FEDERAL REGISTER: 53 FR 44356 (November 2, 1988)

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

30 CFR Part 700
Surface Coal Mining and Reclamation Operations; Coal Exploration Operations; Termination of Jurisdiction

ACTION: Final rule.

SUMMARY: The Office of Surface Mining Reclamation and Enforcement (OSMRE) is amending its regulations to clarify the circumstances whereby a regulatory authority may terminate regulatory jurisdiction under a regulatory program approved under the Surface Mining Control and Reclamation Act of 1977 (the Act) for the reclaimed sites of completed surface coal mining and reclamation operations and coal exploration operations. This final rule requires the regulatory authority either to make a written determination that the permittee has met all reclamation requirements, or to decide to release fully a permanent program performance bond before regulatory jurisdiction over the reclaimed site of a completed surface coal mining and reclamation operation, or increment thereof, or of a coal exploration can be terminated.

EFFECTIVE DATE: This rule is effective on December 2, 1988.

FOR FURTHER INFORMATION CONTACT:

SUPPLEMENTARY INFORMATION:

I. BACKGROUND

As discussed in the preamble to the proposed rule *(52 FR 24092,* June 26, 1987), the general practice among State regulatory authorities has been to terminate regulatory jurisdiction under State programs upon the final release of the performance bond for a completed surface coal mining and reclamation operation or, where no bond was required, upon a finding that all reclamation has been successfully completed. The effect of terminating regulatory jurisdiction under the regulatory program is that inspections at the site are terminated, and the regulatory authority then lacks authority to enforce the program at the particular site. The practice of terminating regulatory jurisdiction upon final bond release has been an established practice predating the Act (in States where bonds were required) and is not inconsistent with the provisions of approved State programs, the Act or OSMRE's implementing regulations. OSMRE has not objected to the States' general practice of terminating regulatory jurisdiction in this manner. However, OSMRE, in its oversight capacity, has conducted some oversight inspections after the State has released the final bond. When notified that OSMRE has reason to believe violations may exist at bond release sites, the State regulatory authorities normally have declined to take any action because they contend that, under State law, enforcement authority has terminated with final bond release. As a result, OSMRE has sometimes taken Federal enforcement actions at such sites.

Because Federal inspections and resultant enforcement actions have sometimes occurred long after a State released the final bond, factual issues are raised as to whether the condition existed at the time of final bond release, arose subsequently, or was the result of actions or inactions of the operator. Also, the issue of whether or not a particular condition constitutes a violation or whether its acceptance was within the discretion of the regulatory authority is sometimes disputed. These OSMRE enforcement actions occasionally have resulted in disagreements between OSMRE and the States and between OSMRE and operators. Upon appeal, some enforcement actions have been upheld while others have not. States with approved programs have objected that OSMRE's enforcement actions on post-bond release sites where the State considers regulatory jurisdiction to have terminated undermine the concept of primacy as envisioned by the Act and that these enforcement actions amount to second-guessing the State regulatory authority on a matter of interpretation of State program requirements. The industry objects that OSMRE enforcement actions after final bond release and termination of jurisdiction subject operators to perpetual liability and a dual regulatory scheme when the regulatory authority has already determined that they have met all reclamation requirements.

OSMRE has not and does not object to the long standing practice by the States to terminate regulatory jurisdiction at some definite point under the regulatory programs. Under *Haydo v. Amerikohl Mining, 830 F.2d 494 (3rd Cir. 1987),* surface coal mining and reclamation operations are subject to approved State or Federal programs, and not directly to the Act. Therefore, it is appropriate that OSMRE by regulation set specific standards for such terminations to be included in State and Federal programs. On June 26, 1987, at *52 FR 24092,* OSMRE proposed a rule that would clarify the circumstances under which regulatory authority jurisdiction may end over reclaimed surface coal mining and reclamation operations and coal exploration sites, which no longer are "surface coal mining and reclamation operations" as defined in section 701(27) of the Act or "coal explorations" within the meaning of the Act. OSMRE solicited and received public comments through September 4, 1987. An opportunity for a public hearing on the proposed rule was offered but none was requested or held. Eighteen comment submissions were received from among six coal industry representatives, five environmental groups, five State regulatory authorities, one Federal agency and one private citizen. Both the State regulatory authorities and industry representatives strongly supported the rule and urged its adoption. In contrast, the environmental groups opposed the rule.

II. DISCUSSION OF THE RULE AND RESPONSE TO COMMENTS

In this section, OSMRE will discuss the final rule, how it operates, and the differences between the proposed and final rules. Also, OSMRE will respond to the comments received as related to each section of the final rule.

30 CFR 700.10 - INFORMATION COLLECTION

Section 700.10 is being revised to codify the current information collection burden for Part 700. Sections 700.11(d), 700.12(b) and 700.13 of Part 700 contain information collection requirements requiring approval by the Office of Management and Budget under the Paperwork Reduction Act *(44 U.S.C. 3501* et seq.).

Section 700.11(d) is part of the rule being published today. The information collected in Section 700.11(d) is used by OSMRE and States to establish standards for determining when a mine site is no longer a surface coal mining and reclamation operation and thereby when regulatory jurisdiction may end.

