FEDERAL REGISTER: 46 FR 7208 (January 22, 1981)

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

30 CFR Part 716
Prime Farmland: Initial Regulatory Program

ACTION: Final rules.

SUMMARY: The Office of Surface Mining Reclamation and Enforcement (the Office or OSM) is amending a portion of its initial regulatory program (42 FR 62639-62716, December 13, 1977, codified at 30 CFR Chapter VII, Subchapter B) relating to prime farmland. The changes and the basis and purpose of each are discussed below. The Office is required to effect these changes primarily as a result of the decisions of the United States District Court in In Re: Surface Mining Regulation Litigation , 452 F. supp. 327 (D. D.C. 1978) and 456 F. Supp. 1301 (D. D.C. 1978). (The Office is also promulgating regulation changes which are not the direct result of the court's decision.) These final regulations are intended to replace those portions of the prime farmland regulations which the court enjoined and remanded to the Secretary of the Interior for reconsideration, to clarify some provisions of the regulations, and to make the Office's initial regulations with respect to prime farmland more analogous to the permanent regulatory program on prime farmland.

EFFECTIVE DATE: February 23, 1981.

ADDRESSES: Director, Office of Surface Mining Reclamation and Enforcement, Department of the Interior, Washington, D.C. 20240, 202/343-4006.

FOR FURTHER INFORMATION CONTACT: Donald F. Smith, Agricultural Engineer, Branch of Applied Research, Office of Surface Mining, U.S. Department of the Interior, 1951 Constitution Ave. N.W., Washington, D.C. 20240; 703/756-6964.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 13, 1977 (42 FR 62639-62716), the Office promulgated final initial regulations (30 CFR Chapter VII, Subchapter B), as required by Section 501(a) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. Section 1251(a), (SMCRA or the Act). Section 716.7 of the initial regulations pertains to surface coal mining and reclamation operations conducted on prime farmland (42 FR 62693-95 (1977)).

The validity of Section 716.7 was challenged in In Re: Surface Mining Regulation Litigation , 452 F. Supp. 327 (D. D.C. 1978 and 456 F. Supp. 1301 (D. D.C. 1978). The court's opinions in these cases as they relate to prime farmland will be discussed below in greater detail under the headings "HISTORICAL USE CLAUSE" and "GRANDFATHER EXEMPTION." The regulations discussed under those headings are intended primarily to replace those portions of the initial prime farmland regulations which the court enjoined and remanded to the Secretary of the Interior for reconsideration. These rules together with the unaffected portion of Section 716.7 of the initial regulations constitute the initial regulations of the Office with regard to surface coal mining and reclamation operations on prime farmland. Other revisions to the prime farmland grandfather clause are now pending before the agency. (See discussion below.)

HISTORICAL USE CLAUSE

Sections 510(d) and 515(b)(7) of the Act provide for special environmental protection during the mining and reclamation process for lands classified as "prime farmland." Section 701(20) of the Act defines prime farmland as having the same meaning as that previously prescribed and published by the Secretary of Agriculture and lists several factors which shall be the components of that definition.

In addition, Section 701(20) requires that land meeting the technical criteria of the Department of Agriculture must also have been historically used for intensive agricultural purposes (30 U.S.C. Section 1291(20)). The statutory definition of prime farmland was implemented in the initial regulations of the Office in Section 716.7(a) and (b) (42 FR 62693-95 (1977)). The technical criteria which had previously been published by the Secretary of Agriculture were referenced in Section 716.7(b) and

the pertinent portion of the technical criteria was reproduced for the convenience of the reader (42 FR 62694 (1977)). Section 716.7(b) was not challenged in the litigation and thus was not an issue in the District Court's opinion.

Section 716.7(a)(1) of the initial regulations further defined the concept of historic use for intensive agricultural purposes by specifying the historical use period (the period of time the land must have been in crop production) as at least 5 years out of the 20 years preceding the date of the permit application (42 FR 62693 (1977)). The District Court enjoined this part of the initial regulations because the regulation was not explained or supported in the preamble and the regulation as written was overly broad. (See In re: Surface Mining Litigation , 456 F. Supp. at 1312 (D. D.C. 1978)).

GRANDFATHER CLAUSE

Section 510(d)(2) of the Act, 30 U.S.C. Section 1260(d)(2), sets forth a grandfather exemption with respect to some surface coal mining and reclamation operations as follows:

Nothing in this Subsection shall apply to any permit issue 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.

