FEDERAL REGISTER: 46 FR 47720 (September 29, 1981)

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

30 CFR Parts 716 and 785
Surface Coal Mining and Reclamation Operations; Permanent Regulatory Program;
Prime Farmland Grandfather Rules

ACTION: Amendments to final rule.

SUMMARY: OSM is revising the Prime Farmland Grandfather Rules as published on January 23, 1981, *46 FR 7894*, the effective dates of which were postponed in Federal Register notices of February 4, 1981 *(46 FR 10707)*, March 23, 1981 *(46 FR 18023)*, April 3, 1981 *(46 FR 20211)*, April 29, 1981 *(46 FR 23924)* June 15, 1981 *(46 FR 31258)*, and August 14, 1981 *(46 FR 41046)*, and the revisions include removing the cut-off date of the exemption. This action is being taken after OSM solicited and received voluminous comments from the public on whether the rules should become effective, modified, or suspended indefinitely. Accordingly, the rules which take effect today exempt certain permits and revisions or renewals of those permits from both the special prime farmland permits application and performance standards of the Surface Mining Control and Reclamation Act.

EFFECTIVE DATES: The amendments to Sections 716.7 and 785.17 are effective on September 29, 1981.

FOR FURTHER INFORMATION CONTACT:
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SUPPLEMENTARY INFORMATION:

BACKGROUND

The statutory basis, legislative history and rulemaking history of the prime farmland grandfather rules appeared in the Notice of Proposed Rules *(45 FR 25992-95*, April 16, 1980) and Notice of Final Rules *(46 FR 7894-7900*, January 23, 1981). That material will not be repeated here, but is incorporated and made a part hereof unless otherwise stated in this notice.

RELATED LITIGATION

Several parties filed lawsuits after publication of the rules on January 23, 1981. These cases are in the early stages of litigation and are entitled: National Coal Association and American Mining Congress v. Watt, et al., Civ. No. 81-0693 (D.D.C.); Peabody Coal Company v. Watt, et al., Civ. No. 81-0645 (D.D.C.); Illinois Department of Mines and Minerals v. U.S. Department of the Interior, et al., Civ. No. 81-0708 (D.D.C.).

ANALYSIS OF COMMENTS

The final regulations published on January 23, 1981, exempted all lands included in pre-August 3, 1977, permits and all revisions or renewals of those permits. Continuations of pre-existing surface coal mining operations would be exempt where the lands are: (1) an extension of a continuous mining pit or pits; (2) part of a single permitted operation; and (3) part of a continuous recoverable coal seam. The regulations also required that the permittee demonstrate that he or she had a pre-August 3, 1977, legal right to mine the exempted lands, and established a cut-off date of August 3, 1982. Numerous public comments were received on the issues of whether to modify, issue or suspend the rules indefinitely pending the outcome of further rulemaking. These comments are summarized and responded to in the following paragraphs.

GENERAL COMMENTS

Several commenters expressed strong objection to the January 23, 1981, grandfather rule, stating that the rule will interfere with primacy and that the objectives of the Surface Mining Act will be better served by an indefinite postponement or extension of the January 23, 1981 rule followed by full notice and comment in a new rulemaking. Most of these commenters attached copies of their comments submitted at earlier stages of OSM's permanent program rulemaking on prime farmland and requested that those comments be reconsidered by OSM. Some commenters stated their belief that OSM had not seriously considered the

prior comments in developing the grandfather rules. Other commenters merely expressed strong objection without specifying any details.

Several commenters also expressed strong objection to further postponement of the rule stating that there are no compelling reasons for delaying the protection afforded prime farmland under the January 23, 1981 regulations. These commenters stated that the productivity of thousands of acres of prime farmland will be in jeopardy because no prior rules remain in effect; that allowing the January 23, 1981 regulation to take effect would not interfere with primacy; and that regulations on this subject are needed because Section 510 of the Surface Mining Act is sufficiently vague to require clarification. Some commenters stated that they believed that OSM's justification for requesting notice and comment amounted to a prejudgment because the agency had already decided to suspend the January 23, 1981 rule and have a new rulemaking on prime farmland grandfather issues. Among those commenters who opposed further delay in implementing the January 23, 1981 regulations were several Members of Congress and the Secretary of the Department of Agriculture.

