

FEDERAL REGISTER: 49 FR 27493 (July 5, 1984)

DEPARTMENT OF THE INTERIOR

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

30 CFR Parts 773 and 870

Abandoned Mine Reclamation Fund Fee Collection and Coal Production Reporting

ACTION: Final Rule.

SUMMARY: The Office of Surface Mining Reclamation and Enforcement (OSM) has revised 30 CFR Part 870, regarding the Abandoned Mine Reclamation Fund, fee collection requirements and coal production reporting procedures. These changes provide further administrative and enforcement procedures and options for OSM to ensure a more efficient and effective collection effort. The changes include certain management activities for the collection of reclamation fees and provide a range of compliance activities that include investigations, reports, audits and debt collection and litigation procedures. The rule will also require as a permit condition the continued payment of reclamation fees for coal produced under the permit for sale, transfer or use.

EFFECTIVE DATE: August 6, 1984.

FOR FURTHER INFORMATION CONTACT: Dr. Phyllis G. Thompson, Chief, Abandoned Mine Land Reclamation Division, Office of Surface Mining, U.S. Department of the Interior, 1951 Constitution Ave., NW., Room 5401-L, Washington, D.C. 20240, Telephone (202) 343-7937.

SUPPLEMENTARY INFORMATION:

- I. Background
- II. Discussion of comments and rules adopted
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I. BACKGROUND

Title IV of The Surface Mining Control and Reclamation Act of 1977, *30 U.S.C. 1201 et seq.* (SMCRA) establishes an abandoned mine land reclamation program for the purposes of reclaiming and restoring lands and water resources adversely affected by past mining. The program is funded by a reclamation fee imposed upon the production of coal. Lands and water eligible for reclamation are those that were mined or affected by mining and abandoned or left in an inadequate reclamation status prior to August 3, 1977, and for which there is no continuing reclamation responsibility under State or other Federal law.

Section 402 of SMCRA provides that "all operators of coal mining operations subject to the provisions of this Act shall pay to the Secretary of the Interior, for deposit in the Fund, a reclamation fee of 35 cents per ton of coal produced by surface coal mining and 15 cents per ton of coal produced by underground mining or 10 per centum of the value of the coal at the mine as determined by the Secretary, whichever is less, except that the reclamation fee for lignite coal shall be at a rate of 2 per centum of the value of the coal at the mine or 10 cents per ton, whichever is less." Reclamation fees are to be paid no later than 30 days after the end of each calendar quarter beginning with the first calendar quarter occurring after the date of enactment of SMCRA (August 3, 1977) and ending fifteen years after the date of enactment of SMCRA, unless extended by an Act of Congress.

On October 25, 1978, OSM published regulations implementing the Abandoned Mine Reclamation Program, *43 FR 49932*. Regulations relating to the amount and collection of reclamation fees were promulgated in 30 CFR Part 837 on December 13, 1977, *42 FR 62713*. This part was redesignated as Part 870, *43 FR 49932* (October 25, 1978). Certain provisions of the Abandoned Mine Reclamation Program regulations were revised on June 30, 1982, *47 FR 28574*. On November 30, 1983, OSM published a proposed rule concerning the Abandoned Mine Reclamation Fund fee collection requirements and coal production reporting procedures. For a detailed discussion of the components of the fee collection program, refer to the preamble discussion in the AML Regulations published June 30, 1982, *47 FR 28574*.

Numerous comments from the public and representatives of the States, industry, and environmental organizations were received and considered in this rulemaking process. All substantive comments received are addressed in the following preamble.

All comments received as well as the record of the public hearing held are available for inspection in the Administrative Record Room 5124, 1100 L Street, NW., Washington, DC.

II. DISCUSSION OF COMMENTS AND RULES ADOPTED

A. GENERAL COMMENTS

Three commenters questioned DOI's determination that this document is not a major rule and does not require a regulatory impact analysis under Executive Order 12291. One of the three commenters suggested that the proposed rule would primarily affect small operators. This commenter contends that small operators have recently suffered considerable economic hardship, and that the burden of any decrease in coal production would fall on the small operators. OSM disagrees. It is OSM's opinion that the payment of reclamation fees is a statutorily mandated cost of doing business which creates no particular burden on small operators. The Determination of Effects, completed by OSM prior to proposing these rules, indicated that the annual effect on the economy would be less than one hundred million dollars. Moreover, since OSM has decided not to adopt proposed Section 870.9, the economic impact of the final rules will be considerably less.

Two commenters expressed support for OSM's efforts to develop an effective system of fee collection.

B. PROPOSED SECTION 870.9 -- FEE RESPONSIBILITY

The new rule proposed in this Section would have specified the party responsible for reclamation fee payment on the basis of coal ownership without taking into consideration existing contractual agreements for sale or other disposition of the coal, or the payment of royalties and fees between the producer and third parties. OSM has elected not to adopt this proposed rule based on its review and evaluation of comments received.

Several commenters questioned OSM's authority to apply this new requirement retroactively to a number of entities not previously designated as responsible for the reclamation fee payment either by statute or existing regulation. In addition, one commenter contended that this would constitute a large financial burden on such companies, and considered OSM's proposed new definition of "operator" to be contrary to OSM's actions, procedures and past practices. This commenter further stated the OSM-1 (Coal Production and Reclamation Fee Report form) asks for the permit holder to include his State and Federal permit numbers with each return. The commenter stated that nowhere on the form, or in the instructions, is there any reference to the owner of the minerals when severed. This commenter also added that OSM has placed requirements on State permanent regulatory programs for applicants for new and renewal permits to submit proof of fee payment.

