FEDERAL REGISTER: 53 FR 47378 (November 22, 1988)

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

30 CFR Part 701
Permanent Regulatory Program; Definitions; Support Facilities

ACTION: Final rule.

SUMMARY: The Office of Surface Mining Reclamation and Enforcement (OSMRE) is removing the definition of support facilities from its regulations because a definition is not needed in order to ensure that such facilities are regulated under the Surface Mining Control and Reclamation Act ("the Act" or SMCRA). OSMRE has determined that the identification of facilities that support surface coal mining operations has been conducted in a manner consistent with the intent of SMCRA during those periods when there has been no definition in Federal regulations (prior to the 1983 introduction of a definition and since the 1985 suspension of the definition).

EFFECTIVE DATE: December 22, 1988.

FOR FURTHER INFORMATION CONTACT: Stephen M. Sheffield, Office of Surface Mining Reclamation and Enforcement, U.S. Department of the Interior, 1951 Constitution Avenue NW., Washington, DC 20240; Telephone: 202-343-5950 (Commercial or FTS).

SUPPLEMENTARY INFORMATION:

I. BACKGROUND

The Surface Mining Control and Reclamation Act of 1977, *30 U.S.C. 1201* et seq. ("the Act" or SMCRA), sets forth general regulatory requirements governing surface coal mining and the surface impacts of underground coal mining. Sections 701(28) (A) and (B) of the Act define surface coal mining operations subject to regulation under the Act to include (A) specific activities conducted in connection with a coal mine and:

(B) The areas upon which such activities occur or where such activities disturb the natural land surface. Such areas shall also include any adjacent land the use of which is incidental to any such activities, all lands affected by the construction of new roads or the improvement or use of existing roads to gain access to the site of such activities and for haulage, and excavations, workings, impoundments, dams, ventilation shafts, entryways, refuse banks, dumps, stockpiles, overburden piles, spoil banks, culm banks, tailings, holes or depressions, repair areas, storage areas, processing areas, shipping areas and other areas upon which are sited structures, facilities or other property or materials on the surface, resulting from or incident to such activities; * * *

OSMRE had initially proposed a definition of "resulting from or incident to" on September 18, 1978 *(43 FR 41801).* However, following review of comments on the proposed definition, OSMRE decided not to include it in the final regulations issued on March 13, 1979. In the preamble to those final regulations *(44 FR 14915),* OSMRE stated that "a meaningful definition which would cover all situations is not possible." Instead, the determination as to whether an off-site area or facility would be subject to regulation under section 701(28)(B) of SMCRA would be made on a case-by-case basis. Further guidance was provided in the discussion of permitting requirements for support facilities and coal processing plants at Section 785.21 *(44 FR 15095).* In that discussion, OSMRE stated that regulatory authorities would be required to extend their permit requirements to include all facilities on the mine site and all facilities incident to the mine at or near the site.

On May 5, 1983, in an attempt to further clarify which facilities were subject to regulation under section 701(28)(B) of SMCRA, OSMRE defined the term support facilities *(48 FR 20401).* In the 1983 definition, OSMRE included in

regulations an interpretation of the phrase in section 701(28)(B) of SMCRA, "resulting from or incident to," to connote an element of geographic proximity. Facilities regulated as support facilities were to be determined, in part, based upon their location relative to a regulated activity.

The 1983 definition was challenged in the U.S. District Court for the District of Columbia in In Re: Permanent Surface Mining Regulation Litigation II, No. 79-114 (D.D.C. July 6, 1984) (In Re: Permanent II). Plaintiffs maintained that there was no lawful basis for a geographic limitation in the definition, and that the statutory language, "resulting from or incident to," connotes a functional relationship. The court determined that there was no evidence to support OSMRE's conclusion that areas that result from or are incident to activities must be located near those activities. The court found that a limitation based solely on proximity could not stand. In Re: Permanent (II), Slip op. at 20-23.

