FEDERAL REGISTER: 47 FR 18553 (April 29, 1982)

DEPARTMENT OF THE INTERIOR
AGENCY: Office of Surface Mining Reclamation and Enforcement (OSM)

30 CFR Parts 715, 816, 817, and 826
Initial and Permanent Regulatory Programs: Disposal of Excess Spoil

ACTION: Final rule.

SUMMARY: The Office of Surface Mining (OSM) is issuing new final rules relating to the disposal of excess spoil. These final rules describe a new method of disposal of excess spoil on preexisting benches, providing operators an additional option for spoil disposal while helping to achieve the goals of the Surface Mining Control and Reclamation Act of 1977. This rule incorporates the existing rules for preexisting benches in steep slope areas.

DATE: These rules become effective June 1, 1982.

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SUPPLEMENTARY INFORMATION:

I. BACKGROUND.

Past surface mining operations have resulted in many miles of abandoned benches throughout the Appalachian coal region. One of the objectives of the Surface Mining Control and Reclamation Act of 1977, *30 U.S.C. 1201* et seq. (the Act), is the reclamation of these previously mined areas (Section 102(h) of the Act, *30 U.S.C. 1202*(h)). Reclamation of these abandoned mine lands through disposal of excess spoil on preexisting (i.e., previously mined) benches is one method that will help to achieve this objective of the Act, with a corresponding reduction in erosion, surface water degradation, flood hazards, and damage to fish and wildlife. Disposal of excess spoil on preexisting benches will also help protect the environment by reducing both the size and number of valley, head-of-hollow, and durable-rock fill structures in areas not disturbed by previous or active mining operations. However, under current OSM rules for both the initial and permanent regulatory programs (Sections 715.15, 816.71-816.74, 817.71-817.74, and 826.16), spoil material in excess of that necessary to reclaim the active bench and eliminate the highwall may only be disposed of in fill structures approved by the regulatory authority in accordance with excess spoil disposal requirements.

Amendments to the excess spoil disposal rules, at Sections 715.15, 716.2, 816.71, 817.71, and 826.16, that would allow the disposal of excess spoil on preexisting benches, were initially proposed by OSM at *45 FR 32331-33* (May 16, 1980). As a result of the public comments received, OSM reproposed on July 20, 1981, in substantially different form, amendments to the excess spoil disposal rules *(46 FR 37283-86).* A comment period of 30 days ended on August 19, 1981.

II. RULES ADOPTED

OSM is now finalizing rules substantially as reproposed on July 20, 1981. The benches to which the rule will be applicable are those remaining from mining operators conducted prior to the currently permitted operation. These rules encourage the use of excess spoil for the purpose of backfilling these preexisting benches, but OSM is not requiring the use of preexisting benches for the disposal of excess spoil. The changes are intended to provide operations with another

option for the handling of excess spoil -- an option which will help to achieve the important goal of reclaiming abandoned mine lands and which will, in many circumstances, prove to be economically and technologically attractive to operators.

The final rule requires that all spoil must be placed on the solid portion of the existing bench and that the preexisting bench shall be backfilled and graded to achieve the most moderate slope possible which does not exceed the angle of repose. In addition, excess spoil disposal on preexisting benches must be conducted in conformance with all of the general requirements for excess spoil disposal (Sections 715.15(a), 816.71, and 817.71), with two major exceptions: (1) The rule reduces the geotechnical design requirements by providing that disposal on preexisting benches be designed to a long-term static safety factor of 1.3 rather than 1.5; and (2) the rule provides that the existing highwall need not be completely eliminated when excess spoil is placed on a preexisting bench. Thus, the final rule not only states clearly the requirement for the long-term static safety factor, but also assures fulfillment of the requirements for excess spoil which are mandated by Section 515(b)(22) of the Act *(30 U.S.C. 1265*(b)(22)).

The reduction in the safety-factor requirement is based on OSM's analysis that the disposal of excess spoil on preexisting benches is similar, from a geotechnical standpoint, to the requirements for backfilling and grading active benches developed as part of a new mining operation. Under the backfilling and grading rules, a safety factor of 1.3 has been established as a reasonable standard to ensure the stability of the final backfill (Sections 816.102 and 817.102). The higher safety factor of 1.5, which is required for valley and head-of-hollow fills, is not deemed necessary when backfilling preexisting benches, because most preexisting benches are as solid as those of active mining operations and because the volume of material will not be as great at any location as the amount frequently disposed of in valley or head-of-hollow fills.

