FEDERAL REGISTER: 53 FR 47384 (November 22, 1988)

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

30 CFR Parts 785 and 827
Permanent Regulatory Program; Coal Preparation Plants Not Located Within the Permit Area of a Mine

ACTION: Final rule.

SUMMARY: The Office of Surface Mining Reclamation and Enforcement (OSMRE) is amending its regulations to clarify the circumstances under which coal preparation plants located outside of the permit area of a mine are subject to the performance standards and permitting requirements of the Surface Mining Control and Reclamation Act ("the Act" or SMCRA).

OSMRE is concerned that, because of the May 11, 1987, promulgation of a new definition of "coal preparation" *(52 FR 17724),* existing regulations at 30 CFR 785.21 and 30 CFR 827.1 might be interpreted to regulate certain coal preparation plants which are not properly subject to regulation under the Act. By more closely tracking the language of SMCRA in this final rule, OSMRE ensures that coal preparation activities that are carried out "in connection with" a coal mine are appropriately regulated under SMCRA.

EFFECTIVE DATE: December 22, 1988.

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SUPPLEMENTARY INFORMATION:

I. BACKGROUND

The Surface Mining Control and Reclamation Act of 1977, *30 U.S.C. 1201* et seq. ("the Act" or SMCRA), sets forth general regulatory requirements governing surface coal mining and the surface impacts of underground coal mining. Section 701(28) of the Act is a lengthy definition of "surface coal mining operations." Because this final rule implements an element of that definition, and because commenters focused on the question of the proper interpretation of this definition, it is included here verbatim from the Act.

For the purposes of this Act * * * "surface coal mining operations" means --

(A) activities conducted on the surface of lands in connection with a surface coal mine or subject to the requirements of section 516 surface operations and surface impacts incident to an underground coal mine, the products of which enter commerce or the operations of which directly or indirectly affect interstate commerce. Such activities include excavation for the purpose of obtaining coal including such common methods as contour, strip, auger, mountaintop removal, box cut, open pit, and area mining, the uses of explosives and blasting, and in situ distillation or retorting, leaching or other chemical or physical processing, and the cleaning, concentrating, or other processing or preparation, loading or coal for interstate commerce at or near the mine site: Provided, however, That such activities do not include the extraction of coal incidental to the extraction of other minerals where coal does not exceed 16 2/3 per centum of the tonnage of minerals removed for purposes of commercial use of sale or coal explorations subject to section 512 of this Act; and

(B) the areas upon which such activities occur or where such activities disturb the natural land surface. Such areas shall also include any adjacent land the use of which is incidental to any such activities, all lands affected by the construction of new roads or the improvement or use of existing roads to gain access to the site of such activities and for

haulage, and excavations, workings, impoundments, dams, ventilation shafts, entryways, refuse banks, dumps, stockpiles, overburden piles, spoil banks, culm banks, tailings, holes or depressions, repair areas, storage areas, processing areas, shipping areas and other areas upon which are sited structures, facilities, or other property or materials on the surface, resulting from or incident to such activities * * *. (SMCRA section 701(28), *30 U.S.C. 1291*(28)).

The processing and preparation activities mentioned in the definition are usually conducted at the mine site and are then covered by OSMRE's permitting requirements at 30 CFR Parts 780 and 784 and also by the performance standards at 30 CFR Parts 816 and 817. However, such activities sometimes occur at a preparation plant which is not located at a mine site but is still operating "in connection with" a coal mine and, thus, is subject to the requirements of the Act. To ensure that off-site coal preparation is appropriately regulated, OSMRE established a special category of permitting requirements for coal preparation plants not located within the permit area of a mine at 30 CFR 785.21 and also established special performance requirements for such facilities at 30 CFR Part 827.

The terms "processing" and "preparation" in the definition at section 701(28) of the Act are often used interchangeably. Indeed, OSMRE is not aware of any practical difference between coal preparation and coal processing. "Coal preparation" at 30 CFR 701.5 is defined as meaning "chemical or physical processing and the cleaning, concentrating, or other processing or preparation of coal" (emphases added). Although OSMRE uses the term "preparation" in this final rule at 30 CFR 785.21 and 30 CFR Part 827 and also in the definition at 30 CFR 701.5, because of numerous references to "processing" in the Act, earlier regulations, court decisions, and comments received, OSMRE continues to refer to the subject activity as "processing" as well as "preparation" in the preamble to this rulemaking.

Final regulations published on March 13, 1979 *(44 FR 15317)* defined a "coal processing plant" as a facility "where run-of-the-mine coal is subjected to chemical or physical processing and separated from its impurities" (emphasis added). In the preamble to those definitions, OSMRE discussed the rationale for the need to reach facilities not located at the mine site *(44 FR 15292).* "Coal processing plants are usually located at the mine mouth, but frequently one central preparation plant may serve several mines as a focal point for coal preparation and shipment to market. The coal may be transported to this central plant without removal of the rock and other impurities in the run-of-mine coal."

The revised permanent program regulations of May 5, 1983, defined "coal preparation plant" and added a complementary definition of "coal preparation or coal processing." Both of the 1983 definitions described the activity being conducted as "cleaning, concentrating, or other processing or preparation" *(48 FR 20400).* This definition retained the concept of separation of coal from its impurities as an integral element of coal preparation.

