

**FEDERAL REGISTER: 45 FR 25992 (April 16, 1980)**

DEPARTMENT OF THE INTERIOR

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

30 CFR Parts 716 and 785

Prime Farmlands Grandfather Provisions

ACTION: Proposed rules for interim and permanent regulatory programs.

**SUMMARY:** The proposed regulations would revise the grandfather exemption to the prime farmlands provisions of Section 510(d)(1) of the Surface Mining Act in both the interim and permanent regulatory programs. The exemption would be the same in both the interim and permanent programs.

**DATES:** The comments period on the proposed rules will extend until May 30, 1980. All written comments must be received at the address given below by 5 p.m. on May 30, 1980. Comments received after that hour will not be considered or included in the Administrative Record for this rulemaking. A Public hearing will be held on April 30, 1980 and on May 15, 1980.

**ADDRESSES:** Written comments must be mailed to: Office of Surface Mining, U.S. Department of the Interior, South Building, Room 135, 1951 Constitution Avenue, N.W., Washington, D.C. 20240. All comments should be clearly marked as comments on these proposed rules. The April 30 hearing will be held in the Department of the Interior Auditorium, 18th & C Sts. N.W., Washington, D.C. 20240 and the May 15 hearing will be held in Room -- Vista North A, Hilton Forum, 700 East Adams Street, Springfield, Illinois 62701.

**FOR FURTHER INFORMATION CONTACT:** David Maneval, Assistant Director, Technical Services and Research, Office of Surface Mining. Department of the Interior, Washington, D.C. 20240, 202-343-4264.

**SUPPLEMENTARY INFORMATION:**

*Availability of Copies :* Copies of these proposed amendments may be obtained from the following OSM offices:

Headquarters, U.S. Department of the Interior, South Building, Room 35, 1951 Constitution Avenue, N.W., Washington, D.C. 20240, 202-343-8125.

Region I, Thomas and Hill Building, 1st Floor, 950 Kanawha Boulevard, East Charleston, W. Va. 25301, 303-342-8125.

Region II, Suite 500, 530 Gay Street, S.W., Knoxville, TN 37902, 615-637-8060.

Region III, Room 502, Federal Building & U.S. Courthouse, 46 East Ohio Street, Indianapolis, IN 46204, 317-269-2600.

Region IV, Scarritt Building, 5th Floor, 818 Grand Avenue, Kansas City, MO 64106, 816-374-2618.

Region V, Brooks Towers, 1029 15th Street, Denver, CO 80202, 303-837-5511.

**PUBLIC HEARINGS**

The public hearings on these proposed regulations will be held at the addresses and on the dates specified above under "DATES", and will begin at 9:30 a.m. local time at each location. Persons wishing to testify at the public hearings on these proposed amendments should contact persons listed under "Public Meetings". Individual testimony at these hearings will be limited to 15 minutes. The hearings will be transcribed. Filing of a written statement at the time of giving oral testimony would be helpful and would facilitate the job of the court reporter. Submission of written statements in advance of the hearings would greatly assist OSM officials who will attend the hearings. Advance submissions will give those officials an opportunity to consider appropriate questions which could be asked for clarification or to request more specific information from the person testifying. The Public hearings will continue on the days identified above until all persons scheduled to speak have been heard. Persons in the audience who have not been scheduled to speak and wish to do so will be heard following the scheduled speakers. Each hearing will end after all persons present in the audience who wish to speak have been heard, Persons not scheduled to testify, but wishing to do so, assume the risk of having the public hearing adjourned unless they are present in the audience at the time all scheduled speakers have been heard.[Page 25993]

## **PUBLIC MEETINGS**

Representatives of OSM will be available to meet between the date of this notice and May 30, 1980, at the request of members of the public, State representatives, and industry organizations to receive their advice and recommendations concerning the content of these proposed amendments. Persons wishing to meet with representatives of OSM during this time period may request a meeting at the Washington Office of any of the five regional offices. Persons to contact to schedule or attend such meetings are as follows:

Washington: Lee deMoulin, 202-343-5261.

Charleston: Louis McGee, 304-345-3394.

Knoxville: Gary B. Tucker, 615-637-8060 (Ext. 239).

Indianapolis: Ralph Ewalt, 317-269-2666.

Kansas City: James W. Spotts, 816-374-2690.

Denver: Carolyn Chesteen, 303-837-4072.

