FEDERAL REGISTER: 47 FR 51316 (November 12, 1982)

DEPARTMENT OF THE INTERIOR
AGENCY: Office of Surface Mining Reclamation and Enforcement (0SM)

30 CFR Part 826
Surface Coal Mining and Reclamation Operations; Permanent
Regulatory Program; Steep-Slope Remining

ACTION: Interim final rule.

SUMMARY: The Office of Surface Mining Reclamation and Enforcement (OSM) is issuing interim final rules that modify certain requirements for remining operations that affect previously contour-mined steep-slope areas. Revision of the rules with regard to remining is necessary because the permanent program rules generally require return to approximate original contour and elimination of the highwall in steep-slope areas, even though there may be insufficient spoil in some previously mined areas to completely cover the highwall if an area is remined. Under these revised rules, a highwall affected by remining will have to be eliminated using reasonably available spoil to the maximum extent technically practical, in accordance with specific new criteria.

EFFECTIVE DATE: December 13, 1982.

FOR FURTHER INFORMATION CONTACT: Raymond Aufmuth, Division of Engineering Analysis, Office of Surface Mining, Department of the Interior, 1951 Constitution Avenue, N.W., Washington, D.C. 20240; 202-343-5245.

SUPPLEMENTARY INFORMATION:

I. BACKGROUND.

On January 7, 1982 *(47 FR 928),* OSM proposed revised performance standards for remining in previously contour-mined steep-slope areas, in order to resolve the conflict that arises in applying the existing rules to situations where insufficient spoil is available to completely backfill the highwalls of mining operations that affect previously mined lands. For a discussion of the background and extent of the problem and the legal basis for these rules under the Surface Mining Control and Reclamation Act, *30 U.S.C. 1201,* et seq. (the Act), see the Federal Register preamble to the proposed rule, *47 FR 928, 929.* The rules adopted today will replace the requirement that highwalls be eliminated completely with the requirement that, during contour remining of previously affected areas, highwalls have to be eliminated to the maximum extent technically practical, using all reasonably available spoil, that ensures safety, stability, and erosion control necessary to achieve the approved postmining land use and maximize the recovery of coal.

A public hearing was initially scheduled for January 15, 1982, but it was rescheduled for February 8, 1982, so that the public would have more time to prepare comments *(47 FR 2340,* January 15, 1982). Because only one person was interested in presenting comments at the public hearing, the hearing was cancelled and a public meeting was held in its place. A summary of the meeting is on file in the Administrative Record.

During the 30-day comment period, OSM received comments from 27 sources representing industry and associations, environmental groups, and Federal and State agencies. The overwhelming majority of the commenters supported the proposal and recommended that it be adopted with minor word changes.

These are interim final rules. OSM has reproposed them in a rulemaking that proposes new performance standards for remining operations generally and that is not limited to remining on steep slopes *(47 FR 27743,* June 25, 1982). These rules covering remining in steep-slope areas, along with the other remining rules proposed on June 25, 1982 *(47 FR 27734),* are considered in a draft supplemental environmental impact statement that OSM published on June 18, 1982 (see announcement at *47 FR 26405,* June 18, 1982).

In addition to soliciting comments on the proposed rules in the January 7, 1982, notice, OSM requested comments on the following related considerations in the remining of previously mined areas: (1) Applicability of the proposed rules to first-cut mining, auger mining (especially on pre-existing benches), second-cut mining with sufficient reasonably available spoil to achieve AOC, and nonsteep-slope mining; and (2) recommendations of other methods to assure maximum coal recovery. Comments received on these issues will be addressed in a final rule issued as part of the June 25, 1982, rulemaking.

Comments received concerning this proposed rule are addressed below.

II. DISCUSSION OF COMMENTS AND RULES ADOPTED

When OSM proposed these changes to the steep-slope mining rules, amendments to both the initial and permanent programs were included. Since that time each major coal-producing State has received approval or conditional approval of its permanent regulatory program. Thus, any new permit incorporating the standards of this rule must be issued under the permanent regulatory program. For this reason, the proposal to amend the initial regulatory program has not been adopted and only the permanent program is being amended. The amendments adopted today apply to Section 826.12(b) of the permanent regulatory program.

