

**FEDERAL REGISTER: 58 FR 44630 (August 24, 1993)**

DEPARTMENT OF THE INTERIOR

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

30 CFR Parts 701, 773, 778, and 784

Surface Coal Mining and Reclamation Operations, Permanent Regulatory Program; Availability of Decision; Public Participation in Permit Processing and Landowner Protection; Partial Granting of Petition

**ACTION:** Notice of decision on petition for rulemaking.

**SUMMARY:** The Office of Surface Mining Reclamation and Enforcement (OSM) is making available to the public its final decision on a petition for rulemaking from Mr. Jim B. Wyant of Vincennes, Indiana. The petition requested that OSM amend its existing regulations regarding the time frames for regulatory authority decisions following an informal conference and the notice to participants of such decisions; the notification requirements to people potentially affected by mining during the permit application review process; the inclusion of property within the permit area for which the applicant has not established uncontested surface rights; and the need for the permit to set forth projected land use within the 5-year term of permit.

**ADDRESSES:** Copies of the petition, and other relevant materials comprising the Administrative Record of this petition are available for public review and copying at Office of Surface Mining Reclamation and Enforcement, room 660, 800 North Capitol Street, NW., Washington, DC 20001.

**FOR FURTHER INFORMATION CONTACT:** Scott Boyce, Office of Surface Mining Reclamation and Enforcement, U.S. Department of the Interior, 1951 Constitution Avenue, NW., Washington DC 20240; Telephone: 202-343-3839 (Commercial or FTS).

**SUPPLEMENTARY INFORMATION:**

- I. Petition for Rulemaking Process
- II. The Wyant Petition

**I. PETITION FOR RULEMAKING PROCESS**

Pursuant to section 201(g) of the Surface Mining Control and Reclamation Act of 1977 (the Act), any person may petition the Director of OSM for a change in OSM's regulations. The regulations governing the handling of rulemaking petitions are found at 30 CFR 700.12. Under the rules, the Director may publish a notice in the Federal Register seeking comments on the petition and hold a public hearing, conduct an investigation, or take other action to determine whether the petition should be granted. If the petition is granted, the Director initiates a rulemaking proceeding. If the petition is denied, the Director notifies the petitioner in writing setting forth the reasons for denial. Under 30 CFR 700.12 the Director's decision constitutes the final decision for the Department of the Interior.

**II. THE WYANT PETITION**

OSM received a letter dated September 29, 1992, from Mr. Jim B. Wyant of Vincennes, Indiana, (the petitioner) to amend certain parts of OSM's regulations regarding the review and content of permit applications. The principal requests of the petition are set forth below. On November 12, 1992, OSM published a notice in the Federal Register containing the petition for rulemaking and providing a public comment period until December 14, 1992. (57 FR 53670.)

The principal requests of the petition are to-

1. Amend the permit application rules of 30 CFR 773.15 to require that all parties to an informal conference be notified of any decision requiring modification of the permit application within 60 days of the close of the conference or within some other fixed appropriate period of time following the close of such conference.

2. Amend 30 CFR 773.15 to require that a final decision on the permit application be made within 150 days of the close of an informal conference or within some other fixed appropriate period of time following the close of such conference.

3. Amend the public participation rules at 30 CFR 773.13 to require that during the pendency of the permit application review process the same notification requirements be applied to persons within the permit area (the "surface effects area" in Indiana for underground mines) as to persons adjacent to the permit area.

4. Amend the right-of-entry rules at 30 CFR 778.15 to require that the permit area (the "surface effects area" in Indiana for underground mines) designated in a permit application only be allowed to include property to which the applicant has established uncontested surface rights.

5. Amend the operation and reclamation plan requirements at 30 CFR 784.11 and 784.13 to require that the applicant set forth the proposed uses of land within the permit area (the "surface effects area" in Indiana for underground mines) during the 5-year term of the permit.

For the reasons discussed in the appendix to this notice, the Director has granted that part of the petitioner's first request which would require that all parties to an informal conference be notified of any decision to require modification of the permit application. OSM will initiate a rulemaking on this subject. The Director has denied that part of the first request which would impose fixed time frames for providing such notice. The Director has also denied the remainder of the petition requests. OSM will, however, propose a rule based on the fourth request that will prevent the inclusion of properties in the permit area of approved permits to which the applicant does not have uncontested right-of-entry. OSM will also through its oversight of the Indiana program address issues raised in the third request.

The Director's letter of response to the petitioner on this rulemaking petition appears in the appendix to this notice. This letter reports the Director's decision to the petitioner. Included in the appendix is an evaluation report on the issues raised by the petitioner. Included in this report are the comments received on the petition, a discussion of the comments, and OSM's position on the issues.

