

FEDERAL REGISTER: 44 FR 77440 (December 31, 1979)

DEPARTMENT OF THE INTERIOR

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

30 CFR Parts 701, 741, 761 and 769

Surface Coal Mining and Reclamation Operations; Permanent Regulatory Program

ACTION: Final rule.

SUMMARY: This notice amends 30 CFR 701.11 and 741.11 by postponing the effective date for operator compliance with the permanent program on Federal lands until the date of approval of a State program or implementation of a Federal program for a State, and amends 30 CFR 701.1(b)(3) and Parts 761 and 769 to preserve the current applicability of those regulations on Federal lands.

EFFECTIVE DATE: January 30, 1980.

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

SUPPLEMENTARY INFORMATION:

A proposal to postpone the effective date for operator compliance with the permanent regulatory program on Federal lands was initiated by a petition from the State of Montana (subsequently joined by five additional western States) alleging that the requirements of 30 CFR 741.11(a) conflicted with Section 523(c) of the Surface Mining Control and Reclamation Act of 1977. Based on their argument, the petitioners recommended that the effective date for operator compliance with permanent Federal lands performance standards be extended for all operations in States with approved modified cooperative agreements pursuant to Section 523(c) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA) until after State program approval or implementation of a Federal program for a State (44 FR 56272).

In response to the petitioners, OSM published a notice on September 28, 1979, (44 FR 56272-56275) proposing to amend the schedule for operator compliance with the permanent program until approval of a State program or implementation of a Federal program for a State. In contrast to the Montana petition, however, the new schedule proposed by OSM would have applied in all States and only to existing surface coal mining operations on Federal lands. Plans for new mines or major extensions of existing mines on Federal lands would still have had to comply with the March 13, 1979, regulations.

On October 11, 1979, the Department published a notice (44 FR 58873) which temporarily suspended, pending decision and publication of a final rule, the requirement that existing surface coal mining and reclamation operations on Federal lands comply with the permanent performance standards of Subchapter K on and after October 12, 1979.

Comments received from the western States and the coal industry indicated opposition to the September 28 revised rule and strong support for the Montana petition language. Several environmental groups, on the other hand, supported the proposed revision, if clarified in some particulars, while others opposed any change whatsoever. After evaluating the comments received and considering the issues raised, the Secretary has decided to adopt revised language which would postpone operator compliance with the permanent program on Federal lands for all operations in all States until approval of a State program or implementation of a Federal program for a State. An analysis and discussion of the major issues and concerns raised by the commenters follows.

Several comments from State and industry representatives expressed the belief that the proposed amendment was inconsistent with section 523(c) of the Act, which provides that "States with cooperative agreements existing on the date of enactment of this Act, may elect to continue regulation on Federal lands within the State, prior to approval by the Secretary of their State program, or imposition of a Federal program, provided that such existing cooperative agreement is modified to fully comply with the initial regulatory procedures set forth in Section 502 of this Act." They felt it preempted the existing modified State/Federal cooperative agreements by requiring the administration and enforcement of two separate standards for mining operations within a State.

Commenters asserted that the basic purpose of the cooperative agreement is to prevent duality of administration and enforcement of mining and reclamation requirements by providing for State regulation of surface coal mining and

reclamation operations on Federal lands within a State. They asserted OSM's proposed amendment violated this fundamental purpose by requiring one set of standards for new mining operations and major extensions and a second set of standards for existing mines. These commenters felt imposing two sets of standards would not permit a smooth transition from the interim program to the permanent regulatory program; it would likely create complex and confusing on-the-ground administrative problems for both the operator and for the regulatory authorities. This dual regulatory scheme, contend several commenters, would be inconsistent with the language of section 523(a) that States have an opportunity to develop State programs, the requirements of which must be reflected in the Federal lands program. Such opportunity, asserted the commenters, is important if local diversity in terrain, climate, biologic, chemical, and other physical conditions is to be considered fully in adopting a regulatory program.

One commenter felt OSM's argument that the revised rule would provide evenhanded treatment for operators of existing mines and a single timetable was not supported by facts or common sense. If these arguments are to be valid, asserted the commenter, all mines -- not just existing ones -- would follow the same schedule.

Suggesting that OSM had gone further than authorized by Section 523, one commenter asserted that the Act expressly forbids the Secretary from delegating his authority on Federal lands, except under the narrow provisions of a cooperative agreement. Further, the Federal lands program may have more stringent requirements than those required by a State (Section 523 (a) and (b)). Thus, contended the commenter, the Act makes no provision for the de facto deferral of the permanent program for existing mines proposed by OSM in the revised rule, that of prolonging less stringent requirements of the initial program in order to achieve "evenhanded" treatment. (The Secretary reasoned in the Preamble to the proposed rules, 44 FR 56273, that the proposal would provide for evenhanded treatment for operators of existing mines.) The commenter based his argument on Senate Report No. 95-128, 95th Congress, 1st session p. 95 (1977) which states that:

While the Secretary could, for example, impose more stringent reclamation requirements on Federal lands than were required on non-Federal lands in the State, he could not permit less stringent requirements.

Also, pointed out this commenter, the Senate Report indicates that the Federal lands program would apply even if a State did not have a State program.

The Federal Lands Program... must, at a minimum, incorporate all of the Act's requirements and where the Federal lands are in a State with an approved State program, the requirements imposed by the States.
S. Rep. No. 95-128, 95th Cong., 1st Session p. 95 (1977)

The commenter asserted that both the Senate and House versions of the Act included a period of time when the Federal lands program would be covered by the Federal program (sic) but not by an approved State program, which nullifies the Secretary's rationale that Congress anticipated the States would have an opportunity to have a program approved.