On July 10, 1985, in response to the court's finding, OSMRE published an interim final regulation *(50 FR 28186)* suspending the definition of support facilities. At the same time, OSMRE proposed the removal of the definition *(50 FR 28180)*. OSMRE further stated in those rulemakings that it had determined that a definition of support facilities was not needed, and that there was no need to amplify the language of section 701(28)(B) of the Act with respect to the meaning of the phrase "resulting from or incident to" a regulated activity.

Nine comments were received from representatives of the coal industry, environmental organizations, and State regulatory authorities on the 1985 proposal to delete the definition of support facilities. All commenters favored retention of a definition to clarify which types of facilities would be subject to regulation as support facilities. Because of the expressed interest in having a regulatory definition, OSMRE reconsidered possible definitions. On May 11, 1987, OSMRE stated in the preamble to a final regulation defining "coal preparation" *(52 FR 17724)* that it would propose a new definition of support facilities. However, for reasons discussed in the following section of this preamble, "Discussion of Final Rule," OSMRE did not propose a new definition.

In order to ensure full consideration of opinions on this issue, OSMRE undertook an extensive outreach effort involving the participation of interested parties from industry, environmental groups, State regulatory authorities and professional societies. This included holding facilitated outreach meetings to provide interested parties with an opportunity to comment on draft rule language and to fully discuss issues relative to this proposed rulemaking.

In addition to embarking on the outreach effort and reconsidering possible definitions, responsible officials in each of OSMRE's field offices were consulted to determine if support facilities have been adequately identified by States. The results of that consultation, as well as the outreach effort, are discussed in the following section of this preamble, "Discussion of Final Rule."

Finally, on January 29, 1988, the U.S. Court of Appeals issued a decision which overturned the decision in In Re: Permanent (II) concerning whether proximity could be considered in determining SMCRA's jurisdiction over off-site facilities. (*NWF v. Hodel, 839 F.2d 694, 765-766* (D.C. Cir., 1988) ("NWF")). The court of appeals affirmed the Secretary's incorporation of a consideration of proximity in the 1983 definition of support facilities. Specifically, the court stated that the "phrase 'resulting from or incident to' clearly suggests a causal connection, which, while not indicating an element of geographic proximity, certainly does require some type of limiting principle of proximate causation * * *." (*NWF, 839 F.2d at 745)*. The court of appeals reinstated the provision which stated that "resulting from or incident to an activity connotes an element of proximity to that activity." Based on this ruling, OSMRE reinstated the definition of support facilities on June 9, 1988 *(53 FR 21767)*.

On June 22, 1988, OSMRE proposed to amend its permanent program regulations at 30 CFR 701.5 by removing the definition of support facilities *(53 FR 23522)*. Removal was reproposed rather than taking final action on the similar proposal of 1985 *(50 FR 28180)* because of the public expectation that a new definition would be forthcoming following OSMRE's statement to that effect in the final rulemaking defining "coal preparation" *(52 FR 17724)*. This allowed all interested parties to consider again the proposed removal and comment on it prior to any final effect.

In addition to soliciting public comments and providing an opportunity for public hearings upon request, OSMRE provided a 45-day public comment period. OSMRE received comments from three organizations: A State regulatory authority, a representative of a coalition of environmental groups, and a representative of the coal industry. No public meeting was requested and none was held.

II. DISCUSSION OF FINAL RULE

OSMRE is removing the definition of support facilities from 30 CFR 701.5. Although comments on the 1985 proposed removal of the definition of support facilities *(50 FR 28180)* favored having a definition, generally because it would help in interpreting which facilities should be subject to regulations, outreach discussions with commenting parties indicated that the interest in having a definition was not strong. The 1987 outreach consultations focused, in particular, on an effort to identify those categories of facilities which would always be considered support facilities and those which would never be support facilities. OSMRE was unable to develop a definition of support facilities based upon categories of facilities. Any such definition would involve high potential for either under- or over-inclusive findings when applying the criteria of "resulting from or incident to."

