

FEDERAL REGISTER: 47 FR 32939 (July 30, 1982)

DEPARTMENT OF THE INTERIOR

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

30 CFR Parts 716 and 785

Surface Coal Mining and Reclamation Operations; Initial and Permanent Regulatory Programs:

Prime Farmland

ACTION: Interim final rules.

SUMMARY: The Office of Surface Mining Reclamation and Enforcement is publishing interim final rules which place a temporal limit on the prime farmland grandfather exemption contained in Section 510(d) of the Surface Mining Control and Reclamation Act of 1977. Pursuant to the initial program rule of Section 716.7, the grandfather exemption is terminated on April 3, 1983. This termination date is also effective for the permanent program rule of Section 785.17.

EFFECTIVE DATE: The amendments to Sections 716.7 and 785.17 are effective on August 30, 1982.

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SUPPLEMENTARY INFORMATION:

- I. Background.
- II. Discussion of Comments and Rules Adopted.
- III. Procedural Matters.

I. BACKGROUND

Section 510(d)(2) of the Surface Mining Control and Reclamation Act of 1977 (the Act), *30 U.S.C. 1260(d)(2)*, exempts some surface coal mining and reclamation operations on prime farmland from the special prime farmland permit approval requirements of Section 510(d)(1) and the prime farmland performance standards of Section 515(b)(7). Specifically, the so-called "grandfather exemption" provides that:

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

This special exemption does not mean that surface coal mining operations on prime farmlands are not required to be reclaimed. Rather, all the other stringent permit application and reclamation requirements apply, including the requirement to return land with a premining cropland use to the capability to support an equivalent or higher use after mining. Reclamation of grandfathered mines could, however, be planned and conducted without meeting certain soil reconstruction provisions developed with and approved by the U.S. Department of Agriculture for prime farmland soils. See Section 515(b)(7) of the Act. The grandfather clause also exempts certain operations from the special prime farmland permit application requirements.

A. INTERIM FINAL RULES

The interim final rule for the initial regulatory program under Section 716.7(a)(2)(iv) requires a termination of the prime farmland grandfather exemption on April 3, 1983. The interim final rule for the permanent regulatory program under Section 785.17(a)(5) requires the same cutoff date of April 3, 1983. These rules are being issued as interim final rules pending completion of a reconsideration of their environmental impacts in a supplement to OSM's Final Environmental Impact Statement OSM-EIS-1 and are issued at this time to give States and operators time to prepare for the termination of grandfathering on April 3, 1983. Following issuance of the final supplemental environmental impact statement, final rules will be issued.

B. LEGISLATIVE HISTORY AND PRIOR RULEMAKING

The rulemaking history of the prime farmland grandfather issue as set out in the Federal Register is as follows:

- December 13, 1977 (*42 FR 62693*) -- Initial program grandfather rule.
- September 18, 1978 (*43 FR 41856*) -- Proposed permanent program rule.
- March 13, 1979 (*44 FR 15373*) -- Final permanent program rule.
- December 31, 1979 (*44 FR 77454*) -- Notice of grandfather rule suspension due to permanent program litigation.
- April 16, 1980 (*45 FR 25992*) -- Proposed rule, revised regulation which provided a uniform grandfather clause.
- January 23, 1981 (*46 FR 7894*) -- Final rule published to become effective February 23, 1981.
- January 29, 1981 -- Presidential memorandum postponing all pending regulations was signed (published on February 6, 1981, at *46 FR 11227*).
- February 4, 1981 (*46 FR 10707*) -- Extension of effective date for 60 days due to Presidential memorandum of January 29, 1981.
- March 23, 1981 (*46 FR 18023*) -- Grandfather rule suspended pending outcome of State program approvals.
- April 3, 1981 (*46 FR 20211*) -- Cancellation of March 23, 1981, notice; request for comment as to whether rules should be suspended indefinitely; and deferral of effective date.
- April 29, 1981 (*46 FR 23924*) -- Deferral of effective date and reopening of public comment period due to request from public.
- June 15, 1981 (*46 FR 31258*) -- Deferral of effective date to allow OSM time to analyze comments received.
- August 14, 1981 (*46 FR 41046*) -- Deferral of effective date to allow OSM additional time to comply with the Presidential memorandum of January 29, 1981.
- September 29, 1981 (*46 FR 47720*) -- Final grandfather rule published without a cutoff date.
- March 22, 1982 (*47 FR 12310*) -- Proposed grandfather rule with cutoff date options.
- April 12, 1982 (*47 FR 15605*) -- Extension of comment period at the request of the public.
- April 28, 1982 (*47 FR 18134*) -- Extension of comment period at the request of the public.
- May 17, 1982 -- End of comment period.

