**FEDERAL REGISTER: 55 FR 29536 (July 19, 1990)**

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

30 CFR Parts 736 and 750
Surface Coal Mining and Reclamation Operations;
Application Fee for Permit To Conduct Surface Coal Mining Operations

ACTION: Final rule.

**SUMMARY:** The Office of Surface Mining Reclamation and Enforcement (OSM) of the U.S. Department of the Interior (DOI) is amending its regulations to add a system of fees to be paid to OSM by applicants to obtain processing and issuance of new surface coal mining permits in Federal program States and on Indian lands.

The regulations are being amended to implement the requirement at section 507(a) of the Surface Mining Control and Reclamation Act of 1977 and 30 CFR 777.17 that permit fees shall accompany an application for a permit.

EFFECTIVE DATE: August 20, 1990.

FOR FURTHER INFORMATION CONTACT: Adele Merchant, Office of Surface Mining Reclamation and Enforcement, U.S. Department of the Interior, 1951 Constitution Ave., NW., Washington, DC 20240; Telephone (202) 208-2533 or FTS 268-2533.

**SUPPLEMENTARY INFORMATION:**



## I. BACKGROUND

Section 507(a) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act), *30 U.S.C. 1257*(a), provides that an application for a surface coal mining permit shall be accompanied by a fee determined by the regulatory authority, which may be less than but shall not exceed the actual or anticipated cost of reviewing, administering and enforcing the permit, and that the regulatory authority may develop procedures so that the fee may be paid over the term of the permit.

The legislative history of section 507(a) indicates that the Congress had originally intended to finance the entire cost of implementing the Act through permit fees, but that considerations of fairness and financial burdens on small and medium size operators led to the requirement for a fee that is less than these costs. H.R. Rep. 94-1445, 94th Cong., 2nd Sess., 5-7 (1976).

OSM rules at 30 CFR 777.17 incorporate the permit application fee requirements of SMCRA section 507(a); the language of Section 777.17 is similar to that of SMCRA.

On February 22, 1985, OSM proposed a rule which would have required collection of application fees to cover the full cost to the Department of the Interior for processing permits to conduct surface coal mining operations and coal exploration, for all other OSM permit processing actions and for decisions on mining plans *(50 FR 7522).* The rule would have applied to applications for mining on Indian lands, in the Federal program States and on Federal lands in States not having State-Federal cooperative agreements.

In response to public comments received on this initial proposal, on May 17, 1988, OSM proposed a modified system of permit fees for permitting actions in Federal program States, on Federal lands where OSM issues a permit, and on Indian lands *(53 FR 17568).*

The May 1988 proposal included a combination of a fixed fee plus a fee for each acre of land included in the permit area for new permit applications to conduct surface coal mining operations, and an hourly rate for permit renewals and revisions, coal exploration permits, and the transfer, assignment or sale of rights under an existing permit.

The fees for a new permit application were based on an analysis of data collected through OSM's cost accounting system for permit processing costs in Tennessee. Data accumulated for permits issued by OSM from October 1, 1985 through June 1, 1987, were analyzed to determine the costs of processing a permit and the variation in costs that resulted from variations in the acreage included in the permit, the number of administrative completeness reviews, and the number of technical deficiency letters for each permit. The permit fee amounts in the May 1988 proposed rulemaking were based on results of that analysis. For a more detailed explanation of the fee amount analysis and the choices made by OSM earlier, the reader is referred to the discussion in the May 17, 1988, proposed rule at *53 FR 17568-17575*.

The comment period on the May 1988 proposal ended July 18, 1988. It was reopened on July 20, 1988 *(53 FR 27361)*, for an additional 60 days ending September 19, 1988, in response to several requests from interested parties. On July 11, 1988, a hearing was held in Washington, DC, with three people testifying. A second hearing was held on July 13, 1988, in Denver, Colorado, in response to requests from industry representatives. Three people testified at the July 13th hearing.

A Congressional oversight hearing was held on July 12, 1988, by the Subcommittee on Mining and Natural Resources of the Committee on Interior and Insular Affairs, U.S. House of Representatives. At this hearing, OSM Director Robert Gentile announced the planned 60-day reopening of the comment period and offered to meet with industry representatives to discuss their concerns. Subsequently, the Director met with industry representatives on August 3, 1988, in Knoxville, Tennessee, and on August 19, 1988, in Denver, Colorado. In addition to the transcripts from these hearings and the records from these meetings, OSM received 19 letters containing written comments on the proposed rule.

On February 6, 1990, OSM again reopened the comment period on the proposed rule, this time for the narrow purpose of soliciting comments on a reduced fee for small operators. The commend period closed March 8, 1990. Seven parties submitted comments on the proposed small operator fee.

## II. DISCUSSION OF RULE AND RESPONSE TO COMMENTS

### A. COMPARISON OF PROPOSED AND FINAL RULES

Much of the proposed rule has either been revised or has not been adopted. The reasons for revising or not adopting parts of the proposed rule are explained in the "Response to Comments" section below.

Under this final rule OSM will collect application fees for new permits only, and these fees will apply only in Federal program States and on Indian lands. New permits applications currently under review by OSM will be assessed fees for stages of review begun on or after the effective date of the rule, as discussed further on in this section.

The proposed amendment at 30 CFR 740.25 to adopt a new permit application fee system for Federal lands is not adopted. In contrast to the proposed rule, OSM will not collect the permit fees established by this rule for Federal lands in States with approved State programs. Existing 30 CFR 740.13(b)(1) provides that applications for permits, permit revisions, or permit renewals to conduct surface coal mining operations on lands subject to part 740 shall be accompanied by a fee made payable to the regulatory authority, and that the amount of the fee shall be determined in accordance with the permit fee criteria of the applicable regulatory program. OSM has determined that this existing provision is more in keeping with the intent of SMCRA section 523(a) that on Federal lands in a State with an approved State program, the Federal lands program shall at a minimum include the requirements of the approved State program.

In a State with an approved regulatory program and a cooperative agreement giving the State permitting authority over Federal lands, any State permit fees will be collected by the State. If there is no cooperative agreement, OSM, as the regulatory authority under Section 740.13(b)(1), will collect from the applicant the fee set by the State regulatory program. If the cooperative agreement provides for dual permitting on Federal lands by OSM and the State regulatory authority, OSM and the State are both considered to be the regulatory authority for permitting purposes under Section 740.13(b)(1) and each will collect the fee established by the State program.

The proposed rule included hourly fees for processing permit renewals and revisions, the transfer, assignment or sale of rights under an existing permit, and coal exploration permits. The final rule does not include these fees. OSM will conduct a study of possible fees for these actions (and for technical deficiencies in a permit application) during the year following the publication of this rule, and plans to repropose fees for these actions shortly thereafter where that study indicates fees for these actions are justified and collection is feasible. There are no hourly fees in this final rule, and no fees for permit renewals or revisions, the transfer, assignment or sale of rights, or coal exploration permits.

For a new permit application, the proposed rule provided for a $250 administrative completeness review fee, a $1,350 technical review fee, and a $2,000 decision document fee, plus acreage fees of $13.50 per acre of the permit area. This totaled $3,600 plus the acreage fee. Incomplete applications would have been subject to additional administrative completeness review fees, and to a $690 fee for each technical deficiency letter sent to the applicant.

In the final rule, the fees for the initial administrative completeness review, technical review and decision document are retained as proposed. The proposed fees for additional administrative completeness reviews and technical deficiency letters have not been adopted. The acreage fee is revised to a sliding scale of $13.50 per acre for the first 1,000 acres, $6.00 per acre for the next 1,000, $4.00 per acre for the next 1,000, and $3.00 per acre for the remainder. Acreage fees will be collected only for proposed disturbed areas within the permit area, that is, areas that would be disturbed by activities proposed in the permit application. Thus, under this rule, the fee for a new permit is $3,600 plus acreage fees. The reduced fee for small operators proposed in the February 6, 1990, Federal Register is not adopted. During the coming year OSM will conduct a study that will include consideration of a fee for technical deficiencies in the permit and plans to conduct further rulemaking shortly thereafter where the study results indicate fees for these actions are justified and collection is feasible.

The proposed rule provided that no fees would be refunded if a permit were withdrawn or denied. The final rule provides for a full refund of fees if a permit is denied for certain specified reasons, and for specified refunds of fees that have been paid for a particular stage of review if an operator withdraws an application.

The proposed rule provided that the fee for each stage of permit application review must be paid before OSM would commence that stage. The final rule allows the applicant to pay all application fees when submitting the application (the $3,600 plus acreage fees), so that there will be no delays caused by OSM notifying the applicant that the fee for the next stage of review is due, and waiting for receipt of payment. Or, the applicant may pay the fee in prescribed partial payments before each stage of review as in the proposed rule.

The proposed rule provided that if a technical deficiency letter were sent, technical review would cease until the applicant responded to the issues in the letter and submitted the technical deficiency fee. The final rule does not include technical deficiency fees and allows the technical review of other parts of the application to continue, if possible, while OSM is waiting for the information requested in a technical deficiency letter.

