

FEDERAL REGISTER: 48 FR 41720 (September 16, 1983)

DEPARTMENT OF THE INTERIOR

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

30 CFR Part 701, 816 and 817

Surface Coal Mining and Reclamation Operations; Permanent Regulatory Program; Remining

ACTION: Final rule.

SUMMARY: The Office of Surface Mining Reclamation and Enforcement (OSM) is issuing final rules providing environmental performance standards for remining operations. These new rules supplement the existing rules for new mining operations and add requirements applicable only to remining operations. The standard is these rules also cover the surface effects of underground mining when remining previously mined areas. In addition, the new rules contain definitions of certain technical terms associated with both types of operations.

EFFECTIVE DATE: October 17, 1983.

FOR FURTHER INFORMATION CONTACT: Raymond Aufmuth, Division of Engineering Analysis, Office of Surface Mining, Department of the Interior, 1951 Constitution Avenue, NW., Washington, D.C. 20240; 202-343-4022.

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I. BACKGROUND

Remining operations now constitute a substantial segment of all surface coal mining operations in the United States. This development is attributable to the decreasing amount of virgin lands available for mining and to technological advances making coal recovery at greater depths economically profitable.

Remining operations offer several distinct advantages. First, these activities ensure that recovery of coal reserves is maximized. Second, remining minimizes the adverse environmental impacts of preexisting mining on areas left unclaimed or inadequately reclaimed. Third, reclamation conducted during remining may decrease the expenditure of tax dollars required to reclaim previously mined lands under the Abandoned Mine Lands Reclamation Program established by Title IV of the Act.

On January 7, 1982 (*47 FR 928*) and June 25, 1982 (*47 FR 27734*), the Office of Surface Mining proposed permit and performance standards for remining previously mined areas and for reprocessing coal mine waste. The January 7, 1982, proposal dealt specifically with the requirement to reclaim highwalls affected by remining, while the June 25, 1982, rulemaking would have provided additional standards applicable to all remining and reprocessing operations. On November 12, 1982 (*47 FR 51316*), an interim final rule was issued applicable to remining of steep slope areas. The interim final rules issued on November 12, 1982, as well as other aspects of the June 25, 1982, proposal were considered in OSM's "Final Environmental Impact Statement, OSM-EIS-1: Supplement" on the permanent program regulations.

This rulemaking finalizes portions of the June 25, 1982, proposal and reissues the November 12, 1982, interim final rule as a final rule. For a more complete discussion of the problem of remining and the legal bases for these rules, interested persons should consult the preamble to the January 7, 1982, proposal (*47 FR 928*); the interim final rule on steep slope remining issued on November 12, 1982 (*47 FR 51316*); and the June 25, 1982, proposed remining rules (*47 FR 27734*).

The June 25, 1982, notice announced an open-ended comment period on the proposed remining rules (*47 FR 27734*). On July 13, 1982, OSM announced (*47 FR 30266*) that the public comment period on the proposal would close at 5 P.M. on August 25, 1982. Because several persons had proposed to offer testimony on various OSM regulatory reform proposals at the Congressional oversight hearings of September 9 and 10, 1982, the public comment period was

reopened to permit the transcripts of those hearings to be placed in the Administrative Record (47 FR 39201). The comment period closed on September 10, 1982.

Throughout the development of these rules, OSM has solicited public comments and recommendations. Following publication of the proposed rules, OSM made provisions to hold public hearings and public meetings upon request. Several public meetings on the proposed rules were conducted by OSM. Notations concerning these meetings are available for review in the Administrative Record at the Office of Surface Mining (OSM), U.S. Department of the Interior, 1100 L St., NW., Room 5315, Washington, D.C. A public hearing on the proposed remining rules was originally scheduled for August 4, 1982, but was cancelled when no persons wishing to testify appeared.

II. DISCUSSION OF COMMENTS RECEIVED AND RULES ADOPTED

OSM received comments on the proposed rules from industry, citizens, environmental groups, and other government agencies. OSM has reviewed each comment carefully and taken commenters' suggestions into consideration in writing these final rules.

SECTION 701.5 -- DEFINITIONS

ADVERSE PHYSICAL IMPACT

The proposed rule would have added a new definition to Section 701.5 for the term "adverse physical impact." Under the proposal, "adverse physical impact" was defined to mean, with respect to a highwall, actions that cause or can reasonably be expected to cause sloughing of material, subsidence, instability or an increase in wind or water erosion of the highwall. As a result of commenters' suggestions, OSM has modified the definition of "adverse physical impact" in the final rule to mean, with respect to a highwall created or impacted by remining, conditions, such as sloughing of material, subsidence, instability, or increased erosion of highwalls, which occur or can be expected to occur as a result of remining and which pose threats to property, public health, safety, or the environment. The final rule also uses the phrase "increased erosion," rather than "increased wind or water erosion," for simplicity, but without change in meaning.

One commenter suggested that the term "can reasonably be expected to cause" in the proposed definition, be replaced by the word "may", but offered no rationale for this change. OSM has rejected this suggestion and retained the term "can." "Can" is the proper word in this context, connoting a physical possibility of occurrence.

Another commenter claimed that limiting the proposed definition to impacts "that * * * can reasonably be expected" would weaken the definition of "adverse physical impact." This aspect of the proposed definition was alleged to be at odds with the agency's position in *Miami Springs Properties, Inc. v. OSM*, 2 *IBSMA* 399 (December 23, 1980) that augering, by its very nature, should be presumed to cause adverse physical impacts on highwalls. The commenter suggested that the definition be revised to treat "actions that * * * may potentially cause negative impacts on highwalls" as adverse physical impacts.

OSM has rejected the commenter's suggestion. The reference to conditions which can reasonably be expected to occur, rather than all "potentially negative impacts," provides a more realistic measure and is in accord with decisions of the Interior Board of Surface Mining Appeals (the Board) in *Cedar Coal Co. v. OSM*, 1 *IBSMA* 145 (April 20, 1979), and *Miami Springs Properties v. OSM*, 2 *IBSMA* 399 (December 23, 1980). Further, the commenter is incorrect in regard to the agency's position with respect to Miami Springs. The issue before the Board in Miami Springs was the propriety of the motion to dismiss granted by the Administrative Law Judge (ALJ) on the ground that the permittee's augering operations resulted in an adverse physical impact upon the orphan highwall. In its appeal, OSM argued only that it had presented sufficient evidence of the adverse impact to the highwall caused by the permittee's activities so as to make the ALJ's dismissal of the case below erroneous. The Board noted that a permittee could not be required to eliminate a preexisting highwall completely unless his mining activities caused an adverse physical impact to the highwall. The Board then remanded the case to the ALJ for an evidentiary hearing to determine whether any adverse physical impacts had occurred to the orphan highwall as a result of the permittee's auger mining of the coal seam at the base of the highwall. However, the case against the permittee was subsequently dismissed on rehearing after the ALJ found that no adverse physical impact had occurred. Thus, Miami Springs indicates that an operator may be required to eliminate only that portion of a preexisting highwall adversely physically impacted by his mining activities. The final rule simply defines an adverse physical impact more precisely.

A commenter found the proposed definition incorrect by describing an "adverse physical impact" as the cause, rather than the result of an action that affects or may affect the highwall. OSM agrees and the language of the final definition has been revised to state that an "adverse physical impact" includes "conditions which occur or can reasonably be expected to occur as a result of * * *."

Two commenters argued that the proposed reference to "sloughing of material" should not be included in the final definition of "adverse physical impact," since all highwalls, both natural as well as man-made, deteriorate to some degree over time, regardless of whether or not they are remined. One commenter claimed that current operators would be discouraged from remining preexisting highwalls if sloughing of material from such highwalls could be considered an "adverse physical impact" for which backfilling would be required under proposed Section 816.109(a)(1). Another commenter warned that remining of preexisting highwalls by auger mining would be prohibited unless the current operator could stabilize such highwalls to the satisfaction of the regulatory authority so long as sloughing of material from such highwalls would be defined as an "adverse physical impact."

The suggestion to delete sloughing of material as a condition which could be an adverse physical impact is rejected.

Sloughing of material from highwalls may pose a threat to public safety and property and should be covered by the definition. However, OSM agrees with the commenters on the need for a distinction between adverse and nonadverse physical impacts. Accordingly, the final definition is qualified by the addition of language providing that "conditions * * * which pose threats to property, public health, safety, or the environment" shall be considered adverse physical impacts. Sloughing normally involves only minor spalling of rock or soil from an exposed excavation. Nevertheless, sloughing of certain lithologic units (e.g., poorly indurated siltstones, claystones, or shales) as well as sloughing of some solid or residual soils which have been undercut may have adverse effects. Based on these facts, OSM retained the reference to sloughing of material in the final definition as an impact of remining which may adversely affect the physical stability of the preexisting highwall.

A commenter also objected to the proposed definition of "adverse physical impact" for suggesting that auger mining or underground face-ups on preexisting benches would be presumed to have such an effect on the structural integrity of highwalls in all instances, and sought clarification on this point.

OSM recognizes that conditions which affect or may affect highwalls are not necessarily adverse physical impacts, and the final definition is revised to reflect this fact. Thus, auger remining and underground faceup areas on preexisting benches are defined as adverse physical impacts on the highwall only when threats to property, public health, safety, or the environment are posed by the operation or could reasonably be expected to occur as a result of the remining. In the absence of site-specific information, it is not possible to state definitively that all auger mining or underground face-ups will result in such adverse impacts.

One commenter urged OSM to delete the proposed reference to "subsidence" from the definition of "adverse physical impact" because subsidence has no impact on the highwall and is already regulated by Sections 817.121-817.126.

OSM disagrees with the commenter and has included subsidence in the final definition as one of the physical impacts of remining which may adversely affect the preexisting highwall. The term "subsidence," as used in the context of remining, refers to situations where the highwall can collapse or subsidence impacts could occur on the surface above the highwall. Highwall collapse and subsidence have occurred or can be expected to occur in many cases above areas of auger and underground mining as a result of insufficient webbing or remining pillar support. Because larger masses or blocks of material may fall from highwalls affected by subsidence, collapses of highwalls in areas of retrogressive mass failures can be more severe than highwall collapses caused by weathering, jointing and fracturing, stratigraphic characteristics or some combination of these factors.

One commenter found the "adverse physical impact" concept applicable to conditions on remined areas, such as revegetation and surface and ground water quality. He recommended that the definition of "adverse physical impact" be expanded to cover any surface impact from post-mining conditions worse than those which existed prior to remining. Another commenter noted that other factors, in addition to highwalls, are causes of environmental problems which should be addressed in OSM's remining rules.

