

FEDERAL REGISTER: 50 FR 28180 (July 10, 1985)

DEPARTMENT OF THE INTERIOR

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

30 CFR Parts 700, 701, 785, and 827

Surface Coal Mining and Reclamation Operations: Permanent Regulatory Programs; Definitions; Requirements for Permits for Special Categories of Mining; Coal Preparation Plants: Performance Standards

ACTION: Interim final rule.

SUMMARY: The Office of Surface Mining Reclamation and Enforcement (OSM) is amending certain portions of its regulations applicable to coal preparation plants and other offsite facilities. This action is being taken as a result of, and in compliance with, the District Court for the District of Columbia's July 6, 1984, ruling in *In Re: Permanent Surface Mining Regulation Litigation II*. The revised regulations will (1) bring additional coal preparation plants and other surface coal mining operations under the permanent program regulations of the Surface Mining Control and Reclamation Act of 1977 (the Act); (2) allow persons operating coal preparation plants not previously subject to OSM rules a certain period of time to obtain the permit required as a result of the Court ruling; and (3) make certain performance standards immediately applicable to such plants or facilities. The rules adopted on an interim basis by this action are on this same day being proposed by OSM in this issue of the Federal Register, so that public comment may be received and considered before OSM promulgates a final rule concerning the regulation of coal preparation plants.

DATES: This rule is effective on September 9, 1985. Public comments on the corresponding proposed rule should be submitted by September 18, 1985.

FOR FURTHER INFORMATION CONTACT: Raymond Aufmuth, Division of Permit and Environmental Analysis, OSM, Department of the Interior, 1951 Constitution Avenue, N.W., Washington, D.C. 20240; Telephone: (202) 343-1507.

SUPPLEMENTARY INFORMATION:

- I. Background.
- II. Public Commenting Procedures.
- III. Related Issues.
- IV. Discussion of Rules Adopted.
- V. Procedural Matters.

I. BACKGROUND

The Surface Mining Control and Reclamation Act of 1977, *30 U.S.C. 1201* et seq. (the Act) sets forth general regulatory requirements governing surface coal mining operations and the surface impacts of underground coal mining. OSM has by regulation implemented or clarified many of the general requirements of the Act and set performance standards to be achieved by different operations. See 30 CFR Part 700 et seq.

On May 5, 1983, OSM promulgated a final rule intended to clarify the coverage under the Act of offsite coal preparation plants and support facilities. *48 FR 20392 (1983)*. In order to clarify OSM's jurisdiction, OSM adopted new definitions of "coal preparation or coal processing," "coal preparation plant," and "support facilities" and provided new preamble discussions of those rules. In part, the rules adopted in 1983 included a definition of "coal processing or coal preparation" which required that coal be separated from its impurities. The definition of support facilities included proximity as one factor to be considered.

These definitions were challenged in Round I of *In Re: Permanent Surface Mining Regulation Litigation II*, Civil Action No. 79-1144 (D.D.C. 1984). In a July 6, 1984, opinion in that case, the District Court for the District of Columbia determined that they improperly narrowed the regulatory scope of the Act. Specifically, the Court held that facilities which in any way leach, chemically process, or physically process coal should be regulated as coal preparation plants even if they do not separate coal from its impurities. The Court also held that the Act contemplated a functional test for determining what is a regulated support facility, rather than a limitation which includes an element of proximity.

As a result of this ruling, the definitions of "surface coal mining operations," "coal preparation or coal processing," and "coal preparation plant" were remanded to the Secretary. Although the definition of "support facility" was not remanded, the Court's Memorandum Opinion clearly indicated that it also could not stand.

In order to implement the District Court's Order concerning offsite coal preparation plants OSM has decided to adopt an interim final rule, and simultaneously publish the identical rule as a proposal. Adoption of an interim final rule, without notice and comment, is justified in this instance because of the interpretive nature of the rule. The rule clarifies the effects of the July 1984 court ruling on facilities which leach or chemically or physically process coal or which result from or are incident to a regulated facility, and which do not have an element of proximity. Since the court decision, such facilities have been considered surface coal mining operations under the Act. This interim final rule and the accompanying proposal conform OSM's regulations to the Act and explain the applicability of performance standards, enforcement obligations and permitting requirements. This interim final rule is effective sixty days from today. This will ensure that facilities subject to the Act are promptly regulated. The notice of proposed rulemaking allows for public comment on the rules before they are adopted in permanent form.

