FEDERAL REGISTER: 45 FR 8241 (February 6, 1980)

DEPARTMENT OF THE INTERIOR
AGENCY: Office of Surface Mining Reclamation and Enforcement (OSM)

30 CFR Parts 700, 701, 761, 786, 816, 817
Permanent Regulatory Program; Modifications

ACTION: Proposed rulemaking.

SUMMARY: Modifications to the Permanent Regulatory Program are proposed to: (1) delete the inclusion of physically unrelated sites which total more than two acres as a type of operation covered by the regulations; (2) require that structures meeting certain conditions receive the exemption for existing structures; (3) exclude roads not actually used by the public from the definition of public roads; (4) allow the use of State case law for interpretation of documents relied upon to establish valid existing rights; (5) accept waivers obtained before August 3, 1977, and make waivers obtained after that date effective against subsequent owners for the purpose of approval of mining within 300 feet of an occupied dwelling; (6) exclude from the definition of irreparable damage reference to damage that "has not been corrected"; and (7) allow treatment of acid- or toxic-forming materials as an alternative to covering.

DATES: Comments must be received by March 7, 1980 at the address below by not later than 5:00 p.m. A public hearing will be held on February 25, 1980. Representatives of OSM will be available to meet with interested persons upon request between (date of publication) and (30 days after publication).

ADDRESSES: Written comments must be mailed or hand delivered to the Office of Surface Mining, U.S. Department of the Interior, Room 135, South Building, 1951 Constitution Avenue, N.W., Washington, D.C. 20240. Persons wishing to testify at the hearing should contact the person listed below under "For further information contact". A transcript of the public hearing, all written comments received, and summaries of meetings with representatives of OSM will be prepared and made available for public review in Room 135 of the Interior South Building.

FOR FURTHER INFORMATION CONTACT: Mary M. Crouter, Program Analyst, Office of the Deputy Director, Office of Surface Mining, U.S. Department of the Interior, South Building, 1951 Constitution Avenue, N.W., Washington, D.C. 20240; (202) 343-9158.

SUPPLEMENTARY INFORMATION:

These regulations are proposed to amend OSM's permanent program regulations published at 44 FR 15312 *et seq.* (March 13, 1979). The affected regulations, the rationale for the proposed changes, and the proposed rules are set forth below. The basis and purpose for the existing regulations now being proposed for amendment are found at 44 FR 14901-15309 (March 13, 1979). That basis and purpose statement is incorporated herein by reference insofar as it is consistent with these proposed amendments.

SECTION 700.11(b) - TWO-ACRE EXEMPTION.

Section 528(2) of the Act exempts from regulation under the Act surface coal mining operations which affect two acres or less. The congressional intent behind this section suggests that it should be narrowly construed. See S. Rep. No. 95-128, 95th Cong., 1st Sess. 97-98 (1977). At present, the regulations at 30 CFR 700.11(b) exclude from this exemption operations "conducted by a person who affects or intends to affect more than two acres at physically related sites, or any such operation conducted by a person who affects or intends to affect more than two acres at physically unrelated sites within one year." This language was intended to avoid potential abuse of this exemption by unscrupulous operators jumping from one small site which is less than 2 acres, to another. Unfortunately the language also covers legitimate operations of less than two acres conducted by the same operator. The language referring to physically unrelated sites in the current regulations is, therefore, proposed to be deleted. The proposed regulation would exempt al physically unrelated operations of two acres or less, irrespective of who conducts them. The Secretary would welcome, however, factual information concerning potential for abuse of this exemption and suggested regulatory language to eliminate any potential abuse within the confines of the law.

The amended regulation also states that the exceptions provided for in 30 CFR 700.11 do not apply to coal processing and preparation facilities. The Secretary believes the language of 30 U.S.C. 1278(2) indicates Congress did not intend that coal processing facilities would be included within the scope of the two-acre exemption. By its terms, the exemption applies only to

"*the extraction of coal* for commercial purposes where the surface mining operation affects two acres or less." 80 U.S.C. 1278(a) (emphasis added). Thus, rather than extending the exemption to all "surface coal mining operations" as that term is defined in Section 701(28) of the Act (30 U.S.C. 1291(28)), Congress limited its scope to activities involving the "extraction of coal." The two-acre exemption would, therefore, be confined to actual coal extraction and any necessary concomitants to that extraction, including haul roads. It would not include coal processing or other such activities subject to regulation under the Act, the purpose or need for which is unrelated to the process of extracting coal.

