FEDERAL REGISTER: 47 FR 33424 (August 2, 1982)

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

30 CFR Parts 700 and 825
Permanent Regulatory Program: Two-Acre Exemption

ACTION: Final rule.

SUMMARY: The Office of Surface Mining Reclamation and Enforcement (OSM) is amending 30 CFR 700.11(b) which relates to exemption from the requirements of the Surface Mining Reclamation Act of 1977 (the Act) for the extraction of coal where a coal mining and reclamation operation affects two acres or less. The final rule provides criteria for determining when an operation qualifies for the exemption.

The rule also establishes a procedure by which the regulatory authority may make a determination that an operation is exempt. These changes are made to clarify the existing rule and as a result of litigation on the Permanent Regulatory Program regulations.

OSM also is amending 30 CFR Part 825 which provides for alternative permanent program performance standards for special bituminous coal mines in Wyoming. Pursuant to the changes, OSM will make clear that authority to regulate such mines is with the State of Wyoming.

EFFECTIVE DATE: September 1, 1982.

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SUPPLEMENTARY INFORMATION:

I. BACKGROUND

A. INTRODUCTION

On January 4, 1982 *(47 FR 41)*, OSM published a notice of proposed rulemaking to amend 30 CFR Chapter VII relating to the two-acre exemption and definition and use of the terms "adjacent area," "affected area," "permit area" and "road." OSM also proposed to delete the term "mine plan area" and replace it where appropriate with either "permit area," "permit area and adjacent area" or "permit area and potentially impacted offsite areas." The proposed rule also included two alternatives for a new term, "area of expected subsidence" or "area of potential subsidence." Finally, OSM proposed to amend 30 CFR Part 825 to eliminate unnecessary regulations regarding special bituminous coal mines in Wyoming.

OSM today is issuing final rules with respect to the two-acre exemption and special bituminous coal mines in Wyoming. Final action on the other proposals in the January 4, 1982 notice is being deferred for a latter final rulemaking notice.

B. TWO-ACRE EXEMPTION

Section 528(2) of the Surface Mining Control and Reclamation Act, *30 U.S.C. 1201* et seq. (the Act), exempts from the requirements of the Act "the extraction of coal for commercial purposes where the surface mining operation affects two acres or less * * * " Regulations implementing this provision (30 CFR 700.11(b)) were originally published on March 13, 1979 *(44 FR 15311)*. This regulation has a complicated history which is set forth fully in the January 4, 1982 notice of proposed rulemaking. See *47 FR at 41*.

In view of the complex history of the two-acre rule, OSM proposed on January 4, 1982, to completely revise the two-acre rule. Public comments were solicited for 30 days ending on February 3, 1982. This period was subsequently extended to February 16, 1982. Those persons offering comments during this time included industry representatives, State officials, citizens and environmental groups. A public hearing was scheduled for January 25, 1982, but no testimony was offered. OSM carefully considered all comments received on the proposed two-acre rule in drafting these final rules.

II. RULE ADOPTED AND RESPONSES TO PUBLIC COMMENTS ON PROPOSED RULES

A. REORGANIZATION OF SECTION 700.11

30 CFR 700.11 has been reorganized so that the exemptions provided for in the Act (other than the two-acre exemption), which were in subsections (a) and (c)-(g), have all been put into a new subsection (a) as paragraphs (1)-(6). No substantive change is intended by this reorganization. The two-acre exemption remains in subsection (b) but is amended as described below. A new subsection (c) providing for determination of exemption by the regulatory authority has been added and is discussed later in this preamble.

B. CHANGES TO TWO-ACRE EXEMPTION RULE (SECTION 700.11(b))

1. General. OSM proposed various alternatives for the two-acre exemption rule. OSM has chosen among these alternatives and the rule being adopted is essentially the same as the alternatives proposed except as noted below. The reasons for the proposal were set forth fully in the preamble to the January 4, 1982 notice of proposed rulemaking.

Although the final rule adopts specific criteria to identify operations that qualify for a two-acre exemption, it is interpretative in the sense that it clarifies, but does not change the ambit of, an exemption that currently exists.

Section 700.11(b) is being revised to provide that the requirements of 30 CFR Chapter VII do not apply to the extraction of coal for commercial purposes where the surface coal mining and reclamation operation (together with any "related" operations) has or will have an "affected area," as defined in Section 701.5, of two acres or less. In other words, "related" operations, discussed in detail below, are considered as part of one operation for purposes of determining the "affected area" and hence the application of the exemption.

Other principal changes to the two-acre exemption are the addition of criteria for determining (1) the method of treating haulage or access roads used by two or more operations and (2) whether two or more operations are related. These changes are described below.

A determination of whether an operation qualifies for the two-acre exemption is a determination whether that operation must comply with the requirements of the remainder of 30 CFR Chapter VII. Therefore, if an operation were determined not to be exempt, it would be subject to, among other requirements, the performance standards in Subchapter K and the requirements to pay abandoned mine land reclamation fees under Subchapter R.

In the proposed rule, the term "coal mining operation" was used instead of the term "surface coal mining operation." The omission of the word "surface" in the use of the term was inadvertent and the final rule uses the correct term: "surface coal mining operation." As used in this preamble, the term has the meaning set forth in Section 701(28) of the Act and Section 700.5 of OSM's regulations.

For purposes of this preamble, the term "operator" is used to refer to all persons conducting surface coal mining operations. Use of the term is not meant to be limited to the definition of "operator" in 30 CFR 701.5, i.e., a person removing at least 250 tons of coal in a twelve month period.

2. Intent to Affect (Section 700.11(b), introductory clause). The introductory clause to Section 700.11(b) indicates that the requirements of Chapter VII do not apply to the extraction of coal for commercial purpose where the surface coal mining operation, together with any related operations, has or will have an affected area of two acres or less.

