

November 7 meeting, at which the Board will consider a proposal for procurement of an existing building in New York City, is closed to the public. The November 8 meeting is open to the public. The Board expects to discuss the matters stated in the agenda which is set forth below. Requests for information about the meeting should be addressed to the Secretary of the Board, David F. Harris, at (202) 268-4800.

Monday Session

November 7—1:00 p.m.

1. Consideration of Procurement of Existing Building in New York City. (Stanley W. Smith, Assistant Postmaster General, Facilities Department)

Tuesday Session

November 8—8:30 a.m. (Open)

1. Minutes of the Previous Meeting, October 3-4, 1988.
2. Remarks of the Postmaster General.
3. Board of Governors 1989 Meeting Schedule.
4. Report on Compliance with the Budget Reconciliation Act of 1987. (Comer S. Coppie, Senior Assistant Postmaster General, Finance Group.)
5. Quarterly Report on Service Performance. (Ann McK. Robinson, Consumer Advocate)
6. Report on Administrative Services Group Programs. (Mitchell H. Gordon, Senior Assistant Postmaster General, Administrative Services Group)
7. Report on Human Resources Group Programs. (David H. Charters, Senior Assistant Postmaster General, Human Resources Group)
8. Report on Long-Life Vehicles. (John J. Davin, Assistant Postmaster General, Procurement and Supply Department)
9. Capital Investments. (Stanley W. Smith, Assistant Postmaster General, Facilities Department)
 - a. Advanced Facer-Canceler System. (Warren P. Denise, Acting Assistant Postmaster General, Engineering and Technical Support Department)
 - b. South Suburban, Illinois, General Mail Facility.
 - c. Southwest Suburban, Illinois, Mail Processing Center.

- d. Chicago, Illinois, Bulk Mail Center Expansion.
10. Tentative Agenda for December 5-6, 1988, Meeting in Tampa, Florida.

David F. Harris,
Secretary.

[FR Doc. 88-25229 Filed 10-27-88; 3:15 pm]

BILLING CODE 7710-12-M

POSTAL SERVICE

Board of Governors; Notice of Vote To Close Meeting

By telephone vote, a majority of the members contacted and voting, the Board of Governors voted to close to public observation its meeting scheduled for November 7, 1988, at United States Postal Service Headquarters, 475 L'Enfant Plaza, SW., Washington, DC. The meeting will involve consideration of a proposal for procurement of an existing building in New York, New York.

The meeting is expected to be attended by the following persons: Governors Alvarado, del Junco, Griesemer, Hall, Nevin, Pace, and Setrakian; Postmaster General Frank; Deputy Postmaster General Coughlin; Secretary for the Board Harris; and General Counsel Cox.

The Board determined that, pursuant to section 552b(c)(9)(B) of Title 5, United States Code, and § 7.3(i) of Title 39, Code of Federal Regulations, the discussion of this matter is exempt from the open meeting requirement of the Government in the Sunshine Act (5 U.S.C. 552b(b)), because it is likely to disclose information, the premature disclosure of which would likely significantly frustrate implementation of a proposed procurement action.

In accordance with section 552b(f)(1) of Title 5, United States Code, and § 7.6(a) of Title 39, Code of Federal Regulations, the General Counsel of the United States Postal Service has certified that in his opinion the meeting may properly be closed to public

observation, pursuant to section 552b(c)(9)(B) of title 5, United States Code, and § 7.3(i) of title 39, Code of Federal Regulations.

Requests for information about the meeting should be addressed to the Secretary for the Board, David F. Harris, at (202) 268-4800.

David F. Harris,

Secretary.

[FR Doc. 88-25230 Filed 10-27-88; 3:15 pm]

BILLING CODE 7710-12-M

SECURITIES AND EXCHANGE COMMISSION Agency Meeting

"FEDERAL REGISTER" CITATION OF
PREVIOUS ANNOUNCEMENT: (53 FR 41648
October 24, 1988).

STATUS: Closed meeting.

PLACE: 450 Fifth Street, NW.,
Washington, DC

DATE PREVIOUSLY ANNOUNCED:
Wednesday, October 19, 1988.

CHANGE IN THE MEETING: Additional
item.

The following item was considered at a closed meeting on Tuesday, October 25, 1988, following the 10:00 a.m. open meeting:

Regulatory matter bearing enforcement implications.

