FEDERAL REGISTER: 44 FR 52098 (September 6, 1979)

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

30 CFR Part 705
Restriction of Financial Interests of State Employees

ACTION: Proposed rulemaking

SUMMARY: The Office of Surface Mining Reclamation and Enforcement has granted in part a petition to initiate rulemaking to amend the definition of "employee" in 30 CFR 705.5. New language for the amended definition is proposed in two alternatives and OSM seeks public comment on the proposed amendment.

DATES: A public hearing on the proposed amendment will be held at the Department of the Interior Auditorium, 18th and C St., NW. Washington, D.C. 20240, on September 25, 1979, at 9:30 a.m. Comments must be received by November 5, 1979 at the address above by no later than 5 p.m. on that date. Individuals making oral statements are limited to ten minutes.

ADDRESSES: Written comments must be mailed to: Office of Surface Mining, U.S. Department of the Interior, P.O. Box 7267, Benjamin Franklin Station, Washington, D.C. 20044; or be hand delivered to: Office of Surface Mining, Room 135, U.S. Department of the Interior, South Bldg., 1951 Constitution Avenue, N.W. Washington, D.C. 20240.

FOR FURTHER INFORMATION CONTACT: Carl C. Close, Assistant Director for State and Federal Programs, Office of Surface Mining, U.S. Department of the Interior, Washington, D.C. 20240, (202) 343-4225.

SUPPLEMENTARY INFORMATION

I. BACKGROUND

On August 23, 1977, the Department issued proposed regulations to implement the two conflict of interest provisions of the Surface Mining Control and Reclamation Act, P.L. 95-87 (the Act): Section 201(f) concerning Federal employees and Section 517(g) concerning State regulatory authority employees. Sections 201(f) and 517(g) of the Act make it a crime for Federal or State employees performing any function or duty under the Act knowingly to have a direct or indirect financial interest in any coal mining operation. The Act further directs the Secretary to publish regulations which establish methods for monitoring and enforcing the conflict of interest provisions. After publication of proposed rules and a comment period, the final financial restriction regulations were published on October 20, 1977. (42 FR 56060).

The Secretary's final regulations implementing the above provisions are based on to guiding principles. First, these regulations reiterate the "clear Congressional intent that affected employees maintain the highest standards of honesty, integrity and impartiality to avoid even the appearance of conflict of interest." (42 FR 56060, Oct. 20, 1977). Second, in keeping with the legislative intent and at the suggestion of several States, the regulations place primary responsibility upon the States to resolve internal financial restriction problems of State employees.

On December 15, 1978, five environmental organizations - the National Wildlife Federation, Save Our Mountains, Inc., Colorado Open Space Council, Save Our Cumberland Mountains, and Council of Southern Mountains - jointly petitioned the Office of Surface Mining to amend two definitions contained in 30 CFR 705.5 concerning financial interest restrictions. That petition was previously published for public comment. (44 FR 11795, March 2, 1979).[Page 52099]

Petitioners proposed the following changes to the current definitions:

1. Amend the definitions of "employee" to eliminate the exception created there for "members of advisory boards or commissions established in accordance with State law or regulations to represent multiple interests...".

2. Change the definition of "indirect financial interest" to read:

(a) Ownership or part-ownership of, or employment by, a firm or business that is a subsidiary or affiliate of a coal mining operation or which controls, is controlled by, or is under common control with, a coal mining operation;

(b) Ownership or part-ownership of, or employment by, a firm or business that derives a significant portion of its income (more than 10%) from contracts with firms or businesses involved in coal mining operations;

(c) Benefits reaped by the employee of the direct or indirect interests (as described in (a) and (b) above or as described for direct financial interests) held by the employee's spouse, minor child, or other relatives, including in-laws residing in the employee's home; and

(d) For purpose of this section, ownership of shares in a mutual fund or other similar diversified investment funds that have interest in coal or coal-related firms does not constitute a prohibited indirect interest.

The proposed change to the definition of "indirect financial interest" was rejected by OSM on July 12 in a letter to Mr. Terrence Thatcher of the National Wildlife Federation.

Under the current definition of "employee," members of State advisory boards or commissions serving a function under the Surface Mining Act are exempt from filing the financial interest statements if the board or commission is required by State regulation or statute to represent multiple interests. The petitioners maintained that this exemption is contrary to the intent of congress as expressed in section 517(g) of the Act and they asked OSM to delete this exemption.

