FEDERAL REGISTER: 54 FR 52092 (December 20, 1989)

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

30 CFR Parts 700, 702, 750, 870, 905, 910, 912, 921, 922, 933, 937, 939, 941, 942, and 947
Surface Coal Mining and Reclamation Operations;
Exemption for Coal Extraction Incidental to the Extraction of Other Minerals

ACTION: Final rule.

SUMMARY: The Office of Surface Mining Reclamation and Enforcement (OSM) of the United States Department of the Interior (DOI) is adopting regulations relating to the exemption contained in section 701(28) of the Surface Mining Control and Reclamation Act of 1977 (the Act) concerning the extraction of coal incidental to the extraction of other minerals. This action provides guidance to the coal and noncoal mining industry and coal regulatory authorities concerning implementation of the exemption under section 701(28) and establishes criteria and procedures for determining whether an operation qualifies initially and on a continuing basis for the exemption. This action is necessary to halt and prevent abuse of the exemption. The final rule is intended to provide a fair and consistent basis for determining the applicability of the Act to operations producing both coal and other minerals in order to ensure that the mining of coal is appropriately regulated.

EFFECTIVE DATE: April 1, 1990.

FOR FURTHER INFORMATION CONTACT: Patrick W. Boyd, OSM, Department of the Interior, 1951 Constitution Avenue NW., Washington, DC 20240; telephone: 202-343-1864 (Commercial or FTS).

SUPPLEMENTARY INFORMATION:

I. BACKGROUND

Section 701(28) of the Surface Mining Control and Reclamation Act of 1977 (the Act), *30 U.S.C. 1291*, excludes from the definition of surface coal mining operations the extraction of coal incidental to the extraction of other minerals where coal does not exceed 16 2/3 percent of the tonnage of minerals removed for purposes of commercial use or sale. Operations meeting the above standard are thereby not subject as surface coal mining operations to provisions of the Act such as permitting, bonding, and abandoned mine reclamation fee payments.

The incidental mining exemption first appeared in S. 425 introduced in the 93rd Congress (See Senate Rept. No. 402, 93rd Cong., 1st 160 (1973).) and was included in every major version of the Act before Congress between 1973 and 1977. The Congressional reports indicate that this provision was aimed at operations, such as limestone quarries, where the primary mineral being sought is something other than coal and comparatively small proportions of coal are recovered incidental to those operations. For example, see Id., p. 74 and Senate Rept. No. 28, 94th Cong., 1st Sess. 224 (1975).

Regulations implementing this section of the Act were originally promulgated in 30 CFR 700.11(e) *(44 FR 15315,* March 13, 1979). This provision simply repeated the language of the Act. Similarly, for purposes of describing the applicability of the abandoned mine reclamation fee obligations of title IV of the Act, 30 CFR 870.11(d) (1979) also generally recited the language of the proviso.

Because Section 700.11 did not contain provisions prescribing how those seeking an exemption from the applicability of the Act could request one from the regulatory authority or prescribing how the regulatory authority, on its own initiative, could make a written determination that an operation is exempt, OSM added such provisions when Section 700.11 was reorganized on August 2, 1982 *(47 FR 33424).* In the reorganization, the incidental mining exemption, formerly Section 700.11(e), was shifted to Section 700.11(a)(4). New procedures were added at Section 700.11(c), which provide that the regulatory authority may make a written determination, when requested, whether the operation is

exempt and that the person requesting the exemption has the burden of establishing the exemption. Section 700.11(c) also provides that if a written determination of exemption is reversed through subsequent administrative or judicial action, any person who, is good faith, has made a complete and accurate request for an exemption and relied upon the determination, will not be cited for violations which occurred prior to the date of reversal.

On June 30, 1982, OSM revised 30 CFR 870.11(d), governing abandoned mine land fee obligations, and imposed a tonnage measurement constraint under which operators had to qualify for the exemption during any twelve consecutive months *(47 FR 28574, 28594).* As discussed below, this final rule revises Section 870.11(d).

Because the 1979 and 1982 regulations at 30 CFR 700.11 did not provide specific guidance for determining whether an operation is exempt, OSM published an advance notice of proposed rulemaking and request for public comment on section 701(28) of the Act in the Federal Register on May 7, 1984 *(49 FR 19336-19340).* At the same time, OSM published guidelines intended to assist operators and the States in implementing this exemption pending promulgation of final regulations. The guidelines established a two-part test for the exemption. An operator desiring to qualify for the exemption had the burden of establishing that the extraction of coal (1) is incidental to the extraction of other minerals and (2) does not exceed 16 2/3 percent of the mineral tonnage removed for commercial use or sale. Under the guidelines, whether an operation was "incidental" was a question of fact to be determined by the regulatory authority based on information required to be submitted by the operator. The documentation could include information on volumetric calculations, the physical layout of the mine site, stockpiles and production records. Among other provisions, the guidelines also required the operator to request a written exemption from the regulatory authority. For the complete text of the guidelines for implementing the incidental mining exemption issued in 1984, see *49 FR 19338.*

After considerable discussion and public comment gathered through a regulatory outreach process, OSM published proposed rules on June 1, 1987 *(52 FR 20546-20552).* The proposal was characterized by a three-part test for the incidental mining exemption. An operator wishing to obtain the exemption would have the burden of passing (1) the "tonnage" test whereby the tonnage of coal must not exceed 16 2/3 percent of the tonnage of minerals removed for reasonable commercial use or bona fide sale over the life of the mining operation, (2) a "stratigraphic" test whereby the coal produced must lie above or immediately below the deepest stratum of other minerals extracted, and (3) a "commercial value" test whereby the other minerals produced must be commercially valuable either at the time of application for the exemption or in the reasonably foreseeable future, not to exceed twelve months. The proposal also required the operator to give notice to the regulatory authority of its intention to rely on the exemption at least 30 days (for new operations) or 60 days (for existing operations that intend to continue operations after the end of the 60-day period) prior to commencement of operations. Please refer to the Federal Register notice cited above for detailed coverage of all provisions of the proposed rules. The proposal allowed for a public comment period of 70 days. A public hearing on the proposed rule was held in Columbus, Ohio, on August 3, 1987.

In response to public requests and to provide for proposed modifications to the regulatory text of the proposed rules, the proposed rules were modified and the public comment period was reopened on February 24, 1988, for 30 days *(53 FR 5430-5433).* Major features of the modifications included requiring application for and approval of the exemption before operations could commence (or continue for more than 90 days after the effective date of the final rule) and an annual reporting requirement related to the tonnage test. Additional aspects of the modified proposal are discussed in the above cited Federal Register notice.

Subsequently and in response to comments received on earlier proposals, particularly comments from the House Committee on Interior and Insular Affairs, OSM issued additional modifications to the proposed regulatory text and reopened the public comment period for an additional 30 days *(53 FR 13415-13417,* April 25, 1988). This set of modifications was characterized by the addition of a fourth test, the revenue test, that an operator would have to pass in order to obtain the incidental mining exemption. The operator would have the burden of establishing that the revenue derived from the coal extracted would not exceed 50 percent of the total revenue derived from the coal and other minerals extracted from the same mining area. In addition, initial and annual reporting requirements for revenue were proposed. Refer to the Federal Register notice cited above for a full discussion of the modified proposal. The most recent comment period closed on May 25, 1988. OSM received many comments from public interest groups, industry associations, mining and mining-related firms, and State regulatory authorities. As discussed in the next portion of the preamble to this final rule, OSM gave full consideration to all comments received. Any changes in the final rule from the proposed rules are identified in the following detailed discussion of the final rule.

II. DISCUSSION OF FINAL RULE AND RESPONSE TO COMMENTS

A. LEGAL BASIS FOR THE FINAL RULE

Activities and areas regulated under the Act are specified in the definition of the term "surface coal mining operations," which contains this important proviso:

* * * Provided, however, that such activities do not include the extraction of coal incidental to the extraction of other minerals where coal does not exceed 16 2/3 per centum of the tonnage of minerals removed for purposes of commercial use or sale * * * *(30 U.S.C. 1291)*

The Act does not define the terms "incidental" or "other minerals" for purposes of this proviso and does not specify the period of time over which the tonnage constraint applies. Thus the Secretary of the Interior (the Secretary) may interpret the Act in a reasonable manner, consistent with whatever Congressional intent that may be inferred. Authority for this rule is also found in sections 201(c)(2), 412(a) and 501 of the Act. The legislative history of the proviso indicates that it is intended "to exclude operations, such as limestone quarries, where coal is found but is not the mineral being sought." Sen. Rept. No. 28, 94th Cong., 1st Sess. 98 (1975). Apart from that sentence, the legislative history provides little guidance on how Congress intended that the exemption be implemented.

The earliest known version of the incidental mining exemption was proposed by a limestone operator, Carbon Limestone Company, based on the fact that its open limestone quarry, which bottomed out 117 feet below the surface, had an overburden that included a 24-inch coal seam above the limestone produced. Hearings, 93rd Cong., 1st Sess. 1680-1 (April 9, 10, 16 and 17, 1973). Carbon Limestone proposed the following exemption:

Provided that where the extraction of coal is incidental to the extraction of other minerals and the tonnage of coal extracted does not exceed 15% of the total saleable production, the operation shall not be deemed surface mining of coal.

The proviso first appeared in bill language subsequent to the 1973 hearings. OSM has consistently interpreted the statutory language and the legislative history to imply that Congress intended that the incidental mining exemption be based both on tonnage and on whether the coal extraction is incidental to the extraction of other minerals.

It has, however, been argued that if Congress had intended such a two-part test, it would have connected the two statutory phrases "the extraction of coal incidental to the extraction of other minerals" and "coal does not exceed 16 2/3 per centum of the tonnage of minerals removed" with the conjunction "and." However, OSM believes that Congress intended more than a simple tonnage test. If Congress had meant for the exemption to be based solely on tonnage, the provision could have been written, "that such activities do not include the extraction of coal where coal does not exceed 16 2/3 per centum of the tonnage of minerals removed." OSM believes that Congress included the phrase "incidental to the extraction of other minerals" for a purpose, not merely as superfluous language. That purpose is that the exemption be based both on tonnage and on whether the coal extraction is incidental to the extraction of other minerals.

In recent court decisions and administrative hearings before the DOI, the requirement that the incidental mining exemption is based on more than just the relative tonnages of coal and other minerals extracted has been upheld. In United States v. Beaird Coal Co., No. CV-84-V-0850-J slip op. at 9 (N.D. Ala. Mar. 10, 1986), rev'd on other grounds, *825 F.2d 1471 (11th Cir. 1987)*, the court stated that "even though [the defendant's] coal production did not exceed the 16 2/3 percent limit," the court was "not reasonably satisfied that the mining of coal by [the defendant] was incidental to its extraction of other mineral." In S&G Excavating, Inc. v. United States, No. 137-85C, slip op. at 8 (Cl. Ct. July 5, 1988), hereafter S&G, the Claims Court was "unable to conclude that OSM's interpretation of the statute is unreasonable," and therefore, applied both the tonnage test and an interpretation of the term "incidental" to the particulars of the case. In *McNabb Coal Co. v. OSMRE, 181 IBLA 282, 289* (March 15, 1988), hereafter McNabb, heard before the Interior Board of Land Appeals (IBLA), the administrative judge found that "the statute clearly provides the extraction of coal must be incidental to the mining operation, as well as constituting less than 16 2/3 percent of the tonnage produced." On April 28, 1989, the IBLA decision was affirmed. See McNabb Coal Co. v. Lujan, No. 88-C-281-E (N.D. Okla. 1989).

Although the Secretary has consistently asserted that to be exempt an operator must separately meet the "tonnage" and "incidental" elements, in the absence of a regulation specifying what is meant by "incidental," various approaches

have been used. In this rulemaking, OSM has examined the merits of the alternatives, seeking a clear and practical way to delineate the boundaries of the term "incidental" for the purposes of applying the incidental mining exemption, consistent with the Act. All of these approaches have been aimed at determining, in accordance with the legislative history, which minerals are primarily being sought.

OSM believes that the "incidental" element of the exemption should be based on specific, objective criteria that clearly distinguish exempt operations from surface coal mining operations for both operators and regulatory authorities. To this end, OSM has decided to employ two straightforward and easily measured criteria to define incidental mining, the stratigraphic test and the revenue test.

OSM believes that the "incidental" element of the exemption should be partly based on the actual physical location of the coal in relation to the other minerals mined. This is an easily administrable primary purpose test. For example, if a person's principal purpose is to extract and sell limestone, but must first mine through a coal seam to reach the limestone, the decision to mine the coal is governed by its physical location in the path of the mining activity. If that coal seam were not present, the person would still conduct the mining activity for the purpose of extracting the limestone. As a further example, if a person were mining limestone that occurred directly on top of a coal seam, that person would be likely to mine the coal as well since it would involve little additional cost. If the coal had not been present, the person may well have mined the limestone anyway. However, if the coal seam were not located in close proximity below the limestone, removal of the intervening, non-commercially valuable strata to reach the coal would tend to establish that the primary purpose, not just of the additional activities, but of the entire operation, was to extract the coal. In this case, the mining operation would not be exempt from the requirements of the Act. The stratigraphic test reveals the intentions of both current and prospective operators by focusing on the outward manifestations of those intentions. Therefore, OSM has interpreted the term "incidental" in this final rule partly in terms of the stratigraphic test whereby coal is produced from a geological stratum lying above or immediately below the deepest stratum from which other minerals are extracted for purposes of bona fide sale or reasonable commercial use.

In addition, the stratigraphic test will not ordinarily be subject to widely varying interpretations. The relative positions of strata can be determined with precision even in the highly transformed Appalachian region. Depending on the direction or planned direction of the mining activity, exempt operations will encounter coal before the other mineral, or the coal will be immediately adjacent to or immediately below the other mineral without a substantial amount of intervening strata. The stratigraphic test also has the advantage of achieving a balance between protection of the environment and full utilization of coal by minimizing the potential for future disturbance of the land to recover coal.

The revenue test, whereby no more than 50 percent of total revenue may be derived from coal, is also an effective tool for identifying the operations where coal extraction is incidental to the extraction of other minerals. The test is objective and easily measured and will complement the stratigraphic test by providing another means of assessing the primary purpose of a mining operation. Clearly, the revenue generated by a mining operation of a vital factor in any kind of economic or financial analysis of the operation and is a key element in determining the primary purpose of an operation.

Previously, in the absence of a definite regulation, several approaches have been taken to determining the financial implications of the term "incidental." Some have interpreted the McNabb decision as promoting the use of an economic viability test to determine if an operation is or will be exempt. OSM believes that in the absence of a rule the IBLA was merely applying the 1984 guidelines, which call for an evaluation of all relevant factors, and due to the particular facts of the case, found an economic viability test an appropriate yardstick in that case alone. In S&G, the Claims Court acknowledged that the stratigraphic test is "easy to apply," but preferred a "primary purpose test," involving "an analysis of the totality of the circumstances."

OSM believes it would be an essentially unproductive exercise and administratively impractical to set up incidental mining exemption criteria that would be based on the totality of all factors. In contrast, the bright line test established by a revenue test is effective by directly comparing the revenue derived from the coal with that derived from other minerals and by allowing operators to know in advance the yardstick against which compliance will be measured.

Thus, for the reasons stated above, OSM believes that the most reasonable interpretation of the incidental mining exemption provision of the Act includes separate "tonnage" and "incidental" elements and that the most practical and effective way to implement the term "incidental" is to employ the stratigraphic test and the revenue test. The final rule adopted today is faithful to and reflects these principles. Based on an analysis of the issues involved, the legislative

history of the Act, applicable court and administrative law decisions, and the administrative record of this rulemaking, including comments received, this final rule is a proper and reasonable interpretation of section 701(28) of the Act.

B. EFFECT OF THE FINAL RULE

The effective date of this rulemaking is April 1, 1990. OSM chose this date in recognition of the fact that many businesses customarily record and report information on a calendar quarter basis, thereby facilitating compliance with the reporting and record keeping requirements contained in this rule.

In States with Federal programs and on Indian lands, the entire rule becomes effective on April 1, 1990. In primacy States, the application for exemption process, as well as the substantive standards established by this rule, will be phased in through the adoption of application requirements in the State programs. That is, no exemption application is due until the applicable State program requires such an application. Until a State program is modified by the incorporation of regulations promulgated pursuant to this final rule, operations and regulatory authorities should rely on the 1984 guidelines, as interpreted by recent legal decisions, particularly McNabb (discussed above), in implementing the incidental mining exemption.

This rule is not intended retroactively to bring under this Act activities that occurred prior to the effective date of this rule or the effective date of counterpart provisions of the State regulatory programs, which would not qualify for an exemption under the standards of this rule, but that did qualify under previous standards. Such operations would legitimately have relied upon standards in place to qualify for the exemption. Similarly, this rule is not intended retroactively to invalidate 30 CFR 870.11(a), as adopted in 1982.

C. SECTION 700.11(a)(4) - APPLICABILITY.

Final Section 700.11(a)(4), which is the exemption from the applicability of the Act for the extraction of coal incidental to the extraction of other minerals, includes a cross-reference to 30 CFR part 702, which contains the specific rules implementing the incidental mining exemption in section 701(28) of the Act. The final rule is identical to the June 1, 1987 proposal. No comments were received on the proposed language.

D. PART 702 -- EXEMPTION FOR COAL EXTRACTION INCIDENTAL TO THE EXTRACTION OF OTHER MINERALS -- SECTION-BY-SECTION ANALYSIS

The final rule adopted today establishes a new part 702 relating to the exemption for coal extraction incidental to the extraction of other minerals.

SECTION 702.1 - SCOPE

Final Section 702.1 explains that part 702 implements the exemption contained in section 701(28) of the Act concerning the extraction of coal incidental to the extraction of other minerals where coal does not exceed 16 2/3 percent of the total tonnage of coal and other minerals removed for purposes of commercial use or sale over the life of the mining operation. The operations exempt under section 701(28) of the Act and part 702 are not subject to the environmental protection performance standards of Title V and abandoned mine reclamation fee provisions of title IV of the Act, OSM is, however, authorized to inspect and enter sites to verify the validity of claimed exemptions. Final Section 702.1 is identical to the proposal.

One commenter was concerned about situations where coal is overlain by other marketable materials and asked whether coal or non-coal regulations would govern in those cases.

If only noncoal minerals and materials are mined, then the operation is not a surface coal mining operation and not subject to the Act. If, however, the operation is not an exploration activity and is not exempt under section 528 of the Act, and coal is mined along with noncoal minerals and materials, then the operation is a surface coal mining operation unless it qualifies under section 701(28) for a statutory exemption. Section 701(28) of the Act defines surface coal mining operations as not only "activities conducted on the surface of lands in connection with a surface coal mine * * * the products of which enter commerce or the operations of which directly or indirectly affect interstate commerce," but

also "the areas upon which such activities occur" to include "holes or depressions". Therefore, subject to the exemptions of section 701(28), whenever a non-exploration activity, which is also not exempt under section 528 of the Act, conducted on the surface of land results in the extraction of coal, the activity is a surface coal mining operation.

SECTION 702.3 - AUTHORITY

The June 1, 1987 proposal contained an authority section, proposed Section 702.3, which identified sections 201, 412 and 501 of the Act as directing the Secretary to administer the program for controlling coal mining operations and to publish and promulgate such rules and regulations as may be necessary to carry out the purposes and provisions of the Act. Proposed Section 702.3 also identified section 701(28) of the Act as providing an exemption to the requirements of the Act for the extraction of coal incidental to the extraction of other minerals where coal does not exceed 16 2/3 percent of the total tonnage of coal and other minerals removed for purposes of commercial use or sale. OSM has decided not to include proposed Section 702.3 in the final rule because authority for a part in the Code of Federal Regulations (CFR) is cited at the end of the table of contents of the part.

Several commenters stated that OSM has exceeded its statutory authority and is violating the Constitution in promulgating this regulation.

OSM disagrees. The Act has been held to be constitutional and promulgation of this rule is authorized by the Act.

According to these same commenters, OSM is also changing the meaning, verbiage and intent of the legislative enactment, the meaning of which is obvious from the plain and ordinary language of the statute. Other commenters contended that the rule is contrary to case law and administrative decisions.

OSM disagrees with both sets of comments. As discussed above, OSM believes that section 701(28) sets forth a two-part test for the incidental mining exemption. The first part of the test is clear, i.e., coal cannot exceed 16 2/3 percent of the tonnage of minerals removed. The second part of the test, i.e., the coal extracted must be "incidental to the extraction of other minerals" was not defined in the statute. Nor did Congress provide guidance as to how the exemption was to be implemented. Congress did, however, direct the Secretary in 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 this Act". Congress also gave the Secretary the authority in section 412(a) of the Act to "engage in any work and to do all things necessary or expedient, including promulgation of rules and regulations, to implement and administer the provisions of this title." OSM believes that this rulemaking is necessary to carry out the purposes and provisions of the Act. As for the comments stating that the rule is contrary to court and administrative decisions, a thorough discussion of pertinent decisions and their relationship to the final rule is provided above.

One commenter requested that the following provision be included: "The Secretary shall indemnify an operation currently operating under a valid exemption in place before the final date of these regulations." The commenter argued that he is entitled to compensation because the regulation is "taking" under the "Glendale Lutheran Church case."