These comments raise issues outside the scope of the present rulemaking. The final definition of "adverse physical impact" covers only the negative impacts of remining preexisting highwalls. This is consistent with Sections 515 (b)(3), (d)(2), (d)(3), 201, and 102 which are relied on as the sources of authority for final Section 816.106 and the Cedar Coal and Miami Springs Board decisions.

HIGHWALL REMNANT

The final rule defines the term "highwall remnant" to mean that portion of highwall that remains after backfilling and grading of a remining permit area. Under the proposed definition, a "highwall remnant" referred to an engineered cut slope designed to be incorporated into the final grade of a reclaimed remining site and the portion of stabilized highwall that remains after backfilling and grading of a remining permit area when it is demonstrated that sufficient spoil is available to eliminate the highwall.

Two commenters suggested that OSM modify the proposed definition of "highwall remnant" to refer only to the portion of the stabilized highwall that remains after backfilling and grading of a remining permit area when it is demonstrated that sufficient spoil is not available to eliminate the highwall.

OSM has accepted the comment, in part, and omitted the proposed reference to "an engineered cut slope designed to be incorporated into the final grade of a reclaimed remining site" from the final definition. However, the commenter's proposed qualifier ("when it is demonstrated that sufficient spoil is not available to eliminate the highwall") has been rejected, since a highwall remnant could exist both where the operation did not cause an adverse physical impact on the highwall and where there is insufficient spoil available to eliminate the highwall.

A commenter objected to the term "stabilized highwall" in the proposed definition, because it implied that the remining operator would be responsible for stabilizing the entire remaining highwall. He favored the deletion of this term from the final definition of "highwall remnant," arguing that the operator should be required to stabilize only the area of the highwall disturbed by his remining operation.

This comment has been accepted. The reference to "stabilized highwall" was included in the proposed definition of "highwall remnant" to indicate that the operator is responsible for stabilizing the remaining highwall to prevent hazards to the environment and to public health or safety, even when there is insufficient spoil reasonably available to backfill the highwall completely. However, a highwall could be a highwall remnant whether or not an operator was required to take steps to stabilize the highwall. Applicable performance standards for stabilizing highwall remnants are more appropriately included in Sections 816.106 and 817.106. Under final Section 816.106(a)(4), stabilization efforts are required for highwalls created or impacted by the remining operation. Additionally, the current operator is required to stabilize any preexisting highwall remnant that will not be adversely impacted by his remining operation under final Section 816.106(b)(2).

Two commenters found the statement in the preamble allowing blending, shaving, stairstepping, or laying back of the preexisting highwall inconsistent with the proposed definition of "highwall remnant," which omitted any references to these methods for conveying upslope runoff safely or minimizing sloughing. They claimed that remining operations should not be allowed to shave, blend, or layback preexisting highwalls since these activities would introduce additional suspended solids on the disturbed areas.

OSM disagrees with the commenters' position. To the extent that highwall remnants may remain, the final rules allow remining operators to blend, shave, stairstep, or lay back preexisting highwalls. For steep-slope operations, such disturbances above the highwall which may be necessary to facilitate such blending or shaving are permissible if approved under Section 515(d)(3) of the Act. In any event, remining operations are required to comply with the performance standards for protection of the hydrologic balance contained in Sections 816.41-816.57 and Sections 817.41-817.57. No change in these requirements is made by this final rule.

PREVIOUSLY MINED AREA

The proposed rule would have defined the term "previously mined area" as any lands from which coal was extracted by, or which were affected by, earlier surface coal mining operations. The final definition provides that "previously mined

area" means land disturbed or affected by earlier coal mining operations that was not reclaimed in accordance with the requirements of 30 CFR Chapter VII.

A commenter contended that lands reclaimed to the requirements of the permanent performance standards of Part 816 should not be included in the definition of "previously mined area" or covered by the proposed re-mining rules. According to the commenter, only lands not reclaimed to the permanent performance standards of Part 816 should be treated as "previously mined area[s]" and addressed in the re-mining rules.

OSM has accepted the commenter's suggestion and has added the phrase "that were not reclaimed in accordance with the requirements of this chapter" to the final definition of "previously mined area." Accordingly, final Section 816.106 applies only to re-mining of lands not reclaimed to meet the performance standards of Chapter VII. Re-mining operations on lands reclaimed to the performance standards of Chapter VII must comply with the general backfilling and grading requirements of Sections 816.102-816.107.

OSM requested and received comments on whether the definition of "previously mined area" should include sites of unpermitted operations which failed to meet the reclamation standards of OSM's permanent program. Several commenters believed that the definition should cover unpermitted operations which failed to meet the permanent program's standards for reclamation.

Asserting that current operators should not be penalized for the failure of previous operators to obtain permits to mine such areas, one commenter urged that areas of unpermitted operations should be covered in OSM's definition to ensure uniform application of the final definition among the States. Another commenter argued that the final definition should encompass both areas of permitted and nonpermitted operations since the environment would be affected by surface mining activities, regardless of whether or not they were conducted pursuant to a permit. Two commenters contended that the definition should be interpreted to cover very old unpermitted sites, which had been mined prior to the existence of any performance standards for reclamation. They alleged that any other interpretation of "previously mined area" would be inconsistent with the objective of the re-mining rules for elimination or reduction of old problem sites.

A commenter criticized the proposal to make the definition of "previously mined area" under Section 701.5 consistent with the scope of lands "eligible" for reclamation with Abandoned Mine Land (AML) Fund monies under 30 CFR Part 870. According to the commenter, this approach would compound the serious deficiencies in Section 404 of the Act by allowing thousands of acres of previously mined lands to go unreclaimed.

In response to the commenters' concerns, OSM has modified the language of the definition to treat all lands which were disturbed or affected by earlier coal mining operations and improperly reclaimed as previously mined areas. This final definition covers all areas previously mined but not reclaimed in accordance with the requirements of Chapter VII, including those lands where bond forfeitures have occurred or which were mined by unpermitted operations.

One commenter found the proposed definition of "previously mined area" vague and claimed that it could be interpreted to cover all subsequent cuts on areas where initial cuts had been made prior to the Act's effective date, thereby allowing later operations unjustifiable exemptions from the approximate original contour (AOC) requirement. Because re-mining usually occurs in areas where there has been a period of inactivity, the commenter thought the term "previously mined area" should apply only to "areas which were mined or mining processes [sic] prior to August 3, 1977, and on which all mining has ceased." The commenter felt his suggested definition would be consistent with the definition of "previously mined area" under the AML rules. Another commenter recommended that the definition of "previously mined area" be clarified to cover mining operations which were previously abandoned as well as continued operations of ongoing mines.

OSM disagrees that the definition of "previously mined area" is vague and has rejected the suggestion that the definition "previously mine area" be limited only to lands mined prior to August 3, 1977, and which were inactive for some period of time prior to re-mining. However, neither the proposal nor the final definition allows ongoing operations variances from the requirements for backfilling and grading or AOC restoration in areas not adversely impacted by past mining. In the case of any coal mine developed on or after May 3, 1978, the effective date of the interim regulatory program, reclamation in accordance with the Act's standards is required. This rule does not relieve the continuing obligations of former operators with regard to any site. Thus, there is no unjustifiable exemption from the approximate original contour operation.

Nevertheless, the final rule recognizes that there may have been some mining which occurred after August 3, 1977 that was not reclaimed in accordance with the requirements for return to AOC. Such operations could include unpermitted mines; mines exempt under Section 528 of the Act; and mines in existence between August 3, 1977, and May 3, 1978, or which qualified for the special exemption of Section 710.12. Thus, while the AML program established by Title IV of the Act establishes the overall objective of reclamation of abandoned mined lands, the basis for this final rule is not limited to lands eligible for funding under that program. Furthermore, inclusion of lands disturbed and improperly reclaimed since the Act was enacted in the definition of "previously mined area" will not result in damage to the environment because in every instance where sufficient spoil is reasonably available, highwalls must be eliminated.

One commenter suggested that the proposed definition of "previously mined area" be modified to include both surface and underground, as well as coal and noncoal, mining operations so that the adverse environmental effects of deep mines in Appalachia and old clay mines, quarries and sand and gravel pits in Pennsylvania could be ameliorated by re-mining.

OSM found this suggestion unnecessary since underground coal mining operations are already included in the scope of the final definition adopted for "previously mined area." This is consistent with Section 701(28) of the Act and Section 701.5, which define "surface coal mining operations" to include surface impacts of underground mining activities. Noncoal areas are beyond the scope of this rulemaking and have not been included under the definition of "previously mined area." Re-mining of unreclaimed noncoal sites by subsequent coal mining operations is likely to occur on only the most limited basis. Thus, no special consideration has been given to such sites under the final rule. If the provisions of 30 CFR 785.13 could be met, consideration of such special conditions can be made under the experimental practices provisions of Section 711 of the Act.

Another commenter suggested that the definition of "previously mined area" cover unreclaimed areas where the overburden has been removed and other disturbed areas which have not been reclaimed, such as tipples, construction sites, and storage areas.

OSM agrees with the commenter's interpretation of the proposed definition. The reference to "lands from which coal was extracted by or which were affected by * * *." in the proposed definition has been replaced by the phrase, "lands disturbed or affected by * * *." in the final definition. This change is intended to make it clear that "previously mined area" includes unreclaimed areas where overburden has been removed and other disturbed areas which have not been reclaimed. Surface coal mining operations can cause physical disturbance to lands in some situations even if no coal is actually extracted from those lands. Roads, buildings, conveyors, stockpiles, and other facilities on abandoned and unreclaimed mine sites should be considered "previously mined areas."

REASONABLY AVAILABLE SPOIL

Numerous commenters discussed their interpretation of the term "reasonably available spoil" which was included in the preamble to the proposed rules (*47 FR 27740*, June 25, 1982). The proposal defined the term as "spoil that is generated by the mining operation and other spoil located in the permit site that is accessible and available for use and that when rehandled will not cause a hazard to the public safety or significant damage to the environment." In response to these comments, the final rule includes a definition of the term "reasonably available spoil" in Section 701.5. The definition of reasonably available spoil was included in Section 826.12(b) of the November 12, 1982, interim final rule. Except as indicated below, the discussion of the definition and response to comments in the November 12, 1982, Federal Register notice continue to be applicable to the definition included in Section 701.5 of this final rule.

Several commenters feared the definition in the preamble to the proposal would not be binding and urged OSM to define "reasonably available spoil" in the rules. They claimed that re-mining would not be cost-effective if the proposed definition could be construed as a requirement for operators to obtain spoil from borrow pits on or off the permit area. Some commenters contended that OSM should require operators to use spoil in the permit area that was created, disturbed, rehandled, or affected by re-mining for backfilling material.

