FEDERAL REGISTER: 46 FR 37232 (July 17, 1981)

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

30 CFR Parts 715, 816 and 817
Surface Mining; Disposal of Excess Spoil

ACTION: Final rules.

SUMMARY: OSM is amending 30 CFR 715.15 (interim program), 816.71 and 817.71 (permanent program) to allow controlled gravity transport of excess spoil from an actively mined upper bench to an existing lower bench where the lower highwall meets the upper bench with no intervening natural slope provided that spoil is not placed on the downslope of the lower bench.

EFFECTIVE DATE: August 17, 1981.

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SUPPLEMENTAL INFORMATION:

In response to questions raised by the Virginia Surface Mining Reclamation Association, OSM on August 11, 1980, at 45 FR 53183, proposed to revise 30 CFR 715.15, 816.71 and 817.71 to allow controlled gravity transport of excess spoil from actively mined upper benches to pre-existing lower benches whose highwalls meet the upper benches with no intervening natural slope. Specific requirements were proposed to ensure, among other things, that no spoil would be placed on the downslopes of the lower benches. The rationale for proposing these rules and for the specific proposed requirements is expressed in the preamble to the proposed rules, at 45 FR 53185.

A comment period of 30 days was provided, which closed on September 10, 1980. A public hearing on the proposed rules was held on August 29, 1980, at the Main Interior Building, 18th & C Streets, N.W., Washington, D.C. No comments were presented at this public hearing.

These rules revise the interim and permanent performance standards. The permanent program performance standards, including these revisions, are being reviewed with regard to Secretary Watt's goals of eliminating excessive, burdensome or counterproductive regulations and of more effectively and efficiently implementing the Surface Mining Control and Reclamation Act of 1977 (SMCRA). Further revisions in the permanent program performance standards may occur.

Differences between the final and proposed rules are discussed below in the responses to written and oral comments that were received.

1. One commenter asserted that "any procedure such as the one proposed which allows for the disposal of excess spoil must deal with the basic problem of determining how much spoil is excess." The commenter proposed that the operator be required to include in the permit application computations of how much spoil is necessary to return to approximate original contour (AOC) and how much spoil is excess. The intent of the proposed rules was to require the operator to demonstrate, prior to regulatory authority approval of use of gravity transport method, that sufficient spoil will remain on the upper bench for the purposes of eliminating the highwall and return to AOC. See proposed 30 CFR 715.15(a)(15)(B)(ii), 816.71(o)(2)(B) and 817.71(o)(2)(B). To make this obligation clearer, however, the final rules require that regulatory authority approval of use of the gravity transport method may not be given unless the operator demonstrates that only spoil unnecessary for elimination of the highwall and return of the upper bench to AOC will be moved by gravity transport. See final 30 CFR 715.15(a)(15)(A), 816.71(o)(1), and 817.71(o)(1). OSM expects that operator compliance with this provision will entail computation by the operator of the amount of spoil necessary for return to AOC.

The commenter also suggested that the operator include in the permit application a schedule of dumping the excess spoil in order to facilitate the role of the regulatory authority and its inspectors in ensuring that only spoil in excess of that necessary for return to AOC is disposed of on the lower bench. OSM rejects this suggestion. The Secretary does not believe that imposition of this requirement is justified by the marginal increase in ease of enforcement the requirement could attain.

2. One commenter urged OSM to require the operator to specify in the permit application specific gravity transport points and require the regulatory authority to approve these points as a permit condition. The proposed regulations required regulatory authority determination of where these points should be. OSM has accepted the comment to the extent of requiring operator determination of where the points will be and regulatory authority approval of the points selection.

3. Another commenter pointed out that the proposed regulations did not require the operator to handle the spoil in a timely manner when it was dumped onto the lower bench. The Secretary believes that the general spoil handling requirements (30 CFR 816.100/817.100 contemporaneous reclamation), reinforced by the concurrent compaction requirement of final 30 CFR 715(a)(15)(B), 816.71(o)(2)(D) and 817.71(o)(2)(D), address this issue Therefore, the suggestion has been rejected.

4. Several commenters indicated that the proposed regulations did not consider specific mining operations such as augering and second-cut mining on previously mined areas. The proposed regulations, though, address the disposal of excess spoil regardless of the type of mining operation from which that excess spoil is generated. If an augering operation or a second-cut operation on a previously mined area were to generate spoil in excess of that necessary to eliminate the highwall and return the area to AOC, then that excess spoil may well be considered for disposal by gravity transport.

