FEDERAL REGISTER: 43 FR 22459 (May 25, 1978)

DEPARTMENT OF THE INTERIOR
AGENCY: Office of Surface Mining Reclamation and Enforcement (OSM)

State of Texas et al.; Petitions to Initiate Rulemaking

ACTION: Notice seeking comments on petitions.

SUMMARY: In accordance with the rules and regulations of the Office of Surface Mining Reclamation and Enforcement, 30 CFR 700.12(c), notice is hereby given that this Office is now seeking comments from the public concerning petitions submitted by the State of Texas, the Dow Chemical Co., the National Coal Association/American Mining Congress Joint Committee on Surface Mining Regulations, the Monterey Coal Co., and the Carter Oil Co.

The State of Texas petitions for clarification, interpretation and reconsideration or, in the alternative, for amendment or repeal of the prime farmlands provisions of the interim regulations. The State of Texas has simultaneously filed with the Secretary of Agriculture a petition for clarification, interpretation and reconsideration of the Department of Agriculture's final rule on prime farmlands. The Dow Chemical Co. seeks reconsideration or, in the alternative, amendment or repeal of 15 provisions of the interim regulations, objecting generally that these provisions are arbitrary and unreasonably inflexible. The National Coal Association/American Mining Congress Joint Committee on Surface Mining Regulations (hereinafter "Joint Committee") seeks postponement of the effective date of the interim regulations, and requests that expedited rulemaking procedures be initiated to repeal or modify those provisions specifically challenged. The Joint Committee suggests that many of the provisions are unnecessary, unreasonable, or without a statutory basis. The Monterey Coal Co. is a wholly owned subsidiary of the Carter Oil Co., and the petitions of these companies contain verbatim objections to many of the same provisions, alleging generally that the requirements are unnecessary, burdensome, and environmentally unsound.

DATES: Comments must be received by June 26, 1978.

ADDRESSES: Interested persons should address their comments to the Director, Office of Surface Mining Reclamation and Enforcement, U.S. Department of the Interior, 18th and C Streets NW., Washington, D.C. 20240, 202-343-4006. The petitions and all comments in response to this notice will be available for public inspection during normal business hours at the above address.

FOR FURTHER INFORMATION CONTACT: John Beattie, 202-343-5207.

SUPPLEMENTARY INFORMATION:

The State of Texas is concerned with the effect of the prime farmlands provisions on mining Texas lignite coal, and asserts that the classification scheme of these provisions misclassifies Texas near-surface lignite lands as prime farmlands, thereby triggering the soil horizon segregation requirements. Texas claims that this result is unreasonable because most Texas near-surface lignite lands are not farm but grazing lands.

Specifically, Texas claims that Section 716.7(b) ignores the general criteria for designation of lands as prime farmlands, and suggests that this section be amended so as to allow waiver of the more technical criteria for prime farmlands where application of the general criteria imply that an area cannot reasonably be regarded as fit for intensive agricultural purposes.

Texas suggests that Section 716.7(a)(2) and (d)(1) are ambiguous with respect to the meaning of "cultivated crops," and requests clarification so as to exclude from the meaning of the phrase forage commonly grown without a cultivator.

In addition Section 716.7(d) is opposed on the grounds that the slope criterion is impracticable for Texas lignite lands. [Page 22460] Texas suggests that Section 716.7(d)(4) should be interpreted to allow the regulatory authority discretion to make a negative determination in classifying prime farmlands where the area in question is too small for intensive agricultural purposes. Texas is concerned as well with the interpretations of Section 716.7(d) and (g) as these sections relate to soil and overburden removal, storage, and replacement, and requests clarification to allow these operations without soil segregation, where appropriate. In addition, Texas seeks clarification to the effect that Section 716.7(d) and (g), so interpreted, control Section 716.17(e)(3), (g)(2), (g)(4), and (g)(5), and incorporate into the latter sections the discretion to waive soil segregation requirements.

Finally, Texas requests that Section 716.7(e)(4) and (f)(1)(i) be clarified to provide that non-agricultural lands bordering on agricultural lands need not be restored to the latter's productivity levels merely because of physical proximity.

Dow Chemical objects first to Section 715.14(h)(1), (3), and (4) and 715.15(a) on the grounds that (1) requiring spoil and waste to be transported will result in alteration of the approximate original contour, in contravention of specific prohibitions in the Act; and (2) the intended results can be achieved merely by backfilling and grading.