As indicated above, the suggestion to include the definition of "reasonably available spoil" in Section 701.5 has been accepted. This definition treats spoil and suitable coal mine waste materials generated by the re-mining operation or other spoil or suitable coal mine waste material located in the permit area that is accessible and available for use and that when

rehandled will not cause a hazard to public safety or significant damage to the environment, as "reasonably available spoil."

One commenter recommended that "reasonably available spoil" be defined as "spoil which is generated as a direct result of the coal extraction process and [which] could not require any additional disturbance beyond that which is necessary to achieve the maximum economic recovery of the coal being mined." The commenter argued that his definition would eliminate the need to use borrow pits, take into consideration the economics of coal recovery, and minimize unnecessary disturbances to the surrounding environment.

No change in the rule has been made based on this comment. Section 515(b)(1) of the Act requires that all surface coal mining operations be conducted to maximize fuel resource recovery and minimize land to be reaffected in the future by mining. This requirement is already recognized in Section 816.59 of OSM's regulations and need not be repeated in the definition of reasonably available spoil. All spoil or suitable coal mine waste generated by the re-mining operation is to be considered reasonably available. However, spoil in addition to that generated by the re-mining operation need only be used if it is accessible and available for use. Thus, the definition should not impose an undue burden on operators to use spoil in addition to that necessary to achieve the maximum economic recovery of the coal.

A commenter recommended that coal mine waste be included as reasonably available spoil for backfilling. OSM previously rejected this suggestion in the interim final rule (*47 FR 51317*, November 12, 1982), since OSM's rules existing at that time precluded the disposal of coal mine waste in the backfill. On May 24, 1983 (*48 FR 23356*), the rules for backfilling and grading in Sections 816.102 and 817.102 were revised to allow disposal of coal mine waste in mined-out areas in accordance with Sections 816.81-816.83. For this reason, this comment has been accepted in the final rule and the phrase "and suitable coal mine waste material" has been added to the final definition of "reasonably available spoil."

One related provision in Part 816 should be noted. In response to a comment, Section 816.106(a)(1) requires the permit area to encompass all reasonably available spoil in the immediate vicinity of the re-mining operation. This will ensure that permit area boundaries are not manipulated so as to allow the operation to avoid its reclamation obligations.

REMINING

Under the definition proposed for addition to Section 701.5, the term "remining" meant conducting surface coal mining and reclamation operations which affect previously mined areas. No comments were received on the proposed definition, and it has been adopted as final in Section 701.5.

REPROCESSING

According to the proposed definition, "reprocessing" meant processing coal mine waste to remove the marketable coal. The final rule does not include standards applicable specifically to reprocessing and therefore the final rule does not add a definition of "reprocessing" to Section 701.5. A definition of reprocessing and specific standards for reprocessing operations are unnecessary because reprocessing operations involving the extraction of coal are surface coal mining operations under 30 CFR 700.5 and Section 701(28) of the Act. Thus, the standards of the permanent regulatory program already apply to reprocessing. To the extent that this final rule is applicable, reprocessing on previously mined areas is included in the final definition of the term "remining."

One commenter believed that "reprocessing" should be redefined to include extraction and processing of coal waste since both activities would be covered under Section 780.34(d) of the proposed rules. OSM did not accept suggestion for the reasons stated above.

PROPOSED SECTION 780.34 -- PERMIT REQUIREMENTS

The final rules do not adopt proposed Section 780.34, which would have set forth permit application requirements for various types of surface re-mining and reprocessing operations. The information required in permit applications for surface re-mining and reprocessing operations under the proposed rule was duplicative of the information required in the reclamation plan segment of permits for surface coal mining and reclamation operations under Subchapter G.

One commenter advocated close scrutiny by the regulatory authority of applications for permits to remine sites near populated or aesthetically sensitive areas seeking variances under proposed Section 816.109. Another commenter contended that the plans and analyses required in remining permit applications should be described generally to provide the regulatory authority sufficient flexibility to evaluate proposed operations on a site-specific basis. A commenter recommended that the following provisions be specified in the rule to ensure maximum coal recovery on each remining site and limit the potential for abuse of variances by remining operators: (1) A requirement that remining permit applications contain data on the applicant's use of the best technology currently available to demonstrate that the deepest possible cut will be taken; and (2) a requirement that approval of the remining permit application be contingent on such a demonstration of maximum coal recovery.

These comments were rejected. There is no basis to include special standards for mining near populated or aesthetically sensitive areas applicable solely to remining operations. Additionally, Sections 779.24, 779.25, 780.11, 780.14, and 780.18 for surface mines, and equivalent requirements for underground mines, will provide the regulatory authority with information necessary to evaluate whether the mine will be in compliance with the requirements of Sections 816.59 and 817.59 for coal recovery.

Commenters questioned whether the proposed rule would require a special, distinct permit to be obtained for a remining operation conducted in conjunction with a larger mining operation. One commenter suggested that the informational requirements of proposed Section 780.34(a) be applied only to applications for permits to remine areas where the volume of spoil available is insufficient to eliminate the highwall or return the remined area to AOC. Under this scheme, applications for permits to conduct remining on areas where sufficient spoil is available would be treated as ordinary surface mining permit applications and exempt from compliance with the informational requirements of proposed Section 780.34(a). OSM was urged to delete the cross-reference to Section 816.109 performance standards from proposed Section 780.34(a) and to specify in the final rule the maps, cross-sections, and other drawings required in the remining permit application.

The final rules do not require a separate permit for a remining operation. Rather, the final rules treat remining operations the same as all other operations for permitting purposes.

One commenter viewed the phrase "on the outslope" in proposed Section 780.34(a)(2) and (4) as evidence of OSM's belief that most, if not all, remining would occur in the Eastern Appalachian coal region. He advocated deletion of the phrase to ensure that the final rules would apply to remining in all coal regions, including the West and Midwest where outcrops are nonexistent. A commenter suggested that proposed Section 780.34(a)(2) be revised to require remining permit applications to contain maps showing the extent of preexisting highwalls and spoil "which will be affected by remining." Commenters felt the phrase "that may be impacted by the proposed operation" should be added after the word "spoil" in proposed Section 780.34(a)(2) and (4) to clarify that a remining permit would cover only areas affected by the proposed operation. Commenters also suggested that proposed Section 780.34(a)(4) be modified to require that permit applications analyze the effects of the proposed operation on "preexisting spoil which will be affected by remining, * * *." OSM's use of the term "analysis" in proposed Section 780.34(a)(4) was criticized for implicitly requiring a permit applicant to make certain volumetric calculations to determine the effects of his proposed remining operation on preexisting highwalls. Because it would be impossible for applicants to determine such effects, a commenter argued that the permit application should be required only to "describe" the effects of the proposed remining operation on preexisting highwalls.

One commenter, claiming proposed Section 780.34(a)(4) was intended to limit or prevent offsite environmental damage, recommended that permit applications also be required to "[d]escribe the measures to be taken to prevent or minimize any adverse impact that remining may have on the highwalls." Another commenter claimed that a description of mitigation measures and design specifications should be required in a permit application upon a showing that "additional adverse impacts cannot be prevented" pursuant to proposed Section 780.34(4). Commenters also recommended that OSM add a provision to the new rule exempting applications from the informational requirements of Section 780.34(b) and (c), as proposed, unless their analytical contents demonstrate the existence of additional adverse impacts.

One commenter thought that volumetric calculations of available spoil should be a function of the regulatory authority under the AML Program unless the remining permit application showed a specific intent to achieve approximate original contour.

Another commenter recommended that Section 780.34(b)(5) of the proposed rule be revised to require a showing of "the approximate postmining surface contour" since it would be virtually impossible for operators to show the exact postmining surface contour in applications for remining permits.

The final rules do not distinguish between remining operations in different parts of the country. OSM has determined that the existing permitting rules require sufficient information and analyses to meet applicable requirements for remining operations. Thus, there is no need to require special maps, specifications, or special permits limited to the remining operation. An applicant has the flexibility under the existing rules to include special maps and plans for remining as appropriate. OSM disagrees with the commenter who suggested that volumetric calculations are not possible or that it is not possible to estimate postmining surface contours. In fact, such calculations are routinely used by the coal industry. Under this rule, the permit applicant must provide a written demonstration to the regulatory authority that the volume of reasonably available spoil is insufficient to completely cover the highwall if the applicant wishes the standards of Section 816.106(a) to apply to his or her operation.

One commenter objected to the phrase "created by remining" in proposed Section 780.34(b)(1) on the ground that it could be interpreted to require the remining permit applicant to show all of the highwalls which would be created during his proposed operation, including highwalls which he might backfill completely. The commenter suggested that the objectionable language be replaced in the final rule by the phrase "proposed to remain after remining" to make it clear that permit applications must show only portions of the preexisting highwall which would not be eliminated by the proposed remining operation.

OSM agrees that it is not necessary to provide a special description of highwalls which would be backfilled completely beyond the normal permitting requirements.

One commenter favored deletion of proposed Section 780.34(b)(7) from the final rule on the ground that the impact of the proposed remining operation on a lower seam intersecting the preexisting highwall would already have been included in the remining permit application pursuant to proposed Section 780.34(a)(4). Commenter found the requirements in proposed Section 780.34(b)(8) unnecessary since spoil on the outslope affected by remining would be considered part of the permit area and covered in the reclamation plan segment of the permit application.

OSM agrees that the reclamation plan requirements of Part 780 are sufficient to cover the items included in proposed Section 780.34 and therefore has not adopted the proposed rule.

One commenter suggested that proposed Section 780.34(c) be omitted from the final rule to discourage remining by auger mining. Because auger mining allegedly renders remaining coal deposits inaccessible by any other remining method, the commenter asserted that the proposed requirements for auger remining permit applications would not enable such operations to achieve maximum resource recovery. Another commenter recommended that the final rule adopted by OSM require auger remining permit applications to include the information specified in proposed Section 780.34(b) in addition to the data required by proposed Section 780.34(c).

A commenter favored deletion of proposed Section 780.34(c)(2) from the final rule on the theory that measures to mitigate the adverse physical impacts of the proposed auger remining operation on the stability of a preexisting highwall would already be required in the permit application under proposed Section 780.34(a)(4). Commenters detected a typographical error in Section 780.34(c)(2)(ii), as proposed by OSM. One commenter, who questioned the meaning of "substance" in the proposed requirement for mitigating measures "to counteract the potential effects of substance [sic] to structures or facilities both during and after mining," suggested that the reference be changed to "subsidence" in the final rule. One commenter found the language of proposed Section 780.34(c)(3) ambiguous and recommended that the provisions be revised to require the permit application to "[s]how the plan for the reclamation of areas from which preexisting spoil will be removed or borrow areas from which material will be utilized to backfill auger-mined preexisting highwalls to achieve stability." Another commenter thought the requirement would be unnecessary since any area affected by the auger remining operation would be part of the permit area and covered by the reclamation plan segment of the permit application.

