

FEDERAL REGISTER: 57 FR 12461 (April 10, 1992)

DEPARTMENT OF THE INTERIOR

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

30 CFR Part 700

Surface Coal Mining and Reclamation Operations; Permanent Regulatory Program; Termination of Jurisdiction

ACTION: Notice of reinstatement of suspended rule.

SUMMARY: The Office of Surface Mining Reclamation and Enforcement (OSM) of the United States Department of the Interior (DOI) is reinstating a suspended rule that was upheld by the U.S. Court of Appeals for the District of Columbia Circuit in *NWF v. Lujan II*. This rule had been suspended by OSM in response to the decision issued by the U.S. District Court for the District of Columbia in *NWF v. Lujan I*. The rule clarified the circumstances whereby a regulatory authority may terminate regulatory jurisdiction under a regulatory program approved under the Surface Mining Control and Reclamation Act of 1977 (the Act) for the reclaimed sites of completed surface coal mining and reclamation operations.

EFFECTIVE DATE: May 11, 1992.

FOR FURTHER INFORMATION CONTACT: Daniel Stocker, 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 Reinstated Rule
- III. Procedural Matters

I. BACKGROUND

On November 2, 1988 (*53 FR 44356*), OSM promulgated the termination of jurisdiction rule at 30 CFR 700.11(d) which sets forth the circumstances under which regulatory jurisdiction could be terminated or reasserted over the sites of reclaimed surface coal mining and reclamation operations. As noted in the preamble to that rule, the general procedure among State regulatory authorities has been to terminate regulatory jurisdiction upon the final release of a performance bond for a complete surface coal mining and reclamation operation, or, where no bond was required, upon a finding that all reclamation had been successfully completed. In the rulemaking, 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. (*52 FR 44356*.)

This rule was challenged and subsequently suspended on June 3, 1991 (*53 FR 25036*), in response to a decision rendered by the U.S. District Court for the District of Columbia in *National Wildlife Federation, et al., v. Manuel Lujan, Jr., et al.*, No. 88-3345 (D.D.C. August 30, 1990) (*NWF v. Lujan I*).

The suspension notice noted that it was not intended to affect the right of the Secretary of the Interior to appeal the district court's decision. (*56 FR 25036*.) The Secretary appealed and on December 10, 1991, the U.S. Court of Appeals for the District of Columbia Circuit issued a decision which upheld the suspended rule. *National Wildlife Federation, et al. v. Manuel Lujan, Jr., et al.*, No. 90-5352 consolidated (D.C. Cir. 1991) (*NWF v. Lujan II*). As explained in detail under the following heading, II. Discussion of Reinstated Rule, this notice reinstates the suspended rule which the court of appeals upheld.

OSM will interpret the reinstated rule in accordance with the court of appeal's decision in *NWF v. Lujan II*, the notice of final rulemaking under which the rule originally was promulgated and this reinstatement notice.

II. DISCUSSION OF REINSTATED RULE

SECTION 700.11(d) - TERMINATION OF JURISDICTION

OSM is reinstating paragraph (d) of 30 CFR 700.11 as promulgated on November 2, 1988 (*53 FR 44356*), which sets forth the circumstances whereby a regulatory authority may terminate jurisdiction on surface coal mining and reclamation operation and the circumstances and methods under which a regulatory authority must reassert jurisdiction over such operation.

Section 700.11 (d)(1) and (d)(1)(i) provide that the regulatory authority may terminate its jurisdiction under the regulatory program over a reclaimed site at an initial program surface coal mining and reclamation operation, or increment thereof, if the regulatory authority determines in writing that all requirements imposed under the initial program regulations at 30 CFR chapter VII, subchapter B had been successfully completed.

Section 700.11 (d)(1) and (d)(1)(ii) provide 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, if the regulatory authority determines 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 has occurred.

Section 700.11(d)(2) defines 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 (d)(1) termination of jurisdiction was found to be the result of fraud, collusion, or a misrepresentation of a material fact.