The grandfather clause was implemented in the initial regulations of the Office as Section 716.7(a)(2). (See 42 FR 62693 (1977)).

The District Court held that this Section was generally a reasonable exercise of the Secretary's discretion in implementing the Act and properly limited the areas which are exempt from the prime farmland provision of the initial regulations. (See In Re: Surface Mining Regulation Litigation , 452 F. Supp. at 340 (D. D.C. 1978)). However, to the extent that Section 716.7(a)(2) as originally promulgated attempted to limit the effect of the grandfather exemption to the permit application requirements of Section 510(d)(1) of the Act, the court found that the exemption was an incorrect application of the statute. The court found that the exemption stated in Section 510(d)(2) of the Act specifically applies to the prime farmland performance standards of Section 515(b)(7), 30 U.S.C. Section 1265(b)(7), as well as to the permit application requirement of Section 510(d)(1) of the Act. The Court then enjoined enforcement of the provisions of Section 716.7 to the extent they imposed performance standards on operations exempt from those requirements under Section 510(d) of the Act. Thus, the grandfather clause, as a result of the Court's opinion, should be construed as exempting surface coal mining and reclamation operations operating under permits issued prior to August 3, 1977, or renewals or revisions thereof, from both the prime farmland permit application requirements and performance standards.

SUPPLEMENTAL JUDICIAL DECISION AND RELATED RULEMAKING

As noted above, the District Court has previously upheld the Secretary's interim program regulations implementing the grandfather clause of the Act.

On April 16, 1980, OSM published proposed revisions to 30 CFR 716.7(a)(z) and its counterpart in the permanent program. 30 CFR 785.17(a) (45 FR 25992-95, April 16, 1980, comment period extended at 45 FR 39448, June 10, 1980; comment period reopened 45 FR 56364, August 25, 1980.) The proposed revision to the permanent program grandfather regulation was mandated by the Department's decision to suspend that regulation as part of the permanent program litigation. OSM proposed a revision in the interim program regulations in an attempt to respond to difficulties encountered in attempting to enforce the regulation as written. States were also having difficulty in applying the interim program regulation. {7209}

On May 2, 1980, the U.S. Court of Appeals for the District of Columbia issued a decision invalidating the interim program regulation at 30 CFR 716.7(a)(2).In Re: Surface Mining Regulation Litigation, Nos. 78-2190, 78-2191, 78-2192, Slip op. 26-31.

In the proposed regulations which are the subject of this notice (44 FR 33628, June 11, 1979), OSM proposed to revise 30 CFR 716.7(a)(2) to take into consideration the District Court's holding that operations having permits issued prior to August, 3, 1977, or renewals or revisions thereof, were exempt from both the prime farmland permit application requirements and performance standards. See 44 FR 33628, June 11, 1979. This change was reflected in the deletion of the words, "regarding actions to be taken before a permit is issued", from the original version of 30 CFR 716.7(a)(2), second sentence, December 13, 1977, and is preserved in the final rule published today. Compare 42 FR 62693, December 13, 1977, and 44 FR 33628, June 11, 1979, and see discussion below.

The proposed grandfather regulation for the interim program published on April 16, 1980, does not contain any of the second sentence of 30 CFR 716.7(a)(2) which appeared in previous versions of the regulation. See 45 FR 25995, April 16, 1980. This sentence appears to be unnecessary based on the scope of the grandfather exemption as published in the April 16, 1980 proposed grandfather regulation. However, OSM will retain the second sentence of 30 CFR 716.7(a)(2) until the proposed regulations published on April 16, 1980 are published in the Federal Register in final form. That Federal Register will discuss and explain the treatment of 30 CFR 716.7(a)(2) in its entirety.

PUBLIC HEARINGS

Public hearings on the proposed regulations were held on June 27, 1979, in Washington, D.C., Indianapolis, Indiana, and Kansas City, Missouri. Scheduled morning, afternoon, and evening sessions were held to give the public maximum time to participate in the development of the rules. Members of the public took advantage of these public hearings by submitting their comments, both verbally and written, to representatives from the Office. These comments were then made part of the public record and were carefully considered in preparation of the final rules.

PUBLIC MEETINGS

Representatives of the Office were available to meet with members of the public between June 15, 1979, and July 27, 1979, at their request to receive their advice and recommendations concerning the content of the proposed regulations. Notice of the Office's availability was published in the proposed rules at 44 FR 33626, June 11, 1979. One public meeting was held at 1951 Constitution Avenue, NW; Washington, D.C. The comments received at this meeting were made a part of the public record and carefully considered in preparation of the final rules.

