

FEDERAL REGISTER: 48 FR 9478 (March 4, 1983)

DEPARTMENT OF THE INTERIOR

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

30 CFR Part 785

Surface Coal Mining and Reclamation Operations; Permanent Regulatory Program Experimental Practices

ACTION: Final rule.

SUMMARY: The final rule adopted by the Office of Surface Mining Reclamation and Enforcement (OSM) for experimental practices will provide that an operator may obtain a variance from the environmental protection performance standards of Subchapter K of the permanent program regulations for an experimental practice after submitting an application which contains the information asked for by the rule, complying with the public notice requirements of Subchapter G of the permanent program regulations and receiving approval from the regulatory authority based on certain findings set out in the rule and concurrence from the Director of OSM.

Section 711 of the Surface Mining Control and Reclamation Act of 1977 (Act), provides authorization for variances in individual cases on an experimental basis from the environmental protection performance standards promulgated under Sections 515 and 516 of the Act. The objective of such departures, as authorized by the regulatory authority with the concurrence of the Director, is to encourage advances in mining and reclamation practices or to allow alternative postmining land uses.

EFFECTIVE DATE: April 4, 1983.

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SUPPLEMENTARY INFORMATION:

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I. BACKGROUND

Section 711 of the Surface Mining Control and Reclamation Act of 1977 (Act), *30 U.S.C. 1201* et seq., provides authorization for variances in individual cases on an experimental basis from the environmental protection performance standards promulgated under Sections 515 and 516 of the Act. The objective of such departures, as authorized by the regulatory authority with the concurrence of the Director, is to encourage advances in mining and reclamation practices or to allow alternative postmining land uses.

OSM encourages industry and State regulatory authority participation in the experimental practices program. OSM is willing to work with industry and State regulatory authorities to develop innovative and beneficial experimental practice proposals.

On March 19, 1982 (*47 FR 12082*), OSM proposed to amend 30 CFR 785.13 of the permanent program regulations in order to clarify certain subsections and to eliminate unnecessary requirements for operators. The proposal also called for consultation with the U.S. Department of Agriculture prior to approval of an experimental practice on prime farmlands in accordance with Section 510(d) of the Act and for simple notification of the regulatory authority by an operator prior to the implementation of minor revisions to an experimental practices permit. A public hearing was held on April 9, 1982. However, the proceeding was adjourned because no member of the public appeared to give oral testimony. The comment period remained open until August 25, 1982 and later was reopened from September 7, 1982 through September 10, 1982.

During the comment period, OSM received comments from 40 sources representing industry, trade associations, environmental groups, and Federal and State agencies. After analyzing the recommendations made by the various commenters, OSM has decided to adopt the rule as proposed with certain modifications which are set out below.

II. DISCUSSION OF COMMENTS AND RULE ADOPTED

A. SECTION 785.13(a) GENERAL REQUIREMENTS

In response to comments, this paragraph has been revised by including language to clarify that an experimental practice variance is part of an approved surface coal mining and reclamation operation permit or permit revision and that it may be for experimental or research purposes, or to allow an alternative postmining land use. In addition, language has been inserted stating that the approved permit or permit revision must meet the requirements of Subchapter G of 30 CFR Chapter VII. In the proposal this reference appeared in Section 785.13(b) which deals with the special information operators must provide in their applications for an experimental practice variance. However, the processing and application requirements of Subchapter G apply to the entire section and therefore reference to them has been placed in the more appropriate provision.

Several commenters expressed concern that issuance of an experimental practice permit would only be possible during the initial application process for a surface mining and reclamation operation permit. OSM believes that an application for an experimental practice may be submitted at any time during the life of a mining operation. The experimental practice application may be made when submitting the original permit application or, at a later time, as a permit revision application.

A commenter felt that the proposed rule was not consistent with the Congressional intent for Section 711 of the Act and that OSM was mistaken if it assumed that the goal of the provision was to obtain economic advantages for operators. Instead, the commenter saw the goal of Section 711 as improving environmental protection over the standards of Sections 515 and 516.

The language of the provision clearly states that the variances are to be approved in order to encourage advances in technology or to allow alternative postmining land uses. However, such approvals may not be given unless certain conditions are met. Therefore, while an experimental practice could lead to improvements in environmental protection, it could also result in a technological improvement. In both cases, in order to be approved, the experimental practice must be potentially more or at least as environmentally protective as the environmental protection performance standards which were promulgated pursuant to Sections 515 and 516 of the Act and from which a variance is being sought.

