FEDERAL REGISTER: 56 FR 6224 (February 14, 1991)

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

30 CFR Part 710
Surface Coal Mining and Reclamation Operations; Initial Regulatory Program

ACTION: Final rule.

SUMMARY: The Office of Surface Mining Reclamation and Enforcement ("OSM") is amending its regulations to allow surface coal mine operators who received permits under the Initial Regulatory Program to meet counterpart Permanent Program performance standards in lieu of meeting the Initial Program requirements. This action is appropriate because it enables Initial Program sites to be reclaimed to the latest technical and environmental standards of the Permanent Program.

EFFECTIVE DATE: March 18, 1991.

FOR FURTHER INFORMATION CONTACT: Stephen M. Sheffield, Office of Surface Mining Reclamation and Enforcement, U.S. Department of the Interior, 1951 Constitution Avenue, NW., Washington, DC 20240; Telephone: 202-208-2954 (Commercial) or 268-2954 (FTS).

SUPPLEMENTARY INFORMATION:

I. BACKGROUND

The Surface Mining Control and Reclamation Act of 1977 ("the Act" or "SMCRA") was signed into law on August 3, 1977. Section 502 of the Act authorized the establishment of an Initial Regulatory Program under which surface coal mining operations would be regulated pending the establishment of a more comprehensive Permanent Program. The regulations implementing the Initial Program were published in final on December 13, 1977 *(42 FR 62639).* Final Permanent Program regulations, which differ from their Initial Program counterparts in some significant respects, were promulgated on March 13, 1979 *(44 FR 14901),* and subsequently revised in part in 1983 and later.

Although the Permanent Program rules have been in effect for some time, the Initial Program rules continue to apply to operators who are acting pursuant to permits received under the Initial Program. This is appropriate because these operators, many of whom have completed mining and much of the required reclamation, have directed their operation and reclamation activities toward meeting the Initial Program requirements. It would be inequitable or infeasible to require these operators to comply with an entirely new set of performance standards.

The Permanent Program rules request the latest technical and environmental standards for interpretation of the Act and are the result of more than ten years of experience in implementing the Act. They include many program revisions mandated by courts. However, in cases where the Initial Program performance standards continue to apply, Regulatory Authorities must require operators to comply with all of the earlier standards, even when compliance with Permanent Program standards would ensure implementation of SMCRA or would result in reclamation superior to that which would be achieved under the Initial Program standards.

In some cases, as discussed in the examples below, specific Initial Program performance standards have become outdated or impractical to comply with. Where compliance does not occur, sites are left partially reclaimed, and final bond release and termination of the permit are delayed indefinitely. In addition, the regulatory authority must continue to inspect these inactive sites on a regular basis. In some cases, if the Permanent Program performance standards could be applied to these sites, they could be reclaimed in a manner consistent with the requirements now routinely applied to new

mining operations, and bonds could be released. At the same time, Initial Program permittees who plan to comply with the Initial Program performance standards would not be prevented, or in any way restricted, from doing so.

Some examples of cases where Initial Program performance standards differ from newer Permanent Program standards are described below. In these cases, the current requirements of the Permanent Program assure full implementation of the Act.

BACKFILLING AND GRADING REQUIREMENTS (30 CFR 715.14 and 717.14)

These sections of the Initial Program rules require complete highwall elimination on remined areas with pre-existing highwalls even when there is insufficient spoil. In contrast, the Permanent Program rules at 30 CFR 816.106 and 817.106 allow for less than complete highwall elimination under the same conditions where the volume of all reasonably available spoil is demonstrated to be insufficient to completely backfill the reaffected or enlarged highwall. The Permanent Program standards require that remined highwalls be backfilled to the maximum extent technically practical using all reasonably available spoil. Therefore, if the regulatory authority allows the standards found in the Permanent Program rules to apply to sites governed by the Initial Program, the regulatory authority will be encouraging the reclamation of some sites not currently reclaimable to the Initial Program standards.

