

FEDERAL REGISTER: 44 FR 61312 (October 24, 1979)

DEPARTMENT OF THE INTERIOR

AGENCY: Office of Surface Mining Reclamation and Enforcement (OSM)

30 CFR Part 716

Backfilling and Grading To Achieve Approximate Original Contour; Proposed Rulemaking

ACTION: Proposed rule.

SUMMARY: The Office of Surface Mining is seeking comments on these proposed rules which provide for interim program variances from the requirement to return mined land in steep slope areas to the approximate original contour. The variances are now available only in the permanent program.

DATES: Comments must be received by 5 p.m., November 23, 1979. A public hearing will be held at 9:30 a.m., November 16, 1979.

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. Alternatively, comments may be hand delivered to: Office of Surface Mining, Room 135, U.S. Department of the Interior, South Building, 1951 Constitution Avenue, N.W., Washington, D.C. 20240 where all comments will be available.

The public hearing will be held at the Department of the Interior, Room 8070, 18th and C Streets, N.W., Washington, D.C. 20240.

Persons wishing to testify at the public hearing on the proposed rule should contact Alan Palisoul, Enforcement Specialist, Office of Surface Mining, Department of the Interior, Washington, D.C. 20240, 202-343-8061.

FOR FURTHER INFORMATION CONTACT: Alan Palisoul, 202-343-8061.

SUPPLEMENTARY INFORMATION:

These regulations are proposed to amend OSM's initial program regulations published at 42 FR 62639 *et seq.* (December 13, 1977). The proposal would add as section to the initial program regulations which would implement Section 515(e) of the Act by providing for a limited variance on steep slopes from the requirements of Section 515(d)(2) of the Act to return land mined on steep slopes to approximately original contour.

Section 515(e) was not implemented in the interim program regulations because of OSM's interpretation of the subsection. The subsection starts:

Each State program may and each Federal program shall include a procedure...

The phrase "Federal program" is defined in section 701(5) and the phrase "State program" is defined in section 701(25) of the Act to refer only to permanent regulatory programs. OSM at first believed that the use of those defined phrases established Congressional intent that section 515(e) not apply in the interim program.

Further analysis leads OSM to believe it should re-examine this conclusion. Congress clearly intended to phase in the applicability of the environmental performance standards. It is unlikely that Congress intended to require compliance with standards that are more rigorous during the interim program than during the permanent program. Moreover, the primary author of section 515(e) was Senator Jennings Randolph (D-W.Va.). He said he derived the amendment from analogous provision in West Virginia's surface mining statute. 23 *Cong. Rec.* 58101-8103 (May 20, 1977). It is unlikely Senator Randolph intended that West Virginia's State law provision be rendered inapplicable during the interim program.

Congress used other words in the Act in ways inconsistent with their defined meaning. The word "permit" is defined in section 701(15) of the Act as a permit issued pursuant to a State program or a Federal program.

This definition on its face does not include permits issued during the interim program by a State. Yet section 502(a), (b), and (c) use the term "permit" with reference to permits issued by a State during the interim program. This example is especially instructive because it shows Congress sometimes intended words to be applicable in the interim program that on their face are applicable only during the permanent program. For these reasons, OSM has tentatively concluded that Congressional intent was not definitely established by the use of the phrases "State program" and "Federal program" and is

more forcefully demonstrated by the central theme of the Act that the interim program be no more stringent than the permanent program.

OSM has tentatively concluded that the use of the phrases "State program" and "Federal program" in section 515(e) may have been unwitting and does not necessarily indicate an intent to limit that subsection to the permanent program. This conclusion is bolstered by the facts that section 515(e) originated as an amendment on the Senate floor and therefore did not receive the careful Congressional and staff scrutiny of Committee consideration. There is nothing in the floor debate or conference committee report that shows an awareness of the possible result of the use of these defined phrases.

OSM solicits comment on this central interpretive issue with citation to legislative history or other useful authority, if possible.

The proposed regulations are based on section 515(e) of the Act which provides as follows:

(e)(1) Each State program may and each Federal program shall include procedures pursuant to which the regulatory authority may permit variances for the purposes set forth in paragraph (3) of this subsection, provided that the watershed control of the area is improved; and further provided complete backfilling with spoil material shall be required to cover completely the highwall which material will maintain stability following mining and reclamation.

(2) Where an applicant meets the requirements of paragraphs (3) and (4) of this subsection a variance from the requirement to restore to approximate original contour set forth in subsection 515(d)(2) of this section may be granted for the surface mining of coal where the owner of the surface knowingly requests in writing, as a part of the permit application that such a variance be granted so as to render the land, after reclamation, suitable for an industrial, commercial, residential, or public use (including recreational facilities) in accord with the further provisions of (3) and (4) of this subsection.

(3)(A) After consultation with the appropriate land use planning agencies, if any, the potential use of the affected land is deemed to constitute an equal or better economic or public use;

(B) is designed and certified by a qualified registered professional engineer in conformance with professional standards established to assure the stability, drainage, and configuration necessary for the intended use of the site; and

(C) after approval of the appropriate state environmental agencies, the watershed of the affected land is deemed to be improved.