Several commenters objected to language in the proposal which suggested that the variances would be from performance standards of the Act. OSM has rejected this comment. The performance standards of Subchapter K of 30 CFR Chapter VII are merely an extension of the standards of Sections 515 and 516 of the Act. Thus, to provide a variance from these standards it is also necessary to recognize that the variance could also be to the standards of the Act. The legislative history of this provision demonstrates that Congress contemplated that the experimental practices section would be used in just such a manner. The revised rule does not change the meaning of the regulations, but merely clarifies it. (See *44 FR 15080*, March 13, 1979.) Section 711 of the Act provides for departures from any of the environmental protection performance standards "promulgated under" Sections 515 and 516 of the Act. The departures, thus, may be granted to any rules that are published pursuant to the authorities of Sections 515 and 516 and which include the requirements set out in those sections.

One commenter suggested that experimental practices should be separated from "regulatory variances" because they imply the use of unproven techniques which involve a degree of risk and significant returns if successful. OSM recognizes that frequently cost savings and other benefits can be realized by new practices without obtaining a variance from the performance standards as provided in the experimental practice rule. It is only when a variance from the regulatory standards is necessary that the special approval granted under this rule is required.

B. SECTION 785.13(b) APPLICATION REQUIREMENTS

Section 785.13(b) sets forth information that shall be provided by an operator in a permit application for an experimental practice. Among other things, this information shall include a description of the variances from performance

standards that are being requested, show how use of the practice will encourage advances in mining or reclamation technology or allow alternative postmining land uses on an experimental basis, provide assurances that the practice is potentially more or at least as environmentally protective as required under Subchapter K and set out the monitoring efforts which the operator shall undertake. In the case of the monitoring efforts, the data collected shall be reliable and sufficient to enable the regulatory authority and OSM to evaluate the effectiveness of the experimental practice and to identify at the earliest possible time potential risk to the environment and public health and safety which may be caused by the experimental practice.

One commenter recommended retaining Section 785.13(b) of the previous rule as being the only language seeking to encourage the use of experimental practices. OSM has not included this paragraph in the final rule because it is unnecessary. However, Section 785.13(a) has been revised to state the purposes of experimental practices.

Two commenters believed that any provisions in the rule which went beyond the requirements of Section 711 of the Act should be deleted. These comments are rejected. Section 201(c)(2) of the Act provides the Secretary with authority to promulgate such rules and regulations as may be necessary to carry out its purpose. *30 U.S.C. 1211(c)(2)*. As the District Court found in *In re: Permanent Surface Mining Reclamation Litigation*, Civ. No. 79-1144, Slip op. at 5-8 (D.D.C. February 26, 1980), "An agency's regulations may cover items not specifically delineated in a statute so long as the regulations conform to an Act's purposes and policies." In promulgating this rule, OSM believes that the requirements of Section 785.13 are appropriate to carry out the purposes of Section 711 specifically, and the Act in general.

Several commenters were confused as to whether the rule would require a separate experimental practice permit application or whether the request would be part of the surface mining operation permit application. OSM believes that the information required for approval of an experimental practice is in addition to that required for a surface coal mining and reclamation operation permit application. This information can be submitted with the general permit application or separately as a revision to the permit. OSM considers that the language changes which were made to Section 785.13(a), and discussed above, are sufficient to clarify the relationship of an experimental practice variance to the general permit for the operation.

Several commenters stated that under the Act both the permit applicant and regulatory authority have the responsibility to assure that an approved practice is not larger or more numerous than necessary to determine its effectiveness and economic feasibility. The commenter disagreed with OSM's proposal not to require an operator to demonstrate in its permit application that the proposed variances are not larger or more numerous than necessary to determine its effectiveness and economic feasibility. The commenter believed that it was incumbent upon the operator, who had the data and self-interest in expanding the scope or duration of the variance, to establish the need for the magnitude and scope of the proposal. The commenter also believed that there must come a point when the regulatory authority would conclude that sufficient experimentation had taken place on a new technology or alternative postmining land use so that additional experimentation would not be permissible under the Act. By contrast, another commenter recommended deleting as redundant the proposed Section 785.13(d)(3) finding by the regulatory authority concerning the size and number of the experimental practices.

OSM rejects both of these recommendations. OSM believes the Act requires the regulatory authority to make a specific finding as to the size and number of the experimental practice to determine its effectiveness and economic feasibility. Under this final rule, the regulatory authority and the Director must evaluate the proposed experimental practice to make the necessary findings. Information necessary to determine that the experimental practice is not larger or more numerous than necessary will generally be readily available to the regulatory authority.