The phrase "has or will have an affected area" has been adopted in Section 700.11(b) to clarify that the first two acres of a larger operation, or a series of less-than-two-acre operations that are actually one large operation, would not be

exempt. Accordingly, under this revised Section 700.11(b), if an operation was intended from its beginning to affect 20 acres it will not be entitled to the exemption at any time. If an operation were originally intended to affect less than two acres, but the person conducting the operation changed his or her intention and decided to mine a total of four acres, at the time that intent changed the operation would cease to be exempt. This is a change in wording, not a change in substance, from the previous regulation. OSM believes that this is the proper interpretation of the Act and its legislative history, which makes it clear that Congress intended to provide an exemption only for small operations and not for the first two acres of any larger operation. See the preamble to the proposed rule for a complete discussion of the legislative history of the two-acre exemption.

3. Roads (Section 700.11(b)(1)). Two issues were addressed in the notice of proposed rulemaking concerning the treatment of a road used by a surface coal mining operation for access or haulage. The first issue is at what point a public road should be considered independent of a surface coal mining operation, such that it should not be included in the "affected area" of that operation. For purposes of clarity in understanding this rule, this issue is discussed in this preamble below; however, the final amendment to the definition of "affected area" in 30 CFR 701.5, will be deferred for a later final rulemaking because the remainder of the definition, not dealing exclusively with roads, is closely tied to, and should be considered with, the other definitions that were proposed.

The second issue is whether a road used by more than one operation should be included in whole or in part in the affected area of each such operation. Section 528(2) of the Act provides an exemption from the requirements of the Act for "the extraction of coal" where the surface mining operation "affects" two acres or less. Under 30 CFR 700.11(b), as revised, in determining whether a coal mining operation affects two acres or less, the regulatory authority must first determine the affected area of the surface coal mining operation and any related operations. If a road used by a surface coal mining operation is part of its "affected area," it is counted for purposes of determining whether that operation affects two acres or less. Conversely, a road which is not part of the "affected area" of an operation is not counted.

Often, however, portions of the same road are used by more than one operation for access or haulage. Under Section 700.11(b)(1) as previously in effect, it was not clear to which operation the road should be attributed, or whether the road should be attributed to each operation that "affects" it. The previous regulation was silent as to which of these interpretations was correct.

The proposed rule provided five alternatives for treating segments of roads used by more than one operation for purposes of determining the "affected area" of each operation and whether the two-acre exemption applies. Of the five alternatives considered in the proposed rule, OSM has determined that the best choice is the second alternative, which provides that the entire area of any segment of a road used by more than one operation will be included in the "affected area" of each of those operations. Thus, for example, if four operations use a segment of a road, the entire segment is to be treated as part of the "affected area" of each of those four operations for purposes of determining whether any of those operations is exempt under Section 700.11(b).

There is one exception to this rule. When two or more operations are considered "related" under Section 700.11(b)(2), as discussed below, they are considered to be one operation for purposes of the two acre rule. Thus, if two or more "related" operations use the same segment of a haulage or access road, the entire area of that segment will be included only once in their combined acreage to avoid counting the same segment of road more than once in the acreage of the same operation.

The other proposed alternatives and the comments are described below, followed by OSM's response to the comments.

Under the first proposed alternative, if one operation owned and used a segment of a road which was also used by other operators, the segment would be attributed to the operation that owned it. If the segment was not owned by one of the operations using it or if more than one of such operations owned the road, it would be attributed to the operation which made the greatest use of the road. No commenters supported this alternative. Several said that it would be difficult to implement because, as usage changed, the road would have to be reattributed, and thus an operator might not know in advance whether he was subject to the Act, which would be unfair.

OSM agrees that this alternative would be difficult to implement because ownership of the road could change possibly necessitating a change in status of the other operations using the road even though their operation was not related to the

new owner and had not changed. Also, in the event that no operation owned the road or ownership was divided, it would be administratively impractical to attribute the road to a particular operation based on usage because usage can change daily. Therefore, this alternative was rejected.

Under the second alternative, which OSM has adopted, the entire segment of the road used by more than one operation is included in the "affected area" of each of those operations. Two commenters supported this alternative as the only one consistent with the Act because any coal operation using a road for access "affects" the road. One commenter stated that this alternative is unworkable because, should more than one operator permit the same road and fail to maintain it appropriately, the regulatory authority would have a dilemma as to whom to cite.

OSM is adopting this alternative because it is most consistent with the language and purpose of the two-acre exemption and does not present the administrative problems discussed above with regard to the usage.

The commenter who was concerned about enforcement misunderstood the proposal. Section 700.11(b) states that the attribution of roads is only "(for) purposes of this paragraph," i.e., to determine whether the affected area of the operation exceeds two acres. If an operation using the road is less than two acres, there is no enforcement problem because the enforcement regulations are inapplicable. If, on the other hand, a permit is required, it is no different from the situation where any two or more operations share a road. In such a situation the operator to whom the road is permitted is responsible for compliance.

Under the third alternative, it was proposed that the area of the commonly used segment would be divided equally among the users so that the total area attributed to the users would not exceed the actual area of the road. No commenters supported this alternative. One commenter stated that since shares could change with the number of operations beginning and ending, it would not allow an operator to know in advance whether the total acreage affected by his operation would exceed two acres, and thus the legal responsibilities which may apply. Another stated it would be unfair for an operator at the road's mouth to be assigned a segment of the road used by many, while the operator at the head is assigned a segment only he uses. Another stated that it would violate Sections 528(2) and 701(28) of the Act.

As with the first alternative, OSM agrees that the third alternative would be difficult to implement. The addition or deletion of any surface coal mining operation using the road would require the status of the other operators using the road to be reevaluated according to the increase or decrease in the size of their share of the commonly used segment. OSM agrees that this would cause uncertainty for operations as to whether they come under the requirements of the Act. The commenter who stated that the operator at the road's mouth would bear a disproportionate amount of responsibility for maintaining the road did not understand that only that segment of the road used by an operator would be attributed to him; if he used only the first 500 yards of a 1500-yard road, only his share of the first 500 yards would be attributed to him. See the preamble to the proposed rule for a complete analysis of the implementation of each alternative.

