

Order 12291 and the Regulatory Flexibility Act.

(The Catalog of Federal Domestic Assistance program numbers are 14.108, 14.117, and 14.120)

List of Subjects

24 CFR Part 232

Fire prevention, Health facilities, Loan programs—Health, Loan programs—Housing and community development, Mortgage insurance, Nursing homes, Intermediate care facilities.

24 CFR Part 235

Condominiums, Cooperatives, Low and moderate income housing, Mortgage insurance, Homeownership, Grant programs—housing and community development.

Accordingly, the Department amends 24 CFR Parts 232 and 235 as follows:

PART 232—NURSING HOMES AND INTERMEDIATE CARE FACILITIES MORTGAGE INSURANCE

1. The authority citation for 24 CFR Part 232 continues to read as follows:

Authority: Sections 211, 232, National Housing Act (12 U.S.C. 1715b, 1715w); sec. 7(d), Department of Housing and Urban Development (42 U.S.C. 3535(d)).

2. In § 232.560, paragraph (a) is revised to read as follows:

§ 232.560 Maximum interest rate.

(a) The loan shall bear interest at the rate agreed upon by the lender and the borrower, which rate shall not exceed 9.00 percent per annum, except that where an application for commitment was received by the Secretary before November 24, 1986, the loan may bear interest at the maximum rate in effect at the time of application.

PART 235—MORTGAGE INSURANCE AND ASSISTANCE PAYMENTS FOR HOME OWNERSHIP AND PROJECT REHABILITATION

3. The authority citation for 24 CFR Part 235 continues to read as follows:

Authority: Secs. 211, 235, National Housing Act (12 U.S.C. 1715b, 1715z); Sec. 7(d), Department of Housing and Urban Development Act (42 U.S.C. 3535(d)).

4. In § 235.9, paragraph (a) is revised to read as follows:

§ 235.9 Maximum interest rate.

(a) The mortgage shall bear interest at the rate agreed upon by the mortgagee and the mortgagor, which rate shall not exceed 9.00 percent per annum, except that where an application for

commitment was received by the Secretary before November 24, 1986, the loan may bear interest at the maximum rate in effect at the time of application.

5. In § 235.540, paragraph (a) is revised to read as follows:

§ 235.540 Maximum interest rate.

(a) On or after November 24, 1986, the loan shall bear interest at the rate agreed upon by the lender and the borrower, which rate shall not exceed 9.00 percent per annum, with the exception of applications submitted pursuant to feasibility letters, or outstanding conditional or firm commitments, issued prior to the effective date of the new rate. In these instances, applications will be processed at a rate not exceeding the applicable previous maximum rates, if the higher rate was previously agreed upon by the parties. Notwithstanding these exceptions, the application will be processed at the new lower rate if requested by the mortgagee.

Dated: November 24, 1986.

Thomas T. Demery,
Assistant Secretary for Housing—Federal Housing Commissioner.
[FR Doc. 86-27353 Filed 12-4-86; 8:45 am]
BILLING CODE 4210-27-M

DEPARTMENT OF TRANSPORTATION

Coast Guard

33 CFR Part 165

[COTP Boston, MA Reg. CCGD1-86-20]

Safety Zone Regulation; Jenny Dock, Chelsea River, Boston Inner Harbor, Boston, MA

AGENCY: Coast Guard, DOT.

ACTION: Emergency rules.

SUMMARY: The Coast Guard is establishing a safety zone on the waters of the Chelsea River, Boston Inner Harbor. The safety zone starts at a line across the Chelsea River 100 yards downstream of the Chelsea Street Highway Drawbridge and ends at a line drawn across the Chelsea River at the southwestern limit of the Mobil Oil Terminal in East Boston, MA. The safety zone encompasses the Chelsea River from bank to bank. This safety zone abuts an existing safety zone centered about the Chelsea Street Highway Drawbridge (33 CFR 165.120). On the evening of 3 November 1986 approximately 125 feet of the sea wall, tank farm containment bulkhead, and embankment at the Northeast Petroleum

Marginal Street Terminal (locally referred to as the Jenny Dock) collapsed into the Chelsea River. The terminal is located on the Chelsea, MA side of the Chelsea River just downstream of the Chelsea Street Highway Drawbridge. The safety zone is needed to protect vessels passing in the vicinity of the terminal and to protect remaining sections of the terminal sea wall from damage. The hazard is due to the presence of concrete slabs that have fallen from the sea wall into the Chelsea River. Until it is recovered, this rubble presents a potential hazard to vessels passing through the area. Until the missing section of sea wall can be replaced, the remaining structure is more vulnerable to erosion by water. This condition would be aggravated by large vessels passing through the area at a full 35 foot draft because of the bank and bottom effect expected in a waterway such as this. Reconstruction of the sea wall will require mooring of construction barges at the site, constricting the waterway even further. Navigation of vessels through this safety zone is prohibited unless the conditions established in this regulation are met or unless passage deviating from these conditions is specifically authorized by the Captain of the Port.

EFFECTIVE DATE: This regulation is effective November 3, 1986. This regulation will terminate when the repairs to the sea wall at the Jenny Dock have been completed and construction vessels have been removed from the site, unless sooner terminated by the Captain of the Port.

FOR FURTHER INFORMATION CONTACT: LCDR Michael "A" Wade, Port Operations Officer, USCG Marine Safety Officer Boston, MA (617) 565-9000.

SUPPLEMENTARY INFORMATION: In accordance with 5 U.S.C. 553, a notice of proposed rulemaking was not published for this regulation and good cause exists for making it effective in less than 30 days after Federal Register publication. Publishing an NPRM and delaying its effective date would be contrary to the public interest since immediate action is needed to prevent further damage to the Jenny Dock sea wall and to minimize the opportunity for damage to vessels transiting the area.

Drafting Information

The drafters of this regulation are LCDR Michael "A" Wade, Project Officer for the Captain of the Port, and LCDR James M. Collin, Project Attorney, First Coast Guard District Legal Office.

Discussion of Regulation

The Chelsea River was closed to navigation by Captain of the Port Boston, MA immediately following the sea wall collapse on the evening of 3 November 1986. Based upon information from structural surveys of the tank farm area, and a channel depth survey by the U.S. Army Corps of Engineers the waterway was reopened to navigation (subject to the conditions herein) at 9:00 o'clock a.m. on Friday 7 November 1986. The circumstances requiring this regulation arise from the fact that rubble from the sea wall and tank farm containment bulkhead as well as soil from the shore embankment have fallen into the Chelsea River. Additionally, vessels required to be present for sea wall reconstruction and rubble removal are moored in the area. Their presence constricts the waterway just downstream from the Chelsea Street Highway drawbridge making unrestricted use of the waterway unsafe. The conditions set forth in the regulation were developed after consultation with the Boston Harbor Pilots and the Boston docking masters. The conditions set forth to govern vessels operating through the Chelsea Street Drawbridge (33 CFR 165.120) are not modified by this regulation and remain in full effect. This regulation is issued pursuant to 33 U.S.C. 1225 and 1231 as set out in the authority citation for all of Part 165.

List of Subjects in 33 CFR Part 165

Harbors, Marine safety, Navigation (water), Security measures, Vessels, Waterways.

PART 165—[AMENDED]

Regulation

In consideration of the foregoing, Subpart C of Part 165 of Title 33, Code of Federal Regulations, is amended as follows:

1. The authority citation for Part 165 continues to read as follows:

Authority: 33 U.S.C. 1225 and 1231; 50 U.S.C. 191; 49 CFR 1.46 and 33 CFR 1.05-1(g), 6.04-1, 6.04-6, and 160.5.

2. A new § 165.T0117 is added to read as follows:

§ 165.T0117 Safety Zone: Chelsea River, Jenny Dock.

(a) *Location.* The following area is a safety zone: The waters of the Chelsea River, Boston Inner Harbor starting at a line drawn across the Chelsea River 100 yards downstream of the Chelsea Street Highway Drawbridge between Chelsea and East Boston, MA. The safety zone extends downstream to a line drawn across the Chelsea River at

the southwestern edge of the Mobil Oil Terminal in East Boston, Massachusetts. The entire river between these two lines is encompassed within this zone.

(b) *Effective date.* This regulation becomes effective November 3, 1986. The regulation will terminate when reconstruction of the collapsed sea wall at the Northeast Petroleum Terminal in Chelsea, MA (Jenny Dock) has been completed and construction vessels have been removed from the site, unless sooner terminated by the Captain of the Port.

(c) *Regulations.* (1) In accordance with the general regulations in § 165.23 of this Part, entry into this zone is prohibited unless authorized by the Captain of the Port.

(2) The following standards are minimum requirements for vessels 450 feet or greater in length overall (including tug and barge combinations) intending to transit the Chelsea River. Additional precautions may be taken by the pilot and/or person in charge (Master or Operator) on vessels of any size.

(i) Vessels shall transit the safety zone only during the hours between sunrise and sunset.

(ii) No vessel greater than 575 feet in length overall (including tug and barge combinations) and/or no vessel greater than 86 feet in extreme breadth may transit this safety zone unless fitted with an operational bow thruster.

(iii) The maximum draft from vessels transiting this safety zone is 31 feet.

(iv) No vessel may transit this safety zone inbound during an ebb tide.

(2) Variances from the standards listed above must be approved in advance by the Captain of the Port.

Dated: November 17, 1986.

R. L. Anderson,

Captain, U.S. Coast Guard, Captain of the Port, Boston, Massachusetts.

[FR Doc. 86-27299 Filed 12-4-86; 8:45 am]

BILLING CODE 4910-14-M

POSTAL SERVICE

39 CFR Part 111

Domestic Mail Manual; Miscellaneous Amendments

AGENCY: Postal Service.

ACTION: Final rule.

SUMMARY: The Postal Service hereby describes the numerous miscellaneous revisions consolidated in the Transmittal Letter for Issue 21 of the Domestic Mail Manual, which is

incorporated by reference in the Code of Federal Regulations, 39 CFR 111.1.

Most of the revisions are minor, editorial, or clarifying. Substantive changes, such as the revised regulations on bulk third-class sacking, preferred rates, and plant load operations, have previously been published in the Federal Register.

EFFECTIVE DATE: September 4, 1986.

FOR FURTHER INFORMATION CONTACT: Paul J. Kemp, (202) 268-2960.

SUPPLEMENTARY INFORMATION: The Domestic Mail Manual, which is incorporated by reference in the Code of Federal Regulations (see 39 CFR 111.1) has been amended by the publication of a transmittal letter for issue 21, dated September 4, 1986. The text of all published changes is filed with the Director of the Federal Register. Subscribers to the Domestic Mail Manual receive these amendments automatically from the Government Printing Office.

The following excerpt from the Summary of Changes section of the transmittal letter for issue 21 covers the minor changes not previously described in interim or final rules published in the Federal Register.

Note: Issue 21 is a complete revision of the DMM. It contains all DMM revisions published between November 21, 1985, and September 4, 1986 (Postal Bulletin 21541 through 21582). In addition to substantive and procedural changes, issue 21 reflects the organization title changes implemented as a result of the Spring 1986 Postal Service restructuring.

Summary of Changes

Major Revisions

1. Forwarding and Return Services. The following sections are revised to clarify and enhance the regulations governing mail forwarding and return services:

a. Exhibit 159.151 is revised and expanded to Exhibits 159.151a-f to reflect clearly and accurately the new forwarding and return rules and to specify permissible endorsements and two abbreviations for endorsements used on third- and fourth-class mail. The endorsements are *Forwarding and Return Postage Guaranteed—Address Correction Requested and Do Not Forward—Address Correction Requested—Return Postage Guaranteed*.

b. Section 159.16 is added to require that undeliverable-as-addressed mail be processed within 24 hours after receipt at the markup unit.

c. Section 159.212 is revised to clarify that a sender's endorsement

guaranteeing forwarding postage on fourth-class mail will be honored only if the addressee also has guaranteed forwarding postage.

d. Section 159.221f specifies that fourth-class mail is forwarded only locally or when the recipient guarantees forwarding postage.

e. Section 159.331 adds the last two sentences for general information.

f. Section 159.412 is revised to show that post and postal cards that cannot be forwarded or returned now are sent to a dead letter branch.

g. Section 492.2 is revised to specify the return of Form 3579, *Undeliverable 2nd, 3rd, 4th Class Matter*.

h. Section 492.3 is added to provide a general description of Address Change Service.

i. Section 691 is restructured for clarity and conciseness, to reorganize the use of the *Do Not Forward* endorsement, and to ensure that the weighted fee for forwarding and return service is not charged when the forwarding is not caused by a customer's move.

j. Section 791 is revised to clarify the return service for fourth-class mail.

k. Section 793 is revised to clarify the method used when preparing address correction notification (PB 21546, 12-26-85).

2. * * *

3. * * *

4. * * *

Other Revisions

1. Section 113.66 and Exhibit 113.66 are revised to show Dr. Martin Luther King, Jr.'s Birthday as a holiday to be observed by the Postal Service (PB 21549, 1-16-86, and PB 21576, 7-24-86).

2. Section 114.2 is revised to update the addresses where information and complaints concerning a possible postal law violation can be sent (PB 21559, 3-27-86).

3. Section 122.422 is revised to reflect current forwarding regulations and to make it agree with section 153.11h (PB 21543, 12-5-85).

4. Exhibit 122.63e is revised to reflect optional area distribution labeling changes (PB 21544, 12-12-85).

5. * * *

6. * * *

7. Exhibit 125.2, including its footnotes, is revised to reflect changes in the restrictions applied to mail that is addressed to military post offices overseas (PB 21558, 3-20-86; PB 21560, 4-3-86; PB 21563, 4-24-86; PB 21571, 6-19-86; and PB 21578, 8-7-86).

