FEDERAL REGISTER: 46 FR 7902 (January 23, 1981)

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

30 CFR Part 700
Permanent and Interim Regulatory Program Modifications; Extraction of Coal

ACTION: Final rule.

SUMMARY: This rule change implements Section 528(2) of the Surface Mining Control and Reclamation Act of 1977 (Act) which provides an exemption from the Act's requirements for the extraction of coal where a surface mining operation affects two acres or less.

EFFECTIVE DATE: February 23, 1981.

ADDRESSES: Director, Office of Surface Mining, U.S. Department of the Interior, South Building, 1951 Constitution Avenue NW., Washington, D.C. 20240.

FOR FURTHER INFORMATION CONTACT: Carl Pavetto, Office of Surface Mining, Division of Inspection, (202) 343-5365.

SUPPLEMENTARY INFORMATION:

BACKGROUND:

Section 528(2) of the Act exempts from regulation surface coal mining operations which affect two acres or less. 30 U.S.C. 1278(2). The intent of Congress in providing for this exemption was to avoid imposing the Act's requirements on the occasional "pick and shovel" operator. 119 Cong. Rec. 1357 (1973). Throughout the legislative history of the Act, Congress expressed its belief that the exemption "would cause very little environmental damage and that the regulation of [such operators] would place a heavy burden on both the miner and the regulatory authority." See e.g. S. Rep. 95-128, 95th Cong. 1st. Sess. 98 (1977); S. Rep. 94-28, 94th Cong. 1st Sess. 223 (1975). Clearly, Congress did not intend that the two acre exemption be used as a vehicle for circumventing the Act in a manner that would cause serious environmental harm.

The Surface Mining Act is a remedial statute which includes among its purposes for the protection of "society and the environment from the adverse effects of surface coal mining operations." Section 102(a). 30 U.S.C. 1202(a). The courts require that exemptions from the terms of remedial statutes, such as the Surface Mining Act, be narrowly construed. De Luz Ranchos Inc. v. Coldwell Banker & Co., 606 F. 2d 1297, 1302 (9th Cir. 1979); Wirtz v. Ti Ti Peat Humus Company, 373 F. 2d 209, 212, (4th Cir. 1967). To interpret such exemptions otherwise would "utterly frustrate the legislative purpose." Southern Ry. Company v. Occupational Safety and Health Review Comm'n, 539 F. 2d 335, (4th Cir. 1976); Southern Pacific Transportation v. Usery, 539 F. 2d 386 (5th Cir. 1976). Accordingly, the provisions exempting surface mining operations of two acres or less from the requirements of the Act must be narrowly construed to insure that society and the environment are protected from the adverse effects of surface mining.

Section 700.11(b) of the permanent program regulations as originally adopted attempted to avoid abuse of the exemption by excluding from its scope operations "conducted by a person who affects or intends to affect more than two acres at physically related sites, or any such operation conducted by a person who affects or intends to affect more than two acres at physically unrelated sites within one year." 44 FR 15312 (1979). In the litigation over the permanent regulatory program, the Commonwealth of Virginia challenged these regulations as overbroad. In re: Permanent Surface Mining Regulation Litigation, Civ. No. 80-1308 (D.D.C. 1980). In response to this legal challenge, OSM agreed to change the language of Section 700.11(b) to reflect more closely congressional intent. On February 6, 1980, OSM proposed new rules on the two acre exemption. 45 FR 8241 (1980). A hearing was held on the purposed rules in Washington, D.C. on February 25, 1980. The public comment period extended from February 6, 1980 to March 7, 1980.

As a result of comments received at the hearing and in writing during the comment period OSM conducted an investigation to ascertain the extent to which the two acre exemption was being abused. That investigation has revealed widespread abuse of the two acre exemption. For example, in one documented case a single operator was found to be conducting surface mining operations on four separate sites within a one-mile radius. Although the aggregate area of the four

sites exceeded four acres, the operator claimed the two acre exemption for each operation. As a result of inadequate reclamation measures, erosion and acid drainage has occurred. Another instance of abuse was observed and documented where one operator is conducting mining operations on two sites within a three-mile radius. Again the two acre exemption has been claimed although the total disturbed area exceeds three acres. OSM also has observed operators opening mining operations of less than two acres then skipping 50 or 100 feet to open new operations of less than two acres, claiming the exemption in each instance.

The abuses cited are not isolated incidents. In the Administrative Record are documented hundreds of sites where a two acre exemption is claimed. While OSM does not seek to regulate bona fide pick and shovel operations it is clear that many alleged two acre operations do not properly qualify for the exemption. The number of abuses appears to be increasing as more operators learn of the exemption and new methods are devised for mining on multiple sites and claiming the exemption. Methods uncovered thus far include the use of shall corporations where an exemption is claimed by many ostensibly small operators that are in fact closely connected to larger corporations. One such scheme uncovered by OSM employed 30 individual operators, each subject to the control of the parent corporation and each claiming the exemption. Case studies of these and other examples of abuse have been collected and placed in a file labeled "two acre exemption case studies" in the administrative record for this rule.