In its digest of the district court decision the D.C. court of appeals noted that the National Wildlife Federation (NWF) claimed that it was "premature" to terminate regulatory jurisdiction at the time of bond release. The district court interpreted NWF's complaint not simply as an objection to timing, but an attack on the concept of terminating jurisdiction. In striking down the termination of jurisdiction provisions of Section 700.11(d), the district court read the enforcement requirements of section 521 (a)(1) and (a)(2) of the Act as imposing "an ongoing duty * * * to correct violations * * * without limitation." That court also believed that allowing termination of jurisdiction would "hinder" the Act's goal of protecting the environment. Accordingly, the court believed it proper to interpret Congress' silence on the precise question of termination of jurisdiction as a call for perpetual regulation. *NWF v. Lujan II*, slip op. at 6.

In upholding section 700.11(d), the court of appeals stated "(t)he district court's opinion and NWF's claim of prematurity suffer from the same flaw. Section 521 cannot be read to express or assume that regulatory jurisdiction over a surface coal mining and reclamation operation must continue forever." *Id.* at 6-7.

The court of appeals noted that "(b)ecause the Act does not evince a clear congressional intent on the issue of whether regulatory jurisdiction may terminate, the question becomes whether the Secretary's regulation is based on a permissible interpretation of the Act." The court held that the effect of the regulation comports with the statutory scheme "in light of the language of the regulation and the interpretation provided in both the preamble and the Secretary's brief * * *." *Id.* at 8-9.

The court held that "the regulation itself clearly speaks to the concerns voiced by the district court and NWF. '(T)he regulatory authority shall reassert jurisdiction if * * * the bond release * * * was based upon fraud, collusion, or misrepresentation.' 30 CFR 700.11(d)(2) (emphasis added)." *Id.* The court also held that the regulation "strikes a reasonable balance between the gradual increase, due to improving technology, in what legitimately may be demanded of an operator, and an operator's need for certainty regarding closed sites." *Id.* at 10.

III. PROCEDURAL MATTERS

Administrative Procedure Act

Good cause exists under 5 *U.S.C.* 553(b) of the Administrative Procedure Act that this reinstatement be published without the general opportunity for notice and comment otherwise required by this section. As discussed above, the present document merely reinstates provisions previously remanded by the D.C. District Court but later upheld by the

D.C. Circuit Court of Appeals. The requisite opportunity for notice and comment for the reinstated provisions was provided in the 1987 proposed rulemaking for 30 CFR 700.11(d) at *52 FR 24092*.

Effect of Reinstatement in Federal Program States and on Indian Lands

The reinstated rule 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 reinstated rule applies on Indian lands through cross-referencing in the Federal program for Indian lands at 30 CFR part 750.

Effect on State Programs

Following reinstatement of this rule, 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 reinstated rule, the individual States will be notified in accordance with the provisions of 30 CFR 732.17.

Executive Order 12291

The DOI has examined this notice of reinstatement 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 this rule being reinstated was not a major action and for the same reasons, neither is this reinstatement.

Regulatory Flexibility Act

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

Federal Paperwork Reduction Act

The collection of information contained in this rule have been approved by the Office of Management and Budget under *44 U.S.C. 3501* et seq. and assigned clearance number 1029-0094. Public reporting burden of this information is estimated to average one hour per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing the burden, to Information Collection Clearance Officer, Office of Surface Mining Reclamation and Enforcement, 1951 Constitution Ave., NW., Washington, DC 20240; and the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503.

National Environmental Policy Act

The effect of the regulation being reinstated by this notice is covered in an Environmental Assessment (EA) prepared by the DOI. This is the EA prepared prior to promulgation of the November 2, 1988, final rule at 30 CFR 700.11(d) (referenced at *53 FR 44356*). This document is on file at the OSM Administrative Record, room 5131, 1100 L Street, NW., Washington, DC 20240.

Author

The author of this notice of reinstatement is John A. Trelease, Office of Surface Mining Reclamation and Enforcement, 1951 Constitution Avenue, NW., Washington, DC 20240; Telephone (202) 208-2550 (Commercial) or 268-2550 (FTS).

LIST OF SUBJECTS IN 30 CFR PART 700

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

Accordingly, 30 CFR part 700 is amended as set forth below:

Dated: February 28, 1992.

Harry M. Snyder, Director, Office of Surface Mining Reclamation and Enforcement.

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 [Amended]

2. Section 700.11(d) is reinstated in full.

[FR Doc. 92-8294 Filed 4-9-92; 8:45 am]
BILLING CODE 4310-05-M