FEDERAL REGISTER: 53 FR 26582 (July 13, 1988)

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

30 CFR Part 762
Surface Coal Mining and Reclamation Operations; Unsuitability Criteria;
Substantial Legal and Financial Commitments

ACTION: Final rule.

SUMMARY: The Surface Mining Control and Reclamation Act of 1977 (the Act) provides that the regulatory authority shall establish a planning process to enable it to make an objective decision as to which, if any, lands are unsuitable for all or certain types of surface coal mining operations. That process does not apply to lands where substantial legal and financial commitments in surface coal mining operations were in existence prior to January 4, 1977. The definition of "substantial legal and financial commitments" (SLFC) is found at 30 CFR 762.5. The final rule revises the definition of SLFC to clarify that the presence of an existing mine is not necessary to demonstrate SLFC.

EFFECTIVE DATE: August 12, 1988.

FOR FURTHER INFORMATION CONTACT: James M. Kress, Office of Surface Mining Reclamation and Enforcement, U.S. Department of the Interior, 1951 Constitution Avenue, NW., Washington, DC 20240; Telephone: 202-343-5145 (Commercial or FTS).

SUPPLEMENTARY INFORMATION:

I. BACKGROUND AND DISCUSSION OF PROPOSED RULE

The Act provides that each State regulatory authority must establish a "planning process enabling objective decisions based upon competent and scientifically sound data and information as to which, if any, land areas of a State are unsuitable for all or certain types of surface coal mining operations * * *." (unsuitability process). *30 U.S.C. 1272*(a)(1). The same requirements apply to Federal land and in States with a Federal program where the Office of Surface Mining Reclamation and Enforcement (OSMRE) is the regulatory authority. *30 U.S.C. 1272*(b). The unsuitability process may be used to prohibit or limit surface coal mining operations which (1) would be incompatible with existing State or local land use plans or programs; or (2) would affect fragile or historic lands and could result in significant damage to important historic, cultural, scientific, and esthetic values and natural systems; or (3) affect renewable resource lands and could result in a substantial loss or reduction of long-range productivity of water supply or of food or fiber products, which lands include aquifers and aquifer recharge areas; or (4) affect natural hazard lands in which such operations could substantially endanger life and property, such lands to include areas subject to frequent flooding and areas of unstable geology. *30 U.S.C. 1272*(a)(3)(A)-(D). Also, areas must be designated as unsuitable for all or certain types of surface coal mining operations if the State regulatory authority determines that reclamation pursuant to the requirements of the Act is not technologically and economically feasible. *30 U.S.C. 1272*(a)(2).

However, the Act provides that the unsuitability process does not apply (1) to lands on which surface coal mining operations were conducted on the date of its enactment; (2) under a permit issued pursuant to the Act; or (3) where SLFC were in existence prior to January 4, 1977. *30 U.S.C. 1272*(a)(6). OSMRE first defined SLFC in its regulations on March 13, 1979. *44 FR 15344.* The 1979 definition provided in part that "(a)n example (of SLFC) would be an existing mine, not actually producing coal, but in a substantial stage of development prior to production. Costs of acquiring coal in place or the right to mine it without an existing mine, * * * alone are not sufficient to constitute substantial legal and financial commitments." Id. OSMRE retained the 1979 definition in its 1983 revision of Part 762. *48 FR 41351,* September 14, 1983.

The coal industry challenged the 1983 revisions, asserting, among other arguments, that the definition of "substantial legal and financial commitments" was too narrow and rigid to define the universe of circumstances in which the term should apply. Industry objected to the predominant features of the definition which incorporated an example suggesting that there be an existing mine and a long-term coal contract. In re: Permanent Surface Mining Regulation Litigation II, Civil Action No. 79-1144 (D.D.C., July 15, 1985) (Hereafter In re II). It claimed that the language in the House of Representatives committee report, on which the Secretary relied for his definition, did not mandate the definition chosen, but was merely intended to be illustrative, and therefore should not have set the outer bounds of the definition. The committee report declared:

The phrase "substantial legal and financial commitments" in the designation section and other provisions of the act is intended to apply to situations where, on the basis of a long-term coal contract, investments have been made in power plants, railroads, coal handling and storage facilities and other capital-intensive activities. The Committee does not intend that mere ownership on acquisition costs of the coal itself or the right to mine it should constitute "substantial legal and financial commitments." H.R. Rep. No. 218, 95th Cong., 1st Sess. 95 (1977).