Continuing this reasoning, the commenter noted that Sections 511(a)(2) and 511(a)(3) of the Act prohibit approval of permit revisions unless the regulatory authority makes a positive finding that the revised reclamation plan meets the requirements of the Act and the State or Federal program. An extension to the area covered by the permit, except in incidental boundary revisions, must be made by application for another permit. Thus, asserts the commenter, OSM does not have the discretion to distinguish between "major" and "minor" extensions in requiring an applicant to seek a new permit when the plan is revised. Further, asserts the commenter, the application to be approved must comply with the Federal lands program if no State program is in effect.

In conclusion, the commenter indicated that nothing suggests that the Federal lands program must await State program approval. Rather, the Federal lands program would be amended to incorporate any special provisions of the approved State program. Thus, according to the commenter, no legal basis exists for the petitioners' argument that Congress intended States to have an opportunity to develop and have approved State programs prior to implementation of a permanent Federal lands program.

Another commenter indicated that, if adopted, the proposed revision should apply only in States where surface mining operations on Federal lands are being regulated by a State regulatory authority under a modified cooperative agreement approved pursuant to Section 523(c) of the Act. The commenter asserted that the amendment should only apply to those States that have in good faith complied with the Act as evidenced by approval of a modified cooperative agreement. The commenter further contended that in States without cooperative agreements no legal mechanisms will be available to protect the land, air, and water quality on Federal lands.

Many comments on the proposed rule concerned the use of terms and phrases, such as "major or minor extension," "approvable," "not approvable," "sufficiently close to decision," "approved mining plans," and "existing mine plans." The comments were that without clarification, definition or deletion these undefined and non-specific terms and phrases will cause considerable confusion and conflict between the operators and the regulatory authority.

Several comments were received relative to the potential for increased adverse impact to the environment. One commenter indicated that restricting the permanent Federal lands programs to new mines and major additions would result in considerable environmental harm because the commenter felt that interim regulations contain less protective measures than the permanent program.

Other commenters alleged that the proposed rule, if adopted, might increase environmental harm, because the permanent Federal lands program for new and expanded mines would not contain requirements that reflect local variations on areas subject to mining activity; i.e., regulations developed under the State window concept would not be considered in evaluating mine plans relative to local conditions, thus subjecting these areas to possible greater environmental degradation.

As indicated by one commenter, many of the Federal lands in the East involve National Forest lands underlain by private coal. Citing several examples, the commenter pointed out that there is, apparently, considerable confusion concerning the jurisdictional responsibility and authority for the administration and regulation of mining operations on these lands. This confusion, asserts the commenter, should be resolved through clarifying language in the Preamble to the final rule.

Finally, several commenters supported the proposed amendment, but did not believe it should result in postponing the designation program, including the petition process to designate or terminate designations of Federal lands unsuitable for all or certain types of surface coal mining operations.

The divergent comments received on the proposed rulemaking confirm the ambiguous nature of the language in Section 523 of the Act. The ambiguity arises in paragraphs (a) and (c) of the section and concerns the timing and scope of the Federal lands program. This section's language raise questions as to whether initial and permanent Federal lands programs are authorized, analogous to the non-Federal lands statutory scheme, and the relationship between the Federal lands program and cooperative agreements with States authorizing joint State-Federal regulation of surface mining operations on Federal lands.

Because of the section's ambiguous language, the Secretary explains his interpretation of the section here, hoping that the explanation will aid those who commented and other interested members of the public to understand the basis for the regulations promulgated in this notice.

Section 523 begins by stating that "the Secretary shall promulgate and implement a Federal lands program" within one year of enactment of the Act. The Act, however, provides only limited guidance concerning the composition of a "Federal lands program." That term is defined in Section 701(5). The definition, however, merely refers back to section 523 defining the term to mean a program established by the Secretary pursuant to that section.

Some guidance is found in Section 523(a). The Federal lands program is required to be one which (1) at a minimum, incorporates all of the requirements of the Act, (2) takes into consideration the diverse physical, climatological, and other unique characteristics of the Federal lands and (3) includes, at a minimum, the requirements of an approved State program, where Federal lands in a State with an approved State program are involved.

In attempting to structure a rational Federal lands program these factors need to be applied in the context of other pertinent, general, guiding principles found elsewhere in the Act. For example, States are acknowledged as the leading sources of knowledge on how diversity in terrain, climate, biologic, chemical, and other physical conditions in areas subject to mining operations should be reflected in regulations for surface coal mining operations. Sections 101(f) and 201(c)(g). Surface mining and reclamation standards among the coal producing States are to be reasonably uniform so that competition in interstate commerce among sellers of coal produced in different States will not be used to undermine the ability of the several States to improve and maintain adequate standards. Section 101(g). Cooperation between the States and the Secretary is necessary to prevent or mitigate adverse environmental effects of surface coal mining operations. Sections 101(k), 102(g), 201(c)(9).

In light of these several factors and guiding principles, the Secretary has used his broad legislative delegation of rulemaking authority, Section 201(c)(2), to carry out the purposes of the Act to promulgate and implement a rational Federal lands program. This program reflects a reasonable reconciliation of the ambiguous statutory provisions and careful consideration

of the administrative problems associated with regulation of surface coal mining operations that occur on Federal lands in many States and on Federal and private lands within a given State.

