

FEDERAL REGISTER: 46 FR 7894 (January 23, 1981)

DEPARTMENT OF THE INTERIOR

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

30 CFR Parts 716 and 785

Prime Farmlands: Interim and Permanent Regulatory Programs

ACTION: Final rules.

SUMMARY: The Department is revising the grandfather exemption to the prime farmland provisions of Section 510(d) of the Surface Mining Control and Reclamation Act in the interim regulatory program, 30 CFR 716.7(a)(2), and the permanent regulatory program, 30 CFR 785.17(a). The final rules exempt all pre-August 3, 1977, permits and all revisions or renewals of those permits from the special prime farmland performance standards established by Section 510(d)(1) of the Act. They also allow continuations of pre-existing mining operations where the lands to be grandfathered are an extension of a mining pit or pits permitted and in existence on August 3, 1977. All such prime farmland exemptions will terminate on August 3, 1982.

EFFECTIVE DATE: February 23, 1981.

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SUPPLEMENTARY INFORMATION:

BACKGROUND

Section 510(d)(1) of the Surface Mining Control and Reclamation Act of 1977 (the Act) gives special protection to the nation's prime farmlands in two main ways. First, an operator who desires to mine these lands must show that he has the technological capability to restore the lands to their premining productivity. Second, if a satisfactory showing is made, the Act then mandates the operator to take special environmental protection measures during operations, including soil handling measures not required of other mining operations. Section 515(b)(7).

The Congress chose, however, not to apply this standard immediately to all surface coal mining operations and provided in Section 510(d)(2) of the Act:

Nothing in this subsection shall apply to any permit issued prior to the date of enactment of this Act, or to any revisions or renewals thereof, or to any existing surface mining operations for which a permit was issued prior to the date of enactment of this Act.

This provision exempts or "grandfathers" the listed operations from the restoration showing requirement and from the performance standards designed for prime farmlands.

To carry out Section 510(d)(2), the Department adopted separate regulations for the interim and permanent regulatory programs. As originally adopted for the interim program on December 13, 1977 (42 FR 62693-94, codified at 30 CFR 716.7(a)(2)), the regulations provided:

The requirements of this section are applicable to any permit issued on or after August 3, 1977. Permits issued before that date and revisions and renewals of those permits need not conform to the provisions of this section regarding actions to be taken before a permit is issued. Permit renewals or revisions shall include only those areas that –

(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.

The intent of this regulation was "to allow permit renewals or revisions to include expansions of existing operations" under limited conditions, thereby assuring a reasonable transition period for the industry. 42 FR 62661, December 13, 1977.

By contrast, the permanent program regulation, 30 CFR 785.17(a), adopted on March 13, 1979 (44 FR 15373), provided an exemption only for those "areas where mining is authorized under permits issued or mining plans approved prior to August 3, 1977 * * *." The permanent rule exemption was designed to implement congressional intent "to prevent indefinite expansion of mining in prime farmland areas if operators cannot achieve compliance with the prime farmland performance standards." 44 FR 15084, March 13, 1979.

Both the interim and permanent regulations were challenged by the coal industry. The interim regulations were generally sustained in the District Court as a reasonable exercise of the Secretary's discretion in implementing the Act (In Re: Surface Mining Regulation Litigation, 452 F. Supp. 327, 340 (D.D.C. 1978)), but were overturned in the Court of Appeals (In Re: Surface Mining Regulation Litigation, No. 78-2190, 78-2191, 78-2192, Slip op. at 26 (D.C. Cir., May 2, 1980) as amended by order dated June 30, 1980. Prior to the decision of the Court of Appeals, the Department voluntarily suspended the permanent program regulation. 44 FR 77454-55, December 31, 1979.

In the litigation, as well as in the interim and permanent program rulemakings, the primary issue has been whether the Act allows an exemption for areas of ongoing mines that were not covered by state permits prior to August 3, 1977, and, if so, how extensive an area could be exempt. The legislative history of the Act shows that this issue was of major congressional concern. During presentation of the final Conference Committee Report, H.R. Rep. No. 95-493, 95th Cong., 1st Session (July 12, 1977) to both Houses of Congress, contradictory statements of intent were made on the floor of both Houses. On one side were several members of Congress who believed that the grandfather exemption would be limited to those lands already included in state permits. On the other side were those who understood that the grandfather exemption protected not only permitted operations, but also allowed continuation for an extended period of those operations outside permit areas. For example, Congressman Tsongas, with the approval of Congressman Udall, stated that the exemption was not intended to give grandfathered operations "the right of contiguous or noncontiguous expansions that were not specified or authorized in the originally approved and grandfathered permits." 123 Cong. Rec. H7588-89 (Daily ed., July 21, 1977). On the other hand Senator Metcalf noted agreement with Senator McClure's statement that "the exclusion will apply to continued operation of an ongoing mine beyond the acreage and time covered in the existing permit * * * just so long as the continuance does, in fact, constitute a continued operation of an ongoing mine." 123 Cong. Rec. S12442 (Daily ed., July 20, 1977).