8. Section 131 is revised to reflect that Rates and Classification Centers provide customer assistance on special mail services such as business reply

mail and post office box service (PB 21567, 5-22-86).

9. In section 136.312, *Payment of Postage*, the last sentence is deleted, since the transient rate has been eliminated (PB 21575, 7-17-86).

10. Section 137.253 is added and 137.273a, 137.273b, 137.273d, 137.273f, 137.273i, and 137.273k are revised to reflect changes required to implement Phase I of the new Official Mail Accounting System (OMAS) (PB 21554, 2-20-86).

11. Section 137.273a is revised to allow all Federal government agencies to use the drop-shipment meter provisions contained in 144.39 (PB 21578, 8-7-86).

12. * * *

13. Section 137.3 is revised (1) to require that absentee balloting materials should meet the addressing guidelines in 122.3 and (2) to emphasize that postage is not required on these materials (PB 21578, 8-7-86).

14. Section 137.5 is revised to permit military units engaged in hostile operations to use a special postage due penalty mail format. Section 137.265 is revised to incorporate the provisions of 137.5 (PB 21563, 4-24-86).

15. Section 144 is revised to eliminate the requirement that a production model of each approved meter be deposited with the Postal Service. Also, a meter manufacturer's address and Postal Service organizational titles are updated (PB 21576, 7-24-86).

16. * * *

17. Section 145.1 is revised to clarify that mailings submitted with permit imprints are subject to weighing for the purpose of postage verification unless acceptance is authorized under an alternative procedure by the Rates and Classification Center (PB 21565, 5-8-86).

18. Section 147.28 is revised to reflect that Form 3532, *Refund of Fees for Retail Services*, has been combined with Form 3533, *Application and Voucher for Refund of Postage and Fees* (PB 21544, 12-12-85).

19. Sections 149.41b, 149.413, and 149.441a(3) are revised to correspond with the current Form 565, *Registered Mail Application for Indemnity/Inquiry* (May 1984) (PB 21560, 4-3-86).

20. Section 152.71 is revised to permit Federal agencies, including the Social Security Administration, to use Express Mail to send requests for the recall of specific mailing pieces from any post office (PB 21561, 4-10-86).

21. Section 155.262 is revised to clarify the policy on exceptions to existing delivery service because of physical hardship (PB 21545, 12-19-85).

22. Effective June 7, 1986, section 155.262 is revised to provide for

managerial changes as required by the reorganization (PB 21571, 6-19-86).

23. Effective July 17, 1986, section 155.6 is revised to clarify the definition of an apartment. In addition to the clarification of a common building entrance and a common address, a residential building is now identified as an apartment when there are three or more units having a common building entrance OR a common address (PB 21575, 7-17-86).

24. Sections 158.215, 911.31a-d, 912.1, 912.2, 912.62d, 912.8a-b, 913.461a-c, 913.462, 914.31, 914.321, 914.322, 914.325, 914.326, 915.5, 916.3, and 933.31 are revised to emphasize the proper placement of special service endorsements, to explain the requirements for mailer printed forms, and to clarify other special regulations (PB 21541, 11-21-85).

25. Effective July 10, 1986, DMM Exhibit 159.14, *Endorsements for Mail Undeliverable-As-Addressed*, is revised as follows:

a. Endorsement 17 is revised to clarify the language.

b. Endorsement 20, also revised to clarify language, is renumbered 21.

c. New endorsement 20 is added to show that some orders for return of mail are issued due to violations of both the postal false representation and lottery provisions in the law (PB 21574, 7-10-86).

26. Section 159.16, which describes the Computer Forwarding System (CFS) processing objectives, inadvertently omitted from TL 20, is reinserted (PB 21572, 6-26-86).

27. Effective May 1, 1986, section 159.561 is revised to reflect the closing of the Boston, Massachusetts Dead Parcel Branch. All material formerly sent to Boston, MA 02205-9518 now will be sent to the New York Dead Parcel Branch, NY 10199-9543 (PB 21564, 5-1-86).

28. Section 322.2c is revised to reflect that the maximum thickness for postcards is no greater than 0.0095 of an inch (PB 21578, 8-7-86).

29. * * *

30. Effective July 17, 1986, sections 367.3 and 367.4 are reorganized to clarify and separate the packaging requirements (367.3) from the tray requirements (367.4) for carrier route mailings. The sections also are revised to allow carrier route First-Class mailers to prepare 3-digit carrier route trays when there are insufficient densities of mail to fill three-fourths of a standard tray for a single 5-digit ZIP Code. Section 367.313 also specifies that carrier route packages that are placed in the 3-digit carrier routes trays MUST be labeled with a pressure sensitive purple

label "CR" whenever the mailer uses the carrier route optional endorsement line (PB 21575, 7-17-86).

31. Section 367.32 is deleted, since 367.4 addresses the traying requirements for carrier route mailings (PB 21575, 7-17-86).

32. Section 367.421 is revised to include a reference to section 367.4 for traying requirements as well as 367.3 for packaging requirements (PB 21575, 7-17-86).

33. Sections 411.321, 411.322, and 411.323 are revised to reflect new criteria for copies of second-class publications to qualify for mailing at the in-county rates (PB 21549, 1-16-86).

34. Sections 411.321 (Note), 422.32c, and 426.11 are revised and sections 422.33 and 422.4c are added to ensure that certain publications that do not maintain a list of paid subscribers may continue to qualify for the in-county rates if they comply with the new criteria (PB 21552, 2-6-86).

35. Sections 412, 423.3, 442.1, 443.1, and 444.1 are revised to reflect the change in application procedures for requesting special second-class rates (PB 21578, 8-7-86).

36. Sections 422.32c and 422.32d are revised to clarify the requirements for second-class publications, specifically those publications issued by institutions and societies that carry general advertising, the circulation of which is limited mainly to members who pay for their subscriptions through membership dues (PB 21552, 2-6-86). Section 422.32c is revised further to make it consistent with other sections, which prescribe that the total distribution of the publication is used for determining whether a publication qualifies for second-class in-county rates, and section 422.32d was eliminated (PB 21557, 3-13-86).

37. * * *

38. Section 444.1 is revised and new section 484 is added to provide instructions for a new data collection form, Form 3541-CX, *Second-Class Certification for Multiple Issues on the Same Day*, that must be completed and submitted by the publisher with Form 3510, *Application for Second-Class Mail Privileges* (PB 21569, 6-5-86).

39. Sections 445.2, 445.3, and 445.4 are revised to require publishers who request authorization to deliver copies of second-class publications, at the publisher's own expense and risk, from the post office of original entry or post office of additional entry to other post offices to submit documentation that will allow the approving offices to verify the number of copies qualifying for and

mailed at the various presort level discount rates (levels B, C, E, F, H, I, and K) (PB 21551, 1-30-86).

40. * * *

41. Section 453.2 is revised to allow publishers the option of simply printing the words "SECOND-CLASS" in the upper-right corner of any envelope, wrapper, or cover used with the publication (PB 21567, 5-22-86). Section 453.2a(3) is revised to read, "As an alternative to printing the information in (1) and (2), only the words 'Second-Class' . . ." (PB 21575, 7-17-86).

42. Sections 462.25c, 463.25c, 464.25c, 464.34b, and 467.222 are revised and 467.221a-d are added to clarify the minimum packaging and sacking requirements for second-class mail. The revised regulations permit mailers to make up packages and sacks that contain fewer than six copies of a publication for destinations when the copies are those that have not been placed in required or optional packages and sacks after all such packages and sacks have been prepared. The revised regulations also permit firm packages containing as few as two copies to be placed in bundles on pallets or directly on pallets (PB 21555, 2-27-86).

43. Section 467.342 is revised to allow mailers of second-class publications who are authorized to palletize sacks to prepare Transfer Hub pallets after all required 5-digit, 3-digit, SCF, and SDC pallets have been prepared (PB 21559, 3-27-86).

44. Section 468.1 is revised to specify that the applicable rates in 411.2 and 411.33-411.35 apply when copies that are delivered at destinations within the county of publication do not qualify for in-county rates. All copies of regular-rate and science of agriculture publications may qualify for the nonadvertising adjustment provided for in 411.25 (PB 21562, 4-17-86).

45. Section 472 is revised to emphasize that copies of second-class publications may be deposited only at places designated by the Postal Service as stated in section 200.050 of the Domestic Mail Classification Schedule (PB 21560, 4-3-86).

46. * * *

47. * * *

48. Sections 667.33 and 667.43 are revised to specify that the postmaster of the accepting post office may authorize a third-class mailer to use trays when the mail inside the trays is destined for delivery within the sectional center facility (SCF) of mailing (PB 21549, 1-16-86).

49. Effective June 26, 1986, section 667.66 is added to generally permit qualifying mailers to commingle third-class mail prepared for different rate levels (basic, five-digit, and carrier route) on the same pallet (PB 21572, 6-26-86).

50. Effective August 17, 1986, section 723.21 is revised to clarify postage computation procedures for matter that is mailed at the bulk bound printed matter rates (PB 21580, 8-21-86).

51. Section 917.51 is revised to remove the requirement that all Business Reply Mail (BRM) pieces have optical character readable address font styles. This change revokes a format requirement that appeared in *Postal Bulletin 21538, 10-31-85* (PB 21563, 4-24-86).

52. Sections 919.421c and 919.421d are revised to allow (1) permit holders to use names other than that appearing on the permit and (2) omission of the "Insurance Fee If Any" endorsement (PB 21549, 1-16-86).

53. Section 941.131 is revised to permit computer-generated money orders (PB 21551, 1-30-86).

54. Section 941.3 is revised to rescind the restriction that no money order will be paid after 20 years (PB 21557, 3-13-86).

55. Section 944 is revised to update information concerning the Postal Savings System (PB 21559, 3-27-86).

56. Section 951 is revised to exempt mail addressed to a post office box address, which is used as part of Express Mail reshipment services, from being counted in the accumulation of overflow mail (PB 21564, 5-1-86).

57. Section 951 is revised to:

- Cross reference the five box limit from 951.123 to 952.122b to facilitate administration.

- Eliminate the requirement in 951.141 and 952.181 for residency for "other persons" to receive mail through an individual's post office box number.

- State in 951.152a that specific arrangements must be made for the accumulation of mail beyond 30 days if an overflow condition is probable.

- Cross reference the holding period requirements established in 951.155 and 952.193 to 159.332g for mail addressed and deliverable to a box number.

- Preclude changes of payment period dates covered in 951.274 and 952.234 to circumvent fee changes.

- Allow the rental of a post office box 11 days after the payment period due date in 951.35.

- Provide an inventory control list of

rented and vacant post office boxes and assigned caller service numbers in 951.62 and 952.237b.

h. State in 951.75 that only persons or organizations' representatives listed on the Form 1093, *Application for Post Office Box or Caller Service*, may file change of address orders.

i. In section 952.14, change the payment period for reserved number fees from the postal fiscal year to the calendar year (PB 21567, 5-22-86).

58. Under section 951.6, Record of Boxholders (PB 21567, 5-22-86), the paragraph titled *Who May File* should be modified as 951.753 (PB 21568, 5-29-86).

59. * * *

60. Section 951.2 is revised to allow the acceptance of post office box rental payments of up to 90 days in advance of the due date. Rental payments of more than 90 days in advance may be accepted at the discretion of the postmaster or Station or Branch Manager (PB 21580, 8-21-86).

61. Section 952.122c is revised to provide a uniform definition of the term "customer" for application of the five post office box limit rule (PB 21560, 4-3-86).

62. Minor editorial and typographical changes have been made in 411.214, 453.2, 915.612, 919.23, 933.44, 940.134, 940.135, and 941.352.

List of Subjects in 39 CFR Part 111

Postal Service.

PART 111—GENERAL INFORMATION ON POSTAL SERVICE

1. The authority citation for 39 CFR Part 111 continues to read as follows:

Authority: 5 U.S.C. 552(a); 39 U.S.C. 101, 401, 404, 407, 408, 3001-3011, 3201-3219, 3403-3406, 3621, 5001.

2. In consideration of the foregoing, 39 CFR 111.3 is amended by adding at the end thereof the following:

§ 111.3 Amendments to the Domestic Mail Manual

* * * * *

Transmittal letter for issue	Dated	Federal Register publication
21.....	Sept. 4, 1986.....	51 FR

Paul J. Kemp,

Supervisory Attorney, Legislative Division.
[FR Doc. 86-27345 Filed 12-4-86; 8:45 am]

BILLING CODE 7710-12-M

DEPARTMENT OF THE INTERIOR Bureau of Land Management

43 CFR PARTS 3100, 3400, 3470 AND 3500

[Circular No. 2591; AA-60-87-4121-02]

Coal Management—General; Coal Management Provisions and Limitations; Oil and Gas Leasing; Leasing of Solid Minerals Other Than Coal and Oil Shale; Amendments to Incorporate Changes Required by Section 2(a)(2)(A) of the Mineral Leasing Act of 1920

AGENCY: Bureau of Land Management, Interior.

ACTION: Final rulemaking.

SUMMARY: This final rulemaking amends the existing regulations in 43 CFR Groups 3100, 3400, and 3500 to bring them into compliance with the requirements of section 2(a)(2)(A) of the Mineral Leasing Act of 1920. This section was added to the Mineral Leasing Act by section 3 of the Federal Coal Leasing Amendments Act on August 4, 1976. Section 2(a)(2)(A) provides that any entity, or any of its affiliates, that holds and has held a Federal coal lease for 10 years beginning on or after August 4, 1976, and which is not producing coal in commercial quantities from each such lease, cannot qualify for issuance of any other lease granted under the Mineral Leasing Act. The cutoff date was extended by the Act of December 19, 1985, from August 4, 1986, to December 31, 1986.

