

FEDERAL REGISTER: 52 FR 17526 (May 8, 1987)

DEPARTMENT OF THE INTERIOR

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

30 CFR Parts 701 and 773

Surface Coal Mining and Reclamation Operations – Requirements for Permits and Permit Processing;
Definition of Previously Mined Area

ACTION: Final rule.

SUMMARY: The Office of Surface Mining Reclamation and Enforcement (OSMRE) is amending its regulations concerning previously mined areas. The amended regulations provide a new definition of the term previously mined area, and require a related finding prior to the issuance of a surface coal mining and reclamation permit.

EFFECTIVE DATE: June 8, 1987.

FOR FURTHER INFORMATION CONTACT: Raymond Aufmuth, Division of State Program Assistance, OSMRE, U.S. Department of the Interior, 1951 Constitution Avenue, NW., Washington, DC 20240; Telephone: (202) 343-5843, Commercial or FTS.

SUPPLEMENTARY INFORMATION:

- I. Background
- II. Discussion of comments received
- III. Discussion of rules adopted
- IV. Procedural matters

I. BACKGROUND

The Surface Mining Control and Reclamation Act of 1977 (the Act), *30 U.S.C. 1201* et seq., sets forth general regulatory requirements governing surface coal mining operations, including the surface impacts of underground coal mines. OSMRE has by regulation implemented or clarified many of the general requirements of the Act and set performance standards to be achieved by surface coal mining operations. See 30 CFR Chapter VII. Sections 816.102 and 817.102 of the regulations, entitled "Backfilling and grading: General requirements," govern areas which have been disturbed by mining, outlining general performance standards for backfilling and grading of surface and underground mines, respectively. Paragraphs (a)(2) of these sections require the complete elimination of highwalls in accordance with section 515(b)(3) of the Act, *30 U.S.C. 1265(b)(3)*.

In a final rule dated September 16, 1983 (*48 FR 41720*), OSMRE revised various regulations applicable to remining operations. A performance standard was added to 30 CFR 816.106 and 817.106 for remining operations on previously mined areas. The performance standard which applies to previously mined areas, provides for partial highwall elimination in situations where the remined area was not reclaimed to the standards of the Act. Under sections 816.106 and 817.106 such preexisting highwalls must be eliminated to the maximum extent technically practical using all reasonably available spoil.

In the September 16, 1983 rule, OSMRE also promulgated a definition of the term previously mined area. The definition, at 30 CFR 701.5, reads as follows:

"Previously mined area means land disturbed or affected by earlier coal mining operations that was not reclaimed in accordance with the requirements of this chapter."

Revised sections 816.106 and 817.106, together with parallel sections in 30 CFR Part 819 for highwalls remaining after auger mining operations, were challenged in *In Re: Permanent Surface Mining Regulation Litigation II*, No. 79-1144 (D.D.C. 1984), as not being specifically excepted by the Act from the complete highwall elimination requirement of section 515(b)(3). In its July 6, 1984, opinion the court upheld the auger mining regulations in part 819.

The parties subsequently settled the challenge to sections 816.106 and 817.106, with one issue outstanding, the definition of the term previously mined area at 30 CFR 701.5.

In Round III of the case, the plaintiffs asserted that the definition of previously mined area was too broad and in direct contravention of the Act. In response, the court remanded the definition. In *Re: Permanent*, No. 79-1144, slip opinion at 122 (D.D.C. July 15, 1985).

On July 31, 1986, OSMRE proposed a new definition at 30 CFR 701.5, which limited the scope of previously mined area to those lands on which there were no surface coal mining operations subject to the standards of the Act. The proposed rule, at 30 CFR 773.15(c)(12), also required the regulatory authority, in reviewing a surface coal mining and reclamation permit application where the applicant intended to reclaim a remining operation in accordance with the requirements of 30 CFR 816.106 or 817.106, to find that the site was not previously subject to the requirements of the Act.

II. DISCUSSION OF COMMENTS RECEIVED

This rule was proposed on July 31, 1986 (*51 FR 27508*) with a comment period that closed on October 9, 1986. Nine comment letters were received from State regulatory authorities, environmental organizations, mining associations, and other Federal agencies. Their comments are analyzed below.

One commenter said that the proposed definition would perpetuate the problems that inhibit the remining of operations abandoned between 1978 and re-permitted under an approved State program. Generally this is true. The Act in section 502 set the effective dates when specific surface coal mining operations became subject to its permitting and performance standards. These standards first applied under section 502(b) to operations which were active after February 3, 1978, and which were conducted under a valid State permit. Other lands mined subsequent to May 3, 1978, were generally subject to the interim performance standards under section 502(c) of the Act. Thus, the operations referred to by the commenter are generally covered by the standards of the Act and would not qualify as a previously mined area.

