FEDERAL REGISTER: 51 FR 41952 (November 20, 1986)

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

30 CFR Parts 701, 761, 764, 769, 772, 773, 780, 784, 785, 816, and 817
Surface Coal Mining and Reclamation Operations; Permanent Regulatory Program; Compliance with Court Order

ACTION: Final rule; suspension.

SUMMARY: The Office of Surface Mining Reclamation and Enforcement (OSMRE) is suspending certain portions of its permanent program regulations. OSMRE is taking these actions as a result of a District Court's decisions in Round III of the litigation on OSMRE's permanent program regulations.

EFFECTIVE DATE: December 22, 1986.

FOR FURTHER INFORMATION CONTACT: Richard Miller, Regulatory Development and Issues Management, Office of Surface Mining Reclamation and Enforcement, U.S. Department of the Interior, 1951 Constitution Avenue, NW., Washington, DC 20240 (202) 343-5241.

SUPPLEMENTARY INFORMATION:

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 the surface operations and surface impacts of underground coal mining. OSMRE has by regulation implemented or clarified many of the general requirements of the Act and set performance standards to be achieved by different operations. See 30 CFR Chapter VII.

On March 13, 1979, OSMRE published regulations implementing the permanent regulatory program required by Title V of the Act. *44 FR 14902* et seq. A number of these regulations were challenged by States, coal industry representatives and citizen and environmental groups. In Re: Permanent Surface Mining Regulation Litigation, No. 79-1144 (D.D.C. 1980) (In Re: Permanent (I)). The District Court issued decisions in In Re: Permanent (I) in February and May 1980. Certain issues were appealed but the D.C. Circuit Court remanded the case on motion of the parties pending the outcome of OSMRE's program of regulatory reform. In Re: Permanent (I), Order (D.C. Cir., February 1, 1983).

Many of the regulations originally promulgated in 1979 were revised and repromulgated during 1983 as part of OSMRE's extensive program of regulatory reform. Citizen and environmental groups, as well as States and industry representatives, again challenged some of these new regulations in In Re: Permanent Surface Mining Regulation Litigation (II), No. 79-1144 (D.D.C. 1984 and 1985) (In Re: Permanent (II)). In that case the court divided its consideration of the challenged regulations into three rounds of briefing and oral argument, the last round of which was separated into two sets of briefings. Decisions were issued in In Re: Permanent (II) on July 6 and October 1, 1984, and on March 22 and July 15, 1985. This notice is issued to comply with the March 22, 1985 and July 15, 1985 Memorandum Opinions and orders.

An explanation of each of the regulations to be suspended, the basis upon which the court remanded them to the Secretary and the effect of the suspension of each regulation is provided below. Where necessary, OSMRE intends to propose revisions to the remanded rules consistent with the court's opinions.

Although affecting the Code of Federal Regulations, this suspension notice is an interpretative statement which describes how the Secretary is already implementing the court's decisions. Even in the absence of this notice, the Secretary's actions must be consistent with the court orders.

Most State programs were approved prior to the promulgation of the 1983 rules, and are generally based on OSMRE's 1979 rules. In a few instances, State program amendments were approved based on the 1983 revisions. State programs will remain in effect until the Director of OSMRE has examined the provisions of each State program to determine whether changes are necessary and has notified the State regulatory authority pursuant to 30 CFR 732.17 (c) and (d) that a State program amendment is required.

With respect to Federal lands, the Secretary is continually required to make programmatic decisions, such as whether and under what conditions to issue a Federal lands permit. Although 30 CFR 740.11 makes State programs applicable on Federal lands, the Secretary will not take any action which is inconsistent with the court's opinions. For Federal lands this kind of issue is likely to arise only in those instances where the District Court ruled that a particular provision is inconsistent with the Act rather than basing its decision solely on procedural grounds.

This suspension notice has a direct effect on States with Federal Programs and on Indian lands, the rules for which generally reference the remanded sections. In a few instances, a specific program will have an individually tailored provision rather than a cross-reference to a remanded section. Such provisions will not be affected by this notice.

This suspension notice is not intended to affect the Secretary's appeal of the court's decisions on any of these regulations. With regard to issues on appeal, this notice is intended to implement the court orders during the pendency of the appeals. Should the Secretary prevail in his appeal, today's suspensions are likely to be lifted as to the issues upon which he prevails.

II. DISCUSSION OF RULES SUSPENDED

1. SECTION 701.5 - DEFINITION OF "AFFECTED AREA"

OSMRE's March 1979 rules defined the term "affected area" so as to include, in relevant part, any land upon which surface mining activities or underground mining activities are conducted or located. The 1979 definition did not exclude "public roads."

On April 5, 1983, OSMRE adopted a revised definition of the term "affected area." *48 FR 14814.* With respect to roads, the April 1983 definition of "affected area" was revised to include:

“every road used for purposes of access to, or for hauling coal to or from, surface coal mining and reclamation operations, unless the road (a) was designated as a public road pursuant to the laws of the jurisdiction in which it is located; (b) is maintained with public funds, and constructed in a manner similar to other public roads of the same classification within the jurisdiction; and (c) there is substantial (more than incidental) public use. (Emphasis added).”

The intent of the above quoted language was to exclude public roads from the definition of "affected area."

This rule was challenged insofar as it imposed the "more than incidental" public use test in determining whether a public road is part of the "affected area." The District Court determined that the rule improperly excluded from regulation some public roads which are included in the statutory definition of "surface coal mining operations." The rule was remanded because the coverage of the rule was related to use by the public rather than use for mining. In Re: Permanent (II), July 15, 1985 Mem. op. at 143.

In compliance with the Order, OSMRE is suspending the definition of "affected area" to the extent that it excludes public roads which are included in the definition of "surface coal mining operations." The suspension will have the effect of including in the "affected area" all lands affected by the construction of new roads or the improvement or use of existing roads to gain access to the site of regulated activities or for haulage. The definition of "affected area" with regard to areas other than public roads is not suspended. OSMRE recognizes that this suspension provides imperfect guidance in a difficult area. Thus, OSMRE intends to develop and propose at a later date a new rule to clarify the relationship between public roads and the "affected area."

2. SECTION 701.5 - DEFINITION OF "PREVIOUSLY MINED AREA"

OSMRE's 1979 rules did not have a definition of "previously mined area" nor did those rules provide special performance standards for the remining of previously mined areas. On September 16, 1983 *(48 FR 41720)*, OSMRE promulgated a definition of the term "previously mined area" in 30 CFR 701.5. The definition is used in determining whether operators may be eligible for a certain limited exception from the requirement for total highwall elimination. The exception appears in 30 CFR 816.106 and 817.106.

Under OSMRE's 1983 definition, "previously mined areas" meant "land disturbed or affected by earlier coal mining operations that was not reclaimed in accordance with the requirements of [30 CFR Chapter VII]."

OSMRE's definition was challenged because it allowed areas to be treated as "previously mined" even if they were mined after the Act's reclamation standards took effect and reclamation was required. Challengers to the rule contended that the definition was inconsistent with the Act because it allowed less than complete highwall elimination in areas mined after the Act's reclamation standards took effect. The District Court agreed and remanded the regulation. In Re: Permanent (II), July 15, 1985 Mem. op. at 118.

OSMRE is suspending the definition of "previously mined area" insofar as it applies to any area upon which operations were previously conducted which were required to comply with the Act's approximate original contour and highwall elimination requirements. Under this suspension, the remining of any area which was previously subject to a complete highwall elimination requirement will continue to be subject to such a requirement. OSMRE intends to solicit comments on this issue shortly in a proposed rule.

3. SECTION 761.5 - DEFINITION OF "CEMETERY"

Section 522(e)(5) of the Act prohibits mining within 100 feet of cemeteries. OSMRE's 1979 definition of "cemetery" included all places where human bodies are interred.