Commissioner Fleischman, as duty officer, determined that Commission business required the above change.

At times changes in Commission priorities require alterations in the scheduling of meeting items. For further information and to ascertain what, if any, matters have been added, deleted or postponed, please contact: Kevin Fogarty at (202) 272-3195.

Jonathan G. Katz,

Secretary.

October 26, 1988.

[FR Doc. 88-25191 Filed 10-27-88; 3:14 pm]

BILLING CODE 8010-01-M

Final Report

Monday
October 31, 1988

Part II

Department of the Interior

**Office of Surface Mining Reclamation and
Enforcement**

**30 CFR Parts 761, 785, 816, and 817
Surface Coal Mining and Reclamation
Operations; Permanent Regulatory
Program; Areas Unsuitable for Mining;
Special Categories of Mining; Surface
Mining Activities; Underground Mining
Activities; Proposed Rule**

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Parts 761, 785, 816 and 817

Surface Coal Mining and Reclamation Operations; Permanent Regulatory Program; Areas Unsuitable for Mining; Special Categories of Mining; Surface Mining Activities; Underground Mining Activities

AGENCY: Office of Surface Mining Reclamation and Enforcement, Interior.

ACTION: Proposed rule.

SUMMARY: The Office of Surface Mining Reclamation and Enforcement (OSMRE) of the U.S. Department of the Interior (DOI) proposes to amend its permanent program regulations in five general subject areas. Except for the subject area of disposal of excess spoil on preexisting benches, the proposed amendments generally respond to U.S. district court and court of appeals decisions.

In the subject area of values incompatible with surface coal mining operations, the rule would amend the definition of *no significant recreational, timber, economic, or other values incompatible with surface coal mining operations* by removing the phrase "beyond an operators ability to repair." This would eliminate reclaimability as a criterion in determining compatibility with surface coal mining operations.

In the subject area of AOC variances, the rule would revise regulations governing permits incorporating variances from AOC restoration requirements to limit their application to steep slope mining.

In the subject area of disposal of excess spoil on preexisting benches, the rule would revise regulations governing the disposal of excess spoil on preexisting benches to conform them with the general requirements for backfilling and grading.

In the subject area of coal mine waste, the rule would revise the general requirements governing the disposal of coal mine waste to add to the existing requirement that it be placed in a controlled manner the additional requirement that it be hauled or conveyed. This addition would prohibit the end or side dumping of coal mine waste. Also in this subject area, the rule would remove regulations requiring the handling of hazardous noncoal mine waste in accordance with the Resource Conservation and Recovery Act and its implementing regulations.

Finally, in the subject area of contemporaneous reclamation/

backfilling and grading, the rule would add new regulations reinstituting backfilling and grading time and distance requirements. It would require the completion of backfilling and grading within a certain time or distance following coal removal, or under a schedule established by the regulatory authority. Also in this subject area, the rule would define *thin overburden* and *thick overburden* using general standards relating to the restoration of AOC, and would establish performance standards governing the backfilling and grading of thin and thick overburden.

Any previous suspensions of these and related regulations that would be obviated by these amendments would be removed.

DATES:

Written Comments: OSMRE will accept written comments on the proposed rule until 5:00 p.m. Eastern time on December 30, 1988.

Public Hearings: Upon request, OSMRE will hold public hearings on the proposed rule in Washington, DC, Pittsburgh, Pennsylvania, and Denver, Colorado, at 9:30 a.m. local time. The hearing in Washington, DC, will be held on December 19, 1988; in Pittsburgh, Pennsylvania, on December 21, 1988, and in Denver, Colorado on December 23, 1988. If sufficient interest is shown, OSMRE may also hold public hearings in other locations at times and on dates to be announced prior to the hearings.

OSMRE will accept requests for public hearings until 4:30 p.m. Eastern time on November 30, 1988. Individuals wishing to attend but not testify at a hearing should contact the person identified under "FOR FURTHER INFORMATION CONTACT" beforehand to verify that the hearing will be held.

ADDRESSES:

Written Comments: Hand-deliver to the Office of Surface Mining Reclamation and Enforcement, Administrative Record, Room 5131, 1100 L Street NW., Washington, DC; or mail to the Office of Surface Mining Reclamation and Enforcement, Administrative Record, Room 5131-L, 1951 Constitution Avenue NW., Washington, DC 20240.