Although no citation was given, OSM believes that the commenter was referring to *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California, 107 U.S. 2378 (1987)*, hereafter Glendale Lutheran, which concerned a regulatory taking. OSM disagrees that this final rule will have the effect of a taking under Glendale Lutheran or any other case. The Glendale Lutheran case did not change substantive "takings" standards. It opened up the possibility that a taking requiring compensation could be established during the time that an invalid rule remains in effect. In the first place, this rule is not invalid. Secondly, it is not retroactive, and thirdly, a person who does not qualify for the exemption under this rule could obtain a permit to commence or continue mining coal. Thus, this rule does not have any significant takings implications and fully implements the Congressional directive to protect the environment from the adverse effects of surface coal mining operations.

SECTION 702.5 - DEFINITIONS

Final Section 702.5 provides definitions of the terms "cumulative measurement period," "cumulative production," "cumulative revenue," "mining area" and "other minerals."

As explained below, the exemption criteria of final Section 702.14 provide that a person must annually satisfy both the tonnage test on a cumulative production basis and the revenue test on the cumulative revenue basis. "Cumulative measurement period" is defined at final Section 702.5(a) and means the period of time over which both cumulative production and cumulative revenue are measured.

Production rates of coal and other minerals are usually not consistent over the life of the mining operation. In some years a relatively large amount of coal may be produced; in other years coal production may be small or nonexistent. To avoid making such operations become subject to and not subject to the jurisdiction of the Act, as may occur under the 12 consecutive month test, and to avoid the unacceptable situation of applying the tonnage test after a mine has stopped producing, as may occur under a life-of-mine test, OSM is adopting a rule that measures production, adjusted for legitimate stockpiling, and revenue on a cumulative basis. The annual report required by final Section 702.18 will be used by the regulatory authority to evaluate compliance of the operation with the exemption criteria on an annual basis. The cumulative measurement concept evolved in response to numerous comments critical of either the life-of-mine or annual tests, and the definition of this term was added to the final rule in response to those comments.

The definition of "cumulative measurement period" includes in final Section 702.5(a)(1) a mechanism for determining the date from which cumulative production and revenue will be measured. For purposes of determining the beginning of the cumulative measurement period, subject to regulatory authority approval, the operator must select and consistently use (1) for mining areas where coal or other minerals were extracted prior to August 3, 1977, the date extraction of coal or other minerals commenced at that mining area or August 3, 1977, or (2) for mining areas where extraction of coal or other minerals commenced on or after August 3, 1977, the date extraction of coal or other minerals commenced at that mining area, whichever is earlier.

This provision is a logical extension of the decision to implement a cumulative standard for production and revenue. The purpose of the provision is to help the operator and the regulatory authority choose a starting date from which to calculate cumulative production and revenue for each mining area. The operator must use the starting date consistently in making production and revenue reports to the regulatory authority. The regulatory authority will be aided in administering the exemption by having a definite and consistent date from which cumulative production and revenue are calculated.

The definition of "cumulative measurement period" also includes a mechanism for determining the end of the period for which cumulative production and revenue are calculated in final Section 702.5(a)(2). This provision is necessary for determining the period covered by the annual report required under final Section 702.18. For annual reporting purposes, the end of the period for which cumulative production and revenue are calculated is (1) for mining areas where coal or other minerals were extracted prior to April 1, 1990, March 31, 1989, and every March 31 thereafter, or (2) for mining areas where extraction of coal or other minerals commenced on or after April 1, 1990, the last day of the calendar quarter during which coal extraction commenced, and each anniversary of that day thereafter. This provision is necessary to provide appropriate guidance to both operators and regulatory authorities for determining the period covered by the annual report.

"Cumulative production" is defined at final Section 702.5(b) and is the basis for measuring whether a mining area meets the tonnage requirement of the exemption in final Section 702.14(a)(1). It is defined as the total tonnage of coal or other minerals extracted from a mining area during the cumulative measurement period. The definition explains that the inclusion of stockpiled coal and other mineral tonnages in the total is governed by Section 702.16. The final rule provides that a mining area must satisfy the tonnage test on a cumulative production basis when each annual report is submitted.

"Cumulative revenue" is defined at final Section 702.5(c) and is the basis for measuring whether an operator meets the revenue test of final Section 702.14(a)(3). It is defined as the total revenue derived from the sale of coal or other minerals and the fair market value of coal or other minerals transferred or used, but not sold, during the cumulative measurement period. See the preamble to Section 702.14 of the final rule for a discussion of fair market value. The final rule provides that a mining area must satisfy the revenue test on a cumulative basis when each annual report is submitted.

"Mining area" is defined at final Section 702.5(d) as an individual excavation site or pit from which coal, other minerals and overburden are removed. The final definition differs from that proposed in June 1987 by substituting the phrase "coal, other minerals and overburden" for the proposed phrase "minerals and overburden." The change is intended to improve the clarity of the definition by employing terms that are themselves defined in the regulations. The primary

purpose for the definition being limited to an individual excavation site or pit is to preclude an operator from averaging mineral tonnages from different locations to gain an unwarranted exemption from the Act. The definition also prohibits an operator from claiming an exemption by combining production from distinct noncoal and coal operations. Each excavation site or pit must individually qualify for the exemption in accordance with the requirements for exemption under final Section 702.14. OSM recognizes that a single excavation site or pit may, depending on its size, include a number of individual excavation activities. In this context, OSM considers a mining area to include the excavation activities occurring within a single excavation site or pit.

"Other minerals" is defined at final Section 702.5(e) as any commercially valuable substance mined for its mineral value, excluding coal, topsoil, waste and fill material. The definition requires that the substance be mined for its mineral value, and therefore allows the regulatory authority the flexibility to consider local conditions in determining whether the mineral has commercial value. The exclusion of waste and soil from the definition of "other minerals" is intended to take into account material which is spoiled or otherwise disposed of without being used for its mineral value. Fill material is also excluded from the definition of other minerals. Including fill material is an "other mineral," or including fill as a valid commercial use of an "other mineral," could result in the inappropriate claiming of an exemption. For example, a person claiming the exemption could haul "overburden" to a site outside the mining area and claim the material is being commercially placed to prepare a site for construction, farming, etc. Allowing such claims could circumvent the provisions of the Act. A more definitive list of materials to be excluded from the definition of other minerals is not provided, as any attempt to list specific materials that are not "other minerals" runs the risk of excluding materials which may serve specialized uses and which may legitimately be exempt.

The definition of "other minerals" found in section 701(14) of the Act is not used in the final rule. It is clear from the legislative history that the section 701(14) definition is intended for use under section 709 of the Act, "Study of Reclamation Standards for Surface Mining of Other Minerals." See, for example, Sen. Rept. 93-402, 93rd Cong., 1st Sess. 75(1973) where the inclusion of the definition of "other minerals" is described in terms of the study "to provide a basis for future legislation to regulate surface mining and reclamation for these minerals." If applied in the context of section 701(28) of the Act, the broad section 701(14) definition could likely lead to substantial abuse of the exemption.

Several commenters objected to the definition of "mining area" because it is limited to an "individual excavation site or pit." The commenters said the definition will result in "selected small acreage pits across the country suddenly becoming subject to expensive and burdensome reclamation requirements."

OSM did not change the proposed definition in response to these comments. The purpose of limiting the definition to an individual excavation site or pit is to preclude averaging mineral tonnages from different locations to obtain an unwarranted exemption from the Act. For example, if averaging were allowed, a pit from which nothing but coal is mined could be considered exempt because mining is conducted in coordination with another mine several miles distant where a different mineral is extracted. The definition therefore prevents an operator from claiming an exemption by combining production from distinct noncoal and coal operations. Each excavation site or pit may contain more than one area of active excavation, but must individually qualify for the exemption.

Other commenters argued that since section 701(28) of the Act uses the plural in defining surface coal mining operations, e.g., "activities, lands, products," etc., the definition of "mining area" is inconsistent with the Act.

OSM is not aware of a Congressional intent to exempt single mines, operations or activities from the Act. The use of the plural form in section 701(28) is simply an editorial decision. OSM's definition is in keeping with Congressional policy of striking a balance between protection of the environment and the Nation's need for coal.

Several comments were received on the definition of "other minerals." One commenter stated that exclusion of topsoil and fill material is inconsistent with the minerals mining laws of some States. This commenter encouraged OSM to use the commercial sale of the mineral as the basis for the exemption and not exclude topsoil and fill materials simply because of potential abuse. Another commenter asked if his company could continue to provide "fill dirt" to local farmers, developers and highway departments even though it is not a commodity of commercial value under the proposed definition. Several other commenters argued that the definition of "other minerals" should also include "overburden." In contrast, a number of commenters opposed the inclusion of topsoil, waste and fill materials and stated that there are "abundant opportunities for abuse of the exemption if topsoil and/or fill material could be counted in the other mineral tonnage." These commenters believed that any operation can be engineered in such a way that coal constitutes only

one-sixth of the total materials removed if overburden is included. The commenters indicated that by eliminating topsoil, subsoil, and overburden from consideration as an "other mineral" a significant window for abuse will be eliminated.

Congress intended this exemption to be limited in nature and to be used where incidental amounts of coal were found while producing other minerals. If fill dirt or overburden material could be used in calculations, coal mining operations could be engineered improperly to meet the 16 2/3 tonnage test. The result could be widespread abuse of the exemption resulting in damaged and unreclaimed areas with insufficient material available to ensure reclamation. While topsoil, waste and fill material may have some commercial value in particular instances, to allow these materials to be used in calculating the exemption would allow mining areas that Congress clearly did not intend to be exempt to obtain the exemption. Since opportunities for inflating the tonnage removed for purposes of commercial use or sale would be difficult to regulate, OSM believes that, in order to avoid unnecessary regulatory burdens, it is best to exclude them from the definition of "other minerals." As for the operator who provides area farmers, highway departments, etc., with "fill dirt," nothing in this rule would prevent the operators from continuing to provide this service consistent with applicable provisions of 30 CFR chapter VII. However, the operator cannot use the material transferred for purposes of calculating the tonnage requirements of final Section 702.14(a), and if the operator is conducting surface coal mining operations, his activities must be performed in accordance with applicable regulatory requirements.

In response to the commenters who encouraged OSM to include "overburden" in the list of other minerals excluded from the definition of "other minerals," OSM believes that to include overburden would be confusing and is not necessary. While "overburden" has different meanings, OSM, for purposes of this rulemaking, considers it to be material of any nature, consolidated or unconsolidated, that overlies a deposit of useful materials, minerals, ores, or coal. Since this rulemaking addresses multiple strata of coal and other minerals which over and/or underlay each other, the term "overburden" is confusing. In its definitions of "other minerals," OSM excludes topsoil, waste, and fill materials from being considered commercially valuable materials for the purpose of calculating cumulative production. By specifically excluding topsoil, waste, and fill materials and confining "other minerals" to commercially valuable substances mined for their mineral value, OSM intends that only minerals and materials that have a recognized commercial value be used in applying the exemption criteria of final Section 702.14. OSM, therefore, believes further definition of "other minerals" to be unnecessary.

One commenter believed that the term "mining operation" needs to be defined, since several sections of the proposed rule (Sections 702.1, 701.2(d), and 702.14) would have evaluated the exemption based upon removal of coal and minerals over the "life of the mining operation." For the commenter, the terms "mining area" and "life of the mining operation" must be co-extensive, or else there will be a conflict. In particular, "life of the mining operation" must refer to all operations in a particular mining area in which both coal and other minerals are being extracted. The commenter further indicated that the "life of the mining operation" might be interpreted to cover several mining areas which are being concurrently or consecutively mined by the same company.

It is not necessary to define "mining operation" as requested by the commenter. By defining "mining area" to mean an individual excavation site or pit and requiring each mining area to be in compliance with all of the requirements of the rule, the physical extent of the overall mining operation is not relevant. No matter how extensive a mining operation may be or how many individual pits or excavation areas it encompasses, each pit and excavation area must comply with all the requirements of this part. Moreover, the rule adopted does not use the life of the mining operation concept about which the commenter was concerned.

SECTION 702.10 - INFORMATION COLLECTION

Final Section 702.10 explains that the information collections contained in final Sections 702.11, 702.12, 702.13, 702.15 and 702.18 of part 702 have been approved by the Office of Management and Budget (OMB) under *44 U.S.C. 3301* et seq. and assigned clearance number 1029-0089. The information collected will be used to determine the initial and continuing applicability of the incidental mining exemption to a particular mining operation. Response is mandatory for all those who wish to obtain and maintain the incidental mining exemption in accordance with section 701(28) of the Act. This section was inadvertently omitted from the proposals, but is included in the final rule because it is required by OMB. Inclusion of this section is technical in nature and imposes no requirements not otherwise contained in part 702.

SECTION 702.11 - APPLICATION REQUIREMENTS AND PROCEDURES

Final Section 702.11 establishes the application requirements and procedures for obtaining the incidental mining exemption. It is based upon the February 24, 1988 proposal.

Final Section 702.11(a)(1) states the application requirements. Any person who plans to commence or continue coal extraction in reliance on the incidental mining exemption after April 1, 1990, the effective date of these rules, under a Federal program or on Indian lands, or after the date of counterpart provisions in a State program shall file a complete application for exemption with the regulatory authority for each mining area. Final paragraph (a)(2) provides that once an application process is included in a regulatory program and except as provided in Section 702.11(e)(3), an operator may not commence coal extraction based upon the exemption until the regulatory authority approves such application.

Final paragraph (a) differs from the June 1, 1987 proposal due to the change from a notice of exemption filing requirement to a procedure requiring application for and approval of an exemption. OSM believes that section 201(c) of the Act provides the necessary authority to require an application for exemption as opposed to merely a notice of exemption.

The final rule has been somewhat modified from proposed Section 702.11(a) of the February 24, 1988 proposal, which only required new operations to file an application for exemption. The final rule states that the requirement to file a complete application for exemption applies to existing as well as new operations. Such a requirement could have been inferred from final Section 702.11(b), but for clarity is included in final Section 702.11(a). Also, OSM has inserted the phrases "after April 1, 1990 under a Federal program or on Indian lands, or after the date of counterpart provisions in a State program" in final paragraph (a)(1). OSM added these words to the final rule in recognition of the fact that under primacy, in States with approved regulatory programs, it is the State program procedures that apply, not the Federal regulations in this chapter. Under 30 CFR chapter VII, subchapter C, such States have the responsibility of conforming their regulations to be no less effective than the Federal regulations and operators are responsible for complying with the requirements of those State programs.

Final Section 702.11(a)(2) is based on the second sentence of Section 702.11(a) of the February 24, 1988 proposal. The final rule differs from that proposal by conditioning the prohibition on the commencement of coal extraction prior to exemption application approval on the incorporation of an exemption application approval process into the regulatory program. Such a condition recognizes that operators cannot apply for exemptions unless such a process is provided for in the State program. OSM recognizes that it will take time to incorporate the exemption application process into State programs. If the February 24, 1988 proposal had been adopted as proposed, no new operations could have claimed the exemption until the State program had been changed. To avoid the potential for a temporary taking, OSM modified the proposal accordingly.

Final Section 702.11(b) states the application requirement for existing operations. Any person who has commenced coal extraction at a mining area in reliance upon the incidental mining exemption prior to April 1, 1990 in a Federal program State or on Indian lands, or prior to the effective date of counterpart provisions of a State regulatory program may continue mining operations for 60 days after such effective date. Coal extraction may not continue after such 60-day period unless that person files an administratively complete application for exemption with the regulatory authority. If an administratively complete application is filed within 60 days, the person may continue extracting coal in reliance on the exemption beyond the 60-day period until the regulatory authority makes an administrative decision on such application. The 60-day period is intended to provide operators who plan to apply for an exemption time to prepare the application. Any coal extraction that occurs during the 60-day period will be considered a de facto assertion of the exemption and will be subject to the enforcement provisions of Section 702.17 of the final rule or its State program counterpart.

Final paragraph (b) differs from Section 702.11(b) of the February 24, 1988 proposal due to the change in the final rule from a notice of exemption filing requirement to a procedure requiring application for an approval of an exemption. The final rule also differs from the proposal by the insertion of the words "or the effective date of counterpart provisions of a State program" in the first sentence. These words were added to the final rule by OSM in recognition of the States' regulatory role under primacy and of the fact that an operator cannot file an application for an exemption until such a procedure is embodied in a State program. This change allows existing operations to continue during the interim that certain States may need to amend their programs. The final rule also differs from the February 1988 proposal, but is the same as the June 1987 proposal, in that existing operations are given 60 days, not 90 days, to submit an application for

exemption. The 60-day standard was originally proposed, but was changed without explanation to 90 days in the February 1988 proposal. The 60-day standard is being retained in the final rule for consistency with the rules establishing a grace period for surface coal mining operations to apply for a permit (30 CFR 773.11).

Final Section 702.11(c) is identical to the February 24, 1988 proposal and states that the regulatory authority shall notify the applicant if the application for exemption is incomplete and may at any time require submittal of additional information. The final rule differs from the June 1, 1987 proposal in providing for notification of the application if the application for exemption is incomplete instead of notification of the persons submitting the notice of exemption if the notice is incomplete. This change makes the notification provision consistent with the requirement for an exemption application in final Section 702.11(a).

Final Section 702.11(d) is identical to the February 24, 1988 proposal and states that following publication of the newspaper notice required by final Section 702.12(i), the regulatory authority shall provide a period of no less than 30 days during which time any person having an interest which is or may be adversely affected by a decision on the application may submit written comments or objections.

Final Section 702.11(e) is, with the exceptions described below, identical to the February 24, 1988 proposal and address the exemption determination. Final paragraph (e)(1) states that no later than 90 days after filing of an administratively complete application, the regulatory authority shall make a written determination whether, and under what conditions, the persons claiming the exemption are exempt under this part, and shall notify the applicant and persons submitting comments on the application of the determination and the basis for the determination. OSM decided that persons submitting comments should be notified of the determination and its basis so that they would have the opportunity to file for administrative review of the determination.

Final paragraph (e)(2) provides that the determination of exemption shall be based upon information contained in the application and any other information available to the regulatory authority at that time. This provision was added to the final rule by OSM in order to clarify the basis for the regulatory authority's determination of exemption.

Final paragraph (e)(3) states that if the regulatory authority fails to notify an operator as specified in paragraph (e)(1) of this section, an operator who has not begun may commence coal extraction pending a determination on the application unless the regulatory authority issues an interim finding, together with reasons therefore, that the operator may not begin coal extraction. A change made by OSM to Section 702.11(e) of the final rule is to make the 90-day period for decision on the application for exemption begin after the filing of an administratively complete application, not after publication of the required newspaper notice. OSM made this change to ensure that the public has an opportunity to comment on administratively complete applications for exemption.

Final Section 702.11(f) provides for administrative review of regulatory authority decisions on applications for exemption. Final paragraph (f)(1) incorporates the substance of Section 702.11(f) of the February 24, 1988 proposal and provides that any adversely affected person may request administrative review of exemption application determinations within 30 days of notification of such determination according to Federal or State procedures, whichever are applicable. Final paragraph (f)(2) was added to the final rule by OSM and provides that a petition for administrative review filed either under Federal or State procedures shall not suspend the effect of a determination on an application for exemption. This provision is intended to allow determinations to take effect without the delay required for resolution of an administrative review request. Of course, those seeking administrative review of a determination have the right to seek a temporary stay in accordance with the provisions of the applicable regulatory program.

Numerous comments were received on the issue of whether an operator should file a notice of exemption or be required to submit an application requiring approval of the regulatory authority. Comments received opposing the application requirement offered the following reasons: (1) The existing regulatory scheme which allows for the filing of a voluntary notice is adequate to identify and penalize violators of the exemption, and/or (2) an application requirement would place a significant and unjustified financial and manpower burden on industry without providing commensurate additional protection to human health and the environment. One comment acknowledged that a change from a notice to an application would not make much difference to "legitimate industrial mineral operators mining in a State having regulations controlling the mining and reclamation practices of such companies." The commenter did, however, offer the proviso that the State regulatory authority must effectively blend the reporting requirements of the coal and other

minerals regulations in such a manner as to eliminate any additional paperwork. Comments received in favor of an application requirement contended that a formal application is necessary to prevent abuse of the exemption.

After reviewing all comments on the issue, OSM has decided to adopt the proposed requirement that all mining operators claiming the exemption must make application for the exemption as provided in final Sections 702.11 and 702.12. OSM believes that an application requirement is necessary and reasonable as a measure to help assure that the operations claiming the exemption are, in fact, entitled to the exemption. OSM has made the application requirements as free of burden and expense as possible while at the same time providing sufficient information for the regulatory authority to evaluate the claim to exemption. While OSM encourages State regulatory authorities to make every effort to blend the requirement for an exemption application with the requirements of other coal and minerals regulations, the specific method used by each State to ensure that the requirement is met is best determined by the individual State regulatory authority.

