

FEDERAL REGISTER: 44 FR 55322 (September 25, 1979)

DEPARTMENT OF THE INTERIOR

AGENCIES: Office of Surface Mining Reclamation and Enforcement (OSM); Environmental Protection Agency (EPA).

30 CFR Ch. VII; 40 CFR Ch. I [FRL 1324-3]

Memorandum of Understanding

ACTIONS: Proposed Memorandum of Understanding (MOU), Advance Notice of Proposed Rulemakings.

SUMMARY: OSM and EPA announce the availability of the solicit public comment on a proposed Memorandum of Understanding (MOU) which integrates the National Pollutant Discharge Elimination System (NPDES) permit program under the Clean Water Act (CWA) (30 U.S.C. 1251 *et seq.*) with the permanent regulatory program permit system for Surface Coal Mining and Reclamation Operations (SCMROs), under Title V (Title V permit program) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA) (30 U.S.C 1201 *et seq.*). In addition, OSM and EPA announce their intention to engage in future rulemakings to implement the MOU and solicit comments for the purpose of drafting the proposed rules. Finally, because EPA proposed revision to the permit program on June 14, 1979, some of the revisions, when final, may be adopted (possibly through a cross reference) into OSM's rules. Comments are invited, therefore, on EPA's proposed rules, as they specifically apply to SCMROs.

DATES: Comments on the proposed MOU and on what rules should be proposed by OSM and EPA to implement the MOU must be submitted not later than 5 p.m. Eastern Daylight Savings Time November 9, 1979.

ADDRESSES: Copies of the proposed MOU may be obtained from and comments on both the proposed MOU and on what rules OSM and EPA should propose to implement the final MOU must all be submitted to *either*:

(1) Office of Surface Mining Reclamation and Enforcement, United States department of the Interior, South Building, 1951 Constitution Avenue, NW. (Attn: Administrative Record - Room 135), Washington, D.C. 20240 or 20245; telephone number (202) 343-4728; *or*

(2) Dov Weitman (A-2), Office of Water Enforcement (FN-336) United States Environmental Protection Agency, 401 M Street, S., Washington, D.C. 20460; telephone number (202) 755-2598.

FOR FURTHER INFORMATION CONTACT EITHER: (1) Lewis M. McNay, Office of Surface Mining Reclamation and Enforcement, United States Department of Interior, 1100 L Street, N.W., Room 5315, Washington, D.C. 20018; telephone number (202) 343 - 8032; *or*

(2) Dov Weitman (A-2), Office of Water Enforcement (FN-336), United States Environmental Protection Agency, 401 M Street, S.W., Washington, D.C. 20460; telephone number (202) 755-2598.

SUPPLEMENTARY INFORMATION:

I. BACKGROUND

A. THE NPDES PROGRAM

Under Sections 301(a) and 402 of the Clean Water Act (CWA), discharges of pollutants to waters of the United States are required to obtain NPDES Permits. The NPDES Program includes regulation of discharges by SMCROs. The NPDES permit program is administered in particular States either by the Regional Offices of EPA, or by State water quality agencies with EPA-approved programs. EPA has recently revised its NPDES regulations at 40 CFR Part 122-125 (44 FR 32854, June 7, 1979), and subsequently repropoed the NPDES regulation in a new format, in EPA's Consolidated Permit Regulations (44 FR 34244, *et seq.*, June 14, 1979).

B. SMCRA PROGRAMS

In 1977, Congress enacted the Surface Mining Control and Reclamation Act of 1977 (SMCRA), establishing a national federal environmental and public health and safety regulatory scheme for SCMROs. Under the SMCRA, detailed environmental protection performance standards, including standards to protect the quality and quantity of water resources, are applicable to the industry. *See, e.g.*, Sections 101, 102; 515(b), 516(b), 517. These performance standards are to be applied through a phased, comprehensive regulatory program.

