



---

Wednesday  
February 27, 1980

---

**Part III**

**Department of the  
Interior**

---

**Office of Surface Mining Reclamation and  
Enforcement**

---

**Conditional Approval of the Texas  
Proposed Permanent Regulatory Program**

## DEPARTMENT OF THE INTERIOR

## Office of Surface Mining Reclamation and Enforcement

## 30 CFR Part 943

## Conditional Approval of the Permanent Program; Submission from the State of Texas Under the Surface Mining Control and Reclamation Act of 1977

**AGENCY:** Office of Surface Mining Reclamation and Enforcement, Interior.

**ACTION:** Final Rule; Conditional Approval of the Texas Proposed Permanent Regulatory Program.

**SUMMARY:** On July 20, 1979, the State of Texas submitted to the Department of the Interior its proposed permanent regulatory program under the Surface Mining Control and Reclamation Act of 1977 ("SMCRA"). The purpose of the submission is to demonstrate the State's intent and the capability to administer and enforce the provisions of "SMCRA" and permanent regulatory program regulations, 30 CFR Chapter VII. After opportunity for public comment and thorough review of the program submission, the Secretary of the Interior has determined that the Texas program meets the minimum requirements of SMCRA and the Federal permanent program regulations, except for minor deficiencies discussed below under "Supplementary Information". Accordingly, the Secretary of the Interior has conditionally approved the Texas program. A new Part 943 is being added to Title 30 of the Code of Federal Regulations to reflect this conditional approval.

**EFFECTIVE DATE:** This conditional approval is effective February 16, 1980 and will terminate on June 15, 1980 unless the deficiencies identified in 30 CFR 943.11, adopted below, have been corrected before that date.

**FOR FURTHER INFORMATION CONTACT:** Mr. Carl C. Close, Assistant Director, State and Federal Programs, Office of Surface Mining Reclamation and Enforcement, U.S. Department of the Interior, South Building, 1951 Constitution Avenue, N.W., Washington, D.C. 20240, Telephone (202) 343-4225.

**ADDRESSES:** Copies of the Texas program and the administrative record on the Texas program, including the letter from the Texas Railroad Commission agreeing to correct the deficiency which resulted in the conditional approval, are available for public inspection and copying during business hours at:

Texas Railroad Commission, Surface Mining and Reclamation Division, Field Office, Suite 125, 1121 East SW Loop 323, Tyler, Texas 75703.

Texas Railroad Commission, Surface Mining and Reclamation Division, Field Office, Shank Office Building, 1419 3rd Street, Floresville, Texas 78114.

The Office of Surface Mining Reclamation and Enforcement, Scarritt Building, 818 Grand Avenue, Kansas City, Missouri 64106, Telephone (816) 374-3920.

Office of Surface Mining, Room 135, Interior South Building, 1951 Constitution Avenue, Washington, D.C. 20240, Telephone (202) 343-4728.

**SUPPLEMENTARY INFORMATION:****General Background on the Permanent Program**

The environmental protection provisions of SMCRA are being enacted in two phases—the initial program and the permanent program—in accordance with Sections 501-503 of SMCRA. 30 U.S.C. 1251-1253. The initial program has been in effect since December 13, 1977, when the Secretary of the Interior promulgated interim program rules, 30 CFR Parts 710-725 and 795, 42 FR 62639.

The permanent program will become effective in each State upon the approval of a State program by the Secretary of the Interior or implementation of a Federal program within the State. If a State program is approved, the State will be the primary regulator of activities subject to SMCRA, rather than the Federal government.

The Federal rules for the permanent program, including procedures for States to follow in submitting State programs, and minimum standards and procedures the State programs must include to be eligible for approval, are found in 30 CFR Parts 700-707 and 730-865. Part 705 was published October 20, 1977 (42 FR 56064). Parts 795 and 865 (originally Part 860) were published December 13, 1977 (42 FR 62639). The other permanent program regulations were published at 44 FR 15385-15393 (March 13, 1979). Corrections were published at 44 FR 15485 (March 14, 1979), 44 FR 49673-49687 (August 24, 1979), 44 FR 53507-53509 (September 14, 1979) and 44 FR 66195 (November 19, 1979). Amendments to the rules have been published at 44 FR 60969 (October 22, 1979), as corrected at 44 FR 75143 (December 19, 1979), at 44 FR 75302 (December 19, 1979), 44 FR 77440-77447 (December 31, 1979) and 45 FR 2626-2629 (January 11, 1980). Portions of these rules have been suspended, pending further rulemaking. See 44 FR 67942 (November 27, 1979), 44 FR 77447-77454 (December 31, 1979) and 44 FR 77454-77455 (December 31, 1979).

**General Background on State Program Approval Process**

Any State wishing to assume primary jurisdiction for the regulation of coal mining under SMCRA may submit a program for consideration. The Secretary of the Interior has the responsibility to approve or disapprove the submission.

The Federal rules governing State program submissions are found at 30 CFR Parts 730-732. After review of the submission by OSM and other agencies, opportunity for the State to make additions or modifications to the program, and opportunity for public comment, the Secretary may either approve the program unconditionally, approve it conditioned upon minor deficiencies being corrected in accordance with a timetable set by the Secretary, or disapprove the program in whole or in part. If the program is disapproved, the State may submit a revision of the program to correct the items which needed change to meet the requirement of SMCRA and the applicable Federal regulations. If this revised program is also disapproved, the SMCRA requires the Secretary of the Interior to establish a Federal program in that State. The State may again request approval to assume primary jurisdiction after the Federal program is implemented.

The Secretary, in reviewing State programs, is complying with the provisions of Section 503 of SMCRA, 30 U.S.C. 1253, and 30 CFR 732.15. With respect to the Texas program, the Secretary has used as criteria the Federal rules as corrected, amended, and suspended in the Federal Register notices cited above under "General Background on the Permanent Program."

State programs must contain provisions which regulate coal mining in accordance with the requirements of the Federal Surface Mining Act and consistent with the Secretary's regulations. The requirements under SMCRA and 30 CFR Chapter VII for special bituminous coal mines in Wyoming and anthracite mines in Pennsylvania are inapplicable in Texas.

With respect to suspended regulations, the following standards are being applied in reviewing State program submissions:

1. A State program need not contain provisions to implement a suspended regulation and no State program will be disapproved for failure to contain a suspended regulation.

2. A State program must be able to implement all provisions in the Surface Mining Act which are part of the regulation of coal mining during the

permanent program, including those provisions of the Surface Mining Act upon which the suspended regulations were based.

3. A State program may not contain any provision which is inconsistent with a provision of the Surface Mining Act. A State program may not include provisions implementing a suspended regulation if that regulation was suspended because it was inconsistent with the Surface Mining Act. There were two such suspensions, relating to 30 CFR 805.13(d) and 808.12(c). Although the Texas submission contained both these provisions, they have been repealed by operation of the provision on page I-44 of the Texas submission, which automatically repeals provisions of the Texas program which correspond to sections of the Federal rules which may be deleted.

4. Subject to public comment and agency analysis in the context of a particular State program, it would appear that any other suspended provisions, if included in a State program, could probably be characterized as more stringent than the Secretary's remaining rules. Accordingly, its inclusion in the State program could not ordinarily be grounds for disapproval under Section 503 of the Surface Mining Act, 30 U.S.C. 1253. Alternatively, a State may delete or suspend its corresponding regulation so long as standard 2 was met.

5. Upon promulgation of new regulations to replace those which have been suspended, the Secretary will afford States which do not have approved programs a reasonable opportunity to amend their programs, as appropriate. In general, we expect that the provisions of 30 CFR 732.17 will govern this process for States with approved programs.

To codify decisions on State programs, Federal programs, and other matters affecting individual States, OSM has established a new Subchapter T of 30 CFR Chapter VII. Subchapter T will consist of Parts 900 through 950. Provisions relating to Texas will be found in 30 CFR Part 943.