While the legislative history contains conflicting views, the Court of Appeals has ruled on the issue of whether any lands unpermitted as of August 3, 1977, may be grandfathered. In responding to a petition for rehearing of its May 2, 1980, panel decision in the interim program litigation, the Court made it clear that the Secretary must extend the grandfather exemption beyond the actual, pre-1977 permit area:

The issue essentially is whether, under the Section 502(d) exclusion from the Act's more rigorous reclamation requirements of "any existing surface mining operations for which a permit was issued prior to August 3, 1977," there can be any ongoing operations on land that, although contiguous, was not covered by the permit. We believe that, if the quoted statutory provision is to have any meaning at all, there can be; and that the legislative history of the last-minute addition to the Act of the words quoted above, disclosed a Congressional purpose that there can be. The Secretary's interim regulation to the contrary was thus in conflict with the statute. (footnote omitted). In re: Surface Mining Regulation Litigation, No. 78-2190, 78-2191, 78-2192, Slip op. (D.C. Cir., June 30, 1980).

In reaching this conclusion the Court deleted language previously used in its May 2, 1980, decision which implied that the exemption was nearly limitless. The Secretary thus interprets the June 30, 1980, decision to authorize him to place a reasonable limit on the extent of grandfathering in order to carry out the "purposes and provisions" of the Act. See Section 201(c)(2) of the Act. {7895}

PROPOSED RULES

After the District Court's ruling, but prior to the Court of Appeals May 2, 1980, decision, the Secretary proposed identical interim and permanent program grandfather regulations interpreting Section 510(d)(2). 45 FR 25992-25995, April 16, 1980. The rules took a new approach and did not directly follow either of the prior rules. The Secretary proposed to allow grandfathering in three specific instances. First, the proposed regulations grandfathered lands included in permits prior to August 3, 1977. The proposal corresponds to the first of the three statutory clauses in Section 510(d)(2). Second, the proposed regulations grandfathered permitted lands if the permits were "renewed" or "revised" within the meaning of the Act. In other words, the grandfather exemption would be available if the term of the permit were lengthened (a renewal) or if the

method of mining within the permit were changed (a revision). Neither of these exemptions would allow new lands (other than incidental boundary changes) to be grandfathered. This approach corresponds to the second statutory clause in Section 510(d)(2). Third, to cover the third clause of Section 510(d)(2), the proposed regulations added a new basis for grandfathering contiguous mining areas, and placed a 1982 limitation on the period of time for which this exemption would be valid.

The comment period on the proposed rule was extended once and later reopened to allow the public to comment on how the Court of Appeals' decision of June 30, 1980, affected the proposal. 45 FR 39448, June 10, 1980; 45 FR 56364, August 25, 1980. The Secretary has now considered all of the comments and the recent court decisions and has decided to adopt the rules as proposed, with only minor changes, for both the interim and permanent programs.

FINAL RULEMAKING

The final rules exempt all lands included in pre-August 3, 1977, permits and all revisions or renewals of those permits. 30 CFR 716.7(a)(2)(i) and (ii) and 785.17(a)(1) and (2). The final rules also allow continuations of pre-existing surface coal mining operations where the lands to be exempted are: (1) an extension of a continuous mining pit of pits; (2) part of a single permitted operations; and (3) part of a continuous recoverable coal seam. Moreover, the permitted must demonstrate that he or she had a pre-August 3, 1977, legal right to mine the exempted lands. 30 CFR 716.7(a)(2)(iii) and 785.17(a)(3).

The proposed regulations substantially anticipated the modified decision of the Court of Appeals. In accordance with that decision's interpretation of the Act, the final regulations allow some grandfathering outside of the original pre-August 3, 1977, permit area and establish a grandfathering cut-off date of August 3, 1982. The regulations respond to the congressional concern that the grandfather clause give some flexibility to existing operations. See, e.g., 123 Cong. Rec. S8104 (Daily ed., May 20, 1977).