ANALYSIS OF PUBLIC COMMENTS

The Office received 33 different comments from 30 individuals, organizations, and government agencies during the comment period. This preamble to the final rules contains the bases and purpose, alternative considered, and decisions made by the Office in responding to significant comments. The Office considered significant comments to be those urging the adoption of viable alternatives or questioning the provisions in the proposed regulations, and those which provided reasonable rationale, justification, technical references, or other materials supporting the recommendations or comments. Insignificant comments, that is, of a more general nature or those which correct minor errors, appear in the administrative record but are not discussed in the preamble.

In its June 11, 1979, Federal Register notice, the Office proposed a total of six changes. Briefly described, these proposed changes were as follows: (1) Defining historically used for cropland as 5 out of 10 years; (2) measuring the historical use period from the date of acquisition of the land for mining purposes; (3) providing for the regulatory authority to have flexibility to classify as prime farmland those lands important to the state or local economy; (4) providing for the regulatory authority to have flexibility to classify as prime farmland those lands taken out of cropland use of more that 5 years in 10 due to ownership circumstances which do not relate to the capability of the land to produce crops; (5) substitution of the term "cropland" for "cultivated crops"; and (6) implementing the grandfather clause of the Act (Section 510(d)(2)) as exempting surface coal mining and reclamation operations operating under permits issued prior to August 3, 1977, or renewals or revisions thereof, from both the prime farmland permit application requirements and performance standards of the Act. These proposals and the comments received are discussed below.

MEASURING THE HISTORICAL USE PERIOD

The initial regulations promulgated on December 13, 1977 provide that the date from which the historical use period must be measured is the date of the permit application (42 FR 62693). In its June 11, 1979 notice, the Office proposed to change the date of measurement to the date of acquisition of the land for the purpose of mining. Several commenters felt that the historical use period should begin prior to the date of the permit application. They felt that the whole program would make more sense and could be more easily implemented; that land purchased prior to mining and held out of cropland use would no longer be prime farmland and therefore should not be required to be reconstructed to prime farmland standards; that it may be difficult to establish as a matter of fact, how the land was actually used in instances where a long period of time is involved; that the time period proposed could provide a basis of historical farming determinations far in excess of the past 10-years concept; that the starting data was adequate in the final rules of December 13, 1977, and it should continue to be acceptable; that in some instances the burden of proof would be impossible to comply with; that a time frame starting from the date of filing of a mining application is straight forward, enforceable and workable; that proposed Section 716.7(b)(2)(ii) gives the regulatory authority the flexibility to curtail abuses of the present system.

Another commenter felt the historical use period should begin from the date of the Act, August 3, 1977. He felt that the regulations pose an unnecessary hardship on the operators to delve into the use of land acquired many years ago; that local records may not indicate the use of the land, in which case the operator would be forced to base a decision on historical use on the memories and hearsay of local residents, and the belief that, "the years prior to the date of the land purchase would better represent a prime farmland historical use, because it would not be influenced by the mining activity", (44 FR 14931, March 13, 1979), is mere supposition. Also, the regulation, as proposed, would require the regulatory authority to determine motives for acquiring the land. Furthermore, the land would have to be returned to row crop use despite the historical use as other than cropland. Finally, an operator who is an owner or lessee of prime farmland is as likely, as is any other private owner, to use the land for row crops, in order to make a profit from the land. {7210}

Several other commenters supported the historical use clause as proposed by OSM. They felt that the existing regulations provided a loophole for coal operators, and needed revision; that coal companies can control the land and let it remain in pasture 5 years prior to mining; that this type of loophole was being used by coal companies in Illinois until that State passed a law in 1975 which required all prime farmland to be reconstructed to prime farmland standards; that the intent of the Act and initial regulations is to identify a class of very productive soil, "prime farmland", and ensure that those lands were restored to their original productivity.

