

FEDERAL REGISTER: 48 FR 1160 (January 10, 1983)

DEPARTMENT OF THE INTERIOR

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

30 CFR Parts 816 and 817

Permanent Regulatory Program; Erosion Control

ACTION: Final rule.

SUMMARY: The Office of Surface Mining Reclamation and Enforcement (OSM) is amending its rules which previously regulated air pollution from surface coal mining and reclamation operations. The final rules will instead regulate erosion and air pollution related to erosion, in accordance with the statutory language authorizing these performance standards.

OSM is also amending its rules which relate to stabilizing rills and gullies associated with surface coal mining and reclamation operations. OSM has amended the rules to require the stabilization of rills and gullies if they (1) disrupt the approved postmining land use or the reestablishment of the vegetative cover; or (2) cause or contribute to a violation of water quality standards for receiving streams.

EFFECTIVE DATE: February 9, 1983.

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SUPPLEMENTARY INFORMATION:

- I. Background and Rules Adopted
- II. Responses to Public Comments on Proposed Rules
- III. Procedural Matters

I. BACKGROUND AND RULES ADOPTED

On February 18, 1982 (*47 FR 7384*), OSM published a notice of proposed rulemaking (1) to amend 30 CFR 816.95 and 817.95 n1 relating to air resources protection for surface coal mining and reclamation operations and (2) to remove 816.106 and 817.106 relating to regrading or stabilizing rills and gullies. A public hearing was scheduled for March 15, 1982, but no one requested to testify. During the 30-day comment period, OSM received 12 comments from State agencies, industry, and environmental groups.

n 1 Sections 816.95 and 817.95 were suspended by the Department on August 4, 1980 (*45 FR 51549*).

The relevant provisions of the Surface Mining Control and Reclamation Act of 1977 (the Act), *30 U.S.C. 1201* et seq., are Sections 515(b)(4) and 516(b)(10), *30 U.S.C. 1265(b)(4)* and *1266(b)(10)*. Section 515(b)(4) requires that all surface coal mining and reclamation operations:

[S]tabilize and protect all surface areas including spoil piles affected by the surface coal mining and reclamation operation to effectively control erosion and attendant air and water pollution.

Under Section 516(b)(10) of the Act, similar requirements apply to underground mining operations.

In *In re: Permanent Surface Mining Regulation Litigation*, CA 79-1144 (D.D.C., May 16, 1980), Sections 816.95 and 817.95 of the rules were remanded by the trial judge to the Secretary of the Interior for revision because the Act's legislative history "indicates that the Secretary's authority to regulate [air] pollution is limited to activities related to erosion." *Id.*, slip op. at 28. The Secretary appealed this decision to the U.S. Court of Appeals. No decision has yet been rendered on that appeal.

OSM has reconsidered this entire issue in the context of the rulemaking. The final rule reflects OSM's decision to concur in the conclusions of the U.S. District Court and is consistent with that decision. This reconsideration consisted of both a review of the public comment on the proposed rule and a careful search of the Act's legislative history. As the U.S. District Court points out, the language of Section 515(b)(4) of the Act, *30 U.S.C. 1265(b)(4)*, is not without its ambiguities. Section 515(b)(4) could be read to require the Secretary to regulate air pollution as well as erosion or to control erosion, alone with air pollution which is only attendant to erosion. As the U.S. District Court notes: "the statutory construction argument may turn either way." *Id.*

Suspended particulates are the primary air pollutants associated with coal mining. Emissions of particulates from a duct or stack at a stationary source are subject to comprehensive regulation under the Clean Air Act, as amended (*42 U.S.C. 8157 et seq.*) and related State laws. Other particulate contributions result from wind erosion and the operation of nonstationary sources. This background is important for it refocuses the primary inquiry: Did Congress in enacting Section 515(b)(4) of the Act intend to create a program for the regulation of pollution that may result from the operation of nonstationary sources related to coal mining. OSM believes that the legislative history resolves any statutory ambiguity in favor of the more narrow interpretation.