One commenter proposed that the term "coal extraction" used in proposed Section 702.11 (a) and (b) be replaced with the term "coal sales and use." The purpose of the suggested substitute language was to eliminate the delays in obtaining a new exemption on a site by allowing the applicant to commence the removal of the coal and other minerals but not allow any disposal of the coal until the application was approved. The commenter noted that a delay of 3-4 months in filling a customer's order for other minerals might result while the application for exemption is being processed and thus the operator would suffer economic loss. The delay and economic loss would occur if there were coal overlaying the other mineral being mined. Other commenters contended that if an operator with a permit to mine "other minerals" unexpectedly encounters coal, no coal should be removed until an application for exemption has been approved by the regulatory authority. The commenters reasoned that it would be unlikely that coal would be unexpectedly encountered. These commenters said that it would be likely that other areas of the other mineral operation might be mined while the application for exemption is pending.

The inconvenience addressed by the commenters primarily relates to new operations because existing operations may continue to extract coal if an administratively complete application for exemption has been timely filed. Final Section 702.12(j) requires that the application for exemption include test borings or other information to show relative position and approximate thickness of the coal, other minerals and any material not classified as other materials. Such information should allow new operations to avoid coal extraction while their applications for exemption are pending. Because mining procedures are costly, operators do not blindly pursue coal or other minerals but specifically target the substance that they seek. OSM believes that in many instances modern mining methods are sophisticated enough to allow other minerals to be extracted while an application for an incidental mining exemption is being processed. Despite the possibility that certain activities could be delayed, delays are not expected to be excessive because of the provisions of final Section 702.11(e)(1) and (3). Therefore OSM does not believe the rule language needs to be changed as requested by the commenters.

One commenter stated that no exemption should be granted to a person who holds or intends to apply for a surface coal mining permit in the same watershed. For this commenter, the potential for abuse of the incidental mining provision is "very similar to that of the two-acre exemption, when carefully engineered sites are strung together in order to subvert the Act and to cause substantial damage without regard for environmental controls."

OSM disagrees. Since each individual pit or excavation site must comply with all the provisions of this part, sites cannot be "strung together" to subvert the Act.

One commenter stated that existing operations that have been considered exempt from surface mining regulations should be provided with a "grandfather clause" exempting them from the application requirements of proposed Section 702.11(b).

OSM does not agree. One of the principal purposes of this rule is to identify and then to deny an incidental mining exemption to future activities of existing operations that have claimed the exemption, but whose actual coal extraction is not incidental as intended by Congress. A "grandfather provision" would be counterproductive to this purpose.

One commenter observed that some existing operations may not be able to meet the requirements of this part and obtain an exemption. These operations will then be forced to get a coal permit. Since it takes time to get a permit, the commenter asked whether the coal should continue to be mined in the process of extracting other minerals and simply

"spoiled," i.e., treated as overburden. The commenter's concern was that coal is a resource to be utilized, not destroyed, and argued that "philosophically it is not correct, economically it is unsound and environmentally it is absolutely ridiculous to take a potentially usable toxic substance and spoil it."

Under final Section 702.11(b), an existing operation may continue to mine coal for 60 days following the effective date of this final rule or counterpart provisions of a State regulatory program. If after that 60-day period, the operation has not applied for an exemption, no further coal extraction may take place. The operator may apply for a coal mining permit at any time, however. The operator will be liable for violations of the appropriate regulatory program in existence after the 60-day period. Application for a coal mining permit does not forestall the reclamation obligation.

One commenter requested that the interim finding of Section 702.11(e)(2) of the February 1988 proposal and accompanying reasons should be detailed and sufficiently specific to allow an applicant to attempt to cure any problem set forth in the application and to preclude the regulatory authority from presenting additional reasons for denial after an applicant has responded to an interim finding.

OSM agrees that the reasons supporting an interim finding under final Section 702.11(e)(3) should be sufficiently detailed to allow the applicant to understand the basis for the regulatory authority's action. OSM, however, does not agree with the remainder of the comment. An applicant's response to reasons or issues raised by an interim finding may generate new or additional issues relevant to a determination of exemption. To preclude a regulatory authority from ever considering new or additional reasons that might arise out of an applicant's response to an interim finding is not reasonable and would expose the application review process to potential abuse.

Several commenters proposed that a second newspaper notice should be published after receipt of notice from the regulatory authority that the application is deemed administratively complete. They argued that it is in the best interest of the regulatory authority to fully involve the public in the review of the proposed exemption.

OSM agrees that the public should be fully involved in the exemption application process. However, to avoid the expense of two notices, OSM has changed the final rule at Section 702.12 to require publication of notice only after an administratively complete application has been received.

Some commenters urged OSM to set forth "interim standards" that must be met by the operator during the period after application for exemption but prior to approval. The commenters argued that this approach will avoid abuse of the exemption or the tacit approval of that abuse resulting from the regulatory authority's failure to make a determination on the application for exemption. The commenters further urged that the interim standards which they propose should include those operations which are still extracting any material, whether it is coal or other mineral, from the mining site. Other commenters disagreed with the provisions of proposed Section 702.11 which would allow interim operation while an application is pending if the agency fails to respond within 90 days and urged OSM to affirmatively act to preclude such activity. These commenters believed that the time frame for review must not begin to run until after the application is complete, "lest the applicant be allowed to submit inadequate information and be allowed to operate because of the delay in review that it has created." For these commenters the "interim procedure is contrary to prudent procedure in dealing with applications, since the agency may need additional time to review more questionable or close call situations." The commenters asserted that the provisions require "allocation of agency resources to making and defending an interim finding which are better spent on substantive review." The commenters suggested that OSM "eliminate the interim operation procedure" and allow sufficient time after submission of an administratively complete application for making exemption determinations.

OSM does not intend for operators to take unfair advantage of the interim finding provisions of final Section 702.11(e)(3), and has modified the text with regard to when the regulatory authority must act. Under the provisions of final Section 702.11(a), once an application process is included in a regulatory program, persons who plan to commence coal extraction following the effective date of the rules cannot do so until the regulatory authority approves the application. Only if the regulatory authority fails to act in 90 days after filing of an administratively complete application can new operations commence coal extraction. If delay by the applicant in submitting information is the basis for the regulatory authority not being able to make a final determination on the application within 90 days, that certainly would be a sufficient basis for making an interim finding under final Section 702.11(e)(3). Moreover, concern should not exist over the standards that apply to operations commencing under final Section 702.11(b) or (e)(3). Under final Section 702.15(c), such operations may proceed under the exemption only when they conduct their operations in accordance

with the standards of part 702 or counterpart provisions of the State regulatory program while their applications are pending before the regulatory authority. For instance, during the period before approval of the application, the applicant must satisfy the cumulative revenue and tonnage requirements of Section 702.14. If operators do not comply, they are liable for violations of the Act or the regulatory program and subject to the payment of abandoned mine reclamation fees (final Section 702.17(d)). Thus, the final rule sets forth adequate safeguards to prevent abuse.

A commenter stated that a comment period should not be required as part of the exemption because the delay inherent in such a procedure is overly burdensome. In contrast, other commenters urged OSM to retain the provision requiring public comment.

OSM has decided to retain the minimum 30-day public comment period in order to allow persons who may be adversely affected by the application for exemption or a decision on such an application the opportunity to submit written comments or objections to that application or decision. The receipt of public comments from interested persons is seen as part of the initial phase of a very necessary sequence of reviews conducted during the life of a mining operation to assure that an incidental coal mining exemption is justified and that the applicant is, in fact, an "other mineral" operator. This is consistent with the Congressional purpose of section 102(i) of the Act "to assure that appropriate procedures are provided for the public participation in the development, revision, and enforcement of regulations, standards, reclamation plans, or programs established by the Secretary or any State under this Act." Any administrative delay experienced by an "other mineral" operator in the processing of its application because of the provision for a public comment period will be more than offset by the benefit derived from public comments in assisting the regulatory authority to evaluate the application.

One commenter requested that the public, as well as an operator, have the right to appeal from the regulatory authority's decisions on the exemption.

The right to appeal from the regulatory authority's decisions is specifically granted to adversely affected parties by Section 702.11(f) of the final rule.

One commenter argued that preparation and processing of the application annually would be too costly and suggested a five-year interval.

OSM did not accept the comment since an annual application was not intended, proposed or adopted. The information that must be included in the annual report required under final Section 702.18 is not as extensive as that which must be included in the application and should be easily assembled based on information gathered for other purposes.

SECTION 702.12 - CONTENTS OF APPLICATION FOR EXEMPTION

Final Section 702.12 identifies the minimum information that must be included in an application for exemption. The name and address of the applicant are required by Section 702.12(a) to enable the regulatory authority to identify and contact the applicant. The term "applicant" is used in final Section 702.12(a), rather than "operator" as proposed in June 1987, to reflect that the final rule employs an application process. A list of the minerals sought to be extracted is required by final Section 702.12(b). This requirement was included in all the proposals.

Estimates of annual production of coal and other minerals within each mining area over the anticipated life of the mining operation and estimated annual revenues to be derived from bona fide sales of the coal and other minerals to be extracted within the mining area are required by final Section 702.12(c) and (d) respectively. Under final Section 702.12(e), estimated annual fair market values at the time of projected use must be submitted by the applicant where coal or other minerals to be extracted from the mining area are to be used rather than sold. When the coal or other minerals extracted are used by the operator or a related entity instead of being sold, no revenue is obtained from the material used. The appropriate economic factor to consider in such instances is the fair market value at the time of projected use of the coal and other minerals to be extracted. As quoted in the recent Claims Court case, Whitney Benefits, Inc., and Peter Kiewit Sons' Co., v. the United States, No. 499-83L (Cl. Ct. October 13, 1989), slip op, at 17-18, the Supreme Court has defined fair market value as:

“The amount that a willing and informed buyer of mining properties, under no compulsion to buy, will pay, and what a willing an informed owner, under no compulsion to sell, will accept for property, after fair and voluntary dealing, and

taking into account all those factors which such willing and well informed persons would consider regarding the property in light of the custom of the industry."

United States v. Miller, 317 U.S. 369, 373-74, reh'g denied, *318 U.S. 798 (1943).*

OSM intends that the above standard be applied in determining the value of coal or other minerals transferred to a related entity or used, rather than sold. The production, revenue and fair market value information will allow the regulatory authority to evaluate whether the operation will be able to comply with the exemption criteria of final Section 702.14.

Final Section 702.12(f) requires the submittal of the basis for all annual production, revenue and fair market value estimates. By requesting basis of such estimates, in addition to the figures themselves, the regulatory authority will be able to verify independently the applicant's calculations. Final Section 702.12(c), (d), (e), and (f) are virtually identical to Section 702.12(b) of the April 1988 proposal, except that the final rule incorporates the idea of annual measurement of cumulative production and revenue, a concept that was added in response to comments and is discussed in the preamble to final Section 702.14.

The requirements of final Section 702.12(g) and (h) are, respectively, a description, including county, township if any, and boundaries of the land, of sufficient certainty that the mining area may be located and distinguished from other mining areas over the anticipated life of the mining operation. This information will enable the regulatory authority to locate and distinguish the sites of proposed and existing operations. These paragraphs were proposed as Section 702.12(c) and (d) in June 1987.

Public participation in the application process is provided by final Section 702.12(i). This paragraph requires evidence of publication, in a newspaper of general circulation in the county of the mining area, of a public notice of filing of an application for exemption with the regulatory authority. The public notice must identify the persons claiming the exemption and must contain a description of the proposed operation and its locality that is sufficient for interested persons to identify the operation. One public notice may contain information on more than one mining area. Editorial changes were made to final paragraph (i) from the version published on February 24, 1988 as proposed Section 702.12(e).

The next three application information requirements of the final rule, Section 702.12(j), (k), and (l) are, respectively, representative stratigraphic cross-sections showing relative position and approximate thickness and density of the coal and each other mineral to be extracted for commercial use or sale and the relative position and thickness of any material, not classified as other minerals, that will also be extracted during the conduct of mining activities; a map of appropriate scale which clearly identifies the mining area; and a general description of mining and mineral processing activities for the mining area. This information will allow the regulatory authority to evaluate the tonnage ratio of coal to other minerals. These paragraphs were included in the June 1987 proposal as proposed Section 702.12(f), (g) and (h).

In final Section 702.12(m), the applicant is required to provide a summary of sales commitments, if any, which the applicant has received for other minerals to be extracted from the mining area or a description of potential markets for such minerals. Final Section 702.12(n) requires the applicant to submit a description specifying the use if the other minerals are to be commercially used by the applicant. The regulatory authority will use this information to verify that the other minerals expected to be extracted will actually be commercially used or sold. These two paragraphs have been edited slightly from proposed Section 702.12(i), which was contained in the June 1987 proposal.

Additional information requirements for existing operations are set forth in final Section 702.12(o), which was proposed as Section 702.12(j) in June 1987. In addition to complying with the other requirements for this section for the mining area over the life of the mining operation, existing operations must also submit pursuant to Section 702.12(o)(l) any relevant documents the operator has received from the regulatory authority documenting its exemption from the requirements of the Act. The regulatory authority will use this information to verify that past activities of the existing operation are covered by a legitimately approved exemption and to aid in review of the current application. Paragraph (o)(2) requires documentation of the past cumulative production of coal and other minerals from the mining area. This information will be used by the regulatory authority to determine that the operation is entitled to the exemption based on the tonnage of coal and other minerals already extracted in relation to the potentially recoverable tonnages of coal and other minerals. New paragraph (o)(3) requires estimated tonnages of stockpiled coal and other minerals. This paragraph

was added so that the regulatory authority may verify that the operation complies with the stockpile provisions of final Section 702.16. Finally, as provided for in final Section 702.12(p), the regulatory authority may request any other information pertinent to the qualification of the operation as exempt. This provision will enable the regulatory authority to request any information it deems necessary to make a determination of eligibility for the incidental mining exemption. It was proposed as Section 702.12(k) on June 1, 1987.

The final rule differs from the June 1, 1987 proposal (1) in that the context within which the information is required is changed from information to be included in a notice of exemption to information to be included in an application for an exemption and (2) in the addition of information necessary to evaluate the operation's potential for compliance with the revenue test. In addition, the June 1987 requirement for two newspaper publications in proposed Section 702.12(e) was modified to require only "evidence of publication" in final Section 702.12(i). This change was proposed in February 1988. Also, final Section 702.12(i) contains a requirement that the newspaper publication contain "a description of the proposed operation" instead of the requirement of proposed Section 702.12(c) that the newspaper publication contain a description of "sufficient certainty that the mining area may be located and distinguished from other mining areas and surface coal mining operations." This change was made in response to public comments that requested clarification of the proposed rule. Finally, a new Section 702.12(o)(3) was added to the final rule to reflect OSM's rule governing stockpiling contained in final Section 702.702.16 and discussed in the preamble thereto.

One commenter requested that in order to avoid unnecessary duplication of paperwork, a single application, newspaper publication, and report be allowed for operations having more than one mining area.

OSM agrees that unnecessary paperwork and expense should be avoided and a single application, newspaper publication, and report could suffice for operations having multiple mining areas. OSM declines, however, to put a requirement in the rule that operations with multiple mining areas should file a single application, newspaper publication, or report. OSM believes that the matter should rest with the administrative discretion of the regulatory authority which is in the best position to determine how applications, publications, and reports should be filed or processed. Where OSM is the regulatory authority, one application will be allowed as long as the required information is specified separately for each mining area.

Several commenters requested that additional information be required in the application for exemption. Some commenters suggested that the application require evidence that the other mineral is sufficient in extent and recoverable in a quantity necessary to make the operation commercially viable without consideration of the additional value of the coal.

OSM did not change the final rule in response to this comment because independent commercial viability is not one of the standards under final Section 702.14.

Some commenters suggested OSM require testing and sampling data that the other mineral is of the quality and quantity needed to be commercially valuable.

Since the applicant has the burden under final Section 702.12(f) to establish to the regulatory authority's satisfaction the basis for all tonnage projections, the applicant may include, or be required to include by the regulatory authority, in the application for exemption, testing and sampling data to establish the commercial value of the other minerals. In addition, pursuant to final Section 702.12 (m) and (n), the applicant must summarize sales commitments or specify commercial uses of the other minerals. Thus, it is not necessary specifically to require testing and sampling to establish the commercial value of the other minerals.

Some commenters suggested that the application include historical data on the applicant regarding past coal and noncoal extraction activities and involvement of the owners, controllers, agents and contractors of the applicant with prior coal mining activities. The commenters argued that the existence of outstanding violations by any owner, controller, agent or contractor of the applicant of surface mining laws should "constitute a strong presumption against allowance of an exemption."

Final Section 702.12(o) of the final rule requires that all operations that extracted coal or other minerals prior to filing an application for exemption submit any relevant documents the operator has received from the regulatory authority documenting its exemption, the cumulative production of the coal and other minerals from the mining area, and tonnage

estimates of stockpiled minerals. This information will establish the applicant's past history with the exemption. OSM's authority under sections 201(c)(1) and 510 of the Act to withhold mining permits from violators, owners and controllers of violators, and those who are owned and controlled by violators does not extend to activities outside the jurisdiction of the Act, such as mining activities that qualify for the incidental mining exemption. It would be an inappropriate extension of its authority for OSM to withhold an incidental mining exemption due to the applicant's unabated violations because the exemption, by definition, applies to activities outside the scope of the Act. Furthermore, the requirements of final Section 702.12 provide sufficient information to judge each applicant's claim to the exemption on its merits. State regulatory authorities can specify additional requirements that fit their local needs provided such additional requirements are no less effective than those contained in this rule.

Several commenters suggested that the application require evidence of the applicant's current ability to market the other mineral. These commenters believed that the allowance of anticipated future markets would create an enormous loophole for abuse. Some commenters wanted historical and current evidence of the existence of a market for the other mineral. Other commenters urged OSM to require that the other mineral have a "recognized" market and provide evidence of a "generally acknowledged" regional, state, or national market. In contrast, another group of commenters noted that established operations might not currently have at the time of application any orders for the other mineral simply because of fluctuations in supply and demand. These commenters believed that allowance should be given for an existing operator's "opinion, past sales, local geographic growth, and economic conditions."

OSM is aware that because of the yearly cyclical nature of the market for many other minerals, applicants at one season of the year may not be able to establish a current "spot" market. They could, however, reasonably anticipate on the basis of the historical spot market that a future spot market will exist, for example, in the spring as is usually the case with the construction business. Final Section 702.12(f) requires that the application include the basis for all tonnage projections. If there is no current market for the other mineral, the applicant will have to establish on the basis of a historical market or other evidence that a market for the mineral will exist. The burden is on the applicant. For these reasons, Section 702.14(b)(1) of the final rule specifies that a legally binding agreement for the future sale of other minerals is sufficient to demonstrate the existence of markets for other minerals.

Several commenters opposed the consideration of a local market in the determination of the other mineral's commercial value. These commenters asserted that a local market is too susceptible to manipulation to be used as a gauge of commercial value. Kentucky's regulations were cited as an example of a State which excludes consideration of a local market and requires a State, regional or national market (405 KAR7:030, section (3)(1)(e)).

OSM does not agree. While the local market might be more susceptible to manipulation than other markets, the largest market served by many "other minerals" operators is the local market, and, as such, should not be excluded from determining the commercial value of the mineral. Crushed limestone for the local construction industry would be an example of this point. Because of transportation and marketing factors, the actual market served by other mineral operators may not be the State or regional market but some smaller local market. In these cases, therefore, it is the local market that must establish the value of the mineral. If the exemption application reflects a local market that varies significantly from the larger State, regional or national markets for a particular other mineral, then scrutiny of the local market by the regulatory authority is justified.

One commenter recommended that the application include a detailed operational plan with four-month tonnage projections with provision for suspension or revocation of the exemption if the operator fails to meet the four-month plan.

OSM does not agree with a four-month plan concept. To base the continuation of the exemption on compliance with a four-month tonnage plan prepared years before the initiation of mining gives no allowance for the recognized uncertainties of the business world. Additionally, to require the figures to be adjusted every four months would be too burdensome of both the operator and the regulatory authority. The annual production estimates and reporting contained in this part provide a more reasonable basis by which to judge the legitimacy of the exemption.

Several commenters objected to the April 25, 1988 proposal's use of life-of-mine figures based on projected tonnage and market value because of the subjective nature of such projections and the possibility of substantial error.

OSM agrees that it is difficult to accurately project the market value of coal and other minerals. However, the final rule contains two safeguards against inaccurate projections. First, by requiring submittal of the basis for all annual

production, revenue and fair market value estimates, the rule allows the regulatory authority to ensure that the estimates are calculated according to a rational, mutually agreeable formula. Secondly, the final rule provides for reassessment of the exemption based on annual reporting of cumulative production and cumulative revenue. This provision will enable the regulatory authority to evaluate compliance with the exemption criteria on an ongoing basis taking into account changes in the market for coal and other minerals.

In response to the April 25, 1988 proposal, several commenters recommended that the applicant require that the current market value of the local and other minerals be used in making life-of-mine revenue projections.

OSM did not specify in the final rule a method for estimating annual production, revenue or fair market value because it did not wish to place any limitation on how such estimates may be developed. Estimates may be based on current market value, or on another benchmark, provided that the applicant can convince the regulatory authority that the estimates so developed are rational and give a reasonably accurate picture of the mining area's ability to comply with the exemption criteria.

One commenter suggested that the proposed requirement of a newspaper publication providing for public notice of filing of the application for exemption should be modified to provide the site location and information on where the application is located.

