FEDERAL REGISTER: 54 FR 9724 (March 7, 1989)

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

30 CFR Parts 701 and 785
Surface Coal Mining and Reclamation Operations; Permanent Regulatory Program;
Requirements for Permits for Special Categories of Mining

ACTION: Final rule.

SUMMARY: The Office of Surface Mining Reclamation and Enforcement (OSMRE) of the United States Department of the Interior (DOI) is establishing separate definitions for the terms "agricultural activities" and "farming" to replace the suspended definition of "agricultural activities or farming." Related changes to existing regulations governing mining on alluvial valley floors (AVFs) will conform these existing regulations with the new definitions for "farming" and "agricultural activities." Also, OSMRE is amending its regulations to specify the essential hydrologic functions of AVFs for which information must be provided in a permit application. These actions are necessary to respond to court decisions arising from legal challenges to rules promulgated in 1983. The effect of these actions will be to remove the mining prohibition from those AVFs used for agricultural activities other than farming and to provide guidance to operators and regulatory authorities as to what type of information must be included in a permit application.

EFFECTIVE DATE: April 6, 1989.

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SUPPLEMENTARY INFORMATION:

I. BACKGROUND

STATUTORY BACKGROUND

In addition to the general environmental protection performance standards applicable to all lands, the Surface Mining Control and Reclamation Act of 1977 (the Act), *30 U.S.C. 1201* et seq., provides specific protection for alluvial valley floors (AVFs). Section 701(1) of the Act, *30 U.S.C. 1291*(1), defines "alluvial valley floors" as "unconsolidated stream laid deposits holding streams where water availability is sufficient for subirrigation of flood irrigation agricultural activities * * *." As discussed in more detail below, the nature of the protection afforded to AVFs is two-fold. The performance standards of section 515 of the Act protect all AVFs by requiring the preservation throughout the mining and reclamation process of the essential hydrologic functions of AVFs. In addition, the permitting requirements of section 510 of the Act prohibit surface coal mining operations for interrupting, discontinuing or precluding farming on certain AVFs. Thus, certain "farmed" AVFs have an absolute safeguard, while other AVFs are protected without precluding mining.

Subject to a number of exceptions, section 510(b)(5) of the Act, *30 U.S.C. 1260*(b)(5), requires a surface coal mining operation permit application to demonstrate affirmatively, and the regulatory authority to find in writing, that a number of requirements unique to AVFs would be satisfied by the proposed operation. Section 510(b)(5)(A) requires that the application demonstrate that the surface coal mining operation would "not interrupt, discontinue, or preclude farming on alluvial valley floors that are irrigated or naturally subirrigated * * *." In addition, section 510(b)(5)(B) requires a demonstration that the operation would not materially damage the quantity or quality of water in surface or underground water systems that supply the AVFs referred to in paragraph (5)(A).

As provided in section 510(b)(5) these requirements do not apply to:

(1) Surface coal mining operations located east of the 100th meridian west longitude;

(2) Undeveloped range lands which are not significant to farming on the AVFs;

(3) Lands for which the regulatory authority finds that the mining operation will only interrupt, discontinue or preclude farming of "such small acreage as to be of negligible impact on the farm's agricultural production[;]" and

(4) Those surface coal mining operations which in the year preceding the enactment of the Act (August 3, 1977) produced coal in commercial quantities, and were located within or adjacent to AVFs or had specific permit approval from the State regulatory authority to conduct surface coal mining operations on AVFs.

Another exemption from the section 510(b)(5) requirements is provided by section 506(d)(2) of the Act, *30 U.S.C. 1256*(d)(2), for new operations proposed in an application for renewal or revision of a permit issued under the Act where the new operations extend to land beyond the boundaries authorized in the original permit. This exemption applies only if (1) the new land previously was identified in the reclamation plan submitted under section 508 of the Act, and (2) the original operations were exempt from the requirements of section 510(b)(5) of the Act under the section 510(b)(5) proviso for operations which produced coal in commercial quantities in the year preceding enactment of the Act.

However, even where mining of AVFs is allowed under section 510(b)(5) of the Act, the hydrologic protection requirements of section 515(b)(10)(F) of the Act, *30 U.S.C. 1265*(b)(10), will apply. Section 515(b)(10)(F) requires surface mining operations to minimize disturbances to the prevailing hydrologic balance at the mine site and in associated off site areas, and to the quality and quantity of water in surface and ground water systems both during and after surface coal mining operations by preserving throughout the mining and reclamation process the essential hydrologic functions of AVFs in the arid and semiarid areas of the country.

REGULATORY HISTORY AND COURT DECISIONS -- SECTION 701.5 - DEFINITION OF "AGRICULTURAL ACTIVITIES OR FARMING"

The definition of AVFs in section 701 of the Act uses the term "agricultural activities," and its definition is thus relevant to determining what is and what is not an AVF subject to the protection of sections 510(b)(5) and 515(b)(10)(F) of the Act. The term "farming" is used in section 510(b)(5) of the Act and is relevant to determining the scope of the additional protection provided by that section. The term "agricultural activities" was first defined in a final rule published on March 13, 1979 *(44 FR 15317).* The rule did not define the term "farming." On June 28, 1983 *(48 FR 29820),* the substance of the definition was revised somewhat, and its scope was expanded to cover either "agricultural activities or farming." Under the revised definition the term "agricultural activities or farming" meant:

[W]ith respect to alluvial valley floors, the use of any tract of land for the production of animal or vegetable life, based on regional agricultural practices, where the use is enhanced or facilitated by subirrigation or flood irrigation. These uses include, but are not limited to, pasturing or grazing of livestock, and the cropping, cultivation, or harvesting of plants whose production is aided by the availability of water from subirrigation or flood irrigation. Those uses do not include agricultural activities which have no relationship to the availability of water from subirrigation or flood irrigation practices.

The preamble to the June 28, 1983 rule *(48 FR 29803)* stated that although the Act and OSMRE's regulations use both the terms "agricultural activities" and "farming," their meaning with respect to AVFs is the same.

Coal industry plaintiffs in In Re: Permanent Surface Mining Regulation Litigation (II), No. 79-1144 (D.D.C. October 1, 1984), hereafter In Re: Permanent II, challenged the combined definition of "agricultural activities or farming" arguing that the term "agricultural activities" is more general than the term "farming," and thus encompasses more land uses.

Reasoning that the use of two different terms in the Act indicated a congressional intent to prescribe a different meaning to each, the district court in In Re: Permanent II remanded the definition of "agricultural activities or farming." Slip op. at 30-31. The court held that the Secretary must reconsider the definition and any additional regulations necessary to conform them to Congressional intent. On February 21, 1985, OSMRE suspended the definition *(50 FR*

7274). OSMRE since has reconsidered the definition and has proposed separate definitions for "agricultural activities" and "farming." OSMRE has also proposed other rule changes needed for conformity with the proposed definitions.

At the same time, the coal industry plaintiffs argued that the reach of the protection provided by Section 515(b)(10) should be the same as that of Section 510(b)(5). They were unsuccessful both with the district court and, upon appeal, with the United States Court of Appeals for the District of Columbia Circuit. See *NWF v. Hodel, 839 F.2d 694,* (D.C. Cir. 1988), hereafter NWF v. Hodel. The appeals court held that it is appropriate for the Secretary to consider that Section 515(b)(10)(F) reaches to AVFs not protected by Section 510(b)(5). (*Id. at 746.)*

SECTION 785.19(d)(2)(i) - INFORMATION ON THE ESSENTIAL HYDROLOGIC FUNCTIONS OF ALLUVIAL VALLEY FLOORS.

The March 13, 1979, permanent program rules at 30 CFR 785.19(d)(3) *(44 FR 15375)* described specific information, surveys and analyses that a surface coal mining and reclamation permit application was required to include concerning the geologic, hydrologic and biologic characteristics that support the essential hydrologic functions of AVFs. These rules were revised by OSMRE on June 28, 1983 *(48 FR 29821)* as part of a major revision of the AVF rules. The revised regulation at 30 CFR 785.19(d)(2)(i) required that the permit application include detailed surveys and baseline data required by the regulatory authority for a determination of the characteristics of AVFs which are necessary to preserve their essential hydrologic functions throughout the mining and reclamation process. However, the details formerly contained in Section 785.19(d)(3) of precisely what such surveys and baseline data should consist of had been deleted.

The citizen and environmental plaintiffs in In Re: Permanent II challenged the deletion of the specific requirements from the rule on the grounds that the preamble to the rule contained inadequate justification for the revision. The court remanded 30 CFR 785.19(d)(2)(i) for OSMRE to provide guidance to operators and regulatory authorities as to what type of information was required or explain why such guidance is no longer needed. Slip op. at 39-40. The appeals court affirmed the district court remand, concluding the Secretary did not adequately explain why such guidance was deleted (NWF v. Hodel, at 729-31). Accordingly, OSMRE is amending Section 785.19.

