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DEPARTMENT OF THE INTERIOR

AGENCY: Office of Surface Mining Reclamation and Enforcement (OSM)

30 CFR Parts 701, 785, 816, 817, and 824

Surface Coal Mining and Reclamation Operations, Permanent Regulatory Program:
Postmining Land Uses and Variances From Approximate Original Contour

ACTION: Final rule.

SUMMARY: The Office of Surface Mining Reclamation and Enforcement (OSM) is adopting revised final rules on postmining land uses and on variances from the requirement to restore disturbed areas to their approximate original contour (AOC). These final rules simplify procedures for approval of alternative postmining land uses and broaden the situations under which variances may be obtained from the requirement to restore affected lands to their AOC. These changes will facilitate reclamation and allow operators to take advantage of unique land use development opportunities provided by surface coal mining and reclamation operations.

EFFECTIVE DATE: October 3, 1983.

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SUPPLEMENTARY INFORMATION:

- I. Background.
- II. Discussion of Rules Adopted and Responses to Comments.
- III. Procedural Matters.

I. BACKGROUND

On April 14, 1982 (*47 FR 16152*), OSM proposed to amend its permanent program rules regarding allowable postmining land uses and regarding the situations under which variances may be granted from the requirement to restore areas disturbed by surface mining and reclamation operations to AOC. After several extensions the comment period closed on September 10, 1982. These final rules finalize the April 14 proposal.

GENERAL PERFORMANCE STANDARDS

Section 515(b) of the Surface Mining Control and Reclamation Act of 1977, *30 U.S.C. 1201* et seq. (the Act), contains a number of minimum general performance standards applicable to all surface coal mining and reclamation operations. Section 515(b)(2) of the Act, pertaining to postmining land conditions and uses, requires an operator to -- "restore the land affected to a condition capable of supporting the uses which it was capable of supporting prior to any mining, or higher or better uses of which there is reasonable likelihood, so long as such use or uses do not present any actual or probable hazard to public health or safety or pose any actual or probable threat of water diminution or pollution, and the permit applicants' declared proposed land use following reclamation is not deemed to be impractical or unreasonable, inconsistent with applicable land use policies and plans, involves unreasonable delay in implementation, or is violative of Federal, State, or local law."

Section 515(b)(3) of the Act establishes the general AOC restoration standard and requires the operator to -- "backfill, compact (where advisable to insure stability or to prevent leaching of toxic materials), and grade in order to restore the approximate original contour of the land with all highwalls, spoil piles, and depressions eliminated (unless small depressions are needed in order to retain moisture to assist revegetation or as otherwise authorized pursuant to this Act) * * *." [Provisos follow for thin and thick overburden situations.]

Section 516(b)(10) of the Act generally imposes the standards of Section 515 of the Act with regard to the surface effects of underground mining.

The postmining land use rules implementing the performance standards of Section 515(b)(2) of the Act were published originally on March 13, 1979 (*44 FR 15312*) as 30 CFR 816.133 and 817.133.

The AOC restoration (backfilling and grading) rules implementing Section 515(b)(3) of the Act were published originally on March 13, 1979 (*44 FR 15312*) as 30 CFR 816.101-816.105 and 817.101-817.103, and revised final rules were published on May 24, 1983 (*48 FR 23356*) as 30 CFR 816.102, 816.104, 816.105, 816.107, 817.102, and 817.107.

MOUNTAINTOP REMOVAL

Section 515(c) of the Act permits an exception to the AOC restoration requirement for mountaintop removal operations which, after reclamation, would be capable of supporting specified postmining uses. In such operations, "where an entire coal seam or seams running through the upper fraction of a mountain, ridge, or hill" is removed, the operator is permitted to remove all the overburden and to create "a level plateau or a gently rolling contour with no highwalls remaining" instead of restoring AOC. Such land has to be capable of supporting certain specified postmining uses which include "an industrial, commercial, agricultural, residential, or public facility (including recreational facilities) use." The regulatory authority may grant a permit of this nature if a number of additional specific conditions are also satisfied.

VARIANCES FROM AOC RESTORATION

Section 515(e) of the Act allows "a variance from the requirement to restore [lands] to approximate original contour * * * for surface mining of coal where the owner of the surface knowingly requests, in writing, as a part of the permit application that such a variance be granted so as to render the land, after reclamation, suitable for an industrial, commercial, residential, or public use (including recreational facilities)." Such variances are allowed "provided that the watershed control of the area is improved; and further provided that backfilling with spoil material * * * cover[s] completely the highwall which material will maintain stability following mining and reclamation."

Specific requirements for a variance under Section 515(e) of the Act are that --

(1) "After consultation with the appropriate land use planning agencies, if any, the potential use of the affected land is deemed to constitute an equal or better economic or public use;"

(2) The potential postmining use "is designed and certified by a qualified registered professional engineer in conformance with professional standards established to assure the stability, drainage, and configuration necessary for the intended use of the site;"

(3) "[A]fter approval of the appropriate state environmental agencies, the watershed of the affected land is deemed to be improved;" and

(4) "[O]nly such amount of spoil will be placed off the mine bench as is necessary to achieve the planned postmining land use, insure stability of the spoil retained on the bench," and all other requirements of the Act.

In *In re: Permanent Surface Mining Regulation Litigation*, Civil Action No. 79-1144 (D.D.C., February 26, 1980), pp. 69-70, U.S. District Court Judge Flannery ruled that the provisions of Section 515(e) of the Act apply only to steep slope mining. That is the position OSM took before the district court in that case. However, upon carefully examining the legislative history of Section 515(e), OSM has reconsidered its previous interpretation of that section and has concluded for the reasons described in detail under "Discussion of Rules Adopted and Responses to Comments" in this preamble that the variance from AOC allowed under Section 515(e) of the Act is not limited to mining on steep slopes.

The two provisions of the Act allowing for exception to the AOC restoration requirement, Sections 515 (c) and (e), were implemented in the March 13, 1979, rules by 30 CFR 785.14 and Part 824 for mountaintop removal mining operations and by 30 CFR 785.16 and 826.15 for steep slope mining operations.

II. DISCUSSION OF RULES ADOPTED AND RESPONSES TO COMMENTS

After evaluating the comments received, OSM has adopted the rules substantially as proposed for the reasons discussed in the Federal Register preamble to the proposal. Section 701.5 contains a definition of the new term "higher or better uses" and revisions to the definition of the term "land use." Section 785.16 contains revisions to the permit requirements for variances from AOC restoration requirements. Sections 816.133 and 817.133 contain revisions to the postmining land use performance standards for surface and underground mining activities. Because these two sections are substantially the same, they are discussed together in the preamble. Final Sections 816.133(d) and 817.133(d) adopt proposed Alternative A for AOC variances. The following is a discussion of the final rules and the comments received in response to proposed revisions to Parts 701, 785, 816, 817, and 826 of 30 CFR Chapter VII.

SECTION 701.5 - "LAND USE" DEFINITION

The definition of the term "land use" in the previous rule emphasized the use or management aspects of a land parcel, rather than the vegetation or cover of the land surface. In addition, 10 categories of use were defined. The discussion of the land use definition in the preamble to the previous rule (*44 FR 14933*) stated that "[i]n practice, land use categories will only be used to determine if the postmining use has changed from the premining use. A different or alternative use occurs when any change of use occurs." In the April 14, 1982, proposal, OSM proposed only a minor change in the definition that consisted of removing from the land use categories the repetitive language concerning support facilities that are integral with each use and including similar language in the first paragraph of the definition. The definition has been adopted as proposed.

In addition, the proposal contained a request for comments addressing whether the 10 categories are needed and if consolidation would further the purposes of the Act. Sixteen comments were received pertaining to the subject of land use categories and the specific postmining land uses required to qualify for a variance in Sections 515(c)(3) and 515(e)(2) of the Act. Several commenters recommended specific changes within land use categories or conveyed their support for consolidation of the existing categories.

Two commenters recommended that the categories be retained in detail to provide consistent explanation of each category of land use. This was thought to be necessary to avoid confusion and misunderstanding between the operator, landowner, and the regulatory authority. Another commenter recommended that the categories be consolidated into a general land use definition, thereby giving the regulatory authority proper discretion to make land use decisions.

Another commenter recommended that the categories be modified to clarify which land uses are suitable for a variance. Another commenter recommended deleting all of the land use categories and using only the proposed definition of the phrase "higher or better uses."

After consideration of these comments, OSM has decided to retain the 10 separate land use categories of the previous and proposed rules. These basic land use categories are needed to help identify proposed land use changes that will trigger the requirements of Section 816.133(c), which sets criteria under which regulatory authorities may approve alternative postmining land uses that are higher or better uses. Consolidation of these categories into a general land use definition would fail to provide a means to ensure that Section 816.133(c) will be applied uniformly and evenhandedly. It could also result in potential problems when applying the minimum revegetation success standards in Section 1816.116 which are keyed to specific postmining land uses.

The land use categories identified in the land use definition are more detailed than those identified in Sections 515(c)(3) and 515(e)(2) of the Act because the land use definition is relevant generally and is not limited to variance situations. In Section 515(c)(3) a variance may be granted for mountaintop removal where the planned postmining land use is industrial, commercial, agricultural, residential, or public facility (including recreational facilities). In Section 515(e)(2), an AOC variance is permissible where the planned postmining land use is industrial, commercial, residential, or public (including recreational facilities). The final land use categories adopted in Section 701.5 include cropland, pastureland or land occasionally cut for hay, grazingland, forestry, residential, industrial/commercial, recreation, fish and wildlife habitat, developed water resources, and undeveloped land or no current use or land management. Agricultural use is interpreted as including cropland, pastureland or land occasionally cut for hay, grazingland, and forestry.

"Public use" is another term used in the Act and in the rules for which there is no specific land use category. In this regard, two commenters recommended adding a definition of the term "public use." A specific public use definition is unnecessary in the rules and could be confusing because public use overlaps more than one of the existing land use categories. A use is a public use if it involves benefit, utility, or advantage to the public generally or any part of the public, as distinguished from benefitting an individual or a few specific individuals. This interpretation is consistent with the definition provided in "The Language of Cities: A Glossary of Terms," (Charles Abrams, 1971, Viking Press, New York, p. 251). States may add such a definition or other land use definitions if deemed necessary to a State's regulatory program.

