

FEDERAL REGISTER: 52 FR 39404 (October 21, 1987)

DEPARTMENT OF THE INTERIOR

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

30 CFR Parts 700 and 736

Permanent Regulatory Program; Federal Program for a State; Public Notice, Comment and Hearing Procedures

ACTION: Final rule.

SUMMARY: The Office of Surface Mining Reclamation and Enforcement (OSMRE) of the U.S. Department of the Interior (DOI) is amending its rules governing the promulgation and revision of a Federal program for a State for coal exploration and surface coal mining operations on non-Federal and non-Indian lands. The rule revises the existing public notice, comment and hearing procedures. In addition, the rule adds to the general provisions in Part 700 a definition of the terms OSM and OSMRE.

EFFECTIVE DATE: November 20, 1987.

FOR FURTHER INFORMATION CONTACT: Andrew F. DeVito, Office of Surface Mining Reclamation and Enforcement, U.S. Department of the Interior, 1951 Constitution Avenue NW., Washington, DC 20240; Telephone: (202) 343-5241 (Commercial or FTS).

SUPPLEMENTARY INFORMATION:

- I. Background
- II. Discussion of the Rule
- III. Procedural Matters

I. BACKGROUND

The Surface Mining Control and Reclamation Act of 1977 (the Act), *30 U.S.C. 1201* et seq., establishing a nationwide program for the regulation of surface coal mining and reclamation operations. To provide a consistent regulatory framework for this nationwide program, section 501(b) of the Act, *30 U.S.C. 1251(b)*, requires the Secretary of the Interior (the Secretary) to promulgate a permanent regulatory program (the permanent program). The permanent program regulations are grouped in 30 CFR Chapter VII. These regulations include performance standards for surface coal mining and reclamation operations (Subchapter K), and procedures for establishing State and Federal programs (Subchapter C).

A State program may be established pursuant to section 503 of the Act, *30 U.S.C. 1253*. A State program, with certain exceptions, gives a State exclusive jurisdiction over the regulation of surface coal mining and reclamation operations within its borders. Where a State does not establish a State program, section 504 of the Act, *30 U.S.C. 1254*, requires the Secretary to establish a Federal program for that State. Standards and procedures that govern Federal programs and their promulgation appear in Subchapter C at 30 CFR Part 736.

Under Part 736 of the permanent program OSMRE has promulgated Federal programs for ten States: Georgia (August 19, 1982; *47 FR 36393*); Idaho (April 14, 1983; *48 FR 16218*); Massachusetts (September 12, 1983; *48 FR 41000*); Michigan (October 22, 1982; *47 FR 47162*); North Carolina (June 30, 1983; *48 FR 30298*); Oregon (November 2, 1982; *47 FR 49818*); Rhode Island (September 12, 1983; *48 FR 40990*); South Dakota (April 19, 1983; *48 FR 16818*); Tennessee (October 1, 1984; *49 FR 38874*); and Washington (February 24, 1983; *48 FR 7870*). As provided by 30 CFR 900.13, the rules for each of these Federal programs are codified in 30 CFR Subchapter T under separate parts for each State.

To take full advantage of the existing permanent program performance standards, while avoiding unnecessary repetition, most of the rules that make up each Federal program do not themselves set out detailed requirements, but instead cross-reference a corresponding part in the permanent program. In situations where a cross-reference to the permanent program does not meet the needs of a particular State, the Federal program rule for that State also includes an additional paragraph or paragraphs with appropriate detailed requirements.

For example, the Federal program for the State of Georgia is codified at 30 CFR Part 910. Section 910.842, which governs Federal inspections, in paragraph (a) cross-references the corresponding Part 842 of the permanent program. In addition, paragraph (b) requires OSMRE to furnish to the Georgia Department of Natural Resources upon request a copy of any inspection report or enforcement action taken.

