

FEDERAL REGISTER: 47 FR 18555 (April 29, 1982)

DEPARTMENT OF THE INTERIOR

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

30 CFR Parts 722 and 843

Surface Coal Mining and Reclamation; Interim and Permanent Program Regulations: Cessation Orders

ACTION: Final rule and interim final rule with request for public comments.

SUMMARY: The Office of Surface Mining (OSM) is issuing a final rule modifying one section of its permanent regulatory program regulations relating to cessation orders and an interim final rule modifying the corresponding section of its initial program regulations. Both rules will allow OSM to issue cessation orders to persons conducting surface coal mining operations without a valid permit.

DATES: Effective date: April 29, 1982.

Written comments: On interim final rule (Section 722.11), accepted until 5 p.m. (eastern time) on June 1, 1982.

Public hearing: On interim final rule (Section 722.11), held on request only, on May 28, 1982, at 9:30 a.m.

Public meetings: On interim final rule (Section 722.11), scheduled on request only.

ADDRESSES:

Written comments: Hand-deliver to the Office of Surface Mining, U.S. Department of the Interior, Administrative Record (R&I 31), Room 5315, 1100 L Street, NW., Washington, D.C.; or mail to the Office of Surface Mining, U.S. Department of the Interior, Administrative Record (R&I 31), Room 5315L, 1951 Constitution Avenue, NW., Washington, D.C. 20240.

Public hearing: On interim final rule (Section 722.11), if held -- Department of the Interior Auditorium, 18th and C Streets, N.W., Washington, D.C.

Public meetings: On interim final rule (Section 722.11), if requested, OSM Offices in Washington, D.C.

FOR FURTHER INFORMATION CONTACT:

Carl S. Pavetto, Chief, Branch of Inspection, Office of Surface Mining, U.S. Department of the Interior, 1951 Constitution Avenue, NW, Washington, D.C. 20240; 202-343-5384.

SUPPLEMENTARY INFORMATION:

- I. Public Commenting Procedures
- II. Background
- III. Discussion of Rules Adopted
- IV. Response to Comments
- V. Procedural Matters

I. PUBLIC COMMENTING PROCEDURES

WRITTEN COMMENTS

Part of the rule being issued is an interim final rule (Section 722.11(c)), on which OSM is accepting public comment. (OSM is not soliciting public comment on Section 843.11(a)(2), which is being adopted as a permanent final rule.) Written comments should be specific, pertain only to the issues raised by the interim final rule, and include explanations in support of the commenter's recommendations. Commenters are requested to submit five copies of their comments (see "Addresses"). Comments received after the time indicated under "Dates" or at locations other than that indicated under "Addresses," will not necessarily be considered or be included in the Administrative Record for the final rulemaking.

PUBLIC HEARING

Persons wishing to comment at the public hearing on the interim final rule should contact the person listed under "For Further Information Contact" by the close of business three working days before the date of the hearing. If no one requests a public hearing by that date, the hearing will not be held. If only one person requests a public hearing, a public meeting, rather than a public hearing, may be held and the results of the meeting included in the Administrative Record.

Filing of a written statement at the time of the hearing is requested and will greatly assist the transcriber. Submission of written statements in advance of the hearing will allow OSM officials to prepare appropriate questions. The public hearing will continue on the specified date until all persons scheduled to comment have been heard. Persons in the audience who have not been scheduled to comment and wish to do so will be heard following those scheduled. The hearing will end after all persons scheduled to comment, and persons present in the audience who wish to comment, have been heard.

PUBLIC MEETINGS

Persons wishing to meet with OSM representatives to discuss the interim final rule may request a meeting at the location listed in "Addresses" by contacting the person listed under "For Further Information Contact."

All such meetings are open to the public and, if possible, notices of meetings will be posted in advance in the Administrative Record room (Room 5315, 1100 L St. office). A written summary of each public meeting will be made a part of the Administrative Record.