Several comments pertaining to specific changes within categories and to editorial changes were also received. One commenter recommended that the definition specify only the use and not the management aspects of the land. Other commenters recommended emphasizing management and omitting the term "specific uses" in the introductory text of the definition. Still other commenters suggested that the definition of fish and wildlife habitat be revised to emphasize management.

OSM agrees that the management activities practiced on the land normally are an accurate reflection of the land's use. In general, as the intensity of the management increases, the land use becomes more well defined. However, in some instances, a specific use can be identified without active management. For this reason, OSM has not altered the definition of the term "fish and wildlife habitat" as suggested by the commenters.

Two commenters voiced agreement with OSM's view stated in the preamble language in the proposal that the categories are not hierarchical.

Another commenter identified a typographical error that has been corrected.

SECTION 701.5 - "HIGHER OR BETTER USES" DEFINITION

As described in the preamble to the proposed rule (*47 FR 16154*), the proposed definition of the term "higher or better uses" was intended to clarify the requirement in Sections 816.133(a) and 817.133(a) relating to restoration of disturbed areas to conditions capable of supporting (1) the premining uses or (2) higher or better uses. OSM received 12 comments on the proposed definition of "higher or better uses." The definition is adopted as proposed, with one change. Under the final rule, "higher or better uses" means those postmining land uses that have a higher economic value or nonmonetary benefit to the landowner or community than the premining land use.

Three commenters supported the definition as proposed and specifically the improvement made by the clarification in the preamble to the proposal of the inclusion of nonmonetary benefits. One of those commenters recommended that further clarification could be made by inserting the word "nonmonetary" in the definition. OSM has accepted this suggested change because it reduces the chance of confusion or misinterpretation of the word "other" in the proposed definition.

Another commenter supported the proposed definition, if used as a guide in evaluating postmining land use. Such usage is OSM's intention. Two commenters criticized the proposed definition and raised questions about specific terms used. One raised the question of who will determine economic value or benefit. It is the regulatory authorities who will determine increased value or benefit of local land use changes. Land use decisions are traditionally made by State and local authorities. OSM anticipates that the regulatory authorities, working with other State agencies and local governments, will develop specific postmining land use criteria that meet their specific geographic conditions.

The other commenter questioned the meaning of the proposed word "community." The word is used in a general manner to indicate postmining land use benefits accruing to a group rather than to an individual such as the landowner. OSM, in its definition of higher or better uses, has provided only the basic limits -- both monetary and nonmonetary benefits must be considered, and these benefits can accrue to either the landowner or the community. Further refinement of this definition, if needed, is left to the regulatory authorities.

Three commenters misinterpreted the use of the proposed definition of higher or better uses to be applicable also to proposed Sections 816.133(d)(4) and 817.133(d)(4), which contain the phrase "equal or better economic or public use".

The definition of higher or better uses applies only to that specific term as it is used in Sections 816.133 (a) and (c) and Sections 817.133 (a) and (c) of the final rules. These sections of the rules set criteria under Section 515(b)(2) of the Act for the return to conditions capable of supporting premining uses or higher or better postmining land uses. Sections 515 (c) and (e) of the Act, which are implemented by Sections 816.133(d) and 817.133(d) and Part 824 and which require the potential use to constitute an "equal or better economic or public use," apply only to a variance from AOC or to mountaintop removal.

Two commenters suggested that the proposed definition of higher or better uses be changed to allow economic and other benefits to be measured against the community and not to allow landowner benefits to be considered. The commenters based this recommendation on emphasis of the term "economic or public use" in Sections 515(c)(3)(A) and 515(e)(3)(A) of the Act. OSM has rejected the commenters' recommendation for two reasons. First, the criteria in Section 515 (c) and (e) of the Act are not applicable to situations where reclamation to an alternative postmining land use does not require a variance. Second, benefits to the landowner are clearly relevant in determining whether the proposed use of an area after mining is higher or better than before mining. In some situations, a regulatory authority may have to weigh the benefits to the landowner against benefits to the community in making that determination.

Although the phrase "equal or better economic or public use" is applicable only to an AOC variance or to mountaintop removal, in such situations the criteria of Sections 816.133 (a) and (c) or 817.133 (a) and (c) are also applicable. Thus, the applicability of the phrase "equal or better economic or public use" will often be tied to the phrase "higher or better uses."

SECTION 785.14 - MOUNTAINTOP REMOVAL MINING

Section 785.14 contains the permit requirements for mountaintop removal mining. OSM proposed (*47 FR 16152*) to revise the mountaintop removal permit requirements of Section 785.14(c)(1)(ii) in order to clarify that the performance standards applicable to mountaintop removal would include the general alternative postmining land use criteria of proposed Section 816.133(c), but not those of proposed Section 816.133(d).

One comment was received on this proposed change. The commenter recommended that the former language be restored because the reference to Section 816.133(c) is insufficient, since the method for determining premining use in Section 816.133(b) is equally applicable to mountaintop removal operations. OSM agrees with the commenter. A mountaintop removal operation must include reclamation to a condition capable of supporting a higher or better postmining land use in accordance with the requirements of Paragraphs (a), (b), and (c) of Section 816.133. However, because Section 816.133(d) pertains only to AOC variances, a requirement for mountaintop removal operations to meet all of the Section 816.133 performance standards is inappropriate. Thus, the final rule references Sections 816.133(a) -- (c).

In addition, the references to the backfilling and grading requirements of Sections 816.101-816.105 in previous Sections 785.14(c) and (c)(2) have been changed to agree with the final backfilling and grading rules (*48 FR 23356*, May 24, 1983).

SECTION 785.16 - PERMITS INCORPORATING VARIANCES FROM AOC

GENERAL. – Section 785.16 contains the requirements for permits that incorporate AOC variances for nonmountaintop removed mining and, together with Sections 816.133(d) and 817.133(d), is intended to implement Section 515(e) of the Act.

Under Section 515(e) of the Act, State regulatory authorities may, but are not required to, allow for AOC variances. However, if AOC variances are allowed by a State, they must conform to the requirements of Section 515(e) of the Act. Those State that wish to allow for these variances must include provisions which, at a minimum, meet the requirements of Section 785.16. The requirements of Section 785.16 are derived from the specific conditions in Section 515(e) of the Act.

Previous Section 785.16 set out the permit requirements for obtaining an AOC variance for steep slope mining. Final Section 785.16 is expanded to include mining on both steep slope and nonsteep slope terrain. This will be explained in more detail in the discussion of final Sections 816.133(d) and 817.133(d).

Several commenters expressed their support of the expansion of Section 785.16 to include nonsteep slope terrain. One commenter raised objection to this expansion. Although these comments were directed to Section 785.16, they were more applicable to Sections 816.133(d) and 817.133(d). Therefore, responses to them are included in the discussion of those two sections.

To eliminate redundancy, OSM has removed previous Sections 785.16(a) and (b), which specified the applicability and purpose of Section 785.16. The substance of these paragraphs continues to be contained in the remainder of the section, particularly final Section 785.16(a).

SECTION 785.16(a)

Final Section 785.16(a), which was proposed as Section 785.16(c), provides that the regulatory authority may issue a permit for nonmountaintop removal surface coal mining and reclamation operations which includes a variance from the requirements for restoration of the disturbed areas to their AOC under Sections 816.102, 816.104, 816.105, and 816.107 or 817.102 and 817.107. These references have been updated from proposed Section 785.16(a) to conform to the final backfilling and grading rules. The permit may contain an AOC variance only if the regulatory authority finds, in writing, that the applicant has demonstrated on the basis of a complete application that all of the requirements of the Section 785.16(a) are met. These requirements are discussed below.

In response to a commenter's suggested change to proposed Section 785.16(c), the phrase "that the applicant has demonstrated" has been inserted before the phrase "on the basis of a complete application." As a result, the phrase "the applicant has demonstrated that" in proposed Sections 785.16(c)(1) -- (c)(4) has been removed in final Sections 785.16(a)(1) -- (a)(4). This change simplifies the wording of the rules without changing the substance.

SECTION 785.16(a)(1)

Final Section 785.16(a)(1), which was proposed as Section 785.16(c)(1), requires that, after reclamation, the lands to be affected by the variance must be suitable for an industrial, commercial, residential or public land use (including recreational facilities). Final Section 785.16(a)(1) is derived from Section 515(e)(2) of the Act.

OSM received seven comments concerning the land use restrictions of proposed Sections 785.16(b)(2) and (c)(1) that are contained in final Section 785.16(a)(1). Seven commenters recommended the addition of agricultural land use to the list of acceptable uses under this variance. These commenters described the need for flat agricultural land in areas where surface mining reclamation could provide a bench suitable for agricultural uses. In addition, the commenters pointed out that the mountaintop removal variance does contain the provision to allow agricultural uses and this provision should also be extended to the AOC variance.

OSM has rejected these comments and has adopted in final Section 785.16(a)(1) the acceptable postmining land uses that were enumerated in the proposal, because Section 515(e)(2) of the Act is specific as to postmining uses allowed. The variance must facilitate the development of these specific land uses. It was not the intent of Congress to extend an AOC variance for reclamation to conditions suitable for agricultural uses. Other comments expressed a similar recommendation that OSM consider other land uses in place of, or in addition to, the ones listed in proposed Section 785.16(b)(2). One suggestion was to allow any land use defined under Section 701.5; another suggested omitting the specific uses and allowing "higher or better uses." OSM has also rejected these comments for the same reason stated above. The Act does not provide OSM authority to add or delete categories of uses.