DATE: Effective December 5, 1986.

ADDRESS: Inquiries or suggestions may be addressed to: Director (660), Bureau of Land Management, Room 3411, Main Interior Building, 1800 C Street, NW., Washington, DC 20240.

FOR FURTHER INFORMATION CONTACT:

Paul W. Politzer, (202) 343-7722,
Allen B. Agnew, (202) 343-7722, or
Pamela J. Lewis, (202) 343-7722

SUPPLEMENTARY INFORMATION: Section 2(a)(2)(A) of the Mineral Leasing Act of 1920, as amended and supplemented (30 U.S.C. 201(a)(2)(A) (1982)) was added to the Mineral Leasing Act by section 3 of the Federal Coal Leasing Amendments Act on August 4, 1976. Section 2(a)(2)(A) is a lessee-qualification requirement which directs that any entity, or any of its affiliates, that holds and has held a Federal coal lease for 10 years when the entity, or any of its affiliates, is not, except as provided in section 7(b) of the Mineral Leasing Act, producing coal from the lease deposits in commercial quantities, shall not be issued any leases granted under the provisions of the Mineral Leasing Act. [All references

to the U.S.C., unless otherwise noted, are to the 1982 edition.

The Bureau of Land Management has published guidelines for the implementation of the provisions of section 2(a)(2)(A) of the Mineral Leasing Act. The proposed guidelines were published in the *Federal Register* on February 15, 1985 (50 FR 6398), with a 60-day public comment period. The comment period, in response to public requests, was later extended for an additional 30 days, ending on May 13, 1985. The proposed guidelines generated 21 comments, all of which were given careful consideration during the preparation of the final guidelines. The final guidelines, including a discussion of the comments received, were published in the *Federal Register* on August 29, 1985 (50 FR 35125). The **SUPPLEMENTARY INFORMATION** section of the final section 2(a)(2)(A) guidelines (50 FR 35125 through 35133 (August 29, 1985)) that addressed the public comments received on the draft section 2(a)(2)(A) guidelines is hereby incorporated in this final rulemaking in its entirety, as modified by this **SUPPLEMENTARY INFORMATION** for these final regulations.

The final guidelines incorporated changes suggested in the comments on the proposed guidelines and advice rendered by the Office of the Solicitor, Department of the Interior, and are consistent with Solicitor's Opinion M-36951 (92 I.D. 537), which interpreted Section 2(a)(2)(A) of the Mineral Leasing Act.

Section 2(a)(2)(A) of the Mineral Leasing Act would have taken effect on August 4, 1986. However, the effective date was extended by the Act of December 19, 1985 (Pub. L. 99-190), from August 4, 1986, to December 31, 1986.

The Department of the Interior delayed making necessary revisions to Title 43 of the Code of Federal Regulations because of legislation pending in the Congress that would have amended section 2(a)(2)(A) of the Mineral Leasing Act. Since the Congress did not take action to amend section 2(a)(2)(A), the Bureau of Land Management on October 20, 1986 (51 FR 37202), proposed amendments to the existing regulations in Title 43 of the Code of Federal Regulations to implement the provisions of section 2(a)(2)(A) of the Mineral Leasing Act. Due to the immediacy of the effective date of section 2(a)(2)(A) of the Mineral Leasing Act, the proposed rulemaking was given a 30-day public comment period, ending November 19, 1986. This rulemaking is being made effective upon publication in the *Federal Register*

because it recognizes exemptions and relieves restrictions, and for good cause (5 U.S.C. 553(d)). The provisions of section 2(a)(2)(A) become applicable by operation of law on December 31, 1986. This rulemaking must be effective by that date also, so that affected parties will have some certainty regarding the status of both pending and new lease applications. If the rulemaking were not effective until sometime in January 1987, a gap would exist and whether these applicants are qualified would be in doubt. Finally, the adverse consequences of section 2(a)(2)(A) will occur by operation of law on December 31, 1986, whether or not these regulations are in effect.

The Bureau of Land Management received comments on the proposed rulemaking from 24 entities. Of these, 12 were from business entities, 3 were from trade associations, 2 were from environmental organizations, 1 was from an attorney, 2 were from state governments, and 4 were from offices of the Bureau of Land Management. All 24 comments received have been given careful consideration in the drafting of these final regulations. The comments are addressed below; the text of the regulations has been changed as appropriate.

In general, comments addressed seven specific areas: (1) Section 2(a)(2)(A) bracket, (2) pending actions and appeals, (3) producing, (4) control, certification of compliance and apparent double filing of qualifications for lease issuance, (5) the definition of the phrase "holds and has held," (6) oil and gas lease qualifications and assignments, (7) and apparent conflicts between specific provisions of proposed 43 CFR 3472.1-2(e). Following general discussion of the regulations below, the general and specific comments received on the seven specific areas are addressed.

General Discussion

Section 3 of the Federal Coal Leasing Amendments Act of 1976 added paragraph 2(a)(2)(A) to the Mineral Leasing Act. Section 6 of the Federal Coal Leasing Amendments Act added paragraph 7(b) to the Mineral Leasing Act. That paragraph provides that each Federal coal lease must satisfy the requirements of diligent development and continued operation. The phrase "amended Mineral Leasing Act" in this SUPPLEMENTARY INFORMATION refers to the Mineral Leasing Act as amended by the Federal Coal Leasing Amendments Act of 1976, and subsequent amendments. The following discussion addresses the reason for publication of regulations and the major issues concerning section 2(a)(2)(A).

1. One primary reason for the publication of these final regulations is to ensure uniform and consistent nationwide implementation of the "producing . . . in commercial quantities" requirement of section 2(a)(2)(A). Determination of compliance with this provision requires the establishment of a time frame during which the current regulatory definition of commercial quantities (1 percent of the recoverable coal reserves) must be produced from each lease for section 2(a)(2)(A) purposes. This determination of compliance is made by the Bureau of Land Management Field Offices.

2. Section 2(a)(2)(A) applies, for all practical purposes, only to the holders of Federal coal leases issued prior to enactment of the Federal Coal Leasing Amendments Act on August 4, 1976. "New" Federal coal leases, those issued or otherwise made subject to the amended Mineral Leasing Act after August 4, 1976, terminate under amended section 7(a) after 10 years if they are not producing in commercial quantities, so the prohibition of section 2(a)(2)(A) on holding such a Federal coal lease for 10 years and not producing cannot occur.

3. Section 2(a)(2)(A) is a "qualification" provision, affecting the ability of an entity, or any of its affiliates, to acquire new Federal leases granted under the Mineral Leasing Act. Section 2(a)(2)(A) is not a "diligence" provision. It is not to be equated with amended section 7(a) of the Mineral Leasing Act, which provides for production in commercial quantities at the end of 10 years after a lease issuance or after the lease becomes subject to the amended Mineral Leasing Act, nor with amended section 7(b) of the Mineral Leasing Act, which provides for diligent development and continued operation. Diligence relates to the obligation to develop a specific Federal coal lease or lose that Federal coal lease. The diligence clock is tied to the date that the Federal coal lease is readjusted (20 years after issuance), or otherwise made subject to the amended Mineral Leasing Act. The diligence production clock is independent of the section 2(a)(2)(A) 10-year Federal coal lease-holding clock. If a Federal coal lessee does not seek to qualify for new Federal leases granted under the Mineral Leasing Act (but decides rather to continue holding those Federal coal leases it currently holds), section 2(a)(2)(A) does not compel that Federal coal lessee to do anything. Section 2(a)(2)(A) requires that a lessee be "producing" coal in order to be issued a new lease under the Mineral Leasing

Act. In addition, the production must constitute "commercial quantities," an amount which is not further defined in the statute. The regulations provide this definition.

4. The section 2(a)(2)(A) leasing prohibition is not limited only to Federal coal leasing. Where a Federal coal lease is in violation of section 2(a)(2)(A), the Secretary may not issue that Federal coal lessee, or any of its affiliates, any new Federal leases granted under the terms of the Mineral Leasing Act for coal, gilsonite (including all vein-type, solid hydrocarbons), onshore oil and gas (including tar sand), oil shale, phosphate, potash, sodium, and sulphur. Solicitor's Opinion M-36951 (92 I.D. 537, 546-7). The Department of the Interior's position regarding the scope of section 2(a)(2)(A) was upheld in the case of *Conoco, Inc. v. Hodel*, 626 F. Supp. 287 (D. Del. 1986).

General Comments

Two comments received on the proposed rulemaking stated that the publication of these regulations is a major Federal action and requires publication of an environmental impact statement. As was stated in the SUPPLEMENTARY INFORMATION section that accompanied the proposed rulemaking (51 FR 37202, 37203) on October 20, 1986: "It is hereby determined that this rulemaking does not constitute a major Federal action significantly affecting the quality of the human environment and that no detailed statement pursuant to section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C)) is required." The comments stated that the above quoted statement was not based on any environmental analysis or finding of no significant impact. This is an incorrect assumption. As with any proposed rulemaking of this type, an Environmental Assessment was prepared by the Bureau of Land Management. It was determined by the Department of the Interior that there was no significant impact. Copies of the Environmental Assessment and attendant Finding of No Significant Impact, dated September 26, 1986, may be obtained by writing to: Director (660), Bureau of Land Management, 1800 C Street, NW., Rm. 3411, Washington, DC 20240.

Several comments stated that the proposed regulations at 43 CFR 3472.1-2(e) placed a restriction on the assignment of Federal coal leases to an entity, and any of its affiliates, that would otherwise be barred from being issued any Federal lease because the entity, and any of its affiliates, was not

in compliance with section 2(a)(2)(A). The restriction on any type of transfer of a Federal coal lease to such a disqualified entity, and any of its affiliates, is contained in 43 CFR 3453.3-1(a) when read in concert with 43 CFR 3453.2-1, and is an exercise of Secretarial discretion under section 30 of the Mineral Leasing Act (30 U.S.C. 187). This provision was added to 43 CFR Group 3400 on July 30, 1982 (47 FR 33114, 33148). This final rulemaking in no way affects the existing regulatory language regarding transfers of Federal coal leases. More importantly, and contrary to the concerns stated by many comments, Federal coal is the only commodity leasable under the Mineral Leasing Act that is subject to this regulatory provision. The final regulations have been revised to reflect that the other commodities leasable under the Mineral Leasing Act, as listed in item number 4 of the *General Discussion* above, are not subject to section 2(a)(2)(A) restrictions regarding transfers. The lease issuance prohibition, however, applies to all of the commodities listed in item number 4 of the *General Discussion* above.

It should be noted that the term "lease" used throughout the 43 CFR Group 3400 regulations is defined at 43 CFR 3400.0-5(r) to be solely restricted to Federal coal. A cross-reference from another 43 CFR Group related to another set of leasable commodities does not, by inference, alter the use of the term "lease" at 43 CFR Group 3400. For example, the cross-reference from 43 CFR 3102.5 does not alter the term "lease" as used throughout the 43 CFR Group 3100 regulations, as the terms "gas" and "oil" are defined at 43 CFR 3000.0-5 (a) and (b), respectively. The same logic holds true for the cross-reference from 43 CFR 3502.1, which does not alter the term "lease" as used throughout the 43 CFR Group 3500 regulations, as the term "leasable minerals" is defined at 43 CFR 3500.0-5(h) (51 FR 15204, 15214, April 22, 1986).

One comment stated that in at least three areas the proposed regulations were in direct conflict with either the statute or the existing rules, as well as the discussion of the statute and existing rules contained in Solicitor's Opinion M-36951. The comment then stated that the Solicitor's Opinion was inconsistent with the statute. First, the comment stated that diligent development and continued operation (section 7(b) of the Mineral Leasing Act) apply to all Federal coal leases due to the express exception in section 2(a)(2)(A). Second, the comment stated that the regulatory diligent development period for Federal

coal leases issued prior to August 4, 1976, is equivalent to the section 2(a)(2)(A) 10-year holding period. Third, the comment stated that the use of floating 10-year brackets for determining compliance with the section 2(a)(2)(A) continuing production obligation is not allowed, based on the first two statements.

The arguments did not persuade the Department of the Interior to reconsider the analysis and conclusions in Solicitor's Opinion M-36951. Section 2(a)(2)(A)'s relevant part states:

When such entity is not, except as provided for in section 7(b) of this Act, producing coal from the lease deposits in commercial quantities . . . 30 U.S.C. 201(A)(2)(A)

The express exception reference to "section 7(b)" can only be inferred to state that if a Federal coal lease is subject to the amended Mineral Leasing Act "diligence," then the section 2(a)(2)(A) production requirement is relieved simultaneously with the relief of the amended section 7(b) production requirement, when such relief is granted in accordance with the amended section 7(b) conditions for relief. The section 7(b) production requirement can be relieved by *force majeure* suspension or by payment of advance royalty in lieu of continued operation, consistent with amended section 7(b)'s limitations (i.e., no less than the production royalty that would have been paid and for not more than 10 years after the date that the lease became subject to the amended Mineral Leasing Act's diligence provisions). The section 7(b) conditions of diligent development and continued operation attach to a Federal coal lease only after it becomes subject to the amended Mineral Leasing Act. See Solicitor's Opinion M-36939, 88 I.D. 1003.