The regulations also respond to congressional concern that mining operations in different states be accorded equal grandfathering treatment. 123 Cong. Rec. S8802 (Daily ed., May 26, 1977). This concern is reflected in Section 101(g) of the Act in which Congress has noted that uniform mining and reclamation standards are essential to avoid distortions of competition among coal producers in different states. The Secretary believes that a fixed cut-off date for grandfathering is necessary to respond fully to these congressional concerns.

The regulations are also based on the prevailing congressional concern, the protection of the nation's prime farmlands. See for example, Sections 102(f), 510(d)(1), and 515(b)(7) of the Act and 123 Cong. Rec. S8104 (Daily ed., May 20, 1977). To satisfy this concern and these statutory requirements, the Secretary believes that he has a duty to ensure that full environmental protection is made applicable to all prime farmlands within a reasonable time. a cut-off date ensures that mining operations cannot continue for a period far beyond the time needed to provide a fair and reasonable transition period.

In establishing a fixed cut-off date while extending the grandfather exemption beyond the immediate permit area in special cases, the Secretary is mindful of Illinois' experience with grandfathering and has considered the practical implications of these changes. Illinois has been the state where application of these changes has raised the most controversy. In applying a fixed cut-off date and extended grandfathering, Illinois has grandfathered 12 thousand acres which were not included in pre-August 3, 1977, permits. Illinois limited the scope of these decisions by having all exemptions expire in 1982. See discussion of *In re: Southwestern Illinois Coal Corporation (The Captain Mine)*, Docket No. RA 78-1 at 45 FR 25994, April 16, 1980. Conversely, Illinois' decisions were expansive in that mining sites were deemed contiguous even if two sites were physically unconnected except by long stretches of haul-roads. See discussion of *Midland Coal Company v. Andrus*, No. 79-1172 (D. Ill. Dec. 21, 1979), vacated May 28, 1980, at 45 FR 25994, April 16, 1980. The state's policy with respect to contiguity was based on its view that some reasonable extension of grandfathering beyond the permit area was needed. The Secretary has reviewed Illinois' exemption decisions and finds that virtually all come within the new rule; two exceptions have been identified but both involve mines that are now inactive and consequently will not be affected by this rulemaking.

The final regulations allow a five-year period for pre-existing, permitted prime farmland operations to remain exempt from the Act's special prime farmlands permitting and performance standard requirements. This five-year period gives the mining companies adequate time for transition and allows them opportunity to meet the new permitting and performance standards and to conduct any new tests they might need. This five year period is identical to the basic five year permit term established by Section 506(b) of the Act. (The Secretary, however, does not view the proviso in Section 506(b) as an appropriate vehicle for extending the August 3, 1982, date). The Secretary believes that the statutory permit term creates an inference of the reasonableness of this provision. Finally, and perhaps most importantly, the five-year term is identical to that chosen by Illinois after that state carefully considered the condition of the mining industry there. Companies in Illinois (and, to

a lesser degree, elsewhere) have relied upon this limit. While this reliance does not prevent the Secretary from adopting a different standard, it has been a major factor in seeking a workable resolution of this difficult problem. {7896}

The Secretary considered several alternatives in addition to the August 3, 1982, time limit: no time limitation, a later limit such as 1987, and an earlier limit. Each of the alternatives is less successful than the final regulation in carrying out the multiple congressional concerns noted above and frustrates one or more of the purposes to be achieved. A shorter limit would tend to restrict the ability of mining companies to make a smooth transition and does not share the statutory basis of the five year term. Longer or unrestricted time limits err in the other direction. They would provide too much time, thereby unnecessarily sacrificing the productivity of prime farmlands, and would undermine the progress that Illinois has made in reaching a reasonable solution to the problem. For these reasons, the Secretary has decided not to change the 1982 cut-off date as set forth in the proposed rule.

With respect to physical contiguity, there is further need to define those operations that qualify for the exemption. For example, an operation partially or fully permitted before August 3, 1977, which mines continuously along a seam, clearly qualifies under the regulation. The more difficult question involves partially or fully permitted operations where mining areas are physically separated. The regulation promulgated today will not allow breaks except those caused by roads or similar facilities which bisect but do not connect two parcels.

Upon further consideration, however, the Secretary has concluded that a single continuous surface coal mining operation for purposes of grandfathering could include non-contiguous parcels. Accordingly, the proposed rule has been amended by changing Sections 716.7(a)(2)(iii)(A) and (C) and 785.17(a)(3)(i) and (iii) to include the concept of "continuous surface coal mining operation" and by adding Sections 716.7(a)(2)(v) and 785.17na(5) to explain that phrase. The additions and amendments allow non-contiguous parcels to be grandfathered if the operator can present clear and convincing evidence that, prior to August 3, 1977, the non-contiguous parcels were part of a single continuous surface coal mining operation. A single continuous surface coal mining operation is presumed to consist only of a single continuous mining pit unless the permittee can meet the "clear and convincing" proof requirement.