To the petitioners, the mandate of the Section 517(g) Act is unequivocal. In their view, State boards or commissions exercising decisionmaking functions under the Act should be conclusively deemed employees irrespective of the rationale underlying their formation. To the petitioners, the Act clearly intended "to guard against any possibility that regulatory decisions would be made by individuals attached to the coal mining industry or who might benefit financially, even if indirectly, from the coal mining operation." While there is no specific discussion of this matter in the legislative history, petitioners draw support for their arguments from the fact that Congress considered, in a 1975 draft of the surface mining bill, allowing employees to hold up to 100 shares of commonly traded coal company stock without violating the conflict of interest provisions. (121 Cong. Rec. 6786, March 17, 1975.) The exception, however, was subsequently eliminated. (121 Cong. Rec. 13368.) Petitioners believe that since Congress refused to grant exceptions to the financial restriction provisions, OSM has no authority to do so by regulations.

On the one hand, OSM said that "the existence of employee/employer, ownership and creditor relationships that conflict with official duties is the type of situation that Section 517(g) intended to prevent." 42 FR 56061. yet OSM stated that the exception in the definition of employee was included to "avoid dismembering boards or commissions composed in such a manner as to represent divergent interests." *Ibid.*

More importantly the petitioners claim that their proposal focuses on the phrase "performing any function or duty under the Act." This phase not only helps delineate which "employees" should be covered, but also establishes and focuses upon the critical area of concern to the Congress. The fundamental change which Congress intended to accomplish through section 517(g) was to ensure that functions or duties which affect the administration and integrity of a State's program to regulate surface mining would not be performed by persons with direct or indirect financial interest in the coal industry. As shown by the petitioners, several State boards or commissions which otherwise meet this exemption exercise more than purely advisory functions. Because the decisions of these Boards directly affect the functioning and the integrity of the State regulatory program, the petitioners believe that they should not be exempted from the financial interest restrictions.

II. PUBLIC COMMENTS ON THE PETITION

The Director, Office of Surface Mining Reclamation and Enforcement, received 39 written comments on the petition by the close of the public comment period April 2, 1979. Twelve commenters expressed support for the petition in whole or part and twenty-three commenters opposed the petition.

A. *Comments Supporting the Petition*

Commenters suggest that when OSM promulgated the definition of "employee" it relied upon two contradictory rationales. In the commenters' view, it was the influence of these boards and consequent self-regulation by the industry that permitted the widespread abuses which lead to the passage of SMCRA and which the prohibitions of section 201(f) and 517(g) were designed to correct. They maintain that the exception for advisory boards defeats the purpose of the Act and consequently inhibits the reforms that SMCRA was intended to accomplish.

Those commenters supporting the petition believe that the current definition of employee is inconsistent with the intent of Congress as expressed in SMCRA. Most of the commenters felt that the exemption perpetuates the very practices which the Act prohibits. Commenters claim that section 517(g) of the Act is unequivocal. The majority of the commenters believe that the definitions in question, as presently written, are legally and logically unsupportable.

Another commenter stated that, unless the petition is granted, restrictions of financial interests cannot be monitored or administered State board members will file financial interest statements and others will not, depending on the purpose of the boards or commissions as established in statute or regulations. The commenters maintained that the effectiveness of SMCRA depends, in part, on unified and consistent administration among the States.

Finally, a few commenters believed that, unless the petition is accepted, there will be severe damage to the public perception of, and confidence in, the enforcement of SMCRA. In other words, "even the appearance of conflict of interest" (42 FR 56060), which OSM claimed must be avoided, is not eliminated so long as the exception is continued.

B. *Comments Opposing the Petition*

Some commenters pointed out that the petitioner's arguments are devoid of support in the Act or its legislative history. Several citations were mentioned to support this contention. First the Act refers to an employee, not multiple-interest-boards; secondly, it refers to an employee, not the broader term, person, thus limiting the conflict of interest provision.

One commenter pointed out that according to Webster's Dictionary, an employee is "one employed by another, usually for wages or salary and in a position below the executive level." Board or commission members generally do not receive wages or salary for their services, and the positions are at the executive level.[Page 52100]

One commenter claimed that the petitioners provided no support for the claim that Congress anticipated, or indeed intended, that boards or commissions whose members represent divergent interests directly or indirectly related to coal mining would be dismembered. The only legislative history dates back to March 1975, and a prior version of the Act that was finally passed. Another commenter also stated that Congress did not intend that all regulation under SMCRA be accomplished without the benefit of any person with experience in the mining industry.