#### Background on the Texas Program Submission

On July 20, 1979, OSM received a proposed regulatory program from the State of Texas. The program was submitted by the Texas Railroad Commission, the agency which will be the primary regulatory authority under the Texas permanent program. Notice of receipt of the submission initiating the program review was published in the July 27, 1979, Federal Register (44 FR 44281-44283) and in newspapers of

general circulation within the State. The announcement noted information for public participation in the initial phase of the review process, relating to the Regional Director's determination of whether the submission was complete.

On September 5, 1979 a public review meeting on the program and its completeness was held by the Regional Director in Austin, Texas. September 5, 1979 was also the close of the public comment period on completeness, which had begun July 27, 1979.

On September 17, 1979, the Regional Director published notice in the Federal Register announcing that he had determined the program to be incomplete (44 FR 53813). The notice specified that the submission was missing a section-by-section comparison of SMCRA and the Federal regulations with the Texas regulations, as required by 30 CFR 731.14(c).

On November 13, 1979, the Texas Railroad Commission submitted an amended program submission containing the missing section-by-section comparison, in addition to a number of substantive and non-substantive modifications.

On November 20, 1979, the Regional Director published notice in the Federal Register (44 FR 66764-66766) and in newspapers of general circulation within the State that the amended Texas submission was complete. The notice set forth procedures for the public hearing and comment period on the substance of the Texas program.

On December 19 and 20, 1979, a public hearing on the Texas submission was held in Austin, Texas, by the Regional Director.

On December 20, 1979, the Texas Railroad Commission submitted a four page document, proposing for discussion (but not adopting) certain amendments to its regulations, and amending the program submission. The proposed regulation changes, which appear on page one and the first six lines of page two of the document, did not constitute changes to the program, and are not part of the program being approved today. The program changes, beginning on the seventh line of the second page of the document and continuing to the end of the document, are part of the program being approved today.

On December 21, 1979, the Regional Director published notice in the Federal Register extending until December 28, 1979, the public comment period on the Texas program, to enable the public to review and comment on matters discussed at the public hearing on December 20 and 21, 1979 (44 FR 75733-75734). The amendments submitted by the Texas Railroad Commission on

December 20, 1979, were discussed and distributed at the public hearing.

On December 31, 1979, the Texas Railroad Commission submitted new information to the Regional Director in response to certain of the public comments received during the re-opened comment period.

On January 7, 1980, the Regional Director submitted to the Director of OSM, his recommendation that the Texas program be conditionally approved, together with copies of the transcript of the public meeting and the public hearing, written presentations, exhibits, copies of all public comments received, and other documents comprising the administrative record.

On January 17, 1980, the Director published a notice in the Federal Register re-opening the public comment period until January 22, 1980, to allow the public to review and comment upon the new information submitted by the Texas Railroad Commission on December 31, 1979. (45 FR 3398.)

On January 25, 1980, the Director recommended to the Secretary that the Texas program be conditionally approved.

On January 28, 1980, the Administrator of the Environmental Protection Agency transmitted his written concurrence on the Texas program.

On February 1, 1980, the OSM published in the Federal Register a notice of the availability of the views on the Texas program submitted by the Administrator of the Environmental Protection Agency, the Secretary of Agriculture through the Soil Conservation Service, the U.S. Forest Service, the Fish and Wildlife Service, the Heritage Conservation and Recreation Service, the U.S. Bureau of Mines, the U.S. Geological Survey and the Advisory Council on Historic Preservation.

#### Secretary's Findings

1. In accordance with Section 503(a) of SMCRA, the Secretary finds that Texas has, subject to the exception in finding 4(k) below, the capability to carry out the provisions of SMCRA and to meet its purposes in the following ways:

(a) The Texas Surface Coal Mining and Reclamation Act (Texas SCMRA), the regulations adopted thereunder, and the Administrative Procedures and Texas Register Act, provide for the regulation of surface coal mining and reclamation operations on non-Indian and non-Federal lands in Texas in accordance with SMCRA;

(b) The Texas SCMRA provides sanctions for violations of Texas laws, regulations or conditions of permits

concerning surface coal mining and reclamation operations, and these sanctions meet the requirements of SMCRA, including civil and criminal actions, forfeiture of bonds, suspensions, revocations, and withholding of permits, and the issuance of cease-and-desist orders by the Texas Railroad Commission or its inspectors;

(c) The Texas Railroad Commission has sufficient administrative and technical personnel, and sufficient funds to enable Texas to regulate surface coal mining and reclamation operations in accordance with the requirements of SMCRA;

(d) Texas law provides for the effective implementation, maintenance, and enforcement of a permit system that meets the requirements of SMCRA for the regulation of surface coal mining and reclamation operations on non-Indian and non-Federal lands within Texas;

(e) Texas has established a process for the designation of areas as unsuitable for surface coal mining in accordance with Section 522 of SMCRA;

(f) Texas has established for the purpose of avoiding duplication, a process for coordinating the review and issuance of permits for surface coal mining and reclamation operations with other Federal and State permit processes applicable to the proposed operations;

(g) Texas has fully enacted regulations consistent with regulations issued pursuant to SMCRA, subject to the exception discussed below in finding 4(k);

2. As required by Section 503(b)(1)-(3) of SMCRA, 30 U.S.C. 1253(b)(1)-(3), and 30 CFR 732.11-732.13, the Secretary has, through OSM:

(a) Solicited and publicly disclosed the views of the Administrator of the Environmental Protection Agency, the Secretary of Agriculture, and the heads of other Federal agencies concerned with or having special expertise pertinent to the proposed Texas program;

(b) Obtained and disclosed the written concurrence of the Administrator of the Environmental Protection Agency with respect to those aspects of the Texas program which relate to air or water quality standards promulgated under the authority of the Federal Water Pollution Control Act, as amended (33 U.S.C. 1151-1175), and the Clean Air Act, as amended (42 U.S.C. 7401 *et seq.*); and

(c) Held a public review meeting in Austin, Texas, on September 5, 1979, to discuss the Texas program submission and its completeness and held a public hearing in Austin, Texas, on December

19 and 20, 1979 on the substance of the Texas program submission;

3. In accordance with Section 503(b)(4) of SMCRA, 30 U.S.C. 1253(b)(4), the Secretary finds that the State of Texas has the legal authority and qualified personnel necessary for the enforcement of the environmental protection standards of SMCRA and 30 CFR Chapter VII.

4. In accordance with 30 CFR 732.15, the Secretary finds, on the basis of information in the Texas program submission, including the side-by-side comparison of the Texas law and regulations with SMCRA and 30 CFR Chapter VII, public comments, testimony and written presentations at the public hearings, and other relevant information, that:

(a) The Texas program provides for Texas to carry out the provisions and meet the purposes of SMCRA and 30 CFR Chapter VII, and that Texas has not proposed any alternative approaches to the requirements of 30 CFR Chapter VII pursuant to 30 CFR 731.13;

(b) The Texas Railroad Commission has the authority under Texas laws and regulations to implement, administer, and enforce all applicable requirements consistent with 30 CFR Chapter VII, Subchapter K, and the Texas program includes provisions to do so. The Texas law and regulations on performance standards are consistent with SMCRA and 30 CFR Chapter VII, Subchapter K. Special performance standards for concurrent surface and underground mining, mountaintop removal and operations on steep slopes are not included in the Texas law or regulations. These performance standards are not applicable to Texas because these types of mining are not now conducted and are not expected to be conducted in Texas. Texas has stated, on page I-44 of its program submission, that it will not issue permits for these types of mining without first adopting and having approved appropriate regulatory provisions;

