

**FEDERAL REGISTER: 51 FR 41734 (November 18, 1986)**

DEPARTMENT OF THE INTERIOR

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

30 CFR Parts 701, 816, and 817

Surface Coal Mining and Reclamation Operations -- Permanent Regulatory Program;

Removal of Adverse Physical Impact Definition and Certain Remining Operations Performance Standards

ACTION: Final rule.

**SUMMARY:** The Office of Surface Mining Reclamation and Enforcement (OSMRE) is removing from its rules the definition of adverse physical impact, and certain performance standards pertaining to remining operations. The effect of these changes is to require all persons conducting remining operations on previously mined areas to use all reasonably available spoil in the immediate vicinity of the operation to backfill the highwall to the maximum extent technically practical.

EFFECTIVE DATE: December 18, 1986.

FOR FURTHER INFORMATION CONTACT: Raymond Aufmuth, Division of State Program Assistance, Office of Surface Mining Reclamation and Enforcement, U.S. Department of the Interior, 1951 Constitution Avenue NW., Washington, DC 20240; Telephone: 202-343-5843.

**SUPPLEMENTARY INFORMATION:**

- I. Background
- II. General Discussion
- III. Responses to Comments
- IV. Procedural Matters

**I. BACKGROUND**

On January 7, 1982 (*47 FR 928*), and June 25, 1982 (*47 FR 27734*), the Office of Surface Mining Reclamation and Enforcement (OSMRE) proposed permit and performance standards for remining previously mined areas. The January 7, 1982, proposal included a requirement to reclaim highwalls affected by remining, while the June 25, 1982, proposal provided additional standards applicable to remining and reprocessing operations. On November 12, 1982 (*47 FR 51316*), OSMRE issued an interim final rule applicable to remining of steep slope areas. That interim final rule, as well as other aspects of the June 25, 1982, proposal, were considered in OSMRE's "Final Environmental Impact Statement, OSM-EIS-1: Supplement" on the permanent program regulations.

In a final rule promulgated on September 16, 1983 (*48 FR 41720*), OSMRE revised portions of its regulations at 30 CFR 816.106 and 817.106 on performance standards applicable to remining operations. Under the revised rule at 30 CFR 816.106(b) and 817.106(b), remining operations with no adverse physical impact on a pre-existing highwall were excepted from the requirement to use all reasonably available spoil in the immediate vicinity of the operation to backfill the highwall to the maximum extent technically practical.

These revised regulations were challenged in Round III of In Re: Permanent Surface Mining Litigation II, Civil Action No. 79-1144 (D.D.C. 1984). However, before that portion of the case was decided, the Secretary of the Interior, in a joint motion with the environmental plaintiffs (the National Wildlife Federation et al.), agreed to suspend the definition of adverse physical impact as well as the related regulations at 30 CFR 816.106(b) and 817.106(b). On December 3, 1984, the court entered an order approving the agreement.

As a result of the court order, on January 3, 1985 (*50 FR 257*), OSMRE suspended 30 CFR 816.106(b) and 817.106(b), and the definition of adverse physical impact at 30 CFR 701.5.

On June 13, 1985 (*50 FR 24881*), OSMRE proposed to amend its remining regulations to permanently remove the suspended provisions. A seventy-day public comment period was announced in the proposed rule, to close on

August 22, 1985.

OSMRE received comments on the proposed rule from a total of six individuals and organizations, representing industry, citizens, environmental groups, and other government agencies. OSMRE has reviewed these comments carefully and has taken them into consideration in writing this final rule. No request was received for a public hearing or meeting, and none was held.

## **II. GENERAL DISCUSSION**

This rule removes from 30 CFR 701.5 the definition of adverse physical impact.

Also, it removes from 30 CFR 816.106 paragraph (b), which excepted from the backfilling and grading requirements of paragraph (a) those remaining operations that would not cause an adverse physical impact. The introductory text of Section 816.106 is redesignated as paragraph (a), and paragraph (a) is redesignated as paragraph (b).

Finally, this rule amends 30 CFR 817.106, which applies to underground mining, in the same way as it amends Section 816.106.