SECTION 785.16(a)(2)

Final Section 785.16(a)(2), which combines proposed Section 785.16(c)(2) and (c)(5), requires a demonstration that the requirements of Sections 816.133 or 817.133 will be met. By cross-referencing Sections 816.133 and 817.133 in Section 785.16, two duplicative requirements of previous Section 785.16 have been eliminated: There is no need to repeat the general alternative postmining land use requirements of Sections 816.133(a)-(c) and 817.133(a)-(c) or the specific criteria for an AOC variance of Section 816.133(d) and 817.133(d).

One commenter suggested that previous Section 785.16(c)(2) be retained because it is mandated by Section 515(e)(3)(A) of the Act. This commenter also suggested retaining previous Section 785.16(c)(7) because this section "reflects the limited nature of the AOC configuration variance." OSM has rejected these suggestions because the specific requirements of those sections are included in final Sections 816.133(d)(4) and (d)(3), respectively. Under final Section 785.16(b)(1), all requirements of Section 816.133(d) or Section 817.133(d) will be a specific condition of a permit containing an AOC variance.

SECTION 785.16(a)(3)

Final Section 785.16(a)(3), which was proposed as Section 785.16(c)(3), requires a demonstration that the watershed of lands within the proposed permit and adjacent areas will be improved by the operations. It is derived from Section 515(e)(1) of the Act. In clarification of the proposed rule, the final rule specifies that the improvement may be determined either on the basis of the condition of the watershed before mining or its condition if AOC were to be restored. Final Sections 785.16(a)(3)(i)-(a)(3)(iii) contain the criteria for measuring such improvement. They were proposed in Section 785.16(c)(3) and were previously set forth in Section 785.16(c)(4).

Two commenters suggested that in proposed Section 785.16(c)(3) the term "permit area and adjacent areas" be changed to "affected area." These commenters asserted that Section 515(e)(3)(C) of the Act specifically requires the watershed of the "affected land" to be improved. OSM has rejected these comments and has adopted the phrase "permit and adjacent areas" in final Section 785.16(a)(3) because the terms "permit area" and "adjacent area" have been redefined (*48 FR 14814*, April 5, 1983) in a manner that is consistent with Section 515(e) of the Act. The adjacent area encompasses resources, such as a watershed, that are or may reasonably be expected to be impacted by the proposed mining operations. (*48 FR 14821*, April 5, 1983)

Several commenters provided suggestions on proposed Section 785.16(c)(3) dealing with watershed improvement. One commenter recommended that the watershed improvement should be compared with conditions equal to those which would exist if AOC were to be restored. The basis for this suggested change is that the regulatory authority's decision in granting a variance pertains to whether the final configuration of the land is to be returned to AOC upon the issuance of a permit, and not to whether mining will be allowed at all. Another commenter suggested that the provisions of this section be streamlined by omitting the specific means by which an applicant must demonstrate watershed improvement. Another commenter suggested that the operator be required to demonstrate that the permit and adjacent areas will be "equivalent to the natural premining conditions" and that proposed Section 785.16(c)(3)(i) be deleted. This commenter asserted that there should be no concern with granting a variance as long as the watershed control is not degraded but is maintained in its premining condition. Another commenter suggested that OSM provide examples of improved watershed control in the preamble to the final rule. Another commenter suggested substituting the words "the affected areas" for the words "lands within the proposed permit area and adjacent areas" in proposed Section 785.16(c)(3); substituting "no increase" for "a reduction" and "affected" for "permit" in proposed Section 785.16(c)(3)(i); and substituting "estimated postmining runoff" for "the total volume of flows" and "affected" for "permit," and omitting "during every season of the year" in proposed Section 785.16(c)(3)(ii).

OSM has considered these comments pertaining to the watershed improvement and has made only one change to the language of the proposed requirements in final Section 785.16(a)(3). This change allows comparison either to premining watershed conditions or to conditions if AOC were to be restored. The other suggestions are rejected. OSM, in establishing a basis for the comparison, considered three alternatives. First, allow watershed improvement to be based upon comparison with the premining conditions (as in the previous and proposed rules). Second, allow the improvement to be based upon comparison with conditions if AOC were to be restored (as suggested by a commenter). Third, allow a comparison with premining conditions that requires only equivalent watershed control (as suggested by a commenter).

The first two alternatives meet the requirements of the Act. The third alternative is contrary to the requirements of Section 515(e)(3)(C) of the Act, which allows a variance only where "the watershed of the affected land is deemed to be improved."

OSM is adopting a combination of the first and second alternatives. Given that the land will likely be mined whether or not the variance is allowed, it is logical to compare the probable postmining conditions to determine if there will be an improvement of watershed conditions. Comparing two hypothetical postmining conditions, which differ only in slope, is more logical than comparing the postmining condition to the premining condition which could differ in erodability,

permeability, vegetative cover, etc. Final Section 785.16(c)(3) will allow comparison with either premining conditions or the condition of the watershed if it were returned to AOC. In the Kentucky State program, OSM determined that language similar to this final rule was no less effective than the previous rule.

OSM has rejected the comments that suggested omission of the specific means of measuring improvement. The Act is clear that improvement must occur, and the two specific situations in which watersheds would be deemed improved are also founded in the requirements of the Act (*43 FR 41714*). The suggestion to alter the areal extent of the watershed considered is also rejected because it was not the congressional intent to examine improvement of the permit area alone. Where the term "watershed improvement" is used in the legislative history, the discussion is in the context of an areal unit larger than the permit area.

Three commenters suggested changes to proposed Section 785.16(c)(3)(iii). Two questioned the meaning of an "appropriate State environmental agency." The other suggested adding the words "if required."

OSM has rejected the comment suggesting the addition of "if required" because Section 515(e)(3)(C) of the Act requires "approval of the appropriate State environmental agencies." It is not possible on a national basis to specify precisely which environmental agencies must approve the planned improvement of the watershed. Within particular States, the regulatory authorities should have little difficulty in discerning the particular agencies with expertise and/or responsibility for the watershed.

SECTION 785.16(a)(4)

Final Section 785.16(a)(4), which was proposed as Section 785.16(c)(4) and was contained in previous Section 785.16(c)(5), sets the requirement that the surface owner of the lands within the permit area must knowingly request that a variance be granted. This paragraph is derived from Section 515(e)(2) of the Act. The surface owner's request must be separate from the general consent given under 30 CFR 778.16 or 782.15 for the operations to be conducted.

One commenter asserted that in proposed Section 785.16(c)(4), the requirement "that the owner of the surface of the lands within the permit area has knowingly requested, in writing . . . that a variance be granted" should also provide for written request from a surface managing agency for public lands.

OSM has considered this suggestion and has not made any change to the proposed requirement. The word "owner" in final Section 785.16(a)(4) means any owner, whether public or private. Thus, the requirement applies to a managing agency of public lands as well as to a private landowner.

SECTION 785.16(b)

Final Section 785.16(b), which was proposed as Section 785.16(d), requires that a permit containing an AOC variance must include the variance criteria of Section 816.133(d) or 817.133(d) as a specific permit condition and must be specifically marked as containing an AOC variance.

SECTION 785.16 (c) and (d)

Final Section 785.16(c), which was proposed as Section 785.16(e), provides that a permit incorporating an AOC variance must be reviewed by the regulatory authority at least every 30 months following the issuance of the permit to evaluate the progress and development of the surface coal mining and reclamation operations to establish that the operator is proceeding in accordance with the terms of the variance.

Proposed Section 785.16(e)(1)-(e)(3), which would have required that the permit review occur within the 6-month period preceding the third year from the date of issuance, before each permit renewal, and not later than the middle of each permit term, have been simplified by the single requirement in final Section 785.16(c) that review must occur at least every 30 months. This change is consistent with the suggestion of a commenter and will require a review by the midpoint of the permit term.

Final Section 785.16(d), which was proposed as Section 785.16(f), is a companion to final Section 785.16(c). It provides that the review required by Section 785.16(c) need not be held upon a demonstration that the operations have

been, and continue to be, conducted in compliance with the terms and conditions of the permit, the requirements of the Act, and applicable regulations.

The requirement for regulatory authority review is found in Section 515(e)(6) of the Act. This requirement states that "[a]ll exceptions granted under the provisions of this subsection shall be reviewed not more than three years from the date of issuance of the permit, unless the permittee affirmatively demonstrates that the proposed development is proceeding in accordance with the terms of the reclamation plan." Final Sections 785.16 (c) and (d) implement these requirements.

SECTION 785.16(e)

Final Section 785.16(e), which was proposed as Section 785.16(g), was previously contained in Section 785.16(g). It provides that the terms and conditions of a permit incorporating an AOC variance may be modified at any time if more stringent measures are necessary to ensure compliance with the Act and applicable rules.

SECTION 785.16(f)

Final Section 785.16(f), which was proposed as Section 785.16(h) and is unchanged from previous Section 785.16(h), implements the requirement under Section 515(e)(1) of the Act that AOC variances may be issued only if specific procedures are included in the applicable regulatory program. It provides that such variance may be granted by a regulatory authority if specific rules are promulgated to govern such actions. Any such rules must be consistent with Section 785.16 and any necessary additional, more stringent requirements.

SECTIONS 816.133 AND 817.133 - POSTMINING LAND USE

Sections 816.133 and 817.133 set forth criteria and procedures for determining premining use of the disturbed area and approving postmining land uses which are different from premining uses. In most respects, final Sections 816.133 and 817.133 have been adopted as proposed. The preamble to the proposed rules explains the reasons for a number of changes from the previous rules.

Each section is divided into four lettered paragraphs. Paragraph (a) sets forth the general requirement that the disturbed areas must be restored to conditions capable of supporting premining uses or higher or better uses. Paragraph (b) sets forth criteria for determining premining uses. Paragraph (c) sets forth the criteria for approval of alternative postmining uses, and Paragraph (d) sets forth criteria for AOC variances.

