

FEDERAL REGISTER: 53 FR 11606 (APRIL 7, 1988 8)

DEPARTMENT OF THE INTERIOR

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

30 CFR Part 773

Surface Coal Mining and Reclamation Operations; Requirements for Permits and Permit Processing

ACTION: Final rule.

SUMMARY: The Office of Surface Mining Reclamation and Enforcement (OSMRE) of the Department of the Interior (DOI) is adopting a final rule revising the regulatory prohibition on mining without a permit more than eight months after approval of the State or Federal regulatory program. The grace period will be available only to persons conducting surface coal mining operations under a permit from the State regulatory authority, issued in accordance with the initial regulatory program. This change responds to a decision rendered in Federal district court. The effect of this change is that any existing mining operation that has no permanent program permit and does not qualify for the exception will have to cease operations and remain shut down until a permanent program permit is issued. This change is not intended to affect coal preparation plants separately authorized to operate under 30 CFR 785.21(e).

EFFECTIVE DATE: May 9, 1988.

FOR FURTHER INFORMATION CONTACT: Patrick W. Boyd, Branch of Federal and Indian Programs, OSMRE, 1951 Constitution Avenue NW., Washington, DC 20240; Telephone (202) 343-1864 (FTS or commercial).

SUPPLEMENTARY INFORMATION:

- I. Background
- II. Discussion of Rule Adopted and Response to Comments
- III. Procedural Matters

I. BACKGROUND

Section 502(d) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), *30 U.S.C. 1201 et seq.*, prohibits the conduct of surface coal mining operations without a permanent program permit for more than eight months after approval of the State or Federal regulatory program. All operators who expect to continue to operate eight months after the Secretary of the Interior approves a State regulatory program (primacy) or implements a Federal program must submit a permit application to the regulatory authority within two months following primacy or the implementation of a Federal program. In addition, the regulatory authority must process, and grant or deny, permanent program permits within the eight-month period after primacy or the implementation of a Federal program for the operators who wish to continue to operate beyond that period.

However, section 506(a) of SMCRA recognizes the possibility that this task may be unachievable in some States due to workforce limitations and potential administrative delay in permit processing. As a result, that section provides that certain operators may continue to operate after the eight-month period elapses under their existing permits from the State regulatory authority issued in accordance with the initial regulatory program. Operators holding such permits may continue to operate beyond the eight-month period if they have filed applications, within the two-month deadline, for permanent program permits and no initial administrative decision has been rendered.

On September 18, 1978, OSMRE proposed a rule to implement the section 506(a) exception. See the discussion at *43 FR 41687*. The final rule was published on March 13, 1979 as 30 CFR 771.13(b). See *44 FR 15014* for the discussion and *44 FR 15350* for the rule. The final rule provided that an operator holding a permit issued or amended by the regulatory authority in accordance with the requirements of section 502 of SMCRA could continue operating after the eight-month period if a timely and complete permanent program permit application had been filed, no initial administrative decision had been rendered, and the operation was conducted in compliance with 30 CFR Chapter VII, Subchapter B; SMCRA; and applicable State statutes and rules.

On June 25, 1982, OSMRE proposed to revise this rule by providing a second exception to the prohibition on mining without a permit eight months after primacy or the implementation of a Federal program. Under the proposal, in addition to those holding a permit, any person authorized under the initial regulatory program to conduct surface coal mining operations could also continue operations beyond the eight-month period provided certain conditions were met. The purpose of the proposed change was to recognize that some existing operations required to have permits under the permanent regulatory program might not have been required to have permits under the initial regulatory program (*47 FR 27694*). The final rule, unchanged from the proposed rule, was published on September 28, 1983. Although the rule was adopted unchanged, one commenter did suggest that allowing continued operation of "unpermitted but authorized" mining operations exceeds the requirements of SMCRA. In disagreeing with the commenter, OSMRE stated that it would be "inequitable and contrary to [the intent of SMCRA] to deny some operators the privilege on continuing operations solely because they were not required to have a permit during the initial program." *48 FR 44354*.

Subsequently, the regulation was challenged in the U.S. District Court for the District of Columbia. The court concluded that the rule "does not address the plain language of section 506(a) and Congress' express requirement that only permit holders be extended the grace period." It remanded the rule to the Secretary of the Interior. In *Re: Permanent Surface Mining Regulation Litigation (II)*, No. 79-1144, (D.D.C.) July 15, 1985, Slip Op. at 133.

Thus, on November 9, 1987, OSMRE proposed to return to the language of the 1979 regulation, deleting the remanded exception for those who were authorized to conduct surface coal mining operations but who did not have an initial program permit. This action would bring the rule into conformance with the court order.

II. DISCUSSION OF RULE ADOPTED AND RESPONSE TO COMMENTS

Section 506(a) of SMCRA prohibits mining without a permit eight months after the permanent regulatory program has been approved, unless an operator holding a permit from the regulatory authority issued in accordance with section 502 of SMCRA has applied for a permanent program permit but an initial administrative decision has not been rendered before the eight-month period expires. The rule language adopted today is unchanged from the proposal and closely conforms to the statutory language. The remanded exception for those who were authorized to conduct surface coal mining operations but who did not have an initial program permit has been deleted.