This rulemaking history and several pertinent court decisions are briefly described in these past Federal Register documents. Members of the public are encouraged to review these related documents in order to obtain the complete history of the prime farmland grandfather issue.

In Congress' 10-year consideration of surface coal mining legislation, special standards for the preservation of prime farmland were not discussed until late 1976 and 1977 near the end of the process. The mining and reclamation of prime farmlands became a major issue when in 1977 the Secretary of the Interior, supported by President Carter, called for a moratorium of surface mining on prime farmland (House Report No. 95-218, 95th Cong., 1st sess., April 22, 1977, pages 157 and 185).

An interagency task force consisting of representatives from the Office of Management and Budget, Soil Conservation Service, Bureau of Mines, Federal Energy Administration, and Environmental Protection Agency was convened to address the issue of a moratorium of surface mining on prime farmland. This interagency task force concluded that the technological capability of restoring prime farmland had been demonstrated in three States, that a very small percentage of prime farmland would be affected by surface mining in the near future, and that the strippable coal reserve base of major sections of several States would be diminished by approximately 50 percent, thus causing extreme economic and social problems in those States. (See "Report of the Interagency Task Force on the Issue of a Moratorium or a Ban on Mining in Prime Agricultural Lands," 1977, available in OSM's Administrative Record as Accession No. 693D. The conclusions of this study, with respect to the impact of coal mining on agricultural production, were later supported in large part by the 1981 Rural Development Research Report No. 29 of the U.S. Department of Agriculture entitled "Coal Development in Rural America, The Resources at Risk," by Wallace McMartin, Virgil Whetzel, and P. R. Myers, on file in OSM's Administrative Record with this Federal Register notice.) In view of the findings of the Interagency Task Force, and also in view of testimony at hearings supporting the conclusion that reclamation was possible, Congress chose not to place a surface mining moratorium on prime farmland, but to allow mining where it could be demonstrated that the productive capability of prime farmland could be restored. It was suggested during discussions on the proposed moratorium of surface mining on prime farmland that several years might be needed to put this technological capability in place. The pre-Act legislative history does not provide any explicit guidance with respect to a cutoff date for the grandfather exemption, and what legislative history does exist contains conflicting views. (See discussion at *46 FR 7894*, January 23, 1981.) Senators Percy, Culver, and others presented the grandfather exemption as an amendment to Senate Bill 7 (95th Cong., 1st sess., May 20, 1977; 123 Congressional Record S8103, daily ed.). Senator Percy described the action as follows:

The administration proposal provided for case-by-case variances for new permits -- and grandfathered all existing permits for stripping prime farmlands. We have retained the case-by-case variance procedure and the grandfather clause. * * * and we have written our amendment very carefully to indicate that we accept the coal companies' own contention that they can restore prime farmlands to full productivity.

What we require is that they demonstrate -- to the satisfaction of the State regulatory authorities -- that they can and will do so before receiving any new permits. (123 Congressional Record S7871, daily ed., May 18, 1977).

The regulation adopted today responds to congressional concern for the protection of the Nation's prime farmland and the concern that mining operations in different States be accorded equal treatment. Since the passage of the Act, the Senate has moved to amend it and specifically to include a grandfather exemption cutoff date of August 3, 1982, under Senate Bill 2112 (96th Cong., 2d sess., August 22, 1980; 126 Congressional Record S11398, daily ed.). Congressional committees and individual Congressmen lent support to this effort and have expressed their desire to have a prime farmland grandfather cutoff date. Most importantly, the Senate's vote of 84 to 1 on August 22, 1980, to impose a 1982 cutoff date under S. 2112, is evidence of Congress' interpretation of the grandfather clause.

Additionally, the State of Illinois has considered the practical implication of the grandfather provisions of the Act and has limited the scope of the exemptions by having them expire on August 3, 1982. (See discussion at *46 FR 7895*, January 23, 1981.) Illinois has relied upon this limit, but has indicated that if OSM were to fail to adopt a similar cutoff date, the Illinois provision may be unable to survive court challenge in the State. Illinois' action in adopting a cutoff date in its program has been one factor in OSM's decision to impose a nationally uniform cutoff date. As indicated later in response to comments, a period of time will be required before termination of the exemption to provide an opportunity for amendment of existing permits to include the special prime farmland requirements. For this reason the interim final rule provides an 8-month period for revising permits from August 3, 1982, and imposes a uniform cutoff date of April 3, 1983.