A. SECTION 826.12(b)

The existing rules require generally that the disturbed area of steep-slope surface coal mining operations be returned to the approximate original contour (AOC) and that the highwall be completely covered in accordance with applicable backfilling and grading performance standards. The rules adopted today provide that in the contour remining of previously mined steep-slope areas that were not reclaimed to the standards of Parts 715, 816, or 817, whichever was applicable, and that do not have sufficient reasonably available spoil to completely backfill the highwall, the highwall must be eliminated to the maximum extent technically practical, according to the criteria of Section 826.12(b)(1)-(5), which are discussed in detail below. Although the proposal would only have required elimination of the "new" highwall to the maximum extent practical, the interim final rule deletes the term "new" in recognition that in some remining operations, previously existing highwalls may remain which have been affected by the new operation.

In addition, in the interim final rule OSM has changed the proposed phrase "to the maximum extent practical" to the phrase "to the maximum extent technically practical." This change has been made to emphasize OSM's belief that the Act does not require operators to employ extraordinary physical measures to eliminate the highwall in remining situations where insufficient spoil is available. It is expected that only the standard equipment and practices associated with backfilling and grading will have to be used to eliminate highwalls and that no external structures, such as retaining walls, would have to be constructed as part of those efforts.

Furthermore, the proposed reference to the amount of spoil necessary to return to AOC has not been adopted because it was confusing and not germane to the rule. The interim final rule makes it clear that the reasonably available spoil has to be insufficient to cover the highwall for this rule to apply and does not depend upon the amount of spoil necessary to achieve AOC. This is consistent with the remainder of the rule which discusses the conditions under which portions of affected highwalls can remain.

One commenter stated that the cross reference in Section 826.12(b) to the backfilling and grading requirements for underground mining activities should be deleted because the proposed rule was inappropriate for faceup operations. The commenter stated that the long life of an underground mine was one of the distance differences which Section 516(a) of the Act required the Secretary to consider in promulgating rules regulating the surface effects of underground mining. On the other hand, three other commenters felt there was a need to specifically make these rules applicable to faceup operations.

The rule promulgated today has been limited in its application to contour-mining operations. OSM recognizes that faceup operations of underground mines in previously mined areas can present problems similar to those addressed today with respect to contour mines. OSM will address the comments related to underground mining operations as part of its resolution of comments received on the June 25, 1982, proposed rulemaking.

REASONABLY AVAILABLE SPOIL

Nearly a third of the commenters discussed their interpretation of the term "reasonably available spoil," which was identified in the preamble to the proposed rules as "spoil that is located at or near the permit site, is accessible and available for use, and when rehandled will not cause a hazard to public health or safety or significant damage to the environment." The comments ranged from advocating using only spoil generated by the new coal extraction process to using all spoil that may be located either inside or outside the permit area, including spoil located on the downslope.

Three commenters observed that reasonably available spoil was defined only in the preamble to the proposal, not in the rules, and were concerned that the definition would not be binding. They believed the explanation was not adequate and that it could compel operators to obtain spoil from borrow pits either on or off the permit area. To overcome these problems, they suggested defining the term "reasonably available spoil" as "spoil which is generated as a direct result of the coal extraction process and would not require any additional disturbance beyond that which is necessary to achieve the maximum economic recovery of the coal being mined." Such a definition, they concluded, would eliminate the need to utilize borrow pits, consider the economics of coal recovery, and minimize unnecessary disturbance of the surrounding environment. They also recommended that the term be formally defined in the rule. Another commenter agreed that "borrowing" from virgin areas in order to cover the preexisting highwall is not reasonable nor consonant with Congressional intent.

A commenter suggested that the rule be revised to require that "all available," not "all reasonably available," spoil be used. The distinction, made by the commenter, between the two terms appears related to the suggestion that available spoil include the pulling up of spoil previously placed on the downslope. The commenter cites the "thin overburden" proviso of Section 515(b)(3) of the Act as authority for this position. Another commenter disagreed and supported the provisions of proposed Section 826.12(b)(5) which restricted disturbance of spoil previously placed on the outslope. That commenter pointed out that such a restriction was necessary because in most cases material placed on the outslopes from previous mining has achieved a relatively stable position and an ecological balance. The commenter asserted that disturbing this balance and removing existing vegetation will, in many cases, result in significant environmental damage and unreasonably increase the probability of offsite damage from slides. Additionally, the commenter continued, the operation of equipment on these outslopes is generally unsafe and it will be nearly impossible to assure that any outslope area disturbed by such operations could be effectively reclaimed.