In addition, the outreach participants expressed the concern that having a definition could be harmful in that it would limit the ability of regulatory authorities to make case-by-case determinations of what is "resulting from or incident to." Indeed, during the discussions there developed considerable support for making the proposed removal of the definition final.

Concurrent with the outreach effort, responsible officials in each of OSMRE's field offices were consulted to determine if support facilities have been adequately identified by States. While only two approved State programs contain a definition of support facilities, rarely have objections been raised to OSMRE concerning the administration of State programs on this issue. In fact, there have been only two instances where OSMRE has issued a ten-day notice to a State with an approved program questioning whether or not particular facilities should be regulated as support facilities.

In consideration of OSMRE's experience with this issue, it appears that regulatory authorities are capable of identifying off-site facilities that should be subject to the provisions of SMCRA without having a definition of support facilities in Federal regulations. In fact, there appears to be no significant difference in the administration of State programs with or without a Federal definition. OSMRE believes that the term "resulting from or incident to," in the context of the rest of the language of section 701(28) of SMCRA, provides adequate guidance to regulatory authorities in the identification of facilities that support surface coal mining operations. Having considered the court's decision, OSMRE will again recognize that the consideration of proximity, as well as function, is valid in determining whether facilities are "resulting from or incident to" regulated activities. The agency is dealing with industrial practices of great complexity (*NWF, 839 F.2d at 745).* It is imperative that OSMRE's regulations provide reasonable flexibility to implement the statute in a manner that considers the myriad site-specific situations that cannot be fully anticipated in a Federal regulation.

OSMRE will continue to monitor, through existing oversight and annual evaluation mechanisms, the interpretation by regulatory authorities of the term "resulting from or incident to." If, as a result of this monitoring, it is determined that there has developed a need for additional guidance or regulatory action, OSMRE will take appropriate action.

III. RESPONSE TO COMMENTS

Two commenters supported the proposed removal. One commenter suggested that, because the definition merely gives examples of facilities which may be regulated, and the definition of surface coal mining operations provides sufficient guidance to enable regulatory authorities to identify such facilities, a definition of support facilities is not needed. The second commenter expressed support for the court of appeals finding that the consideration of an element of proximity is a reasonable approach to determining when the facilities in section 701(28)(B) of the Act are "resulting from or incident to" the activities in (A). This commenter also endorsed the court's finding that interpreting the scope of such a statutory phrase is, as the court stated, "an obvious example of the sort of congressional delegation of policy choices to an agency the courts are bound to respect."

One of these supporting commenters went on to suggest that OSMRE should also remove the performance standards for support facilities in 30 CFR 816.181. Because such facilities must be operated in accordance with the permit issued for the mine which they support and must comply with all other performance standards, the commenter maintained, special performance standards are not needed.

OSMRE has noted this suggestion. However, the performance standards of 30 CFR 816.181 are beyond the scope of this rulemaking.

The commenter opposing the removal of the definition of support facilities suggested that the June 9, 1988, reinstatement of the definition had the effect of classifying certain coal preparation activities (e.g. crushing, sizing, screening) as activities of support facilities rather than as surface coal mining operations. This, the commenter maintained, conflicts with the express direction given the Secretary in In Re: Permanent II and warrants the promulgation of a final definition that conforms to the decision in In Re: Permanent II.

OSMRE recognizes that an argument can be made that the coal preparation facilities of concern to the commenter could be considered to be support facilities under the reinstated definition but does not agree that this is a problem or that it warrants redefining support facilities. The reinstatement was made in response to the direction of the court of appeals. Thus, regardless of whether or not it conflicts with the direction given in In Re: Permanent II, it was necessary to comply with the higher court's decision. The Office is taking actions, in this rulemaking and in another final rule, fully consistent with the decision of the court of appeals reversing the finding of the lower court relative to the scope of regulation of coal processing. (see separate final rule for Coal Preparation Plants Not Located Within the Permit Area of a Mine in this issue of the Federal Register, proposed June 22, 1988; *53 FR 23526).*