One consequence of this cross-referencing from the Federal programs to the permanent program is that whenever a permanent program rule is revised directly, each Federal program rule which cross-references that permanent program rule also is revised indirectly in a similar way. Thus, in addition to the public notice, comment and hearing procedures that apply to the permanent program, when revising a cross-referenced permanent program rule OSMRE also must comply with the public notice, comment and hearing procedures that apply to each affected Federal program.

For the promulgation or revision of the permanent program regulations there are no OSMRE rules governing public notice, comment and hearing procedures. OSMRE follows the requirements of section 501 of the Act, *30 U.S.C. 1251*, and section 553 of the Administrative Procedure Act (APA), *5 U.S.C. 553*. Generally, section 501 requires OSMRE to provide a 30-day public comment period, and at least one public hearing on a proposed rule. In appropriate cases a longer comment period is provided by OSMRE, and additional public hearings at different locations are scheduled in advance or held on request.

For the promulgation or revision of a Federal program, the public notice, comment and hearing procedures are governed by section 504(c) of the Act. Section 504(c) requires simply that "[p]rior to the promulgation and implementation of any proposed Federal program, the Secretary shall give adequate public notice and hold a public hearing in the affected State."

Prior to this revision, the OSMRE rules at Sections 736.12 and 736.13, which implemented section 504(c), were far more detailed. They included requirements for a public hearing in the affected State; notice in the Federal Register at least 60 days before the hearing; placing a copy of the administrative record in an appropriate OSMRE office and a public office in the capital city of the affected State; specified hearing procedures; and notice at least once a week for 3 weeks within the 30 days before the hearing in at least one newspaper of general circulation in the coal mining area of the affected State.

Because most of the permanent program rules are cross-referenced by the ten Federal programs, OSMRE was required to follow these detailed procedures for most revisions of the permanent program. Since there are ten Federal programs, the prior procedures required OSMRE to distribute copies of the administrative record for the revision to ten different States, and to publish at least 30 accurately-timed newspaper notices. Since the permanent program rules continually are undergoing revision, this process, if continued, would have consumed considerable time, money and manpower.

OSMRE believed that procedures far simpler than those of prior Sections 736.12 and 736.13 would give the public adequate opportunity to participate fully in the rulemaking process. OSMRE reevaluated the procedures in those sections and tentatively concluded that most of them were too elaborate, that they did not produce benefits to the public commensurate with the costs of compliance, and that simpler procedures would not lessen the ability of either OSMRE or the public to meet the requirements and achieve the goals of the Act. Accordingly, OSMRE proposed revisions to Sections 736.12 and 736.13 on March 31, 1987 (*52 FR 10352*).

In addition to the revision of Part 736, OSMRE also proposed to add a new definition to 30 CFR 700.5. Although the term OSM is used throughout existing 30 CFR Chapter VII, it is defined only in Section 870.5, which applies only to Parts 870 through 888. Therefore, OSMRE proposed to revise 30 CFR 700.5 by adding a definition of OSM that would apply throughout Chapter VII. OSMRE also proposed to revise Section 700.5 by adding a definition of OSMRE, the preferred acronym for the Agency.

The comment period for the proposed rule closed on June 1, 1987. Only one comment was received. The comment was from a State regulatory agency which indicated that it had no objection to the proposed revision. In view of the lack of objections to the proposed rule, OSMRE has adopted the rule as proposed. A discussion of the rule follows.

II. DISCUSSION OF THE RULE

DEFINITIONS -- SECTION 700.5

The rule revises existing 30 CFR 700.5 adding a definition of the terms OSM and OSMRE to mean the Office of Surface Mining Reclamation and Enforcement established under Title II of the Act. The definition applies throughout 30 CFR Chapter VII. The existing regulations in Chapter VII will continue to use the term OSM until they are otherwise revised.

FEDERAL PROGRAM NOTICE, COMMENT AND HEARING PROCEDURES -- SECTION 736.12

The rule amends the public notice, comment and hearing procedures OSMRE must follow when promulgating or revising a Federal regulatory program for a State. It simplifies the existing procedures, while continuing to give the public adequate opportunity to participate effectively in the rulemaking process.