Several commenters were concerned that an operation which was completed prior to 1978 and reclaimed in accordance with existing State requirements at that time could now be remined and reclaimed to lesser standards under the proposed definition. This result is possible, but unlikely. Most operations reclaimed to State standards prior to the effective date of the Act may not be economically feasible for remining at this time. Many of these operations, in addition to extracting the coal seam to the highwall, were also auger mined to various depths behind the highwall and subsequently reclaimed. This auger mining extracts most of the coal that could subsequently be remined. In addition, the variances applicable to previously mined lands under 30 CFR 816.106 and 817.106 require reclamation using all available spoil to eliminate the highwall to the maximum extent technically practical. This insures maximum reclamation using all reasonably available materials. State regulatory authorities have the option of developing standards which are more stringent than the Federal regulations. If a State regulatory authority is concerned that this situation may occur, then it may develop a stricter definition of previously mined area to prevent it.

Several commenters suggested that the definition be expanded to include: All operations abandoned and not reclaimed to the standards of the permanent program; lands disturbed by mining and subject to the standards of the Act, but for which there remains no continuing reclamation obligation; lands illegally mined for which the regulatory authority has been unable to find the responsible party; and to be applicable to the period following May 4, 1978. As stated above, section 502 of the Act identifies effective dates when specific permitting and performance standards become applicable. Any lands once subject to these standards are not eligible as previously mined areas. Since the suggested lands generally were subject to the requirements of the Act, the definition cannot be expanded to include them.

Several commenters said the proposed rule would open the door to abuse the legitimate exemptions of the Act. These commenters identified: The on-site construction exemption; the two acre exemption; coal processing plants in Kentucky; and the other exemptions identified in section 528 of the Act and section 700.11 of the regulations. OSMRE disagrees. This rule is intended to promote the reclamation of lands which have not been reclaimed land on which there were no operations subject to the Act. The rule should have little or no effect on the exemptions identified above. Each of these exemptions is covered by separate regulations, the criteria of which are not affected by this definition.

One commenter believed that the inclusion of post-Act disturbances within the definition is inconsistent with the Act and the Round III In RE: Permanent decision. The final definition of previously mined area applies only to lands mined prior to the effective date of the Act and lands which qualify as exemptions identified in section 528 of the Act. The Round III decision reasserted that the standards of the Act applied only to surface coal mining operations as defined within the Act. The only post-Act disturbances which fall within this definition are those not subject to the Act.

One commenter said that the language of proposed 30 CFR 773.15 with respect to the finding by the regulatory authority did not accord with the preamble with respect to what the phrase "previously subject" was intended to cover. This was because the rule used the term "site" instead of the term "operation". This ambiguity has been eliminated in the final rule by revising 30 CFR 773.15(c)(12) to require a finding that the operation is a previously mined area as defined in 30 CFR 702.5. Since the definition of the term previously mined area refers to "operations subject to the Act," the correct standard now applies.

One commenter was concerned that the definition of previously mined area would include all the lands overlying the workings of underground mines. Such lands are not generally included in the definition. The Act governs only the surface operations and effects of underground mining. Since the area over the workings of an underground mine generally would not be disturbed during the mining operation (except for possible subsidence) it would not qualify as a previously mined area. As pointed out by the commenter, only the areas disturbed for surface operations and facilities of an underground mine could qualify as previously mined areas.

One commenter suggested a detailed definition of previously mined area which included provision for addressing some of the mining and processing activities which are exempt under 30 CFR 700.11, and for lands which have been returned to a condition equal to or better than required by the Act. OSMRE appreciates the comment, but believes that the suggested definition is cumbersome, requires a judgment call on the part of the regulatory authority, and that not all of the exemptions identified in sections 528 and 701(28)(A) of the Act are addressed. The Office believes that it is better to have a concise definition and explain applicability and exceptions within the preamble to the final rule.

One commenter asked OSMRE to clarify the degree of certainty with which the regulatory authority must make the determination required in 30 CFR 773.15(c)(12). OSMRE expects the Regulatory Authority to make this determination based on the information submitted by the applicant to the same degree of certainty that is necessary to make other findings required in this section.

If a situation arises where it is difficult to differentiate between a regulated and an exempt operation, it is expected that the regulatory authority will use its best judgment, keeping in mind the purposes of the standards of the Act and the variances therein.