SECTIONS 816.133(a) and 817.133(a) - GENERAL PERFORMANCE STANDARDS

Proposed Sections 816.133(a) and 817.133(a) set forth the general requirement that the disturbed area must be restored to conditions capable of supporting the premining use or an alternative higher or better use. The principal change in the proposed rules was that the previous rules required that all "affected" areas be restored and the proposed rules required that all "disturbed" areas be restored. In addition, the preamble to the proposed section (*47 FR 16153*) clarified that operators are not required to develop or construct a higher or better use; rather, in accordance with Section 515(b)(2) of the Act, operators are required to return the disturbed area to a condition that is capable of supporting the uses that it was capable of supporting prior to mining or to a condition capable of supporting a higher or better use. Final Sections 816.133(a) and 817.133(a) are the same as proposed, except for removal of the proposed phrase "achievable under criteria and procedures of this section" in Paragraph (a)(2). That a higher or better use must be achievable under this section is understood from Sections 816.133(c) and 817.133(c).

OSM received 11 comments on the proposed change to Sections 816.133(a) and 817.133(a). Two commenters supported the proposed change because the language provides a clarification and better alinement of the rules with the Act. Another commenter supported the proposed substitution of the term "disturbed area" for "affected area" but raised a question about the language in the preamble stating that the operator is no longer responsible for developing or constructing a higher or better use. This commenter suggested that specific language be inserted in the rule to clarify this point.

The proposed wording is clear, and OSM has not made a change in the final rule. The language in the preamble to the proposal (*47 FR 16153*) was included for two reasons. First, previous Sections 816.133(c) and 817.133(c) included all the mountaintop removal requirements and additional detail beyond that called for in Section 515(b)(2) of the Act as general criteria for alternative postmining land use reclamation. Therefore, in the past, considerable confusion existed over who was responsible for developing the postmining land use. Second, the district court in *In re: Permanent Surface Mining Regulation Litigation*, Civ. No. 79-1144, (D.D.C., May 16, 1980) at pp. 55-56, overturned a portion of the previous rule that did not allow previously mined land to be restored to its capability before any mining. Thus the final rule emphasizes the lands' capability, both with regard to premining uses and higher or better uses, in this implementation of Section 515(b)(2) of the Act. This requirement is distinct from the revegetation or prime farmland rules, which under some circumstances may require actual production on the reclaimed land as a measure of successful reclamation.

Another commenter said that reference to "disturbed areas" rather than "affected areas" impermissibly restricts the scope of the provision beyond that intended in Section 515(b)(2) of the Act, so the previous language containing the word "affected" should be retained. OSM has rejected this commenter's suggestion because the term "disturbed" is consistent with the Act. Section 515(b)(2) of the Act applies to the land disturbed during the surface coal mining operations that must be restored. Under OSM's recently revised definition (*48 FR 14821*, April 5, 1983), the term "affected area" includes areas, such as those overlying underground workings, which may have no surface disturbance and thus would not have to be reclaimed. Thus, final Sections 816.133(a) and 817.133(a) focus on the areas actually subject to surface disturbance, the "disturbed areas."

Several commenters raised the question of using "equal or better" in place of "higher or better" to be consistent with Section 515(e)(3)(A) of the Act. OSM rejects this suggestion. Final Sections 816.133(a) and 817.133(a) directly implement Section 515(b)(2) of the Act, which uses the term "higher or better" in reference to postmining land use. Sections 515(c)(3)(A) and 515(e)(3)(A) of the Act, which include specific criteria for variances, use the term "equal or better." These terms are not generally interchangeable. Therefore, OSM has retained the "higher or better uses" requirement in final Sections 816.133(a) and 817.133(a).

Another commenter expressed concern with OSM's intent stated in the preamble to the proposed rules that operators would not be responsible for developing postmining land uses. This commenter agreed with OSM that the operator is not responsible for developing the higher or better uses, but expressed concern that the OSM rules will not contain the specific criteria prescribing the operator's responsibilities. This comment has been rejected. The final language is consistent with the Act.

Final Sections 816.133(a) and 817.133(a) do not remove the responsibility of the operator who seeks approval of an alternative postmining land use to show, prior to the issuance of a permit, how the criteria for higher or better uses, under Sections 816.133(c) and 817.133(c), are to be met. The operator's reclamation plan must describe in detail how the operator intends to reclaim the land to a capability of attaining the proposed postmining land use; moreover, the operator's performance bond cannot be totally released until reclamation is achieved.

SECTIONS 816.133(b) and 817.133(b) - DETERMINING PREMINING USES OF LAND

Final Sections 816.133(b) and 817.133(b) contain the standards for determining the premining uses of the land to which postmining land use is to be compared. OSM proposed (*47 FR 16153*) that Sections 816.133(b) and 817.133(b) would continue the previous requirement that the premining uses of land to which the postmining land use is compared must be those uses which the land previously supported, if the land has not been previously mined and has been properly managed. If the land has been previously mined and cannot be reclaimed to the land use that existed prior to any mining, the postmining land use must be judged on the basis of the highest and best use that can be achieved which is compatible with surrounding areas and does not require the disturbance of areas previously unaffected by mining. OSM received eight comments on proposed Sections 816.133(b) and 817.133(b). After evaluating these comments, OSM has decided to adopt the language of proposed Sections 816.133(b) and 817.133(b) in the final rule.

Four commenters supported the change as proposed. One commenter suggested that the first sentence be deleted because it creates confusion. Another commenter pointed out that for previously mined areas the premining use is that use which has existed since the previous mining operation, not that which existed before any mining. OSM disagrees with these latter two comments. The first sentence of final Sections 816.133(b) and 817.133(b) is the basis of the premining determination. In addition, Section 515(b)(2) of the Act is clear in this requirement to "restore the land

affected to a condition capable of supporting the uses which it was capable of supporting prior to any mining" [emphasis added].

One commenter stated that the proposed revision of Section 816.133(b) unduly limits the restoration requirements for previously mined lands, in light of recent litigation. This commenter makes the point that the proper standards, where the land is previously mined and not reclaimed, should not be the use that existed prior to mining, but instead the restoration to a condition capable of supporting the use the land was capable of supporting prior to mining. OSM does not disagree with this comment that restoration is to be to a condition capable of supporting premining uses and not the actual redevelopment or construction of the premining use. However, if the land following reclamation is not capable of supporting the premining use, Section 816.133(b) establishes the standard to be attained.

One commenter suggested an editorial change. In the proposed rule, the word "used" should have been "use." This typographical error is corrected in the final rule.

SECTIONS 816.133(c) and 817.133(c) - CRITERIA FOR ALTERNATIVE POSTMINING USES

Sections 816.133(c) and 817.133(c) contain the criteria for approval by the regulatory authority of higher or better postmining land uses. The previous rules included the detailed requirements of Sections 515 (c) and (e) of the Act that are specific requirements for mountaintop removal and an AOC variance. OSM originally included these requirements in the general alternative postmining land use requirements stating "that a composite of these concepts is a reasonable approach to setting forth the regulatory requirements for approval of proposed postmining land uses" (44 FR 15243). As stated in the preamble to the proposed rules (47 FR 16154), OSM now disagrees with its earlier conclusion.

Final Sections 16.133(c) and 817.133(c) impose the standards of Section 515(b)(2) of the Act as the general criteria for allowing higher or better uses as alternative postmining land uses. The rule provides that higher or better uses may be approved by the regulatory authority as alternative postmining land uses after consultation with the landowner or the land management agency having jurisdiction over the lands, if the proposed uses meet the following criteria:

1. There is a reasonable likelihood for achievement of the use.
2. The use does not present any actual or probable hazard to public health or safety or threat of water diminution or pollution.
3. The use will not (i) be impractical or unreasonable; (ii) be inconsistent with applicable land use policies or plans; (iii) involve unreasonable delay in implementation; or (iv) cause or contribute to violation of Federal, State, or local law.

OSM received and considered 17 comments pertaining to proposed Sections 816.133(c) and 817.133(c). With a few changes, OSM has adopted the proposed language.

Two commenters suggested that in the introductory paragraph of Sections 816.133(c) and 817.133(c) the requirement for "consultation" with the landowner be changed to "written consent" of the landowner. In analyzing these comments, OSM recognizes the potential problem of approving a postmining land use which is in conflict with the landowner's goals; however, Section 515(b)(2) of the Act does not specify that the owner must give written consent for a higher or better postmining land use. Section 508(a)(3) of the Act does require that the reclamation plan (for both reclamation to premining condition or an alternative higher or better use) contain a statement of the proposed use and comments of any surface owner. Section 508(a)(8) of the Act requires a statement of the consideration that has been given to making the surface mining and reclamation operation consistent with surface owner plans. The regulatory authority has the responsibility for making the determination whether an alternative postmining land use should be allowed and must use all the available information and comments.

Five commenters supported the proposed change because it provides more flexibility and replaces the unworkable and complex previous procedure with a practical one which gives the regulatory authority the necessary guidelines to approve an alternative postmining land use. One commenter also added that it was hoped the regulatory authority would be responsible in its data collection requirements.

Three commenters recommended that OSM retain the language of previous Sections 816.133(c) and 817.133(c). One suggested retaining the language of the previous rule because, without specific criteria, operators will dramatically

increase the creation of postmining land use configurations that lack the useful purpose Congress intended. Another stated that previous Sections 816.133(c) and 817.133(c) properly implemented the congressional intent and that all the requirements are mandated by general provisions of the Act. This commenter also recommended information and plan requirements that should be included in the permit application. OSM has analyzed these suggestions and has rejected the recommendation to retain previous Sections 816.133(c) and 817.133(c). OSM does not disagree with the commenters' point that Section 508 of the Act does contain specific postmining land use requirements that must be included in the reclamation plan. However, these specific reclamation plan requirements do not justify inclusion of the detailed requirements set forth in previous Sections 816.133(c) and 817.133(c). Final Sections 816.133(c) and 817.133(c) are intended to include as performance standards the postmining land use requirements authorized in Section 515 of the Act. The provisions of Section 508 of the Act are implemented in the permitting sections of the rules. They need not be repeated in Sections 816.133 and 817.133 and do not serve as a justification for performance standards that the Act does not require. Furthermore, OSM does not agree that a "composite," using standards established under Sections 515(c) and 515(e) for special circumstances, is justified in establishing general alternative postmining land use standards. This is supported by the legislative history of the Act. In describing a predecessor to the Act, one Senate report stated that "there are three provisions in the bill which permit variance to the mining reclamation standards of the bill. The first permits mountaintop mining by granting a variance to the requirement for restoration to approximate original contour and the prohibition of placing spoil on the downslope. Rigid criteria are specified for the granting of such a variance." [Emphasis added.] Senate Report No. 94-28; 94th Congress, 1st sess., 178 (1975). Thus, Congress intended additional, more specific requirements to be used only when variances were permitted. This is reflected in the distinctly different criteria found in Sections 515 (b)(2) and 515(c) or (e) of the Act. OSM has followed this congressional intent in these rules by separately incorporating the postmining land use criteria of Section 515(b)(2) of the Act and those of Sections 515 (b), (c), and (e) of the Act in corresponding sections of the rules. This provides a framework for States to add more specific requirements that are compatible with their geographic conditions and land use plans.