OSM rejects the assertion that it has prejudged this issue by assuming that the January 23, 1981 regulations would be suspended after a perfunctory notice and comment period. This may have been the impression left by the March 23, 1981 Federal Register, "Notice of Suspension of Certain Rules in 30 CFR Chapter VII." *(46 FR 17191-92.)* As noted in the later Federal Register notice, the March 23, 1981 notice was published in error and was cancelled and superseded by the April 3, 1981 notice. *46 FR 20211,* April 3, 1981. OSM has carefully considered all public comments received, including those comments filed in previous rulemakings which were incorporated in the public's comments filed in this rulemaking. The comments received on the issues of "pre-existing permits," "renewals and revisions of pre-existing permits," "existing surface coal mining operations" and definitions of "continuous mining pit" and "continuous surface coal mining operation" are discussed in the January 23, 1981 Federal Register notice *(46 FR 7898-99)* and that discussion is adopted here and incorporated by and made a part hereof. As stated in the January 23, 1981 notice announcing the final rule, the Secretary interprets the June 30, 1980 decision of the Court of Appeals to authorize him to place a reasonable limit on the extent of grandfathering in order to carry out the "purposes and provisions" of the Surface Mining Act. See *46 FR 7895* (January 23, 1981) and In Re: Surface Mining Regulation Litigation, No. 78-2191, 78-2192, Slip Op. (D.C. Cir., June 30, 1980).

OSM is cognizant of the claims of the State of Illinois that the portions of the rules made effective today "fail(ed) to exempt or otherwise give account to the distinct differences between surface and underground coal mining, to the application of this rule to surface structures and facilities, and to the physical characteristics of certain continuous and ongoing surface coal mining operations in Illinois," Illinois Department of Mines and Minerals v. United States Department of the Interior, No. 81-0708, D.D.C. Petition for Judicial Review, p. 3, filed March 24, 1981. OSM has worked closely with the State of Illinois in developing these regulations (see discussion at *45 FR 25994-95,* April 16, 1980). OSM will continue to work closely with Illinois and all states in the context of state programs submissions and amendments in accommodating the physical characteristics of mining in each state. However, OSM makes this rule effective today in the belief that it is necessary to establish a general regulatory structure which responds to Congressional concern that the grandfather clause give some flexibility to existing operations and which clarifies a section of the Surface Mining Act which is accompanied by conflicting legislative history.

EXEMPTION TERMINATION DATE

OSM has also carefully considered all comments received on the August 3, 1982 exemption cut-off date. See 30 CFR 716.7(a)(2)(vi) and 785.17(a)(6) of the final regulations published on January 23, 1981. OSM promulgated regulations containing the 1982 exemption termination date based in part on the experience of the State of Illinois. See discussion in proposed rule *(45 FR 25994-95,* April 16, 1980) and final rule *(46 FR 7895-96,* January 23, 1981). Two comments were received from the State of Illinois (the Department of Mines and Minerals and the Department of Agriculture) supporting the use of the 1982 termination date. Other general comments in support of and in opposition to the 1982 date were also received. At this time, OSM believes that an orderly transition period between pre-Act and post-Act prime farmland standards may be necessary to reduce wide variations in application of the law and to provide certainty to the public, states and operators on the scope of Section 510(d) of the Act. The public comments received by OSM in past rulemakings and in this rulemaking demonstrate that considerable controversy surrounds the concept of uniform termination date. In order to provide maximum public participation and to enable OSM and commenters to gather additional information on potential solutions to this issue, OSM announces here its intention to engage in further rulemaking on this issue. Meanwhile, the 1982 termination date which appeared in the January 23, 1981 rules will not be made effective and will be deleted. Persons desiring to submit written comments for consideration in proposing a new rule on termination of grandfathering should send those comments to the individual listed under the heading "For Further Information Contact:" OSM is, of course, willing to work with individual States desiring to include a more stringent provision (i.e., a termination date) in their programs.

The Office does not agree that the action taken today will interfere with state primacy or destroy thousands of acres of prime farmland. As noted in the January 23, 1981, Federal Register notice *(46 FR 7897),* there is an orderly procedure and opportunity for states to amend their programs to take this rule into account. In addition, the interim program rule at 30 CFR 716.7(a)(2) will become effective today in States without primacy and in States with primacy for those operations not yet permitted under permanent programs. In addition, and as noted in some public comments, eligibility for grandfathering does not automatically result in inadequate reclamation of the land. Such operations remain subject to the regular non-prime farmland performance standards of the Surface Mining Act, including topsoil protection, revegetation, postmining land use and bonding.

EDITORIAL CORRECTION

The following line appearing in 30 CFR 716.7(a)(2)(ii) on January 23, 1981, was inadvertently omitted from 30 CFR 785.17(a)(2) -- (decision by the regulatory authority to allow) changes in method of mining operations within the original permit area, or the decision of the regulatory authority to allow (incidental boundary changes * * *). This correction makes the interim and permanent program regulations identical and is not considered a substantive change.

Statements Under E.O. 12291 and NEPA

OSM has determined that making this rule effective is not a major rule under Executive Order 12291 and a regulatory impact analysis will not be prepared.

