

FEDERAL REGISTER: 52 FR 34394 (September 11, 1987)

DEPARTMENT OF THE INTERIOR

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

30 CFR Part 750

Petition To Initiate Rulemaking; Surface Coal Mining and Reclamation Operations;
Federal Program for Indian Lands; Performance Standards

ACTION: Notice of decision on petition for rulemaking.

SUMMARY: the Office of Surface Mining Reclamation and Enforcement (OSMRE) is making available to the public its final decision on a petition for rulemaking from the Peabody Coal Company. The petitioner requested that OSMRE amend the applicable performance standards regarding stabilization of surface areas for existing operations not yet permitted under OSMRE's Federal program for Indian lands. On September 4, 1987, the Director made a decision to deny the petition.

ADDRESS: Copies of the petition, and other relevant materials comprising the administrative record of this petition are available for public review and copying at OSMRE, Administrative Record, Room 5131, 1100 L Street NW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Arthur W. Abbs, Chief, Division of Regulatory Programs, Office of Surface Mining Reclamation and Enforcement, U.S. Department of the Interior, 1951 Constitution Avenue NW., Washington, DC 20240; Telephone (202) 343-5351 (Commercial or FTS).

SUPPLEMENTARY INFORMATION:

I. PETITION FOR RULEMAKING PROCESS

Pursuant to section 201(g) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), any person may petition the Director of OSMRE for a change in OSMRE's regulations. Under the applicable regulations for rulemaking petitions, 30 CFR 700.12, if the Director determines that the petition has a reasonable basis, the Director shall publish a notice in the Federal Register seeking comments on the petition, and may hold a public hearing, conduct an investigation, or take other action to determine whether the petition should be granted. If the petition is granted, the Director initiates a rulemaking proceeding. If the petition is denied, the Director notifies the petitioner in writing, setting forth the reasons for denial. Under 30 CFR 700.12(d), the Director's decision constitutes the final decision for the Department of the Interior.

II. THE PEABODY COAL CO. PETITION OF APRIL 30, 1987

OSMRE received a letter dated April 30, 1987, transmitting a petition for rulemaking on behalf of the Peabody Coal Company to amend OSMRE's existing regulations at 30 CFR 750.16 concerning the applicable performance standards for surface coal mining and reclamation operations on Indian lands. Specifically, the petitioner sought to revise the regulatory requirements regarding stabilization of surface areas for existing operations not yet permitted under OSMRE's Federal program for Indian lands at 30 CFR Part 750.

On June 5, 1987, OSMRE published a notice in the Federal Register (52 FR 21328) requesting public comment on the petition. The comment period closed on July 6, 1987. One comment letter was submitted in response to this request.

For the reasons discussed in the appendix to this notice, the Director is denying the petition.

The Director's letter to the petitioner on this rulemaking petition appears as an appendix to this notice. This letter reports the Director's decision to the petitioner. It also contains a summary description of the issues raised by the petitioner, a discussion of the applicable statutory provisions and OSMRE's current regulatory program, an analysis of the petitioner's proposed regulatory change and justification for the proposed amendment, and a summary of the comments received on the petition.

Dated: September 4, 1987.

Jed Christensen, Director, Office of Surface Mining Reclamation and Enforcement.

APPENDIX

The Director's response to the petition from the Peabody Coal Company is as follows:

Mr. Kenneth R. Moore,
President, Western Division,
Peabody Coal Company, 1300 South Yale, Flagstaff, Arizona 86001.

Dear Mr. Moore:

This letter is in response to the April 30, 1987, petition for rulemaking submitted to the Office of Surface Mining Reclamation and Enforcement (OSMRE) on behalf of the Peabody Coal Company. The petition requested that OSMRE amend its existing regulations governing surface coal mining and reclamation operations on Indian lands with respect to stabilization of surface areas.

On June 5, 1987, OSMRE published a notice in the Federal Register (*52 FR 21328*) requesting public comment on the petition. The comment period closed on July 6, 1987. Comments were submitted by the Hopi Tribe.