The Federal lands program must incorporate all the requirements of the Act. Section 523. The Secretary interprets this to mean that operators must comply initially with the set of performance standards specified in Section 502(c), analogous to the situation for operators on non-Federal lands. Congress intended a phased implementation of performance standards with the most important being applied first. S. Rep. No. 95-128, 95th Cong., 1st Sess. 70 (1977). "This appears to the committee to be a practical mechanism for assuring compliance without raising the possibility of unwarranted hardship on the operator." *Id.* The Secretary has not found, nor did commenters cite any legislative history to the contrary suggesting that the unwarranted hardship Congress wanted to avoid imposing on operators on private lands, they, nevertheless, wanted to impose on operators on Federal lands.

Language in Section 523(c) gives support to the Secretary's interpretation of Section 523(a) that an initial Federal lands program is justified by the congressional mandate to include in the Federal lands program all the requirements of the Act. Congress required that existing cooperative agreements be modified to comply fully with the initial regulatory procedures set forth in Section 502 of the Act if a State wished to continue its regulatory role on Federal lands under cooperative agreements which predated the Act. Congress did not require the existing cooperative agreements to be modified to comply with the permanent program.

The rationale for this is clear to require the cooperative agreements to comply with the permanent program would have required such compliance in advance of the schedule for States to implement the permanent program under State programs incorporating laws and regulations corresponding to the permanent statutory requirements under SMCRA. Sections 503 and 501. But to read the requirement to modify cooperative agreements to comply with the initial program as suggesting that States with existing cooperative agreements, and operators who were fortunate to be operating on Federal lands within such States, were to be given a special variance from an otherwise clear requirement to regulate Federal lands under the permanent program is unwarranted. The Statute establishes no such clear requirement to regulate Federal lands under a permanent program in advance of State or Federal program implementation. As has been shown, the Secretary has reasonably interpreted Section 523(a) to authorize an initial program to be followed by a permanent program. Where a statute authorizes explicit variances. Section 515 (c) and (e), implied variances are not likely to be construed. *TVA v. Hill*, 437 U.S. 153 (1978).

The Secretary implemented the initial Federal lands program on August 22, 1978, when he promulgated amendments to 30 CFR Part 211 to incorporate the initial Federal lands program (43 FR 37181). When he did this, he satisfied his statutory obligation to promulgate and implement a Federal lands program within one year of the Act's enactment. Section 523(a). The Federal lands program was implemented on a phased schedule one year and 25 days following the August 3, 1977, enactment of SMCRA.

Although the initial phase of the Federal lands program had begun, its permanent phase had yet to be promulgated. On March 13, 1979, the Secretary promulgated the permanent phase, 30 CFR Chapter VII, Subchapter D, 44 FR 15332-15341. It reflected his then current interpretation of his authority and responsibility under Section 523. See, Preamble to Subchapter D, 44 FR 14972-14989 (March 13, 1979).

As explained in the preamble to the proposed rulemaking to amend 30 CFR 701.11 and 741.11, the Secretary's interpretation was questioned by Montana in the form of a petition to amend 30 CFR 741.11 (44 FR 56272, September 28, 1979).

The Secretary has reconsidered his interpretation of his responsibility and authority under Section 523 in the light of the rationale presented in that petition and comments received on the proposed amendments. The basis for his interpretation of Section 523 as reflected in the amendments to 30 CFR 701.11 and 741.11 adopted in this notice, is as follows: Nothing in Section 523 explicitly dictates when the second phase of the Federal lands program is to be implemented. (As has been explained, the one year requirement for implementation of the Federal lands program was satisfied when the program was implemented on a phased-in schedule, on August 22, 1978.) However, the provision that the Federal lands program incorporate all the requirements of the Act suggests with good reason that the permanent phase should coincide with permanent program implementation in the States. The schedule for this is dictated by Sections 503 and 504.

The Federal lands program is to reflect the diverse physical, climatological, and other unique characteristics of the Federal lands. Section 523(a). As explained above, Congress felt the States to be best qualified to judge how such characteristics should be reflected in the regulatory scheme. The States will make these judgments for non-Federal lands in their Tate

program applications through the so-called "State window" mechanism in 30 CFR 731.13, through the use of various other provisions in the regulations, or by imposing more stringent standards than those chosen by the Secretary. As these local characteristics are unlikely to disappear abruptly at the boundary lines between Federal and non-Federal land within a State, the Secretary believes waiting for State judgment on these conditions before applying the permanent Federal lands program will benefit the regulated industry and regulatory authorities by eliminating the administrative and planning problems associated with another stage of regulation amendments applicable to operations on Federal lands.

In addition to this deference to State judgment which Congress seems to have intended, Section 101(f), 2012(c)(9), Congress states in Section 523(a) that "the Federal lands program shall, at a minimum, include the requirements of the approved State program." In so doing, Congress has provided the explicit mechanism by which State judgment on local conditions will be reflected in the Federal lands program. To avoid a subsequent amendment to the Federal lands program in each State upon adoption of a State program, and the administrative and implementation burdens it would impose upon the regulators and regulated companies, the Secretary believes this requirement of Section 523(a) provides added justification for implementing the second phase of the Federal lands program concurrently with State program implementation in all Federal lands States.

Other practical administrative and implementation considerations provide a reasoned basis for the Secretary interpreting his authority under Section 523 in this manner. Were the Secretary to implement a permanent Federal lands program in advance of State program implementation, operators with mines on commingled Federal and private lands would be subject to two different regulatory schemes, the permanent program on the Federal lands and the initial program on the private lands.

