FEDERAL REGISTER: 44 FR 33626 (June 11, 1979)

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

30 CFR Part 716
Prime Farmland; Initial Regulatory Program

ACTION: Proposed Rule and Notice of Public Hearing.

SUMMARY: The Office of Surface Mining Reclamation and Enforcement (the Office) proposes to amend portions of its initial regulatory program (42 FR 62639-62716, December 13, 1977) relating to prime farmland. The proposed changes and the basis and purpose of the proposal are further discussed below. The Office is required to effect these changes primarily as a result of the decisions of the United States District Court in *In re Surface Mining Regulation Litigation,* 452 F. Supp. 327 (D. D.C. 1978) and 456 F. Supp. 1301 (D. D.C. 1978). The Office is also proposing changes which are not the direct result of the court's decisions. The proposed regulations are intended to replace those portions of the prime farmland regulations which the-court enjoined and remanded to the Secretary of the Interior for reconsideration, to clarify some provisions of the regulations, and to make the Office's initial regulations with respect to prime farmland more analogous to the permanent regulatory program on prime farmland.

DATES: The comment period on the proposed rules will extend until July 27, 1979. All written comments must be received at the address given below under "ADDRESS" by 5 p.m. on July 27, 1979.

Public hearings on the proposed regulations will be held on June 27, 1979, beginning at 9:30 a.m. local time at each location.

Washington -- Department of the Interior Auditorium, 18th & C Streets, N.W., Washington, D.C.

Indianapolis -- Indiana World War Memorial Auditorium, 431 North Meridian Street, Indianapolis, Indiana.

Kansas City -- New Federal Building, Room 147/148, 601 East 12th Street, Kansas City, Missouri 64106.

Person wishing to testify at the public hearings on the proposed regulations should contact the appropriate person listed below under "PUBLIC MEETINGS".

Individual testifying at these hearings will be limited to 15 minutes. The hearing will be transcribed. Filing of a written statement at the time of giving oral testimony would be helpful and facilitate the job of the court reporter. Submission of written statements to the persons identified below, under "SUPPLEMENTAL INFORMATION," for these hearings, in advance of the hearing date whenever possible, would greatly assist Office officials who will attend the hearings. Advance submission will give these officials an opportunity to consider appropriate questions which could be asked to clarify or elicit more specific information from the person testifying. The record will remain open until July 27, 1979, for comments on the proposed regulations.

The public hearings will continue on the day identified above until all persons scheduled to speak have been heard. Persons in the audience who have not been scheduled to speak and wish to do so will be heard at the end of the scheduled speakers. The hearings will end after all people scheduled to testify and persons present in the audience who wish to speak have been heard. Persons not scheduled to testify, but who wish to do so, assume the risk of having the public hearing adjourned unless they are present in the audience at the time all scheduled speakers have been heard.

ADDRESSES: Written comments must be mailed or hand delivered to the Office of Surface Mining, Administrative Record Office, Room 120, South Building, 1951 Constitution Avenue, N.W., Washington, D.C. 20240, telephone 202-343-4728. All comments received and the transcript of the public hearing will be available for further inspection at the same address.

FOR FURTHER INFORMATION CONTACT: Dr. David R. Maneval, Office of Surface Mining Reclamation and Enforcement, U.S. Department of the Interior, Washington, D.C. 20240, Telephone: 202-343-4264.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 13, 1977 (42 FR 62639-62716), the Office promulgated final initial regulations (30 CFR Chapter VII) as required by Section 501(a) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. Section 1251(a),

(SMCRA or the Act). Section 716.7 of the initial regulations pertains to surface coal mining and reclamation operations conducted on prime farmland. (42 FR 62693-95 (1977).)

The validity of Section 716.7 was challenged in *In re Surface Mining Regulation Litigation,* 452 F. Supp. 327 (D. D.C. 1978) and 456 F. Supp. 1301 (D. D.C. 1978). The court's opinions in these cases as they relate to prime farmland will be discussed below in greater detail under the headings "HISTORICAL USE CLAUSE" and "GRANDFATHER EXEMPTION." The regulations which are discussed under those headings are intended primarily to replace those portions of the initial prime farmland regulations which the court enjoined and remanded to the Secretary of the Interior for reconsideration. When promulgated in final form, after public hearing and analysis of comments, these rules together with the unaffected portion of Section 716.7 of the initial regulations will constitute the initial regulations of the Office with regard to surface coal mining and reclamation operations on prime farmland.

PUBLIC PARTICIPATION

Procedures for filing written comments are described above under the heading "ADDRESSES." Public hearings will be held on June 27, 1979, beginning at 9:30 a.m. in the locations listed above under "DATES."