On September 14, 1983 *(48 FR 41312)*, OSMRE revised the definition of "cemetery" in 30 CFR 761.5. That definition was revised to reflect the August 6, 1981 decision of the United States Court of Appeals for the Sixth Circuit, *Holmes Limestone Co. v. Watt, 655 F.2d 732 (6th Cir. 1981).* In that case, the court ruled that the Act did not prohibit mining within 100 feet of private family burial grounds where the operator had obtained the owner's consent. The 1983 definition distinguished between cemeteries and private family burial grounds and expressly excluded private family burial grounds from the definition of "cemetery."

OSMRE's 1983 definition of "cemetery" was challenged for its exclusion of private family burial grounds. The District Court ruled that OSMRE had no basis for distinguishing between private family burial grounds and other cemeteries. In Re: Permanent (II), July 15, 1985 Mem. op. at 83.

OSMRE is suspending the definition to the extent that it excludes private family burial grounds from the definition of "cemetery." As suspended, "cemetery" will be defined as any place where human bodies are interred and will include private family burial grounds. In this instance, a proposed rule has already been published. See *51 FR 8471*. If finalized, it will supersede this suspension.

4. SECTION 761.5 - DEFINITION OF "SIGNIFICANT RECREATIONAL, TIMBER, ECONOMIC, OR OTHER VALUES INCOMPATIBLE WITH SURFACE COAL MINING OPERATIONS"

Generally, Section 522(e)(2) of the Act prohibits coal mining on Federal lands in national forests, subject to several exceptions. One exception permits mining on Federal lands in national forests where there are no "significant recreational, timber, economic, or other values incompatible with surface coal mining operations", and, impacts are either incident to an underground coal mine or, if west of the 100th meridian, are in compliance with the Multiple-Use Sustained Yield Act of 1960 and certain other requirements.

OSMRE's 1983 definition of "significant recreational, timber, economic, or other values incompatible with surface coal mining operations" in 30 CFR 761.5 included consideration of whether the protected values could be damaged "beyond an operator's ability to repair or restore." Such a consideration was considered reasonable because certain values

which could be restored after mining could be temporarily disrupted without mining being incompatible with the listed national forest uses.

OSMRE's rule was challenged. The plaintiffs contended that OSMRE's definition equated the determination with regard to compatibility with the determination that reclamation could be achieved. A determination that reclamation can be achieved must be made for all mines.

The District Court ruled that the regulation was inconsistent with the Act and remanded the rule. The court found that the Secretary must look beyond reclaimability in making a compatibility determination. In Re: Permanent (II), July 15, 1985 Mem. op. at 80-81.

In compliance with the Order, OSMRE is suspending the definition of "significant recreational, timber, economic, or other values incompatible with surface coal mining operations" insofar as the values listed in the definition are evaluated for compatibility with mining solely in terms of reclaimability. This will mean that reclaimability is but one factor to be considered in determining whether an operation would be incompatible with forest values and that a showing of damage to those values during the term of the mining could make the operation incompatible. OSMRE will consider the duration of the damage only as part of the determination of compatibility.

5. SECTION 761.5(a) - DEFINITION OF "VALID EXISTING RIGHTS"

Section 522(e)(3) of the Act prohibits or limits surface coal mining operations on or near certain private, Federal and other public lands, subject to valid existing rights and except for those operations which existed on August 3, 1977. The Act does not define "valid existing rights" (VER), but the legislative history of the Act indicates that the VER provision was included in Section 522(e) to avoid takings of property without just compensation in violation of the Fifth Amendment to the United States Constitution.

OSMRE's first attempt to define VER was an unsuccessful effort to limit the exemption to those property rights in existence on August 3, 1977, the owners of which either had obtained all necessary mining permits on or before August 3, 1977, or could demonstrate that the coal for which the exemption was sought was both needed for, and immediately adjacent to, a mining operation in existence prior to August 3, 1977. (30 CFR 761.5(a), *44 FR 15342,* March 13, 1979).

On judicial review, the court remanded to the Secretary that portion of the definition requiring the property owner to have obtained all permits necessary to mine ("all permits" test, 30 CFR 761.5(a)(2)(i)). Specifically, the court indicated that "a good faith attempt to obtain all permits before the August 3, 1977 cut-off date should suffice for meeting the all permits test." In Re: Permanent (I), February 26, 1980 Mem. op. at 20. To comply with the court's 1980 opinion, OSMRE suspended the definition only insofar as it required that to establish VER all permits must have been obtained prior to August 3, 1977. *(45 FR 51547, 51548,* August 4, 1980). The notice of suspension stated that, pending further rulemaking, OSMRE would interpret the regulation as including the court's suggestion that a good faith effort to obtain all permits would establish VER.

On June 10, 1982, OSMRE proposed three major options for revising the definition of VER, including a "good faith/all permits" test, and three alternatives which were variations of the major options. All of the proposed options were attempts to identify the class or classes of circumstances which would operate to effect takings under section 522(e), while excluding all else. These tests are referred to as "mechanical" tests. Commenters on the proposed rule criticized each option as either too broad or too narrow and many raised the issue of taking without compensation on one or more of the proposed options. These comments led OSMRE to examine the case law applying the Just Compensation Clause of the Fifth Amendment. As a result of that examination, OSMRE stated that "because the courts refuse to prescribe set formulas for takings, OSMRE is convinced that it cannot specifically delineate a class of circumstances with the assurance that the class is neither over inclusive or under inclusive of all potential takings which might result from section 522(e) prohibitions." *48 FR 41314,* September 14, 1983. Therefore, on September 14, 1983, OSMRE promulgated a broad definition which relies on a general "takings" standard *(48 FR 41312).* VER is defined in Section 761.5(a) as:

Except for haul roads, that a person possesses valid existing rights for an area protected under section 522(e) of the Act on August 3, 1977, if the application of any of the prohibitions contained in that section to the property interest that

existed on that date would effect a taking of the person's property which would entitle the person to just compensation under the Fifth and Fourteenth Amendments to the United States Constitution.

30 CFR 761.5(a) (1984).

In its March 22, 1985 decision, the court held that the broad takings standard represented such a significant departure from the mechanical tests of the proposed rule that a new notice and comment period was necessary. Accordingly, the court held that the promulgation of the VER definition in 30 CFR 761.5(a) violated the Administrative Procedure Act (APA), *5 U.S.C. 553*, and remanded the definition to the Secretary for proper notice and comment. In Re: Permanent (II), March 22, 1985 Mem. op. at 11. Therefore, to comply with the court's order, OSMRE is suspending the definition of VER in 30 CFR 761.5(a) pending further rulemaking to define VER.

EFFECT OF THE VER SUSPENSION

Federal Programs and Indian Lands Program. This suspension notice has a direct effect on Federal program States and on Indian lands, the rules for which directly reference the remanded section. The suspension of a section of the permanent regulatory program results in the suspension of the corresponding sections of each Federal program and the Indian lands program, unless a specific exception is provided.

The suspension of the VER definition has a particular impact in Federal program States (where OSMRE is the regulatory authority), because the suspension, without the substitution of some test, would leave such programs without regulatory criteria. This is especially important in Tennessee where a number of permit applications are pending and OSMRE will be called upon to make VER determinations before permits may be issued.