One commenter was concerned that the definition of previously mined area only pertains to highwall elimination and does not provide the flexibility the agency may wish to have with respect to other performance standards at a later date. The commenter suggested that to provide this flexibility the definition should be moved from 30 CFR 701.5 to the specific performance standards which it addresses. This is not desirable because previously mined areas may be referenced in many specific performance standards. To place the definition within each of these performance standards would result in repetition and redundancy. To place it in a central location with all other definitions provides for more concise regulations.

One commenter supported OSMRE in the inclusion of exempt operations in the definition of previously mined area.

One commenter recommended that OSMRE retain as much flexibility as possible in the final definition to avoid arbitrary constraints not intended by the Congress. However, the Congress and the courts have been very specific as to what lands are eligible for designation as previously mined area. In view of these constraints, OSMRE believes that the final definition is as flexible as possible.

One commenter noted that the final definition of previously mined area would need to be carefully distinguished from the commonsense meaning of this term when developing regulations or guidelines for the identification and consideration of historic properties during permit application and review. The commenter said it was a common practice to exclude areas which already had been mined from requirements for archeological surveys and other efforts to identify historic properties, and that care should be taken to ensure that the new definition does not result in requirements for historic

preservation activities where they are not needed. OSMRE agrees, and notes that the final definition does not apply to the context of historic preservation activities.

One commenter felt that OSMRE should remove total operator liability for reclamation of a remaining operation as a means to encourage remining and reclamation of abandoned mine areas, stating that without relaxation of this liability it is simply too risky to remine most areas. OSMRE appreciates the concern of the commenter; however, existing statutory requirements would appear to preclude adoption of such a lesser standard of liability.

One commenter said that using the effective date of the Act, as opposed to its enactment date, as the cutoff for determining whether an operation was "subject to the Act" under the definition of previously mined area was contrary to the opinion of the court in *In Re: Permanent*. OSMRE disagrees. The appropriate cutoff date for determining preexisting highwalls was not an issue in the Round III Opinion on the definition of previously mined area. It is reasonable for OSMRE to interpret the definition of previously mined area relative to the effective date of the performance standards of the Act, which is a meaningful cutoff for avoiding retroactive application of the Act, rather than relative to the date of passage, which is not.

This conclusion is supported by the lack of any reference to either the effective date or the date of passage of the Act in the court's Round I opinion on the auger mining regulations. While the court in Round I concluded that the highwall elimination requirement of section 515(b)(3) of the Act, *30 U.S.C. 1265(b)(3)*, should not have retroactive application in auger mining situations, whether retroactivity should be measured from the effective date or date of passage of the Act was not an issue and not decided.

For these reasons, in applying the definition of previously mined area, OSMRE will use the effective date of the Act as the cutoff for determining whether an operation was "subject to the Act."

The same commenter also said it was improper for OSMRE to include under the definition of previously mined area those operations which occurred subsequent to the Act, but which were not subject to its requirements because of exemptions specified in the Act. Again, OSMRE disagree. Sections 528 and 701(28)(A) of the Act, *30 U.S.C. 1278* and *1291(28)(A)* specified certain coal mining activities (operations) to which the provisions of the Act, including the highwall elimination requirement of section 515(b)(3), *30 U.S.C. 1265(b)(3)*, do not apply. Because these operations are exempt from the Act, they have essentially the same status with respect to the highwall elimination requirement of section 515(b)(3) as operations which were conducted prior to the effective date of the Act. For this reason, OSMRE has concluded that it is reasonable to base the definition of previously mined area on the general condition that there were no surface coal mining operations subject to the standards of the Act, regardless of why the operations were not subject to the Act or when they occurred.

One commenter stated that the proposed rule used the same logic, rationale and scope as the 1983 proposal, which was remanded. The commenter also identified the retention of highwalls on lands mined after passage of the Act. OSMRE disagrees. The logic used in development of this definition was that any lands mined prior to the Act's effective date or lands mined after this date but not subject to the act may be designated as "previously mined area", since they would not be subject to the permitting or performance standards of the Act. As stated previously in this discussion, the Act identifies the specific dates on which its standards became effective. On the other hand, the 1983 rule included as previously mined areas any area not reclaimed to the standards of the Act, regardless of whether the Act's performance standards applied to the previous mining operation.