II. PUBLIC COMMENTING PROCEDURES

These rules are also being proposed today in this issue of the Federal Register. OSM welcomes public comments. Comments should be specific where possible and identify problems, if they exist, and offer potential solutions. The rules represent an attempt to formulate a balanced approach to recognizing on-the-ground realities while conforming to the requirements of law. Public participation in this effort is both essential and appreciated. Public commenting procedures are set out in the proposed rule.

III. RELATED ISSUES: APPLICATION OF PROHIBITIONS IN SECTION 522(e)

As a result of the District Court's decision and this rulemaking, additional coal preparation plants and other surface coal mining operations are recognized as coming within the jurisdiction of the Act. Once within the jurisdictional ambit of the Act, such operations that were not in existence August 3, 1977, and that do not have "valid existing rights" are immediately subject to the prohibitions of section 522(e) of the Act. OSM plans to deal with this situation in the following manner. Surface coal mining operations within the areas subject to the Section 522(e) prohibitions will be subject to those prohibitions immediately after the effective date of these rules. These facilities will be subject to enforcement actions by the regulatory authority. If OSM receives an inappropriate response to a "Ten Day Notice," OSM intends to issue a Notice of Violation which will provide an abatement period of approximately 30 days. In that time, an operator must obtain necessary waivers, demonstrate valid existing rights, demonstrate that the operation was existing on the date of enactment or cease operations and initiate reclamation of the site. Any determination of "valid existing rights" made by OSM will be consistent with the March 22, 1985, District Court ruling in *In Re: Permanent Surface Mining Regulation Litigation II*, No. 79-1144 (D.D.C. 1985).

IV. DISCUSSION OF RULES ADOPTED

A. AMENDMENT TO DEFINITION OF "SURFACE COAL MINING OPERATIONS"

The statutory authority for the regulation of offsite coal preparation plants originates from the definition of "surface coal mining operations" in section 701(28)(A) of the Act. In relevant part that definition reads as follows:

"[S]urface coal mining operations" means --

(A) activities conducted on the surface of lands in connection with a surface coal mine or subject to the requirements of Section 516 surface operations and surface impacts incident to an underground coal mine, the products of which enter commerce or the operations of which directly or indirectly affect interstate commerce. Such activities include excavation for the purpose of obtaining coal including such common methods as contour, strip, auger, mountaintop removal, box cut, open pit, and area mining, the uses of explosives and blasting, and in situ distillation or retorting, leaching or other chemical or physical processing, and the cleaning, concentrating, or other processing or preparation, loading of coal for interstate commerce at or near the mine site . . . [emphasis added].

In implementing its May 5, 1983, regulations concerning offsite coal preparation plants, OSM interpreted the above definition to mean that the activities "leaching and other chemical or physical processing" were limited by the phrase "in situ." *48 FR 20395 (1983)*. In its decision remanding those regulations, the District Court held that such an interpretation was improper. In particular, the Court held that "in situ" modifies only "distillation or retorting," and that "chemical or physical processing" were surface coal mining operations whether performed "in situ" or not.

OSM's 1983 regulatory definition of "surface coal mining operations" at 30 CFR 700.5 tracked its statutory counterpart very closely. In pertinent part it read as follows:

"[S]urface coal mining operations" means --

(A) Activities conducted on the surface of lands in connection with a surface coal mine or, subject to the requirements of section 516 of the Act, surface operations and surface impacts incident to an underground coal mine, the products of which enter commerce or the operations of which directly or indirectly affect interstate commerce. Such activities include excavation for the purpose of obtaining coal, including such common methods as contour, strip, auger, mountaintop removal, box cut, open pit, and area mining; the uses of explosives and blasting; in situ distillation, retorting, leaching, or other chemical or physical processing; and the cleaning, concentrating, or other processing or preparation of coal. Such activities also include the loading of coal for interstate commerce at or near the mine site 30 CFR 700.5 (1983).