Also on May 5, 1983, OSMRE made final the addition of limiting language in Sections 785.21 and 827.1 to exclude facilities "at the site of ultimate coal use." *(48 FR 20401).* In addition, OSMRE stated that it would treat "all facilities which handle coal as either 'in connection with' a mine or 'in connection with' an end user." OSMRE continues to believe that regulation of facilities operated by or for the end user of coal at the point of such use is not required under SMCRA because, by virtue of their association with the end user of the coal, such facilities are not operated "in connection with" a coal mine.

The 1983 definitions of "coal preparation or coal processing" and "coal preparation plant," and the Secretary's jurisdiction to regulate off-site processing plants, were challenged in the U.S. District Court for the District of Columbia in In Re: Permanent Surface Mining Regulation Litigation II, No. 79-1144 slip op. (D.D.C. July 6, 1984) (In Re: Permanent (II)). The court concluded that these definitions were based on a misreading of the statute. The court rejected OSMRE's interpretation that coal preparation activities necessarily involve the separation of coal from its impurities. In Re: Permanent II, Slip op. at 15-20. However, the court affirmed the Secretary's jurisdiction to regulate off-site processing plants. In Re: Permanent II, Slip op. at 17, note 12.

In response to the court's decision, OSMRE redefined "coal preparation" and "coal preparation plant" in an interim final rule and, concurrently, in a proposed rule (July 10, 1985; *(50 FR 28180)).* The revised definitions included "chemical or physical processing" and "cleaning, concentrating, or other processing or preparation." Most significantly, the condition that coal preparation must include the separation of coal from its impurities was deleted from the definitions. These definitions were published as a final rule on May 11, 1987 *(52 FR 17724).*

On January 29, 1988, the U.S. Court of Appeals upheld the decision in In Re: Permanent (II) affirming the Secretary's jurisdiction to regulate off-site processing plants. (*NWF v. Hodel, 829 F.2d 694, 742-745* (D.C. Cir., 1988) ("NWF")). This decision and its effect on OSMRE's interpretation of the phrase "in connection with" are discussed in the following "Discussion of Final Rule."

On June 22, 1988, OSMRE proposed to amend its permanent program regulations at 30 CFR Parts 785 and 827 to clarify that off-site coal preparation is subject to regulation under SMCRA only when it is conducted "in connection with" a coal mine *(53 FR 23526).* In addition to soliciting public comments and providing an opportunity for public hearings upon request, OSMRE provided a 45-day public comment period. OSMRE received comments from nine organizations, including State regulatory authorities, environmental groups and representatives of the coal industry. No public meeting was requested and none was held.

II. DISCUSSION OF FINAL RULE

OSMRE is amending the language in 30 CFR 785.21, the permitting requirements for off-site preparation plants, and 30 CFR 827.1, the performance standards for off-site preparation plants, to make clear that those sections apply only to off-site coal preparation that is "in connection with" a coal mine.

The first sentence of Section 785.21(a), which specifies the requirements for permits for coal preparation plants not located within the permit area of a mine, previously read, "This section applies to any person who operates or intends to operate a coal preparation plant outside the permit area, other than such plants which are located at the site of ultimate coal use." Under this final rule, this sentence is replaced with, "This section applies to any person who operates or intends to operate a coal preparation plant in connection with a coal mine but outside the permit area for a specific mine." Further, this language differs from the proposed rule in that it includes the clarifying phrase, "for a specific mine." The second sentence of paragraph (a) remains the same. Because the purpose of this rulemaking is to clarify that the rule applies only to coal preparation plants operated in connection with a coal mine, and OSMRE believes that this limitation necessarily excludes facilities at the site of ultimate use, the redundant phrase "other than such plants which are located at the site of ultimate coal use," is deleted in this final rule.

Section 827.1, which specifies the performance standards for coal preparation plants not located within the permit area of a mine, previously read, "This part sets forth requirements for coal preparation plants not within the permit area for a specific mine other than those plants which are located at the site of ultimate coal use." In the final rule, this language is replaced with, "This part sets forth requirements for coal preparation plants operated in connection with a coal mine but outside the permit area for a specific mine." As in the case of 30 CFR 785.21, this language differs from the proposed rule in that it includes the clarifying phrase, "for a specific mine." Again, for the reasons cited above, the redundant phrase "other than those plants which are located at the site of ultimate coal use," is deleted.

The new definitions of "coal preparation" and "coal preparation plant" promulgated on May 11, 1987 *(52 FR 17724),* include activities and facilities in addition to those that involve the separation of coal from its impurities. OSMRE's experience has been that these additional activities are not necessarily conducted at the point of ultimate use, nor are they necessarily conducted "in connection with" a coal mine. As a result, OSMRE can no longer treat all facilities which handle coal as either "in connection with" a mine or "in connection with" an end user as it could when the definition of coal preparation was based on the separation of coal from its impurities. For example, facilities such as the docks at Baltimore, MD; Hampton Roads, VA; Mobile, AL; and Long Beach, CA, that may occasionally crush or size coal, may conduct "coal preparation" under the new definition. However, OSMRE does not believe that the activities being conducted at such facilities are "in connection with" a coal mine or that the Act was intended to regulate the activities at such facilities.

