

FEDERAL REGISTER: 56 FR 25036 (June 3, 1991)

DEPARTMENT OF THE INTERIOR

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

30 CFR Parts 700, 840, and 842

Surface Coal Mining and Reclamation Operations; Permanent Regulatory Program; Compliance with Court Order

ACTION: Notice of suspension.

SUMMARY: The Office of Surface Mining Reclamation and Enforcement (OSM) of the United States Department of the Interior (DOI) is suspending certain portions of its permanent program regulations which: (1) Provide that a regulatory authority may terminate regulatory jurisdiction under the Surface Mining Control and Reclamation Act of 1977 (the Act) for reclaimed sites of completed surface coal mining and reclamation operations and coal exploration operations; and (2) allow for a reduced inspection frequency for "abandoned sites." OSM is taking these actions as a result of a recent District Court decision which remands these rules to the Secretary of the DOI because the court has found these rules contrary to the language and intent of the Act.

EFFECTIVE DATE: July 3, 1991.

FOR FURTHER INFORMATION CONTACT: George M. Stone, Jr., Office of Surface Mining Reclamation and Enforcement, U.S. Department of the Interior, 1951 Constitution Avenue NW., Washington, DC 20240; telephone (202) 208-2550 (Commercial) or 268-2550 (FTS).

SUPPLEMENTARY INFORMATION:

- I. Background.
- II. Discussion of Rules Suspended.
- III. Procedural Matters.

I. BACKGROUND

The Surface Mining Control and Reclamation Act of 1977, *30 U.S.C. 1201 et seq.* (the Act), sets forth general regulatory requirements governing surface coal mining and reclamation operations. OSM has, by regulation, implemented or clarified many of the general requirements of the Act by setting forth specific requirements to be implemented by regulatory authorities in their regulation of surface coal mining operations. See 30 CFR chapter VII.

On November 2, 1988, OSM promulgated the termination of jurisdiction rule at 30 CFR 700.11(d) (*53 FR 44356*) to set forth the circumstances under which regulatory jurisdiction could be terminated over the sites of reclaimed surface coal mining and reclamation operations. The general procedure among State regulatory authorities has been to terminate regulatory jurisdiction upon the final release of a performance bond for a completed surface coal mining and reclamation operation or, where no bond was required, upon a finding that all reclamation had been successfully completed. OSM had decided to codify this long standing practice, and thereby establish a uniform standard, to clarify for regulatory authorities, the coal industry, and the public, the point in time at which regulatory jurisdiction could be terminated and the circumstances and methods under which a regulatory authority must reassert jurisdiction, and the standard OSM would use to review such terminations.

Also, on June 30, 1988, OSM promulgated rules at 30 CFR 840.11 (g) and (h) 842.11 (e) and (f) concerning inspection frequency requirements for abandoned sites of surface coal mining operations. OSM had concluded that repeated inspections at abandoned sites were an ineffective expenditure of resources, and that a reduced inspection frequency would not result in increased harm to the environment or reduce the likelihood of compliance.

Both of these rules were challenged in Federal District Court. On August 30, 1990, Judge Thomas A. Flannery of the United States District Court for the District of Columbia issued an order in the case of *National Wildlife Federation, et al., v. Manuel Lujan, Jr., et al.*, No. 88-3345, D.D.C. August 30, 1990, (*NWF, et al. v. Lujan, et al.*). The court rules on seven consolidated cases in which environmental and industry plaintiffs separately asked the court to strike down

certain regulations promulgated under the Act by OSM. Among other matters, the court ruled in favor of the environmental plaintiff' challenge the rules on termination of jurisdiction and inspection of abandoned sites.

This suspension notice is being published in accordance with the court's order. It is not intended to affect any appeal of the court's decision concerning the affected regulations. The purpose of this notice is to implement the Federal court's order and is not intended to be an endorsement of the district court's decision which may be challenged in an appeal.

Although it affects the Code of Federal Regulations, this suspension notice is an interpretive statement which describes how the Secretary is already implementing the court's decision. Even in the absence of this notice, the Secretary's actions must be consistent with the Act as interpreted by the court. The Secretary may not implement regulations that are inconsistent with the Act. In order to update the Code of Federal Regulations to reflect the District Court's interpretation, OSM intends to propose revisions to the remanded rules consistent with the court's opinions.

II. DISCUSSION OF RULES SUSPENDED

TERMINATION OF JURISDICTION

SECTION 700.11(d) - APPLICABILITY.

On November 2, 1988, OSM promulgated the termination of jurisdiction rule to explain under what circumstances a regulatory authority may terminate jurisdiction over a surface coal mining and reclamation operation, the circumstances and methods under which a regulatory authority must reassert jurisdiction, and the standard OSM would use to review such terminations. The final rule specified that a reclaimed site of a surface coal mining and reclamation operation, or increment thereof, or of a coal exploration operation may no longer be subject to regulatory jurisdiction under either a Federal or State regulatory program when all reclamation requirements of the regulatory program had been successfully completed, the period of extended liability for revegetation had expired, and final release of the performance bond, if any, had occurred.