II. BACKGROUND

On December 1, 1981 (*46 FR 58464*), OSM proposed to amend the standards and procedures in its permanent regulatory program governing State regulatory authority inspection and enforcement, Federal inspection and enforcement and civil penalty assessments.

Public comment was solicited through February 1, 1982 and three hearings were held on January 13, 1982. Many written comments also were received.

One of the proposed amendments, a new Section 843.11(a)(2), dealt with the issuance of cessation orders to persons conducting surface coal mining operations without a valid permit. That proposed section would supersede a ruling by the Interior Board of Surface Mining Appeals (the Board) in *Claypool Construction Company v. OSM*, 2 *IBSMA 81*, May 16, 1980 (Claypool), interpreting the scope of existing 30 CFR 722.11(b). This rule adopts in final form proposed Section 843.11(a)(2), with one change from the proposal as described below in the Discussion of Rules Adopted. This new provision applies only in States where the permanent regulatory program rules are in effect. The remaining sections of the inspection and enforcement rules proposed on December 1, 1981, will be addressed in a later final rulemaking.

OSM is also adopting as an interim final rule a provision for the interim regulatory program to be inserted as a new Section 722.11(c). This provision is essentially the same as Section 843.11(a)(2) as it was proposed. The problem of unpermitted operations is even more acute in States without approved State programs where the interim regulatory program remains in effect. At the time the changes to Part 843 were developed, OSM had anticipated that extension of the permanent program regulations to all affected States as a result of State program approvals was near and that further changes to the interim program regulations would not be necessary. Such approvals have not yet been completed. The revision to the interim regulations is therefore necessary so that OSM can enforce its regulations against operations without valid permits required by the Act and the interim program regulations in the States where the interim regulatory program will continue. This will ensure national uniformity in the enforcement of one of the basic requirements of the Surface Mining Control and Reclamation Act of 1977, 30 *U.S.C. 1201 et seq.* (the Act). See Sections 101(g) and 102(a) of the Act. Surface coal mining operations not required to obtain permits under the interim regulatory program would not be affected by the change.

The revision to Section 722.11 is an interim final rule that is effective concurrently with the revision to Section 843.11. See the discussion below under Procedural Matters. Upon considering the comments received, OSM will make

any necessary modifications. Commenters should address the differences, if any, between the application of this new rule under the interim and permanent program regulations.

III. DISCUSSION OF RULES ADOPTED

Section 521(a)(2) of the Act and 30 CFR 722.11(b) of the regulations require "an authorized representative of the Secretary (who) finds conditions or practices, or violations of applicable performance standards, which are causing or can reasonably be expected to cause significant, imminent environmental harm to land, air and water resources" to immediately order a cessation of any portion of a surface coal mining and reclamation operation relevant to the offending condition, practice or violation. In Claypool, the Board held that the conduct of surface coal mining operations without the requisite permit was inadequate to demonstrate the existence or reasonable expectation of significant, imminent environmental harm related to such operations.

OSM's experience in administering the Act demonstrates that the failure to plan mining operations in advance and obtain the necessary authorization to conduct surface coal mining operations constitutes an imminent threat of significant environmental harm, and therefore falls within the ambit of Section 521(a)(2) of the Act. The requirements of the Act and regulations and the general permitting requirements in most State laws (especially the requirements for pre-operational planning as to hydrology, reclamation potential of an area and bonding) demonstrate the critical role that the permit plays in an environmentally acceptable surface mine operation. Indeed, Congress expressly recognized this fact when, in Section 502(a) of the Act, it prohibited the development of any new mine on lands regulated by a State unless the operator first obtained a permit from the State regulatory authority. The failure to obtain such a permit under most circumstances means that the operator knows little, if anything, about the actual environmental consequences that can be expected from mining. OSM's experience is that the continuation of such operations leads quickly to significant environmental harm.