The Secretary has considered including in the proposed regulations a set of criteria to be used by the regulatory authority in determining whether sites are physically related. Such criteria have not been specifically proposed but the Secretary does solicit public comment on both the need for including criteria in the regulations and on the criteria being considered. Following consideration of comments received on this matter, OSM may include these or other criteria in the final rules. The criteria under consideration are: (1) whether the coal extraction operations are conducted or financed by the same operator, permittee, or principal, (2) whether the coal extraction operations occur along the same coal seam or seams, (3) whether the coal extraction operations use the same equipment, haul roads, loading or processing facilities, and (4) whether the coal extraction operations are in such physical proximity as to suggest an intent by the operator to avoid the requirements of the Act. Even without the criteria being included in the regulations, the Secretary believes that in making a determination as to whether any given sites are physically related the regulatory authority will need to balance each of these or similar factors. In determining whether the physical proximity of operations suggests an intent to avoid the requirements of the Act, the regulatory authority would consider whether the operator would have structured his operations in the same manner whether or not the Act applied to him. When two or more sites are found to be physically related, they should be treated as one operation and their acreage should be added together for purposes of determining whether they come within the exemption of Section 528(2) of the Act. The Secretary seeks comments on the appropriateness of the four proposed criteria as well as any other factors which should be applied to the determination.[Page 8242]

SECTION 701.11(e) (i) AND (ii) - EXISTING STRUCTURES.

Industry has challenged use of the word "may" in 30 CFR 701.11(e) (i) and (ii) on the basis that it gives the regulatory authority unfettered discretion to deny an exemption from the reconstruction requirements for an existing structure although the structure would otherwise qualify for the exemption. Industry suggests that the word "shall" be substituted for "may" in 30 CFR 701.11(e) (i) and (ii) to show that the exemption is mandatory if the necessary findings are made.

Industry believes that the preamble to 30 CFR 701.11(e) may be read to indicate that the Secretary did not intend the regulatory authorities to have this discretion. They argue that to require reconstruction would also be inconsistent with Judge Flannery's ruling on the interim program regulations. *In re Surface Mining Regulation Litigation,* 452 F. Supp. 327, 339-40 (D.D.C. 1978).

After careful review of the preamble and the permanent regulations, the Secretary proposes that the second "may" in 30 CFR 701.11(e) (i) and (ii) be changed to "shall". This change will reflect the Secretary's original intent and does not negate two factors which were of concern in the drafting the "existing structure" regulations. One factor was to allow sufficient flexibility for the States to adopt a more stringent regulatory approach for existing structures. Section 505 of the Act, 30 U.S.C. 1255, and 30 CFR 730.11 ensure that States may take a more stringent approach, such as requiring reconstruction of structures that do not comply with design standards but do comply with performance standards.

The second factor is the risk of failure for structures not constructed according to design criteria in the regulations. Existing structures may be in apparent compliance with the applicable permanent performance standards, or a comparable initial program standard which is as stringent. The risk of the structure's failure over the long term or inability to remain in compliance with the permanent standard may be increased, however, by its failure to be constructed in accordance with the design standard. OSM Final Regulatory Analysis, pp. 39-40 (1979).This factor is taken into account in 30 CFR 786.21(a) (1) (ii) and (a) (2) (i) (B). In order to grant an exemption from reconstruction, the regulatory authority must find that the structure complies with the appropriate permanent performance standards or the comparable initial standard which is as stringent. In addition, the regulatory authority must find that: "(ii) *No significant harm to the environment or public health or safety will result from use of the structure."* 30 CFR 786.21(a) (1) (ii), emphasis added. 30 CFR 786.21(a) (2) (i) (B) uses the same language. This language calls for the regulatory authority to find that, notwithstanding a structure's nonconformance with design standards, it will nevertheless be safe. If this finding is made, the Secretary believes the exemption from reconstruction should necessarily follow.

