FEDERAL REGISTER: 53 FR 21764 (June 9, 1988)

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

30 CFR Parts 701, 800, 816 and 817
Permanent Regulatory Program; Surface Mining Activities; Underground Mining Activities;
Bond and Insurance Requirements; Performance Standards

ACTION: Notice of reinstatement of suspended rules.

SUMMARY: The Office of Surface Mining Reclamation and Enforcement (OSMRE) of the United States Department of the Interior is reinstating eight suspended rules that were upheld by the U.S. Court of Appeals for the District of Columbia Circuit in NWF v. Hodel. These rules had been suspended by OSMRE in response to decisions issued by the U.S. District Court for the District of Columbia in In Re: Permanent II. Generally, the rules concern the definition of support facilities, incremental bonding, phased bonding, the retention of highwalls in permanent impoundments, coal waste refuse pile compaction, and the construction of coal waste refuse piles using lifts greater than two feet thick.

EFFECTIVE DATE: July 11, 1988.

FOR FURTHER INFORMATION CONTACT: Richard O. Miller, Chief, 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, Telephone: 202-343-5241 (Commercial or FTS).

SUPPLEMENTARY INFORMATION:

I. Background
II. Discussion of Reinstated Rules
III. Procedural Matters

I. BACKGROUND

On February 21, 1985 *(50 FR 7274),* and November 20, 1986 *(51 FR 41952),* OSMRE published in the Federal Register two notices suspending certain portions of its permanent program rules. On July 10, 1985 *(50 FR 28186),* OSMRE also published in the Federal Register an interim final rule which, among other things, suspended the definition of support facilities at 30 CFR 701.5. These rules were suspended in response to decisions issued by the U.S. District Court for the District of Columbia in In Re: Permanent Surface Mining Regulation Litigation (*In Re: Permanent II), 21 ERC 1193 (D.D.C. 1984)* (Round I); *21 ERC 1724 (D.D.C. 1984)* (Round II); *22 ERC 155.7* (D.D.C. 1985) (Round III-VER); and *629 F. Supp. 1519 (D.D.C. 1985)* (Round III).

As noted in the two suspension notices, neither was intended to affect the right of the Secretary of the Interior to appeal the district court's decisions on any of the suspended rules. *50 FR 7274; 51 FR 41952.* Appeals were filed, and on January 29, 1988, the U.S. Court of Appeals for the District of Columbia Circuit issued a decision which upheld a number of the suspended rules. NWF v. Hodel, No. 84-5743 (D.C. Cir. Jan. 29, 1988). As explained in detail under the following heading, II. Discussion of Reinstated Rules, this notice reinstates those suspended rules which the court of appeals upheld.

In NWF v. Hodel the court of appeals repeatedly recognized the discretion vested in the Secretary to use reasoned and expert judgment in interpreting the Surface Mining Control and Reclamation Act of 1977 (the Act or SMCRA), *30 U.S.C. 1201* et seq. Slip op. at 43 (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983)),* 59 (citing *Chevron U.S.A. Inc. v. NRDC, 467 U.S. 837, 844-45 (1984);* and *Chemical Mfrs. Ass'n v. NRDC, 470 U.S. 116, 125 (1985)),* 80-81, 104-105, 107, 133-134 and 137-138.

On the issue of whether the Secretary is required to promulgate rules that elucidate or elaborate upon the general environmental performance standards of the Act, the court of appeals ruled that "we read the Act, in light of its legislative history * * * to afford the Secretary discretion, absent an express statutory instruction to regulate, to decide whether fleshing out is appropriate in light of other concerns. Chief among those concerns is the need to accommodate

widely varying local conditions that will not admit of a single, nationwide rule." Id. at 80-81 (footnote omitted). Nevertheless, when proposing to delete previously fleshed-out standards, "if [the Secretary] determines there is no need to 'flesh out' the statute, [he] must 'flesh out' his explanation [in the preamble to the rule] so that [the court] can review the rationality of his decision." Id. at 84.

OSMRE will interpret the reinstated rules in accordance with the court of appeals' decision in NWF v. Hodel, the notices of final rulemaking under which the rules originally were promulgated, and this reinstatement notice. For convenience, in the following discussion the corresponding rules for surface and underground mining activities are cited together as sections 816/817.