Permit and pre-plan requirements allow the operator and the regulatory authority to determine those conditions that might potentially cause significant environmental harm and to make adequate provision for their control. Such conditions, particularly those involving sub-surface hydrology and geology and unidentified prior deep mining, often cannot be uncovered solely by an inspection. Moreover, once the conditions are actually encountered in mining -- once an aquifer is disturbed, or toxic water is released from old deep mines, or a landslide occurs -- the environmental damage may be irreparable. Only the operator, through thorough pre-mining studies, and the permitting authority, through review of those studies, have the opportunity to discover such conditions. Moreover, only if such conditions are revealed in the permit application process can the regulatory authority ensure that significant environmental harm will not occur.

Specifically, the two new sections provide that surface coal mining and reclamation operations conducted by any person without a required valid surface coal mining permit constitute a condition or practice which causes or can reasonably be expected to cause significant, imminent environmental harm to land, air or water resources. In both sections, OSM has provided an exception for uninterrupted extensions of previously permitted operations for which timely and complete permit applications are pending because it recognizes that in such instances the earlier permit and the operator's efforts to obtain a further permit reduce the risk of environmental harm from the unpermitted operation.

In a change from the proposal, a second exception has been provided in Section 843.11(a)(2). This exception applies to unpermitted mines which were operating lawfully under the interim program regulations in certain States which had not required permits for such operations. At the time of passage of the Act, some States (e.g., West Virginia) did not require permits for underground mines, since such mines generally cause fewer environmental problems than surface mines. In recognition of this, the Act did not require permits during the interim regulatory program for those operations which were otherwise not subject to State permitting requirements.

By the same reasoning, the continuation of these previously lawful operations after implementation of the permanent regulatory program (when a permit is required) would not reasonably be expected in every case to constitute an imminent threat of significant environmental harm. While the failure to obtain a permit under such circumstances would violate the regulations, a notice of violation (or the State equivalent) would be the appropriate remedy unless specific significant environmental harm in fact exists.

IV. RESPONSE TO COMMENTS

1. Several commenters objected to proposed Section 843.11(a)(2), which they said created a presumption that any coal mining conducted without a permit causes significant environmental harm. They stated this presumption violates Claypool, lacks a reasonable basis, and violates due process rights by sanctioning a cessation order without any hearing to determine whether a permit is even required.

See the preceding section, Discussion of Rules Adopted, for an explanation of the basis for these rules.

While it is true that the finding of significant, imminent environmental harm from unpermitted mining operations is inconsistent with the Board's holding in Claypool, these rules supersede that holding.

As for the expressed due process concerns, it will be the Office's policy in implementing these regulations to refrain from issuing a cessation order until it resolves any question concerning its jurisdiction over a given operation. The Office notes that the limited circumstances which preclude its jurisdiction over a surface coal mining operation are delineated in 30 CFR 700.11, and are readily ascertainable.

2. Several other commenters supported proposed Section 843.11(a)(2), but objected to the exception for operations which are "an integral, uninterrupted extension of previously permitted operations, (where) the person conducting such operations has filed a timely and complete application for a permit to conduct such operations." These commenters saw the exception as violating the prohibition of Section 502 of the Act against mining without a permit, especially since there is no assurance that a permit extension will be granted.

The Office disagrees. The exception provided for in this rule in no way sanctions unpermitted surface coal mining operations. Rather, OSM's experience indicates that such operations do not cause significant environmental harm through lack of adequate planning and review. Of course, in all instances where a significant, imminent environmental harm does in fact exist, a cessation order will be issued.

V. PROCEDURAL MATTERS

Administrative Procedure Act

In accordance with 5 *U.S.C. Section 553*(b), OSM finds good cause why advance notice and advance public comment on the interim changes to Section 722.11 are both unnecessary and contrary to the public interest.

Advance notice and comment on the interim rule are unnecessary because advance notice has been given and public comment has been received on essentially the same change in the permanent regulatory program at Section 843.11. The issues associated with the changes have been fully aired. An adequate opportunity to comment has been provided. Furthermore, additional public comment will be considered after publication of the interim final rule.