The final rules do not attempt to encourage or discourage auger mining. Such operations will be fully described under the existing permitting requirements.

Several commenters objected to the informational requirements of proposed Section 780.34(d), and urged OSM to minimize the burdens on applicants for reprocessing permits. Other commenters believed that proposed Section 780.34(d) would perpetuate economic disincentives to coal mine waste reprocessing by imposing more permit application requirements on these operations than those required of full-scale mining operations under the previous rules. As noted by these commenters, refuse piles are leased from large mining concerns by small operators who do not have the capital to finance reprocessing permits and often cannot wait for permit approval because of fluctuations in the market price of recoverable coal. They recommended that OSM adopt permit application requirements for reprocessing refuse piles identical to requirements for coal exploration permit applications under the previous rules.

Commenters also suggested that an exception be added to the rule granting the regulatory authority discretion to fashion reclamation requirements for lands previously disturbed by coal refuse piles based partly on the permit applicant's ability to make a profit on the proposed extraction operation. Under the commenters' suggested rule, approval would be required for the permit application of any reprocessing operation which would not produce more environmental harm than the preexisting refuse pile.

In the final rule, OSM has not adopted special performance standards for reprocessing. Therefore, special permitting provisions for such operations included in the proposal are not applicable to the final rule.

FINAL SECTION 816.106

Final Section 816.106 contains requirements for backfilling and grading of previously mined areas. It is adopted from proposed Section 816.109. The final rule replaces the interim final rule issued on November 12, 1982, with a new section incorporating the requirements of that interim rule. The analysis included in the preamble of the November 12, 1982, Federal Register notice continues to be applicable to this rulemaking and is incorporated by reference unless otherwise noted. The interim rule was applicable only to steep slope contour re-mining operations. This rule is not so limited. The legal bases for this rule are discussed in the preambles to the interim final rule (*47 FR 51316*, November 12, 1982) and the proposed rule (*47 FR 27734*, June 25, 1982). Interested persons are referred to those Federal Register notices for additional information.

In the November 12, 1982, final rule, OSM deferred response to several issues related to re-mining of previously mined areas (see *47 FR 51316*). These included: (1) Applicability of the rules to first-cut mining, auger mining, second-cut mining with sufficient spoil available to achieve AOC, and non-steep-slope mining; and (2) recommendations of other methods to assure maximum coal recovery. As discussed below, this final rule includes standards for second-cut re-mining applicable to steep-slope areas and non-steep slope areas. Standards applicable to auger mining of previously mined areas were included in a separate rulemaking (*48 FR 19314*, April 28, 1983). Operations that have sufficient spoil available to achieve AOC are required to comply with the full requirements of Sections 816.102-816.107 unless the operation will not cause an adverse physical impact on the highwall. This exception is discussed under Section 816.106(b) below.

This preamble discussion refers to Section 816.106 for surface mining activities. Unless otherwise indicated, it applies equally to Section 817.106 for underground mining activities.

The initial paragraph of final Section 816.106 states that re-mining operations on previously mined areas containing a preexisting highwall must comply with the requirements of Sections 816.102-816.107, except as provided in Section 816.106. This provision is intended to clarify the scope of requirements for operations addressed in the re-mining rules. The final rule allows a limited exception from the requirements of complete highwall elimination and AOC restoration for the re-mining of previously mined areas where the re-mining operation does not result in an adverse physical impact on the preexisting highwall or where the volume of reasonably available spoil is insufficient for complete backfilling and grading of the reaffected or enlarged preexisting highwall.

One commenter claimed that the exception provided in proposed Section 816.109(a) would be inconsistent with OSM's responsibility to balance the nation's energy needs against the need to protect the environment from the harmful effects of surface coal mining operations. OSM disagrees with the commenter's claim. The requirement of total elimination of highwalls under the previous regulations made re-mining of abandoned highwalls uneconomic in most situations or required the unnecessary act of disturbing virgin areas to obtain spoil for highwall reclamation in others.

On many abandoned sites, spoil generated by the previous mining operation has been dumped over the side of a mountain and is not reasonably available to the remining operation as backfill material. So long as total reclamation of the preexisting highwall was required, the operator was compelled to sustain the high costs of retrieving the necessary fill material from borrow pits outside the immediate mining area or hauling old spoil from remote areas to the remining site. Under the circumstances, thousands of miles of abandoned highwalls remained unreclaimed.

Partial reclamation through remining of abandoned highwalls will produce improvements in the existing environment. For this reason, OSM has chosen to encourage remining of previously mined areas by granting these operations a limited exception from the requirements of complete highwall elimination and restoration to premining AOC in final Section 816.106(a). The final rule allows an operator, using the equipment presently available, to remine an unreclaimed highwall "to the maximum extent technically practical." It requires that all of the available overburden from his remining operation be used for reclaiming the bench, together with other reasonably available material located in the permit area.

Final Section 816.106 has several purposes. First, it is intended to promote the recovery of remaining coal reserves of importance to the Nation's present and future energy needs; second, it is intended to effectuate at least partial rehabilitation of abandoned benches which were not fully reclaimed by the earlier mining operation; and third, it is intended to minimize unnecessary disturbances of the environment by the creation of borrow areas to effectuate highwall elimination. Without the limited exception provided in final Section 816.106(a) for remining of previously mined areas, there is little likelihood that the thousands of miles of unreclaimed highwalls would be reclaimed without utilization of the AML Fund or other methods of subsidization. This final rule attempts to remove a portion of the regulatory and economic impediments to achieve a net environmental improvement. Thus, final Section 816.106(a) is consistent with OSM's responsibilities under Section 102 of the Act. As addressed more fully in the earlier preambles referenced above, Congress did not consider the ramifications on remining of previously mined areas in adopting the highwall elimination requirement.

Two commenters found proposed Section 816.109 objectionable for allowing operators conducting remining on fully reclaimed lands to evade compliance with the Act's requirements for complete highwall elimination and restoration to premining AOC.

Final Section 816.106 allows an exception from AOC restoration for remining areas which were inadequately reclaimed and in which highwalls were left by the previous mining operation. It does not authorize operators to evade compliance with the Act's requirements on fully reclaimed lands. Operators remining fully reclaimed areas are required to comply with the general performance standards, including complete highwall elimination and AOC restoration, as specified in Sections 816.102-816.017.

A commenter contended that performance standards for mining sites which were unpermitted prior to the effective date of the Act (August 3, 1977) should be less stringent than performance standards for remining areas of new or continuing operations. Accordingly, he recommended that performance standards for remining operations which were unpermitted before August 3, 1977 and cannot meet the full reclamation requirements of the Act should be left to the discretion of the regulatory authority.

OSM has rejected the commenter's recommendation. Mining operations in existence since the effective date of the interim regulatory program are required to comply with the performance standards for restoration to premining AOC and elimination of highwalls in Sections 515 (b)(3), (d)(2), and (d)(3) of the Act. OSM is required to adopt regulations implementing these provisions. Section 816.109(a), as finally adopted, allows a limited exception from the highwall elimination and restoration to premining AOC requirements. However, this limited variance is in accord with the Act's intent and objectives. It would not be consistent with the objectives of the Act or the requirements of Section 501(b) requiring OSM to establish permanent program regulations to include no regulations applicable to such operations in the final rule.

FINAL SECTION 816.106(a) (PROPOSED SECTION 816.109(a)(1))

Final Section 816.106(a) allows remining operations an exception from the AOC restoration requirement in Section 816.102(a)(1) and the complete highwall elimination requirement in Section 816.102(a)(2) upon submission of a written demonstration to the regulatory authority that the volume of all reasonably available spoil is insufficient to backfill the reaffected or enlarged highwall completely. This provision was proposed in Section 816.109(a)(1). In response to

remarks from commenters, OSM has revised the language of the proposed rule in final Section 816.106(a). The final rule states that the requirements of Section 816.102 (a)(1) and (a)(2) shall not apply to remining operations where the volume of all reasonably available spoil is demonstrated in writing to the regulatory authority to be insufficient to completely backfill the reaffected or enlarged highwall. Under final Section 816.106(a), the remining operator is required to eliminate the highwall to the maximum extent technically practical in accordance with the criteria specified in Paragraphs (a)(1)-(a)(5) of Section 816.106.

Proposed Section 816.109(a)(1) stated that the remining operation was required to conduct backfilling and grading in accordance with Sections 816.101-816.103 in order to eliminate the remaining highwall to the maximum extent practical. Two commenters objected to the cross-reference in the proposed rule because they implied that operators would be required to eliminate highwalls completely and backfill remined areas to premining AOC. One commenter suggested that proposed Section 816.109(a)(1) be deleted from the final rule. Another commenter advised OSM to add the phrase "except for the requirements to restore to approximate original contour and eliminate the highwall" after the cross-referenced sections in the proposed rule.

In response to the commenters' suggestions, final Section 816.106(a) was rewritten to state that the requirements of Section 816.102 (a)(1) and (a)(2) regarding the elimination of highwalls shall not apply to remining operations where the volume of all reasonably available spoil is demonstrated in writing to be insufficient to completely backfill the reaffected or enlarged highwall. The final rule should make it clear that restoration to premining AOC is not required of remining operations whenever there is insufficient spoil reasonably available for complete highwall elimination. The introductory language of Section 816.106 explains that the provisions of Sections 816.102-816.107 do apply to remining operations except as specified in Section 816.106.

One commenter thought the term "practical" in proposed Section 816.109(a) was ambiguous and should be defined since the rule otherwise could be misinterpreted to allow incomplete reclamation based on changed economic conditions or the insolvency of the operator. Commenters also recommended that the rule require remining operators to use the best technology currently available (BTCA) in eliminating remaining highwalls to the maximum extent practical. One of these commenters suggested that the BTCA concept would ensure that the economic conditions of the particular operator would not be considered as a justification for incomplete reclamation. A number of commenters advised OSM to replace the term "practical" in the proposed rule with the word "possible." One commenter warned that the proposed requirement for elimination of "the remaining highwall to the maximum extent practical" would result in incomplete restoration of hundreds of miles of highwalls. Another commenter contended that the term "possible" would reflect OSM's intention to comply with Section 102 (d), (f), and (h) of the Act more accurately than would the reference to "practical" in proposed Section 816.109(a).