The information collected under Section 700.12(b) is used by OSMRE to consider need, costs and benefits of a proposed regulatory change in order to grant or deny a petition that has been submitted.

The information collected in Section 700.13 identifies the person and nature of a citizen's suit, so that OSMRE or a State can respond appropriately.

These collections of information have been approved by the Office of Management and Budget under *44 U.S.C. 3501* et seq. and assigned clearance number 1029-0094.

30 CFR 700.11(d)(1) - GENERAL

A new paragraph (d) has been added to 30 CFR 700.11. Paragraph (d)(1) specifies that a regulatory authority may terminate its jurisdiction under the regulatory program over the reclaimed site of a completed surface coal mining and reclamation operation, as defined under the regulatory program, when the regulatory authority either makes a written determination that all requirements of the regulatory program have been successfully completed or releases fully the permanent program bond in accordance with all the requirements of the State or Federal program counterpart to 30 CFR Part 800, as set forth in paragraphs (d)(1) (i) and (ii).

The final rule is similar to that proposed by OSMRE on June 26, 1987 *(52 FR 24092)* with the following modifications. OSMRE has modified the introductory language of paragraph (d) to clarify that successful completion of an operation and termination of regulatory authority jurisdiction may occur for the entire permit area on an increment within that permit area. This modification is consistent with 30 CFR 800.40(c), which authorizes the release of performance bonds for increments within a permit area.

The final rule has also been modified to use the phrase "reclaimed site of a completed surface coal mining and reclamation operation, or increment thereof, or of a coal exploration" rather than the proposed phrase "completed surface

coal mining and reclamation operation or coal exploration operation." The term "reclaimed site of" emphasizes the fact that the jurisdiction may terminate over the site because the site no longer constitutes a surface coal mining and reclamation operation or coal exploration subject to the regulatory program.

The final rule specifies when the regulatory authority may terminate its jurisdiction under the regulatory program, instead of specifying when the applicability of 30 CFR Chapter VII shall terminate, as proposed. This change from the proposal stems from the comments received, and has a number of implications. It recognizes that the regulatory program applies to sites within a state and not OSMRE's national regulations, as may have been inferred from the proposal. This is in keeping with the decision of the U.S. Court of Appeals for the 3rd Circuit in Haydo v. Amerikohl Mining where the court affirmed that operators are bound to the regulatory provisions under a State program rather than the Act. This concept is discussed more fully in the OSMRE final rule published on July 14, 1988 *(53 FR 26728)*. By specifying when the regulatory authority may terminate jurisdiction, the final rule recognizes that the Secretary's rule imposes minimum standards upon State programs.

Several commenters argued that there is no basis in the Act for the rule because the Act does not contain specific language providing for the termination of regulatory jurisdiction. On the other hand, several commenters agreed with OSMRE that at a certain point in time a reclaimed site is no longer a surface coal mining and reclamation operation subject to regulation.

A reclaimed site of a surface coal and reclamation operation, or increment thereof, or of a coal exploration is no longer subject to regulatory jurisdiction under either a Federal or State regulatory program when all reclamation requirements of the regulatory program have been successfully completed and the period of extended liability for revegetation has expired. Nothing in the Act requires a permittee to be subject to regulatory jurisdiction beyond this point.

It was not the intent of the Surface Mining Act that the regulatory authority maintain perpetual jurisdiction over all lands that were mined. It is recognized that the Surface Mining Act does not impose requirements upon fully reclaimed land. Termination of jurisdiction may occur when reclamation is in fact accomplished and the period of extended responsibility for revegetation has run. The regulatory authority is vested with the authority to determine that reclamation has been completed.

The statutory provisions supporting this fundamental principle include sections 102, 201, 501, 502, 503, 507(f), 509, 512, 515, 516, 519, 701(27), and 701(28) of the Act, as well as the overall scheme embraced in the implementing regulations. Title V of the Act, which contains the regulatory program, applies to "surface coal mining operations", "surface coal mining and reclamation operations," and to "coal exploration." The first two terms are defined in section 701 of the Act. The term "coal exploration" is not defined in the Act, but has been defined by OSMRE at 30 CFR 701.5. The term "surface coal mining operations" is defined in section 701(28) to include activities performed in connection with coal mines and the area where such activities disturb the natural land surface. Section 701(27) defines "surface coal mining and reclamation operations" to include surface coal mining operations as defined in section 701(28), and "all activities necessary and incident to the reclamation of such operations * * *."

The Act establishes performance standards for coal exploration operations in section 512 and for surface coal mining and reclamation operations in section 502, for initial program operations, and in sections 515 and 516 for permanent program operations. These latter performance standards, imposed through permits issued pursuant to an approved regulatory program, include a requirement under section 515(b)(20) that the operator assume responsibility for successful revegetation for a period of five or ten full years after the last year of augmented seeding, fertilizing, irrigation or other work. The period of extended operator responsibility under section 515(b)(2) did not apply to initial program operations subject to the requirements of section 502.

Section 509 of the Act requires an operator to post a performance bond in an amount sufficient to assume the completion of the reclamation plant by the regulatory authority in the event of forfeiture. Section 509(b) establishes that liability under the bond shall be "for the duration of the surface coal mining and reclamation operation and for a period coincident with operator's responsibility for revegetation requirements in section 515" (emphasis added).