Fees under this rule will not be charged retroactively. However, all new permit application processing actions begun on or after the effective date of the final rule will be subject to fees. Any new permit application which is currently in process will be assessed a fee for any stage of review begun on or after the effective date of the rule. For example, if a permit application is in the administrative completeness review stage when the rule becomes effective, a technical review fee plus per-acre fees will be collected before the technical review stage of processing will begin. If an application has entered the technical review stage of processing before the effective date of the rule, only the decision document fee will apply.

**FEDERAL ENFORCEMENT OF A STATE PROGRAM**

Where OSM takes oversight action under 30 CFR part 733 and subsequently becomes the regulatory authority for permitting activities in a State with an approved regulatory program, permit fees as established in that State program will be collected by OSM. In States where a Federal program is substituted for an existing State program under 30 CFR parts 733 and 736 because a State has withdrawn its program or OSM has withdrawn approval of the program, OSM will charge permit fees according to this fee system but will deduct an amount equal to any fees the permit applicant had already paid to the State for the permitting action. If a State regains primacy following OSM enforcement of the State or Federal program in that State, OSM will refund any permit fees that have been paid on permits not yet issued.

**AUTHORITY FOR COLLECTING PERMIT FEES**

This permit fee system is being implemented under the authority of section 507(a) of SMCRA and section 9701 of Public Law 97-258, 96 Stat. 1051 *(31 U.S.C. 9701)*, which prior to editorial revision and recodification was section 501 of the Independent Offices Appropriation Act (IOAA).

Section 507(a) of SMCRA provides that an application for a surface coal mining permit "shall be accompanied by a fee as determined by the regulatory authority [which] may be less than but shall not exceed the actual or anticipated cost of reviewing, administering, and enforcing such permit * * *."

Section 9701 of the IOAA authorizes an agency to prescribe regulations establishing the charge for a service or thing of value provided by the agency. Under section 9701 the charge shall be fair and based on the costs to the government, the value of the thing or service to the recipient, the public policy or interest served, and other relevant factors.

**B. SECTION BY SECTION ANALYSIS OF THE RULE**

**PART 736 -- FEDERAL PROGRAM FOR A STATE**

**SECTION 736.25 - PERMIT FEES**

Section 736.25 establishes the fees to be paid to OSM by an applicant for processing an application and issuing a new permit to conduct surface coal mining operations in States with Federal programs. Currently there are Federal programs for California, Georgia, Idaho, Massachusetts, Michigan, North Carolina, Oregon, Rhode Island, South Dakota, Tennessee and Washington.

SEC**TION 736.25(a) - APPLICABILITY**

Paragraph (a) of Section 736.25 states that an applicant for a new permit to conduct surface coal mining operations under a Federal program, shall submit to OSM fees in the amounts set out in paragraph (d) of that section. It provides that the applicant shall either prepay all applicable fees by submitting them with the permit application, or shall submit the fees in partial payments by stage of review as provided in paragraphs (a)(1) through (a)(3) of the section. The rule provides that for applications submitted prior to the effective date of this rule fees shall apply only for stages of OSM review begun on or after the effective date. Where an applicant submits the fees in partial payments, OSM will not commence any stage of review until the fee for that stage has been paid.

Paragraph (a)(1) requires an applicant making payments by stage of review to submit with the application the administrative completeness review fee, as listed in paragraph (d). If the application is found to be administratively incomplete, the applicant will be notified that additional information is required, but no additional administrative completeness review fees will be charged. The proposal to collect an additional $250 for each administrative completeness review after the initial review was not adopted, for the reasons discussed below under "Response to Comments."

Paragraph (a)(2) contains requirements for fees for the technical review of a permit application. It provides that when an applicant paying by stage of review receives notice from OSM that the permit application is administratively complete, the applicant must submit the basic and per-acre technical review fees as set out in paragraph (d). Per-acre fees according to the sliding scale in paragraph (d) must be submitted for each acre or fraction thereof of areas that would be disturbed by activities proposed in the permit application. Areas that were disturbed by previous activities and would not be redisturbed will not be assessed acreage fees. Technical review of the permit will begin upon receipt of these fees by OSM. If all permit fees are prepaid by the applicant as provided by paragraph (a), technical review will begin promptly upon completion of the administrative review and determination of administrative completeness of the application.

If during the technical review, OSM notifies the permit applicant of technical deficiencies in the application and requests additional information, OSM will continue technical review of other sections of the application where possible while awaiting the required information. No fees will be charged for technical deficiency letters; the proposed fee of $690 per technical deficiency letter is not adopted, for the reasons discussed below under "Response to Comments."

Paragraph (a)(3) provides for payment of the decision document fee as set out in paragraph (d). If the applicant pays by stage of review, to obtain a permit the applicant will be required to submit a decision document fee upon being notified by OSM that the permit application is technically adequate. OSM will prepare the decision document upon receipt of the applicable fee.

**SECTION 736.25(b) - REFUND OF FEES**

Section 736.25(b) sets forth requirements for refund of fees. The proposed rule did not provide for refunds. This paragraph is added in response to commenter requests that refunds be given where permits were denied through no fault of the operator or where applications were withdrawn before a final decision was made.

Paragraph (b)(1) provides that upon written request from an applicant, OSM will refund any permit fees paid under this section for a permit application that is denied for specified reasons.

Paragraph (b)(1)(i) allows a refund when the permit is denied on the basis of information concerning endangered or threatened species or their critical habitats or information concerning cultural or historical resources, where such information was not available prior to submission of the permit application. Paragraph (b)(1)(ii) allows a refund of permit fees paid when the permit is denied because subsequent to submittal of the permit application, lands contained in the permit application are declared unsuitable for mining under Subchapter F. Paragraph (b)(1)(iii) allows a refund when the permit is denied because subsequent to submittal of the application, the applicant is denied a determination of valid existing rights to mine under 30 CFR part 761 where such rights are required to conduct surface coal mining operations on the lands contained in the permit application.

Paragraph (b)(2) provides that an applicant wishing to withdraw an application may file a written request for withdrawal and a refund of fees in accordance with paragraph (b)(3). Paragraph (b)(3) requires OSM, upon receipt of a written request for a withdrawal, to cease processing of the application. If requested, OSM will refund fees paid by the applicant for a stage of review not yet begun by OSM and, where technical review has begun will refund paid fee amounts remaining after deduction of actual OSM costs incurred for that partial technical review. Actual costs incurred will be determined by OSM using an existing cost accounting system whereby hours spent by each reviewer in processing the action are multiplied by the hourly salary of that reviewer, with overhead costs added on to that amount. The deduction may include costs of processing the withdrawal. Paragraph (b)(4) provides that no interest will be paid on refunded fees.

**SECTION 736.25(c) - FORM OF PAYMENT**

Section 736.25(c) requires that all fees due under this section be submitted to OSM by the applicant in the form of a certified check, bank draft or money order, payable to Office of Surface Mining. A bank draft is a check, draft or other order for payment of money drawn by an authorized officer of the bank. The payee was proposed as "the United States" and is changed to "Office of Surface Mining" to simplify OSM's deposit procedures.

**SECTION 736.25(d) - FEE SCHEDULE FOR A NEW PERMIT**

Section 736.25(d) establishes the fee schedule for Section 736.25.

The fee for the administrative completeness review of a new permit application is $250. Any subsequent administrative completeness reviews necessary because of insufficient information in the permit application will not result in additional fees.

The fee for the technical review is $1,350.00 plus acreage fees for each acre or fraction thereof of disturbed areas to be included in the permit area. There are no fees for technical deficiency letters. The proposed rule would have assessed acreage fees for all acres in the proposed permit area and a fee of $690 for each technical deficiency letter sent to the applicant. In the final rule, acreage fees are assessed on a sliding scale, only for proposed disturbed areas in the permit application, with the first 1,000 acres subject to a fee of $13.50 per acre, the next 1,000 at $6.00 per acre, the next 1,000 at $4.00 per acre, and any in excess of 3,000 acres at $3.00 per acre.

These changes in the proposed rule were made in response to commenter concerns about the open-endedness of the proposed fees and the possibility that some of the fees may not have been fair. Further discussion of the reasons for these changes is found under "Response to Comments," below.

The decision document fee is $2,000.00. This fee covers the costs of OSM's preparation of all documentation necessary to issue or deny the permit and is adopted as proposed. In the event that OSM determines that the permit application must be denied, OSM may prepare the decision document even if not all fees have been paid.

On February 6, 1990, OSM proposed a reduced new permit fee for small operators *(55 FR 3982).* That proposal would have allowed any applicant for a Federally-processed new permit to pay a reduced fee for that permit, if the applicant could demonstrate eligibility as a small operator under 30 CFR 795.6(a) Small Operator Assistance Program eligibility requirements. The reduced fee would have totaled $100 per permit. This proposed reduced small operator permit fee has not been adopted for the reasons set forth in the section titled "Proposed Reduced Fee for Small Operators," under "Response To Comments" below.