The Secretary cannot anticipate nor has a rule been established for the type or amount of evidence an operator must produce to meet this burden of proof. This is an evidentiary matter to be determined by the regulatory authority. Examples of such evidence might include signed contracts, mining plans, permit applications or other legal documents specifically treating physically separate parcels as a single mining unit. On the other hand, if an operator lacked a legal interest in all of the property, there would be a strong presumption against a finding of a single unit. Convenience of the operator or generalized plans without specific proof of a legal interest would be inadequate to meet the "clear and convincing proof" test. This limited expansion of the grandfather exemption is also adopted with the express understanding that its expansion is closely and integrally tied to the August 3, 1982, time limit. Without the time limit, the expanded exemption would clearly present an unacceptable risk that operations could be indefinitely exempted.

Finally, there is a minor change in Section 716.7(a)(2). "After August 3, 1977," has been changed to "on or after August 3, 1977," in order to comport with the statutory language at Section 510(d)(2). For additional clarity, "and" has been added after the semi-colon at Sections 716.7(a)(2)(iii)(A) and 785.17(a)(3)(i); "or" has been added after the semi-colon at Sections 716.7(a)(2)(i) and 785.17(a)(1). "Surface mining operation" has been changed to "surface coal mining operation" whenever necessary to comport with the Act, the regulations, and congressional intent (see discussion under the analysis of public comments).

RELATED RULEMAKING

On June 11, 1979, the Department proposed six revisions to 30 CFR 716.7 of the interim regulations in order to implement the District Court's decision generally sustaining those regulations. See, *In Re: Surface Mining Regulation Litigation*, 452 F. Supp. 327, 340 (D.D.C. 1978), and 44 F.R. 33628, June 11, 1979. 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 for more than 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 exemption of the Act (Section 510(d)(2)).

Final regulations on these six changes will soon be published by the Department in the Federal Register (citation and date of publication presently unavailable; hereinafter referred to as the "historical use" rulemaking). The first five changes

described above and in the final "historical use" rulemaking notice are not affected by the instant rulemaking. The sixth proposed change, the revision of the interim program grandfather exemption (42 FR 62661, December 13, 1977, codified at 30 CFR 716.7(a)(2)), is affected by the instant rulemaking. Following is a discussion of the evolution and current status of the grandfather exemption regulation.

On June 11, 1979, the Department proposed to revise 30 CFR 716.7(a)(2) to clarify that Section 510(d)(2) of the Act exempted surface coal mining operations operating under permits issued prior to August 3, 1977, or renewals or revisions thereof, from both the prime farmland permit application requirements and special performance standards of the Act. 44 FR 33628, June 11, 1979. This revision was accomplished by proposing the deletion of the words "regarding actions to be taken before a permit is issued" from 30 CFR 716.7(a)(2) as originally promulgated on December 13, 1977 (44 FR 62694). Subparagraphs (i) and (ii) of 30 CFR 716.7(a)(2), as published on December 13, 1977, were not affected by the June 11, 1979, proposal. This proposed deletion was mandated by the District Court's decision in *In Re: Surface Mining Regulation Litigation*, 452 F. Supp. at 340 (D.D.C. 1978).

As noted in the recent "historical use" rulemaking, the Department received no comments on this proposed change. Comments on other exemption issues such as contiguity, revisions, renewals, and other matters were, however, received. These have been transferred to this rulemaking for review, consideration and response, and are analyzed below. In summary, the Department has recently published in its "historical use" rulemaking as final rules the six changes proposed on June 11, 1979. As part of the recent "historical use" notice of final rulemaking, the clause "regarding actions to be taken before a permit is issued" has been deleted from 30 CFR 716.7(a)(2).