(c) The Texas Railroad Commission has the authority under Texas laws and regulations and the Texas program includes provisions to implement, administer and enforce a permit system consistent with 30 CFR Chapter VII, Subchapter G. The Texas program includes no detailed requirements for concurrent surface and underground mining, mountaintop removal and operations on steep slopes. These permit requirements are not applicable to Texas because these types of mining are not now conducted and are not expected to be conducted in Texas. Texas has stated, on page I-44 of its program submission, that it will not issue permits

for these types of mining without first adopting and having approved appropriate regulatory provisions. Section 11 of the Texas SCMRA provides the authority for Texas to prohibit surface coal mining and reclamation operations without a permit issued by the Texas Railroad Commission;

(d) Section 27 of the Texas SCMRA and Part 776 of the Texas regulations provide the Texas Railroad Commission with the authority to regulate coal exploration consistent with 30 CFR Parts 776 and 815 and to prohibit coal exploration that does not comply with 30 CFR Parts 776 and 815, and the Texas program includes provisions to do so;

(e) The Texas Railroad Commission has the authority under Texas laws and the Texas program includes provisions to require that persons extracting coal incidental to government-financed construction maintain information on site consistent with 30 CFR Part 707. The provisions of 30 CFR Part 707 are incorporated within Part 707 of the Texas regulations;

(f) The Texas Railroad Commission has the authority, under Section 29 of the Texas SCMRA and in Part 840 of the Texas regulations, and the Texas program includes provisions to enter, inspect, and monitor all coal exploration and surface coal mining and reclamation operations on non-Indian and non-Federal land within Texas.

(g) The Texas Railroad Commission has the authority under Texas laws and the Texas program includes provisions to implement, administer, and enforce a system of performance bonds and liability insurance, or other equivalent guarantees, consistent with 30 CFR Chapter VII, Subchapter J. The performance bond and liability insurance provisions of Sections 507(f), 509, 510, and 519 of SMCRA and 30 CFR Chapter VII, Subchapter J are incorporated in Sections 24, 25, and 26 of the Texas SCMRA and in Subchapter J of the Texas regulations. The informal conference provided in 30 CFR 807.11(e) has been replaced by a more formal public hearing subject to the Administrative Procedures and Texas Register Act (APTRA). The informal conference provided for in Section 519(g) of SMCRA is at the discretion of the regulatory authority and, accordingly, is not necessarily available in each case. Accordingly, the public hearing, even though it is formal rather than informal, assures more opportunity for citizen participation than is required under the Federal Act because it is a hearing which is available as a matter of right, not at the discretion of the

regulatory authority. (See Section .312(e) of the Texas regulations.)

(h) The Texas Railroad Commission has the authority, under Section 30 of the Texas SCMRA, and the Texas program includes provisions to provide for civil and criminal sanctions for violation of Texas law, regulations and conditions of permits and exploration approvals including civil and criminal penalties in accordance with Section 518 of SMCRA and consistent with 30 CFR Part 845, including the same or similar procedural requirements. Section 30 of the Texas SCMRA requires that the interest rate paid by Texas on money to be returned to operators is to be calculated at the prevailing United States Department of the Treasury rate rather than the prevailing Department of Treasury rate or 6 percent, whichever is greater, as provided in Section 518(c) of SMCRA. This difference and its counterpart in Part 845 of the Texas regulations are acceptable because they only potentially decrease amounts being returned to operators and they do not lessen the amounts to be paid by operators for violations. The civil penalty provisions of 30 CFR Part 845 are contained in Part 845 of the Texas regulations. The Texas regulations do not contain the procedural requirement of 30 CFR 845.19(a) that the fact of the violation may not be contested, if it has been decided in a formal review. However, this is merely a procedural requirement, not a substantive one. This difference is acceptable because the Texas procedures for imposing civil penalties are, in general, similar to the Federal provisions, and the difference neither impairs Texas authority to impose civil and criminal sanctions for violations nor lessens the stringency of those sanctions. The criteria for evaluating procedural aspects of a State program's penalty provisions are that they must be the same as, or similar to, those at the Federal level. See 30 CFR 840.13 and Section 518(i) of SMCRA, 30 U.S.C. 1268(i);

(i) The Texas Railroad Commission has the authority under Texas laws, and the Texas program contains provisions, to issue, modify, terminate and enforce notices of violation, cessation orders and show-cause orders in accordance with Section 521 of SMCRA and with 30 CFR Chapter VII, Subchapter L, including the same or similar procedural requirements. The enforcement authorities in Section 521 of SMCRA are contained in Section 32 of the Texas SCMRA. The applicable provisions of 30 CFR Chapter VII, Subchapter L are contained in Parts 840 and 843 of the Texas regulations with two exceptions.

The first exception is the omission of § 843.17, "Failure to give notice and lack of information." This difference is acceptable because Texas does not need to rely on prior information to have the authority to conduct an inspection and take enforcement actions. The authority to conduct inspections and to take enforcement actions contained in Sections 29 and 32 of the Texas SCMRA is not restricted. Accordingly, these potential grounds for vacating a notice under the Federal scheme would not constitute legally sufficient grounds under the Texas program, so no provision is required declaring these grounds insufficient. The second exception is that review of notices of violation and cessation orders are subject to the Administrative Procedures and Texas Register Act (APTRA) rather than a counterpart of 43 CFR Part 4. This difference is acceptable because the APTRA, in conjunction with the General Rules of Procedure of the Texas Railroad Commission, provides all the essential rights and protections contained in 43 CFR Part 4;

(j) The Texas Railroad Commission has the authority, under Section 33 of the Texas SCMRA and in Subchapter F of the Texas regulations and the Texas program contains provisions to designate areas as unsuitable for surface coal mining consistent with 30 CFR Chapter VII, Subchapter F;

(k) The Texas Railroad Commission has the authority under Texas laws and the Texas program contains provisions to provide for public participation in the development and revision of Texas regulations and the Texas program consistent with the public participation requirements of SMCRA and 30 CFR Chapter VII. Texas also has the authority to provide for public participation in the enforcement of its laws and regulations, with one exception. The Texas program does not provide for award of costs in accordance with 43 CFR 4.1290, *et seq.* This issue is discussed further in paragraph 44 under "Disposition of Comments," below. The Texas program does adequately provide for public participation in the permitting process, in requesting and conducting inspections, and in review of enforcement orders. The program also provides for citizen suits corresponding to Section 520 of SMCRA.

(l) The Texas Railroad Commission has the authority under Texas laws and the Texas program includes provisions to monitor, review, and enforce the prohibition against indirect or direct financial interests in coal mining operations by employees of the Texas

Railroad Commission consistent with 30 CFR Part 705. The prohibitions against financial interests in coal mining operations are contained in Section 29(f) of the Texas Surface Coal Mining and Reclamation Act. These provisions of 30 CFR Part 705 are incorporated in Part 705 of the Texas Regulations.

(m) The Texas Railroad Commission has the authority under Texas laws to require the training, examination, and certification of persons engaged in, or responsible for blasting and the use of explosives in accordance with Section 719 of SMCRA.

Texas has no regulations on the training, examination, and certification of persons engaged in blasting because 30 CFR 732.15(b)(12) does not require a State to implement regulations governing certification and training of persons engaged in blasting until six months after Federal regulations for these provisions have been promulgated. The Federal regulations have not been promulgated at this time;

(n) The Texas Railroad Commission has the authority under Texas laws and the Texas program contains provisions to provide small operator assistance consistent with 30 CFR Part 795. The small operator assistance provisions are contained in Section 19 of the Texas SCMRA and in Part 795 of the Texas regulations.

(o) The Texas Railroad Commission has the authority under Texas laws and the Texas program contains provisions to provide protection of employees of the Texas Railroad Commission in accordance with the protection afforded Federal employees under Section 704 of SMCRA. Although Texas has not enacted a law equivalent to Section 704, the program submission indicates that the Texas Railroad Commission will, as a condition of each permit for surface coal mining issued under an approved State program, include the following:

Any person who shall, except as permitted by law, willfully resist, prevent, impede, or interfere with the Commission or any of its agents in the performance of duties pursuant to the 'Surface Coal Mining and Reclamation Act' shall be subject to a fine of not more than \$10,000 or by imprisonment for not more than one year, or both!