Section 519 of the Act establishes the timing of and conditions for bond release. In specifying the timing of bond release, paragraph (c)(3) provides that "[w]hen the operator has completed successfully all surface coal mining and

reclamation activities," the regulatory authority may release the remaining portion of the bond, "but not before the expiration of the period specified for operator responsibility in section 515: Provided, however, That no bond shall be fully released until all reclamation requirements of this Act are fully met." Thus, at the time of final bond release, the period for "operator responsibility" must have expired and all reclamation must be complete. At this point, the reclaimed site is no longer a "surface coal mining and reclamation operation" by statutory definition because "all activities necessary and incident to the reclamation of such operations" have been successfully completed.

Furthermore, section 507(f) of the Act requires the permittee to secure a public liability insurance policy which "shall be maintained in full force and effect during the terms of the permit or any renewal, including the length of all reclamation operations." *30 U.S.C. 1257* (emphasis added). Indeed, rather than such a policy having to be maintained perpetually, Congress envisioned that once the operator has satisfied all the reclamation obligations for a site, and the specified additional responsibility period has run, operator liability for that site terminates. If Congress intended otherwise, it could have stated that operator liability for a reclaimed site never ends or that regulatory jurisdiction attaches forever to the site of completed "surface coal mining and reclamation operation." It did not.

The sections discussed above demonstrate that Congress intended regulatory jurisdiction to end at the time of bond release under section 519, rather than extending forever. This conclusion draws support from the fact that imposing perpetual regulatory authority jurisdiction over coal operators for every site they mine would necessarily -- perhaps drastically -- limit the number of coal production projects which any person or group, no matter how efficient and responsible, would be willing or able to undertake. This would run afoul of the Act's purpose to "assure that the coal supply essential to the Nation's energy requirements, and to its economic and social well-being is provided * * *." Section 102(f), *30 U.S.C. 1202.*

The legislative history of the Act also supports this rule. The 1977 Senate Report interpreted section 509(b) in the context of operator liability and specifically stated "bond liability extends for a period coincident with the operator's liability * * *." S. Rep. 95-128, 95th Cong., 1st Sess. 78 (1977). This rule recognizes that coal mining is, and should be, a temporary land use. Upon successful completion of all reclamation obligations and the extended period of bond liability, the land "returns" to its previous status and non-coal mining status.

The same logic applies to initial program sites and to coal exploration sites. Neither section 502 nor section 512 of the Act specifies continuing regulatory jurisdiction over such sites following the successful completion of applicable reclamation requirements.

Consistent with these principles, State regulatory authorities have been terminating regulatory jurisdiction at reclaimed sites for many years. In the absence of any explicit provisions to the contrary, such actions have been consistent with approved State programs unless States are terminating jurisdiction at sites where reclamation activities have not been completed.

To ensure these principles will continue to be consistently applied and because jurisdiction may have been terminated at some sites without full completion of reclamation requirements, OSMRE has decided to codify the minimum standard all regulatory authorities will apply in future decisions to terminate regulatory jurisdiction. This final rule provides that standard.

A commenter stated that there is a distinction between the bonded liability of the operator and the residual, long-term liability of the operator for failures of reclamation after bond release. The commenter asserted that while bonded liability may terminate with bond release, all liability and jurisdiction cannot be extinguished under any circumstances.

The commenter cited two cases, *Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249, 278-9 (1977);* and *Rodriguez v. Compass Shipping Ltd., 451 U.S. 596 (1981),* arguing that an agency cannot adopt a position which operates to restrict the remedial purposes of the Act.

An operator's obligations under the approved program, bonded or otherwise, and regulatory authority jurisdiction under the approved program may simultaneously terminate at the time of proper final bond release under the permanent program because the period of extended responsibility will have run, all reclamation obligations will have been met successfully and, by definition in the statute, a surface coal mining and reclamation operation no longer exists. Liability under the approved program for a failure of reclamation, however, may be subject of a Secretarial or regulatory authority

inquiry or a civil suit in the courts pursuant to section 520 of the Act. Such liability would depend upon whether the reclamation failure was caused by a violation by the operator of the regulatory program. Partially in response to the commenter's concern, a regulatory authority will be required to reassert jurisdiction under Section 700.11(d)(2) if it can be shown that the bond release was based upon fraud, collusion, or any other misrepresentation of a material fact at the time of bond release.

The two cases cited supporting the commenter's position concerned interpretation of the Longshoremen's and Harbor Workers' Compensation Act. This final rule is consistent with the principles in those cases because nothing in it restricts the remedial purposes of the Act. The remedial purposes of the Act are achieved with successful completion of all reclamation requirements, which under this rule is demonstrated by a valid final bond release or a written determination to that effect.

A commenter agreed with the statement in the preamble to the proposed rule which stated that citizen suits under section 520(a)(1) may be commenced after termination of regulatory jurisdiction. Other commenters disagreed with OSMRE's conclusion that citizen suits under section 520(a)(1) may continue after termination of regulatory jurisdiction, suggesting that instead OSMRE meant to cite section 520(e).