(4) In granting a variance pursuant to this subsection the regulatory authority shall require that only such amount of spoil will be placed off the mine bench as is necessary to achieve the planned post-mining land use, insure stability of the spoil retained on the bench, meet all other requirements of this Act, and all spoil placement off the mine bench must comply with subsection 515(b)(22).

(5) The regulatory authority shall promulgate specific regulations to govern the granting of variances in accord with the provisions of this subsection, and may impose such additional requirements as he deems to be necessary.

(6) All exceptions granted under the provisions of this subsection shall be reviewed not more than three years from the date of issuance of the permit, unless the permittee affirmatively demonstrates that the proposed development is proceeding in accordance with the terms of the reclamation plan.

This subsection states several constraints on the variance which must be kept in mind when the reader analyzes and comments on the proposed regulations. Several points deserve special attention.

First, the subsection makes watershed improvement a condition of any variance. How that is to be implemented is one of the important issues of the proposed regulations and is discussed in more detail below.

Second, the subsection makes the backfilling of all highwalls a condition of any variance. This will limit the usefulness of the variance in very steep slopes. This issue is also discussed in more detail below.

Third, the subsection limits the variance so as to render the land, after reclamation, suitable for an industrial, commercial, residential, or public use (including recreational facilities * * *).

OSM presently interprets that language to be functionally the same as the requirement in section 515(c) of the Act that allows a variance for mountaintop mining when certain post-mining land use is proposed. The precise relationship between the granting of the variance and the degree of likelihood of the land use actually occurring is an important issue. In addition, the list of land uses justifying the variance does not include agriculture. This issue is discussed in more detail below.

In addition, OSM draws attention to the proposed Section 816.2(e)(3)(iv)(A). This section as drafted establishes the condition of the area prior to mining as the reference point when determining watershed control improvement. Another

alternative would be to use as the reference point the conditions of the area if it were mined and restored to the approximate original contour. OSM invites comments on this latter approach, specifically as to whether it more accurately represents the intent of Congress and whether the use of this hypothetical benchmark would be feasible. OSM solicits comments on its proposed regulation and on the principal alternative. Of course, it also seeks other alternatives and comments.

Section 515(e)(2) states that the owner of the surface must knowingly request that the variance be granted so that the land is suitable for industrial, commercial, residential, or public use. It makes no reference to agricultural use (compare section 515(c)(3)). In addition, the legislative history seems to indicate clearly an intent to exclude this type of use. OSM seeks comments on this issue also. Section 716.2(e)(3)(i) requires that the regulatory authority find that the proposed use is likely to occur. OSM realizes that as a practical matter, it is impossible for an agency to predict with certainty that something will happen. However, it is OSM's present opinion that before a variance may be granted the Act requires that the postmining land use be appropriate and the conditions exist, including the operator's or another's commitment, to insure that the land use will actually occur. Thus, the proposed regulations are an attempt to provide a standard to insure that the land-use will occur while at the same time allowing for change that may sometimes occur even given good intentions. OSM requests comments on the proper phrasing of this test. Finally, proposed Section 716.2(e)(4)(i) would require that the highwall be completely backfilled with spoil to achieve a static safety factor of at least 1.3. This two-pronged requirement is drawn from section 515(e)(1) of the Act which OSM reads to say that even where a variance is granted, complete backfilling and achieving stability are mandatory. OSM realizes that this may make the variance of little use in certain instances. OSM seeks comments and suggestions on alternatives available under section 515(e), if any exist.

The variance which is being proposed differs from the variance provision in the permanent program (30 CFR 785.16 and 826.15) somewhat. OSM will be considering amending the permanent program regulations to conform to any adopted regulations.

Proposed regulation Section 716.2(e)(2)(ii) uses the phrase "Allow the land to be used for * * *" where the permanent program regulations, Section 785.16(b)(2), uses "Makes the land * * * suitable for * * *". This is not intended to present a different meaning. It is believed that this is a better way to state the agency's meaning.

Proposed regulation Section 716.2(e)(3) uses the phrase "* * * on the basis of a showing by the permittee, * * *" while the permanent program regulation Section 785.16(c) uses "* * * on the basis of a complete application, * * *". This also is merely a clarification that the burden is on the applicant when applying for the variance.

Proposed regulation Section 716.2(e)(3)(i) adds the phrase "* * * and that the proposed use is likely to occur." This does not appear in the permanent program regulations. This, again, is believed to be a clearer way of stating the meaning intended by the permanent program regulations, specifically Section 785.16(c)(1), (2), and (3). In addition, this specific issue is addressed above in this preamble.

Proposed regulation Section 716.2(e)(5) states that the regulatory authority shall review each variance "* * * not more than three years from the date of issuance * * *", while the permanent program regulation Section 785.16(e)(1), (2), and (3) require evaluation "within the sixth month preceding the third year * * *", "Before each permit renewal", and "Not later than the middle of each permit term." OSM does not intend to change the requirements which will apply in the permanent program. Since the permanent program will be in effect before any of these evaluation times could possibly arise. OSM believes it would be useless surplusage and therefore proposes to merely state the general statutory requirement.