Section 505 is cited as the proof that the requested change is not legal. Section 505 says that State laws are not pre-empted by SMCRA if they are not inconsistent. The commenter argues that because "employee" is not defined under SMCRA, any provision of State law which relates to citizen members of boards or commissions and does not treat them as employees should prevail.

Several commenters pointed out that multiple interest boards have many advantages. One advantage mentioned was the expertise, knowledge and experience that a representative of the mining industry can provide, which benefits the quality of the board's decision, because he or she can fully understand the issues and practical solutions. A financial restriction on board members would limit the number of qualified people who could be willing or able to serve on the board. It would be increasingly difficult to get competent people to accept appointments. A commenter stated that th history of multiple interest boards demonstrates how more knowledgeable examinations, informed arguments, and realistic decisions can be derived from those with experience in respective industries, that can those advanced by the general public. Another commenter stated that independent special interest boards requiring expertise in various fields of business and professions have long been approved in Federal and State court decisions as well as by numerous treatises.

One commenter said that the additional exclusionary requirements will insure that no one who works for a regulatory authority will know anything at all about coal mining. Another commenter proposed that, if the industrial interests were precluded, then environmental interests should be equally precluded.

Other commenters pointed out that a multiple-interest board can also promote good relations with industry and prompt compliance with the laws. Also, as one commenter stated, a board which is advisory should not have the same impact as a board which issues or denies a permit. One State agency representative mentioned that its board has created some competitive interest in reclamation among coal companies. An appeal board can help to mediate disputes and minimize an unnecessary burden on the courts.

Other comments referred to the importance of striking a balance between protection of the environment and agricultural productivity and the Nation's need for coal, as required in section 102(f) of the Act. Multiple interest boards are one effective means of coordinating and balancing these diverse interests, especially if the number of members representing the mining industries is limited so that the board is not dominated by mining industry representatives.

Various State agency representatives stated that in their experience multi-interest boards have proven to be effective under present surface mining regulatory schemes. They claimed that there is no basis for allegations in the petition that any board member has obtained financial benefits from any decision. Also, a State may require that board members who represent the mining industry not vote on any matter in which they have an interest. Another method to avoid such a conflict is to impose severe restrictions on board members' participation in decisions which might affect their own financial interests. In many States, these board members are subject to the Governor's appointment and State Senate review. They may also be subject to State conflict of interest laws.

Other commenters stated that current State multiple interest boards do not have a majority of coal members on any boards. Although the number of industry representatives on these boards varies from State to State, commenters claimed that they do not control a board's policies.

Moreover, two commenters were concerned that the proposed changes could apply to the multiple-interest boards composed of only officials of State agencies. It was claimed that this type of restriction could limit the ability of the State regulatory authority to utilize personnel of other agencies of that State because potential conflicts could arise. In the commenter's view, the State regulatory authority would have no authority under State or Federal law to take action against "employees" of other agencies of that State or require them to file financial disclosure statements.

One commenter stated that OSM had gone too far in establishing the regulations as they exist; any board member is a non-employee, whether it is a multiple-interest board or not. Another stated that the petition contradicts the "State-lead" concept and, because the boards are convened in accordance with State laws, an argument could be posed as to whether these bodies are performing any function under SMCRA.

A commenter stated that preempting State law is a Congressional prerogative, not an option available at will to executive branch officials. Another commenter stated that the legislative support for a State program may well hinge on the continued involvement of part-time unpaid multi-interest board members.

Several commenters proffered alternatives to the definition proposed by the petitioners. Citing the fact that industry representation on an oversight board is necessary for balanced judgments, one commenter suggested that such representation should be allowed, but limited, as an example, the board in one particular State by statute cannot have more than one member with a direct connection with the mining industry, but does not limit any with indirect financial interests. {52100}

Another commenter suggested that industry representative be allowed to be Board members, but not to exceed a majority of the voting members. All Board members would file conflict of interest statements to insure that the majority of the board had no conflict of interest, either direct or indirect. Under this approach, the Board would be considered as a unit. Boards or commissions already established by State statute would not be dismembered, input would be received from all of the multiple interests represented and no one faction could dominate the voting or decisionmaking.