The proposed rule, incorporating changes to the definitions and to the information requirements to the essential hydrologic functions of AVFs, was published in the Federal Register on August 3, 1988 *(53 FR 29310).* Public hearings were scheduled for August 31, 1988 in Washington, DC and Denver, CO. Since no one requested to testify at these hearings, none were held. The comment period closed on September 19, 1988. OSMRE received comments from 15 sources: the State regulatory authorities of Utah and Wyoming, the Bureau of Land Management, five public interest groups, four individuals representing consulting firms, two individual landowners and a mining industry association. One commenter requested an additional 30 days for comment. OSMRE did not accede to the request; however, OSMRE did give full consideration to all comments received regardless of whether the comments were timely or late.

The rules adopted today replace the definition suspended in 1985 and respond to the court decisions described above. The minor changes from the proposed rule are identified in the following detailed discussion of the final rule. Based on an analysis of the issues involved, the legislative history of the Act, applicable court decisions, and the administrative record of this rulemaking, including comments received, this final rule is a proper and reasonable interpretation of the provisions of sections 701(1), 510(b)(5) and 510(b)(10) of the Act.

II. DISCUSSION OF FINAL RULE AND RESPONSE TO COMMENTS

GENERAL. The final rule removes the definition of the term "agricultural activities or farming" from 30 CFR 701.5 and replaces it with separate definitions of the terms "agricultural activities" and "farming." To conform related AVF rules with these proposed definitions OSMRE also has revised the definition of "materially damage the quantity or quality of water" and has revised 30 CFR 785.19(b)(2)(ii) and (b)(3). OSMRE also has revised 30 CFR 785.19(d)(2)(i) in response to the court order to provide guidance to operators and regulatory authorities as to what type of information about potentially affected AVFs must be placed in a permit application.

Each of these changes and the public comments received concerning them are discussed in detail below.

A. SECTION 701.5 - DEFINITIONS OF "AGRICULTURAL ACTIVITIES" AND "FARMING"

The final rule at 30 CFR 701.5 removes the suspended definition of the term "agricultural activities or farming" and replaces it with separate definitions of the terms "agricultural activities" and "farming." OSMRE has made this change following reexamination of both the language and legislative history of the Act in response to the remand order issued by the district court.

1. COURT DECISION

The district court in In Re: Permanent II stated: "Congress used the term 'agricultural activities' in its definition of AVFs, *30 U.S.C. 1291*(1), and 'farming' in describing permit requirements. Id. at section 1260(5)(A). This court will not presume to define these terms, but the use of different words does connote an intent to prescribe a different meaning." (In Re: Permanent II, Slip op. at 31.) Thus, separate definitions of these two terms are required by the court's decision if they are needed to conform the OSMRE regulations with Congressional intent.

2. LEGISLATIVE HISTORY

To determine Congressional intent OSMRE reexamined the legislative history of the Act as it relates to AVFs. Based on the statutory language and on the legislative history of section 510(b)(5) of the Act, OSMRE has concluded that separate definitions are appropriate.

Congress used the term "agricultural activities" in section 701(1) of the Act in defining "alluvial valley floors." The term "farming" was used in section 510(b)(5)(A) of the Act in the AVF permit finding provision, which provides a higher standard of protection to a more limited number of AVFs than provided in the performance standards of section 515(b)(10) of the Act. In an attempt to strike a balance between the need to preserve the productive use of AVFs and the need to recover coal beneath them, Congress intended sections 510(b)(5) of the Act to protect only those AVFs which support farming, but not those which support other agricultural activities and are protected by section 515(b)(10)(F) of the Act.

Early versions of section 510(b)(5)(A) of the Act would have applied to ranching as well as farming on AVFs. Both the House and Senate bills at one time prohibited the regulatory authority from approving a permit unless it found that the proposed surface coal mining operation, if located west of the 100th meridian west longitude, would "not have a substantial adverse effect on valley floors * * * where farming can be practiced * * * (excluding undeveloped range lands), where such valley floors are significant to * * * farming and ranching operations * * *." H.R. Rep No. 45, 94th Cong., 1st Sess. 22 (1975) (Reporting accompanying H.R. 25); S. Rep. No. 128, 95th Cong., 1st Sess. 20 (1977) (Report accompanying S. 7) (Emphasis added.) Additionally, both bills extended this prohibition to potential as well as present farming and ranching.

The language extending the coverage to "ranching operations" was deleted by the House in 1976 and by the Senate in 1977. After H.R. 25 was reported out in 1975, a controversy arose concerning the scope of section 510(b)(5). In the next session the House adopted language very similar to the provision that was finally enacted on August 3, 1977. It provided that the regulatory authority could not approve the permit unless it found that the operation would not "interrupt, discontinue, or prevent farming on alluvial valley floors, * * * but, excluding undeveloped range lands * * * and those lands as to which the regulatory authority finds that if the farming that will be interrupted * * * is of such small acreage as to be of negligible impact on the farm's agricultural production * * *." Section 510(b)(5) of the 1976 House bill also contained a provision grandfathering certain operations which existed prior to the enactment of the Act. See H.R. Rep. No. 896, 94th Cong., 2nd Sess. 2 (1976) (Report accompanying H.R. 9725).

Although the deletion of the term "ranching" was not specifically discussed, the debates on the floor indicated that the Congress amended the AVF permit finding provision largely in response to the Administration's concern that the provision in the 1975 House bill could be read to "close some existing mines and * * * lock up significant coal reserves." 121 Cong. Rec. 12958, 62-64 (May 5, 1975); H.R. Rep. No. 896, 94th Cong., 2nd Sess. 3 (1976). The effect of the amendment was to increase the recoverability of coal underlying AVFs by deleting the limitations on mining both for present and potential ranching provided by section 510(b)(5) of the Act, and by adding the grandfather provisions and the small acreage exception.

The Senate did not delete the ranching protection from the AVF permit finding provision of its bill until May of 1977 when it passed a compromise amendment introduced by Senator Melcher. Senator Johnston first introduced an amendment which required a finding that the operation would not interrupt, discontinue or prevent farming on AVFs unless, among other matters, "the total value of the coal mined * * * would exceed, by a ratio of 100 to 1, the total value of the farming or ranching products that would be produced from said acreage * * *." (123 Cong. Rec. S 8030, May 19, 1977) (Emphasis added.) Senator Hart then offered an amendment which would have banned all mining on AVFs irrespective of the agricultural use of the land, with a limited grandfather provision. (123 Cong. Rec. 15691, May 20, 1977) These two amendments were defeated.

A third amendment, introduced by Senator Melcher and ultimately adopted by the Senate, contained the identical language of the 1976 House bill, including the deletion of the protection for ranching, and the addition of the grandfather provision and the small acreage exemption. The Senator emphasized that this language was designed to protect lands where there was farming that depended on irrigation. He further stated that in 1976 this language had been carefully reviewed and represented a compromise among environmental and labor groups, coal companies, individual landowners and government agencies. (123 Cong. Rec. 15751, May 20, 1977) The Senator characterized his amendment as a "middle ground [between the Hart and the Johnston amendments] * * * because it does retain the restrictions on keeping the alluvial valley floor farming operations intact. But it allows enough discretion through the regulatory authority to allow [mining] in those instances where the mining operation would not violently disturb a farming operation on a valley floor * * *." (123 Cong. Rec. 15752) (Emphasis added.)

The legislative history of section 510(b)(5), therefore, indicated that the Congress twice rejected language which would have broadened the scope of the AVF permit finding provision to encompass ranching as well as farming activities. OSMRE's 1983 combined definition of "agricultural activities or farming" therefore was inconsistent with Congressional intent. Accordingly, OSMRE has defined "farming" as a subset of "agricultural activities" distinct from ranching.

3. DEFINITIONS

As described above, it appears from the debates leading to adoption of the Melcher amendment that the Congress intended to protect only those AVFs being farmed and not those being ranched. Therefore, in promulgating separate definitions of "agricultural activities" and "farming" consistent with the legislative history it was necessary to distinguish farming from ranching. The most practical way to make the distinction is to consider "pasturing or grazing of livestock" in the arid and semi-arid areas west of the 100th meridian as ranching, and to limit farming to activities which involve raising plants. That concept is embodied in the final definitions described below.

"Agricultural activities". The definition promulgated for "agricultural activities" is similar to the remanded definition of "agricultural activities or farming." However, the specific terms "cultivation," "cropping," and "harvesting" found in the definition of "agricultural activities or farming" are replaced in this final rule definition by the generic term "farming." Therefore, the definition of "agricultural activities" reads as follows:

Agricultural activities means, with respect to alluvial valley floors, the use of any tract of land for the production of animal or vegetable life, based on regional agricultural practices, where the use is enhanced or facilitated by subirrigation or flood irrigation. These uses include, but are not limited to, farming and the pasturing or grazing of livestock. These uses do not include agricultural activities which have no relationship to the availability of water from subirrigation or flood irrigation practices.