In the instant rulemaking, the Department is affecting all subsections of 30 CFR 716.7(a)(2). Accordingly, the version of 30 CFR 716.7(a)(2) recently published as part of the "historical use" rulemaking is now entirely replaced by the final regulations published today. {7897}

For the convenience of the public, the following table shows the current status of all subsections of 30 CFR 716.7:

Subsection of regulation	Where to find the final regulation
Section 716.7	
(a)(1)	The "historical use" rulemaking
(a)(2)	The instant rulemaking (published today).
(b)(1)	The "historical use" rulemaking
(b)(2)	The "historical use" rulemaking.
(b)(3)	The "historical use" rulemaking.
(c)	42 FR 62694, Dec. 13, 1977, codified at 30 CFR 716.7(c).
(d)(1)	The "historical use" rulemaking 42 FR 62694-95, Dec. 13, 1977, codified at 30 CFR 716.7(d) et seq.
remainder of (d), (e), (f), (g)	

STATE PROGRAMS

State programs must have provisions which are consistent with the final permanent rule, Section 785.17(a), in accordance with 30 CFR Part 732. However, at this time, resubmission is pending for numerous other state programs because of injunctions issued against the states. The Secretary is also developing other new permanent program legislative rules at this time. Accordingly, the Secretary has determined that state programs need not contain provisions consistent with today's new permanent program rule at this time. After review and final decision on state programs submitted before March 4, 1980, the states will be given the opportunity to amend their programs as appropriate to make them consistent with the new permanent rule.

In the meantime, state programs must have provisions consistent with the Surface Mining Control and Reclamation Act of 1977 and those Federal regulations issued on March 13, 1979, and which have not been suspended. States may, if they wish, adopt provisions implementing federal regulations adopted after March 13, 1979.

Nonetheless, the interim program rule, Section 716.7(a)(2), will be effected in those states with and without approved permanent state programs 30 days from publication in the Federal Register.

All states, regardless of primacy status, are therefore expected to apply the interim program rule commencing 30 days from publication to each operation until that operation receives its permanent program permit. The Secretary believes that efficient implementation of these revised rules would lead states with approved programs to encourage all permit applicants to comply with the new rules in their permanent program applications, even if the state program is not yet revised to reflect the new rules.

PUBLIC HEARINGS

Public hearings on the proposed grandfather regulations were held on April 30, 1980, in Washington, D.C. and on May 15, 1980, in Springfield, Illinois. Sessions were scheduled to begin in the morning and to continue until all those intending to speak had opportunity to do so. Members of the public took advantage of these public hearings by submitting their comments, both verbally and written, to representatives from OSM. These comments were then made part of the public record and were carefully considered in preparation of the final rules.

PUBLIC MEETINGS

Representatives of OSM were available to meet members of the public at their request between April 16 and May 30, 1980, between June 10 and June 25, 1980, and between August 25, and September 4, 1980, to receive their advice and recommendations concerning the content of the proposed regulations. Notice of OSM's availability was published in the proposed rules at 45 FR 25993, April 16, 1980, the extension notice at 45 FR 39448, June 10, 1980, and the reopening notice at 45 FR 56364, August 25, 1980.

ANALYSIS OF COMMENTS

In its April 16, 1980, Federal Register notice, 45 FR 25992-25995, the Department proposed identical interim and permanent program prime farmland grandfather regulations interpreting Section 510(d) of the Act. Briefly described, the Secretary proposed to allow grandfathering on prime farmlands permitted prior to August 3, 1977, for renewals or revisions of pre-August 3, 1977, permits, and for certain extensions of pre-existing mining operations where the grandfathered lands are an extension of a mining pit. All exemptions were proposed to terminate on August 3, 1982. The proposed rule was opened to public comment, meetings and hearings as noted above.

As a result of a thorough review and consideration of the submitted comments, the Department has promulgated final rules. These are uniform for interim and permanent program. They depart from the proposed rules only by the addition of a limited modification which allows non-contiguous parcels, which are found by the regulatory authority to be part of a single continuous surface coal mining operation permitted prior to August 3, 1977, to be exempted until August 3, 1982, from the special prime farmlands permitting requirements and performance standards.

In response to the proposed rule on the grandfather exemption, the Department received 30 sets of written comments in addition to the oral testimony taken at the public hearings of April 30 and May 15, 1980. Written comments were received essentially from four sources: governmental authorities, concerned citizens (primarily farmers), private environmental organizations, and coal mining companies and organizations composed of such companies.

This section discusses the comments presented by the public and the decisions made by the Department in response to those comments. The Department considered significant comments to be those urging the adoption of viable alternatives or questioning the provisions in the proposed regulation, and those which provided reasonable rationale, justification, technical references, or other materials supporting the recommendations or comments. Insignificant comments, that is, those of a more general nature or which correct minor errors, are included in the administrative record for this rulemaking but are not discussed here.