This interim final rule revises the 1983 definition in accordance with the Court's interpretation of the statutory definition, as discussed in the preceding paragraph. Specifically, the comma between distillation and retorting will be replaced by an "or" and a semicolon will be placed after the phrase "in situ distillation or retorting." This change will mean that "leaching, chemical or physical processing" will no longer be limited by the phrase "in situ." Thus, these operations will be regulated wherever they occur.

B. AMENDMENTS TO DEFINITIONS AT SECTION 701.5

1. COAL PREPARATION. This rule will replace the 1983 definition of the phrase "coal preparation or coal processing" which was formulated on the basis of OSM's previous interpretation of section 701(28)(A) of the Act. Under the 1983 rules "coal preparation or coal processing" meant the "cleaning concentrating, or other processing or preparation of coal in order to separate coal from its impurities." In accordance with the District Court's decision, this rule deletes the definition of "coal processing or preparation." In its place, the Department adopts a new definition of the term "coal preparation." Under the new definition "coal preparation" means the chemical or physical processing and the cleaning, concentrating or other processing or preparation of coal. Facilities which do not separate coal from its impurities will be included in this definition.

2. COAL PREPARATION PLANT. The Department is revising the definition of "coal preparation plant" in order to track the revised definition of coal preparation discussed above.

3. SUPPORT FACILITIES. The Department is suspending the definition of support facilities for several reasons. First, this is being done to implement the July 6, 1984, District Court decision in *In Re: Permanent Surface Mining Regulation Litigation II*, No. 79-1144 (D.D.C. 1984). There the Court ruled that the determination of whether a facility was subject to the Act cannot include an element of proximity. The definition of support facilities adopted in 1983 included an element of proximity. Accordingly, OSM is suspending the definition.

OSM has determined that no definition of support facilities is needed. OSM had none from 1977 to 1983. The 1983 definition was an attempt to more precisely define what things are considered to be resulting from or incident to the regulated activity. However, after careful reexamination, and in light of the Courts opinion, the department has determined that there is no need to amplify the language in the Act with respect to the meaning of activities that are "resulting from or incident to" a regulated activity. Furthermore, since support facilities are subject to the same performance standards as the mine they support, deletion of the definition eliminates possible confusion over whether support facilities are subject to different performance standards.

Suspension of the definition of "support facilities" does not mean that OSM will decline to regulate these facilities. All facilities which are resulting from or are incident to a regulated activity are regulated surface coal mining operations under the Act. As such, they are subject to the prohibitions of section 522(e) and applicable performance standards.

C. AMENDMENTS TO 30 CFR 785.21 - SCHEDULE FOR PERMITTING COAL PREPARATION PLANTS

Section 785.21 establishes the permitting requirements for coal preparation plants. It requires any person who operates or intends to operate a coal preparation plant outside the permit area for a specific mine, other than those located at the site of use, to obtain a permit. To obtain a permit, an applicant must submit a permit application which demonstrates that the plant will comply with 30 CFR Part 827 and must describe the construction, operation, maintenance, and planned removal of such facilities.

The coal preparation plants made subject to OSM's regulations by the District Court's July 6, 1984, opinion and by the amendments contained herein will, of course, be required to obtain a permit. However, OSM recognizes that considerable time may be involved in applying for and obtaining a permit. OSM is therefore amending Section 785.21 by adding new paragraphs (d) and (e) to set out a reasonable schedule for the permitting of plants which have only recently become subject to regulation under the Act.

New paragraph (d)(1) of Section 785.21, requires any persons who plan to operate, after eight months from the effective date of this rule, a coal preparation plant which was not subject to the regulations of 30 CFR Chapter VII prior to July 6, 1984, to apply for a permit no later than two months after the effective date of this rule.