5. Several commenters questioned the reference in the preamble of the proposed rules to an experimental practice allowing the use of spoil "lanes" or "chutes" for gravity transport of excess spoil where a nature slope intervenes between the two involved benches. These commenters feel that the utility of this practice has already been demonstrated and is not appropriately the subject of further experimental practice. These comments have been rejected because SMCRA prohibits gravity transport of spoil over the natural slope between benches. See comment response 10.

6. Several commenters suggested that the gravity transport method should be allowed with respect to benches created after August 3, 1977, the date of enactment of SMCRA. They argued that many benches created after that date are legal and in accord with applicable surface mining regulations. OSM acknowledges that benches have been created and legally abandoned after enactment of SMCRA. The final regulations allow use of the gravity transport method with respect to these benches if all other conditions are met.

7. One commenter suggested that the safety berm be constructed only on the "solid portion" of the lower bench because placing additional material on the "fill" portion of existing benches may contribute to instability. The commenter also stated that dumping of material onto the lower bench prior to construction of the berm may be necessary to enable construction of the safety berm where insufficient material exists on the lower bench. The final rule requires that the safety berm be constructed on the solid portion of the lower bench. See 30 CFR 715.15(a)(15)(B)(v), 816.71(o)(2)(E) and 817.71(o)(2)(E). {37233}

The intent of these rules is that the safety berm on the lower bench will usually be constructed prior to gravity transport of materials to this bench. In the event insufficient material is available to construct the berm, however, sufficient spoil may be gravity transported to the lower bench to construct the berm. The Secretary accepts this recommendation and the regulation has been amended to reflect this. See final 30 CFR 715.15(a)(15)(B)(v), 816.70(o)(2)(E) and 817.71(o)(2)(E).

8. One commenter questioned whether OSM should limit the source of the spoil that is transported to the lower bench. This commenter suggested that the source of the materials for reclamation of various benches in a multiple seam mining operation should be up to the discretion of the operator, so long as the requirements of the regulations are met. OSM does not believe that these or any of the other regulations governing the disposal of excess spoil require an operator to use specific materials on specific fill sites.

If, as in the example presented by this commenter, multiple seams are being mined, the spoil from the first (upper) seam may be transported to the second (middle) bench and down to the next bench (lowest) and so on, provided that all the requirements of these regulations are met, including, specifically, the requirement of 30 CFR 715.15(a)(15)(B)(i), 816.71(o)(2)(A) and 817.71(o)(2)(A) and the requirement that the lower benches onto which spoil is placed by gravity transport have been legally abandoned. See comment response 6.

9. Several commenters stated that the proposed regulations unnecessarily require safety berms on the lower bench in all instances. These commenters reason that, since the operator is responsible, in any event, for spoil placed on the downslope, the operator necessarily will take precautions to prevent this. One commenter asserted that safety berms are not the only means of preventing material from moving downslope off the lower bench and that the regulatory authority should be given the discretion to approve alternate means. This commenter did not, however, provide any examples of effective alternate means. The Secretary has not accepted these comments as the proposed rules indicate such berms are necessary to protect public safety.

However, the specific type or method of construction of the safety berm is left to the operator, thereby allowing flexibility in meeting these requirements.

10. One commenter felt that the proposed regulations unreasonably restrict use of the gravity transport method to upper benches that meet lower benches with no intervening natural slopes. The commenter reasoned that, in most cases, more environmental damage would be caused by constructing the reads, berms, etc., needed to haul material to a lower bench by vehicle than would be caused by controlled gravity transport. SMCRA, however, prohibits the placing of spoil on the downslope, and OSM interprets this as preventing gravity transport of spoil where the natural slope intervenes between the upper and lower bench. See preamble to the proposed gravity transport regulations at 45 FR 53184, col. 1 (Aug. 11, 1980).

11. Several commenters objected to the requirement in the proposed regulations that "all excess spoil on the lower solid bench" must be rehandled. These commenters requested that this statement be clarified to insure that the operator is not required to rehandle existing spoil on the lower benches. OSM agrees that existing spoil that has been placed legally on the lower bench does not have to be rehandled in all instances. Such spoil must, however, be rehandled if necessary to insure the stability of the fill. See final 30 CFR 715.15(a)(15)(B)(iv), 816.71(o)(2)(D) and 817.71(o)(2)(D).