In light of the broadened definitions of "coal preparation" and "coal preparation plant," it is necessary to ensure that the performance standards in 30 CFR Part 827 and the permitting requirements in 30 CFR 785.21 are applied only to facilities conducting coal preparation "in connection with" a coal mine. The limitation to coal preparation conducted "in connection with" a coal mine is necessarily implied in Parts 785 and 827 because of the statutory and regulatory use of that phrase in the definition of the term "surface coal mining operations." However, OSMRE believes it would clarify the provisions if the limitation were explicitly referenced and would help to ensure that the provisions are not misconstrued.

No definition of the term "in connection with" is included in this final rule. Any attempt to further define this phrase in a regulation would unduly restrict the discretion that regulatory authorities must have in order to make valid decisions about the applicability of the performance standards of SMCRA in individual cases. Categorical exclusions or inclusions would almost certainly result in inappropriate applications of the rule in some instances. Regulatory authorities will find ample guidance for making determinations as to whether a coal preparation plant is being operated in connection with a coal mine in the language in the definitions of "surface coal mining operations" in section 701(28) of SMCRA and 30 CFR 700.5, in case histories interpreting those definitions, and in preamble discussions in OSMRE's related 1979 and 1983 rules.

OSMRE continues to believe that the ability of mine operators, or coal handlers directly servicing such operators, to have control of processing operations is essential in establishing that a processing plant is being operated in connection with a coal mine. This position was set forth in an explanation of the reach of the 1979 regulation (30 CFR 785.21) when OSMRE stated, "OSM is only requiring regulatory authorities to extend their permit requirements as far into the stream of commerce as those activities over which mine operators and the coal handlers who directly serve them, such as coal processors, have or could have control of operations." *(44 FR 15095).*

In identifying the relationship necessary for coal preparation to be "in connection with" a coal mine, the principle stated in the May 5, 1983, preamble to the definition of "coal preparation of coal processing" should be referenced. In that preamble, OSMRE cited examples of facilities which could be considered to be "in connection with" a coal mine, including "facilities which receive a significant portion of their coal from a mine; facilities which receive a significant portion of the output from a mine; facilities which have an economic relationship with a mine; or any other type of integration that exists between a facility and a mine." Further, OSMRE stated that a "facility need not be owned by a mine owner to be in connection with a mine." *(48 FR 20393;* see also discussion at *52 FR 17726,* May 11, 1987). This rulemaking does not alter that position.

Finally, in determining the applicability of SMCRA to off-site facilities, OSMRE has considered the January 29, 1988, ruling of the court of appeals (*NWF, 839 F.2d at 742-745).* That decision affirmed OSMRE's interpretation that the phrase "at or near the mine site" found in section 701(28)(A) of the Act did not limit the Act's regulatory jurisdiction over coal processing activities. While acknowledging that the reasonableness of the Secretary's reading of section 701(28)(A) of the Act concerning jurisdiction over coal processing activities was a close question, the court affirmed OSMRE's authority to regulate off-site coal processing under section 701(28)(B) of SMCRA, which extends the Secretary's authority to "processing areas" and other areas upon which are sited structures and facilities "resulting from or incident to" activities specified in section 701(28)(A).

In addition to affirming this authority, the court of appeals found that the phrase "resulting from or incident to" could be construed to connote an element of proximity. Specifically, the court of appeals stated that the "phrase 'resulting from or incident to' clearly suggests a causal connection, which, while not indicating an element of geographic proximity, certainly does require some type of limiting principle of proximate causation * * *." (*NWF, 839 F.2d at 745).*

Because the court affirmed the Secretary's authority to regulate offsite coal processing under section 701(28)(B) of SMCRA, it is appropriate for OSMRE to consider the court's approval of the use of a proximity factor in determining the reach of 701(28)(B). Hence, OSMRE believes that geographic proximity, as well as the functional relationship between mines and coal preparation plants, are proper factors to be considered by regulatory authorities when identifying off-site preparation plants which operate in connection with a coal mine and therefore are subject to regulation under SMCRA.

III. RESPONSE TO COMMENTS

JURISDICTION OF SMCRA OVER "COAL PROCESSING"

One commenter maintained that the rule is an attempt to assert authority beyond the limits of SMCRA. Congress did not intend, the commenter asserted, to regulate off-site activities incidental to the loading of coal, such as crushing or sizing.

OSMRE does not agree. The question of whether Congress intended the physical processing of coal, such as crushing and sizing, to be regulated under SMCRA is not at issue in this rulemaking. As discussed in the "Background" of this preamble, OSMRE revised the definitions of "coal preparation" and "coal preparation plant" (May 11, 1987; *52 FR*

17724) to include physical processing of coal in response to the decision in In Re: Permanent II (Slip op. at 15-20). The issue in this rulemaking is how to determine those off-site coal preparation activities which are included in the definition of "surface coal mining operations" at section 701(28) of the Act.

Another commenter suggested that the rule was an illegal attempt to curtail jurisdiction over crushing, screening, sizing, and other physical processing. The commenter maintained that OSMRE was failing to meet the intent of SMCRA to regulate all coal processing.

OSMRE disagrees. Contrary to the commenter's assertion, there is nothing in the Act or its history that implies that SMCRA was meant to apply nation-wide to all industrial facilities that process coal irrespective of whether or not they are operating in connection with a coal mine. This rule relies on the statutory standard in section 701(28)(A) of the Act that the off-site coal preparation must be performed "in connection with" a coal mine. Because the phrase "in connection with" is not defined in the Act, and there is no statutory obligation to define it in regulations, OSMRE has the latitude to adopt it verbatim and apply it in a reasonable manner consistent with its normal meaning.