Under the fourth proposed alternative, the segment of the road used by more than one operation would have been prorated among the users, but the proration would have been based on usage. Usage could be measured by various methods such as vehicular traffic or coal production. The measure of usage would have been determined by the regulatory authority. No commenters supported this alternative. Two stated it would pose administrative problems, violate the Act, and be unduly complicated. One commenter described this alternative as the worst because it not only presents problems of determining frequency of use, but would lead to arbitrary enforcement against an operator for failure to maintain his permitted area without giving him control over the use of that area.

As discussed above, OSM agrees that the usage test is administratively impractical. Therefore, this alternative was rejected.

Under the fifth alternative, the regulatory authority could have adopted any method for attributing a road segment used by more than one operation, so long as the entire segment was allotted by the regulatory authority and the method was consistent with the Act. Thus, the regulatory authority could have adopted a procedure similar to the other alternatives proposed for this subsection, or could have developed a different approach.

Several commenters supported this alternative because it gave a State the opportunity to maintain current practices and was consistent with the Act. Another commenter stated that it was the "least objectionable" alternative. Those

opposing this alternative stated that it would have violated OSM's duty in Section 304(a) of the Act to prescribe necessary rules and would allow unequal application of the two-acre exemption throughout the nation.

The fifth alternative is being rejected by OSM. To allow the States to maintain current practices would tend to continue and encourage unequal administration and enforcement of the two-acre rule since every State could require different criteria for dealing with the roads. (See discussion of past problems in implementation of the existing rule at *47 FR 41,* January 4, 1982.)

OSM received a number of other comments on the issue of attributing haul roads for the two-acre exemption. Several commenters stated that none of the alternatives was acceptable because double bonding and permitting of any roads is administratively cumbersome and inconsistent with Section 528(2) of the Act. One commenter stated that since the alternatives represent arbitrary enforcement, each would constitute an unconstitutional taking of property of persons entitled to the two-acre exemption. One of these commenters stated that the regulatory authority should be able to assign segments of a haulage road on a case-by-case basis, rather than trying to cover all situations with general language.

Another commenter stated that it would be fairer and simpler to allocate the haulage road to the first affected operator with the legal right to permit the road.

Several other commenters stated that the operators should work out among themselves who will be responsible for the various parts of the road, such as permitting, bonding and maintenance, and the agreement would be subject to the approval of the regulatory authority. They stated that this procedure would be flexible and also beneficial to operators since the two-acre exemption might be more valuable to one operator who would be willing to compensate another operator (who may not care about the two-acre exemption) for assuming entire responsibility for the road.

OSM rejected the idea of assigning segments of haulage roads on a case-by-case basis to the operators using the road because it could lead to arbitrary enforcement and unequal application of the two-acre rule.

Allocating the road to the first operator with the right to permit the road could also lead to abuse of the exemption. It would allow one operator to include the road in its affected area; then a whole series of different operations along the road which in fact "affect" the road would be able to exclude the road for purposes of calculating the two-acre exemption.

Allowing the operators to work out an agreement among themselves may also lead to arbitrary enforcement and abuse of the exemption. Furthermore, it would not be consistent with the purposes of the Act to, in effect, allow an operator to "buy" an exemption through an agreement with other operators with regard to responsibility for roads.

The alternative selected will not require double bonding or double permitting of any segment of a road. The attribution to more than one operation of a segment of a road is done for purposes of determining the size of the affected area. Only one operation at a time is required to actually permit or bond any segment of such a road.

4. Related Sites (Section 700.11(b)(2)). Congress' intent in adopting Section 528(2) of the Act was to avoid imposing the Act's requirements on "the one-man operation." Surface Mining Control and Reclamation Act of 1977. Hearings on S. 7 before the Subcommittee on Public Lands and Resources of the Committee on Energy and Natural Resources, 95th Cong., 1st Sess. 436 (1977). Congress' rationale for the exemption was that it "would cause very little environmental damage and that regulation of [such operators] would place a heavy burden on both the miner and the regulatory authority." S. Rep. No. 95-128, 95th Cong., 1st Sess. 98 (1977).

In promulgating both the previous regulations to implement Section 528(2) of the Act, and the revisions discussed in this document, OSM has been concerned that the limited exemption provided by Congress not be abused by operators seeking to evade the permitting and environmental protection performance standards of the Act. OSM is concerned primarily with situations where an operator tries to claim the exemption by dividing what is essentially one mine site into numerous sites of two acres or less. In Section 700.11(b), as originally adopted, OSM attempted to avoid extension of the exemption to such operations by excluding from the scope of the exemption operations "conducted by a person who affects or intends to affect more than two acres at physically related sites, or any such operation conducted by a person who affects or intends to affect more than two acres at physically unrelated sites within one year." *44 FR 15312, 15315* (March 13, 1979). The Commonwealth of Virginia challenged this provision, alleging that the exemption should not be

denied to operators with physically unrelated sites which in total area exceed two acres, but individually are less than two acres. In re: Permanent Surface Mining Regulation Litigation, No. 79-1144 (D.D.C. 1979). In response to this legal challenge, OSM agreed to change Section 700.11(b).

Section 700.11(b) as proposed on January 4, 1982 provides that two or more surface coal mining operations should be considered as one for purposes of the exemption if they were "related;" operations were deemed "related" only if they occurred within 12 months of each other and met both the physical relatedness test in proposed Section 700.11(b)(2)(i) and the common ownership or control test in proposed Section 700.11(b)(2)(ii). OSM received several comments on this proposed change and has decided to adopt the "related operations" concept with changes discussed below. The rules adopted, and the comments received, are discussed in terms of the three major components of the "relatedness" test: the temporal (twelve-month) limitation; physical relatedness; and relatedness through "ownership or control." Under the final rule two or more operations will have to meet all three components before they will be deemed "related" for purposes of the two-acre exemption.

Several commenters stated that relating two operations if they occur within 12 months is unrealistic because the operations may be some distance apart and owned by different people. One of these commenters stated that if a limit is needed, three months should be adequate. Another commenter, however, appeared to state that 12 months is too short. One commenter said a time shorter than 12 months is unlikely to deter subterfuge.