II. DISCUSSION OF REINSTATED RULES

SECTION 701.5 - DEFINITIONS.

OSMRE is reinstating the suspended definition of Support facilities at 30 CFR 701.5, as promulgated on May 5, 1983 *(48 FR 20392)*. The reinstated definition provides: "Support facilities means those facilities resulting from, or incident to, an activity identified in paragraph (a) of the definition of 'surface coal mining operations' in Section 700.5 of this chapter and the areas upon which such facilities are located. Support facilities may consist of, but need not be limited to, the following facilities: Mine buildings; bath houses; coal loading facilities; coal crushing and sizing facilities; coal storage facilities; equipment and storage facilities; fan buildings; hoist buildings; sheds, shops, and other buildings; facilities used to treat and store water for mine consumption; and railroads, surface conveyor systems, chutes, aerial tramways, or other transportation facilities, but not including roads. 'Resulting from or incident to' an activity connotes an element of proximity to that activity."

The district court in In Re: Permanent II had ruled that the Act does not allow the Secretary to limit the definition of support facilities on the basis of geographic proximity. *21 ERC at 1202.* The court of appeals in NWF v. Hodel reversed the district court and reinstated the definition. Slip op. at 148-150.

In reinstating the definition, the court of appeals ruled: "The statutory language neither plainly precludes the consideration of distance from the mine site nor dictates a functional test * * *. The Secretary's definition of support facilities does not impose a strict proximity test, but rather considers both function and distance to be relevant * * * . While it would have been contrary to the language and spirit of the Act to promulgate a per se distance rule cutting off coverage of coal mining support facilities otherwise subject to the Act solely because they were not adjacent to or nearby the mine site * * * it is not an irrational reading of the statute to conclude that distance may be 'an element of proximity,' * * * to be weighed among other factors." Id. at 149-150 (emphasis in original).

Notwithstanding the court of appeals' decision, however, OSMRE intends to propose a rule removing the definition of support facilities from 30 CFR 701.5. As noted in the July 10, 1985, notice suspending the definition, OSMRE has determined that the definition is not needed. *(50 FR 28187).* OSMRE appealed the district court ruling so that even in the absence of a definition proximity could be considered by the regulatory authority in identifying support facilities.

SECTION 800.11(b) - INCREMENTAL BONDING.

SECTION 800.13(a)(2) - PHASED BONDING.

OSMRE is reinstating 30 CFR 800.11(b), as promulgated on July 19, 1983 *(48 FR 32932),* to allow the applicant for a surface coal mining and reclamation permit to post a performance bond for less than the entire permit area. Reinstated paragraph (b)(1) provides: "The bond or bonds shall cover the entire permit area, or an identified increment of land within the permit area upon which the operator will initiate and conduct surface coal mining and reclamation operations during the initial term of the permit." Reinstated paragraphs (b)(2) to (b)(4) set out additional bonding procedures for the initial and successive increments of the permit area.

OSMRE also is reinstating 30 CFR 800.11(a)(2), as promulgated on July 19, 1983 *(48 FR 32932).* Reinstated paragraph (a)(2) provides: "With the approval of the regulatory authority, a bond may be posted and approved to guarantee specific phases of reclamation within the permit area provided the sum of phase bonds posted equals or

exceeds the total amount required under [30 CFR] 800.14 and 800.15. The scope of work to be guaranteed and the liability assumed under each phase bond shall be specified in detail."

The district court in In Re: Permanent II had ruled that to the extent it allowed the applicant to post a performance bond for an area less than the entire area to be mined within the initial permit term, Section 800.11(b) contradicted the Act and its legislative history. *21 ERC at 1744.* With respect to Section 800.13(a)(2), the district court ruled that the Act "does not give the Secretary authority to break the bond into specific phases of reclamation." *Id. at 1744.* The court of appeals in NWF v. Hodel reversed the district court and upheld the rules. Slip op. at 56-62.

In upholding the incremental bonding approach of Section 800.11(b) and the phased bonding approach of Section 800.13(a)(2), the court of appeals "defer[red] to the reasonable interpretation ultimately proffered by the Secretary," and ruled that section 509(c) of the Act "reasonably could be read by the Secretary to permit his approval of alternative bonding methods that will fulfill the purposes of the Act." Id. at 59 (emphasis in original).