The above analysis does not mean that Federal coal leases that have not yet been made subject to the amended section 7 of the Mineral Leasing Act are not subject to conditions of diligent development and continued operation. The original section 7 of the Mineral Leasing Act, which had no subsection (b), did require Federal coal lease-specific diligence requirements (30 U.S.C. 207 (1970)). Pre-August 4, 1976, Federal coal leases were issued subject to those conditions, as implemented in the minimum production or comparable Federal coal lease clause. The above analysis means only that the amended section 7(b) is not applicable to these pre-August 4, 1976, Federal coal leases until they are made subject to the amended Mineral Leasing Act.

The Department of the Interior was not persuaded by this comment, when it

published the final guidelines implementing section 2(a)(2)(A) (50 FR 35125, August 29, 1985), and the Department of the Interior is still not persuaded by this comment that Congress intended amended section 7(a) to be prospective (in its produce-in-10-years and royalty provisions), but that amended section 7(b) be retroactive. Congress never distinguished among the subsections of amended section 7 in discussing its prospective application. Congress recognized the dual production obligations of section 2(a)(2)(A) and section 7(b) by including the express exception-of-production language to state that a Federal coal lease, with its "diligence" production obligations under section 7(b) suspended, would also have its production obligation for section 2(a)(2)(A) suspended. Until a Federal coal lease becomes subject to the amended Mineral Leasing Act "diligence" requirement, its only production obligations, if any, are those established in the pre-August 4, 1976, Federal coal lease terms. After a Federal coal lease becomes subject to the amended Mineral Leasing Act, the section 7(b) "diligence" requirements apply.

As stated above, section 2(a)(2)(A) is not a lease-specific diligence provision, but is a lessee-qualification requirement. The question of whether the diligence provisions of the amended section 7 applied by operation of law to all coal leases in existence on August 4, 1976, the date of the amendment, is not a matter addressed by this rulemaking. This question is currently before the U.S. District Court for the District of Columbia (*NRDC v. Burford*, Civil No. 82-2763), where the plaintiffs have recently dropped their additional allegations that issuance of the 1982 diligence regulations violated the National Environmental Policy Act and the Administrative Procedure Act.

Regarding Federal coal leases that are not yet subject to the amended Mineral Leasing Act, the Department of the Interior adopted 10 years as the appropriate time during which a lessee meets its commercial quantities obligation under section 2(a)(2)(A) by producing coal under an approved plan of operations. The Federal coal lease-holding period for the section 2(a)(2)(A) prohibition, however, is independent of the time frame over which production may be measured. The period over which commercial quantities will be measured is not tied to August 4, 1976. Neither the statute nor the regulations prescribe such a time frame (Solicitor's Opinion M-36951, 92 I.D. 537, 543). The beginning of the section 2(a)(2)(A)

production bracket may begin as late as the date that coal is first produced on or after August 4, 1976. The Department of the Interior concluded, after examining the comments and considering alternative ways of determining commercial quantities, that a 10-year period for determining commercial quantities is appropriate, and that it should begin on the date that coal is first produced on or after August 4, 1976. In all cases, the operative quantity to be used in determining whether a Federal coal lease is producing in commercial quantities is 1 percent of the recoverable coal reserves, as the term "commercial quantities" is currently defined by regulation at 43 CFR 3480.0-5(a)(6) (1985). For further clarification and discussion on the issue of the section 2(a)(2)(A) bracket, see *Specific Comment* number 1, below.

Two comments stated that the "simplest and most effective way to ease the burdens of Section 3 [sic] enforcement would be for the Department to publish a list which indicates just which companies are barred from receiving new MLA leases and revise it at appropriate intervals. While the list might not be able to detail all subsidiaries and parents of each holder of a lease who is affected by the section 3 prohibition, it would clearly aid the authorized officers in the field and provide warning and notification to companies affected by section 3." The Department of the Interior accepts this advice, and will make such a list available to any member of the public upon request.

The Bureau of Land Management developed its first such list in the spring of 1985 and has been updating it ever since. The list is currently updated weekly, based on the previous week's activities regarding arm's-length lease assignments, relinquishments, approvals of logical mining units determined to be producing, and statutory relief from production requirements, where applicable. The list is not deemed to be confidential in any manner. The list should not be considered as final adjudication by the Bureau of Land Management of whether an entity, and any of its affiliates, is or is not qualified under section 2(a)(2)(A), but is merely an indication of such status. Copies of the weekly list are available to the public and any other concerned party by writing to the following address: Director (660), Bureau of Land Management, 1800 C Street NW., Rm. 3411, Washington, DC 20240.

One comment stated that preference right leases, if applications are still pending before the Bureau of Land

Management, should not be prevented from being issued, and inquired as to the effect of section 2(a)(2)(A) on lease modifications. Another comment stated that emergency leases should not be prevented from being issued. The Department of the Interior is without authority to alter the intent of Congress. Section 2(a)(2)(A) states, in part, that the "Secretary shall not issue a lease or leases under the terms of this Act. . . ." The Solicitor's Opinion M-36951 stated that the intent of Congress in using "Act" when it added section 2(a)(2)(A) to the Mineral Leasing Act referred directly to the Mineral Leasing Act of 1920, as amended and supplemented, not the terms of the Federal Coal Leasing Amendments Act of 1976, as some have interpreted. This was argued in the District Court in *Conoco, Inc. v. Hodel*, in which the Court upheld the Department of the Interior's interpretation (626 F.Supp 287, D.Del. 1986). Therefore, neither preference right leases nor emergency leases for Federal coal may be issued to an entity, or any of its affiliates, if it holds a Federal coal lease that would otherwise disqualify the entity, or any of its affiliates, under section 2(a)(2)(A) from being issued a lease granted under the Mineral Leasing Act. However, lease modifications under section 3 of the Mineral Leasing Act (30 U.S.C. 203) do not involve issuance of new Federal coal leases. The Bureau of Land Management will continue to consider lease modifications without regard to section 2(a)(2)(A), because without lease modifications many bypass situations could result.

Two comments stated that revisions to the final guidelines implementing section 2(a)(2)(A) should be made to conform the guidelines to the final regulations, as adopted. The Department of the Interior agrees with this recommendation, and the Bureau of Land Management intends to publish revised guidelines in 1987.

Finally, several comments stated that the definitions in the proposed rulemaking were confusing, partly because of the repetitive use of the phrase "for purposes of section 2(a)(2)(A)." To avoid such confusion, all of the definitions have been consolidated and are contained in § 3400.0-5(rr).

Specific Comments

1. *Section 2(a)(2)(A) Bracket.* One comment stated that an assignment "without notice of a short section 2(a)(2)(A) bracket by an Interior official might come as quite a shock to a lessee and could frustrate entirely its section 2(a)(2)(A) compliance strategy." The comment also stated that a prior written

notice should be given to the lessee of a proposed section 2(a)(2)(A) bracket assignment decision, together with the reasons therefore. Two comments stated that the Department of the Interior needed to articulate more clearly the purpose and function of this section 2(a)(2)(A) bracket concept in the final rulemaking.

Another comment recommended that the regulatory proposal be expanded to specifically address "which Bureau of Land Management authority is to establish a section 3 [sic] 'bracket' for each lease and to mandate that such a 'bracket' be established for each pre-76 [sic] lease immediately."

Another comment stated that the proposed use of a 10-year section 2(a)(2)(A) bracket constituted a "terse and basically unintelligible definition with absolutely no discussion of the meaning of the term or of the justification for making use of brackets." The comment further continued, stating that "the fact is that section 3 [sic] and section 7 *must* be subject to similar interpretations. The provisions were developed . . . as parts of the same statute. . . they both establish ten year time frames." (Emphasis in original.)

These specific comments, as well as the discussion of section 2(a)(2)(A) brackets in the *General Comments* section above, led the Department of the Interior to consider carefully the proposed regulatory discretion regarding the assigning section 2(a)(2)(A) brackets versus the establishment in this final rulemaking of a fixed, regulatory time frame. The comments expressed concern about potential abuse by Bureau of Land Management Field Office personnel establishing section 2(a)(2)(A) brackets and, upon subsequent reevaluation, reestablishing the section 2(a)(2)(A) brackets. To alleviate this concern, and to establish a consistent, nationwide policy, the Department of the Interior has determined that it is appropriate to establish a specific section 2(a)(2)(A) brackets in this final rulemaking.

As noted earlier, section 2(a)(2)(A) provides no definition of commercial quantities, leaving this to the discretion of the Secretary. Solicitor's Opinion M-36951 (92 L.D. 537, 543-46). By regulation, the amount has been set at 1 percent of recoverable coal reserves. The section 2(a)(2)(A) guidelines adopted the policy of utilizing the amended section 7(a) 10-year production time frame as the basis for producing in commercial quantities under section 2(a)(2)(A).

The comments stated that this 10-year period is appropriate. Therefore, the section 2(a)(2)(A) bracket has been set in the final rulemaking as 10 years from

the date coal is first produced from the Federal coal lease on or after August 4, 1976, where the first production occurs before the lease becomes subject to the amended Mineral Leasing Act. A lessee who has held a Federal coal lease for 10 years and who is producing coal under an approved plan of operations for mining will qualify, and any of its affiliates will qualify, for new mineral leases granted under the Mineral Leasing Act at any time during the section 2(a)(2)(A) bracket. If the lessee meets its commercial quantities requirement of producing 1 percent of recoverable reserves during the section 2(a)(2)(A) bracket, the lessee, and any of its affiliates, will qualify for new mineral leases granted under the Mineral Leasing Act thereafter, provided the lessee is "producing" coal at the time of determination of lessee qualification. If the lessee does not meet its commercial quantities requirement of producing 1 percent of recoverable reserves by the end of the section 2(a)(2)(A) bracket, the lessee, and any of its affiliates, will no longer qualify for new mineral leases granted under the Mineral Leasing Act after the bracket ends (i.e., 10 years after the date that coal is first produced from the lease on or after August 4, 1976). This disqualification will continue until the lessee produces the commercial quantities amount 1 percent. When the lessee does in fact produce 1 percent from each such Federal coal lessee, the lessee, and any of its affiliates, will again qualify for new mineral leases granted under the Mineral Leasing Act, provided the lessee is "producing" coal at the time of qualification. The 1 percent of recoverable coal reserves that must have been produced shall be 1 percent of the recoverable reserves in existence at the beginning of the 10-year section 2(a)(2)(A) bracket.

In all circumstances, the "producing" requirement is relieved, and the section 2(a)(2)(A) bracket is extended, if necessary, by the duration of an approved suspension under section 39 of the Mineral Leasing Act or under section 7(b) of the amended Mineral Leasing Act.

It must be emphasized that section 2(a)(2)(A) is independent of the production obligations under section 7 of the amended Mineral Leasing Act. However, where the coal is first produced from a Federal coal lease after it becomes subject to the amended Mineral Leasing Act, production which meets the commercial quantities requirements of the amended section 7 will also satisfy the commercial

quantities requirement of section 2(a)(2)(A).

The only relief from a section 2(a)(2)(A) bracket (other than extension due to a suspension under section 39 or amended section 7(b) occurs when a lease is committed to an approved logical mining unit. Production from an approved logical mining unit satisfies both the "producing" and the "commercial quantities" requirements under section 2(a)(2)(A) for all Federal coal leases committed to the unit, whether producing or not. Thus, the lessee, and any of its affiliates, holding any Federal coal lease that is committed to an approved logical mining unit qualifies for new mineral leases granted under the Mineral Leasing Act provided that coal is being produced from the logical mining unit at the time of qualification. If the logical mining unit fails to produce coal in commercial quantities under the terms of its approval, then the Federal coal leases contained in the approved logical mining unit will not have satisfied their commercial quantities requirement for purposes of section 2(a)(2)(A) thereafter to the extent that such qualification was based on production from the approved logical mining unit.

These provisions ensure that each Federal coal lease is not only producing in commercial quantities, as prescribed by section 2(a)(2)(A), but also is not being held for speculative purposes. In all circumstances, the lessee must be producing coal unless one of the statutory provisions authorizes a cessation. This was, and still is, the clear intent of the Congress, as expressed in the Federal Coal Leasing Amendments Act of 1976.

2. Pending actions and appeals. Several comments stated that the final guidelines for implementation of section 2(a)(2)(A) included 6 administrative actions which permit a lessee holding a noncompliance lease to avoid the section 2(a)(2)(A) sanction: relinquished lease (thus no longer holds); arm's length assigned lease (thus no longer holds); approved, producing logical mining unit (thus the production obligation is being satisfied); approved section 39 suspension of operations and production in the interest of conservation (thus the production obligation is suspended); approved *force majeure* suspension under amended section 7(b) (thus the production obligation is suspended); and payment of advance royalty in lieu of continued operation under amended section 7(b) (thus the production obligation is satisfied by the in lieu payment). However, the proposed rulemaking only

allowed pending applications for 3 of these 6 actions to avoid disqualifying an entity, or any of its affiliates, during the pendency of the action before the Bureau of Land Management.