"Farming." For consistency with the definition of "agricultural activities" described above, OSMRE has defined "farming" in terms of the "cultivation," "cropping" or "harvesting" of plants as follows:

Farming means, with respect to alluvial valley floors, the primary use of those areas for the cultivation, cropping or harvesting of plants which benefit from irrigation, or natural subirrigation, that results from the increased moisture content in the alluvium of the valley floors. For purposes of this definition harvesting does not include the grazing of livestock.

The final definition of "farming" differs from the proposal by substituting the word "or" for the word "and" in the proposed phrase "cultivation, cropping and harvesting." OSMRE made this change in response to comments that

indicated requiring all three activities to be performed to establish that an AVF is farmed is too restrictive One commenter pointed out that farming operations employing "no-till" practices, where little if any cultivation occurs, could be excluded by the definition. Other commenters argued that the definition would exclude native hay meadows that are mechanically harvested for use as winter feed, but may not be cultivated. Thus, under the final rule, all three activities need not occur for farming to exist. For the purposes of the final rule, OSMRE intends that cultivation means the preparation of the land for planting, cropping means planting and tending, and harvesting means the gathering in of the crop. OSMRE also intends, for purposes of the final rule, that "pasturing or grazing of livestock" is not a method of harvesting. The production of forage is only considered a farming activity when the forage crop is cultivated, cropped or mechanically harvested (i.e., cut and either stacked or baled).

Farming as the "primary use" of an AVF. The phrase "primary use" in the definition of "farming" is intended to cover those AVFs which are farmed in most years but not in others due to an unsatisfactory yield, excess production, or some other factor. The use of an AVF for the "pasturing or grazing of livestock" in some years does not preclude the AVF from being classified as farmed and thereby subject to the mining prohibition under sections 510(b)(5) of the Act. However, the "cultivation, cropping or harvesting" of plants constitute "farming" only where such activities are actually the primary use of an AVF. The suspended definition placed all "cultivation, cropping or harvesting" within the scope of "agricultural activities or farming." This final rule differs since occasional farming activities on AVFs not primarily used for "cultivation, cropping or harvesting," and not capable of producing crops on a regular basis, are not considered farming. As discussed below in connection with the legislative history of the word "preclude" in section 510(b)(5)(A) of the Act, a change in primary use, from farming to some other use, will not eliminate the protection provided by section 510(b)(5).

Plants not benefitting from irrigation or subirrigation. "Farming," under the definition promulgated herein, is limited to those "plants * * * which benefit from irrigation, or natural subirrigation, that results from the increased moisture content in the alluvium of the valley floors." Therefore, although an AVF is used for the cultivation, cropping or harvesting of plants, it would not qualify as "farmed" if the plants being cultivated, cropped or harvested do not benefit from the irrigation or subirrigation described above.

4. EFFECT OF FINAL RULE.

The chief consequence of defining "farming" separately from "agricultural activities" is that whenever 30 CFR 785.19 or 822.12 refer to "farming," they no longer will apply to all "agricultural activities," but only to those activities which involve the "cultivation, cropping or harvesting" of plants. The "farmed" AVF areas being affected so as to invoke the Section 822.12(a) prohibition can include areas which were not being mined but would have their "farming" interrupted, discontinued, or precluded by a mining operation located on a nearby portion of the same AVF or outside the AVF. The net effect of these final rule definitions would be to remove the prohibitions of section 510(b)(5) of the Act from those AVFs used for agricultural activities other than "farming." However, it should be emphasized that while the scope of the mining prohibition of section 510(b)(5) of the Act may be somewhat reduced under this final rule, that provision of the Act and implementing regulations were never intended to cover undeveloped rangelands not significant to farming, which characterize much of the grazing land on AVFs west of the 100th meridian. Moreover, the performance standards of 30 CFR Part 822, which implement section 515(b)(10)(F) of the Act, still apply to all AVFs allowed to be surface minded.

One commenter was confused about the effect of the rule and indicated support for "the proposal to make farming a prerequisite to AVF designation."

The process and criteria for AVF determination in 30 CFR 785.19(a) are not the subject of nor are they affected by this final rule. The presence of geologic and hydrologic characteristics determines whether an area is to be considered an AVF. All AVFs are protected by the performance standard established by section 515(b)(10)(F) of the Act. Whether "farming" may be interrupted, discontinued or precluded on a particular AVF is only a concern when applying the mining prohibition pursuant to section 510(b)(5) of the Act.

Two commenters were concerned about the affect the rule would have on a specific area. One stated "OSMRE's proposed rule would substantially limit or eliminate protection for AVFs in the Alton coalfield in Utah, currently the subject of a permitting dispute over a mine proposed by Utah International." The second stated the proposal "would serve to alleviate almost all the problems that BHP-Utah Intl., Inc. is having in convincing the Utah [regulatory authority] to deem complete its application for a permit to strip mine coal at Alton, Utah."

OSMRE agrees that the final rule does narrow the scope of the mining prohibition established by section 510(b)(5) of the Act; however the rule does not eliminate the protection afforded AVFs pursuant to section 515(b)(10)(F) of the Act. The Alton mine permit application and any subsequent mining activity must comply with the approved Utah regulatory program. Under primacy, the effect on the Alton application of any changes that may be made in the Utah program pursuant to these changes in OSMRE's permanent regulatory program would be evaluated by Utah, not by OSMRE. Under section 505 of the Act, any State program may be more stringent than the Secretary's regulations.

The proposed rule interpreted the pasturing and grazing of livestock as a non-farming (ranching) agricultural activity and would have limited "farming" to those situations where cultivation, cropping and harvesting practices are employed. Comments were solicited on whether any other meaningful or practical distinctions, consistent with the court order and the legislative history, could be made between "agricultural activities" and "farming."

Of the 15 commenters, 12 opposed OSMRE's exclusion of grazing activities from the definition of "farming" and three favored it. Many of the opposing comments focused on different interpretations of the legislative history of the Act. Several commenters argued that the focus of Congressional debate was water and its importance to Western agriculture, not agricultural production techniques. In relation to AVFs, they felt it is the non-AVF dependent and other non-water dependent agricultural activities that are not protected from mining even if they occur on an AVF. For example, a poultry operation on an AVF would not preclude mining since its production is not enhanced by irrigation. AVFs are important due to their greater productivity, which is a function of soils, topography and water, not a function of planted versus native crops or mechanical versus natural harvesting (grazing). Other commenters asserted that since the bulk of Western agriculture is beef production, not row crops, it does not make since for Congress to try to protect agricultural production without including livestock production. Many commenters attacked OSMRE's interpretation of the discussion of Senator Melcher's amendment and argued that he was concerned about irrigation and subirrigation in protected areas versus dry creeks, not farming versus ranching. In the commenters' view, Melcher opposed a total ban on mining on AVFs because it would protect dry creeks, not because it would protect irrigated or subirrigated grazed AVFs. Thus, the commenters held the opinion that the real issue behind the Melcher amendment was developed versus undeveloped AVF lands.

OSMRE believes that this final rule is a proper and reasonable interpretation of the intent of Congress, consistent with the language of the Act and the legislative history. Congress wanted to balance the needs of two competing interests, agriculture and coal mining. Congress achieved that balance by allowing mining to take place, albeit with strict performance standards, in most areas of the West. In areas important to the agricultural economy, AVFs, two levels of protection were provided: first, the preservation during and after mining of the essential hydrologic functions of all AVFs where water sufficient for irrigation or subirrigation is available, and second, a prohibition of mining that would interrupt, discontinue or preclude farming on AVFs. Congress did not forsake livestock production. On the contrary, Congress attempted to ensure the continued viability of Western livestock producers by preserving the areas that are crucial to any Western livestock operation, the areas where storable winter forage is produced. Livestock operations require hay and grain crops to sustain the animals during times when grazing and pasturing are ineffective, e.g. in winter or periods of drought. Congress protected the areas where crops can be produced that are essential to the overall viability of such operations. The "farmed" AVFs, as OSMRE has defined them, are the essential winter feed production areas that, together with the surrounding grazing land, make a livestock operation capable of sustaining itself.

Congress was aware of the differences between ranching and farming. Where it intended a provision to apply to both farming and ranching, it used both terms. Where it intended a provision to apply only to farming, it used the term "farming" alone. Thus, in section 714 of the Act, surface owner consent is needed from persons conducting farming or ranching operations. In section 510(b), however, only farming is covered. Therefore, the express protection provided for ranching is limited to where that term is used, section 714, and requires surface owner consent, but unlike section 510(b) does not prohibit mining.