Public Hearings: Department of the Interior Auditorium, 18th and C Streets NW., Washington, DC; Parkway Center Inn, 875 Greentree Road, Pittsburgh, Pennsylvania; and Brooks Towers, 2nd Floor Conference Room, 1020 15th Street, Denver, Colorado.

Request for public hearing: Submit requests orally or in writing to the person and address specified under "FOR FURTHER INFORMATION CONTACT."

FOR FURTHER INFORMATION CONTACT:

Dermot Winters, Office of Surface Mining Reclamation and Enforcement, U.S. Department of the Interior, 1951 Constitution Avenue NW., Washington, DC 20240.

SUPPLEMENTARY INFORMATION:

- I. Public Comment Procedures
- II. Background
- III. Discussion of Proposed Rule
- IV. Procedural Matters

I. Public Comment Procedures**Written Comments**

Written comments submitted on the proposed rule should be specific, should be confined to issues pertinent to the proposed rule, and should explain the reason for any recommended change. Where practicable, commenters should submit three copies of their comments (see "ADDRESSES"). Comments received after the close of the comment period (see "DATES") or delivered to addresses other than those listed above may not be considered or included in the Administrative Record for the final rule.

Public Hearings

OSMRE will hold public hearings on the proposed rule on request only. The times, dates, and addresses for the scheduled hearings are specified previously in this notice (see "DATES" and "ADDRESSES").

Any person interested in participating at a hearing should inform Dermot Winters (see "FOR FURTHER INFORMATION CONTACT") either orally or in writing of the desired hearing location by 4:30 p.m. Eastern time on November 30, 1988. If no one has contacted Mr. Winters to express an interest in participating in a hearing at a given location by that date, the hearing will not be held. If only one person expresses an interest, a public meeting rather than a hearing may be held and the results included in the Administrative Record.

If a hearing is held, it will continue until all persons in attendance wishing to testify have been heard. To assist the transcriber and ensure an accurate record, OSMRE requests that persons who testify at a hearing give the transcriber a copy of their testimony. To assist OSMRE in preparing appropriate questions, OSMRE also requests that persons who plan to testify submit to OSMRE at the address previously specified for the submission of written comments (see "ADDRESSES") an advance copy of their testimony.

II. Background

Section 201(c)(2) of the Surface Mining Control and Reclamation Act of 1977

(SMCRA or the Act), 30 U.S.C. 1211(c)(2), directs the Secretary of the Interior (the Secretary), acting through the Office of Surface Mining Reclamation and Enforcement (OSMRE), to "publish and promulgate such rules and regulations as may be necessary to carry out the purposes and provisions of this Act." Section 501(b) of the Act, 30 U.S.C. 1251(b), directs the Secretary to "promulgate and publish in the Federal Register regulations covering a permanent regulatory procedure for surface coal mining and reclamation operations performance standards * * *." The resulting OSMRE regulations are codified at 30 CFR Chapter VII.

This proposed rule concerns five general subject areas in Chapter VII. These subject areas have been grouped together in this combined rule for administrative convenience. The pertinent legislative, regulatory and litigation background of each proposed section in these subject areas is discussed in turn under the following general headings, with the affected sections listed in parentheses.

For convenience, where the discussion concerns similar sections in Part 816, which applies to surface mining activities, and Part 817, which applies to underground mining activities, these sections are cited together in the heading as §§ 816.[]/817.[], but in most cases only Part 816 is discussed in the text. In such cases the discussion applies equally to Parts 816 and 817 unless otherwise noted.

A. Values Incompatible with Surface Coal Mining Operations (§ 761.5)

Section 522(e)(2) of the Act, 30 U.S.C. 1272(e)(2), with certain exceptions, prohibits surface coal mining operations "on any Federal lands within the boundaries of any national forest [unless] the Secretary finds that there are no significant recreational, timber, economic, or other values which may be incompatible with such surface [coal] mining operations * * *." (Emphasis added). The corresponding OSMRE permanent program regulation appears at 30 CFR 761.11(b).