Section 700.11(d)(1)(i) provided that if the regulatory authority determined in writing that all requirements imposed under the initial program regulations at 30 CFR chapter VII, subchapter B had been successfully completed, the regulatory authority may terminate its jurisdiction under the regulatory program over reclaimed sites at initial program surface coal mining and reclamation operations.

Section 700.11(d)(1)(ii) provided that a regulatory authority may terminate its jurisdiction under the regulatory program over the reclaimed site of a permanent program surface coal mining and reclamation operation, or increment thereof, or of a coal exploration site, if the regulatory authority determined in writing that all requirements imposed under the applicable regulatory program had been successfully completed, or where a performance bond was required, final release of the bond had occurred.

Paragraph 700.11(d)(2) defined the circumstances that would require a State regulatory authority to reassert jurisdiction over a site of a surface coal mining and reclamation operation because a prior termination of jurisdiction was found to be the result of fraud, collusion, or a misrepresentation of a material fact.

In the case of *NWF, et al. v. Lujan, et al.*, the District Court determined that the language of sections 521 (a)(1) and (a)(2) of the Act imposes "an ongoing duty upon the Secretary to correct violations of the Act. This appears to be without limitation." The court ruled that this enforcement authority and obligation never ends at a site where a surface coal mining and reclamation operation has occurred. The court, therefore, struck down the rule at 30 CFR 700.11(d).

In compliance with the court order, the regulatory provision for termination of jurisdiction at 30 CFR 700.11(d) is suspended.

ABANDONED SITES

The second rule challenged by the environmental plaintiffs in the case of *NWF, et al. v. Lujan, et al.*, was the abandoned sites rule (*53 FR 24872*, dated June 30, 1988), specifically those sections of the rule that allow regulatory authorities to establish alternative inspection frequencies for abandoned sites at 840.11(h) and 842.11(f). Although the

definition of abandoned sites was not subject to the court challenge, the court has ordered that inspection frequencies at abandoned sites and the definition of abandoned sites at 30 CFR 840.11(g) and 842.11(e) (as it relates to inspection frequencies) be remanded to the Secretary. Discussed below are those sections of the rule which are being suspended in whole or in part.

SECTION 840.11/842.11 - INSPECTIONS BY STATE REGULATORY AUTHORITY/FEDERAL INSPECTIONS AND MONITORING.

On June 30, 1988, OSM amended its rules concerning inspections by State regulatory authorities at 30 CFR 840.11 by adding new paragraphs (g) and (h). The rules governing Federal inspections and monitoring at 30 CFR 842.11 were amended by adding new paragraphs (e) and (f) (*53 FR 24872*). This rulemaking added to the inspection requirements a definition of "abandoned sites" and allowed for inspection of these sites "as necessary to monitor environmental conditions or changes of status." For a site to have qualified as abandoned under the definition of an abandoned site, the regulatory authority must have made a written finding that surface mining and reclamation activities had ceased, and that specified enforcement measures had been taken. For an abandoned site to have qualified for a reduced inspection frequency the regulatory authority must have also evaluated the site and documented in writing both the inspection frequency necessary to comply with the rule and the reasons for selecting that frequency. The regulatory authority would then be required to inspect the site at the new frequency level selected.

In its August 30, 1990, decision, the court remanded the rule to the Secretary, with respect to the statutory inspection frequency requirement for abandoned sites at 30 CFR 840.11 (g) and (h) and 842.11 (e) and (f). The court recognized that while reducing the inspection frequency on abandoned mine sites makes sense, it conflicts with the plain language of section 517(c) of the Act which provides for inspections by the regulatory authority on an irregular basis averaging not less than one partial inspection per month and one complete inspection per calendar quarter for the surface coal mining and reclamation operation covered by each permit. Accordingly, to comply with the court order, OSM is suspending the regulatory provisions for inspections of abandoned sites at 30 CFR 840.11(h) and 842.11(f), and the definition of abandoned sites at 30 CFR 840.11(g) and 842.11(e) insofar as the definition relates to inspection frequencies at abandoned sites.

OSM has decided not to suspend the definition of abandoned sites beyond the scope of the court remand for two reasons. First, the definition of abandoned sites at 30 CFR 840.11(g) and 842.11(e) is an integral part of a State regulatory authority's good cause showing for not taking action in response to a ten-day notice (*53 FR 26740*, dated July 14, 1988). Under section 521(a)(1), if an authorized representative of the Secretary of the Interior has reason to believe that a person is in violation of the Act he must notify the State regulatory authority (SRA) in the primacy state. The SRA is given ten days after notification to take appropriate action to cause the said violation to be corrected, or show good cause for failing to take appropriate action. The authorized representative shall then determine in writing whether the standards for appropriate action or good cause for such failure have been met. Under 30 CFR 842.11(b)(1)(ii)(B)(2) an action or response by an SRA that is not arbitrary, capricious, or an abuse of discretion under the State program shall be considered appropriate action to cause a violation to be corrected or good cause for failure to do so. When reviewing the SRA response to a ten-day notice, the authorized representative (and Deputy Director of OSM when the SRA requests an informal review) shall consider good cause for failure to take action, as enumerated in 30 CFR 842.11(b)(1)(ii)(B)(4)(v), "with regard to abandoned sites as defined in section 840.11(g) of this chapter, the State regulatory authority is diligently pursuing or has exhausted all appropriate enforcement provisions of the State program."