The suspension of the VER definition is of particular concern because of the possible effect the suspension could have on property rights. Creation of a regulatory vacuum would be unworkable in this instance because OSMRE does not wish to unduly delay the permitting process or be required to shut down ongoing operations merely because the agency lacks a regulatory definition of VER. However, during the period of the suspension, these problems will be avoided. Suspending the rule has the effect of undoing the improper promulgation and leaving in place the VER test in use before the 1983 definition was promulgated. That test was the 1979 test, including the "needed for and adjacent" test, as modified by the August 4, 1980 suspension notice which implemented the District Court's February 1980 opinion in In Re: Permanent (I) (the 1980 test). The suspension notice stated that pending further rulemaking OSMRE would interpret the regulation as including the court's suggestion that a good faith effort to obtain all permits would establish VER. That interpretation remained in effect until October 14, 1983, when the 1983 VER definition became effective. Under the 1980 test, a demonstration of both property rights and that the person either had made a good faith effort to obtain all permits necessary to mine or that the coal is both needed for and adjacent to an ongoing surface coal mining operation is sufficient to establish VER.

Accordingly, OSMRE will make VER determinations in Federal program States and on Indian lands using the 1980 test. OSMRE will make VER determinations on a case-by-case basis after examining the particular facts of each case, and will consider property rights in existence on August 3, 1977, the owner of which by that date had made a good faith effort to obtain all permits, as one class of circumstances which would invariably entitle the property owner to VER. VER would also exist when there are property rights in existence on August 3, 1977, the owner of which can demonstrate that the coal is both needed for and immediately adjacent to a mining operation in existence prior to August 3, 1977.

FEDERAL LANDS PROGRAM

The Federal regulations at 30 CFR 740.11(a) which were adopted on February 16, 1983, provide that upon approval or promulgation of a regulatory program for a State, that program and the Federal lands rules, 30 CFR Subchapter D, shall apply to surface coal mining and reclamation operations on Federal lands. However, under 30 CFR 740.4(a)(4) and 745.13(o), the Secretary is responsible for making VER determinations on Federal lands within the boundaries of any areas specified in section 522(e)(1) or (e)(2) of the Act, which includes national parks and forests. The Secretary may not delegate that responsibility to a State.

During the period of the suspension OSMRE has decided, consistent with 30 CFR 740.11(a), to make VER determinations on Federal lands, and on non-Federal lands within the boundaries of (e)(1) areas where operations would affect the Federal interest, using the VER definition contained in the appropriate State or Federal regulatory program. Where the State regulatory program contains a VER definition similar to OSMRE's 1979 "all permits" test, OSMRE will apply the test to include the District Court's suggestion that a good faith effort to obtain all permits would establish VER. In States where the State program provides for a "takings" test, OSMRE will not process VER applications within units of the National Park System until a Federal rule is finalized. This decision is based on National Park Service concerns over potential impacts on such units. To date, no such VER applications have been received.

In promulgating a new definition for VER, OSMRE plans to address whether the definition contained in a State program adopted pursuant to the Act should apply or whether one definition should be used nationwide for all Federal VER determinations. The VER rulemaking will clarify what standard will be used, in States with a "takings" test, to process any VER applications within the boundaries of units of the National Park System which may be received although not acted upon prior to the effective date of the Federal rule.

6. SECTION 761.5(c) - "NEEDED FOR AND ADJACENT" TEST

The September 14, 1983 permanent program regulations included as part of the VER definition a specific test, known as the "needed for and adjacent" test, for determining VER. 30 CFR 761.5(c), *48 FR 41315-41316, 41349.* The test had been promulgated as part of OSMRE's permanent program rules in March 1979 (30 CFR 761.5(a)(2)(ii) (1979)). The 1983 rules amplified the "needed for" portion of the definition so that the existing test provides:

A person possesses valid existing rights if the person proposing to conduct surface coal mining operations can demonstrate that the coal is both needed for, and immediately adjacent to, an ongoing surface coal mining operation which existed on August 3, 1977. A determination that the coal is "needed for" will be based upon a finding that the extension of mining is essential to make the surface coal mining operation as a whole economically viable.

30 CFR 761.5(c) (1984).

The court concluded that the rule as promulgated did not have adequate notice and comment under the APA, because it was related to the overall VER definition remanded by the court and because nothing in the proposed rule suggested such an expansion of the "needed for and adjacent" test. The court therefore remanded the test to the Secretary for notice and comment in accordance with the APA. Therefore, OSMRE is suspending paragraph (c) of the VER definition to comply with the court's opinion.

7. SECTION 761.5(d) - CONTINUALLY CREATED VER

On September 14, 1983, OSMRE added paragraph (d) to the definition of VER to provide for "continually created VER." The purpose of the provision is to avoid takings of property interests where areas come under the protection of section 522(e) of the Act after August 3, 1977. Paragraph (d) provides:

"Where an area comes under the protection of section 522(e) of the Act after August 3, 1977, valid existing rights shall be found if --

(1) On the date the protection comes into existence, a validly authorized surface coal mining operation exists on that area; or

(2) The prohibition caused by section 522(e) of the Act, if applied to the property interest that exists on the date the protection comes into existence, would effect a taking of the person's property which would entitle the person to just compensation under the Fifth and Fourteenth Amendments to the United States Constitution."

30 CFR 761.5(d) (1984).

The court upheld the concept of "continually created VER" but remanded for further notice and comment that portion of the regulation (30 CFR 761.5(d)(2)) which incorporates the takings test of Section 761.5(a). Therefore, to comply with the court's order, OSMRE is suspending subparagraph (d)(2) of the VER definition insofar as it incorporates the takings test of paragraph (a). However, the "continually created VER" test in subparagraph (d)(1) will remain in effect.

8. SECTION 761.11(c) - REQUIREMENT THAT HISTORIC PLACES BE "PUBLICLY OWNED"

Section 522(e)(3) of the Act prohibits mining that would adversely affect any "publicly owned park or places included in the National Register of Historic Sites" with certain exceptions. On September 14, 1983, OSMRE revised its regulations at 30 CFR 761.11(c) and applied the term "publicly owned" to both "park" and "places included in the National Register of Historic Places." This limited the application of the prohibition of mining only to publicly owned places listed in the National Register of Historic Places, and publicly owned parks.

OSMRE's interpretation was challenged. Plaintiffs contended that the prohibition of mining should be afforded to any place listed in the National Register of Historic Places, without regard to ownership.

The District Court agreed. The court held that the term "publicly owned" does not apply to "places included in the National Register of Historic Places." In Re: Permanent (II), July 15, 1985 Mem. Op. at 73-76.

OSMRE is suspending the words "publicly owned" the second time they appear in Section 761.11(c). This will have the effect of extending the prohibition to mining which will adversely affect any places included in the National Register of Historic Places, without regard to ownership of the place.

A directly related provision is 30 CFR 761.12(f). This provision implements the exception in section 522(e)(3) of the Act which allows mining in historic places or parks when approved by the Federal, State, or local agency with jurisdiction over the place or park. Section 761.12(f) provides the mechanism for the approval. This notice will extend the approval mechanism to historic places which are not publicly owned so as to conform with the extended prohibition. Thus, OSMRE is suspending the words "publicly owned" when they appear before "place," and "National Register place" in Section 761.12(f).

9. SECTION 761.11(h) - AREAS WHERE MINING IS PROHIBITED

Section 761.11(h) provides:

There will be no surface coal mining, permitting, licensing, or exploration of Federal lands in the National Park System, National Wildlife System, National System of Trails, National Wilderness Preservation System, Wild and Scenic Rivers System, or National Recreation Areas unless called for by Acts of Congress. (Emphasis added.)

30 CFR 761.11(h) (1984).

OSMRE added Section 761.11(h) in response to numerous comments from persons concerned that mining or drilling would occur in National Parks or other areas protected under section 522(e)(1) of the Act. The court held that there appeared to be no rational basis for distinguishing between Federal and non-Federal lands in this context, since section 522(e)(1) prohibits, subject to VER and except for operations existing on August 3, 1977, surface coal mining operations on any lands within the statutorily protected areas. The court remanded the rule for lack of adequate notice and comment. Therefore, OSMRE is suspending the rule to comply with the court order. Section 761.11(a), however, will continue to implement the section 522(e)(1) prohibition on mining within the protected areas.