For reference to the preamble for the permanent program regulations, see Federal Register, Volume 44, No. 50, March 13, 1979, pages 15083-15081. In addition, the Preamble to the draft permanent regulatory program in the Federal Register Volume 43, No. 181, September 18, 1978, pages 41713-41715 is instructive.

For all comments on these and other provisions and issues, OSM requests that commenters include citations to the act and the legislative history wherever possible.

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 501(a) of the Surface Mining and Reclamation Act of 1977 exempts this action from the Environmental Impact Statement requirement of the National Environmental Policy Act.

Regulation Drafters . The proposed modifications to the interim regulations have beenrafted principally by Richard M. Hall, Assistant Director, Inspection and Enforcement.

Dated: October 15, 1979.

Joan M. Davenport, *Assistant Secretary, Energy and Minerals* .

Accordingly, it is proposed to amend Section 716.2 of 30 CFR by adding a new paragraph (e) to read as follows:

SECTION 716.2 - STEEP-SLOPE MINING.

* * *

(e) Variances from approximate original contour restoration requirements.

(1) This Section applies to non-mountaintop removal steep slope surface coal mining and reclamation operations where the operation is not to be reclaimed to achieve the approximate original contour.

(2) The objective of this subsection is to allow for a variance from approximate original contour restoration requirements on steep slopes for surface mines to --

(i) Improve watershed control of lands within the permit area and on adjacent lands; and

(ii) Allow the land to be used for an industrial, commercial, residential, or public use, including recreational facilities.

(3) The regulatory authority may grant a variance from the requirement for restoration of the affected lands to their approximate original contour only if it first finds, in writing, on the basis of a showing by the permittee, that all of the following requirements are met:

(i) The permittee has demonstrated that the purpose of the variance is to make the lands to be affected within the permit area suitable for an industrial, commercial, residential, or public use postmining land use and that the proposed industrial, commercial, residential, or public use is likely to occur.

(ii) The proposed use, after consultation with the appropriate land use planning agencies, if any, constitutes an equal or better economic or public use.

(iii) The permittee has demonstrated compliance with the requirements for acceptable alternative postmining industrial, commercial, residential or public land uses of 30 CFR 715.13.

(iv) The permittee has demonstrated that the watershed of lands within the proposed permit area and adjacent areas will be improved by the operations. The watershed will be deemed improved if --

(A) There will be a reduction in the amount of total suspended solids or other pollutants discharged to ground or surface waters from the permit area as compared to such discharges prior to mining, so as to improve public or private uses or the ecology of such waters; or, there will be reduced flood hazards or more even flow within the watershed containing the permit area due to reduction of the peak flow discharges from precipitation events or thaws. If only flow or pollutant load is improved, the other must not deteriorate.

(B) The total volume of flows from the proposed permit area, during every season of the year, will not vary in a way that adversely affects the ecology of any surface water or any existing or planned use of surface or ground water and.

(C) The appropriate State environmental agency approves the plan.

(v) The permittee has demonstrated that the owner of the surface of the lands within the permit area has knowingly requested, in writing, as a part of the application, that a variance be granted. The request shall be made separately from any surface owner consent given for the operation and shall show an understanding that the variance could not be granted without the surface owner's request.

(vi) The proposal is designed and certified by a qualified registered professional engineer in conformance with professional standards established to assure the stability, drainage, and configuration necessary for the intended use of the site.

(vii) All other requirements of the Act and these regulations will be met by the proposed operations.

(4) Every permittee who obtains a variance under this subsection shall:

(i) Backfill completely the highwall with spoil material, in a manner which results in a static factor of safety of at least 1.3 using standard geotechnical analyses.

(ii) Improve the watershed control of the area within which the mining occurs by reducing the peak flow from precipitation or thaw or reducing the total suspended solids or other pollutants in the surface water discharge during precipitation or thaw, while maintaining the variable not reduced at the premining level.

The total volume of flow during every season of the year shall not vary in a way that adversely affects the ecology of any surface or ground water.

(iii) Disturb land above the highwall only to the extent that the regulatory authority deems appropriate and approves as necessary to facilitate compliance with the provisions of this section, if the regulatory authority finds that the disturbance is necessary to --

(A) Blend the solid highwall and the backfilled material;

(B) Control surface runoff; or

(C) Provide access to the area above the highwall.

(iv) Place off the mine bench no more than the amount of spoil necessary to achieve the postmining land use, ensure the stability of spoil retained on the bench, and meet all other requirements of the Act and Parts 710 through 725 of this Chapter. All spoil not retained on the bench shall be placed in accordance with 30 CFR 715.15.

(5) The regulatory authority shall review every variance granted pursuant to this section not more than three years from the date of issuance of the permit to ensure that the proposed alternative post-mining, use is preceding in accordance with the terms of the approved plan.