SECTION 761.5 - PUBLIC ROAD.

In 30 CFR 761.5, "public road" is defined to mean any thoroughfare open to the public for the passage of vehicles. The Secretary's proposed amendment would narrow the scope of this definition.

Section 522(e) (4) of the Act provides that, subject to certain exceptions, no surface coal mining operations shall be permitted "Within one-hundred feet of the outside right-of-way line of any public road." No reference is made in the current regulation to ownership or maintenance of such a road by a public agency, since the Secretary believes that roads used by the public over an extended period of time should be considered public, even if not maintained by a governmental entity. This is in line with Congress's findings and purposes in SMCRA, 30 U.S.C. 1201(c), (d) and 1202(a) and (m), to protect the health and safety of the public from the adverse disturbances of surface areas associated with surface coal mining operations which disturbances burden and adversely affect the public welfare.

The Secretary intends the proposed amendment to make the definition of public roads more consistent with the rationale, set forth in the preamble to the permanent program regulations (44 FR 14991), of protecting public access to and use of roads which actually have been and are being used by the public. This definition also is consistent with court holdings that the essential feature of a public road is that it is open to the public for travel, not that it is owned or maintained by a public agency. *E.g.*, *Burdis* v. *Texas & Pacific Ry, Co.,* 569 F. 2d 320 (5th Cir. 1978); *State* v. *O'Connor,* 184 A.2d 83 (N.J. 1926).

SECTION 761.5(c) - VALID EXISTING RIGHTS.

The present test in 30 CFR 761.5(c) for determining whether valid existing rights exist is based upon the case of *United States* v. *Polino,* 131 F. Supp. 772 (N.D. W.Va. 1965). This case is specifically mentioned in the legislative history of the valid existing rights provision. The *Polino* case concerned proposed mining of privately owned coal within a National Forest. The court held that Polino's right to mine depended on whether the deed conveying the coal to him specifically granted the right of extraction by surface mining. The court decided that unless the deed or lease "expressly grants stripping rights," the coal could only be mined by deep mining so as not to disturb the surface. The *Polino* decision relates to the nature of rights being conveyed between private parties and the method of interpreting the document which conveys that right. Congress relied on *Polino* to establish the requirement that an applicant who asserts ownership of the coal must show that the parties to the conveyance document contemplated that strip mining methods could be used and that strip mining was a usage or custom at the time and place of the execution of that document: "(In) West Virginia's Monongahela National Forest, strip mining of privately owned coal underlying federally owned surface has been *prohibited* as a result of * * * *Polino* * * * The phrase "subject to existing rights" is thus *in no way intended to open up national forest lands to strip mining where previous legal precedents have prohibited stripping."* H. Rep. 95-218, 95th Cong., 1st Sess. 95 (1977) (emphasis added).

On the other hand, Congress may have been using *Polino* as an example of one State's law concerning the interpretation of documents, rather than requiring that it be used nationwide. There is other legislative history to this effect. The 1974 Conference Committee stated that "(the) language of 522(e) is in no way intended to affect or abrogate any previous state court decisions." H. Conf. Rep. No. 93-1522, 93rd Cong., 2d Sess. 85 (1974).

In order to implement what the Secretary believes is Congress' intent that State case law on the subject not be overruled, the Secretary is proposing that Subsection (c) of Part 761.5 be changed to provide an alternative basis for valid existing rights determinations. Where a State has case law establishing some other standard for interpreting documents which convey mineral rights, this law will be used to interpret documents executed in that State.

SECTION 761.12(e) - WAIVERS.

The current language of Section 761.12(e) provides that where mining is proposed within 300 feet of any occupied dwelling, the mine plan or permit applicant must submit a waiver from the owner. The issue has been raised as to whether an applicant, who, prior to August 3, 1977, obtained from [WORD ILLEGIBLE] of an occupied dwelling the right to mine within 300 feet of that dwelling, would be prohibited from doing so if the owner refuses to waive rights created under Section 522(e) (5).[Page 8243]

The Secretary believes that this concern is well founded. Therefore, the Secretary proposes to amend Section 761.12(e) to make clear that after passage of the Act a new waiver would not be required. Thus, if prior to August 3, 1977, a mine plan or permit applicant had obtained from the owner of an occupied dwelling the right to mine close to that dwelling, the applicant would not be required to obtain a new waiver. The applicant would, however, have to submit the document as provided in 761.12(e) (1), showing the valid pre-Act waiver. The Secretary believes that this interpretation is legally correct and consistent with the language of Section 522(e) (5).