One commenter endorsed the elaboration of information to be provided by the applicant concerning the nature of the proposed experimental practice. The commenter recommended revising proposed Section 785.13(b)(1) to read "a description of the performance standards for which variances are requested." This change has been adopted.

One commenter was concerned that OSM's reference in Section 785.13(b)(2) and (d)(1) in the proposal to "postmining land use" as a possible experimental practice could be interpreted to mean that whenever an operator proposed an alternative postmining land use in its surface mining permit application, such would have to be couched as an experimental practice. The commenter's fear is unfounded. An operator need apply for an experimental practice only when it is necessary to obtain a variance from the environmental protection performance standards.

Two commenters objected to the deletion of an application requirement showing the necessity for obtaining a variance from the performance standards. According to one of the commenters, without such a showing experimental practices could become a way to circumvent the requirements of not only Sections 515(b)(2) and 515(c) of the Act, but also those of Section 511 relating to procedures for surface mining permit revisions.

For two reasons OSM has not required information as to whether the ends sought through the experimental practice could not be otherwise attained under the regulatory program. First, OSM believes that the intent of Section 711 is to encourage advances in technology and alternative postmining land uses. Thus, even if an end product could be obtained through the existing regulatory program, improved procedures for attaining that goal could possibly also be developed through the experimental practices program. Second, OSM is of the opinion that during review by the regulatory authorities and the Director, those experimental practices which should not be approved because they are larger or more numerous than necessary or do not meet the other criteria will be identified. Finally, OSM considers that the language of the final rule makes it clear that the permit revision requirements of Section 511 of the Act and Subchapter G of 30 CFR Chapter VII apply to experimental practices.

Two commenters recommended including "economic advantage" among the purposes for conducting experimental practices noted in Section 785.13(b)(2) and (d)(1). In support of their recommendation, the commenters cited language from the preamble of the proposed rule which said that experimental practices could lead to economic benefits.

OSM has not adopted this suggestion because the two advantages listed in the rule are in keeping with those provided for in Section 711 of the Act. However, OSM believes to the extent such information aids in showing that the proposed practice encourages technological advances in mining, an operator may supplement his permit application with information demonstrating the economic benefits of the proposal.

One commenter objected to the monitoring requirement which would enable the regulatory authority and the Director to evaluate the effectiveness of the practice. The commenter believed that this was not required by the Act, that it would be extremely expensive and that the same purpose could be accomplished by other monitoring requirements. The recommendation to delete this requirement is rejected because OSM thinks that such data will enable the regulatory authority and the Director to evaluate the effectiveness of an experimental practice for purposes of allowing further experimental practices and possibly changing existing regulatory standards and is also needed to identify potential risks to the environment. Furthermore, the monitoring requirements provided under other rules may not be sufficient for activities covered by this rule. Since an experimental practice is conducted pursuant to a variance from promulgated performance standards, it must be more closely observed than standard mining practices. As for any additional expenses incurred due to monitoring, OSM believes that these may well be offset by economic advantages obtained as a result of successful experimental practices. Finally, OSM considers it has sufficient authority under the Act to require the monitoring data.

Two commenters recommended deleting language in proposed Section 785.13(b)(4) referring to monitoring "during and after the operation involved." Instead, they thought that the regulatory authority should set the monitoring requirement in the experimental practice permit. The commenters wished to do away with open-ended monitoring requirements after the experimental practice was completed.

OSM rejects this suggestion in part because the degree of monitoring being specified follows the Act which provides for the experimental practice potentially to be "more or at least as environmentally protective, during and after mining operations" [emphasis added] as the promulgated performance standards. In order to ensure that this mandate is followed, a monitoring program both before and after the operation may be necessary. However, OSM agrees that the extent and scope of required monitoring should be determined and established in the experimental practices permit. For this reason the language has been revised by not adopting the proposed phrase "during and after the operation involved" in the first sentence of Section 785.13(b)(4). Instead, the phrase "during and after mining" has been added to Section 785.13(b)(4)(ii). This will assure that postmining monitoring need only be conducted if necessary to identify the risk to the environment and public health and safety during and after mining. Whether monitoring after mining may be required to meet this objective can be determined within the context of the individual experimental practices permit.