12. OSM made two other changes in the wording of the proposed rules based on the general comments and its review of the proposed rules.

a. The phrase "* * * and, as such, is subject to all requirements of the regulations, including but not limited to, topsoil handling, hydrologic, revegetation and coal processing wastes requirements" was deleted from 30 CFR 715.15(a)(15)(B)(vi), 816.71(o)(2)(F) and 817.71(o)(2)(G). This phrase is unnecessary because it duplicates the existing mandate of the interim and permanent regulations that disturbed and affected areas are subject to these requirements. "Disturbed area" was substituted for "affected area" in 30 CFR 715.15(a)(15)(B)(vi) because the former but not the latter phrase is defined in the interim regulations.

b. The requirement of removing the safety berm was clarified. The proposed rules indicated that the berm must be removed "during final grading operations." This was not meant to require removal as the last step in grading. The rules were revised by replacing the word "during" with "by" in 30 CFR 715.15(a)(15)(B)(v), 816.71(o)(2)(E) and 817.71(o)(2)(F) to indicate that the berm could be removed during the period of grading as soon as safe handling methods would allow its removal.

13. One commenter recommended that the regulations be promulgated as proposed. OSM accepts this comment except for the revisions referred to in the previous responses to comments.

DETERMINATIONS. UNDER EXECUTIVE ORDER 12291, THE REGULATORY FLEXIBILITY ACT AND THE NATIONAL ENVIRONMENTAL POLICY ACT

OSM has examined these final rules according to the criteria of Executive Order 12291 (February 17, 1981) and determined that they do not constitute major rules. The economic impact of the rules is expected to be small, though beneficial to coal operators and consumers, because of the limited applicability of the rules.

The rules have also been examined pursuant to the Regulatory Flexibility Act, 5 U.S.C. 601 et seq ., and OSM has determined that the final rules will not have a significant impact on a substantial number of small entities. The final rules are expected to reduce the regulatory burden on small coal operators by allowing a previously prohibited means of spoil disposal when it is more economical.

OSM has determined that adoption of the final rules does not constitute a major federal action that would significantly affect the quality of the human environment. The rules are, therefore, exempt from the requirement to prepare a detailed statement pursuant to Section 102(2)(C) of the National Environmental Policy Act of 1969, 42 U.S.C. 4332(2)(C). {37233}

PART 715 - GENERAL PERFORMANCE STANDARDS

30 CFR 715.15(a) is amended by adding a new subparagraph (15) as follows:

SECTION 715.15 - DISPOSAL OF EXCESS SPOIL.

(a) General requirements. * * *

(15) Disposal of excess spoil from an upper actively mined bench to a lower pre-existing bench by means of gravity transport is permitted provided that:

(i) The operator receives the prior written approval of the regulatory authority upon demonstration by the operator that the spoil to be disposed of by gravity transport is not necessary for elimination of the highwall and return of the upper bench to approximate original contour; {37234}

(ii) The following conditions and performance standards in addition to the environmental performance standards of this part are met;

(A) The highwall of the lower bench intersects (meets) the upper actively mined bench with no natural slope between them;

(B) The gravity transport points are determined on a site specific basis by the operator and approved by the regulatory authority to minimize hazards to health and safety and to ensure that damage will be minimized should spoil accidentally move down-slope of the lower bench;

(C) The excess spoil is placed only on solid portions of the lower pre-existing bench;

(D) All excess spoil on the lower solid bench, including that spoil immediately below the gravity transport points, is rehandled and placed in a controlled manner to eliminate as much of the lower highwall as practicable. Rehandling and placing the excess spoil on the lower solid bench shall consist of placing the excess spoil in horizontal lifts in a controlled manner, concurrently compacted as necessary to ensure mass stability and prevent mass movement, and graded to allow surface and subsurface drainage to be compatible with the natural surroundings to ensure a long term static safety factor of 1.3. Spoil on the bench prior to the current mining operation need not be rehandled except to ensure stability of the fill.

(E) A safety berm is constructed on the solid portion of the lower bench prior to gravity transport of the excess spoil. Where there is insufficient material on the lower bench to construct a safety berm, only that amount of spoil necessary for the construction of the berm may be gravity transported to the lower bench prior to construction of the berm. The safety berm must be removed by the operator by final grading operations;

(F) The area of the lower bench used to facilitate the disposal of excess spoil is considered a disturbed area. {37234}

PART 816 - PERMANENT PROGRAM PERFORMANCE STANDARDS: SURFACE MINING ACTIVITIES

30 CFR 816.71 is amended by adding paragraph (o) as follows:

SECTION 816.71 - DISPOSAL OF EXCESS SPOIL: GENERAL REQUIREMENTS.