III. DISCUSSION OF RULES ADOPTED.

Section 502 of the Act established initial regulatory procedures and specified several dates when various surface coal mining operations became subject to its performance standards. Under section 502(b) the performance standards first applied to all operations that were regulated by a State and began operating on or after February 3, 1978. Under this final rule, any lands upon which such operations were conducted do not qualify as a previously mined area. Under section 502(c) of the Act, lands mined after May 3, 1978, generally were subject to the initial performance standards of the Act, and under this rule do not qualify as a previously mined area. Any highwalls on such lands are subject to complete elimination if subsequently remined.

All lands that were mined prior to May 3, 1978 (except where covered under section 502(b)), and that were mined after May 3, 1978, but were not subject to the Act, qualify under this rule as previously mined areas. Lands mined after May 3, 1978, which were not subject to the Act include those that qualify for the exemptions listed in sections 528 and 701(28)(A) of the Act with respect to extraction of coal incidental to the extraction of other minerals. Also, under section 502(c) certain small operations first became subject to the Act on January 1, 1979. The lands on which those small operations were conducted qualify as a previously mined area if the operator received an exemption from OSMRE under 30 CFR 710.12.

For lands on which operations have occurred which were subject to the Act, the original operator will continue to have a reclamation obligation, as would any operator later conducting remining operations. Lands on which unpermitted activities occurred, but were subject to the Act and should have been permitted, do not qualify as a previously mined area.

For a proposed remining operation where a permit applicant intends to reclaim in accordance with the requirements of 30 CFR 816.106 or 817.106, the regulatory authority is required under 30 CFR 773.15(c)(12) to make a finding that the site of the proposed remining operation is a previously mined area as defined in 30 CFR 701.5.

IV. PROCEDURAL MATTERS

Federal Paperwork Reduction Act

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

Executive Order 12291

The Department of the Interior (DOI) has examined that final rule according to the criteria of Executive Order 12291 (February 17, 1981) and has determined that it is not major and does not require a regulatory impact analysis. This rule will impose no additional cost on the coal industry, since relatively few operations will be affected. Likewise, the impact upon coal consumers will be negligible.

Regulatory Flexibility Act

The DOI has also determined, pursuant to the Regulatory Flexibility Act, *5 U.S.C. 601* et seq., that this final rule will not have a significant economic impact on a substantial number of small entities. While it may impact a relatively small number of coal operators, the majority of them would not be small entities. To the extent that small entities are affected, the economic impact of this rule will not be significant.

Author

The author of this final rule is Raymond E. Aufmuth, Office of Surface Mining Reclamation and Enforcement, 1951 Constitution Avenue, NW., Washington, DC 20240; Telephone: (202) 343-5843, Commercial or FTS.

National Environment Policy Act

OSMRE has prepared an environmental assessment (EA) for this rule, and has made a finding that it would not significantly affect the quality of the human environment under section 102(2)(C) of the National Environmental Policy Act of 1969, *42 U.S.C. 433(2)(C)*. The EA and finding of no significant impact are on file in the administrative record for this rule in the OSMRE Administrative Record Room at 1100 L Street, NW., Washington, DC.

LIST OF SUBJECTS

30 CFR Part 701

Law enforcement, Surface mining, Underground mining.

30 CFR Part 773

Reporting and recordkeeping requirements, Surface mining, Underground mining.

Accordingly, 30 CFR Parts 701 and 773 are amended as set forth below.

Dated: April 7, 1987.
J. Steven Griles, Assistant Secretary for Land and Mineral Management.

PART 701 -- PERMANENT REGULATORY PROGRAM

1. The authority citation for Part 701 continues to read as follows:

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

2. Section 701.5 is amended by revising the definition of previously mined area as follows:

SECTION 701.5 - DEFINITIONS.

* * * * *

PREVIOUSLY MINED AREA means land previously mined on which there were no surface coal mining operations subject to the standards of the Act.

* * * * *

PART 773 -- PERMANENT REGULATORY PROGRAM

3. The Authority citation for Part 773 continues to read as follows:

Authority: 30 U.S.C. 1201 et seq., 16 U.S.C. 470 et seq., 16 U.S.C. 1531 et seq., 16 U.S.C. 661 et seq., 16 U.S.C. 703 et seq., 16 U.S.C. 668a et seq., 16 U.S.C. 469 et seq., and 16 U.S.C. 470aa et seq.

4. Section 773.15 is amended by adding paragraph (c)(12) as follows:

SECTION 773.15 - REVIEW OF PERMIT APPLICATIONS.

* * * * *

(c) * * *

(12) For a proposed remining operation where the applicant intends to reclaim in accordance with the requirements of Sections 816.106 or 817.106 of this chapter, the site of the operation is a previously mined area as defined in Section 701.5 of this chapter.

* * * * *