Another commenter recommended that the Act be amended to accomplish this substantive proposed change and to expand the scope of those parties responsible for fee payment to the party with economic interest in the mineral. This commenter further stated such an amendment should apply prospectively only, thereby protecting the rights of parties already contracting with operators to mine coal or businesses who have entered into agreements anticipating reclamation fee costs would be borne by one party. A number of commenters questioned OSM's authority to supersede legally existing contracts or agreements, which would have resulted under the proposed regulation. One commenter suggested this proposed regulation would abrogate any lease agreement and disregard State contract law where existing leases designate the operator as the party responsible for governmental extractions and fees. One commenter recommended the party taking the depletion allowance should be the responsible party; this commenter added that the depletion allowance is taken by the operator or parties having operating interests in coal extraction. A few commenters stated the permittee should be the responsible party.

One commenter stated the Act and existing regulations clearly state that the operator is responsible for reclamation fees. This commenter further stated the operator pays the reclamation fees in the absence of written contracts clearly designating the person liable for paying reclamation fees. For these reasons this commenter considered the person who stands to benefit from the sale of the mineral not to be an issue.

OSM has reviewed and evaluated the concerns raised by these commenters and has chosen not to adopt the proposed provision on fee responsibility. OSM, instead, will continue to implement the policies set forth in the Abandoned Mine Land Program's initial rules published in *42 FR 62639* (December 13, 1977).

Section 402 of SMCRA requires that all operators pay a reclamation fee based on coal produced, and section 701(13) defines "operator" as the person. . . . engaged in coal mining who removes . . . the coal. OSM recognizes, however, that in light of the number and variety of business arrangements employed in the coal industry, the term operator is not limited to the party which actually removes the coal but is broad enough to include a party who controls or directs that removal. OSM believes that Congress intended the burden of fee payment to fall upon the person or persons who stand to benefit directly from the sale, transfer, or use of coal. As outlined in further detail below, this intent will continue to guide the office in making decisions as to who is liable for the fee. The identification will continue to be made in light of the realities of the business world and will not necessarily turn solely on a literal interpretation of the word "removes."

In the preamble discussion to the initial AML rules, OSM stated its intent to send a preprinted Coal Production and Reclamation Fee Report to all operators listed on the Mining Enforcement and Safety Administration's (MESA's) operator-mine identification number list to avoid a dual identification system, and reduce administrative and recordkeeping costs to the government and the coal mine operators. Since the inception of this program, OSM has continued to use the operator-mine identification number, currently assigned by the Mine Health and Safety Administration (MSHA), as an identifier for persons or entities engaged in coal production under SMCRA.

Each operator-mine identified on the MSHA operator-mine identification list is sent a preprinted Coal Production and Reclamation Fee Report form OSM-1. OSM has decided to use this existing mechanism to identify the party responsible for filing production reports and payment of reclamation fees. OSM has revised this form, and accompanying instructions, to clearly identify the person or entity whose MSHA identification number appears on the OSM-1 as the party responsible for filing the OSM-1 and making payments of any owed reclamation fee.

If the person or entity identified by the MSHA operator-mine list notifies OSM in writing and produces documentary evidence that it has a business relationship with another person which makes that other person responsible for filing production reports and payment of reclamation fees, OSM then may require the other person to immediately file an amended OSM-1 form with the necessary information and to pay reclamation fees. If after being required to file the form and to pay the fees, the other person fails to file an OSM-1, or fails to pay owed reclamation fees, both the other person and the MSHA identified operator will be held jointly and severally liable for production reporting and reclamation fee payment. In the absence of requiring any other person to file forms and pay fees, OSM will continue to send the OSM-1 form and hold the MSHA operator liable for production report filing and payment of fees.

C. SECTION 870.15(c) -- POST-JUDGMENT INTEREST

OSM retains this Section as in the previous rule except that the phrase ". . . or until judgment is rendered by a court of competent jurisdiction in an action at law to compel payment of debts" is now removed to ensure that all parties understand that OSM reserves the right to collect post-judgment interest in all unpaid reclamation fee collection cases.

One commenter is in support of this change and three oppose it. The three who oppose it suggest that no interest should accrue where the liability for delinquent fee payments is the subject of ongoing litigation. OSM disagrees. It is OSM's position that the debt becomes due and payable at the time an audit discloses that fees are owing. OSM removed the phrase to clarify that interest will continue to run until the debt is paid. Contrary to what one commenter believes, OSM does not think this amendment will deter legitimate challenges. An operator whose challenge is entirely successful will not be assessed the fees or the interest.

OSM agrees with the comment that the proposed amendment should be applied prospectively only. This section will become effective 30 days following publication in the Federal Register.

D. SECTION 870.15(c) -- INTEREST RATE PAYMENTS

OSM has added a clarifying provision to Section 870.15(c) regarding the accrual of interest on late payments to provide that interest will accrue on any payment postmarked later than thirty days after the end of the calendar quarter in

which the fee was owed. This provision responds to questions that have been raised as to whether the previous ambiguous regulations required that OSM must have been in actual receipt of the payment by the 30th day or whether the payment must have been postmarked by that time in order to avoid the interest charges. This change provides that either is sufficient. In addition, OSM has made some minor editorial changes to the final rule for the sake of clarity.