This language specifically ties in Section 30 (e) and (g) of the Texas Act, which provide criminal penalties for violation of a permit condition. These penalties are as severe as those provided in Section 704 of SMCRA. This scheme will provide protection to State employees comparable to that provided Federal employees by Section 704 of SMCRA, except that persons who are not employees of a permittee will not be subject to criminal penalties. The

Secretary does not believe that any material risk exists of interference with government employees from "wildcatters" or others, in light of the information on the nature of the Texas lignite industry in the program submission and the absence of any public comments on this issue. The Secretary is able to approve this element of Texas program in light of this permit term requirement.

(p) Texas has the authority under its laws and the Texas program contains provisions to provide for administrative and judicial review of State program actions in accordance with Sections 525 and 526 of SMCRA and 30 CFR Chapter VII, Subchapter L. The review provisions of Section 525 of SMCRA are contained in Section 32(c) of the Texas SCMRA except that Section 32(c)(1) provides that hearings shall be subject to APTRA rather than 5 U.S.C. 554. The APTRA, in conjunction with General Rules of Procedure of the Texas Railroad Commission, provides all the essential rights and protections contained in 5 U.S.C. 554.

(q) The Texas Railroad Commission has the authority under Texas laws and the Texas program contains provisions to cooperate and coordinate with and provide documents and other information to the Office of Surface Mining under the provisions of 30 CFR Chapter VII. The provisions for cooperation, coordination, and provision of documents are contained in Section .672 of the Texas regulations;

(r) The Texas Surface Coal Mining Act and regulations adopted thereunder, and the Administrative Procedure and Texas Register Act, Art. 6252-13(a), Vernon's Annotated Texas Civil Statutes, the State Water Administration Water Code Section 26.0001-.268 and regulations adopted thereunder, the Texas Clean Air Act, Art. 4477-5, Vernon's Annotated Texas Civil Statutes, as amended, and regulations adopted thereunder, the General Procedures of the Texas Railroad Commission and the other laws and regulations of Texas do not contain provisions which would interfere with or preclude implementation of the provisions of SMCRA and 30 CFR Chapter VII. Accordingly, there are no Texas laws inconsistent with SMCRA that are being set aside in this approval;

(s) The Texas Railroad Commission and other agencies having a role in the program have sufficient legal, technical, and administrative personnel and sufficient funds to implement, administer, and enforce the provisions of the program, the requirements of 30 CFR 732.15(b), and other applicable State and Federal laws.

#### Disposition of Comments

The comments received on the Texas program during the public comment periods raised the issues listed below, which were considered in the Secretary's evaluation of the Texas program as indicated.

1. The Texas Agricultural Experiment Station said that the soil series descriptions of the National Cooperative Soil Survey should not be used for on-site soil descriptions because of the general nature of these descriptions.

Texas regulations specify that soil series descriptions may be used only with the approval of the Commission. The Secretary believes that the use of existing soil series descriptions should not be categorically denied because there may be those situations where site-specific soil surveys would not be necessary. In those cases, the Commission needs the flexibility to accept soil series descriptions.

2. The Texas Agricultural Experiment Station also suggested that the definition of topsoil should be expanded to include "other materials as approved and recommended by a certified professional soil scientist."

The Texas regulations allow for other materials to be used as topsoil or subsoil under the appropriate conditions, the suggested change in the definition is not necessary.

3. The Texas Agricultural Experiment Station said that the tolerance value of 0.1 for moist bulk density in reclaimed soils is unreasonable.

The Federal performance standard on moist bulk density has been suspended. Accordingly, Texas may retain its regulation on moist bulk density or may amend its program to delete the standard. If the Secretary promulgates a new performance standard on moist bulk density, then Texas may be required to amend its program.

4. The Texas Agricultural Experiment Station also offered a more comprehensive definition of the term "soil survey."

The Texas definition is identical to the Federal definition for the portion of the definition that the commenter suggests should be changed. Therefore, the Secretary believes that changing the definition is not necessary for Texas to meet the requirements for approval of a State program.

5. A commenter said that it was impractical to use a rigid depth in defining topsoil to be removed in thin topsoil situations. (See .335(c) of the Texas regulations). As an alternative, the commenter suggested that the determination of topsoil quality and thickness to be removed, segregated and

redistributed should be made by a certified professional soil scientist on a site-specific basis.

The Texas regulations are identical to the Federal regulations and do not prohibit site-specific determinations. The Texas Railroad Commission has the authority to approve variations on topsoil removal, segregation and redistribution on a site-specific basis. (See .334, .335, .336, .337, and .338 of the Texas regulations).

6. The Soil Conservation Service (SCS) commented that consideration should be given to requiring additional soil resource information in the form of a description of the chemical and physical properties of the soil.

The Texas regulations are identical to the Federal regulations with regard to soil resource information requirements. The Secretary believes that the regulations will provide the regulatory authority with sufficient information to evaluate the soil resource when the applicant plans to segregate and replace the topsoil. Section .134 of the Texas regulations requires that the applicant provide chemical, physical, and other information if the applicant proposes to use overburden material as a substitute for topsoil. The Secretary believes this additional information is sufficient for the Commission in determining if the applicant's request to use substitute soil material should be approved.

7. Several commenters noted that soil testing should be carried out in a qualified laboratory under the direction or supervision of a certified professional soil scientist and that judgments concerning soils, soil substitutes, and soil fertility analyses should be made by a certified professional soil scientist.

The Secretary believes that if the surveys are prepared according to the procedures and standards of the National Cooperative Soil Survey and in accordance with procedures set forth in USDA Handbook 436 (Soil Taxonomy) and 18 (Soil Survey Manual), then uniformity and high standards will be achieved. Texas regulation .335(e) requires that laboratories conducting soil analyses must be approved by the Commission. The Secretary assumes that the Commission will require reasonable professional standards of these laboratories.

8. One commenter indicated that the Texas submission does not adequately address means of protecting water tables and aquifers and of enforcing the protection that exists.

The Secretary believes that the detailed performance standards on protecting surface and groundwater in Parts 816 and 817 and the inspection and enforcement provisions of Parts 840 and

843 accomplish the results sought by the commenter.

9. EPA suggested that the Texas program should indicate how Texas will handle water quality and effluent limitations soon to be promulgated by EPA (Best Available Technology Economically Achievable (BAT) regulations). Since these regulations have not yet been promulgated by EPA, Texas need not address this issue at this time.

10. Two commenters believed that the effluent limitation for total suspended solids was too stringent for Texas streams, and one commenter suggested that the allowable total suspended solids levels should be raised to between 300-500 mg/l.

The proposed limitations are identical to those already established by U.S. EPA, OSM regulations, and the Texas Water Resources Commission. The Texas Railroad Commission adopted the standard based upon Section 23(b)(10)(B)(i) of the Texas Surface Coal Mining and Reclamation Act which states in part, ". . . but in no event shall contributions be in excess of requirements set by applicable State or Federal law." The Texas Railroad Commission could not set any less stringent standards than those already set.

11. A commenter stated that no mention is made in the Texas program submission of National Pollutant Discharge Elimination System (NPDES) compliance review and enforcement.

Texas does not have jurisdiction over NPDES. However, the Commission is required to enforce the effluent standards in the Texas regulations at Section .340 which are the same as the NPDES effluent limitations. This is consistent with and at least as stringent as SMCRA.

12. A commenter suggested that the regulations should provide for the quantification of emissions from mining operations, particularly fugitive dust particulates, and that this quantification should be done in a consistent manner. The commenter also requested that the emissions information should be made accessible to the Prevention of Significant Deterioration (PSD) program.