As a result of this rule the exceptions in removed Sections 816.106(b) and 817.106(b) for operations that would not cause an adverse physical impact no longer apply. All remaining operations covered by redesignated Sections 816.106 (a) and (b) and 817.106 (a) and (b) must comply with the specified backfilling and grading requirements.

OSMRE will interpret and enforce redesignated paragraphs (a) and (b) as described in the preamble to the rule under which they originally were promulgated. *48 FR 41720* (September 16, 1983). An operator who conducts remaining operations will be responsible for those areas which he re-affects and/or re-disturbs. Where a remaining operation re-affects or enlarges a pre-existing highwall, and all reasonably available spoil is insufficient to completely eliminate the highwall, the operator will be required to backfill the highwall to the maximum extent technically practical using all spoil generated by the remaining operation and any other reasonably available spoil located in the permit area. Under this rule, additional highwall cuts and face up areas for underground mines on previously mined areas are assumed to re-affect or enlarge a pre-existing highwall. Auger mining operations are covered under 30 CFR 819 and are not affected by this rule.

## **III. RESPONSES TO COMMENTS**

### **SECTION 705.1 - DEFINITIONS**

#### **ADVERSE PHYSICAL IMPACT**

A number of comments on the proposed rule concerned the removal from 30 CFR 701.5 of the definition of the term adverse physical impact. Since these comments typically pertained to removed Sections 816.106(b) and 817.106(b) as well, for convenience they are discussed below with the related comments on these latter sections.

#### **SECTIONS 816.106 AND 817.106 - BACKFILLING AND GRADING: PREVIOUSLY MINED AREAS**

A number of comments on the proposed rule concerned the substance of, or proposed the amendment of, redesignated Sections 816.106 (a) and (b), and 817.106 (a) and (b). Since this rule does not affect the substance of these sections, these comments do not pertain to this rule, and further response by OSMRE is not appropriate. For guidance on how OSMRE will interpret and enforce amended Sections 816.106 and 817.106, see the preamble to the rule under which they originally were promulgated. *48 FR 41720* (September 16, 1983).

#### **REMOVED SECTIONS 816.106(b) AND 817.106(b)**

#### **AGREEMENT WITH PROPOSED RULE**

Two commenters agreed with the intent of the proposed rule. Generally, they concluded that it was an important means to mitigate environmental degradation and physical hazards resulting from mining activity conducted prior to enactment of the Surface Mining Control and Reclamation Act of 1977, *30 U.S.C. 1201* et seq. OSMRE agrees.

## **CONSISTENCY WITH THE ACT**

Several commenters stated that the proposed rule was inconsistent with the Surface Mining Control and Reclamation Act of 1977 (the Act), *30 U.S.C. 1201 et seq.*

OSMRE disagrees. This rule is consistent with section 515(b)(3) of the Act, *30 U.S.C. 1265(b)(3)*, as interpreted in a related context in *In Re: Permanent Surface Mining Litigation II*, No. 79-1144, slip op. at 25-29 (D.D.C. July 6, 1984). There, the District Court upheld 30 CFR 819.19(b), which pertains to auger mining of previously mined areas, and is essentially the same as redesignated Sections 816.106(b) and 817.106(b). Thus, by removing the exception for operations that do not cause an adverse physical impact, this rule brings Sections 816.106 and 817.106 into conformance with a rule that has been challenged and upheld as lawful.

## **INTERPRETATION OF REDESIGNATED PROVISIONS**

A number of commenters on the proposed rule asked for guidance on how to interpret the requirements of Sections 816.106 and 817.106 in the absence of the exception for operations that would not cause an adverse physical impact. As stated previously, OSMRE will interpret and enforce redesignated paragraphs (a) and (b) of Sections 816.106 and 817.106 as described in the preamble to the rule under which they originally were promulgated. *48 FR 41720* (September 16, 1983).

Due to diversity of circumstances under which a remining operation may reffect or enlarge a pre-existing highwall, it is not possible to provide in advance specific guidance applicable to all situations. To the extent additional guidance may be needed by an operator, it will be provided by the regulatory authority during the permitting process on the basis of the information on remining that is submitted in a complete permit application.