The second reason why OSM has decided not to suspend the definition is its function in 30 CFR 843.22 which delineates authority for enforcement actions under Federal programs. 30 CFR section 843.22 authorizes OSM to "refrain from issuing a notice of violation or cessation order for a violation at an abandoned site, as defined in section 842.11(e) of this chapter, if abatement of the violation is required under any previously issued notice or order." (emphasis added). The purpose of this section is to save the regulatory authority the time and expense involved in issuing redundant enforcement actions, and assessing uncollectible civil penalties for violations which are already covered by existing citations.

Therefore, since OSM has determined that these sections defining abandoned sites have a bearing on the enforcement mechanism of Federal and State regulatory programs other than inspection frequencies at abandoned sites, sections 30 CFR 840.11(g) and 842.11(e) are not being suspended in their entirety.

III. PROCEDURAL MATTERS

Administrative Procedure Act

This document is an interpretive statement not subject to 5 *U.S.C.* 553(b) of the Administrative Procedure Act. Also, good cause exists under 5 *U.S.C.* 553(b) to issue this document without advance notice and comment. Publication of this notice will avoid further delay in informing the public concerning OSM's implementation of the court's direction to implement the statutory frequency of inspections and not to allow termination of jurisdiction under section 521.

Effect in Federal Program States and on Indian Lands

The final suspension notice applies through cross-referencing in those States with Federal programs and on Indian lands. The States with Federal programs are California, 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 905, 910, 912, 921, 922, 933, 937, 939, 941, 942, and 947, respectively. The Indian lands program appears at 30 CFR parts 750.

Effect on State Programs

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

Executive Order 12291

The DOI has examined this suspension notice 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 promulgation in 1988 of the rules being suspended was not a major action and for the same reasons, neither is this suspension.

Regulatory Flexibility Act

The DOI also has determined, pursuant to the Regulatory Flexibility Act, 5 *U.S.C.* 601 et seq., that the suspension will not have significant economic impact for the same reasons that promulgation of the rules in 1988 did not have such an impact.

Federal Paperwork Reduction Act

This suspension notice does not contain collections of information which require approval by the Office of Management and Budget (OMB) under 44 *U.S.C.* 3501 et seq. The information collection requirement contained in 30 CFR 700.11(d), which was previously approved by OMB, is being suspended.

National Environmental Policy Act

The effect of the regulations being suspended by this notice is covered in two Environmental Assessments (EAs) prepared by the DOI. These are the EAs prepared prior to promulgation of the November 2, 1988, final rule at 30 CFR 700.11(d) (referenced at 53 *FR* 44356) and promulgation of the June 30, 1988, final rule at 30 CFR 840.11 (g) and (h), 30 CFR 842.11 (e) and (f), and 30 CFR 843.11 (referenced at 53 *FR* 24872). These documents are on file at the OSM Administrative Record, room 5131, 1100 L Street NW., Washington, DC 20240.

Authors

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LIST OF SUBJECTS

30 CFR Part 700

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

30 CFR Part 840

Intergovernmental relations, Reporting and recordkeeping requirements, Surface mining, Underground mining.

30 CFR Part 842

Law Enforcement, Surface Mining, Underground mining.

Accordingly, 30 CFR parts 700, 840, and 842 are amended as set forth below:

Dated: May 28, 1991.

David O'Neal, Assistant Secretary, Land and Minerals Management.

SUBCHAPTER A -- GENERAL

PART 700 -- GENERAL

1. The authority citation for part 700 continues to read as follows:

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

SECTION 700.11 - APPLICABILITY.

2. Paragraph (d) of Section 700.11 is suspended.

SUBCHAPTER L -- PERMANENT PROGRAM INSPECTION AND ENFORCEMENT PROCEDURES

PART 840 -- STATE REGULATORY AUTHORITY: INSPECTION AND ENFORCEMENT

3. The authority citation for part 840 continues to read as follows:

Authority: Pub. L. 95-87, *30 U.S.C. 1201* et seq., and Pub. L. 100-34, unless otherwise noted.

SECTION 840.11 - INSPECTIONS BY STATE REGULATORY AUTHORITY.

4. Paragraph (g) of Section 840.11 is suspended insofar as it authorizes reduced inspection frequencies at abandoned sites, and paragraph (h) of Section 840.11 is suspended.

PART 842 -- FEDERAL INSPECTIONS AND MONITORING

5. The authority citation for part 842 continues to read as follows:

Authority: Pub. L. 95-87, *30 U.S.C. 1201* et seq., and Pub. L. 100-34, unless otherwise noted.

SECTION 842.11 - FEDERAL INSPECTIONS AND MONITORING.

6. Paragraph (e) of Section 842.11 is suspended insofar as it authorizes reduced inspection frequencies at abandoned sites, and paragraph (f) of Section 842.11 is suspended.