This would be so regardless of whether a cooperative agreement existed with a particular State. Congress did not want operators subject to two regulatory schemes. n1 Although this is evidenced by statements made in the context of discussing cooperative agreements, the rationale is equally applicable to non-cooperative agreement situations. Were the initial and permanent programs in effect at the same time for different portions of the same mine, different permit, bonding and performance standards would apply to different portions of one operation. This would create some confusion in terms of the permit information required for the different portions, burdens on the applicant to demonstrate the feasibility of reclamation, the rights of the public to participate in the review and approval process for the different portions and standards against which inspection and enforcement actions would be measured. In order to eliminate such confusion and to provide a clear understandable regulatory program through which coal may be produced and the environment protected, the Secretary believes all surface coal mining operations, whether on Federal or private lands or both, should proceed under a uniform regulatory schedule.

n1 S. Rep. No. 95-128, 95th Cong., 1st Sess. 95 (1977).

The Montana petition urged postponement of the Federal lands program only for cooperative agreement States. Some commenters supported this approach. The Secretary has not accepted this approach because it perpetuates the confusion created by a dual regulatory scheme. This kind of approach would also not resolve the congressional concern that competitive imbalances not be created by operators in some States being subject to a less stringent or comprehensive regulatory program than in other States. Section 101(g). Thus, were the permanent phase of the Federal lands program to coincide with State program implementation in only the States with modified cooperative agreements, operators on Federal lands in those States would be subject to a less comprehensive regulatory program than would be operators on Federal lands in non-cooperative agreement States. In non-cooperative agreement States under the proposed amendment, operators of new mines or major extensions of existing mines would have been subject to the more comprehensive permanent phase of the Federal lands program. Arguably they would be at a competitive disadvantage because of the more costly permitting requirements and more comprehensive set of environmental performance standards. The only way to minimize the potential for inequity across State lines is to have the permanent phase of the Federal lands program coincide with State program implementation in all States as individual programs are approved or rejected. Thus, the regulations adopted in this notice do not distinguish between cooperative and non-cooperative agreement States.

The Secretary believes the comment suggesting that Federal lands in non-cooperative agreement States will not receive adequate protection reflects a misunderstanding of the effect of cooperative agreements. During the extended initial program pursuant to these rules, surface coal mining and reclamation operations on Federal lands in non-cooperative agreement States will be administered by OSM pursuant to authority in the Mineral Leasing Act, as amended, SMCRA, 30 CFR Part 211, and the terms and conditions of a lease or license. This will provide the same level of environmental protection for Federal lands as in cooperative agreement States. The only difference will be that the program will be administered exclusively by OSM, rather than jointly with a State.

Also, the Secretary does not believe that postponing the permanent Federal lands program will cause any significant adverse affect on Federal lands. A high level of environmental protection will be maintained because all of the most important permanent program performance standards are also requirements of the initial regulatory program, as specified in Section 502(c) of SMCRA. A high degree of protection for Federal lands is also provided by the terms and conditions of the Federal coal lease and regulations in 30 CFR Part 211, adopted pursuant to the Mineral Leasing Act of 1920, as amended and SMCRA. Additionally, in States with cooperative agreements applicable State laws and regulations particularly those more stringent than Federal requirements will also remain in effect and will ensure protection of Federal lands.

In adopting a final rule, the Secretary has refrained from using undefined and non-specific terms and phrases, which concerned several commenters. This should alleviate much of the confusion and conflict which could have arisen between the operators and the regulatory authority.

With regard to the jurisdictional responsibility for the administration and regulation of surface coal mining operations involving Federal surface -- private coal, the Secretary recognizes the ambiguity of the existing regulations. Efforts are currently underway which will clarify State and Federal roles in the administration and regulation of surface coal mining operations on lands involving Federal surface/private coal and private surface/unleased Federal coal.

The Secretary would also like to clarify that applications for approval of new mine plans or expanded operations submitted pursuant to 30 CFR 741.11(a)(2), as published March 13, 1979 (44 FR 15333) or pursuant to amended 30 CFR 741.11, as noted in this document, will be reviewed using the initial regulatory requirements of 30 CFR Part 211. Upon approval of a State program or implementation of a Federal program for a State, the operator would be required to submit a complete application for a permit in accordance with 30 CFR 741.11(a), as amended. This includes the submission of a mine plan which meets all the requirements of the permanent Federal lands program.

The Secretary reached this decision based on the argument that the permanent Federal lands program cannot be fully implemented until after approval or disapproval of a State program. Therefore, the Secretary concluded that no rational basis exists for continuing to review and approve mine plans submitted pursuant to 30 CFR 741.11(a)(2), as adopted on March 13, 1979. Such approvals would not be based upon the permanent Federal lands program as now interpreted by the Secretary through regulations adopted in this notice because State program conditions are not now reflected in the Federal lands regulations. The Secretary believes the permanent program requirements under the Act, as well as those to be incorporated in the Federal lands program from State programs, should be adopted at one time. This will eliminate one more sequence of amendments which would create new procedural and substantive obligations for operators and the regulatory authority.

As previously noted, several commenters, while supporting the proposed amendments, wanted assurances that the petition process for designations would not be postponed. The Secretary at no time intended to postpone the applicability of the designation program to Federal lands. He believes a basis exists for not postponing the designation program and believes a few clarifying amendments are needed to ensure its continued applicability.

The so-called congressional designations were applicable by their terms following the date of enactment of the Act. "After the enactment of this Act and subject to valid existing rights, no surface coal mining operations except those which exist on the date of enactment of this Act shall be permitted ----" Section 522(e) (Emphasis added). Regulations establishing procedures for processing applications to mine in which these congressional designations are at issue, were promulgated on March 13, 1979. 30 CFR Part 761, 44 FR 15341. They properly referred to permits or permit applications because after the effective date of those regulations permits, not mine plans, would have been the document authorizing surface coal mining operations on Federal lands. Mine plans, which fill this function under the initial Federal lands program would no longer have been the controlling document.