In this amended rule, OSM adopts three methods for halting abuse of the two acre exemption: (1) Defining the term "affect"; (2) excluding related sites that exceed two acres in aggregate; and (3) excluding processing and support facilities from the exemption.

The definition of "affect" is taken from WEBSTER'S NEW INTERNATIONAL DICTIONARY, (1961), which defines that term as follows: "To act upon; to produce a material influence upon or alteration in * * *." Accordingly, under this revised rule, any impact from a surface mining operation that materially influences or alters any land or water resource is deemed to "affect" that resource for purposes of the exemption. This construction is consistent with the intent of Congress that the two acre exemption apply only where very little environmental harm would result. S. Rep. 94-128, 95th Cong., 1st Sess. 988 (1977).

The rule also provides, as part of the definition of "affect," that roads and streams affected by a mining operation shall be included in the two acre calculation. This interpretation flows directly from the language of Section 528(2) of the Act. In particular, OSM intends that roads affected by mining operations be included in the two acre calculation regardless of their ownership. The inclusion of all affected roads will ensure that the exemption is not circumvented by statues that authorize counties to accept into county road systems private roads used for industrial purposes and neither maintained by the county nor used by the general public. Finally, the definition of "affects" states that the area affected shall include the land or water above underground mine workings. This language reaffirms the current policy as reflected by the definition of "affected area" at 30 CFR 701.5 and makes clear that OSM intends that the definition of "affects" in no way changes the definition of "affected area" in the existing regulations. {7903}

Second the revised rule adopts both mandatory and discretionary criteria for determining whether two or more sites are related. For purposes of calculating the affected area, the acreage of related sites is added.

The two mandatory criteria which require a finding of relatedness are: (1) Sites on which operations are conducted by the same operator, principal or permittee within a one year period; and (2) sites which are located in the same State. Where both of these criteria are met, the sites shall be deemed related and their acreage added unless the operator can demonstrate affirmatively that the operations are not related. These mandatory criteria are necessary because OSM has found numerous mine sites that allegedly fall within the two acre exemption, but are owned by the same company within the same general area and appear to have been scattered deliberately so that each site remains just less than two acres. Many of these mines are connected by haul roads and use the same processing facilities. OSM does not believe that these are the "pick and shovel" operations Congress intended to exempt from the Act's requirements. Accordingly, OSM has determined that operations under the control of the same operator, principal or permittee and located in close physical proximity to one another must be treated as a single operation for the purposes of Section 528(2) of the Act.

In attempting to establish an appropriate distance between sites presumed to be "related," OSM considered radii of various lengths, but decided that the State boundary would be the most logical limit because it would be easiest to administer and enforce. Such a limit is also consistent with the concept of State primacy embodied in Section 101(f) of the Act, 30 U.S.C. 1201(f).

In addition to the two mandatory criteria for determining that sites are related, the rules contain three discretionary criteria. Two or more sites may be deemed related if: (1) Two or more operations are conducted with substantially the same personnel, equipment, haul roads, or loading or processing facilities; or (2) the coal extraction operations are conducted or controlled by the same person or persons in such a manner or under a scheme which suggests that the operations involved are related; or (3) the coal removed from the various sites is owned by the same person or persons. Whenever any of these criteria are met, the state regulatory authority, in states with approved state programs, or OSM, in the initial regulatory program, in states in which a federal program has been implemented, and in the federal lands program, may exercise its discretion and find these sites related. This provision guards against abuse of the exemption by ensuring, for example, that a contract operator, who owns and processes all of the coal being mined by subsidiary operators, protected by shell corporations, cannot avoid the requirements of the Act by claiming the two acre exemption for himself and each subsidiary operator. OSM does not believe that Congress intended to allow miners operating under such a scheme to be exempt under Section 528(2) of the Act. See 119 Cong. Rec. 1357 (1973).

The determination as to the relatedness of sites will be made either by OSM, during the initial regulatory program, in states where a federal program has been implemented, and in the federal lands program, or by the state regulatory authority in states with approved permanent regulatory programs. This determination will be made by the appropriate agency, either on its own initiative or at the request of any person, and must be made within a reasonable time of receipt of such a request. The determination must be made in writing and include the right of administrative appeal. Where OSM makes the determination this right of appeal will be provided in accordance wit the regulations at 43 CFR 4.1280. OSM expects that a comparable appeal right shall be provided by states with approved programs.

Third and finally, the revised regulation specifically provides that the two acre exemption does not apply to coal processing and preparation facilities. By its terms, the exemption applies only to "the extraction of coal for commercial purposes where the surface mining operation affects two acres or less." 30 U.S.C. 1278(a) [emphasis added]. Rather than extend the exemption to all "surface coal mining operations" as that term is defined in Section 701(28) of the Act (30 U.S.C. 1291(28)), Congress limited the scope of Section 528(2) activities involving the "extraction of coal."