10. SECTIONS 764.15 AND 769.14 - SUSPENSION OF UNSUITABILITY PETITIONS

OSMRE's rules governing unsuitability petitions, adopted on September 14, 1983, included provisions that authorized the suspension of the processing of petitions where consideration of the petition is premature because there is no real or foreseeable potential for mining. In adopting this rule OSMRE wanted to provide a mechanism to allow deferral of consideration of petitions for unsuitability determinations until mining was sufficiently likely that a decision on the petition would be meaningful. The petition suspension provisions apply to petitions for declaring Federal lands unsuitable, 30 CFR 769.14(b)(2), and to petitions to State regulatory authorities to declare non-Federal, non-Indian lands unsuitable, 30 CFR 764.15(a)(3). Should a petition be suspended, the rules require that it be processed as soon as it becomes ripe.

Plaintiffs challenged OSMRE's rules, contending that there was no basis in the Act for a ripeness determination. They also contended that it allowed OSMRE to waive the one-year statutory deadline in section 522(c) of the Act for petition

decisions.

The District Court ruled that the regulations with regard to petition suspension were inconsistent with the Act and remanded the rules.

OSMRE is suspending the rules which authorize the suspension of petitions and all references in other portions of the rules to suspended petitions. Specifically, Section 764.15(a)(3), which provides for petition suspensions by State regulatory authorities, is suspended. Section 764.15(a)(8), which provides for the resumption of processing of petitions where suspension has occurred and a permit application has since been filed, is also suspended.

With regard to petitions to designate Federal lands unsuitable, OSMRE is suspending all of paragraphs 769.14(a)(3), (b)(2), and (h). In addition, OSMRE is suspending the words "ripe for further processing" or "ripe" in Sections 769.14 (a)(1) and (c) respectively.

These suspensions mean that the regulatory authority may not suspend petitions to designate lands unsuitable. In the initial processing of petitions, the appropriate regulatory authority will make the completeness and other determinations required by the rules, but no ripeness or foreseeability of mining determination will be a prerequisite to petition processing.

11. SECTION 772.11(a) - COAL EXPLORATION NOTICES OF INTENT

OSMRE's 1979 rules with regard to coal exploration required all persons who would conduct coal exploration and who would extract 250 tons or less of coal to file a notice of intent to explore. Those who would extract in excess of 250 tons were required to obtain a coal exploration permit.

OSMRE revised its rules with regard to coal exploration on September 8, 1983. The revised Section 772.11(a) required that any person who intends to conduct coal exploration operations outside a permit area during which 250 tons or less of coal will be removed and which may substantially disturb the natural land surface must file a notice of intent to explore with the regulatory authority. Thus a notice of intent was not required in every case, but only where coal exploration would substantially disturb the land surface.

The District Court ruled that OSMRE had failed to adequately explain its departure from the previous rules, and remanded Section 772.11(a).

OSMRE is suspending Section 772.11(a) insofar as it limits the responsibility to submit a notice of intent to explore to those persons who will substantially disturb the natural land surface. This means that all persons conducting coal exploration will be required to submit a notice of intent to explore whether or not they will substantially disturb the natural land surface.

The requirement to file a notice of intent in the Tennessee Federal program, 30 CFR 942.772, which differs from both the 1979 and 1983 national rules, remains unaffected by this suspension.

12. SECTIONS 772.11(b)(3) AND 772.12(b) - COAL EXPLORATION NARRATIVE

OSMRE's rules at 30 CFR 772.11(b)(3) and 772.12(b)(3) identify information which must be submitted as part of a notice of intent to explore or as part of an application for a coal exploration permit, respectively. Paragraphs 772.11(b)(3) and 772.12(b) require "a narrative or map." This allows the submission of either a narrative or a map. OSMRE adopted this provision because the District Court for the District of Columbia, in its May 16, 1980 decision in In Re: Permanent (I) had ruled that OSMRE had erred in its 1979 rules by requiring both a narrative description and a map.

OSMRE's 1983 rule was challenged because it does not require a narrative description of the exploration area in all instances. The plaintiffs contended that a map alone is insufficient to describe a proposed exploration area.

The District Court remanded OSMRE's rules. In Re: Permanent (II), July 15, 1985 Mem. op. at 139-140.

OSMRE is suspending Sections 772.11(b)(3) and 772.12(b)(3) insofar as they allow a coal exploration notice or application to be submitted which does not include a narrative describing the exploration area. This will mean that notices of intent and applications for coal exploration operations must include narratives.

13. SECTION 773.11 - CONTINUED OPERATIONS UNDER THE INITIAL REGULATORY PROGRAM

Section 773.11(b)(2) permits an operator conducting operations under the initial regulatory program to continue to conduct such operation while the permanent program permit application is being processed, beyond eight months after the State program or Federal program has been approved. The regulation allows continued operations by operators who are operating with a valid initial program permit and operators who are lawfully operating in areas where no such permit is required.

Section 773.11(b)(2) was challenged because it permits mining by initial program operators who do not have an initial permit from the State. Challengers relied on Section 506(a) of the Act, which provides for continued operations by persons operating "under a permit from the State. . . ." The District Court held that continued operation could only be allowed where initial program permits had been issued. The court remanded the rule.

OSMRE is suspending the phrase "under the initial regulatory program or" in Section 773.11(b)(2). This will have the effect of limiting the authority to continue operations after eight months after a program is implemented to those operators who had a permit from the State during the initial regulatory program.

14. SECTIONS 785.16, 816.133(d), AND 817.133(d) - VARIANCES FROM APPROXIMATE ORIGINAL CONTOUR

Section 515(e) of the Act authorizes a limited variance from the requirement to return mined lands to approximate original contour (AOC). OSMRE's September 1, 1983 rulemaking provided for variances from AOC restoration requirements in both steep slope and in non-steep slope areas. *48 FR 39892.*

OSMRE was challenged on its adoption of a variance procedure applicable in non-steep slope areas. The challengers contended that the Act and legislative history only authorize variances from AOC in steep slope areas. The Secretary pointed to both pre- and post-enactment Congressional statements which support a more general variance provision.

The District Court ruled that the Act does not permit a variance from AOC unless steep slope mining is involved. In Re: Permanent (II), July 15, 1985 Mem. op. at 132. Accordingly, the District Court remanded Sections 785.16, 816.133(d) and 817.133(d).

OSMRE is therefore suspending Sections 785.16, 816.133(d) and 817.133(d) insofar as they permit the granting of variances from AOC for surface coal mining operations in non-steep slope areas.

15. SECTIONS 780.21 AND 784.14 - HYDROLOGIC INFORMATION TO BE SUBMITTED

OSMRE's September 26, 1983 rulemaking concerned hydrologic resources information. *48 FR 43956.* Sections 780.21(f) and 784.14(e) established the requirements for the probable hydrologic consequences (PHC) determination. This is the predictive estimate of the probable hydrologic consequences of the proposed operation upon the quantity and quality of ground water and surface water which must be submitted by the applicant.

Challengers to the regulations contended that OSMRE failed to require the information required by section 507(b)(11) of the Act. In particular, they contended that the rule should be remanded because it only requires operators to submit hydrologic information for operations conducted during the term of the permit, and not for the entire life of the mine.

The District Court ruled that section 507(b)(11) of the Act does permit a regulatory authority to require operators to submit hydrologic data for the life of the mine in the PHC determination. In Re: Permanent (II), July 15, 1985 Mem. op. at 16. It also ruled that the Secretary had erred by failing to provide an adequate explanation for not requiring life of the mine analysis in the PHC. Thus, the Court remanded the rule.