Another issued raised concerning Section 761.12(e) suggests that waivers which were obtained after August 3, 1977, should remain effective against subsequent knowing purchasers. The Secretary agrees with this suggestion and, therefore,

"BILLING proposed the additional language of 761.12(e) (3). The Secretary believes that this amendment has the advantage of providing certainty for operators. Pursuant to this change, an operator who had obtained a waiver would not be required to obtain a new one from a knowing purchaser each time the ownership of a dwelling changes. Furthermore, the Secretary believes that such an interpretation would not be unfair to subsequent owners who purchased the property with actual knowledge of the existing waiver and who, because of the waiver, may have been able to obtain the dwelling at a lower market price than if no waiver had been executed."

SECTION 786.5 - IRREPARABLE DAMAGE TO THE ENVIRONMENT.

The proposed rule revises the current definition of "irreparable damage to the environment" at 30 CFR 786.5. That definition currently encompasses damage that cannot be "or has not been" corrected. The proposed amendment deletes the phrase "or has not been" to reflect the plain meaning of the word "irreparable." Although the revision narrows the kinds of damages which can be considered irreparable for purposes of denying permits under Section 510(c) of the Act, it should not have any impact on the overall scope of that section. Section 510(c) of the Act and 30 CFR 786.17(c) already prohibit the issuance of permits to an applicant who is in violation of the Act until that applicant submits proof that the violation has been or is in the process of being corrected or that the applicant has filed and is pursuing in good faith an appeal of the violation. Thus, the law and the regulations provide reasonable assurance that no person will be issued a permit who has failed to correct violations of the Act.

SECTION 816.103(a), 817.103(a) - ACID-FORMING AND TOXIC-FORMING MATERIALS.

These sections control the disposal of acid-forming, toxic-forming, combustible, or other identified materials exposed, used, or produced during mining. The regulations adopted on March 13, 1979, require that the coal seam and the materials listed above be covered with at least 4 feet of nontoxic and noncombustible material. 30 CFR 816.103(a) (1) and 817.103(a) (1). The regulations also require treatment, if necessary, to neutralize toxicity. 30 CFR 816.103(a) (2) and 817.103(a) (2). The Secretary believes that these regulations conflict with Section 515(b) (14) of the Act, the initial program regulations (30 CFR 715.14(j), 715.17(g), 717.14(e), 717.17(g)), and certain parallel provisions of the permanent regulations (30 CFR 816.48, 817.48).

Section 515(b) (14) of the Act allows for the alternative of either covering *or* treating the materials controlled by 30 CFR 816.103(a) and 817.103(a). Section 515(b) (14) is implemented under the general authority of Section 516(b) (10) of the Act, for underground mining operations, 30 U.S.C. 1266(b) (10).

Moreover, the initial program regulations which address acid- and toxic-forming materials also allow for the alternative of covering *or* treating such materials. 30 CFR 715.14(j), 715.14(g), 717.14(e) and 717.14(g).

Further, in litigation in the initial program rules, sections 715.14(j) and 715.17(g) were sustained on the basis of the Secretary's ector, Office of representation that the rules allow for the control of acid- or toxic-forming materials by *either* covering *or* treatment. *In re Surface Mining Regulation Litigation*, 456 F. Supp. 1301, 1310 (D.D.C. 1978).

The permanent program counterparts to 30 CFR 715.14(j), 717.14(e) are at 30 CFR 816.103(a) and 817.103(a). The permanent program provisions on their face require covering and treatment in all instances and preclude the use of treatment as an alternative to covering at the operator's election. The preamble to this section does not specifically indicate that the Secretary intends to allow for alternatives of either cover or treatment. 44 FR 13229-15230 (March 13, 1979). This omission was apparently an oversight, because the permanent selling program counterparts to 30 CFR 715.17(g)/717.17(g) (30 CFR 816.48(c) and 817.48(c)) clearly allow for the use of either cover *or* treatment, 44 FR 15401, 15428.