While OSM agrees that the public notice must provide sufficient information to enable the public to locate the mining operation, it believes the specific contents of the public notice should be left to the individual regulatory authorities so that there can be consistency in their internal process for public notices in their jurisdictions. The notice provision of final Section 702.12(i) has been amended to provide for "a description of the proposed operation and its locality that is sufficient for interested persons to identify the operation." This change should provide sufficient guidance to the regulatory authorities while leaving them the discretion to require any specific information they may need or that is required by their administrative processes.

In regard to proposed Section 702.12(f) which would require test boring or other information on the minerals and their positions, several commenters stressed the importance of requiring cross sections based on test borings to show the "exact" position and "precise" thickness and density of coal and each of the other minerals to be mined. The commenters stressed that this would provide the regulatory authority with the specific information about seam thickness and positions which is needed to make accurate evaluation of mineral and tonnage ratios.

It is unnecessary to require exact or precise information in Section 702.12(j) of the final rule. The burden of establishing the exemption is on the applicant, and the regulatory authority may decide that an applicant's information is insufficiently precise and accurate to be granted an exemption. No rule change is needed to accomplish this.

In regard to proposed Section 702.12(g), which would require a map of "appropriate" scale which clearly identifies the mining area, one commenter wanted OSM to specify a map scale not to exceed 1" = 400', since that scale was seen as the smallest scale that would allow the regulatory authority to distinguish and evaluate industrial mining areas.

OSM has established a reasonable and clear standard of map scale, an "appropriate scale which clearly identifies the mining area" in final Section 702.12(k). The regulatory authority can specify a scale if it finds it necessary to do so.

Another commenter suggested that the applicant be required to describe how the other minerals will be transported and processed.

Mineral processing activities are covered by final Section 702.12(l). The regulatory authority may request additional information pursuant to final Section 702.12(p) if circumstances warrant.

Several commenters recommended that the application should require existing operations to submit historical data on production of coal and other minerals for commercial use or sale. These commenters observed that tonnage reporting, in and of itself, does not ensure satisfaction of the requirement that such extraction be for commercial use or sale.

OSM disagrees. The purpose of the requirement in final Section 702.12(o)(2) that the applicant submit past production tonnages is to obtain an accurate, objective record of past production upon which future production for

commercial use or sale will be based for determining compliance with the exemption criteria. If the final rule were to require historical production for commercial use or sale, an element of subjectivity, and possibly ambiguity, would be injected into the past production figures. Furthermore, the applicant must separately establish the commercial value of the other minerals under final Section 702.12(m). If the basis for all annual production projections required under final Section 702.12(f) or the summary of sales commitments required under final Section 701.12(m) do not establish the operation's eligibility for the exemption, the regulatory authority is free under final Section 702.12(p) to request additional pertinent information.

SECTION 702.13 - PUBLIC AVAILABILITY OF INFORMATION

Final Section 702.13 is identical to the June 1, 1987 proposal, except for the changes discussed below. Final Section 702.13 provides standards for the availability to the public of information submitted to the regulatory authority under this part.

Final Section 702.13(a) states that except as provided in Section 702.13(b), all information submitted to the regulatory authority under this part shall be made immediately available for public inspection and copying at the office of the regulatory authority having local jurisdiction over the mining operation claiming the exemption until at least three years after expiration of the period during which the subject mining area is active. The word "immediately" has been added to ensure the timely availability of the application. A requirement has also been added that such application be kept available for a three-year period after an operation is no longer active. This recordkeeping requirement is consistent with section 517(f) of the Act. The exception to this provision, final Section 702.13(b), allows the regulatory authority to keep information submitted to the regulatory authority under this part confidential if the person submitting it requests in writing, at the time of submission, that it be kept confidential and the information concerns trade secrets or is privileged commercial of financial information relating to the competitive rights of the persons intending to conduct operations under this part. Final paragraph (b) is changed from the June 1, 1987 proposal, which required the regulatory authority to keep information confidential if so requested. Under the final rule, the decision to keep information confidential is discretionary, not mandatory. Final Section 702.13(c) states that information requested to be held as confidential under Section 702.13(b) shall not be made publicly available until after notice and opportunity to be heard is afforded persons both seeking and opposing disclosure of the information. Determinations by OSM as to the proprietary nature of information will be made in accordance with the Freedom of Information Act *(5 U.S.C. 552*(b)), Privacy Act *(5 U.S.C. 552*(a)), and implementing regulations at 43 CFR part 2.

One commenter was concerned about obtaining access to exemption application information without having to go to the agency's central office and suggested that the application should be maintained both in the regional and central agency offices.

Section 702.13(a) provides that all information, except confidential information, shall be available for public inspection and copying at the local offices of the regulatory authority having jurisdiction over the mining operations claiming exemption.

One commenter argued that Section 702.12, which specifies the contents of the application, is in conflict with former 30 CFR 786.15, subsequently codified in 30 CFR 773.13(d), which provides for public availability of information in a permit.

OSM disagrees with the comment. A permit application and an exemption application are two separate things. The public availability of permit information provisions at 30 CFR 773.13(d) apply to permit applications, not to applications for exemption submitted pursuant to this part.

SECTION 702.14 - REQUIREMENTS FOR EXEMPTION

Final Section 702.14 establishes three basic criteria that must be satisfied in order for an operation to be determined to be exempt from the requirements of the Act and two other conditions necessary to obtain or maintain the exemption. Paragraph (a) implements the concept that the incidental mining exemption is based on a two-prong test, (1) that the extraction of coal does not exceed 16 2/3 percent of the mineral tonnage removed for commercial use or sale, the "tonnage" test, and (2) that the extraction of coal is incidental to the extraction of other minerals, as judged by the "stratigraphic" and "revenue" tests.

Final Section 702.14(a)(1) specifies that the cumulative production of coal extracted from the mining area determined annually may not exceed 16 2/3 percent of the cumulative production of coal and other minerals removed for purposes of bona fide sale or reasonable commercial use, that is, for every 100 tons of total materials mined (coal and other minerals combined), up to 16 2/3 tons of that total may be coal.

Final Section 702.14(a)(1) differs from the June 1, 1987 proposal. The final version of paragraph (a)(1) bases the tonnage test on "cumulative production * * * determined annually," whereas the original proposal would have measured "total tonnage" over the life of the mine. The annual determination of cumulative production will be based on the annual report submitted pursuant to final Section 702.18.

In response to numerous concerns, OSM reconsidered the time period over which the exemption will be judged. Some commenters felt that the life-of-the-mine time frame was too long and requested OSM to consider a shorter period. In the February 24, 1988 proposal, OSM specifically requested comments on whether it should change the proposed standard, and if so, what period of time would be proper. In addition, commenters were asked to consider whether different time periods should be established for certain types of operations. As discussed below in the response to comments, OSM made this change due to its concern for potential abuse of the incidental mining exemption if the tonnage test were based on life-of-the-mine production with no intermediate compliance dates. By requiring that cumulative production be in compliance annually, OSM has included intermediate stages for compliance.

Final Section 702.14(a)(2) is unchanged from Section 702.14(b) of the original proposal and requires coal to be produced from a geological stratum lying above or immediately below the deepest stratum from which other minerals are extracted for purposes of bona fide sale or reasonable commercial use. To satisfy this test, a person must demonstrate that each stratum of other minerals included in cumulative production is extracted for purposes of bona fide sale or reasonable commercial use in accordance with the market requirements of Section 702.14(b). For example, if two strata of other minerals are identical, and the deeper stratum, which is immediately above a coal seam, is not needed to satisfy market requirements for that mineral, then removal of the deeper stratum would not be considered extraction for bona fide sale or reasonable commercial use. Similarly, if a larger number of acres of other minerals is removed than is needed for bona fide sale or reasonable commercial use, the standard would not be satisfied.

Final Section 704.14(a)(3) is based on Section 702.14(d) of the April 1988 proposal and provides that the cumulative revenue derived from the coal extracted from the mining area determined annually shall not exceed 50 percent of the total cumulative revenue derived from the coal and other minerals removed for purposes of bona fide sale or reasonable commercial use. Final paragraph (a)(3) further provides that if the coal extracted or the minerals removed are used by the operator or transferred to a related entity for use instead of being sold in a bona fide sale, then the fair market value of the coal used or other mineral used at the time of the use shall be considered rather than revenue.

The final rule bases the revenue test on "cumulative revenue * * * determined annually," the same basis as the tonnage test. The April 1988 proposal would have measured "revenue * * * over the life of the mining operation." This change was made in response to comments on the proposals and is discussed below. The basis for the annual determination of cumulative revenue will be the annual report submitted pursuant to final Section 702.18 and any other available information.

Although other tests for determining whether the extraction of coal is incidental to that of other minerals were considered, the provisions selected achieve a balance between environmental concerns and concerns for the full utilization and conservation of the coal. They will minimize the potential for future disturbance of the land to recover coal.

Final Section 702.14(b) establishes two conditions with which persons seeking to obtain or who have obtained an incidental mining exemption must comply. Final Section 702.14(b)(1) requires that each of the other minerals upon which an exemption under this part is claimed must be a commercially valuable mineral. This means that either a market presently exists or the mineral is mined in bona fide anticipation that a market will exist in the reasonably foreseeable future, not to exceed twelve months from the end of the current period for which cumulative production is calculated. Other minerals do not have to be sold in a marketplace to meet this standard if they are put to some reasonable commercial use within the structure of a single business entity. For example, a company may mine limestone and provide it to a subdivision of the company for use in construction activities. That limestone is considered a commercially valuable

mineral even though it was transferred, rather than sold in the marketplace. Except for the phrase delineating the beginning of the 12-month period for market development, which was added in response to a comment discussed below, this portion of final paragraph (b) is identical to the original proposal.

At the time the original proposal was issued, OSM was concerned that the "bona fide anticipation" standard might provide an area of abuse because it might not be possible to project with precision the future marketability of any mineral. Thus, any expectation might qualify as a "bona fide anticipation." OSM considered adopting a rule that would only allow an exemption if a market exists for the commercial valuable other mineral at the time of the exemption application. Alternatively, if OSM were to allow future marketability to establish that the other mineral is commercially valuable, OSM considered requiring documentary evidence to establish the likelihood that a market for the other mineral will in fact develop during the next 12 months. OSM specifically requested comments on this issue. As discussed below in response to comments, OSM determined that a bona fide anticipation that a market will exist within a 12-month period is a standard that equitably balances the need to prevent abuse with the need to accommodate standard business practices.

Final paragraph Section 702.14(b)(1) also provides that a legally binding agreement for the future sale of other minerals is sufficient to satisfy the "commercially valuable mineral" standard of that paragraph. In response to comments, the legally binding agreement provision was added to the final rule by OSM to assist the regulatory authorities in determining when a "bona fide anticipation" exists. The operator must provide evidence documenting the claim to a future market.

Final Section 702.14(b)(2) requires that if either coal or other minerals are transferred or sold by the operator to a related entity for its use or sale, the transaction must be made for legitimate business purposes. OSM added this provision in response to commenters' concern for potential abuse of the incidental mining exemption by operators who might transfer or sell quantities of coal or other minerals to other entities for the sole purpose of meeting the criteria of this section.

GENERAL COMMENTS

A majority of commenters favored a two-pronged test to determine whether an operation is eligible for the exemption, i.e., an "incidental mining" test as well as a "tonnage" test. In regard to the incidental mining test, it was variously proposed that such a test should include a value or gross revenue test, an economic viability test, a geological incidental or stratigraphic test, or an acreage test that compares the acreage of coal removed to the acreage of other mineral removed for commercial purposes. One commenter stated that although the proposed rule paraphrased the statute, it modified the verbiage to the extent that, contrary to Congressional intent, a two-prong test had been created. This commenter maintains that Congress created a tonnage test which defined incidental production. Another commenter stated that "The basis of the incidental mining exemption should simply be that the primary mineral extracted is valuable and sold or commercially used, and that the amount of coal removed is small in relation to the amount of other mineral extracted."

After careful consideration, OSM has decided upon the exemption criteria and conditions contained in Section 702.14 of the final rule. Those criteria implement a cumulative production tonnage test and an incidental mining test as demonstrated by the stratigraphic test and the cumulative revenue test. The conditions require a commercial market for other minerals and good faith in conducting transactions. Comments received on these requirements for exemption will be discussed below. For the reasons discussed earlier in this preamble, OSM rejects the commenter's interpretation of the statute under which only tonnage need be considered to qualify for the exemption. (Even if the statute were capable of more than one construction, the rule would be supportable under sections 201(c)(2) and 412(a) of the Act as a reasonable interpretation and necessary to meet the purposes of the Act.) OSM also rejects the comment that OSM need only consider that the amount of coal removed is small in relation to the other minerals extracted. Such a scheme would violate the terms of section 701(28) of the Act, which specifies the acceptable ratio of coal to other minerals production (1:6).

COMMENTS ON SECTION 702.14(a)(1) -- TONNAGE TEST

Some commenters objected to the term "bona fide sale" as constituting a new criterion not found in the Act itself. Although they do not have a basic problem with this addition to the final regulation, they believe that the attempt to change the Act by regulation is improper, arbitrary and should not be allowed.

The use of the modifier "bona fide" with the term "sale" is merely an effort to clarify the term "sale" in order to avoid abuse through the elimination of bogus sales in the tonnage calculation. Each bogus sale would artificially inflate or misrepresent the total tonnage of other minerals. To avoid this result, OSM used the modifier "bona fide." This is reasonable, necessary, appropriate, consistent with Congressional intent and within the scope of the Secretary's authority pursuant to sections 201(c) and 412(a) of the Act. Further, this added phrase does not change the Act, but implements the statutory language, as is appropriate for a regulation.

A majority of commenters strongly urged OSM to require that an operation meet the criteria of the incidental mining exemption on an annual rather than life-of-mine basis. One commenter asserted that adoption of a life of the mine test would require regulatory authorities to rely on operators' unreliable, self-serving assertions of their future intentions. Several commenters stated that under a life-of-mine scenario, it would be impossible to take enforcement action against any operator until all mining activities had ceased. In the commenters' view, it would be relatively easy for an operator to mine coal for an indefinite period of time and claim that some time in the future he will mine enough other minerals to compensate for current or past non-complying percentages. During the period while the operator is making such a claim, significant environmental and other abuses could be occurring and remain totally uncurbed. At a later date, the operator could easily disappear and leave the regulatory authority with no entity to hold accountable during enforcement actions. These commenters were therefore of the opinion that it would be reasonable to require an operation to meet the tonnage test during a 12-month period. They believed that if the test could not be met, then it would be reasonable to require the operator to obtain a surface coal mining permit.

In opposition to the above views were the comments received from two brick companies. These commenters stated that the 12-month period is inconsistent with the basic nature of the brick making process. A typical raw material pit would require approximately two years of preparation, i.e. removal of shale, limestone, coal and other material not usable for the brick making process, to serve as a contingency pit. This pit would often sit idle awaiting appropriate other raw materials for blending into the required brick material per a customer order. Total time from initial pit preparation to the yield of usable material per a customer order could be several years. In such a scenario, a typical pit could exceed the 16 2/3 coal tonnage limitation during a 12-month period. One of the commenters stated it would have two choices under the 12-month proviso: (1) Mine coal under a surface mining permit or (2) treat the coal as overburden never to be productively used. In the commenter's view, the latter choice would be the most likely outcome, although philosophically it is incorrect and both economically and environmentally it is unsound because "coal is a resource to be utilized not destroyed." As a solution to this quandary, the commenter suggested that the regulatory authority be provided latitude to review not only the quantity of coal and other minerals extracted during a year, but also the estimated future production of coal and minerals to be produced from that mining area along with the potential market for those minerals and coal and the operator's ability to satisfy that market. Such an approach is provided for by at least one State and, the commenter asserted, would allow an incidental coal operator to continue to exist and mine coal in an incidental fashion.

In response to these comments, OSM has not adopted the life-of-mine requirement and has included in its place a cumulative production test which must be met at the end of each annual reporting period under final Section 702.18. The commenters have convinced OSM that the life of the mine is too long a period over which to allow compliance and that the potential for abuse is significant. Moreover, if the operation were not in compliance at the end of the life of the mine, there is little remedial action that the regulatory authority could take since the mining process would have displaced much of the material needed to meet the performance standards of the Act. OSM believes a 12-month test under which the tonnage constraint must be met by the total production which occurred during any 12 months is similarly unreasonable because some large operations, such as brick companies, will not be able to comply on an annual basis due to the nature of their production methods. By instead requiring that all operations be in compliance cumulatively at the end of each annual reporting period, operators will count all production that occurred since mineral extraction began. They will not be penalized if in a particular 12-month period coal production exceeds 16 2/3 percent of total production as long as cumulatively they remain under that figure at the end of each reporting period. OSM believes that this test achieves a balance between unnecessary burden on the legitimate mining industry and the need to protect the public and the environment. The terms "cumulative production" and "cumulative revenue" are defined in final Section 702.5 (b) and (c) and discussed in the preamble to that section. In addition, OSM has made provision for stockpiling in final Section 702.16 so that operators entitled to the exemption may, if their industry practices necessitate, temporarily stockpile coal and other minerals. This should satisfy the brick manufacturers' concern for flexibility without jeopardizing the effectiveness of the rule to curb abuses. The provisions on stockpiling of other minerals are contained in Section 702.16 and discussed in the preamble to that section.

COMMENTS ON SECTION 701.14(a)(2) -- STRATIGRAPHIC TEST

A multitude of comments were received regarding this provision, in addition to proposed variations of the stratigraphic test. Several commenters suggested that coal production be allowed only above the deepest stratum of other minerals extracted for commercial use or sale. This was termed a "physical necessity" test, i.e., removal of only that coal which physically prevents an operator from reaching the sought stratum of other mineral. Commenters argued for the physical necessity test based on the rationale that the extraction of coal is not incidental to the mining of other minerals if the decision to mine the stratum directly above the coal is based on the decision to mine the coal. These commenters cite the recent IBLA decision in NcNabb as authority for this position. Other commenters also urged this position, and expanded upon it by suggesting inclusion of a requirement that the deepest stratum of other mineral be entirely removed for commercial use or sale. The commenters asserted that so doing would avoid the abuse of removing negligible quantities of the other mineral which underlies a coal seam, and subsequently claiming that the mineral bottom layer is the prime extraction goal. One commenter strongly urged elimination of the provision that would allow any coal production below the other mineral to be exempt because it could open the exemption to wide abuse. That commenter advocated adoption of the physical necessity test. Other commenters supported the proposal and favorably viewed coal extraction from the stratum below as both environmentally sound and in the interest of national energy conservation and utilization. One commenter suggested that coal production be allowed below, rather than the proposed standard of "immediately below," the deepest stratum from which other minerals are extracted. The basis for this suggestion arises in the context of eastern Ohio geology where multiple seams of coal, limestone and/or clay or shale are present. In the commenter's view, the use of an "immediately below" limit could potentially eliminate certain minerals or coal which would otherwise be extracted. Another commenter proposed that the rule be modified to allow coal to be extracted "adjacent to" as well as immediately below the deepest stratum of other mineral. Other commenters urged a rule which would allow production of other minerals as well as coal from the same pit regardless of the proximity of one to the other so long as the coal production does not exceed 16 2/3 percent of total tonnage removed.

OSM has reviewed the issue and decided not to change the proposed language. Although the physical necessity test may be easy to administer, precluding the exempt removal of coal immediately below the other minerals is not environmentally sound nor in the interest of conservation of the nation's natural resources. Coal should not be left as the last strata since once it is exposed to air it can deteriorate and cause pollution. Coal can also be an aquifer which could result in groundwater contamination if disturbed but not removed. While OSM recognizes that the IBLA in McNabb discussed the physical necessity of removing the coal to reach the other mineral, the Board was interpreting the term "incidental" based on the facts and circumstances of the situation. The IBLA was not attempting to establish a general rule. By requiring that coal be produced from a geological stratum lying above or immediately below the deepest stratum from which other minerals are extracted for purposes of bona fide sale or reasonable commercial use, OSM believes that the coal may legitimately be characterized as "incidental" to the other mineral and thus satisfy Congressional intent if the other criteria are also met.

OSM did not require that the coal be "adjacent to" the other mineral, as one commenter suggested. Such a phrase is inconsistent with the geology of the coal fields where minor amounts of intervening strata typically separate coal and other minerals. OSM intends "immediately below" to mean that no substantial intervening strata exist between the lowest other mineral stratum and the coal seam. Since in certain areas, such as the Appalachian region, the strata are folded and faulted to the extent that bedding planes are not horizontal, OSM intends that the "immediately below" standard be interpreted that, given the direction of mining, the coal seam is reached closely following the latest stratum of other mineral. Given these variables, OSM intends to provide limited discretion to the regulatory authorities in determining whether coal lies "immediately below" other minerals.

OSM does not believe that it is necessary to require removal of the entire last seam of other mineral, as some commenters urged, as long as a substantial amount of the other mineral overlying the coal is actually removed for purposes of bona fide sale or reasonable commercial use. This latter condition will satisfy the Act's intent. Because of the requirement that the other mineral be removed for purposes of bona fide sale or reasonable commercial use, where two seams of more-or-less identical other mineral are present, with coal immediately below the second, mining of the second seam to reach the coal will not qualify for the exemption if the quantity of the other mineral in the first seam is sufficient to meet the needs of the operator.