This same commenter suggested the need to redefine support facilities to assure uniform regulation among all states. Lack of a definition, the commenter maintained, would result in having no minimum national standards for identifying such facilities and would leave the States, the public, and the industry with no guidance on the scope of regulated support facilities. Industry would be subject to more after-the-fact liabilities and the public would be deprived of intended statutory protection, the commenter asserted. In addition, the commenter suggested, States will inevitably diverge widely in their decisions on the scope of regulation of facilities, and OSMRE will have no basis upon which to exercise Federal jurisdiction where States fail to act. One result, the commenter maintained, will be "forum shopping," particularly in the Kentucky-Ohio-West Virginia border area, for the least restrictive State policy on support facilities, a result which Congress intended be avoided.

OSMRE believes that adequate guidance exists to regulatory authorities in the statutory definition of surface coal mining operations. This belief is reinforced by OSMRE's and the State's experience in identifying support facilities as discussed elsewhere in this preamble. OSMRE is concerned that any attempt to be too prescriptive in regulation covering the broad spectrum of possible facilities would unduly restrict the discretion that regulatory authorities must have in order to make valid decisions about the jurisdiction of SMCRA in individual cases. Categorical exclusions or inclusions would almost certainly result in inappropriate applications of the rule in some instances. Further, the court of appeals explicitly acknowledged the legal defensibility of OSMRE's "flexible implementation of the statute that allows regulatory authorities to 'consider the myriad site specific situations that cannot be fully anticipated in writing a Federal regulation.' *48 FR 20397 (1983).*" *NWF, 839 F.2d at 745.*

As noted in this preamble, OSMRE had initially proposed a definition of "resulting from or incident to" on September 18, 1978 *(43 FR 41801).* However, based on comments received and following further consideration, OSMRE excluded the definition from the 1979 final regulations and chose, instead, to take a case-by-case approach to identifying support facilities. The history of the program shows that there has not been a compelling need to have such a definition.

Concerning the commenter's assertion about "forum shopping," this simply has not been OSMRE's experience. OSMRE has verified that only two States, Ohio and Virginia, define support facilities in their program rules. These definitions, which have been approved by OSMRE as "no less effective" than Federal requirements, will not have to be removed as a result of the removal of the definition of support facilities at 30 CFR 701.5. To the extent operators wish to take into account any aspect of a State's regulatory program and its implementation in determining the location of facilities, they are free to do so. However, OSMRE has seen no evidence that such considerations are likely to override other more significant economic factors, such as transportation availability and costs and ease of access and communications, when an operator is deciding on the location of support facilities.

In addition to maintaining that a definition of support facilities is necessary, this same commenter provided an interpretation of section 701(28)(B) of the Act upon which to base the definition. The commenter suggested that there are six discernable subcategories of section 701(28)(B): (1) The areas upon which section 701(28)(A) activities occur; (2) the areas where section 701(28)(A) activities disturb the land surface; (3) adjacent lands the use of which is incidental to section 701(28)(A) activities; (4) all lands affected by new roads or improvements of existing roads for haulage or access; (5) excavations, workings, impoundments, dams, ventilation shafts, entryways, refuse banks, dumps, stockpiles,

overburden piles, spoil banks, culm banks, tailings, holes or depressions, repair areas, storage areas, processing areas, and shipping areas; and (6) other areas upon which are sited structures, facilities, or other property or materials on the surface, resulting from or incident to such activities. Those specific areas enumerated by Congress, the commenter maintained, such as roads, excavations, workings, impoundments, dams, ventilation shafts, entryways, refuse banks, dumps, stockpiles, overburden piles, spoil banks, culm banks, tailings, holes or depressions, repair areas, storage areas, processing areas and shipping areas, etc., because of their enumeration by Congress, are "resulting from or incident to" activities in section 701(28)(A).