The first phase, or "initial regulatory program" phase, covering all SCMROs, was established through OSM's issuance of rules 30 CFR Parts 700-725 (Private and Federal Lands) published on December 13, 1977; 25 CFR Part 177 (Indian Lands) published on December 16, 1979; and 30 CFR Part 211 (Federal Lands) published on August 22, 1978. During the initial program a minimum number of federal standards are applicable under SMCRA to the permitting of coal mines. *See, e.g.*, Sections 502, 510(d), 515(a)-(d), 516, 522(e), SMCRA. However, during the second, or "permanent regulatory program" phase, more detailed Federal Standards are imposed under SMCRA through a comprehensive permitting system. *See, e.g.*, Sections 502(d), 506-517, 519, 522, SMCRA. National rules for implementing the SMCRA permanent regulatory program were promulgated by OSM on March 13, 1979. 44 FR 15312, *et seq.*

(1). *PRIVATE LANDS.* The SMCRA permanent program permit will be introduced according to a phased schedule. For privately-owned lands, the States have the opportunity to assume primary jurisdiction over the regulation of SCMRAS if the Secretary of the Interior approves the State program. *See* Section 503, SMCRA. If a State does not obtain approval of its program from the Secretary, then a Federal program must be initiated. *See* Section 504, SMCRA. If a State program cannot be approved by June 3, 1980, the Secretary is to implement a Federal program for the State involved. Section 504(a), SMCRA.

Under either a State or Federal program, all existing SCMROS must file permit applications with the applicable SMCRA regulatory authority within two months from the approval of a State or Federal program. *See* Sections 502(d), 506(a), SMCRA. The regulatory authority is to act to approve or disapprove those applications within eight months from program approval. Sections 502(d), 506(a), SMCRA. Although permit system requirements will be published for each separate Federal or State program, each will contain requirements generally similar to those at Subchapter G of OSM's permanent program rules. 44 FR 15349-15385.

(2). *FEDERAL LANDS.* For Federal lands, a somewhat different phase-in schedule will apply. The Secretary of the Interior has the ultimate responsibility for administering the permanent SMCRA program permits system on Federal lands, a responsibility he cannot delegate to the States. Section 523, SMCRA. However, joint administration of the permit system for Federal lands may occur through cooperative agreements with States in which Federal lands are located. *See* Section 523(c), SMCRA. For Federal lands, applications for permits for new coal mines or extensions of existing mines must be filed according to requirements in the permanent program after April 12, 1979. Unless otherwise required by the SMCRA regulatory authority, persons conducting existing SCMROS on Federal lands will not be subject to the permanent program permit requirements until a State or Federal program is instituted for private lands in a particular State. *See* 30 CFR 741.11(C) (I), 44 FR 15333 (March 13, 1979). As a result, applications for permanent program permits for existing SCMRAS on Federal lands ordinarily will have to be filed within two months of approval of a State or Federal program covering the private lands of the particular State and a permit approved or denied within eight months of the program approval. *See* 30 CFR 741.11(c) (1)-(2), 44 FR 15333 (March 13, 1979). [Page 55323]

(3). *INDIAN LANDS.* For Indian lands, a permanent regulatory program is not applicable until 1980. Implementing rules for the permanent *C. lands program, including permits, will not be adopted until later.* *See* Section 710, SMCRA.

I. POTENTIAL FOR DUPLICATION

Without coordination, the potential exists for substantial duplication in the application of SMCRA and NPDES permit program requirements. First, extensive agency resources would be devoted to the regulation through permit systems of individual SMCROS under both programs. Second, the industry would be required to prepare applications for and obtain separate individual SMCRA and NPDES permits for the same SCMRO. Third, an operator could be subject to conflicting substantive requirements under the two permit systems. Fourth, the interested public and other governmental agencies would have to devote substantial resources for participation in two separate, individualized permit systems for the same SCMRO.

To avoid potential duplication of this magnitude, Sections 503(a) (6) and 504(h) of SMCRA mandate that permit systems under SMCRA State and Federal programs specifically include processes for coordination in the review and issuance of SMCRA permits with other applicable Federal and State permit processes. In addition, EPA is engaged in a concerted effort to consolidate the administration of its permit programs, among other reasons, to eliminate unnecessary duplication. EPA is also seeking to consolidate their permit programs with the permit programs of other Federal agencies. As a result of these considerations, OSM and EPA have developed a proposal whereby the two agencies would provide for a coordinated permit system to control discharges of pollutants into waters of the United States.