(o) Disposal of excess spoil from an upper actively mined bench to a lower pre-existing bench by means of gravity transport is permitted provided that:

(1) The operator receives the prior written approval of the regulatory authority upon demonstration by the operator that the spoil to be disposed of by gravity transport is not necessary for elimination of the highwall and return of the upper bench to approximate original contour;

(2) The following conditions and performance standards in addition to the environmental performance standards of this part are met:

(i) The highwall of the lower bench intersects (meets) the upper actively mined bench with no natural slope between them;

(ii) The gravity transport points are determined on a site specific basis by the operator and approved by the regulatory authority to minimize hazards to health and safety and to ensure that damage will be minimized should spoil accidentally move downslope of the lower bench;

(iii) The excess spoil is placed only on solid portions of the lower pre-existing bench;

(iv) All excess spoil on the lower solid bench, including that spoil immediately below the gravity transport points, is rehandled and placed in a controlled manner to eliminate as much of the lower highwall as practicable. Rehandling and placing the excess spoil on the lower solid bench shall consist of placing the excess spoil in horizontal lifts in a controlled manner, concurrently compacted as necessary to ensure mass stability and prevent mass movement, and graded to allow surface and subsurface drainage to be compatible with the natural surroundings to ensure a long-term static safety factor of 1.3. Spoil on the bench prior to the current mining operation need not be rehandled except to ensure stability of the fill;

(v) A safety berm is constructed on the solid portion of the lower bench prior to gravity transport of the excess spoil. Where there is insufficient material on the lower bench to construct a safety berm, only that amount of spoil necessary for the construction of the berm may be gravity transported to the lower bench prior to construction of the berm. The safety berm must be removed by the operator during final grading operations;

(vi) The area of the lower bench used to facilitate the disposal of excess spoil is considered an affected area. {37234}

PART 817 - PERMANENT PROGRAM PERFORMANCE STANDARDS: SURFACE MINING ACTIVITIES

30 CFR 817.71 is amended by adding paragraph (o) as follows:

SECTION 817.71 - DISPOSAL OF UNDERGROUND DEVELOPMENT WASTE AND EXCESS SPOIL: GENERAL REQUIREMENTS.

(o) Disposal of excess spoil from an upper actively mined bench to a lower pre-existing bench by means of gravity transport is permitted provided that:

(1) The operator receives the prior written approval of the regulatory authority upon demonstration by the operator that the spoil to be disposed of by gravity transport is not necessary for elimination of the highwall and return of the upper bench to approximate original contour;

(2) The following conditions and performance standards in addition to the environmental performance standards of this part are met:

(i) The highwall of the lower bench intersects (meets) the upper actively mined bench with no natural slope between them;

(ii) Only underground development waste and spoil in excess of that necessary to eliminate the highwall and return the upper bench to the approximate original contour may be placed on the lower solid bench;

(iii) The gravity transport points are determined on a site specific basis by the operator and approved by the regulatory authority to minimize hazards to health and safety and to ensure that damage will be minimized should spoil accidently move down slope of the lower bench;

(iv) The excess spoil is placed only on solid portions of the lower pre-existing bench;

(v) All excess spoil on the lower solid bench, including that spoil immediately below the gravity transport points, is rehandled and placed in a controlled manner to eliminate as much of the lower highwall as practicable. Rehandling and placing the excess spoil on the lower solid bench shall consist of placing the excess spoil in horizontal lifts in a controlled manner, concurrently compacted as necessary to ensure mass stability and prevent mass movement, and graded to allow surface and subsurface drainage to the compatible with the natural surroundings to ensure a long term static safety factor of 1.3. Spoil on the bench prior to the current mining operation need not be rehandled except to ensure stability of the fill.

(vi) A safety berm is constructed on the solid portion of the lower bench prior to gravity transport of the excess spoil. Where there is insufficient material on the lower bench to construct a safety berm, only that amount of spoil necessary for the construction of the berm may be gravity transported to the lower bench prior to construction of the berm. The safety berm must be removed by the operator by final grading operations;

(vii) The area of the lower bench used to facilitate the disposal of excess spoil is considered an affected area.

Dated: June 15, 1981.
Approved: William P. Pendley, Deputy Assistant Secretary, Energy and Minerals .

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