PUBLIC COMMENTS

Written and oral comments should be as specific as possible. The Office will appreciate any and all comments, but those most useful and likely to influence decisions on these regulations will be those which include references to source material, including legislative history, technical data and research, and other material which provides a basis for any given recommendation. An explanation of the rationale for each recommendation should also be given. The preamble to the final regulations will reflect consideration of comments received on the proposed rules.

PUBLIC MEETINGS

Representatives of the Office will be available to meet between June 15, 1979, and July 27, 1979, at the request of members of the public, State representatives, industry officials, labor representatives, and environmental organizations to receive their advice and recommendations concerning the content of the proposed regulations.

Persons wishing to meet with representatives of the Office during this time period may request to meet with Office officials at the Washington Office or the two Regional Offices. Persons to contact to schedule such meetings are as follows:

Indianapolis -- Norma Dailey (317) 269-2600.

Kansas City -- Kerry Cartier (816) 374-2618.

Washington -- Arlo Dalrymple (202) 343-5261.

The Office will be available for such meetings between 9:00 a.m. and noon and 1:00 p.m. and 4:00 p.m. local time, Monday through Friday, excluding holidays at these locations.

AVAILABILITY OF COPIES

Copies of the proposed regulations are available for inspection and copies may be obtained at the following offices:

OSM Headquarters, Department of the Interior, Room 120, 1951 Constitution Avenue, N.W., Washington, D.C. 20240, 202-343-4278.

OSM Region I, 1st Floor, Thomas Hill Building, 950 Kanawha Boulevard, East, Charleston, West Virginia 25301, 304-342-8125.

OSM Region II, 530 Gay Street, S.W., Suite 500, Knoxville, Tennessee 37902, 615-637-8060.

OSM Region III, Room 502, Federal Building, U.S. Courthouse, 46 East Ohio Street, Indianapolis, Indiana 46204, 317-269-2600.

OSM Region IV, New Federal Building, Room 147/148, Kansas City, Missouri, 918-758-2193.

OSM Region V, Old Post Office -- Downtown, 1832 Stout Street, Denver, Colorado, 303-837-5511.

HISTORICAL USE CLAUSE

Sections 501(d) and 515(b)(7) of the Act provide for special environmental protection during the mining and reclamation process for lands classified as "prime farmland." Section 701(20) of the Act defines prime farmland as having the

same meaning as that previously prescribed and published by the Secretary of Agriculture and lists several factors which shall be the components of that definition.

In addition, Section 701(20) requires that land meeting the technical criteria of the Department of Agriculture must also have been historically used for intensive agricultural purposes. (30 U.S.C. Section 1291(20).)

The statutory definition of prime farmland was implemented in the initial regulations of the Office in Section 716.7(a) and (b). (42 FR 62693-95 (1977).) The technical criteria which had previously been published by the Secretary of Agriculture were referenced in Section 716.7(b) and the pertinent portion of the technical criteria was reproduced for the convenience of the reader. (42 FR 62694 (1977).) Section 716.7(b) was not challenged in the litigation and thus was not an issue in the district court's opinion. The proposed amendments also incorporate but do not reproduce the technical criteria of the Secretary of Agriculture in the definition of prime farmland. (See proposed Section 716.7(b).)

Section 716.7(a)(1) of the initial regulations further defined the concept of historic use for intensive agricultural purposes by specifying the historical use period (the period of time the land must have been in crop production) as at least 5 years out of the 20 years preceding the date of the permit application. (42 FR 62693 (1977).) The district court enjoined this part of the initial regulations because the regulation was not explained or supported in the preamble and the regulation as written was overly broad. (*See In re Surface Mining Regulation Litigation*, 456 F.Supp. at 1312 (D. D.C. 1978).)

It has been estimated that there are about 250 million acres of soils which could be classified as prime farmland and which have a demonstrated cropland use. (H.R. Rep. No. 95-218, 95th Cong. 1st Sess. 105 (1977).) The total acreage of the five cropland classes has remained relatively constant since 1949, a peak cropland year. (U.S. Department of Agriculture, 1978 Handbook of Agricultural Charts, Agriculture Handbook 551, p. 27.) It is, therefore, assumed that nearly all prime farmland with a cropland history would have been in crop production for some amount of time since 1949. As a result, the historical use period need not extend back before that year.

The Office considered the following alternatives for the historical use period: (1) Choose a time frame of 20 years or less and a specified number of years within that time (e.g., 5 in 20, 14 in 20, 4 years prior, 10-year history, 5 in 10, 7 in 10, 1 in 2, anytime, etc.); (2) allow for substantial flexibility by leaving the precise definition to the regulatory authority or other State, Federal, or land management agencies; and (3) make no change (i.e., use 5 in 20).