This final rule does not modify the civil remedies afforded by Congress under sections 520 (a)(1), (e), and (f), nor is the rule intended to preclude the jurisdiction of the courts. Section 520(a)(1) establishes the right on an adversely affected person to commence a civil suit to compel compliance against any person who is alleged to be in violation of any rule, regulation, order or permit issued under the Act. Section 520(f) establishes such a right for damages. States with approved programs must have similar provisions providing access to State courts. In addition, Congress preserved existing common law and statutory remedies under section 520(e).

Where a person brings an action under section 520 following a bond release, the court will determine if a cause of action exists and this regulation cannot add to or decrease the jurisdiction of the court to make that determination. In situations where citizen suits are allowed, such suits provide a backstop of protection, regardless of whether regulatory authorities reassert regulatory jurisdiction.

The same commenter added that the rule improperly absolves OSMRE or the regulatory authority of its duty by shifting the burden of environmental protection to the public if violations are overlooked at final bond release or occur thereafter.

OSMRE disagrees with the commenter's assertion that the rule shifts the burden of environmental protection to the public. Unsatisfied reclamation requirements should not go undetected at the time of final bond release. The regulatory scheme designed by Congress and the Secretary contains multiple safeguards to detect violations. For example, until making a decision to release the bond fully, the regulatory authority performs regular and frequent inspections of the site as required under 30 CFR 840.11. Each inspection is conducted to assure that regulatory requirements are being met. At any time prior to bond release, including the 5 or 10 year extended period of responsibility, citizens may bring possible violations to the attention of State regulatory authorities under State laws and rules promulgated pursuant to 30 CFR 840.15 and Part 842. For initial program sites, citizens also have had opportunities for several years to bring possible violations to the attention of regulatory authorities.

Moreover, bond release proceedings under regulatory program counterparts to 30 CFR Part 800 provide additional opportunities to detect violations prior to a final bond release. Persons with a valid legal interest which might be adversely affected by release of the bond are given the opportunity to become aware of, object to, and request public hearings or informal conferences concerning bond release applications. Under 30 CFR Part 800, the regulatory authority must perform an inspection and evaluation of the reclamation work involved. Also, any person with an interest in the bond release may visit the site to gather information relevant to the proceeding. All of these procedures insure that all mining and reclamation activities have been properly completed. At that point, it is reasonable to terminate jurisdiction under the regulatory program since a surface coal mining and reclamation operation as defined under the regulatory program no longer exists.

The commenter's concern that violations which did not exist at the time of bond release will occur thereafter is unwarranted. Potential problems resulting from the quality of reclamation, if any, will most likely appear during the congressionally mandated 5 or 10 year period of extended responsibility for revegetation following completion of

augmentative activities. Should a problem appear despite the safeguards of permit planning, regular inspections, opportunity for citizen participation, and the extended period for responsibility, it may be likely that the problem was not caused by the permittee's violation of the regulatory program. In such circumstances, it would not be appropriate for the regulatory authority to reassert jurisdiction under the approved program as discussed later in this preamble. The need for administrative finality justifies the termination of jurisdiction under the approved regulatory program at the time of a proper bond release.

However, in response to this and other concerns expressed by the commenters, OSMRE has decided to codify the proposed preamble language describing the circumstances under which the regulatory authority must reassert jurisdiction and has modified the standard to "misrepresentation of a material fact" rather than "intentional wrongdoing." If, following final bond release, any reasonable person could determine that the bond release was based upon fraud, collusion, or a misrepresentation of a material fact at the time of release, under final Section 700.11(d)(2), the regulatory authority would have to reassert regulatory jurisdiction. Moreover, this rule is not intended to preclude any person's rights to challenge a bond release decision under the applicable regulatory program. The Secretary retains a proper and carefully designed oversight role under this rule. If, at any time, the Secretary has reason to believe a violation of the regulatory program exists, he will notify the State regulatory authority when required by 30 CFR Part 842. If, in response to the OSMRE notice, a State regulatory authority maintains that it has no jurisdiction over the alleged violation because final bond release has occurred or a written determination under section 700(d)(1)(i) was made, then OSMRE must determine whether the State was arbitrary, capricious, or abused its discretion under the State program by not reasserting jurisdiction over the site under the standards established in this final rule.

30 CFR 700.11(d)(1)(i) - INITIAL PROGRAM OPERATIONS

Final paragraph 700.11(d)(1)(i) provides that a regulatory authority may terminate its jurisdiction under the regulatory program over reclaimed sites of initial program surface coal mining and reclamation operations, if the regulatory authority determines in writing that all requirements imposed under 30 CFR Chapter VII, Subchapter B (the initial program regulations) have, in fact, been successfully completed. Paragraph (d)(1)(i) is not applicable to coal exploration because the Act does not provide for the regulation of coal exploration operations under the initial program.