OSM agrees that neither external economic conditions nor insolvency of the operator should be used in determining whether a specific remining proposal will satisfy the highwall elimination standard in final Section 816.106(a). Accordingly, OSM has revised the final rule to require the operator to eliminate the highwall to the maximum extent technically practical. The phrase "technically practical" will accommodate the commenters' concern without opening the rule to extreme interpretations in situations where it may be "theoretically possible" to cover the highwall only through the use of extraordinary technological measures. The Act does not require operators to employ extraordinary means to eliminate the highwall in remining situations where there is insufficient spoil for complete backfilling. Final Section 816.106(a) is intended to require operators to eliminate only that portion of the highwall which can be eliminated through standard backfilling and grading techniques using presently available equipment.

A commenter also suggested that the preamble to the final rule include examples of the criteria States should use to determine whether highwall elimination is economically feasible, given the possibility for disputes to arise over the unreasonably high costs of backfilling and grading.

This suggestion has been rejected. Under final Section 816.106(a), the operator will be responsible for highwall elimination to the maximum extent technically practical. Such a determination will be made based upon standard engineering practices available and not general economic considerations.

A commenter asked whether proposed Section 816.109(a)(1) would make any distinction between preexisting highwalls and highwalls created during the remining process.

Final Section 816.106 applies only to previously mined areas which contain a preexisting highwall. In response to the comment, clarifying language has been included in the first sentence of Section 816.106 and in Section 816.106(a). Final Section 816.106(a) does not distinguish a reaffected preexisting highwall from a highwall enlarged during the remining operation. This includes second cuts where the face of the highwall may be new but which is really an enlargement of the preexisting highwall. The final rule requires elimination of the highwall to the maximum extent technically practical. In situations where the bench is reaffected and a larger highwall is made by remining, final Section 816.106(a) will result in every foreseeable case in the operator covering at least an amount of highwall equal to that newly created and as much of the preexisting highwall as is technically practical.

PROPOSED SECTION 816.109(a)(2)

As proposed, Section 816.109(a)(2) provided that the person who conducts the surface coal mining and reclamation operation shall demonstrate to the regulatory authority with a certification from a qualified registered professional engineer that the minimum static safety factor for stability of the backfill is at least 1.3. The general requirement for the postmining slope to achieve a minimum long-term static safety factor of 1.3 is included in final Section 816.102(a)(3), which is applicable to remining operations. For this reason, it is unnecessary in Section 816.106 and has been removed from the final rule as redundant.

A commenter alleged that determinations of the static safety factor for backfill stability would be expensive, time-consuming, and unnecessary for any remining operation using a 4:1 slope. Under these circumstances, he suggested that remining operators should have the option of showing the regulatory authority that the backfill slope has an established history of long-term stability, in lieu of being required to demonstrate a minimum static safety factor for backfill stability of at least 1.3.

This suggestion has been rejected. As indicated in the final backfilling and grading rule (*48 FR 23359*, May 24, 1983), the 1.3 safety factor is appropriate to meet the stability requirements of the Act in Section 515 (b)(3), (b)(4) and (d)(2). The basis for establishing the 1.3 safety factor is discussed in the preamble to the previous rules at *44 FR 15228* (March 13, 1979). These reasons are equally applicable to remining operations and justify applying the same requirements to postmining slopes of remining operations.

Commenters claimed that the certification requirement provided in proposed Section 816.109(a)(2) would not guarantee stability of the backfill. One commenter suggested that the rule be revised to require operators to submit to the regulatory authority calculations of the minimum static safety factor along with the certification. Another commenter challenged the cost-effectiveness of the proposed requirement that certification be obtained from a qualified, registered professional engineer. He contended that the operator's own employees would be better qualified, more experienced and, in some cases, the only personnel available to make the safety factor determination, but failed to cite any proof in support of his contentions.

The final rules impose the same requirements for backfill stability on remining operations as on all other operations. The same factors are relevant, whether or not a specific certification is required. For certain kinds of structures, such as impoundments, siltation structures, stream diversions, etc., OSM has imposed certification requirements to provide added assurance that the environment will be protected. Such a requirement is not considered necessary for achieving the stability of the postmining slope of the backfilled area. This comports with previous Section 816.102(a)(2) which did not contain a certification requirement. Certification alone does not guarantee backfill stability, although a State may determine that certification of the backfill is appropriate under a State program. Additionally, it should be noted that profiles of the final surface configuration are required to be certified by a qualified registered professional engineer under Section 507(b)(14) of the Act.

A commenter recommended that determinations of safety factors be required for backfill stability only in unusual circumstances. Since highway fills as steep as 2h to 1v are routinely designed without calculations of safety factors during the design process, the commenter believed it would be unreasonable to require determinations of safety factors to be made for embankments well above the design requirements.

OSM disagrees. Calculation of safety factors is the standard engineering practice used to assess the stability of earth and rockfill structures. This requirement is retained to satisfy OSM's responsibilities under Sections 515 and 201 of the Act.

Highway fills using 2:1 slopes are routinely constructed without calculations of safety factors only after the fill materials have been tested and have been determined compatible with previous stability determinations. Where geotechnical testing indicates the materials are inappropriate for 2:1 slopes, flatter slopes are used for highway fills. Since the operator is required to ensure the stability of the backfill, the 1.3 safety factor provides an appropriate standard.

FINAL SECTION 816.106(a)(1) (PROPOSED SECTION 816.109(a)(3))

Final Section 816.106(a)(1) requires that all spoil generated by the remining operation and any other reasonably available spoil be used to backfill the area. The final rule was proposed in Section 816.109(a)(3) which stated that all spoil generated by the mining operation and other reasonably available spoil shall be used to backfill the area so as to eliminate the highwall to the maximum extent practical. As discussed above, the proposed phrase "to the maximum extent practical" has been replaced with the phrase "to the maximum extent technically practical." Final Section 816.106(a)(1) also requires that spoil in the immediate vicinity of the remining operation be included within the permit area as "reasonably available spoil" for the purpose of the rule.

One commenter protested OSM's use of the phrase "all reasonably available spoil" in the proposed rule on the ground that the regulatory authority could construe that term any way it desired. He warned that remining projects would be scrapped if regulatory authorities could ignore the costs involved in moving any spoil, regardless of its reasonableness or availability. Other commenters recommended that the terms "reasonably available spoil" in the proposed rule be replaced by the phrases "spoil affected by remining" or "spoil from the remining operation" in the final rule. They believed that operators should be required to use old spoil affected by remining as well as new spoil created by the operation for backfilling the highwall.

Other commenters contended that proposed Section 816.109(a)(3) would require operators to haul old spoil or borrowfill located outside the permit area to the remining site for backfilling the remined highwall. Increases in the size of the permit area and the amount of the performance bond resulting from the borrow requirement of proposed Section 816.109(a)(3) were alleged to be economic disincentives to remining operations. Another commenter found the highwall elimination requirement in proposed Section 816.109(a)(3) inconsistent with the objective of reclamation on the ground that it would be economically infeasible for most remining operators to restore preexisting benches to AOC without creating borrow pits on unmined areas to make up the deficit of available spoil. Because remining would improve the stability of unreclaimed benches, the commenter urged that remining operators be responsible only for partial backfilling and grading of preexisting highwalls. Another commenter thought it would be inconsistent with congressional intent to require borrowing from virgin areas to cover preexisting highwalls.

Under final Section 816.106(a), AOC restoration is not required of remining operations where the volume of all reasonably available spoil is insufficient to backfill the highwall completely. Instead, the final rule requires that all spoil generated by the remining operation and any other reasonably available spoil located in the permit area be used to eliminate the highwall to the maximum extent technically practical. Under final Section 816.106(a)(1), spoil in the immediate vicinity of the remining operation must be included in the permit area and included in determining what constitutes "reasonably available spoil." This provision is in accord with the objectives of the Act and should not impose an undue burden on remining operations. One commenter was incorrect in asserting that the use of borrow pits is required by final Section 816.106(a)(1).

Final Section 816.106(a)(1) should eliminate the necessity to create borrow pits, since the elimination of the reaffected or enlarged highwall to the maximum extent technically practical may be accomplished with only the spoil which is reasonably available. Environmental degradation from borrow pits on unmined areas could exceed the benefits of reclaiming preexisting highwalls through remining.

Some of the commenters appeared to misunderstand the meaning of the term "spoil." Under Section 701.5, spoil is defined as overburden that has been removed during surface coal mining operations. It does not include undisturbed material in virgin areas. As stated earlier, "reasonably available spoil" is defined in Section 701.5 to include spoil and suitable coal mine waste material generated by the remining operation or other spoil or suitable coal mine waste material located in the permit area that is accessible and available for use and that when rehandled will not cause a hazard to public safety or significant damage to the environment.

Two commenters argued that re-mining operators should be required to use only spoil moved or relocated during road construction, but not the entire depth of spoil on which a road is constructed during mining. Another commenter contended that an operator should not be required to use spoil from areas adjacent to the re-mining operation just because it may not be on the downslope. According to the commenter, requiring the operator to do so would only serve to reduce the amount of material available to reclaim the abandoned area when either re-mining or AML reclamation occurs there.

OSM disagrees with the commenters' positions. The final rule provides only a limited exception to the highwall elimination requirements and provides that spoil generated by re-mining as well as preexisting spoil in the immediate vicinity of the operation must be used for backfilling unless its rehandling will cause a hazard to public safety or significant damage to the environment. Such a requirement is consistent with the Act's intent to eliminate highwalls to minimize safety, environmental, and aesthetic problems due to unreclaimed highwalls. The exception provided for re-mining should be a narrow one and should ensure that the highwall is removed to the maximum extent technically practical.

A commenter discussed the possibility of using excess spoil from adjacent mining operations to assist in highwall elimination. On April 29, 1982 (*47 FR 18553*), OSM issued a final rule that allows disposal of excess spoil on preexisting benches. This was repromulgated on July 19, 1983 (*48 FR 32910*). Such spoil could be used as appropriate for eliminating highwalls created by a re-mining operation. Under both rules, the regulatory authority has the flexibility to allow excess spoil created at another location to be used in the reclamation of the re-mining operation. However, final Section 816.106(a)(1) does not require that spoil from another mining operation be used to reclaim the highwall at the re-mining site unless both operations are within the same immediate vicinity and the spoil from the other operations is legally, as well as physically, available.

FINAL SECTION 816.106(a)(2) (PROPOSED SECTION 816.109(a)(4))

Final Section 816.106(a)(2) requires that backfill be graded to a slope which is compatible with the approved postmining land use and which provides adequate drainage and long-term stability. This provision was proposed as Section 816.109(a)(4). The word "approved" was added to the final rule to ensure that the language of final Section 816.106(a)(3) is consistent with references to the "approved postmining land use" in Sections 816.133 and 817.133.

Three commenters suggested that a minimum of 4 feet of nontoxic material should be required to cover the coal seam on any re-mining site where reasonably available spoil is insufficient. No rationale was offered for this suggestion.