A number of commenters suggested that the word "equal" be substituted for the word "higher" in the phrase "higher or better uses" in Sections 816.133(c) and 817.133(c). These commenters thought this change should be made to be consistent with the term "equal" used in Section 515(e)(3)(A) of the Act. OSM has rejected these comments for the reasons described earlier regarding similar changes to other provisions.

One commenter suggested adding the following fourth requirement to the proposed Sections 816.133(c) and 817.133(c) criteria:

"The proposed postmining action should include a reasonable attempt to restore any threatened or endangered species habitat destroyed during mining operations and minimize impact on endangered species or critical habitat that may be near or adjacent to the mined site."

OSM has rejected this suggestion because the requirements concerning endangered species and their critical habitats are addressed in Sections 816.97 and 817.97 and need not be repeated. Those sections will not allow surface or underground mining activities which will jeopardize the continued existence of endangered or threatened species or will result in the destruction or adverse modification of designated critical habitats. Furthermore, it should be noted that the criteria in Sections 816.133(c)(3) and 817.133(c)(3) include the requirement that the proposed postmining land use will not cause or contribute to violation of Federal, State, or local laws. The protection of endangered species and critical habitats provided under the Endangered and Threatened Species Act, *16 U.S.C. 1531 et seq.*, is included under this provision.

Commenters requested that previous Section 816.133(c)(8), requiring approval of appropriate State and Federal fish and wildlife agencies, be retained to protect fish and wildlife. OSM disagrees. Adequate protection of fish and wildlife will be provided through the consultation process provided in Sections 816.97 and 817.97 and the coordination procedures with interested government agencies under the permitting rules of Subchapter G of 30 CFR Chapter VII. Consent of fish and wildlife management agencies is thus unnecessary.

SECTIONS 816.133(d) and 817.133(d) - APPROXIMATE ORIGINAL CONTOUR: CRITERIA FOR VARIANCE

Because of commenters' assertions that OSM's interpretation of Section 515(e) of the Act is not correct, particularly in light of Judge Flannery's earlier referenced ruling, it is appropriate to explain OSM's rationale in detail in this preamble. Much of this discussion was contained in the preamble to the proposed rule.

LEGISLATIVE HISTORY OF SECTION 515(e) OF THE ACT

On May 20, 1977, Senator Wendell Ford introduced the original AOC variance provision as an amendment to Senate Bill S. 7, the Senate predecessor to the Act (123 Cong. Rec. S8097, daily ed., May 20, 1977), to allow variances from the AOC restoration requirement for certain postmining land uses. It was aimed chiefly at Appalachia, but did not apply only to steep slope mining. The provision, Section 415(d) of S. 7, would have allowed variances from the general AOC restoration requirement of Section 415(b)(3) of Bill S. 7 and the additional steep slope AOC restoration requirement, Section 415(c)(2) of Bill S. 7. These sections were the Senate predecessors to Sections 515(b)(3) and 515(d)(2) of the Act, respectively.

Senator Ford's original amendment would have allowed retention of highwalls when variances were granted. The highwall retention aspect generated considerable controversy and a modification to the amendment was introduced on the same day which would have allowed retention of highwalls in variance situations only when sound engineering technology indicated that the highwalls could not be completely eliminated. The modified Ford amendment, referring both to Sections 415(b)(3) and 415(c)(2), ultimately became part of the Senate bill that went to the House-Senate conference.

Also on May 20, 1977, Senator Jennings Randolph stated that because the managers of Bill S. 7 accepted the modified Ford amendment, he would not offer his own AOC variance provision. Senator Randolph asked that his amendment be printed in the Congressional Record, together with accompanying remarks. These appear at 123 Congressional Record at S8102-8103 (daily ed., May 20, 1977). The scope of the Randolph amendment, that is a variance from the requirement to restore the approximate original contour set forth in subsection 415(b)(3) or 415(c)(2), would have been the same as the Ford amendment, except that the Randolph amendment would have required complete elimination of the highwalls. In his printed remarks, Senator Randolph stated that his proposal was generally designed for use in non-steep slope regions.

The bill passed by the House of Representatives, H.R. 2, which the House-Senate conference was considering, had no AOC variance provision (other than for mountaintop removal). Conference Staff Recommendation No. 3 (at p. 48), in presenting the issue before the conference, described S. 7 as containing "a general variance provision, not requiring complete backfilling of highwalls." [Emphasis added.]

In the conference there was strong objection to any provision that would allow retention of highwalls. To resolve the issue, the conferees were presented with a new subsection as an amendment to Section 515 (the renumbered Section 415). The new subsection was the Randolph amendment, which required complete elimination of highwalls, that had been printed in the Congressional Record. The only difference between the conference version of the Randolph amendment and the version printed in the May 20, 1977, Congressional Record was the deletion of the reference to Section 515(b)(3), the general AOC restoration requirement.

The deletion in Section 515(e)(2) of the reference to Section 515(b)(3) left the plain meaning of the language unclear. For example, a variance from the provisions of Section 515(b)(3) of the Act is necessary to apply the variance even on steep slopes because the provisions of Section 515(d) of the Act complement the provisions of Section 515(b) but do not replace them. Therefore, a variance from Section 515(b)(3) must be read into Section 515(e) to give it any meaning.

In the preamble to the proposed rule, OSM asserted that apparently the deletion of the reference was not intentional. OSM reasoned that because both of the previous amendments on the subject, Senators Randolph's and Ford's in S. 7, contained a reference to the general AOC restoration requirement, deletion of the reference would have been noted if it was intentional, particularly in light of Senator Randolph's earlier remarks that the variance was intended for non-steep slope regions. Although OSM now acknowledges that the deletion may have been made intentionally by the Conference Committee staff, it was neither noted nor discussed in the conference itself. In conference, the discussion of the Randolph amendment focused on the highwall provision and Senator Ford's insistence that in some situations the retention of highwalls be allowed. While there was an implicit assumption that the variance provision was needed mainly in Appalachia, there was no explicit statement that it was limited to steep slopes. On the contrary, at one point when the chairman of the conference was discussing the width of benches that would remain after covering the highwalls, he acknowledged that it would depend upon the terrain. (OSM agrees with this latter assertion. In steep slope areas, after the highwall is backfilled in a stable manner, the benches are not likely to be wide enough for many uses. For Section

515(e) of the Act to have practical utility, it should apply to non-steep slope areas.)

The conference adopted the Randolph amendment with one further change relating to the disposal of spoil. The conference report, House Report 95-493 (95th Cong., 1st sess. 108 (1977)), focused exclusively on the highwall retention issue and the opportunity for a broad range of postmining land uses on very wide benches. Specifically, it states that the variance "gives an opportunity for a broad range of postmining land uses on those operations which would result in a very wide bench accommodating both the stable and complete backfilling of the highwall as well as additional areas for planned land uses."

On July 21, 1977, the chairman of the Conference Committee, Congressman Udall, described to the House of Representatives a summary of the major changes made during the conference, along with related legislative history. This description included the following discussion related to the variance from approximate original contour:

"Both the House and Senate bills provided for [returning] to approximate original contour including the complete backfilling of the highwall.

"The Senate bill however provided a variance to the approximate original contour and backfilling highwalls completely for a wide range of post mining land uses. In addition, if sound engineering technology indicated that the highwall cannot be completely backfilled, then the operator would have been required to reduce the highwall to the maximum extent consistent with sound engineering technology and develop a revegetation plan that is reasonably calculated to screen the remaining highwall within 5 years.

"The conference report includes a modified variance to the approximate original contour standard which, requires however that in every instance all highwalls are to be completely backfilled. This amounts to a variance from the configuration aspects of the approximate original contour regarding standard. This gives an opportunity for a potential range of postmining land uses from those operations which would result in a very wide bench accommodating both the stable and complete backfilling of the highwall as well as additional areas for the planned land uses. This variance however is only for developed land uses such as industrial, residential or commercial sites. Agricultural, open space and similar types of land uses do not qualify. This variance procedure in section 515(e) contemplates only one variance procedure for the entire subsection which is conditioned by the constraints discussed above including the complete backfilling of all highwalls." [Emphasis added.] 123 Cong. Rec. H7584, daily ed., July 21, 1977.

In his discussion of the variance and its associated constraints, Chairman Udall made no reference to limiting its applicability to steep slope mining operations.

OSM's interpretation is further buttressed by remarks of Representative Seiberling, a member of the House-Senate Conference on the Act. The following colloquy occurred during an OSM oversight hearing in March 1979. Although not official legislative history, the remarks shed some light on one Conference member's view of the applicability of Section 515(e) of the Act.

"Mr. SEIBERLING. Thank you. One other question. Governor Carroll said that your regulations say that section 515 (e) of the act are applicable only to steep slopes. Section 515 (e) (1) is the provision that says that you may have variances from the original contour requirements provided that the watershed control of the area is improved, and you cover the highwall. I do not interpret that section as applying only to steep slopes. Is that the interpretation that your regulation proposes? [Emphasis added.]

"Mr. HEINE. As you know, Mr. Seiberling, that particular provision was drafted on the floor of the Senate, I believe, and --

"Mr. SEIBERLING. And, subsequently, fought over very hard in the conference.