GENERAL COMMENTS

While the bulk of the comments discussed specific aspects of the proposed rulemaking, some comments were directed toward the rules in general. One group of comments concerned the impacts of *In re: Surface Mining Regulation Litigation*, No. 78-2190 et al. (D.C. Cir., May 2, 1980), as modified (D.C. Cir., June 30, 1980), which postdated the publication of the proposed rules. Some commenters suggested that the proposed regulations be withdrawn and new regulations proposed to

ensure compliance with the findings in those decisions. The Secretary is of the opinion that the final rules comply with the Court of Appeals' modified decision. Because there are no major changes from the proposed rules, it is unnecessary for the rules to be withdrawn and repropounded. The changes that have been made in the proposed rules have resulted largely from the Department's accepting certain comments.

Commenters have disagreed about the Court decision's effect on the interim and permanent program regulations relating to the grandfather clause. One commenter contended that the decision touched only interim program regulations and thus the permanent program regulation could be independently formulated and contain separate provisions. Another contended that both the interim and permanent program regulations were governed by the Court decision. The Secretary agrees with the latter viewpoint. The Court of Appeals based its decision on the language in Section 510(d)(2) of the Act. That section does not differentiate between the interim and permanent program with respect to the grandfather clause. Moreover, as noted in the April 16, 1980, proposed rulemaking at 45 FR 25993, the decision to adopt similar rules "is an attempt to respond to the difficulty the Department has encountered in attempting to enforce the current grandfather clause and in problems State have had in applying the regulation." Hence, the Secretary has decided to promulgate identical provisions for the grandfather clause exemption in the interim and permanent programs. {7898}

A second group of comments suggested alternative mechanisms for the implementation of the grandfather clause exemptions. One commenter recommended returning to the approach in the permanent regulations adopted March 13, 1979 (44 FR 15373) and suspended December 31, 1979 (44 FR 77454-55). The Secretary concluded, however, that further rulemaking was necessary as a result of issues raised in the permanent program litigation. See 44 FR 77454, December 31, 1979.

Some commenters favored a case-specific determination on the applicability of the exemption to individual mining operations based on suggested criteria (e.g., mining plans, maps, and documents relating to the mining operation which were prepared before August 3, 1977; information concerning the company's legal and financial commitments relating to the operation; governmental documents and approvals relating to the operation). The flaw in this approach is that it would undermine the uniform treatment of mining operations in different states as required by the Act. The criteria suggested by the commenters of necessity depend upon information developed in conjunction with pre-Act state permit requirements. The application of these suggested criteria would thus result in exemptions based on the vagaries of pre-Act state permit procedures. See testimony of John Colon (National Coal Association/American Mining Congress), May 15, 1980, pp. 53-54. Congress clearly intended "* * * that such existing mines should continue in operation independent of the tortuous nature of states' permit machinery." In re: Surface Mining Regulation Litigation, supra. (May 2, 1980) at 31, fn. 18. Moreover, Congress explicitly stated in the Act that national standards were necessary to insure that competition among coal producers in different states would not undermine the ability of the individual states to control coal operations within the states. Section 101(g). Congress recognized the importance of uniformity in the regulatory standards. Thus the commenters' approach is at odds with congressional intent. In any event, operators have some opportunity to demonstrate the particular circumstances of each case for purposes of proving the existence of "a single continuous surface coal mining operation" under these regulations.

PRE-EXISTING PERMITS

Section 716.7(a)(2)(i) of the interim rules, and Section 785.17(a)(1) of the permanent rules provide an exemption for mines that are operating under a permit issued prior to August 3, 1977. To a large extent, commenters accepted or supported the wording of these sections. However, two critical comments were received. One commenter wanted the regulations to specify that only surface mining permits (meaning a permit to mine coal) issued prior to August 3, 1977, would exempt a mining operation from the prime farmlands provisions of the Act. The Secretary believes that the language of the regulations as proposed is sufficient to provide this interpretation.

Another commenter suggested that the mine operator, when applying for a permit under the permanent program, be required to have commenced mining in addition to possessing a permit issued prior to August 3, 1977. The Secretary did not adopt this suggestion. The language of the Act specifically extends the prime farmlands exemption to mining operations possessing a permit issued prior to August 3, 1977. Imposing the suggested limitation would exclude permitted mining operations in violation of congressional intent. H.R. Rep. No. 95-493, 95th Cong., 1st Sess. 105 (1977).

RENEWALS AND REVISIONS OF PRE-EXISTING PERMITS

Pursuant to the Act, the regulations (in Sections 716.7(a)(2)(ii) and 785.17(a)(2)) extend the exemption to include renewals or revisions of a permit issued prior to August 3, 1977. Most commenters accepted the wording of these sections in the proposed form. One commenter asserted that a "renewal" or "revision" of the permit cannot allow the expansion of the

mining operation beyond the permit boundaries. The Secretary believes the commenter has misunderstood the effect of the rule. The intent of the grandfather exemption is not to issue renewals or revisions of permits. Instead the rule exempts permit "revisions or renewals" from the special prime farmlands permitting and performance standards requirements, as mandated by Section 510(d)(2) of the Act. The Department's use of the term "revisions" in Sections 716.7(a)(2)(ii) and 785.17(a)(2), which include "incidental boundary changes to the original permit," is based on Section 511(a)(3) of the Act.