II. DISCUSSION OF COMMENTS AND RULES ADOPTED

OSM received comments from 121 commenters during the 56-day comment period of March 22, 1982, to May 17, 1982. One public hearing was held in Springfield, Ill., on April 15, 1982, at which 19 commenters voiced their concerns with respect to these prime farmland regulations. Those who expressed their concerns during the comment period included 37 members of Congress, the Secretary of Agriculture, three State regulatory agencies, and a variety of private citizens and organizations. The majority of these commenters supported a uniform cutoff date.

A. COMMENTS OF THE SECRETARY OF AGRICULTURE

The U.S. Department of Agriculture is the Federal agency charged with the responsibility of protecting this Nation's farmlands. The Secretary of Agriculture, in his comments on this rulemaking, has reinforced his commitment to prime farmland conservation and protection. He and the Secretary of the Interior have solidified the cooperative partnership envisioned by Congress in carrying out the prime farmland provisions of the Act. The Department of Agriculture, through assignment to the Soil Conservation Service, and the Department of the Interior, through assignment to the Office of Surface Mining, stand ready to fulfill their responsibilities to meet the Act's requirements for reclamation of prime farmland soils.

One commenter pointed out that the Secretary of Agriculture did not concur in the prime farmland grandfather regulation promulgated on September 29, 1981, and stated that therefore those regulations are invalid. The same commenter also pointed out that the Secretary of Agriculture has historically supported the August 3, 1982, cutoff date and opposed any delay in its implementation. For this reason the commenter felt OSM should also support the August 3, 1982, cutoff date.

In his comments on this rulemaking, the Secretary of Agriculture reaffirms his commitment to the preservation of prime farmland through the adoption of an August 3, 1982, cutoff date. He also explains that while section 510(d)(1) of the Act requires concurrence by the Secretary of Agriculture in any OSM regulations dealing with section 510(d)(1) of the Act, Congress did not extend this requirement of concurrence to regulations addressed solely to implementation of the grandfather exemption provided in section 510(d)(2).

OSM agrees with the Secretary of Agriculture in his evaluation of responsibilities under section 510(d)(2) of the Act. The concurrence of the Secretary of Agriculture for regulations implementing section 510(d)(1) of the Act is required to assure that his technical expertise is brought to bear on those rules to which it is applicable, such as defining and locating prime farmland and regulating its reclamation. Such technical expertise is not relevant to the policy decisions of Congress which are incorporated into section 510(d)(2) and which must be reconciled by the Secretary of the Interior. This is not a new position with respect to this issue. The working relationships developed over the past several years between OSM and the Soil Conservation Service involving regulation development and State programs have been formulated based upon this premise. The Soil Conservation Service has taken positive steps under the Act and regulations with respect to locating and identifying prime farmland soils (section 507(b)(16)), commenting on permit applications containing prime farmland (section 510(d)(1)), and establishing specifications for prime farmland soil reconstruction (section 515(b)(7)). OSM has developed all prime farmland rules with the assistance and concurrence, where appropriate, of the Soil Conservation Service.

B. GENERAL COMMENTS

Several commenters asserted that there is no legal or technical justification to set a time frame for termination of the grandfather exemption. They indicated that time is not an appropriate vehicle to determine when grandfathering should cease and that the setting of an arbitrary cutoff date is beyond the power of the Secretary. They also felt that this determination must be made, if at all, based upon a case-by-case evaluation of the legal commitments, financial commitments, operational commitments, or a combination of these made as of August 3, 1977. This would be in keeping with the expressed intent of Congress to assure the continued operation of ongoing mines. These commenters went on to say that this is only fair to operators who designed mining operations, purchased equipment, analyzed economics, etc., based upon mining a certain area under specific requirements. Other commenters pointed out that there are too many differences among State practices and among mining operations to make any uniform termination date either practical or fair and that States which desire a cutoff date may establish one since a State regulatory program may always be more stringent than the Federal program. Another commenter pointed out that a termination date is not practical or reasonable because the technology exists to reclaim prime farmland and thus any such land disturbed would ultimately be returned to its premining capability. Several commenters also stated that the U.S. Court of Appeals of the District of Columbia rejected a previous OSM regulation that attempted to limit the section 510(d)(2) exemption to "revisions or renewals" of existing permits, saying:

Our disposition of this issue reflects the recognition of Congress in section 510(d)(2) of the Act that when the statute was enacted, existing operations on prime farmlands had already made large investments in reliance on the requirements

in effect at the time and that such existing mines should continue in operation independent of the fortuitous nature of the States' permit machinery. In re: *Surface Mining Regulation Litigation*, 627 F. 2d 1346, 1363 n. 18 (1980).