OSM has determined that a time limit is necessary in order to properly implement the two-acre rule. Without such a limitation, if an operator of a less-than-two-acre site returned to the same vicinity five or ten years later to mine another less-than-two-acre site, in the absence of a time limit, those sites could be "related" under the other portions of the rules being adopted. The time limit will allow a small operator to return to the vicinity of a previous operation without having these sites deemed related. OSM has decided to adopt 12 months as the time limitation. A shorter time limit may allow operators to circumvent the two-acre rule by mining two acres or less, waiting a few months, and then returning to mine an additional two acres. OSM received no specific comments suggesting a specific longer time period.

The 12-month requirement does not stand alone as the sole criterion of determining related sites, as some commenters seemed to believe. In addition to the 12-month requirement, two or more operations cannot be considered to be related unless they also meet both the physical relatedness test and the common ownership or control test.

The second major component of the relatedness test is a physical relatedness criterion, proposed in Section 700.11(b)(2)(i). OSM proposed two alternatives for determining when two sites are physically related. The first alternative provided that two or more operations would be deemed physically related if they were contiguous. Under the second alternative, as proposed, operations would be deemed physically related if they met any one of three tests: (A) Any portion of one site was in the same or adjacent counties as any portion of the other site and drainage from both sites flowed into the same watershed at or before a point located in the same county as, or within ten aerial miles of, either site, (B) they shared the same equipment or personnel or used some of the same access or haulage roads, or loading, processing, shipping or other handling facilities, or (C) they were situated so that surface coal mining operations at one site could cause harm to some of the same persons or environments as operations at the other site or sites.

The first alternative for physical relatedness was not adopted by OSM because it would not adequately define when two operations, each claiming the exemption, were in reality two parts of a larger non-exempt operation. OSM has already encountered situations in which an operator mined two acres, skipped 50 feet and mined two more acres, and then claimed the exemption for each "operation."

The second alternative was selected with modifications discussed below, because OSM believes this alternative will provide uniform and understandable rules for determining when two operations should be regarded as one for purposes of the exemption.

Section 700.11(b)(2)(i), as amended, will provide one test for physical relatedness. Two operations will be deemed "physically related" if drainage from the two (or more) operations in question flows into the same watershed at or before a point within five aerial miles of either operation. OSM determined that the 10-mile limit contained in the proposed rule was too large. Also OSM did not adopt the proposed requirement that the operations had to be in the same or adjacent counties or that physical relatedness be based on the common use of equipment, roads, support facilities, etc. Finally,

OSM omitted the proposed paragraph (C) criterion, relating to operations that may harm the same persons or environs, because the test is too vague and difficult to implement.

With these changes, the "physical relatedness" criterion will be easier to administer, but will ensure that two or more operations that are distant from each other or that do not impact the same environmental resources are not treated as one for purposes of the two-acre exemption. Thus, under the final rule the test will be whether drainage from the two sites flows together in a local watershed within five miles of either operation. This test is consistent with the intent of Congress to exempt only operations which have minimal effects on the environment. If two operations owned or controlled by the same person are sufficiently close to have more than minimal cumulative effects on a local watershed, then they should be considered as one operation for purposes of the two-acre exemption. (See the discussion of the legislative history in the preamble to the proposed rule.)

OSM believes that a geographical relationship is the most appropriate measure of physical relatedness. Consideration of common use of equipment, personnel and facilities is more appropriate in the context of the third aspect of relatedness; that is, whether the two or more operations are under common ownership or control. Moreover, the watershed drainage test set out in the final rule will likely encompass many operations that are using common equipment, personnel and facilities.

OSM received many comments on the proposed "physical relatedness" test. Several commenters supported the first alternative (contiguity) as more realistic than the second (watershed test). They found the second alternative arbitrary because the ten-mile and county criteria are unrelated to the topography of an area and because watersheds vary substantially and depend on subjective judgments. As discussed above, the contiguity test is too narrow, but OSM agrees that the county criterion is not valid and has dropped it from Section 700.11(b)(2)(i) as adopted; OSM also reduced the ten-mile limit to five miles.

Several other commenters favored the second alternative, although a few had reservations. One commenter stated that the ten-mile limit would exempt some operations that should not be exempt, but would cover most related operations and would represent a reasonable way to draw the line. This commenter stated that OSM should clarify that the "local" watershed used in the regulation refers to the ten-mile circle. Another commenter stated that the test as proposed would end the common practice of creating multiple mines in contiguous areas, while insulating bona fide separate, small operations from the full rigors of the law. Another would omit the requirement that sites need to drain into the same watershed since the coal fields of Appalachia contain many small watersheds which eventually feed into a larger watershed, and it would therefore be easy for illegal miners to first mine one side of a hill draining into one creek and then go a short distance to the other side of the hill which drains into another creek. One commenter recommended deleting the ten-mile limit.

As discussed above, OSM believes that the five mile watershed test adopted will carry out the intent of Congress to exempt small operators which cause minimal environmental damage. Measurement of the five mile limit will be based on aerial distances and not the distance that may be covered by a stream or other watercourse within the watershed. Furthermore, OSM believes that the five mile limit is broad enough to prevent abuse of the exemption by related operations. It would be a rare occasion when a single operation could move into a separate watershed to avoid the Act's requirements.

One commenter stated that neither the first nor the second alternative is necessary for a determination of physical relatedness because if two operations are not close enough to use common facilities or personnel (paragraph (B) of the second proposed alternative) or be under common control, then they should not be considered related even though they may be in the same or adjacent counties.

OSM does not agree. If two operations owned by the same owner have an additive environmental effect, they should be treated as one. Thus, a geographical criterion in establishing whether two or more operations are related is appropriate. Also, as indicated above, it is believed that the five-mile watershed test is broad enough to encompass those operations that use common equipment, personnel and facilities.