EXISTING SURFACE COAL MINING OPERATIONS

The proposed interim regulations at Section 716.7(a)(2)(iii) and the permanent rule counterpart at Section 785.17(a)(3) provide an exemption for existing surface coal mining operations. In addition, the proposed regulations list three requirements for an existing surface coal mining operation: the land is part of a single continuous mining pit permitted prior to August 3, 1977; the operator must have possessed the legal right to mine the land prior to August 3, 1977; and the land must contain a continuous recoverable coal seam.

Comments critical of the proposed regulations were numerous. One commenter asserted that the Secretary's interpretation of the language in the Act underlying these provisions is mistaken. That commenter claimed that the scope of the mining operation was limited by the scope of the permit issued to the operation. Thus, the exemption could not apply to property beyond the original permit boundaries. This interpretation of the Act is at variance with the Appeals Court's holding that Section 510(d)(2)'s provision for "any existing surface mining operations for which a permit was issued prior to August 3, 1977" includes ongoing operations on land that was not a part of the original permit. *In Re: Surface Mining Regulation Litigation*, supra. (June 30, 1980). The Department has based the final regulations in part on the Court's holding.

A commenter urged that the regulations be altered to specify that all three conditions listed in 30 CFR 716.7(a)(2)(iii) and 785.17(a)(3) must be met by the mining operation to receive the prime farmlands exemption. The final rule includes "and" after 716.7(a)(2)(iii)(A) and 785.17(a)(3)(i) to insure that this interpretation is understood.

Numerous commenters expressed concern that the use of "surface mining operations" in the regulations was intended to exclude the surface impacts of underground mines from the exemption. The term employed in the proposed regulations is the same term used by Congress in Section 510(d)(2) of the Act. However, elsewhere in the Act and particularly in the definitions (Section 701), Congress employed the term "surface coal mining operations." There is no indication from the language of the Act or the legislative history of Section 510 that Congress intended these two terms to differ. The Secretary is of the opinion that the language in Section 510(d)(2) was a mere oversight by Congress. As a result, the Secretary has used the term "surface coal mining operation" in the final regulation to insure that surface effects of underground mines are included in the exemption. {7899}

Commenters criticized the use of the term "single continuous mining pit" because it excluded mining operations involving multiple pits. They assert that Congress did not intend multiple pit mining operations to be treated differently than single pit operations. The Secretary concurs with this comment and has altered the regulations accordingly. See 30 CFR 716.7(a)(2)(v) and 785.17(a)(5) and the discussion above related thereto.

Commenters also criticized the requirement that permittees must have had a "legal right to mine the lands prior to August 3, 1977." They argued that because the limitation was not explicitly included in the Act, the Department was not justified in imposing it in the regulations. It is clear, however, that Congress intended and the Court of Appeals recognized the prime farmlands exemption is limited in scope. The Secretary has concluded that a "right to mine" as indicated by ownership, contract, or lease is both indicative of the geographical scope of the mining operation at the time the permit was issued and effective in fairly limiting the scope of the exemption. This limitation certainly will not exclude any ongoing mining operations intended to be included in this exemption because ongoing operations could be expected to possess a right to mine. Some commenters have criticized the exclusion of options to purchase, contract or lease. They assert that the acquisition of such an option is indicative of an intent to include the property within the ongoing mining operation. The Secretary does not accept this assumption. By the very nature of an option, an operator is in no way bound or committed to including the property within the operation. At most, an option can be said to indicate that the operator is considering including the land in the operation. Thus, the Secretary believes that an option does not demonstrate that the land is within an ongoing mining operation.

DEFINITIONS OF "CONTINUOUS MINING PIT" AND "CONTINUOUS SURFACE COAL MINING OPERATION"

Sections 716.7(a)(2)(iv) and 785.17(a)(4) of the proposed regulations defined the term "continuous mining pit" for the purpose of these regulations. To clarify the intent of the final regulations at Sections 716.7(a)(2)(iii) and 785.17(a)(3), the

definition of the term "continuous surface coal mining operations" was added in Sections 716.7(a)(2)(v) and 785.17(a)(5). The inclusion of this term in the final regulations is the result both of a number of comments concerning the potential exclusion of surface effects of underground mines from the exemption and the Court of Appeals' decision including non-contiguous parcels within the exemption for existing operations.