OSMRE will conduct a rulemaking at a later date in order to determine whether and under what circumstances hydrologic information submitted in the permit application must cover the life of the mine. In the interim, OSMRE is suspending Sections 780.21(f) and 784.14(e) to the extent that those sections limit a regulatory authority from requiring a permit applicant to address life-of-the-mine hydrologic impacts in the probable hydrologic consequences determination.

In Federal program States and on Indian lands, where OSMRE is the regulatory authority, this suspension means that in evaluating the appropriate scope of a PHC determination, OSMRE will determine on a case-by-case basis whether and to what degree a permit applicant should include hydrologic information for operations conducted outside of the permit area during the entire life of the operation.

16. SECTIONS 816.46(b)(2) AND 817.46(b)(2) - SILTATION STRUCTURES

OSMRE's September 26, 1983 rulemaking established new requirements for siltation structures. *48 FR 43956.* At 30 CFR 816.46(a)(3) and 817.46(a)(3), OSMRE requires that all surface drainage from a disturbed area be passed through a siltation structure. In Sections 816.46 and 817.46, OSMRE defined a siltation structure to include a sedimentation pond, a series of sedimentation ponds and other treatment facilities. Other treatment facilities were defined in that section to include treatments with point source discharges used to prevent additional contribution of suspended solids to streamflow or runoff outside the permit area. This requirement was adopted in order to implement sections 515(b)(10)(B) and 516(b)(9)(B) of the Act, which mandate the use of "best technology currently available" (BTCA) to prevent additional contributions of suspended solids to streamflow or runoff outside the permit area.

Challengers to this provision asserted that in certain circumstances siltation structures can cause long term and short term adverse effects on the hydrologic balance. In particular they pointed to problems in the Western United States such as increased erosion, channel deepening and enlargement, and increased flooding in low lying areas, attributed to siltation structures.

The District Court ruled that the September 26, 1983 preamble fails to articulate a reason for requiring siltation structures in every instance. In Re: Permanent (II), July 15, 1985 Mem. op. at 102-108. In particular the court noted that "the record evidence that pointed to potential negative impacts of siltation structures in the West was dismissed without reasoned analysis. 'OSMRE's recognition that the use of sedimentation ponds and other siltation structures in the West presents some problems', *48 FR 44030 (1983)* was not followed by any recognition of what those problems are and why, in the face of those problems, siltation ponds were still considered BTCA." Id. Thus, the court remanded Sections 816.46(b)(2) and 817.46(b)(2).

OSMRE is suspending Sections 816.46(b)(2) and 817.46(b)(2). This means that the regulatory authority must determine on a case-by-case basis what constitutes the "best technology currently available" as required by the Act and 30 CFR 701.5 which defines BTCA. In many instances, State programs have defined BTCA and such definitions are to be followed. OSMRE anticipates that sedimentation ponds or some other siltation structure will most likely be the best technology currently available; however, a case-by-case determination should be made. Moreover, OSMRE is not suspending its performance standards with regard to siltation structures or sedimentation ponds. Thus, in those instances where sedimentation ponds or other siltation structures are determined to be BTCA, the performance standards in Sections 816.46(b), (c), and (d), and 817.46(b), (c), and (d) will continue to apply. Where BTCA includes a discharge from a point source, effluent limits will continue to apply and a NPDES permit is needed. In situations where sediment control measures other than siltation structures are determined as BTCA, the performance standards of Sections 816.45 and 817.45 will control.

17. SECTIONS 816.49(a)(3), 816.49(a)(5)(i), 817.49(a)(3) AND 817.49(a)(5(i) - IMPOUNDMENTS

On September 26, 1983, OSMRE also imposed new performance standards on impoundments. *48 FR 43956.* OSMRE's rules at Sections 816.49(a)(3) and 817.49(a)(3) impose a minimum static safety factor of 1.5 and a seismic safety factor of 1.2 for all impoundments used for surface and underground mines, respectively. OSMRE's rules at Sections 816.49(a)(5)(i) and 817.49(a)(5)(i) establish stability requirements for foundation abutments and require sufficient foundation investigation and laboratory testing to determine design requirements for foundation stability.

Challengers to the rules contended that OSMRE's proposed rule had not included a static safety factor of 1.5 for small sedimentation ponds. They claimed that factor had only been proposed for larger sedimentation ponds. Similarly, they

contended that the requirements for foundation investigation and laboratory testing were not proposed for small sedimentation ponds.

The District Court determined that OSMRE's rule must be remanded for additional rulemaking procedures to the extent that it applies to small sedimentation ponds not previously required to meet the 1.5 static safety factor. In Re: Permanent (II), July 15, 1985 Mem. op. at 108-113.

Accordingly, OSMRE is suspending Sections 816.49(a)(3), 816.49(a)(5)(i), 817.49(a)(3) and 817.49(a)(5)(i) insofar as they apply to small sedimentation ponds. Small sedimentation ponds are those ponds in which no embankment is more than 20 feet in height, measured from the upstream toe of the embankment to the crest of the emergency spillway and with a storage volume of less than 20 acre feet.

18. SECTIONS 816.49(a)(9) AND 817.49(a)(9) - UNDERWATER HIGHWALLS IN IMPOUNDMENTS

OSMRE's September 26, 1983 rulemaking included other regulations with regard to permanent impoundments. *48 FR 43956.* Sections 816.49(a)(9) and 817.49(a)(9) allow the retention of segments of highwalls in certain impoundments if the segment is located underwater. OSMRE's rules allow the retention of such highwalls only where the vertical portion of the highwall is completely below the low-water line, and sufficiently so to provide adequate safety and access for the proposed water users.

Challengers to the rules contended that in all cases highwalls must be eliminated, and cited section 515(b)(3) of the Act. The District Court ruled that the Act did not authorize the retention of highwalls in impoundments, even if the highwall was under water. Thus, the Court remanded the regulations. In Re: Permanent (II), July 15, 1985 Mem. op. at 117.

OSMRE is suspending Sections 816.49(a)(9) and 817.49(a)(9) insofar as they permit the retention of highwalls in permanent impoundments. This will mean that underwater highwalls may not be retained in permanent impoundments. The requirement to eliminate highwalls underwater does not mean that the approximate premining contour must be achieved within the impoundment. As was required by the initial program rules at 30 CFR 715.14(e), only appropriate contour will be required within an impoundment so long as highwalls are eliminated.

19. SECTIONS 816.49, 817.49, 816.84(b)(2) AND 817.84(b)(2) - MSHA SIZE DISTINCTIONS

OSMRE's regulations at Sections 816.49 and 817.49 classify impoundments based on size. Large impoundments are subject to more stringent requirements than smaller impoundments. OSMRE's regulations reference regulations of the Mine Safety and Health Administration (MSHA) at 30 CFR 77.216 for the size distinctions. Challengers to the regulations contended that OSMRE's adoption of the size distinctions used by MSHA was improper. They contended that OSMRE should independently classify impoundment size.

The District Court ruled that it was improper to rely on MSHA's size distinctions, and accordingly remanded Sections 816.49 and 817.49. In Re: Permanent (II), July 15, 1985 Mem. op. at 30-32.

OSMRE is not suspending those provisions. The effect of a suspension removing these distinctions would be either to require operators who have small impoundments to satisfy performance standards promulgated for large impoundments, or, in the alternative, to eliminate requirements for large impoundments to conform with the lesser standards imposed on small impoundments. The effect of either of these options would be to modify standards in a manner different than the rules in place before 1983. Thus, because it is impossible merely to undo the transaction, OSMRE will propose a new regulation on this subject to comply with the court order.