Several commenters stated that proposed paragraph (C) of the second alternative was too broad in covering all harm that "could" occur. These commenters also stated that operations should not be deemed "related" unless "all," not "any," of the criteria in proposed paragraphs (A) through (C) are met.

OSM agrees with the first comment and has deleted paragraph C. With regards to the second comment, OSM disagrees. It is OSM's view that the "physical relatedness" test would be too narrow if operations had to meet all three of the proposed criteria. Such a requirement would frustrate OSM's attempt to limit the scope of the two-acre exemption to those small operations for which it was intended.

Before two or more operations which meet the temporal and physical relatedness tests described above are deemed "related," the operations must also be related by ownership or control, the third component of the relatedness test. Section 700.11(b)(2)(ii) has been adopted as proposed. This section provides that two or more physically related operations are deemed "related" for purposes of the two-acre exemption if they are owned or controlled, directly or indirectly, by or on behalf of: (A) The same person; (B) two or more persons one of which controls, is under control with, or is controlled by the other, or (C) members of the same family and their relatives, unless the person conducting surface coal mining operations establishes that there is no direct or indirect business relationship between or among them. For purposes of this section, "control" is defined as ownership of 50 percent or more of the voting shares of, or general partnership in, an entity; any relationship which gives one person the ability in fact or law to direct what another does; or any relationship which gives one person express or implied authority to determine the manner in which coal at different sites will be mined, handled, sold or disposed of.

The most important aspect of this section is the definition of "control". If one person exercises sufficient authority over another (whether by contract, lease, other agreement, or implied authority) to determine how that person mines, handles, sells or disposes of coal from a site, there is "control." By way of illustration, if company A owns 100 acres and leases two acres each to operators X, Y, and Z for a prescribed fixed fee unrelated to the amount of coal extracted, and company A has no authority to direct operators X, Y, or Z as to how the coal should be mined, handled, sold or disposed, then operations X, Y, and Z (absent meeting one or more of the other control tests) would not be considered "controlled" by company A. However, if company A and operators X, Y, and Z are part of the same corporate structure, the operations are "controlled or owned, directly or indirectly, by or on behalf of the same person."

Under the definition of "control" which is adopted, ownership of 50 percent or more of the voting shares in a company is not necessarily required for control. "Control" exists if enough shares are owned by a person to give him the "ability in fact or law to direct" what the company does. As previously stated, to be related for purposes of the two-acre rule, two or more operations must be related both "physically" and through "ownership or control."

Control is determined solely for the purposes of deciding whether the two-acre exemption applies. If two or more operations are deemed "related" under the criteria in revised Section 700.11(b)(2) and therefore not exempt because their combined "affected areas" exceed two acres, this would not prevent owners of coal from subcontracting the mining of the coal to one or more operators. The only effect is that those operators would have to comply with the regulatory program if the relatedness tests are met.

One commenter suggested that OSM should delete the proviso defining "control" because how the coal is sold or disposed of is irrelevant to the mining operations and potential environmental harm. Another commenter stated that all leases contain some provisions that control mining operations to prevent loss of reserves, and thus this proposed paragraph would in fact eliminate the two-acre exemption. OSM does not intend the control test to extend to standard arm's length lease agreements that are designed to ensure payment of royalties or prevent loss of reserves. However, OSM believes the control test should be broad enough to encompass those relationships that evidence an interrelationship of the parties beyond the transfer of rights to a mineral reserve.

One commenter stated that operations should be considered "related" if either the physical relatedness or the common ownership or control test is met because otherwise persons would establish numerous shell corporations and abuse the two-acre exemption.

OSM believes that the term "direct or indirect" in the "ownership or control test" is enough to prevent any attempt at circumvention of the exemption by operators through the use of "shell" corporations. OSM does not believe that operators which meet the "physical relatedness" test but not the "ownership/control" test, or vice versa, should be treated as related. If only one of the tests were necessary to establish relatedness, the two-acre exemption would be too narrowly defined; an operator who through ownership had two independent operations on opposite sides of the State would not be

able to qualify for the exemption, and operations which were close to each other but independent in every other way could not qualify for the exemption. Thus, this comment was not accepted.

5. Regulatory Determination of Exemption (Section 700.11(b)(3)). OSM has adopted this section in the final rule as proposed. OSM believes that the criteria adopted should operate to assure that the exemption will apply to all operations intended by Congress to be exempt and to no others. OSM recognizes that there is a great variety of possible legal and factual situations to which the rule may apply, and there may be situations where, through the application of Section 700.11(b)(2), an operation is treated as non-exempt where in fact it is the type of operation Congress intended to exempt. Therefore, OSM has adopted this provision under which the regulatory authority can determine that two or more operations are entitled to the exemption despite being "related" within the meaning of Section 700.11(b)(2). The regulatory authority may make such a determination after considering the entire circumstances surrounding the operations and their history. The determination must be consistent with the purposes of the Act. The determination must be made in writing and after public notice. It is expected that this provision would be used only in rare cases.

Several commenters stated that this provision creates a loophole which would negate national uniformity and allow abuse of the two-acre exemption. One commenter stated that the Act is remedial legislation, and thus exemptions should be narrowly construed. This commenter stated that this provision is unnecessary because if an operator believes he should not be "related" to another, he can petition for an emergency rulemaking.

Another commenter stated that the policy of paragraph (b)(3) should be expanded beyond the two-acre rule to exempt from the Act environmentally beneficial activities which, like that commenter's landfill, are only incidentally related to mining coal.

It is the belief of OSM that this provision would be used only rarely and after appropriate investigation and documentation by the regulatory authority. If the provision should result in abuse, OSM will reexamine it. There is no basis in the Act for expanding the policy beyond the two-acre rule that Congress has mandated.

6. Activities Other Than Coal Extraction (Section 700.11(b)(4)). One commenter stated that the language of proposed Section 700.11(b)(4) should be reworded for clarity to say simply that the exemption applies only to operations involving extraction of coal and not others such as coal processing. In response to this comment the proposed language has been revised to clarify the meaning of the section.