Dated: July 23, 1993.

W. Hord Tipton, Acting Director, Office of Surface Mining Reclamation and Enforcement.

## **APPENDIX**

July 23, 1993.

Mr. Jim B. Wyant  
R.R. 4 Box 71A  
Vincennes, IN 47591.

Dear Mr. Wyant:

This letter is in response to your September 29, 1992, petition for rulemaking to the Office of Surface Mining Reclamation and Enforcement (OSM) to amend certain OSM permitting regulations.

On October 27, 1992, the Director determined that the petition for rulemaking had sufficient basis to seek public comments on the proposed rule changes. Accordingly, on November 12, 1992, OSM published a notice of availability in the Federal Register and requested comments on the petition. (57 FR 53670.) The comment period closed on December 14, 1992. Ten comments were received by OSM during the comment period.

After careful consideration of the arguments presented in the petition and public comments, I am granting the petition in part. As a result, OSM will initiate Federal rulemaking proposing to revise the permit application provisions of 30 CFR 773.15 to require notification of all parties to an informal conference of any decision to require modification of the permit application. OSM will also initiate a rulemaking to revise the provisions of 30 CFR 778.15 to address the degree to which lands may be included in the permit area where the permittee does not have the right to enter. OSM will further address in its oversight of the Indiana program the issues raised in your third request regarding the different notification

requirements for land owners adjacent to and those within a proposed permit area. The basis for my decision is fully disclosed in the enclosed evaluation of the petition. As provided in 30 CFR 700.12 this decision constitutes the final decision for the Secretary of the Interior.

Sincerely,  
W. Hord Tipton,  
Acting Director, Office of Surface Mining Reclamation and Enforcement.

## **EVALUATION OF THE PETITION TO AMEND OSM'S RULES GOVERNING PUBLIC PARTICIPATION IN PERMIT PROCESSING AND PERMIT CONDITIONS**

Under section 201(g) of the Surface Mining Control and Reclamation Act of 1977 (the Act), any person may petition the Director for a change in OSM's regulations. The rules governing the handling of rulemaking petitions are found at 30 CFR 700.12. To accept a petition for rulemaking, the petition must cite facts, technical justification, or law which was not previously considered in a petition or prior rulemaking and which justifies a need for a new rule or amending an existing rule.

On October 7, 1992, OSM received a petition from Mr. Jim B. Wyant, Vincennes, Indiana (the petitioner).

The principal requests in the petition were to-

1. Amend the permit application rules of 30 CFR 773.15 to require that all parties to an informal conference be notified of any decision requiring modification of the permit application within 60 days of the close of the conference or within some other fixed appropriate period of time following the close of such conference.

2. Amend 30 CFR 773.15 to require that a final decision on the permit application be made within 150 days of the close of an informal conference or within some other fixed appropriate period of time following the close of such conference.

3. Amend the public participation rules at 30 CFR 773.13 to require that during the pendency of the permit application review process the same notification requirements be applied to persons within the permit area (the "surface effects area" in Indiana for underground mines) as to persons adjacent to the permit area.

4. Amend the right-of-entry rules at 30 CFR 778.15 to require that the permit area (the "surface effects area" in Indiana for underground mines) designated in a permit application only be allowed to include property to which the applicant has established uncontested surface rights.

5. Amend the operation and reclamation plan requirements at 30 CFR 784.11 and 784.13 to require that the applicant set forth the proposed uses of land within the permit area (the "surface effects area" in Indiana for underground mines) during the 5-year term of the permit.

On November 12, 1992, OSM published a notice in the Federal Register containing the petition for rulemaking and providing public comment period until December 14, 1992 (*57 FR 53670*).

## **ANALYSIS OF REQUESTS MADE BY THE PETITIONER AND COMMENTS IN RESPONSE TO THE PETITION**

This analysis addresses the requests made by the petitioner. The requests, as given in this document, have been rephrased to facilitate analysis. Each request is stated followed by applicable regulations. Comments addressing the requests are then presented along with OSM's response to each comment and an analysis of the petitioner's request. OSM's decision is then stated.

REQUEST NUMBER 1. Petitioner requests that OSM amend the permit application rules of 30 CFR 773.15 to require that all parties to an informal conference be notified of any decision requiring modification of the permit application within 60 days of the close of the conference or within some other fixed appropriate period of time following the close of such conference.