As the comment correctly stated, an applicant for a section 39 or section 7(b) lease suspension is not protected during the pendency of the application, "yet processing those suspension applications is much more time-consuming than is processing relinquishment, assignment, or, even, LMU applications." Requests for relinquishments and assignments and for establishment of logical mining units are relatively routine and are approved in most cases, i.e., when statutory and regulatory requirements are satisfied. However, qualification for a suspension has very stringent tests that must be met. The tests associated with a request for a suspension are not readily met merely by compliance with the law and regulations, in contrast to pending requests for relinquishments or assignments or approval of a logical mining unit. This is 1 reason that the Department of the Interior determined that it will not allow lessees to be qualified during the pendency of requests for suspensions. In addition, there are approximately 12,000 oil and gas leases issued annually. Processing such applications for suspensions for coal leases may take several months, if not longer, and could, if the suspension requests are denied, result in the overwhelming administrative burden of having to cancel, terminate, or revoke many thousands of oil and gas leases retroactively, as well as leases for other Mineral Leasing Act minerals, that were issued during the pendency of such requests to the Bureau of Land Management. Further, if the comment were adopted and if the Department of the Interior were to allow entities to obtain Mineral Leasing Act mineral leases during the pendency of a suspension, the Department of the Interior would be as flooded with requests for these suspensions as it currently is for protests/appeals/civil suits on Federal coal lease readjustments (more than 100 as of September 30, 1986). The Department of the Interior simply does not have the manpower or the available budget to handle such an administrative workload.

Two comments stated that an addition should be made to the pendency language regarding Congressionally authorized (not Congressionally required) exchanges; for example, where a request has been made to the Bureau of Land Management pursuant to the

Congressionally authorized I-90 exchange legislation or the Congressionally authorized alluvial valley floor exchange legislation (i.e., the Surface Mining Control and Reclamation Act of 1977). The Department of the Interior has determined that, although Congress has authorized such exchanges, such legislation does not confer any valid existing rights that require the exchanges to be consummated. Therefore, these comments were rejected.

Several comments stated that an appeal of an adverse decision by the Bureau of Land Management on any of the 3 listed pendency actions contained in the proposed rulemaking should continue the requestor's immunity from the section 2(a)(2)(A) disqualification. One comment stated: "Otherwise, the rule will have a chilling effect upon the full exercise of an entity's rights and may be an infringement on its due process rights." One comment stated that: "Moreover, it conflicts directly with 43 CFR 4.21(c) [sic] which states that 'a decision will not be effective during the time in which a person adversely affected may file a notice of appeal, and the timely filing of a notice of appeal will suspend the effect of the decision appealed from pending the decision on appeal.'" However, the introductory language in 43 CFR 4.21(a) states: "Except as otherwise provided by law or other pertinent regulation, a decision . . ." 43 CFR 3472.1-2(e)(4) has been clarified to state that the decision by the Authorized Officer regarding any of the three pending actions shall be effective immediately, regardless of subsequent appeal of that decision. Therefore, the suspension provision at 43 CFR 4.21(a) will not be triggered if an entity files an appeal from an adverse decision of the Bureau of Land Management in one of the 3 pending categories retained in this final rulemaking.

When an administrative decision is effective, pending appeal, the affected entity has the option of seeking a stay from the Interior Board of Land Appeals or going directly to court to challenge the effectiveness of the decision. When an entity has immediate access to judicial relief, its due process rights cannot be said to be violated.

The comment further stated that: "By denying an entity the right to obtain a lease pending a good faith appeal, BLM is denying that entity's legal right under the 5th Amendment and 14 Amendments [sic] to the Constitution in the absence of any statutory provisions directing that the entity's rights be so impaired.

This provision is clearly without legal support and must be deleted." To the extent that this is a complaint that due process rights are being violated (5th Amendment to the Constitution), the Department of the Interior has addressed it by stating the right to challenge judicially the fact that the decision has been put into effect. To the extent that this is a claim that property is being taken (5th Amendment to the Constitution) or that "equal protection" rights are being violated (14th Amendment to the Constitution), Congress possesses and has exercised the power to determine what entities qualify under the Mineral Leasing Act to apply for and be issued mineral leases. The Department of the Interior is under no constitutional or statutory obligation to promulgate regulations regarding requests for approval of actions pending before the Bureau of Land Management, nor does an application for a lease under the Mineral Leasing Act rise to the level of a Constitutionally protected "property" right.

In fact, the Department of the Interior in the alternative could have promulgated regulations without allowing any requests for actions pending before the Bureau of Land Management to relieve the applicant or requestor from the section 2(a)(2)(A) disqualification. From that standpoint, the Department of the Interior believes it has taken a positive action to ensure that there is no infringement on due-process rights.

These comments were rejected, with the exception of the regulatory clarification noted above.

Finally, two comments stated that the Bureau of Land Management should consider the dual pendency of requests before it. After careful consideration, 43 CFR 3472.1-2(e)(4) has been amended to allow for this in a specific, and justified, limited universe of Federal coal leases. In many instances, Federal coal leases were received by the current record title holder by arm's-length assignment. Some of the original assignors retained the right-of-first refusal in the assignment document. Therefore, even though the current record title holder wants to relinquish such a Federal coal lease, the record title holder must first try to locate the original assignor(s) to determine whether it still exists and if so, whether the original assignor wants to have such Federal coal leases reassigned to it.

This is a time-consuming process as to both determinations. It is further complicated by the fact that the original assignor, if found and if it wants the Federal coal leases to revert to it, must

be able to obtain sufficient bonds in order for the executed assignment to be submitted to the appropriate Bureau of Land Management State Office for approval. Therefore, 43 CFR 3472.1-2(e)(4) has been revised for this specific situation to allow the filing of a relinquishment by the current record title holder of such a Federal coal lease, conditioned on the execution of lack thereof, of the reassignment to the original assignor only where a right-of-first-refusal can be demonstrated to be the sole reason for the filing of the conditional request for relinquishment.

In such cases, the Bureau of Land Management will not act on the relinquishment request because it does not control the execution of such a reassignment. However, the current record title holder will also have to file a simultaneous request for arm's-length assignment. This action will allow the Bureau of Land Management to issue a request to the potential assignee(s) for further information and/or execution and submittal of the assignment document and the posting of a bond sufficient to allow the assignment to be approved. If the potential assignee(s) (i.e., the original assignor(s) that retained the right-of-first-refusal) does not comply with the Bureau of Land Management's request within 30 calendar days from date of receipt of the request, the Bureau of Land Management will disapprove the assignment and act on the pending relinquishment request. The failure of the potential assignee(s) (i.e., original assignor(s) retaining the right-of-first-refusal) to comply with the Bureau of Land Management's request removes the condition from the conditional request for relinquishment of the Federal coal lease. This rulemaking modifies the 90-day period for submittal of applications for approval of a lease transfer for those transfer applications submitted by the potential assignees within this limited category. These comments were accepted, as modified.

3. *Producing.* Several comments stated, in essence, that the definition of "producing" fails to reflect the reality of mining by severely restricting the exceptions to its "daily" severance requirements. The comments stated that the Department of the Interior failed to take into account that there are many events which regularly occur in the course of an ongoing mining operation that result in the temporary cessation of actual coal production. The comments suggested that the list of general exceptions be broad enough to take into account mining-related occurrences that customarily and in the course of coal

production necessitate the temporary cessation of mining activities. Such variances include, but are not limited to: 4-day work weeks; miners' vacations; temporary, limited shutdowns for equipment maintenance; withdrawal of closure orders under the Federal Mine Safety and Health Act of 1977 (30 U.S.C. 814(b) and (d), and § 817(a)); cessation orders under the Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. 1271(a)(2)); temporary, limited shutdown of a customer's power plant; contract requirements stating that mining only take place intermittently; and formal lease suspensions under section 39 or section 7(b) of the Mineral Leasing Act. In addition, the comments pointed to temporary, limited *force majeure* mine closing, which may result from strikes by rail workers or truck drivers, coal buyer's operations of its power plants that require the coal buyer to temporarily stop taking coal shipments for a limited duration of time, and labor disputes.

It was not the intent of the proposed rulemaking to compromise standard industry operating practices. That is why the rulemaking was couched in terms of "such reasons as," not "the following reasons." Allowing standard industry operating practices to govern "producing" is less burdensome to the mining industry and more administratively efficient for the Bureau of Land Management. It also provides a satisfactory basis from which the Authorized Officer can determine whether the mining operation is "producing". Under this approach, the Authorized Officer will determine whether the mining operation is "producing" in accordance with the approved plan of operations. Standard industry operating practices will be used as the primary basis for determining whether the mining operation is "producing;" but it must be stressed that conformity with standard industry operating practices is not dispositive of "producing," and variances from the practices may be required where case-specific conditions warrant such a variance. However, the burden of establishing that a mining operation is "producing" is on the operator/lessee. Cessation of production for reasons of *force majeure* do not exempt the lessee from section 2(a)(2)(A), unless production is suspended under section 7(b) after the lease becomes subject to the amended Mineral Leasing Act. It should be noted that interruptions of mining operations due to such events as floods, mine fires, and roof falls or rock bursts, may be sufficient cause to apply

for a section 39 suspension of operations and production.

The definition of "producing" has been revised to reflect the original intent of the proposed rulemaking, as discussed above. As one comment accurately stated: "The purpose of Congress in enacting section 3 [sic] was to eliminate perceived speculation in federal coal where much coal was leased at low cost and few mines were opened as the 'speculators' waited for the price of coal to rise. Beginning a mine operation requires substantial investment. The lessee has significant costs and has no reason not to mine." The Department of the Interior agrees with these statements.

One comment questioned whether "sale of coal from stockpiles" referred to the market transaction or to the physical removal of coal. "Sale of coal from stockpiles" was intended to refer to the market transaction and the proposed rulemaking's intent was to differentiate that type of transaction from "coal is being processed, loaded, or transported from the point of severance to point of sale." See also the responses to the previous documents, above.

One comment stated that the proposed rulemaking would significantly expand the clear requirement of section 2(a)(2)(A) to make production in commercial quantities a requirement for the duration of the subject lease. The comment continued: "No statutory, legislative history, or practical reasons is [sic] presented by BLM, and none is available, to support such an expansion of the law." This comment ignores the clear, express language of section 2(a)(2)(A) (30 U.S.C. 201(a)(2)(A)), which states, in part: "when such entity *is not*, except as provided for in section 7(b) of this Act, *producing* coal from the lease deposits in commercial quantities . . ." (emphasis added) as opposed to stating "when such entity has not . . . produced coal from the lease deposits in commercial quantities." Congress phrased section 2(a)(2)(A)'s producing requirement in the present tense and thus clearly intended that this requirement continue for the duration of the subject lease. It should be noted, as discussed in the *General Discussion*, *General Comments*, and *Specific Comments*, number 2, above, that there is, at certain times and under specific circumstances, statutory relief available from the continuing section 2(a)(2)(A) requirement to be producing coal in commercial quantities.

4. *Control*. One comment, noting that the Office of Surface Mining and the Minerals Management Service are also considering ownership/control

regulations relating to coal activities, stated: "I urge you to coordinate with the Office of Surface Mining and the Minerals Management Service. A single definition may not be appropriate for all 3 agencies. However, the impacts of different definitions should be recognized and acknowledged."

The following discussion concerns the "controlled by or under common control with" language of section 2(a)(2)(A) of the Mineral Leasing Act. Language identical to that quoted in the previous sentence is contained in the Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. 1257(b)(5)). The Office of Surface Mining Reclamation and Enforcement proposed regulations related to it control concept on April 5, 1985 (50 FR 13724), and repropoed those regulations for further consideration April 16, 1986 (51 FR 12879).

The Minerals Management Service intends to propose regulations on coal product valuation in the near future. That proposal will also address a control concept.

The Bureau of Land Management will continue to work closely with both the Office of Surface Mining Reclamation and Enforcement, the Minerals Management Service, and the Office of the Solicitor to determine the appropriate control concepts for all 3 Federal agencies. The responses to the comments addressed below relate solely to the language of section 2(a)(2)(A) of the Mineral Leasing Act, not the Surface Mining Control and Reclamation Act of 1977, and are not intended to resolve or address any issues currently before the Office of Surface Mining Reclamation and Enforcement or the Minerals Management Service.

One comment was highly supportive of the proposed control concept.

All comments focused on the degree of ownership that will create a presumption of control—ownership of 20 through 50 percent of the instruments of ownership of the voting securities of an entity. Most of the comments were concerned about stock ownership in companies and stated that, rather than creating a presumption of control, ownership of 20 through 50 percent should create a presumption of noncontrol unless the owner has a majority representation on the board of directors or by some other arrangement has actual control of the corporation. Several of these comments cited cases in which courts stated that stock ownership alone, when less than a majority, did not necessarily demonstrate control of the company. See, e.g., *United States v. Carr*, 543 F.2d 1042, 1050 (2d Cir. 1976); *Gilbert v. El*

Paso Company, 490 A.2d 1050, 1055, (Del.Ch. 1984); *Kaplan v. Centrex Corp.*, 284 A.2d 119, 122-23 (Del.Ch. 1971). The Department of the Interior does not disagree with statements in the above-cited decisions that stock ownership of less than a majority does not necessarily demonstrate control of the corporation. That is why the Department of the Interior's 20 through 50 percent category only creates a presumption of control. The cited cases, however, only indicate that it may not be possible to determine who or what entity has the ultimate control, not that it is inappropriate to presume control. Moreover, as noted in Solicitor's Opinion M-36951, several courts have found that actual control exists when the single largest stockholder owns less than the majority of the voting interests in the corporation. See *Securities and Exchange Commission v. R.A. Holman & Co.*, 377 F.2d 665, 667 (2d Cir. 1967); *Gottesman v. General Motors Corp.*, 279 F.Supp. 361, 368 (S.D. N.Y. 1967). If an entity does not believe that the presumption of control is applicable to it, then it can provide information rebutting the presumption or declaring who, in fact, is in control.