One commenter, responding to OSMRE's request for comments on meaningful and practical distinctions between "agricultural activities" and "farming," indicated that "agricultural activities" and "farming" have distinct purposes in the Act. The commenter asserted that they do not depend on one term being a subset of the other. In the commenter's view, "agricultural activities" restricts AVFs to those with a certain amount of water. "Farming" limits the full protection of the Act to AVFs where agricultural production takes place, i.e., where AVF rangeland is developed or significant to agricultural production and where the agricultural production dependent on the AVF is significant to the farm's

production. The commenter concluded that the difference is that one term addresses water availability, while the other is concerned with agricultural production.

OSMRE agrees in part. The terms are used for different purposes in the Act. However, the definition of "farming" adopted today is consistent with the statutory language, the legislative history and common usage.

In reference to the use of the term "undeveloped range lands" in section 510(b)(5)(A) of the Act, one commenter argued that if Congress had defined farming as OSMRE proposed, the phrase "undeveloped rangelands which are not significant to farming" would be unnecessary.

OSMRE disagrees. While Congress specifically excluded undeveloped range lands, they are not necessarily the only lands excluded from the protection of section 510(b)(5) of the Act. Moreover, OSMRE's definition of farming, which does not include ranching, is consistent with the usage employed by Congress in another part of the Act. In section 714(e)(2), Congress defined the term "surface owner," in part, as a person or persons who conduct farming or ranching operations upon a farm or ranch unit. Clearly, Congress considered farming and ranching to be separate activities.

As discussed in more detail below, the House discussion of April 29, 1977, makes clear that the House felt that a broader amendment was needed to extend the protection of section 510(b)(5) to areas grazed by cattle and sheep. Without further amendment, H.R. 2 would only prohibit mining those areas currently being "cultivated" and not those with potential for cultivation. While such an amendment was passed by the House on that day, it did not become law. Instead, the language of H.R. 2 being criticized that day as providing inadequate protection is what was ultimately passed into law.

Further evidence exists to refute the commenter's assertion that the undeveloped rangeland exception in section 510(b)(5) of the Act is inconsistent with OSMRE's proposed definition of "farming." In a February 1977 prepared statement submitted in a House subcommittee hearing, then-Congressman Baucus of Montana suggested that the undeveloped rangeland exception in section 510(b)(5) of H.R. 2 be eliminated. In his view, the use of land as undeveloped rangeland did not qualify as agriculture. His statement was as follows:

"It seems to me that the current use of land, such as 'undeveloped rangeland,' is not nearly so important as the potential use of the land -- we should not render unproductive land which offers potential for agriculture."

(Hearings Before the Subcommittee on Energy and the Environment of the Committee on Interior and Insular Affairs on H.R. 2, Serial No. 95-1, Part III, 95th Cong., 1st Sess., 161 (February 24, 1977)). Thus the commenter is wrong to suggest that inclusion of the exception for undeveloped rangeland requires OSMRE to conclude that farming must include a land use that at least one member of the House did not even consider to be agriculture. Nothing in the definition of "farming" is inconsistent with the language of section 510(b)(5) of the Act. Likewise, the language of the Act does not preclude a definition such as the one adopted today, which is consistent with the legislative history.

One commenter, who felt that Congress wanted to protect developed AVFs as distinct from undeveloped range lands rather than farming as distinct from ranching, suggested that undeveloped range lands be defined as grazing land which is not irrigated or naturally subirrigated and has not been developed to enhance or facilitate agricultural production.

The definition of "undeveloped range lands" in 30 CFR 701.5 was not a part of proposed rulemaking. Currently, "undeveloped range lands" are defined, for the purposes of AVFs, as lands where the use is not specifically controlled and managed. OSMRE does not agree with the commenter's interpretation of the legislative history. The suggested change would define "undeveloped range lands" in an inappropriately narrow manner in relation to irrigation or subirrigation and would inject ambiguity into the definition due to the lack of any clear meaning for the word "developed."

One commenter highlighted the following excerpts from a discussion between Representatives Udall and Johnson (of Colorado) concerning an amendment to H.R. 2 offered by Representative Baucus as evidence that Congress wanted to prohibit mining on grazing areas in AVFs (123 Cong. Rec. 12866, April 29, 1977):

"Mr. Udall: We do not protect the whole valley; we protect the valley floor. In most cases, this comprises a hundred yards. This is the subterranean stream, or this is where the alfalfa and forage crops are raised.

"Mr. Johnson: [T]here will not be any farming operations which are interrupted except for that one narrow exception that I pointed out earlier. This would essentially stop mining in areas that are presently being grazed by cattle and sheep . . . is that not correct?

"Mr. Udall: [I]f it is in the valley floor itself, then there would be a ban in the valley floor."

The commenter indicated that the second sentence of Mr. Johnson's remarks referred to H.R. 2, which was the House version of the bill that was sent to the conference committee that produced the final legislation. At that time, H.R. 2 contained an AVF provision similar to section 510(b)(5) of the Act.

Careful scrutiny of the entire context of the quoted remarks, however, reveals that Mr. Johnson was actually referring to the Baucus amendment as the instrument by which mining would be prohibited in grazing lands. Earlier in the same discussion, Mr. Johnson had stated, "Why do we want to prevent mining in areas where there is only grazing for cattle or sheep? That makes no sense to me whatever. I think the extension of the [Baucus] amendment goes too far and is not warranted." (123 Cong. Rec. 12865.) In support of this view is the fact that immediately following the Udall-Johnson discussion, Representative Jeffords of Vermont in voicing his support for the Baucus amendment stated that "I am aware that much of the land in question is used for cattle grazing, and is not presently under cultivation. But the underground water systems which would be endangered by strip mining present a long-term potential for crop cultivation." (Emphasis added.) (123 Cong. Rec. 12867) It is clear that the Baucus amendment was intended to extend the mining prohibition beyond lands under cultivation to grazing lands, lands that were not so protected under H.R. 2. While this amendment passed the House following the above cited discussion, it did not become a part of the Act. Since the conferees subsequently rejected the Baucus amendment and adopted language similar to the earlier House language, the Act does not extend the mining prohibition to grazing lands.

One commenter argued that OSMRE's statement in the proposal that deletion of the term "ranching" was not discussed in the legislative history lends support to the theory that it was an inconsequential change, not an attempt to exclude a major agricultural activity from protection. The commenter asserted that such an exclusion would not be done without explanation. In the commenter's opinion, the deletion of "ranching" from "farming and ranching operations" was not to distinguish them, but to avoid redundancy. Similarly, a commenter said that brevity was the purpose of removing the reference to ranching because the term "farming" is used three times in section 510(b)(5)(A) of the Act.

In cases where a change was made to statutory language without an explanation, OSMRE is guided by the principle expounded by the Supreme Court and referenced in NWF v. Hodel, at 764, in circumstances relating to the authority to grant variance from approximate original contour requirements. That is, that the plain language of the statute should be relied upon unless the legislative history contains a clearly expressed contrary intention. In this case, the words "and ranching" were deleted while, as noted above, other portions of the legislative history indicate that section 510(b)(5) as it became law was not intended to extend to grazing areas. The commenter's assertion that reference to ranching was deleted solely for brevity is belied by Congress' use of both farming and ranching three times in section 714(e)(2) of the Act. Thus, when Congress wished to include ranching, it did so expressly. Therefore, OSMRE may conclude properly that ranching was deleted to reduce the scope of the protection rather than to eliminate redundancy or to be brief.

One commenter who opposed OSMRE's proposal suggested that any distinction between farming and ranching as the terms are used in the West is cultural. For example, a large operation involving wheat production can be referred to as a wheat ranch. The commenter argued that lacking a statutory definition of ranching, it is logical to consult a dictionary, e.g. Webster's, which defines a ranch as a Western term meaning a large farm for the raising of cattle, horses or sheep or any large farm devoted to the raising of a particular crop or livestock.

While Webster's may define ranching as a Western U.S. subset of its global definition of farming, the two terms do have distinctly different meanings to farmers and ranchers of the arid and semiarid West. Farming is generally thought of as crop production associated with supplemental irrigation. Grain production without supplemental irrigation is as apt to be called dry farming as wheat ranching, depending on locality. The definition of "farming" adopted today is consistent with these practices and protects the irrigated areas used for stored forage production associated with cattle ranches.

Other commenters opposed the proposed definition of "farming" for reasons unrelated to the legislative history of the Act. Many commenters opposed the proposed change to the definition of "farming" because they believed it would

remove from protection much of the AVF acreage in the West, was a rollback of protection for AVFs, ignored regional agricultural practices, would not protect grazed AVFs that are significant to farming, and would result in an illogical granting and denying of permits. In contrast, another commenter indicated that "using the [proposed] definitions, * * * there would be almost no changes in the AVF determinations already made in Wyoming. [T]he impact of the proposed definitions would be relatively minimal in our State."