## **ADVERSE EFFECT NOT RELEVANT**

One commenter concluded that under the proposed rule remining always would be viewed by OSMRE as causing an adverse effect on a highwall.

OSMRE disagrees. In removing from Section 701.5 the definition of adverse physical impact, and removing from Sections 816.106 and 817.106 the exception in paragraphs (b) for operations that do not cause an adverse physical impact, OSMRE has eliminated from these backfilling and grading regulations any consideration of adverse effect. OSMRE will not and need not view remining under the rule as always causing an adverse effect because the requirements of amended Sections 816.106 and 817.106 do not depend on adverse affect. Under the relevant terms of redesignated paragraphs (b), the requirement to eliminate a pre-existing highwall to the maximum extent practical depends only on whether the highwall is "reaffected or enlarged."

## **IBSMA DECISIONS**

One commenter asked OSMRE to explain how removal of the definition of adverse physical impact from Section 701.5, and of the corresponding performance standards from Sections 816.106(b) and 817.106(b), was related to the decisions of the Interior Board of Surface Mining and Reclamation Appeals (the board) in *Cedar Coal Co. v. OSM, 1 IBSMA 145* (April 20, 1979), and *Miami Springs Properties v. OSM, 1 IBSMA 399* (Dec. 23, 1980). This commenter concluded that for these two decisions to have meaning a definition of the term adverse physical impact was necessary.

OSMRE disagrees. Notwithstanding any previous interpretation to the contrary, OSMRE has concluded that neither board decision applies to Sections 816.106 or Section 817.106. *Cedar Coal Co.* and *Miami Springs Properties* interpret the OSMRE interim program regulations which required complete highwall elimination, while Sections 816.106 and 817.106 come under the permanent program, which differs in its specific requirements. Moreover, to the extent these decisions might be construed as applying to the permanent program, it is within the discretion of OSMRE to revise its regulations to negate their effect.

In *Cedar Coal Co.* the permittee, operating under an interim program permit, had removed overburden from the base of an orphaned highwall, resulting in new highwall exposures. The board, interpreting the OSMRE interim program

regulations, found "no showing that Cedar's removal of overburden [had] resulted in any adverse physical impact on the orphaned highwall," and thus concluded that "this activity [had] not triggered any obligation on the part of Cedar to eliminate the highwall." 1 *IBSMA at 155*.

In Miami Springs Properties the board read Cedar Coal Co. as clearly implying "that a[n interim program] permittee who did disturb an orphaned highwall in such a way as to cause an adverse physical impact on the highwall might be responsible for its complete elimination." 2 *IBSMA at 403*.

The board decisions in Cedar Coal Co. and Miami Springs Properties interpret the interim program regulation on backfilling and grading at 30 CFR 715.14, which in paragraph (b)(1)(ii) requires the complete elimination of a reaffected pre-existing highwall. Both decisions interpret the highwall elimination requirement of Section 715.14 as conditioned upon whether disturbance of the highwall causes an adverse physical impact.

Unlike Section 715.14, the corresponding permanent program regulations at 30 CFR 816.102 and 817.102 authorize less than complete elimination of a pre-existing highwall in accordance with Sections 816.106 and 817.106, respectively. In appropriate circumstances, redesignated paragraphs (b) of these sections require an operator to eliminate a pre-existing highwall only to the maximum extent technically practical. Thus, the requirements of the permanent program for reclamation of a pre-existing highwall are significantly more flexible than those of the interim program.

Based on a previous interpretation of the board decisions in Cedar Coal Co. and Miami Springs Properties, OSMRE incorporated in previous Sections 816.106(b) and 817.106(b) (herein removed), an exception to the highwall elimination requirements for permanent program operations that do not cause an adverse physical impact. It is this exception that this rule removes, along with the related definition in Section 701.5 of adverse physical impact.

In view of the greater flexibility afforded by the permanent program regulations, OSMRE has concluded that the Board's interpretation of the interim program regulation on backfilling and grading does not apply to the permanent program, and that it is not reasonable to include in Sections 816.106 and 817.106 an exception for operations that do not cause an adverse physical impact. OSMRE believes that in removing this exception this rule strikes a reasonable balance between protection of the environment and agricultural productivity and this country's need for coal.