The principal difference between permanent program sites and both initial program sites and coal exploration sites is that for the latter two categories, the Act does not impose a requirement to file performance bonds or specify a procedure, such as that set forth in section 519, under which a regulatory authority signifies that reclamation is complete. Therefore, paragraph (d)(1)(i) is not couched in terms of bond release because the Act does not require performance bonds for initial program operations, even though some States did. Where performance bonds were required, the written determination required by this rule could take the form of an approved bond release application or other document that the State regulatory authority uses to accompany final bond release, provided that the document relied upon meets the requirement of paragraph (d)(1)(i) for a written determination of compliance with the initial program standards. Where no bond was required or where bond release does not include the written determination required by paragraph (d)(1)(i), the State regulatory authority must make such a determination for regulatory jurisdiction to terminate.

One commenter argued that the rule improperly delegates OSMRE's initial program responsibilities under section 502(e) to the States. The same commenter maintained that the proposed rule is inconsistent with judicial decisions which have determined that OSMRE's jurisdiction over initial program sites is independent of and unaffected by State partial or complete bond release, citing *Grafton Coal Co., 3 IBSMA 175 (1981);* and *Bannock Coal Co. v. OSM, 93 IBLA 225 (1986).*

The rule does not improperly delegate the Secretary's responsibilities under section 502(e). Under that section, OSMRE was required to implement an initial Federal enforcement program in each State. The initial program was to remain in effect in each State until the Secretary approved a permanent State program or promulgated a Federal program for the State. Upon the approval of a State program, section 503 of the Act grants the State exclusive jurisdiction for the regulation of surface coal mining and reclamation operations on lands within such State, except for Secretarial responsibilities under sections 521 and 523. In addition to responsibility for permanent program operations, States have accepted the responsibility for regulating initial program operations under the State programs. This regulatory responsibility delegated to the State includes not only inspection and enforcement authority but also the authority to determine when reclamation under the initial regulatory program has been successfully completed. Only for situations

where state regulatory authorities have not accepted responsibility over initial program sites does the Secretary continue to be the regulatory authority.

With respect to the case law cited by the commenter, the cases cited are administrative cases heard before the Interior Board of Surface Mining and Reclamation Appeals, later the Interior Board of Land Appeals (the Board). Grafton upheld the Secretary's authority to issue a Federal NOV before the partial release of an initial State program bond. Bannock upheld the Secretary's authority to issue a Federal NOV after final State bond release. Neither case affects OSMRE's authority to promulgate this rule which is not written in the context of initial program bond release, but instead requires a written determination that the initial program reclamation requirements have been satisfied.

One commenter cited OSMRE's 1985 Semiannual Report on the Kentucky Permanent Program to allege that the proposed rule is capricious because OSMRE has knowledge through oversight inspections and special studies that State regulatory authorities have improperly released performance bonds on interim program sites. The commenter asserted that in response to this problem OSMRE is attempting to promulgate a rule which would arbitrarily extinguish jurisdiction in order to avoid "conflict" with States. The commenter then cited OSMRE's June 4, 1987 Directive on State Bond Release Oversight Inspections to assert that Federal oversight of State bond releases would be eliminated. Other commenters submitted a 1985 newspaper article and a General Accounting Office (GAO) report entitled "Surface Coal Mining Operations in Two Oklahoma Counties Raise Questions About Prime Farmland Reclamation and Bond Adequacy (GAO/RCED-85-148)," dated August 8, 1985. Both were submitted to show that States are improperly releasing performance bonds.

OSMRE acknowledges that there have been some initial program final bond releases by States without full reclamation. The fact that OSMRE took special notice of the problems and conducted special studies demonstrates OSMRE's commitment to resolve those problems. Because States have been using initial program bond releases as a mechanism for terminating regulatory jurisdiction, OSMRE recognizes the need to clarify the standard for termination. Post-bond release problems which occurred in the past support the need for such a rule. This rule will clarify what standard the States must meet to terminate regulatory jurisdiction, the mechanism to be used for future terminations, and the standard OSMRE would use to review such terminations. As such, this rule is essential to preclude further actions terminating jurisdiction by State regulatory authorities in the absence of full and complete reclamation in accordance with the applicable standards.

The Secretary has the general authority under section 201(c)(2) of the Act to "publish and promulgate such rules and regulations as may be necessary to carry out the purposes and provisions" of the Act. He may exercise that authority to establish a procedure for initial program sites similar in purpose to section 519(c)(3). Under such a procedure, when a regulatory authority determines an operator has in fact successfully completed all reclamation activities at an initial program surface coal mining and reclamation operation site, regulatory authority jurisdiction may be terminated over such reclaimed sites. Such a procedure is allowable because, by operation of the statutory definition, such sites are no longer "surface coal mining and reclamation operations."

Contrary to the commenters' allegation, the OSMRE Directive referenced does not eliminate Federal oversight of State bond releases but rather recognizes that States are currently terminating jurisdiction through bond release and dropping such sites from their list of inspectable units subject to normal oversight as surface coal mining and reclamation operations. It then identifies a separate procedure to be used in evaluating the effectiveness of the State's bond release process which may include inspections of sites where final bond has been released.