OSMRE's coal waste regulations also reference the MSHA size distinctions. Those regulations except small coal waste impounding structures from achieving the same combination spillway requirement as larger impounding structures. OSMRE is suspending Sections 816.84(b) and 817.84(b) to the extent that the combined spillway capacity of impounding structures consisting of or impounding coal waste, which do not meet the MSHA size criteria, are exempt from OSMRE's requirements. This means that any impounding structure, regardless of size, either made of or impounding coal mine waste must have a spillway or spillways able to safely pass the 100-year, 6-hour design precipitation event.

20. SECTIONS 816.49(a)(8), 816.84(b), 817.49(a)(8), AND 817.84(b) - NUMBERS OF SPILLWAYS

OSMRE regulations at Sections 816.49(a)(8) and 816.84(b)(2) and 817.49(a)(8) and 817.84(b)(2) require that "the combination of principal and emergency spillways shall be able to safely pass the . . . design precipitation event."

OSMRE's regulation with regard to the necessity for having more than one spillway was challenged. In briefing the question, the Secretary determined that the challenge had merit and stated his intention to propose a rule specifying that one spillway capable of safely passing the design precipitation event may be used instead of separate principal and emergency spillways. In Re: Permanent (II), Federal Defendants' Memorandum in Support, filed December 17, 1984, p. 41 n. 26.

OSMRE is suspending Sections 816.49(a)(8), 816.84(b)(2), 817.49(a)(8), and 817.84(b)(2) to the extent that they require separate principal and emergency spillways where one spillway may safely pass the design storm event.

21. SECTIONS 816.81(a) and 817.81(a) - COAL WASTE GRAVITY TRANSPORT

OSMRE's September 26, 1983 rulemaking dealt with several coal waste issues. *48 FR 44006.* In its 1979 rules OSMRE had required that coal mine waste be "hauled and conveyed and placed in a controlled manner." In revising the rules in 1983 OSMRE adopted a rule which required that coal mine waste be "placed in a controlled manner."

Challengers to the rule contended that the record did not support allowing end or side dumping of coal waste.

The District Court ruled that OSMRE's rule did not have sufficient explanation for deletion of the requirement that coal mine waste be "hauled and conveyed" and did not adequately justify the departure from the previous conclusion that end or side dumping were inherently dangerous activities, even where the operator is then required to take some additional step, like spreading the piles in layers. Thus, the court remanded the rule. In Re: Permanent (II), July 15, 1985 Mem. op. at 26-27.

Accordingly, OSMRE is suspending the rule to the extent that the end dumping or side dumping of coal waste is allowed.

22. SECTIONS 816.81(c) and 817.81(c) - COMPACTION OF COAL WASTE

OSMRE's 1979 regulations required coal waste banks to be "compacted to attain 90 percent of the maximum dry density to prevent spontaneous combustion . . . ." The regulations published on September 26, 1983 allow construction of coal waste banks without a specific compaction standard provided they achieve a minimum long term safety factor of 1.5. 30 CFR 816.81(c)(2); 817.81(c)(2). *48 FR 44006.* This allows refuse piles to be constructed in some instances with less compaction than previously required.

Challengers to the 1983 rule contended that the Secretary erred by adopting a performance standard rather than a design standard.

The court ruled that the Secretary had failed to explain his removal of the design standard with regard to compaction, and failed to provide design standards for coal waste piles as required by section 515(f) of the Act. The court remanded the rule. In Re: Permanent (II), July 15, 1985 Mem. op. at 27-29.

Thus, OSMRE is suspending Sections 816.81(c)(2) and 817.81(c)(2) to the extent that they permit coal waste refuse piles to be constructed or modified with less compaction than necessary to attain 90 percent of the maximum dry density determined in accordance with the standard Proctor method. Use of the previous standard will be required until OSMRE adopts a further rule change.

23. SECTIONS 816.83 AND 817.83 - DISPOSAL OF COAL WASTE IN TWO FOOT LIFTS

OSMRE's coal waste rules establish requirements for lift thickness. OSMRE's 1979 rules required that coal refuse banks not be constructed in lifts of thickness in excess of two feet. In its September 26, 1983 rules at Sections 816.83

and 817.83, *48 FR 44028 (1983),* OSMRE deleted that requirement, and instead required coal refuse piles be constructed in accordance with the Mine Safety and Health Administration's (MSHA) rules at 30 CFR 77.215. MSHA's rules allow refuse piles to be constructed with lifts in excess of two feet thick if a 1.5 safety factor is attained and if approved by the MSHA district manager.

Challengers to the rule contended that the Secretary had failed to promulgate design requirements, as required by section 515(f) and that the Secretary had improperly delegated his responsibilities to MSHA.

The court ruled that the regulation violates section 515(f) of the Act by relying on a performance standard. In Re: Permanent (II), July 15, 1985 Mem. op. at 30.

Accordingly, OSMRE is suspending the rule to the extent that it allows coal waste refuse piles to be constructed in lifts larger than two feet in thickness. In Federal program States such as Tennessee, this means OSMRE will employ a maximum two foot lift standard in reviewing coal refuse pile designs until a new rule is promulgated.

24. SECTIONS 816.89 AND 817.89 - HAZARDOUS WASTES

In its September 26, 1983 rulemaking with regard to coal waste, OSMRE adopted Sections 816.89(d) and 817.89(d). These provisions required coal operators to dispose of "hazardous" noncoal mine wastes consistent with the Resource Conservation and Recovery Act (RCRA), and 40 CFR Part 261.

The District Court ruled that Sections 816.89(d) and 817.89(d) were promulgated without notice and comment. Thus, OSMRE is suspending those provisions and will not enforce any requirements of RCRA regarding hazardous noncoal mine wastes. This suspension of OSMRE's rules is not intended to affect in any manner the applicability of the Environmental Protection Agency rules which implement RCRA.

25. SECTIONS 816.116 AND 817.116 - REVEGETATION ISSUES: REPAIR OF RILLS AND GULLIES AND REPLANTING OF TREES

Section 515(b)(20) of the Act establishes a five- or ten-year period of responsibility which begins after the last year of augmented seeding, fertilizing, irrigation or other work on reclaimed areas. OSMRE's rules governing revegetation, published on September 2, 1983, *48 FR 40153,* raised two issues with regard to what postmining practices could be undertaken without restarting the five- or ten-year period of responsibility before which the operator's performance bond may not be fully released. These involve the concept of "normal conservation practices." OSMRE's rules at 30 CFR 816.116 and 817.116 allow normal conservation practices to occur without restarting the period of responsibility.

OSMRE's rules at Sections 816.116(c)(4) and 817.116(c)(4) permit the regulatory authority to "approve selective husbandry practices excluding augmented seeding, fertilization or irrigation without extending the period of responsibility for revegetation success and bond liability. . . ." OSMRE's preamble to that provision stated that "the repair of rills and gullies including reseeding can occur without extending the period of responsibility for revegetation success" only if it is approved by the regulatory authority after consideration of normal conservation practices in the region. *48 FR 40157.*

Challengers to the rule contended that the repair of rills and gullies is never a "normal conservation practice." While the District Court did not find that the rule was unreasonable, it did not find support in the record for the proposition that repair of rills and gullies is a normal conservation practice.

Accordingly, the court determined that in the absence of such record support, OSMRE may not promulgate a rule that permits the repair of rills and gullies to be considered a normal conservation practice. In Re: Permanent (II), July 15, 1985 Mem. op. at 92-94. Accordingly, OSMRE is suspending 30 CFR 816.116(c)(4) and 817.116(c)(4) insofar as they allow the repair of rills and gullies to occur without restarting the period of responsibility for the areas of repair.