During oral argument in response to this industry challenge, counsel for the government explained that the use of the term, "an existing mine," as an example in the rule language "is simply an example of a situation where SLFC will be found." The court noted that the Secretary had filed a memorandum which stated that the definition is not limited to existing coal mines. The court concluded that the use of the example in the rule suggested that there had to be an existing mine to establish SLFC, and that this was inconsistent with the Secretary's memo. Therefore, the court remanded the rule to the Secretary for the express purpose of clarifying his position that an existing mine is not necessary for SLFC. In re II, at 55. The court did not remand the definition with respect to long-term coal contracts. Pursuant to the court's remand, OSMRE is promulgating this final rule.

On October 20, 1987 *(52 FR 39186)* OSMRE published a proposed rule that would delete all reference to an existing mine in the definition of SLFC. The proposal announced a 70-day comment period ending on December 29, 1987. OSMRE also offered to hold public hearings upon request in Washington, DC on December 22, 1987, and in each Federal program State. It was announced that requests for public hearings would be accepted until November 15, 1987. However, no requests for public hearings were made, and none were held.

II. RULE ADOPTED AND RESPONSE TO PUBLIC COMMENTS

A. SUMMARY OF THE FINAL RULE

This final rule adopts the proposal to delete all language describing "an existing mine" from the definition as a requirement for a finding of "substantial legal and financial commitment." The rule adopted here and found at section 762.5 now reads:

Substantial legal and financial commitment in a surface coal mining operation means significant investments that have been made on the basis of a long-term coal contract in power plants, railroads, coal-handling, preparation, extraction, or storage facilities, and other capital-intensive activities. Costs of acquiring the coal in place, or the right to mine it alone without other significant investments, as described above, are not sufficient to constitute "substantial legal and financial commitments."

This final definition remains unchanged from the proposed rule.

B. PUBLIC COMMENTS

Three States and one industry group commented on the proposed rule. The comments addressed the proposed changes. A discussion of the comments and OSMRE's response follows.

Three commenters supported OSMRE's deletion of the phrase containing the example. Two of those commenters suggested that OSMRE had not gone far enough in revising the definition. The commenters stated that the definition should be expanded to include those operators who have made considerable investments in exploration, scientific analysis, environmental monitoring and studies, planning and legal fees, permitting, the regulatory approvals, but have not concluded a long-term coal contract. The commenters suggested that OSMRE include additional language in the

definition to reflect this point of view. The commenters also stated that this aspect of the definition is on appeal before the U.S. Court of Appeals for the District of Columbia Circuit. Finally, the commenters stated that the definition of SLFC should be changed to recognize that, where an operator has made a substantial financial investment in acquiring coal rights, depending on the size of the company, or setting a minimum investment amount, that alone should be considered as being SLFC.

The items enumerated by the commenters, including acquisition of the coal, may be considered collectively in determinations of whether substantial investments have been made. They may be considered under the term "capital-intensive activities" already included in the definition. However, with respect to the cost of acquiring the coal, OSMRE determined in promulgating the March 13, 1979, definition of SLFC that acquisition of the coal alone as a criterion for SLFC is inconsistent with the House of Representatives committee report discussed above. OSMRE believes that retention of the language on long term contracts is appropriate since it mirrors the language in the House of Representatives committee report as discussed earlier and as upheld by the District Court. Further, this interpretation of SLFC has recently been upheld by the U.S. Court of Appeals for the District of Columbia Circuit. NWF v. Hodel, C.A. 87-5743, January 29, 1988. Therefore, with the exception of removing references to existing mines, OSMRE has decided to finalize this rule as proposed.