**PART 750 -- INDIAN LANDS**

**SECTION 750.12 - PERMIT APPLICATIONS**

Previous Section 750.12(a) is revised to conform it with other requirements of this rule. Although no changes to Section 750.12 were proposed in the May 17, 1988 Federal Register notice, the February 22, 1985, notice *(50 FR 7534)* proposed to conform Section 750.12(a) with similar requirements of that proposed rule. Previous Section 750.12(a) required that applications for permits, permit revisions and permit renewals to conduct surface coal mining operations on lands subject to 30 CFR part 750, be accompanied by a fee made payable to the United States, the amount of which would be determined by the Director. Revised Section 750.12(a) requires that each application for a permit to conduct surface coal mining operations on lands subject to part 750 be accompanied by fees in accordance with Section 750.25 of this rule.

**SECTION 750.25 - PERMIT FEES**

Section 750.25 establishes the fees to be paid to OSM for processing an application and issuing a new permit to conduct surface coal mining operations on Indian lands. OSM is the regulatory authority for such operations.

Section 750.25 parallels Section 736.25 of this rule, and the preamble explanation for that section also applies to this section.

**C. RESPONSE TO COMMENTS**

Numerous comments were received on the proposed rule. The comments are grouped below according to topic.

**GENERAL COMMENTS**

Most commenters generally opposed one or more aspects of the proposed permit application fees. Several commenters said that the rule should not be allowed to go forward. One said that a delay in instituting a permit fee would have no environmental consequences. Some commenters said that the proposal was written without any industry input. One commenter said that the proposed fees were unduly complex and would be difficult to administer.

OSM has decided to go forward with a final rule establishing application fees for new permits in Federal program States and on Indian lands, although the final rule has been revised in response to comments. Industry was given ample opportunity to comment on the initial and later proposed rules through written comments and in various hearings and meetings. OSM has carefully considered all comments in formulating this final rule. OSM does not necessarily agree that the proposed rule was unduly complex or that it would have been difficult to administer, but notes that the final rule is simpler than the proposed.

**IS A USER FEE WARRANTED: WHO BENEFITS?**

A number of commenters said that the proposed rule did not clearly identify the service or benefit received by a permit applicant in return for the proposed permit application fee. Several of them said that the applicant did not receive any benefit in return for the fee, and that the only benefit accrued to the general public. One commenter said that this particularly was true in the case of permit denial. Another characterized the proposed fee as a tax.

Another commenter said that an operator's mining and reclamation plans and the protection of environmental resources during and after mining under a permit were benefits most specifically accruing to the public. This commenter said that the benefit of a permit was not in the right to mine, but in the form of a service to the public, and that no immediate or substantial gain accrued to the permittee above and beyond that which served the public interest.

The same commenter concluded that the permittee's right to mine existed by reason of ownership of the coal itself, and that while SMCRA did require a permit, that permit did not confer mining rights or privileges in the sense of a license, but instead was a collection of conditions imposed upon the pre-existing right to mine. The commenter said that these conditions were not imposed for the protection of the mine operator, but for the protection of the environment, which was a public and not a private purpose.

OSM disagrees. These commenters have misinterpreted the service for which OSM will collect the fees imposed by this rule. Contrary to the commenters' interpretations, the service is not the permit itself, but the time and money spent by OSM in processing the permit application and issuing or denying a permit. This service was identified in the February 22, 1985, proposed rule at *50 FR 7526-7527,* and in the May 17, 1988, proposed rule at *53 FR 17568 and 17571.* While the general public does derive an incidental benefit from the SMCRA permitting process, it is the permit applicant who initiates and derives the principal benefit from the review of a permit application and the resulting permitting decision.

As noted in the proposed rule, the United States Supreme Court has held that under section 9701 of the Independent Offices Appropriation Act (IOAA), *31 U.S.C. 9701,* an agency must base a fee for a service on its value to an identifiable recipient. *National Cable Television Ass'n (NCTA) v. United States, 415 U.S. 336 (1974); Federal Power Comm'n v. New England Power Co., 415 U.S. 345 (1974).*

The General Accounting Office has concluded that "[a]lthough these decisions arose under the [IOAA], the courts' [sic] reasoning appears to apply to any statute permitting an agency to assess fees." Comptroller General's Report to the Congress, PAD-80-25, 7 (March 28, 1980). Thus, it is appropriate to interpret the permit application fee requirements of section 507(a) of SMCRA in conformity with these Supreme Court decisions.

Also, in a series of contemporaneous cases interpreting these decisions, the United States Court of Appeals for the District of Columbia Circuit has specified what an agency must do to justify a particular fee. *National Cable Television v. Federal Communications Comm'n, 554 F.2d 1094 (D.C. Cir. 1976); Electronics Industries Ass'n v. Federal Communications Comm'n, 554 F.2d 1118 (D.C. Cir. 1976);* and *Capital Cities Communications, Inc. v. Federal Communications Comm'n, 554 F.2d 1135 (D.C. Cir. 1976).*

In NCTA the Supreme Court said that unlike a tax, which need not be related to any benefit,

"a] fee * * * is incident to a voluntary act, e.g., a request that a public agency permit an applicant to practice law or medicine or construct a house or run a broadcast station. The public agency performing those services normally may exact a fee for a grant which, presumably, bestows a benefit on the applicant, not shared by other members of society."

*415 U.S. at 340-341.* Contrary to the commenter's conclusion, a SMCRA permit is a license equivalent to those recited by the Court. Since a permit application is reviewed by OSM in response to a voluntary decision of the applicant to undertake mining operations and submit his or her application, it is proper for OSM to collect a permit application fee.

And contrary to the commenters' conclusions that it is the public, and not the applicant, who benefits from the permitting process, the United States Court of Appeals for the District of Columbia Circuit in Electronics Industries Ass'n has said that the second sentence of the preceding quotation:

“Only means that the private recipient must be ‘identifiable’ or, to state it another way, that no fee should be charged to a private party "when the identity of the ultimate beneficiary is obscure and the service can be primarily considered as benefitting broadly the general public."

*554 F.2d at 1114* (emphasis in original, later quotation cited to Bureau of Budget Circular No. A-25 (September 23, 1959)). In the SMCRA permitting process the ultimate beneficiary is not obscure. The permit applicant clearly is both the cause for and the beneficiary of the time and money spent by OSM in permit application review and decisionmaking, and thus is an identifiable recipient from whom the collection of a permit application fee is proper.

Because the general public also derives an incidental benefit from the permit application process, the commenters appear to conclude that the IOAA prohibits OSM from collecting a permit application fee. Under these court decisions, however, an incidental public benefit does not preclude the imposition of a fee.

As stated by the court in Electronics Industries Ass'n,

“it is clear that under NCTA expenditures made to benefit the public are required to be excluded from a proper fee. *415 U.S. at 341-43, 94 S.Ct. 1146.* But the Court has not held that no fee can be assessed in situations which partially benefit the public.”

*554 F.2d at 1113* (emphasis in original). Thus, as long as the applicant receives a benefit from the permitting process commensurate with the application fee that is charged, an incidental public benefit is immaterial.

Notwithstanding simultaneous benefit to the public and a private party, courts have upheld charging the entire cost of a service to the private party benefitting from the service. *Mississippi Power and Light v. U.S. NRC 601 F.2d 223 (5th Cir. 1980).*

The permit applicant, and not the general public, is the principal beneficiary of the permitting process for a number of reasons. First, the mining and reclamation requirements of SMCRA do not depend on the issuance of a permit, but are imposed on a permittee directly through the applicable regulatory program. Accordingly, at 30 CFR 701.5 the term permittee is defined to mean "a person holding or required by the Act of this chapter to hold a permit * * *." (Emphasis added.) Since the environmental or other benefits provided to the public by SMCRA do not depend on the permitting process, any benefits the public receives from that process are incidental to it. Second, section 506 of SMCRA, *30 U.S.C. 1256,* and the implementing regulations at 30 CFR 773.11 prohibit a person from engaging in surface coal mining operations unless that person has first obtained a permit. Since a permit applicant cannot lawfully mine without a permit, the applicant benefits from the permitting process because it enables OSM to justify and issue the necessary license to mine.

And finally, the applicant benefits from the permit application review and decision process by learning from OSM whether the proposed operation complies with SMCRA and the applicable regulatory program, or what changes are necessary to bring it into compliance. Even where a permit is denied, the applicant benefits from this process through the time and money spent by OSM in reviewing the application and noting any deficiency in the proposed operation. This process also saves the applicant the expense of commencing and then shutting down operations that would not comply with SMCRA.

Thus, OSM concludes that the benefits received by an applicant through the permitting process provide value to the applicant that is at least commensurate with the fees imposed by this rule, and that these fees comply fully with all applicable laws and regulations.

**APPLICABILITY OF THE PERMIT FEES**

A few commenters said that SMCRA does not authorize a fee for Indian lands permits and does not clearly authorize a fee for Federal lands permits. One commenter said that on Federal lands, an applicant already is compensating the Federal Government through leasing bonuses and royalties. Another said that to mine Federal or Indian coal, an operator must pay a royalty and rental fee per acre. One commenter said that since section 710 of SMCRA requires that operations on Indian lands comply with certain SMCRA requirements (including section 507) and that the Secretary shall

incorporate such provisions in leases, permit fees should be charged only for those costs that exceed the lease payment. Another saw a distinction between the benefit of being allowed to mine Federal versus fee coal.