As a result of careful evaluation of these comments, the Office continues to feel that the years prior to the date of the land purchase would better represent a prime farmland historical use, because it would not be influenced by the mining activity. The Office does not expect the historical use period to extend beyond the year 1949 as stated at 44 FR 14931, March 13, 1979. This will alleviate some of the difficulty in determining land use in the past. The fact that land can be held out of crop land use for a period of time, thus avoiding the prime farmland reconstruction standards, was one of the reasons for changing the date from which the historical use period was to be measured. The Office feels that these rules are more sensible and consistent with the final permanent program regulations. The date of measurement in the permanent program definition at 30 CFR 701.5 has been upheld by the District Court in In Re: Permanent Surface Mining Regulation Litigation, No. 79-1144, D.D.C., slip op. at 8, n. 7 (May 16, 1980). It is true that proposed Section 716.7(b)(2)(ii) does give the regulatory authority more flexibility to include additional agricultural lands under the prime farmland reconstruction standards. Several commenters have pointed out that a few regulatory authorities have been avoiding the prime farmland reconstruction standards. The Office feels that these State regulatory authorities may not exercise their more stringent options immediately.

Several commenters disagreed with OSM's statement that cropland records for the 5 out of 10 years are readily available from local sources. 44 FR 33626, June 11, 1979. OSM has considered these objections. In instances where specific cropland history is not readily available, the regulatory authority may accept other methods such as affidavits, certifications from landowners, aerial photography, cropping history, etc, to reveal the historical cropland use.

DEFINING HISTORICALLY USED FOR CROPLAND AS 5 YEARS OR MORE OUT OF 10 YEARS

Several comments were received with respect to the historical use period of any 5 years out of the 10 years preceding the date of acquisition of the land for the purposes of mining. Some commenters supported the five year in ten criterion as representative of modern agricultural practices. Most of these commenters supported this criterion only if the full set of changes proposed by OSM are adopted as final rules. They stated that the relationship between the 5 years in 10 years criterion and the start of the historical use period at the date of acquisition of the land for the purposes of mining (together with the other proposed changes) was an important step in preserving prime farmland.

Some commenters felt that the historical use period should remain for 20 years because land ownership of 10 years prior to mining is common where the land was purchased for purposes other than farming. These commenters expressed the belief that much land acquired and left fallow would not fall within the historical use period criteria. Other commenters suggested that five consecutive years be used rather than any five years out of the ten year historical use period citing as support an unspecified conferees' report. An additional commenter suggested that any use for agricultural purposes in the entire past history of land use qualified land as prime farmland and that a specified number of years of historical use is bound to leave out of the prime farmland designation areas suitable for cropland use. Some commenters stated that all soils meeting the U.S. Department of Agriculture criteria for prime farmland should be reclaimed regardless of the historical use of those soils.

The Office is unable to accept those comments which recommend placing no limitations on or eliminating the concept of historical use in the definition of prime farmland. OSM must be guided by the statutory definition of prime farmland which specifies that such land shall meet the technical definition of the U.S. Department of Agriculture and must have been historically

used for intensive agricultural purposes. Section 701(20), 30 U.S.C. 1291(20). Congress did not intend that any past use for agricultural activities qualified the land as prime farmland (123 Cong. Rec. 8110, May 20, 1977 (daily ed.) The Office continues to believe that a historical use period of 10 years prior to the date of acquisition of the land for the purpose of mining constitutes a reasonable method for establishing agricultural land use with recent and generally more available data. Fifty percent or more of this period represents the predominant land use, i.e., 5 or more years out of 10. The Office finds nothing in the legislative history of the Act to support the assertion that the 5 years must be consecutive.

PROVIDING FLEXIBILITY TO THE REGULATORY AUTHORITY TO CLASSIFY ADDITIONAL LANDS A PRIME FARMLAND

OSM's proposed regulations (proposed Section 716.7(b)(2) (ii) and (iii)) included provisions to allow regulatory authorities to classify as prime farmland lands important to the State or local economy and lands taken out of cropland use for more than 5 years out of 10 for reasons not related to the capability of the land to produce crops (e.g., retirement, litigation, death). Several commenters felt that proposed Section 716.7(b)(2) (ii) and (iii) should be deleted because: (1) the operator is being penalized for management and production decisions by persons over which he has no control, (2) these provisions are vague and overly broad, and (3) the rule is not rational or authorized by the statute. Several commenters also supported these provisions. These subsections are included to permit the regulatory authority to consider local conditions and practices and to protect prime farmland that may be temporarily inactive for reasons not related to crop capability. The Office believes these provisions are consistent with the intent of Congress to allow the States to have a lead role in administering the Act (Section 503) and to have more stringent laws and regulations than those mandated by the Act (Section 505). (See also the preamble to the permanent program regulations at 44 FR 14931-2, March 13, 1979).