WATER QUALITY STANDARDS AND EFFLUENT LIMITATIONS (30 CFR 715.17(a) and 717.17(a))

These sections of the Initial Program rules contain specific numerical effluent limitations which were based on Environmental Protection Agency (EPA) rules in effect at the time the final Initial Program rules were issued in 1977. Since then, EPA has made changes to its rules governing effluent limitations, and those changes are incorporated by reference in OSM's current Permanent Program rules at 30 CFR 816.42 and 817.42. While OSM's Initial Program retains the outdated EPA effluent limitations, the Permanent Program keeps pace with EPA's standards. Allowing Initial Program permittees to comply with current Permanent Program rules will enable operators to meet current EPA standards.

SEDIMENTATION POND REQUIREMENTS (30 CFR 715.17(e)(21) and 717.17(e)(21))

These Initial Program rules include requirements that exceed those found in the Permanent Program rules in that they require that drainage entering a sedimentation pond meet the applicable State and Federal water quality requirements for the receiving stream before the pond may be removed. The Permanent Program rules at 30 CFR 816.46 (b)(5) and (b)(6) and 30 CFR 817.46 (b)(5) and (b)(6) require that the disturbed area be stabilized and revegetated prior to removal of the pond. This recognizes that, once stabilized and revegetated, a disturbed area is unlikely to continue to contribute unacceptable levels of suspended solids during runoff from precipitation events. Thus, when reclamation of a disturbed area has reached that point, sedimentation ponds to control siltation are no longer needed and may be removed. If a regulatory authority allows Initial Program permittees to meet the Permanent Program standard in this case, it will eliminate a requirement that is environmentally unnecessary.

STANDARDS FOR MEASURING SUCCESS OF REVEGETATION (30 CFR 715.20(f)(1))

This section of the Initial Program rules requires that revegetation success be measured by comparing revegetated areas to reference areas, units of land maintained and managed for the purpose of measuring ground cover, productivity and species diversity naturally produced in a given area. The Permanent Program rules at 30 CFR 816.116 and 817.116 provide for determining revegetation success either by comparison to reference areas or through the application of established procedures and techniques. This latter method allows flexibility to consider the diverse climatic and soil conditions found in different mining areas rather than limiting the evaluation of success to a comparison with reference areas.

Allowing application of the Permanent Program rules would also enable the regulatory authority to establish success standards which are applicable statewide, rather than developing procedurally complex site-specific success standards as required by the Initial Program rules. The Permanent Program approach allows the application of more consistent success standards, thus reducing both the administrative and procedural burden on the operator and on the regulatory authority.

ALTERNATIVE POSTMINING LAND USE STANDARDS (30 CFR 715.139(d))

The permanent Program performance standards governing postmining land use found at 30 CFR 816.133 and 817.133 are more flexible than the Initial Program rules in providing for alternative land uses. Such alternatives, however, are allowed only when the use in higher or better than the pre-mining land use as determined under the criteria in 30 CFR 816.133(c) and 817.133(c). Allowing such alternatives for Initial Program sites will allow greater flexibility in developing and reclaiming disturbed areas for approved postmining land uses, while ensuring that the interests of all affected parties are protected.

On July 3, 1990, OSM proposed to amend its Initial Program regulations at 30 CFR 710.11 to allow Initial Program permittees the option of meeting counterpart Permanent Program performance standards in lieu of meeting the Initial Program requirements *(55 FR 27588).* Changes were also proposed, as described below, in the information collection requirements statement at 30 CFR 710.10.

In addition to soliciting public comments and providing an opportunity for public hearings upon request, OSM provided a 60-day public comment period. OSM received eight comments on the proposed rule: four from representatives of the coal industry, three from State regulatory authorities, and one from a Federal agency. No public meeting was requested and none was held.