Proposed Section 736.12 incorporates, with varying degrees of revision, the majority of the procedures found in prior Sections 736.12 and 736.13. The procedures in prior Sections 736.12 and 736.13 that are omitted from Section 736.12, are discussed subsequently in their relevant contexts.

SECTION 736.12(a) - FEDERAL REGISTER NOTICE

Prior to the promulgation or revision of a Federal program for a State, Section 736.12(a) requires OSMRE to publish in the Federal Register a notice which at a minimum will include five specified items of information.

Paragraph (a)(1) requires that the notice include the basis, purpose and substance of the proposed Federal program or revision. It corresponds with prior Sections 736.12(a)(1) and (a)(2), which required that the Federal Register notice include "the bases and purposes of" and "the proposed text of" the Federal program or revision. The term "substance" is substituted for "proposed text" in accordance with section 533(b)(3) of the APA, which requires that a Federal Register notice of proposed rulemaking include "either the terms or substance of the proposed rule or a description of the subjects and issues involved." In the context of the promulgation or revision of a Federal program, the term "substance" is the more apt of these APA alternatives.

Paragraph (a)(2) requires that the notice offer the public an opportunity to submit written comments on the proposed Federal program or revision for a period to end no less than 30 days after the date of the notice. This corresponds with portions of prior Sections 746.12(a)(7). However, the mandatory comment period has been reduced from 60 days to the 30 days specified in the APA. This change will afford OSMRE flexibility in instances where the nature of the rulemaking does not justify an extended comment period. When the complexity of a proposed rule or its impact justifies an extended comment period, OSMRE can still provide a 60 day comment period as it has in the past.

The term data in prior Section 746.12(a)(7) was deleted from this rule because it is included implicitly in the more general term comments. A commenter may submit to OSMRE any written information which he or she believes is relevant to the promulgation or revision of a Federal program, including data.

Paragraph (a)(3) requires that in the notice of proposed rulemaking, OSMRE offer to hold a public hearing on the proposed Federal program or revision in the affected State during the comment period, only upon request. This corresponds with portions of prior Sections 736.12(a)(5) and 736.13(c). While section 504(c) of the Act requires OSMRE to hold a public hearing when promulgating a Federal program, this obviously does not include a hearing which no member of the public plans to attend. Prior Section 736.13(c) required OSMRE to hold a public hearing for the promulgation of a Federal program, but for a revision only upon request. This rule requires the public to request a hearing under either circumstance. In addition, there is no longer any requirement to publish the Federal Register notice at least 60 days before the date of the hearing, as the prior rule required. The 60 day period was unnecessarily long and it prolonged the rulemaking process without any corresponding public benefit.

Paragraph (a)(4) requires that the notice specify the address of an appropriate place where any person may inspect and copy during normal business hours, a copy of the administrative record for the proposed Federal program or revision. This corresponds with portions of prior Sections 736.12(a)(4) and 736.13(f).

While the prior rule required OSMRE to make available "the text of the proposed program or revision and any supporting information" and "[c]opies of all written comments received and the transcripts of the public hearings," this rule specifies only "a copy of the administrative record." This does not limit the information available to the public, but merely substitutes a more general term that includes all of the information specified by the prior rule.

For the promulgation of a Federal program, the prior rule required OSMRE to make certain information available at both an OSMRE office and a public office in the capital city of the affected State. Paragraph (a)(4) substitutes for these two offices the term "an appropriate place." This might be either an OSMRE office, a State or other public office, a library, or other appropriate facility. This paragraph also differs from the prior requirement in that the location does not have to be in the affected State. This will relieve OSMRE from having to lodge copies of the administrative record for a Federal program revision, which essentially is the administrative record for the underlying permanent program revision, in all Federal program States, which currently are 10 in number. OSMRE believes that for the promulgation or revision of a Federal program, the administrative record located in OSMRE headquarters in Washington, DC, generally is adequate to meet the needs of the public. In cases where there appears to be sufficient demand for a copy of the administrative record in a particular State, OSMRE will consider making one available at an appropriate place in the State. By not specifying any particular office, the rule gives OSMRE maximum flexibility to lodge a copy of the administrative record at the location where there is the greatest interest in the Federal program or revision.