One commenter thought that the proposed language in Section 785.13(b)(4)(i) would create a major loophole to compliance with the performance standards by deleting the previous requirement for a monitoring program to evaluate and compare experimental practices. Another commenter believed the proposal was in direct conflict with the Section 711 limitation on experimental practices to be "not larger or more numerous than necessary" to determine their

effectiveness and economic feasibility. According to that commenter, unless the monitoring data were given in a form to enable comparison with other experimental practices, the regulatory authority or Director might approve practices more numerous than necessary or approve one already shown to be ineffective or infeasible.

OSM rejects these comments because the regulatory authority and the Director will have sufficient information from the experimental practice permit application to evaluate a given experimental practice on its own merit as well as in comparison with other similar experiments. Under this provision, reviewers are provided with data as to the effectiveness of the practice. Likewise, under Section 785.13(b)(1), all performance standards for which variances are requested are identified, thus providing reviewers with a basis for comparison if and when necessary.

Several commenters opposed the proposed rule's requirement for operators to provide information in the permit application concerning the mitigative measures which would be taken in the event the experimental practice failed to meet its objectives. This was unacceptable to the commenters because they believed that experimental practices must be limited to situations where the worst case situation will not fall below the Subchapter K standards in environmental and public health and safety protection.

OSM has reviewed the legislative history for Section 711 and does not agree that experimental practices need be evaluated based upon the worst case possible if the practices were to fail. OSM believes the commenter's position is internally inconsistent. On the one hand it asserts that mitigative measures are inappropriate because the Subchapter K performance standards are minimum criteria which the operation must meet even under the worst possible circumstances if the experimental practice fails. On the other hand, the commenter recognizes that, in fact, an experimental practice may carry with it a risk of failure in which the Subchapter K performance standards cannot be met. In such a situation, the commenter urges that mitigative measures are insufficient because affirmative remedial measures are required. OSM is of the opinion that an experimental practice is exactly that, "experimental," and carries with it a certain level of uncertainty of success. However, OSM agrees with the commenters that, if additional measures are required to make the findings under Section 785.13(d) (2) and (4) that the experimental practice is potentially more or at least as environmentally protective as the standards of Subchapter K and that equivalent protection is afforded the public health and safety, then the regulatory authority and the Director have the responsibility to require under Section 785.13(f), that such measures be incorporated in the experimental practice. Accordingly, the proposed requirement to specifically identify mitigative measures in the experimental practice application has not been adopted in the final rule.

C. SECTION 785.13(c) PUBLIC NOTICE

Under this paragraph an operator and the regulatory authority shall comply with the public notice requirements of proposed 30 CFR 773.13, as set forth in Volume III of OSM's "Final Environmental Impact Statement OSM-EIS-1: Supplement." (The use of proposed sections is discussed under "Procedural Matters.") This means that specific reference to a proposed experimental practice shall appear in the newspaper advertisement and in the notification to Federal, State and local government agencies with jurisdiction over or an interest in the proposed operation that are required by proposed Section 773.13.

One commenter questioned requiring a newspaper advertisement in all cases when experimental practices permit applications are made. The commenter believed there were times when the proposed experimental practice would not change the surface mining permit at all. OSM rejects this comment because, at a minimum, an experimental practice will result in a variance from the applicable performance standards.

Another commenter was concerned that, as proposed, Section 785.13(c) applied only to initial permit applications, and, therefore, permit revisions would not be subject to the same degree of public notice and participation. The commenter thought that the requirements of 30 CFR 786.11 applied only to initial permit applications.

The commenter is referred to 30 CFR 788.12(b)(2) which stated that significant alterations to a permit had to meet the same notice requirements as the initial application. Under the preferred alternative in Volume III of "Final Environmental Impact Statement OSM EIS-1: Supplement" for permit revisions, OSM would retain this requirement. See proposed 30 CFR 774.13 as set forth in OSM EIS-1: Supplement.

D. SECTION 785.13(d) APPROVAL REQUIREMENTS

Section 785.13(d) requires the regulatory authority to find in writing that the proposed experimental practice will encourage advances in technology or allow an alternative postmining land use; is potentially more or at least as environmentally protective during and after mining operations as the promulgated standards of Subchapter K; is not larger or its operations more numerous than necessary to determine its effectiveness and economic feasibility; and does not reduce the protection afforded public health and safety below that provided by standards promulgated under Subchapter K. Once the regulatory authority has made its findings, the Director will review them along with the permit application to reach a decision on concurrence.

Several commenters were concerned that there would be delays in the issuance of approvals for experimental practices due to confusion over the order of review between the regulatory authority and the Director. Others wanted it clear that the State regulatory authorities had the lead in initially reviewing and determining the merits of a proposal. In order to lessen the possibility of delay in approvals or confusion about the order of review, OSM has written the final rule so that it is clear that the Director will not concur in an application until after the regulatory authority has made its specific findings.