OSMRE does not agree with the opposing commenters. Pursuant to section 515(b)(10)(F) of the Act, surface coal mining operations are required to preserve the essential hydrologic functions of all Western AVFs as defined in the Act. This rule in no way affects or diminishes that protection. This rule does affect the scope of the prohibition on mining "farmed" AVFs pursuant to section 510(b)(5) of the Act to the extent that it will be incorporated into State programs. As noted, in the case of Wyoming, it may have relatively little impact. Although opposed by some commenters, the final definition of "farming" adopted today is consistent with the intent of Congress and the statutory language, as discussed above.

One commenter argued that the definition would have ludicrous consequences in practice: If hay planted on an AVF is baled and fed to cattle in the field, the AVF would be protected, yet if the same cattle ate the same hay in the same field before it was baled, the AVF would not be protected.

While the commenter is partially correct in his representation of the effect of this rule, he misstates the issue. Contrary to the commenter's assertion, all AVFs are protected by the performance standards of 30 CFR Part 822. The issue is not whether protection exists, but rather is for what AVFs the prohibition on mining will apply. Because of the more limited areas available for producing storable forage necessary for a successful livestock operation, the higher level of protection of such areas afforded by a mining prohibition is far more critical to the overall production of a given agricultural unit than affording such protection to areas merely being grazed in season.

In the opinion of several commenters, applying the special protection to AVFs based on past or current agricultural practices does not address the statutory requirement in section 510(b)(5)(A) of the Act that mining not preclude (future) farming. Another commenter wanted to add to the definition of "farming" a statement to the effect that to be considered "farmed" an area would have to have been "historically used for cropland." In the commenter's opinion, this would eliminate the need for the "primary use" concept in the definition, a concept that "could be subject to different interpretations."

OSMRE does not agree with these commenters. Under the Act, the special protection of section 510(b)(5) is only applied to AVFs significant to farming. That provision requires that the primary use of the land, either currently or in the past, be farming. Inclusion of the word "preclude" supports this interpretation and was discussed in the final House-Senate conference report on H.R. 2. The conferees stated, "[t]he phrase 'not interrupt, discontinue or prevent farming' was modified to 'not interrupt, discontinue or preclude farming' in order to assure coverage of those lands which may be taken out of agricultural production in order to qualify for a new mine start on an alluvial valley floor. The conferees did not want this type of change in land-use to qualify an alluvial floor for mining." H.R. 95-493, 95th Cong., 1st Sess. 104 (July 12, 1977). This statement indicates that there had to have been pre-existing farm use. The Jeffords discussion cited earlier lends additional support to this position. The phrase "primary use" in the definition of "farming" is intended to cover those AVFs which are farmed in most years, but not in others due to an unsatisfactory yield, excess production or some other factor. The concepts of "primary use" and "historical use" mesh in that the regulatory authority should examine the facts and determine whether the primary use of the land in the past had been farming.

The response to the commenter's concern that a regulatory authority determination of primary use may be subject to varying interpretations is that the potential for varying interpretations exists in any discretionary determination by the regulatory authority. The safeguard is that the permitting process requires public participation to assist the regulatory authority in making the decision and, under section 514 of the Act, any adversely affected person may petition for administrative review.

One commenter, a landowner, argued that in his case some meadows are hayed in high rainfall years (rare) and grazed in years of low rainfall (frequent). He asserted that the proposal makes application of the special protection dependent on a factor beyond the control of the farm or ranch operator.

OSMRE intends that the determination of which AVFs are covered by the mining prohibition will be made by the regulatory authority on a case-by-case basis based, in part, on whether the primary use of the area is farming.

The same landowner also argued that to obtain the special protection, a crop would have to be harvested instead of grazed. Such a forced change could affect the profitability of agricultural operations.

This rule does not require landowners to engage in any practice, profitable or not. The final rule was changed from the proposal so that the prohibition will apply if the land is cropped or cultivated, regardless of whether harvesting occurs. If the landowner chooses not to engage in cropping, cultivation or harvesting, the protection of section 515(b)(10) of the Act will still apply.

One commenter argued that AVFs should be defined by geological and hydrological parameters, not according to the changing practices of man.

OSMRE agrees in part. Under the Act and the permanent program regulations, AVF identification and protection is related to geological and hydrological parameters, including the availability of water. Such availability may be enhanced by irrigation. However, the applicability of the prohibition on mining is applied consistent with the intent of Congress that AVFs significant to farming not be mined.

Two landowners were concerned about the impact of mining on downstream unmined AVFs. One asserted that if a grazed AVF is mined, downstream farmed AVFs would be damaged.

OSMRE shares the landowners' concern about potential damage to "farmed" AVFs as a result of mining operations on non-"farmed" AVFs and other areas. In such circumstances the mining prohibition would apply. The protection provided by the performance standard at 30 CFR 822.12(a), which prohibits mining operations from interrupting, discontinuing or precluding farming on AVFs or causing material damage to the quality or quantity of water in surface or underground water systems that supply AVFs, is not limited by distance from or spatial relationship to the mining operation. Downstream effects of mining operations will be considered by the regulatory authority in the permitting process.

In addition to the comments on the definition of "farming" discussed above, OSMRE received a large number of comments suggesting specific language to be used in the definitions of both "agricultural activities" and "farming." Many of these suggestions would have had the effect of including grazing in the definition of "farming." Such a definition of the word "farming" would not be consistent with the statutory language and the intent of Congress, for the reasons discussed above, and the comments were not accepted.

One commenter suggested deleting the phrase "where the use is enhanced or facilitated by subirrigation or flood irrigation" and the entire last sentence from the proposed definition of "agricultural activities." The same commenter wanted to delete the phrase "which benefit from irrigation, or natural subirrigation, that results from the increased moisture content in the alluvium of the valley floors" from the proposed definition of "farming." The commenter felt that these changes were desirable because the relationship between agricultural activities and irrigation is covered in the Act.

OSMRE did not accept these comments. Because the relationship between agricultural activities and irrigation or natural subirrigation is specified in the Act, it is important and appropriate to carry the relationship over into the regulatory definitions for clarity and consistency.

One commenter opined that there was no support in the record for harvesting being limited to mechanical harvesting, nor for mechanical harvesting meaning not just "swathing," but also either stacking or baling.

As discussed above, OSMRE believes that the legislative history supports excluding grazing from the definition of "farming." Therefore, direct harvesting by animals, that is, pasturing and grazing, is not considered harvesting under the rule. Since Congress intended to prohibit mining in areas where storable winter forage is produced, harvesting must consist of cutting ("swathing") and preparing the crop for storage by stacking or baling, or for grain production, placing the grain in storage.

B. SECTION 701.5 - DEFINITION OF "MATERIALLY DAMAGE THE QUANTITY OR QUALITY OF WATER."

As required by the district court in In Re: Permanent II, slip op. at 31, and for conformity with the amended definitions of "agricultural activities" and "farming," OSMRE has also amended the definition of "Materially damage the quantity or quality of water" by substituting the term "farming" for the term "agricultural activities." The revised definition reads as follows:

Materially damage the quantity or quality of water means, with respect to alluvial valley floors, to degrade or reduce by surface coal mining and reclamation operations the water quantity or quality supplied to the alluvial valley floor to the extent that resulting changes would significantly decrease the capability of the alluvial valley floor to support farming.

The final definition is unchanged from the proposed rule. Based on OSMRE's previously discussed review of the statutory language and legislative history of the Act to include only farming and not ranching, and the decision of the district court in In Re: Permanent II, the material damage finding required by section 510(b)(5)(B) of the Act applies only to AVFs which support "farming." Therefore, the definition of material damage should be, and is, limited to decreases in the capability of those AVFs to support "farming" instead of all "agricultural activities." The result of this change is to eliminate the mining prohibition, but not the protection under section 515(b)(10)(F) of the Act, for AVFs primarily used for non-farming agricultural activities such as grazing which were covered under the previous rule.

One commenter suggested that the definition of material damage should relate to the premining condition of the land, which can be documented and compared, and recommended defining material damage in terms of adverse impacts on pre-existing vegetation or changes limiting the adequacy of water for irrigation.

OSMRE did not accept this comment because it is not tied to the protection provided by section 510(b)(5) of the Act. The material damage finding required by section 510(b)(5)(B) of the Act applies only to AVFs which support "farming." The definition of material damage should be, and is, limited to decreases in the capability of those AVFs to support "farming" instead of all "agricultural activities" or pre-existing vegetation. To the extent that mining would limit the adequacy of water for irrigation, the capability of the AVF to support farming would most likely be decreased.

One commenter was concerned that use of the term "alluvial valley floors" in 30 CFR 785.19(e)(2)(ii) and 822.12(a)(2) could give the erroneous impression that all AVFs, not just those significant to farming, are subject to the regulatory requirements of section 510(b)(5) of the Act. The commenter suggested that OSMRE preclude any possible confusion by providing a clear statement in the final rule to the effect that the use of the term "alluvial valley floors" in the cited regulations refers only to "farmed" AVFs.