After careful consideration of the positions and arguments presented in the petition, I have decided to deny the petitioner's request to initiate rulemaking. The requested amendment to the regulations would not significantly alter current regulatory requirements pertaining to the stabilization of surface areas and the proposed rule change is thus unwarranted. Therefore, no rulemaking proceeding will be initiated on this subject. The reasons for my decision are discussed in the enclosed analysis. As provided in 30 CFR 700.12, my decision constitutes the final decision for the Department of the Interior.

I appreciate your interest in the surface coal mining and reclamation program.

Sincerely,
Jed Christensen,
Director.

ENCLOSURE

Decision on Petition To Initiate Rulemaking To Amend Surface Stabilization Performance Standards Under the Federal Program for Indian Lands (30 CFR Part 750)

I. BACKGROUND ON PETITION

On May 18, 1987, the Office of Surface Mining Reclamation and Enforcement (OSMRE) received a petition to initiate rulemaking from Mr. Kenneth R. Moore, President of the Western Division of the Peabody Coal Company. The petitioner, Peabody Coal Company, proposed that OSMRE amend its existing regulations under 30 CFR Part 750 concerning the applicable performance standards for surface coal mining and reclamation operations on Indian lands. Specifically, Peabody sought to revise the interim regulatory requirements at 30 CFR 750.16 with respect to surface stabilization on Indian lands.

On June 5, 1987, OSMRE published a notice in the Federal Register (*52 FR 21328*) announcing the availability of the petition and requesting public comment. The 30 day comment period closed on July 6, 1987. OSMRE received one comment letter from the Hopi Tribe.

II. SUBSTANCE OF PETITION

The petitioner proposed that OSMRE amend its regulations at 30 CFR 750.16 to authorize all surface coal mining operations on Indian lands to comply with the surface stabilization requirements of 30 CFR 816.95. Presently, existing operations that have not yet been issued a permanent program permit pursuant to 30 CFR Part 750 must adhere to the performance standards codified at 25 CFR Part 216, Subpart B, including the regulation at 25 CFR 216.105(i) -- Regrading or stabilizing rills and gullies. Under the petitioner's proposal, the provisions of 30 CFR 816.95 would apply uniformly to all surface coal mining operations on Indian lands including existing operations not yet permitted under 30 CFR Part 750.

III. APPLICABILITY STATUTORY PROVISIONS

The Secretary of the Interior, through OSMRE, exercises exclusive regulatory jurisdiction over Indian lands with respect to surface coal mining and reclamation operations. OSMRE's statutory obligations as the regulatory authority on Indian lands are set forth in section 710 of the Surface Mining Control and Reclamation Act of 1977 (SMCRA).

Section 710(d) requires all surface coal mining operations on Indian lands to comply with requirements at least as stringent as those imposed by sections 507, 508, 509, 510, 515, 516, 517, and 519 of SMCRA. With respect to stabilization of surface areas, section 515(b)(4) requires, at a minimum, that all such areas affected by the mining operation be stabilized and protected so as to effectively control erosion and attendant air and water pollution. Section 515(b)(19) further requires reestablishment on the regraded areas, and all other lands affected, of a diverse, effective, and permanent vegetative cover.

IV. CURRENT OSMRE REGULATORY PROGRAM

OSMRE's existing regulations at 30 CFR 750.16 establish the applicable performance standards for surface coal mining and reclamation operations on Indian lands. Existing operations are subject to the requirements of 25 CFR Part 216, Subpart B -- Surface Exploration, Mining, and Reclamation of Lands -- Coal Operations -- until OSMRE issues a permanent program permit pursuant to 30 CFR Part 750. Accordingly, such operations must comply with the provisions of 25 CFR 215.106(i) -- Regrading or stabilizing rills and gullies. The regulations at 25 CFR 216.105(i) require that when rills and gullies deeper than nine inches form in areas that have been regraded and have had the topsoil replaced, but where vegetation has not yet been established, the permittee shall fill, grade, or otherwise stabilize the rills and gullies and reseed or replant the area according to 25 CFR 216.110. The rules also specify that rills and gullies of lesser size must be stabilized if they will disrupt the approved postmining land use or may result in additional erosion.