The presumption of control can be rebutted by evidence that the single largest shareholder is incapable of control or has consistently been denied control by block voting of smaller shareholders. However, the burden of proof of noncontrol properly rests with the owner of the 20 through 50 percent interest, not with the Bureau of Land Management or some third party, neither of which has the information on which a control determination can be accurately made. The Department of the Interior is not under the obligation to investigate these entities, and any of their affiliates. The lease applicant is under the obligation to show that it is qualified. The presumption standard adopted here materially aids making such determinations to carry out this responsibility.

The comments that criticized the Department of the Interior's standards for *Presuming* control do not persuade the Department that the standards for *Presumption* are inappropriate. Rather, they simply demonstrate the variety of circumstances in which the *Presumption* could be rebutted because "actual control" will, after scrutiny, be determined to be different than what one *presumes* upon initial examination. The Department of the Interior recognizes that, under a variety of circumstances, *proper proof will rebut the presumption*. The *presumption*, however, serves the purpose of identifying those situations in which

rebuttal evidence should and must be submitted for competent determinations of control to be made.

Other comments on the presumption of control definition argued that partners owning less than a majority of the partnership, or limited partners who may have contracted with general partners to manage the partnership, should not be presumed to be in control. One comment further stated that "[m]anagement control, contract mining operations operator responsibility, and other relationships that constitute control for a large proportion of corporations are simply ignored by the proposed rulemaking."

Congress did not require the Department of the Interior to determine control by examining management committees or other management or contract arrangements. It only dealt with the instruments of ownership of an entity. Moreover, simply because limited partners or corporations have contracted with other entities to manage their ownership interests, this does not necessarily insulate them from retaining actual control of the partnership, corporation, contractor, or operator. Although limited partners may not generally exercise control over the partnership's activities, the final rule does not address this or any other specific management arrangement. If "control" is as obviously absent as the comments suggest, it should be a relatively simple matter for a lease applicant to rebut the presumption.

Again, the 20 through 50 percent category only creates a *presumption* of control, which the affected entity has an opportunity to rebut through the submission of evidence that it, in fact, is not in control of the entity holding the section 2(a)(2)(A) noncompliance coal lease.

Another comment stated that an owner of a 20 through 50 percent interest in an entity, who is not exercising actual control over that entity but who has the "theoretical" ability to control it in the future (e.g., by electing a new board of directors), should not be presumed to be in control. The Department of the Interior is interested in development of coal leases. If an entity has in its power the ability to develop a coal lease through restructuring the management of an entity in which it has a 20 through 50 percent interest (see *Essex Universal Corp. v. Yates*, 305 F.2d 572 (2d Cir. 1962)), it can avoid the section 2(a)(2)(A) prohibition against new mineral lease issuance under the Mineral Leasing Act by exercising that power. Thus, the Department of the Interior does not adopt the comment that control cannot

be presumed simply because the single largest shareholder has failed to assume actual management control of the lease holding company. The Department of the Interior will continue to presume that control is in the hands of the company owning the largest single block of stock or other instruments of ownership in a publicly traded or widely held corporation. However, again, the *presumption of control can be rebutted* by submission of evidence that such an entity, in fact, does not have the power to exercise such control.

Another comment stated that it was inappropriate for the Solicitor in Opinion M-36951 to cite two cases discussing "control" "that may be appropriate in the context of securities violations, farm investment credit and some Internal Revenue Service applications" because Interior is dealing with a different problem than the statutes and regulations related to those areas. As noted above, Congress was silent as to the definition of "control" in the amendments to the Mineral Leasing Act enacted in the Federal Coal Leasing Amendments Act of 1976. It thus left that definition to the Secretary's discretion. The Department of the Interior believes it is better, and more reasonable and appropriate, in establishing the criteria to determine control or presumption of control, to look to other Federal statutes, their implementing regulations, and court decisions related to those statutes and regulations, which have dealt with this issue and have established standards by which to make "control" determinations.

If an entity does not believe that the presumption of control is applicable, then it is up to the entity to provide information rebutting the presumption or declaring who, in fact, is in control. The Department of the Interior prefers to avoid erroneously disqualifying an entity that does not control other entities, or any of their affiliates, that hold noncompliance Federal coal leases. The burden of proof, however, is on the lease applicant. A lease applicant that does not provide rebuttal information or otherwise declare who controls the corporation through ownership of stock or other instruments of ownership is agreeing that, if the Department of the Interior applies its presumption of control, the Department of the Interior will correctly identify who is in control of the entity, and any of its affiliates. The self-certification process at 43 CFR 3472.1-2(e)(2) has been amended to reflect this procedure.

Another comment stated that the term "interest" in a Federal coal lease should be applied from the standpoint of those

entities that control the "working" interest in a lease, because this is the interest which can actually develop the lease. The Department of the Interior agrees, and has revised its "hold and has held" definition to indicate that working interests, rather than property interests (which could include nonparticipating interests), are the "holding" interests subject to section 2(a)(2)(A). However, this comment does not affect the definition of "control," because "control," as used in section 2(a)(2)(A), relates to the structure and ownership of the business concern which "holds" the lease, not with the lease "holding" itself. See also the responses to comments received on the "holds . . . and has held" provision of the proposed rulemaking below.

One comment challenged the use of 20 percent as the lowest limit for percentage in the presumption of control category, contending that "BLM's proposal would, therefore, unduly narrow the effect of the statute without explanation, analytical support, or even the presentation of a rudimentary legal theory to support this untenable change in the Department's position." First, there has been no change in the Department of the Interior's position.

This is the first time that the Department of the Interior has promulgated a final rulemaking dealing with the issue of control for the purposes of lease-issuance qualification under section 2(a)(2)(A) of the Mineral Leasing Act. Second, the 10 percent ownership of stock or other instruments of ownership relates solely to acreage attribution, 30 U.S.C. 184(e). Acreage attribution has nothing to do with corporate management control or affiliation. If the Congress had intended for the Department of the Interior to use acreage attribution as the basis for defining control for the purpose of lease-issuance qualification, the Congress would have so ordered the Secretary of the Interior by statute. However, in the absence of such an order from Congress, the 10 percent used for acreage attribution bears no relevance to control because Congress established the 10 percent merely to avoid the "administrative nightmare" of *pro rata* acreage attribution to each stock owner in a corporation. S. Rep. No. 1549, 1960 U.S. Code Cong. & Ad. News 3313, 3325. Although this comment was rejected, it does serve as the basis for the following discussion regarding how the lowest limit of "20 percent" for the "20 through 50 percent" was derived, constituting the presumption of control.

The Department of the Interior had to choose a number less than 50 percent as

a lowest limit of percentage for the presumption of control. The fact that it may be hard to justify selecting one number over the rest of the numbers in a given range does not prohibit the Department of the Interior from selecting a lowest limit. The Department of the Interior did not want arbitrarily to exclude any percentage that has been held to constitute control. See *Gottesman v. General Motors Corp.*, supra, where 23 percent stock ownership constituted control. Therefore, the Department of the Interior chose a lowest limit that is less than the 23 percent in *Gottesman*, but preserved the right of entities to rebut the presumption. Also, the Department of the Interior should not make a selection that excludes one of the potentially more controversial ownerships, when the opportunity to rebut the presumption of control is clearly provided to any entity affected by the lowest limit.

Also, the definition has been amended to provide that ownership less than 20 percent creates a presumption of noncontrol, rather than conclusive evidence of noncontrol. The burden of rebutting this presumption rests with the Department of the Interior. The burden of presenting rebuttal information is clearly on a party challenging a determination of noncontrol by the Department of the Interior, where there is less than 20 percent ownership of the stock or other voting securities by the entity.

Several other comments were received regarding the self-certification provisions at proposed 43 CFR 3472.1-2(e)(2) and the Authorized Officer's determination that there is compliance with section 2(a)(2)(A) on the date of lease issuance at proposed 43 CFR 3472.1-2(e)(1)(ii). Most expressed concern that there appeared to be two lessee-qualification dates resulting in the lease applicant potentially having to submit 2 qualification statements. The intent of the provision was that, at the time that a lease was offered, the lease applicant would have to self-certify that it, and all of its affiliates, were not in noncompliance with section 2(a)(2)(A) of the amended Mineral Leasing Act. This is a simple clarification of the information already required to be submitted in the contents of qualification statements (see existing 43 CFR 3472.2-2). The apparent requirement for a double submission is nonexistent. On the subsequent date of lease issuance, the affected Federal coal leases must be producing in commercial quantities in order for the lease applicant to be qualified to be issued the lease. The determination that the

affected Federal coal leases are in compliance is made by the Authorized Officer both on the date of determination of lessee qualification and on the date the lease is issued. This is because the date that the Authorized Officer makes the determination of lessee qualifications normally precedes the date of lease issuance. There is no requirement for a dual submission of information on the part of the lease applicant. These comments were rejected.

5. *Holds and Has Held.* Several comments received on this issue questioned Solicitor's Opinion M-36951, the draft and final implementation guidelines for section 2(a)(2)(A), and the proposed rulemaking. The major concern was that a Federal coal lessee's holding period should not be attributable to the ultimate parent corporation or any of its affiliates or subsidiaries. The Department of the Interior is not persuaded by any of the arguments presented regarding this specific issue to reexamine the Solicitor's Opinion M-36951 for possible revision on this issue nor to reexamine Appendix C to the final guidelines for implementation of section 2(a)(2)(A) of the Mineral Leasing Act. In fact, the Department of the Interior believes it appropriate here to repeat a portion of that Appendix C in this **SUPPLEMENTARY INFORMATION** for clarification of how the "holds . . . and has held" provision is attributable to corporate entities, and any of their affiliates or subsidiaries from the aspect of "controlled by or under common control with." See the following 3 paragraphs.

The legislative history and administrative interpretation of section 11 of the Federal Coal Leasing Amendments Act of 1976 are particularly relevant in interpreting section 2(a)(2)(A) of the Mineral Leasing Act, because the language used in both sections is identical. The legislative history of section 11 states, in part, that "[t]he purpose . . . of this language is to assure that the restrictions . . . are not circumvented by the formation of holding companies, or other devices of corporate organization." H.R. Rep. No. 94-687, 94th Cong., 1st Sess. 25 (1975) It is apparent from the plain language of section 2(a)(2)(A) and the legislative history of section 11 that "control" is the key concept through which ownership of a Federal coal lease will be attributed to related corporate entities. The phrase "controlled by or under common control with such person, association, or corporation" modifies the words "subsidiary," "affiliate," and "persons." Therefore, when a chain of corporate

ownership is involved, the question is whether a given corporation is "controlled by or under common control with" a related corporation. If there is sufficient control of a corporation by another corporation, related corporations in the corporate chain will be charged with ownership of the Federal coal lease. This analysis is consistent with the Department of the Interior's established interpretation of section 11 of the Mineral Leasing Act. See 46 FR 61390, 61403 (1981). The question of whether a particular entity is "controlled by or under common control with" another entity for purposes of section 2(a)(2)(A) will have to be determined on a case-by-case basis at the time that qualifications are being determined for a Federal lease issuance on or after December 31, 1986.

Actual control of a corporation will often exist without ownership of a majority of the corporation's voting stock. Ownership of less than 50 percent may provide actual control where stock ownership or other instruments of ownership are widely dispersed. These determinations will necessarily have to be made on a case-by-case basis.

Generally, the application of section 2(a)(2)(A) to a Federal coal lease holding entity will not be affected by a corporate reorganization of the entity. This is true even if the reorganized entity is renamed. In addition, if a Federal coal lessee in violation is acquired by a corporation, resulting in a parent-subsidiary structure, the section 2(a)(2)(A) violation will automatically run to the parent corporation. This is because the section 2(a)(2)(A) leasing prohibition runs up and down a chain of corporate ownership. That is, a parent's violation is charged to a controlled subsidiary and a subsidiary's violation is charged to a controlling parent, as well as to any other subsidiary commonly controlled by that parent. These comments were rejected.

One comment agreed that the time of ownership or control of a Federal coal lease must be counted in a cumulative manner. The comment also agreed that "the regulations must provide that holding a mined-out lease would not subject the lease holder to disqualification for new leases." Another comment stated that, with respect to holding mined-out Federal coal leases, the regulation should be expanded to apply to all circumstances which may necessitate retention of the lease after all recoverable coal reserves have been mined out. The Department of the Interior believes that the use of the term "for such purposes as" encompasses this concern (see 43 CFR

3472.1-2(e)(5)). Therefore, although the Department of the Interior agrees with this comment, there is no need to amend the proposed 43 CFR 3472.1-2(e)(6) in this final rulemaking, except to redesignate the paragraph number.

One comment stated that the regulation regarding mined-out Federal coal leases was "too limiting in that it requires that the lease be mined out. A mine can be forced to close even though all recoverable reserves have not been mined. This section should be expanded to allow for the reclamation of a lease even if the lease has not been mined out." The comment provided no specific examples for such an occurrence. This comment was rejected because it would run afoul of the Mineral Leasing Act's requirement that the Secretary of the Interior must ensure that maximum economic recovery is achieved.

One comment stated that the "statutory language of section 2(a)(2)(A) states that the Secretary shall not issue a lease to any person or entity 'where any such entity holds a lease or leases issued by the United States to coal deposits.' Holding a lease is not the same as 'any property interest in a lease.'" Another comment stated that the "guidelines referred mainly to a holder of 'record title' whereas the proposed regulations talk about 'any property interest'—a broader concept." The concept of "holding" a lease within the meaning of section 2(a)(2)(A) is limited to a working interest, versus other types of interests, as discussed in the responses to comments received, in the **SUPPLEMENTARY INFORMATION, Specific Comments**, number 4., on the issue of "control." "Holding" a lease is clearly broader than owning a record title interest, as shown by the language used in section 27(a) of the Mineral Leasing Act, 30 U.S.C. 184(a), where Congress directed that no entity shall "take, own, hold or control" leases in excess of a maximum acreage limit. Congress repeated this phrasing when it amended section 27(a) in section 11 of the Federal Coal Leasing Amendments Act. However, in section 2(a)(2)(A), Congress chose to focus on entities that "hold" a lease, their affiliates and those who "control" such entities rather than merely those who "own" a lease. The final rulemaking therefore revises this definition to include only "working interests" and also to include arrangements where an entity may not own the record title but yet "holds" the right to develop the coal.