Applicable regulations: 30 CFR 773.15 Review of permit applications. Section 773.15(a)(1) requires that "(t)he regulatory authority shall review the application for a permit, revision, or renewal; written comments and objections submitted; and records of any informal conference or hearing held on the application and issue a written decision, within a reasonable time set by the regulatory authority, either granting, requiring modification of, or denying the application. If an informal conference is held under Section 773.13(c), the decision shall be made within 60 days of the close of the conference, unless a later time is necessary to provide an opportunity for a hearing under paragraph (b)(2) of this section."

The petitioner objects to the fact that following an informal conference to which he was a party the regulatory authority did not notify him and other concerned citizens of its decision to require modification of the permit. He states that "a response should be required to be made to individuals participating in an informal conference within 60 days following the conference" or, if there is justification, a more appropriate time period. He cites section 514 of the Act as evidencing the intent to provide a reasonably quick decision on permit applications once an informal conference has been held.

Comments and analysis: One commenter stated that the request to impose a requirement that the regulatory authority respond to participants of an informal conference within 60 days has no basis in the Act. Another commenter stated that the Act does not authorize OSM to promulgate regulations requiring the regulatory authority to respond to each participant in an informal conference.

The petitioner's request that the Federal rules be amended to provide notice of informal conference decisions on permit applications to all persons party to the conference raises legitimate issues. While OSM's current regulations at 30 CFR 773.19(b)(1) require the regulatory authority to provide written notification of its final decision on the permit application to all parties to an informal conference, its regulations at 30 CFR 773.15(a) do not oblige the regulatory authority to provide the same notification to the same parties for a required modification of the permit application. Such notification was originally provided in the 1979 final permanent program regulations at 30 CFR 786.23(c) (March 13, *44 FR 15381*) but dropped without explanation in the 1983 revision of OSM's regulations. (September 28, *48 FR 44371, 44395*.) Accordingly, the Secretary will institute a Federal rulemaking on this subject. If a need for a rule exists, authority is provided under section 201(c)(2) of the Act.

REQUEST NUMBER 2. The petitioner requests that OSM amend 30 CFR 773.15 to require that a final decision on the permit application be made within 150 days of the close of an informal conference or within some other fixed appropriate period of time following the close of such conference.

Applicable regulations: 30 CFR 773.15 Review of permit applications. This request is closely allied with request number 1. The Section 773.15 regulations which are described in part under request number 1. apply to this request as well.

In support of his request, the petitioner states that the uncertainty associated with having his property included in a permit application pending for over a year has had a negative impact on the property's value. Cited as principally contributing to this pendency of application is the fact that the applicant has an unlimited amount of time to respond to the modification letter sent by the regulatory authority some six months before. The petitioner contends that if a permit application is substantially inadequate at the end of some fixed time period, the regulatory authority should then deny the application and require the applicant to submit an entirely new permit application when the missing data can be provided. The petitioner further states his belief that section 514 of the Act was intended to provide for a reasonably quick decision on the permit application once an informal conference has been held.

Comments and analysis: Several commenters opposing the petition's request noted that section 510(a) of the Act leaves to each regulatory authority the discretion to place reasonable time limits on the decision to "grant, require modification of, or deny the application for a permit." Another commenter supporting the petition pointed out that, once a modification letter has been sent to an applicant, the applicant has unlimited time to respond and there is nothing requiring the process to be brought to closure to the potential detriment of third party interests. This commenter also pointed out that OSM was not overly concerned with third party interests in its 1979 rulemaking because permit decisions could be expected to occur routinely in as little as 60 to 80 days. (*44 FR 15102*.)

OSM agrees with the petitioner and commenters regarding the need under sections 510 and 514 of the Act to provide reasonably quick decisions on a permit application once an informal conference has been held. The Secretary's regulations at 30 CFR 773.15(a)(1) accommodate the need for an expeditious decision regarding issues raised by an informal conference and satisfy the statutory requirements. Where an informal conference is held, the rule requires a decision granting, denying, or modifying the permit application within 60 days of the close of the conference (with one minor exception unrelated to this issue). In effect, a decision requiring modification of a permit application may be construed to be a denial in part of that portion of the application required to be modified.