"Mr. HEINE. That is correct, and it probably lacks perfection in writing, and it is one of those where, if you got a room full of lawyers, you would get a room full of different answers. We are reexamining that issue to see if it really makes more sense to change our policy on it.

"Mr. SEIBERLING. I strongly disagree with Governor Carroll's feeling that this is an impractical provision, that they

should leave the highwalls, and that would improve the drainage. I suggest that the word improve, does not mean that you have to improve only the drainage. But if you are not going to restore the original contour, it ought to be a little bit better result overall. The idea behind this section was that you could have a kind of terracing effect provided that the highwall was covered up. That was a very hard-fought provision, and the Senator from Kentucky himself was one of the leading proponents of relaxation, and we worked out this compromise. My personal view is that it does not just apply to steep slopes, and I would hope you would take another look at it. " [Emphasis added.] Implementation of the Surface Mining Control and Reclamation Act of 1977, Oversight Hearings Before the Subcommittee on Energy and the Environment of the Committee on Interior and Insular Affairs. H. Rep. Serial No. 96-4, 96th Cong., 1st sess., 47, March 5, 1979.

Judge Flannery held that Section 515 (e) provides for only one variance and that the variance applies to steep slopes. However, Judge Flannery was not informed in the briefs filed prior to his February 26, 1980, decision that both earlier versions of Section 515 (e) would have allowed variances from the general AOC restoration requirement. No attempt was made in the briefs to explain the removal of the reference to Section 515 (b)(3) of the Act by the Conference Committee.

OSM agrees that Section 515 (e) of the Act provides for only one variance, but for the reasons described above concludes that the section allowing for AOC variances is not limited to steep slope operations.

DESCRIPTION OF FINAL SECTIONS 816.133 (d) and 817.133 (d)

Final Sections 816.133 (d) and 817.133 (d) establish the minimum standards for a surface coal mining operation under an AOC variance. The standards set out in Sections 816.133 (d) and 817.133 (d) are required in Section 515 (e) of the Act. OSM proposed two alternative standards for an AOC variance (*47 FR 16156*). Alternative A has been adopted since it directly implements OSM's interpretation of Section 515 (e) of the Act. This interpretation allows for a variance from the requirement to restore disturbed areas to AOC, regardless of the terrain, if the following conditions are satisfied:

- (1) The regulatory authority grants the variance under a permit issued in accordance with Section 785.16.
- (2) The alternative postmining land use requirements of Section 816.133 (c) and 817.133 (c) are met.
- (3) All applicable requirements of the Act and the regulatory program, other than the requirement to restore affected areas to their approximate original contour, are met.
- (4) After consultation with the appropriate land use planning agencies, if any, the potential use is shown to constitute an equal or better economic or public use.
- (5) The proposed use is designed and certified by a qualified registered professional engineer in conformance with professional standards established to assure the stability, drainage, and configuration necessary for the intended use of the site.
- (6) After approval, where required, of the appropriate State environmental agencies, the watershed of the permit and adjacent areas is shown to be improved. The phrase "permit and adjacent areas" has been substituted for the proposed term "affected land" for the reasons described in the discussion of final Section 785.16(a)(3).
- (7) The highwall is completely backfilled with spoil material, in a manner which results in a static factor of safety of at least 1.3, using standard geotechnical analysis.
- (8) Only the amount of spoil as is necessary to achieve the postmining land use, ensure the stability of spoil retained on the bench, and meet all other requirements of the Act and this chapter can be placed off the mine bench. All spoil not retained on the bench must be placed in accordance with Sections 816.71-816.74 or 817.71-817.74.
- (9) The surface landowner of the permit area has knowingly requested, in writing, that a variance be granted, so as to render the land, after reclamation, suitable for an industrial, commercial, residential, or public use (including recreational facilities). The word "knowingly" has been inserted to parallel Section 785.16(a)(4) and the Act.

(10) Federal, State, and local government agencies with an interest in the proposed land use have an adequate period in which to review and comment on the proposed use. Although OSM proposed a maximum 60-day period, in the final rule the regulatory authority may use its discretion to determine how much time is adequate. Depending on the situation, 60 days may be too little or too much time.

DISCUSSION OF COMMENTS ON SECTIONS 816.133(d) and 817.133(d)

OSM received 48 comments pertaining to the alternatives of Sections 816.133(d) and 817.133(d). Twenty-five comments supported Alternative A; 2 comments supported Alternative B; 5 comments supported the previous rules with no change; and 14 comments recommended specific change without support to either alternative. OSM has reviewed and evaluated these comments and adopted the language of Alternative A for Sections 816.133(d) and 817.133(d).

OSM received 25 comments that supported Alternative A. The commenters recommended adoption of this alternative because it would provide practical benefits to both the operators and communities, regardless of landform. In addition, several of these commenters voiced support for OSM's interpretation of the legislative history and provided documents supporting this interpretation.

Two commenters supported Alternative B. These commenters suggested that there is no need for an AOC variance in rolling terrain because flat land is abundant and enough flexibility exists in the definition of AOC to allow the needed minor alteration to the terrain to accommodate alternative postmining land uses. Another of these commenters said Alternative B would allow for operations in areas steeper than 20 degrees and would allow the regulatory authority latitude in determining the regions where AOC variance could be applied. OSM has rejected these comments for the following reasons. Landowners and communities located in some steep slope terrain can clearly benefit from a mining operation that reclaims to conditions capable of supporting an alternative postmining land use. However, substantial benefits can also accrue to landowners or communities in non-steep slope terrain due to the site-improvement opportunities reclamation offers in preparing the land for an alternative postmining land use. The intent of Congress was not to regulate land use or guide development patterns, but to encourage the best postmining land use for the reclaimed land.

There may have been confusion regarding Alternative B providing a variance for areas steeper than 20 degrees. Either of the two alternatives would be equally applicable to terrain with slopes of more than 20 degrees.

Five commenters suggested that OSM retain the previous Section 826.12 instead of either proposed alternative. Two of these commenters said OSM should retain the previous language and thought the proposed rule was illegal. Two of these commenters suggested that the AOC variance is limited to steep slope surface mining conditions as defined in Section 515(d) of the Act and provided elaboration on legislative history and subsequent actions to support what Congress said in the text of Section 515(e) as the best evidence of its intent. Another commenter thought the proposed rules granting a variance in nonsteep slope areas were a direct violation of both the statute and a Federal district court opinion. As described above, the final rule does not violate the Act. Although the final rule is not in accord with Judge Flannery's 1980 interpretation of the Act, he did not rule on the validity of the present rule and thus OSM is not in violation of the district court order.

Commenters recommended specific changes to the proposed Sections 816.133(d) and 817.133(d) performance standards. One commenter suggested deletion of the reference to the backfilling and grading rules because all spoil not retained on the bench must be placed in accordance with the excess spoil disposal rules (according to Section 515(e)(4) of the Act.) OSM has accepted this comment and has deleted the reference to " Sections 816.101 through 816.106" and "817.101 through 817.106" in Sections 816.133(d)(8) and 817.133(d)(8). Final Sections 816.102(k) and 817.102(k) exempt from the AOC restoration requirements operations that have a variance under Section 785.16. (See *48 FR 23369 and 23370*, May 24, 1983.)

OSM received one comment suggesting that proposed Sections 816.133(d)(10) and 817.133(d)(10) be deleted because any agency with an interest in the proposed postmining land use has already had an opportunity to comment under the public participation provisions of the permit process. Another commenter questioned whether OSM intended to have a "minimum or maximum" 60-day review period in proposed Sections 816.133(d)(10) and 817.133(d)(10). OSM has considered these two comments pertaining to the government agency review and has modified the provision as described

above.

Another commenter suggested that proposed Sections 816.133 (d)(7) and (d)(8) and 817.133 (d)(7) and (d)(8) include a better definition of "static factor of safety" and "mine bench." OSM has considered the suggestion of adding these definitions, but has rejected the suggestion. Both of these terms are commonly used in the surface coal mining industry, and OSM finds no confusion or ambiguity in their meaning.

One commenter suggested that agricultural land use be added to the list of acceptable postmining land uses in Sections 816.133(d)(9) and 817.133(d)(9). OSM has rejected this comment because the Act authorizes specific postmining land uses that are allowable as a variance and does not include agriculture as a qualifying use.

One commenter suggested changing Sections 816.133(d)(6) and 817.133(d)(6) by deleting the word "improved" and substituting the words "equivalent to the natural, premining condition." Another commenter suggested that the words "equal or" be added in Sections 816.133(d)(6) and 817.133(d)(6) so that the watershed of the affected lands could be shown to be equal or improved. This change would make the watershed improvement requirement consistent with the equal or better land use requirement. These suggested changes are rejected for the reasons discussed under Section 785.16(a)(3). Both the Act and legislative history are specific in the requirement of watershed improvement.

One commenter suggested that in proposed Sections 816.133(d)(9) and 817.133(d)(9) OSM "provide for a written request from a surface managing agency for public lands." This identical comment was also made for proposed Section 785.16(c)(4). OSM has rejected this comment for the reason described earlier in the discussion of final Section 785.16(a)(4). This requirement is not limited to a private owner but also applies to a land management agency with jurisdiction over the surface.

Two commenters suggested that in prime farmland areas, no AOC variance should be granted that allows postmining slopes of higher grade than the original average contour. In addition, it was recommended that land be reclaimed to its former or higher land use in order to maintain its agricultural viability. OSM has made no special provision in Sections 816.133(d) and 817.133(d) for prime farmland. However, for lands whose premining use is prime farmland, it is not anticipated that an alternative postmining land use will be approved, except as specifically identified in 30 CFR Part 823.

One commenter suggested the OSM not add Paragraph (d) to Sections 816.133 and 817.133. This commenter thought that proposed Paragraphs (d)(5)-(d)(10) belong in the Part 785 permit requirements, that proposed Paragraph (d)(1) is unnecessary, and that proposed Paragraph (d)(2) is misleading because a change in use is not necessary to obtain approval for an alternative postmining land use. The commenter uses the example that an existing recreation use may be enhanced to a higher or better recreation use. OSM has reviewed the suggestions contained in this comment and has rejected the suggested changes. The criteria required in Paragraphs (d)(1)-(d)(10) are specific performance standards required in Section 515(e) of the Act. These performance standards are the basic measures that the operation will be judged against for allowing a variance and, thus, serve a different purpose from the information that the operator provides in a permit application.