An early version of the Act contained a provision substantially the same as Section 515(b)(4). (See H.R. 11500, 93d Cong., 2d Sess., 211(b)(6), 1974). The report of the House Committee on Interior and Insular Affairs explained that Section 211(b)(6) of H.R. 11500 required operators "to stabilize and protect all surface areas including spoil piles to control air and water pollution." H.R. Rep. No. 93-1072, 93d Cong., 2d Sess. 134 (1974). The same House committee reported a subsequent bill, H.R. 13950, 94th Cong., 2d Sess. (1976), which contained a provision identical to Section 515(b)(4) that required operators to "stabilize and protect all surface areas including spoil piles to control air and water pollution." H.R. Rep. No. 94-1445, 94th Cong., 2d Sess. 118 (1976). Finally, the House Interior and Insular Affairs Committee Report for H.R. 2, the bill which was enacted, when highlighting the "major provisions" of the environmental performance standards of Section 515, made no reference to the regulation of air quality. H.R. Rep. No. 95-218, 95th Cong., 1st Sess. 173-174 (1977). However, the report did say that "[s]tandards to assure the stability of spoil mass as well as to control surface erosion are prescribed for surplus soil from all types of mining operations." *Id.*

Thus, the language of these three reports dealt with erosion and its effects rather than air quality control. OSM believes that the absence of any reference to the major undertaking of air quality control in these committee descriptions of the environmental performance standard is most telling and supports the direction of the final rule. n2

n 2 See also S. Rep. 95-128, 95th Cong., 1st Sess. 82 (1977). (In the section-by-section analysis the Senate Committee on Energy and Natural Resources did not include air quality control as one of the 22 listed environmental protection standards to be enacted.)

After reviewing Section 515(b)(4) of the Act and its legislative history, OSM has decided to adopt the interpretation of the U.S. District Court in this final rule. In making this decision, it should be noted that the EPA, under the Clean Air Act, has developed a complex system of regulation to protect air quality in each State. Under this program, each State must develop a comprehensive State Implementation Plan designed to bring the State into compliance or to assure continued compliance with National Ambient Air Quality Standards for public health and welfare and to prevent significant deterioration of clean-air areas. Such plans can include consideration of pollution from coal mines in the particular region or locale. As the District Court observed, "if Congress wanted the Secretary to develop regulations protecting air quality, it could have done so in a straightforward manner." *In re: Permanent Surface Mining Regulations Litigation*, supra., p. 29. Accordingly, the final rule will require operators to take steps to stabilize and protect all exposed surface areas in order to effectively control erosion and air pollution related to erosion; but it will not regulate fugitive dust emissions from the operation of equipment and trucks.

In a related vein, OSM is aware that roads can be a major source of fugitive dust from surface coal mining and reclamation operations. The classification and maintenance of these roads are governed by Sections 816.150-816.176 and Sections 817.150-817.176 of the permanent program rules. OSM suspended those sections in response to Judge Flannery's decision, in *In re: Permanent Surface Mining Reclamation Litigation*, supra., p. 32-36, to remand those rules to the Secretary. *45 FR 51547* (August 4, 1980). OSM has proposed revisions to the road rules which include provisions for road maintenance and more specific standards with respect to erosion control. The relevant sections are proposed Sections 816.150(a), 816.180(a)(1), 817.150(a), and 817.180(a)(1), which are discussed at *47 FR 16594 and 16595* (April 16, 1982).

Additionally, OSM had proposed to remove Sections 816.106 and 817.106 of the permanent regulatory program which required the regrading and stabilizing of rills and gullies deeper than 9 inches. OSM was of the opinion that the proposed erosion control rules requiring protection and stabilization of all exposed surface areas would include stabilization of rills and gullies. OSM continues to believe that a separate design criterion for rills and gullies is not needed to assure erosion stabilization of rills and gullies and that such a problem will be governed by the general performance standard for the section. However, in response to public comment which pointed out that rills and gullies can create reclamation problems separate from erosion problems, OSM has developed a performance standard for their control which incorporates other specific reclamation requirements of the Act and rules. The new rules will require the operator to take remedial action if rills and gullies develop which (1) disrupt the approved postmining land use or the reestablishment of a vegetative cover or (2) cause or contribute to a violation of water quality standards for receiving streams. The revised standard will be included as Sections 816.95(b) and 817.95(b).

Finally the titles of Sections 816.95 and 817.95 have been changed to reflect more accurately their content.

II. RESPONSES TO PUBLIC COMMENTS ON PROPOSED RULES

SECTION 816.95(a) and 817.95(a)

Two commenters found that the proposed Sections 816.95 and 817.95 merely restated the statutory language and provided no guidance for implementation. Another commenter thought the rules were so vaguely worded that they would require no specific minimum level of action and could result in discriminatory enforcement by the regulatory authority.