The revegetation regulations at 25 CFR 216.110 require the establishment of a diverse, effective, and permanent vegetative cover, capable of stabilizing the soil surface with respect to erosion and supportive of the approved postmining land use, on all lands that have been disturbed. Areas containing rills and gullies must meet all applicable requirements of 25 CFR 216.110 before full release of bond or operator liability can occur.

In addition to the regulations, OSMRE has issued a policy directive entitled "Interpretation of Initial Program and Indian Lands Regulations Concerning Rills and Gullies" for distribution to its field personnel. The July 9, 1987, directive provides interpretative clarification regarding the requirements of 25 CFR 216.105(i) for purposes of on-site inspection.

After obtaining a Federal permit pursuant to 30 CFR Part 750, mining operations on Indian lands are subject to the applicable performance standards of 30 CFR Subchapter K, including Parts 816, 817, 819, 822, 823, 824, 827, and 828. The regulations at 30 CFR 816.95 -- Stabilization of surface areas -- are the permanent regulatory program counterpart to 25 CFR 216.105(i). The regulations state that rills and gullies which form in areas that have been regraded and topsoiled and which either (1) disrupt the approved postmining land use or the reestablishment of the vegetative cover, or (2) cause or contribute to a violation of water quality standards for receiving streams shall be filled, regraded, or otherwise stabilized; topsoil shall be replaced; and the areas shall be reseeded or replanted. Like the Indian lands rules at 25 CFR 216.110, the permanent program regulations at 30 CFR 816.111 require the permittee to establish a vegetative cover or regraded areas that is diverse, effective, permanent, and capable of stabilizing the soil surface from erosion.

V. ANALYSIS OF PETITIONER'S PROPOSAL

As stated previously, the regulations at 30 CFR 750.16 establish the applicable performance standards for surface coal mining and reclamation operations on Indian lands. The petitioner proposed that OSMRE amend the current regulatory requirements of 30 CFR 750.16 as follows. (The underlined portion represents the revised language proposed by Peabody.)

SECTION 750.16 PERFORMANCE STANDARDS.

After OSM issues a permit under this part, a person conducting surface coal mining operations on Indian lands shall do so in accordance with Parts 816, 817, 819, 822, 823, 824, 827, and 828 of this chapter. Prior to that time, the person conducting surface coal mining operations shall adhere to the performance standards of 25 CFR Part 216, Subpart B except 216.105(i). Stabilization of surface areas shall be governed by 30 CFR 816.95.

For the reasons set forth below, OSMRE does not believe that the change sought by Peabody would substantively alter current regulatory requirements. Proper application of the provisions of 25 CFR 216.105(i), as explained in the OSMRE directive defining agency policy on this topic, would ultimately render on-site differences between the permanent program standards contained in 30 CFR 816.95 and the requirements of 25 CFR 216.105(i) insignificant.

The regulations at 25 CFR 216.105(i) and 216.110, when considered in conjunction with each other, require that rills and gullies which form on regraded and topsoiled areas on Indian lands where vegetation has not yet been established, be filled, graded, or otherwise stabilized unless they have naturally stabilized and will not interfere with the postmining land use. Where vegetation sufficient to control overall erosion has not yet been established on the site, the presence of active rills and gullies constitutes a violation only when the rills and gullies are greater than nine inches in depth, or where they would be disruptive to the postmining land use or are of such areal extent as to preclude successful establishment of vegetation. Operators are encouraged to initiate appropriate soil conservation measures before erosion occurs to this degree.

The principal difference between the regulations at 30 CFR 816.95 and 25 CFR 216.105(i) is that the latter prescribe a specific numerical depth at which the presence of unstabilized rills and gullies constitute a definite violation on areas where vegetation has not been reestablished. The regulatory programs are similar in requiring that rills and gullies which will disrupt the approved postmining land use or interfere with vegetative establishment be regraded or otherwise stabilized. Likewise, both sets of regulations require that surface areas be stabilized so as to effectively control additional erosion or sedimentation. Neither regulatory program requires regrading of stabilized rills and gullies which do not disrupt the postmining land use, or redisturbance of successfully revegetated areas.