In upholding Section 800.11(b), the court of appeals ruled: "The district court rejected incremental bonding because the area covered by such a bond could be (and likely would be) smaller than the area to be mined in the course of one permit term. But under the Secretary's prescription, no surface area could be disturbed until the regulatory authority determined that the amount of bond posted for that area was sufficient to assure completion of the reclamation plan in the event of forfeiture. * * * True, the regulation allows an operator to confine bonding ahead to that portion of the permitted area that the operator plans to affect in the near future. But as long as the bond is calculated * * * at the full cost of reclaiming that particular increment of the land, and the size and configuration of the increment * * * are appropriate for efficient reclamation, we do not see how the arrangement appreciably heightens the risk that any land will be left unreclaimed." Id. at 60-61.

In upholding Section 800.11(a)(2), the court of appeals continued: "Phased bonding, too, measures up to the standard we deem critical. We reiterate that '[t]he total of the phase bonds must be sufficient to cover costs to the regulatory authority to complete the reclamation plan, and bond[s] covering all three phases must be posted before disturbance of the area or increment bonded.' " Id. at 61 (citation omitted, brackets in original).

The court of appeals concluded: "In sum, the Secretary reasonably construed Section 509(c) of the Act, and responsibly determined that the incremental and phased bonding programs he authorized fulfilled the statutory objective: to ensure, to the extent feasible, completion of the reclamation plan in the event that an operator defaults." Id. at 62.

SECTIONS 816.49(a)(9)/817.49(a)(9) - IMPOUNDMENTS.

OSMRE is reinstating 30 CFR 816.49(a)(9)/817.49(a)(9), as promulgated on September 26, 1983 *(48 FR 43994),* to allow the retention of underwater highwalls in permanent impoundments. Reinstated paragraphs (a)(9) provide: "The vertical portion of any remaining highwall shall be located far enough below the low-water line along the full extent of the highwall to provide adequate safety and access for the proposed water users."

The district court in In Re: Permanent II, in remanding Sections 816.49(a)(9)/817.49(a)(9) was "wary of permitting highwalls to remain in impoundments under an 'implied' exception to [the approximate original contour (AOC) requirement of Section 515(b)(3) of the Act], when Congress did not even permit the retention of highwalls when granting express exemptions from AOC." *620 F. Supp. at 1571.* The court of appeals in NWF v. Hodel reversed the district court and reinstated the rules. Slip op. at 134-138.

In upholding Sections 816.49(a)(9)/817.49(a)(9), the court of appeals ruled: "The Act * * * on its face, does not support the district court's interpretation. Unlike the other two AOC variances, the water impoundment grading requirements do not include a highwall elimination requirement. Instead, an operator wishing to create a permanent water impoundment must show, among other things, that 'final grading will provide safety and access for proposed water users.' SMCRA 515(b)(8)(E).

"* * * Congress in this case has not stated that highwalls completely submerged in an authorized impoundment must be removed. The Secretary in turn has considered policies in favor of the general highwall elimination requirement and concluded that they do not necessitate removing those highwalls in every water impoundment case. This is the type of judgment we would expect Congress to leave to the agency given the task of implementing and enforcing their complex

regulatory scheme. The district court should have given greater deference to the Secretary's interpretation of the statute." Id. at 137-138 (footnote and citation omitted).

SECTIONS 816.81(c)(2)/817.81(c)(2) - COAL MINE WASTE: GENERAL REQUIREMENTS.

SECTIONS 816.83/817.83 - COAL MINE WASTE: REFUSE PILES.

OSMRE is reinstating 30 CFR 816.81(c)(2)/817.81(c)(2), as promulgated on September 26, 1983 *(48 FR 44006),* to allow the construction or modification of coal waste refuse piles with compaction that does not attain ninety percent of the maximum dry density determined in accordance with the standard Proctor method, provided they achieve a long-term static safety factor of 1.5. Reinstated paragraphs (c)(2) provide: "The disposal facility shall be designed to attain a minimum long-term static safety factor of 1.5. The foundation and abutments must be stable under all conditions of construction."