Specifically, this commenter maintained that the consideration of proximity in determining jurisdiction over off-site coal processing is illegal. The proximity consideration authorized by the court of appeals for support facilities, the commenter maintained, does not apply to coal processing. The phrase in section 701(28)(B), "resulting from or incident to," the commenter asserted, modifies "other areas upon which are sited structures, facilities, or other property or materials on the surface" and does not modify "processing" in (B).

OSMRE disagrees. OSMRE's position is based in part on the decision of the court of appeals, which stated, "At issue in the interpretation of section 701(28)(B) is the scope of 'processing areas * * * and other areas upon which are sited structures, facilities or other property or materials on the surface resulting from or incident to such activities.' " The court continued, "We agree * * * with the district court that the Secretary may reasonably construe the meaning of 'processing areas * * * resulting from or incident to such activities' to include processing facilities that are not at or near the mine site." The court added, "The language of subsection (B) is without geographic limitation; coal processing facilities can certainly be 'incident to' surface coal mining operations without being onsite" (*NWF, 839 F.2d at 744-745).* This language supports OSMRE's conclusion that the phrase "resulting from or incident to" modifies "processing areas," and that OSMRE may regulate off-site coal preparation facilities pursuant to the definition of "surface coal mining operations" at section 701(28) of the Act.

This same commenter suggested that even if it is accepted, for argument's sake, that "processing areas" is modified by "resulting from or incident to," it is arbitrary to apply this to dry coal preparation and not other coal preparation. If, the commenter maintained, the phrase does modify "coal processing," then it also modifies the other enumerated facilities in section 701(28)(B), including coal waste impoundments, dams, spoil banks, overburden piles, etc. The commenter suggested that OSMRE would be hard-pressed to argue before any court that this is the case because of the obvious environmental hazards that would result from such an interpretation.

Contrary to this assertion, OSMRE is not interpreting the modifying phrase "resulting from or incident to" as limited to dry coal preparation but rather interprets it to apply to all coal processing or preparation. Although OSMRE is not addressing in this rulemaking the interpretation of (B) as it applies to facilities other than coal preparation plants, OMSRE must note that the phrase "resulting from or incident to" clearly does modify all those other areas specified in section 701(28)(B) of the Act. OSMRE does not believe that the enumeration by Congress of examples in section 701(28)(B) was intended to reach such facilities not resulting from or incident to a mine. If Congress had intended to regulate these enumerated facilities without any consideration of whether they were resulting from or incident to coal mine activities, then all impoundments and dams nationwide would be subject to SMCRA regardless of whether or not they had anything to do with a coal mine. Certainly Congress did not intend OSMRE to regulate cattle-watering agricultural impoundments or major water project impounding structures without any coal mining association. Congress did not intend that "shipping areas" regardless of their association with coal mines be regulated under SMCRA. It is unreasonable to assume that Congress intended to regulate all coal processing at all industrial facilities nationwide, absent any relationship to a mine. Congress did not enumerate the examples in section 701(28)(B) as types of facilities which will always be regulated under SMCRA, irrespective of whether or not they are associated with coal mines. Congress identified them as examples of facilities that will be regulated if they are "resulting from or incident to" activities in connection with a coal mine.

In addition to the objection concerning OSMRE's interpretation of the language in section 701(28)(B) of the Act, this commenter suggested that OSMRE's rule amounts to an expansion of the 1988 court of appeals decision and that it conflicts with the 1980 and 1984 district court decisions that paragraphs (A) and (B) of section 701(28) of the Act are independent and that they cumulatively establish the scope of jurisdiction. OSMRE has attempted, the commenter continued, to interject a geographic proximity consideration crafted under paragraph (B) into an interpretation of "in connection with" which is found in paragraph (A). This, the commenter argued, is contrary to court decisions in that it makes paragraph (A) servient to the language in paragraph (B).

The commenter suggested that the court of appeals, although expressly declining to find jurisdiction under paragraph (A), endorsed the lower court's judgment to find authority under paragraph (B). Thus, according to the commenter, the lower court's interpretation of the relationship between paragraphs (A) and (B) must stand as the only proper interpretation consistent with rules of statutory construction and the broad intent of Congress.

Again, OSMRE disagrees. First, the court of appeals found authority to regulate off-site coal processing under section 701(28)(B) of the Act. Second, the court acknowledged that the term "processing areas" is modified by the phrase "resulting from or incident to." The question is which processing areas are resulting from or incident to the activities in section 701(28)(A) of the Act. Third, the court found the element of proximity to be a valid consideration in determining whether a facility is "resulting from or incident to." Thus, the consideration of proximity in determining the reach of the regulation to "processing areas" is appropriate. The court indicated that the Secretary may properly limit the reach of the regulation to "facilities that are 'in connection with' a surface coal mine * * *." Thus, the court acknowledged without objection an approach to determining what is "coal processing * * * resulting from or incident to" coal mining activities, which is based on a consideration of proximity appropriate in implementing section 701(28) (B) of the Act, and which incorporates pertinent limiting language found in section 701(28) (A) of the Act -- "activities * * * in connection with."