OSM believes that the new rules succinctly set out the required performance standards. Most of the measures specified in the previous rules pertained to the control of fugitive dust. Their retention would not be appropriate in the revised rules. As with other performance standards proposed by OSM, regulatory authorities will have flexibility to develop stabilization measures consistent with local terrain, climate, soils, and other conditions existing within the State. Appropriate techniques to stabilize exposed areas can be determined by the regulatory authority and operators in conjunction with local Soil Conservation Districts and air quality agencies, as appropriate. Furthermore, in order for a State program to be approved, the State must satisfy OSM that it has the capability to carry out the provisions and purposes of the Act. *30 U.S.C. 1253*. During implementation these programs will be subject to OSM oversight.

One commenter was concerned that after OSM deleted the air quality control measures from the rules, they would simply be placed in a guidance manual which would still be considered by OSM for permit approval. The commenter's concern appears misplaced for two reasons: First, permit approval will be based upon standards included in the State regulatory programs and implemented as legally enforceable in that State, and not guidelines that may be developed by OSM. And second, any OSM guidance manual would simply provide advice and not mandatory direction for State regulatory authorities. For these reasons the comment is rejected.

Several commenters generally supported the proposal but added recommendations that would limit the rule's coverage or clarify its application. These suggestions included limiting stabilization efforts to exposed areas of 1 percent or more of the permit area; controlling the surface areas only as required; and stabilizing only those surface areas that are exposed from mining operations. These comments are rejected. The Act's language is clear on this matter. Section 515(b)(4) applies to the entire area that has been disturbed by mining and includes spoil piles. The extent of the stabilization and erosion control activities required is to be determined on the basis of local conditions and may include such techniques as prompt revegetation of disturbed areas or other surface stabilization techniques.

Related to the concern over the breadth of the rules was a comment on whether operators, particularly in the West, would have to create better conditions than those which exist naturally in the surrounding area. As previously indicated, effective erosion control may vary from State to State. The intent of the rule is to ensure that surface areas are protected from erosion and to minimize air pollution resulting from such erosion. These actions should be consistent with the approved postmining land use and the plan for revegetation. Comparisons with surrounding areas may be used by the regulatory authority in determining whether such standards are met.

One commenter recommended that the rule provide for erosion control by meeting applicable Federal and State air quality laws and regulations and suggested that Section 515(b)(4) did not extend OSM's erosion control authority or air

pollution control authority. The commenter's interpretation of Section 515(b)(4) as not providing general erosion control authority is not accepted. The Act does provide for control of erosion, which these rules address. As indicated above, however, these rules are not intended to cover all aspects of air pollution or to provide a means of regulating ambient air quality. Although some particulate omissions may not be regulated by OSM under the final rule, they can be regulated by a State as necessary under a State Implementation Plan adopted pursuant to the Clean Air Act.

One commenter believed it was necessary to amend the permit application rules found at Sections 780.15 and 784.26 for consistency. These provisions require fugitive dust control plans in accordance with Sections 816.95 and 817.95 as part of a permit application. Because the revised Sections 816.95 and 817.95 will no longer specify fugitive dust control practices, OSM agrees that it will be necessary to amend the permit application rules related to erosion. OSM will consider this as a future independent rulemaking.

One commenter objected to OSM proposing a rule which was not consistent with the position taken by it before the District and Appellate Courts in the litigation challenging the 1979 permanent program rules. The court in *In re: Permanent Surface Mining Reclamation Litigation*, supra, remanded the air resources protection rules to the Secretary. As indicated above, OSM has reviewed the legislative history and the comments received on the proposed rule and has decided to adopt a final rule consistent with the District Court's ruling in that case.

One commenter thought that the coverage of the proposed rules did not extend far enough and that OSM should propose new rules to include impacts on air quality that are unrelated to erosion. As indicated above, this interpretation has been rejected in the final rule which has been developed in accordance with the District Court's opinion in *In re: Permanent Surface Mining Regulation Litigation*, supra. In that case, Judge Flannery ruled that Section 514(b)(4) of the Act, which is the statutory authority for Sections 816.95 and 817.95 of the rules, is limited to the control of erosion and air pollution resulting from erosion-related sources.