In implementing this requirement, the 1979 OSMRE regulations at 30 CFR 761.5 defined the emphasized language in section 522(e)(2) in part to mean: "[T]hose significant values which could be damaged by, and are not capable of existing together with, surface coal mining operations because of the undesirable effects mining would have on those values, either on the area included in the permit application or on off-site areas which could be affected by

mining. * * *" 44 FR 15341 (March 13, 1979).

On June 10, 1982 (47 FR 25278) OSMRE proposed, and on September 3, 1983 (48 FR 41312) OSMRE promulgated, a rule revising the 1979 definition. The revised definition dropped the introductory term "no" as unnecessary, changed the phrase "significant values" to "values to be evaluated for their significance," changed the term "offsite areas which could be affected by mining" to "affected areas," and of particular relevance to this proposed rule, inserted after the word "damage" the phrase "beyond an operator's ability to repair or restore."

Thus, following revision in 1983 the corresponding portion of the definition read: "Significant recreational, timber, economic, or other values incompatible with surface coal mining operations means those values to be evaluated for their significance which could be damaged beyond an operator's ability to repair or restore by, and are not capable of existing together with, surface coal mining operations because of the undesirable effects mining would have on those values, either on the area included in the permit application or on other affected areas." 30 CFR 761.5 (1983).

This revised definition was challenged by the citizen and environmental plaintiffs in *In re Permanent Surface Mining Regulation Litigation (In re Permanent II (Round III))*, 620 F. Supp. 1519 at 1556-57 (D.D.C. July 15, 1985). The challengers contended that the definition was contrary to the Act because under it mining could be permitted in national forests as long as reclamation was possible. The U.S. District Court for the District of Columbia agreed with this contention and remanded the definition. *Id.* at 1557. On November 20, 1986 (51 FR 41952) OSMRE suspended the definition "insofar as the listed values are evaluated for compatibility solely in terms of reclamation." *Id.* at 41960-41961.

OSMRE appealed, and the U.S. Court of Appeals for the District of Columbia Circuit affirmed the district court ruling. *NWF v. Hodel*, No. 84-5743, slip op. at 116-121 (DC Cir. January 29, 1988). Like the district court, the court of appeals ruled that the revised regulation was contrary to the intent of the Congress and to elementary principles of statutory construction.

OSMRE now proposes to revise the § 761.5 definition of *significant recreational, timber, economic, or other values incompatible with surface coal mining operations* in conformance with

the district court and court of appeals decisions.

B. AOC Variances (§§ 785.16 and 816.133(d)/817.133(d))

Section 515(b)(3) of the Act, 30 U.S.C. 1265(b)(3), generally requires "all surface coal mining and reclamation operations * * * to * * * compact * * * and grade in order to restore the approximate original contour of the land with all highwalls, spoil piles, and depressions eliminated * * *." For steep slope mining, section 515(d)(2), 30 U.S.C. 1265(d)(2), imposes an additional requirement for "[c]omplete backfilling with spoil material * * * to cover completely the highwall and return the site to the approximate original contour * * *."

The term *approximate original contour* (AOC), as used in these sections, is defined in section 701(2) of the Act, 30 U.S.C. 1291(2), and in the regulations at 30 CFR 701.5. For the text of the definition, which is not essential to an understanding of this portion of the proposed rule, see the subsequent heading, E. Contemporaneous Reclamation/Backfilling and Grading.

Sections 515(e)(1) through (e)(6) of the Act, 30 U.S.C. 1265(e)(1) through (e)(6), allow regulatory authorities to permit variances from AOC under certain circumstances. Section 515(e)(1) allows State regulatory programs, and requires Federal regulatory programs, to include procedures for permitting variances for the purposes set forth in section 515(e)(3). Section 515(e)(2) explicitly allows the regulatory authority to grant a variance from the steep-slope requirement of section 515(d)(2).

Accordingly, on March 13, 1979 (44 FR 15372) OSMRE promulgated at 30 CFR 785.16 a regulation which authorized the regulatory authority to grant a variance from AOC for nonmountaintop removal, steep slope mining. This regulation was challenged by the coal industry in *In re Permanent Surface Mining Regulation Litigation (In re Permanent I)*, No. 79-1144, slip op. at 69-70 (D.D.C. February 26, 1980), as unduly restrictive.