The protection provided by the definition of "materially damage the quantity or quality of water" is clearly limited to those areas whose primary uses are or have been farming. Therefore, no further clarification in the regulations is necessary.

C. SECTION 785.19(b) - APPLICABILITY OF STATUTORY EXCLUSIONS

Revisions also were needed to conform existing 30 CFR 785.19(b) to the proposed definition of "agricultural activities" and "farming." Section 785.19(b)(2) is unchanged from the proposed rule and provides for mining on AVFs under two of the section 510(b)(5) statutory exclusions described above. The first exclusion applies to undeveloped rangelands which are not significant to farming; the second exclusion applies to mining when the regulatory authority finds that mining activities would affect farming of "such small acreage as to be of negligible impact on the farm's agricultural production." Final Section 785.19(b)(2)(ii) requires the regulatory authority to base its determination of whether an impact was "negligible" on the relationship between the loss of production from the affected farmland areas to the farm's total agricultural production over the life of the mine.

This final provision includes several changes, but remains very similar to the 1983 final rule. Because this paragraph deals with the impact of surface coal mining on "farming" and the final definition of "farming" does not include the use of AVFs for grazing, OSMRE has deleted the reference to grazing in Section 785.19(b)(2)(ii). Further, because the use of AVFs for hay production falls within the final definition of "farming" as previously discussed, this paragraph has been reorganized and the term "hayed AVF area" deleted.

Two other editorial changes also have been made for clarity and consistency with the final definition of "farming." First, the word "total" has been added as a modifier to the term "agricultural production" to emphasize that the basis by which any impact is measured is a farm's total agricultural production. Second, the phrase "vegetation and water of the developed grazed or hayed alluvial valley floor area" has been changed to "farmland areas" because the former could be construed to be related to areas which are not farmed under the final definition of "farming." The use of "farmland areas" is consistent with terms found in existing Section 785.19(b)(3).

One commenter suggested that Section785.19(b)(2)(i) should begin "Any farming on the irrigated or naturally subirrigated AVF * * *" rather than just "Any farming on the AVF * * *."

This comment was not accepted. It is not necessary to insert "irrigated or naturally subirrigated" in the subparagraph since the words are already present in the definition of AVF.

One commenter was concerned about the use of the term "agricultural production" in two places in Section 785.19(b)(2)(ii). The commenter believed that the term is intended to mean "farming" production and suggested that OSMRE clearly state this in the final rule. A second commenter also opposed comparing impact on "farmed" AVFs to total agricultural production because to do so would allow inclusion of thousands of acres of non-AVF land, diluting the relative impact of mining on the AVFs. This commenter urged that the determination of impact should compare "farmed" AVFs to "the production of only the AVF portion of the farm or ranch." In contrast, one commenter found "considerable support" in the legislative history for the position that the impact of mining should be based on total agricultural production, not on the impact to areas solely used for farming. Another commenter objected to the insertion of the word "total" as an unwarranted deviation from the statutory language.

In applying the statutory exclusion of section 510(b)(5)(A) of the Act, which also uses the term "agricultural production," OSMRE has consistently interpreted the comparison to consist of the relative importance of the affected "farmed" AVF on the entire farming operation. For this reason, OSMRE added the clarifying adjective "total" to "agricultural production" in this paragraph. The need for clarity in this instance is demonstrated by the above comments. Because the farmed AVF may contribute a very critical element (stored forage) from a small portion of the total acreage, the comparison must be to the agricultural unit as a whole including non-AVF areas.

Several commenters argued that the phrase "vegetation and water of the developed, grazed or hayed AVF area" should not be changed to "farmland areas" because to do so would ignore the importance of water to production and restrict the measurement of importance of the mined AVF area to the farm's production to the acreage disturbed. One commenter objected to "farmland areas" because he believed the resources, i.e., water and vegetation, rather than the land area are the important elements of AVFs.

OSMRE does not agree. The exception in the Act focuses on the impact on agricultural production of the interruption of farming on the AVF. It is not necessary to specify the interrupted elements, such as water or vegetation. Reference to water and vegetation was deleted because it could be construed as applying to areas not "farmed." Because this paragraph deals with the impact of surface coal mining on "farming," and the final definition of "farming" does not include the use of AVFs for grazing, the reference to grazing was deleted from the paragraph. Also, since the use of AVFs for hay production falls within the definition of "farming," the term "hayed AVF area" is not necessary and has been deleted.

One commenter was concerned about the impact of the proposed definitions in terms of reclamation requirements. In the commenter's opinion, it may not be sufficient to require that a previously grazed or hayed AVF simply be reclaimed to a suitable postmining land use; it may be more appropriate to require restoration of the essential hydrologic functions of the AVF.

OSMRE agrees. The reclamation performance standards found in 30 CFR 822.11 require the re-establishment of the essential hydrologic functions of an AVF within the permit area, as well as the preservation of those functions outside the permit area. This performance standard is unchanged by the adoption of this final rule.

Four commenters were concerned about how the determination of negligible impact is to be made. All opposed measuring the impact of mining over the life of the mine. They believed that the use of a long period of time, such as the

life of a mine (which may exceed 40 years), as opposed to the bond liability period (a minimum of ten years) or annual measurement, would result in more "farmed" AVFs being mined with the possible concomitant elimination of farms.

OSMRE believes that a time frame needs to be defined to measure the impact and that the expected life of mine is the most reasonable and accurate one. Consideration of impacts over such an extended period will reduce errors in measurement associated with normal expected fluctuations in a farm's annual output. The foregoing notwithstanding, OSMRE intends that a primary criterion to be applied by the regulatory authority in determining the impact of mining on farming operations on AVFs is preservation of the viability of the farming operation. This position is consistent with the intent of Congress. Therefore, the determination should be made on a case-by-case basis. The regulatory authority does have the flexibility to adopt a shorter time frame if, based on local conditions, imposition of such a provision is no less effective than this rule or if the regulatory authority wishes to establish more stringent protections.

Final Section 785.19(b)(3) is unchanged from the proposed rule and defines a farm as a land unit on which farming is conducted. The requirements of this section are the same as those in the suspended rule except that the term "farming" has been substituted for the term "agricultural activities." This revision has been made to conform this paragraph with section 510(b)(5) of the Act, as well as with the final definition of "farming."

D. SECTION 785.19(d)(2)(i) - INFORMATION ON THE ESSENTIAL HYDROLOGIC FUNCTIONS OF ALLUVIAL VALLEY FLOORS

The district court in In Re: Permanent II, slip op. at 38-40, remanded 30 CFR 785.19(d)(2)(i) to the Secretary to provide guidance to operators and regulatory authorities as to what type of information was required. Section 785.19(d)(2) and (3) of the 1979 rules had included specific information requirements to describe the characteristics which support the essential hydrologic functions of alluvial valley floors. Those specific information requirements has been deleted from Section 785.19(d) when it was revised in 1983. The appeals court "affirm[ed] the remand so that the Secretary may provide appropriate, official guidance to the operators and regulatory authorities, or conversely, explain why such guidance is not needed. NWF v. Hodel, at 731.

The special protections afforded to AVFs by the Act are described in two sections: Section 510(b)(5) prohibits a regulatory authority from approving a permit unless the applicant submits information which affirmatively demonstrates that certain protections to farming on AVFs are provided. Section 515(b)(10)(F) requires the preservation throughout mining and reclamation of the "essential hydrologic functions" of AVFs. In section 515(b)(10)(F) the Congress identified special protections to be afforded all AVFs independent of the protections for farming on alluvial valley floors provided by section 510(b)(5).

The court of appeals upheld the Secretary's view that the protection of essential hydrologic functions extended to all alluvial valley floors rather than just those significant to farming. The court stated that "it seems entirely plausible * * * that Congress intended * * * to protect all alluvial valley floors in arid and semi-arid areas with a performance standard while also providing special protection at the permit stage for those alluvial valley floors significant to farming." NWF v. Hodel at 747. The court went on to say that "[a]lthough the legislative history cited by Industry clearly supports the notion that Congress intended special protection for farms dependent on alluvial valley floors, it does nothing to refute the notion that other alluvial valley floors are also subject to protection, albeit not at the permitting stage." (Emphasis added.) This is consistent with the fact that the Act requires no permitting information on the essential hydrologic functions of AVFs.

Although the Act does not require any permit information on essential hydrologic functions, and does not require the Secretary to further elaborate or "flesh out" this performance standard, it remains within the Secretary's discretion to add corresponding permit information requirements. NWF v. Hodel, at 734-5. Therefore, OSMRE has decided to continue to require permit information relative to preserving and reestablishing the essential hydrologic functions of all AVFs. The information requirement found in this final rule, which differs from that required under the 1979 and 1983 rules, is described below.