OSM agrees with the second commenter's concern about disturbing material previously placed on the outslope. OSM believes that the first commenter's reliance on the proviso for thin overburden in Section 515(b)(3) as authority for requiring recovery of material previously placed on an outslope is misplaced. That proviso specifically relates to mining in thin overburden situations and does not address conditions associated with previously mined areas.

Other aspects of OSM's interpretation of reasonably available spoil were addressed in the comments. Two commenters recommended that waste should also be included as spoil. OSM's existing rules preclude the disposal of coal processing waste in the backfill. The reason for this rule was concern over the disposal of potentially acid-forming or toxic-forming material. OSM has decided not to change the proposal in response to these comments. To do so could result in the improper disposal of some waste materials.

Five commenters recommended that only spoil within the permit area be considered as reasonably available, and three of them pointed out that the term "at or near the permit site" in the preamble definition is, and has been in the past, subject to different interpretations. As was also pointed out, under that definition a operator might be required by the regulatory authority to go outside the permit boundaries to obtain that necessary backfill material even though the operator did not own the land. OSM agrees that use of the phrase "at or near the permit site" might create problems of interpretation and that there is no provision for requiring an operator to disturb areas outside the permit area. The interim final rule limits reasonably available spoil to the permit area.

Another commenter discussed the possibility of using excess spoil from adjacent mining operations to assist in highwall elimination. On April 29, 1982 *(47 FR 18553)*, OSM issued a final rule that allows disposal of excess spoil on preexisting benches. Such spoil could be used as appropriate for backfilling highwalls created by a remining operation. Under both rules, the regulatory authority will have the flexibility to allow the use of excess spoil created at another location in the reclamation of the remining operation. The final rule, however, does not require that spoil from another

mining operation be used to reclaim the highwall at the remining operation, unless the operations are within the same permit area.

OSM expressed its concern in the preamble to the proposed rules that the then-existing rules might be interpreted as requiring the "useless act of digging a new pit to obtain fill material." Although several commenters echoed the same concern regarding the proposed rules, none of the commenters who advocated a broader interpretation of the term "reasonably available spoil" favored the use of borrow pits as a source of backfill material. Consequently, OSM does not intend in this rule to require borrow pits to be used to generate material for backfilling of previously mined areas. This is consistent with OSM's definitions of "spoil" as being "overburden" and "overburden" as being material overlying a coal deposit.

OSM believes there should be a minimum of restrictions on spoil that will be considered as reasonably available for highwall elimination. Under more restrictive readings, spoil could be eliminated from consideration that is easily obtainable within the permit area, but which may not have been created during the extraction of coal by the new mining operation. This interpretation could preclude the potential use of spoil generated by the previous mining operation and is in fact reasonably available to assist in reclamation of the new mining operation. Conversely, a requirement that all spoil be used might entail disturbing stable spoil placed on the outslope even if such disturbance would result in unstable conditions and present a threat to the public and the environment. Consequently, OSM intends to allow some latitude regarding what spoil is considered reasonably available. In this regard, the spoil to be used for highwall elimination and the final surface configuration must be described in the operation and reclamation plans required by 39 CFR Parts 780 and 784. The regulatory authority will decide on a site-specific basis as to whether all reasonably available spoil has been identified in the permit application and whether the required demonstration has been made that insufficient spoil is available to cover the highwall.

One commenter wanted the permit application to show the amount of existing spoil and an engineering analysis of the reasons why there is inadequate existing spoil. OSM believes that the description of the spoil in the operation and reclamation plan and the required demonstration from the operator that insufficient spoil is available will meet the concerns of this commenter.

After consideration of the comments, OSM has decided to include a description of reasonably available spoil in the interim final rules. OSM's concept of reasonably available spoil remains substantially the same as was discussed in the preamble to the proposed rules with the one change mentioned above. Reasonably available spoil means spoil generated by the mining operation and other spoil located in the permit area that is accessible and available for use and that when rehandled will not cause a hazard to the public safety or significant damage to the environment.