In upholding the § 785.16 limitation of AOC variances to steep slope mining, the U.S. District Court for the District of Columbia in *In re Permanent I* said: "Section 515(e) of the Act contains one variance provision: it applies to steep slopes. Rather than calling for a general variance mechanism, section 515(e)(1) establishes the right to apply for a variance * * *. Section 515(e)(2) restricts the variance application to the contour restoration requirements of subsection 515(d)(2) (steep slopes). Whatever ambiguity may be read into

section 515 is dispelled upon examination of the legislative history." *Id.* at 69-70.

Subsequently, OSMRE reconsidered the legislative history of the Act and concluded "that the section allowing for AOC variances was not limited to steep slope operations." 48 FR 39900 (September 1, 1983). Accordingly, OSMRE expanded the coverage of § 785.16 to permit variances from AOC on both steep and non-steep slope terrain. 48 FR 39892 (September 1, 1983), as amended at 48 FR 44780 (September 30, 1983). At the same time (48 FR 39892), OSMRE revised its regulations governing postmining land use to include at 30 CFR 816.133(d) criteria for permitting variances in accordance with revised § 785.16. OSMRE set out its rationale for these revisions in a detailed analysis of the legislative history of section 515(e), and of the issues considered by the district court in *In re Permanent I*. 48 FR 39899-900.

These revised regulations were challenged by the citizen and environmental plaintiffs in *In re Permanent II (Round III)*, 620 F. Supp. at 1574-1578. In response, the district court remanded the revised regulations "as inconsistent with law to the extent they permit[ed] a variance beyond the variance for steep slopes embodied in section 515(e)(2) [of the Act]." *Id.* at 1577-78.

On November 20, 1986 (51 FR 41952), OSMRE suspended §§ 785.16 and 816.133(d) insofar as they authorized any variance from AOC outside a steep slope area. The district court remand was appealed by the coal industry, and affirmed by the court of appeals in *NWF v. Hodel*. Slip op. at 141-146. In affirming the district court, the court of appeals "rel[ie]d on the text of section 515(e)(2), which specifically states that variances may be granted from the AOC requirements of section 515(d)(2), the steep slope mining provision; it does not, as enacted, state that non-steep slope mining AOC requirements may be waived or excused, and neither does it reference section 515(b)(3), the general AOC provision." *Id.* at 145. The court of appeals found nothing in the legislative history that would change its reading of section 515(e). *Id.* at 146.

OSMRE now proposes to revise § 785.16, and to remove the suspension of that section and of §§ 816.133(d) and 817.133(d), in conformance with the district court and court of appeals decisions.

C. Disposal of Excess Spoil on Preexisting Benches (§§ 816.74/817.74)

Section 515(b)(22) of the Act, 30 U.S.C. 1265(b)(22), specifies general

performance standards for the placement of excess spoil material resulting from surface coal mining and reclamation activities. Section 516(b)(10) of the Act, 30 U.S.C. 1266(b)(10), authorizes similar performance standards for underground mining activities, with "such modifications as are necessary to accommodate the distinct difference between surface and underground coal mining."

The existing OSMRE permanent program regulations implementing these statutory performance standards appear at 30 CFR 816.71 through 816.74 for surface mining activities. In particular, § 816.74, which is affected by this proposed rule, governs the disposal of excess spoil on preexisting benches.

The original OSMRE permanent program regulations governing the disposal of excess spoil appeared at 30 CFR 816.71 through 816.74 (1979). These 1979 regulations did not provide specifically for the disposal of excess spoil on preexisting benches.

Regulations to allow the disposal of excess spoil on preexisting benches were proposed by OSMRE on May 16, 1980 (45 FR 32331). As a result of public comment, these regulations were repropoed in substantially different form on July 20, 1981 (46 FR 37283). Final regulations at 30 CFR 816.75 were promulgated on April 29, 1982 (46 FR 18553).

On June 8, 1982 (47 FR 24954), as part of an overall revision of its regulations governing the disposal of excess spoil, OSMRE proposed to revise § 816.75. The final revised and renumbered regulations at 30 CFR 816.74 were promulgated on July 29, 1983 (48 FR 32910). Paragraphs (a) through (d) of the revised regulations were essentially the same as the 1982 regulations, and a new paragraph (e) was added to allow in certain circumstances the disposal of excess spoil from an upper actively-mined bench to a lower preexisting bench by means of gravity transport.