Advance notice and comment on the interim final rule would be contrary to the public interest because the purposes of the Act are frustrated if OSM cannot expeditiously halt the conduct of unpermitted operations which pose a serious danger to the environment. As discussed earlier, the permitting process is central to the health, safety and environmental protection provisions of the Act, and the ability to issue cessation orders for unauthorized operations is essential to enforcement of the permitting process.

In accordance with 5 *U.S.C. Section 553*(d), there is also good cause to make immediately effective both Sections 722.11(c) and 843.11(a)(2). Not to do so would be contrary to the public interest for the reasons discussed above.

Executive Order 12291

The Department of the Interior (DOI) has examined these rules according to the criteria of Executive Order 12291 (February 17, 1981). OSM has determined that these are not major rules and do not require a regulatory impact analysis because they will impose only minor costs on the coal industry and coal consumers.

Regulatory Flexibility Act

The DOI has also determined, pursuant to the Regulatory Flexibility Act, 5 *U.S.C. 601* et seq., that these rules will not have a significant economic impact on a substantial number of small entities.

Paperwork Reduction Act

The rules adopted today, Sections 843.11(a)(2) and 722.11(c), contain no information collection requirements requiring Office of Management and Budget approval under 44 U.S.C. Chapter 35.

National Environmental Policy Act

OSM has prepared an environmental assessment (EA) on the revision to Section 843.11 and has made a finding that it will not significantly affect the quality of the human environment. The EA is on file in the OSM Administrative Record at the address listed in the "Addresses" section of this preamble.

Under Section 501(a) of the Act, the revision to the interim program regulations in Section 722.11 is deemed not to be a major Federal action within the meaning of Section 102(2)(c) of the National Environmental Policy Act of 1969, 42 U.S.C. 4322.

Drafting Information

These regulations were drafted by Neil Stoloff, Enforcement Specialist, Branch of Inspection, OSM, and Joel Yudson, Attorney-Adviser, Division of Surface Mining, Office of the Solicitor.

LIST OF SUBJECTS

30 CFR PART 722

Law enforcement, Public health, Safety, Surface mining, Underground mining.

30 CFR Part 843

Administrative practice and procedure, Law enforcement, Reporting and recordkeeping requirements, Surface mining, Underground mining.

Accordingly, 30 CFR Part 722 is revised on an interim basis and 30 CFR Part 843 is revised permanently, as set forth herein.

Dated: April 1, 1982.

Daniel N. Miller, Jr., Assistant Secretary, Energy and Minerals.

PART 722 -- ENFORCEMENT PROCEDURES

1. Section 722.11 is amended by redesignating paragraphs (c), (d), (e) and (f) as (d), (e), (f) and (g), respectively, and adding a new paragraph (c) to read as follows:

SECTION 722.11 - IMMINENT DANGERS AND HARMS.

* * * * *

(c) Surface coal mining and reclamation operations conducted by any person without a valid surface coal mining permit required by this Subchapter constitute a condition or practice which causes or can reasonably be expected to cause significant, imminent environmental harm to land, air or water resources, unless such operations are an integral, uninterrupted extension of previously permitted operations, and the person conducting such operations has filed a timely and complete application for a permit to conduct such operations.

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PART 843 -- FEDERAL ENFORCEMENT

2. Section 843.11 is amended by redesignating paragraph (a)(2) as paragraph (a)(3) and by adding a new paragraph (a)(2) to read as follows:

SECTION 843.11 - CESSATION ORDERS.

(a) * * *

(2) Surface coal mining and reclamation operations conducted by any person without a valid surface coal mining permit constitute a condition or practice which causes or can reasonably be expected to cause significant, imminent environmental harm to land, air or water resources, unless such operations

(i) Are an integral, uninterrupted extension of previously permitted operations, and the person conducting such operations has filed a timely and complete application for a permit to conduct such operations; or

(ii) Were conducted lawfully without a permit under the interim regulatory program because no permit had been required for such operations by the State in which the operations were conducted.

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(Pub. L. 95-87; 30 U.S.C. 1201 et seq.)

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