In its 1979 rulemaking, OSM previously considered and rejected a comment request to set further time limits for the processing of permit applications. Contrary to the characterization of commenter to the instant petition that OSM was not overly concerned with third party interests in its 1979 rulemaking, the preamble to that rule specifically stated that OSM concluded it to be in the "best interest of all parties" to allow the regulatory authority as much flexibility as possible regarding the time needed to judiciously consider the complex data often required in permit applications (*44 FR 15102*). As contemplated by OSM in 1979, regulatory authorities regularly require a substantial period of time to make informed decisions on increasingly large and complex administratively complete permit applications. In turn, permit applicants often legitimately require an equally substantial period of time to respond to the permit modifications imposed by the regulatory authority. In the great majority of such cases, it is in the applicant's best interests to move the permit application review process along as rapidly as possible. Required permit modifications even for the most diligently prepared permit application may reasonably take anywhere from a few months to over a year to respond to. Therefore, to require a final decision on the permit application within the 150 plus days requested by the petitioner would, in many cases, not only prevent meaningful review by the regulatory authority but also preclude meaningful compliance by the applicant to required modifications and would be contrary to the public's and petitioner's best interest.

To further require, as the petitioner requests, that a "substantially inadequate" (yet administratively complete) permit application be denied after some fixed period of time would force the applicant to later resubmit his application and start afresh the permit review process. This would unnecessarily increase the existing administrative burden of the regulatory authority and the applicant, needlessly drag out the permit application process, and further extend the uncertainty complained of by the petitioner as negatively affecting the value of his property.

On this basis, the Director is denying the petitioner's second request that OSM amend its national rules to require final decisions on the permit application be made within a fixed time period following the close of an informal conference.

REQUEST NUMBER 3: Amend the public participation rules at 30 CFR 773.13 to require that during the pendency of the permit application review process the same notification requirements be applied to persons within the permit area (the "surface effects area" in Indiana for underground mines) as to persons adjacent to the permit area.

Applicable regulations: 30 CFR 773.13 Public participation in permit processing. These regulations track the public notice provisions of Section 513 of the Act and require that "an applicant \* \* \* shall place an advertisement in a local newspaper of general circulation in the locality of the proposed surface coal mining and reclamation operation at least once a week for four consecutive weeks." The Indiana program has, in addition to counter-part notice regulations to 30 CFR 773.13, statutory requirements I 13-4. 1-4-1(a)(2) which requires the permit applicant to mail a copy of the newspaper advertisement to "owners of record of all surface and subsurface areas adjacent to any part of the permit area" and I 13-4.1-4-1(a)(3) which requires the applicant to mail copies of the newspaper advertisement "to every person who had requested notice of such applications."

The petitioner contends that persons with property within the permit area should be entitled to receive the same level information from the applicant as persons with property adjacent to the permit area. The petitioner further argues that the current situation in Indiana allows the applicant to manipulate the mailing of information to land owners by varying the size and shape of the permit area (surface effects area) so as to exclude individuals within the permit area from receiving information by mail.

Comments and analysis: Several commenters opposing the petition pointed out that the specific mailing notice requirements of the Indiana regulations go beyond the general newspaper notice requirements of the Federal regulations and that the different mailing requirements (inside the permit area vs. adjacent to the permit area) about which the petitioner objects are themselves outside the purview of OSM.

As noted above, the general Federal newspaper notice requirements of 30 CFR 773.13 track the notice provisions of section 513 of the Act. The petitioner has not provided sufficient basis for amending these regulatory provisions. The notice problem about which the petitioner complains appears to be unique to the Indiana program. On this basis, the petitioner's third request for rulemaking is denied.

While OSM agrees with commenters that the Indiana mailing provisions provide more notice than that required by the Federal regulations, OSM does not agree with these commenters that such provisions are therefore outside the purview of OSM. Sections 201(c)(1), 503, 505, and 517 of the Act clearly charge the Secretary with the duty and give the authority to evaluate the content and administration of approved State programs. Accordingly, OSM will address this issue through its oversight of the Indiana program.

REQUEST NUMBER 4: Amend the right-of-entry rules at 30 CFR 778.15 to require that the permit area (the "surface effects area" in Indiana for underground mines) designated in a permit application only be allowed to include property to which the applicant has established uncontested surface rights.

Applicable regulations: 30 CFR 778.15 Right-of-entry information. These regulations require that "an application shall contain a description of the documents upon which the applicant bases his legal right to enter and begin surface coal mining \* \* \* shall state whether that right is the subject of pending litigation \* \* \* and explain the legal rights claimed by the applicant."

The petitioner objects to the inclusion of properties in the permit area designated in a permit application when the applicant does not have surface rights to such properties. He states his firm intention of never granting to the applicant the surface rights to his own property. He also objects to the characterization of all such properties as in "pending litigation" and "surface rights pending" as implying that the properties have been sold or will be sold to the applicant. The petitioner further states his belief that it is the intent of sections 507(b)(8) and 507(b)(9) of the Act to prevent the conditions to which he objects.