OSM received one comment supporting use of the postmark date to establish "timely" payment compliance.

E. SECTION 870.15(e) -- FEE COMPLIANCE ACTIONS

OSM added a new subsection (e) which details new more stringent enforcement and collection efforts OSM may take against responsible persons for failure to pay overdue reclamation fees, including interest on late payments or underpayments, failure to maintain adequate records, failure to file required reports or failure to provide access to records by an operator subject to requirements of SMCRA. These options include: Initiation of litigation; reporting to the Internal Revenue Service, State agencies responsible for taxation, and credit bureaus, and referrals to collection agencies. OSM has changed the proposed word "will" to "may" so that this section will authorize but not require OSM to undertake these actions. This change was made because in certain circumstances, such as failure to maintain records, a requirement to take one of the enumerated actions could be inappropriate. Under the provision as finally adopted, OSM may choose one or more of these specific alternatives to encourage compliance with the operator's statutory responsibilities under section 402 of SMCRA. OSM has also made some minor editorial changes to the final rule.

Moreover, OSM may take enforcement action based upon breach of a permit condition for nonpayment of reclamation fees where such a permit condition exists. This is reflected by the addition of a sentence that the prescribed remedies are not exclusive. Also, the payment of reclamation fees will be a condition of any new permanent program permit.

One commenter supported this new proposed section in spirit but recommended that OSM alter the language slightly to ensure that OSM undertakes some type of referral action to the state or federal taxation agency as well as initiating some form of enforcement action, i.e., either initiating litigation or referring the case to a collection agency. OSM has declined to make the suggested change. This option is already available to OSM under the proposed language. This language provides OSM sufficient flexibility to undertake any or all options required to encourage and enforce compliance with section 402 of the Act.

Another commenter argued OSM has no valid reason to add this new section other than as harassment of the operator. This commenter further stated these actions are clearly outside OSM's legal authority. OSM respectfully disagrees.

OSM added this new section to provide notification of the action or actions it may take to enforce requirements of section 402 of the Act when an operator fails to file production reports or pay reclamation fees. Such options are clearly within OSM's statutory authority granted under section 412 of SMCRA as well as under governmental-wide debt collection directives.

F. FINAL SECTION 773.17(g) -- Proposed Section 870.15(f) -- PERMITS AFFECTED BY FEE DEBTS

OSM had proposed to add a new Section 870.15(f) requiring State regulatory authorities to suspend a permit for a specific mining operation if reclamation fees on the coal therefrom are due and owing the Federal Government for more than one month. That is, if the payment was delinquent on the last day of the month following the month in which the reclamation fee was due, the regulatory authority would have been required to initiate actions to suspend the permit for the mining operation in question. Similarly, if a mine report form for the last quarter of 1984, for example, covering production or non-production was not filed, suspension proceedings for that mining operation would also have been commenced.

Based on an analysis of comments received on the proposal, OSM has decided that a suspension outside of the normal enforcement context is not warranted in this situation. Instead, the final rule will allow such suspensions or other actions to occur only after providing all of the procedural safeguards associated with the issuance of a Notice of Violation or Cessation Order. This will be accomplished through amendment of 30 CFR 773.17 requiring continued payment of reclamation fees by the operator as a permit condition. Thus the permit will not be suspended automatically upon a

failure to pay required fees. There will have to be a separate enforcement action taken based upon a violation of the permit condition.

The following is a summary of major comments and responses thereto:

A number of commenters questioned the source of the authority which would have allowed the States to suspend permits under the proposed rule for failure to pay reclamation fees. Several suggested that implementation of the proposed rule would require amendments to their State programs, and one State believed that fee collection was intended to be a part of the federal administrative procedure. In addition, several commenters were concerned that implementation of the proposed rule would impose an additional administrative and financial burden on the State Regulatory Authorities.

OSM agrees that proposed Section 870.15(f) would have required States to develop new procedures to require the immediate suspension of mining. As adopted, the final rule will not require the adoption of new State procedures, but will require State program amendments to incorporate the new permit condition. OSM is not suggesting that States develop their own fee compliance mechanism. Instead OSM fee compliance officers (FCOs) and other personnel will notify States of violators and assist States in taking appropriate enforcement action. Moreover, OSM authorized personnel will be able to directly issue NOVs in oversight when necessary.

Several commenters had also questioned the adequacy of the proposal's "due process" protections. OSM shares the commenters' concerns and has required any actions aimed at suspending the permit to be taken in the standard enforcement context.

One commenter pointed out that suspension or revocation would be burdensome to a permittee who was not the "responsible party" under the proposed definition. The final rule responds to this concern by requiring payment by the operator. Because the condition applies only to coal produced under the permit, it is entirely appropriate that the permit be conditioned upon payment of fees associated with such coal, even in instances where the permittee and the operator are not the same person.