In the 1979 rules OSMRE regulated the protection of essential hydrologic functions in three ways: First, by promulgating at 30 CFR 701.5 an extensive definition of "essential hydrologic functions" which read as follows:

"Essential hydrologic functions means the role of an alluvial valley floor in collecting, storing, regulating, and making the natural flow of surface or ground water, or both, usefully available for agricultural activities by reason of the valley floor's topographic position, the landscape and the physical properties of its underlying materials. A combination of these functions provides a water supply during extended periods of low precipitation.

(a) The role of the valley floor in collecting water includes accumulating runoff and discharge from aquifers in sufficient amounts to make the water available at the alluvial valley floor greater than the amount available from direct precipitation.

(b) The role of the alluvial valley floor in storing water involves limiting the rate of discharge of surface water, holding moisture in soils, and holding ground water in porous materials.

(c)(1) The role of the alluvial valley floor in regulating the natural flow of surface water results from the characteristic configuration of the channel flood plain and adjacent low terraces.
(2) The role of the alluvial valley floor in regulating the natural flow of ground water results from the properties of the aquifers which control inflow and outflow.

(d) The role of the alluvial valley floor in making water usefully available for agricultural activities results from the existence of flood plains and terraces where surface and ground water can be provided in sufficient quantities to support the growth of agriculturally useful plants, from the presence of earth materials suitable for the growth of agriculturally useful plants, from the temporal and physical distribution of water making it accessible to plants throughout the critical phases of the growth cycle either by flood irrigation or by subirrigation, from the natural control of alluvial valley floors in limiting destructive extremes of stream discharge, and from the erosional stability of earth materials suitable for the growth of agriculturally useful plants." *(44 FR 15314,* March 13, 1979)

Second, by promulgating a performance standard at 30 CFR 822.11 requiring the preservation or reestablishment of the geologic, hydrologic, and biologic characteristics that support those functions. In the pertinent part, that standard read as follows:

"(a) Surface coal mining and reclamation operations shall be conducted to preserve * * * the essential hydrologic functions of alluvial valley floors not within an affected area * * * by maintaining those geologic, hydrologic and biologic characteristics that support those functions.

(b) Surface coal mining and reclamation operations shall be conducted to reestablish * * * the essential hydrologic functions of alluvial valley floors within an affected area * * * by reconstructing those geologic, hydrologic and biologic characteristics that support those functions.

(c) The characteristics that support the essential hydrologic functions of alluvial valley floors are those in 30 CFR 785.19(d)(3) * * *." *(44 FR 15450,* Mach 13, 1979).

And third, by promulgating, at 30 CFR 785.19(d), permit information requirements to describe those characteristics. *(44 FR 15375-6,* March 13, 1979).

In 1983, OSMRE revised the AVF rules with respect to essential hydrologic functions in four ways: First, the definition of "essential hydrologic functions" was shortened and simplified to read as follows:

"Essential hydrologic functions means the role of an alluvial valley floor in collecting, storing, regulating, and making the natural flow of surface or ground water, or both, usefully available for agricultural activities by reason of the valley floor's topographic position, the landscape, and the physical properties of its underlying materials. A combination of these functions provides a water supply during extended periods of low precipitation."

Second, the Section 822.11 performance standards were rewritten to relate directly to protection of the essential hydrologic functions, rather than to the "geologic, hydrologic, and biologic characteristics that support those functions." In pertinent part, Section 822.11 was revised to read as follows:

(a) The operator * * * shall minimize disturbances to the hydrologic balance by preserving * * * the essential hydrologic functions of an alluvial valley floor not within the permit area.

(b) The operator * * * shall minimize disturbances to the hydrologic balance within the permit area by reestablishing * * * the essential hydrologic functions of alluvial valley floors.

Third, former paragraph Section 822.11(c) containing the cross reference to Section 785.19(d)(3), which specified the detailed information requirements to describe those "geologic, hydrologic, and biologic" characteristics, was removed. *(48 FR 29820,* June 28, 1983)

And fourth, the Section 785.19(d) permitting requirements were revised. That revision removed (1) the detailed information requirements previously contained in Section 785.19(d)(2), which primarily related to the use of an alluvial valley floor for farming; and (2) Section 785.19(d)(3), which required detailed information describing those geologic, hydrologic, and biologic characteristics necessary to support the essential hydrologic functions. See *48 FR 29820* (June 28, 1983). The 1983 revision of Section 785.19(d)(2)(i) did retain, however, the requirement for detailed survey and baseline data to determine those characteristics of alluvial valley floors necessary to preserve the essential hydrologic functions, but did not specify what those surveys and baseline data should address.

In its October 1, 1984, decision, the district court in In Re: Permanent II remanded Section 785.19(d)(2)(i) to the Secretary to provide guidance as to what type of information would satisfy this requirement in the absence of previous Section 785.19(d)(3). Slip op. at 39-40. Although the court of appeals noted the deletions of both Section 785.19(d)(2) and Section 785.19(d)(3) (NWF v. Hodel, at 729, note 51), only the deletion of previous Section 785.19(d)(3), which specified permit information requirements to describe those characteristics which support the essential hydrologic functions, was the subject to the district court remand. Therefore, the scope of this rulemaking is limited to providing the necessary degree of guidance as to what information must be submitted on the permit application to describe the essential hydrologic functions of alluvial valley floors, and to explaining the deviation from the requirements of Section 785.19(d)(3) of the 1979 rules. Since the 1983 changes to the information requirements contained in Section 785.19(d)(2) of the 1979 rules were not related to the characteristics supporting essential hydrologic functions, and were not covered by the district court remand, this rule does not address them.

In light of the court of appeals decision upholding the district court remand of Section 785.19(d)(2)(i) to the Secretary the further guidance, OSMRE has reconsidered the requirements of that section and has made a substantial revision. Since this rule addresses those permit application information requirements necessary for a regulatory authority to determine projected compliance with the performance standards, the information requirement is structured to support the definition of essential hydrologic functions at 30 CFR 701.5 and the performance standard requiring their protection at 30 CFR 822.11, as they exist today. Since the performance standard no longer is written in terms of the characteristics which support the essential hydrologic functions, it is inappropriate to return to the information requirements previously contained in Section 785.19(d)(3), which was written in terms of those "characteristics." Instead, final Section 785.19(d)(2)(i) is structured to reflect the revised definition of essential hydrologic functions and the performance standard requiring direct protection or restoration of those functions.

Final Section 785.19(d)(2)(i) expands upon the 1983 rule and identifies those specific requirements for AVF information that must be included in a permit application. It requires the applicant to include in the application specified information on essential hydrologic functions of the AVF. An editorial change has been made to the final rule in response to a comment. The word "evaluate" has been substituted for the word "identify" in the proposed sentence that began, "The information required by this subparagraph shall identify those factors which contribute. * * *" Use of the word "evaluate" more accurately conveys the nature of the information to be submitted. The applicant shall not just identify the factors involved, but shall also evaluate their effects and interactions.

OSMRE believes that the detailed language added to final Section 785.19(d)(2)(i)(A) through (D), although different from the information required under Section 785.19(d)(3) of the March 13, 1979 rule, provides the necessary guidance to operators and regulatory authorities, consistent with the revised definition and performance standards. This final rule has an emphasis different from the 1983 rule, which contained requirements to provide information on those characteristics of AVFs necessary to support their essential hydrologic functions. OSMRE has made this change since the performance standard is no longer structured around those characteristics, but is now built around the essential hydrologic functions themselves, and those factors related to the AVF that contribute to them. Therefore, OSMRE has revised 30 CFR

785.19(d)(2)(i)(A) through (D) as described below to specify those functions of AVFs for which information is required in a permit application.

Paragraph A is identical to the proposed rule and requires a description of those factors contributing to the collection of water within the AVF, such as the amount, rate and frequency of rainfall and runoff, surface roughness, slope and vegetative cover, infiltration and evapotranspiration, relief, and slope and density of drainage channels.

Paragraph B is identical to the proposed rule and requires a description of those factors contributing to storing of water within the AVF, such as permeability, infiltration, depth and direction of ground water flow, porosity, and water holding capacity.

Paragraph C is identical to the proposed rule and requires a description of those factors contributing to regulation of the flow of surface and ground water within the AVF, such as longitudinal profile and slope of the valley and channels, the sinuosity and cross sections of the channels, interchange of water between streams and associated alluvial and bedrock aquifers, and rates and amount of water supplied by the aquifers.

Paragraph D is identical to the proposed rule and requires a description of those factors contributing to the availability of water in the AVF, such as the presence of floodplains and terraces suitable for agricultural activities.

One commenter objected to OSMRE's decision to continue to require permit information relative to preserving and re-establishing the essential hydrologic functions of AVFs. The commenter felt that the decision represents an unwarranted broadening of 30 CFR 785.19(d)(2)(i), which seeks only information required to determine what is necessary to "preserve" the essential hydrologic functions. In the commenter's view, section 515(b)(10)(F) of the Act speaks only in terms of "preserving" essential hydrologic functions; therefore, to speak of "preserving and re-establishing" goes beyond the intent of Congress.