Comments and analysis: Several commenters opposing the petition argued for continuation of the current Indiana practice of allowing "uncontrolled" property in the permit area designated in the application. As used here and elsewhere in this document, the term "uncontrolled property" means property for which the applicant does not have uncontested right of entry. These commenters feel that allowing uncontrolled property to be included in the permit area enables the creation of a logical unit from which projection of environmental impact can more accurately and easily be made. They also asserted that this practice accommodates the realities of the real estate market where it is not always possible nor prudent to acquire property rights long in advance of actual mining. These commenters pointed out that approval of a permit with uncontrolled property does not constitute the right to mine such property until the surface rights are acquired. They suggested that if particular surface rights are in dispute, the regulatory authority could condition the permit to preclude mining until the rights are resolved.

Another commenter opposing the practice of including uncontrolled property in the permit area stated that "(o)wnership of the rights is supposed to be a prerequisite, not an after-thought \* \* \* I would be very upset if the State granted someone else a permit to mine my coal, if they can later gain my consent."

In response, section 507(b)(8) of the Act is not germane to the petitioner's fourth request. Section 507(b)(9) is more to the point and states "the applicant shall file with the regulatory authority on an accurate map or plan, to an appropriate scale, clearly showing the land to be affected as of the date of the application, the area of land within the permit area upon which the applicant has the legal right to enter and commence surface mining operations and shall provide to the regulatory authority a statement of those documents upon which the applicant bases his legal right to enter and commence surface mining operations on the area affected, and whether that right is the subject of pending court litigation: Provided, That nothing in this Act shall be construed as vesting in the regulatory authority the jurisdiction to adjudicate property title disputes."

It is OSM's practice under its Federal and Indian lands programs to allow inclusion in the permit application of land for which the applicant can not establish uncontested right-of-entry but to prohibit inclusion of such land in the permit at its time of issuance. OSM believes this practice strikes a reasonable balance between unnecessarily burdening the

legitimate mining industry and protecting the rights of landowners. OSM's practice is not replicated by State programs, however. On this basis and in partial response to the issues raised by the petitioner, OSM will initiate a rulemaking proceeding which will address the issue of inclusion of land in the approved permit for which the applicant does not have right-of-entry.

REQUEST NUMBER 5: Amend the operation and reclamation plan requirements at 30 CFR 784.11 and 784.13 to require that the applicant set forth the proposed uses of land within the permit area (the "surface effects area" in Indiana for underground mines) during the 5-year term of the permit.

Applicable regulations: Section 784.11 Operation plan: General requirements. Section 784.13 Reclamation plan: General requirements. Section 784.11 requires that "(e)ach application shall contain a description of the mining operation proposed to be conducted during the life of the mine within the proposed permit area, including, at a minimum, the following: \* \* \* coal mining procedures \* \* \* equipment to be used \* \* \* construction, modification, use, maintenance, and removal of \* \* \* dams \* \* \* overburden and topsoil handling and storage areas \* \* \* coal processing waste", etc. Section 784.13 requires analogous information for the reclamation plan including a detailed timetable for the completion of each major step in the reclamation plan.

Comments and analysis: No commenters addressed this issue. The proposed land use information requested by the petitioner is already required to be included in a mining permit on a life of mine basis by Sections 784.11 and 784.13. OSM believes that breaking out this information into consecutive 5-year permit terms represents an unnecessary burden to the applicant and would not provide tangible benefit to other parties. On this basis, the petitioner's fifth request is denied.

#### **OTHER ISSUES RAISED BY COMMENTERS BUT NOT INCLUDED IN THE PETITION**

Two commenters noted that permit applications may be revised subsequent to the informal conference with no mechanism for public comment. One commenter believes that revisions should be made available to the public at the place of public filing, and that comments should be accepted concerning such revisions up to the time of the final decision. The commenter believes this can be accomplished under existing regulations by a change in policy. Another commenter noted this lack of a specific mechanism to comment on a modified permit application as a weakness in the regulations protection of landowner's rights.

In response to these comments, OSM notes that when an application is revised responsive to required modifications, the regulatory authority already has sufficient authority under its approved program to require, as appropriate, readvertisement of the application and opportunity for public comments.

Two commenters raised issues peripheral to the petitioner's request. One commented as to an alleged problem with another state program. The second expressed concerns about the protection of surface and near surface property rights in coal producing states particularly as such rights are affected by subsidence. Both of the issues addressed by these commenters fall outside the scope of this petition. The comments will, however, be forwarded to appropriate offices within OSM. The subsidence comment will be placed in the administrative record of the subsidence related rulemaking required by OSM under section 2504(a) of the National Energy Policy Act of 1992, Public Law 102-486.