30 CFR 700.11(d)(1)(ii) - PERMANENT PROGRAM OPERATIONS

Final paragraph 700.11(d)(1)(ii) provides that a regulatory authority may terminate its jurisdiction under the regulatory program over the reclaimed site of a permanent program surface coal mining and reclamation operation, or increment thereof, or of a coal exploration site, if the regulatory authority determines in writing that all the requirements imposed under the applicable regulatory program have been successfully completed or, where a performance bond was required, the regulatory authority has made a final decision to fully release the performance bond in accordance with Federal or State program equivalent to 30 CFR Part 800. A bond release decision is not final until all administrative and judicial appeals have been resolved. For surface coal mining and reclamation operations which operated under the permanent program, the written determination will be the written decision required by 30 CFR Part 800, or program counterpart for the release of final performance bonds.

Both the public and OSMRE have the right to participate in State bond release proceedings and to voice any objections to such releases. The bond release pursuant to 30 CFR 800.40 may not occur until "all reclamation requirements of the Act are fully met." Because the Act does not require performance bonds for coal exploration activities, the written determination before regulatory authority jurisdiction may terminate over a coal exploration site is a new procedure and is similar to the way unbonded initial program sites will be handled under Section 700.11(d)(1)(i) as explained above.

Several commenters argued that the final release of a performance bond does not justify termination of agency jurisdiction. The commenters alleged that some regulatory authorities rely on visual observations during their bond release evaluations, and do not conduct any of the technical analyses necessary to assure that at the time of final bond release all performance standards have been satisfied. The commenters indicated that they are unaware of situations in which the regulatory authority performs independent testing of actual compliance with performance standards, such as compaction of backfilled areas, stability of slake testing for hollow fills, core sampling of impoundments and other structures, underground investigations to validate subsidence control measures, or other analyses to measure full compliance.

The commenters' premise appears to be that all of these things should be done at the time of bond release. Such a premise is inconsistent with the overall regulatory program that monitors each phase of each mining and reclamation operation from beginning to end. Approval of the reclamation and operation plan required for each permit is predicated on a demonstration by the permit applicant that the design and performance standards of the regulatory program will be met. Throughout the conduct of both mining and reclamation operations, the regulatory authority performs periodic inspections to ensure compliance with the approved reclamation and operation plan. Also, certifications are required both during and upon completion of construction for certain critical structures cited by the commenters. Where operations are inconsistent with the approved plan or certifications are not provided or are inaccurate, the regulatory authority will require corrective measures, either through enforcement actions or permit revisions. Relying on this process, which includes extensive documentation, the regulatory authority can legitimately conclude that reclamation has been completed according to engineering designs at the time of final bond release, without conducting further extensive testing.

Under Part 800 or an approved Federal or State program counterpart, the regulatory authority must perform an onsite inspection and evaluate the reclamation work involved as part of the bond release process. Under Part 800, the regulatory authority has the discretion to determine on a site-specific basis the extent and type of additional technical analysis, if any, necessary to evaluate whether reclamation has been successfully completed. Also, it must be remembered that under the permanent program the bond release process entails extensive public participation and allows any person with a legal interest in the bond release to file written objections and request a public hearing. Persons with an interest in the bond release may also be provided access to the permit area and access to all relevant inspection documents. In addition, written notification is provided of a decision to release a performance bond and such a decision is appealable. The bond release is not final until appeals have been resolved.

One commenter stated that since the Act has been in existence for only ten years, OSMRE does not have the data to demonstrate the point at which reclamation is complete. As an example, the commenter cited a mine site described in an unsuitability petition. At that site, leaching through acidic overburden, not noted or anticipated at the time of final bond release, subsequently occurred.

OSMRE recognizes the potential for unanticipated events to occur after final bond release which may have adverse environmental consequences. The occurrence of such an event, however, is not automatically a basis for a regulatory authority to disturb an administratively final decision to release a bond and to terminate regulatory jurisdiction. Whether reclamation was in fact successfully completed by a permittee and whether jurisdiction must be reasserted by the regulatory authority are factual questions, the answers to which are dependent upon particular circumstances. In the example provided by the commenter, the occurrence of an acid seep subsequent to bond release does not, by itself, establish the cause of the seep, whether reclamation had been completed, whether intervening events occurred, or the circumstances surrounding bond release. This rule establishes the circumstances when a regulatory authority must reassert jurisdiction.

As, over time, OSMRE and State regulatory authorities gain greater knowledge of successful reclamation techniques, these would be reflected in new permit approvals. However, it would not be appropriate through a reassertion of

regulatory jurisdiction to require the operators who had long ago left completed sites which had met the standards of their permits and the applicable regulatory program to return to such sites and reclaim them in accordance with new technology.

One commenter submitted part of the March 13, 1979, Federal Register preamble to OSMRE's 1979 permanent program rules on coal waste disposal and impoundments, and the cover sheet without accompanying text of an Office of Technology Assessment (OTA) report entitled "Western Surface Mining Permitting and Reclamation (OTA-E-279)," dated June 1986. Another commenter submitted an OTA report entitled "Staff Memorandum -- Reclaiming Prime Farmlands and Other High-Quality Croplands After Surface Coal Mining," dated December 1985. Citing the report, this commenter asserted that the bond release success standards are inadequate to guarantee reclamation will be achieved and that long term productivity problems may exist on prime farmlands after the operator has successfully met the bond release test. While the first commenter did not provide a rationale for submitting the preamble segment of the 1979 regulations nor the OTA report, OSMRE presumes the intent was to also express concern about long term reclamation success. However, OSMRE considered the June 1986 OTA report and it should be noted that this rule will not modify any performance, design, or construction standards for coal waste disposal.