The exemption set forth in Section 528(2) of the Act applies to "the extraction of coal" where the "surface coal mining operation" affects two acres or less. It is not clear from that statute what is meant to be included in the term "extraction of coal." The title of Section 528 is "Surface Mining Operations Not Subject To This Act." The term "surface mining operations" presumably has the same meaning as "surface coal mining operations," which is defined in Section 701(28) of the Act. However, there are some activities covered by Section 701(28) which can exist independently of extraction of coal, such as coal processing plants. OSM believes that the most reasonable interpretation of the Act is that "extraction of coal" does not cover such facilities where they exist independently of extraction of coal. This position is reflected in Section 700.11(b)(4) which is being adopted generally as proposed. However, OSM believes that support facilities incidental to the extraction of coal on a less than two-acre operation would be exempt as well as the extraction of coal. If this were not so, such facilities on a less than two acre site would have to be permitted while the coal extraction activities themselves would be exempt. Such an anomalous result was not intended by Congress. OSM believes Congress intended to exempt all facilities on a two-acre site incidental to the extraction of coal for commercial purposes on the same two acres.

7. Notice and Determination of Exemption (Section 700.11(c)). The previous regulations did not provide for a person who intends to conduct surface coal mining operations on two acres or less, or pursuant to an exemption in Section 700.11(a), to be able to request a written determination of exemption in advance from the regulatory authority. The previous regulations also did not contain a formal procedure for the regulatory authority to make such a determination on its own initiative. OSM is adopting a provision in Section 700.11(c) that allows the regulatory authority on its own initiative to make a written determination that an operation is exempt and gives any person who intends to conduct exempt surface coal mining operations a right to receive a written determination. An advance determination of an operation's status might be desired, for example, by a person who intends to conduct surface coal mining operations on two acres or less, because it would provide a measure of certainty about the proposed operation's status. A sentence is added in the final rule that was not in the proposal which provides that a person requesting that an operation be declared

exempt shall have the burden of establishing the exemption. this language is consistent with holdings of the Interior Board of Surface Mining Appeals, including Jewell Smokeless Coal Corporation, IBSMA 81-39, 81-47 (decided June 18, 1982).

OSM also is adopting a provision addressing the situation where a person in good faith accurately presents all of the relevant facts, obtains a determination of an exemption, then later has it reversed. OSM believes that in such cases the operation or person conducting the operation should not be cited for violations or otherwise penalized for regulatory program violations during the time it relied upon the regulatory authority determinations of exemption. For example, where administrative or judicial action results in a reversal of the regulatory authority's determination that an operation is exempt, the surface coal mining operation will become subject to the applicable regulatory program requirements only as of the date the final determination is rendered.

One commenter supported Section 700.11(c) in concept, but stated that Section 102(i) of the Act requires any person to be able to request a determination on exemption, that there should be a right of appeal regarding OSM decisions as under 30 CFR 776.11, and that failure to cite violations where an exemption is reversed violates Section 521(a)(3).

Another commenter stated that Section 700.11(c) should be deleted because it places an undue burden on the regulatory authority to ensure that the operator remains exempt when it should be the operator's responsibility to comply with the Act at all times.

Another commenter stated that Section 700.11(c) should be clarified to provide that although the operator should not be cited for violations during the exempt status, the operator must upon reversal begin to comply with all standards or face penalties.

OSM believes that this provision as proposed is satisfactory and does not impose an undue burden on the regulatory authority. Persons other than the operator who want the regulatory authority to review an operation's status can do so through the citizen complaint provisions in 30 CFR 721.13 and 842.12. OSM also believes that it is clear from the adopted language that if a decision of exemption is reversed, the operator must immediately begin to comply with the Act's requirements.

C. DISCUSSION OF ROADS AND THE AFFECTED AREA

1. General. 30 CFR 701.5 was proposed to be amended by revising the definition of the term "affected area." Because this definition is closely related to the other proposed definitions which are deferred to a later final rule, this rule will not amend the definition of "affected area." However, because the portion of the definition of "affected area" which pertains to roads is closely related to the two-acre exemption, this issue is addressed in this preamble. When the definition of "affected area" is revised, it will be consistent with the findings and discussion contained herein.

Under previously promulgated rules the definition of the term "affected area" specified that it included any area where surface coal mining activities are conducted or located. The basis for this definition was the definition of "surface coal mining operations" in Section 701(28) of the Act. (See *44 FR 14920,* March 13, 1979.) In practice, OSM has found difficulties and ambiguities in the application of this definition. As a result, OSM proposed a revised definition of "affected area" to more closely reflect the scope of areas covered in Section 701(28) of the Act. The definition of "affected area" proposed on January 4, 1982, also was intended to clarify possible ambiguity concerning its application to roads. See the preamble to the proposed rule, *47 FR at 44-45,* for a discussion of the legislative history and of the term "affected area."

OSM proposed four alternatives for the definition of which roads are to be considered included in the "affected area."

The first alternative would have excluded from the "affected area" any part of a road used for coal haulage or access which is owned unconditionally, controlled and maintained by a public entity, used frequently for purposes other than coal haulage or access, and maintained (using public funds) in a manner similar to other public roads of a similar nature in the jurisdiction.

The second alternative would have excluded from the "affected area" any part of a road which (a) was designated as a public road pursuant to the laws of the jurisdiction in which it is located; (b) is maintained with public funds in a manner

similar to other public roads of the same classification within the jurisdiction; (c) there is substantial (more than incidental) public use; and (d) meets road construction standards at least as stringent as the standards applicable to access and haul roads under the State program.

The third alternative replaced the public use and road construction criteria of the second alternative with a requirement that the road be paved. "Paved" meant that the entire length of the road be surfaced with all weather surfacing material of asphalt, concrete or similar consolidated, hard and durable material. The placement of gravel, rock or other unconsolidated material would not constitute paving.

The fourth alternative replaced the paving requirement of alternative three with the requirement that the road meet the road classification standards for a class 1, 2, or 3 road under the mapping system established by the U.S. Geological Survey for 7.5-minute topographic maps.