OSM representatives will be available for these meetings between 9:00 a.m. and noon and 1:00 and 4:00 p.m., local time, Monday through Friday excluding holidays, at the OSM regional offices. All such meetings are open to the public. Notices of the meetings will be publicly posted in advance as to the location of the meeting. A written summary of the meetings will be a part of the administrative record and will be available to the public.

## **PUBLIC COMMENTS**

Written and oral comments should be as specific as possible. OSM will appreciate any and all comments, but those most useful and likely to influence decisions on these amendments will be those which include a rationale based on fact, not opinion, for any given recommendation. Comments should also be supported by reference to case law and legislative history where appropriate.

The Office cannot insure that written comments received or delivered during the comment period to any locations other than that specified in the "Address" section will be considered and included in the Administrative Record for this rulemaking.

## **EXPLANATION OF PROPOSED AMENDMENTS**

Section 510(d)(1) of the Surface Mining Act establishes special performance standards for mining operations which are conducted on prime farmland areas. That section requires operators on prime farmland to show that they have the technological capability to restore the mined area, within a reasonable time, to equivalent or higher levels of yield as non-mined prime farmland in the surrounding area under equivalent levels of management before the regulatory authority may approve a permit which allows mining of those lands. The performance standards which an operator on prime farmlands must meet include special spoil handling and reconstruction standards and special productivity standards. See Sections 510, 510(b)(7) and 519(c)(2) of the Act. In establishing these requirements, the Congress exempted certain operators.

Section 510(d)(2) provides that "[nothing] in this subsection shall apply to any permit issued prior to the date of enactment of this Act, or to any revisions or renewals thereof, or to any existing surface mining operations for which a permit was issued prior to the date of enactment of this Act." On December 13, 1977, the Department adopted regulations in 30 CFR Section 716.7(a)(2) to further define this statutory exemption. 42 FR 62693-94, codified at 30 CFR 716.7 (1979). These regulations, which are applicable to the interim regulatory program, were challenged and upheld in litigation in the United States District Court for the District of Columbia, *In Re Surface Mining Regulation Litigation*, 452 F. Supp. 327, 340 (D. D.C. 1978), *appeal pending*. The interim program regulations exempt from the requirements of Section 510(d)(1) the following permits and operations:

Permits issued [before August 3, 1977] and revisions and renewals of those permits need not conform to the provisions of this section regarding actions to be taken before a permit is issued. Permit renewals or revisions shall include only those areas that

(1) Were in the original permit area or in a mining plan approved prior to August 3, 1977; or

(ii) Are contiguous and under State regulation or practice would have normally been considered as a renewal or revision of a previously approved plan.

The counterpart to this regulation in the permanent program was adopted on March 13, 1977. 30 CFR 785.17(a) (1979). In contrast to the interim program regulation, the provision in 30 CFR 785.17(a) exempted from the requirements in Section 510(d)(1) of the Surface Mining Act "only those "[areas] where mining is authorized under permits issued or mining plans approved prior to August 3, 1977 \* \* \*." This regulation was also challenged in the U.S. District Court for the District of Columbia in *In re Permanent Surface Mining Regulation Litigation*, No. 79-1144. In response to this challenge, the Department of the Interior suspended this regulation. 44 FR 77454-55, December 31, 1979. At the present time, there are no regulatory provisions governing the prime farmland grandfather exemption in the permanent program.

This proposed rulemaking proposes an identical grandfather provision to be applicable during both the interim and permanent programs. The publication of this rule does not affect, in any way, the validity of the regulation now in effect for the interim program. The revision to the permanent program regulation is mandated by the Department's decision to suspend that regulation as part of the permanent program litigation. The Department's decision to propose a similar rule for the interim program is not due to any legal necessity, but it is an attempt to respond to the difficulty the Department has encountered in attempting to enforce the current grandfather clause and in problems States have had in applying the regulation. This difficulty has focused on two different problems.

First, there has been disagreement between the State of Illinois and the Department of the Interior over the meaning of "contiguous" in the interim program regulations. The State of Illinois has interpreted the Department's regulations to allow the grandfathering of lands which are connected only by a haulroad and for which there is not continuous mining between two or more parcels. The Department of the Interior's interpretation of its regulations is that lands are not contiguous unless they are substantially connected along considerable distances and there is mining which proceeds directly from one portion of the land to the other. This disagreement has resulted in a suit brought by a coal company against the Department of the Interior, *Midland Coal Company v. Andrus*, Central District of Illinois, Civ. No. 79-1172, *appeal pending*. This suit challenges the Department's right to proceed to take enforcement action against a company holding a State-issued permit where the Department believes the State permitting decision is legally invalid. Nothing in this proposed rule is to be construed as waiving any rights the Department may have against Midland Coal Company.[Page 25994]

The second problem has dealt with the practice of the State of Illinois of grandfathering lands on the basis of "mining plans" as the current rules allow during the interim program.