II. DISCUSSION OF FINAL RULE

OSM will provide regulatory authorities greater flexibility in implementing Initial Program regulations by allowing Initial Program permittees the option of meeting counterpart Permanent Program performance standards in lieu of meeting the Initial Program requirements. AT 30 CFR 710.11, which establishes the applicability of the Initial Program, a new paragraph (e), is added as follows:

(e) Satisfying Permanent Program Performance Standards in lieu of Initial Program Performance Standards. Where there is a counterpart Permanent Program performance standard in subchapter K of this chapter that corresponds to an Initial Program performance standard in subchapter B of this chapter, meeting either performance standard will satisfy the requirements of subchapter B of this chapter.

Changes are also being made in the information collection requirements statement at 30 CFR 710.10. These changes, which are not substantive, are included in this final rule merely to reflect the current status of Office of Management and Budget approval of information collection requirements for part 710 and to provide information to those who may wish to comment on the information collection requirements contained in part 710.

Existing 30 CFR 710.10 reads: Since the information collection requirements contained in 30 CFR 710.4(b); 710.11(d)(2)(ii); 710.12(e) [sic] have fewer than 10 respondents per year, they are exempt from the requirements of the Paperwork Reduction Act *(44 U.S.C. 3507* et seq.) and do not require clearance by OMB.

The new final section 710.10 reads: The collections of information contained in Sections 710.4, 710.11, and 710.12 have been approved by the Office of Management and Budget under *44 U.S.C. 3501* et seq. and assigned clearance number 1029-0095. The information will be used in administering the Initial Regulatory Program. Response is required to obtain a benefit in accordance with *30 U.S.C. 1201* et seq.

Public reporting burden for this collection of information is estimated to average one hour per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing the burden, to Information Collection Clearance Officer, OSM, Department of the Interior, 1951 Constitution Avenue, NW., Washington, DC 20240; and to the Office of Management and Budget, Paperwork Reduction Project (1029-0095), OMB, Washington, DC 20503.

III. RESPONSE TO COMMENTS

All commenters supported the concept of allowing operators to meet counterpart permanent Program performance standards in lieu of meeting Initial Program standards. Some commenters suggested, however, slight revisions to the final

rule language.

CONCERN ABOUT APPLYING PERMANENT PROGRAM STANDARDS

One commenter was concerned about applying those Permanent Program standards that may be less stringent than their Initial Program counterparts. The commenter suggested that the proposed rule was vague as to whether the option would be limited to those cases where it is impracticable to meet the Initial Program standard, such as where there is insufficient spoil to eliminate a highwall. The commenter was further concerned that the proposal would allow operators to pick and choose among standards and seek out the less stringent.

OSM believes that, in practice, the possibility that what the commenter is concerned about would not be a problem. This rule is designed primarily to address the problems at sites where mining has finished and reclamation is, for the most part, complete. OSM expects that the option to choose a Permanent Program standard would be exercised in cases where efforts to meet the Initial Program standard had not been successful. It would also be beneficial in that a permittee might find it more practicable to comply with one standard of all the permittee's operations.

More importantly, allowing operators to choose compliance with the Permanent Program rules would not be a problem because it would constitute full compliance with the Act. The Permanent Program rules represent the latest technical and environmental standards for interpretation of the Act, and are the result of more than ten years of experience in implementing the Act. The Permanent Program rules also include revisions mandated by courts. Even if the option to meet the Permanent Program Standards is exercised on sites where mining is ongoing, operators would still be meeting requirements that satisfy the Act.

This same commenter questioned the magnitude of the problem that the rule was addressing, and wondered how many sites would be affected and how significantly.

OSM does not see a need to specifically quantify the problem addressed by this rule. As stated in the proposed rule and as reiterated in this final rule, meeting Permanent Program performance standards that are counterpart to existing Initial Program performance standards, ensures full compliance with the Act. Whether sites permitted under the Initial Program are mined and reclaimed to the standards of the Initial Program, the Permanent Program, or a combination of both programs as envisioned in this final rule, the mining and reclamation requirements of the Act will be met fully. It is not necessary to determine the number of sites falling into any given category in order to justify the need for this rule change or in order to implement it.