Because the Federal lands permanent program permit requirements are being delayed by this rulemaking, certain clarifying amendments are being made to 30 CFR 701.1(b)(3) and Part 761. These are necessary to make clear that the congressional designations and petition process apply to mine plan applications filed under the initial Federal lands program in 30 CFR Part 211 as well as the permanent program permit procedures when implemented. Had the proposed amendments been adopted as final, such changes would not have been necessary because new mines would have remained subject to the permanent program permit requirements.

The congressional designations apply to operations on all Federal lands as defined in Section 701(4) of the Act. This includes Federal surface lands above private coal and private surface lands above Federal coal. Thus, notwithstanding any

apparent limitation concerning the scope of the initial Federal lands program as stated in 30 CFR 211.1(a), the congressional designations do apply coal mine approvals on Federal surface above privately held coal.

For the same reasons noted above for the needed clarifications to 30 CFR 701.1(b)(3) and Part 761, the applicability of the petition process to Federal lands pursuant to 30 CFR Part 769 also needs clarification through limited amendments adopted in this document. Under the reasoning applied above, which relied upon the phrase "incorporate all of the requirements of this Act" in Section 523(a) as the basis for postponing the permanent phase of the Federal lands program, an argument could be made that the petition process to designate Federal lands should be delayed also. This is because the Section 522(c) petition process on non-Federal lands does not become applicable until a State program is approved. As a prerequisite to assuming primary regulatory authority jurisdiction under a State program, a State must establish a planning process enabling objective decisions concerning designations. (Section 522(a).)

Following this reasoning to its conclusion, one could argue that reliance upon the quoted language from Section 523(a) to postpone implementation of the permit and performance standards requirements on Federal lands compels postponement of the designation petition process by analogy to the State program-petition process relationship. Blind application of that logic to this circumstance would call for ignoring certain important distinctions. The reasons for delaying the petition process for non-Federal lands until approval of State programs were to provide time for the States to develop an adequate planning process and have that process subject to public review during the State program approval process. However, that rationale is not applicable in the context of Federal lands. Under Section 522(b), the Secretary has begun an independent review of the Federal lands to determine whether any such lands are unsuitable for all or certain types of surface coal mining operations, utilizing among others the criteria in Section 522(a) (2) or (3). Secondly, in contrast to most States, Federal surface managing agencies already have established planning processes for making land use determinations on Federal lands, including lands unsuitable for coal mining under the Surface Mining Act and other statutory authorities. Federal Land Policy and Management Act of 1976 (43 U.S.C. 1701 et seq.); and other authorities cited at 43 CFR 3400.0-3, 44 FR 42609, July 19, 1979; 43 CFR Subpart 3461, 44 FR 42638, July 19, 1979; 43 CFR Part 1600, 44 FR 46386, August 7, 1979. The environmental impact and importance of this planning and designation process are analyzed in the Final Environmental Impact Statement for the Federal Coal Management Program, April 1979, at p. 3-31 through 3-52. Given that these planning mechanisms exist, the Secretary is fully prepared to respond to any Federal lands petitions which might be filed. Therefore, the absence of an adequate planning process is not a basis for delaying the petition process on Federal lands.

A further distinction is found in the statutory scheme which justifies implementing the petition process on Federal lands at this time while postponing application of the permanent program permitting and performance standards. Section 523 speaks in terms of incorporating State program requirements in Federal lands programs, as has been discussed. In addition, as has been shown, if implementation of the permitting and performance standards is not postponed, dual regulatory schemes would exist for commingled mines. On the other hand, Sections 523(a) and (c) specifically provide that the Secretary is to retain responsibility for the designation process on Federal lands. Therefore, whereas language of Section 523 provides a basis for postponing the implementation of the permitting and performance standards in order to incorporate elements of State programs, the same section gives no basis for postponing the designation program on Federal lands.

The Secretary also believes that early implementation of the unsuitability designation regulations on Federal lands is desirable because early action will help clarify which Federal lands might be available for subsequent leasing and mining. In particular, this could help operators save time and money in both short and long-range coal development planning.

For these reasons the Secretary feels compelled to adopt limited and clarifying amendments to 30 CFR 701.1(b)(3) and Parts 761 and 769 to show that postponement of the permit and performance standards on Federal lands does not postpone the Federal lands designation program. The regulations which have been in effect since April 12, 1979, 44 FR 15312, established procedures for applying the congressional designations of Section 522(e) and implemented the petition process of Section 522(c). The clarifying amendments do no more than preserve the status quo with respect to the designation program on Federal lands.

OSM'S AMENDMENTS AFFECT PARTS 701, 741, 761 AND 769 AS FOLLOWS:

1. **30 CFR 701.1 - SCOPE**, is an introductory section outlining the general applicability of certain regulations to the permanent regulatory program. Paragraph 30 CFR 701.1(b)(3) of this section is revised to conform to amendments to 30 CFR 701.11, 30 CFR 741.11 and 30 CFR Parts 761 and 769. The effect of the amendment merely maintains the status quo, whereby Federal lands are subject to the congressional designations and the petition process for designating Federal lands unsuitable for all or certain types of surface coal mining operations and for terminating previous designations as of the effective date of the permanent regulations (April 12, 1979).