A number of commenters suggested that a pit (or by implication, a mining operation) could not be considered "continuous" where it was divided physically by anything -- be it road or bare land. Drawing an analogy to farmlands, these commenters noted that farmland bisected by a road, pipeline, railroad, powerline or bare land would not be considered a continuous land tract. It would be operated and taxed independently. So, they argued, a mining pit should be similarly divided.

The Secretary recognizes that such a situation may exist with regards to farmlands the analogy is not applicable here. Under the Court of Appeals' decision, the Department is compelled to conclude that such a division would not alter the "continuous" nature of the pits or mining operations.

EXEMPTION TERMINATION DATE

The Department specifically requested comments on the August 3, 1982, exemption cut-off date proposed in Sections 716.7(a)(2)(v) and 785.17(a)(5), renumbered as Sections 716.7(a)(2)(vi) and 785.17(a)(6), in the final regulations. 45 FR 25992-25995, April 16, 1980. Most of the commenters did not suggest alternate dates, but rather stated that the cut-off date was arbitrary, unsupported by the Act and should be deleted. While two alternative dates were suggested, both suffer the same flaw and neither complies with the congressional intent as effectively as the proposed 1982 date. One commenter suggested that the exemption terminate 8 months after the date on which the Secretary approves a state regulatory program. This date is derived from 30 CFR 771.11 (general requirements for permits).

Other commenters suggested that the termination date be determined in a case-specific manner, depending on the individual mining operation and the permit programs of the individual states. Both alternatives would vary the termination date from state to state. The latter suggestion could even result in different dates for each operation. This variation would undermine the previously discussed congressional desire for uniformity in regulations to ensure that competitive advantages to individual operations in different States are not granted based on administrative technicalities.

The Secretary believes that the proposed cut-off date is not arbitrary and is supported by the Act. As discussed above, Congress intended, and the Appeals Court recognized, that the prime farmland exemption would not be limitless. The need for geographical limitations was explained in the preamble to the proposed regulations. 45 FR 25994, April 16, 1980. The cut-off date insures an orderly transition period between pre-Act and post-Act standards, prevents mining from continuing indefinitely through expansions to contiguous and non-contiguous areas, reduces the potentially wide variations in the application of the law in the different states, and provides certainty to the public and the industry with regards to the scope of the prime farmland exemption. The five-year period chosen corresponds to that of a permit under the Surface Mining Act (Section 506(b)) and is reasonable in fulfilling the purposes stated above.

DRAFTING INFORMATION

The principal authors of these rules and the accompanying preamble are: Ralph E. Ewalt, Agronomist, Technical Services and Research, OSM, Indianapolis, Indiana (317/269-2666) and Arlo Dalrymple, Agronomist, Technical Services and Research, OSM, Washington, D.C. (703/756-6964).

SUPPLEMENTS 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. The final rule for the interim program is exempt from Section 102(2)(c) of the National Environmental Policy Act under Section 501(a) of the Surface Mining Act. The Department of the Interior has determined that the significant impacts of the final permanent program rules on the quality of the human environment have previously been identified in the final environmental statement on the permanent program (OSM-EIS-1) available January 29, 1979. Accordingly, no new environmental impact statement has been prepared for this rulemaking. The documents supporting the determinations of significance and of environmental impact are available for inspection in Room 135 of the Interior South Building, 1951 Constitution Avenue N.W., Washington, D.C. 20240.

Dated: January 19, 1981.

Joan M. Davenport, 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:

A. 30 CFR 716.7(a)(2) is revised to read:

SECTION 716.7 - PRIME FARMLAND.

(a) * * *

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

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

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

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

(A) Such lands are part of a single continuous 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 contained 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.

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

(v) For the purpose of this paragraph, a single continuous surface coal mining operation is presumed to consist only of a single continuous mining pit begun 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 subparagraph, 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.

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

B. 30 CFR 785.17(a) is 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 except:

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

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

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

(i) Such lands are part of a single continuous 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 contained 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 a part of a single continuous surface coal mining operation) begun under a permit issued prior to August 3, 1977.

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

(5) For the purposes of this paragraph, a single continuous surface coal mining operation is presumed to consist only of a single continuous mining pit begun 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.

(6) The exceptions granted by paragraphs (a)(1)-(5) of this section apply only to lands mined to the coal face and related benches prior to August 3, 1982.

[FR Doc. 81-2589 Filed 1-22-81; 8:45 am]

BILLING CODE 4310-05-M