Prior to the passage of the Surface Mining Act, the State of Illinois did not have documents formally known as "mining plans." It is their view, however, that the Department's regulations, in order to be applied fairly to the State of Illinois, should allow the State to grandfather lands which had the equivalent of a mining plan. The practice in Illinois has resulted in the grandfathering of approximately 12 thousand acres of prime farmlands. It is arguable that the Department's regulations do not currently allow grandfathering based on this kind of mine plan.

In addition, the current status of the regulations have the potential of leading to additional difficulties in administration. In particular, all of the grandfathering decisions by the State of Illinois to date include a specific statement that the grandfathering exemption expires on August 3, 1982. This limitation is not explicitly in the current interim program regulations, and was not expressly made a limitation of the permanent program regulations.

In an effort to resolve these issues, the Department of the Interior and the State of Illinois, as part of the issuance of an interim program grant to the State, have agreed that additional permits involving the question of contiguity by haulroads will be held in abeyance pending the completion of this rulemaking. The agreement by the State of Illinois to hold these kinds of permitting actions in abeyance is without prejudice to its rights as to its view of the proper meaning of the Department's regulations.

In proposing this regulation today, the Department has reviewed the comments it has previously received, the Act, and the legislative history, and has held some discussions with the State of Illinois regarding this proposed rule. After consideration of all of these materials, it is the Department's view that a revised regulation will clarify the situation and insure the uniform, equal enforcement of the grandfather clause according to the statutory mandate. As the proposed regulation states, it exempts from the provisions of Section 510(d)(1) of the Act all pre-August 3, 1977, permits, all revisions or renewals of those permits (as those terms are used in the Surface Mining Act), and allows continuations of preexisting mining operations where the lands to be grandfathered are an extension of a mining pit permitted and in existence on August 3, 1977. This third category of exemption is only applicable to those operators who had the legal right to mine the proposed grandfathered areas prior to August 3, 1977. In addition, the Department has proposed a definite time limitation by which all grandfathered exemptions must terminate. This date, August 3, 1982, would coincide with the practice of the State of Illinois.

The Office of Surface Mining believes that this revised regulation is fully justified in all respects. The substantive portion of the regulation carries out each of the three clauses in the statute -- the permitting clause, renewal and revision clause and the partially permitted operations clause. The proposed regulation is also consistent with the Congress' intent to prevent indefinite expansion of mining in prime farmland areas if operators cannot achieve compliance with the prime farmland performance standards. See, e.g., 123 Cong. Rec. H7588-7589 (daily ed.), July 21, 1977, statements of Congressmen Tsongas and Udall; and *In Re Surface Mining Litigation*, 452 F. Supp. 327 (D D.C. 1978). The Department believes the August 3, 1982, date is justified for several reasons. First, it carries out Congress' intent to insure an orderly transition from the pre-Act to the post-Act standards by allowing operators a reasonable period to meet the new standards. Second, it prevents mining from continuing indefinitely beyond that time needed in which operators can compile the information and make the showing required by the Act. Third, it tends to reduce the potential of wide variations between States in the administration of the law. Fourth, it gives certainty to both the public and the operators about the scope and extent of the grandfather clause. The action also takes into account the declaration in Section 101(g) to avoid having competition in interstate commerce which undermines the abilities of States regulating mining operations within their borders.

The Department of the Interior also expressly incorporates in this rulemaking proceeding the decision and rationale used by the State of Illinois Department of Mines and Minerals, in the *Captain Mine* (*In re: Southwestern Illinois Coal Corporation*). (*The Captain Mine*, Docket No. RA 78-1) at 13, which is the decision establishing the August 3, 1982, cut-off date as a permit requirements in the State of Illinois. This five-year period corresponds to that of a permit under the Federal law (Section 506(b)). This decision is available upon request and is in the administrative record for this rule.

The Office of Surface Mining expressly requests comments on alternatives to this rule. Comments are specifically requested comparing this rule to the interim program and permanent program standards previously promulgated. The Department also requests information on whether the August 3, 1982, date should be later or earlier. The Department also specifically requests comments on the standard in subparagraph (v) of the revised Section 716.7(a)(2) and subparagraph 5 of the revised Section 785.17(a). These subparagraphs establish that the grandfather exemption extends only to the coal face mined as of August 3, 1977, and related benches. Alternative standards for this and other portions of the regulations are also requested as are comments on how these proposed regulations should be applied to previously-issued permits if those permits would not qualify under the proposed regulations.