In a related vein, a Midwestern State agency expressed the opinion that it was not logical to assume that the intent of Congress in drafting Section 515(b)(4) was to control air pollution only attendant to erosion. In the State agency's experience, the primary sources of fugitive dust were from excavation, blasting, haul roads, and preparation plants, rather than from erosion. Therefore, the commenter believed that the emphasis of the rules should be on the source of air pollution. OSM disagrees that it is not logical to regulate air pollution attendant to erosion. OSM believes that the stabilization of disturbed surface areas to control erosion can be effectively integrated with other aspects of the regulatory program.

One commenter believed that the proposed rule changes were being examined out of context with closely related rules also being proposed for revision. OSM completed an environmental assessment which analyzed the cumulative impacts of adopting these rules in relation to other proposed rules. In that analysis, this rule was identified as a rule that did not have a significant interrelationship with the other proposals and that it could proceed independently. If it develops that regulatory adjustments are necessary due to subsequent rulemakings, then proposed revisions will be made as needed.

The same commenter thought that the proposed rules were ambiguous as to which sources of air pollution were covered and what air quality goals must be reached. This commenter was concerned that there would be little preplanning to take a preventative approach to air pollution control and that enforcement would depend on citizen complaints and the attitude of individual inspectors rather than on an objective and uniform program. The commenter recommended adopting a flexible approach to air quality control which would base the level of control on the proximity of the minesite to sensitive areas such as residential communities, transportation routes, and recreation areas.

OSM thinks that the performance standards are sufficiently clear as to the standards to be imposed to control erosion. These can be expanded upon by individual regulatory authorities as necessary on the basis of local conditions. As previously explained, the final rule reflects the interpretation of Section 515(b)(4) that limits the applicability to the stabilization of exposed surface areas, erosion control, and control of air pollution attendant to erosion. It is not intended to regulate air quality in general or establish air quality goals. Development of an approach for general air quality controls are the responsibility of the State and EPA as the enforcers of National Ambient Air Quality Standards and of MSHA as the enforcer of the Federal Mine Safety and Health Act of 1977. This can be accomplished as necessary through individual State Implementation Plans.

A commenter thought that if the final rules are to be limited to air pollution attendant to erosion, then the removal of specific control measures would prevent the regulatory authority from requiring additional and enumerated measures, especially in light of the restriction in some State programs against the adoption of rules that are more stringent than those prescribed by OSM.

OSM believes that the performance standards have been written so that States can develop the necessary specifics. OSM's role in reviewing State programs and amendments for consistency with the Subchapter K performance standards, provided under the procedures of 30 CFR Part 732, ensures that State program provisions will adequately meet the OSM standard. This rule is intended to implement the requirements of Section 515(b)(4). Under Section 505 of the Act, *30 U.S.C. Section 1255*, a State may adopt provisions in addition to the requirements of the Act, including provisions specifically related to air quality if authorized under State law. These rules are not intended to preclude State legislatures from adopting or not adopting provisions more stringent than those required under the Act.

The same commenter felt that the final rules should contain measures to minimize air pollution from erosion in all phases of mining and reclamation operations. OSM believes that the final rules will be broad enough to control air pollution originating from erosion in all phases of mining and reclamation operations as necessary based on local conditions.

One commenter recommended including language in the rule that measures to stabilize surface areas not conflict with approved State Implementation Plans adopted to meet the requirements of the Clean Air Act. These rules are not expected to conflict with approved State Implementation Plans. The Act (Sections 503 and 702) specifically requires that these rules not conflict with laws such as the Clean Air Act. Because general compliance with Federal and State air quality laws is accounted for in the regulations of the air pollution control agencies, OSM does not believe it is necessary to reference such requirements in Sections 816.95 and 817.95.

The same commenter recommended defining key terms such as "attendant air pollution" and "effective control measures." By "attendant air pollution," OSM means generally any air borne particulates or fugitive dust directly caused by erosion associated with a surface mining and reclamation operation. OSM does not believe it is necessary at this time to include specific regulatory definitions of these terms because these words' meanings will vary depending upon local and site specific conditions. If at a future point significant problems are identified in the interpretation of these terms, OSM will consider providing additional guidance.