As discussed in response to a previous comment, the permitting and inspection processes are the mechanisms designed by the Act and implementing regulations to ensure long term reclamation success. Each permit subject to the prime farmlands provisions of a regulatory program must contain an approved operation and reclamation plan which includes pre-mining soil mapping and soil analysis and a topsoil and subsoil removal, storage, and restoration plan. The operation is inspected at least monthly to ensure compliance with the approved permit. Before the final bond can be released an operator must demonstrate, among other things, that soil productivity is equal to or better than similar non-mined areas based on crop yield measurements for at least three years. The bond release decision process includes the opportunity for public participation, meaning that in reaching its decision the regulatory authority must consider any objections raised. Once these processes are satisfied, the operator is considered to have met all obligations under a regulatory program, the site is recognized as no longer being a surface coal mining and reclamation operation as defined in the regulatory program, and regulatory jurisdiction may therefore terminate. Should, at some time after bond release, it become apparent the techniques currently being approved at some sites are not yielding the desired long term results, or new technologies have become available, that does not justify requiring the reconstruction of past operations which were conducted in accordance with approved plans and met soil productivity and revegetation success standards at the time of bond release.

One commenter questioned how coal slurry impoundments fit into the scheme of the rule, given that many such impoundments will not be dewatered or reclaimed for decades, and may require chemical and physical treatment for an indefinite period.

No operator can obtain a final bond release as long as a site constitutes a surface coal mining and reclamation operation as defined under the regulatory program. In cases where a structure such as a coal slurry impoundment continues to require additional or ongoing reclamation work by the operator, then no final bond release is possible. Only when the operator's work is done and all reclamation required under the regulatory program has been completed and, for permanent program sites, the period of extended responsibility has run can the regulatory authority decide to cease its jurisdiction.

A commenter questioned how OSMRE will apply the rule to mining operations with post-closure drainage which will continue to require chemical and physical treatment to meet effluent limitations.

This rule does not affect the standard required for full bond release which requires full compliance with the applicable performance standards. In order for a release to be appropriate under such circumstances, it should include assurances which are provided through a contract or other mechanism enforceable under other provisions of law to provide, for example, long term treatment of an alternative water supply or acid discharge. When such assurances are provided, the failure of such maintenance following bond release is not sufficient reason to reassert regulatory jurisdiction under the regulatory program. If, subsequent to bond release, a problem occurs related to inadequate maintenance, the contract or agreement would be enforceable through other provisions of law. Should such contract or agreement prove unenforceable, then the bond release would have been based on misrepresentation and jurisdiction should be reasserted.

One commenter was concerned about the effect of the rule regarding previously made written determinations of successful completion of reclamation required by paragraph (d)(1)(ii) of this rule for coal exploration sites. The commenter stated that it would be unreasonable for the regulatory authority to have to locate a written determination for such sites because the files may have been archived.

This comment relates to an approach outlined in the proposed preamble *(52 FR 24094)* concerning the status of sites where mining or exploration was determined to be completed by the regulatory authority prior to the effective date of this rule. That approach, for which OSMRE specifically invited comment, suggested that if States wished to terminate jurisdiction at completed sites where no bond was required or where bond release did not include a written determination of compliance, they would need to revisit such cases and make the written determination required by this rule. OSMRE believes that the approach outlined in the proposed rule provided inadequate recognition of the fact that States already terminate jurisdiction under their approved programs and therefore no need exists for States to disturb past final determinations unless such determinations were inconsistent with the approved programs. Accordingly, this rule is prospective only. It does not invalidate previous actions by State regulatory authorities to terminate their jurisdiction but instead formalizes the standards that must be incorporated into approved programs and applied thereafter.

One commenter wrote that a Federal surface management agency should play a primary role in the determination of whether reclamation goals have been met, and in determining when regulatory jurisdiction ends on Federal lands.

The comment concerns OSMRE's Federal lands program and bond release procedures, which are beyond the scope of this rule. Under 30 CFR 740.4(e), the Federal land management agency is responsible for determining post-mining land uses. In States where responsibility for administering the Federal lands program has been delegated to the State under a Federal/State cooperative agreement, a Federal responsibility exists to concur in State bond releases when leased Federal coal is involved. See 30 CFR 740.15(d)(3). Under some cooperative agreements, the Federal land management agency has assumed the responsibility to concur in the State bond release. Moreover, under 30 CFR Part 800, any Federal surface management agency may participate in the final bond release proceeding, and thus play a role in the determination of whether reclamation goals have been met. However, the regulatory authority has the responsibility to decide whether to terminate regulatory jurisdiction, and not the Federal surface management agency.

30 CFR 700.11(d)(2) - REASSERTION OF REGULATORY AUTHORITY JURISDICTION

As noted previously in response to concerns that States may improperly release final bonds and terminate their jurisdiction over sites which have not been fully reclaimed, OSMRE has added a new paragraph (d)(2) to Section 700.11(d) to make explicit the effect of the final rule and to codify the preamble discussion to the proposed rule explaining what circumstances would warrant requiring a State regulatory authority to reassert jurisdiction over a site as a "surface coal mining and reclamation operation" following an earlier termination of jurisdiction. Paragraph (d)(2) establishes the circumstances under which the regulatory authority has the obligation to reassert regulatory jurisdiction over a site where bond has been fully released or written determination made and regulatory jurisdiction was terminated.