A closely related issue involves the replanting of trees. OSMRE's rules, at Sections 816.116(b)(3)(ii) and 817.116(b)(3)(ii), permit the inclusion of trees and shrubs which have been in place for three growing seasons, or in areas with a ten-year period of responsibility, for eight growing seasons in the determination of the number of trees and shrubs for the purpose of determining revegetation success. Challengers to the rule contended that the inclusion of trees which have been in place less than the full responsibility period is improper.

The District Court ruled that the record did not demonstrate that the replanting of trees is a normal husbandry practice, and accordingly, remanded the rule. In Re: Permanent (II), July 15, 1985 Mem. op. at 93-95.

Thus, OSMRE is suspending Sections 816.116(b)(3)(ii) and 816.117(b)(3)(ii) to the extent that they authorize the inclusion of trees and shrubs which have been in place less than the full period of responsibility in determining the success of stocking.

This will mean that OSMRE will not approve the determination of reclamation success or authorize bond release on the basis of trees or shrubs in place less than the applicable period of liability.

26. SECTIONS 816.116(c)(2) AND 817.116(c)(2) - PERIOD FOR MEASURING REVEGETATION SUCCESS

OSMRE's 1983 revegetation rules at Sections 816.116(c)(2) and 817.116(c)(2) provide that for areas which receive more than 26 inches of rainfall per year, "vegetation parameters identified in paragraph (b) of this section shall equal or exceed the approved success standard during the growing season of the last year of the responsibility period or, if required by the regulatory authority, during the growing seasons of the last two years of the responsibility period."

Challengers to the rule contended that the rule was inadequate, because revegetation success in areas with more than 26 inches of rainfall could not be demonstrated over less than the last two years of the responsibility period. They pointed to evidence in the rulemaking for OSMRE's 1979 rules which supported a two-year period for determining success.

The District Court ruled that OSMRE's change from a two-year to a one-year period for measuring attainment of revegetation success was not adequately supported in the record. The court remanded Sections 816.116(c)(2) and 817.116(c)(2). In Re: Permanent (II), July 15, 1985 Mem. op. at 96-99.

Thus, OSMRE is suspending Sections 816.116(c)(2) and 817.116(c)(2) to the extent that these sections permit the determination of revegetation success to be measured over less than the growing seasons of the last two years of the responsibility period in areas with 26 inches or more of rainfall per year.

III. PROCEDURAL MATTERS

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 1983 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 a significant economic impact on a substantial number of small entities for the same reasons that the promulgation of the rules in 1983 did not have such an impact.

National Environmental Policy Act

The effect of the suspensions covered by this notice is covered in two environmental impact statements prepared by the Department of the Interior. These are the Final Environmental Impact Statement OSM-EIS-1 and the Final Environmental Impact Statement OSM-EIS-1: Supplement. These are on file at the OSMRE Administrative Record at 1100 L Street, NW., Washington, DC.

Paperwork Reduction Act

No new information collection requirements are imposed by the suspensions in Parts 701, 761, 764, 769, 773, 785, 816 and 817. Additional information requirements of Parts 772, 780 and 784 are imposed pursuant to court order in In Re: Permanent Surface Mining Regulation Litigation (II), No. 79-1144 (D.D.C. July 15, 1985), and are covered by OMB approvals for these parts having Approval Numbers 1029-0033, 1029-0036, and 1029-0039, respectively. The obligation to respond is mandatory.

LIST OF SUBJECTS

30 CFR Part 701
Coal mining, Law enforcement, Surface mining, Underground mining.

30 CFR Part 761
Coal mining, Historic preservation, Monuments and Memorials, National forests, National parks, Reporting requirements, Surface mining, Underground mining, Wildlife refuges.

30 CFR Part 764
Administrative practice and procedure, Coal mining, Reporting requirements, Surface mining, Underground mining.

30 CFR Part 769
Administrative practice and procedure, Coal mining, Reporting requirements, Surface mining, Underground mining.

30 CFR Part 772
Coal mining, Reporting and recordkeeping requirements, Surface mining, Underground mining.

30 CFR Part 773
Coal mining, Reporting and recordkeeping requirements, Surface mining, Underground mining.

30 CFR Part 780
Coal mining, Reporting and recordkeeping requirements, Surface mining.

30 CFR Part 784
Coal mining, Reporting and recordkeeping requirements, Underground mining.

30 CFR Part 785
Coal mining, Reporting requirements, Surface mining, Underground mining.

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 foregoing reasons, Parts 701, 761, 764, 769, 772, 773, 780, 784, 785, 816, and 817 are amended as follows:

Dated: November 10, 1986.
J. Steven Griles, Assistant Secretary Land and Minerals Management.

PART 701 -- PERMANENT REGULATORY PROGRAM

1. The authority citation for Part 70 is revised to read as follows:

Authority: *30 U.S.C. 1201* et seq.

SECTION 701.5 [Amended]

2. In Section 701.5, the definition of "affected area" is suspended insofar as it excludes roads which are included in the definition of "surface coal mining operations."

3. In Section 701.5, the definition of "previously mined area" is suspended insofar as it applies to areas upon which surface coal mining operations were previously conducted that were or should have been subject to the Act.

PART 761 -- AREAS DESIGNATED BY ACT OF CONGRESS

4. The authority citation for Part 761 is revised as follows:

Authority: *30 U.S.C. 1201* et seq.

SECTION 761.5 [Amended]

5. In Section 761.5, in the definition of "cemetery," the phrase "except for private family burial grounds" is suspended.

6. In Section 761.5, the definition of "significant recreational, timber, economic, or other values incompatible with surface coal mining operations" is suspended insofar as the listed values are evaluated for compatibility solely in terms of reclaimability.

7. In Section 761.5, paragraphs (a) and (c) of the definition of "valid existing rights" are suspended, and subparagraph (d)(2) is suspended insofar as it incorporates the takings test of paragraph (a).

SECTION 761.11 [Amended]

8. In Section 761.11(c), the words "publicly owned" immediately preceding the word "places" are suspended.

9. In Section 761.11, paragraph (h) is suspended.

SECTION 761.12 [Amended]

10. In Section 761.12(f)(1), the words "publicly owned" immediately preceding the word "place" and immediately preceding the word "National" are suspended.

PART 764 -- STATE PROCESSES FOR DESIGNATING AREAS UNSUITABLE FOR SURFACE COAL MINING OPERATIONS

11. The authority citation for Part 764 is revised as follows:

Authority: *30 U.S.C. 1201* et seq.

SECTION 764.15 [Amended]

12. Paragraphs (a)(3) and (a)(8) of Section 764.15 are suspended.

PART 769 -- PETITION PROCESS FOR DESIGNATION OF FEDERAL LANDS AS UNSUITABLE FOR ALL OR CERTAIN TYPES OF SURFACE COAL MINING OPERATIONS AND FOR TERMINATION OF PREVIOUS DESIGNATIONS

5113. The authority citation for Part 769 is revised as follows:

Authority: *30 U.S.C. 1201* et seq.

SECTION 769.14 [Amended]

14. In paragraph (a)(1) of Section 769.14, the words "ripe for further processing" are suspended.

15. Paragraphs (a)(3) and (b)(2) of Section 769.14 are suspended.

16. In paragraph (c) of Section 769.14, the word "ripe" is suspended.

17. Paragraph (h) of Section 769.14 is suspended.

PART 772 -- REQUIREMENTS FOR COAL EXPLORATION

18. The authority citation for Part 772 is revised as follows:

Authority: *30 U.S.C. 1201* et seq.

SECTION 772.11 [Amended]

19. In paragraph (a) of Section 772.11, the phrase "during which 250 tons or less of coal will be removed and which will substantially disturb the natural land surface," is suspended.

20. Paragraph (b)(3) of Section 772.11 is suspended to the extent that it does not require the submission of a narrative describing the exploration area.

SECTION 772.12 [Amended]

21. Paragraph (b)(3) of Section 772.12 is suspended to the extent that it does not require the submission of a narrative describing the proposed exploration area.