OSM believes that the proposed cutoff date is not arbitrary and is supported by the Act. Congress intended, and the Court of Appeals recognized, that the prime farmland exemption would not be limitless. See 46 FR 7895. The cutoff date insures that all mining operations will be required to meet the same standards, it will reduce potential variation in the application of the law in different States, and it will provide certainty to the public and the industry with regard to the scope of the prime farmland exemption. A case-by-case evaluation of each grandfathered mine to determine when the exemption should terminate for that mine could result in a different termination date for each operation. This variation would undermine the previously mentioned congressional desire for uniformity in regulations.

The majority of commenters recommended imposition of a uniform cutoff date based upon the belief that Congress did not expect the grandfathering of prime farmlands to continue long into the future. They further stated that lack of a cutoff date would allow circumvention of the prime farmland provisions of the Act, which must not be allowed to continue without end. These commenters generally expressed their support for alternative A in the March 22, 1982, proposal which would provide an August 3, 1982, termination date for the prime farmland grandfather exemption. The support expressed in these comments for alternative A has been a major factor in the decision to impose a uniform grandfather exemption cutoff date. OSM agrees with these comments to the extent that they support a cutoff date in the near future.

In this regard, several commenters who favored a uniform cutoff date pointed out the lack of time remaining for an August 3, 1982, cutoff date and therefore suggested December 31, 1982, and February 3, 1983, as alternative cutoff dates. One commenter suggested that the exemption terminate 8 months after the date on which the Secretary approves a State regulatory program (as derived from 30 CFR 771.11, general requirements for permits). These commenters were concerned with the time required by the regulatory authority permit approval process under the interim or permanent programs, coordination with the Soil Conservation Service in prime farmland soil surveys and reclamation plan review, and the time to obtain the information needed to establish proof of technological capability under section 510(d)(1) of the Act.

OSM agrees that the regulatory authority permit approval process under permanent regulatory programs is time consuming. Establishing reclamation plan coordination, soil surveys, and proof of technological capability with the Soil Conservation Service will be time consuming. The proof needed to assure technological capability to reclaim prime farmland will vary depending upon local conditions including soils, soil handling equipment, crop productivity requirements, and other reclamation plan requirements. Moreover, some commenters pointed out that this burden of proof delays the permitting process and could disrupt mining for operators capable and willing to meet the special prime farmland reclamation standards, but whose existing permit does not include specific approval under the permanent program to mine prime farmlands.

In response to these comments, OSM has selected a cutoff date of April 3, 1983. The selection of April 3, 1983, as the cutoff date is based upon the necessity of providing a period of time to allow for the amendment of existing permits to include the special standards applicable to prime farmlands. This date is consistent with the 8-month period provided in sections 502 and 506 of the Act and 30 CFR 771.11 for issuance of permanent program permits after approval of a State program.

Several commenters observed that imposition of a uniform cutoff date would be contrary to congressional intent to ensure a transition for existing mines to the full requirements of the special prime farmlands performance standards of the permanent program. They noted that such a rule could impose harsh local and regional employment, energy, and other socioeconomic impacts in direct conflict with congressional intent in enacting section 510(d)(2). They added that such impacts could further be detrimental to the President's and the Nation's economic recovery goals and would only aggravate the Nation's record high unemployment levels.

OSM agrees that in enacting section 510(d)(2), Congress intended to provide for a transition period for existing operations and to help minimize adverse financial and socioeconomic impacts. The majority of commenters felt that the 5-year period from August 3, 1977, to August 3, 1982, has provided an adequate period for transition of preexisting, permitted prime farmland operations. Further, the termination date selected by OSM will encompass the 5-year transition period chosen by Illinois after that State carefully considered the condition of the mining industry there. As mentioned

above, OSM determined that August 3, 1982, would not be fair to States and operators and therefore chose a date 8 months beyond the 5-year period from passage of the Act.