As a final point, OSM notes that all operators of surface coal mining operations subject to the Act are required to pay to the Secretary of the Interior a reclamation fee as set forth in 30 CFR Part 837. If an operator is found to have violated the two acre exemption regulation and therefore is subject to the Act, OSM will assess a reclamation fee plus interest for all coal mined by the operator at the relevant site after the effective date of the Act.

RESPONSE TO PUBLIC COMMENTS

1. In the preamble to the proposed rules, (45 FR 8241 (1980)) OSM suggested four criteria for determining the relatedness of mine sites. Among these criteria was whether coal extraction operations occur along the same coal seam or seams. Several commenters complained that this factor is irrelevant because one coal seam may extend for hundreds of miles. OSM agrees with this criticism and accordingly has eliminated this criterion from the final rule.

The original proposed rules also considered whether coal extraction operations "are in such physical proximity as to suggest an intent by the operator to avoid the requirements of the act." Commenters objected to this criterion as overly vague and OSM has decided to substitute a statewide geographic standard to address this objection.

2. One commenter asserted that inquiry into whether operations are conducted with substantially the same equipment, personnel, haul roads, or loading and processing facilities is inappropriate inasmuch as many small operators, for reasons of efficiency, share common support facilities and management. OSM has rejected this view. The "pick and shovel" standard announced by Congress for determining eligibility for the exemption is a narrow one; as noted above in the discussion of the legislative history of the Act, only a small percentage of surface mining operations properly fall within its scope. Moreover, under this revised rule the common use of such resources as equipment, roads and personnel does not necessitate a determination that the sites are related. OSM expects that the regulatory authority will look at all facets of the operations implicated by the discretionary criteria in deciding whether two or more sites are related.

3. One commenter suggested that determinations as to the relatedness of different sites should be carried out on a case by case basis and that advance criteria are unnecessary. OSM has rejected this suggestion on the ground that uniform application of the exemption is essential. The Act requires that "competition in interstate commerce among sellers of coal produced in different States" be insured. 30 U.S.C. Section 1201(g). Unless the criteria for the exemption are applied uniformly among the States, persons conducting operations in States that construe the exemption broadly would gain a competitive advantage over operators in States that adopt a more restricted interpretation.

4. Several commenters argued that the regulations are inconsistent insofar as they exclude preparation facilities from the exemption while at the same time including haul roads in the two acre calculation. OSM's believes that the statutory language for the exemption applies only to the extraction of coal and the necessary concomitants of such extraction, including haul roads. Accordingly, the exemption is inapplicable to coal processing or other such activities subject to regulation under the Act, the purpose or need for which is unrelated to coal extraction. {7904}

OTHER INFORMATION

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

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

The principal authors of these proposed rules are Carl Pavetoo, OSM, and Mark Squillace, Office of the Solicitor.

Dated: January 15, 1981.
Joan M. Davenport, Assistant Secretary, Energy and Minerals.

Section 700.11(b) is revised as follows:

SECTION 700.11 - APPLICABILITY.

(b) The extraction of coal for commercial purposes where the surface coal mining and reclamation operation incident to the coal extraction affects two acres or less, but not any operation conducted by a person who affects or intends to affect more than two acres at related sites. All land and bodies of water affected by coal extraction, including roads and streams shall be included in the two acre calculation; Provided, however, That:

(1) For purposes of this paragraph, "affect" means, to act upon, to produce a material influence upon or alteration in; Provided, however, That the area affected shall include land or water which is located above underground mine workings;

(2) This exemption from the requirements of the Act is not available for coal loading, processing, or preparation facilities;

(3) Two or more sites shall be deemed related if the operations on those sites are conducted by the same operator, principal, or permittee during any one year period and the sites are located in the same State unless the operator affirmatively demonstrates that the sites are not related;

(4) The regulatory authority may exercise its discretion to find that any two or more sites are related if --

(A) The operations on those sites are conducted with substantially the same equipment, personnel, haul roads, loading or processing facilities; or

(B) The operations are conducted or controlled by the same person or persons in a manner which suggests that the sites involved are related; or

(C) The coal removed at such operations is owned by the same person or persons.

(5) The regulatory authority may on its own initiative, and shall, within a reasonable time after receipt of a request from any person, make a written determination that two or more sites are not related for purposes of this subsection. The regulatory authority shall make a reasonable effort to notify interested persons by mail at least ten (10) days prior to making such a determination. Prior to the time that the determination is made, any person may submit and the regulatory authority shall consider written information supporting or refuting the relatedness of sites under both the mandatory and discretionary criteria established by this subsection. Any determination made under this subsection shall state, with reasonable specificity, the information and criteria on which it is based. A copy of the determination shall be sent to all persons who submitted information to the regulatory authority or otherwise expressed an interest in the decision. Any person who is or may be adversely affected by the determination shall have the right of administrative appeal.

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