One commenter recommended that the rule should provide explicit recognition that the statutory principle of " * * * better than or equivalent environmental protection * * *" contemplates a balancing of various environmental effects and standards with emphasis on the final product. OSM believes that no revision to the rule is necessary. The level of environmental protection provided by each experimental practice must be compared to the minimum level of environmental protection provided under the regulatory standards of Subchapter K. No change is necessary to provide emphasis in the final product.

One commenter objected to the deletion in the proposed rule of the requirement conditioning approval of an experimental practice upon the imposition of enforceable alternative environmental protection performance standards in the event the specific variance is departed from or the experiment fails. The same commenter, however, objected to the provision requiring the operator to include potential mitigative measures in the permit application for the experimental practice. As indicated above, OSM has deleted both provisions from the final rule. As revised, the standard for approval of the experimental practice will be the statutory standard. Potential mitigative measures may be included in the experimental practice approval as appropriate and considered by the regulatory authority and the Director in evaluating whether the statutory standard is met. Regardless of whether mitigative measures are prescribed in advance, if a failure of the experimental practice leads to a degradation of the environment, the Director and the regulatory authority will have the responsibility to order measures to ensure protection of the environment and public health and safety.

The same commenter thought that the revised language in Section 785.13(d)(4) was vague regarding the "promulgated standards" below which the experimental practice could not fall with respect to health, safety and environmental protection.

The commenter believed that specific references to standards required by Subchapter K and the regulatory authority's program should be included. OSM has accepted the commenter's suggestion with respect to Subchapter K and has revised paragraph (d)(4) accordingly. OSM has not, however, included reference to the standards of the regulatory program, since a State, under Section 505 of the Act, may include standards more stringent than the standards of Subchapter K. Departures from such requirements only require an experimental practice permit when they would also result in a variance to the Subchapter K standards.

E. SECTION 785.13(e) CONSULTATION WITH USDA

Section 785.13(e) requires consultation with the U.S. Department of Agriculture, Soil Conservation Service (SCS), prior to granting variances from the special environmental performance standards for prime farmlands in keeping with the provisions of Section 510(d)(1) of the Act. Under 30 CFR 785.17, the Secretary of Agriculture has assigned these responsibilities to the SCS.

One commenter endorsed this provision provided that no deviation from the prime farmlands productivity requirements would be allowed. OSM agrees that Section 711 of the Act allows variances only from the environmental protection performance standards established by Sections 515 and 516 of the Act. Thus an experimental practice can be

approved which provides a variance from the prime farmland soil reconstruction standards of Section 515(b)(7) of the Act. However, variances are not allowed from the productivity standards established separately under Sections 510(d) and 519(c)(2) of the Act. A conforming reference to Sections 515 and 516 of the Act has been included in Section 785.13(e).

Another commenter recommended deleting the new requirement as duplicative of requirements found at 30 CFR 785.17 for prime farmlands. This comment is rejected. Section 785.17 deals with permit requirements for prime farmlands and does not cover the variances from performance standards allowed by Section 711 of the Act.

F. SECTION 785.13(f) MONITORING/ADDITIONAL REQUIREMENTS

Section 785.13(f) will require that anyone undertaking an approved experimental practice shall conduct the periodic monitoring, recording and reporting program set forth in the application as well as fulfill any additional steps the regulatory authority or the Director may require to ensure protection of the public health and safety and the environment.

One commenter recommended deleting proposed Section 785.13(f) as being redundant with the monitoring requirements of paragraph 785.13(b)(4). OSM has rejected this suggestion because new Section 785.13(f) serves a different purpose than the referenced paragraph. Section 785.13(b)(4) concerns information which an operation must provide in an application for an experimental practice. On the other hand, Section 785.13(f) indicates that the operator shall perform monitoring activities as well as any other requirements the regulatory authority or the Director may specify. OSM has adopted the word change recommended by another commenter in order to make it clear that the paragraph involves two distinct requirements.

G. SECTION 785.13 (g) and (h) PERMIT REVIEW/REVISION REQUIREMENTS

Proposed Sections 785.13 (g)(1) and (g)(2) are adopted as new Sections 785.13 (g) and (h). Section 785.13(g) will require each experimental practice to be reviewed by the regulatory authority at a frequency set forth in the approved permit, but no less than every two and a half years. Two and a half years will generally correspond to the midterm of the permit. After any such review, the regulatory authority may require modifications of the practice which are necessary to ensure that the operation fully protects the environment and public health and safety. OSM has made clear that the administrative and judicial review provisions attendant to permits also apply to modifications of experimental practices. Under Section 785.13(h), in the event an operator wishes to revise an approved experimental practice, it will be necessary first to submit an application for a permit revision subject to the requirements of Subchapter G.