Paragraph (a)(5) requires for the indirect revision of a Federal program that the Federal Register notice state that the affected provision of the permanent program is cross-referenced by the Federal program, and thus that the proposed permanent program revision also would revise the Federal program.

SECTION 736.12(b) - NEWSPAPER NOTICE

Prior to the initial promulgation of a Federal program for a State, Section 736.12(b) requires OSMRE to publish in a newspaper of general circulation in the coal mining area of the affected State a notice like the Federal Register notice required by Section 736.12(a)(1). For the substance of the proposed Federal program the rule authorizes OSMRE to substitute a brief description in order to avoid the cost of publishing a lengthy newspaper notice. Any person interested in the full text of the proposed Federal program can consult the Federal Register notice.

This new provision requires only a single notice, while prior Section 736.12(b) required newspaper notice at least once a week for 3 weeks. OSMRE believes that the multiple notice required by the prior rule was unnecessary and that a single notice is adequate to inform the public about, and provide an opportunity to comment on, a proposed Federal program.

While the prior procedures required OSMRE to publish the newspaper notice at least 30 days before the hearing, this rule requires only that OSMRE publish a newspaper notice. The deadline has been removed to accommodate the reduced public comment period. OSMRE intends to publish the newspaper and Federal Register notices as concurrently as practicable.

A major difference in new Section 736.12(b) as compared to prior Section 736.12(b) is the lack of a requirement for newspaper notice of a proposed revision of a Federal program. OSMRE has deleted the requirement for newspaper notice for a revision of a Federal program because it has concluded that for a revision of a Federal Register notice is sufficient.

There are two reasons for this conclusion: First, after a Federal program is promulgated for a State any person in that State who is interested in the regulation of surface coal mining is aware of the Federal presence and reasonably can be expected to rely on the Federal Register for notice of a revision.

And second, for a revision of the Federal program which is in effect a revision of the permanent program, the nationwide scope of the underlying permanent program revision insures widespread public involvement. Under these circumstances it is unlikely that a newspaper notice would reach any interested persons who were not already aware of the proposed revision.

In addition, OSMRE routinely issues a press release for any rule that is likely to generate public interest. The result is that those persons most interested in, and most likely to comment, on a proposed rule revising a Federal program are aware of the proposal.

Even though there presently are 10 states with full Federal programs, except for operators in Tennessee and Washington, there has been little interest in the revision of a Federal program, and only rarely has a hearing on the promulgation or revision of a Federal Program been requested.

SECTIONS 736.12(c) - FEDERAL AGENCY COMMENT

Prior to the promulgation or revision of a Federal program for a State, Section 736.12(c) requires OSMRE, as appropriate, to solicit comments from the Administrator of the Environmental Protection Agency, the Secretary of Agriculture, and the heads of other Federal agencies concerned with or having special expertise relevant to the proposed Federal program or revision. This corresponds with prior Section 736.13(a).

The prior procedures required OSMRE to solicit comments from the heads of these agencies in all cases, while this rule requires OSMRE to do so only "as appropriate." Under this rule OSMRE will solicit comments from only those agencies which reasonably might be expected to have comments, and only on those issues of apparent interest to them. OSMRE has made this change to eliminate unproductive correspondence with agencies that are neither concerned with nor have any expertise relevant to a proposed Federal program or revision.

The rule does not contain a procedure corresponding to prior Section 736.12(a)(3), which required that the Federal Register notice include the proposed effective date of the Federal program or revision. Because of the numerous variables in the rulemaking process, it seldom is possible to predict the effective date of a rule with sufficient accuracy to benefit the public at the proposal stage. To avoid the uncertainties resulting from proposing an inaccurate effective date, OSMRE has deleted this requirement.