A few commenters have focused on the number of prime farmland acres potentially affected by surface coal mining and these grandfather regulations. OSM received widely varying estimates of the number of acres potentially affected. The State of Illinois estimates that approximately 14,000 acres of prime farmland have currently been grandfathered in Illinois, and of this amount only 12,000 acres are projected to be mined out prior to August 3, 1982. The State of Indiana estimates that 11,560 acres of prime farmland are grandfathered under current permits.

One of the largest coal companies in the country operating fourteen mines in areas where a high percentage of prime farmland exists estimates that no more than 22,000 acres of prime farmland would be subject to the grandfather clause at all fourteen of their mines including three mines in Illinois, five mines in Kentucky, and six mines in Indiana. Another coal company reported that approximately 11,764 prime farmland acres in Illinois would be affected by a termination date.

OSM is unable to resolve the variation in these comments and has not determined the precise number of acres potentially affected by this rule. However, the majority of commenters requested a uniform cutoff date regardless of the number of acres affected, and thus the selection of a uniform cutoff date is not based upon the number of acres potentially affected.

Prime farmland impacted by underground mines was of concern to some commenters because of the potential effects of surface support facilities and subsidence. Another commenter pointed out that a typical Midwestern underground mine acquires a few hundred acres of surface area for support facilities to mine an entire block of coal (15,000-20,000 acres of coal).

Prime farmland affected by subsidence is protected under 30 CFR 784.20, 817.121, 817.122, 817.124, and 817.126 of the permanent program regulations. The permit application for underground mining operations must contain an analysis of whether or not there are renewable resource lands" (prime farmland included) potentially affected by subsidence and specify measures that will be taken to prevent material damage to the land surface. These regulations are not affected by this rulemaking and are the same for both grandfathered and nongrandfathered mines. For a discussion of proposed changes to the subsidence rules, see the proposed rule published on April 16, 1982 (*47 FR 16604*).

III. PROCEDURAL MATTERS

Executive Order 12291

OSM has determined that this rule is not a major rule under Executive Order 12291 and a regulatory impact analysis has not been prepared.

The Regulatory Flexibility Act

These rules have also been examined pursuant to the Regulatory Flexibility Act, *5 U.S.C. 601* et seq., and OSM has determined that the rules do not have a significant impact on a substantial number of small entities.

The National Environmental Policy Act

Revision of Section 716.7 of the initial program regulations is deemed not to be a major Federal action within the meaning of the National Environmental Policy Act of 1969 (NEPA), *42 U.S.C. 4332*, as stated in Section 501(a) of the Act, *30 U.S.C. 1251*, and a detailed statement on the analysis of the environmental impacts of its revision is not required.

Revision of Section 785.17, however, required OSM to prepare an environmental assessment (EA) on the impacts of this revision and the cumulative impacts of this revision in relation to revisions of certain other rules. In the finding of no significant impact (FONSI) of July 2, 1982, for those certain revisions whose cumulative impacts were analyzed, this revision of Section 785.17 was considered to be in Category I, which contains those revisions for which the analysis of impacts is sufficiently certain to support a FONSI. However, this revised rule is also being reconsidered in the draft supplement to OSM's Final Environmental Statement OSM-EIS-1 and will be reconsidered in the final supplement to OSM-EIS-1. This rule is being issued as an interim final rule prior to completion of the supplement to OSM-EIS-1, due

to the necessity of allowing States and operators time to prepare for the termination of grandfathering. OSM will issue a final rule after the environmental effects are completely analyzed in the supplemental EIS.

LIST OF SUBJECTS

30 CFR Part 716

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

30 CFR Part 785

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

Accordingly, 30 CFR Parts 716 and 785 are amended as set forth herein.

Dated: July 16, 1982.

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

PART 716 -- SPECIAL PERFORMANCE STANDARDS

1. In Section 716.7, paragraph (a)(2)(iv) is added to read as follows:

SECTION 716.7 - PRIME FARMLAND.

(a) * * *

(2) * * *

(iv) The exceptions granted by Paragraphs (a)(2)(i)-(iii) of this section apply only to lands mined to the coal face and related benches prior to April 3, 1983.

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

2. In Section 785.17, paragraph (a)(5) is added to read as follows:

SECTION 785.17 - PRIME FARMLAND.

(a) * * *

(5) The exceptions granted by Paragraphs (a)(1)-(3) of this section apply only to lands mined to the coal face and related benches prior to April 3, 1983.

* * * * *

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

[FR Doc. 82-20688 Filed 7-29-82; 8:45 am]
BILLING CODE 4310-05-M