In July 1986, OSMRE released for public review and comment the final draft of a study titled, "Encouraging Abandoned Mine Reclamation Via Remining: A Federal, State and Industry Initiative." On September 23, 1986, OSMRE held a public meeting in Washington, DC, to discuss the initiatives identified in this draft study. Copies of the draft study and a transcript of the public meeting have been placed in the administrative record for this rule.

One of the initiatives identified in the draft study and discussed at the public meeting was "Reclaiming Abandoned Mine Lands with Excess Spoil." A sub-issue within this initiative was the

disposal of excess spoil on preexisting benches, and, particularly, whether the requirements for such disposal were excessive as compared to the general requirements for backfilling and grading. Both in written comments and orally at the public meeting, commenters pointed out that the differences in these requirements were inconsistent with the similar geologic and engineering characteristics of preexisting and active-mining benches.

In response to these comments, OSMRE proposes to revise §§ 816.74/817.74 to conform their requirements for disposal of excess spoil on preexisting benches with the backfilling and grading requirements of §§ 816.102/817.102.

D. Coal Mine Waste (§§ 816.81/817.81 and 816.89/817.89)

Recognizing the problems posed by improper disposal of coal waste, the Congress included in the Act a number of performance standards governing waste disposal. These performance standards appear in section 515 of the Act, 30 U.S.C. 1265, for surface mining activities, and in section 516 of the Act, 30 U.S.C. 1266, for underground mining activities.

To implement these statutory performance standards, the 1979 permanent program included at 30 CFR 701.5 a definition of *coal processing waste*, and at 30 CFR 816.81 to 816.93 (44 FR 15395 and 15422 (March 13, 1979)), regulations governing the disposal of coal mine waste. Several changes in the 1979 regulations, which are not otherwise relevant to this discussion but are noted for completeness, were made on August 18, 1980 (45 FR 54753), and on November 20, 1980 (45 FR 76932).

On September 26, 1983 (40 FR 44006) OSMRE promulgated at 30 CFR 701.5 a revised definition of *coal processing waste*, and new definitions of *coal mine waste*, *impounding structure*, and *refuse pile*. At the same time (40 FR 44006), OSMRE promulgated at 30 CFR 816.81, 816.83, 816.87 and 816.89, a comprehensive revision of the 1979 regulations. These new regulations were challenged in *In re Permanent II (Round III)*, 620 F. Supp. at 1534-1538.

In re Permanent II (Round III) involved two coal waste issues that are dealt with by this rule: (1) Controlled transport of coal waste; and (2) Environmental Protection Agency (EPA) regulations on hazardous wastes.

1. Controlled Transport of Coal Waste (§§ 816.81(a)/817.81(a))

In *In re Permanent II (Round III)* the district court rejected §§ 816.81(a)/817.81(a) as arbitrary and capricious to

the extent they allowed end or side dumping of coal, a practice in hilly mining areas of placing material at a disposal site by means of gravity. 620 F. Supp. at 1534-1535.

On November 20, 1988 (51 FR 41952), OSMRE suspended §§ 816.81(a)/817.81(a) insofar as they allowed end or side dumping of coal mine waste. OSMRE now proposes to amend these sections, and to remove their suspension, in conformance with the district court decision.

2. EPA Regulations on Hazardous Wastes (§§ 816.89(d)/817.89(d))

Section 816.89(d) of the 1983 regulations required that "any noncoal mine waste defined as 'hazardous' under section 3001 of the Resource Conservation and Recovery Act (RCRA) (Pub. L. 94-580, as amended) and 40 CFR Part 261 shall be handled in accordance with the requirements of Subtitle C of RCRA and any implementing regulations." 48 FR 44006, 44030 and 44032 (September 26, 1983). As OSMRE noted in the preamble to the final rule, this was done at the suggestion of the U.S. Environmental Protection Agency (EPA). *Id.* at 44027.

In *In re Permanent II (Round III)*, 620 F. Supp. at 1538, the coal industry challenged this section of the regulations, which the district court remanded for lack of adequate notice and comment. The district court said:

"Industry challenges this rule because it contends that Congress gave the Secretary exclusive responsibility to regulate every kind of waste at coal mines in SMCRA permits, and expressly provided that EPA's regulations for hazardous wastes under RCRA shall not be applied to coal mines.