OSM rejects the commenters' suggestion as unnecessary for typical surface mining operations. The final rule requires that re-mining operations on previously mined lands comply with the Section 816.102(f). Under Section 816.102(f), exposed coal seams, acid and toxic-forming materials, and combustible materials exposed, used, or produced during mining must be adequately covered with nontoxic and noncombustible material or treated to control the impact on surface and ground water in accordance with Section 816.41, to prevent sustained combustion, and to minimize adverse effects on plant growth and the approved postmining land use. This requirement is independent of the exception that allows the incomplete elimination of highwalls because of insufficient reasonably available spoil. There is no exception from the provisions of Section 816.102(f).

A separate standard, however, applies to auger mining, where exposed auger holes have historically posed potential water-quality problems and where the quantity of spoil generated by mining is small. This provision, requiring 4 feet of cover over exposed coal seams, is discussed in the final auger mining rule (*48 FR 19321*, April 28, 1983).

FINAL SECTION 816.106(a)(3) (PROPOSED SECTION 816.109(a)(5))

Final Section 816.106(a)(3) requires that any remnant of the highwall be stable and not pose a hazard to the public health and safety or to the environment. This provision was proposed in Section 816.109(a)(5) which stated that any remaining highwall shall be made stable and not pose a hazard to the public health or safety or to the environment. The word "made" is deleted from the language of the final rule. This change was made for editorial purposes and to recognize that all highwall remnants may not have been created by the re-mining operation. OSM has replaced the term "remaining highwall" in proposed Section 816.109(a)(5) with the term "highwall remnant" in final Section 816.106(a)(3) since that term is defined in final Section 701.5.

Proposed Section 816.109(a)(5) also required the operator to demonstrate the stability of the highwall remnant to the satisfaction of the regulatory authority. This provision is included in final Section 816.106(a)(3) as proposed.

One commenter took issue with the proposed rule for requiring current operators to ensure the long-term stability of highwalls they had not created. He argued that current operators should be responsible only for ensuring the stability of highwall disturbances which they create and that the regulatory authority should use monies from the State Abandoned Mine Lands Reclamation Funds to pay the costs of ensuring the long-term stability of any remaining highwalls.

OSM disagrees. The issue of financing the stabilization of highwall remnants with monies from the AML Fund is beyond the scope of the present rulemaking. Further, an operator who wishes to remine a previously mined area should ensure that the mining does not result in a condition which would pose a hazard to the public health and safety or to the environment. Under final Section 816.106(a)(3), the operator is required to ensure that any portion of the highwall which remains after backfilling and grading of the remaining permit area does not pose threats to the environment or public safety. Such a requirement is clearly in accordance with the objectives of the Act.

FINAL SECTION 816.106(a)(4) (PROPOSED SECTION 816.109(a)(6))

Final Section 816.106(a)(4) requires that spoil placed on the outslope during previous mining operations not be disturbed if such disturbances will cause instability of the remaining spoil or otherwise increase the hazard to the public health and safety or to the environment. This provision was proposed in Section 816.109(a)(6), which prohibited the disturbance of spoil placed on the outslope during previous mining operations if such disturbances will cause instability of the remaining spoil or increase the potential for damage to the environment and/or danger to public health and safety.

OSM replaced the phrase "potential for damage" in the proposed rule with the word "hazard" in final Section 816.106(a)(4). OSM also added the term "otherwise" before the word "increase" in final Section 816.106(a)(4) to indicate that the remaining operator is liable for contributing adverse physical impacts to preexisting damages. The reference to "the environment and/or danger to public health and safety" in proposed Section 816.109(a)(6) is replaced by a reference to "the public health and safety or to the environment" in final Section 816.106(a)(4). This revision was made for editorial purposes and no substantive change is intended.

Several commenters suggested that the phrase "on the outslope" contained in proposed Section 816.109(a)(6) be deleted from the language of the final rule to apply the provisions to all preexisting spoil. OSM has rejected this suggestion. Paragraph (a)(4) of the final rule is intended to recognize the special problems associated with spoil placed on the outslope from previous mining operations. Operators should not have difficulty ensuring the stability of spoil left on the bench from such previous operations. Additionally, such spoil would have to be used only if it were reasonably available; that is, it must be accessible and available for use and, when rehandled, not create a hazard. The phrase "on the outslope" was retained in final Section 816.106(a)(4) to make it clear that operators are to give special consideration to the reclamation of such previously mined spoils.

Several commenters favored the proposed restriction against the use of preexisting spoil as a means of avoiding increased probability of significant offsite damage resulting from slides and erosion. They urged OSM to include an absolute prohibition in the final rule, since spoil retrieval from the outslope could endanger equipment operators and since there would be no assurance that outslopes disturbed during spoil retrieval could be effectively reclaimed by remaining operators.

This suggestion has not been accepted. If there is a safety hazard associated with the handling of preexisting spoil on the outslope in a particular remaining operation, final Section 816.106(a)(4) will apply. Potential risks in particular operations is not an adequate basis in this instance for general prohibitions. Also, the possibility that remaining activities would disturb vegetation on preexisting spoil is insufficient justification for prohibiting the disturbance of such material altogether during remaining. In many cases, spoil remaining from previous mining can be reclaimed. Under such circumstances, use of such spoil to reclaim the reaffected highwall is in accord with the objectives of the Act. When preexisting spoil is adversely impacted by remaining, the operator is liable for mitigating those impacts under final Section 816.106(a)(4). Under Part 816, all disturbed areas, including outslopes from which preexisting spoil is removed, must be reclaimed.

PROPOSED SECTION 816.109(a)(7)

No comments were received on proposed Section 816.109(a)(7), which would have provided that surface drainage from a remining or reprocessing operation shall not be discharged into spoil placed on the outslope by previous mining operations unless such drainage will not cause erosion or decrease stability. The proposed restriction on discharge of surface drainage was considered redundant of other provisions of the remining rules and other provisions of Part 816. Thus it is not included in final Section 816.106 to avoid unnecessary repetition.

Under final Section 816.106(a)(2), all persons conducting remining operations on previously mined areas are required to grade the backfill to a slope which is compatible with the approved postmining land use and which provides adequate drainage and long-term stability. Final Section 816.106(b)(1) prescribes the same general performance standard for grading the backfill in situations where remining does not have an adverse physical impact on the preexisting highwall. Final Section 816.95(a) requires that all surface areas, including spoil piles be stabilized and protected from erosion. (*48 FR 1160*, January 10, 1983.) Taken together, these provisions establish that the operator is responsible for preventing discharges into preexisting spoil on the outslope if surface drainage from the remining operation will cause erosion or decrease stability.

PROPOSED SECTION 816.109(b)

Proposed Section 816.109(b) would have provided that preexisting spoil and coal mine waste moved to allow access to the coal shall be backfilled and graded in the new location in accordance with Sections 816.101-816.103. This requirement was not restated in final Section 816.106 since the same requirements apply directly under the backfilling and grading provisions of Sections 816.102-816.107.

Two commenters recommended that Section 816.109(b) of the proposed rule be incorporated into proposed Section 816.109(a) since both requirements would apply to remining sites where insufficient spoil is reasonably available for highwall elimination. Preexisting spoil and suitable waste materials are covered under Section 816.106(a) when they are reasonably available.

A commenter claimed that Section 816.109(b) could be construed as authority for operators to remove preexisting spoil from the remining site and place it in an area for permanent disposal of excess spoil. Because preexisting spoil on the remining site is not excess spoil, the commenter recommended that proposed Section 816.109(b) be narrowed to allow for temporary storage of such spoil in another location in anticipation of its later use for backfilling the remined highwall. The commenter also suggested that the final rule include a provision allowing remining operators to move preexisting spoil to another location for highwall elimination there.

Proposed Section 816.109(b) was not intended to allow reasonably available spoil to be disposed of as excess spoil rather than to be used for backfilling the highwall under final Section 816.106(a). However, final Section 816.106 does not preclude an operator from removing preexisting spoil from the remining site to another location for temporary storage (assuming that applicable requirements of Part 816 for temporary storage are also met). Nevertheless, operators are required to return the preexisting spoil to the remining site for use in backfilling the highwall.

PROPOSED SECTION 186.109(c)

Proposed Section 816.109(c) provided that each highwall remnant shall be protected from runoff from the area upslope from the highwall and from the highwall itself. This requirement has not been adopted in the final rule.

Commenters urged OSM to delete the proposed provision from the final rule, given the absence of statutory authority for the requirement that highwall remnants be protected from runoff. Commenters claimed that no technology could stop runoff from springs and seeps without destroying aquifers intercepted by previous mining operations. They feared that any structure built to divert runoff from above the highwall would direct the runoff into stress cracks, which had been formed in the rock upslope of the highwall edge as a result of excessive blasting during prior mining, thereby causing instability in highwalls which had existed for 20 to 30 years without the protection of permanent diversion ditches. According to commenters, the utility of the proposed rule would also be questionable, since the measures required of remining operations could create additional watershed problems and jeopardize the safety of miners working on the

highwall. Commenters claimed that highwalls would remain stable in most situations and recommended that the rule be revised to protect the backfill from erosion and resultant instability. One commenter recommended revision of the proposed rule to provide that "[e]ach highwall remnant shall be protected from erosion due to runoff from the area upslope from the highwall and from the highwall itself." [Emphasis added.]

OSM agrees that it is not possible to stop runoff from areas above the highwall. Under the final rule the highwall remnant must be stable, adequate drainage over the backfill must be provided, and the reclaimed area must be compatible with the postmining land use. These standards provide the regulatory authority the flexibility to determine the measures which will be required to direct or convey runoff across the remining site.

PROPOSED SECTION 816.109(d)

OSM has not adopted proposed Section 816.109(d) which would have stated that remining operations in a previously mined area that had been reclaimed to the performance standards of Part 816 were required to reclaim the area to the performance standards of Part 816. This provision is unnecessary for the reasons described below and because the provisions of Part 816 apply by their own terms.

One commenter advocated deletion of proposed Section 816.109(d) from the final rule on the ground that the remining rules should not be applicable to areas where the performance standards of Part 816 previously had been met. Another commenter recommended that proposed Section 816.109(d) be moved to Paragraph (b) of the proposed rule to clarify that complete highwall elimination would be required of remining operations in areas previously reclaimed to the standards of Part 816 and that proposed Section 816.109(a) would allow variances from this requirement only for remining operations on previously mined areas not reclaimed to the standards of Part 816.

OSM agrees that the special remining rules of Section 816.106 should not apply to areas where the performance standards of 30 CFR Chapter VII have previously been met. In response to the commenters' concerns, the definition of "previously mined area" was revised to include only those areas which were not reclaimed to the standards of Chapter VII and proposed Section 816.109(d) was eliminated from the final rule. Although remining is allowed on areas which were previously reclaimed in accordance with the requirements of Part 816, operations on these areas are required to comply with the performance standards of Part 816, including total elimination of highwalls and complete AOC restoration.