PART 773 -- REQUIREMENTS FOR PERMITS AND PERMIT PROCESSING

22. The authority citation for Part 773 is revised as follows:

Authority: *30 U.S.C. 1201* et seq.

SECTION 773.11 [Amended]

23. In paragraph (b)(2) of Section 773.11, the phrase "under the initial regulatory program, or" is suspended.

PART 780 -- SURFACE MINING PERMIT APPLICATIONS -- MINIMUM REQUIREMENT FOR RECLAMATION AND OPERATION PLAN

24. The authority citation for Part 780 continues to read as follows:

Authority: Pub. L. 95-87, 91 Stat. 445 *(30 U.S.C. 1201* et seq.) and Section 115, Pub. L. 98-146, 97 Stat. 938 *(30*

U.S.C. 1257).

SECTION 780.21 [Amended]

25. Paragraph (f) of Section 780.21 is suspended insofar as it limits a regulatory authority from requiring an applicant to address life-of-the-mine hydrologic impacts in the probable hydrologic consequences determination.

PART 784 -- UNDERGROUND MINING PERMIT APPLICATIONS -- MINIMUM REQUIREMENT FOR RECLAMATION AND OPERATION PLAN

26. The authority citation for Part 784 continues as follows:

Authority: Pub. L. 95-87, 91 Stat. 445 *(30 U.S.C. 1201* et seq.) and Section 115, Pub. L. 98-146, 97 Stat. 938 *(30 U.S.C. 1257),* unless otherwise noted.

SECTION 784.14 [Amended]

27. Paragraph (e) of Section 784.14 is suspended insofar as it limits a regulatory authority from requiring an applicant to address life-of-the-mine hydrologic impacts in the probable hydrologic consequences determination.

PART 785 -- REQUIREMENTS FOR PERMITS FOR SPECIAL CATEGORIES OF MINING

28. The authority citation for Part 785 is revised as follows:

Authority: *30 U.S.C. 1201* et seq.

SECTION 785.16 [Amended]

29. Section 785.16 is suspended insofar as it authorizes any variance from approximate original contour for surface coal mining operations in any area which is not a steep slope area.

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

30. The authority citation for Part 816 continues as follows:

Authority: Pub. L. 95-87, 91 Stat. 445 *(30 U.S.C. 1201* et seq.) and Section 115, Pub. L. 98-146, 97 Stat. 938 *(30 U.S.C. 1257),* unless otherwise noted.

SECTION 816.46 [Amended]

31. Paragraph (b)(2) of Section 816.46 is suspended.

SECTION 816.49 [Amended]

32. Paragraphs (a)(3) and (a)(5)(i) of Section 816.49 are suspended insofar as they apply to sedimentation ponds in which no embankment is at least twenty feet in height as measured from the upstream toe of the embankment to the crest of the emergency spillway and which have a storage volume of less than 20 acre feet.

33. Paragraph (a)(8) of Section 816.49 is suspended insofar as it requires separate principal and emergency spillways where one spillway may safely pass the design storm event.

34. Paragraph (a)(9) of Section 816.49 is suspended insofar as it permits the retention of highwalls in permanent impoundments.

SECTION 816.81 [Amended]

35. Paragraph (a) of Section 816.81 is suspended insofar as it allows end dumping or side dumping of coal mine waste.

36. Paragraph (c)(2) of Section 816.81 is suspended insofar as it allows coal waste refuse piles to be constructed or modified with compaction which does not attain 90 percent of the maximum dry density determined in accordance with the standard Proctor method.

SECTION 816.83 [Amended]

37. Section 816.83 is suspended insofar as it permits the construction of coal refuse piles using lifts of greater than 2 feet thickness.

SECTION 816.84 [Amended]

38. Paragraph (b)(2) of Section 816.84 is suspended insofar as it permits any impounding structure which is constructed of coal mine waste or intended to impound coal mine waste to have spillways, the combined capacity of which do not safely pass the 100-year 6-hour design precipitation event. It is also suspended insofar as it requires separate principal and emergency spillways where one will safely pass the 100-year 6-hour storm event.

SECTION 816.89 [Amended]

39. Paragraph (d) of Section 816.89 is suspended.

40. Paragraph (b)(3)(ii) of Section 816.116 is suspended insofar as it permits the counting of trees and shrubs which have been in place less than the applicable period of responsibility in determining revegetation success.

41. Paragraph (c)(2) of Section 816.116 is suspended insofar as it permits revegetation success to be measured over less than the growing seasons of the last two years of the responsibility period.

42. Paragraph (c)(4) of Section 816.116 is suspended insofar as it permits the repair of rills and gullies without restarting the period of responsibility.

SECTION 816.133 [Amended]

43. Paragraph (d) of Section 816.133 is suspended insofar as it authorizes any variance from approximate original contour for surface coal mining operations in any area which is not a steep slope area.

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

44. The Authority citation for Part 817 continues as follows:

Authority: Pub. L. 95-87, 91 Stat. 445 *(30 U.S.C. 1201* et seq.) and Section 115, Pub. L. 98-146, 97 Stat. 938 *(30 U.S.C. 1257)*, unless otherwise noted.

SECTION 817.46 [Amended]

45. Paragraph (b)(2) of Section 827.46 is suspended.

SECTION 817.49 [Amended]

46. Paragraphs (a)(3) and (a)(5)(i) of Section 817.49 are suspended insofar as they apply to sedimentation ponds in which no embankment is at least twenty feet in height as measured from the upstream toe of the embankment to the crest of the emergency spillway and which have a storage volume of less than 20 acre feet.

47. Paragraph (a)(8) of Section 817.49 is suspended insofar as it requires separate principal and emergency spillways where one spillway may safely pass the design storm event.

48. Paragraph (a)(9) of Section 817.49 is suspended insofar as it permits the retention of highwalls in permanent impoundments.

SECTION 817.81 [Amended]

49. Paragraph (a) of Section 817.81 is suspended insofar as it allows end dumping or side dumping of coal mine waste.

50. Paragraph (c)(2) of Section 817.81 is suspended insofar as it allows coal waste refuse piles to be constructed or modified with compaction which does not attain 90 percent of the maximum dry density determined in accordance with the standard Proctor method.

SECTION 817.83 [Amended]

51. Section 817.83 is suspended insofar as it permits the construction of coal waste refuse piles using lifts of greater than 2 feet thickness.

SECTION 817.84 [Amended]

52. Paragraph (b)(2) of Section 816.84 is suspended insofar as it permits any impounding structure which is constructed of coal mine waste or intended to impound coal mine waste to have spillways, the combined capacity of which do not safely pass the 100-year 6-hour design precipitation event. It is also suspended insofar as it requires separate principal and emergency spillways where one will safely pass the 100-year 6-hour storm event.

SECTION 816.89 [Amended]

53. Paragraph (d) of Section 817.89 is suspended.

SECTION 817.116 [Amended]

54. Paragraph (b)(3)(ii) of Section 817.116 is suspended insofar as it permits the counting of trees and shrubs which have been in place less than the applicable period of responsibility in determining revegetation success.

55. Paragraph (c)(2) of Section 817.116 is suspended insofar as it permits revegetation success to be measured over less than the growing seasons of the last two years of the responsibility period.

56. Paragraph (c)(4) of Section 817.116 is suspended to the extent that it permits the repair of rills and gullies without restarting the period of responsibility.

SECTION 817.133 [Amended]

57. Paragraph (d) of Section 817.133 is suspended insofar as it authorizes any variance from approximate original contour for surface coal mining operations in any area which is not a steep slope area.

[FR Doc. 86-26178 Filed 11-19-86; 8:45 am]
BILLING CODE 4310-05-M