One commenter argued that there was no statutory authority justifying the proposed yearly review of experimental practices. While OSM has modified its review proposal as described above, it rejects the general assertion that establishing a review procedure is somehow outside the scope of its authority. The Act provides OSM with ample authority to promulgate those rules it believes are necessary to carry out the purposes of the Act.

Several commenters objected to the proposed annual review of each experimental practice. Some felt that the data accumulated from one year could be inadequate to determine the effectiveness of the practice. Also, they thought that the frequent review with possibilities for unlimited modification by the regulatory authority could act as a disincentive to participation in the program and could be unnecessarily burdensome to the regulatory authority as well. The commenters recommended having the review period determined by the regulatory authority on a case-by-case basis so as to take into account the specific nature and location of the practice and the parties involved. Some commenters thought it was better not to have the review set by an arbitrary schedule. They believed that State regulatory authorities wishing to have more frequent reviews would be able to establish this in their State programs. OSM agrees with the thrust of these comments and has written the final rule so that the review period shall be set by the regulatory authority in the approved permit, but shall be no less frequent than every two and one half years. OSM believes this provision will give the regulatory authorities sufficient flexibility to establish an appropriate review process without creating unnecessary burden.

Another commenter objected to the proposed rule because he felt the review should be of the entire permit and not just the experimental "practice." The commenter was also concerned that citizen participation was being deleted. OSM considers Section 785.13(g) to include review of the experimental practices and any directly related provisions of the permit. The regulatory authority need not review unrelated aspects of the permit at the same time. Review of other aspects of the entire permit is governed by 30 CFR 788.11. (See also proposed 30 CFR 774.11 as set forth in OSM

EIS-1: Supplement.) OSM has also revised paragraph 785.13(g) to assure public participation when modifications occur in accordance with the administrative and judicial review provisions of proposed 30 CFR Part 775, as set forth in OSM EIS-1: Supplement.

One State commenter found the language of proposed Section 785.13(g) (1) and (2) to be inconsistent. The commenter thought it was necessary to have language in each paragraph making it clear that it is necessary to obtain the approval of the regulatory authority for any permit modifications. OSM agrees with the observation of the commenter and has rewritten both paragraphs accordingly.

In the proposed rule, OSM distinguished between major and minor revisions to the experimental practice approval. Under proposed Section 785.13(g)(2), prior to the implementation of a minor revision, an operator would have only needed to provide the regulatory authority with written notice. In the case of a major revision, approval by the regulatory authority and the Director would have been necessary before implementation. Much discussion with respect to the major/minor dichotomy and who should retain responsibility for approval was generated as a result of OSM's proposal.

Two commenters wanted the term "major" and "minor" revisions to be defined. Others thought that simple notice to the regulatory authority in all cases was sufficient. A third commenter believed that while the regulatory authority should retain control over major revisions, the full permitting process should not be necessary. One State commenter preferred to see the regulatory authority provide written approval. Another State commenter wanted the role of the Director to be limited in the approval process. A different State wished to require regulatory authority approval in all instances. Two commenters thought there should be a deadline within which a regulatory authority must act or be deemed to have approved the revision. Another commenter made the point that any revision to an experimental practice may be significant and, therefore, there was no basis for distinctions concerning the significance of revisions.

OSM has decided not to adopt the major/minor distinction. Instead the final rule, in Section 785.13(h), requires processing and approval by the regulatory authority consistent with the provisions of the proposed new rule for permit revisions, Section 774.13, as set forth in OSM EIS-1: Supplement. Revisions that propose significant alterations to the experimental practice must also be subject to notice, hearing and public participation requirements and concurrence by the Director. OSM believes this comports with Section 511(a)(2) of the Act requiring that revisions which propose significant alterations in the permit be subject to notice and hearing requirements. Non-significant revisions may be handled more expeditiously. Under Subchapter G, such applications must be processed within a reasonable time. However, no specific time limit has been included in the final rule.

H. MISCELLANEOUS RECOMMENDATIONS

One commenter recommended several new provisions. One of these would require a regulatory authority to designate contact persons on its technical staff for monitoring experimental practices who would be immediately notified by an operator in the event problems developed in the course of an experiment. The proposed provision would also authorize the issuance of a notice of violation only if an experimental practice plan were not followed or if appropriate action as required by the regulatory authority were not taken.