"PRACTICAL" V. "POSSIBLE"

Two commenters suggested that the word "practical" be replaced with the word "possible" in the proposed phrase "the new highwall shall be eliminated to the maximum extent practical." One of the commenters felt that because "practical" is not defined, the rule could be abused through changing economic conditions and insolvency of the operator. The other commenter believed that an operator who is remining an area benefits from having to move less overburden and therefore the operator should be expected to create a net improvement in the existing condition of a remined area.

OSM agrees that changing external economic conditions or the possible insolvency of the operator should not be the criteria used in the determination of whether a specific mining proposal will satisfy the requirement for highwall elimination. For this reason, the interim final rule has been revised to require the operator to eliminate the highwall to the maximum extent technically practical. Under this language OSM intends that accepted engineering practices be included in the evaluation, not the overall financial condition of the coal operator. OSM believes the inclusion of the term "technically practical" in the interim final rule will accommodate the commenters' concern without opening the rule to extreme interpretations in situations under which it may be "theoretically possible" to cover the highwall, but which would require extraordinary measures. It is OSM's intent to require the operator to eliminate that portion of the highwall and technologically can be eliminated using standard backfilling and grading techniques.

However, the second commenter's suggestion that less overburden has to be moved in a remining situation appears to be misplaced. In fact, overburden depth for a remining situation is usually greater than for the original operation since the cut generally advances further into the mountainside in the steep-slope contour operation. OSM, however, shares the

commenter's desire to improve the conditions in areas impacted by past mining. The interim final rule should help accomplish this goal as well as minimize unnecessary impacts in virgin areas.

B. SECTION 826.12(b)(1)

Paragraph (b)(1) of the rule states that the person who conducts the surface coal mining and reclamation operation must demonstrate that the minimum static safety factor for the stability of the backfill is at least 1.3. The rule also states that the fill shall be designed by a qualified registered professional engineer.

A commenter recommended deletion of the requirement in the proposed rule that standard geotechnical analysis be used to demonstrate the stability of the backfill, because geotechnical testing is only one of several methods used to determine stability. OSM agrees that there are other acceptable methods of determining stability, and the requirement to use geotechnical testing has not been adopted. The same commenter pointed out that the phrases "In each case" and "all portions of" (the backfill) are unnecessary. OSM agrees that they are superfluous, and they, too, have not been included in the interim final rule.

In addition to the required demonstration of the 1.3 safety factor, the phrase "designed by a qualified registered professional engineer" has been inserted to ensure that whatever method of determining stability is used, the fill will be designed properly. This is in accordance with the requirement of Section 780.14(c)(2).

C. SECTION 826.12(b)(2)

According to new Section 826.12(b)(2), all spoil generated by the mining operation and other reasonably available spoil must be used in backfilling the area to eliminate the highwall to the maximum extent technically practical. In the proposed rule, the word "or" was used in describing the spoil to be used in the backfilling operation. In the interim final rule, "or" has been replaced with "and" to make it clear that both the spoil generated by the mining operation and other reasonably available spoil are to be used for backfilling and not one or the other.

The phrase "so as to eliminate the highwall to the maximum extent practical" in proposed Section 826.12(b)(2) was an inadvertent and unnecessary repetition of the same phrase in the introductory paragraph in Section 826.12(b) and has therefore not been included in Section 826.12(b)(2).

D. SECTION 826.12(b)(3)

New Section 826.12(b)(3) will require that the backfill must be graded to a slope which is compatible with the approved postmining land use and which provides adequate drainage and long-term stability.

The word "approved" was added before "postmining land use" at the suggestion of a commenter. This is the same term used in the postmining land use rules at Sections 826.133 and 817.133.

Another commenter advocated adding the word "surface" before "drainage" to indicate that the rule covers surface drainage only, because a distinction should be made between overland flow from precipitation events and infiltrated shallow subsurface water flow and nonstorm base-flow seepage from underdrains and filter systems. OSM cannot accept the idea of restricting drainage considerations to surface flow, because there may be situations where shallow subsurface water flow must be considered when designing and building the backfill area. Also, the suggestion was made that the drainage should complement existing surface drainage patterns. Although Sections 816.41(b) and 817.41(b) require that changes in the location of surface water channels be minimized, it could be undesirable to perpetuate drainage patterns that have formed in previously mined areas and that may be directed onto material previously placed on the outslope or that may not be compatible with the approved postmining land use. Therefore, the suggested language has not been added.