III. PROPOSED CHANGES

OSM favors the alternative suggested above and proposes the following language:

"Employee Means (i) any person employed by the State Regulatory Authority who performs any function or duty under the Act and (ii) advisory board or commission members and consultants who perform any function or duty under the Act, if they perform decisionmaking functions for the State Regulatory Authority under the authority of State law or regulations. Members of advisory boards or commissions established in accordance with State law or regulations to represent multiple interests must file annual financial interest statements but may continue to participate in the activities of the board or commission as long as the number of members with prohibited financial interests does not exceed 50 percent of the total membership and such members do not act on any matter which relates to their own financial interests. State officials may through State law or regulations expand this definition to meet their program needs for more stringent financial interest restrictions."[Page 52101]

As a second alternative the petitioners propose deletion of the Board exemption in its entirety. The exemption can be eliminated by deleting the second sentence of the current definition resulting in the following language:

"Employee, means (i) any person employed by the State Regulatory Authority who performs any function or duty under the Act, and (ii) advisory board or commission members and consultants who perform any function or duty under the Act, if they perform decisionmaking functions for the State Regulatory Authority under the authority of State law or regulations. State officials may through State law or regulations expand this definition to meet their program needs."

The final alternative would be to take no action and leave the definition as it presently reads. OSM welcomes further comment and discussion of the three alternatives during the comments period and at the hearing. The purpose of the hearing is to allow full public participation in the rulemaking process. Individuals making oral statements or submitting written comments should limit their statements to this proposed rule. Individuals are encouraged to submit statements in writing. Reservation of time for oral statements may be obtained by contacting Carl C. Close, Assistant Director, State and Federal Programs, Office of Surface Mining Reclamation and Enforcement, Department of the Interior, Washington, D.C. 20240, (202) 343-4225.

IV. ADDITIONAL INFORMATION REQUESTED

During the public comment period, OSM welcomes information about States which currently have multiple-interest commissions or boards. Of particular interest are the nature of commissions or boards' functions, such as hearings, rulemaking, administrative appeals, permit reviews, and enforcement actions. The history of a board's decisions is also important. A pattern of decisions in favor of State regulatory authorities, industry or citizen groups could be indicative of

serious conflicts of interest. Commenters should also provide information concerning the mechanism for appeal and review of boards or commissions decisions, and any historical patterns to these appeals. It should be noted whether or not the membership of these boards has historically favored any special interest group. Further, commenters should indicate whether or not boards or commissions are currently subject to State conflict of interest laws and, if so, whether coal related interests are prohibited and what disclosure of financial interests is already required.

V. DETERMINATION OF SIGNIFICANCE

The proposed definition does not fall within any of the categories listed in 43 CFR 14.3(c). Consequently, 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.

Furthermore, the Department has determined that a notice of intent to purpose rules will not be beneficial in the drafting process. OSM received sufficient information during the public comment period, which was initiated when the petition was published in the Federal Register, to prepare a draft rule and proceed directly to proposed rulemaking. A notice of intent to propose rules would only duplicate OSM's efforts in the first public comment period.

VI. STATEMENT OF AUTHORSHIP

The primary authors of this document are Gregory Carroll and Arthur Abbs, State Programs Division, Office of Surface Mining.

Dated: August 29, 1979.
Joan M. Davenport, *Assistant Secretary for Energy and Minerals.*

TEST OF THE AMENDMENT

30 CFR 705.5 is amended by changing the definition of Employee as follows

SECTION 705.5 - DEFINITIONS.

* * *

Employee Means (1) any person employed by the State Regulatory Authority who performs any function or duty under the Act and (2) advisory board or commission members and consultants who perform any function or duty under the Act, if they perform decision making functions for the State Regulatory Authority under the authority of State law or regulations. Members of advisory boards or commissions established in accordance with State law or regulations to represent multiple interests must file annual financial interest statements but may continue to participate in the activities of the board or commission provided that members with prohibited financial interests do not exceed 50 percent of the membership and that such members do not act on any issue which concerns their own financial interests. State officials may through State law or regulations expand this definition to meet their program needs for more stringent financial interest restrictions.

[FR Doc. 79-27782 Filed 9-5-79; 8:45 am]
BILLING CODE 4310-05-M