OSM believes that regulatory authorities will set up appropriate contact arrangements and therefore specific directions to this effect are not warranted in this rulemaking. With respect to the issuance of notices of violation, the experimental practice variance becomes part of the surface mining permit and, if followed, would not lead to the issuance of a notice of violation or a cessation order with regard to those standards from which a variance was granted.

The same commenter proposed including provisions which would identify what constitutes a successful experimental practice; would require a regulatory authority to notify all operators in the State of a practice that was deemed successful; would permit the practice's use on a case-by-case basis; and would require the Director to circulate to the State regulatory authorities technical memoranda informing them of practices deemed to be successful.

OSM has not adopted any of these suggestions in this rulemaking, because it believes that whether an experimental practice is completely or partially successful will be apparent. As for how dissemination of the new information will be accomplished within a State, OSM believes that those decisions are within the prerogative of the regulatory authority. Since an experimental practice permit is issued to allow a variance from performance standards, it will be necessary to

revise regulations before widespread use of a successful practice can occur. Merely circulating notices or technical memoranda would not be sufficient.

Several commenters raised questions about the bonding requirements that apply to experimental practices. One believed that small and medium sized operations had little inducement to provide an investigator with areas for experimental research, if those locations might not qualify for bond release as quickly as conventionally reclaimed areas. Moreover, the commenter felt that operators could not be required to rework failed experimental plots at added cost. To counter these perceived problems, the commenter suggested lessening the performance bond requirements for areas where experimentation was taking place and having the organization sponsoring the research assume some or all of the liability of any performance bond. A Federal agency suggested, as a way of promoting cooperation between research organizations and mine operators, providing early release from reclamation bonds for specific areas dedicated to reclamation research and demonstration of reclamation technology. The commenter thought that research areas would seldom encompass an entire permitted area, and therefore the incremental release could occur provided the area otherwise qualified for such status. At the recent oversight hearings of the House Subcommittee on Energy and the Environment, a mining industry spokesman testified that under the proposed rule there was at least one issue which remained an obstacle to enhancing reclamation technology. The witness said there was no statutory provision for establishing designated postmining land use research and demonstration areas on bonded surface mining lands. According to the spokesman, Section 711 was seen by the regulatory authorities as applying to alternative design work and engineering practices. Therefore, research groups (universities and government agencies) had to assume responsibility for the long term performance bonds. The witness recommended that Section 711 be expanded or a new provision enacted to encourage research groups and operators to participate in revegetation research.

Bonding amounts and length of liability are governed by Sections 509 and 519 of the Act and 30 CFR Parts 800-809. No provision is included in the Act for waiver of bonding requirements for experimental or research requirements. However, the bond amount can include consideration of the provisions of the experimental practice. As for whether Section 711 of the Act can be expanded to cover revegetation research not considered an experimental practice, such action is outside the scope of this rulemaking.

One commenter thought that simply preparing an environmental assessment on the experimental practice rulemaking did not meet the requirements of the National Environmental Policy Act of 1969, as amended (NEPA), *42 U.S.C. 4321 et seq.*, or Section 702(d) of the Act.

The Office has prepared an environmental impact statement which analyzes the impacts on the quality of the human environment resulting from changes to the permanent program regulations.

III. PROCEDURAL MATTERS

For convenience, certain references in the final rule are to proposed section numbers that have not been finalized. If such sections are not adopted as proposed, conforming technical amendments will be issued.

Executive Order 12291 and the Regulatory Flexibility Act

The Department of the Interior has determined that this document is not a major rule under E.O. 12291 and certifies that this document will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (*5 U.S.C. 601 et seq.*).

National Environmental Policy Act

OSM has analyzed the impacts of these final rules in the final Environmental Impact Statement OSM EIS-1: Supplement according to Section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA) (*42 U.S.C. 4332(2)(C)*). The final supplement is available in OSM's Administrative Record in Room 5315, 1100 L Street, NW., Washington, D.C., or by mailing a request to Mark Boster, Chief, Branch of Environmental Analysis, Room 134, Interior South Building, U.S. Department of the Interior, Washington, DC 20240. This preamble serves as the record of decision under NEPA. This final rule adopts the preferred alternative published in Volume III of the EIS which is analyzed in the EIS, with minor editorial changes.