The preamble to the proposed rule explained that jurisdiction over specific sites should not exist following bond release or other written determination, except where the final release or determination involved fraud, collusion, or any other intentional wrongdoing *(52 FR 24094)*. The final rule removes the proposed requirement to establish intentional wrongdoing as one of the bases for the mandatory reassertion of regulatory jurisdiction, and replaces it with the requirement that regulatory authority jurisdiction be reasserted if the bond release was based upon a misrepresentation of a material fact at the time of bond release.

Establishing intentional wrongdoing would have required evidence relating to the intent of the persons involved with the bond release proceeding. Such proof would have been difficult to obtain in most instances, and would not have required the reassertion of regulatory jurisdiction in situations where it is clear that reclamation was never successfully performed, but the intent of the parties could not be established.

The standard adopted, bond release or written determination based upon misrepresentation of a material fact, can be established by objective evidence relating to whether the reclamation plan was fully complied with and completed at the time of bond release, and, in certain instances, can be inferred from an examination of the site on which jurisdiction was terminated. This standard is consistent with the environmental protection purposes of the Act, and is responsive to the

commenters' concerns that bond release can occur and jurisdiction terminate without reclamation having been successfully accomplished.

If the regulatory authority has terminated jurisdiction at sites where OSMRE has reason to believe that reclamation was not complete at the time of such termination, whether by bond release or other means, under the rule OSMRE will notify the State of possible violations (including incomplete reclamation) it believes exist at the site. Should the State decline to reassert jurisdiction under Section 700.11(d)(2), OSMRE will determine whether or not the State's decision not to reassert regulatory jurisdiction was arbitrary, capricious, or an abuse of discretion under the approved State program.

III. PROCEDURAL MATTERS

Effect in Federal Program States and on Indian Lands

The final rule applies through cross-referencing in those States with Federal programs and on Indian lands. The States with Federal programs are California, 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 905, 910, 912, 921, 922, 933, 937, 939, 941, 942, and 947, respectively. The Indian lands program appears at 30 CFR Part 750.

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 changes in these programs will be necessary. If the Director determines that certain State 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

The collection of information contained in this rule have been approved by the Office of Management and Budget under *44 U.S.C. 3501* et seq. and assigned clearance number 1029-0094. Public reporting burden of this information is estimated to average one hour per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing the burden, to Information Collection Clearance Officer, Office of Surface Mining Reclamation and Enforcement, 1951 Constitution Ave., NW., Washington, DC 20240; and the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503.

Executive Order 12291 and Regulatory Flexibility Act

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 in 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.

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 (NEPA) of 1969, *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 specified previously (see "ADDRESSES").

Authors

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LIST OF SUBJECTS IN 30 CFR PART 700

Administrative practice and procedures, Reporting and recordkeeping requirements, Surface mining, Underground mining.

Accordingly, 30 CFR Part 700 is amended to read as follows:

Dated: September 30, 1988.
J. Steven Griles, Assistant Secretary -- Land and Minerals Management.

PART 700 -- GENERAL

1. The authority citation for Part 700 continues to read as follows:

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

2. Section 700.10 is revised as follows:

SECTION 700.10 - INFORMATION COLLECTION.

The collection of information, and recordkeeping requirements, contained in 30 CFR 700.11(d), 700.12(b) and 700.13 has approved by the Office of Management and Budget under *44 U.S.C. 3501* et seq. and assigned clearance number 1029-0094. The information collected in Section 700.11(d) is used by OSMRE and States to establish standards for determining when a mine site is no longer a surface coal mining and reclamation operation and thereby when regulatory jurisdiction may end. The information collection under Section 700.12(b) is used by OSMRE to consider need, costs, and benefits of a proposed regulatory change in order to grant or deny a petition that has been submitted. Information collected in Section 700.13 identifies the person and nature of a citizen's suit, so that OSMRE or a state can respond appropriately.

3. In Section 700.11, paragraph (d) is added to read as follows:

SECTION 700.11 - APPLICABILITY.

* * * * *

(d)(1) A regulatory authority may terminate its jurisdiction under the regulatory program over the reclaimed site of a completed surface coal mining and reclamation operation, or increment thereof, when:

(i) The regulatory authority determines in writing that under the initial program, all requirements imposed under Subchapter B of this chapter have been successfully completed; or

(ii) The regulatory authority determines in writing that under the permanent program, all requirements imposed under the applicable regulatory program have been successfully completed or, where a performance bond was required, the regulatory authority has made a final decision in accordance with the State or Federal program counterpart to Part 800 of this chapter to release the performance bond fully.

(2) Following a termination under paragraph (d)(1) of this section, the regulatory authority shall reassert jurisdiction under the regulatory program over a site if it is demonstrated that the bond release or written determination referred to in paragraph (d)(1) of this section was based upon fraud, collusion, or misrepresentation of a material fact.

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