II. THE PROPOSED MEMORANDUM OF UNDERSTANDING

A. INTRODUCTION.

In summary, the MOU would establish an integrated NPDES/SMCRA permitting system under the SMCRA permanent regulatory program. The MOU would directly apply only in cases where EPA itself operates the NPDES program. However, in States where EPA has approved State NPDES programs, EPA will authorize and encourage the State water quality agency to similarly coordinate NPDES programs with SMCRA regulatory authorities.

Where EPA is the NPDES permitting authority, NPDES requirements would be fulfilled in two stages. First, EPA would issue State-wide "Special NPDES coal mining permits" covering all SCMRAS in the State. The Special permit would authorize discharges under NPDES by all SCMROS which are subject to issued SMCRA permanent regulatory program permits (Title V permits), containing the water-quality related requirements of the NPDES system.

The second phase of the NPDES permitting system would be accomplished by integration of applicable procedural and substantive NPDES requirements into the Title V permit process itself, including EPA and State water quality agency review and comment upon Title V permit applications inclusion of NPDES-related conditions into SMCRA permits, and enforcement of those conditions under both the *CWA* and *SMCRA*. In addition, EPA would retain the right, pursuant to its statutory obligations, to require that a SCMRO be covered by an "Individual NPDES coal mining permit," if the SMCRA permit were found not to satisfy NPDES requirements adequately.

OSM and EPA are proposing this system following the agencies' detailed review of available agency resources and their understanding of Congress' expectation under the *CWA* and *SMCRA*. EPA's resources under the NPDES permit program must be divided among dozens of categories of municipal and industrial point-source discharges. Coal mining is only one of those many categories. OSM on the other hand, has been provided with resources to focus specifically upon the comprehensive regulation of coal mining. Also, in enacting *SMCRA*, Congress has called for a comprehensive national environmental regulatory scheme, including a broad and highly detailed permitting program, specifically fashioned for coal mining. In doing so, Congress anticipated that the primary reservoir or regulatory expertise for coal mining would be located within OSM and State *SMCRA* regulatory agencies. Finally, the scope of permitting requirements for coal mining under *SMCRA* is much more extensive than under the *CWA*. *See* Sections 507, 508, *SMCRA*. Principally, *SMCRA* is broader because it covers all environmental media, while the *CWA* focuses on water quality only. Therefore, it is desirable to integrate all applicable water-quality considerations into the comprehensive environmental scheme under *SMCRA*. For all these reasons, OSM and EPA tentatively have concluded that detailed permitting of individual SMCROS ordinarily should be handled primarily through the *SMCRA* regulatory process, incorporating applicable NPDES requirements, rather than through a transfer of *SMCRA* requirements into the NPDES permit process, or by requiring SCMROS to acquire individual permits from both programs.

B. SCOPE OF MOU

Because the initial regulatory program under *SMCRA* provides only indirectly for Federal permitting standards, the agencies do not believe that a significant potential for duplication exists between the mandatory requirements of the *SMCRA* and the *CWA* during the initial regulatory program under *SMCRA*. The proposed MOU does not, therefore, contemplate a coordinated permitting process during the *SMCRA* initial regulatory program. Of course, the MOU would not preclude States from developing processes for coordination of NPDES requirements with their initial *SMCRA* regulatory program. In addition, the MOU would not establish a coordination system for permitting SCMROS on Indian lands, since *SMCRA* permanent regulatory programs regulations for Indian lands have not yet been developed. However, under the MOU, EPA and the Department would expect to establish a coordination process when permanent *SMCRA* program rules for Indian lands are developed.