Next, Dow asserts that the rill and gully requirements of Section 715.15(i) are arbitrary and capricious and exceed the authority of Section 515(b)(2) of the Act, that Section 715.16(a)(1) should be changed to allow the regulatory authority discretion to decide under what circumstances erosion control is necessary, and that Section 715.16(a)(2) should be repealed entirely because it is arbitrary and capricious and beyond the scope of authority granted by Section 515(b)(5) of the Act. Section 715.16(a)(4)(iii) and (b)(1) are opposed because their requirements are allegedly not site specific and, as such, are arbitrary.

Dow proposes allowing the regulatory authority discretion with respect to the mandates of these sections. Sections 715.17(c) and (g) are said to be inconsistent with the terms of Section 515(b)(10) of the Act, in that the latter only requires minimization but not prevention of adverse environmental effects. Dow asserts that Section 715.17(b)(2) contains arbitrary requirements for effluent limitations of runoff, and that the "5 years out of the 20 years preceding * * * " criterion for prime farmlands in Sections 716.7(a)(1) and (d)(1) is not among the criteria promulgated by the Secretary of Agriculture pursuant to his authority to define "prime farmlands."

Finally, Dow suggests that Section 722.14 is unreasonable in that it allows valid service of process on any person who appears to be in charge of a mining or reclamation operation, and requests that this section be changed to require expressly (1) that immediate actual notice be given to a responsible official of the operator where the operator or permittee or a designated agent is not served, and (2) that all notices conform to the requirements of Section 521(a)(5) of the Act as regards their contents.

The Joint Committee asserts first that the definition of "regulatory authority" in Section 700.5 is ambiguous in that it leaves unclear where the ultimate authority for approval lies. Next, Section 710.11(d) is said to be beyond the scope of authority of Section 502(c) of the act and to impose requirements for pre-existing non-conforming structures to which it will be nearly impossible to conform because of conditions in the coal field. Sections 715.13(a) and (b) which require that lands improperly managed prior to mining be restored to the condition of lands properly managed prior to mining, are claimed to exceed the mandates of the claimed to exceed the mandates of the act. Sections 715.14 and 715.15(b) are opposed because they are allegedly not site specific, and hence unnecessary, arbitrary, and unreasonable. Section 715.15(a)(8) is said to exceed the scope of Section 515(d)(1) of the act. The topsoil handling standards of Section 715.16 are said to exceed the scope of Sections 515(b) and 502(c) of the Act. The topsoil handling requirements as they apply to selected overburden, in Section 715.16(a)(4)(iii), are said to be unnecessary and unjustified.

The Joint Committee questions Sections 715.17(a) and (e) because the requirement that alkaline water be treated for manganese is said to be inconsistent with EPA's water pollution control rules, and it is further alleged that in any event such treatment is unnecessary because manganese concentrations normally found in mining operations discharges do not have adverse environmental effects. The Office intends to withdraw its rule in Section 715.17(a) regarding the treatment of alkaline water for manganese and has so advised the Federal District Court in the Surface Mining Regulation Litigation. Thus, this part of the Joint Committee's petition is now moot.

The buffer zone requirement of Section 717.17(d)(3) is said to be without statutory, scientific, or technical justification. The Joint Committee next requests an extension of the compliance date for implementing programs under Section 715.17(h), alleging the complexity of such programs as its reason.

Section 750.17(j) is asserted to be overly restrictive in implementing Section 510(b) of the act, and in any event as beyond the scope of authority of Section 502(c) of the act.

Section 715.17(b)(2) is also alleged to exceed the scope of authority of Section 502(c) of the act, and Section 715.18 is questioned because it conflicts with the MESA regulations for dams.

Regarding explosives, the Joint Committee questions the reasonableness of applying the regulations to blasts of the size covered by Section 715.19, opposes the decibel level limitations as lower than necessary and as promulgated without

opportunity for formal comment, and maintains that the particle velocity limitation is unjustified. The personnel requirements of Section 715.19(a)(3) are said to overlap and partially conflict with MESA's rules, and thus stand in conflict with Section 702(a) of the act. The distance specifications of Sections 715.19(e)(1)(vii)(A) and (B) are alleged to be inconsistent with Section 522(e)(5) of the act.