As for those comments that urge that the coal production be allowed below, or regardless of proximity, rather than immediately below the deepest stratum of other minerals, OSM believes that allowing operations to qualify for the exemption regardless of the thickness of the intervening strata would lead to non-"incidental" operations qualifying for the exemption and abuse would occur.

COMMENTS ON SECTION 702.14(a)(3) -- REVENUE TEST

Many comments were received urging OSM to adopt a revenue test. Some commenters asserted a revenue test is necessary to prevent the other mineral from being "dumped on the market below cost in order to extract and market coal without complying with the tax (i.e., reclamation fee) and environmental constraints of a permitted surface coal mining operation." The commenters believed a revenue test is needed to prevent "unfair competition" and to establish a "level playing field." Other commenters believed that a revenue test is necessary because it defines the primary objectives of any business venture. For these commenters, the "units in which private business measures importance are dollars" and so "no operator can claim to be incidentally extracting coal where his revenues exceed revenues from other minerals." A commenter further stated that his company's financial statements "like everyone else's, are computed in dollars and cents, not tons of material, because money is the bottom line reality of the private sector." The commenter believed that "every operator in the United States can determine from a glance at his tax returns whether he has generated more gross revenue from coal than from limestone." The commenter contended that a "gross revenues test would impose absolutely no reporting burden and could be enforced through the simple expedient of requiring operators who seek the exemption to file an annual sworn statement that their gross revenues from other minerals exceeded their gross revenues from coal." Other commenters stated their belief that a revenue test is "common sense" and do not "see how it is possible to believe that an operator who makes most of his income from coal mining is only incidentally mining that coal." Some commenters believed that a "50 percent standard may be too high," and request the OSM consider a lower threshold for situations where coal revenues as compared to other mineral revenues would make the operation non-exempt. One commenter argued for "flexibility" for smaller operations in applying the rule. Another commenter argued against any less stringent requirements for small operators because "Congress did not intend to exempt small coal operators from compliance with the Act."

Some commenters opposed a revenue test. A State regulatory authority argued that it is "not equipped with the staff or resources to review and accept or reject documentation of revenue, bona fide sales, or fair market value." The commenter indicated that based on 1986 production and sales figures compiled by the agency an operator would have to produce 21.3 tons of shale, 5.1 tons of clay, or 7.8 tons of limestone for each ton of coal produced to earn equal revenues for the other mineral and coal. The commenter asserted that if a revenue test is adopted, market decline in any noncoal minerals coupled with an improved coal market during the course of a mining operation could unfairly penalize an operator whose initial operation was clearly exempt. The commenter believed that a fifty percent revenue test applied to currently exempt operations in some States would result in the loss of the exemption for several operations. One commenter contended that an economic test would ignore the decisions in several cases decided on the exemption. One commenter believed that the problem is "not [one of] coming up with more complicated formulas, but of enforcement." The commenter recommended that the Federal and State regulatory agencies "work closer together to do more audits to determine whether or not there is compliance with the current standards." The commenter urged "strict enforcement and follow-up and monitoring industrial mineral operations."

OSM has carefully reviewed the comments received concerning the viability of a revenue test for determining the initial or ongoing qualifications of an operation for an incidental mining exemption and has decided to adopt the final rule as proposed in April 1988 with a change to reflect that cumulative revenue will be determined annually. The proposal stated that revenue would be measured over the life of the mining operation. This change parallels the one made to the tonnage test to make the compliance and measurement methodologies consistent. Evaluation of cumulative production (and revenue) on an annual basis, instead of a life-of-mine basis, was adopted in response to comments. See the preamble discussion of the tonnage test above.

A comparison of coal-derived revenue to total gross revenue is a simple and straightforward tool for determining the primary purpose of an operation. The revenue test, in tandem with the stratigraphic test, gives the regulatory authority an objective way to determine whether coal extraction is incidental to other mining activities. As the commenters pointed out, revenue is the "bottom line" and defines the primary objective of a business venture. No evaluation of the purpose of a commercial activity would be complete without an examination of the revenue it generates. Although some commenters felt that the proposed 50 percent revenue threshold would be too high, OSM adopted the 50 percent standard in the final

rule because it believes that taken together with the tonnage and stratigraphic tests, the 50-percent threshold will adequately prevent abuses. OSM is willing to re-examine this issue in the future, if it can be demonstrated that the 50 percent revenue threshold is not effectively preventing abuse of the exemption. Concerning small operations, OSM did not provide any less stringent requirements because there is no authority under the Act to do so.

In regard to the concern about adequate staff and resources to implement the revenue test, OSM believes that there will be relatively few mining areas applying for and obtaining the exemption, requiring a relatively small increment of staff and resources. Subject to appropriations, funds are available in the form of 50:50 matching grants for program administration costs. Regulatory authorities are not prohibited by this final rule from offsetting some of their costs by charging fees for exemption application reviews.

Concerning the uncertainty of maintaining the exemption in view of the possible fluctuations in the market values of coal and other minerals, OSM believes that the final rule contains sufficient flexibility to allow legitimately exempt operations a reasonable amount of certainty of maintaining the exemption. Both the 50 percent revenue threshold and the stockpiling provisions of final Section 702.16 provide flexibility.

COMMENTS ON SECTION 702.14(b)(1) -- OTHER MINERAL COMMERCIAL MARKET DETERMINATION

Final Section 702.14(b)(1) requires that each of the other minerals upon which an exemption under part 702 is based is a commercially valuable mineral for which a market exists or which is mined in bona fide anticipation that a market will exist for the mineral in the reasonably foreseeable future, not to exceed 12 months. This was included in the June 1987 proposal as proposed Section 702.14(c). In response to a comment, OSM has clarified that the 12-month period in which a market must be developed begins after the annual reporting period during the stockpiled material was extracted. OSM has added a statement in the final rule that a legally binding agreement for the future sale of other minerals is sufficient to demonstrate the above standard.

Numerous comments were received on the proposed rule. Some commenters objected to the provision that allows an applicant to mine "in bona fide anticipation that a market will exist" because they believe the provision opens "an unenforceable loophole." For these commenters, if there is no current market, then the removal is not for commercial use or sale, but rather in anticipation of a future sale or use. Other commenters believed that specific and detailed documentary evidence should be provided to verify that a market actually exists for the mineral, as well as to establish the likelihood of the development of a market in the reasonably foreseeable future. Other commenters asserted that the provision will be difficult to administer, burdensome on applicants and too subjective. The commenters further contended that in "previous regulations, i.e., oil and gas product value rules, the [DOI] has argued that the elimination of such subjective regulatory requirements is a major objective." The commenters argued that by basing the exemption on what is sold or used from the mine each year, the "potential problems associated with determining whether noncoal minerals are commercially valuable can be avoided." Some commenters believed that no allowance should be made for future markets regardless of documentation that could be developed to support such a projection. For these commenters, such documentation is a "mere prediction of commercial value and does not reflect current commercial value as required by the plain language of section 701 of the Act." They asserted that given the strong incentive to gain a competitive advantage over coal producers who "are required to comply with the full panoply of standards of the Act, the likelihood of paper trails of anticipated markets being concocted is great." One commenter suggested language that would require the applicant to establish that the other minerals can be "extracted, removed and marketed at a profit even in the absence of the extraction and sale of incidental coal production." One commenter remarked that the bona fide anticipation of a future market provision is reasonable and effective for operators who have been in the other minerals business for a period of years because there is a basis upon which to make an evaluation of the nature of the business. The problem, according to the commenter, is with new operations that are "under ten acres and all mining would be done in much less than 12 months." The solution for the commenter is for OSM to adopt the "primary purpose test enunciated in the Cordova Clay case." The result would be to require an operator "to prove from the beginning of the operation that there is a legitimate intention to be in some business other than mining coal." The commenter urges that OSM "make clear that an operator is not given a free 12 months" and that "an evaluation of the primary purpose of the operations may be made at any time taking into consideration the totality of the circumstances of each operation."

Other commenters argued that "the bona fide anticipation that a market will exist for the mineral in the reasonably foreseeable future, not to exceed 12 months" is too stringent because 12 months is "arbitrary to the standpoint that it

does not give a reasonable period of time to determine if it is a commercially valuable or commercially marketable mineral." Another commenter contended that the 12-month limitation "gives no reality to the depressed markets that might affect the minerals mined." The commenter also believed that the provision is unclear and asks the following questions: does it mean that a market must exist and all of the minerals must be sold within a period of 12 months; and, does the 12 months begin to run on the completion of the application for exemption, at the beginning of the mining, or at some other point? The commenter further argued that the provision gives "no benefit to the miner who is spending his money in mining since he would venture to undertake a mining operation which may suffer economic setbacks because of a turn down in the housing market which easily affects the markets for the sale of clay or similar problems." The commenter further asserted that the proposed rule "seems to be attempting to dismantle the decision reached by Judge David Torbett in the case involving Cordova Clay Company." Another commenter indicated that the 12 months provision is "unworkable" because "our raw materials are so changeable and our blending so complex, to obtain desired color, texture, and size control, that testing and classification of these raw materials cannot occur until they are exposed and [it is] only then that we develop a plan for when, where, and how much a specific raw material from a specific location can be utilized." Another commenter asserted that an operator should be required to prove marketability of the other mineral. The commenter agreed that it should be required that the market exists within the reasonably foreseeable future, but it is "not important that it exists within a specified time period, i.e., not to exceed 12 months." The commenter believed that it is more important that the operation of the company "be conducted in a reasonable commercial fashion." The commenter gave an example: "An operator can show that after mining clay, it is required that the clay weather for six months before it is commercially marketable." The commenter believed that the "commercial reasonableness" of the operation should be a prime consideration in determining the applicability of the exemption and the company must be able to show that it is operating in a "reasonable commercial manner in light of accepted industry practices."

OSM has considered the above comments and has decided to promulgate the language as proposed with some additional language to provide guidance to the regulatory authority. A great variety and diversity of other minerals and materials are being mined by operators who extract coal and come under the provisions of these rules. Moreover, markets change and technology finds new uses for minerals and materials. For these reasons, it would not be good public policy to prohibit other mineral mining in anticipation of a future market. OSM recognizes, however, that the provision can be abused and has attempted to give the regulatory authority the ability to reject spurious claims to a future market by requiring that mining must be in "bona fide anticipation that a market will exist." By retaining a 12-month provision in the final rule, a reasonable standard is established by which the regulatory authority can judge the claim to future market. To further aid the regulatory authority OSM has added a sentence at the end of the provision to read: "A legally binding agreement for the future sale of other minerals is sufficient to demonstrate the above standard." OSM's intent in adding this language is to ensure that the claim to a future market must be demonstrated by the operator by some evidence that the market will exist in the future.

OSM does not agree that, as one commenter contended, the provision is "difficult to administer, burdensome on applicants and too subjective." By providing a specific standard as to what constitutes sufficient documentation of the existence of a commercial market, the provision is simple and objective. OSM does not believe it is burdensome for applicants and existing operations to supply documentation of sales commitments since this is a routine type of documentation. OSM agrees that the elimination of subjective regulatory requirements is a DOI goal. For instance, OSM rejects the suggested standard that a company need only operate in a reasonable commercial manner in light of accepted industry practices because that is a subjective standard that in practice would be subject to abuse. OSM does not believe, however, that the provision as adopted and explained is overly subjective.

OSM does not agree that, as one commenter contended, the "plain language of section 701 of the Act requires current commercial value for the other minerals" because there is no indication in either the language or the legislative history that Congress intended to reject application of the exemption to other minerals having a commercial value in the near future. Absent any specific guidance in the legislative history of the Act, OSM believes it is reasonable to consider a mineral as being commercially valuable if a market will develop in the 12 months immediately following the annual reporting period during which the mineral was extracted. The Act does not use the phrase "commercially valuable," but instead refers to minerals "removed for purposes of commercial use or sale," without expressly stating when such use or sale must occur. OSM's final rule is a reasonable interpretation of the statutory language in the absence of any specific guidance in the legislative history.

As for the commenter who says he knows of operators with ten-acre mines who would complete their mining in less than 12 months, OSM's response is that the regulatory authority can require those operators to demonstrate their future

market and reject the applications of those operators who cannot so demonstrate.

As for those commenters who contended that 12 months is not sufficient time in which to allow a future market to develop, OSM believes a 12-month period from the end of the annual reporting period during which the mineral was extracted is a reasonable accommodation between the need to establish a time limitation to prevent abuse and the need to establish a valid business commitment.

In response to the commenter who was concerned about when the 12 months begins to run and if a market must exist and all of the mineral must be sold within the 12-month period, the 12-month period begins to run from the end of the annual reporting period during which the mineral was extracted. This is specified in final Section 702.14(b)(1) to avoid confusion and to ensure consistency as to when the period should run. For example, for minerals that were extracted during an annual reporting period that extends from April 1, 1990 through March 31, 1991, the stockpiled minerals must be sold by March 31, 1992, regardless of whether they were extracted in April 1990 or March 1991. An approval based upon individual accounting for the date of each ton of other mineral removed would impose an unreasonable administrative burden.

The requirement will be satisfied if the operator will either sell or, during that period, enter into a legally binding agreement to sell the other mineral. OSM believes that this provision is flexible enough to allow the operator to adjust to market changes. It should be noted that since cumulative production is calculated annually under this final rule, a ton of other mineral removed shortly after the end of a reporting period (or in the absence of a reporting requirement, shortly after the end of a period for measuring cumulative production) is not subject to the requirement to be sold or have a legally binding agreement to be sold until 12 months after the end of the current period for measuring cumulative production. This period of time could exceed one year from removal, but will not exceed two years. Although one commenter opposed allowing any "free" time for the development of markets, this provision is needed to make the rule work.

As for the comment that the proposed rule "seems to be attempting to dismantle the decision reached by Judge David Torbett in the case involving Cordova Clay Company," the commenter is apparently referring to Cordova Clay Co. v. OSMRE, NX5-3-R (January 2, 1986), an administrative hearing before the DOI. In this case the administrative law judge (ALJ) stated that "Congress meant the obvious, that is, the term "incidental" means that the coal removed must not exceed 16 2/3 per centum of the tonnage of the materials removed for the purposes of commercial use or sale." In the absence of a rule, the ALJ applied a two-part test, stating that "[t]he applicant in this particular case must first prove * * * that it was primarily seeking clay and, secondly, that no more than 16 2/3 percent of the material removed for commercial purposes was coal." In seeking to determine what was the operator's primary intention, the ALJ relied on a variety of factors, including the length of time the operator had been in business, his credibility as a witness, and his ability to sell all the clay he removed from the ground. The ALJ discounted the importance of the location of the coal in relation to the clay, stating "[t]he fact that the applicant mines perhaps to greater depth to reach fire clay because of the availability of certain coal which helps to pay expenses does not take the applicant out of primarily being in the business of mining clay." OSM's opinion is that the ALJ was correct in perceiving that the Act requires a two-part test for the incidental mining exemption. However, the ALJ's application of a "primary intention" test in this case points out the benefits of establishing objective criteria. In the Cordova case, the ALJ relied on peripheral issues, such as the operator's longevity and credibility as a witness, instead of the fact that the operator mined through relatively worthless rock and clay to reach marketable coal. OSM believes that the rule adopted today will allow for clear and consistent application of the incidental mining exemption and will lessen reliance on subjective factors.

OSM's response to the comment that asserts that the other mineral mined cannot be utilized until it has been exposed and a plan developed to use it is that the 12-month limit should pose no problem as long as the operator has a legally binding agreement to sell the other mineral or its product. OSM agrees with the commenter that the operation "be conducted in a reasonable commercial standard" but that the 12-month requirement is necessary to ensure that the exemption is not subject to abuse. OSM agrees that the regulatory authority cannot be arbitrary in applying the rule and must consider, as the commenter urges, whether the operation is conducted in a "reasonable commercial manner in light of accepted industry practices," but does not agree that such a standard itself is sufficient to prevent abuse. Despite the rejection of these comments, OSM is willing to consider in the context of a specific proposed State program amendment whether the State can demonstrate for specific industries in that State an identifiable time period needed for market development that is no less effective than final Section 702.14(b)(1) in recognizing accepted industry practices and preventing abuse of the exemption.

COMMENTS ON THE PROPOSED ECONOMIC VIABILITY TEST

OSM also solicited comments on an "economic viability" test. Several commenters advocated the test, referring to it by various names, such as the "independent viability" test and the "but for" test. The commenters used the terms synonymously. While some commenters preferred this test as an alternative to a revenue test, most commenters who favored adoption of some kind of financial test urged its adoption in addition to the revenue test in order to "avoid the manipulation of revenues in order to achieve exempt status." The test posits that if the other mineral operation would not have "independent viability but for the additional revenues projected from coal removal and sale, the activity is not a legitimate other mineral operation since coal removal is a primary purpose rather than an incidental aspect of the other mineral operation." The commenters indicated that the regulatory authority must have certain basic information in order to make an informed judgment regarding the independent viability of proposed exempt operations. In the commenters' opinion, the applicant must provide estimates of tonnages of other mineral and coal to be removed, and identify the sources of such estimates, including core sampling or other subsurface exploration records. The regulatory authority must also have access to documentation from the applicant establishing the existence of a current market of national, regional or state scope for the other mineral and the range of market values for the mineral. Based on the information provided in the application, other data available to the agency on market values for bona fide coal and other mineral sales, and the tonnages of the coal and other mineral, the regulatory authority must find that the "other mineral" operation would have independent economic viability as a profitable enterprise independent of the coal extraction. The commenters believed that the revenue test alone is an "insufficient protection against abuse of the exemption." The combination of the revenue test and the economic viability test would assess whether the operation would be commercially viable absent projected coal removal and thereby, according to the commenters "lessen potential for abuse and conform to the legislative intent that the exemption apply to cases where coal is found but is not the mineral being sought." One commenter indicated that the economic viability standard was enunciated by the Interior Board of Land Appeals in McNabb. The commenter contended that since the Board is the "voice of the Secretary of the Interior, and is authorized to determine as fully and finally as might the Secretary, all matters within the jurisdiction of the Department of the Interior (see 43 CFR 4.1), the adoption of an economic viability regulation amounts to nothing more than the ministerial codification of a standard which the Secretary has already determined to be required by the Congress through the enactment of SMCRA." The commenter argued that the adoption "of any standard less stringent than the economic viability standard would thus be unlawful since OSM has no discretion to allow surface coal mining operations (as defined at section 701(28) of (the Act) to proceed outside (the Act's) regulatory framework (see section 521(a) of (the Act))."

OSM does not believe that an economic viability test in place of or in addition to the revenue test is either needed or desirable. Moreover, the economic viability test proposed by the commenters would be very difficult for the regulatory authority to administer. The test is not needed because the other requirements of this section are sufficient to define "incidental" and to allow the regulatory authority to evaluate all claims to the exemption. In addition, OSM does not believe that it is appropriate that the regulatory authority have to analyze complicated economic factors and make a finding that the "other mineral operation would have independent economic viability as a profitable enterprise independent of the coal extraction." The test is too stringent and impractical to be used as a standard to determine what operations can claim the exemption. And, as discussed earlier in this preamble, an economic viability test is not required by the Act.

OSM does not agree that the Interior Board of Land Appeal's decision in McNabb has the effect suggested by the commenters. In the absence of a rule, the Board was interpreting the facts and circumstances of the case in light of the 1984 incidental mining exemption guidelines, which recommended consideration of a variety of factors in determining if the extraction of coal is "incidental" to the extraction of other minerals. The Board resolved a particular controversy in McNabb. The Board's decision in that case does not limit the Secretary's authority subsequently to promulgate new rules in accordance with rulemaking requirements that interpret or implement the Act. To hold otherwise would bind other members of the public to the results of a decision in which they had no opportunity to participate.

OTHER COMMENTS

Several miscellaneous or general comments were received on proposed Section 702.14. One commenter recommended a "threshold" test. The commenter indicates that a provision could be included which establishes a "coal

production or value threshold above which the exemption would not be granted." The commenter gave the example that "if the information in the exemption application discloses that over the life of the mine more than 1/3 of the time (a 1/3 production threshold) annual coal production exceeds the 16 2/3 percent limit, the exemption would not apply and the mine would be considered to (fall under the jurisdiction of the Act.)" The commenter indicated that the 1/3 annual threshold test would also apply to coal value, i.e., in order to obtain an exemption the value of annual coal production could not exceed the value of noncoal production more than 1/3 of the time over the life of the mine. The commenter concluded that "conformance would be easily measured by comparing the annual report data with the information provided in the application."

OSM did not accept this comment. The commenter's suggestion was a means of increasing the enforceability of the life-of-mine tonnage test and a financial test. As discussed earlier in this preamble, OSM decided not to adopt the life of the mine as a time frame for applying the incidental mining exemption criteria. The commenter's suggestion is too complex to be workable. Like the June 1987 proposal, the regulatory authority would have to wait until the life of the mine were over to determine if the mine should have been considered exempt under the 1/3 of the life test.

Two commenters urged OSM to allow the regulatory authority the flexibility to grant specific time extensions to an operator if more time is needed to meet the 16 2/3 ratio. One commenter submitted the language of a State regulation that provides the criteria used in deciding whether to grant time extensions.

OSM did not accept this comment. The issue raised is the time frame within which an operator must comply with tonnage requirements. Sufficient flexibility is provided by the cumulative production test and the stockpiling provisions of final Section 702.16. Under the cumulative production test, the operator's cumulative coal production must not exceed allowable limits at the end of the annual reporting period. During the period itself slight overages may occur as long as the operator can come into compliance with tonnage requirements at the end of the annual period, and in fact does so. Responsible operators should be able to comply, and no purpose is served by allowing extensions.