OSM received several comments pertaining to the Sections 816.133(d)(7) and 817.133(d)(7) requirement to completely cover the highwalls. Two commenters suggested that highwalls could be beneficial and that provision should be made to allow the regulatory authority to approve the retention of highwalls on a case-by-case basis. One commenter suggested that Sections 816.133(d)(7) and 817.133(d)(7) contradict one of the original reasons for introducing the AOC variance. This commenter also suggested that highwalls be allowed on a case-by-case basis. OSM has rejected the recommendation that some highwalls be allowed because Section 515(e)(1) specifically requires that "complete backfilling with spoil material shall be required to cover completely the highwall." Other comments pertained to highwalls that were integral with a postmining land use. These commenters specifically questioned the applicability of this requirement to completely cover the highwall under the waterline of a final-cut lake. OSM considered these suggested changes and has not made any change in this rule. Requirements for final-cut lakes are included in a separate rulemaking on impoundments.

Another commenter said that proposed Sections 816.133(d)(4) and (d)(6) present a "pass the buck attitude that results in duplication of review." OSM disagrees with the commenter because the Act requires this review by other appropriate agencies.

SECTION 824.11(a)(4) - SPECIAL PERMANENT PROGRAM PERFORMANCE STANDARDS -- MOUNTAINTOP REMOVAL

Part 824 contains the conditions under which an operator engaged in mountaintop removal surface mining activities could be exempted from the requirement to restore affected areas to AOC. Previous Section 824.11(a)(4) specified that all the requirements of Section 816.133 were to be met.

In the proposed rule (*47 FR 16160*), OSM changed Section 824.11(a)(4) to clarify that the performance standards applicable to mountaintop removal mining would include the general alternative postmining land use criteria of Section 816.133(c) but not the criteria for variance from AOC of Section 816.133(d).

OSM received no comment on this proposed revision and has thus adopted this proposed language in the final rule, except that the final reference is to Paragraphs (a)-(c) of Section 816.133, not just Paragraph (c).

REMOVAL OF SECTION 826.15 - SPECIAL PERMANENT PROGRAM PERFORMANCE STANDARDS -- OPERATIONS ON STEEP SLOPES (STEEP SLOPES: LIMITED VARIANCES)

Previous Section 826.15 contained the performance standards for the AOC variance applicable only to steep slope mining. This section was duplicative of either alternative proposed for Section 816.133(d). Because OSM has adopted the necessary provisions of previous Section 826.15 in Sections 816.133(d) and 817.133(d), Section 826.15 is no longer needed. It has already been removed as part of the backfilling and grading rules (*48 FR 23356*, May 24, 1983). No comments were received on this proposed revision.

III. PROCEDURAL MATTERS

Federal Paperwork Reduction Act

The information collection requirements for Parts 785, 816, and 817 were approved by the Office of Management and Budget (OMB) under *44 U.S.C. 3507* and assigned approval numbers 785-1029-0040, 816-1029-0047, and 817-1029-0048, respectively. These approvals have been codified under final Sections 785.10, 816.10, and 817.10. The information required by Parts 785, 816, and 817 will be used by the regulatory authority in granting permits and in monitoring and inspecting surface and underground mining activities to ensure that they are conducted in a manner which preserves and enhances environmental and other values of the Act. This information required by Parts 785, 816, and 817 is mandatory.

Executive Order 12291 and the Regulatory Flexibility Act

The Department of the Interior (DOI) has determined that these rules are not major rules requiring a regulatory impact analysis under Executive Order 12291. Also, DOI certifies that these rules will not have a significant economic effect on a substantial number of small entities and therefore do not require a regulatory flexibility analysis under Public Law 96-354. The rules will allow small coal operators increased flexibility in meeting performance standards and should especially ease the regulatory burden on small coal operators in Appalachia.

Agency Approval

Section 516(a) of the Act requires the written concurrence of the head of the department that administers the Federal Mine Safety and Health Act of 1977, the successor to the Federal Coal Mine Health and Safety Act of 1969, in rules concerning the surface effects of underground mining. OSM has obtained the written concurrence of the Assistant Secretary for Mine Safety and Health, U.S. Department of Labor.

National Environmental Policy Act

OSM has analyzed the impacts of these final rules in the "Final Environmental Impact Statement OSM-EIS-1: Supplement" (FEIS) according to Section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA) (*42 U.S.C. 4332 (2)(C)*). The FEIS is available in OSM's Administrative Record in Room 5315, 1100 L Street, NW., Washington, D.C., or by mail request to Mark Boster, Chief, branch of Environmental Analysis, Room 134, Interior South Building, U.S. Department of the Interior, Washington, D.C. 20240. This preamble serves as a record of decision under NEPA. The final rules differ from the preferred alternative in Volume III of the EIS in that: (1) The definition of "fish and wildlife habitat" is unchanged from the existing rules and thus has no environmental effect. (2) The permitting rules for mountaintop removal operations do not revise variance review procedures in Section 785.14(d) and thus are

encompassed by Alternative B in the FEIS. (3) Proposed Section 785.16(a) and (b) have been removed to eliminate redundancy, but with no environmental or other substantive effect. (4) The maximum 60-day review period for other agency review of AOC variances has been changed to assure adequate time for review. This will have no environmental effect. (5) The review of permits incorporating an AOC variance must occur at least every 30 months following the issuance of the permit and is not specifically tied to the middle of the permit term. The environmental effect of this change is negligible and is no different from the FEIS preferred alternative. (6) Sections 816.133(c)(3)(iv) and 817.133(c)(3)(iv) use the words "cause or contribute." This is more environmentally protective than the preferred alternative. (7) The use of the word "disturbed" in Sections 816.133(d) and 817.133(d) will have no effect. (8) The FEIS preferred alternative included a definition for the phrase "equal or better economic or public use" that had not been proposed. Not adopting that definition has no environmental effect. (9) A number of other editorial changes have no effect.

LIST OF SUBJECTS

30 CFR Part 701

Coal mining, Law enforcement, Surface mining, Underground mining.

30 CFR Part 785

Coal mining, Reporting requirements, Surface mining, Underground mining.

30 CFR Part 816

Coal mining, Environmental protection, Reporting and recordkeeping requirements, Surface mining.

30 CFR Part 817

Coal mining, Environmental protection, Reporting and recordkeeping requirements, Underground mining.

30 CFR Part 824

Coal mining, Environmental protection, Surface mining.

Accordingly, 30 CFR Parts 701, 785, 816, 817, and 824 are amended as set forth herein.

Dated: August 25, 1983.

William P. Pendley, Deputy Assistant Secretary, Energy and Minerals.

PART 701 -- PERMANENT REGULATORY PROGRAM

1. Section 701.5 is amended by adding the definition of "higher or better uses" in alphabetical order and by revising the definition of "land use" to read as follows:

SECTION 701.5 - DEFINITIONS.

* * * * *

HIGHER OR BETTER USES means postmining land uses that have a higher economic value or nonmonetary benefit to the landowner or the community than the premining land uses.

* * * * *

LAND USE means specific uses or management-related activities, rather than the vegetation or cover of the land. Land uses may be identified in combination when joint or seasonal uses occur and may include land used for support facilities that are an integral part of the use. Changes of land use from one of the following categories to another shall be considered as a change to an alternative land use which is subject to approval by the regulatory authority.

(a) Cropland. Land used for the production of adapted crops for harvest, alone or in rotation with grasses and legumes, that include raw crops, small grain crops, hay crops, nursery crops, orchard crops, and other similar crops.

(b) Pastureland or land occasionally cut for hay. Land used primarily for the long-term production of adapted, domesticated forage plants to be grazed by livestock or occasionally cut and cured for livestock feed.

(c) Grazingland. Land used for grasslands and forest lands where the indigenous vegetation is actively managed for grazing, browsing, or occasional hay production.

(d) Forestry. Land used or managed for the long-term production of wood, wood fiber, or wood-derived products.

(e) Residential. Land used for single-and multiple-family housing, mobile home parks, or other residential lodgings.

(f) Industrial/Commercial. Land used for --

(1) Extraction or transformation of materials for fabrication of products, wholesaling of products, or long-term storage of products. This includes all heavy and light manufacturing facilities.

(2) Retail or trade of goods or services, including hotels, motels, stores, restaurants, and other commercial establishments.

(g) Recreation . Land used for public or private leisure-time activities, including developed recreation facilities such as parks, camps, and amusement areas, as well as areas for less intensive uses such as hiking, canoeing, and other undeveloped recreational uses.

(h) Fish and wildlife habitat . Land dedicated wholly or partially to the production, protection, or management of species of fish or wildlife.

(i) Developed water resources . Land used for storing water for beneficial uses, such as stockponds, irrigation, fire protection, flood control, and water supply.

(j) Undeveloped land or no current use or land management . Land that is undeveloped or, if previously developed, land that has been allowed to return naturally to an undeveloped state or has been allowed to return to forest through natural succession.

* * * * *

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

2. In Section 785.14, the introductory language in paragraph (c) is revised and paragraphs (c)(1)(ii) and (c)(2) are revised to read as follows:

SECTION 785.14 - MOUNTAINTOP REMOVAL MINING.

* * * * *

(c) The regulatory authority may issue a permit for mountaintop removal mining, without regard to the requirements of Sections 816.102, 816.104, 816.105, and 816.107 of this chapter to restore the lands disturbed by such mining to their approximate original contour, if it first finds, in writing, on the basis of a complete application, that the following requirements are met:

(1) * * *

(ii) The applicant demonstrates compliance with the requirements for acceptable alternative postmining land uses of paragraphs (a)-(c) of Section 816.133 of this chapter;

* * * * *

(2) The applicant demonstrates that in place of restoration of the land to be affected to the approximate original contour under Sections 816.102, 816.104, 816.105, and 816.107 of this chapter, the operation will be conducted in compliance with the requirements of Part 824 of this chapter.