SECTION 736.13 - PUBLIC COMMENT (REMOVED)

This rule removes prior Section 736.13. A number of the procedures in that section have been relocated in Section 736.12, either with or without additional revision. Other procedures have been eliminated entirely. An explanation of the effect of the rule on each paragraph of this section follows.

SECTION 736.13(a)

Prior Section 736.13(a) required OSMRE, when proposing to promulgate or revise a Federal program, to solicit comments from the heads of various Federal agencies. A similarly-worded, revised version of this paragraph appears in Section 736.12(c). The revised version requires OSMRE to solicit Federal-agency comments only "as appropriate." For more information on these changes, see the preceding discussion of Section 736.12(c).

SECTION 736.13(b)

Prior Section 736.13(b) required OSMRE to give the public an opportunity to submit written data and comments on a proposed Federal program or revision within 60 days after publication of a notice in the Federal Register. A similarly worded, revised version of this paragraph appears in Section 736.12(a)(2). The principal differences in the revised rule are that the comment period has been reduced from 60 to 30 days, and the term data has been deleted as superfluous. For more information on these changes, see the preceding discussion of Section 736.12(a)(2).

SECTION 736.13(c)

Prior Section 736.13(c) required OSMRE to hold a public hearing prior to promulgating a Federal program for a State, and upon request prior to revising a Federal program. For promulgation and revision, these procedures have been relocated in Section 736.12(a)(3). Unlike prior paragraph (c), Section 736.12(a)(3) requires OSMRE to hold a hearing for both promulgation or revision only upon request. For more information on these changes, see the preceding discussion of Section 736.12(a)(3).

SECTION 736.13(d)

Prior Section 736.13(d) authorized OSMRE to hold additional hearings or to solicit additional public comment when appropriate. There is no corresponding procedure in this rule. Paragraph (d) was removed as superfluous because notwithstanding the prior rule OSMRE had sufficient authority to do either of these things. Even though the paragraph is being removed to simplify the rule, OSMRE will continue to hold additional hearings or to solicit additional public comment when the public interest in a particular rule warrants.

SECTION 736.13(e)

Prior Section 736.13(e) required OSMRE to transmit to the Director all public comments, hearing transcripts and related materials. This requirement is implicit in Section 736.14(a), which requires the Director to consider such information in deciding whether to promulgate or revise a Federal program. Therefore, OSMRE has removed this paragraph as superfluous.

SECTION 736.13(f)

Prior Section 736.13(f) required OSMRE to make available for public inspection and copying at the appropriate OSMRE office, and at a public office in the capital city of the affected State, copies of all written comments and hearing transcripts. A revised version of these procedures is relocated in Section 736.12(a)(4), which unlike paragraph (f) requires OSMRE to make "a copy of the administrative record" available only at "an appropriate place." For more information on these changes, see the preceding discussion of Section 736.12(a)(4).

SECTION 736.14 - DIRECTOR'S DECISION

This rule also makes a technical change in Section 736.14, which governs the Director's decision on a proposed Federal program or revision. The reference to "Section 736.13 has been changed to Section 736.12 of this part" to conform with the changes the rule makes in the referenced sections. This will not have any substantive effect on Section 736.14, itself, which except for this technical change remains the same.

III. PROCEDURAL MATTERS

Effect in Federal Program States

The revisions to Part 700 of this rule apply through cross-referencing to the following Federal program States: Georgia, Idaho, Massachusetts, Michigan, North Carolina, Oregon, Rhode Island, South Dakota, Tennessee, and Washington. The Federal programs for these States appear at 30 CFR Parts 910, 912, 921, 922, 933, 937, 939, 941, 942, and 947, respectively. No comments were received concerning unique conditions which exist in any of these States which would have required changes to the national rule or State-specific amendments to any of the Federal programs.

Federal Paperwork Reduction Act

The rule does not contain any information collection requirements requiring approval by the Office of Management and Budget under *44 U.S.C. 3507*.