2. **30 CFR 701.11 - APPLICABILITY**, is a general statement of applicability of the performance standards and mirrors the existing requirements of Section 741.11. This section is, therefore, revised to reflect accurately the amendment to the latter Section which postpones operator compliance with the permanent Federal lands program until approval of a State program or implementation of a Federal program for a State. Paragraph (b) has been amended to conform with amendments to 30 CFR 741.11. Existing paragraph (c) has been deleted because under the amended rules, all operations will be on the same schedule. Operations described in this paragraph are now covered in paragraph (b). Existing paragraphs (d) and (e) are renumbered (c) and (d), respectively, and are amended to conform with the amendments to 30 CFR 741.11. Existing paragraph (f) is renumbered (e).

3. **30 CFR 741.11** has been restructured and rewritten. As amended, paragraph 741.11(a) incorporates the provisions of existing Section 741.11(c)(1) and (c)(2). The effect of this change is to eliminate the requirement that operators having an approved mining plan under 30 CFR 211 comply with the permanent performance standards in Subchapter K on and after October 12, 1979. This change also eliminates the requirement that applications for approved new or expanded mining operations, submitted after April 12, 1979, comply with the requirements of 30 CFR 741.13, 30 CFR 742, and 30 CFR 744 as of that date. All operations on Federal lands will be subject to the initial program requirements until approval of a State program or implementation of a Federal program for a State. Paragraph 741.11(b) of the existing rules remains unchanged. Paragraph (c), as previously indicated, is restructured and renumbered (a). Paragraph 741.11(d) is renumbered (c), and the reference to "Paragraph (c)" is revised to read "(a)". Finally, existing Paragraph (e) is redesignated (d).

4. **30 CFR 761.1 - SCOPE**, is revised to clarify terminology; the term "authorized" is substituted for "permitted". 30 CFR 761.4(a)(1) and (a)(2) are amended to reflect that mine plan applications filed under the initial program are also subject to the provisions of Section 522(e) of the Act. Clarifying language has been added to 30 CFR 761.5(a)(2)(ii). 30 CFR 761.12(a), (b)(2), (c), (e), (f)(1), and (f)(2) have also been revised to conform with the amendments to 30 CFR 761.4.

5. **30 CFR 769.7(b)** and (c) include clarifying language and a new paragraph 30 CFR 769.7(d) is added to conform with the limited and clarifying amendments to 30 CFR Part 761. Similarly, 30 CFR 769.14(i) and 769.17(d) are amended to provide continuity with amendments to 30 CFR Part 761.

Public Meetings

In response to specific requests, representatives of the Office and Departmental officials met twice with State and industry representatives on the substance of the proposed revision between October 2, 1979 and October 18, 1979. Summaries of each of these meetings have been prepared and are on file in the Administrative Record Office, Room 135, South Interior Building, 1951 Constitution Avenue, Washington, D.C. 20240 and the Office of Surface Mining Region V. Post Office Building, 1832 Stout Street, Denver, Colorado 80205. Issues raised at these meetings were fully considered in developing the final rule.

Public Hearings

A public hearing was held October 18, 1979, at 9 a.m., Room 269 of the Old Post Office Building, Denver, Colorado, to receive oral and written comments on the proposed revision. Transcripts of the testimony presented were placed in the administrative record and were reviewed and analyzed along with other written comments. Copies of the hearings transcripts are available for public inspection in the Administrative Record Office, Room 135, South Interior Building, 1951 Constitution Avenue, Washington, D.C. 20240 and the Office of Surface Mining, Region V. Post Office Building, 1832 Stout Street, Denver, Colorado 80205.

OTHER INFORMATION:

Pursuant to 43 CFR Part 14, the Assistant Secretary, Energy and Minerals has determined that the amendments to 30 CFR 701.11, 741.11, 761 and 769 are not a significant action and, therefore, do not require a regulatory analysis. The revised rule will not have a major and national or region wide impact on State or local governments. The initial regulation procedures of Section 502 of the Act 30 CFR 211 and existing State laws will remain in effect and will provide a level of protection for the public health and safety and the environment comparable to that on non-Federal lands. Additionally, the amended rule will not impose any new recordkeeping or reporting requirements on the States or industry. No new information will be required.

Also, the amended rule does not constitute a major Federal action for which an environmental impact statement is required by Section 102(2)(C) of the National Environmental Policy Act of 1969. The amended rule is part of the implementation of the Federal lands program which has a special exemption under Section 702(d) of the Act which specifies that "...

implementation of the Federal lands program... shall not constitute a major action within the meaning of Section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332)."

Finally, the amended rule is not a significant action, because it will not have a major impact on other programs of the Department, other Federal agencies or the allocation of Federal funds nor would it have a substantial effect on the entire economy or on an individual region, industry, or level of government. Postponing the compliance date will not affect the Department's coal management program leasing schedule nor will it involve a reallocation of agency funding. The amended schedule will not increase the cost to State governments, and because of more uniform application and administration of program requirements, the new rule will permit a smoother transition from the initial regulatory program to the permanent program, thus, reducing costs of administering the program. Coal mine operators may also benefit from reduced cost of operations because of the less comprehensive regulatory program. Such benefits, however, are thought to be of minor consequence and will be temporary in nature.

The principal author of this notice, in consultation with the Solicitors Office, is John R. Carlson, Division of State and Federal Programs, Office of Surface Mining.

Dated December 21, 1979.

John M. Davenport,
Assistant Secretary, Energy and Minerals .

1. Accordingly, 30 CFR 701.1(b)(3) is revised to read as follows:

SECTION 701.1 - SCOPE.