Two commenters suggested that the regulations allow for the negotiation of settlement agreements in lieu of suspension of permits. A number of commenters objected to suspension of permits for a single delinquency under the proposed rule, as opposed to a pattern of violations, and two of the commenters questioned how the proposed procedure would work in practice. The final rule provides the flexibility requested by the commenters. Satisfactory abatement action under an NOV is site-specific and could include an agreement to pay fees in a manner agreed to by OSM, including by installment agreements. Any breach of an agreement could lead to immediate action by OSM either under the original Notice of Violation or through new enforcement proceedings.

Finally, one commenter supported the new Section, in theory, but expressed concern that the proposed language was too vague since it failed to outline specific procedures for permit suspension by the States. This commenter also suggested that OSM adopt a national rule, incorporating section 521(a)(3) to ensure uniformity of enforcement.

This commenter's concerns are taken care of by using established enforcement procedures. OSM will rely on existing statutory and regulatory authority for enforcement of fee compliance, as a matter of direct Federal enforcement. OSM will make use of every means available under the Act to ensure that fees are paid on coal produced, including issuances of Notices of Violation and Cessation Orders, where appropriate, pursuant to section 521 of SMCRA.

G. SECTION 870.15(f) -- Proposed as Section 870.15(g) -- PENALTY ON FEE DEBTS

In accordance with the Debt Collection Act of 1982 (Pub. L. 97-365), this new subsection imposes a six-percent per annum penalty on all fee debts owed under section 402 of SMCRA as soon as such debts are 91 days overdue. This penalty will be in addition to the interest which begins to accrue at the rate set by the U.S. Treasury, on the 31st day following the end of the calendar quarter for which the fee is due. OSM made some minor editorial changes to the final rule.

One commenter supported the revision in this section. This commenter remarked that an additional 6 percent interest rate, on top of the already existing interest rate required will have deterrent benefits. This commenter further stated such

a charge, together with section 870.15(c), would make the interest penalty for being delinquent more in keeping with modern day economics.

A second commenter stated it should be clear that any penalty is on the principal and not on the accrued interest. This commenter also stated the Federal Claims Collection Act specifies a 6 percent or less penalty, and that no penalty is required. The commenter further recommended the penalty should start at one percent and then increase as long as the fee is due.

The Debt Collection Act of 1982, Pub. L. 97-365, section 11(e)(2)(B), requires the head of a Federal agency, or his designee, to "assess a penalty charge of no more than 6 per centum per annum, for failure to pay any portion of debt more than ninety days past due." OSM has elected to assess this penalty at the 6 percent maximum rate. As specifically stated in the Debt Collection Act, no interest will accrue on any assessed penalty.

A third commenter referred to the 6% penalty as an additional tax being imposed upon an operator who is delinquent in reclamation fee payments. This commenter called this action a legislative enactment by DOI exceeding the statutory powers given DOI by Congress. The commenter continued by stating that Congress has set the fee payment rate and method of establishing interest. The commenter advised no authority was granted for adding on any penalties. The commenter believed the proposed enactment to be unconstitutional.

The Debt Collection Act of 1982 was enacted by Congress "to increase the efficiency of Government-wide efforts to collect debts owed the United States and to provide additional procedures for the collection of debts owed the United States." This Act provides clear legal authority for DOI to implement these provisions.

A fourth commenter advised that the requirement of a 6% penalty is costly to the small operator. This commenter further stated that penalties should cease on the date a payment plan is initiated, and only come back into existence if the payment plan is defaulted.

The Debt Collection Act of 1982 mandates a penalty of 6% or less on debts owed the Federal Government. OSM has elected to impose this penalty at the maximum rate after the fee is 91 days overdue. If an installment agreement is negotiated prior to the ninety-first day, no penalty will be imposed. A penalty will be imposed if the installment agreement is defaulted.

H. SECTION 870.15(g) -- Proposed as Section 870.15(h) -- PROCESSING AND HANDLING CHARGES

The new Section 870.15(g) assesses charges to cover the cost of processing and handling delinquent claims. The processing includes referrals to the Solicitor's Office, Department of the Interior, as well as private collection agencies. The debtor is to be notified in the first demand letter (bill) of the potential penalty and processing charge that will be incurred if the debt remains unpaid.

The amount of the processing charge is approximately what OSM must spend to collect overdue fees. The amount of the processing charge will be based upon the following components: (1) For fee debts referred to a collection agency, the amount the collection agency charges; (2) For debts OSM processes and handles without using a collection agency, an amount equivalent to that charged by collection agencies for the same or similar services; and (3) For debts referred to the Solicitor, Department of the Interior, to bring suit for collection of the fee, one or two additional fixed components. The first component will be based on the then current estimated cost to prepare a debt case for litigation and will reflect expenses incurred by OSM, the Solicitor and any other person (such as a collection agency or asset location company responsible for the preparation of appropriate documentation regarding its collection on behalf of OSM). Should a debt subsequently proceed to litigation, the second additional component will be based on the estimated cost of litigating each of these debt cases, which includes the cost for preparing a debt case for litigation. Under Section 870.15(g)(1)(v), all of OSM's other administrative collection costs may be provided for. Particular administrative expenses are not limited to the examples cited in the final rule. The final rule also specifies under Section 870.15(g)(2) that no prejudgment interest accrues on any processing and handling charges. The word "prejudgment" was added so as not to preclude collection of post-judgment interest on the total amount owed, including processing and handling charges. OSM also made some minor editorial changes in the final rule.