It is suggested that Section 715.20(a)(2) be amended to provide that vegetative cover must stabilize soil surface only in those areas where such cover existed naturally, and that Section 715.20(d) be amended to provide that mulching is required only where it will assist revegetation. The Joint Committee maintains that Section 716.7 exceeds the scope of authority granted in Section 502(c) of the act, and that Section 716.7(a)(2) limits the scope of protection of grandfather rights provided by Section 510(d)(2) of the act.

Part 717 is opposed in its entirety on the grounds that regulation of the effects of underground mining during the interim period is beyond the scope of authority of Section 502(c) of the act. Sections 717.14, 717.15 and 717.17(g)(4) are opposed because they are not site specific. In addition, Section 717.17(g)(4) is opposed because its requirements allegedly cannot be met within the prescribed time period.

In the enforcement area, the Joint Committee contends that the time requirements of Section 722.12(d) constitute an arbitrary interpretation of the language of Section 521(a)(3) of the act, and that Section 722.16(d)(2) is unreasonable because it does not set forth standards for whether a violation warrants suspension or revocation of a permit. Finally, regarding civil penalties the Joint Committee objects to Section 723.12(d) on the grounds that its definition of negligence deviates from accepted legal definitions, and to Section 723.18(c) because it allegedly binds the Office of Hearings and Appeals to a point system, thereby encroaching upon the judicial discretion of administrative law judges. [Page 22461]

Sections of Monterey Coal Co's petition question for the same reasons the same regulations at issue in Carter Oil Co.'s petition; in many places the language of the contention is verbatim. Both petitioners object to Sections 715.17(d) and 717.17(d), claiming that it is unnecessary and unreasonable to require consultation with both State and Federal fish and wildlife management agencies regarding stream channel diversions. Both object to Sections 715.17(g)(5) and 717.17(g)(5) because these sections allegedly could be interpreted to require plugging all boreholes and wells, a result thought environmentally unnecessary and economically impracticable. They further object to Section 715.17(h)(2) because the ground water requirements do not make clear when, if ever, selective backfilling may be required; to the definition of "significant, imminent harm to land, air, or water resources" in Section 700.5, on the ground that, as it relates to Section 722.11(b), the definition grants excessively broad authority to inspectors; to Section 722.11(b), the definition grants excessively broad authority to inspectors; to Section 721.15(b) on the ground that it appears to grant inspectors unlimited inspection and copying rights; and to Section 722.12 because the time limit for abating non-imminent danger or harm is arbitrary and unnecessarily harsh. Finally, both companies oppose Section 723.17 because it fails to require that notice of conferences be given to operators, and because it allows any person to attend the conference.

Individually, Monterey asserts that Sections 715.16 and 717.20 if read together with Section 710.11(d), require modification of pre-existing structures in order to remove any underlying topsoil, a result thought to be environmentally and economically detrimental. Monetary suggests amendment of these sections to provide that removal of topsoil be required only from areas to be used for new structures or facilities.

Monetary opposes Section 715.15 because it appears to be an absolute prohibition of waste disposal in valley or head of hollow fills. Section 717.17(g)(4) is said to contain unreasonably short-time requirements for waste burial. Monetary objects to Section 717.18(b)(2), stating that it is unnecessary to abandon existing dams which have not been approved by the regulatory authority by May 3, 1978. Sections 715.17(a) and 717.17 are said to contain unnecessary requirements for surface drainage. Monterey claims it is not always necessary to treat such drainage to meet the same effluent limitations as apply to drainage from active mines, nor is it necessary always to route such drainage through sedimentation ponds. In that regard, Monterey opposes Sections 715.17(e) and 717.17(e) because the sediment control requirements will result in unnecessarily large sediment ponds, and will impose severe problems in steeply sloping areas.

Individually, Carter Oil objects to Sections 715.17(e)(6) and 717.17(e)(6), stating that in many instances the spillway construction requirements will not benefit the environment or the health and safety of the public.

The petitions are being considered under the authority of Section 201(g) of the Act and 30 CFR 700.12 of the rules and regulations of the Office of Surface Mining Reclamation and Enforcement. Comments should include relevant data for affected mines and should be addressed to the specific issues raised. At the close of the comment period, a determination will be made regarding the necessity of conducting a further investigation. However, it is anticipated that the comments will

provide a sufficient basis for a final decision on these petitions, which will be made shortly after the close of the comment period.

Dated: May 15, 1978.
WALTER N. HEINE, *Director, Office of Surface Mining Reclamation and Enforcement.*

[FR Doc. 78-14659 Filed 5-24-78; 8:45 am]
BILLING CODE [4310-05]