A permit fee for Indian lands is authorized by section 710(d) of SMCRA, which requires that operations on Indian lands comply with requirements imposed by certain sections of SMCRA, including the permit fee requirements of section 507(a). For Federal lands, section 523(a) of SMCRA provides that the Federal lands program shall at a minimum include all of the requirements of SMCRA. In addition, permit fees for Federal and Indian lands are authorized by section 9701 of the IOAA.

OSM has determined that as compared to the proposed rule, applying State program fees on Federal lands in States with approved programs is more in keeping with the intent of section 523(a) that in such States the Federal lands program include at a minimum the requirements of the approved State program. (In Federal program States the fees adopted here will apply on Federal lands.) Thus, in contrast to the proposed rule, OSM has retained the provision at 30 CFR 740.13(b)(1) which applies to Federal lands the fees required by the applicable regulatory program. Proposed rule Section 740.25 is not adopted.

As to royalty and rental fees paid to mine Federal or Indian coal, those fees are unrelated to the fees adopted herein. Royalty and rental fees are collected under other authorities and for purposes different from the permit fees of this rule. Thus, the payment of royalty or rental fees does not entitle an applicant to any reduction in the fees imposed by this rule.

Several commenters expressed concern that this OSM permit application fee system would be expanded to primacy States, and that as a result State grants would be phased out. Some commenters referred to a 1985 General Accounting Office (GAO) report, titled "The Department of Interior's Office of Surface Mining Should More Fully Recover or Eliminate Its Costs of Regulating Coal Mining." That report recommended that OSM and the States should recover costs to implement SMCRA through fees collected from operators, and that OSM should phase out grants to States for coal mining regulatory programs.

One commenter said that GAO did not understand the relationship between the States and OSM, which is a working partnership with a relatively stable understanding. Another said that continued Federal funding of primacy States was certainly implied in the course of congressional deliberations on SMCRA, and is clearly the expectation of the States. The commenter said that loss of grant revenues might force States to withdraw their programs.

Some commenters felt that OSM needed to clarify that the fee system only applied in States that did not have approved State programs. A few expressed concern that OSM would apply the "no less effective" test to State permit fees and would require that States adopt similar fees to make the State program no less effective than Federal standards. One said that if OSM adopted these rules, the States would likely follow suit.

Primacy States are not required to adopt a permit fee system similar to this rule, nor is OSM considering phasing out State grants to encourage States to do so. The fees established by this rule will apply in Federal program States and on Indian lands, where OSM is exercising its discretion as the regulatory authority under section 507(a) of the Act. Because section 507(a) provides discretion to the regulatory authority in establishing the amount of a permit fee and does not require a national minimum standard, OSM does not consider the fees charged for permit applications to have a bearing on the effectiveness of a State program, and will not apply to "no less effective" test of 30 CFR 730.5 and 732.15 to permit fee requirements. This rule is not intended to be a national rule applicable to States with primacy.

One State representative recommended that the rule should apply only in those States that have chosen not to implement a State program and those States where OSM has taken action under 30 CFR part 733, and not in a State with dual permitting on Federal lands by both the State and Federal governments. A representative of another State noted that its cooperative agreement allows for issuance of a Federal permit in cases where the State permit cannot cover all Federal concerns. The commenter said that since in such cases the vast amount of the work is done by the State, Federal fees should not be assessed. Another said that even in States with cooperative agreements, OSM now spends almost as much time reviewing a permit for Federal lands as does the State regulatory authority. Another commenter was concerned that the proposed fees might apply when OSM imposed a permit stipulation on a Federal lands permit issued by a State. This commenter said that if OSM did not intend to assess fees for permit stipulations, this should be clearly stated.

OSM agrees that the fees adopted herein should not apply on Federal lands in States with approved State programs. As stated in the discussion above regarding proposed Section 740.25, which has not been adopted, OSM has determined that a fee determined in accordance with the State regulatory program is more in keeping with the intent of SMCRA section 523(a).

In a State with an approved regulatory program and a cooperative agreement giving the State permitting authority over Federal lands, permit fees will be determined by and collected by the State. If there is no cooperative agreement or the cooperative agreement provides for dual permitting by OSM and the State regulatory authority, OSM will charge the applicant the State permit fee. For Federal lands in a Federal program State, the fees in Section 736.25 of this rule will apply to the entire permit area including any State, Federal and private lands. OSM will not assess fees where OSM merely imposes a stipulation on a permit issued by a State for a permit to mine coal on Federal lands.

Where OSM institutes action under 30 CFR part 733 and substitutes Federal enforcement for permitting activities in a State with an approved regulatory program, permit fees as established in that State program will be collected by OSM. Where a State withdraws its program or OSM withdraws approval of the program and OSM promulgates a Federal program, OSM will collect permit fees according to Section 736.25 of this rule, but will deduct an amount equal to fees the permit applicant already has paid to the State for the same permitting action.

One commenter thought that the rule should apply only to applications filed after the effective date of the rule because OSM's proposal would be unfair to applicants who did not plan for the additional costs. As explained previously, the final rule will apply to new permit applications and to stages of OSM review begun on or after the effective date of the rule. The proposed rule, which was published May 17, 1988, gave advance notice of OSM's intent in this regard. This final rule does not become effective until 30 days after publication, which should give an applicant sufficient time to plan for additional costs.

One commenter said that the proposed fees should not apply to a permit for office buildings or support facilities, since they do not involve as much review by OSM.

The fees adopted here reflect costs incurred by OSM in processing permit applications for facilities used in support of coal operations. A number of the permits issued in Tennessee during the period of data collection were for tipples that disturbed very few acres. Therefore, the basic $3600 fee reflects OSM costs to process a permit for very low acreage sites. Support facilities resulting from or incident to activities in connection with mining, require a permit and thus involve processing costs. (For further discussion of the regulation of support facilities under SMCRA see 53 47378-47382, November 22, 1988.)

**ECONOMIC EFFECTS**

Several commenters were concerned about the effect of the proposal on small businesses. One questioned whether the per acre fee provided adequate protection against the competitive advantage of larger companies; another questioned whether small coal companies would be able to afford permits. Some said that application fees for a small operator with a 100 acre permit would be $7000 to $8000, and that this would be a significant expense. Several commenters expressed concern that permit fees could have an adverse effect on the already depressed coal industry in Tennessee. Some said that operators in States adjacent to Tennessee compete for the same market but have lower permit fees, and that Tennessee operators would not be able to pass on the costs of the permit application fees. The commenters thought that the imposition of permit fees would place Tennessee operators at a competitive disadvantage. One said that while it might be inequitable that Tennessee operators do not now pay fees, this was not the operators' fault.

Other commenters said that coal operators on Federal and Indian lands, as well as those in Federal program States, would be affected by a user fee that they considered discriminatory, and that the proposed fees would place an unfair economic burden on affected mines. Some said that a perceived unfairness of the proposed permit fee system needed to be worked out with coal operators.

Some commenters said that an underlying concept of SMCRA was to equalize competition among States and that SMCRA should not create a competitive edge in one area due to substantive regulatory differences. One said that in some primary States, fees were much less than the proposed OSM fees, and that the proposed fees might thus violate an

applicant's right to be treated equally under Federal law. One commenter raised the issue of the impact on competition from other countries and said additional costs could not be passed on in the export market.

In response to the identified concerns, OSM compared the costs of its proposed fees to those charged in other States and found that permit fees vary greatly from State to State, but that the basic fees proposed by OSM fell within the range of fees charged. However, the open-ended proposal to charge $250 for each additional administrative completeness review and $690 for each technical deficiency letter could have caused some permit applicants to pay such high fees, comparatively, that some competitive disadvantage may have been felt and some small operators may have been overly burdened by the fees. OSM believes that deletion of these fees from the permit fee system has resulted in fairer and more predictable permit fees that will not be overly burdensome or place some operators at a disadvantage.

For example, the fees adopted here would result in a permit fee of $4950 for a 100 acre mine in Tennessee. In comparison, under some representative eastern State programs, the permit fee for a 100 acre mine in Ohio would be $75 per acre, or $7500; in Alabama, $2500 plus $25 per acre, or $5000; in West Virginia, $1000; in Kentucky, $375 plus $75 per acre, or $7875; and in Virginia, $12 per acre or $1200.

Looking at a larger western (Federal or Indian lands) mine, the OSM fees for a 10,000 acre mine would be $48,100. Under some representative western State programs, in Montana the fee would be $100; in New Mexico, $1000 plus $15 per acre or $151,000; in Utah the fee would be $5; in Wyoming, where permit fees are $100 per mine and $10 per acre with a ceiling of $20,000, the fee would be $20,000; and in Texas, $5000. These State fees do not reflect various severance taxes that some States charge which range up to 25% of the coal price.

In addressing competition aspects of the coal industry section 101(g) of SMCRA declares that:

“surface mining and reclamation standards are essential in order to insure that competition in interstate commerce among sellers of coal produced in different States will not be used to undermine the ability of the several States to improve and maintain adequate standards on coal mining operations without their borders.”