This view is also consistent with the finding of the court of appeals that the "phrase 'resulting from or incident to' * * * certainly does require some type of limiting principle of proximate causation that is familiar to the courts in tort law. Otherwise, every support facility that could be considered a 'but for' result of a surface coal mining operation would be subject to SMCRA regulation" (emphasis added) (*NWF, 839 F. 2d at 745).*

OSMRE believes that a limiting principle similar to the one found by the court of appeals to have merit under section 701(28) (B) of the Act can also be reasonably applied in determining whether coal processing activities are "in connection with" a coal mine under section 701(28)(A). Thus, the element of geographic proximity, along with the element of functional relationship described in this preamble, are proper factors to consider in evaluating whether an off-site coal preparation plant is subject to regulation under SMCRA. Contrary to the assertion of the commenter, OSMRE is interpreting the complex definition in section 701(28) of the Act in a manner wholly consistent with and supported by this latest court decision.

One commenter maintained that the most straight-forward approach to regulating off-site coal processing would be to acknowledge what the court of appeals found to be a "clearly better" reading of the statute -- that "at or near the mine site" in section 701(28)(A) of the Act modifies "cleaning, concentrating, or other processing or preparation."

OSMRE has considered this interpretation in the past but, in light of the fact that the court of appeals has upheld the Secretary's jurisdiction over coal processing under section 701(28)(B) of the Act, it is not necessary to revisit the interpretation of the "at or near the mine site" language in section 701(28)(A). The purpose of this rule is to recognize that there are processing facilities other than those at the point of ultimate use that are not in connection with a coal mine, and to ensure that jurisdiction is extended only to preparation plants operating in connection with a coal mine.

One commenter suggested that OSMRE clarify that off-site coal loading absent chemical or physical processing is not regulated under section 701(28)(B) of the Act as "processing areas" or as "other areas upon which are sited structures * * * resulting from or incident to" mining. The commenter pointed to the language in (A) stipulating that the definition of "surface coal mining operations" includes loading "for interstate commerce" that occurs "at or near the mine site," and suggested that this would preclude regulating coal loading that did not meet this two part criteria in (A).

OSMRE interprets "loading" and "processing" in section 701(28) to be distinct and different activities. Coal loading is not processing, and therefore off-site loading facilities that do not process coal are not subject to the performance standards of 30 CFR Part 827. OSMRE agrees with the commenter that loading facilities that do not process coal are not

regulated unless located at or near the mine site. OSMRE construes the specific language of section 701(28)(A) of the Act limiting the regulation of loading facilities to those at or near the mine site to limit proximity considerations concerning off-site loading facilities.

APPLYING "IN CONNECTION WITH"

In addition to supporting the incorporation of the phrase "in connection with" into the rule, one commenter suggested that OSMRE define the term in order to limit the rule's application.

As mentioned above, there is no statutory obligation to flesh out the language in this rule. OSMRE believes that further attempts to define the phrase "in connection with" would unduly hamper regulatory authorities in making valid case-by-case determinations and would result in inappropriate applications of the rule. For example, in 1983, OSMRE amended the rules governing the reach of SMCRA to off-site coal processing by including all processing but that which was conducted at the point of ultimate use. While the test was mechanical and very easy to apply, it posed the potential for inclusion of facilities that do not operate in connection with a coal mine. To that extent, the fleshing out of the rule was undesirable and needed to be changed.

The preamble to this rule provides adequate guidance, much of which has been in place for many years, on what to consider when evaluating whether a coal preparation plant is operating in connection with a coal mine. Further, the court of appeals (*NWF, 839 F.2d at 745)* found merit in OSMRE's "flexible implementation of the statute that allows regulatory authorities to 'consider the myriad site specific situations that cannot be fully anticipated in writing a Federal regulation.' *(48 FR 20397;* 1983)."

Another commenter criticized OSMRE's assertion that it can no longer treat facilities as being either in connection with a mine or an end user. The commenter maintained that OSMRE has failed to identify any aspect inherent in the preparation activities newly included in the definition of "coal preparation" that justifies any reconsideration of their being subject to regulation. The commenter then went on to exclude the possibility of basing such a distinction on location or environmental harm because processing involving the separation of coal from its impurities is just as likely to occur away from minesites as that which does not involve separation of impurities, and both types of processing involve environmental impacts.

Contrary to the commenter's assertion, OSMRE's experience indicates that facilities separating coal from its impurities are much more apt to be located near the mine or near the end user, while crushing, sizing, and screening may occur at any point in the stream of commerce. Further, as described earlier in this preamble, once the definition of "coal preparation" was changed to include activities less apt to be conducted "in connection with" a coal mine, it raised the specter of the misapplication of the rules to such activities. Because of the addition to the definition of "coal preparation" of new categories of activities which in some instances may not be "in connection with" a mine or end user (e.g., crushing and sizing), OSMRE must revise the language of this rule. OSMRE wishes to appropriately limit and concisely state the jurisdiction provided in section 701(28) of the Act over coal preparation which results from or is incident to an activity "in connection with" a coal mine. Therefore, OSMRE is revising the rules to incorporate the phrase "in connection with."