Moreover, the preamble to Section 816.48 clearly explains that pursuant to Section 515(b) (14), of the Act, the OSM permanent rules are intended to allow the operator to either cover *or* treat acid- or toxic-forming materials, subject to certain safeguards. 44 FR 15168 (March 13, 1979).

For these reasons, the Secretary proposes to revise 30 CFR 816.103(a) and 817.103(a) to provide in the alternative for either cover or treatment of acid-forming or toxic-forming materials.

PUBLIC HEARING

A public hearing will be held on February 25, 1980, in the Department of the Interior Auditorium at 18th and C Streets, N.W., Washington, D.C. The hearing will begin at 9:00 a.m. Individual testimony at the hearing will be limited to 15 minutes. The hearing will be transcribed. Filing of a written statement at the time of given oral testimony would be helpful and facilitate

the job of the court reporter. Submission of written statements in advance of the hearing date whenever possible, to the person identified above under "For further information contact" would greatly assist OSM officials who will attend the hearing. Advance submissions will give OSM officials an opportunity to consider appropriate questions which could be asked to clarify or elicit more specific information from the person testifying. The administrative record will remain open for receipt of additional written comments until March 7, 1980.

Persons in the audience who have not been scheduled to speak and wish to do so will be heard after the scheduled speakers. Persons not scheduled to testify, but wishing to do so, assume the risk of having the public hearing adjourned if they are not present when all scheduled speakers conclude.

PUBLIC MEETINGS

Representatives of OSM will be available to meet between February 6, 1980 and March 7, 1980 at the request of members of the public. State representatives, industry officials, labor representatives, and environmental organizations, to receive their advice and recommendations concerning the content of the proposed regulations.

Persons wishing to meet the representatives of OSM during this time period may request to meet with OSM officials at the Washington office. OSM will be available for such meetings from 9:00 a.m. to noon and 1:00 p.m. to 4:00 p.m. local time Monday through Friday, excluding holidays, at this location. Summaries of meetings will be prepared and made promptly available for public review in Room 135 of the Interior South Building.

OTHER INFORMATION:

Pursuant to 43 CFR Part 14, the Department of the Interior has determined that the proposed rules are not significant and do not require a regulatory analysis. The "Determination of Significance" document prepared by OSM is available for inspection at the address indicated above.[Page 8244]

OSM has prepared an environmental assessment on these proposed amendments. That assessment resulted in a finding that the proposed rules will not have a significant impact on the quality of the human environment so as to require the preparation of an environmental impact statement. The environmental assessment is available for inspection at the address indicated above.

The principal authors of these proposed rules are: Carl Pavetto, Division of Inspection; Wil Wilson, Division of State Programs, Jose del Rio and Ray Aufmuth, Division of Technical Services; and Mary Crouter, Office of the Deputy Director.

Dated: January 31, 1980.

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

PROPOSED REGULATIONS

The following regulations in 30 CFR Chapter VII are amended as listed below:

PART 700 - GENERAL

SECTION 700.11 - APPLICABILITY.

* * *

(b) The extraction of coal for commercial purposes where the surface coal mining and reclamation operation incident to the coal extraction affects two acres or less, but not any coal extraction conducted by a person who affects or intends to affect more than two acres at related sites. All land disturbed by the coal extraction and incident to the coal extraction (including haul roads) and all bodies of water within the boundaries of the disturbed land shall be included in the two acre calculation. Provided, however, that this exemption from the requirements of the Act does not apply to coal loading, processing, or preparation facilities.

* * *

PART 701 - PERMANENT REGULATORY PROGRAM

SECTION 701.11 - APPLICABILITY.

* * *

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

(i) An existing structure which meets the performance standards of Subchapter K of this Chapter, but does not meet the design requirements of Subchapter K of this Chapter, may be exempted from meeting those design requirements by the regulatory authority. The regulatory authority shall grant this exemption on non-Indian and non-Federal lands only as part of the permit application process after obtaining the information required by 30 CFR 780.12 or 784.12 and after making the findings required in 30 CFR 766.21.