Executive Order 12291

The DOI has examined the rule according to the criteria of Executive Order 12291 (February 17, 1981) and has determined that it is not major and does not require a regulatory impact analysis. The procedures the rule amends are strictly administrative and do not involve any major economic costs.

Regulatory Flexibility Act

The DOI has determined, pursuant to the Regulatory Flexibility Act, *5 U.S.C. 601* et seq., that the rule will not have a significant economic impact on a substantial number of small entities. The rule amends administrative procedures which have no significant economic impact.

National Environmental Policy Act

This rule is categorically excluded from the National Environmental Policy Act of 1969 (NEPA) process under DOI Departmental Manual (516 DM 2, Appendix 1.10) and the Council on Environmental Quality Regulations for

Implementing the Procedural Provisions of NEPA (40 CFR 1507.3).

Author

The principal author of this rule is Andrew F. DeVito, Office of Surface Mining Reclamation and Enforcement, 1951 Constitution Avenue, N.W. Washington, D.C. 20240; Telephone 202-343-5241.

LIST OF SUBJECTS

30 CFR Part 700

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

30 CFR Part 736

Coal mining, Intergovernmental relations, Surface mining, Underground mining.

Accordingly, 30 CFR Parts 700 and 736 are amended as follows:

Date: September 16, 1987.

James E. Cason, Acting Assistant Secretary -- Land and Minerals Management.

PART 700 -- GENERAL

1. The authority citation for Part 700 is revised to read as follows:

Authority: Pub. L. 95-87, 91 Stat. 445 (*30 U.S.C. 1201 et seq.*), and Pub. L. 100-34.

2. Section 700.5 is revised by adding in alphabetical order a new definition as follows:

SECTION 700.5 - DEFINITIONS.

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OSM and OSMRE mean the Office of Surface Mining Reclamation and Enforcement established under Title II of the Act.

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PART 736 -- FEDERAL PROGRAM FOR A STATE

3. The authority citation for Part 736 is revised to read as follows:

Authority: Pub. L. 95-87, 91 Stat. 445 (*30 U.S.C. 1201 et seq.*), and Pub. L. 100-34.

4. Section 736.12 is revised to read as follows:

SECTION 736.12 - NOTICE, COMMENT AND HEARING PROCEDURES.

Prior to the promulgation or revision of a Federal program for a State, OSMRE shall:

(a) Federal Register notice. Publish in the Federal Register a notice which:

(1) Includes the basis, purpose and substance of the proposed Federal program or revision;

(2) Offers any person an opportunity to submit written comments on the proposed Federal program or revision for a period to end no less than 30 days after the date of the notice;

(3) Offers to hold a public hearing on the proposed Federal program or revision in the affected State during the comment period if requested by any person;

(4) Gives the address of an appropriate place where any person, during normal business hours, may inspect and copy a copy of the administrative record for the proposed Federal program or revision;

(5) For an indirect revision of a Federal program, states that the affected provision of the permanent program is cross-referenced by the Federal program, and thus that the proposed permanent program revision also would revise the Federal program;

(b) Newspaper notice. For the initial promulgation of a Federal program for a State, publish in a newspaper of general circulation in the coal mining area of the affected State a notice concerning the proposed rulemaking which includes the information required by paragraph (a) of this section, except that for the substance of the proposed Federal program or revision OSMRE may substitute a brief description; and

(c) Federal agency comment. As appropriate, solicit comments from the Administrator of the Environmental Protection Agency, the Secretary of Agriculture, and the heads of other Federal agencies concerned with or having special expertise relevant to the proposed Federal program or revision.

SECTION 736.13 [Removed]

5. Section 736.13 is removed.

6. Paragraph (a) of Section 736.14 is revised to read as follows:

SECTION 736.14 - DIRECTOR'S DECISION.

(a) After considering all relevant information received under Section 736.12 of this part, the Director shall decide whether to promulgate or revise a Federal program for the State.

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