Under either regulatory provision, as the policy directive indicates, observation of a rill or gully is not itself evidence that erosion is presently occurring or that site utility is being impaired. Where an erosional channel appears stabilized, based upon a technical evaluation of active versus inactive channel characteristics, and the channel does not interfere with the postmining land use, the permittee is advised to monitor the site for any change in status, but is not required to take any corrective action. When remedial action is required, the action should allow the use of the environmentally least disruptive method of stabilization consistent with the approved postmining land use.

VI. ANALYSIS OF PETITIONER'S JUSTIFICATION FOR PROPOSED AMENDMENT

The Petitioner requested the proposed amendment on the basis that:

1. The design criteria at 25 CFR 216.105(i) are unnecessarily stringent and only applicable to operators on Indian lands;
2. Rill and gully development is expected in reclaimed areas in the semiarid west as a natural part of the drainage system evolution process;
3. The repair of "minor" rills and gullies is costly and counterproductive in that it requires the redisturbance of considerable amounts of revegetated and reclaimed lands;

4. The permitting process for the petitioner's Black Mesa and Kayenta Mines will be unduly prolonged by the preparation of an environmental impact statement (EIS), thus precluding the possibility of "programmed relief" from the regulation at 25 CFR 216.105(i) within a reasonable timeframe.

OSMRE disagrees that the regulation at 25 CFR 216.105(i) is overly stringent and applicable only on Indian lands. The provisions of 25 CFR 216.105(i) are identical to those promulgated by OSMRE at 30 CFR 715.14(i) under the initial regulatory program which was adopted as an interim measure pending approval of permanent State of Federal regulatory programs and completion of permitting actions under these programs. All operations subject to the initial program standards must meet the specified regulatory requirement.

OSMRE agrees with the petitioner that rill and gully development is to be expected in reclaimed areas under semiarid climatic conditions, but disagrees that rill and gully repair requires redisturbance of considerable amounts of revegetated and reclaimed lands. OSMRE believes that the existing regulations reasonably provide for such situations in that the operator must redisturb regraded areas to the minimal extent necessary to achieve compliance with the regulatory program in a manner that is least disruptive to the environment. The regulations allow for stabilization methods which required no redisturbance such as heavy mulch application in rills and gullies. Areas that have been successfully revegetated are not subject to redisturbance under 25 CFR 216.105(i).

Finally, the petitioner maintained that preparation of the Black Mesa-Kayenta EIS would inordinately delay the regulatory "relief" provided by 30 CFR 816.95. While application of 30 CFR 816.95 would remove the specific criteria of nine inch depth for rills and gullies in areas where vegetation is not reestablished, OSMRE does not agree that 30 CFR 816.95 would grant substantial "relief" to the petitioner since the standards are similar to those in 25 CFR 216.105(i) when properly applied. OSMRE will continue to make every effort to ensure that standards are consistently applied by its field inspections.

VII. PUBLIC COMMENT

In response to the request for comments, a comment letter was submitted by the Hopi Tribe's Office of General Counsel opposing the proposed rule change and recommending denial of the petition. The tribe commented that inadequate reclamation at the Black Mesa-Kayenta mining complex had led to excessive rill and gully development and that the petitioner sought the proposed rule change merely to avoid the costs associated with improved reclamation practices.

To the extent that there may be problems with reclamation at the Black Mesa-Kayenta mining complex, these are matters which are appropriately dealt with during the mine site inspection process. OSMRE cannot speculate as to the petitioner's motivation for seeking the rule change and must consider the petition solely on its merits. As noted above, OSMRE finds that the standards of 30 CFR 816.95 are not substantively different than those of 25 CFR 216.105(i) when properly applied and would anticipate no material difference in costs associated with reclamation under the respective standards.

VIII. FINAL DECISION

Based upon the foregoing analysis, I am denying the petition to initiate rulemaking. OSMRE does not believe that a rulemaking, as proposed by the petitioner, would substantially change the application of standards concerning stabilization of rills and gullies. Moreover, in light of the limited applicability of 25 CFR 216.105(i), the resources which would be needed to effect a regulatory change would be better expended on other agency priorities. OSMRE will continue to assure that its inspectors apply regulatory criteria in a consistent manner. The petitioner has not persuaded me that the issues that concern them warrant revision of the regulations.