All penalties and processing and handling charges imposed and collected on fee debts will go into the Secretary's share of the Abandoned Mine Reclamation Fund to reimburse OSM for the cost of collecting fees owed.

One commenter supporting this new section believes it to be a fair practice used in many other collection arenas. This commenter suggested such charges might also act as a deterrent against future delinquency.

One commenter recommended specific amounts should be charged and not any amounts that would be burdensome to a small operator and arbitrary on the part of OSM.

Another commenter remarked that the proposed rule seems improper especially where minor debts are involved. This commenter further stated these matters can and should be addressed on a case-by-case basis rather than categorically penalizing operators for nonpayment.

A fourth commenter stated it is the responsibility of Congress and not the Department of the Interior to enact taxes. This commenter advised economic times are hard and operators have gone through recessions. This commenter remarked that OSM is attempting to double the amount owed by the small operator because he failed to pay on time. The commenter also observed the 6% penalty and the processing charges could cause the operator to owe the Government more, with these charges and the interest, than the original delinquent tax.

The Debt Collection Act of 1982, Pub. L. 97-365 provides OSM with the authority to assess penalties and to charge for processing and handling debt collection cases. The processing and handling charges are not arbitrary. The amounts charged will be based on actual and estimated costs to provide this service and will differ depending upon the type of case involved. All debtors will be assessed a charge for the service required to process and handle their delinquent account regardless of the size of their operation. Standard charges are appropriate for certain components where the costs of particular services will not vary by size of operation.

One commenter stated the Solicitor's Office and staff is funded for processing and handling delinquent claims. This commenter further remarked that if OSM assesses charges to process and handle delinquent claims, line budget items, including personnel, and all expenses relating to prosecuting the operator and collecting debts should be eliminated.

The administrative costs for OSM's Abandoned Mine Reclamation Program, including the fee compliance program come from the Secretary's share of the Abandoned Mine Reclamation Fund. All penalties, processing and handling charges imposed and collected on fee debts will go into the Secretary's share of the fund. Once this new system is in place, the costs necessary to administer OSM's program to recover delinquent reclamation fees will be borne by the debtor. Over a period of time, OSM may be able to significantly reduce some line items currently budgeted for this purpose.

I. SECTION 870.16(a) -- ACCESS TO MINES, PREPARATION PLANTS, SUPPORT FACILITIES AND LOADING FACILITIES

OSM clarified Section 870.16(a) to put all surface mining operators and any persons engaging in or conducting a surface coal mining operation on notice that they will be required to keep existing records of coal produced, used, bought or sold. The previous rule implied but did not specifically require these persons to keep existing records of purchased coal. This is in addition to the current authority of FCO's under Section 870.17(a) to examine records of the second party involved in the sale or transfer of ownership of coal by the operator. By clarifying recordkeeping requirements for all mining operations subject to the jurisdiction of SMCRA in conjunction with access to records of transferee or purchasing coal brokers and transport facilities, OSM will be able to check production data and thereby hopefully lessen the under reporting or nonreporting of production data. OSM has determined that the proposed reference to section 701(28) of the Act is unnecessary and will not adopt it as part of the final rule. However, that provision and section 528 both are relevant to whether an operation is subject to SMCRA jurisdiction.

One commenter supported revisions to this section. This commenter said that the earlier definition of "operator" failed to adequately include support facility operators. The commenter further stated that the extension of the definition will aid the Fee Compliance Officer in efforts to uncover fee fraud. The commenter recommended that OSM should also require operators to maintain, on the mine site, copies of the AML fee report filed with OSM.

OSM has reviewed this comment and because this recommendation was not included in the initial proposed rule, OSM has decided to postpone consideration.

Another commenter felt this is another attempt by OSM to get into recordkeeping. This commenter stated OSM has the right to inspect records and there is no reason to further pursue this issue. The intent of this clarifying revision is to notify all operators under the jurisdiction of SMCRA, including operators of support facilities, that they are required to keep records of coal produced, used, bought or sold.

J. SECTION 870.16(a)(4) -- CERTIFICATION OF BTU VALUE

Section 870.16(a)(4) is revised slightly by adding the requirement that an independent laboratory certify the Btu value of a ton of in situ coal at least semi-annually. This frequent requirement makes it possible to monitor any changes in the coal seam. OSM received no comments on this Section. It is adopted without change.

K. SECTION 870.16(b) -- ACCESS TO MINES, PREPARATION PLANTS, SUPPORT FACILITIES AND LOADING FACILITIES

OSM revises Section 870.16(b) to clarify that OSM Fee Compliance Officers have the authority to review records of all surface mining operations, including preparation plants and support facilities resulting from or incident to a mine or other regulated activity. Authority for such actions is derived from sections 412(a) and 701(28) of SMCRA.

The purpose of this revision is to provide OSM's fee compliance officers (FCOs) with the means to determine the extent to which operations covered by the Act are discharging their statutory responsibilities to report production figures accurately and pay reclamation fees due on all production for each calendar quarter. The previous regulations did not provide a means of effectively monitoring all mining operations to ensure compliance with the statutory requirements for reporting production figures accurately and paying full reclamation fees on production for each quarter. Both the criminal penalty provision in subsection 402(d) of the Act, *30 USC 1232(d)*, and the provision in subsection 402(e) allowing recovery of reclamation fees through a civil debt collection action, will become operative only after OSM has determined which operators of mines or tipples have under reported production or underpaid fees.