E. SECTION 826.12(b)(4)

New Section 826.12(b)(4) will require that any remnant of the highwall must be stable and not pose a hazard to the public health or safety or to the environment.

One commenter wanted the corresponding provision in the proposal modified to eliminate an unnecessary restraint. OSM has retained the language of the proposed rule to ensure protection from hazards to the public health and safety and to the environment in the remined area.

One commenter wanted clarification of which highwall remnant the rule applies to by adding the word "new" to the requirement. OSM recognizes that in most operations the operator will be working with a new highwall as a result of remining. But, OSM does not intend to restrict the rule to new highwalls, because there may be circumstances where a preexisting highwall will need to be stabilized. Another commenter stated that it should be sufficient for an operator to leave the highwall "no less stable" than before remining. One of the goals of these rules is to reclaim previously mined lands through remining, and one aspect of the reclamation is to leave more stable highwalls. However, the word "made" has been removed from the phrase "shall be made stable" in recognition of the fact that some preexisting stable highwalls may not be affected by remining. It should be noted that the stability requirement and the other requirements of this rule are to apply to every portion of a highwall that is affected by a remining operation.

Two commenters requested that additional provisions be added to this paragraph to include revegetation of the highwall to the extent feasible or to the extent possible. OSM agrees with the commenters' concern since it may not be feasible or possible to revegetate highwall remnants. OSM believes, however, that no rule change is necessary to address this concern. Performance standards for revegetation of previously mined areas are contained in Sections 826.12(b)(3)(i) and 817.116(b)(3)(i). OSM does not believe any change in those standards is required here.

One of the commenters also requested that provisions be added to control sedimentation and erosion. Such requirements in these interim final rules are unnecessary because the requirements are in addition to the other steep-slope and general performance standards for surface coal mining and reclamation operations, which contain the requirements specified by the commenters.

One of the commenters also stated that access ramps and fences should be constructed above the highwall. OSM does not believe access ramps or fences are needed in all cases and believes that flexibility should be provided for the construction of whatever structures are needed at the particular site based on the approved postmining land use. Another commenter stated that the permittee should be required to use geotechnical analysis to demonstrate the stability of the highwall. Along the same theme, a commenter wanted the permit application to show that stability of the highwall and outslope area would be achieved. Another commenter recommended allowing a certification from a registered professional engineer on the stability of the highwall for protection of the environment, public safety, and recovery of the coal resource. Highwall stability can be affected by either an increase in stress or decrease in strength of the highwall material. No commonly accepted mathematical or physical means have been developed to predict the stresses in rock or to obtain an engineering estimate of the strength of a large rock mass. Frequently, the best information is simply related to the highwall slope, type of rock, and observations of existing highwalls under similar conditions. For these reasons, OSM feels that the means used to demonstrate the highwall stability should be specified by the regulatory authority, depending upon site-specific conditions.

F. SECTION 826.12(b)(5)

New Section 826.12(b)(5) will require that spoil placed on the outslope during previous mining operations not be disturbed if such disturbance will cause instability of the remaining spoil or otherwise increase the hazard to the public health and safety or to the environment.

One commenter believed that it should be mandatory that unstable material on the outslope be used as backfill. The commenter stated that only by this mechanism would unstable outslopes be removed in second-cut operations if it is not economical to do so.

OSM has not imposed such a requirement in the interim final rule because there may be situations where more damage would be caused by the mandatory removal of unstable spoil. In addition, mandatory operations on steep slopes or unstable spoil may jeopardize the safety of the equipment operator. If such spoil was reasonably available and was needed to eliminate the highwall, it would have to be used for that purpose so long as the hazard to the public health and safety is not increased.

G. PROPOSED SECTION 826.12(b)(6) Not Adopted

The proposed requirement to achieve maximum recovery of the coal resource given economic and technical constraints in proposed Paragraph (b)(6) has not been adopted in the interim final rules. The change from the proposal was made because maximum utilization and conservation of the coal is required of all surface coal mining operations under Section 515(b)(1) of the Act and Sections 816.59 and 817.59 of the existing rules. The proposed requirement was therefore duplicative. Although the existing sections require utilization of the best appropriate technology currently available to maintain environmental integrity, that standard is not imposed on the maximum utilization and conservation of the coal.