The provision which would allow the operator to dispose of excess spoil on preexisting benches without completely eliminating the highwall has two justifications: (1) In developing the highwall-elimination requirement of the Act, Congress was considering newly mined areas and not abandoned areas, n1 and (2) the disposal of spoil on preexisting benches will not result in an "adverse physical impact" n2 on the preexisting highwall, which would require the imposition of the highwall-elimination requirement even if the disposal area were not on abandoned mine lands.

n1 The legislative history indicates that Congress did not consider the application of the highwall-elimination requirement to previously mined areas. Thus, the general standard was based on Congress' understanding that "[i]n virtually all cases of contour mountain mining, sufficient spoil by volume is created to return the mine site to approximate original contour * * * The swell property of the materials removed (overburden) assures this condition with present stripping ratios." H.R. Report 95-218, 95th Congress, 1st Session at pp. 96-97 (1977).

n2 In order for OSM to require an operator to eliminate all or part of a preexisting highwall, the operator's activities must in some way have had an adverse physical impact on that portion of the highwall. Cedar Coal Co., v. OSM, 1 IBSMA 145 (April 20, 1979); Miami Springs Properties v. OSM, 2 IBSMA 399 (December 23, 1980).

The final rule also removes Section 826.16. OSM believes that adoption of Sections 715.15(e), 816.75, and 817.75 obviates the need for Section 826.16, which allowed for similar activities, but only in steep slope mining. The new rule is not as limited.

III. RESPONSE TO COMMENTS

Comments received on the July 20, 1981 reproposed rules are addressed below:

One commenter who approved of the reproposed changes in the excess spoil rules suggested that OSM also consider the use of excess spoil for public and private projects which are off the permit area. The commenter's suggestion is beyond the scope of the proposed rulemaking, but OSM will accept this comment for future consideration.

Another commenter who also agreed with the reproposed rules suggested that OSM consider excluding benches which are naturally revegetated or reclaimed pursuant to then-existing State requirements or which have recovered to the extent that further vegetation and reclamation work is not necessary. In this regard, the commenter provided suggested language that would exclude preexisting benches that meet the revegetation requirements of Sections 715.20, 816.116 or Section 817.116 from use as disposal areas for excess spoil unless the regulatory authority determines that this is the environmentally preferred option. OSM agrees that this suggestion has merit. However, since disposal of excess spoil

will, in almost all circumstances other than disposal on preexisting benches, result in the disturbance of otherwise virgin areas, and all areas disturbed for excess-spoil disposal must be revegetated in compliance with 30 CFR 715.20, 816.116 or 817.116 before bond release, no change was deemed necessary in the language as reproposed.

Two commenters requested that OSM clarify the phrase "eliminating the highwall to the extent practicable," indicating that they felt the language should convey that the highwall should be covered and stabilized to the maximum extent possible. OSM believes that a phrase such as "to the maximum extent possible" in the rule might be interpreted to require complete highwall elimination on preexisting benches when it is technologically feasible, notwithstanding extraordinarily high costs, or that it would tend to discourage the disposal of excess spoil on preexisting benches. It is OSM's intent to require the operator to eliminate only that portion of the highwall that is both technologically and economically feasible to eliminate using available excess spoil. On this basis, the comment is rejected.

These commenters also believed that by deleting the August 3, 1977, date for the preexisting benches, OSM is inviting abuse of this revision. This subject was addressed in the initial proposed rule *(45 FR 32331)* and is discussed in the preamble to the reproposed rules at *46 FR 37284.* The final rules will permit the disposal of excess spoil on any bench remaining from a mining operation conducted prior to the currently permitted operation. The rule's objective of allowing an additional method of excess spoil disposal would not be furthered by the inclusion of any particular cutoff date.

In addition, these commenters suggested that the regulatory authority should require that it be demonstrated in a permit that only spoil not necessary for elimination of the highwall and return to approximate original contour (AOC) is to be placed on a preexisting bench. This requirement is not necessary, as the disposal of excess spoil on a preexisting bench is an elective means of disposal and by definition applies only to material in excess of that required to return to AOC. It is not practical to require an indication in a permit that only excess spoil will be placed on a preexisting bench. OSM stresses that these rules apply to disposal of spoil in excess of that needed to return an active mining operation to AOC. Violations of other provisions of the Act are, of course, subject to enforcement by the regulatory authority. On this basis, this comment is rejected.

One commenter believed that the proposed revisions are "cumbersome, environmentally unnecessary and in general discouraging" and that the disposal of spoil on preexisting benches should not be considered to be excess spoil "fill" but that such facilities should be evaluated under the backfilling and grading rules. OSM believes this comment has merit from a technical standpoint. However, since the disposal of all excess spoil is controlled by Section 515(b)(22) of the Act, regardless of the configuration of the fill, this comment was rejected. This issue was also addressed in the preamble to the proposed rule at *46 FR 37284.*

The commenter also recommended that the rule as proposed be revised to eliminate the requirement that the fill be designed using standard geotechnical analysis to attain a long-term static safety factor of 1.3 for all portions of the fill. This suggestion is rejected on the basis of OSM's determination that a safety factor of 1.3 is reasonable for such spoil disposal and in accordance with good engineering practices for such facilities.