As mentioned above, the MOU would not provide for mandatory coordination processes where the NPDES program has been delegated to States under Section 402 of the *CWA*, 33 U.S.C. Section 1342. The *CWA* does not empower EPA to preclude approved NPDES States from administering an NPDES permit program which is separate from a *SMCRA* permanent regulatory program permit system. (IN contrast, the *SMCRA* does require the establishment of a coordination process for permanent regulatory program permit systems. *See* Sections 503(a) (6), 504(h), *SMCRA*.) However, EPA recognizes the desirability of coordinating the NPDES program at the State level with Title V permit programs. Therefore, it will encourage States through policy memoranda and other means, to coordinate their programs in a similar manner. EPA will propose regulations allowing a special permit program to be established by NPDES approved States. These regulations will appear as part of the proposed rulemaking announced in this notice. [Page 55324]

C. LEGAL AUTHORITY

The MOU, if adopted, would be executed by EPA and the Department of the Interior under the Administrative Procedures Act (5 U.S.C. Sections 551, *et seq.*); Titles I, II, V, and VII, SMCRA, 30 U.S.C. Sections 201 *et seq.*; and the Clean Water Act, 33 U.S.C. 251 *et seq.*

D. NPDES PERMITS UNDER THE PROPOSED MOU

1. As mentioned above, EPA would issue State-wide "Special NPDES coal mining permits." Procedures providing for appropriate public participation in the issuance of those permits would be utilized.

2. Under Section 511 of the CWA and the National Environmental Policy Act, 42 U.S.C. 4332 (NEPA), EPA must perform environmental reviews prior to issuing NPDES permits to new sources. In some situations, this obligation would overlap with similar NEPA obligations of OSM under the SMCRA permanent regulatory program. In States where OSM is the SMCRA regulatory authority and responsible for issuing Title V permits under either SMCRA Federal or Federal lands programs, it must comply with NEPA. Since NEPA applies only to Federal permitting decisions, States issuing NPDES or Title V permits need not comply with NEPA.

The proposed MOU would establish a policy to minimize NEPA duplication where both EPA and OSM issue permits and to account for EPA's NEPA obligation where no OSM NEPA obligation exists. Where both agencies issue permits (*e.g.*, SMCRA Federal or Federal lands programs), OSM would be the lead NEPA agency. In States where EPA issues permits, but OSM does not (*e.g.*, State SMCRA program), EPA would have primary NEPA responsibility, but only for new sources. In these instances EPA would issue two separate Special NPDES coal mining permits in each such State. One would be applicable to all potential new sources on private lands within the States during the term of the Special permit. EPA would perform its NEPA obligations during the issuance of such Special permits. The other Special permit would cover all other SCMRs in the State and could be issued expeditiously without prior environmental review. Due to the need to have Special NPDES coal mining permits issued at the time that the SMCRA permanent regulatory program permit process is first being implemented, EPA would agree under the MOU to conduct necessary NEPA activities according to priorities established by OSM.

3. Special NPDES coal mining permits would become effective for a particular SCMRO, upon the operator's receipt of a valid Title V permit from the SMCRA regulatory authority. When that happens, any pre-existing, individual NPDES coal mining permit for that SCMRO would terminate, unless EPA decided to require continuation of an individual NPDES coal mining permit. As a condition of authority to conduct operations under the Special NPDES coal mining permit, the SCMRAS would have to be conducted in full compliance with the requirements of the Title V permit. Violations of NPDES requirements contained in the Title V permit would constitute violations of the Special NPDES coal mining permit and would be enforceable separately under both the CWA and SMCRA.

4. EPA's retention of its ability to issue individual NPDES coal mining permits in appropriate circumstances is necessary to allow EPA to discharge its duties under the CWA. Therefore, although SCMRs ordinarily will be covered fully by Special NPDES coal mining permits, EPA's authority to require that a particular SCMRO be covered by an individual NPDES coal mining permit for due cause would be preserved under the proposed MOU. EPA would issue individual NPDES coal mining permits in relatively few situations, such as: (a) The failure of a SMCRA regulatory authority to include in the Title V permit an important water-quality related permit condition; (b) identification of issues affecting a SCMRO during NEPA review in the issuance of either a new source Special NPDES coal mining permit or an OSM-issued Title V permit; or (c) the failure of SCMRO to operate in compliance with NPDES conditions of the Title V permit. Where EPA required the SCMRO to obtain an individual NPDES coal mining permit, EPA would afford the SCMRO an appropriate opportunity to contest the terms of the proposed individual permit.