One commenter argued that it should be "administratively permissible to switch over to a coal permit for the duration of the coal removal and then switch back to an incidental coal permit for final reclamation -- or at least waive the original contour concept."

OSM cannot waive the approximate original contour or any other standard mandated by the Act. OSM believes that the commenter's suggestion of allowing an operator to switch from incidental exemption to regulated surface coal mine to incidental exemption would not only violate the purposes of the Act, but would also cause an inordinate administrative burden on the regulatory authority.

SECTION 702.15 - CONDITIONS OF EXEMPTION AND RIGHT OF INSPECTION AND ENTRY

Final Section 702.15 imposes certain conditions on exempted operations, including the right of entry and inspection.

Final Section 702.15(a), which is virtually identical to Section 702.15(a)(1) in the original proposal, requires a person conducting activities covered by part 702 to maintain on-site or at other locations available to authorized representatives of the regulatory authority and the Secretary information necessary to verify the exemption including, but not limited to, commercial use and sales information, extraction tonnages, and a copy of the exemption application and exemption approved by the regulatory authority. The final rule differs from the original proposal in that the final rule in two places reflects the change in procedure from the notice of exemption process to the application for exemption process. Pursuant to that changed procedure, the final rule indicates that information "necessary to verify the exemption" be maintained on-site, in contrast to the proposed language which stated that information "relevant to the exemption" be maintained on-site. Secondly, the final rule requires a copy of the "exemption application and exemption approved by the regulatory authority" be maintained on-site, while the proposal only required "a copy of the notice of exemption."

Final Section 702.15(b) requires a person conducting activities covered by this part to notify the regulatory authority upon the completion of the mining operation or permanent cessation of all coal extraction activities. The original proposal only required notification of the regulatory authority upon completion of the mining operation. The requirement for notification of the regulatory authority at the permanent cessation of all coal extraction activities was added to the final rule in recognition of the fact that all coal extraction may cease before completion of the mining operation. If so, the

regulatory authority should be notified since the exemption ceases to have any relevance when coal will no longer be mined at the site.

Final Section 702.15(c) requires a person to conduct operations in accordance with the approved exemption application. Also, if an operator is authorized under final Section 702.11(b) to extract coal prior to submittal or approval of its application for exemption, either because pursuant to final Section 702.11(b), it filed an application within 60 days after the effective date of this final rule or because under Section 702.11(e)(3), the regulatory authority does not act within 90 days of receipt of an administratively complete application, the operator must conduct operations in accordance with the exemption criteria of part 702 or counterpart provisions of the State regulatory program. This provision is similar to the language at Section 702.15(a)(3) of the February 24, 1988 modified proposal, but the good faith standard that was contained in the proposal has not been included in the final rule in response to comments as discussed below.

In the February 24, 1988 notice, OSM included a good faith standard in proposed Sections 702.15 and 702.17. The purpose of the provision in proposed Section 702.17 would have been to continue an existing policy whereby a person who received an exemption from the regulatory authority could rely upon the exemption. Under proposed Section 702.17, as long as a person was operating in good faith and attempting to comply with the terms of the exemption, the person would not be subject to direct enforcement action under the Act until revocation of the exemption. The good faith standard was included in proposed Section 702.17 to prevent persons with an approved exemption from intentionally violating the law without being subject to enforcement under the Act. Section 702.15(a)(3) was proposed as a companion section to Section 702.17 to require good faith operation in accordance with the approved application. However, in response to comments pointing out that a good faith standard is difficult to prove, unnecessary and subjective, OSM has not included the standard in the final rule.

Final Section 702.15(d) is identical to Section 702.15(b) of the original proposal and provides that authorized representatives of the regulatory authority and the Secretary shall have the right to conduct inspections of operations claiming exemption under part 702.

Final Section 702.15(e), which is identical to Section 702.15(c) of the original proposal, identifies the specific inspection rights of authorized representatives of the regulatory authority and the Secretary. Final paragraph (e)(1) provides that authorized representatives of the regulatory authority and the Secretary shall have a right of entry to, upon, and through any mining and reclamation operations without advance notice or a search warrant, upon presentation of appropriate credentials. Final paragraph (e)(2) states that the authorized representatives of the regulatory authority and the Secretary may, at reasonable times and without delay, have access to and copy any records relevant to the exemption. Finally, paragraph (e)(3) of the final rule specifies that the authorized representatives of the regulatory authority and the Secretary shall have a right to gather physical and photographic evidence to document conditions, practices or violations at a site.

Final Section 702.15(f), which is identical to Section 702.15(d) of the original proposal, states that no search warrant shall be required with respect to any activity under paragraphs (d) and (e) of this section, except that a search warrant may be required for entry into a building.

Several commenters urged the elimination of the good faith standard of proposed Section 702.15(a)(3) of the February 24, 1988 proposal because it is "overly subjective and difficult to prove." Other commenters suggested that good faith is only appropriate in the computation of discretionary civil penalties and not in enforcement actions. The commenters urged that a "strict liability" standard be adopted.

As mentioned above, OSM agrees with the commenters and has not included the good faith standard in Section 702.15 or Section 702.17 of the final rule.

A commenter objected to the "broad discretion" given to the regulatory authority to review an operator's records. The commenter suggested that the regulatory authority's record search be limited to only those records relevant to the claim for exemption under consideration.

OSM recognizes the merit of the comment. The regulatory authority must have access to all information relevant to the exemption including commercial use and sales information and tonnages of all minerals extracted. OSM believes that final Section 702.15 provides the regulatory authority with the right of access only to records relevant to the exemption.

SECTION 702.16 - STOCKPILING OF MINERALS

Final Section 702.16 establishes the conditions under which a mining area's tonnage figures of stockpiled coal and other minerals may be used for the purposes of qualifying, initially and annually thereafter, for the incidental mining exemption. This section was not affected by the February 24 and April 25, 1988 modifications to the original proposed rule.

Final Section 702.16(a) addresses stockpiling of coal and provides that coal extracted and stockpiled may be excluded from the calculation of cumulative production until the time of its sale, transfer to a related entity or use within the limits specified in paragraphs (a) (1) and (2). Under final paragraph (a)(1), for mining areas that have been extracting coal for at least the two preceding years, coal may be stockpiled and excluded from the cumulative production figures up to an amount equaling a 12-month supply based on the average annual sales, transfer or use from the mining area over the preceding two years. Final paragraph (a)(2) applies to mining areas that have not yet established the two-year track record and provides that an amount of coal that would represent a 12-month supply based on average monthly sales, transfer or use may be stockpiled and excluded from the cumulative production figures. For example, after one year of coal production from a mining area, the operator would be able to stockpile and exclude from cumulative production figures an amount equal to the amount of coal sold, transferred or used during the year of production.

The provisions of final Section 702.16(a) were added in response to comments to draw a reasonable standard and to make the final rule more flexible. An example will illustrate why a degree of flexibility is necessary. If a legitimate "other minerals" operator opens a pit where the upper strata contain coal, which must be mined out in order to reach extensive beds of other minerals below, the operator would be penalized by virtue of the fact that in the early stages of the operation the bulk of production would be coal. This provision allows such an operator to stockpile the coal for a reasonable, but not unlimited, time without including it in the cumulative production totals until the production of other minerals for purposes of bona fide sale or reasonable commercial use reaches a level that would allow the mining area to satisfy the tonnage test.

Final Section 702.16(b) addresses stockpiling of other minerals. With the exception of the change described below and a few editorial changes, final Section 702.16(b)(1) is the same as Section 702.16 of the June 1, 1987 original proposal. Final paragraph (b)(1) provides that the regulatory authority shall disallow all or part of an operator's tonnages of stockpiled other minerals for purposes of meeting the requirements of part 702 if the operator fails to maintain adequate and verifiable records of the mining area of origin, the disposition of stockpiles or if the disposition of the stockpiles indicates the lack of commercial use or market for the minerals. The final rule gives flexibility to the regulatory authority concerning stockpiling of other minerals and is intended to ensure that only verified tonnages of stockpiled other minerals and only stockpiled other minerals for which a commercial use or market exists are included in the calculation of production rations. The word "may" in the proposal was changed to "shall" in the final rule to require disallowance of unverified tonnages. The requirement for maintaining records of the mining area of origin was added because the exemption must be determined for each mining area. This does not require physical segregation of stockpiled other minerals as long as adequate records are maintained.

Final Section 702.16(b) (2), (3) and (4) were added to the final rule by OSM in response to comments concerned with the potential for abuse of the incidental mining exemption through manipulation of its stockpiling provisions. Final Section 702.16(b)(2) provides that the regulatory authority may only allow an operator to utilize tonnages of stockpiled minerals for purposes of meeting the requirements of part 702 if (i) the stockpiling is necessary to meet market conditions or is consistent with generally accepted industry practices; and (ii) the stockpiled minerals do not exceed a 12-month supply of the mineral required for future sales as approved by the regulatory authority on the basis of the exemption application. Final Section 702.16(b)(3) states that the regulatory authority may allow an operator to utilize tonnages of stockpiled minerals beyond the 12-month limit established in paragraph (b)(2) if the operator can demonstrate to the regulatory authority's satisfaction that the additional tonnage is required to meet future business obligations of the operator, such as may be demonstrated by a legally binding agreement for future delivery of the minerals. Final Section 702.16(b)(4) allows the regulatory authority to revise the stockpile tonnage limits periodically in accordance with the criteria established by Section 702.15(b)(2) and (b)(3) based on additional information available to the regulatory authority.

Numerous comments were received on stockpiling. Some commenters wanted a total prohibition on allowing any stockpiled material to be used in calculating the requirements of the exemption. For these commenters, "operators illegally using the exemption could mine the overburden until either tonnage or gross revenues from the stockpiles of other minerals are high enough, then become a surface coal mining operation for an extended period of time following removal of the other mineral." In the commenters' view, stockpiling would thus allow these operators to avoid the standards of the Act. Other commenters advocated prohibiting stockpiling for a period in excess of that needed to load and transport the minerals for end use or processing. For these commenters, the existence of a stockpile beyond that period of time needed to transport or process the minerals is a "good indicia of the lack of commercial value and/or decline of the marketplace, both of which should trigger further agency inquiry."

In contrast, other commenters opposed any restrictions on stockpiling. For these commenters, any restrictions on stockpiling violate the "rights of operators." Some commenters believed that restrictions on stockpiling are unnecessary because the annual reporting requirements of the rule protect against operations falsely claiming the exemption by selling coal while indefinitely stockpiling or spoiling the other minerals. One commenter believed the rule "totally ignores the condition of the market and gives too much discretion to the enforcement efforts of OSM." Other commenter requested guidelines or indication as to what are the "adequate and verifiable records of the disposition of stockpiles" required to be maintained by the operator pursuant to proposed Section 702.16. Another commenter indicated that stockpiling should be allowed only to the extent that it is a "general custom of the industry and only for a limited period of time." This commenter further contended that if stockpiling is not controlled, "a coal operator may remove the unwanted other mineral in order to justify the coal removal without a permit and without bond, only to leave the stockpiled unwanted other mineral once the coal is removed." The result would be "the coal would have been extracted without a permit and the land would be left entirely uncovered by bond." Some commenters believed that, over an annual period, "seasonal stockpiling and subsequent sales will be balanced to address the concerns of entities that legitimately operate under the incidental mining exemption." The commenters "strongly oppose the inclusion of stockpiles in an exemption test made at the end of each year." Another commenter believed that the issue of stockpiling cannot be solved in a rulemaking that is "national in scope." The commenter agreed that some limits are necessary to prevent an operator from using a stockpile that is "actually only a spoil pile that the operator is attempting to use to establish his exemption and thus not to meet Federal and State coal strip mine requirements." The commenter recommended that the solution to the stockpile issue is "best left to the individual States."

OSM, while recognizing the difficulty of the stockpiling issue, believes it is important to ensure that stockpiling is not abused. Therefore, in final Section 702.16(a), OSM limited the amount of coal that may be stockpiled without including it in cumulative production. OSM also added to the final rule provisions governing the conditions under which stockpiled other mineral tonnages will be accepted by the regulatory authority. Final Section 702.16(b)(2) was added to provide that the regulatory authority may only allow an operator to utilize tonnages of stockpiled minerals if the stockpiling is necessary to meet market conditions or is consistent with generally accepted industry standards and the stockpiled minerals do not exceed a 12 month supply of the mineral required for future sales as approved by the regulatory authority on the basis of the exemption application. Since the exemption application contains estimates of other minerals sales and revenues, it is the appropriate document to rely on for justification of other mineral stockpiling. Final paragraph (b)(3) was added to give the regulatory authority discretion to allow an operator to utilize tonnage figures of stockpiled minerals beyond the 12 month limit established in paragraph (b)(2) if the operator can show to the regulatory authority's satisfaction that the additional tonnage is required to meet future business obligations of the operator such as may be demonstrated by a legally binding agreement for future delivery of the minerals. Final paragraph (b)(4) was added to give the regulatory authority the discretion to periodically revise the stockpile tonnage limits based on additional information available to the regulatory authority. OSM believes these additional provisions provide a clear and reasonable standard that is flexible enough to address effectively a variety of mining circumstances.

A total prohibition on stockpiling or a prohibition for a period in excess of that needed to load or transport, as some commenters urged, is not reasonable given the need of many operators to stockpile in order to meet their legitimate business obligations. Nor does OSM believe that restrictions on inclusion of stockpiled minerals violate the rights of operators or that the requirement for compliance with the tonnage and revenue test on an annual basis contained in final Section 702.17 sufficiently protects against operations falsely claiming the exemption. OSM does not believe operators have rights to include unlimited and uncontrolled stockpile tonnages when they claim the exemption. Standards for stockpiling must be provided since ordinary marketing practices require some stockpiling, and, without such standards, the exemption could be easily abused by operators stockpiling for markets that do not exist.

In response to the comment that the rule "totally ignores the condition of the market and gives too much discretion," the inclusion of paragraphs (b)(2) through (4) provides guidance to regulatory authorities.

As for the request for guidelines concerning what are "adequate and verifiable records," the regulatory authority has the discretion to decide what records establish an operator's claim to the need for stockpiling. OSM will provide further guidance for Federal program States if needed.

OSM agrees with the commenter who indicated stockpiling should be allowed only to the extent that it is a general custom of the industry and only for a limited time and believes that the final provisions meet the substance of the comment.

In response to the comment that because seasonal stockpiling and subsequent sales will be balanced, there is no need to include stockpiles in an exemption test made at the end of each year, OSM does not believe that such a balance will always occur and the commenter offers no evidence for his contention. Finally, regarding the comment that the issue of stockpiling should be left to the individual States, OSM believes that this approach would not fulfill its responsibility to implement the incidental mining exemption.

SECTION 702.17 - REVOCATION AND ENFORCEMENT

Final Section 702.17 establishes the regulatory authority's responsibility for annual compliance reviews of exempt operations and for revocation of the incidental mining exemption for mining areas that do not meet the exemption criteria. The final rule also provides for direct enforcement action for violations of the regulatory program in certain circumstances. Section 702.17 of the final rule is similar to the modified proposal issued on February 24, 1988, but is substantially different, for reasons described below, from the original proposal of June 1, 1987.

Final Section 702.17(a) requires the regulatory authority to conduct an annual compliance review of each exempt mining area, utilizing the annual report, an on-site inspection and any other information available to the regulatory authority. If any mining area is not in compliance with the requirements of Section 702.14, the regulatory authority shall notify the mine operator that the exemption for that mining area may be revoked. This provision was added to the final rule so that the regulatory authority will ensure that each mining area is in annual compliance with the exemption criteria of final Section 702.14 on a cumulative basis. The requirement for an annual compliance review for each mining area was added in response to a comment and to ensure that the annual report is analyzed by the regulatory authority and the mining area is inspected at least once each year.

Final Section 702.17(b) is based upon Section 702.17(a) of the February 24, 1988 proposal. Final paragraph (b) provides that if the regulatory authority has reason to believe that a specific mining area is not exempt, was not exempt under the provisions of this part or counterpart provisions of the State regulatory program at the end of the previous reporting period, or will be unable to satisfy the exemption criteria at the end of the current reporting period, the regulatory authority shall notify the operator that the exemption may be revoked and the reason(s) therefore. The exemption will be revoked unless the operator demonstrates to the regulatory authority within 30 days that the mining area in question should continue to be exempt. The final rule specifies that the possibility of past, present or future lack of compliance is sufficient to initiate the exemption revocation process. The February 1988 proposal only mentioned possible current lack of compliance as grounds for initiating the process. OSM made this change to avoid placing an unnecessary limitation on the scope of the regulatory authority's powers and to track the requirement for cumulative compliance evaluated annually. For example, the regulatory authority may have evidence that the mining area is currently out of compliance based on a continually applied exemption criterion such as the stratigraphic test. Or, the regulatory authority may have evidence that the mining area was or will be out of compliance with one of the annually applied exemption criteria such as the tonnage or revenue test.

The final rule also differs from the February 1988 proposal by the inclusion of the phrase "counterpart provisions of the State regulatory program" in recognition of the fact that this final rule becomes effective in primacy States only after incorporation into the State regulatory program.

Final Section 702.17(c)(1) states that if the regulatory authority finds that an operator has not demonstrated that activities conducted in the mining area qualify for the exemption, the regulatory authority shall revoke the exemption and immediately notify the operator and any intervenors in the application process. If a decision is made not to revoke the

exemption, both the operator and any intervenors must be given immediate notice. The notice requirements have been included in the final rule to allow adversely affected persons to seek administrative review.

Final paragraph (c)(2) states that a decision whether to revoke an exemption shall be subject to administrative review under 43 CFR 4.1280 when OSM is the regulatory authority or a State program equivalent when the State is the regulatory authority. A request for administrative review may be filed by any adversely affected person within 30 days of notification of the decision. Paragraph (c)(2) has been modified from the February 24, 1988 proposal to provide for a right of administrative review when the decision is made not to revoke an exemption. The 30-day period to seek review has been included to allow for finality of the decision if no review is sought and is consistent with the period allowed for seeking administrative review of other decisions under the Act, such as permit issuance.

Paragraph (c)(3) states that the filing of a petition for review does not automatically suspend the effect of a decision. This provision was added to the final rule in order to clarify the effect of the revocation decision.

Final Section 702.17(d) specifies that (1) an operator mining in accordance with the terms of an approved exemption shall not be cited for violations of the regulatory program which occurred prior to the revocation of the exemption and that (2) an operator who does not conduct activities in accordance with the terms of an approved exemption and who knows or should know such activities are not in accordance with the approved exemption shall be subject to direct enforcement action for violations of the regulatory program which occur during the period of such activities.

In its original proposal of June 1, 1987, OSM suggested provisions that would have allowed enforcement action to be taken by the regulatory authority or OSM if an operation claiming an exemption was in fact not exempt. Such an approach made sense where operators did not need approval to operate under the exemption. Under proposed Section 702.17(a), if the regulatory authority or OSM had cause to believe that the mining operation claiming exemption was not exempt under the provisions of part 702, appropriate enforcement action would have been taken under the relevant inspection, enforcement, and civil penalty provisions of either the applicable provisions of State or Federal regulations. If the regulatory authority or OSM had found that activities conducted in the mining area constituted surface coal mining operations, the regulatory authority or OSM would have, in accordance with proposed Section 702.17(b) ordered the payment of abandoned mine reclamation fees in accordance with part 870 of this Chapter. OSM or the regulatory authority would also have ordered the operator to cease surface coal mining operations and either obtain a valid surface coal mining permit or undertake and accomplish within a specified time period remedial reclamation in accordance with the standards of the regulatory program applicable to conditions existing on the mining area. As specified in Section 702.17(c) of the June 1, 1987 proposal, the regulatory authority or OSM could have required the operator to submit a reclamation bond pursuant to the regulatory program to ensure the performance of remedial reclamation.

The February 24, 1988 proposal modified the original proposal to reflect the change from a notice of exemption process to an application for exemption process. The February 1988 proposal also would have related direct enforcement liability to the operator's good faith or lack thereof. As discussed in the preamble to final Section 702.15, OSM has not included the good faith standard in the final rule because it is subjective and difficult to prove. Instead, OSM has chosen to focus on objective standards of whether the mining area is operated in accordance with the terms of the approved exemption, a question of fact, and if not, whether the operator knew or should have known about the failure to comply. The final rule also differs from the February 1988 proposal by leaving out the reference to the Act in proposed Section 702.17(c)(1). As discussed below, this change was made in response to a comment. It should be noted that Section 702.17(d)(1) applies only to operators mining under an approved exemption and that direct enforcement action is possible against operators who assert the exemption, but have not yet received approval from the regulatory authority.