IV. DETERMINATIONS UNDER EXECUTIVE ORDER 12291, THE REGULATORY FLEXIBILITY ACT, AND THE NATIONAL ENVIRONMENTAL POLICY ACT

The Department of the Interior has determined that this rule is not a major rule and does not require a regulatory impact analysis under Executive Order 12291.

In addition, the Department has examined this rule under the provisions of the Regulatory Flexibility Act, *5 U.S.C. 601* et seq., and has determined that this rule will not have "a significant economic effect on a substantial number of small entities." OSM believes that the rule will, in fact, be economically beneficial to small operators in southern and central Appalachian regions through a reduction in certain compliance costs. However, the cumulative effects are not estimated to be significant.

With respect to the National Environmental Policy Act of 1969, *42 U.S.C. 4321* et seq. (NEPA), OSM has prepared a final environmental assessment (EA) on this rule that reaches a conclusion that this rule would not significantly affect the quality of the human environment. The final EA and finding of no significant impact are on file in the OSM Administrative Record, Room 5315, 1100 L Street, NW., Washington, D.C. OSM also is preparing an EA of the cumulative impacts on the human environment of this rulemaking and related rulemakings under the Act.

LIST OF SUBJECTS IN

30 CFR Part 715
Environmental protection, Surface mining, Underground mining.

30 CFR Part 816
Environmental protection, Reporting and recordkeeping requirements, Surface mining.

30 CFR Part 817
Environmental protection, Reporting and recordkeeping requirements, Undermining mining.

30 CFR Part 826
Environmental protection, Reporting and recordkeeping requirements, Surface mining, Undermining mining.

Accordingly, 30 CFR Parts 715, 816, 817 and 826 are amended as set forth herein.

Dated: April 22, 1982.
Daniel N. Miller, Jr., Assistant Secretary, Energy and Minerals.

PART 715 -- GENERAL PERFORMANCE STANDARDS

1. In Section 715.15, a paragraph (e) is added to read as follows:

SECTION 715.15 - DISPOSAL OF EXCESS SPOIL.

* * * * *

(e) Preexisting benches.

(1) The regulatory authority may approve the disposal of excess spoil through placement on preexisting benches: Provided, That the standards set forth in paragraphs (a)(1)-(a)(5) and (a)(7)-(a)(14) of this section and the requirements of this paragraph (e) are met.

(2) All spoil shall be placed on the solid portion of the preexisting bench.

(3) The fill shall be designed, using standard geotechnical analysis, to attain a long-term static safety factor of 1.3 for all portions of the fill.

(4) The preexisting bench shall be backfilled and graded to --

(i) Achieve the most moderate slope possible which does not exceed the angle of repose, and

(ii) Eliminate the highwall to the extent practicable.

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

2. In Part 816, Section 816.75 is added to read as follows:

SECTION 816.75 - DISPOSAL OF EXCESS SPOIL: PREEXISTING BENCHES.

(a) The regulatory authority may approve the disposal of excess spoil through placement on preexisting benches: Provided, That all the standards set forth in paragraphs (a)-(e) and (g)-(n) of Section 816.71 and the requirements of this section are met.

(b) All spoil shall be placed on the solid portion of the preexisting bench.

(c) The fill shall be designed, using standard geotechnical analysis, to attain a long-term static safety factor of 1.3 for all portions of the fill.

(d) The preexisting bench shall be backfilled and graded to --

(1) Achieve the most moderate slope possible which does not exceed the angle of repose, and

(2) Eliminate the highwall to the extent practicable.

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

3. In Part 817, Section 817.75 is added to read as follows:

SECTION 817.75 - DISPOSAL OF EXCESS SPOIL: PREEXISTING BENCHES.

(a) The regulatory authority may approve the disposal of excess spoil through placement on preexisting benches: Provided, That all the standards set forth in paragraphs (a)-(e) and (g)-(n) of Section 817.71 and the requirements of this section are met.

(b) All spoil shall be placed on the solid portion of the preexisting bench.

(c) The fill shall be designed, using standard geotechnical analysis, to attain a long-term static safety factor of 1.3 for all portions of the fill.

(d) The preexisting bench shall be backfilled and graded to --

(1) Achieve the most moderate slope possible which does not exceed the angle of repose, and

(2) Eliminate the highwall to the extent practicable.

PART 826 -- SPECIAL PERMANENT PROGRAM PERFORMANCE STANDARDS -- OPERATIONS ON STEEP SLOPES

SECTION 826.16 [REMOVED]

4. In Part 826, Section 826.16 is removed.

5. The authority for Parts 715, 816, 817 and 826 is Pub. L. 95-87, *30 U.S.C. 1201* et seq.

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