One commenters stated that the comma after the word "facilities" altered the meaning of the sentence so that it could be read that "other capital intensive activities" in and of themselves could satisfy the definition of SLFC without being based on the existence of a long-term contract. OSMRE disagrees. The insertion of the comma after "facilities" simply makes the sentence grammatically correct, showing that "other capital-intensive activities" is simply the last item in a series of items that together with a long-term coal contract is necessary to meet the requirements for a finding of SLFC. The same commenter contends that the phrase in the last sentence "without other significant investments, as described above" is both redundant and creates another ambiguity as to whether OSMRE intends that acquisition of coal or the right to mine when coupled with one or more of the investments earlier identified would satisfy SLFC, without the linchpin of the long-term coal contract underlying the investments. The commenter suggests that the phrase "without other significant investments, as described above" should be revised to read "without other significant investments made on the basis of a long-term coal contract," in order to remove any ambiguity. OSMRE disagrees. OSMRE believes that the grammatical construction of the definition of the rule makes it perfectly clear that all of the items in the series in the first sentence are capital-intensive activities, and include other unenumerated capital-intensive activities (thus the phrase "other capital-intensive activities") which are dependent upon long-term coal contracts. Thus, when the phrase "other significant investments as described above" is used in the second sentence, OSMRE believes that phrase refers to the other items in the series, and that those items depend on long-term coal contracts in order to make a finding of SLFC.

III. PROCEDURAL MATTERS

Effect in Federal Program States

The final rule applies through cross-referencing in those States with Federal programs. The States include Georgia, Idaho, Massachusetts, Michigan, North Carolina, Oregon, Rhode Island, South Dakota, Tennessee, and Washington. OSMRE has proposed a Federal program for California *(52 FR 39594,* October 22, 1987). When that program becomes final this final rule will apply to that State as well. The Federal programs for these States appear at 30 CFR Parts 910, 912, 921, 922, 933, 937, 939, 941, 942, and 947, respectively.

Effect on State Programs

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

Federal Paperwork Reduction Act

This rule does not contain information collection requirements which require approval by the Office of Management and Budget under *44 U.S.C. 3507.*

Executive Order 12291, Regulatory Flexibility Act, and Federalism

The DOI has determined that this document is not a major rule under the criteria of Executive Order 12291 (February 17, 1981) and certifies that it will not have a significant economic effect on a substantial number of small entities under

the Regulatory Flexibility Act, *5 U.S.C. 601* et seq. The rule does not distinguish between small and large entities. These determinations are based on the findings that the regulatory additions proposed by the rule will not change costs to industry or to the Federal, State, or local governments. Furthermore, the rule produces no adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States enterprises to compete with foreign-based enterprises in domestic or export markets. Finally, in accordance with the Executive Order on Federalism, OSMRE has determined that the rule described above does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

National Environmental Policy Act

OSMRE has prepared a final environmental assessment (EA), and has determined that the final rule will not significantly affect the quality of the human environment under section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), *42 U.S.C. 4332*(2)(C). A Finding of No Significant Impact has been approved for the final rule in accordance with OSMRE procedures under NEPA. The EA is on file in the OSMRE Administrative Record at the address previously specified (see "ADDRESSES").

Author

The principal author of this rule is James Kress, Office of Surface Mining Reclamation and Enforcement, 1951 Constitution Avenue, NW., Washington, DC 20240; Telephone: 202-343-5145 (Commercial or FTS).

LIST OF SUBJECTS IN 30 CFR PART 762

Historic preservation, Wildlife refuges, Surface mining, Underground mining.

Accordingly, 30 CFR Part 762 is amended as follows:

Dated: May 11, 1988.
James E. Cason, Acting Assistant Secretary -- Land and Minerals Management.

PART 762 -- CRITERIA FOR DESIGNATING AREAS AS UNSUITABLE FOR SURFACE COAL MINING OPERATIONS

1. The authority citation for Part 762 is revised to read as follows:

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

2. The definition of "substantial legal and financial commitments in a surface coal mining operation" in Section 762.5 is revised to read as follows:

SECTION 762.5 DEFINITIONS.

* * * * *

SUBSTANTIAL LEGAL AND FINANCIAL COMMITMENTS IN A SURFACE COAL MINING OPERATION means significant investments that have been made on the basis of a long-term coal contract in power plants, railroads, coal-handling, preparation, extraction or storage facilities, and other capital-intensive activities. Costs of acquiring the coal in place, or the right to mine it alone without other significant investments, as described above, are not sufficient to constitute substantial legal and financial commitments.

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