The permit fee system adopted here does not contradict Congress' declaration. The fees will not affect nationwide reclamation standards that insure that States will not be undermined in their ability to maintain adequate standards. OSM has determined that the impact of the Federal fee on various sized operations and in the various States does not appreciably affect the competitive balance between the States and between U.S. and export/import coal. In its Determination of Effects of Rules, (Administrative Record #7) OSM determined that the proposed fee would not be a significant cost to operators and would be a minimal cost relative to an operator's overall production costs and revenues. The Determination also concluded that the proposed rule would not adversely affect the ability of U.S. enterprises to compete in domestic or export markets.

Concerning the comment on equal treatment under Federal law, all applicants for a Federal permit are treated equally with other similarly situated applicants under this rule.

During the public comment period, OSM held meetings with representatives of the coal industry to discuss the aspects of the proposed permit fee system that some considered unfair. One meeting was held on August 3, 1988, in Knoxville, Tennessee, and another on August 19, 1988, in Denver, Colorado. In addition to concerns voiced at these meetings, OSM considered the written comments received on the initial and later proposed rules in comment letters and at the OSM and congressional hearings.

The final rule reflects changes to the proposed rules adopted in response to concerns expressed by industry and State representatives. The permit fees adopted here do not contain the proposed open-ended fees for additional administrative completeness reviews or technical deficiency letters, nor have the hourly fees proposed for permit revisions and renewals and other permitting actions been adopted. Acreage fees have been adjusted to provide a sliding scale in recognition of the large size of some mines where OSM's costs to process permits have not been commensurately large, and acreage fees will not be collected for areas that will not be disturbed.

**USE OF TENNESSEE DATA FOR NATIONWIDE PERMIT FEES**

Several commenters said that the proposed fee structure was not appropriate for all Federal permits because it was based on limited data from Tennessee. One said that there should be separate fee structures for Washington, Tennessee and Indian lands, reflecting local needs and conditions.

Several commenters said that the proposed rule was based on an analysis that was not representative of western coal mining and that western operations differed from those in the East because of their size, mining methods, terrain and alluvial valley floor requirements. One commenter said that alluvial valley floor analyses for surface and groundwater hydrology issues were not done in Tennessee, so a system of fees based on Tennessee data was not representative of costs in the West where these water complexities existed.

Another commenter said that the largest mine covered by the Tennessee data was 577 acres, and that in the West this would be one of the smallest mines. The commenter said that a permit application for a 64,000 acre mine currently undergoing OSM review would be assessed a fee of $880,000 under the proposed rule. This commenter and others said that OSM should suspend this rulemaking until OSM undertakes an analysis of the impacts of the proposed fees on western mines.

One commenter said that separate fees should be used for the East and West, and suggested a semiarid/arid split or division of east and west of the 100th meridian. Another commenter suggested separate fee structures for surface and underground mines.

In developing the proposed fee system OSM used Tennessee data mainly because it best reflects OSM costs to process permits. OSM sought to avoid the actual cost reimbursement method of collecting permit fees, which was proposed on February 22, 1985 *(50 FR 7522).* Since very few permanent program permits have been issued by OSM in other Federal program States or on Indian lands, OSM has little data for those mines on which to base a fixed fee. In the face of this current lack of data, the only other alternative immediately available is an actual cost reimbursement fee as proposed in February 1985. Although OSM has not completely foreclosed the possibility of adopting such a proposal at some future time, the fixed fees in this final rule are currently the preferable alternative until better data become available.

OSM notes that the differences between eastern and western mines mentioned by the commenters concerning hydrology and alluvial valley floors would tend to increase the complexity of the western permit application reviews and therefore increase OSM's processing costs; and that other factors may tend to decrease processing costs per acre as acreage increased. OSM has made adjustments in this final rule from the proposed to recognize east/west differences. In the final rule OSM has used a sliding scale of acreage fees to account for the larger size of western mines. Also, acreage fees will be assessed only for permit areas of planned disturbances. This is discussed further below under the section heading "Per-acre Fees and Full Cost Recovery." Based on cost data for the western mines for which OSM has issued permits, permit fees under this final rule will not exceed the costs of processing the permit applications for western mines.

In structuring the proposed and final rules, OSM considered separate fees for underground and surface mine applications but found that variations in costs of processing these types of mining applications are adequately reflected in acreage fees.

Some commenters questioned the efficiency of OSM's permit review activities and the experience of its staff. Several said that OSM should look at costs incurred by other more efficient State or Federal agencies. One commented that the Knoxville office takes too long to review permits and issues too many technical deficiency letters. One commenter suggested that OSM study the Bureau of Land Management right-of-way fees.

OSM concedes that its reviewers set high standards for the quality of permit application reviews and that this may tend to lengthen the processing time. OSM does not agree that this results in inefficient reviews. OSM also notes that there often are disagreements between the agency and permit applicants concerning technical issues, and that different technical experts reasonably can disagree on certain issues. OSM has considered Bureau of Land Management fees as well as fees charged by other Federal agencies but has determined that the fee system in this final rule is more appropriate for OSM purposes.

One commenter said that OSM's only source of nationwide data, a February 6, 1987 OSM memorandum (Administrative Record #9), showed that the highest cost for review of a western surface mining permit application was $59,376. The commenter said the proposed fees would be much higher. The commenter said that the median cost for permit review according to the memorandum was $8,000, and that OSM's proposed fees should be adjusted to result in a ceiling closer to that amount.

OSM does not agree that the median cost of permit application review should represent the upper limit on permit fees. The median cost represents the middle value on a distribution of values. This rule includes an acreage fee that results in a permit fee that reflects the higher permit processing costs accrued for large mines and the lower costs accrued for small mines. Use of the median value as an upper limit on fees would not be advisable under this fee system, because the system is designed to reflect the upper limits of OSM processing costs, as well as the lower costs.

More current data from western mines indicate that OSM's costs have far exceeded the $59,376 cited by the commenter. For example, OSM costs to review the Black Mesa/Kayenta mine in Arizona have exceeded $195,000, not including NEPA costs, and permit review is not yet complete. OSM believes that the permit fees adopted today are more realistic than the alternatives suggested by the commenter, in reflecting OSM review costs.

**PRE-COLLECTION AND REFUNDABILITY OF FEES**

Several commenters expressed concern about the proposal to require prepayment of fees before each stage of permit application review. One commenter said that having to pay separate fees for each stage of review would increase bookkeeping costs. Another commenter said that if a technical deficiency letter were sent and the permit review process delayed until the fee was paid, this would lengthen the review process. Some commenters said that requiring prepayment for the decision document would preclude processing of that document until late in the permit review process. One said that since preparation of the decision document now generally occurs concurrently with permit review, the proposal would lengthen the process of obtaining a permit.

Another commenter said that OSM should consider a permit fee system similar to Indiana's, where the acreage fee is not paid until satisfactory completion of the technical review. One commenter suggested that fees be collected after permit application review is complete. Two commenters suggested that OSM should consider allowing an applicant to pay fees in five annual payments or incrementally as the permit area was bonded. Three commenters objected to the proposal that all fees would be non-refundable even if the permit were denied.

The proposed rule provided that the fee for each stage of permit application review must be paid before OSM commenced that stage. The final rule gives the applicant the option of paying all fees upon submission of the application ($3,600 plus acreage fees), so that there will be no delays caused by the time lag between OSM's notification of fees due and receipt of payment. An applicant concerned about bookkeeping costs can keep those costs down by prepaying the entire fee. However, an applicant still has the option of making partial payments before each stage of review, as in the proposed rule.

As proposed, the final rule does not allow payment of the permit application fees over the term of the permit or after review is complete. The fees should not be prohibitive even for small operators, and the administration of a deferred payment system would be costly to OSM and could result in higher fees to compensate for the added costs. The final rule allows OSM to refund some fees to the applicant under certain conditions as discussed under "Section 736.25(b) Refund of Fees" above.

The proposed rule provided that if a technical deficiency letter were sent, technical review of the application would cease until an additional fee of $690 was paid and the applicant responded to the issues raised in the letter. The final rule does not assess additional fees for technical deficiency letters and does not require that the technical review cease while OSM awaits a reply on technical deficiencies. To the extent possible, technical review of the application will continue while OSM is waiting for the requested information.

One commenter responded to OSM's request for comments on the possibility of pre-collecting hourly fees. This commenter was against pre-collection because there were not enough data to accurately estimate the number of hours

that might be necessary for OSM review, and delays could result if the estimated hours were exceeded. The commenter also said that OSM should pay interest on any excess money that would be refunded if hours were over-estimated.

The issue of pre-paying hourly fees is no longer relevant since hourly fees are not adopted in this final rule.

**OPEN-ENDED PERMIT FEES**

Several commenters said that the proposed fee structure contained too much uncertainty for the applicant and no incentive for efficiency by OSM. They objected to the open-ended nature of the proposal to charge fees for additional administrative completeness reviews and technical deficiency letters and the proposal to charge hourly fees for certain permitting actions. Some commenters said that they would be unable to determine the amount of fees they would be required to pay until the end of the review process. The commenters said that an operator could not reasonably estimate fees prior to submitting an application, and therefore could not assess the economic feasibility of the proposed operation, or control costs. One commenter said that there was no assurance of reasonableness in the proposed fee amounts, since the proposal included no provision for monitoring costs and no ceiling on the fees that might be assessed.