Final Section 702.17(d)(3) states that upon revocation of an exemption or denial of an exemption application, an operator shall stop conducting surface coal mining operations until a permit is obtained and shall comply with the reclamation standards of the applicable regulatory program with regard to conditions, areas and activities existing at the time of revocation or denial. This provision was added by OSM to clarify operators' obligations after revocation of the exemption or denial of an exemption application. Such obligations exist regardless of whether a specific provision is included in part 702. Under the final rule, if an exemption is revoked or an application denied, reclamation must begin immediately (even though the operator does have the option of applying for a coal mining permit). At the time of revocation, the unreclaimed area is not immediately in violation of the applicable program. The operator should be given a reasonable time to reclaim the area. If the reclamation is not accomplished in a timely manner, however, then the

regulatory authority should cite violations of the applicable regulatory program. This provision is an outgrowth of the recent IBLA decision in *Cherry Hill Development v. OSMRE, 110 IBLA 185,* August 17, 1989.

Several commenters disagreed with Section 702.17(a) of the February 24, 1988 proposal, which would have provided that if the regulatory authority has reason to believe that an operation granted an exemption for a specific mining area is not exempt, the regulatory authority shall notify the operator that the exemption may be revoked unless the operator demonstrates to the regulatory authority within 30 days that the mining area in question meets the exemption criteria. These commenters believed the provision "risk grave environmental damage." They argued that after OSM's experience with "the wide-spread abuse of the two acre exemption, one would think the agency would seek to avoid creation of a new generation of unreclaimed surface coal mining sites." The commenters contended that the exemption holder has "full and fair opportunity to defend the exemption status after issuance of an enforcement order." The commenters further argued that to the extent that the operation is "a sham and has operated outside of its boundaries, an imminent harm cessation order is mandatory under the Act and the Secretary's regulations." In summary, these commenters believed that "in no event is non-enforcement appropriate in a situation where the Secretary has reason to believe that the activity may be in violation of the Act."

OSM has determined to retain the provision requiring the regulatory authority to notify an operator of potential revocation of the incidental mining exemption and to require him to demonstrate that he continues to be entitled to the exemption. In effect, this is a kind of "show cause" proceeding and places the burden upon the operator to show he continues to qualify for the exemption. In such situations, allowing the operator 30 days to prepare materials to show that the exemption should not be revoked is a fair procedure. It would be unfair to order cessation of operations until the operator has been given the opportunity to demonstrate that the mining area in question is, in fact, in compliance. In addition, if a person is knowingly not complying with the terms of an approved exemption, final Section 702.17(d)(2) does provide for direct enforcement action, including imminent harm cessation orders when justified.

The procedures of final Section 702.17 (b) and (c) are consistent with the Act, including section 521. The purpose of these procedures is to establish an orderly method to determine whether a violation of the Act or regulatory program exists. If it is determined that an operation is not entitled to a previously approved exemption, the exemption is revoked and the operator must stop mining coal and reclaim the mining area to the standards of the appropriate regulatory program. The operator may apply for a coal mining permit at this time. If the operator continues to mine coal without a permit, the operator will be subject to the issuance of a cessation order under 30 CFR part 843. This is certainly consistent with the spirit of the Act as expressed in the proviso of section 521(b) wherein blameless operators relying upon regulatory authority authorizations are given a reasonable time to come into compliance.

A commenter questioned whether an operator could seek administrative review of the notice required by Section 702.17(a) of the February 1988 proposal when the regulatory authority has reason to believe that the operation granted an exemption for a specific mining area is not exempt.

The notice specified in final Section 702.17(b) is neither an enforcement sanction nor a penalty provision for which administrative review would be appropriate. It merely initiates an inquiry. If, however, the regulatory authority finds under the proceeding initiated pursuant to Section 702.17(b) of the final rule that the activities conducted in the mining area do not qualify for the exemption, then Section 702.17(c) of the final rule provides that the regulatory authority shall revoke the exemption. This revocation decision is subject to administrative review under 43 CFR 4.1280 when OSM is the regulatory authority or a State program equivalent when the State is the regulatory authority.

Several commenters urged OSM to specify a minimum inspection frequency for exempt operations and a requirement for periodic review by the regulatory authority of the status of the exemption.

OSM agrees that the regulatory authority should do more than receive annual reports; it should also analyze them and act on any determinations it makes pursuant to them. Thus, Section 702.17(a) of the final rule requires regulatory authorities to conduct an annual compliance review of exempt mining areas, utilizing the annual report, an on-site inspection and any other available information. OSM will monitor State compliance review and inspection activities as part of its oversight responsibilities. The State regulatory authorities may require, at their discretion, more frequent reporting or may conduct more frequent inspections.

Several commenters stated that OSM's data shows that "few of the operations using the exemption to date have met even the tonnage test for the exemption." One commenter indicated that OSM "must take immediate enforcement action against those who operated a surface coal mining operation in violation of the Act and the exemption." The commenter urged that the regulatory authority "must issue an imminent harm cessation order against these operations" and, at a minimum, "ensure that the operators responsible for these sites are placed on the permit block list until the mine site is reclaimed."

OSM is taking appropriate enforcement action against mining areas that may be in violation of the existing regulations. If, subsequent to the effective date of this final rule or the effective date of counterpart provisions of the State regulatory program, a mining area will not qualify for the exemption under the standards of this rule, the operator must reclaim the mining area to the standards of the applicable regulatory program. The operator may also apply for a coal mining permit. If following revocation of an exemption the operator does not meet the reclamation obligation, the operator will be subject to direct enforcement action. As discussed above, this final rule also addresses the problem of operators not acting in accordance with approved exemptions by subjecting them to direct enforcement action for periods when they knew or should have known such activities were not in accordance with the approved exemption.

One commenter requested that the term "Act" be deleted from Section 702.17(c)(1) of the February 1988 proposal. The purpose of this change, according to the commenter, is to "conform the section to the remaining portions of the rule, which properly rely upon the applicable State program as the bench mark for compliance." The commenter also contended that the change is consistent with the statute, which designates the State program as the applicable law under which the operator must comply.

OSM agrees with the commenter and has decided not to include the reference to the Act in final Section 702.17(d)(1) because the applicable State program is the "bench mark" for compliance. This change will not have any major impacts because, when approved, State programs should reflect the requirements of the Act. Further discussion of this subject appears in OSM's final rule published on July 14, 1988 *(52 FR 26728).*

Some commenters suggested that, as an alternative to the good faith standard of Section 702.17(c) of the February 1988 proposal, OSM "base the collection of abandoned mine reclamation (AML) fees on an annual test and the reclamation requirement on a threshold test which is calculated over the life of the mine."

In OSM's view, AML fees are owed by operators for coal produced from surface coal mining operations subject to the provisions of the Act. See section 402(a), *30 U.S.C. 1232.* Once it is determined that a mining area does not qualify for the incidental mining exemption under the criteria established by final Section 702.14 or counterpart provisions of a State program, the operator becomes liable for AML fees for all coal produced since October 1, 1977 (except as provided by 30 CFR 870.11). The money is owed to the United States upon a final determination that the mining area does not satisfy the standards of the exemption and must be paid within 30 days from that determination.

Several commenters argued for the removal of the "period of time" language of Section 702.17(c)(2) of the February 1988 proposal. The commenters believed that the language was improper in that it suggested that there might exist a period of time after discovery of the violation of the exemption when the operator was not subject to immediate, direct enforcement by the regulatory authority.

OSM agrees with the comment. Since OSM did not intend that the final rule be interpreted this way, it has deleted the phrase "period of time" from final Section 702.17(d)(2).

One commenter indicated that Section 702.17 should limit the responsibility for ordering payment of abandoned mine reclamation fees for non-exempt operations to OSM. For this commenter, collection of the abandoned mine reclamation fee is a function of OSM, not the State authorities.

OSM agrees that it is responsible for collecting reclamation fees. The language the commenter objected to was included in Section 702.17(b)(1) as proposed on June 1, 1987. That language does not appear in final Section 702.17.

SECTION 702.18 - REPORTING REQUIREMENTS

Final Section 702.18 requires a person who has received an exemption from the regulatory authority for a mining area to file a written report annually for that mining area. Final Section 702.18 is based upon reporting requirements proposed in the February 24 and April 25, 1988 notices. Changes from the proposals relate primarily to when the reports must be filed and the periods that they must cover. These changes are necessitated by adoption of the cumulative production standard in final Section 702.14, and reflect the calendar quarter approach embodied in that section.

The requirement to file an annual report is set forth in final Section 702.18(a)(1). This paragraph provides that following approval by the regulatory authority of an exemption for a mining area, the person receiving the exemption shall, for each mining area, file a written report annually with the regulatory authority containing the information specified in Section 702.18(b). The reporting requirement was proposed at Section 702.18(a) of both the February and April 1988 proposals.

Final Section 702.18(a)(2) specifies that the report shall be filed no later than 30 days after the end of the 12-month period as determined in accordance with the definition of cumulative measurement period in Section 702.5(a). This means that for operations in Federal program States or on Indian lands that extracted coal or other minerals prior to April 1, 1990, the effective date of these rules, the report must be filed no later than April 30, 1991, and every April 30 thereafter over the life of the mining area. The period for which the cumulative production and revenue of such operations is calculated ends March 31 of each year. Final Section 702.18(a)(2) is similar to Section 702.18(b) of both the February and April 1988 proposals, except that the final rule refers to the cumulative measurement period definition for a determination of the period covered by the report.

For mining areas at which the extraction of coal and other minerals begins on or after April 1, 1990, the reporting date is no later than 30 days after the conclusion of the calendar quarter corresponding to the calendar quarter during which extraction of coal or other minerals commenced. In other words, if extraction of coal or other minerals at new mining areas begins between April 1 and June 30, cumulative production is measured for a period ending on June 30, and the report must be filed no later than July 30 of each year.

If extraction of coal or other minerals at new mining areas begins between July 1 and September 30, cumulative production is measured for a period ending on September 30, and the report must be filed no later than October 30 of each year.

If extraction of coal or other minerals at new mining areas begins between October 1 and December 31, cumulative production is measured for a period ending on December 31, and the report must be filed no later than January 30 of each year.

If extraction of coal or other minerals at new mining areas begins between January 1 and March 31, cumulative production is measured for a period ending on March 31, and the report must be filed no later than April 30 of each year.

For mining areas in primacy States that extract coal or other minerals prior to the effective date of counterpart provisions in the State regulatory program, the first annual report does not have to be filed until after the effective date of the State regulations and must cover the appropriate 12-month period as described above.

Final Section 702.18(a)(3) provides that the information in the report shall cover (i) annual production of coal and other minerals and annual revenue derived from coal and other minerals during the preceding 12-month period, and (ii) the cumulative production of coal and other minerals and the cumulative revenue derived from coal and other minerals. The annual and cumulative production information required in final paragraph (a)(3) is substantially the same as Section 702.18(a)(1) and (2) of the February and April 1988 proposals.

Final Section 702.18(b) identifies six items of information that must be included in the annual report for each mining area both on a cumulative and 12-month basis. Final paragraph (b) states that for each period and mining area covered by the report, the report shall specify (1) the number of tons of extracted coal sold in bona fide sales and total revenue derived from such sales, (2) the number of tons of coal extracted and used or transferred by the operator or related entity and the estimated fair market value of such coal, (3) the number of tons of coal stockpiled, (4) the number of tons of other commercially valuable minerals extracted and sold in bona fide sales and the total revenue derived from such sales,

(5) the number of tons of other commercially valuable minerals extracted and used or transferred by the operator or related entity and the estimated total fair market value of such minerals, and (6) the number of tons of other commercially valuable minerals removed and stockpiled by the operator. Final paragraphs (b)(1) and (2) are identical to Section 702.18(c)(1) and (2) of the April 1988 proposal. Final paragraphs (b)(4) and (5) are identical to Section 702.18(c)(3) and (4) of the April 1988 proposal, except that the phrase "or transferred" has been added to each in the final rule to acknowledge that coal and other minerals may be used by or transferred to a related entity under final Section 702.14. Final paragraphs (b)(3) and (6) were added to the final rule by OSM at the request of commenters to provide information concerning stockpiled minerals. OSM believes that the regulatory authority should have information on stockpiling in order to assess the status of the exemption.

OSM received many comments concerning the time periods for reporting under this rule. Some commenters favored monthly reporting; the large majority of commenters favored annual reporting and still others favored longer periods to coincide with the life-of-mine option. Those favoring the shortest reporting periods stressed the need to ensure that the exemption would not be abused by operators. These commenters stated that operators are likely to maintain these data within their monthly production and sales reports and therefore should have no trouble providing the information to OSM. Moreover, the monthly reporting requirements, they asserted, would alert the regulatory authority quickly so that extensive environmental damage would not occur during an exemption term. Some commenters who favored monthly reporting periods went on to state that, at a minimum, OSM should establish annual reports. In the commenters' view, this should be the longest permissible period. Any reporting period of longer duration, they argued, would be unworkable and unenforceable and would make closure and revocation a sham.

The vast majority of commenters favored an annual reporting requirement regarding tonnages of minerals extracted, documentation of sales or other commercial uses of the minerals, and such other information as the regulatory authority may require. Some of these commenters stated that annual reports would be more practical than life-of-mine or monthly reports. They asserted that allowing the determination to be made over the life of the mine would be too susceptible to manipulation by the operator and could result in widespread abuse of the Act. A period shorter than 12 months, however, was also decried both as an undue burden on the operator and because the sequential removal of strata might skew comparative tonnages. One of the commenters acknowledged that an annual reporting requirement in conjunction with a gross revenues test would not impose a reporting burden on operators since every operator generates such figures in developing its depletion allowance for tax return purposes.

Alternatively, a few commenters favored longer reporting periods to coincide with the life-of-mine standard. These commenters believed that longer reporting periods were absolutely necessary due to the time required for removal of various layers of materials and minerals. They argued that where the coal seam lies near the surface and above other commercial minerals, the excavation of the coal will skew the reporting figures despite the fact that the total coal reserves within the mining area are well below the 16 2/3 percent of other commercially valuable minerals which will be mined. One commenter stated that OSM should carefully review and consider Ohio's rule which allows the Chief of the Division of Reclamation latitude in determining under which law an operator will be required to perform. Ohio's Chief, the commenter stated, reviews not only the quantity of coal and minerals removed from a mining area during a permit year, but also the estimated future production of coal and minerals to be produced from that mining area, along with the available market for those minerals and coal and the operator's ability to service available markets. Providing for similar discretion would enable the regulatory authority to allow mining to occur even though during one 12-month period the 16 2/3 percent tonnage test might not be met. This commenter concluded that if OSM chooses a shorter time period or an alternative less flexible than Ohio's rules, either the smaller incidental operators will cease mining other minerals and attempt to perform as small coal operators, thus spoiling reserves of clay, shale and limestone and driving up the price of other minerals due to higher trucking costs; or the larger incidental coal operators, e.g., many of the clay producing brick companies, will have to decide whether to mine coal under the Act, "which is unworkable for other mineral mining operations" or not to mine coal and treat it as overburden. The commenter believed any of these scenarios would be "philosophically wrong, economically unsound, and environmentally ridiculous."

A number of specific comments were received. One commenter suggested that a "more liberal reporting period would be appropriate for small operators who mine less than, for instance, 10,000 tons of coal per year." One commenter stated that the reporting requirements failed to include any reference to the minerals stockpiled for bona fide commercial sale and failed to specify any method of calculating or reporting such data for the calculation of an operator's claim to exemption. One commenter suggested inclusion of the following additional information in the report: "the total tonnages of coal and other commercially valuable minerals extracted as of the date of the report and the tonnages of coal and other

commercially valuable minerals extracted for that month." One commenter suggested "detailed documentation on the disposition of the other minerals and of the coal, including not merely the sale or use but the specific sale, the value per ton of the mineral and the coal, and the amount of other mineral and coal, stockpiled or otherwise extracted but not sold." One commenter suggested that the reporting requirement should be modified to include "the average unit price received or expected for the coal and noncoal materials; the gross value of the coal and noncoal materials sold or used for the report period;" and "estimates of the gross value of the coal and noncoal materials sold or used in each year of the operation's life."

OSM has concluded that an annual report is the best way of apprising the regulatory authority of the status of the exempt operation, while avoiding the burden of paperwork on the regulatory authority and the operator that would result from more frequent reporting requirements. Less frequent reporting, e.g., five years or life-of-mine as some commenters suggested, would cover too long a period of time for, if a violation were established, it would be difficult to reclaim since an operator would have by then displaced considerable overburden and mined through too large an area. By requiring information on "cumulative production" and defining the term, OSM believes that it has established a clear and workable standard as requested by commenters that will neither be subject to abuse nor be an unreasonable burden on operators, the regulatory authority, or the public.

In regard to specific comments on this section, OSM does not believe that a less frequent reporting period for small operators is possible or desirable. Section 701(28) of the Act does not make a distinction between large and small operators and OSM has no other basis for allowing lesser requirements for small operators. OSM agrees with the comment on stockpiling and has included stockpiling among the list of items that the operator needs to report. The pertinent provisions of final Sections 702.14 and 702.16 should provide the requested guidance as to the appropriate method for calculating stockpiles. OSM agrees with the comment requesting the total tonnages of coal and other commercially valuable minerals extracted as of the date of the report be included in the information requirements and has retained this provision in the final rule. The commenter also requested inclusion of monthly production figures in the report. OSM does not see the need for such specificity as long as the operation is in compliance at the end of each 12-month period. Likewise, OSM sees no need to require detailed documentation on the disposition of the other minerals and coal and has therefore not required such detail in the report. The regulatory authorities are, however, free to require or request any documentation necessary to establish or evaluate the status of the exemption. The comments that the report should include the average unit price received or expected or the gross value of coal and noncoal materials sold or used for the report period were not adopted because reporting of cumulative revenue pursuant to final Section 702.18(b) allows evaluation of compliance with the revenue test. The comment requesting estimates of gross value of the coal and noncoal materials sold or used in each year of the operations life was not adopted because the exemption application requirements for submittal of estimated revenues and estimated fair market values at final Section 702.12 (d) and (e) will provide the same information.

E. SECTION 750.21 - COAL EXTRACTION INCIDENTAL TO THE EXTRACTION OF OTHER MINERALS

The final rule adopted today amends 30 CFR part 750 by adding a new Section 750.21, which states that 30 CFR part 702 is applicable on Indian lands. This portion of the final rule is identical to the June 1, 1987 proposal.

F. SECTION 870.11(d) - APPLICABILITY

Final Section 870.11(d) addresses the applicability of the reclamation fee obligation to coal produced from mining areas exempt either under the final rule adopted today or under counterpart provisions of a State program. The final rule provides that for Federal program States and on Indian lands, the extraction of coal in accordance with part 702 of this Chapter is exempt from the applicability of the reclamation fee obligation. In States with approved programs, the final rule retains the any-12-consecutive-months standard until the State incorporates regulations adopted pursuant to part 703 into the State program. Subsequently, the State's counterpart regulations will govern.

The final rule is similar to the June 1, 1987 proposal except that instead of merely cross-referencing part 702, the final rule retains the previous standard for State programs until provisions counterpart to this final rule are approved. Without this change and in the absence of counterpart provisions to part 702, there would have been no exemption standard in primacy States for mining areas where the coal extracted did not exceed the 16 2/3 threshold. The final rule does not relieve operators from existing obligations to pay reclamation fees. No comments were received on this part of the final rule.

The justification for removing the any-consecutive-12-month standard from Section 807.11(d) once the new rules become effective in a State is the same as for adopting the cumulative production standard in Section 702.14. The June 30, 1982 final preamble to the previous Section 870.11(d) did not discuss how the 12-month constraint for title IV purposes related to how the exemption should be applied for title V purposes *(47 FR 28594)*. The preamble relied upon section 412(a) of the Act, *30 U.S.C. 1242*(a), for authority in promulgating the rule, and did not interpret the proviso in section 701(28) of the Act. The preamble stated that in the absence of the 12-month qualifying period, "incidental production would be subject to quarterly determinations of applicability, because production reports and fee payments are due quarterly, even though the extraction of coal over a longer period (e.g., one year or the life of the project) did not exceed 16 2/3 percent of the mineral tonnage removed." *47 FR 28577*. Although OSM agrees that an operation must be exempt to avoid reclamation fee liability, OSM does not agree that the quarterly payment obligations in Title IV govern the interpretation of section 702(28) of the Act. On the contrary, section 402(a) imposes reclamation fee obligations upon "coal mining operations subject to the provisions of this Act. * * *" Thus, section 701(28) governs the scope of Title IV obligations, not vice versa. It makes sense for the exemption standards to be established in part 702 or counterpart provisions in State programs, and to be cross-referenced in Section 870.11(d).

G. SUBCHAPTER T -- PROGRAMS FOR THE CONDUCT OF SURFACE MINING OPERATIONS WITHIN EACH STATE AND EFFECT IN FEDERAL PROGRAM STATES

The final rule provides that part 702 will 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. These cross references are identical to the June 1, 1987 proposal, except that California has been added because a Federal program for California was promulgated on July 13, 1988 *(53 FR 26570-26579)*. In the proposal, OSM specifically requested comment as to whether unique conditions exist in any of these Federal program States or on Indian lands that should be reflected either as changes to the national rules or as State-specific amendments to any or all of the Federal programs or the Indian lands program. No comments were received in response to this request.

H. EFFECT OF THE RULE ON STATE PROGRAMS

Following promulgation of this rule, OSM will evaluate State programs to determine whether any changes in these programs will be necessary. If the Director determines that any State program provisions should be amended 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.