OSM will be better able to identify those operators who misreport coal production figures if FCO's are granted access to information on sales of coal made by operators to tippie owners. OSM can, in many situations, make better use of its auditing personnel if auditors concentrate on tipples and plants through which coal from several operators moves. Such audits are especially helpful in checking for "wildcatters" and those producers who under report tonnage of production in order to avoid reclamation fee liability.

One commenter suggested that OSM has failed to prove that access to records is a problem, and that regulations should be promulgated only on the basis of demonstrated need. OSM disagrees. OSM's purpose in proposing this section is to notify operators of all surface coal mining operations, including preparation plants and tipples located at or near a mine site, of the authority of OSM FCOs to examine books and records.

Another commenter proposed that OSM extend to Federal and State inspectors the authority to review production records to verify if an operator has filed an AML fee report. This commenter also suggested that OSM require inspectors to give written notice to FCO's of any discrepancies in the AML report. OSM does not support this position for two reasons. First, providing State inspectors such additional authority is inappropriate because collection of AML fees is not a State program function and, second, State inspectors do not function as OSM agents. It is unnecessary to broaden Federal inspectors' responsibilities in every case or to provide a notice requirement because FCO's and inspectors currently work together and share information. Inspectors are put on notice where an operator reports zero production and the FCO has information to the contrary. However, additions were made to the final rule to allow access to records by FCOs and "other authorized representatives," including inspectors where appropriate. OSM has also made some minor editorial changes to the final rule.

L. SECTION 870.16(c) -- SUBSTANTIATING RECORDS

Revised Section 870.16(c) requires all surface coal mining operations subject to the provisions of SMCRA to make their production and sales records available to OSM's Fee Compliance Officers. OSM amended the final rule to clarify

that this section applies to "any person engaging in or conducting a surface coal mining operation," and not just "operators" as originally proposed.

One commenter remarked that an operator takes a substantial number of days to attempt to assemble all the records and information requested when contacted by OSM. This commenter further advised that OSM does not limit requests to books and records necessary to substantiate the accuracy of reclamation fee reports.

The commenter stated that it is beyond all comprehension to allow the investigating person to take the books and copy them somewhere. The commenter suggested that to make this process fair and to avoid abuse by employees of OSM, the operator should be able to charge OSM for the reasonable cost of collecting the necessary requested records and making them available to OSM. The commenter reasoned this would make them more responsive to each particular situation.

Another commenter urged OSM to use flexibility in the application of this Section.

Except for a change in scope, to include records of support facilities, recordkeeping requirements in Section 870.16 are the same as those contained in the rules which have been in effect since October 25, 1978. Revisions to this section were made to notify all persons engaging in or conducting surface coal mining operations subject to the provisions of SMCRA of the change in scope of these requirements. OSM audits of these books and records are essential to ensure compliance with section 402 of SMCRA. Prior to an audit, OSM policy requires FCOs to notify operators of records that must be available for audit. Records required for OSM's review may vary depending on the basis of the operator's reporting or accounting system.

OSM received a comment concerning the following sentence: "If the fee is paid at the maximum rate, the FCO's shall not copy information relative to price." The commenter stated that the sentence was confusing and was not explained in the preamble. This sentence was not one of the proposed changes. It is part of the final rules which have been in effect since regulations were first published on this subject on December 13, 1977, *42 FR 62713*.

These rules were more fully explained in the preamble to the earlier regulation. OSM made clear that the right to copy price information is limited to and needed only for those cases where the fee is based on a percentage of value. If the flat cents-per-ton fee is paid, price information is not relevant.

M. SECTION 870.16(d) -- RECORD MAINTENANCE

OSM revises Section 870.16(d) to clearly state that all persons engaging in or conducting surface coal mining operations must maintain their production and sales records for at least six years from the date the fees were due or paid. In addition, this section limited the time span for OSM audits to six years assuming that production was reported accurately and fees paid accordingly. The previous rule was ambiguous since it referred to the term "operator" and it did not have a time limit for OSM audits. The six-year period for record maintenance is not to be construed as a statute of limitations for the commencement of an action for recovery of delinquent reclamation fees pursuant to section 402 of the Act, *30 U.S.C. 1232*. Absent Government consent through Congressional action, no period of limitations exists. See, *Guaranty Trust Co. v. United States*, *304 U.S. 126, 132 (1938)*.

One commenter remarked that a period of six years from the date the fees were paid is either cumbersome and/or a costly burden on small operators who do not have the financial resources, or the staff available, to maintain such records for a period of six years. This commenter suggested one year would be more appropriate and less costly.

A second commenter stated operators who have under reported reclamation fees for years, and have not been either audited or detected by OSM, will be able to destroy all evidence of fraud if they are allowed to destroy records after six years. This commenter recommended that OSM should require operators to maintain books for the remaining life of the AML fund (1992), to ensure the possibility of proving any fraud detected in the future.

OSM has given consideration to these comments and determined the one year record retention period suggested by the first commenter to be inadequate. OSM believes the second commenter's recommendations to extend the recordkeeping requirement to a fifteen year period, the entire life of the fund, would be a burdensome requirement for

some surface coal mine operators. OSM will neither shorten nor lengthen the six year record retention requirements in effect since December 13, 1977. The preamble to regulations published on that date discusses this requirement.