To avoid conflict with the Clean Air Act program for prevention of significant deterioration and protection of nonattainment areas, the Secretary has decided not to require separate demonstrations of compliance with these Clean Air programs beyond the requirement of Section 508(a)(9) of the Act. The Texas regulations are the same as the Federal regulations. EPA has concurred in the Texas program's air quality provisions.

13. The Texas Agricultural Experiment Station expressed concern that there is a conflict in the interpretations of how introduced grass species affect the land use of an area in defining prime farmland and in determining the period of liability for bonding.

The Secretary believes there is no conflict; even though Bermuda grass requires periodic maintenance, such maintenance is not considered to be augmented by seeding, fertilizing, irrigation, or other work that would result in re-starting the period of liability as required in Section .036(b) of the Texas regulations.

14. Several commenters, including SCS, expressed concern about the definition of prime farmland at Section 3 (15) of the Texas Act and Section .008 of the regulations, and the alternative to separate soil horizon removal and stockpiling spelled out at Section .623 of the regulations. The general concern is that the Texas provisions do not provide the same degree of protection for prime farmlands as do the Federal Act and regulations. It is the Secretary's view that the Texas provisions contain precisely the same protections as the Federal provisions. The expanded language of the Texas provisions reflects OSM's interpretation of the Federal regulations on the specific matters addressed in the Texas language. This language has been previously accepted by OSM in the context of the settlement of a lawsuit brought by the State of Texas (*State of Texas v. Andrus*, U.S.D.C., Western District of Texas, Case #78-CA-35). None of the commenters offered evidence or arguments showing that prime farmland will not be protected by the Texas program in a manner consistent with SMCRA and the Federal regulations. Therefore, no change is required for these provisions to comply with the criteria for State program approval.

15. The SCS commented that the alternative soil handling regulations provide no assurance that the productivity of prime farmland will be restored after mining.

A typographical error in the draft of the Texas regulations that the SCS reviewed greatly distorted the intended meaning of this section. That error has been corrected in the final version, and the Secretary believes that Section .623 now provides adequate assurance that the productivity of prime farmland will be restored after mining.

16. One commenter pointed out that prime farmland is a term referring to the quality of the soil resource, that prime farmland is a land used term, and that

soil surveys map prime farmland soils, not prime farmland.

SMCRA requires that the regulations promulgated by OSM and Texas adopt the definition of prime farmland established by the Secretary of Agriculture in 4 CFR Part 657. The definition as prescribed by the Secretary of Agriculture established the relationship between prime farmlands and prime farmland soils and the Texas regulations adopt and use that relationship.

17. One commenter suggested that the state plan should specify the method of reclamation to be used to protect prime farmland, with organic topsoil on top.

The Secretary believes the Texas regulations are adequate because they require a reconstructed soil of equal or greater productive capacity than exists on surrounding prime farmland. For example, Texas regulation .624(e) requires that the A horizon be replaced as the final soil layer unless other materials are specifically approved.

18. One commenter was concerned that the Texas program submission inhibited field employees from carrying out their enforcement requirements.

The Secretary believes that the Texas Act, regulations, and narrative are consistent and clear that the authorized representatives of the Texas Railroad Commission have the authority and are required to take enforcement actions when a violation is observed. See Section 32 of the Texas Act, Section .680 of the regulations, and the narrative for 731.14(g)(5) on page VII-25 of the program submission.

19. One commenter requested that the Texas program specifically state that cost to the operator is not a consideration in the imposition of affirmative obligations. The commenter accurately pointed out that costs are not a consideration at the Federal level. (Also see the preamble to the Secretary's Permanent Program Rules at 44 FR 15301, March 13, 1979.)

The Secretary agrees with the commenter that cost may not be a consideration in imposing affirmative obligations. However, nothing in the Texas program submission gives any reason to believe that the Commission intends to consider costs in imposing affirmative obligations and therefore the Secretary understands that costs will not be considered.

20. The League of Women Voters of Texas suggested that the Soil Conservation Service (SCS) should approve the reclamation plans before the permit is granted. However, the Texas program submission provides for consultation with Federal, State, and local agencies. Review and consultation

procedures with the Secretary of Agriculture are in Section .395 and .560 of the Texas regulations. This meets the requirements of SMCRA and 30 CFR Title VII for involvement of SCS in permit application review.

21. The U.S. Fish and Wildlife Service commented that the Texas program should describe the process the Commission will use to consult with other agencies on permit review and approval. More specifically, the commenter wanted to be consulted prior to the application process to determine the level of fish and wildlife information that will be required.

Texas regulation .133(c) provides that the State and Federal agencies having responsibilities for fish and wildlife or their habitats will be consulted in determining the level of fish and wildlife information that is required.

Additionally, Texas regulation .215 requires the Commission to consult with State and Federal fish and wildlife agencies in determining the adequacy of fish and wildlife information as part of the permit review process. Accordingly, the Texas program meets the minimum requirements for coordination with the Fish and Wildlife Service, as found in SMCRA and 30 CFR Chapter VII, the criteria by which the Secretary is evaluating the program.

22. One commenter suggested that the State official responsible for the Land and Water Conservation Fund should be identified in the Texas regulations. The Texas regulations, Section .207(c) (1) and (2), provide that Federal, State, and local government agencies, including agencies responsible for historic preservation and public recreation, will be notified of the filing of permit applications. Identification of particular officials is not required under the Federal rules, and accordingly will not be a condition of the Secretary's approval.

23. The SCS commented that where the SCS is the USDA agency to be contacted, USDA should be written as USDA, Soil Conservation Service.

The Texas regulations are identical to the Federal regulations in regard to the terminology used. The Secretary believes that the role of the SCS in making prime farmland determinations is clear and a change in wording is not necessary.

24. Two commenters suggested that experimental practices supported by government, State or university groups should not have to comply with permitting requirements of paragraph (b), Section .200.

Texas has followed the OSM regulations with regard to permitting experimental practices. Furthermore, the

change that is suggested could result in a less enforceable requirement. Thus, the Secretary believes that the Texas program with regard to permitting experimental practices is acceptable.

25. One commenter suggested that sand, silt, and clay mineralogy be included as part of the Geologic Description required by .173 of the Texas regulations.

The Texas regulations equal the requirements of 779.14 of the Federal regulations. The Secretary believes that Texas cannot be required to adopt regulations that are more stringent than the Federal regulations.

26. A commenter stated that the 30-day period for other agencies to review permit applications is inadequate.

The 30-day period for permit review is imposed by Texas regulation on all State agencies and is applicable to interagency coordination in virtually all programs, not just Surface Mining. The Texas program requests, but does not require, Federal agencies to review and respond within the same time period.

The Secretary believes that, although the permit applications will contain very detailed technical information, an agency that is responsible for reviewing part of a permit application will be able to review the portion of the application that is within its area of responsibility within 30 days.

27. A commenter requested that the language of Sections .226(a)(1) and .226(e) be clarified regarding when a change to a permit area would require a new permit, rather than merely a revision to a permit.

The Secretary will not require such a change, because Texas has, as required by 30 CFR 788.12, provided in Section .226(a)(1) guidelines on which to base decisions concerning what changes are significant departures. The Secretary believes that the guidelines identified are adequate to guide the Commission's decisions on this matter.

28. One commenter suggested that the State should address Federal lands coordination.

The Secretary believes that the Texas program does not need to address Federal lands coordination at this time because Texas has not sought a cooperative agreement. If Texas wishes to assume jurisdiction for regulation of surface coal mining on Federal lands in Texas, a cooperative agreement may be prepared and the issue of coordination would more properly be addressed in that event.

29. The U.S. Forest Service requested that it be added to the list on Page 107 of the Texas program submission to ensure notification when National Forest land in the State of Texas is affected.