This same commenter recommended that, in order for Initial Program permittees to satisfy the reclamation requirements of the Surface Mining Act, OSM should develop a consistent policy with respect to the requirements for backfilling and grading, and general reclamation success.

OSM's most recent policy with respect to these requirements, as well as other technical standards and requirements implementing the Surface Mining Act, is found in the Permanent Program. As already stated, if an Initial Program permittee chooses to meet a counterpart Permanent Program standard in lieu of the Initial Program standard, the operator would be satisfying the reclamation requirements of the Act.

OPERATOR'S DISCRETION TO MEET EITHER SET OF PERFORMANCE STANDARDS

A majority of commenters favored the removal of the requirement in proposed 30 CFR 710.11(e) whereby, "the regulatory authority may determine that meeting either performance standard will satisfy the requirements of subchapter B of this chapter." In light of the emphasis made in the preamble that meeting either the initial or counterpart permanent standard meets the requirements of SMCRA, commenters suggested that a formal determination by the regulatory authority was redundant, unnecessary, and counter-productive. Some commenters suggested that it merely added a time-consuming and ill-defined step to the process.

Some commenters further pointed out that the regulatory authority need only determine if a counterpart standard exists in the permanent program. Once that is determined, the operator need simply meet either the initial or counterpart permanent standard.

OSM agrees with the commenters on this point. Where there exists a Permanent Program performance standard counterpart to an Initial Program standard, compliance with the Permanent Program standard ensures compliance with the Act in all cases. Hence, an additional case-by-case determination would serve no useful purpose. In response to this suggestion, the proposed phrase, "the regulatory authority may determine that," has been deleted from final 30 CFR 710.11(e).

However, OSM notes that those State programs containing approved Initial Program standards and requirements must be amended in accordance with 30 CFR 732.17 before the option authorized in the rulemaking may be exercised. As discussed in the portion of this notice entitled Effect on State Programs below, States are not required to amend their programs to include this option in order to be no less effective than the Federal rules.

Further, most changes to the reclamation plan or reclamation requirements now included in Initial Program permits will require permit revisions. To fully ensure compliance with SMCRA and the approved State program, OSM expects the permit revision document approved by the regulatory authority to clearly specify which Initial Program provisions are being replaced by Permanent Program provisions. The permit document also must identify the Permanent Program provisions and describe how they will be applied to the site or sites in question.

INDIAN LANDS

One commenter suggested that the authority to apply Permanent Program performance standards to sites permitted under the Initial Program should be applied to operations on Indian lands. The commenter suggested that the problems that necessitate this new provision and the justification for this new provision on non-Indian lands are also applicable to Indian lands. The commenter suggested that applying this change to non-Indian lands but not to Indian lands results in contradictory standards of enforcement.

Although OSM understands the basis for this commenter's concern, changes to the Initial Program performance standards applicable to operations on Indian lands are outside the scope of this rulemaking. The changes suggested would alter the effect of the regulations of the Bureau of Indian Affairs at 25 CFR part 216, subpart B.

ANOTHER OPTION CONSIDERED BY OSM

In addition to seeking comments on the proposed rule, OSM invited comments on other ways to deal with the Initial Program performance standards in 30 CFR parts 715, 716, and 717, including the possibility of eliminating the Initial Program performance standards entirely and applying the Permanent Program performance standards in subchapter K of this chapter to operations permitted under the Initial Program.

A majority of commenters opposed the elimination of the Initial Program performance standards, and no commenters supported the option. Commenters were concerned that eliminating the Initial Program standards would result in the application of the Permanent Program standards to all remaining Initial Program sites. Commenters suggested that such action would cause unnecessary confusion and would be counter-productive in States that have adapted well to the current two-program system. It was further pointed out that the flexibility provided in the proposed rule itself negated any need for adopting this option.

OSM initiated discussion of this option in the hope that it might lead to ideas for simplifying the body of regulations by eliminating the older counterpart provisions of the Initial Program. However, in light of commenters' concern, and because no constructive suggestions for dealing with this option were received, OSM does not plan to pursue the option any further. OSM hopes that, as suggested by one commenter, this final rule change makes further consideration of this option unnecessary.