New paragraph (d)(2) contains an important exception to the requirements of paragraph (d)(1). It provides that those States with State programs that have statutory or regulatory prohibitions precluding the issuance of permits to facilities covered by paragraph (d)(1) shall notify OSM within 60 days of the effective date of this rule that a program change is necessary. These States must then establish a timetable of the action to be taken in order to adopt appropriate measures and undertake permitting actions for all of the coal preparation plants located within their jurisdiction. The schedule is to be submitted to OSM for approval within 90 days of effective date of this rule. Operators must apply for permits in accordance with that schedule.

New paragraph (e) of Section 785.21 provides that any person operating a coal preparation plant made subject to regulation by the July 6, 1984, decision and not subject to prohibition by 30 CFR 761.11 will be allowed to continue to operate without a permit until eighth months from the effective date of this rule. Such persons will be allowed to operate past the eighth month deadline if (1) they have timely filed a permit application pursuant to paragraph (d)(1) or pursuant to a State imposed schedule specified in paragraph (d)(2); (2) the regulatory authority has yet to issue or deny the permit, and (3) the person complies with the applicable performance standards of Section 827.13 of 30 CFR Chapter VII.

OSM has determined not to employ the ordinary State program review and notification process of 30 CFR 732.17 to ensure that the changes to the definition of the term "surface coal mining operations" and the permitting schedule in Section 785.21(d)(2) will be most effectively implemented. This is being done because of the ease of notifying all States at once in this notice and to allow States the first opportunity to determine whether their programs already allow for implementation of these rules.

Under the approach adopted, States are required to review their own programs and advise OSM if they need to make program amendments to implement these rules. Because the States are in a better position to interpret their own programs, this will avoid possible misunderstandings and unnecessary interpretative problems.

D. AMENDMENTS TO PART 827

Part 827 of 30 CFR sets forth the permanent program performance standards for coal preparation plants not within the permit area for a specific mine. Rather than make the permanent program standards immediately applicable to the coal preparation plants made subject to regulation by the District Court's decision, OSM is amending Part 827 so that interim performance standards will apply to such plants until the permanent program permit for such plant is issued. Such a provision is reasonable because the permanent program performance standards are tied to the issuance of a permit. The interim program performance standards are keyed to direct enforcement not based upon the existence of a permit.

In order to avoid the requirements of Section 827.12 which specify the permanent program performance standards applicable to coal preparation plants, OSM is amending that section by placing at its beginning the phrase "Except as provided in Section 827.13 of this part." OSM is also adopting new Section 827.13(a) which applies performance

standards to coal preparation plants not subject to regulation prior to July 6, 1984, on the basis of the regulatory program of the State in which they are located. For example, if such a plant is located in a State in which either interim or permanent program performance standards apply by State statute or regulation, the program standards of that State shall apply, as specified by the terms of the State program, and will be enforced by the State. That is, if the State program applies interim standards until a permit is obtained, interim standards will be used. If the State applies permanent program standards to these facilities, those standards would be used. If, however, such a plant is located in a State with a State program which must be amended in order to regulate it, the interim program performance standards in Subchapter B of 30 CFR Chapter VII will apply. Such standards would be enforced by the State unless there was some statutory or regulatory bar to such enforcement in which case OSM would enforce the standards. Although States will apply this interim program performance standard, inspection frequency will be as required under the permanent program. Finally if such a plant is located in a State with a Federal program, it will be subject to the interim performance standards in Subchapter B of 30 CFR which will be enforced by OSM.

Paragraph (b) of new Section 827.13 provides that as soon as persons operating coal preparation plants made subject to regulation as of July 6, 1984, obtain a permit, they will become subject to the permanent program performance standards specified in Section 827.12.

IV. PROCEDURAL MATTERS

Federal Paperwork Reduction Act

The information collection requirements in Section 785.21 were submitted to the Office of Management and Budget in 1983 under *44 U.S.C. 3507* and assigned clearance number 1029-0040 (Section 785.21). This interim final rule contains no information collection requirements that were not covered by the previous approval.

Executive Order 12291

The Department of the Interior (DOI) has examined the interim final rule according to the criteria of Executive Order 12291 (February 17, 1981) and has determined that it is not a major rule and does not require a regulatory impact analysis. This rule will impose only minor costs to the coal industry since relatively few operations will be affected. Likewise, the impact upon the consumers of coal will be negligible.