"The court need not spend much time detailing the statutory analysis because it concludes that the rule was promulgated without adequate notice and comment under the APA [(Administrative Procedure Act)] * * *.

"The Secretary * * * did not respond to the Industry's APA challenge, but instead attempted to explain that the rule neither broadens nor diminishes the Secretary's rules on the disposal of noncoal waste. Industry takes a vastly different view of the effect of the regulation, and makes a lengthy argument that has nowhere been considered by the Secretary prior to this litigation. Second, Industry is able to point to legal and practical complications that result from the rules." *Id.*

On November 20, 1988 (51 FR 41952), OSMRE suspended §§ 816.89(d)/817.89(d). OSMRE now proposes to remove these sections from its regulations in conformance with the district court decision.

E. Contemporaneous Reclamation/Backfilling and Grading (§§ 816.100, 816.101, 816.104(a) and 816.105(a))

Section 515(b)(16) of the Act, 30 U.S.C. 1265(b)(16), provides for general performance standards to require surface coal mining and reclamation operations to "insure that all reclamation efforts proceed in an environmentally sound manner and as contemporaneously as practicable with [such operations]."

In addition, section 515(b)(3) of the Act, 30 U.S.C. 1265(b)(3), with two exemptions, provides for general performance standards requiring that "all surface coal mining operations backfill, compact * * * and grade in order to restore the approximate original contour of the land with all highwalls, spoil piles, and depressions eliminated. * * *"

The phrase *approximate original contour* (AOC) is defined in section 701(2) of the Act, 30 U.S.C. 1291(2), and 30 CFR 701.5 generally to mean "that surface configuration achieved by backfilling and grading of the mined area so that the reclaimed area, including any terracing or access roads, closely resembles the general surface configuration of the land prior to mining and blends into and complements the drainage pattern of the surrounding terrain. * * *"

The previously noted exemptions to the AOC restoration requirements of section 515(b)(3) pertain to operations involving either "thin" or "thick" overburden. With respect to thin overburden, section 515(b)(3) provides "[t]hat in surface coal mining which is carried out at the same location over a substantial period of time where the operation transects the coal deposit, and the thickness of the coal deposits relative to the volume of the overburden is large and where the operator demonstrates that the overburden and other spoil and waste materials at a particular point in the permit area or otherwise available from the entire permit area is insufficient, giving due consideration to volumetric expansion, to restore the approximate original contour, the operator, at a minimum, shall backfill, grade, and compact (where advisable) using all available overburden and other spoil and waste materials to attain the lowest practicable grade but not more than the angle of repose, to provide adequate drainage and to cover all acid-forming and other toxic materials, in order to achieve an ecologically sound land use compatible with the surrounding region."

With respect to thick overburden, section 515(b)(3) provides "[t]hat in

surface coal mining where the volume of overburden is large relative to the thickness of the coal deposit and where the operator demonstrates that due to volumetric expansion the amount of overburden and other spoil and waste materials removed in the course of the mining operations are more than sufficient to restore the approximate original contour, the operator shall after restoring the approximate contour, backfill, grade, and compact (where advisable) the excess overburden and other spoil and waste materials to attain the lowest grade but not more than the angle of repose, and to cover all acid-forming, and other toxic materials, in order to achieve an ecologically sound land use compatible with the surrounding region and that such overburden or spoil shall be shaped and graded in such a way as to prevent slides, erosion, and water pollution and is revegetated in accordance with the requirements of this Act."

The OSMRE permanent program promulgated on March 13, 1979 included regulations governing contemporaneous reclamation for surface mining activities at 30 CFR 816.100 (44 FR 15411), and backfilling and grading at 30 CFR 816.101, 816.102, 816.104 and 816.105. 44 FR 15411-15413. Section 816.100 required reclamation efforts to occur as contemporaneously as practicable with mining operations. Section 816.101 provided time and distance schedules as general requirements for backfilling and grading. Sections 816.104 and 816.105 provided for the thin and thick overburden exemptions authorized by section 515(b)(3) of the Act.