FINAL SECTION 816.106(b) (PROPOSED SECTION 816.109(e))

Proposed Section 816.109(e) provided that the standards of Paragraphs (a)(1) through (a)(6) of proposed Section 816.109 shall not apply if the remining operation will not cause an adverse physical impact on the preexisting highwall. OSM replaced the proposed rule with clarifying language in final Section 816.106(b). The final rule states that the requirement of Section 816.102 (a)(1) and (a)(2) requiring the elimination of highwalls shall not apply to remining operations that will not cause an adverse physical impact on the preexisting highwall. AOC does not have to be restored only insofar as the unaffected preexisting highwall does not have to be eliminated. Under final Section 816.106 (b)(1), these remining operations are required to grade the backfill to a slope which is compatible with the approved postmining land use and which provides adequate drainage and long-term stability. Final Section 816.106 (b)(2) also provides that any remnant of the highwall shall be stable and not pose a hazard to the public health and safety or to the environment.

Proposed Section 816.109(e) was viewed as a deterrent to remining by commenters who interpreted this section to allow variances from the requirements of restoration to premining AOC and complete backfilling only for remining operations which would not cause any adverse physical impact to the preexisting highwall. Because the environmental benefits of post-remining reclamation would exceed the adverse impacts of remining in almost all cases, the commenters suggested that the exemption be extended to operations which would have an adverse physical impact on the preexisting highwall to encourage remining.

The commenters misunderstood the proposal. Final Section 816.106(b) provides an exception from the requirements for highwall elimination and return to AOC that is independent of the provision of Section 816.106(a). Final Section 816.106(a) allows an exception from the requirements of restoration to premining AOC and complete highwall elimination for any remining operation previously mined areas where the volume of reasonably available spoil is insufficient for completely backfilling a reaffected or enlarged highwall. This exception applies to remining operations

which will cause an adverse physical impact on the preexisting highwall. Remining operations which will not cause an adverse physical impact on the preexisting highwall are not subject to Section 816.106(a); rather, they are exempt from the highwall elimination requirement under final Section 816.106(b).

Commenters found proposed Section 816.109(e) deficient for failing to indicate clearly the extent of the remining operators' responsibility for mitigating adverse impacts on the preexisting highwalls, including those created by previous mining operations. They claimed that remining would remain an impractical method of reclamation so long as an operator could be held liable for not preventing all adverse impacts on the area surrounding the site of his remining operation. To encourage remining, they recommended that the word "additional" be inserted before the term "adverse physical impact" in proposed Section 816.109(e) and that the proposed reference to "preexisting highwall" be replaced by the phrase "surrounding area" in the final rule.

Two other commenters alleged that remining operators should be responsible only for additional contributions to preexisting impacts, and recommended that a specific prohibition against further degradation of the discharges identified in proposed Section 780.34(b) be added to the language of proposed Section 816.109(e).

OSM agrees that the extent of the operators' responsibility for correcting the adverse impacts of remining was unclear from the language of the proposed rule. To eliminate the commenters' concerns, proposed Section 816.109(e) was replaced by final Section 816.106(b) which specifies the particular mitigation measures required of any remining operation that will not cause an adverse physical impact on the preexisting highwall. Further, the final rule does not impose a burden on operators to reclaim surrounding areas undisturbed by the remining operation. It addresses only reclamation of preexisting highwalls and not other possible preexisting conditions. The proposal did not extend any special requirements to such areas, and the reclamation responsibility for surrounding areas will depend upon whether or not they are disturbed by the remining operation.

One commenter claimed that the operator should be prohibited from disturbing spoil placed on the outslope during previous mining operations when remining will not adversely impact the preexisting highwall. He suggested that proposed Section 816.109(e) be reworded as follows to make the operator responsible for stabilizing preexisting spoil on the outslope even if the preexisting highwall will not be adversely affected by his remining operation:

If the remining operation will not cause an adverse physical impact on the preexisting highwall, the standards of Paragraphs (a)(1) through (a)(5) shall not apply with respect to the preexisting highwall. [Emphasis added.]

The particular standard of concern to the commenter was proposed in the context of determining whether preexisting spoil should be considered reasonably available to cover a reaffected highwall. This suggestion for a general prohibition is rejected as beyond the scope of OSM's authority for the present rulemaking.

Final Section 816.106(b) is based on the Board's decisions in *Cedar Coal Co., 1 IBSMA 145, 154-156 (1979)* and *Miami Springs Properties, 2 IBSMA 399, 403-405 (1980)*. These cases do not authorize OSM to require disturbance of otherwise undisturbed areas where there would be no adverse physical impact on a highwall.

A commenter advised OSM to add a specific provision to proposed Section 816.109(e) requiring the operator to demonstrate to the regulatory authority's satisfaction that remining will not cause any adverse physical impact on the preexisting highwall. This suggestion was rejected as unnecessary. In those situations where an operator asserts that the proposed remining operation will have no adverse physical effect on a preexisting highwall, proof that the remining operation will not have any adverse physical impact on the preexisting highwall would be submitted as part of the operator's reclamation plan for the provisions of Section 816.106(b) to apply.

PROPOSED SECTION 816.109(f)

Proposed Section 816.109(f) provided that remining operations on steep slopes shall be conducted in accordance with 30 CFR Part 826. Several commenters recommended that the cross-reference to Part 826 in the proposed rule be replaced with a cross-reference to Section 816.107 in view of the fact that OSM proposed to remove requirements for steep slope remining operations from Part 826 and place them in a new Section 816.107. (*47 FR 26780* June 21, 1982)

The final rule deletes proposed Section 816.109(f) from final Section 816.106 as unnecessary. The additional performance standards for steep slope operations that are contained in Section 816.107 apply by their own terms and need not be cross-referenced. Also, the provisions of final Section 816.106 will apply to remining operations on steep slopes.

Final Section 816.107(e) became the temporary location for the November 12, 1982, interim final rule on steep slope remining upon the removal of Part 826 (*48 FR 23356*, May 24, 1983). With the adoption of Section 816.106, final Section 816.107(e) is unnecessary and thus is removed in this rulemaking. In this context, Section 816.107(a) is revised to include reference to Section 816.106.

PROPOSED SECTION 816.109(g)

Proposed Section 816.109(g) provided standards applicable to auger remining. Final performance standards for remining by auger mining are included in Part 819 and were addressed in a separate rulemaking. Interested persons should consult the preamble to Section 819.19(b)(1-5) for a thorough explanation of the backfilling and grading performance standards applicable to remining of previously mined areas by auger mining. [*48 FR 19314* April 28, 1983.]

One commenter suggested that the format of proposed Section 816.109 be revised to treat auger mining as part of remining since augering on a previously mined area would be covered under the definition proposed for remining. This suggestion was rejected. Specific requirements for auger mining are fully covered in Part 819 and need not be repeated in Part 816.

PROPOSED SECTION 816.109(h)

Proposed Section 816.109(h) provided that each reprocessing operation conducted by an operator shall comply with all performance standards of Part 816. After considering remarks from several commenters, the proposal was not adopted. The applicability of Part 816 to reprocessing is clear under the definition of "surface coal mining operation" in Section 700.5 and need not be repeated.

Commenters questioned the source of OSM's statutory authority to regulate reprocessing activities, relying primarily on the absence of any specific reference to "reprocessing" in the definition of "surface coal mining operations" under Section 701(28) of the Act. They suggested that proposed Section 816.109(h) be deleted from the final rule or that the statutory basis of OSM's regulatory jurisdiction over reprocessing operations be specified in the preamble to the final rule.

OSM's authority to regulate reprocessing operations is based on Section 701(28) of the Act. Coal reclamation processes are among the activities covered by the definition of "surface coal mining operations" in Section 701(28) of the Act. *Devil's Hole, Inc. v. USA*, No. 80-4553 (E.D. Pa. Sept. 16, 1982).

Two commenters believed that proposed Section 816.109(h) should not be included in a section of the rule allowing variances from the performance standards of Part 816. They claimed the proposed rule should be clarified and placed in a completely separate section of the final rules. One commenter conceded that the proposed rules would relax performance standards for remining operations but argued that those requirements would not ease the burdens imposed on coal reprocessing operations by the existing regulations. Another commenter claimed that reprocessing operations should be subject to compliance with minimum performance standards for reclamation. Commenters also contended that proposed Section 816.109(h) failed to take into account the unique characteristics of reprocessing operations originating from underground mines. Since this class of operations lacks depressed haulage inclines, final cuts, and old spoil areas common to operations originating from surface mines, the commenters noted that reprocessing operations originating from underground mines would be compelled to affect previously undisturbed land adjacent to the site to accomplish reclamation as required under Part 816. Given the prohibitive costs of reclaiming these sites, the commenters suggested that OSM treat reprocessing operations originating from underground mines as underground mines, and that OSM use its discretion under Section 516 (b)(10) and (d) of the Act to vary permitting, performance, and bonding requirements for these operations.

OSM rejected the commenters' suggestions. Section 701.5 defines surface mining activities to include recovery of coal from a deposit that is not in its original location. This applies to reprocessing. Therefore, the requirements for

underground mines are inapplicable.

One commenter recommended that coal waste reprocessing operations be required to cover all residual materials by a minimum of 4 feet of overburden and soil to minimize the potential for future toxic problems and achieve effective revegetation and ground cover.

OSM rejected the commenter's suggestion. Among other provisions, Section 816.102(f) includes performance standards for cover or treatment of acid- or toxic-forming materials; Sections 816.81-816.83 provide standards for the disposal of coal mine waste; and Sections 816.41-816.57 provide requirements for protection of the hydrologic balance. These standards are applicable to reprocessing and should alleviate the commenter's concerns.

RESPONSES TO OTHER COMMENTS ON THE PROPOSED RULE.

Several commenters discussed the relationship between the abandoned mine land reclamation provisions of Title IV of the Act and the environmental performance standards of Title V. One commenter characterized OSM's proposed rules as an apparent attempt to make remining operators responsible for the sort of reclamation projects which should be done under State Abandoned Mine Lands (AML) Programs. A commenter claimed that Section 404 of the Act should be amended to allow the Secretary and the States to spend AML monies on lands abandoned, both before and after passage of the Act, wherever the need is greater. OSM disagrees with both commenters' positions. The final rule does not require an operator to remining previously mined areas. It merely provides standards for reclamation if remining does occur. The extension of Title IV to cover mine lands abandoned after the passage of the Act on August 3, 1977 is an issue beyond the scope of the present rulemaking and is not authorized by the Act.