5. The proposed MOU contains detailed procedures to insure that SCMRAS and other interested parties be afforded adequate input in the permit issuance process. To streamline the process, parties will be strongly encouraged by these procedural requirements to address all water-quality related issues through the Title V permit processes. However if, after unsuccessfully utilizing Title V procedures, a party believes that the final effective Title V permit fails to incorporate all NPDES provisions required under CWA, they may petition EPA to issue an individual NPDES coal mining permit with conditions more stringent than the Title V permit. In addition, EPA may, on its own initiative, decide to issue an individual NPDES coal mining permit. In that case, NPDES - related issues would be adjudicated through NPDES procedures, an no Title V adjudicatory hearing would be held on those issues.

E. SMCRA (TITLE V) PERMITTING

1. The OSM permanent program rules already incorporate much of the permit application, review and permit-issuance requirements of the CWA's NPDES program, as authorized by SMCRA. *See* Sections 507, 508, 510, 511, 515, 516 and 517, SMCRA; Parts 770, 771, 778-88, 816-817, and Subchapter L of OSM's permanent program rules, 44 FR 15349 *et seq.* (March 13, 1979). Under Section C of the MOU, OSM would agree to promulgate regulations which provide for inclusion of the remainder of applicable NPDES requirements into Title V permit requirements, as authorized by SMCRA.

2. Specifically, OSM would agree to propose regulations which would (a) require Title V permit applications to include all information necessary for an NPDES permit; (b) require SMCRA regulatory authorities to incorporate into each Title V permit all required NPDES permit conditions, conditions required by the United States Army Corps of Engineers to protect navigation and anchorage, and conditions required by a valid State certification issued under Section 401 of the CWA; and (c) provide EPA, as well as other interested parties, the opportunity to review and comment on Title V permit applications and propose special water-quality related Title V permit conditions.

3. OSM will propose regulations incorporating (by reference where practicable) appropriate provisions of EPA's application requirements for SCMRAS. EPA recently has proposed new application requirements for existing sources (44 FR 34244 *et seq.*, June 14, 1979).

For new sources, EPA intends to propose new NPDES permit application requirements by December, 1980, at which time it will accept comments on those requirements. Pending EPA's proposal of application requirements for new sources, OSM intends to propose regulations to incorporate applicable portions of EPA's existing new source application requirements, which are contained in EPA's application form OMB 158-4-0100. Copies of this form may be obtained from the addresses listed above.

4. To prevent delays in Title V permit issuances, the proposed MOU would require EPA and State water-quality agency comments on the Title V application to be filed within fixed time periods. As proposed, a general time limit of 90 days would be required, with a shorter 60-day time period for mines whose proposed annual production would be less than 100,000 tons. For operations of those small mines, a shorter period is appropriate, both because less time should be required for application review and because SMCRA evidences a concern for the expeditious processing of their applications by the SMCRA regulatory authority. *Cf.*: Sections 502(c), 507(c), SMCRA. {55325}

Where EPA or State water-quality agency comments suggest the inclusion of special permit conditions not expressly identified in the applicable SMCRA program regulations, those comments would be subject, in turn, to opportunity for further comment. This procedure is proposed as an alternative to the more time-consuming preparation and circulation for public review of a draft NPDES permit. *Compare* 40 CFR 124.311124.45, 44 F.R. 32927-32933 (June 7, 1979). Circulation of a draft NPDES permit prior to final Title V permit issuance is not a procedure which can be incorporated readily into the SMCRA permanent regulatory program, due to statutory SMCRA requirements, including time constraints. *See* sections 502(d), 506(a), 513, 514, SMCRA.