6. *Oil and Gas Lease Qualifications and Assignments.* Several comments stated that it appeared that the Department of the Interior was not

intending to enforce the provisions of section 2(a)(2)(A) on oil and gas leases. The comments stated that the Department intended to rely on an "honor" system whereby it was presumed that lease applicants would state their compliance with section 2(a)(2)(A) upon application for a lease. In lieu of the "honor" system, it was suggested that the Department of the Interior require applicants to certify their compliance with section 2(a)(2)(A) and that the lease include a stipulation or lease term providing for lease cancellation if the lessee is later found to have been in violation of section 2(a)(2)(A) of the amended Mineral Leasing Act when the lease was issued.

The Department of the Interior, in fact, has already begun active enforcement of the section 2(a)(2)(A) provisions in the oil and gas leasing program. This approach does not rely on an "honor" system but rather on actual lessee compliance with section 2(a)(2)(A). Key elements include:

(1) Weekly updates by Bureau of Land Management personnel of parties who are in potential violation of section 2(a)(2)(A) based on the status of coal actions.

(2) Modification of the oil and gas lease form 3100-11 to include a specific lease term providing for the signatory to certify actual compliance with section 2(a)(2)(A) prior to lease issuance. Parties who falsely certify are subject to the stated lease cancellation provisions and the criminal provisions of 18 U.S.C. 1001.

(3) Revisions of the current regulations at 43 CFR 3102 to include compliance with section 2(a)(2)(A) as a specific Leasing Qualification. Language will also be added to give emphasis to the fact that leases issued in violation of section 2(a)(2)(A) are subject to the cancellation provisions at 43 CFR 3108.3.

Several comments stated that the proposed amendments to 43 CFR 3102.5 implied that all oil and gas lease assignment actions as well as lease issuance are subject to the provisions of section 2(a)(2)(A). They correctly pointed out that the Department of the Interior has determined that section 30a of the Mineral Leasing Act does not grant to the Secretary any discretion to apply the section 2(a)(2)(A) sanction to oil and gas lease transfers. The Department of the Interior agrees that the original language could have been so misinterpreted and has revised 43 CFR 3102.5 to clarify this point in this final rulemaking.

7. *Apparent Conflicts Between Specific Provisions of Proposed 43 CFR 3472.1-2(e).* Several comments stated that proposed 43 CFR 3472.1-2(e)(7)(iii)

required that each Federal coal lease be producing and was silent on allowing payment of advance royalty in lieu of continued operation or available suspension relief from the producing requirement. Proposed 43 CFR 3472.1-2(e)(7)(iv), which applied to all of 43 CFR 3472.1-2(e)(7), cross-referenced the proposed paragraph (e) (1), (4), or (6) relief-from-production obligations. Specifically, the advance royalty in lieu of continued operation and the relief-from-production-due-to-suspension language is contained at the cross-referenced 43 CFR 3472.1-2(e)(1)(i). This final rulemaking remains unchanged regarding that cross-reference, except that the section number has been redesignated. These comments were rejected.

These same comments, however, pointed out that there was no such cross-reference to the relief-from-production language at proposed 43 CFR 3472.1-2(e)(5). That was an inadvertent omission in the proposed rulemaking and has been corrected by redesignating this provision as part of § 3472.1-2(e)(6) in this final rulemaking.

Several comments also stated that proposed 43 CFR 3472.1-2(e)(3) "is broader than the other proposed rules. . . . It is recommended that this rule be limited to those seeking to acquire a new lease issuance and apply only to additional information regarding the section 3 [sic] compliance certification." As written, the proposed 43 CFR 3472.1-2(e)(3) was self-limited in this regard by inclusion of the words "further evidence of compliance with the qualifications of this subpart." The words "special leasing" have been inserted before "qualifications" in the final rulemaking for further clarification.

Two comments suggested that proposed 43 CFR 3400.0-5(vv) be revised by replacing the phrase "that is in no way affiliated with" to "that is not an affiliate of" in the definition of "Arm's-length transactions." This point has merit. However, it was pointed out in other comments that the Department of the Interior had defined the term "Affiliate" in terms of itself. Therefore, the definition for the purposes of section 2(a)(2)(A) of the Mineral Leasing Act for "affiliate" has been replaced with a definition for the purposes of section 2(a)(2)(A) of the Mineral Leasing Act of "entity," which will now be used in place of the phrase "entity, or any of its affiliates" throughout the final rulemaking, and the other definitions and regulatory provisions have been revised accordingly. These comments were accepted.

One comment suggested that the following language be inserted at 43

CFR 3472.1-2(e)(1)(i): "A lease shall not be considered to be held during any period when it is subject to a suspension under Part 3400 [sic] of this title." This addition is not necessary because under a section 39 or amended section 7(b) suspension, the section 2(a)(2)(A) production requirement is tolled for the duration of the suspension. This comment was rejected.

Three comments suggested that the following language be added after the words "purposes as reclamation" at 43 CFR 3472.1-2(e)(5): "or any activities associated with an ongoing mine" This was suggested because it "would allow the inclusion of circumstances such as access to another operating lease where there is no logical mining unit." The words at proposed 43 CFR 3472.1-2(e)(6) stating "for such purposes as" encompass this aspect for mined-out Federal coal leases. However, if the lease has not been mined out, is not producing coal in commercial quantities, and is being solely used for access to another Federal coal lease, the nonproducing lease would disqualify the lessee, and any of its affiliates, from being issued another Federal lease granted under the Mineral Leasing Act. These comments were rejected.

One comment stated that if "we read § 3472.1-2(e)(7) for any general proposition, it is for the principle that 'once qualified, always qualified' for purposes of section 3 [sic]. As we have argued in the past, we strongly believe that Congress envisioned a single qualification process for purposes of assuring compliance with section 3 [sic]. Once a lessee qualifies for issuance of a new lease (at the time of new lease issuance), there is no reason to require additional qualification in the future. To do so would work harsh, unintended and, in some cases, inconsistent results." As proposed, and as retained in this final rulemaking, 43 CFR 3472.1-2(e)(6) states that the lease does not prohibit the lessee from being issued Mineral Leasing Act mineral leases as long as it is producing or as long as the producing obligation is being satisfied by statutory relief. 43 CFR 3472.1-2(e)(6) does not state "once qualified, always qualified" and the statement regarding the intent that the "Congress envisioned a single qualification process for purposes of assuring compliance with section 3" is not supportable when the plain, express language of the Mineral Leasing Act states otherwise. The relevant part of section 2(a)(2)(A) states: "when such entity *is not*, except as provided for in section 7(b) of this Act, producing coal from the lease deposits in commercial quantities" as opposed to referring to a completed

event. It refers to an ongoing condition. Section 2(a)(2)(A)'s requirement that coal be produced in commercial quantities is a requirement for the duration of the subject lease. This comment was rejected.

One comment stated that "the existing 43 CFR 3453.3-2(a) (1985), which provides for notice to the applicant to permit the applicant to cure application deficiencies, should be amended to provide notice to both the assignor and the assignee, no matter which party is the applicant." While this comment has merit, this final rulemaking is not the appropriate vehicle with which to address this recommendation. The Department of the Interior is examining 43 CFR Part 3480 to determine whether any changes to the existing regulations are necessary. This comment will be considered during that examination.

One comment stated: "Under the language of proposed 43 CFR [sic] § 3472.1-2(e)(4)(i)(C), the applicant for the LMU or its affiliate would be disqualified under section 3 [sic]. The reason for disqualification will be lack of production before any production is required by section 3. It would appear that the wording should be altered to read: 'the authorized officer determines the LMU would be producing in commercial quantities on the date the first lease in the LMU is held for ten years as provided in paragraph (e)(1)(i) of this section or the effective date of the LMU, whichever is later.'" As proposed, 43 CFR 3472.1-2(e)(4)(i)(C), applied solely to logical mining units that were being formed and which would contain a Federal coal lease that would *otherwise disqualify* the Federal coal lessee under section 2(a)(2)(A) because it has been held for 10 years and is not producing in commercial quantities. Therefore, the comment has misread the proposed rulemaking and the language has not been changed in this final rulemaking. This comment was rejected.

One comment stated that the "proposed rule is silent on coal lease assignments, but we believe the intent is to employ the self-certification process for determining compliance for coal lease assignments as well as MLA lease issuance." As proposed, 43 CFR 3472.1-2(e)(2) stated, in part: "seeking to obtain an interest in a lease" As used throughout 43 CFR Group 3400, the term "lease" means any Mineral Leasing Act Federal coal lease. An assignment is the transfer of an interest in the lease. Such transfers of Federal coal leases are prohibited to entities disqualified under section 2(a)(2)(A) by existing regulation. Therefore, the basic assumption in this

comment is correct. The intent is to also apply the self-certification process for determining compliance for Federal coal lease assignments as well as a Federal coal lease issuance.

One comment stated that should the proposed 43 CFR 3472-1-2(e)(4)(iii) "rule be retained, we believe that the word 'adverse' in 'adverse decision' must be explained. We suspect the word is intended to refer to a disapproval of the application; however, at least for an LMU application, disapprovals are not the only reason for appeal. The applicant may receive an approval and still take issue with and appeal other decisions associated with approval, such as the recoverable reserves estimate. . . . If the proposed rule is not deleted, it, at a minimum, should be worked so that only IBLA appeals of application disapprovals lift the section 3 [sic] immunity. The apparent intent of this provision—to prevent lessees from automatically filing IBLA appeals to preserve their immunity—is not applicable in the case of an IBLA appeal of an approved application, since the approval itself has already extended the immunity." The term "adverse" is clearly intended to be a disapproval of any of the 3 pending actions. If the logical mining unit is approved, then an adverse decision on the pending request for approval is not at issue. However, this comment confuses approval of a logical mining unit containing a Federal coal lease that would otherwise disqualify the lessee under section 2(a)(2)(A) with an extension of immunity from the section 2(a)(2)(A) lease-qualification provision. This is clearly a misunderstanding. Such an approved logical mining unit only "protects" such Federal coal leases contained in the approved logical mining unit if the logical mining unit recoverable coal reserves are being produced. If the logical mining unit is not producing, the lessee would be disqualified from lease issuance pursuant to section 2(a)(2)(A).

Editorial changes have been made as necessary.

The principal authors of this final rulemaking are Allen B. Agnew and Pamela J. Lewis, Division of Solid Mineral Operations, and Rob Cervantes, Division of Fluid Mineral Leasing, Bureau of Land Management, assisted by the staff of the Division of Legislation and Regulatory Management, Bureau of Land Management, and the Office of the Solicitor, Department of the Interior.

It is hereby determined that this rulemaking does not constitute a major Federal action significantly affecting the quality of the human environment and that no detailed statement pursuant to section 102(2)(C) of the National

Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C)) is required.

The Department of the Interior has determined that this document is not a major rule under Executive Order 12291 and that it 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.). The economic impact of this rulemaking is not significant and its impact will fall equally on all affected entities, whether large or small.

This proposed rulemaking contains no information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3507.

List of Subjects

43 CFR Part 3100

Government contracts, Mineral royalties, Oil and gas exploration, Public lands—mineral resources, Reporting and recordkeeping requirements, Surety bonds.

43 CFR Part 3400

Administrative practice and procedure, Coal, Government contracts, Intergovernmental relations, Mines, Public lands—mineral resources.

43 CFR Part 3470

Coal, Government contracts, Mineral royalties, Mines, Public lands—mineral resources, Reporting and recordkeeping requirements, Surety bonds.

43 CFR Part 3500

Government contracts, Mineral royalties, Public lands—mineral resources, Reporting and recordkeeping requirements, Surety bonds.

Under the authority of the Mineral Leasing Act of 1920, as amended and supplemented (30 U.S.C. 181 et seq.), the Mineral Leasing Act for Acquired Lands of 1947, as amended (30 U.S.C. 351-359) and the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1701 et seq.), Part 3100, Group 3100, Parts 3400 and 3470, Group 3400 and Part 3500, Group 3500, all of Subchapter C, Chapter II of Title 43 of the Code of Federal Regulations, are amended as set forth below:

December 2, 1986.

James E. Cason,

Acting Assistant Secretary of the Interior.

PART 3100—[AMENDED]

1. The authority citation for Part 3100 continues to read:

Authority: The Mineral Leasing Act of 1920, as amended and supplemented (30 U.S.C. 181 et seq.), the Mineral Leasing Act for Acquired

Lands of 1947, as amended (30 U.S.C. 351-359), the Alaska National Interest Lands Conservation Act (16 U.S.C. 3101 et seq.), the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1701 et seq.), the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 760 et seq.), the Act of May 21, 1930 (30 U.S.C. 301-306), the Omnibus Budget Reconciliation Act of 1981 (Pub. L. 97-35), the Department of the Interior Appropriations Act, Fiscal Year 1981 (Pub. L. 96-514), the Refuge Administration Act of 1966 (16 U.S.C. 688dd-ee), the Independent Offices Appropriation Act of 1952 (31 U.S.C. 483a) and the Attorney General's Opinion of April 2, 1941 (40 Op. Atty. Gen. 41).