The rule is not intended to limit the responsibility of operators for the reclamation of surface coal mining operations. Operators must reclaim all operations that were not required to obtain permits under the initial program and that have ceased or will cease operation rather than obtain a permanent program permit. This rule is not intended to affect coal preparation plants for which a separate interim authorization to operate is found in 30 CFR 785.21(e). To avoid confusion, specific reference is made to the coal preparation plant regulations in the final rule.

Subparagraphs (i), (ii) and (iii) under 30 CFR 773.11(b)(2) remain unchanged. These paragraphs qualify the exception by establishing three requisite conditions. Under the first, the operator must file the permanent program permit application within two months following the effective date of the program. In addition, the regulatory authority must have not yet rendered an initial administrative decision on the application. Also, the surface coal mining operation must be in compliance with all applicable laws, rules and permit terms and conditions.

One commenter indicated that the proposal "appears to bring the OSMRE regulations into compliance with the decision of [the Federal district court]" and noted "the acknowledgment by OSMRE that those operations which were not required to obtain permits under the initial program and which ceased operation rather than obtain a permanent program permit are nevertheless subject to regulation under SMCRA and are required to reclaim all operations pursuant to the initial program procedures."

The commenter also noted that, "By extension, [SMCRA] jurisdiction covers coal preparation plants which operated after the effective date of [SMCRA] and which terminated operations rather than apply for a permanent program permit under 30 CFR 785.12(e)." As stated above in the discussion of the rule adopted, this rule is not intended to affect coal preparation plants that are covered by 30 CFR 785.21(e). The rules governing such coal preparation plants are found in 30 CFR Parts 700, 701, 785, and 827. The commenter will find a thorough discussion of the subject in the May 11, 1987, Federal Register (*52 FR 17724*).

Two commenters pointed out that the proposal erroneously indicated that it would apply to Indian lands. The Indian lands rules specify that 30 CFR 773.11 is not applicable to permitting on Indian lands. See 30 CFR 750.12(c)(2)(ii). The preamble to the final rule has been modified to correct the misstatement.

III. PROCEDURAL MATTERS

Effect in Federal Program States and on Indian Lands

This rule applies through cross-referencing in those States with Federal programs. They are 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. The rule does not apply to Indian lands pursuant to 30 CFR 750.12(c)(2)(ii). No comments were received concerning unique conditions that exist in any of these States or on Indian lands that would have required changes to the national rule.

Effect on State Programs

Following promulgation of the final rule, OSMRE will evaluate permanent State regulatory programs approved under section 503 of SMCRA to determine whether any changes in these programs will be necessary. If the Director determines that certain State program provisions should be amended in order to be made no less effective than the revised Federal rules, the individual States will be notified in accordance with the provisions of 30 CFR 732.17.

Federal Paperwork Reduction Act

This rule does not contain information collection requirements that require approval by the Office of Management and Budget under *44 U.S.C. 3507*.

Executive Order 12291 and Regulatory Flexibility Act

The DOI has determined that this document is not a major rule under the criteria of Executive Order 12291 (February 17, 1981) and certifies that it will not have significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act, *5 U.S.C. 601* et seq. This rule affects a relatively small number of surface coal mining operations. The rule does not distinguish between small and large entities. The economic effects of the proposed rules are estimated to be minor and no incremental economic effects are anticipated as a result of the rule.

National Environmental Policy Act

OSMRE has prepared an environmental assessment (EA) and has made a finding that the final rule will not significantly affect the quality of the human environment under section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), *42 U.S.C. 4332(2)(C)*. The EA is on file in the OSMRE Administrative Record, Room 5131, 1100 L Street NW., Washington, DC.

Author

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LIST OF SUBJECTS IN 30 CFR PART 773

Reporting and recordkeeping requirements, Surface mining, Underground mining.

Accordingly, 30 CFR Part 773 is amended as set forth herein.

Dated: March 4, 1988.

J. Steven Griles, Assistant Secretary -- Land and Minerals Management.

PART 773 -- REQUIREMENTS FOR PERMITS AND PERMIT PROCESSING

1. The authority citation for Part 773 is revised to read as follows:

Authority: *30 U.S.C. 1201 et seq.*, *16 U.S.C. 470 et seq.* , *16 U.S.C. 1531 et seq.* , *16 U.S.C. 661 et seq.* , *16 U.S.C. 703 et seq.* , *16 U.S.C. 668a*, *16 U.S.C. 469 et seq.* , *16 U.S.C. 470aa et seq.* , and Pub. L. 100-34.

2. The introductory language to paragraph (b)(2) of Section 773.11 is revised to read as follows:

SECTION 773.11 - REQUIREMENTS TO OBTAIN PERMITS.

* * * * *

(b) * * *

(2) Except for coal preparation plants separately authorized to operate under 30 CFR 785.21(e), a person conducting surface coal mining operations, under a permit issued or amended by the regulatory authority in accordance with the requirements of section 502 of the Act, may conduct such operations beyond the period prescribed in paragraph (a) of this section if --

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