OSM intends to adopt a final rule that is similar to the second alternative. Specifically, a road will be excluded from the "affected area" for a mine if it meets three criteria: (a) The road has been designated as a public road pursuant to the laws of the jurisdiction in which it is located; (b) the road is maintained with the public funds, and constructed, in a manner similar to other public roads of the same classification within the jurisdiction in which it is located; and (c) there is substantial (more than incidental) public use of the road.

Several commenters supported the second proposed alternative because it is the most thorough and manageable, provides for input from the local jurisdiction, and uses "substantially" rather than "frequently" as proposed in the first alternative. One of these commenters, however, suggested that OSM delete any reference to the amount of public use of the road since determining "substantial use" may be impossible without an extensive road traffic survey, which was not contemplated by the Act, and the local jurisdiction has already considered the amount and type of use in designating the road as public. Those opposing this alternative stated that the construction standard requirement in proposed paragraph (d) is inappropriate since (1) in many cases the public authority is not required to upgrade township and county roads not meeting standards as stringent as those in the permanent regulatory program, and (2) the proposed paragraph (d) requirement would likely prevent counties from acquiring usable access roads whose construction costs would be prohibitive. One commenter stated that the phrase "pursuant to the laws of the jurisdiction" could be abused by a locality adopting ordinances to accept any coal road as a public road.

As to the latter comment, OSM's revised definition of "affected area" will be adopted with the specific understanding that the States with the majority of two-acre operations have laws and regulations that limit the ability of local jurisdictions to accept public roads. OSM will continue to monitor the adequacy and implementation of these provisions.

OSM intends to adopt the second alternative with one modification. The term "road construction standards at least as stringent as the standards applicable to access and haul roads under the applicable State program" will be replaced by adoption of the road construction standards for other public roads of the same classification in the local jurisdiction. OSM recognizes that in some cases the public authority does not build or maintain public roads to the standards under States' programs. Roads such as State or Federal highways are clearly such roads, but when dealing with roads that are built and maintained at lower governmental levels, it is often necessary to find a touchstone for determining when a road should be treated as exempt. In view of Congress' recognition that roads are one of the most significant sources of environmental degradation associated with surface mining, OSM believes the most practical and effective test is that indicated above. The rule that will be adopted will not require that a road be constructed or maintained to any particular standard; it will just say that unless it meets and is maintained under that standard, it will be included in the operator's "affected area."

Several commenters supported the first alternative, provided that the requirement for "frequent" use for purposes other than coal haulage or access was deleted. These commenters stated that it was clearer and more specific than the other alternatives. Several of these commenters would also clarify that roads with minimal public maintenance which are used for access to a coal mine are nevertheless public roads if other public roads in the vicinity also receive only minimum maintenance. Another of these commenters would clarify that "controlled and maintained by a public entity" means that maintenance typical for State or Federal highways, not merely token maintenance. Another commenter also found this alternative acceptable, but noted that determinations as to "frequent" use would be difficult, and stated that places where the public authority does not adequately maintain the road should be considered part of the "affected area." One commenter opposed this alternative because "frequent use" is an ambiguous criterion subject to abuse, and another

opposed it because coal company maintenance of roads is common and under the law of donation can be considered expenditure of public funds. Another commenter stated the first alternative is not feasible since typically the county does not hold "unconditional" title to the road, but rather an easement to the right-of-way.

OSM agrees that frequent use may impose an unreasonable level of public use required under the rule. Rather, OSM intends to use the phrase "substantial (more than incidental)" to indicate the necessary level of public use. Application of this standard will necessarily relate to uses of roads of a similar classification in the surrounding area.

Two commenters supported the third alternative since paving would reflect frequent public use, this alternative would be simple to administer, and it would clearly encompass the law's intent to protect the environment and public from harm because dirt roads are often the last leg of the haul road system and are apt to be heavily affected by dust, erosion, poor drainage, and fast wear. Those opposing this alternative stated that the paving requirement is inappropriate because (1) many existing legitimate township and county roads are not paved due to infrequent use or lack of funds, (2) it reflects a regional bias inappropriate for national rules since most roads near mines in the East are paved and many roads located near Western mines are not, (3) paved roads are usually damaged during the freeze-thaw periods in certain areas, and (4) it is unrealistic in light of "the pervasive conditions of areas in which mining generally takes place."

OSM rejected this alternative because, as discussed above, many legitimate public roads are not paved and paving is not required for access and haul roads. A properly constructed and maintained road is not necessarily paved.

Two commenters supported the fourth alternative because it recognizes the actual construction and condition of many roads in rural areas and would mean that public roads would not be deemed to include unimproved roads considered passable only in dry weather. Those commenters opposing this alternative stated that (1) many recent revisions to USGS maps have not been field-checked, (2) it is unclear, (3) it is too broad because some haul roads that would meet the Class 3 criteria are used strictly as haul roads, and (4) it eliminates flexibility based on site-specific conditions.

OSM agrees with the comments opposing the fourth alternative. This alternative was rejected by OSM because some access and haul roads meet Class 3 requirements but are used exclusively for coal haulage, and many recent revisions to USGS maps have not been field-checked as the commenter indicates. Also, as discussed above, many county and township roads are unsurfaced and unimproved but still entail considerable public use. Under this alternative such a road may not be considered public although it actually is.

D. AMENDMENT TO PART 825

30 CFR Part 825 is being amended by revising the entire part due to the adopted cooperative agreement between OSM and the State of Wyoming to provide for State regulation of surface coal mining and reclamation operations on Federal lands in Wyoming.

No comments were received on the amendment which is adopted generally as proposed, with editorial changes.

III. PROCEDURAL MATTERS

Federal Paperwork Reduction Act

The Department of the Interior has determined that this final rule does not require the collection of information as defined under *44 U.S.C. 3501* et seq.