One commenter requested a punctuation change with respect to Section 716.7(b)(2)(iii) suggesting that a semicolon following the word "or" preceding subparagraph (iii) will make it clear that subparagraphs (i), (ii), and (iii) are intended to be separate and independent bases for a determination that land has been historically used for cropland. {7211}

The Office rejects this comment because these criteria are not intended to be separate and independent bases. The regulatory authority may make a determination based upon "additional cropland history" or "some fact of ownership or the land" to only increase the minimum cropland acreage identified in Section 716.7(b)(2)(i). The regulation has been revised to reflect this intent (the phrase on increasing acreage has been moved to the end of subparagraph (iii)).

Other comments suggested that these provisions should be drafted to permit the regulatory authority to exclude small size or odd shape parcels and parcels which do not form a viable economic unit. The Office has not accepted this comment because its has no authority to provide a variance from the specific prime farmland requirements of the Act. However, the initial regulations allow for reasonable flexibility in meeting the standards of the Act where small or odd shaped parcels are involved. These parcels may be consolidated and relocated so long as the requirements of Section 716.7 of the regulations are met. Compliance with Section 716.7 has a result in which the aggregated amount of prime farmland that is restored equals the amount that existed before mining and satisfies the prime farmland reconstruction requirements.

SUBSTITUTION OF THE TERM "CROPLAND" FOR "CULTIVATED CROPS"

The Act defines prime farmland as lands which meet certain technical criteria and which have been historically used for intensive agricultural purposes (Section 701(20) of the Act). For purposes of the initial regulations, "intensive agricultural purposes" was defined as "cultivated crops." (See Sections 716.7(a)(1) and 716.7(d)(1), 42 FR. 62693 and 62694 (1977) respectively.) The Office proposed amending 30 CFR 716.7 to substitute "cropland" for "cultivated crops" because cropland is a term with a long history of use by the Department of Agriculture and is a basis for collection of statistical data on crop production and land use. (See 44 FR 33628, June 11, 1979).

One comment received suggested replacing the term "cropland" with the phrase "intensive agricultural activities", returning to this definition the exact language of the statute. The Office has not made this change. As noted above, the term cropland is appropriate because of its history of use by the governmental agency with responsibility to define prime farmland. In addition and as noted in the preamble to the permanent regulations, intensity of agricultural use refers to the amount of economic input, less land costs, that is expended to produce a crop (44 FR 14931, March 13, 1979).

Intensive farming is farming in which a comparatively large amount of labor and working capital is used per acre of farmland. Accordingly, the Office has defined "intensive agricultural purposes" to mean cropland for purposes of the initial and permanent regulations.

IMPLEMENTATION OF SECTION 510 OF THE ACT (THE "GRANDFATHER" CLAUSE)

As noted in the above discussion, the District Court enjoined enforcement of the provisions of 30 CFR 716.7 to the extent they imposed prime farmland performance standards on operations exempt from those requirements under Section 510(d)(2) of the Act. The Office proposed a change which would have the effect of exempting qualified operations from both the prime farmland permit application requirements and performance standards (See proposed Section 716.7(a)(2)). The Office received no comments on the proposed change. This revision to the initial regulations does not relieve an operator from compliance with all other applicable performance standards of the initial program for those lands which, but for the application of the grandfather clause, would qualify for classification as prime farmland.

The Office did, however, receive numerous comments on other aspects of the grandfather clause regulations which were not directly affected by the proposal of June 11, 1979. Issues raised in the comments include contiguous expansion, revisions or renewals, use of types of permits utilized in grandfathering decisions, and revegetation standards. Some commenters recommended eliminating grandfathering expansion entirely. The Office is cognizant of concerns regarding the implementation of the grandfather clause in Section 510(d) of the Act. Those comments are technically outside the scope of the proposal published for comment on June 11, 1979. Since the close of the comment period on that proposal, OSM has published proposed rules on the scope of Section 510(d)(2) of the Act in the permanent program. (See 45 FR 25992-95, April 16, 1980.) These comments will be transferred to that rulemaking. This action is particularly appropriate since many commenters expressed their general views on the correct interpretation of the statute -- an issue fundamental to the April 16, 1980, proposed rulemaking.

MISCELLANEOUS COMMENTS

One commenter noted that the preamble to the proposed regulations implied that the regulatory authority had some flexibility in identifying prime farmland. The Office agrees with this commenter that the Department of Agriculture defines prime farmland (Section 701(20) of the Act) and that the latitude of the regulatory authority is with respect to historical use (30 CFR 716.7(b)(2) (ii) and (iii)). However, no change is required in the regulations.