One commenter recommended that operations for reprocessing coal waste from underground mines be classified as AML projects under Title IV of the Act when minimal environmental controls are implemented by these operations. Another commenter suggested that monies from the AML Program be used by the regulatory authority to compensate remining operators for any mitigation measures they would be required to take with respect to preexisting highwalls which they did not create. A commenter added that operators should be required to replace only spoil disturbed by remining and that replacement of any other spoil should be the responsibility of the regulatory authority under the State's AML Program. The issue of subsidizing remaining activities with monies from the AML Fund is also beyond the scope of this rulemaking. However, activities that are surface coal mining operations are governed by Title V of the Act.

Commenters claimed that potential responsibility for permanent treatment of preexisting pollutant discharges would discourage remining operations. To promote remining as a means of reclamation, one commenter suggested that the following provision be added to proposed Section 816.109:

The operator when remining or reprocessing previously mined areas shall be exempt from the effluent limitations of Section 816.42 of the subchapter where there has been a preexisting discharge not made substantially worse by the remining or reprocessing and the operator meets the other requirements of this section.

Because acid drainage would be reduced by coal removal through remining and by revegetation during reclamation of the remined area, other commenters contended that remining activities would bring environmental improvements over preexisting conditions and produce results similar to reclamation projects under the AML Program. They recommended the following provision for addition to Section 816.109(a) of the proposed rule as a stimulus to remining operations:

(8) Preexisting poor quality surface or ground water discharges and background conditions identified in Section 780.34(a)(2) (or Section 780.34(b)) shall not be further degraded after remining.

Under the commenters' recommended language, preexisting discharges and background conditions which did not meet effluent limitations would be allowed to remain during and after remining if they were unaffected by the remining operation.

These suggestions were not included in the final rule since they exceed the scope of the present rulemaking.

A commenter recommended that a specific requirement for placement of any new spoil on the solid portion of existing benches be added to the final remining rule. OSM did not accept this recommendation. Sections 816.102 and 816.106

provide for the backfill of remined areas. Under these requirements the area must be returned to AOC with elimination of highwalls unless the exception of Section 816.106 is applicable. Under these sections the backfill must be stable. The regulatory authority will have the flexibility to require that it be placed only on the solid portion of the bench if necessary to meet this requirement.

FINAL SECTION 817.106

Final Section 817.106 specifies backfilling and grading performance standards for remining conducted as an underground coal mining operation which are identical to those required of remining conducted as a surface coal mining operation. For the provisions established by this rulemaking, there are no distinct differences between surface mining activities and underground mining activities that require differing treatment in Part 817. With the addition of Section 516 of the Act, the sources of authority for Section 817.106 are the same as those for Section 816.106. Interested persons should consult the preamble of final Section 816.106 for explanation of the requirements applicable to remining conducted as an underground coal mining or reclamation operations under final Section 817.106.

III. PROCEDURAL MATTERS

Executive Order 12291 and Regulatory Flexibility Act

The Department of the Interior (DOI) has examined these proposed rules according to the criteria of Executive Order 12291 (February 17, 1981). OSM has determined that these are not major rules and do not require a regulatory impact analysis since they will impose minor costs on the coal industry and coal consumers. In addition, the final rules emphasize the use of performance standards instead of design criteria, thereby allowing operators to utilize the most cost-effective means of achieving compliance.

Pursuant to the Regulatory Flexibility Act, *5 U.S.C. 601 et seq.*, the Department determined that these rules will not have a significant economic impact on a substantial number of small entities. The final rules allow small coal operators increased flexibility in meeting performance standards and should ease the regulatory burdens, especially for small coal mining operators in Appalachia.

National Environmental Policy Act

OSM analyzed the impacts of these final rules in the "Final Environmental Impact Statement OSM EIS-1: Supplement," pursuant to Section 102(2)(C) of the National Environmental Policy Act of 1968 (NEPA) (*42 U.S.C. 4332(2)(C)*). The final supplement 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, DC 20240. This preamble serves as the record of decision under NEPA. The final rule is different from the draft final rules published in Volume III of the final EIS in that several paragraphs have been reorganized and additional clarifying language was added to the rule. These revisions do not change the EIS analysis.

Federal Paperwork Reduction Act

The information collection requirements in 30 CFR Parts 816 and 817 were approved by the Office of Management and Budget (OMB) under *44 U.S.C. 3507* and assigned clearance numbers 1029-0047 and 1029-0048. This approval is codified under the new Sections 816.10 and 817.10. The information required by 30 CFR Parts 816 and 817 would be used by the regulatory authority 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 under the Act. The information required by 30 CFR Parts 816 and 817 is mandatory.

Agency Approval

Section 516(a) of the Act requires that, with regard to rules directed toward the surface effects of underground mining, OSM obtain written concurrence from the head of the department which administers the Federal Mine Safety and Health Act of 1977, the successor to the Federal Coal Mine Health and Safety Act of 1969. In accordance with this requirement, OSM obtained the written concurrence of the Assistant Secretary for Mine Safety and Health, U.S. Department of Labor.

LIST OF SUBJECTS

30 CFR Part 701

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

30 CFR Part 816

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

30 CFR Part 817

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

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

Dated: September 12, 1983.

Larry D. Cardwell, Acting Deputy Assistant Secretary, Energy and Minerals.

PART 701 -- PERMANENT REGULATORY PROGRAM

1. Section 701.5 is amended by adding, in alphabetical order, the definitions of "adverse physical impact," "highwall remnant," "previously mined area," "reasonably available spoil," and "remining" to read as follows:

SECTION 701.5 - DEFINITIONS.

* * * * *

ADVERSE PHYSICAL IMPACT means, with respect to a highwall created or impacted by remining, conditions, such as sloughing of material, subsidence, instability, or increased erosion of highwalls, which occur or can reasonably be expected to occur as a result of remining and which pose threats to property, public health, safety, or the environment.

* * * * *

HIGHWALL REMNANT means that portion of highwall that remains after backfilling and grading of a remining permit area.

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PREVIOUSLY MINED AREA means land disturbed or affected by earlier coal mining operations that was not reclaimed in accordance with the requirements of this chapter.

* * * * *

REASONABLY AVAILABLE SPOIL means spoil and suitable coal mine waste material generated by the remining operation or other spoil or suitable coal mine waste material located in the permit area that is accessible and available for use and that when rehandled will not cause a hazard to public safety or significant damage to the environment.

* * * * *

REMINING means conducting surface coal mining and reclamation operations which affect previously mined areas.

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

SECTION 816.102 [Amended]

2. Section 816.102(k)(3)(iii) is revised by removing the reference to Section 816.107(e) and inserting a reference to Section 816.106 in its place.

3. Section 816.106 is added to read as follows:

SECTION 816.106 - BACKFILLING AND GRADING: PREVIOUSLY MINED AREAS.

Remining operations on previously mined areas that contain a preexisting highwall shall comply with the requirements of Sections 816.102-816.107 of this chapter, except as provided in this section.

(a) The requirements of Section 816.102 (a)(1) and (a)(2) requiring the elimination of highwalls shall not apply to remining operations where the volume of all reasonably available spoil is demonstrated in writing to the regulatory authority to be insufficient to completely backfill the reaffected or enlarged highwall. The highwall shall be eliminated to the maximum extent technically practical in accordance with the following criteria:

(1) All spoil generated by the remining operation and any other reasonably available spoil shall be used to backfill the area. Reasonably available spoil in the immediate vicinity of the remining operation shall be included within the permit area.

(2) The backfill shall be graded to a slope which is compatible with the approved postmining land use and which provides adequate drainage and long-term stability.

(3) Any highwall remnant shall be stable and not pose a hazard to the public health and safety or to the environment. The operator shall demonstrate, to the satisfaction of the regulatory authority, that the highwall remnant is stable.

(4) Spoil placed on the outslope during previous mining operations shall not be disturbed if such disturbances will cause instability of the remaining spoil or otherwise increase the hazard to the public health and safety or to the environment.

(b) The requirements of Section 816.102 (a)(1) and (a)(2) requiring the elimination of highwalls shall not apply to remining operations that will not cause an adverse physical impact on the preexisting highwall. Such remining operations shall comply with the following:

(1) The backfill shall be graded to a slope which is compatible with the approved postmining land use and which provides adequate drainage and long-term stability.

(2) Any highwall remnant shall be stable and not pose a hazard to the public health and safety or to the environment.

SECTION 816.107 [Amended]

4. In Section 816.107, paragraph (a) is revised by removing the reference to Section 816.102 and inserting Sections 816.102-816.106 in its place and paragraph (e) is removed.

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

SECTION 817.102 [Amended]

5. Section 817.102(k)(2) is revised by removing the reference to Section 816.107(e) and inserting Section 816.106 in its place.

6. A new Section 817.106 is added to read as follows:

SECTION 817.106 - BACKFILLING AND GRADING: PREVIOUSLY MINED AREAS.

Remining operations on previously mined areas that contain a preexisting highwall shall comply with the requirements of Sections 817.102-817.107 of this chapter, except as provided in this section.

(a) The requirements of Section 817.102 (a)(1) and (a)(2) requiring that elimination of highwalls shall not apply to remining operations where the volume of all reasonably available spoil is demonstrated in writing to the regulatory authority to be insufficient to completely backfill the reaffected or enlarged highwall. The highwall shall be eliminated to the maximum extent technically practical in accordance with the following criteria:

(1) All spoil generated by the remining operation and any other reasonably available spoil shall be used to backfill the area. Reasonably available spoil in the immediate vicinity of the remining operation shall be included within the permit area.

(2) The backfill shall be graded to a slope which is compatible with the approved postmining land use and which provides adequate drainage and long-term stability.

(3) Any highwall remnant shall be stable and not pose a hazard to the public health and safety or to the environment. The operator shall demonstrate, to the satisfaction of the regulatory authority, that the highwall remnant is stable.

(4) Spoil placed on the outslope during previous mining operations shall not be disturbed if such disturbances will cause instability of the remaining spoil or otherwise increase the hazard to the public health and safety or to the environment.

(b) The requirements of Section 817.102 (a)(1) and (a)(2) requiring the elimination of highwalls shall not apply to remining operations that will not cause an adverse physical impact on the preexisting highwall. Such remining operations shall comply with the following:

(1) The backfill shall be graded to a slope which is compatible with the approved postmining land use and which provides adequate drainage and long-term stability.

(2) Any highwall remnant shall be stable and not pose a hazard to the public health and safety or to the environment.

SECTION 817.107 [Amended]

7. In Section 817.107, paragraph (a) is revised by removing the reference to Section 817.102 and inserting Sections 817.102-817.106 in its place and paragraph (e) is removed.

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

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