Another commenter objected to the removal from existing regulations of the phrase "other than such plants which are located at the site of ultimate coal use" and the insertion of "in connection with," on the basis that the latter phrase is subjective and will require the regulatory authority to make a judgment as to whether a facility is operating "in connection with" a coal mine. The commenter suggested that the determination of jurisdiction was clearer under previous language and recommended retaining the existing language in 30 CFR Parts 785 and 827.

It has always been necessary for regulatory authorities to determine whether coal preparation activities are being conducted "in connection with" a coal mine. The incorporation of the statutory language in this rule merely specifically repeats the statutory requirement. Because of the amended definition of "coal preparation," the terms of the previous criterion could have been interpreted to include activities and facilities which do not meet the statutory definition of surface coal mining operations. Therefore, this provision needed to be changed.

Another commenter was concerned about the effect of the rule on a specific preparation plant that operates in connection with an end user, a power plant burning coal from a mine located about a mile away. Such plants were not

subject to regulation under OSMRE's previous rules at 30 CFR Parts 785 and 827 because those rules explicitly excluded from jurisdiction "such plants which are located at the site of ultimate coal use."

As stated above, OSMRE has not changed its interpretation that operations in connection with an end user are not operations in connection with a coal mine. Coal preparation facilities which are being operated only in connection with another industrial facility, such as the power plant of concern to this commenter, do not operate in connection with a coal mine and are not subject to the rule.

Another commenter maintained that this rule is a reversal of OSMRE's July 10, 1985 *(50 FR 28186),* interim final rule which required States to revise their programs to ensure that every "coal preparation plant" under the interim final definition would be permitted. Certain operations subject to regulation under the interim final rule will no longer be regulated under the new rule, the commenter asserted.

This new rule does not constitute a reversal of the referenced requirement. Although the revised definition of "coal preparation plant" included facilities not previously considered by OSMRE to be conducting coal preparation, it did not alter OSMRE's requirement that regulatory authorities extend jurisdiction only to coal preparation activities when they are "in connection with" a coal mine.

One commenter emphasized that the fact that the statute is phrased in the singular, "in connection with a surface coal mine" (emphasis added) means that Congress intended that the activity be regulated only when it is in connection with one mine, not several mines. The commenter maintained that the court of appeals supported this interpretation when it noted that "the Secretary only purports to regulate facilities that are 'in connection with' a surface coal mine."

Although OSMRE recognizes that the reference to "activities * * * in connection with a surface coal mine" in section 701(28)(A) of the Act is phrased in the singular, and the singular is used in this rule, the Office does not interpret the language of the Act to indicate Congressional intent to limit application of the Act to activities in connection with only one mine (see, for example, *44 FR 15095 and 15292;* March 13, 1979). The use of the singular "a" in this rule and in the guidance in this preamble does not preclude regulatory authorities from considering the relationship of a facility to more than one mine in determining whether that facility is conducting activities "in connection with" a coal mine.

This commenter also suggested that OSMRE consider whether a plant has a useful life independent of a specific mine in addition to considering those factors already discussed in the preamble to this rule in applying the "in connection with" test.

OSMRE believes that it is valid to consider whether a facility has a useful life independent of the specific mine or mines which it serves, in determining if the facility is operating in connection with a coal mine (particularly in light of the intended effect of the Act as a reclamation statute). A facility lacking a useful life independent of the specific mine or mines which it currently serves would be operating in connection with a coal mine, while a facility having a useful independent life might not. In the latter case, regulatory authorities would have to consider the other aspects of the relationship between the facility and any particular coal mine or mines to determine if it operates in connection with a coal mine. OSMRE believes that this consideration is consistent with the economic and other considerations set forth in the May 5, 1983, preamble to the definition of "coal preparation or coal processing" *(48 FR 20393)* and is also consistent with the need for a limitation noted by the court of appeals (*NWF, 839 F.2d at 745).*

This same commenter added that the functional relationship described by example in the preamble is subject to change over time. For example, the commenter noted, a facility's economic relationship to a mine may change from year to year depending on the life of the permit and, particularly, the useful life of the facility. Consequently, the commenter maintained, a facility that meets the "in connection with" test one year may not meet it under the exact same analysis the next year. The commenter suggested the use of a litmus test which would incorporate proximity and the "useful life independent of a mine" test applied in relation to a specific mine.

The commenter asserted that this will lead to the regulation of preparation plants built and operated for the life of a particular mine thus allowing for a more appropriate application of SMCRA's post-mining land use standards. Independent facilities which operate separate from the life of a particular mine do not fit Congress' statutory scheme for post-mining land use, according to the commenter. Such a facility's useful life, the commenter continued, may extend beyond the life of the particular mine it serves, but the level and frequency of activity of the facility may be associated

with several mines it serves, rather than a particular mine. The commenter further maintained that OSMRE has in the past insisted that a permit for an independent facility show that it will be dismantled and the area reclaimed once processing activities cease, despite the owner's plans to use the facility sometime in the future for new mining anticipated in the area. It appears from legislative history and statutory construction, the commenter maintained, that Congress intended to regulate only those facilities directly related to a mine with no anticipated life beyond a particular mine.

OSMRE agrees with the commenter that the application of the Act, with its primary emphasis on reclamation and post-mining land use, to industrial facilities designed for long-term use and not operated in connection with a coal mine would be inappropriate. Because SMCRA is primarily a reclamation statute, and any facility regulated as a surface coal mining operation must have a reclamation plan, it is reasonable to expect that a regulated facility will have an estimated or prescribed life span and that reclamation will occur following the close of operations.