OSM has determined that making this rule effective is not a major federal action significantly affecting the quality of the human environment based upon a finding of no significant impact (FONSI). The FONSI and environmental assessment are available to the public at OSM's Administrative Record, 1951 Constitution Avenue, N.W., Room 151, South Interior Building, Washington, D.C. 20240. Accordingly, an environmental impact statement will not be prepared.

Regulatory Flexibility Act

Pub. L. 96-354 requires that the head of an agency must make a certification of effect on small entities and publish the certification and reasons therefor in the appropriate Federal Register document. Following is the required certification.

I certify that making this rule effective will not have a significant economic impact on a substantial number of small entities. Potentially there are two groups who may be affected by the revised rules. They are small scale coal operators and small scale farmers who mine coal and grow their crops on prime farmlands. The numbers of small operators in the states most affected by mining are as follows: Kentucky 700, Indiana 30, and Illinois 20. However, the percentage of these operators mining on prime farmlands with a pre-August 3, 1977 permit is not available. This number is assumed to be small since the total acreage of prime farmland affected annually is relatively small. These same assumptions also are true for the number of farmers. In 1977 the annual affected prime farmland acreage was 21,800.

In forming these conclusions, it should be remembered that not all prime farmland is in crops and that even with a grandfather exemption the land must be returned to a "* * * condition capable of supporting the uses it was capable of supporting prior to any mining * * *". Overall, no national effect on small entities is expected and any localized regional impact would be minimal. The possible adverse effects would include the cost to the coal companies of meeting more stringent reclamation standards on prime farmlands and of these costs being passed directly on the coal consumer.

Dated: September 22, 1981.
Daniel N. Miller, Jr., Assistant Secretary, Energy and Minerals.

FINAL REGULATIONS

The following regulations in Chapter VII of Title 30 of the Code of Federal Regulations are amended as follows:

PART 716 -- SPECIAL PERFORMANCE STANDARDS

A. 30 CFR 716.7 (a)(2) and (a)(3) are added to read:

SECTION 716.7 - PRIME FARMLAND.

(a) * * *

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

(i) Lands on which surface coal mining and reclamation operations are conducted pursuant to any permit issued prior to August 3, 1977; or

(ii) Lands on which surface coal mining and reclamation operations are conducted pursuant to any renewal or revision of a permit issued prior to August 3, 1977; or

(iii) Lands included in any existing surface coal mining operations 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 surface coal mining operation begun under a permit issued before August 3, 1977; and

(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 contain part of a continuous recoverable coal seam that was being mined in a single continuous mining pit (or multiple pits if the lands are proven to be part of a single continuous surface coal mining operation) begun under a permit issued prior to August 3, 1977.

(3) For purposes of this section:

(i) "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;

(ii) 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;

(iii) a single continuous surface coal mining operation is presumed to consist only of a single continuous mining pit under a permit issued prior to August 3, 1977, but may include non-contiguous parcels if the operator can prove by clear and convincing evidence that, prior to August 3, 1977, the contiguous parcels were part of a single permitted operation. For the purposes of this paragraph, clear and convincing evidence includes, but is not limited to, contracts, leases, deeds or other properly executed legal documents (not including options) that specifically treat physically separate parcels as one surface coal mining operation.

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PART 785 -- REQUIREMENTS FOR PERMITS FOR SPECIAL CATEGORIES OF MINING

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

SECTION 785.17 - PRIME FARMLAND.

(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. This section does not apply to:

(1) Lands on which surface coal mining and reclamation operations are conducted pursuant to any permit issued prior to August 3, 1977; or

(2) Lands on which surface coal mining and reclamation operations are conducted pursuant to any renewal or revision of a permit issued prior to August 3, 1977; or

(3) Lands included in any existing surface coal mining operations 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 surface coal mining operation begun under a permit issued before August 3, 1977; and

(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 contain part of a continuous recoverable coal seam that was being mined in a single continuous mining pit (or multiple pits if the lands are proven to be part of a single continuous surface coal mining operation) begun under a permit issued prior to August 3, 1977.

(4) For purposes of this section:

(i) "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;

(ii) 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;

(iii) A single continuous surface coal mining operation is presumed to consist only of a single continuous mining pit under a permit issued prior to August 3, 1977, but may include non-contiguous parcels if the operator can prove by clear and convincing evidence that, prior to August 3, 1977, the non-contiguous parcels were part of a single permitted operation. For the purposes of this paragraph, clear and convincing evidence includes, but is not limited to, contracts, leases, deeds or other properly executed legal documents (not including options) that specifically treat physically separate parcels as one surface coal mining operation.

(Sections 201, 501, 527 and 529, Pub. L. 95-87 Stat. 445 *(30 U.S.C. 1201))*

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