Two commenters expressed concern about the discussion in the preamble to the proposal of a showing required by the operator as to how far mining would have to proceed into the mountain in order to generate sufficient spoil to completely cover the highwall and the reasons why mining to that point would not be economically or technically feasible. See *47 FR at 929 and 930*. They stated that certification by a registered professional engineer that insufficient spoil was available should be adequate, and that the proposed requirement would place an excessive burden on the operator.

One commenter pointed out that regardless of the economic and technical stipulations of the rule, mining will proceed only to the point where the next cut would be unprofitable, whether or not enough spoil would be generated to cover the highwall. Therefore, the rule would not affect the degree of highwall elimination or of reclamation of the area.

Another commenter recommended that the phrase "of the coal mining operator" should be added at the end of proposed Section 826.12(b)(6). This would require the assessment of maximum coal recovery to be based on the equipment used by the person who proposes to remine an area, as well as on the characteristics of the site. Two other commenters reflected the same belief that the requirement should be based on individual operators' equipment. In contrast, another commenter stated that in order to assure maximum coal recovery, so that an area will not be remined in the future, an operator should be required to use the best technology available -- the equipment that results in extraction of the most coal in the locale of the operation.

OSM believes that choice of the equipment an operator uses for coal mining is an individual responsibility and not a proper role for OSM. In addition, OSM believes that economic and technical constraints are proper considerations in determining the maximum utilization and conservation of coal. There is no requirement that an operator recover additional coal if it is unprofitable to do so (assuming other performance standards are met). As to the nature of possible economic and technical constraints which justify a limitation of mining, OSM continues to support a case-by-case determination by regulatory authorities based upon showings by individual operators. The existing rule is satisfied by a demonstration that all coal which is economically feasible to be recovered will be mined. See *44 FR 15178* (March 13, 1979) for a further discussion of Sections 816.59 and 817.59. Spoil generated up to that point of mining will be considered as reasonably available and will have to be used to eliminate the highwall.

OSM is in complete agreement that remining activities should improve the environmental character of previously mined areas that were not reclaimed to the standards established by the Act. But it also recognizes the wide diversity of factors that determine how much coal can be economically recovered from a particular site and to what degree a specific area can be reclaimed through remining.

H. RESPONSE TO OTHER COMMENTS ON THE PROPOSED RULE

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The relationship between the abandoned mine land (AML) reclamation provisions of Title IV of the Act and the performance standards of Title V was discussed in four comments. Two commenters believed that a legally remined area would be removed from consideration for reclamation by the Abandoned Mine Land Reclamation Fund established under the Act. To the extent that a remining operation affects a portion of previously mined land, the operator's reclamation responsibilities are established by Title V of the Act and the rules promulgated thereunder, including these rules. A portion of land previously left totally or partly unreclaimed which is not affected by the remining operation would still remain eligible for funding under the AML program assuming that the other requirements in Title IV of the Act are met.

Two commenters urged using money from the AML fund to subsidize remining operations, thereby assuring maximum coal recovery and reclamation. One of those commenters believed further that determination of whether an

area should be remined is a responsibility of the Title IV authority, and that remining should not be allowed without a waiver from that authority.

The issue of subsidization of remining activities from the AML fund is beyond the scope of this rulemaking. OSM is in the process of examining issues arising out of the relationship between Titles IV and V of the Act. However, nothing in the Act requires a Title IV waiver before a Title V permit may be issued for a mining or remining operation.

One commenter proposed that the rules should allow reentry into areas that have been fully reclaimed according to the standards of the Act and the rules, as there would be times when changed market conditions would make it economical to return to previously mined areas for additional coal recovery. Remining may occur in an area that has been fully reclaimed under the Act, but the operation must meet the performance standards of the Act including total elimination of the highwalls. Another commenter remarked that the rules do not consider the economics of remining an area that is currently being mined. Where there are continued operations under a permit, this is not a remining situation. The rules adopted today for steep-slope mining are for a special situation where the spoil from the previous operation is unavailable for highwall elimination. Therefore, these special remining rules do not apply to operations in areas where there has been past compliance with the Act or there is a continuing responsibility under the Act.