The Office believes the third alternative is not a reasonable approach since making no change would result in only a partial implementation of the Act's prime farmland provisions and would be in violation of the court's order.

The Office believes the second alternative is accommodated through the proposed uniform standard which also affords flexibility for regulatory authorities to take local conditions and practices into account.

A historical use period of 10 years was suggested by many commenters in the Office's permanent regulatory program rulemaking. (44 FR 14931, March 13, 1979.) The Office believes that an established use period to 10 years is adequate to determine historical uses. Further, the Office believes that the cropland record for this period of time is readily available from local sources. A period of 10 years should be sufficient in the majority of cases to identify prime farmland soils which have a demonstrated cropland use and to reflect modern agricultural practices such as placement of land in land banks or other deferment status. A period of less than 10 years was not chosen because the Office believes that a land use history of less than 10 years would not establish a true land use history.

Prime farmland used as cropland for 50 percent or more of the historical use period will be considered as prime farmland historically used as cropland. Fifty percent or more was chosen because this represents the predominant land use in the historical period. As a result, the proposed regulation provides that a predominant land use in the historical period has been established and the land qualifies as having been historically used for cropland if the land in question has been used as cropland for 5 or more years of the 10-year period. (See proposed Sections 716.7(b) and 716.7(d)(1).)

GRANDFATHER CLAUSE

Section 510(d)(2) of the Act, 30 U.S.C. Section 1260(d)(2), sets forth a grandfather exemption with respect to some surface coal mining and reclamation operations as follows:

Nothing in this Subsection shall apply to any permit issued prior to the date of enactment of this Act, or to any revisions or renewals thereof, or to any existing surface mining operations for which a permit was issued prior to the date of enactment of this Act.

The grandfather clause was implemented in the initial regulations of the Office as Section 716.7(a)(2). (See 42 FR 62693 (1977).)

The District Court held that this Section was generally a reasonable exercise of the Secretary's discretion in implementing the Act and properly limited the areas which are exempt from the prime farmland provision of the initial regulations. (*See In re Surface Mining Regulation Litigation*, 452 F. Supp. at 340 (D. D.C. 1978). However, to the extent that Section 716.7(a)(2) as originally promulgated attempted to limit the effect of the grandfather exemption to the permit application requirements of Section 510(d)(1) of the Act, the court found that the regulation was an incorrect application of the statute. The court found that the exemption stated in Section 510(d)(2) of the Act specifically applies to the prime farmland performance standards of Section 515(b)(7), 30 U.S.C. Section 1265(b)(7), as well as to the permit application requirements of Section 510(d)(1) of the Act. The court then enjoined enforcement of the provisions of Section 716.7 to the extent they imposed performance standards on operations exempt from those requirements under Section 510(d)(2) of the Act. Thus, the grandfather clause, as a result of the court's opinion, should be construed as exempting surface coal mining and reclamation operations operating under permits issued prior to August 3, 1977, or renewals or revisions thereof, from both the prime farmland permit application requirements and performance standards. The Office proposes to amend Section 716.7 to reflect this judicial construction of the Act. (See proposed Section 716.7(a)(2).) The proposed amendment does not relieve an operator from compliance with all other applicable performance with all other applicable performance standards of the initial program for those surface coal mining and reclamation operations in areas which, but for application of the grandfather clause, would qualify for classification as prime farmland.

OTHER CHANGES

The Office proposes to make other changes in Section 716.7 to clarify its requirements and to make the prime farmland regulations of the initial program more analogous to the prime farmland regulations of the permanent regulatory program. These proposed changes are described below.

As noted above, the Act defines prime farmland as lands which meet certain technical criteria and which have been historically used for intensive agricultural purposes. (Section 701(20) of the Act.) For purposes of the initial regulations, "intensive agricultural purposes" was defined as "cultivated crops." (See Sections716.7(a)(1) and 716.7(d)(1), 42 FR 62693 and 62694 (1977) respectively.) The Office proposes to amend Section 716.7(b) and (d)(1) to substitute "cropland" for "cultivated crops" because cropland is a term with a long history of use by the Department of Agriculture and is a basis for collection of statistical data on crop production and land use. "Cropland" is the term used in the Office's permanent regulatory program and the Office intends that the definition and scope of the term be the same in the initial and permanent programs. (See 44 FR 14928 March 13, 1979).)