## **EFFECT ON COSTS OF REMINING**

Several commenters indicated that removing the exception for remining operations that do not cause an adverse physical impact would increase the cost and volume of spoil movement without any corresponding economic benefit from additional coal production.

OSMRE agrees that where the removed exception otherwise would have applied, remining operations may incur minor additional spoil-handling costs in complying with amended Sections 816.106 and 817.107. However, this rule does not impose any additional obligation on an operator to move spoil from outside the immediate vicinity of the remining operations, and any additional costs can readily be considered in assessing the economic feasibility of a particular remining operation.

The same commenter asked who would bear the cost of a worst case environmental impact, such as a landslide, that occurred during remining. The commenter stated that such costs are unpredictable and would hinder the remining of some areas.

In removing the exception for operations that do not cause an adverse physical impact, this rule does not affect a permittee's responsibility for unforeseen reclamation costs. Until the performance bond is released, a permittee will continue to be responsible for environmental problems that may occur on the permit area. Sound engineering design and operating practices should eliminate most costs of this type.

Finally, this commenter suggested that unplanned for, additional reclamation operations should be approved upon initial permit application to prevent after-the-fact costs to permittees.

OSMRE considered this suggestion, but did not adopt it since it would require the regulatory authority to give blanket approval to reclamation of an unknown nature which might never occur. Under such an approach the regulatory

authority would have insufficient information to determine how the additional reclamation would be done, and thus insure that it would be environmentally sound.

### **FURTHER DISINCENTIVES TO REMINING**

One commenter stated that the proposed rule would create further disincentives to re-mining, and thus lessen the amount of reclamation and societal benefits which accrue from such activities. This commenter stated that the combined effect of the proposed rule and the court-mandated revision in the definition of previously mined area (See *51 FR 27508* (July 31, 1986)) would be to lessen the acreage of lands where the variances of Sections 816.106 and 817.106 were applicable. This commenter believed that the re-mining permittee should be responsible only for the additional impacts of re-mining, but not those from previous operations. This commenter concluded that under the rule reclamation that would have been accomplished at no cost to the taxpayer through re-mining would not be done, and that the resulting unreclaimed lands would continue to pollute and degrade the environment.

While this rule may result in some re-mining operations incurring minor additional spoil-handling costs in complying with amended Sections 816.106 and 817.106, OSMRE does not believe that there will be a significant impact on re-mining operations.

### **THIN SEAM MINING**

One commenter expressed concern that removing the exception for operations that do not cause an adverse physical impact might preclude the use of the technology known as thin seam mining. This commenter stated that removing spoil from the outslope of an old surface mine bench is technically practicable, but economically infeasible in a thin seam mining operation.

This rule is not likely to affect thin seam mining operations, which may be considered to be a form of auger mining. As such this type of mining operation will be covered by the performance standards found at 30 CFR 819. For a discussion of auger mining, see *48 FR 19314, 19321* (April 28, 1983).

### **COORDINATION WITH OTHER RULES**

One commenter urged OSMRE to coordinate this rule closely with other related rules presently under consideration. This commenter cited the substantial, combined, potential impacts of these rules on the re-mining industry. OSMRE agrees, and is closely coordinating all of its rulemaking activities to insure a consistent, workable, regulatory scheme.

### **IMMEDIATE VICINITY**

One comment on the proposed rule concerned the meaning of the term immediate vicinity, which is used in redesignated Sections 816.106(b) and 817.106(b), but is not defined. Since this rule does not affect either the meaning of this term or the substance of these sections, the comment does not pertain directly to this rule, and further response by OSMRE is not needed. For information on the meaning of this term, see the discussion of final Section 816.106(a)(1) at *48 FR 41728* (September 16, 1983).