* * * * *

3. Section 785.16 is revised to read as follows:

SECTION 785.16 - PERMITS INCORPORATING VARIANCES FROM APPROXIMATE ORIGINAL CONTOUR RESTORATION REQUIREMENTS.

(a) The regulatory authority may issue a permit for nonmountaintop removal mining which includes a variance from the requirements of Sections 816.102, 816.104, 816.104, 816.105, and 816.107 or 817.102 and 817.107 of this chapter to restore the disturbed areas to their approximate original contour. The permit may contain such a variance only if the regulatory authority finds, in writing, that the applicant has demonstrated, on the basis of a complete application, that the following requirements are met:

(1) After reclamation, the lands to be affected by the variance within the permit area will be suitable for an industrial, commercial, residential, or public postmining land use (including recreational facilities).

(2) The requirements of Section 816.133 or 817.133 of this chapter will be met.

(3) The watershed of lands within the proposed permit and adjacent areas will be improved by the operations when compared with the condition of the watershed before mining or with its condition if the approximate original contour were to be restored. The watershed will be deemed improved only if --

(i) The amount of total suspended solids or other pollutants discharged to ground or surface water from the permit area will be reduced, so as to improve the public or private uses or the ecology of such water, or flood hazards within the watershed containing the permit area will be reduced by reduction of the peak flow discharge from precipitation events or thaws;

(ii) The total volume of flow from the proposed permit area, during every season of the year, will not vary in a way that adversely affects the ecology of any surface water or any existing or planned use of surface or ground water; and

(iii) The appropriate State environmental agency approves the plan.

(4) The owner of the surface of the lands within the permit area has knowingly requested, in writing, as part of the application, that a variance be granted. The request shall be made separately from any surface owner consent given for the operations under Section 778.15 or 782.15 of this chapter and shall show an understanding that the variance could not be granted without the surface owner's request.

(b) If a variance is granted under this section -- --

(1) The requirements of Section 816.133(d) or 817.133(d) of this chapter shall be included as a specific condition of the permit; and

(2) The permit shall be specifically marked as containing a variance from approximate original contour.

(c) A permit incorporating a variance under this section shall be reviewed by the regulatory authority at least every 30 months following the issuance of the permit to evaluate the progress and development of the surface coal mining and reclamation operations to establish that the operator is proceeding in accordance with the terms of the variance.

(d) If the permittee demonstrates to the regulatory authority that the operations have been, and continue to be, conducted in compliance with the terms and conditions of the permit, the requirements of the Act, this chapter, and the regulatory program, the review specified in Paragraph (c) of this section need not be held.

(e) The terms and conditions of a permit incorporating a variance under this section may be modified at any time by the regulatory authority, if it determines that more stringent measures are necessary to ensure that the operations involved are conducted in compliance with the requirements of the Act, this chapter, and the regulatory program.

(f) The regulatory authority may grant variances in accordance with this section only if it has promulgated specific rules to govern the granting of variances in accordance with the provisions of this section and any necessary, more stringent requirements.

PART 816 -- PERMANENT PROGRAM PERFORMANCE STANDARDS -- SURFACE MINING ACTIVITIES

4. Section 816.133 is revised to read as follows:

SECTION 816.133 - POSTMINING LAND USE.

(a) General. All disturbed areas shall be restored in a timely manner to conditions that are capable of supporting --

- (1) The uses they were capable of supporting before any mining; or
- (2) Higher or better uses.

(b) Determining premining uses of land. The premining uses of land to which the postmining land use is compared shall be those uses which the land previously supported, if the land has not been previously mined and has been properly managed. The postmining land use for land that has been previously mined and not reclaimed shall be judged on the basis of the land use that existed prior to any mining: Provided that, if the land cannot be reclaimed to the land use that existed prior to any mining because of the previously mined condition, the postmining land use shall be judged on the basis of the highest and best use that can be achieved which is compatible with surrounding areas and does not require the disturbance of areas previously unaffected by mining.

(c) Criteria for alternative postmining land uses. Higher or better uses may be approved by the regulatory authority as alternative postmining land uses after consultation with the landowner or the land management agency having jurisdiction over the lands, if the proposed uses meet the following criteria:

- (1) There is a reasonable likelihood for achievement of the use.
- (2) The use does not present any actual or probable hazard to public health or safety, or threat of water diminution or pollution.
- (3) The use will not --
 - (i) Be impractical or unreasonable;
 - (ii) Be inconsistent with applicable land use policies or plans;
 - (iii) Involve unreasonable delay in implementation; or
 - (iv) Cause or contribute to violation of Federal, State, or local law.

(d) Approximate original contour: Criteria for variance. Surface coal mining operations that meet the requirements of this paragraph may be conducted under a variance from the requirement to restore disturbed areas to their approximate original contour, if the following requirements are satisfied:

- (1) The regulatory authority grants the variance under a permit issued in accordance with Section 785.16 of this chapter.
- (2) The alternative postmining land use requirements of paragraph (c) of this section are met.
- (3) All applicable requirements of the Act and the regulatory program, other than the requirement to restore disturbed areas to their approximate original contour, are met.
- (4) After consultation with the appropriate land use planning agencies, if any, the potential use is shown to constitute an equal or better economic or public use.
- (5) The proposed use is designed and certified by a qualified registered professional engineer in conformance with professional standards established to assure the stability, drainage, and configuration necessary for the intended use of the site.
- (6) After approval, where required, of the appropriate State environmental agencies, the watershed of the permit and adjacent areas is shown to be improved.
- (7) The highwall is completely backfilled with spoil material, in a manner which results in a static factor of safety of at least 1.3, using standard geotechnical analysis.
- (8) Only the amount of spoil as is necessary to achieve the postmining land use, ensure the stability of spoil retained on the bench, and meet all other requirements of the Act and this chapter is placed off the mine bench. All spoil not retained on the bench shall be placed in accordance with Sections 816.71-816.74 of this chapter.
- (9) The surface landowner of the permit area has knowingly requested, in writing, that a variance be granted, so as to render the land, after reclamation, suitable for an industrial, commercial, residential, or public use (including recreational facilities).
- (10) Federal, State, and local government agencies with an interest in the proposed land use have an adequate period in which to review and comment on the proposed use.

PART 817 -- PERMANENT PROGRAM PERFORMANCE STANDARDS -- UNDERGROUND MINING ACTIVITIES

5. Section 817.133 is revised to read as follows:

SECTION 817.133 - POSTMINING LAND USE.

(a) General. All disturbed areas shall be restored in a timely manner to conditions that are capable of supporting --

- (1) The uses they were capable of supporting before any mining; or
- (2) Higher or better uses.

(b) Determining premining uses of land. The premining uses of land to which the postmining land use is compared shall be those uses which the land previously supported, if the land has not been previously mined and has been properly managed. The postmining land use for land that has been previously mined and not reclaimed shall be judged on the basis of the land use that existed prior to any mining: Provided that, if the land cannot be reclaimed to the land use that existed prior to any mining because of the previously mined condition, the postmining land use shall be judged on the basis of the highest and best use that can be achieved which is compatible with surrounding areas and does not require the disturbance of areas previously unaffected by mining.

(c) Criteria for alternative postmining land uses. Higher or better uses may be approved by the regulatory authority as alternative postmining land uses after consultation with the landowner or the land management agency having jurisdiction over the lands, if the proposed uses meet the following criteria:

- (1) There is a reasonable likelihood for achievement of the use.
- (2) The use does not present any actual or probable hazard to public health and safety, or threat of water diminution or pollution.
- (3) The use will not --
 - (i) Be impractical or unreasonable; or
 - (ii) Be inconsistent with applicable land use policies or plans;
 - (iii) Involve unreasonable delay in implementation; or
 - (iv) Cause or contribute to violation of Federal, State, or local law.

(d) Approximate original contour: Criteria for variance. Surface coal mining operations that meet the requirements of this paragraph may be conducted under a variance from the requirement to restore disturbed areas to their approximate original contour, if the following requirements are satisfied:

- (1) The regulatory authority grants the variance under a permit issued in accordance with Section 785.16 of this chapter.
- (2) The alternative postmining land use requirements of paragraph (c) of this section are met.
- (3) All applicable requirements of the Act and the regulatory program, other than the requirement to restore disturbed areas to their approximate original contour, are met.
- (4) After consultation with the appropriate land use planning agencies, if any, the potential use is shown to constitute an equal or better economic or public use.
- (5) The proposed use is designed and certified by a qualified registered professional engineer in conformance with professional standards established to assure the stability, drainage, and configuration necessary for the intended use of the site.
- (6) After approval, where required, of the appropriate State environmental agencies, the watershed of the permit and adjacent areas is shown to be improved.
- (7) The highwall is completely backfilled with spoil material, in a manner which results in a static factor of safety of at least 1.3, using standard geotechnical analysis.
- (8) Only the amount of spoil as is necessary to achieve the postmining land use, ensure the stability of spoil retained on the bench, and meet all other requirements of the Act and this chapter is placed off the mine bench. All spoil not retained on the bench shall be placed in accordance with Sections 817.71-817.74 of this chapter.
- (9) The surface landowner of the permit area has knowingly requested, in writing, that a variance be granted, so as to render the land, after reclamation, suitable for an industrial, commercial, residential, or public use (including recreational facilities).

(10) Federal, State, and local government agencies with an interest in the proposed land use have an adequate period in which to review and comment on the proposed use.

PART 824 -- SPECIAL PERMANENT PROGRAM PERFORMANCE STANDARDS -- MOUNTAINTOP REMOVAL

6. Section 824.11(a)(4) is revised to read as follows:

SECTION 824.11 - MOUNTAINTOP REMOVAL: PERFORMANCE STANDARDS.

(a) * * *

(4) The alternative land use requirements of Section 816.133(a)-(c) of this chapter are met;

* * * * *

(Pub. L. 95-87, *30 U.S.C. 1201* et seq.)

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