Two commenters believed that OSM's Technical Memorandum 1 (TM 1, *46 FR 62034,* December 21, 1981), which deals with the issue of drainage or road structures on backfilled materials in steep-slope areas, conflicts with the second-cut remining rules. They contend that TM 1 calls for highwall elimination, and that it therefore conflicts with the second-cut remining rules, which allow partial elimination of the highwall when there is insufficient backfill material due to the previous operation. Technical memorandums are issued to assist the public in complying with and understanding statutory and regulatory requirements in various technical areas. TM 1 provides guidelines for normal mining operations where total highwall elimination is required. These remining rules merely allow partial highwall elimination only in cases of insufficient backfill in remining situations. Therefore, there is no conflict between TM 1 and these interim final rules.

One commenter stated that the rules omit consideration of access to proven coal resources in cases of national emergencies. One of the purposes of the Act stated in Section 102(f) is to strike a balance between the protection of the environment and the Nation's need for coal as an essential energy source. These rules attempt to strike that balance. The rules are not intended to address national emergencies. The same commenter continued that he believes the best interests of the owner, government, and miner are not considered by these rules. OSM considered the purposes of the Act when developing the proposed and interim final rules and believes that the rules are a reasonable interpretation of the Act's provisions and consistent with its purposes. The interests of all persons were considered during this rulemaking process.

III. PROCEDURAL MATTERS

Executive Order 12291 and the Regulatory Flexibility Act

The Department of the Interior has determined that this document is not a major rule under E.O. 12291 and certifies that this document will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act *(5 U.S.C. 601* et seq.).

These interim final rules are not major rules and do not require a regulatory impact analysis because they allow less costly reclamation procedures for mining in previously mined areas.

These interim final rules will not have a significant economic impact on a substantial number of small entities because they make it easier for small operators to remine and reclaim previously mined areas.

National Environmental Policy Act

OSM prepared an environmental assessment (EA) on the impacts of the revision of Section 826.12(b) and the cumulative impacts of this revision in relation to revisions of certain other rules. In the finding of no significant impact (FONSI) for those certain revisions whose cumulative impacts were analyzed, this revision of Section 826.12(b) was considered to be in Category I, which contains those revisions for which the analysis of impacts is sufficiently certain to support a FONSI. This revised rule was also reconsidered in the draft supplement to OSM's Final Environment Statement OSM-EIS-1 and will be reconsidered in the final supplement to OSM-EIS-1.

LIST OF SUBJECTS IN 30 CFR PART 826

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

Accordingly, 30 CFR Part 826 is amended as set forth herein.

Dated: October 10, 1982.
Wm. P. Pendley, Acting Assistant Secretary, Energy and Minerals.

PART 826 -- SPECIAL PERMANENT PERFORMANCE STANDARDS -- OPERATIONS ON STEEP SLOPES

1. In Section 826.12, paragraph (b) is revised to read as follows:

SECTION 826.12 - STEEP SLOPES: PERFORMANCE STANDARDS.

* * * * *

(b) The disturbed area shall be backfilled and graded to comply with the provisions of Sections 816.101-816.106 and 817.101-817.106 of this chapter to return the site to the approximate original contour and completely cover the highwall; Provided, however, that where contour-mining operations affect previously mined areas that were not reclaimed to the standards of this chapter and the volume of all reasonably available spoil is demonstrated in writing the regulatory authority to be insufficient to completely backfill the highwall, the highwall shall be eliminated to the maximum extent technically practical in accordance with the following criteria.

(1) The person who conducts the surface coal mining and reclamation operation shall demonstrate to the regulatory authority that the fill, designed by a qualified registered professional engineer, has a minimum static safety factor for the stability of the backfill of at least 1.3.

(2) All spoil generated by the mining operation and other reasonably available spoil shall be used to backfill the area. Reasonably available spoil shall include spoil generated by the mining operation and other spoil located in the permit area that is accessible and available for use and that when rehandled will not cause a hazard to the public safety or significant damage to the environment.

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

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

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

* * * * *

(Pub. L. 95-87, 91 Stat. 445 *(30 U.S.C. 1201* et seq.))

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