Texas has not made provisions for a Federal lands program in its present State program submission. Texas will not process an application for surface coal mining on Federal land within a National Forest boundary but will forward the application to the Regional Director of the Office of Surface Mining for processing. (See Texas program .072(c) Page 30.) Upon receipt of an application for operations on National Forest system lands, the Regional Director of OSM will follow the procedure established in 30 CFR 741.20 and transmit a copy of the complete application to the Chief, U.S. Forest Service, for review, consent, and approval by the Secretary of Agriculture. This procedure will ensure the notification that the U.S. Forest Service has requested.

30. One commenter suggested, without providing any specific rationale, that 30 CFR 771.15 and 771.17 (the latter erroneously identified as § 771.16 by commenter) be included in the Texas program. These sections concern continuing operations under Federal or State permits.

These sections are only applicable if a Federal program is implemented in Texas, and in that case, the Federal regulations would apply. Therefore, these sections are not required in the Texas regulations.

31. U.S. EPA, Region VI, felt that a Memorandum of Understanding (MOU) should be developed to cover the Underground Injection Control Program pursuant to the Safe Drinking Water Act.

Since the Underground Injection Control Program has not been implemented, the Secretary feels it premature to require such an MOU.

32. The U.S. EPA, Region VI, stated that apparently the State cannot deny a surface mining permit on the basis of Clean Air Act related requirements. This is a misreading of the Texas law and regulations. See Sections .143 (Air Pollution Control Plan), .379 (Air Resources Protection), and .216 (Criteria for Permit Approval or Denial). This commenter also notes that the Texas Railroad Commission does not have the authority to litigate and set fines outside of those administratively applied by the Commission itself, specifically that the Commission does not have the authority to take as stringent an enforcement action as the EPA under the Clean Air Act. The Texas program does contain enforcement powers at least as stringent as SMCRA for air quality violations, and this is the only requirement for program approval on this particular issue. Whether the State of Texas has otherwise complied with the Clean Air

Act is beyond the scope of this approval and is not an appropriate matter for consideration. The U.S. EPA has concurred in the Texas program's provisions relating to the Clean Air Act and regulations issued under it.

33. U.S. EPA, Region VI, noting that the proposed Texas program does not require operators to comply with the Hazardous Waste Regulations proposed under the Resource Conservation and Recovery Act (RCRA), suggested that the Texas program should consider the requirements of that Act and make provisions to incorporate the applicable U.S. EPA regulations when they become effective. Since the RCRA regulations are not yet effective and there has been no agreement between EPA and the Department of the Interior on procedures for handling RCRA issues, it would be premature to expect Texas to provide for these matters. It is possible that Texas may have to revise its program at some future time to incorporate RCRA considerations.

34. The Advisory Council on Historic Preservation sought additional information to determine the extent that the proposed regulatory program is in compliance with Section 106 of the National Historic Preservation Act (NHPA). Information needed concerns the requirements of NHPA for written comments from the State Historic Preservation Officer (SHPO) and an independent determination by OSM's Regional Director as to the likelihood that the State program will adversely affect properties included in, or eligible for inclusion in, the National Register of Historic Places.

The Texas regulations provide for the coordination and consultation with SHPO in Sections .072, .074, and .083 of the Texas regulations. If the State of Texas includes in its regulations language suggested by the commenter, the coordination process would be presented in more detail. The Texas regulations, as presented in the submission, are in compliance with SMCRA. Adoption of the suggested language by the State of Texas is not required at this time. However, once the Secretary promulgates new rules to replace regulations concerning historic preservation suspended November 27, 1979 (44 FR 67942), Texas will have an opportunity to amend its program to be consistent with these new rules.

35. The Advisory Council also suggested additional language for the State of Texas to consider including in its proposed regulatory program. The language was suggested as a means for Texas to comply with the intent of Section 106 of the National Historic Preservation Act (NHPA). The proposed

language would: (1) Provide for a system for consulting with State and Federal agencies having responsibility for the protection or management of historic, cultural, and archeological resources; (2) provide for coordination of review of permits with the applicable requirements of NHPA; and (3) provide procedures and criteria for identifying and protecting properties under the provisions of NHPA.

The Texas program has adopted the language of 30 CFR 761.12(f) in Sections .072, .074, and .083 of the Texas regulations, and has established a procedure for coordination and consultation with State and Federal agencies that could directly or indirectly affect the permit process. See the narrative for § 731.14(g)(9)(10)(11) for a discussion of that procedure.

The Texas program contains provisions to meet the intent of SMCRA and NHPA. The language proposed by the commenter is considerably more detailed and could be adopted by the State of Texas if it so chooses. The language proposed is more stringent and, therefore, the Secretary believes it cannot be required in the Texas program.

36. A commenter stated that the Texas program should specify the priority in which the processing of the applications will be handled so that early in the process, areas unsuitable for surface mining will be reviewed and applications infringing thereon will be eliminated during the review process.

The Texas program specifies a process to review applications that includes a check within the first 30 days for lands unsuitable for surface mining. This process is described on pages VII-1 through VII-4 of the Texas program submission. This process meets the requirements of SMCRA and 30 CFR Chapter VII.

37. A commenter suggested that Texas regulation .075(a) should be clarified by adding after the phrase "if the Commission determines that reclamation is not technologically and economically feasible", the words "under the Act and this Chapter." The commenter thought this addition would clarify the source of the criteria for the evaluation of feasibility.

Section 33(b) of the Texas Act clearly states that no mining will occur where "reclamation pursuant to the requirements of this Act is not technologically and economically feasible." Based on this, it is clear that the requirements of the Act are the source of the criteria for the evaluation of feasibility.

38. U.S. EPA, Region VI, wanted the narrative about reporting systems to

include Discharge Monitoring Reports and other reviews associated with the National Pollutant Discharge Elimination System (NPDES) permit enforcement.

Discharge Monitoring Reports and other reviews done as part of the NPDES permit enforcement are not within the jurisdiction of the Commission, and the State of Texas does not administer NPDES requirements. Accordingly, the requested additions to the narrative are inapplicable in Texas and unrelated to SMCRA requirements.

39. The EPA, Region VI, also suggested that the narrative about inspecting and monitoring should identify activities associated with an NPDES compliance inspection.

The Commission does not have and will not have authority to enforce the NPDES program unless that authority is granted by the EPA. The details of NPDES compliance inspections would be specified in any future agreement between EPA and Texas that grants NPDES authority to Texas.

40. A commenter objected that Texas has substituted a formal public hearing for the informal hearing provided in 30 CFR 786.14 on permit applications. The commenter's concern is that the more formal procedure will discourage public participation because many persons are reluctant to enter into formal hearings without a lawyer. Although Section .211(a) of the Texas regulations does provide that any adversely affected person may request a formal hearing on a permit application, paragraph (b) of that section provides that any affected person may request informal consideration of objections in accordance with Section 13 of the Administrative Procedure and Texas Register Act. In view of these provisions, the Secretary believes that the proposed Texas program provides ample opportunity for public participation in this phase of the permitting process.

41. The National Wildlife Federation stated that the Texas program must be revised to provide for judicial review of rulemaking in accordance with Section 526 of SMCRA, with its provision for challenging regulations. It is the Secretary's view that the State's obligation to afford judicial review of its actions, including rulemaking, is contained solely in Section 526(e) of the Act, which simply provides that State agency action shall be subject to judicial review in accordance with State law. Judicial review of rulemaking in Texas is governed by the APTRA. The State is not required to adopt the standards and

procedures for review of Federal rulemaking contained in Section 526.

42. The National Wildlife Federation argued that the Texas program should be revised to provide for formal administrative review of agency decisions that are not required by the Texas SCMRA to be determined by formal adjudication under APTRA. Such a provision would correspond to 43 CFR 4.1280 and 4.1281. The Secretary believes that the procedures for appeal set forth in 43 CFR 4.1280, *et seq.*, are not required in a State program. Section 4.1281 provides that a person adversely affected by a written decision of the Director or his delegate may appeal to the Board of Surface Mining and Reclamation Appeals only where the decision itself specifically grants such right of appeal. In other words, this "right" is completely dependent upon the discretion of the Director. It is, in fact, not a right of appeal, but simply an administrative mechanism providing the Director with discretion to authorize an appeal to the Board when that is desirable as a matter of administrative policy. SMCRA does not require a State to provide a similar system.