OSM considered comments received on the February 22, 1985, proposed rule in developing the May 17, 1988, proposed rule. Most of the industry commenters on the actual cost reimbursement provision of the initial proposed rule objected that under that system the permit fee would be an unknown expense, and therefore an applicant would not be able to project the cost of doing business. In the May 17, 1988, proposed rule, OSM said that the proposed fee system would enable an applicant to determine in advance the cost of a permit. After reviewing the comments on the May 1988 proposed rule, OSM concedes that advance determination of costs would not necessarily have been possible under the proposal, and the final rule contains no open-ended costs. The final rule includes only a fee system for new permits. It requires a one-time fee for an administrative completeness review, a basic technical review fee plus acreage fees, and a decision document fee. All fees are pre-determined and no fees will be charged for additional administrative completeness reviews or technical deficiency letters. Thus, the fee for a new permit application will be $3,600 plus acreage fees. There are no hourly fees in the rule.

**TECHNICAL DEFICIENCY LETTER FEES**

Many commenters objected to the proposal to charge an additional fee for each letter sent to notify an applicant of technical deficiencies in a permit application. Several commenters said that technical deficiency letters were often subjective and reflected the bias of the reviewer. Other commenters said that allowing OSM to charge for technical deficiency letters gave the reviewer no incentive for efficient review. One said that technical deficiencies often could be better resolved by a phone call or by a more careful review of the information in the permit application, and that the proposed system would not encourage this type of solution. One commenter said that even charging for only a limited number of letters with a limit on fees would not be fair because the amount of scrutiny a permit application receives would differ from reviewer to reviewer.

Several commenters said that $690 was too high a fee for a technical deficiency letter because some of these letters pointed out only minor deficiencies.

One commenters said that operators were submitting much more accurate permit applications now than a few years ago and that grossly deficient permits were no longer a problem. Another said that an applicant would not intentionally submit a deficient application and that the applicant was interested in obtaining a permit as soon as possible.

Some commenters objected to the proposal that if a technical deficiency letter were sent, the review of the application would stop until the technical deficiency fee was paid, thus lengthening the review process. One said that sending a deficiency letter for each technical area would speed up the process but would be very expensive if $690 were charged for each letter. One suggested an alternative whereby the technical review of only that portion of the application for which information was requested would stop. The commenter said that if this alternative were not adopted, OSM should require a one-time only payment at the time the applicant submitted the fee for the decision document. This commenter also stated that OSM should clarify whether an operator could obtain a refund of the technical deficiency letter fee if he prevailed on appeal.

The numerous comments on this aspect of the proposed rule persuaded OSM that technical deficiency fees should not be adopted at this time and that further study of such fees will be necessary.

The rule does not require that all technical deficiencies be identified in a single letter or that technical review cease until a response is received to any technical deficiency letter sent. Technical review of other parts of an application will continue, if possible, while OSM is waiting for the information requested in a technical deficiency letter. These changes eliminate the open-endedness of the proposed technical deficiency letter fee and the potential for unnecessary delay of permit application review while OSM awaits responses to technical deficiency letters.

One commenter said that OSM should develop a uniform permit application form. The commenter said that this would minimize the need for multiple administrative completeness reviews and technical adequacy reviews because the applicant would know exactly what was needed in the permit application. Otherwise, the commenter said, the permit fee would be arbitrary and capricious since there were no objective standards.

OSM disagrees that a uniform permit application form is required to let an applicant know exactly what is needed in a permit application. Permit application requirements are set out in detail in 30 CFR parts 773 through 785.

**PER-ACRE FEES AND FULL COST RECOVERY**

Many commenters objected to the proposed fee of $13.50 for each acre of land in the permit area. One said that fees based on acreage were inherently unfair because more agency time could be spent reviewing an application for a smaller mine than for a larger mine, and that the fees collected for reviewing an application for a large mine could exceed actual costs. Another commenter said that fixed acreage fees would discourage submittal of life-of-mine plans and that the cost to review an application was not necessarily proportional to the acreage.

One commenter said that while the proposed acreage fee was based on the assumption that a fixed amount of time or cost was expended for every acre, there would be economies of scale for larger western mines, where the geology and hydrology would remain somewhat uniform over large areas. Several commenters said that some acreage within the permit area was not disturbed during mining and therefore should not add to the cost of permit review.

Several commenters gave as an example a 64,000 acre mine on Indian lands in Arizona that would have cost $880,000 to permit under the proposed fee system. One commenter said that this amount would be more than a hundred times greater than the average fee in Tennessee, and that the permit processing costs to OSM would not be a hundred times greater. One commenter gave as another example a 5,436 acre mine that would have cost $78,000 to permit under the proposed fees. One said that these fees would violate SMCRA section 507(a) which requires that the fees shall not exceed OSM's actual or anticipated costs of reviewing, administering and enforcing a permit.

Several commenters suggested that a ceiling should be placed on acreage fees. One said that the per-acre fee should not apply to permit renewals or revisions. Another objected to the per-acre rate of $13.50 as excessive for western mines and suggested a cap of $1,000 for such fees or a sliding scale that decreased as acreage increased. One commenter asked OSM to identify the economic impacts of the large fees that could result from the proposal.

Two commenters offered alternative fee schedules for consideration. The first included one per-acre fee for an environmental description review and another for the mining and reclamation plan review. Under this alternative, fees would apply the first time proposed operations for an area were reviewed, whether this was part of the initial permit application, a subsequent renewal, or a major modification. The acreage fee for mining and reclamation plan review would cover all disturbed land, including but not limited to, mining areas, facilities, roads, stockpiles, ponds, etc. A sliding scale of $5 per acre for the first 1,000 acres, $4 for the next 1,000, $3 for the next 1,000, $2 for the next 1,000, and $1 for all remaining acres would be applied. The commenter thought that this sliding fee would be advantageous to the regulatory authority because it would encourage the applicant to describe as much of the life-of-mine area as possible in the first permit application, while the rule proposed by OSM did not encourage this because of the flat per-acre fee. The commenter said that this alternative would also provide the applicant with a known, quantifiable cost.

The second commenter's alternative fee schedule would have placed a 300 acre cap on the acreage fee, so that the maximum fee would have been $7,650 ($3,600 plus $13.50 X 300). The commenter stated that if this modification were not accepted, OSM should consider distinct acreage fees for coal extraction and non-coal extraction areas. The

commenter suggested that OSM collect four percent of the per-acre fee for non-coal extraction areas ($.50), similar to the Illinois practice.

OSM agrees that these commenters have valid concerns over the large fees that might result in some cases from a fee of $13.50 for every acre of land in the permit area. OSM also agrees that some economies of scale may exist in the review of permit applications for very large mines. However, the large size of some mines also increases the complexity of technical reviews. In the final rule, OSM has adopted a sliding scale acreage fee that will apply only to proposed disturbed areas within the permit area, that is, areas that will be disturbed by the activities proposed in the permit application. The acreage fee will be $13.50 per acre for the first 1,000 acres, $6.00 per acre for the next 1,000, $4.00 per acre for the next 1,000 and $3.00 per acre for any remaining acres or fraction thereof. Per-acre fees will not apply to previously disturbed areas that will not be redisturbed under the permit. No fees are adopted for permit renewals or revisions, although OSM may repropose fees for these actions at a later date.

OSM compared the acreage fees that would result under this rule to its permit processing costs for four western mines, and determined that these fees would not exceed OSM processing costs. For these four western mines based on actual cost data, the costs incurred were (rounded to the nearest $100): $42,500 for the Centralia mine disturbing 8,131 acres; $54,300 for the John Henry mine disturbing 363 acres; $34,500 for the LaPlata mine disturbing 107 acres; and $106,800 for the McKinley mine disturbing 11,368 acres. Under this rule the fees for those permit processing actions would have been: $42,500 for the Centralia mine; $8,500 for the John Henry mine; $5,045 for the LaPlata mine; and, $54,204 for the McKinley mine.

OSM notes that the 64,000 acre Indian lands mine cited by several commenters includes vast acreage that will not be disturbed by mining activities and therefore would not be assessed acreage fees under this final rule. OSM estimates that if these permit fees were applied to the mine cited, the fee would be $75,100, which is below OSM costs incurred so far (approximately $195,000 excluding NEPA costs) to process the permit for that mine.

OSM appreciates the submission of the alternative fee systems for its consideration. OSM believes that the first system which would divide the fee between review of the environmental description and the mining and reclamation plan may be administratively burdensome. However, OSM agrees that the commenter's suggestion of a sliding acreage fee has merit and has included a similar system in the final rule.

The second system, with a 300 acre cap on acreage fees, has merit in its simplicity but would be unfairly weighted toward applicants proposing to mine areas of more than 300 acres. This commenter's alternate suggestion of a lower fee for non-coal removal areas is adopted with modification. Under this rule, acreage fees will be assessed for areas of planned disturbance only, rather than making a distinction between areas where coal is removed or is not. This approach was adopted because the disturbance of non-coal-removal areas adds to the cost of reviewing a permit application for the impacts of these disturbances.

Several commenters questioned OSM's proposal to seek full cost recovery. Some commenters said that SMCRA does not require full cost recovery and that the benefit to the public should be considered.