The initial regulations now provide that the date from which the historical use period must be measured is the date of the permit application. See 42 FR 62693 (December 1977).) The Office is proposing to establish a different date for calculation of the use period. Among the alternatives considered were the date of (1) the Act, (2) the initial regulations, (3) the permit application, and (4) the acquisition of land for the purpose of mining. The dates of the Act, regulations, or permit application have not been proposed because they may not truly represent the land use history of the land. The Office believes that the period of time prior to the date of acquisition of the land for mining purposes is more representative because that time period is less likely to be influenced by the proposed mining activity. Accordingly, the Office proposes to amend Sections 716.7(b) and 716.7(d)(1) to reflect this change.

During the recently concluded permanent program rulemaking, the Office received comments stating that local farming conditions vary considerably from region to region and are heavily dependent on the local economy, market conditions, and governmental structure and regulation. As a result, the Office's permanent program regulations relating to prime farmland include provision for the regulatory authority to have flexibility to classify as prime farmland those lands important to the State or local economy. (See 44 FR 15318 (March 13, 1979).) The Office believes this flexibility is also appropriate for the initial regulatory program and proposes to amend Section 716.7(b) accordingly. Under this Section, the regulatory authority may only increase and not decrease prime farmland acreage.

Finally, the Office proposes to amend Section 716.7(b) to include within the category of prime farmland those lands which are taken out of cropland use for more than 5 years in 10 due to ownership circumstances which do not relate to the capability of the land to produce crops (e.g., retirement, litigation, death). Such land may be prime farmland in a temporarily inactive state and should be entitled to protection against loss of productivity under the Act. As in the case of the above-described language affording flexibility to the regulatory authority, this proposed language is similar to the definition of prime farmland in the permanent program and, the Office believes, is appropriate for addition to the initial program.

DRAFTING INFORMATION

The principal authors of these proposed regulations are as follows:

1. Arlo Dalrymple (202) 343-5261

2. Lee de Moulin (202) 343-5261
3. Donald Smith (317) 331-2673

STATEMENTS OF SIGNIFICANCE AND ENVIRONMENTAL IMPACT

The department of the Interior has determined that this document is not a significant rule and does not require a regulatory analysis under Executive Order 12044 and 43 CFR Part 14. Section 702(d) of the Act (30 U.S.C. Section 1292(d)) exempts this action from the environmental impact statement requirement of the National Environmental Policy Act.

Dated: June 4, 1979.
John M. Davenport
Assistant Secretary -- Energy and minerals. [Page 33628]

In consideration of the foregoing, it is proposed to amend Section 716.7 (42 FR 62693-95, December 13, 1977) (to be codified in 30 CFR Section 716.7), as follows:

By revising Section 716.7(a)(1) and (2), (b) and (d)(1) to read:

SECTION 716.7 PRIME FARMLAND.

(a) *Applicability.* (1) Permittees of surface coal mining and reclamation operations conducted on prime farmland shall comply with the general performance standards of Part 715 of this chapter in addition to the special requirements of this section.

(2) The requirements of this Section are applicable to any permit issued on or after August 3, 1977. Permits issued before that date and revisions or renewals of those permits need not conform to the provisions of this Section. Permit renewals or revisions shall include only those areas that --

(i) were in the original permit area or in a mining plan approved prior to August 3, 1977; or

(ii) are contiguous and under State regulation or practice would have normally been considered as a renewal or revision of a previously approved plan.

(b) *Definitions.* For purposes of this Section, the following definitions are applicable.

(1) *Prime farmland* means those lands which are defined by the Secretary of Agriculture in 7 CFR 657 and which have been historically used for cropland.

(2) *Historically used for cropland.* means (i) lands that have been used for cropland for any 5 years or more out of the 10 years immediately preceding the acquisition, including purchase, lease, or option, of the land for the purpose of conducting or allowing through resale, lease, or option the conduct of surface coal mining and reclamation operations; (ii) lands that the regulatory authority determines, on the basis of additional cropland history of the surrounding lands and the lands under consideration, that the permit area is clearly cropland but falls outside the specific 5-years-in-10 criterion, in which case the regulations for prime farmland may be applied to include more years of cropland history only to increase the prime farmland acreage to be protected, or (iii) lands that would likely have been used as cropland for any 5 out of the last 10 years, immediately preceding such acquisition but for some fact of ownership or control of the land unrelated to the productivity of the land.

(3) *Cropland* means land used for the production of adapted crops for harvest, alone or in a rotation with grasses and legumes, and includes row crops, small grain crops, hay crops, nursery crops, orchard crops, and other similar speciality crops.

* * *[Page 33629]

(d) * * *

(1) lands within the proposed permit boundaries have not been historically used for cropland.

* * *

(FR Doc. 79-17961 Filed 6-6-79; 8:45 am)
BILLING CODE 4310-05-M