Paperwork Reduction Act

The information collection requirements contained in Section 785.13 have been approved by the Office of

Management and Budget under 44 U.S.C. 3507 and assigned clearance number 1029-0040. The information is being collected by the regulatory authority in determining whether the applicant meets the applicable performance standards for experimental practices mining activities. This information will be used to give the regulatory authority a sufficient baseline upon which to assess the impact of the proposed operation during the permanent regulatory program. The obligation to respond is mandatory.

LIST OF SUBJECTS IN 30 CFR PART 785

Coal mining, Environmental protection, Reporting and recordkeeping requirements, Surface mining.

For the reasons set forth in the preamble, Part 785 of Chapter VII, Title 30, of the Code of Federal Regulations is amended as set forth herein.

Dated: February 28, 1983.

William P. Pendley, Acting Assistant Secretary, Energy and Minerals.

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

1. Section 785.13 is revised to read as follows:

SECTION 785.13 - EXPERIMENTAL PRACTICES MINING.

(a) Experimental practices provide a variance from environmental protection performance standards of the Act, of Subchapter K of this chapter, and the regulatory program for experimental or research purposes, or to allow an alternative postmining land use, and may be undertaken if they are approved by the regulatory authority and the Director and if they are incorporated in a permit or permit revision issued in accordance with the requirements of Subchapter G of this chapter.

(b) An application for an experimental practice shall contain descriptions, maps, plans, and data which show --

(1) The nature of the experimental practice, including a description of the performance standards for which variances are requested, the duration of the experimental practice, and any special monitoring which will be conducted;

(2) How use of the experimental practice encourages advances in mining and reclamation technology or allows a postmining land use for industrial, commercial, residential, or public use (including recreation facilities) on an experimental basis;

(3) That the experimental practice --

(i) Is potentially more, or at least as, environmentally protective, during and after mining operations, as would otherwise be required by standards promulgated under Subchapter K of this chapter; and

(ii) Will not reduce the protection afforded public health and safety below that provided by the requirements of Subchapter K of this chapter; and

(4) That the applicant will conduct monitoring of the effects of the experimental practice. The monitoring program shall ensure the collection, analysis, and reporting of reliable data that are sufficient to enable the regulatory authority and the Director to --

(i) Evaluate the effectiveness of the experimental practice; and

(ii) Identify, at the earliest possible time, potential risk to the environment and public health and safety which may be caused by the experimental practice during and after mining.

(c) Applications for experimental practices shall comply with the public notice requirements of Section 773.13 of this chapter.

(d) No application for an experimental practice under this section shall be approved until the regulatory authority first finds in writing and the Director then concurs that --

(1) The experimental practice encourages advances in mining and reclamation technology or allows a postmining land use for industrial, commercial, residential, or public use (including recreational facilities) on an experimental basis;

(2) The experimental practice is potentially more, or at least as, environmentally protective, during and after mining operations, as would otherwise be required by standards promulgated under Subchapter K of this chapter;

(3) The mining operations approved for a particular land-use or other purpose are not larger or more numerous than necessary to determine the effectiveness and economic feasibility of the experimental practice; and

(4) The experimental practice does not reduce the protection afforded public health and safety below that provided by standards promulgated under Subchapter K of this chapter.

(e) Experimental practices granting variances from the special environmental protection performance standards of Sections 515 and 516 of the Act applicable to prime farmlands shall be approved only after consultation with the U.S. Department of Agriculture, Soil Conservation Service.

(f) Each person undertaking an experimental practice shall conduct the periodic monitoring, recording and reporting program set forth in the application, and shall satisfy such additional requirements as the regulatory authority or the Director may impose to ensure protection of the public health and safety and the environment.

(g) Each experimental practice shall be reviewed by the regulatory authority at a frequency set forth in the approved permit, but no less frequently than every 2 1/2 years. After review, the regulatory authority may require such reasonable modifications of the experimental practice as are necessary to ensure that the activities fully protect the environment and the public health and safety. Copies of the decision of the regulatory authority shall be sent to the permittee and shall be subject to the provisions for administrative and judicial review of Part 775 of this chapter.

(h) Revisions or modifications to an experimental practice shall be processed in accordance with the requirements of Section 774.13 of this chapter and approved by the regulatory authority. Any revisions which propose significant alterations in the experimental practice shall, at a minimum, be subject to notice, hearing, and public participation requirements of Section 773.13 of this chapter and concurrence by the Director.

Revisions that do not propose significant alterations in the experimental practice shall not require concurrence by the Director.

(30 U.S.C. 1201 et seq.)

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