III. PROCEDURAL MATTERS

Federal Paperwork Reduction Act

The collections of information contained in Sections 702.11, 702.12, 702.13, 702.15 and 702.18 have been approved by the Office of Management and Budget (OMB) under *44 U.S.C. 3501* et seq. and assigned clearance number 1029-0089.

Executive Order 12291 and Regulatory Flexibility Act

The Department of the Interior has determined that this document is not a major rule under E.O. 12291 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 affects a relatively small number of noncoal mineral operations. The rule does not distinguish between small and large entities. The economic effects of the proposed rule are estimated to be minor and no incremental economic effects are anticipated as a result of the rule.

National Environmental Policy Act

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

Executive Order 12630

In accordance with the Attorney General's "Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings," proposals developed and published prior to the issuance of the Executive Order and the guidelines are excluded from coverage under the Executive Order.

Author

The principal author of this rule is Patrick D. Boyd, Division of Regulatory Programs, Office of Surface Mining Reclamation and Enforcement, 1951 Constitution Avenue, NW., Washington, DC 20240; telephone: 202-343-1864.

LIST OF SUBJECTS

30 CFR Part 700

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

30 CFR Part 702

Administrative practice and procedures, Surface mining, Underground mining.

30 CFR Part 750

Indian lands, Reporting and record-keeping requirements, Surface mining, Underground mining.

30 CFR Part 870

Reporting and record keeping requirements, Surface mining, Underground mining.

30 CFR Parts 905 and 910

Administrative practice and procedure, Environmental protection, Intergovernmental relations, Penalties, Surety bonds, Surface mining, Underground mining.

30 CFR Part 912

Intergovernmental relations, Surface mining, Underground mining.

30 CFR Parts 921 and 922

Administrative practice and procedure, Intergovernmental relations, Penalties, Surface mining, Underground mining.

30 CFR Part 933

Intergovernmental relations, Surface mining, Underground mining.

30 CFR Parts 937 and 939

Administrative practice and procedure, Intergovernmental relations, Penalties, Surface mining, Underground mining.

30 CFR Part 941

Intergovernmental relations, Surface mining, Underground mining.

30 CFR Part 942

Intergovernmental relations, Reporting and record keeping requirements, Surface mining, Underground mining.

30 CFR Part 947

Intergovernmental relations, Surface mining, Underground mining.

Accordingly, 30 CFR parts 700, 702, 750, 870, 905, 910, 912, 921, 922, 933, 937, 939, 941, 942, and 947 are amended as set forth below:

Dated: November 21, 1989.
Dave O'Neal, Assistant Secretary, Land and Minerals Management.

PART 700 -- GENERAL

1. The authority citation for part 700 is revised to read as follows:

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

2. Section 700.11(a)(4) is revised to read as follows:

SECTION 700.11 - APPLICABILITY.

(a) * * *

(4) The extraction of coal incidental to the extraction of other minerals where coal does not exceed 16 2/3 percent of the total tonnage of coal and other minerals removed for purposes of commercial use or sale in accordance with part 702 of this chapter.

* * * * *

3. Part 702 is added to read as follows:

PART 702 -- EXEMPTION FOR COAL EXTRACTION INCIDENTAL TO THE EXTRACTION OF OTHER MINERALS

Section

Authority: *30 U.S.C. 1201* et seq., as amended.

SECTION 702.1 - SCOPE.

This part implements the exemption contained in section 701(28) of the Act concerning the extraction of coal incidental to the extraction of other minerals where coal does not exceed 16 2/3 percent of the total tonnage of coal and other minerals removed for purposes of commercial use or sale.

SECTION 702.5 - DEFINITIONS.

As used in this part, the following terms have the meaning specified, except where otherwise indicated:

(a) CUMULATIVE MEASUREMENT PERIOD means the period of time over which both cumulative production and cumulative revenue are measured.

(1) For purposes of determining the beginning of the cumulative measurement period, subject to regulatory authority approval, the operator must select and consistently use one of the following:

(i) For mining areas where coal or other minerals were extracted prior to August 3, 1977, the date extraction of coal or other minerals commenced at that mining area or August 3, 1977, or

(ii) For mining areas where extraction of coal or other minerals commenced on or after August 3, 1977, the date extraction of coal or other minerals commenced at that mining area, whichever is earlier.

(2) For annual reporting purposes pursuant to Section 702.18 of this part, the end of the period for which cumulative production and revenue is calculated is either

(i) For mining areas where coal or other minerals were extracted prior to April 1, 1990, March 31, 1990, and every March 31 thereafter; or

(ii) For mining areas where extraction of coal or other minerals commenced on or after April 1, 1990, the last day of the calendar quarter during which coal extraction commenced, and each anniversary of that day thereafter.

(b) CUMULATIVE PRODUCTION means the total tonnage of coal or other minerals extracted from a mining area during the cumulative measurement period. The inclusion of stockpiled coal and other mineral tonnages in this total is governed by Section 702.16.

(c) CUMULATIVE REVENUE means the total revenue derived from the sale of coal or other minerals and the fair market value of coal or other minerals transferred or used, but not sold, during the cumulative measurement period.

(d) MINING AREA means an individual excavation site or pit from which coal, other minerals and overburden are removed.

(e) OTHER MINERALS means any commercially valuable substance mined for its mineral value, excluding coal, topsoil, waste and fill material.

SECTION 702.10 - INFORMATION COLLECTION.

The collections of information contained in Sections 702.11, 702.12, 702.13, 702.15 and 702.18 of this part have been approved by the Office of Management and Budget under *44 U.S.C. 3501* et seq. and assigned clearance number 1029-0089. The information will be used to determine the initial and continuing applicability of the incidental mining exemption to a particular mining operation. Response is required to obtain and maintain the incidental mining exemption in accordance with section 701(28) of the Act.

Public reporting burden for this collection of 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, OSM Department of the Interior, 1951 Constitution Avenue, NW., Washington, DC 20240; and to the Office of Management and Budget, Paperwork Reduction Project (1029-0089), OMB, Washington, DC 20503.

SECTION 702.11 - APPLICATION REQUIREMENTS AND PROCEDURES.

(a)(1) Any person who plans to commence or continue coal extraction after April 1, 1990, under a Federal program or on Indian lands, or after the effective date of counterpart provisions in a State program, in reliance on the incidental mining exemption shall file a complete application for exemption with the regulatory authority for each mining area.

(2) Following incorporation of an exemption application approval process into a regulatory program, a person may not commence coal extraction based upon the exemption until the regulatory authority approves such application, except as provided in paragraph (e)(3) of this section.

(b) Existing operations. Any person who has commenced coal extraction at a mining area in reliance upon the incidental mining exemption prior to April 1, 1990, in a State with a Federal program or on Indian lands, or prior to the effective date of counterpart provisions in a State program, may continue mining operations for 60 days after such effective date. Coal extraction may not continue after such 60-day period unless that person files an administratively complete

application for exemption with the regulatory authority. If an administratively complete application is filed within 60 days, the person may continue extracting coal in reliance on the exemption beyond the 60-day period until the regulatory authority makes an administrative decision on such application.

(c) Additional information. The regulatory authority shall notify the applicant if the application for exemption is incomplete and may at any time require submittal of additional information.

(d) Public comment period. Following publication of the newspaper notice required by Section 702.12(g), the regulatory authority shall provide a period of no less than 30 days during which time any person having an interest which is or may be adversely affected by a decision on the application may submit written comments or objections.

(e) Exemption determination.

(1) No later than 90 days after filing of an administratively complete application, the regulatory authority shall make a written determination whether, and under what conditions, the persons claiming the exemption are exempt under this part, and shall notify the applicant and persons submitting comments on the application of the determination and the basis for the determination.

(2) The determination of exemption shall be based upon information contained in the application and any other information available to the regulatory authority at that time.

(3) If the regulatory authority fails to provide an applicant with the determination as specified in paragraph (e)(1) of this section, an applicant who has not begun may commence coal extraction pending a determination on the application unless the regulatory authority issues an interim finding, together with reasons therefore, that the applicant may not begin coal extraction.

(f) Administrative review.

(1) Any adversely affected person may request administrative review of a determination under paragraph (e) of this section within 30 days of the notification of such determination in accordance with procedures established under 43 CFR 4.1280 when OSM is the regulatory authority or under corresponding State procedures when a State is the regulatory authority.

(2) A petition for administrative review filed under 43 CFR 4.1280 or under corresponding State procedures shall not suspend the effect of a determination under paragraph (e) of this section.

SECTION 702.12 - CONTENTS OF APPLICATION FOR EXEMPTION.

An application for exemption shall include at a minimum:

(a) The name and address of the applicant;

(b) A list of the minerals sought to be extracted;

(c) Estimates of annual production of coal and the other minerals within each mining area over the anticipated life of the mining operation;

(d) Estimated annual revenues to be derived from bona fide sales of coal and other minerals to be extracted within the mining area;

(e) Where coal or the other minerals are to be used rather than sold, estimated annual fair market values at the time of projected use of the coal and other minerals to be extracted from the mining area;

(f) The basis for all annual production, revenue, and fair market value estimates;

(g) A description, including county, township if any, and boundaries of the land, of sufficient certainty that the mining areas may be located and distinguished from other mining areas;

(h) An estimate to the nearest acre of the number of acres that will compose the mining area over the anticipated life of the mining operation;

(i) Evidence of publication, in a newspaper of general circulation in the county of the mining area, of a public notice that an application for exemption has been filed with the regulatory authority (The public notice must identify the persons claiming the exemption and must contain a description of the proposed operation and its locality that is sufficient for interested persons to identify the operation.);

(j) Representative stratigraphic cross-section(s) based on test borings or other information identifying and showing the relative position, approximate thickness and density of the coal and each other mineral to be extracted for commercial use or sale and the relative position and thickness of any material, not classified as other minerals, that will also be extracted during the conduct of mining activities;

(k) A map of appropriate scale which clearly identifies the mining area;

(l) A general description of mining and mineral processing activities for the mining area;

(m) A summary of sales commitments and agreements for future delivery, if any, which the applicant has received for other minerals to be extracted from the mining area, or a description of potential markets for such minerals;

(n) If the other minerals are to be commercially used by the applicant, a description specifying the use;

(o) For operations having extracted coal or other minerals prior to filing an application for exemption, in addition to the information required above, the following information must also be submitted:

(1) Any relevant documents the operator has received from the regulatory authority documenting its exemption from the requirements of the Act;

(2) The cumulative production of the coal and other minerals from the mining area; and

(3) Estimated tonnages of stockpiled coal and other minerals; and

(p) Any other information pertinent to the qualification of the operation as exempt.

SECTION 702.13 - PUBLIC AVAILABILITY OF INFORMATION.

(a) Except as provided in paragraph (b) of this section, all information submitted to the regulatory authority under this part shall be made immediately available for public inspection and copying at the local offices of the regulatory authority having jurisdiction over the mining operations claiming exemption until at least three years after expiration of the period during which the subject mining area is active.

(b) The regulatory authority may keep information submitted to the regulatory authority under this part confidential if the person submitting it requests in writing, at the time of submission, that it be kept confidential and the information concerns trade secrets or is privileged commercial or financial information of the persons intending to conduct operations under this part.

(c) Information requested to be held as confidential under paragraph (b) of this section shall not be made publicly available until after notice and opportunity to be heard is afforded persons both seeking and opposing disclosure of the information.

SECTION 702.14 - REQUIREMENTS FOR EXEMPTION.

(a) Activities are exempt from the requirements of the Act if all of the following are satisfied:

(1) The cumulative production of coal extracted from the mining area determined annually as described in this paragraph does not exceed 16 2/3 percent of the total cumulative production of coal and other minerals removed during such period for purposes of bona fide sale or reasonable commercial use.

(2) Coal is produced from a geological stratum lying above or immediately below the deepest stratum from which other minerals are extracted for purposes of bona fide sale or reasonable commercial use.

(3) The cumulative revenue derived from the coal extracted from the mining area determined annually shall not exceed 50 percent of the total cumulative revenue derived from the coal and other minerals removed for purposes of bona fide sale or reasonable commercial use. If the coal extracted or the minerals removed are used by the operator or transferred to a related entity for use instead of being sold in a bona fide sale, then the fair market value of the coal or other minerals shall be calculated at the time of use or transfer and shall be considered rather than revenue.

(b) Persons seeking or that have obtained an exemption from the requirements of the Act shall comply with the following:

(1) Each other mineral upon which an exemption under this part is based must be a commercially valuable mineral for which a market exists or which is mined in bona fide anticipation that a market will exist for the mineral in the reasonably foreseeable future, not to exceed twelve months from the end of the current period for which cumulative production is calculated. A legally binding agreement for the future sale of other minerals is sufficient to demonstrate the above standard.

(2) If either coal or other minerals are transferred or sold by the operator to a related entity for its use or sale, the transaction must be made for legitimate business purposes.

SECTION 702.15 - CONDITIONS OF EXEMPTION AND RIGHT OF INSPECTION AND ENTRY.

A person conducting activities covered by this part shall:

(a) Maintain on-site or at other locations available to authorized representatives of the regulatory authority and the Secretary information necessary to verify the exemption including, but not limited to, commercial use and sales information, extraction tonnages, and a copy of the exemption application and exemption approved by the regulatory authority;

(b) Notify the regulatory authority upon the completion of the mining operation or permanent cessation of all coal extraction activities; and

(c) Conduct operations in accordance with the approved application or when authorized to extract coal under Section 702.11(b) or Section 702.11(e)(3) prior to submittal or approval of an exemption application, in accordance with the standards of this part for Federal programs and on Indian lands or in accordance with counterpart provisions when included in State programs.

(d) Authorized representatives of the regulatory authority and the Secretary shall have the right to conduct inspections of operations claiming exemption under this part.

(e) Each authorized representative of the regulatory authority and the Secretary conducting an inspection under this part:

(1) Shall have a right of entry to, upon, and through any mining and reclamation operations without advance notice or a search warrant, upon presentation of appropriate credentials;

(2) May, at reasonable times and without delay, have access to and copy any records relevant to the exemption; and

(3) Shall have a right to gather physical and photographic evidence to document conditions, practices or violations at a site.

(f) No search warrant shall be required with respect to any activity under paragraphs (d) and (e) of this section, except that a search warrant may be required for entry into a building.

SECTION 702.16 - STOCKPILING OF MINERALS.

(a) Coal. Coal extracted and stockpiled may be excluded from the calculation of cumulative production until the time of its sale, transfer to a related entity or use:

(1) Up to an amount equaling a 12-month supply of the coal required for future sale, transfer or use as calculated based upon the average annual sales, transfer and use from the mining area over the two preceding years; or

(2) For a mining area where coal has been extracted for a period of less than two years, up to an amount that would represent a 12-month supply of the coal required for future sales, transfer or use as calculated based on the average amount of coal sold, transferred or used each month.

(b) Other minerals.

(1) The regulatory authority shall disallow all or part of an operator's tonnages of stockpiled other minerals for purposes of meeting the requirements of this part if the operator fails to maintain adequate and verifiable records of the mining area of origin, the disposition of stockpiles or if the disposition of the stockpiles indicates the lack of commercial use or market for the minerals.

(2) The regulatory authority may only allow an operator to utilize tonnages of stockpiled other minerals for purposes of meeting the requirements of this part if:

(i) The stockpiling is necessary to meet market conditions or is consistent with generally accepted industry practices; and

(ii) Except as provided in paragraph (b)(3) of this section, the stockpiled other minerals do not exceed a 12-month supply of the mineral required for future sales as approved by the regulatory authority on the basis of the exemption application.

(3) The regulatory authority may allow an operator to utilize tonnages of stockpiled other minerals beyond the 12-month limit established in paragraph (b)(2) of this section if the operator can demonstrate to the regulatory authority's satisfaction that the additional tonnage is required to meet future business obligations of the operator, such as may be demonstrated by a legally binding agreement for future delivery of the minerals.

(4) The regulatory authority may periodically revise the other mineral stockpile tonnage limits in accordance with the criteria established by paragraphs (b) (2) and (3) of this section based on additional information available to the regulatory authority.

SECTION 702.17 - REVOCATION AND ENFORCEMENT.

(a) Regulatory authority responsibility. The regulatory authority shall conduct an annual compliance review of the mining area, utilizing the annual report submitted pursuant to Section 702.18, an on-site inspection and any other information available to the regulatory authority.

(b) If the regulatory authority has reason to believe that a specific mining area was not exempt under the provisions of this part or counterpart provisions of the State regulatory program at the end of the previous reporting period, is not exempt, or will be unable to satisfy the exemption criteria at the end of the current reporting period, the regulatory authority shall notify the operator that the exemption may be revoked and the reason(s) therefore. The exemption will be revoked unless the operator demonstrates to the regulatory authority within 30 days that the mining area in question should continue to be exempt.

(c)(1) If the regulatory authority finds that an operator has not demonstrated that activities conducted in the mining area qualify for the exemption, the regulatory authority shall revoke the exemption and immediately notify the operator and intervenors. If a decision is made not to revoke an exemption, the regulatory authority shall immediately notify the operator and intervenors.

(2) Any adversely affected person may request administrative review of a decision whether to revoke an exemption within 30 days of the notification of such decision in accordance with procedures established under 43 CFR 4.1280 when OSM is the regulatory authority or under corresponding State procedures when a State is the regulatory authority.

(3) A petition for administrative review filed under 43 CFR 4.1280 or under corresponding State procedures shall not suspend the effect of a decision whether to revoke an exemption.

(d) Direct enforcement.

(1) An operator mining in accordance with the terms of an approved exemption shall not be cited for violations of the regulatory program which occurred prior to the revocation of the exemption.

(2) An operator who does not conduct activities in accordance with the terms of an approved exemption and knows or should know such activities are not in accordance with the approved exemption shall be subject to direct enforcement action for violations of the regulatory program which occur during the period of such activities.

(3) Upon revocation of an exemption or denial of an exemption application, an operator shall stop conducting surface coal mining operations until a permit is obtained and shall comply with the reclamation standards of the applicable regulatory program with regard to conditions, areas and activities existing at the time of revocation or denial.

SECTION 702.18 - REPORTING REQUIREMENTS.

(a)(1) Following approval by the regulatory authority of an exemption for a mining area, the person receiving the exemption shall, for each mining area, file a written report annually with the regulatory authority containing the information specified in paragraph (b) of this section.

(2) The report shall be filed no later than 30 days after the end of the 12-month period as determined in accordance with the definition of "cumulative measurement period" in Section 702.5 of this part.

(3) The information in the report shall cover:

(i) Annual production of coal and other minerals and annual revenue derived from coal and other minerals during the preceding 12-month period, and

(ii) The cumulative production of coal and other minerals and the cumulative revenue derived from coal and other minerals.

(b) For each period and mining area covered by the report, the report shall specify:

(1) The number of tons of extracted coal sold in bona fide sales and total revenue derived from such sales;

(2) The number of tons of coal extracted and used or transferred by the operator or related entity and the estimated total fair market value of such coal;

(3) The number of tons of coal stockpiled;

(4) The number of tons of other commercially valuable minerals extracted and sold in bona fide sales and total revenue derived from such sales;

(5) The number of tons of other commercially valuable minerals extracted and used or transferred by the operator or related entity and the estimated total fair market value of such minerals; and

(6) The number of tons of other commercially valuable minerals removed and stockpiled by the operator.

PART 750 -- REQUIREMENTS FOR SURFACE COAL MINING AND RECLAMATION OPERATIONS ON INDIAN LANDS

4. The authority citation for part 750 continues to read as follows:

Authority: *30 U.S.C. 1201* et seq., as amended; *5 U.S.C. 301;* and Pub. L. 100-34.

5. Part 750 is amended by adding Section 750.21 as follows:

SECTION 750.21 - COAL EXTRACTION INCIDENTAL TO THE EXTRACTION OF OTHER MINERALS.

Part 702 of this chapter is applicable on Indian lands.

PART 870 -- ABANDONED MINE RECLAMATION FUND -- FEE COLLECTION AND COAL PRODUCTION REPORTING

6. The authority citation for part 870 continues to read as follows:

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

7. Section 870.11(d) is revised to read as follows:

SECTION 870.11 - APPLICABILITY.

* * * * *

(d) The extraction of coal incidental to the extraction of other minerals where coal does not exceed 16 2/3 percent of the total tonnage of coal and other minerals removed for commercial use or sale

(1) In accordance with part 702 of this chapter for Federal program States and on Indian lands or

(2) In any twelve consecutive months in a State with an approved State program until counterpart regulations pursuant to part 702 of this chapter have been incorporated into the State program and in accordance with such counterpart regulations, thereafter; and

* * * * *

SUBCHAPTER T -- PROGRAMS FOR THE CONDUCT OF SURFACE MINING OPERATIONS WITHIN EACH STATE

8. The authority citations for parts 905, 910, 912, 921, 922, 933, 937, 939, 941, 942, and 947 continue to read as follows:

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

9. Parts 905, 910, 912, 921, 922, 933, 937, 939, 941, 942, and 947 are amended by adding the following section (the wording for the section added is the same for each affected part.):

SECTION 702 - EXEMPTION FOR COAL EXTRACTION INCIDENTAL TO THE EXTRACTION OF OTHER MINERALS.

Part 702 of this chapter, Exemption for Coal Extraction Incidental to the Extraction of Other Minerals, shall apply to any person who conducts coal extraction incidental to the extraction of other minerals for purposes of commercial use or sale.

* * * * *

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