The final rule does not provide for full cost recovery. While section 507(a) of SMCRA authorizes OSM to recover its costs to review, administer and enforce the permit the fees in this rule will recover the greater part, but not all, of OSM costs to process a permit application and issue the permit.

**DECISION DOCUMENT FEES**

One commenter said that the proposed fee of $2000 for preparing the decision document was too high since most of the required findings would have been made during the technical review. Two commenters were concerned about prepaying before each stage of permit application review, particularly for the decision document. They said that this requirement would preclude OSM from processing the decision document until late in the permit review process. The commenters said that preparation of the decision document generally occurred concurrently with the permit review process, and that a requirement for payment of a fee before preparation of the document would lengthen the process of obtaining a permit. The commenters said that, since most of the material for the decision document was taken from the permit application, the fee was too high for the effort.

The fee schedule in this rule is based on an analysis of data collected through OSM's cost accounting system for permits issued in Tennessee. This analysis showed that the cost of preparing the decision document is approximately $2000.

Regarding preparation of the decision document concurrently with the technical review, preparation of the decision document begins after a determination of technical adequacy is made. This rule will not greatly affect the timing or manner of OSM's preparation of decision documents.

**HOURLY FEES**

The proposed rule included application fees for permit renewals and revisions, the transfer, assignment or sale of rights under an existing permit, and coal exploration permits, at an hourly rate of $24.00 for each hour spent by OSM reviewers in processing the applications. Hourly rates were proposed for these actions due to the great variation in their processing costs and/or insufficient data to validate a fixed fee.

Most commenters objected to the proposed hourly fees. Some said that hourly fees would encourage inefficiency, and that their effect would be to diminish channels of communication for effective interchange of information. One commenter said that hourly fees could create conflicts of interest and a desire on OSM's part to maximize revenues. Some said that since the proposed hourly fees were open-ended, an applicant could not budget for them and would have neither control over nor prior knowledge of what costs might be incurred in the review process.

One commenter objected to the fact that the proposed hourly fees included overhead costs which could vary in different offices. Another commenter thought that the rule should be revised to make it clear that the hourly rate did not apply to new permit applications. Several commenters said that the hourly rate should have a ceiling when applied to renewals, revisions or transfers.

Several commenters raised concerns about the accounting system to be used by OSM to document the hours spent in processing permitting actions. One said that the applicant would be billed for a certain number of hours, but would have no way to question or audit the bill. Another questioned whether OSM had an adequate accounting system in place and whether OSM was prepared to provide full and complete documentation of its charges. Several commenters also wanted to know who had the burden of proof to justify or refute charges, and whether there would be an appeal process.

Several commenters said that hourly fees for revisions would discourage operators from seeking revisions that would cost them money. They said that operators would be reluctant to apply for revisions because of the unknown expense, since the number of hours for review could not be known in advance. The commenters said that this would impede information flow between operators and OSM. The commenters said that some revisions improved efficiency, recovery or reclamation success and kept OSM informed of changes in the mining plan, and that OSM should not discourage these revisions by charging fees for them.

Some commenters said that review of permit revisions could be very time-consuming and therefore very costly to operators under the proposed rule. One said that a current revision his company was requesting had already taken ten months for OSM to review, and that fees for this revision would have amounted to $30,000 under the proposed rule. One commenter said most revisions were minor and should not be subject to a fee. One said that even good permits were revised frequently. Another said that there should be a flat fee for revisions. One said that revision fees could exceed the original permit fees.

Some commenters said that fees should apply only for significant permit revisions and not for minor revisions. One commenter said that operators should not be required to pay for revisions caused by regulatory uncertainty. Two commenters said that there should be no charge for permit renewals or revisions unless acreage was added to an existing permit. One added that for revisions, the fee should consist of only the acreage fee times the number of additional acres, plus the administrative completeness review fee.

Another commenter said that an hourly fee applied to permit renewals, revisions, transfers and assignments with controversial hydrology issues would be very costly. Another commenter said that the transfer, assignment and sale of permits were essentially administrative functions, and that instead of hourly fees, OSM should impose only an administrative completeness review fee.

One commenter objected to additional fees for the successive renewal of a permit for previously reviewed areas. Another commenter objected to the proposed hourly charge for permit renewals because under SMCRA each permit carried with it a right of successive renewal. This commenter said that OSM's rationale for not charging fees for mid-term permit review also should apply to permit renewal.

One commenter said that SMCRA did not authorize a fee for coal exploration permits and recommended that if OSM imposed such a fee it should be fixed, not hourly. Another commenter said that under the Tennessee program, coal exploration notices were not reviewed but were for information only.

The final rule does not include hourly fees or any fees for permit renewals or revisions, for the transfer, assignment or sale of rights under an existing permit, or for coal exploration permits. OSM is persuaded by these comments that further study of potential fees for these actions is necessary and will conduct such a study over the coming year. OSM plans to repropose fees for these actions following that study where the study results indicate such fees are justified and collection is feasible.

**PROPOSED REDUCED FEE FOR SMALL OPERATORS**

On February 6, 1990, OSM reopened the comment period on the proposed Federal permit fees rulemaking for the narrow purpose of soliciting comment on a proposed reduced new permit fee for small operators *(55 FR 3982)*. The proposal would have allowed any applicant for a Federally-processed new permit to pay a reduced fee for that permit, if the applicant could demonstrate eligibility as a small operator under 30 CFR 795.6(a) Small Operator Assistance Program eligibility requirements. The reduced fee would have totaled $1000 per new permit.

The proposed reduced fee for small operators is not adopted in this final rule. OSM has determined that the final rule provides a fair and equitable fee system that reflects respective sizes of operations in the acreage fees, and that the fees as contained in this final rule should not be burdensome for small operators.

Seven parties commented on the proposed reduced small operator fee.

Two commenters expressed support for a small operator fee. One said that the tonnage production limit for small operators should be raised to 500,000 tons per year, rather than 100,000 tons per year. The other supported a reduced fee because of the cost savings it would afford to small operators and because operators could better plan financial investments with a fixed fee. The commenter encouraged the fixed fee approach for all Federal fees.

OSM is not adopting the reduced small operator fee and therefore did not consider changing the tonnage limits for the purpose of small operator permit fees. Regarding cost savings and the ability to plan financial investments, OSM believes the final permit fee schedule represents a fee that small operators can afford and that will enable better planning of financial investments because it is a known fixed fee. The total fee will be $3600 plus acreage fees. For a small operator disturbing fifty acres the fee would be $4275. There are no extra charges for deficiencies.

One commenter felt that the proposal to recuperate fees from operators who had qualified as small operators but whose production subsequently exceeded the 100,000 ton limit should not be adopted. The commenter thought this provision would act as a deterrent to growth. Since the reduced fee for small operators is not adopted, this comment is moot.

Two commenters said that OSM had not justified the need for a separate fee for small operators. They questioned whether operators who could not pay permit fees would be able to pay reclamation costs. The commenters said a small operator fee would introduce in unfair advantage for small operators who already have assistance through the Small Operator Assistance Program. They said that OSM should not continue to grant incentives to one group at the expense of another. These commenters said that the proposal contradicts the stated purpose of the original (May 1988) rulemaking to offset permitting costs. These commenters asked who would pay the additional costs to track operator production to determine whether an operator loses small operator eligibility.

OSM believes that it has the authority to include a reduced fee for small operators in its permit processing fee system. The legislative history indicates that small operators were a concern in establishing the requirement for fees to accompany

a permit application. However, since the fees adopted today do reflect relative sizes of mining operations in the acreage fees, and since the fees should not be overly burdensome even for small operators, no reduced fee for small operators has been adopted.

The Ohio Department of Natural Resources (DNR) commented that under Ohio's permit fee of $75 per acre, a typical fifty-acre small operator would pay $3750 for a permit. The Ohio DNR said that a small operator fee of $1000 would result in a significant loss of revenues and that its current fee structure is reasonable and equitable. The Utah DNR also objected to the proposed small operator fee saying that a reduced small operator fee would provide an incentive for piecemeal permitting. The Utah DNR said that a lump sum fee assumes the same permit review effort regardless of location or type of mine.

The permit fee schedule adopted here will not apply in States with approved programs such as Ohio and Utah. States will not be required to adopt similar schedules. OSM does not necessarily agree with the Utah DNR's assessment that a reduced small operator fee would encourage piecemeal permitting since the costs of completing a permit application tend to be much higher than the costs to obtain permit processing, and economies of scale can be realized by completing an application for a larger mine rather than several small ones. In response to Utah's comment that a uniform small operator fee assumes the same permit review effort for all small mines: a uniform reduced fee for small operators was not intended to be reflective of costs incurred, but rather would have been a cost savings consideration granted to small operators. However, OSM has declined to include a reduced small operator fee in its final fee schedule.

One commenter said that OSM had not identified in the rulemaking the criteria for qualifying as a small operator. The commenter assumed operators producing 100,000 tons of coal per year would qualify but said that this was not stated. This commenter said it should not be a regional or State-by-State decision on who should qualify. OSM identified the criteria at 30 CFR 795.6(a) as the criteria to be applied in determining who would qualify for a reduced small operator permit fee; however, since the proposed reduced small operator fee is not adopted both points stated by the commenter become moot.