43. The National Wildlife Federation also stated that prior to program approval, Texas should be required to affirm its intention that its statutory provisions regarding awards of costs and expenses in court proceedings are subject to the same interpretation as the counterpart Federal provision. The commenter believes this is necessary to ensure that the Texas provisions, Section 31(e) and 32(c)(5), will be interpreted to mean that costs and expenses may be assessed against citizens only where it is established that the citizen brought or pursued the litigation in bad faith or solely to harass or embarrass the defendant.

Since Texas has adopted statutory authority identical to SMCRA on these points, the Texas program satisfies the requirements of SMCRA. Texas cannot be required to revise its program because of the possibility that a State court will interpret Sections 31(e) and 32(c)(5) in a manner inconsistent with SMCRA and Federal case law. The National Wildlife Federation has provided no basis on which to expect Texas courts to make a different interpretation of the language than Federal Courts. The Secretary's approval presumes that a State court will look to and follow the intent of Congress where, as here, its State legislature has enacted statutory provisions pursuant to the mandate of, and identical to, Federal statutes. Therefore, the Secretary believes that

this aspect of the proposed Texas program complies with the requirements of SMCRA.

44. The National Wildlife Federation also pointed out that Texas has no statutory or regulatory provision corresponding to 43 CFR 4.1290 regarding the award of costs and expenses, including attorneys fees, in administrative proceedings. Although Texas has enacted the basic authority for the award of costs and expenses, this commenter believes that SMCRA and the Secretary's regulations require that the State program include the regulations which detail such matters as who may file, contents of a petition, and who may receive an award. The commenter cites 44 FR 15297 which states in part, "The Office believes that a State program must meet the following minimum criteria with respect to citizen participation: \* \* \* (3) It must authorize award of costs and expenses in administrative and judicial proceedings provided under Section 520(d) and (f) and 525(e) of the Act and 43 CFR Part 4." (emphasis added). In light of this specific language, the Secretary believes that a State program must include provisions similar to 43 CFR 4.1290. Texas has agreed to adopt provisions implementing these requirements by June 15, 1980. The approval of the Texas program is conditioned on such provisions being adopted.

45. The National Wildlife Federation stated that the Texas submission does not provide as liberal standards for citizen intervention in administrative proceedings as the Federal regulations and that, therefore, citizens have less access to the State administrative proceedings. Neither the Texas Surface Coal Mining and Reclamation Act (TSCMRA) nor the Administrative Procedure and Texas Register Act (APTRA) contains a provision dealing specifically with rights of intervention in administrative proceedings. However, the program submission does include, at Chapter VII, page 32, the relevant provisions of the General Procedural Rules of the Texas Railroad Commission. Paragraph 10(d), chapter VII, page 35, states that any person or agency interested in any proceeding before the Commission may appear formally before the Commission by simply filing a notice with the Commission five days before the hearing date, and may present any relevant and proper testimony and evidence bearing upon the issues involved in the particular proceeding. Contrary to the National Wildlife Federation contention in its comment dated January 21, 1980,

this intervention provision appears to be at least as liberal as that contained in 43 CFR Part 4.

46. The National Wildlife Federation stated that the discovery provisions beginning at 43 CFR 4.1130 should be included in the Texas program. The Secretary agrees that liberal discovery provisions are essential to meaningful citizen participation in the administrative process. Section 14(a) of the APTRA essentially says that the Commission may allow broad discovery upon motion of any party. The commenter objects that under this provision, all discovery is subject to the apparently unlimited discretion of the Commission, and this discretion could be exercised to deny citizens effective access to the administrative process, contrary to the Secretary's regulations. See 44 FR 15297. The Secretary's approval of this provision is based on the understanding that the Commission will exercise its discretion in this regard in a manner consistent with SMCRA and the Secretary's regulations. If events prove otherwise, the Secretary's authority could be used to correct the problem.

47. The Mine Safety and Health Administration (MSHA) commented on the narrative for § 731.14(g)(13) pertaining to the content of a course for use in training, examining, and certifying blasters on safety procedures.

These comments pertain to a part of the Texas program that is not required until six months after the Federal regulations on training, examining, and certifying blasters are promulgated. (See § 732.15(b)(12)). The narrative provided is used by the Commission only as a guideline for inspectors and does not impose training or safety requirements on operators. Upon adoption of the Federal regulations, the Texas provisions will again be reviewed by the Secretary, and any necessary changes can be required at that time.

48. MSHA also suggested some changes in the outline of the Proposed Training Criteria.

The Secretary notes, initially, that MSHA commented, "We do not find any conflicting requirements in the proposed Texas State program that might present hazards to miners." Texas Admin. Record Control No. TX-53 and TX-108.) The Secretary believes that the training outline is not now essential. Training criteria will need to be developed after regulations on blaster training and certification are promulgated.

49. The Environmental Policy Institute noted that although 30 CFR 764.17(a) and Section .081 of the Texas regulations pertaining to hearing requirements for "unsuitability

provisions" are identical, the section-by-section comparison states that the APTRA is applicable to such hearings. Since the APTRA is in some respects inconsistent with Section .081, the commenter was concerned that this would lead to confusion and ambiguity. The Secretary believes the section-by-section language (Chapter III, page 178) means simply that where the APTRA is not inconsistent with Section .081, the APTRA applies. This is not inconsistent with SMCRA.

50. One commenter stated that the absence from the Texas Surface Coal Mining and Reclamation Act of a provision comparable to Section 514(d) of SMCRA makes the Texas program inconsistent with SMCRA. Section 514(d) provides that the Secretary or State regulatory authority may grant temporary relief under certain conditions when a hearing is requested on a permit application decision. Although Texas has not included a provision corresponding to Section 514(d) in its Act, the State regulation, Section .222, does include the exact language of that section.

51. Another commenter suggested that Section 682(d) of the Texas regulations be revised to spell out what is "appropriate notice" of a show-cause hearing, similar to 30 CFR 843.13(d). The program submission spells out in Chapter VII, page 31, the specifics of appropriate notice. Those specifics are consistent with, and even go beyond, the Federal notice provision.

52. A commenter said that there is no administrative adjudicatory body within the Texas Railroad Commission which is independent of the Commission's regulatory functions. This commenter argues that an independent adjudicator is required by 30 CFR 732.15(b)(15), which refers to Section 525 of SMCRA, which in turn refers to the Federal APA (5 U.S.C. 554), which allegedly contains the actual requirement. It is the Secretary's view that the APA does not require the degree of independence urged by the commenter and that the administrative adjudicatory system proposed in the Texas program complies with the requirements of the APA. All the essential rights and protections of the APA are contained in the Texas system, and interested citizens are provided an opportunity for a fair and impartial hearing. The National Wildlife Federation, in its comment dated January 21, 1980, felt that persons who had participated in development of general policy positions should not participate in particular proceedings in which the policy might be applicable. The Secretary does not believe that

either SMCRA or the APA requires all administrative reviewers to be free of contacts with general decisions made by the regulatory authority and which might be applicable in the case. Accordingly, the Texas program is acceptable on this point.