SECTIONS 816.95(b) and 817.95(b)

In the opinion of one commenter, the proposed removal of Sections 816.106 and 817.106 concerning rills and gullies would reduce uncertainty and ambiguity between existing sections and other applicable requirements. For a number of reasons, other commenters opposed removing the provision mandating the regrading of rills and gullies. One thought the requirement to regrade rills and gullies that are deeper than 9 inches was a specific and enforceable performance standard. Others believed that the language of the rules relating to erosion and attendant air pollution was not adequate to assure a land surface without large rills and gullies. One State felt that the rills and gullies themselves posed a serious impediment to the maintenance of water quality and the establishment of postmining land uses as required by the Act.

After reviewing the specific comments concerning the nature of rills and gullies and the reclamation problems which they can create, OSM has decided to remove Sections 816.106 and 817.106 and, in their stead, to incorporate provisions for regrading rills and gullies in Sections 816.95 and 817.95. Specifically, the amendments will require operators to fill, regrade, or otherwise stabilize rills and gullies, to replace lost topsoil, and to reseed or replant if the rills and gullies disrupt the approved postmining land use or the reestablishment of a vegetative cover or if they cause or contribute to the violation of water quality standards for receiving streams. The amended language will be a general performance standard. States may continue to include specific size limitations on rills and gullies as appropriate.

III. PROCEDURAL MATTERS

Federal Paperwork Reduction Act

The Department of the Interior (DOI) has determined that this final rule does not require the collection of information as defined under *44 U.S.C. 3501* et seq.

Executive Order 12291

The DOI has determined that this document is not a major rule and does not require a regulatory impact analysis under Executive Order 12291.

Regulatory Flexibility Act

The DOI certifies that this document will not have a significant economic effect on a substantial number of small entities and therefore does not require a regulatory flexibility analysis under Pub. L. 96-354.

National Environmental Policy Act

An environmental assessment (EA) was prepared analyzing the individual impacts on the human environment which the amendments to Sections 816.95, and 817.95, will have. On the basis of this EA, it was determined that adopting these rules will not constitute a major Federal action significantly affecting the quality of the human environment. In addition, an EA was prepared which analyzed the cumulative impacts of adopting these rules in relation to certain other proposed revised rules. In a Finding of No Significant Impact (FONSI) based on this latter EA, the amendments to Sections 816.95 and 817.95 were considered to be in category I, a category of revisions for which the analysis of impacts was sufficiently certain to support a finding of no significant impact. Both EAs and FONSI are on file in the Administrative Record located at 1100 L Street, NW., Room 5315, Washington, D.C.

LIST OF SUBJECTS

30 CFR Part 816

Coal mining, Environmental protection, Reporting and recordkeeping requirements, Surface mining.

30 CFR Part 817

Coal mining, Environmental protection, Reporting and recordkeeping requirements, Underground mining.

For the reasons set forth in the preamble, Parts 816 and 817 of Chapter VII, Title 30, of the Code of Federal Regulations are amended as set forth herein.

Dated: October 1, 1982.

Wm. P. Pendley, Assistant Secretary, Energy and Minerals.

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

1. Section 816.95 is revised to read as follows:

SECTION 816.95 - STABILIZATION OF SURFACE AREAS.

(a) All exposed surface areas shall be protected and stabilized to effectively control erosion and air pollution attendant to erosion.

(b) Rills and gullies, which form in areas that have been regraded and topsoiled and which either (1) disrupt the approved postmining land use or the reestablishment of the vegetative cover, or (2) cause or contribute to a violation of water quality standards for receiving stream; shall be filled, regraded, or otherwise stabilized; topsoil shall be replaced; and the areas shall be reseeded or replanted.

SECTION 816.106 [Removed]

2. Section 816.106 is removed.

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

3. Section 817.95 is revised to read as follows:

SECTION 817.95 - STABILIZATION OF SURFACE AREAS.

(a) All exposed surface areas shall be protected and stabilized to effectively control erosion and air pollution attendant to erosion.

(b) Rills and gullies which form in areas that have been regraded and topsoiled and which either (1) disrupt the approved postmining land use or the reestablishment of the vegetative cover, or (2) cause or contribute to a violation of water quality standards for receiving streams; shall be filled, regraded, or otherwise stabilized; topsoil shall be replaced; and the areas shall be reseeded or replanted.

SECTION 817.106 [Removed]

4. Section 817.106 is removed.

(Pub. L. 95-87, 30 U.S.C. 1201 et seq.)

[FR Doc. 83-599 Filed 1-7-83; 8:45 am]
BILLING CODE 4310-05-M