The commenter quoted Senate Report 95-128: " 'Surface coal mining operations' also includes all areas upon which occur surface mining activities and surface activities incident to underground mining. It also includes all roads, facilities[,] structures, property, and materials on the surface resulting from or incident to such activities, such as refuse banks, dumps, culm banks, impoundments and processing wastes.' " (Emphasis added by commenter). The areas identified in (B), the commenter maintained, were thus listed as specific examples of areas which Congress determined to be resulting from or incident to activities in (A). The phrase "and other areas * * *" the commenter continued, was included to cover any other areas which Congress did not delineate. It is only for this latter unidentified "other areas upon which are sited structures, facilities or other property or materials on the surface" that OSMRE must create a criterion for determining which facilities are "resulting from or incident to" activities in (A), the commenter concluded.

OSMRE disagrees with the commenter's interpretation of section 701(28)(B) and cites the court of appeals: "At issue in the interpretation of Section 701(28)(B) is the scope of 'processing areas * * * and other areas upon which are sited structures, facilities or other property or materials on the surface resulting from or incident to such activities.' " Later in the same paragraph, the court refers to "processing areas * * * resulting from or incident to such activities." Clearly, the court of appeals decision provides a basis for OSMRE's interpretation that the phrase "resulting from or incident to" modifies "processing."

In addition, contrary to the commenter's assertion, the phrase "resulting from or incident to" clearly does modify all those other areas specified in section 701(28)(B) of the Act. OSMRE does not believe that the enumeration by Congress of examples in section 701(28)(B) was intended to reach any such facilities which are not resulting from or incident to a mine. If the enumeration were intended to reach such facilities, then all impoundments and dams nationwide would be subject to SMCRA regardless of whether or not they had anything to do with a coal mine. Certainly Congress did not intend OSMRE to regulate cattle-watering agricultural impoundments or major water project impounding structures without any coal mining association. Congress did not intend that "shipping areas" regardless of their association with mines be regulated under SMCRA. It is unreasonable to assume that Congress intended to regulate all coal processing at industrial facilities nationwide, absent any relationship to a mine. Rather than enumerating the examples in section 701(28)(B) as always-regulated types of facilities, irrespective of whether or not they are associated with coal mines, OSMRE believes that Congress identified them as examples of facilities that will be regulated if they are "resulting from or incident to" activities in connection with a mine.

This commenter suggested an approach to defining support facilities involving the identification of specific classes of facilities which would categorically fall within or outside of the regulatory ambit of SMCRA, coupled with the identification of those in the gray area where more site-specific analyses would be applied. In addition, the commenter provided some examples of how case-by-case decisions could be made for those facilities that would be covered explicitly in the definition. A coal transfer operation (e.g. from truck to rail) dedicated solely to coal transfer would clearly be dependent on and resulting from coal extraction activities, the commenter asserted. The commenter suggested that a transfer operation, which also transferred some other commodity, like grain or rock, where coal was not a significant factor in the economic viability of the enterprise, would not likely be found to be resulting from coal extraction activities.

In 1987, in consultation with regulatory authorities and representatives of the coal industry and environmental organizations, OSMRE developed for consideration a three-tiered approach to defining support facilities. As mentioned already in this preamble, OSMRE concluded that any definition that categorized property as always regulated, never regulated, or sometimes regulated would involve high potential for finding instances within each category in which the criteria of "resulting from or incident to" would be applied either under- or over-inclusively.

Thus, not only must OSMRE reject the commenter's particular categorization of facilities based on the interpretation of section 701(28)(B) of the Act, but the Office reaffirms its long-held belief that any attempt to categorize such facilities

in the context of a definition of support facilities would lead to the inappropriate application of SMCRA.

On the question of what factors should be considered in determining whether or not a facility is "resulting from or incident to" an activity in section 701(28)(A) of the Act, the commenter suggested that the determination should hinge on whether or not the facility is resulting from or incident to the types of activities included in the definition, rather than be based on an integration of ownership or control with a specific regulated mining activity. The commenter further maintained that Congress was concerned with regulating these facilities wherever impacts occurred regardless of whether the facility was independently operated or was part of an integrated mining operation. The basis for the determination, the commenter asserted, should be the economic viability of the facility independent of the mining activity.