National Environmental Policy Act

An environmental assessment (EA) of the cumulative impacts on the human environment of these rules was prepared, together with a proposed Finding of No Significant Impact (FONSI). These documents are on file in Room 5315, 1100 L Street, NW., Washington, D.C., and were made publicly available for comment on May 3, 1982 *(47 FR 18920).* A final FONSI covering this rule was issued on July 2, 1982. The two-acre rule is also examined in OSM's draft supplemental environmental impact statement on various proposed regulations that was made publicly available on June 18, 1982.

Executive Order 12291

The Department of the Interior has determined that this document is not a major rule and does not require a regulatory impact analysis under Executive Order 12291.

Regulatory Flexibility Act

The Department of the Interior has determined that this document will not have a significant economic effect on a substantial number of small entities and therefore does not require a regulatory flexibility analysis under Pub. L. 96-354.

LIST OF SUBJECTS

30 CFR Part 700
Administrative practice and procedure, Coal mining, Surface mining, Underground mining, Reporting requirements.

30 CFR Part 825
Coal mining, Environmental protection, Intergovernmental relations, Surface mining, Underground mining.

For the reasons set forth in the preamble, Parts 700 and 825 of Chapter VII, Title 30 of the Code of Federal Regulations are amended as set forth herein.

Dated: July 29, 1982.
Daniel N. Miller, Jr., Assistant Secretary for Energy and Minerals.

PART 700 -- GENERAL

1. Section 700.11 is revised to read as follows:

SECTION 700.11 APPLICABILITY.

(a) Except as provided in paragraph (b) of this section, this chapter applies to all coal exploration and surface coal mining and reclamation operations, except:

(1) The extraction of coal by a landowner for his or her own noncommercial use from land owned or leased by him or her. Noncommercial use does not include the extraction of coal by one unit of an integrated company or other business or nonprofit entity which uses the coal in its own manufacturing or power plants;

(2) The extraction of 250 tons of coal or less by a person conducting a surface coal mining and reclamation operation. A person who intends to remove more than 250 tons is not exempted;

(3) The extraction of coal as an incidental part of Federal, State or local government-financed highway or other construction in accordance with Part 707 of this chapter;

(4) The extraction of coal incidental to the extraction of other minerals where coal does not exceed 16 2/3 percent of the mineral tonnage removed for commercial use or sale;

(5) The extraction of coal on Indian lands in accordance with 25 CFR Part 177, Subpart B; and

(6) Coal exploration on Federal lands outside a permit area.

(b) This chapter does not apply to the extraction of coal for commercial purposes where the surface coal mining and reclamation operation, together with any related operations, has or will have an affected area of two acres or less. For purposes of this paragraph:

(1) Where a segment of a road is used for access or coal haulage by more than one surface coal mining operation, the entire segment shall be included in the affected area of each of those operations; provided, that two or more operations which are deemed related pursuant to paragraph (b)(2) of this section shall be considered as one operation for purposes of this paragraph.

(2) Except as provided in paragraph (b)(3) of this section, surface coal mining operations shall be deemed related if they occur within twelve months of each other, are physically related, and are under common ownership or control.

(i) Operations shall be deemed physically related if drainage from both operations flows into the same watershed at or before a point within five aerial miles of either operation.

(ii) Operations shall be deemed under common ownership or control if they are owned or controlled, directly or indirectly, by or on behalf of:

(A) The same person;

(B) Two or more persons, one of whom controls, is under common control with, or is controlled by the other; or

(C) Members of the same family and their relatives, unless it is established that there is no direct or indirect business relationship between or among them;

(iii) For purposes of this paragraph, "control" means: ownership of 50 percent or more of the voting shares of, or general partnership in, an entity; any relationship which gives one person the ability in fact or law to direct what the other does; or any relationship which gives one person express or implied authority to determine the manner in which coal at different sites will be mined, handled, sold or disposed of.

(3) Notwithstanding the provisions of paragraph (b)(2) of this section, the regulatory authority may determine, in accordance with the procedures applicable to requests for determination of exemption pursuant to paragraph (c) of this section, that two or more surface coal mining operations shall not be deemed related if, considering the history and circumstances relating to the coal, its location, the operations at the sites in question, all related operations and all persons mentioned in paragraph (b)(2)(ii) of this section, the regulatory authority concludes in writing that the operations are not of the type which the Act was intended to regulate and that there is no intention on the part of such operations or persons to evade the requirements of the Act or the applicable regulatory program.

(4) The exemption provided by paragraph (b) of this section applies only to operations with an affected area of less than two acres where coal is being extracted for commercial purposes and to surface coal mining operations within that affected area incidental to such operations.

(c) The regulatory authority may on its own initiative and shall, within a reasonable time of a request from any person who intends to conduct surface coal mining operations, make a written determination whether the operation is exempt under this section. The regulatory authority shall give reasonable notice of the request to interested persons. Prior to the time a determination is made, any person may submit, and the regulatory authority shall consider, any written information relevant to the determination. A person requesting that an operation be declared exempt shall have the burden of establishing the exemption. If a written determination of exemption is reversed through subsequent administrative or judicial action, any person who, in good faith, has made a complete and accurate request for an exemption and relied upon the determination, shall not be cited for violations which occurred prior to the date of the reversal.

(30 U.S.C. 1201 et. seq.)

2. 30 CFR Part 825 is revised to read as follows:

PART 825 -- SPECIAL PERMANENT PROGRAM PERFORMANCE STANDARDS -- SPECIAL BITUMINOUS COAL MINES IN WYOMING

Section

Authority: *30 U.S.C. 1201* et. seq.

SECTION 825.1 SCOPE.

This part establishes requirements for certain bituminous surface coal mining activities located west of the 100th meridian west longitude in Wyoming which existed on January 1, 1972, and for surface coal mining activities immediately adjacent thereto which began development after August 3, 1977, in accordance with Section 527 of the Act.

SECTION 825.2 SPECIAL BITUMINOUS COAL MINES IN WYOMING.

Special bituminous coal mines in Wyoming, as specified in Section 527 of the Act, shall comply with the approved State program, including Wyoming statutes and regulations, and revisions thereto.

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