One commenter suggested that the Office make further provisions for land that has been brought into agricultural use more recently than the 5 years out of 10 years, where special changes such as irrigation or new agricultural techniques, have made such land use feasible in a lesser time period. The commenter felt that the special environmental protection afforded land in use for longer time periods should be made applicable to these newer prime farmlands. The regulatory authority may designate these lands under 30 CFR 716.7(b)(2) (ii) and (iii). Alternatively, the Department of Agriculture may in the future undertake to recognize new techniques in its definition of prime farmland in 7 CFR Part 657, which in turn is part of OSM's definition (See Section 716.7(b)(1)). The Office believes that these are the appropriate means for accommodating as yet undefined technological advances.

One commenter suggested that the reference in proposed Section 716.7(b)(1) to 7 CFR Part 657 should be changed to 7 CFR 657.5(a). The Office acknowledges that 7 CFR 657.5(a) specifically defines prime farmland and that other lands not classified as prime farmlands (e.g., unique farmland) as also defined in 7 CFR Part 657.However, the Office believes the suggested change is unnecessary since prime farmland is clearly defined in only one subsection of 7 CFR Part 657.

A commenter questioned the proposed change to 30 CFR 716.7(d)(1) as having no explanation. The term "cropland" was placed in Section 716.7(d)(1) for reasons stated in the preamble to the proposed change at 44 FR 33628, June 11, 1979. (See also discussion above on comments received on substituting "cropland" for "cultivated crops".)

One commenter questioned the reference to Section 702(d) as a basis for an exemption from the environmental impact statement requirement of the National Environmental Policy Act. Furthermore, this commenter stated that an impact statement should be prepared since an emergency situation does not exist for revisions to the initial regulations. This comment correctly points out a typographical error. The correct statutory reference in Section 501(a) of the Act. The Office believes that the unqualified exemption in Section 501(a) of the Act applies to all regulations of the initial program. Accordingly, no impact statement has been prepared. {7212}

DRAFTING INFORMATION

These changes to the interim program regulations and the accompanying preamble have been drafted by Donald F.

Smith, Agricultural Engineer, and Arlo Dalrymple, Agronomist, Technical Services and Research, OSM, Washington, D.C. (703) 756-6964.

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. Section 501(a) of the Act (30 U.S.C. Section 1251(a)) exempts this action from the environmental impact statement of the National Environmental Policy Act.

Dated: January 12, 1981.
Joan M. Davenport, Assistant Secretary -- Energy and Minerals.

1. 30 CFR 716.7 (a) and (b) are removed in their entirely and new Section 716.7 (a) and (b) is added as follows:

SECTION 716.7 - PRIME FARMLAND.

(a) Applicability.

(1) Permittees of surface coal mining and reclamation operations conducted on prime farmland shall comply with the general performance standards of Part 715 of this chapter in addition to the special requirements of this section.

(2) The requirements of this section are applicable to any permit issued on or after August 3, 1977. Permits issued before that date and revisions or renewals of those permits need not conform to the provisions of this section. Permit renewals or revisions shall include only those areas that --

(i) 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.

(b) Definitions. For purposes of this section, the following definitions are applicable.

(1) Prime farmland means those lands which are defined by the Secretary of Agriculture in 7 CFR 657 and which have been historically used for cropland.

(2) Historically used for cropland means (i) lands that have been used for cropland for any 5 years or more our of the 10 years immediately preceding the acquisition, including purchase, lease, or option, of the land for the purpose of conducting or allowing through resale, lease, or option the conduct of surface coal mining and reclamation operations; (ii) lands that the regulatory authority determines, on the basis of additional cropland history of the surrounding lands and the lands under consideration, that the permit area is clearly cropland but falls outside the specific 5-years-in-10 criterion, or (iii) lands that would likely have been used as cropland for any 5 out of the last 10 years immediately preceding such acquisition but for some fact of ownership or control of the land unrelated to the productivity of the land, in which case the regulations for prime farmland may be applied to include more years of cropland history only to increase the prime farmland acreage to be protected.

(3) Cropland means land used for the production of adapted crops for harvest, alone or in a rotation with grasses and legumes, and includes row crops, small grain crops, hay crops, nursery crops, orchard crops, and other similar speciality crops.

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