However, OSMRE disagrees with the commenter's assertion that SMCRA was intended to regulate only those facilities directly related to a mine with no anticipated life beyond a particular mine. OSMRE sees no basis in SMCRA or the legislative history for the commenter's conclusion. As noted above, a facility may be subject to regulation because it is operating in connection with more than one coal mine.

OSMRE does not expect this approach to lead to a series of situations in which many facilities that meet the "in connection with" test one year will not meet it under the same analysis the next year, as envisioned by the commenter. Decisions of regulatory authorities concerning whether or not facilities operate in connection with a coal mine are to be made consistent with the practical considerations discussed in this rulemaking. OSMRE does not believe that the fundamental economic relationships that exist between facilities and mines fluctuate to the extent that regulatory authorities would properly reverse their determinations from one year to the next. Further, OSMRE believes that the flexibility inherent in this rule does more to enhance the year-to-year consistency of decisions than would be the case if the rule set forth a more mechanical approach.

ISSUE OF "CONTROL OF OPERATIONS"

One commenter criticized OSMRE for stating in the proposed rule that "the ability of the mine operators, or coal handlers directly servicing such operators, to have control of operations is essential in establishing that a plant is being operated in connection with a mine," and then allegedly contradicting that position by stating that "a facility need not be owned by a mine owner to be in connection with a mine" *(53 FR 23528)*. Because of the confusion surrounding what "control" really is, the commenter maintained, OSMRE needs to provide more guidance here.

Further the commenter maintained, OSMRE should make clear that the "control" discussed in the preamble is different from ownership and control as defined in OSMRE's regulations. The former, the commenter suggested, does not have the legal meaning of the latter, and really relates to function rather than a legal relationship.

The language quoted by the commenter is from guidance provided by OSMRE in 1979 and 1983. This rulemaking is not intended to alter the meaning or utility of that guidance, and the application of that guidance through regulatory programs has not raised any significant questions regarding its utility or appropriateness. Further, OSMRE sees nothing contradictory in that guidance. OSMRE was merely making the point that ownership of a facility is not necessary in order for the facility to be operating in connection with a coal mine. The level of economic reliance of a particular facility on a coal mine is a valid consideration in determining if the facility operates in connection with that mine. OSMRE still considers this guidance to be pertinent.

The commenter's point about the use of the term "control" is well taken. OSMRE defines "owns or controls" and "owned or controlled" at 30 CFR 773.5 (see *53 FR 38868)* for purposes of implementing section 510(c) of the Act relative to ownership or control of a mine operation. A definition of "control" did not exist in 1979 when OSMRE first used the term as guidance for resolving questions of SMCRA's jurisdiction over offsite facilities. The purpose and effect of the guidance for this rule is not intended to be altered by OSMRE's recent definition of "owns or controls." The preamble cited in this rulemaking was intended to allude to the economic or functional relationship or linkage that may constitute a connection between coal processing activities and a mine under section 701(28)(A) of the Act, irrespective of ownership of the facilities.

This commenter also suggested that OSMRE's preamble examples of the types of relationships that constitute "in connection with" are vague, and that OSMRE needs to define the terms used in the examples, such as "significant", "economic relationship", or "any type of integration" *(53 FR 23528)*.

OSMRE does not agree that the examples are vague. When used as illustrations in the guidance on evaluating "connections," these terms have generally understood meanings. OSMRE believes that defining or further fleshing out these terms beyond their normal usage is unnecessary in order for the terms to be useful in this context. And to the extent that more detailed definitions would alter the generally understood meanings of these terms, such definitions would lead to inappropriate applications of the rule.

MISCELLANEOUS COMMENTS

One commenter asserted that OSMRE, by referencing specific harbor facilities in the preamble, was attempting to carve out an illegal exemption for facilities based on distance from a mine.

OSMRE is not proposing any class exemption. The port facilities named in the preamble to the proposed rule were included as specific and illustrative examples of facilities which OSMRE believes are not conducting coal preparation in connection with a coal mine. As another commenter pointed out, these specific facilities are primarily freight handling facilities and, as such, are an intermediate transfer point for coal which has already entered interstate or international commerce. OSMRE does not propose that determinations about jurisdiction be made solely on the basis of location relative to a mine absent any consideration of function or relationship. The approach adopted by OSMRE, and one which the court of appeals found to have merit, is to consider proximity as one of the factors in determining jurisdiction.

One commenter noted that a misconception exists concerning blending of coal, where coal from different seams and of differing qualities is loaded into the same coal carrier to achieve a composite product of specified quality. The commenter was concerned that this will be considered "physical processing" under this rule because the characteristics of the blended coal are different from those of the constituent coals. This is particularly objectionable, the commenter maintained, because there is no environmental consequence to such blending.

OSMRE does not believe that the blending of coal during loading, if all that is involved is the loading of different types or qualities of coal, changes the status of a loading operation for purposes of regulation. Such blending is not processing.

One commenter urged that OSMRE clarify that retail sales dealers having their own coal preparation facilities, where the only contact with a mine is the purchase of run-of-the-mine coal at wholesale prices, are not to be regulated under the rule.