* * *

(b)(3) Subchapter F on criteria for designating lands unsuitable for surface coal mining operations and the process for designating these lands or withdrawing the designation by the regulatory authority; provided that, Part 761 is applicable during the initial regulatory program under Subchapter B of this Chapter and 30 CFR Part 211 and that Part 769 and other Parts incorporated therein are applicable to the initial Federal lands program under 30 CFR Part 211.

* * *

2. 30 CFR Section 701.11 is amended by revising paragraph (b), deleting paragraph (c), redesignating and revising paragraphs (d) and (e) as paragraphs (c) and (d), respectively, and redesignating paragraph (f) as paragraph (e). As amended, Section 701.11 reads as follows:

SECTION 701.11 - APPLICABILITY.

* * *

(b) Any person who conducts surface coal mining and reclamation operations on Federal lands on and after 8 months from the date of approval of a State program or implementation of a Federal program for the State in which the Federal lands are located shall have a permit issued pursuant to 30 CFR Part 741. However, under conditions specified in 30 CFR Part 741.11(c), a person may continue such operations under a previously approved mine plan pursuant to 30 CFR Part 211 after 8 months after the date of approval of a State program or implementation of a Federal program.

(c) The requirements of Subchapter K of this Chapter shall be effective and shall apply to each surface coal mining and reclamation operation which is required to obtain a permit under the Act, on the earliest date upon which the Act and this Chapter require a permit to be obtained, except as provided in paragraph (d) of this section.

(d)(1) Each structure used in connection with or to facilitate a coal exploration or surface coal mining and reclamation operation shall comply with the performance standards and the design requirements of Subchapter K of this chapter, except that --

(i) An existing structure which meets the performance standards of Subchapter K of this chapter but does not meet the design requirements of Subchapter K of this chapter may be exempted from meeting those design requirements

by the regulatory authority. The regulatory authority may grant this exemption only as part of the permit application process after obtaining the information required by 30 CFR 780.12 or 784.12 and after making the findings required in 30 CFR 786.21;

(ii) If the performance standard of Subchapter B of this chapter is at least as stringent as the comparable performance standard of Subchapter K of that chapter, an existing structure which meets the performance standards of Subchapter B of this chapter may be exempted by the regulatory authority from meeting the design requirements of Subchapter K of this chapter. The regulatory authority may grant this exemption only as part of the permit application process after obtaining the information required by 30 CFR 780.12 or 784.12 and after making the findings required in 30 CFR 786.21;

(iii) An existing structure which meets a performance standard of Subchapter B of this chapter which is less stringent than the comparable performance standards of Subchapter K of this chapter or which does not meet a performance standard of Subchapter K of this chapter, for which there was no equivalent performance standards in Subchapter B of this chapter, shall be modified or reconstructed to meet the performance and design standard of Subchapter K of the chapter pursuant to a compliance plan approved by the regulatory authority only as part of the permit application as required in 30 CFR 780.12 or 784.12 and according to the findings required by 30 CFR 786.21;

(iv) An existing structure which does not meet the performance standards of Subchapter B of this chapter and which the applicant proposes to use in connection with or to facilitate the coal exploration or surface coal mining and reclamation operation shall be modified or reconstructed to meet the performance and design standards of Subchapter K prior to issuance of the permit.

(2) The exemptions provided in paragraph (d)(1)(i) and (d)(1)(ii) shall not apply to:

(i) The requirements for existing and new waste piles used either temporarily or permanently as dams or embankments; and

(ii) The requirements to restore to the approximate original contour of the land.

* * *

3. 30 CFR Section 741.11 is amended by revising paragraph (a), deleting paragraph (c), redesignating and revising paragraph (d) as paragraph (c), and redesignating paragraph (e) as paragraph (d). As amended, Section 741.11 reads as follows:

SECTION 741.11 - GENERAL OBLIGATIONS.

(a) Not later than two months after the effective date of a State program or a Federal program for a State and regardless of litigation contesting the promulgation of this Subchapter each person who conducts or expects to conduct surface coal mining and reclamation operations on Federal lands after the expiration of eight months from such effective date shall file a complete application for a permit for those operations, and except as provided in paragraph (c) of this section on and after eight months from the effective date of a State program or a Federal program for a State, as person shall conduct surface coal mining and reclamation operations on Federal lands, unless that person has first obtained a valid permit issued by the Regulatory Authority under the Act and this part.

* * *

(c) A person who conducts surface coal mining and reclamation operations, under a mining plan approved by the Secretary in accordance with the Act and 30 CFR Part 211, may conduct those operations beyond the eight month period prescribed in paragraph (a) of this section, K all of the following conditions are present:

(1) Timely and complete application for a permit to conduct those operations under this part has been made to the Regional Director in accordance with the provisions of the Act and this part;

(2) The Director has not yet rendered a final decision with respect to the permit application pursuant to 30 CFR 741.21(a)(4) and

(3) Those operations are conducted in compliance with all terms and conditions of the approved making plan and the requirements of the Act, 30 CFR Part 211, State laws and regulations applicable through an approved cooperative agreement, and the requirements of the applicable lease or license.

(d) Upon issuance of a new permit under this Part, the permittee shall conduct surface coal mining and reclamation operations in accordance with all requirements of the permit, and lease or license, this part and all other applicable State and Federal regulations.

* * *

4. 30 CFR 701.1 is revised to read as follows:

SECTION 761.1 - SCOPE.

This Part establishes the procedures and standards to be followed in determining whether a proposed surface coal mining and reclamation operation can be authorized in light of the prohibitions and limitations in Section 522(e) of the Act for those types of operations on certain Federal, public and private lands.