OSMRE has not changed the final rule preamble to respond to the commenter's concern. The words "and re-establishing" are intended to convey the idea that disruption of the essential hydrologic functions of the AVFs being mined is not precluded by the final rule. This usage parallels the existing performance standards in 30 CFR 822.11, which address the preservation of the essential hydrologic functions of AVFs outside the permit area and the re-establishment of those functions within the permit area. This final rule is supported by the legislative history of the Act which recognizes that the essential hydrologic functions of the actual operating area of a mine will be dewatered during mining (H. Rept. 95-218, 95th Cong., 1st Sess. 110 (1977)).

One commenter was dissatisfied with the proposal and indicated that the preamble spent a great deal of time explaining its change of the term "characteristics" to "factors," without remedying the problem which the district court identified with the previous rule, namely, that the detailed requirements of the 1980 rules of 30 CFR 785.19(d)(3) and 822.11(c) were dropped without adequate explanation. In the commenter's opinion, the proposed rule and preamble fail to explain why OSMRE's new list of "factors" is better than the more detailed previous list of characteristics. The commenter noted that the 1983 rule was remanded in part because the Secretary did not explain why the previously needed information was no longer necessary. This commenter and two others urged a reinstatement of the 1979 rule.

In contrast, another commenter argued that OSMRE had gone too far. The commenter believed that the specification of information to be included in permit applications is an unwarranted intrusion into the role of the regulatory authorities and an unwise limitation on their flexibility. The commenter recommended that the final rule leave the decision on what information is to be submitted to the discretion of the regulatory authority.

OSMRE did not accept these comments. First of all, the performance standard is no longer what it was in 1979 and, therefore, it would be inappropriate to build permit information requirements around characteristics that are not necessarily part of the performance standard. On the other hand, while it is true that the Act requires no permit information on essential hydrologic functions, and the appeals court noted that essential hydrologic functions are not provided the same level of protection at the permitting stage as farmed AVFs (NWF v. Hodel at 746-7), OSMRE believes it is necessary that an evaluation of the essential hydrologic functions for all AVFs be contained in the permit application so that the impact of mining and the effectiveness of reclamation can be evaluated. Thus, the rule is not an unwarranted intrusion into State authority. The word "factor" is used rather than the word "characteristic" to be more

consistent with the revised performance standard and make clear that it is the essential hydrologic functions themselves that are to be described rather than the characteristics of the valley that supports those functions.

One commenter argued that the specific permit information requirements in 30 CFR 785.19(d)(2)(i) should include information on the quality of water in the AVF because water quality is an integral part of essential hydrologic functions. The commenter suggested adding a subparagraph (E) to describe factors contributing to the quality of water in the AVF, including descriptions of premining quality of surface water and of contributing groundwater aquifers.

OSMRE considered, but did not adopt, the suggestion to include water quality information requirements in this rule. Because water quality information for surface water and groundwater is required for both surface and underground mine permits in other parts of the permanent regulatory program (30 CFR 780.21 and 784.14 respectively), adoption of the suggestion would be unnecessarily duplicative.

EFFECTS IN FEDERAL PROGRAM STATES AND ON INDIAN LANDS

The final rules are applicable through cross-referencing in those States with Federal programs. This includes California, Georgia, Idaho, Massachusetts, Michigan, North Carolina, Oregon, Rhode Island, South Dakota, Tennessee, and Washington. The Federal programs for these States appear at 30 CFR Parts 905, 910, 912, 921, 922, 933, 937, 939, 941, 942, and 947, respectively. The rule will also apply through cross-referencing in 30 CFR Part 750 to surface mining and reclamation operations on Indian lands. In the proposal, OSMRE specifically requested comment as to whether unique conditions exist in any of these Federal program States or on Indian lands which 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.

EFFECTS OF THE RULE ON STATE PROGRAMS

Following promulgation of this rule, OSMRE 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

Executive Order 12291 and Regulatory Flexibility Act

The DOI has examined these final rules according to the criteria of Executive Order 12291 (February 17, 1981) and has determined that these are not major rules within the standards established by the Executive Order and, therefore, no regulatory impact analysis is required. The DOI has also determined, pursuant to the Regulatory Flexibility Act, *5 U.S.C. 601* et seq., that the final rule will not have a significant economic impact on a substantial number of small entities. 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.

Federal Paperwork Reduction Act

The information collection requirements contained in this rule have been approved by the Office of Management and Budget under *44 U.S.C. 3501* et seq. and assigned clearance number 1029-0040. Public reporting burden for this information is estimated to average 120 hours 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, OSMRE, Washington, DC 20240; and the Office of Management and Budget, Paperwork Reduction Project (1029-0040) Washington, DC 20503.

National Environmental Policy Act

OSMRE 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 would 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 at the OSMRE Administrative Record, Room 5131, 1100 L Street, NW, Washington, DC.

Author
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LIST OF SUBJECTS

30 CFR Part 701
Law Enforcement, Surface mining, Underground mining.

30 CFR Part 785
Reporting and recordkeeping requirements, Surface mining, Underground mining.

Accordingly, 30 CFR Parts 701 and 785 are amended as follows:

Date: November 21, 1988.
James E. Cason, Deputy Assistant Secretary -- Land and Minerals Management.

PART 701 -- PERMANENT REGULATORY PROGRAM

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

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

2. In Section 701.5 the definition of "agricultural activities or farming" is removed, definitions of "agricultural activities" and "farming" are added in alphabetical order, and the definition of "materially damage the quantity or quality of water" is revised to read as follows:

SECTION 701.5 - DEFINITIONS.

AGRICULTURAL ACTIVITIES means, with respect to alluvial valley floors, the use of any tract of land for the production of animal or vegetable life, based on regional agricultural practices, where the use is enhanced or facilitated by subirrigation or flood irrigation. These uses include, but are not limited to, farming and the pasturing or grazing of livestock. These uses do not include agricultural activities which have no relationship to the availability of water from subirrigation or flood irrigation practices.

* * * * *

FARMING means, with respect to alluvial valley floors, the primary use of those areas for the cultivation, cropping or harvesting of plants which benefit from irrigation, or natural subirrigation, that results from the increased moisture content in the alluvium of the valley floors. For purposes of this definition, harvesting does not include the grazing of livestock.

* * * * *

MATERIALLY DAMAGE THE QUANTITY OR QUALITY OF WATER means, with respect to alluvial valley floors, to degrade or reduce by surface coal mining and reclamation operations the water quantity or quality supplied to the alluvial valley floor to the extent that resulting changes would significantly decrease the capability of the alluvial valley floor to support farming.

* * * * *

PART 785 -- REQUIREMENTS FOR PERMITS FOR SPECIAL CATEGORIES OF MINING

3. The authority citation for Part 785 is revised to read as follows:

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

4. Section 785.19 is amended by revising paragraphs (b)(2)(ii), (b)(3) and (d)(2)(i) to read as follows:

SECTION 785.19 - SURFACE COAL MINING AND RECLAMATION OPERATIONS ON AREAS OR ADJACENT TO AREAS INCLUDING ALLUVIAL VALLEY FLOORS IN THE ARID AND SEMIARID AREAS WEST OF THE 100TH MERIDIAN.

* * * * *

(b) * * *

(2) * * *

(ii) Any farming on the alluvial valley floor that would be affected by the surface coal mining operation is of such small acreage as to be of negligible impact on the farm's agricultural production. Negligible impact of the proposed operation on farming will be based on the relative importance of the affected farmland areas of the alluvial valley floor area to the farm's total agricultural production over the life of the mine; or

* * * * *

(3) For the purpose of this section, a farm is one or more land units on which farming is conducted. A farm is generally considered to be the combination of land units with acreage and boundaries in existence prior to August 3, 1977, or if established after August 3, 1977, with those boundaries based on enhancement of the farm's agricultural productivity and not related to surface coal operations.

* * * * *

(d) * * *

(2) * * *

(i) The essential hydrologic functions of the alluvial valley floor which might be affected by the mining and reclamation process. The information required by this subparagraph shall evaluate those factors which contribute to the collecting, storing, regulating and making the natural flow of water available for agricultural activities on the alluvial valley floor and shall include, but are not limited to:

(A) Factors contributing to the function of collecting water, such as amount, rate and frequency of rainfall and runoff, surface roughness, slope and vegetative cover, infiltration, and evapotranspiration, relief, slope and density of drainage channels;

(B) Factors contributing to the function of storing water, such as permeability, infiltration, porosity, depth and direction of ground water flow, and water holding capacity;

(C) Factors contributing to the function of regulating the flow of surface and ground water, such as the longitudinal profile and slope of the valley and channels, the sinuosity and cross-sections of the channels, interchange of water between streams and associated alluvial and bedrock aquifers, and rates and amount of water supplied by these aquifers; and

(D) Factors contributing to water availability, such as the presence of flood plains and terraces suitable for agricultural activities.

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