OSMRE cannot state with certainty that the facilities of concern to this commenter do not operate in connection with a coal mine. Whether a particular retail sales dealer is operating in connection with a coal mine is a question of fact, to be determined based on the facts of the particular situation. However, because coal preparation facilities operated by retail sales dealers tend to be closely linked to end users, OSMRE does not expect that regulatory authorities, in making case-by-case determinations, will likely find that such facilities are operating in connection with a coal mine.

A Federal agency reminded OSMRE of the authority of Federal land managing agencies to regulate surface mining on agency lands.

This rule deals with the issue of regulation under SMCRA and thus has no effect on regulation by other Federal agencies of lands under their jurisdiction under other statutes.

One commenter objected to the manner of promulgation of these and previous regulations dealing with off-site coal preparation, and maintained that OSMRE violated the Administrative Procedure Act (APA) in promulgating the 1985 interim final rule defining "coal preparation." The commenter maintained that it is difficult for operators of facilities to determine if they are subject to regulation because of the constant changes in the status of regulations. The commenter criticized OSMRE for proposing changes only to portions of the rules governing off-site coal preparation instead of revising all the rules for off-site preparation. OSMRE should, the commenter suggested, at least provide a reasonable effective date for this final rule so that operators have time to determine if they are to be regulated.

Questions of APA violations in other rulemakings are outside the scope of this rulemaking. The APA and section 526(a) of SMCRA provide appropriate procedures for any interested person who feels that a statutory requirement for another rulemaking has not been met. OSMRE has adhered to the APA in proposing this rule, considering public comments, and promulgating the final rule. The rule is issued with the standard effective date of 30-days from the date of publication, which OSMRE believes is a reasonable effective date, given the nature of the issues addressed in this rulemaking. In addition, OSMRE sees no reason to repropose all the rules dealing with off-site coal preparation when the only question at hand is one of clarifying which preparation plants are subject to regulation under the Act's definition of "surface coal mining operations."

Finally, concerning the commenter's assertion that facility operators cannot tell if they are subject to the rule, OSMRE does not purport to provide the entire regulatory scheme in this rule, but rather seeks to provide a reasonable framework for regulatory authorities to adopt and implement regulatory programs, including appropriate case-by-case decisions about jurisdiction. In this regard, OSMRE believes that it is providing sufficient regulatory guidance, and that operators of processing facilities necessarily know whether or not they are operating in connection with a coal mine or if they are operating a long-term industrial facility not in connection with any coal mine. When in doubt, they should contact the regulatory authority.

EFFECT IN FEDERAL PROGRAM STATES AND ON INDIAN LANDS

The rule applies through cross-referencing in those States with Federal programs. This includes California, Georgia, Idaho, Massachusetts, Michigan, North Carolina, Oregon, Rhode Island, South Dakota, Tennessee, and Washington. The Federal programs for these States appear at 30 CFR Parts 905, 910, 912, 921, 922, 933, 937, 939, 941, 942, and 947 respectively. The rule also applies through cross-referencing to Indian lands under the Federal program for Indian lands as provided in 30 CFR Part 750.

EFFECT ON STATE PROGRAMS

OSMRE will evaluate permanent State regulatory programs approved under section 503 of SMCRA to determine whether any changes in these programs will be necessary. If the Director determines that certain State program provisions should be amended in order to be made no less effective than the revised Federal rules, the individual States will be notified in accordance with the provisions of 30 CFR 732.17.

IV. PROCEDURAL MATTERS

Paperwork Reduction Act

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

Executive Order 12291

The Department of the Interior has determined, in accordance with the criteria of Executive Order 12291 (February 17, 1981), that this rule is not major and does not require a regulatory impact analysis because it will not affect existing costs to the coal industry and coal consumers, and will not adversely affect competition, employment, investment, productivity, or innovation.

Regulatory Flexibility Act

The Department of the Interior has determined, pursuant to the Regulatory Flexibility Act, *5 U.S.C. 601* et seq., that this rule will not have a significant economic effect on a substantial number of small entities.

National Environmental Policy Act

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

Author

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LIST OF SUBJECTS

30 CFR Part 785

Reporting and recordkeeping requirements, Surface mining, Underground mining.

30 CFR Part 827

Coal, Environmental protection, Surface mining.

Accordingly, 30 CFR Parts 785 and 827 are amended as set forth below.

Date: October 8, 1988.
J. Steven Griles, Assistant Secretary -- Land and Minerals Management.

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

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

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

2. Section 785.21 is amended by revising paragraph (a) to read as follows:

SECTION 785.21 - COAL PREPARATION PLANTS NOT LOCATED WITHIN THE PERMIT AREA OF A MINE.

(a) This section applies to any person who operates or intends to operate a coal preparation plant in connection with a coal mine but outside the permit area for a specific mine. Any person who operates such a preparation plant shall obtain a permit from the regulatory authority in accordance with the requirements of this section

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PART 827 -- PERMANENT PROGRAM PERFORMANCE STANDARDS -- COAL PREPARATION PLANTS NOT LOCATED WITHIN THE PERMIT AREA OF A MINE

3. The authority citation for Part 827 is revised to read as follows:

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

4. Section 827.1 is revised to read as follows:

SECTION 827.1 - SCOPE.

This part sets forth requirements for coal preparation plants operated in connection with a coal mine but outside the permit area for a specific mine.

[FR Doc. 88-26915 Filed 11-21-88; 8:45 am]
BILLING CODE 4310-05-M