One commenter suggested an alternative small operator fee that would collect $1000 from operators producing up to 100,000 tons per year, $1000 plus $7.25 per acre for operators producing 100,001 to 300,000 tons, and $1000 plus $13.50 per acre to operators producing 300,001 to 500,000 tons per year.

OSM appreciates the commenter's suggestion but is not adopting a reduced fee for small operators. The final fee schedule adopted here provides a fixed fee that reflects relative sizes of operators and OSM costs to process a new permit.

A few comments were received that pertained to OSM's proposal to charge permit fees, as a whole. These comments are not addressed because the comment period that extended from February 7 through March 8, 1990, was opened only to comments pertaining specifically to a proposed reduced fee for small operators.

## III. PROCEDURAL MATTERS

Effect in Federal Program States and on Indian Lands

Section 736.25 of this rule applies in those States with Federal programs. These are California, Georgia, Idaho, Massachusetts, Michigan, North Carolina, Oregon, Rhode Island, South Dakota, Tennessee and Washington. The Federal programs for these States appear at 30 CFR parts 905, 910, 912, 921, 922, 933, 937, 939, 941, 942 and 947, respectively. Sections 750.12 and 750.25 apply on Indian lands.

Federal Paperwork Reduction Act

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

Executive Order 12291 and Regulatory Flexibility Act

The DOI has determined that this is not a major rule under the criteria of Executive Order 12291 (February 17, 1981) and certifies that it will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act, *5 U.S.C. 601* et seq.

Of the nearly 7,000 active mining operations in the United States, the majority (over 95%) are governed by State programs, and not affected by the rule. Most of the operations in the minority potentially affected by the rule already have surface coal mining permits. Given the anticipated number of applications for permits for new operations processed annually by OSM, the anticipated fees are expected to fall below the criteria established by the Executive order. Against this background of limited activity, the Department has concluded that the rule will not have an annual effect on the economy of $100 million or more, or result in a substantial increase in costs or prices for the Federal government, consumers, individual industries, State or local government agencies, or geographic regions.

National Environmental Policy Act

OSM has prepared an environmental assessment (EA) of this final rule, and has made a finding (FONSI) that it will not significantly affect the quality of the human environment under section 102(2)(C) of the National Environmental Policy Act of 1969, *42 U.S.C. 4332*(2)(C). The EA and FONSI are on file in the OSM Administrative Record at 1100 L Street, NW., Room 5131, Washington, DC 20240.

Author

The principal author of this rule is Adele Merchant, Chief, Branch of Federal and Indian Programs, OSM, 1951 Constitution Avenue, NW., Washington, DC 20240; Telephone: (202) 208-2533 or FTS 268-2533.

**LIST OF SUBJECTS**

30 CFR Part 736

Intergovernmental relations, Surface mining, Underground mining.

30 CFR Part 750

Indians -- lands, Reporting and recordkeeping requirements, Surface mining.

Accordingly, 30 CFR parts 736 and 750 are amended as set forth below:

Dated: June 27, 1990.
David O'Neal, Assistant Secretary, Land and Minerals Management.

**PART 736 -- FEDERAL PROGRAM FOR A STATE**

1. The authority citation for part 736 is revised to read as follows:

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

2. Section 736.25 is added to read as follows:

**SECTION 736.25 - PERMIT FEES.**

(a) Applicability. An applicant for a new permit to conduct surface coal mining operations under a Federal program shall submit to OSM fees in the amounts set out in paragraph (d) of this section. For applications submitted prior to the effective date of this rule, fees shall apply only for stages of OSM review begun on or after the effective date. The applicant shall either submit all applicable fees with the permit application, or by stage of review as follows:

(1) Administrative completeness review. An applicant who pays by stage of review shall submit the administrative completeness review fee with the permit application.

(2) Technical review. Following receipt from OSM of a notice of administrative completeness, an applicant who pays by stage of review shall submit the technical review basic fee, plus the per-acre fee for each acre of disturbed area or fraction thereof to be included in the permit area.

(3) Permit issuance. Following receipt from OSM of a notice of technical adequacy, an applicant who pays by stage of review shall submit the decision document fee.

(b) Refund of fees.

(1) Upon receipt of a written request from an applicant, OSM will refund any permit fees paid under this section for a permit application when OSM denies the permit:

(i) On the basis of information concerning endangered or threatened species or their critical habitats or information. concerning cultural or historical resources, where such information was not available prior to submission of the permit application;

(ii) Because subsequent to submittal of a permit application, the lands contained in the permit application are declared unsuitable for mining under subchapter F of this chapter; or

(iii) Because subsequent to submittal of a permit application, the applicant is denied valid existing rights to mine under part 761 of this chapter where such rights are required for surface coal mining operations on the lands contained in the permit application.

(2) An applicant may file a written request for withdrawal of a permit application and a refund of fees in accordance with paragraph (b)(3) of this section.

(3) OSM will, upon receipt of written request for withdrawal of a permit application, cease processing of that application. If requested, OSM will refund fees paid by the applicant for the withdrawn application as follows:

(i) Any fees for a stage of OSM review not yet begun will be refunded;

(ii) Where technical review has begun, partial refund will be made of any technical review fee amounts remaining after deduction of actual OSM costs incurred for that technical review. Costs to process the withdrawal may also be deducted.

(4) No interest will be paid on refunded fees.

(c) Form of payment. All fees due under this section shall be submitted to OSM by the applicant in the form of a certified check, bank draft or money order, payable to Office of Surface Mining.

(d) Fee schedule for a new permit.

| | | |
|---|---|---|
| Administrative completeness review | $250.00 | |
| Technical review: | | |
| Basic fee | | 1350.00 |
| Fee per acre of disturbed area in permit area: | | |
| First 1,000 acres | | 13.50/acre |
| Second 1,000 acres | | 6.00/acre |
| Third 1,000 acres | | 4.00/acre |
| Additional acres | | 3.00/acre |
| Decision Document | | 2000.00 |

**PART 750 -- INDIAN LANDS PROGRAM**

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

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

4. Section 750.12 is amended by revising paragraph (a) to read as follows:

**SECTION 750.12 - PERMIT APPLICATIONS.**

(a) Each application for a permit to conduct surface coal mining operations on lands subject to this part shall be accompanied by fees in accordance with Section 750.25 of this part.

* * * * *

5. Section 750.25 is added to read as follows:

**SECTION 750.25 - PERMIT FEES.**

(a) Applicability. An applicant for a new permit to conduct surface coal mining operations on lands subject to this part shall submit to OSM fees in the amounts set out in paragraph (d) of this section. For applications submitted prior to the effective date of this rule, fees shall apply only for stages of OSM review begun on or after the effective date. The applicant shall either submit all applicable fees with the permit application, or by stage of review as follows:

(1) Administrative completeness review. An applicant who pays by stage of review shall submit the administrative completeness review fee with the permit application.

(2) Technical review. Following receipt from OSM of a notice of administrative completeness, an applicant who pays by stage of review shall submit the technical review basic fee, plus the per-acre fee for each acre of disturbed area or fraction thereof to be included in the permit area.

(3) Permit issuance. Following receipt from OSM of a notice of technical adequacy, an applicant who pays by stage of review shall submit the decision document fee.

(b) Refund of fees.

(1) Upon receipt of a written request from an applicant, OSM will refund any permit fees paid under this section for a permit application when OSM denies the permit:

(i) On the basis of information concerning endangered or threatened species or their critical habitats or information concerning cultural or historical resources, where such information was not available prior to submission of the permit application;

(ii) Because subsequent to submittal of a permit application, the lands contained in the permit application are declared unsuitable for mining under subchapter F of this chapter; or

(iii) Because subsequent to submittal of a permit application, the applicant is denied valid existing rights to mine under part 761 of this chapter where such rights are required for surface coal mining operations on the lands contained in the permit application.

(2) An applicant may file a written request for withdrawal of a permit application and a refund of fees in accordance with paragraph (b)(3) of this section.

(3) OSM will, upon receipt of written request for withdrawal of a permit application, cease processing of that application. If requested, OSM will refund fees paid by the applicant for the withdrawn application as follows:

(i) Any fees for a stage of OSM review not yet begun will be refunded;

(ii) Where technical review has begun, partial refund will be made of any technical review fee amounts remaining after deduction of actual costs incurred for that technical review. Costs to process the withdrawal may also be deducted.

(4) No interest will be paid on refunded fees.

(c) Form of payment. All fees due under this section shall be submitted to OSM by the applicant in the form of a certified check, bank draft or money order, payable to Office of Surface Mining.

(d) Fee schedule for a new permit.

| | | |
|---|---|---|
| Administrative completeness review | $250.00 | |
| Technical review: | | |
| Basic fee | | 1350.00 |
| Fee per acre of disturbed area in permit area: | | |
| First 1,000 acres | | 13.50/acre |
| Second 1,000 acres | | 6.00/acre |
| Third 1,000 acres | | 4.00/acre |
| Additional acres | | 3.00/acre |
| Decision document | | 2000.00 |

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