To preserve the basic purpose behind the draft NPDES coal mining permit process (*e.g.*, exposure for public scrutiny of proposed permit conditions that are recommended on an individual permit), it is proposed that the public be afforded an opportunity to review and comment on particular types of EPA/State water-quality agency comments on the Title V application. The length of the public comment period is proposed to be left to the discretion of the SMCRA regulatory authority on a case-by-case basis, depending upon the complexity and length of the EPA/State water-quality agency comments.

5. Under the proposed MOU, the SMCRA regulatory authority would attempt to resolve any disagreements with EPA on disposition of EPA's comments prior to a final decision on the Title V application. Ultimately, the SMCRA regulatory authority would be allowed discretion under the MOU and OSM's implementing regulations as to whether to follow EPA's suggestions. However, if the SMCRA regulatory authority does not incorporate any of EPA's proposed special conditions, EPA would have the option of requiring an individual NPDES coal mining permit for the SCMRO. The failure of the SMCRA regulatory authority to incorporate EPA's proposed special conditions would be reviewable under Section 514 and 526 of SMCRA only if EPA did not require an individual NPDES coal mining permit. If EPA does require an individual NPDES coal mining permit, the SCMRO would be afforded due process protection through EPA's NPDES permit procedures. Thus, a forum would always be available to resolve particular disputes.

F. AGENCY INSPECTION AND MONITORING

The MOU also would provide for a cooperative inspection and monitoring program. The SMCRA regulatory authority would give EPA representatives access to its monitoring reports and would make semiannual reports available to EPA on

NPDES-related violations by SCRMOs. The SMCRA regulatory authority would have primary responsibility for inspections of SMCROS, including environmental sampling and analysis to determine compliance with all water-quality conditions contained in Title V permits and individual NPDES coal mining permits (where the latter have been issued). EPA would retain authority to conduct independent inspections if needed. EPA, OSM, and SMCRA regulatory authorities will jointly share enforcement authorities for violations of NPDES requirements.

III. PUBLIC PARTICIPATION

A. MOU - Copies of the proposed MOU are available at the addresses listed above and also at each OSM Regional office at the following addresses:

Region I

Office of Surface Mining, U.S. Department of the Interior, 1st Floor, Thomas Hill Building, 950 Kanawha Blvd., East, Charleston, W. Va. 25301.

Region II

Office of Surface Mining, U.S. Department of the Interior, 530 Gay Street, Suite 500, Knoxville, Tennessee 37902.

Region III

Federal Building, Ohio and Pennsylvania Streets, Indianapolis, IN 46204.

Region IV

Office of Surface Mining, U.S. Department of the Interior, 818 Grand Avenue, Kansas City, MO 64106.

Region V

Office of Surface Mining, U.S. Department of the Interior, Post Office Building, Room 270, 1832 Stout Street, Denver, Colorado 80202.

Written comments must be submitted by the date and to the address stated above for the Washington, D.C. offices of EPA or OSM. No public hearing is planned during the 45-day comment period on the proposed MOU. However, public hearings will be held when rules are proposed to implement the MOU. Dates, times, and places for those hearings will be provided when the proposed rules are published in the Federal Register.

B. *PROPOSED RULEMAKING* - OSM and EPA intend to propose rules to implement the MOU. Written comments should address the general scope of such a proposal and specific issues which should be covered by the proposed rules. The comments should be submitted to the Washington, D.C., offices of EPA or OSM by the date and at the addresses given above.

IV. The Department has determined that the proposed implementing rules would not be significant, under applicable rules of procedure, and do not require a regulatory analysis of economic effect. Copies of the document supporting this determination are available at the OSM Washington, D.C., office listed above as an addressee.

V. PRINCIPAL AUTHORS

The principal authors of the proposed MOU have been Lewis M. McNay, Acting Chief, Division of Applied Research, Office of Technical Services and Research, OSM, and William Jordan, Chief, Industrial Permits Branch, Office of Water Enforcement, U.S.E.P.A.

Dated: September 6, 1979.

Joan M. Davenport,

Assistant Secretary for Energy & Minerals, United States Department of the Interior.

Joan Z. Beusten,

Assistant Administrator for Enforcement, Environmental Protection Agency.

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