Regulatory Flexibility Act

The DOI has also determined, pursuant to the Regulatory Flexibility Act, *5 U.S.C. 601* et seq. that the interim final rule will not have a significant economic impact on a substantial number of small entities. This rule will impact a relatively small number of coal operators the majority of which would not be small entities.

National Environmental Policy Act

OSM has determined that this interim final rule is covered adequately by the existing environmental impact statement titled "Final Environmental Impact Statement, OSM EIS-1: Supplement," and that the preparation of any additional environmental documents under section 102(2)(c) of the National Environmental Policy Act of 1969, *42 U.S.C. 4332(2)(c)*, is not required.

LIST OF SUBJECTS

30 CFR Part 700

Coal mining, Environmental protection, Surface coal mining operations.

30 CFR Part 701

Coal mining, Law enforcement, Surface mining, Underground mining.

30 CFR Part 785

Coal mining, Reporting and recordkeeping requirements, Surface mining, Underground mining.

30 CFR Part 827

Coal mining, Environmental protection, Surface mining, Underground mining.

Accordingly, 30 CFR Parts 700, 701, 785, and 827 are amended as follows:

Dated: June 3, 1985.

J. Steven Griles, Deputy Assistant Secretary for Land and Minerals Management.

1. The authority citation for Part 700 continues to read as follows:

Authority: Sections 102, 201, 304, 405, 407, 412, 501, 510, 512, 515, 516, 517, 520, 523, 527, 528, 529, 701, 708, 710, 719, Pub. L. 95-87, 91 Stat. 448, 449, 454, 462, 466, 467, 480, 483, 486, 495, 498, 503, 510, 513, 514, 515, 516, 521, 526 (*30 U.S.C. 1202, 1211, 1224, 1235, 1237, 1242, 1251, 1260, 1262, 1265, 1266, 1267, 1270, 1273, 1278, 1279, 1291, 1298, 1309*), unless otherwise noted.

2. Section 700.5 is amended by revising paragraph (a) of the definition of "surface coal mining operations" to read as follows:

SECTION 700.5 - DEFINITIONS.

* * * * *

SURFACE COAL MINING OPERATIONS means --

(a) Activities conducted on the surface of lands in connection with a surface coal mine or, subject to the requirements of section 516 of the Act, surface operations and surface impacts incident to an underground coal mine, the products of which enter commerce or the operations of which directly or indirectly affect interstate commerce. Such activities include excavation for the purpose of obtaining coal, including such common methods as contour, strip, auger, mountaintop removal, box cut, open pit, and area mining; the use of explosives and blasting; in-situ distillation or retorting; leaching or other chemical or physical processing; and the cleaning, concentrating, or other processing or preparation of coal. Such activities also include the loading of coal for interstate commerce at or near the mine site. Provided, these activities do not include the extraction of coal incidental to the extraction of other minerals, where coal does not exceed 16 2/3 percent of the tonnage of minerals removed for purposes of commercial use or sale, or coal exploration subject to section 512 of the act; and provided further, that excavation for the purpose of obtaining coal includes extraction of coal from coal refuse piles; and

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PART 701 -- PERMANENT REGULATORY PROGRAM

3. The authority citation for Part 701 continues to read as follows:

Authority: Sections 102, 201, 501-529, 701, 705, 708, 710, 711, 713, 714, 715, 716, 717, 719, Pub. L. 95-87, 91 Stat. 448, 449, 467-515, 516, 519, 520, 521, 523, 524, 525, and 526 (*30 U.S.C. 1202, 1211, 1251-1279, 1291, 1295, 1298, 1301, 1304, 1305, 1306, 1307, 1309*) unless otherwise noted.

4. Section 701.5 is amended by removing the definition of "coal preparation or coal processing," by adding a definition of "coal preparation," by revising the definition of "coal preparation plant" and by suspending the definition of "support facilities", in alphabetical order as follows:

SECTION 701.5 - DEFINITIONS.

* * * * *

COAL PREPARATION means chemical or physical processing and the cleaning, concentrating, or other processing or preparation of coal.