Consideration of the second commenter's recommendations has led to OSM's decision to delete the proposed six year audit limitation. OSM's Fee Compliance Officers will audit all existing records containing information required to be kept by Section 870.16(a)(1)(4). In some cases the time period audited will extend beyond a six year period.

Also, OSM amended the final rule to clarify that this section applies to "any person engaging in or conducting a surface coal mining operation," and not just "operators" as originally proposed.

N. SECTION 870.16(e) -- ESTIMATED FEE

This new subsection provides a method of assessing reclamation fees in cases where operators fail to maintain adequate records or fail to make such records available for audit purposes. Previously, OSM had no satisfactory method of determining fee liability whenever an operator failed to keep adequate records or refused access to such records. OSM's only recourse was civil litigation.

This rule will implement a fair method of establishing a fee debt that will be incurred immediately. In the absence of records, OSM will estimate the amount of fees owed on coal produced. In formulating this amount, OSM will base a preliminary estimate on such factors as mining method used, type of coal produced, and geographical location. This preliminary figure will then be increased by 20% to bring the estimate within the range of probable fees owed. This method of determining reclamation fee liability is a variation of the assessment procedure used by Kentucky when the State must estimate natural resource tax liability. Kentucky uses any information in its possession to arrive at a preliminary estimate and then assesses the tax at no more than twice the amount estimated to be due. Rather than double the amount of the estimate, as done by Kentucky, OSM will add 20% to provide a reasonable margin of error. This estimate will be treated as the amount owed, and interest will accrue and other charges will be made in the event of non-payment.

Three commenters raised objections to adoption of this section. One commenter questioned OSM's method for estimating fee liability, claiming that an estimate based on average production, mining method, type of coal or geographical location would be purely arbitrary and unfounded. It was suggested that factors such as weather and market forces also be considered. These will be considered in analyzing the "nature of the operation"; OSM will make use of any and all information available to estimate amount of fee liability where an operator fails to maintain adequate records or refuses access to records for audit purposes. This commenter also believes that the operator assessed should be free to prove that an estimate is inaccurate. OSM agrees. An operator may provide information to challenge the amount of OSM's estimated fee, and OSM has amended its regulation accordingly. These commenters also felt that an additional 20% upward adjustment of the estimated fee would be inequitable. One commenter felt that the 20% adjustment was not adequately explained in the proposed rule, and one said that if OSM is formulating the estimate, a 20% downward adjustment would be a more accurate reflection. OSM believes that 20% upward adjustment will tend to ensure that tonnage produced is not underestimated, encourage operators to provide information and enhance the possibility of collecting all fees owed. The final rule clearly states that OSM will use this estimating technique only in the event that an operator has no adequate records or refuses access to records for audit purposes.

OSM received one comment in support of the rule. This commenter also urged OSM to emphasize that this new section does not preclude OSM or the regulatory authority from issuing a civil penalty citation for violating the requirements of this section. Under the rules adopted today OSM will take whatever enforcement actions are appropriate. OSM will treat the estimated fee as the amount of fee owed. When this estimated fee becomes overdue it is subject to all interest, penalty, processing and handling charges, and enforcement actions in Part 870 or in SMCRA or its other implementing regulations.

III. PROCEDURAL MATTERS

A. Executive Order 12291 and the Regulatory Flexibility Act

The Department of the Interior (DOI) has determined that this rule is not a major rule requiring a regulatory impact analysis under Executive Order 12291. Also, DOI certifies that this rule will not have a significant economic effect on a

substantial number of small entities and, therefore, does not require a Regulatory Flexibility analysis under Public Law 96-354. The reasons underlying these determinations are as follows:

The revisions to Part 870 of the Abandoned Mine Reclamation Fund regulations will not result in significant adverse effects on competition, employment, investment, productivity, innovation or on the ability of the United States-based enterprises to compete with foreign-based enterprises in domestic or foreign markets; nor will they increase costs or prices for consumers, individual industries, Federal, State, Tribal or local governmental agencies or geographic regions.

There will be no significant demographic effects, direct costs, indirect costs, nonquantifiable costs, competitive effects, enforcement costs or aggregate effects on small entities.

B. National Environmental Policy Act

OSM has been granted a categorical exclusion from the procedures of the National Environmental Policy Act for the subject of reclamation fees imposed by Pub. L. 95-87 (46 FR 7487, January 23, 1981).

C. Paperwork Reduction Act of 1980

The information collection requirements contained in 30 CFR 870.15(c), and 870.16 (a) and (d) were approved by the Office of Management and Budget under 44 U.S.C. 3507 and assigned clearance number 1029-0063.

LIST OF SUBJECTS

30 CFR Part 773

Administrative practice and procedure, Reporting requirements, Surface mining, Underground mining.

30 CFR Part 870

Coal mining, Reporting requirements, Surface mining, Underground mining

Based on the foregoing, 30 CFR Parts 773 and 870 are amended as set forth herein.

Dated: June 17, 1984.

Garrey Carruthers, Assistant Secretary, Land and Minerals Management.

PART 773 -- REQUIREMENTS FOR PERMITS AND PERMIT PROCESSING

1. Section 773.17 is amended by adding paragraph (g) as follows:

SECTION 773.17 - PERMIT CONDITIONS.