OSMRE also is reinstating 30 CFR 816.83/817.83, as promulgated on September 26, 1983 *(48 FR 44006),* to allow the construction of coal refuse piles using lifts of greater than two feet thickness, provided they achieve a long-term static safety factor of 1.5. The relevant portions of reinstated Sections 816.83/817.83 provide: "Refuse piles shall meet * * * the requirements of * * * [Section] 77.215 of [30 CFR]." As explained in the preamble to the final rule: "Construction of the refuse pile in compacted lifts of 2-feet maximum thickness is required under Section 77.215 * * *. However, MSHA's [the Mine Safety and Health Administration's] District Manager may approve thicker layers * * * when maintenance of a 1.5 minimum safety factor is supported by engineering data." *48 FR 44015.* Under the reinstated rules, layers or lifts thicker than two feet may be used in accordance with Section 77.215 when approved by the regulatory authority.

The former rules had provided: "The coal processing waste shall be -- (1) Spread in layers no more than 24 inches in thickness; and (2) Compacted to attain 90 percent of the maximum dry density to prevent spontaneous combustion and to provide the strength required for stability of the coal processing waste bank." 30 CFR 816.85(c) (1) and (2)/817.85(c) (1) and (2) (1982) .

The district court in In Re: Permanent II had remanded Sections 816.81(c)(2)/817.81(c)(2), ruling: "The former regulations contained a specific design criteria relative to compaction; the new regulations have rejected that in favor of a performance standard. This is in direct contravention of section 515(f) [of the Act] and, even if the Act leaves discretion with the Secretary for the selection of which design criteria are necessary, the failure to explain the rejection of the previous compaction standard renders the current regulations arbitrary and capricious." *620 F. Supp. at 1536* (footnote omitted). For similar reasons the district court remanded Sections 816.83/817.83 to the extent they allowed the construction of coal refuse piles using lifts of greater than two feet thickness. Id. The court of appeals in NWF v. Hodel reversed the district court and reinstated both of these rules. Slip op. at 73-78.

In upholding Sections 816.81(c)(2)/817.81(c)(2) and 816.83/817.83, the court of appeals ruled: "The district court remanded revised Sections 816.81 and 816.83 insofar as they fail to provide absolute requirements for lift thickness and post-compaction density, or other satisfactory 'how to' rules * * *. In thus remanding, the district court misconstrued the Act; as [the appellant] no longer contests, the district judge incorrectly read section 515(f) [of the Act] to mandate design standards for the mine waste at issue, i.e., non-impounding coal mine waste refuse piles. We find that the Secretary did not contravene section 515(f), and that he adequately explained his departures from the earlier regulations; we therefore reverse the district court on this matter." Id. at 75 (citation omitted).

On the issue of compaction, the court of appeals continued: "Not only did the Secretary relate how changes in the definition of waste rendered the 1979 rule obsolete; he also addressed the critical concerns motivating adoption of the ninety percent compaction rule in 1979: stability and incombustibility. Stability, the Secretary observed, has always been, and continues to be, assured by the generous 1.5 long-term safety rating. The compaction density standard, he intimated, was a superfluous requirement that unnecessarily burdened mine operators * * *. He concluded, we think reasonably, that '[t]he specific numerical requirement for compaction [density] is * * * more appropriately determined based upon the particular design, site conditions and waste characteristics.' " Id. at 76-77 (footnote and citations omitted, brackets in original).

On the issue of lift thickness, the court of appeals concluded: "Given the propriety of eliminating the ninety percent compaction standard, we need not tarry over the Secretary's allowance for variances from the two-foot lift rule. Mine

operators must obtain mine regulator approval before constructing a waste disposal site * * *. Lift thickness has regulatory significance only as a means of assuring adequate compaction * * *. It can be expected, therefore, that mine operators will succeed in obtaining a variance from the two foot lift requirement only when compaction adequate to assure stability and incombustibility remain feasible." Id. at 77-78 (footnotes and citation omitted).

III. PROCEDURAL MATTERS

Effect of Reinstatement in Federal Program States and on Indian Lands

The reinstated rules apply through cross-referencing in the Federal program States of Georgia, Idaho, Massachusetts, Michigan, North Carolina, Oregon, Rhode Island, South Dakota, Tennessee and Washington. The Federal Programs for these States appear at 30 CFR Parts 910, 912, 921, 922, 933, 937, 939, 941, 942 and 947, respectively. OSMRE also has proposed to implement a Federal program for the State of California. *52 FR 39594* (October 22, 1987).