53. A commenter states that Section 14 of the APTRA explicitly allows *ex parte* contact between decision makers and the enforcement arm of the agency at any stage of adjudication, except where an employee of the agency participated in a hearing on a case. The commenter believes this to be inconsistent with the Administrative Procedure Act (5 U.S.C. 554) and therefore, unacceptable in a State program. The Secretary has been assured by the Commission that it interprets Section 17 to preclude *ex parte* contacts between decision makers and hearing examiners, as well as between either decision makers or examiners and any person in any way involved in any hearing, including persons such as technical staff or inspectors. (See letter from J. Randel Hill to Raymond L. Lowrie, December 31, 1979.) With this assurance, the Secretary believes the Texas program is acceptable in this regard. In its comments upon the letter from J. Randel Hill dated December 31, 1979, the National Wildlife Federation asserted, without basis, that examiners should have no contact whatsoever with any employee of the regulatory authority, whether or not the employee had any contact with the matter being decided. The Secretary believes this is not required under the law, and should not be made a condition of approval of a State program, since it might unnecessarily restrict examiners, without providing any additional protection against improper influence on decisions.

54. The U.S. Fish and Wildlife Service recommended that the Texas Railroad Commission make greater use of the expertise of other agencies through cooperative agreements, personnel transfers or other appropriate measures rather than relying on interagency permit review alone.

The Secretary believes that the Texas Railroad Commission has sufficient technical staff to implement the provisions of the permanent program. The Secretary also believes that the provisions the Commission has made for inter-agency review are adequate.

55. The U.S. Environmental Protection Agency, Region VI, suggested that all executed agreements and Memorandums of Understanding (MOUs) relative to the permanent program, and in particular the MOU

between the Commission and the Texas Department of Water Resources, should be included in the Texas program submission.

The amended Texas program submission contains a copy of the transfer of jurisdiction for the regulation of surface coal mining on State-owned lands from the General Land Office to the Texas Railroad Commission. (See page VI-10). An MOU between the Texas Department of Water Resources and the Commission regarding coordination of water quality-related regulation of surface coal mining and reclamation activities is on pages VI-2 through VI-10.

56. One commenter wondered what the role of the General Land Office was in administering the Texas State regulatory program.

A letter dated August 21, 1979, from the General Land Office of the Texas Railroad Commission (See page VI-1 of the Texas program) transferred jurisdiction over coal surface mining on State-owned lands to the Commission. The narrative for § 731.14(e) of the program submission indicates that the General Land Office, Mining Division, will continue to serve in an advisory capacity to the Texas Railroad Commission on issues relevant to mining.

57. The Texas Chapter of the Sierra Club commented that the Texas Railroad Commission had not met its obligation to provide meaningful public participation in the development of the State program. The Secretary finds this allegation not to be supported in the record. In Attachment S to the program submission, the Railroad Commission showed how the public had been informed of the pending program development by means of newspaper announcements. On May 1, 1979, the official State Register carried notice of a June 7, 1979 hearing to be held on the program by the Railroad Commission. (See Attachment T to the Texas submission.) A copy of the transcript of the hearing was submitted as Attachment V to the program submission. The Secretary finds that Texas adequately involved the public in development of its program.

#### Conditional Approval

As indicated above under Secretary's Finding 4(k), there was only one minor deficiency which the Secretary requires be corrected. In all other respects, the Texas program meets the criteria for approval. The deficiency is an absence of regulatory provisions providing for recovery of costs and expenses, including attorneys fees, in accordance with 43 CFR 4.1290-4.1296. Given the

nature of this deficiency and its magnitude in relation to all the other public participation provisions of the Texas program, the Secretary of the Interior has determined this to be a minor deficiency. Accordingly, the program is eligible for conditional approval under 30 CFR 732.13(i), because:

1. The deficiency is of such a size and nature as to render no part of the Texas program incomplete since all other aspects of public participation in the program meet the requirements of SMCRA and 30 CFR Chapter VII and this deficiency, which will be promptly corrected, will not directly affect environmental performance at coal mines;

2. Texas has initiated and is actively proceeding with steps to correct the deficiencies; and

3. Texas has agreed, by letter dated January 28, 1980, to correct the deficiency by June 15, 1980.

Accordingly, the Secretary is conditionally approving the Texas program. This approval shall terminate if regulations correcting the deficiency are not enacted by June 15, 1980.

This conditional approval is effective February 16, 1980. Beginning on that date, the Texas Railroad Commission shall be deemed the regulatory authority in Texas, and all Texas surface coal mining and reclamation operations and all coal exploration in Texas shall be subject to the permanent regulatory program. See 44 FR 77440 (December 31, 1979), in which the Department of Interior adopted rules making the permanent program applicable in a State on the date a State program is approved.

On non-Federal and non-Indian lands in Texas, the permanent regulatory program consists of the State program approved by the Secretary.

There are no coal-bearing Indian lands in Texas.

On Federal lands, the permanent regulatory program consists of the Federal rules made applicable under 30 CFR Chapter VII, Subchapter D—Parts 740–743. In addition, in accordance with Section 523(a) of SMCRA, 30 U.S.C. 1273(a), the Federal lands program in Texas shall include the requirements of the approved Texas permanent regulatory program.

The Secretary's approval of the Texas program relates at this time only to the permanent regulatory program under Title V of SMCRA. The approval does not constitute approval of any provisions related to implementation of Title IV under SMCRA, the abandoned mine lands reclamation program. In accordance with 30 CFR Part 884, Texas may submit a State Reclamation Plan

now that its permanent program has been approved. At the time of such a submission, all provisions relating to abandoned mined lands reclamation will be reviewed by officials of the Department of the Interior.

The approval of the Texas program is effective February 16, 1980, in accordance with a stipulation entered between the Secretary and plaintiffs in *In re: Permanent Surface Mining Regulation* (D.D.C., Civ. Act. No. 79-1144). This stipulation afforded the plaintiffs 30 days notice and an opportunity to challenge before the District Court in the District of Columbia, the Secretary's approval. Hereafter, it is expected that State program approvals for other States will be effective on the date of the Federal Register notice announcing the approval, in accordance with 30 CFR 732.13(h).

#### Additional Findings

The Secretary has determined that, pursuant to Section 702(d) of SMCRA, 30 U.S.C. 1292(d), no environmental impact statement need be prepared on this conditional approval.

The Secretary has determined that this document is not a significant rule under E.O. 12044 or 43 CFR Part 14, and no regulatory analysis is being prepared on this conditional approval:

Dated: February 7, 1980.

Cecil D. Andrus,  
*Secretary of the Interior.*

A new Part, 30 CFR Part 943 is adopted to read as follows:

#### PART 943—TEXAS

Sec

943.1 Scope.

943.2–943.9 [Reserved]

943.10 State Program approval.

943.11 Conditions of State Program approval.

Authority: 30 U.S.C. 1253.

##### § 943.1 Scope.

This part contains all rules applicable only within Texas which have been adopted under the Surface Mining Control and Reclamation Act of 1977.

##### §§ 943.2–943.9 [Reserved]

##### § 943.10 State Program Approval.

The Texas State program, as submitted July 20, 1979 and amended November 13, 1979 and December 20, 1979 is approved, effective February 16, 1980. Copies of the approved program are available at:

Texas Railroad Commission, Surface Mining and Reclamation Division, Field Office, Suite 125, 1121 East SW Loop 323, Tyler, Texas 75703;

Texas Railroad Commission, Surface Mining and Reclamation Division, Field Office, Shank Office Building, 1419 3rd Street, Floresville, Texas 78114;

The Office of Surface Mining Reclamation and Enforcement, Scarritt Building, 818 Grand Avenue, Kansas City, Missouri 64106, telephone (816) 374-3920; and Office of Surface Mining, Room 135, Interior South Building, 1951 Constitution Avenue, Washington, D.C. 20240, telephone (202) 343-4728.

##### § 943.11 Conditions of State Program Approval.

The approval of the State program is subject to the following condition:

The approval found in § 943.10 will terminate on June 15, 1980, unless Texas submits to the Secretary, by that date, copies of fully implemented regulations containing provisions which are the same or similar to those in 43 CFR 4.1290–4.1296, relating to the award of costs, including attorneys fees, in administrative proceedings.

[FR Doc. 80-6115 Filed 2-26-80; 8:45 am]

BILLING CODE 4310-05-M