* * * * *

(g) The operator shall pay all reclamation fees required by Subchapter R of this chapter for coal produced under the permit for sale, transfer or use, in the manner required by that subchapter.

PART 870 -- ABANDONED MINE RECLAMATION FUND -- FEE COLLECTION AND COAL PRODUCTION REPORTING

2. Section 870.15 is amended by revising paragraph (c) and adding paragraphs (e), (f), and (g) to read as follows:

SECTION 870.15 - RECLAMATION FEE PAYMENT.

* * * * *

(c) As of April 1, 1983, delinquent reclamation fee payments are subject to interest at the rate established quarterly by the U.S. Department of the Treasury for use in applying late charges on late payments to the Federal Government, pursuant

to Treasury Fiscal Requirements Manual 6-8020.20. The Treasury current value of funds rate is published by the Fiscal Service in the Notices section of the Federal Register. Interest on unpaid reclamation fees shall begin to accrue on the 31st day following the end of the calendar quarter for which the fee payment is owed and will run until the date of payment. OSM will bill delinquent operators on a monthly basis and initiate whatever action is necessary to secure full payment of all fees and interest. All operators who receive a Coal Production and Reclamation Fee Report (Form OSM-1), including those with zero production, must submit a completed Form OSM-1, as well as any fee payment due. Fee payments postmarked later than thirty days after the calendar quarter for which the fee was owed will be subject to interest.

* * * * *

(e) Failure to pay overdue reclamation fees, including interest on late payments or underpayments, failure to maintain adequate records, or failure to provide access to records of a surface coal mining operation may result in one or more of the following actions:

- (1) Initiation of litigation;
- (2) reporting to the Internal Revenue Service;
- (3) reporting to State agencies responsible for taxation;
- (4) reporting to credit bureaus; or
- (5) referral to collection agencies. Such remedies are not exclusive.

(f) When a reclamation fee debt is greater than 91 days overdue, a 6 percent per annum penalty shall begin to accrue on the amount owed for fees and will run until the date of payment. This penalty is in addition to the interest described in paragraph (c) of this section.

(g)(1) For all delinquent fees, interest and any penalties, the debtor will be required to pay a processing and handling charge which shall be based upon the following components:

- (i) For debts referred to a collection agency, the amount charged to OSM by the collection agency;
 - (ii) For debts processed and handled by OSM, a standard amount set annually by OSM based upon similar charges by collection agencies for debt collection;
 - (iii) For debts referred to the Solicitor, Department of the Interior, but paid prior to litigation, the estimated average cost to prepare the case for litigation as of the time of payment;
 - (iv) For debts referred to the Solicitor, Department of the Interior, and litigated, the estimated cost to prepare and litigate a debt case as of the time of payment; and
 - (v) If not otherwise provided for, all other administrative expenses associated with collection, including, but not limited to, billing, recording payments, and follow-up actions.
- (2) No prejudgment interest accrues on any processing and handling charges.

3. Section 870.16 is amended by revising paragraphs (a), (b), (c), and (d) and adding paragraph (e) to read as follows:

SECTION 870.16 - PRODUCTION RECORDS.

(a) Any person engaging in or conducting a surface coal mining operation shall maintain, on a current basis, records that contain at least the following information:

- (1) Tons of coal produced, bought, sold or transferred, amount received per ton, name of person to whom sold or transferred, and the date of each sale or transfer.
- (2) Tons of coal used by the operator and date of consumption.
- (3) Tons of coal stockpiled or inventoried which are not classified as sold for fee computation purposes under Section 870.12.

(4) For in situ coal mining operations, total BTU value of gas produced, the BTU value of a ton of coal in place certified at least semiannually by an independent laboratory, and the amount received for gas sold, transferred, or used.

(b) OSM fee compliance officers and other authorized representatives shall have access to records of any surface coal mining operation for the purpose of determining compliance of that or any other such operation with this part.

(c) Any person engaging in or conducting a surface coal mining operation shall make available any book or record necessary to substantiate the accuracy of reclamation fee reports and payments at reasonable times for inspection and copying by OSM fee compliance officers. If the fee is paid at the maximum rate, the fee compliance officers shall not copy information relative to price. All copied information shall be protected to the extent authorized or required by the Privacy Act and the Freedom of Information Act (*5 U.S.C. 552* (a), (b)).

(d) Any persons engaging in or conducting a surface coal mining operation shall maintain books and records for a period of 6 years from the end of the calendar quarter in which the fee was due or paid, whichever is later.

(e) (1) If an operator of a surface coal mining operation fails to maintain or make available the records as required in this section, OSM shall make an estimate of fee liability under this part through use of average production figures based upon the nature and acreage of the coal mining operation in question, then assess the fee at the amount estimated to be due, plus a 20 percent upward adjustment for possible error.

(2) Following an OSM estimate of fee liability, an operator may request OSM to revise the estimate based upon information provided by the operator. The operator has the burden of demonstrating that the estimate is incorrect by providing documentation acceptable to OSM, and comparable to information required in Section 870.16(a).

(Pub. L. 95-87, *30 U.S.C. 1201* et seq.; Pub. L. 97-365, *5 U.S.C. 5514* et seq.).

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