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

PART 761 - AREAS DESIGNATED BY ACT OF CONGRESS

SECTION 761.5 - DEFINITIONS.

* * *

Public road means any thoroughfare open to the public which has been, and is being used by the public for vehicular travel.

* * *

SECTION 761.5 - DEFINITIONS.

Valid existing rights means:

* * *

(c) Interpretation of the terms of the document relied upon to establish valid existing rights shall be based either upon applicable State case law concerning interpretation of documents conveying mineral rights or, where no applicable State case law exists, upon the usage and custom at the time and place where it came into existence, and upon a showing by the applicant that the parties to the document actually contemplated a right to conduct the same underground or surface mining activities for which the applicant claims a valid existing right.

* * *

SECTION 761.12 - PROCEDURES.

(e) [renumber existing 761.12(e) as 761.12(e) (1)]

(2) Where the applicant for a permit after August 3, 1977, had obtained a valid waiver prior to August 3, 1977, from the owner of an occupied dwelling to mine within 300 feet of such dwelling, a new waiver shall not be required.

(3) Where the applicant for a permit after August 3, 1977, had obtained a valid waiver as required under Section 522(e) (5) from the owner of an occupied dwelling, that waiver shall remain effective against subsequent purchasers who had actual knowledge of the existing waiver at the time or purchase.

* * *

PART 786 - REVIEW, PUBLIC PARTICIPATION, AND APPROVAL OR DISAPPROVAL OF PERMIT APPLICATIONS AND PERMIT TERMS AND CONDITIONS

SECTION 786.5 - DEFINITIONS.

As used in 30 CFR 786.17(d) and 786.19(i) -

* **

Irreparable damage to the environment means any damage to the environment that cannot be corrected by actions of the applicant.

PART 816 - PERMANENT PROGRAM PERFORMANCE STANDARDS - SURFACE MINING ACTIVITIES

SECTION 816.10 - BACKFILLING AND GRADING: COVERING COAL AND ACID- AND TOXIC-FORMING MATERIALS.

(a) Cover.(1) A person who conducts surface mining activities shall either cover, with a minimum of 4 feet of the best available nontoxic and noncombustible material, or, treat all exposed coal seams remaining after mining and all acid-forming, toxic-forming, combustible, or other materials identified by the regulatory authority as exposed, used or produced during mining. Cover or treatment shall be provided so as to neutralize toxicity, acidity and combustibility in order to prevent water pollution and sustained combustion and to minimize adverse effects on plant growth and land uses.

(2) Where necessary to protect against upward migration of salts, exposure by erosion, formation of acid or toxic seeps, to provide an adequate depth for plant growth, or otherwise to meet local conditions, the regulatory authority shall specify thicker amounts of cover using non-toxic material, or special compaction and isolation from ground water contact. [Page 8245]

(3) Acid-forming or toxic-forming material shall not be buried or stored in proximity to a drainage course so as to cause or pose a threat of water pollution.

PART 817 - PERMANENT PROGRAM PERFORMANCE STANDARDS - UNDERGROUND MINING ACTIVITIES

SECTION 817.103 - BACKFILLING AND GRADING: COVERING COAL AND ACID- AND TOXIC-FORMING MATERIALS.

(a) Cover. (1) A person who conducts underground mining activities shall either cover, with a minimum of 4 feet of the best available non-toxic and non-combustible material, or, treat all exposed coal seams remaining after mining and all acid-forming, toxic-forming, combustible, or other materials identified by the regulatory authority as exposed, used or produced during mining. Cover or treatment shall be provided so as to neutralize toxicity, acidity and combustibility in order to prevent water pollution and sustained combustion and to minimize adverse effects on plant growth and land uses.

(2) Where necessary to protect against upward migration of salts, exposure by erosion, or provide an adequate depth for plant growth, or to otherwise meet local conditions, the regulatory authority shall specify thicker amounts of cover using non-toxic material.

(3) Acid-forming or toxic-forming material shall not be buried or stored in proximity to a drainage course so as to cause or pose a threat of water pollution.

[FR Doc. [WORD ILLEGIBLE] Filed 3-5-80; 3:45 am]
BILLING CODE 4310-06-M