COAL PREPARATION PLANT means a facility where coal is subjected to chemical or physical processing or the cleaning, concentrating, or other processing or preparation. It includes facilities associated with coal preparation activities, including, but not limited to the following: loading facilities; storage and stockpile facilities; sheds; shops, and other buildings; water-treatment and water-storage facilities; settling basins and impoundments; and coal processing and other waste disposal areas.

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

5. The authority citation for Part 785 continues to read as follows:

Authority: Sections 102, 201, 501(b), 503, 504, 506, 507, 508, 509, 510, 511, 513, 514, 516, 517, 519, 527, 529, 701, 710, and 711, Pub. L. 95-87, 91 Stat. 445, 30 U.S.C. 1202, 1211, 1251, 1253, 1254, 1256, 1257, 1258, 1259, 1260, 1261, 1263, 1264, 1265, 1266, 1267, 1269, 1277, 1279, 1291, 1301), unless otherwise noted.

6. Section 785.21 is revised by adding paragraphs (d) and (e) to read as follows:

SECTION 785.21 - COAL PREPARATION PLANTS NOT LOCATED WITHIN THE PERMIT AREA OF A MINE.

* * * * *

(d)(1) Except as provided in paragraph (d)(2) of this section, any person who operates a coal preparation plant beyond May 10, 1985 that was not subject to this chapter before July 6, 1984, shall apply for a permit no later than November 11, 1985.

(2)(i) States with State programs that have a statutory or regulatory bar precluding issuance of permits to facilities covered by paragraph (d)(1) of this section shall notify OSM not later than November 7, 1985 and shall establish a schedule for actions necessary to allow the permitting of such facilities as soon as practicable. Not later than December 9, 1985 this schedule shall be submitted to OSM for approval.

(ii) Any person who operates a coal preparation plant that was not subject to this chapter before July 6, 1984, in a state which submits a schedule in accordance with paragraph (d)(2)(i) of this section shall apply for a permit in accordance with the schedule approved by OSM.

(e) Notwithstanding Section 773.11 of this chapter and except as prohibited by Section 761.11 of this chapter, any person operating a coal preparation plant that was not subject to this chapter before July 6, 1984, may continue to operate without a permit until May 10, 1985, and may continue to operate beyond that date if (1) a permit application has been timely filed under paragraph (d)(1) of this section or under a State imposed schedule specified in paragraph (d)(2) of this section, (2) the regulatory authority has yet to either issue or deny the permit, and (3) the person complies with the applicable performance standards of Section 827.13 of this chapter.

PART 827 -- PERMANENT PROGRAM PERFORMANCE STANDARDS -- COAL PREPARATION PLANTS NOT LOCATED WITHIN THE PERMIT AREA OF A MINE

7. The authority citation for Part 827 continues to read as follows:

Authority: Pub. L. 95-87, 30 U.S.C. 1201 et seq.

8. The introductory language of Section 827.12 is revised to read as follows:

SECTION 827.12 - COAL PREPARATION PLANTS: PERFORMANCE STANDARDS.

Except as provided in Section 827.13 of this part, the construction, operation, maintenance, modification, reclamation, and removal activities at coal preparation plants shall comply with the following:

* * * * *

9. Section 827.13 is added as follows:

SECTION 827.13 - COAL PREPARATION PLANTS: INTERIM PERFORMANCE STANDARDS.

(a) Persons operating coal preparation plants not subject to this chapter before July 6, 1984, shall comply with the applicable interim or permanent program performance standards of the State in which such plants are located, as follows:

- (1) If located in a State in which either interim or permanent program performance standards apply to such plants, the program standards of the State program shall apply;
- (2) If located in a State with a State program which must be amended in order to regulate such plants, the interim program performance standards in Subchapter B of this chapter shall apply; and
- (3) If located in a State with a Federal program, all such plants shall be subject to the interim program performance standards in Subchapter B of this chapter.

(b) After a person described in paragraph (a) of this section obtains a permit to operate a coal preparation plant, the performance standards specified in Section 827.12 shall be applicable to the operation of that plant instead of those specified in paragraph (a) of this section.

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