EFFECT IN FEDERAL PROGRAM STATES

The final rule will apply through cross-referencing in those States with Federal programs. This includes California, Georgia, Idaho, Massachusetts, Michigan, North Carolina, Oregon, Rhode Island, South Dakota, Tennessee, and Washington. The Federal programs for these States appear at 30 CFR parts 905, 910, 912, 921, 922, 933, 937, 939, 941, 942, and 947, respectively.

EFFECT ON STATE PROGRAMS

Following the effective date of this final rule, permanent State regulatory programs approved under section 503 of SMCRA containing Initial Program requirements may amend their programs to allow operators to meet the Permanent Program performance standards in lieu of the Initial Program standards. However, States need not do so. Adoption of a counterpart to this Federal rule is not necessary for State programs to remain no less effective than the Federal rules. States desiring to amend their programs may determine which Initial Program standards may be replaced with Permanent Program standards.

IV. PROCEDURAL MATTERS

Paperwork Reduction Act

OSM is amending the information collection statement contained in existing Section 710.10 to reflect the current status of the Office of Management and Budget (OMB) approval of the information collection requirements contained in part 710 and to provide information to those who may wish to comment on those requirements. The information collection requirements contained in part 710 are located in Sections 710.4(b), 710.11(d) and 710.12(e). They have been previously approved by OMB under *44 U.S.C. 3501* et seq. and assigned clearance number 1029-0095. This final rule does not revise Sections 710.4(b), 710.11(d) and 710.12(e). There are no information collection requirements in existing Section 710.10, revised Section 710.10 or revised Section 710.11(e).

Executive Order 12291

In accordance with the criteria of Executive Order 12291, the Department of the Interior has determined that this rule is not major and does not require a regulatory impact analysis.

Regulatory Flexibility Act

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

National Environmental Policy Act

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

Author

The author of this regulation is Mr. Stephen M. Sheffield, Office of Surface Mining Reclamation and Enforcement, 1951 Constitution Avenue, NW., Washington, DC, 20240; Telephone (202) 208-2954 (Commercial) or 268-2954 (FTS).

LIST OF SUBJECTS IN 30 CFR PART 710

Law enforcement, Public health, Reporting and recordkeeping requirements, Safety, Surface mining, Underground mining.

Accordingly, 30 CFR part 710 is amended as set forth below:

Dated: January 8, 1991.
Jennifer A. Salisbury, Acting Assistant Secretary, Land and Minerals Management.

PART 710 -- INITIAL REGULATORY PROGRAM

1. The authority citation for part 710 is revised to read as follows:

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

2. Section 710.10 is revised to read as follows:

SECTION 710.10 - INFORMATION COLLECTION.

The collections of information contained in Sections 710.4, 710.11, and 710.12 have been approved by the Office of Management and Budget under *44 U.S.C. 3501* et seq. and assigned clearance number 1029-0095. The information will be used in administering the Initial Regulatory Program. Response is required to obtain a benefit in accordance with *30 U.S.C. 1201* et seq. Public reporting burden for this collection of information is estimated to average one hour per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing the burden, to Information Collection Clearance Officer, OSM, Department of the Interior, 1951 Constitution Avenue, NW., Washington, DC 20240; and to the Office of Management and Budget, Paperwork Reduction Project (1029-0095), OMB, Washington, DC 20503.

3. Section 710.11 is amended by adding a new paragraph (e) to read as follows:

SECTION 710.11 - APPLICABILITY.

* * * * *

(e) Satisfying Permanent Program Performance Standards in lieu of Initial Program Performance Standards. Where there is a counterpart Permanent Program performance standard in subchapter K of this chapter that corresponds to an Initial Program performance standard in subchapter B of this chapter, meeting either performance standard will satisfy the requirements of subchapter B of this chapter.

[FR Doc. 91-3500 Filed 2-13-91; 8:45 am]
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