The reinstated rules apply on Indian lands through cross-referencing in the Federal program for Indian lands at 30 CFR Part 750.

Effect on State Programs

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

Federal Paperwork Reduction Act

No new information collection requirements that would require approval by the Office of Management and Budget under *44 U.S.C. 3501* et seq. are imposed by the reinstated rules.

Executive Order 12291

The Department of the Interior has determined, in accordance with the criteria of Executive Order 12291 (February 17, 1981), that the reinstated rules are not major and do not require a regulatory impact analysis for the same reasons that promulgation of the rules in 1983 was not major.

Regulatory Flexibility Act

The Department of the Interior has determined, pursuant to the Regulatory Flexibility Act, *5 U.S.C. 601* et seq., that the reinstated rules will not have a significant economic effect on a substantial number of small entities for the same reasons that promulgation of the rules in 1983 did not have such an effect.

National Environmental Policy Act

The publication of this reinstatement notice is categorically excluded from the NEPA (National Environmental Policy Act of 1969, *42 U.S.C. 4321* et seq.) process by the Department of the Interior Departmental Manual, which at 516 DM 2, Appendix 1.10, excludes "[p]olicies, directives, regulations and guidelines of an administrative, financial, legal, technical or procedural nature." None of the exceptions to individual actions within categorical exclusions, listed at 516 DM 2.3A(3), apply to this notice. A Categorical Exclusion Determination for this notice is on file in the OSMRE Administrative Record located at 1100 L Street, NW., Washington, DC.

Author

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LIST OF SUBJECTS

30 CFR Part 701

Coal mining, Law enforcement, Surface mining, Underground mining.

30 CFR Part 800
Coal mining, Insurance, Reporting and recordkeeping requirements, Surety bonds, 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.

Accordingly, 30 CFR Parts 701, 800, 816 and 817 are amended as set forth below:

Date: June 1, 1988.
James E. Cason, Deputy Assistant Secretary -- Land and Minerals Management.

PART 701 -- PERMANENT REGULATORY PROGRAM

1. The authority citation for Part 701 is revised to read as follows:

Authority: *30 U.S.C. 1201* et seq., and Pub. L. 100-34.

SECTION 701.5 [Amended]

2. In Section 701.5, the definition of Support facilities is reinstated in full.

PART 800 -- BOND AND INSURANCE REQUIREMENTS FOR SURFACE COAL MINING AND RECLAMATION OPERATIONS UNDER PERMANENT REGULATORY PROGRAMS

3. The authority citation for Part 800 is revised to read as follows:

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

SECTION 800.11(b) [Amended]

4. Section 800.11(b) is reinstated in full.

SECTION 800.13(a)(2) [Amended]

5. Section 800.13(a)(2) is reinstated in full.

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

6. The authority citation for Part 816 is revised to read as set forth below, and all other authority citations in Part 816 are removed.

Authority: Pub. L. 95-87, 91 Stat. 445 *(30 U.S.C. 1201* et seq.), Section 115, Pub. L. 98-146, 97 Stat. 938 *(30 U.S.C. 1257),* and Pub. L. 100-34, unless otherwise noted.

SECTION 816.49(a)(9) [Amended]

7. Section 816.49(a)(9) is reinstated in full.

SECTION 816.81(c)(2) [Amended]

8. Section 816.81(c)(2) is reinstated in full.

SECTION 816.83 [Amended]

9. Section 816.83 is reinstated in full.

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

10. The authority citation for Part 817 is revised to read as follows:

Authority: Pub. L. 95-87, 91 Stat. 445 *(30 U.S.C. 1201* et seq.), Section 115, Pub. L. 98-146, 97 Stat. 938 *(30 U.S.C. 1257),* and Pub. L. 100-34.

SECTION 817.49(a)(9) [Amended]

11. Section 817.49(a)(9) is reinstated in full.

SECTION 817.81(c)(2) [Amended]

12. Section 817.81(c)(2) is reinstated in full.

SECTION 817.83 [Amended]

13. Section 817.83 is reinstated in full.

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