OSMRE agrees. Economic independence is a valid consideration in determining whether a facility is a support facility. Indeed, OSMRE would expect the economic dependence of a facility on a mine to be a critical element in determining the degree to which the facility results from or is incident to a regulated mining activity.

An additional consideration in identifying support facilities, the commenter suggested, would be whether the environmental and public health and safety impacts of the support area are regulated by other agencies for water discharges or other environmental impacts. This would not mean, the commenter continued, that areas should be excluded from regulation based on the magnitude of impact or on the basis that OSMRE's regulations would not fully mitigate the impacts. Instead, the commenter urged, it should be a consideration of whether there are, in close cases, unaddressed coal-related environmental impacts of the sort that Congress sought to remedy, such as toxic runoff, proximity to dwellings, surface or groundwater contamination. For example, the commenter suggested, as a practical matter, extended storage of coal would likely cause impacts on both the subsurface hydrology and surface water quality from runoff. Absent the application of SMCRA, the commenter continued, such impacts would be classified as "non-point" pollution under the Clean Water Act and subject to no regulatory controls. The commenter reminded OSMRE that the Office has previously acknowledged that if not regulated, support areas can cause acid and toxic drainage and will be left unreclaimed when they are no longer needed, creating a safety and environmental hazard.

OSMRE does not agree that the consideration of environmental effects in this context is relevant to the determination of whether a "resulting from or incident to" relationship exists. In fact, OSMRE considered this concept during its 1987 outreach activities on this rule but was convinced by the negative comments received, and by further review of the definition of surface coal mining operations at section 701(28) of the Act, that such a consideration is irrelevant to determining "resulting from or incident to," and therefore inappropriate. Congress passed this Act to require environmental protection and reclamation at coal mines and for activities and areas associated with coal mines. This Act was not intended to regulate other industrial facilities not associated with mines even if the facilities involve some coal-related activity and even if they would have undesirable environmental impacts. Therefore, whether there is jurisdiction to regulate a particular facility under some other environmental statute must be irrelevant to a determination of whether there is jurisdiction to regulate the facility under SMCRA. The facility either is or is not properly subject to jurisdiction under SMCRA. Also, the reach of any other statute concerning the facility cannot be affected by whether or not there is jurisdiction under SMCRA.

EFFECT IN FEDERAL PROGRAM STATES AND ON INDIAN LANDS

The proposed rule would apply through cross-referencing in those States with Federal programs. This includes 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 proposed rule also would apply through cross-referencing to Indian lands under the Federal program for Indian lands as provided in 30 CFR Part 750.

IV. PROCEDURAL MATTERS

Paperwork Reduction Act

This rule does not contain collections of information which require approval by the Office of Management and Budget under *44 U.S.C. 3501* et seq.

Executive Order 12291

The Department of the Interior has determined, in accordance with the criteria of Executive Order 12291 (February 17, 1981), that this rule is not major and does not require a regulatory impact analysis because it will not affect existing costs to the coal industry and coal consumers, and will not adversely affect competition, employment, investment, productivity, or innovation.

Regulatory Flexibility Act

The Department of the Interior has determined, pursuant to the Regulatory Flexibility Act, *5 U.S.C. 601* et seq., that this rule will not have a significant economic effect on a substantial number of small entities.

National Environmental Policy Act

OSMRE has prepared an environmental assessment (EA), and has made a finding that this rule will not significantly affect the quality of the human environment under section 102(2)(C) of the National Environmental Policy Act of 1969, *42 U.S.C. 4332*(2)(C). The EA is on file in the OSMRE Administrative Record in Room 5131, 1100 L St., NW., Washington, DC.

Author

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LIST OF SUBJECTS IN 30 CFR PART 701

Coal mining, Surface mining, Underground mining.

Accordingly, 30 CFR Part 701 is amended as set forth below.

Dated: October 7, 1988.
J. Steven Griles, 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. Section 701.5 is amended by removing the definition of support facilities.

[FR Doc. 88-26916 Filed 11-21-88; 8:45 am]
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