## STATEMENTS OF SIGNIFICANCE AND ENVIRONMENTAL IMPACT

The Department of the Interior has determined that this document is not a significant rule and does not require a regulatory analysis under Executive Order 12044 and 43 CFR Part 14. That portion of the proposed regulations for the interim program is exempt from the Section 102(2)(c) of the National Environmental Policy Act under Section 501(a) of the Surface Mining Act. The Department of the Interior has determined that the significant impacts of the proposed permanent program regulation on the quality of the human environment have previously been identified in the final environmental statement on the permanent program (OSM-EIS-1) made available on January 29, 1979. Accordingly, no environmental impact statement will be prepared. The documents supporting the determinations of significance and of environmental impact are available for inspection in Room 135 of the Interior South Building at the Washington, D.C. address given above.

Dated: April 10, 1980.

David A. Schuenke, *Acting Assistant Secretary, Energy and Minerals*.

The Department of the Interior proposes to amend Chapter VII of Title 30 of the Code of Federal Regulations as follows:

A.30 CFR Section 716.7(a)(2) is amended to read: [Page 25995]

### SECTION 716.7 - PRIME FARMLAND.

(a) \* \* \*

(2) Except as otherwise provided in this paragraph, the requirements of this section are applicable to any lands covered by a permit application filed after August 3, 1977. This section does not apply to:

(i) Any permit issued prior to August 3, 1977;

(ii) Any renewal or revision of a permit issued prior to August 3, 1977. For the purposes of this subparagraph, "renewal" of a permit shall mean a decision by the regulatory authority to extend the time by which the permittee may complete mining within the boundaries of the original permit, and "revision" of the permit shall mean a decision by the regulatory authority to allow

changes in the method of mining operations within the original permit area, or the decision of the regulatory authority to allow incidental boundary changes to the original permit; or

(iii) Lands included in any existing surface mining operation, for which a permit was issued for all or any part thereof prior to August 3, 1977, provided that:

(a) Such lands are part of a single continuous mining pit begun under a permit issued before August 3, 1977;

(b) The permittee had a legal right to mine the lands prior to August 3, 1977, through ownership, contract, or lease but not including an option to buy, lease or contract; and

(c) The lands contained part of a continuous recoverable coal seam that was being mined in the pit begun under a permit issued prior to August 3, 1977;

(iv) For the purposes of this paragraph a pit shall be deemed to be a single continuous mining pit even if portions of the pit are crossed by a road, pipeline, railroad or powerline or similar crossing.

(v) The exception granted by subparagraphs (i)-(iv) of this paragraph apply only to lands mined to the coal face and related benches prior to August 3, 1982.

\* \* \*

B. 30 CFR 785.17(a) is amended to read:

#### **SECTION 785.17 - PRIME FARMLANDS.**

(a) This Section applies to any person who conducts or intends to conduct surface coal mining and reclamation operations on prime farmlands historically used for cropland except:

(1) Any permit issued prior to August 3, 1977;

(2) Any renewal or revision of a permit issued prior to August 3, 1977. For the purposes of this subparagraph, "renewal" of a permit shall mean a decision by the regulatory authority to extend the time by which the permittee may complete mining within the boundaries of the original permit, and "revision" of the permit shall mean a decision by the regulatory authority to allow changes in the method of mining operations within the original permit area, or the decision of the regulatory authority to allow incidental boundary changes to the original permit; or

(3) Lands included in any existing surface mining operation, for which a permit was issued for all or any part thereof prior to August 3, 1977, provided that:

(i) Such lands are part of a single continuous mining pit begun under a permit issued before August 3, 1977;

(ii) The permittee had a legal right to mine the lands prior to August 3, 1977, through ownership, contract, or lease but not including an option to buy, lease or contract; and

(iii) The lands contained part of a continuous recoverable coal seam that was being mined in the pit begun under a permit issued prior to August 3, 1977;

(4) For the purposes of this paragraph a pit shall be deemed to be a single continuous mining pit even if portions of the pit are crossed by a road, pipeline, railroad or powerline or similar crossing.

(5) The exception granted by subparagraphs (1)-(4) of this paragraph apply only to lands mind to the coal face and related benches prior to August 3, 1982.