§ 3102.5 [Amended]

2. Section 3102.5 is amended by removing from where it appears the phrase "and (d)" and replacing it with the figure "(d)" and by removing the period at the end of paragraph (d) and adding the phrase "; and (e) except for an assignment or transfer under Subpart 3106 of this title, in compliance with section 2(a)(2)(A) of the Act (compliance is determined for Federal coal leases in accordance with § 3472.1-2(e) of this title), in which case the signature on an application or lease constitutes evidence of compliance. A lease issued to any entity in violation of this paragraph (e) shall be subject to the cancellation provisions at § 3108.3 of this title. The term 'entity' is defined at § 3400.0-5(rr) of this title."

PART 3400—[AMENDED]

3. The authority citation for Part 3400 continues to read:

Authority: The Mineral Leasing Act of 1920, as amended and supplemented (30 U.S.C. 181 et seq.), the Mineral Leasing Act for Acquired Lands of 1947, as amended (30 U.S.C. 351-359), the Multiple Mineral Development Act of 1954 (30 U.S.C. 521-531 et seq.), the Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. 1201 et seq.), the Department of Energy Organization Act of 1977 (42 U.S.C. 7101 et seq.) and the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1701 et seq.).

4. Section 3400.0-5 is amended by adding new paragraph (rr) to read:

§ 3400.0-5 Definitions

* * * * *

(rr) For the purposes of section 2(a)(2)(A) of the Act:

(1) "Arm's length transaction" means the transfer of an interest in a lease to an entity that is not controlled by or under common control with the transferor.

(2) "Bracket" means a 10-year period that begins on the date that coal is first produced on or after August 4, 1976, from a lease that has not been made subject to the diligence provisions of

Part 3480 of this title on the date of first production.

(3) "Controlled by or under common control with," based on the instruments of ownership of the voting securities of an entity, means:

(i) Ownership in excess of 50 percent constitutes control;

(ii) Ownership of 20 through 50 percent creates a presumption of control; and

(iii) Ownership of less than 20 percent creates a presumption of noncontrol.

(4) "Entity" means any person, association, or corporation, or any subsidiary, affiliate, or persons controlled by or under common control with such person, association, or corporation.

(5) "Holds and has held" means the cumulative amount of time that an entity holds any working interest in a lease on or after August 4, 1976. The "holds and has held" requirement of section 2(a)(2)(A) of the Act is lessee-specific for each lease. "Working interest" includes both record title interests and arrangements whereby an entity has the ability to determine when, and under what circumstances, the rights granted by the lease to develop coal will be exercised.

(6) "Producing" means actually severing coal, or operating an ongoing mining operation in accordance with standard industry operation practices. A lease is deemed to be producing, even though:

(i) Severance is temporarily suspended for reasons beyond the reasonable control of the operator/lessee, as that term is defined at § 3480.0-5(a)(2) of this title, including but not limited to factors such as: Dragline or other equipment moving, breakdown, or repair; overburden removal; sale of coal from stockpiles; vacations and holidays; orders of governmental authorities; and failure of customers to take coal; or

(ii) Severed coal is being processed, loaded, or transported from the point of severance to the point of sale.

PART 3470—[AMENDED]

5. The authority citation for Part 3470 continues to read:

Authority: 30 U.S.C. 181 et seq. and 30 U.S.C. 351-359.

6. Section 3472.1-2(e) is revised to read:

§ 3472.1-2 Special leasing qualifications.

(e)(1)(i) On or after December 31, 1986, no lease shall be issued and no existing lease shall be transferred, to any entity, that holds and has held for 10 years any

lease from which the entity is not producing the coal deposits in commercial quantities, except as authorized under the advance royalty or suspension provisions of Part 3480 of this title, or paragraphs (e)(4) or (5) of this section.

(ii) An entity seeking to obtain a working interest in a lease, or approval of a transfer under subpart 3453 of this title, shall qualify both on the date of determination of lessee qualifications and on the date the lease is issued or transfer approved.

(iii) Once a lease has been issued to a qualified entity or transfer approved for a lease under subpart 3453 of this title, disqualification at a later date shall not result in surrender of that lease, or rescission of the approved transfer, except as provided in paragraph (e)(4) of this section.

(2)(i) Any entity seeking to obtain a lease or approval of a transfer of a lease pursuant to 43 CFR Group 3400 of this title shall certify, in writing, that the entity is in compliance with the Act and the requirements of this subpart. The entity's self-certification statement shall include:

(A) A statement that the entity is qualified to be issued a lease or to have a transfer approved in accordance with the presumption of control or the presumption of noncontrol requirements at § 3400.0-5(rr) of this title, and in accordance with the producing requirements at paragraph (e)(8) of this section;

(B) Justification rebutting the presumption of control requirements at § 3400.0-5(rr) of this title, if the entity's instruments of ownership of the voting securities of another entity or of its voting securities by another entity are 20 through 50 percent. The authorized officer, based on the written self-certification statement and other relevant information, shall determine whether the entity has rebutted the presumption of control.

(ii) If a lease is issued, or a transfer approved under subpart 3453 of this title, to an entity based upon an improper, written self-certification of compliance, the authorized officer shall administratively cancel the lease, or rescind the approved transfer, after complying with § 3452.2-2 of this title.

(3) The authorized officer may require an entity holding or seeking to hold an interest in a lease, to furnish, at any time, further evidence of compliance with the special leasing qualifications of this subpart.

(4)(i) An entity, seeking to qualify for lease issuance, or transfer approval under subpart 3453 of this title, shall not be disqualified under the provisions of

this subpart if it has one of the following actions pending before the authorized officer for any lease that would otherwise disqualify it under this subpart:

(A) Request for lease relinquishment; or

(B) Application for arm's-length lease assignment; or

(C) Application for approval of a logical mining unit that the authorized officer determines would be producing on its effective date.

(ii) Once a lease has been issued, or transfer approved, to an entity that qualifies under paragraph (e)(4)(i) of this section, an adverse decision by the authorized officer on the pending action, or the withdrawal of the pending action by the applicant, shall result in termination of the lease or rescission of the transfer approval. Such decision of the authorized officer shall be effective, regardless of appeal of that decision. The possibility of lease termination shall be included as a special stipulation in every lease issued to an entity that qualifies under paragraph (e)(4) of this section.

(iii) The entity shall not qualify for lease issuance or transfer under paragraph (e)(4)(i) of this section during the pendency of an appeal before the Office of Hearings and Appeals from an adverse decision by the authorized officer on any of the actions described in paragraph (e)(4)(i) of this section.

(iv)(A) Where an entity, qualified under this section, had an approved transfer of a lease under subpart 3453 of this title, the transferor retained a right-of-first-refusal, and the entity wishes to relinquish such lease if such lease would otherwise disqualify the entity under this subpart, the entity may file the relinquishment under subpart 3452 of this title. However, the entity shall:

(1) Submit sufficient documentation for the authorized officer to determine that, in fact, such a right-of-first-refusal exists and prevents approval or disapproval by the authorized officer of the pending relinquishment;

(2) Submit with the request for approval of the relinquishment a statement that action by the authorized officer on the pending relinquishment be conditioned on the execution, or lack thereof, of the assignment under the right-of-first-refusal, as well as on the approval or disapproval of the assignment, if executed, under subpart 3453 of this title;

(3) Submit the assignment signed by the entity as well as proof that it has been submitted to the transferor that retained the right-of-first-refusal (e.g., copy of certified mail delivery); and

(4) Submit the name(s) and address(es) of the transferor(s) that retained the right-of-first-refusal.

(B) If the authorized officer determines, based on the information supplied under paragraph (e)(4)(iv)(A) of this section, that the right-of-first-refusal prevents action on the pending relinquishment, the authorized officer will send, via certified mail, return receipt requested, a request for additional information to the transferor that retained the right-of-first-refusal. The request shall state that the transferor that retained the right-of-first-refusal shall comply with subpart 3453 of this title within 30 days of receipt. If the transferor that retained the right-of-first-refusal does not comply within the 30-day time frame, the authorized officer will:

(1) Disapprove the pending assignment and so notify the entity and the transferor that retained the right-of-first-refusal; and

(2) Process the request for relinquishment under subpart 3452 of this title.

(C) If the authorized officer determines, pursuant to the information submitted under paragraph (e)(4)(iv)(A) of this section, that the right-of-first-refusal does not prevent action on the request for relinquishment, the authorized officer will:

(1) Disapprove the pending assignment and so notify the entity and the transferor that retained the right-of-first-refusal; and

(2) Process the request for relinquishment under subpart 3452 of this title.

(5) Leases that have been mined out (i.e., all recoverable reserves have been exhausted), as determined by the authorized officer, may be held for such purposes as reclamation without disqualification of the entity, or any of its affiliates, under the provisions of this subpart.

(6)(i) The authorized officer shall determine the date of first production for the purposes of establishing the beginning of the bracket, if applicable.

(ii) An entity shall not be disqualified under the provisions of this subpart if each lease that the entity holds is:

(A) Producing and is within its bracket;

(B) Producing and has produced commercial quantities during the bracket.

(C) Producing and has achieved production in commercial quantities (an entity holding such a lease is disqualified under section 2(a)(2)(A) of the Act from the end of the bracket until production in commercial quantities is achieved), for leases which fail to

produce commercial quantities within the bracket;

(D) Producing in compliance with the diligent development and continued operation provisions of Part 3480 of this title, for leases which began their first production of coal on or after August 4, 1976, after becoming subject to the diligence provisions of Part 3480 of this title;

(E) Contained in an approved logical mining unit which is producing coal in accordance with the logical mining unit stipulations of approval pursuant to § 3487.1 (e) and (f) of this title; or

(F) Relieved of a producing obligation pursuant to paragraphs (e) (1), (4), or (5) of this section.

* * * * *

PART 3500—[AMENDED]

7. The authority citation for Part 3500 continues to read:

Authority: The Mineral Leasing Act of 1920, as amended and supplemented (30 U.S.C. 181 et seq.); the Mineral Leasing Act for Acquired Lands of 1947, as amended (30 U.S.C. 351-359), the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1701 et seq.); Reorganization Plan No. 3 of 1946 (5 U.S.C. Appendix); sec. 3 of the Act of September 1, 1949 (30 U.S.C. 192c); the Act of June 30, 1950 (16 U.S.C. 508(b)); the Act of June 8, 1926 (30 U.S.C. 291-293); the Act of March 3, 1933, as amended (47 Stat. 1487); sec. 10 of the Act of August 4, 1939 (43 U.S.C. 387); the Act of October 8, 1964 (16 U.S.C. 460n et seq.); the Act of November 8, 1968 (16 U.S.C. 460q et seq.); the Act of October 2, 1968 (16 U.S.C. 90c et seq.); the Act of October 27, 1972 (16 U.S.C. 460dd et seq.); the Alaska National Interest Lands Conservation Act (16 U.S.C. 460mm-2—460mm-4); the Independent Offices Appropriations Act (31 U.S.C. 9701).

6. Section 3502.1 is amended by adding a new paragraph (d) to read:

§ 3502.1 Who may hold leases and permits.

* * * * *

(d) Except for an assignment or sublease under § 3506 of this title, a lease for leasable minerals shall be issued only to an entity if it is in compliance with section 2(a)(2)(A) of the act (compliance is determined for Federal coal leases in accordance with § 3472.1-2(e) of this title). A lease issued to any entity in violation of this paragraph (d) shall be subject to the cancellation provisions at § 3509.4 of this title. The term 'entity' is defined at § 3400.0-5(rr) of this title."

[FR Doc. 86-27519 Filed 12-4-86; 8:45 am]

BILLING CODE 4310-84-M

FEDERAL EMERGENCY MANAGEMENT AGENCY

44 CFR Part 302

Civil Defense; State and Local Emergency Management Assistance Program (EMA)

AGENCY: Federal Emergency Management Agency (FEMA).

ACTION: Final rule.

SUMMARY: This final rule delegates to the FEMA Regional Directors authority to reallocate surplus EMA funds to States within their regions during the first 9 months of each fiscal year.

EFFECTIVE DATE: December 5, 1986.

FOR FURTHER INFORMATION CONTACT: John McKay, Office of Emergency Management Programs, Federal Emergency Management Agency, Washington, DC 20472 (202-646-4252).

SUPPLEMENTARY INFORMATION: The change in procedures will allow a FEMA Regional Director the authority for the first 9 months of each fiscal year to reallocate unused portions of a State's EMA allocation among the other States as, in his/her best judgment, will best assure the adequate development of the civil defense capability of the Nation. This delegation is additional to, and does not replace that of, the Associate Director for State and Local Programs and Support (44 CFR 2.61(j)(7)).

The Regional Directors need not apply the same formula for the reallocations as is done for the original allocations by the Director. Therefore, the paragraphs (l) and (m) in § 302.5 are to be revised to accommodate the redelegation from the Director to the Regional Directors to reallocate EMA funds under certain conditions.

Nonapplicability

As Federal funding to which these regulations will be applicable is less than \$100,000,000 annually, the regulation is not considered to be a major regulation requiring a regulatory analysis under Executive Order 12291. The regulation also is applicable to States to which the funding is made available and, thus, is not subject to the requirements of the Regulatory Flexibility Act which is concerned with small entities. No regulatory flexibility analysis will be prepared. This amendment does not call for any collection of information requiring clearance under section 3504(h) of the Paperwork Reduction Act and, as the regulation is administrative in character, there is no requirement for environmental clearance.