5. 30 CFR Section 761.4(a)(1) and (a)(2) introductory text is revised to read as follows:

SECTION 761.4 - RESPONSIBILITY.

(a) The Secretary shall --

(1) Determine whether any application for a mine plan under the initial Federal lands program or permit under the permanent Federal lands program for surface coal mining and reclamation operations on Federal lands must be denied, limited or conditional because operations on those lands are prohibited or limited by Section 522(e) of the Act (30 U.S.C. 1272(e)) and this Part;

(2) Determine, based upon a showing by an applicant, whether a mine plan applicant or an applicant for a permit covering Federal lands either --

* * *

6. 30 CFR 761.5(a)(2)(ii) is revised to read as follows:

SECTION 761.5 - DEFINITIONS.

* * *

(a)(2)(ii) Can demonstrate to the regulatory authority that the coal is both needed for, and immediately adjacent to, an on-going surface coal mining operation for which all mine plan approvals and permits were obtained prior to August 3, 1977;

* * *

7. 30 CFR Section 761.12 is amended by revising paragraphs (a), (b)(2), (c), (e), (f)(1) introductory text, and (f)(2) to read as follows:

SECTION 761.12 - PROCEDURES.

(a) Upon receipt of a complete mine plan application pursuant to 30 CFR Part 211 or a complete application for a surface coal mining and reclamation operation permit, the regulatory authority shall review the application to determine whether surface coal mining operations are limited or prohibited under Section 761.11 on the lands which would be disturbed by the proposed operations.

* * *

(b)(2) If the regulatory authority is unable to determine whether the proposed operation is located within the boundaries of any of the lands in Section 761.11(a) or closer than the limits provided in Section 761.11(f) and (g), the regulatory authority shall transmit a copy of the relevant portions of the mine plan or the permit application to the appropriate Federal, State or local government agency for a determination or clarification of the relevant boundaries or distances, with a notice to the appropriate agency that it must respond within 30 days of receipt of the request.

(c) Where the proposed operation would include Federal lands within the boundaries of any national forest, and the applicant seeks a determination that mining is permissible under Section 761.11(b) of this Part, the applicant shall submit a mine plan or a permit application to the Regional Director for processing under 30 CFR Part 211 or 30 CFR Subchapter D respectively. Before acting on the mine plan or permit application, the Director shall insure that the Secretary's determination has been received and the findings required by Section 522(e)(2) of the Act (30 U.S.C. 1272(e)(2)) have been made.

* * *

(e) Where the proposed surface coal mining operations would be conducted within 300 feet measured horizontally of any occupied dwelling, the mine plan or permit applicant shall submit with the application a written waiver from the owner of the dwelling, consenting to such operations within a closer distance of the dwelling as specified in the waiver. The waiver must be knowingly made and separate from a lease or deed unless the lease or deed contains an explicit waiver.

(f)(1) Where the proposed surface coal mining operation may adversely affect any public park or any places included on, or eligible for listing one, the National Register of Historic Places, the regulatory authority shall transmit to the Federal, State or local agencies with jurisdiction over a statutory or regulatory responsibility for the park or historic place a copy of the completed mine plan or permit application containing the following:

* * *

(f)(2) A mine plan approval or permit for the operation shall not be issued unless jointly approved by all affected agencies.

* * *

8. 30 CFR Section 769.7 is amended by revising paragraphs (b) and (c) and adding a new paragraph (d) to read as follows:

SECTION 769.7 - REGULATORY POLICY.

* * *

(b) Once an area of Federal lands is designated as unsuitable for all or certain types of surface coal mining operations, the authorized officer shall condition any mine plan, permit or lease in a manner so as to limit or prohibit surface coal mining operations on the designated area.

(c) Review of applications for permits on Federal lands under the permanent Federal lands program is subject to the provisions of 30 CFR Part 741 and 786.19(d)-(e).

(d) Review of mine plan applications for Federal lands under the initial Federal lands program is subject to the provisions of 30 CFR Part 211.

9. 30 CFR 769.14(i) is revised to read as follows:

SECTION 769.14 - PROCEDURES: INITIAL PROCESSING, RECORDKEEPING, AND NOTIFICATION REQUIREMENTS.

* * *

(i) Any petitions received after the close of the public comment period on the notice of availability of a mine plan under 30 CFR 211.5(b) or on a permit application relating to the same mine plan area shall not prevent the Assistant Secretary, Energy and Minerals, from approving a mine plan or the Director from issuing a decision on a permit application. The Regional Director may return any petitions received thereafter to the petitioner with a statement why the Regional Director cannot consider the petition. For the purposes of this Section, close of the public comment period for the purposes of permanent program permits shall mean at the close of any informal conference held under 30 CFR 786.14 or, if no conference is requested, at the close of the period for filing written comments and objections under 30 CFR 786.12-13.

* * *

10. 30 CFR 769.17(d) is revised to read as follows:

SECTION 769.17 - PROCEDURES: HEARING REQUIREMENTS.

* * *

(d) If any petition relates to an area of Federal lands which is the subject of a pending surface coal mining and reclamation operations mine plan or permit application, the Regional Director may, with consent of all petitioners and intervenors, coordinate the hearing on the petition required under paragraph (a) of this section with any hearing on the mine plan or informal conference held in accordance with Section 513(b) of the Act and 30 CFR 741.18 on the permit application. Nothing in this Paragraph shall relieve a mine plan applicant or an applicant for a permit from the burden of establishing that his or her application is in compliance with the requirements of the Federal lands program.

* * *

(Line Illegible) BILLING CODE (numbers illegible)