### **PREVIOUSLY MINED AREA**

One comment on the proposed rule concerned the definition in 30 CFR 701.5 of the term previously mined area. Although this term is used in redesignated Sections 816.106(a) and 817.106(a), this rule does not affect either its definition or the substance of these latter sections. Therefore, the comment does not pertain to this rule, and further response by OSMRE is not appropriate. For a recent OSMRE proposal to amend the definition of previously mined area, see *51 FR 27508* (July 31, 1986)

### **REASONABLY AVAILABLE SPOIL**

Several comments on the proposed rule concerned the definition in 30 CFR 701.5 of the term reasonably available spoil. Although this term is used in redesignated Sections 816.106(b) and 817.106(b), this rule does not affect either the definition of this term or the substance of these latter sections. Therefore, these comments do not pertain to this rule, and

further response by OSMRE is not appropriate. For a discussion of the definition of this term, see *48 FR 41720* (September 16, 1983), and *47 FR 51316* (November 12, 1982).

#### **IV. PROCEDURAL MATTERS**

##### **Federal Paperwork Reduction Act**

This rule contains no new information collection requirements. The information collection requirements in the affected sections of the previous rules were submitted to the Office of Management and Budget under 44 U.S.C. and 3507 and assigned clearance numbers 1029-0047 (Part 816), and 1029-0048 (Part 817).

##### **Executive Order 12291**

The Department of the Interior (DOI) has examined this rule according to the criteria of Executive Order 12291 (February 17, 1981) and has determined that it is not a major rule and does not require a regulatory impact analysis. Any negative economic impact on coal operators will be offset by a corresponding positive impact on the environment and public health and safety.

##### **Regulatory Flexibility Act**

The DOI also has determined, pursuant to the Regulatory Flexibility Act, *5 U.S.C. 601 et seq.*, that this final rule will not have a significant economic impact on a substantial number of small entities. This rule may impact a relatively small number of coal operators, the majority of which will not be small entities.

##### **National Environmental Policy Act**

OSMRE has prepared an environmental assessment (EA) for this rule, and has made a finding that it would not significantly affect the quality of the human environment under section 102(2)(C) of the National Environmental Policy Act of 1969, *42 U.S.C. 4332(2)(C)*. The EA and finding of no significant impact are on file in the administrative record for this rule in the OSMRE Administrative Record Room at 1100 L Street, NW., Washington, DC.

##### **Author**

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#### **LIST OF SUBJECTS**

##### **30 CFR Part 701**

Law enforcement, Surface mining, Underground mining.

##### **30 CFR Part 816**

Environmental protection, Reporting and recordkeeping requirements, Underground mining.

##### **30 CFR Part 817**

Environmental protection, Reporting and recordkeeping requirements, Surface mining.

Accordingly, 30 CFR Parts 701, 816 and 817 are amended as set forth below:

Dated: October 24, 1986.

J. Steven Griles, Assistant Secretary for Lands and Mineral Management.

#### **PART 701 -- PERMANENT REGULATORY PROGRAM**

1. The authority citation for Part 701 continues to read as follows:

Authority: Pub. L. 95-87, 91 Stat 445 (*30 U.S.C. 1201 et seq.*), unless otherwise noted.

**SECTION 701.5 [Amended]**

2. Section 701.5 is amended by removing the definition of "Adverse physical impact".

**PART 816 -- PERMANENT PROGRAM PERFORMANCE STANDARDS -- SURFACE MINING ACTIVITIES**

3. The authority citation for Part 816 continues to read as follows:

Authority: Pub. L. 95-87, 91 Stat 445 (*30 U.S.C. 1201* et seq.), unless otherwise noted.

**SECTION 816.106 [Amended]**

4. Section 816.106 is amended by removing paragraph (b), redesignating the introductory text as paragraph (a), and redesignating paragraph (a) as paragraph (b).

**PART 817 -- PERMANENT PROGRAM PERFORMANCE STANDARDS -- UNDERGROUND MINING ACTIVITIES**

5. The authority citation for Part 817 continues to read as follows:

Authority: Pub. L 95-87, 91 Stat 445 (*30 U.S.C. 1201* et seq.), unless otherwise noted.

**SECTION 817.106 [Amended]**

6. Section 817.106 is amended by removing paragraph (b), redesignating the introductory text as paragraph (a), and redesignating paragraph (a) as paragraph (b).

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