On May 24, 1983 (48 FR 23356) OSMRE revised its regulations governing contemporaneous reclamation and backfilling and grading. The revision deleted § 816.101 from the regulations, and added to § 816.100 a provision authorizing regulatory authorities to establish schedules for defining contemporaneous reclamation. At the same time the numerical limits on thin and thick overburden that appeared in §§ 816.104 and 816.105, i.e., plus or minus twenty percent, were deleted and replaced with the statutory language. 48 FR 23355 (May 24, 1983).

The 1983 regulations were challenged in *In re Permanent Surface Mining Regulation (In re Permanent II (Round II))*, 21 ERC 1724, 1744-1746 (D.D.C. October 1, 1984). As a result, the U.S. District Court for the District of Columbia remanded the regulations governing contemporaneous reclamation (§ 816.100; 21 ERC at 1745-46), cut and fill terraces (§ 816.102(g); 21 ERC at 1744-45), thin overburden (§ 816.104(a);

21 ERC at 1746), and thick overburden (§ 816.105(a); 21 ERC at 1746). Generally, the district court found that the remanded regulations lacked sufficient guidance to regulatory authorities beyond what was provided in the Act.

OSMRE appealed the district court ruling, and the court of appeals in *NWF v. Hodel* affirmed the remand with respect to contemporaneous reclamation and thin and thick overburden, but reversed with respect to cut and fill terraces. Slip op. at 78-890. The court of appeals said:

"We hold, in accord with the Secretary, that the Act does not automatically and inevitably require him to 'flesh out' the prescriptions of section 515(b)(3) and (b)(16). Nonetheless, we affirm the remand of the contemporaneous reclamation and thin and thick overburden regulations, for only with respect to terracing did the Secretary adequately explain why guidance beyond the statutory requirements sensibly could not be given to local regulators.

"We note that the Act expressly commands the Secretary to flesh out certain statutory provisions. * * * Nothing in the Act, however, expressly requires the Secretary to flesh out sections 515(b)(3) or (b)(16)." Slip op. at 79 (emphasis in original).

"In short," the court of appeals continued, "We read the Act, in light of its legislative history * * * to afford the Secretary discretion, absent an express statutory instruction to regulate, to decide whether fleshing out is appropriate in light of other concerns. Chief among these concerns is the need to accommodate widely varying local conditions that will not admit of a single, nationwide rule. * * * *Id.* at 80-81 (footnote omitted).

"* * * Under [*Motor Vehicle Mfrs. Ass'n v. State Farm [Mut. Auto. Inc. Co., 463 U.S. 29, 43 (1983)]*] 'the agency must examine the relevant data and articulate a satisfactory explanation' for the revised regulations. * * * The Secretary's accounting for his actions regarding the contemporaneous reclamation, and thin and thick overburden regulations fails to meet this standard; we do not find in the rulemaking record any identified factual basis for, or satisfactory explanation of, the Secretary's conclusion that the variety of local conditions warrants regulations on these matters that simply reiterate the relevant prescriptions in sections 515(b)(3) and (b)(16) of the Act. In contrast, we find that the Secretary adequately explained his revision of the terracing regulation." *Id.* at 81.

In affirming the district court remand of the contemporaneous reclamation regulations, the court of appeals said:

"Section 515(b)(16) of the Act directs mine operators to reclaim land 'as contemporaneously as practicable [to the] mining operations.' In 1979, the Secretary had issued both a general instruction that reclamation occur 'as contemporaneously as practicable with mining operations,' 30 CFR 816.100 (1982), and specific 'time and distance'

standards for backfilling and grading spoil at contour and area strip mines, 30 CFR 816.101 (1982)." *Id.* at 82 (footnotes omitted, brackets in original).

"The 1983 revision retained the general prescription in § 816.100, but eliminated § 816.101 entirely. * * * To support his deletion, the Secretary commented 'that "contemporaneous reclamation" is a relative term which must be interpreted by each State on the basis of the mining conditions in its territory.' * * * Because § 816.101 was devised to account for local differences, we do not find entirely satisfying, as an explanation for scrapping the regulations entirely, the observation that "'contemporaneous reclamation" is a relative term' whose precise meaning depends on local conditions. The core deficiency, however, is that the Secretary has published barely more than a conclusion that the variety of mining conditions across the nation made § 816.101 of the regulations infeasible. *State Farm* requires a 'satisfactory explanation,' one that informs us why he drew his conclusion. The Secretary, in other words, if he determines there is no need to 'flesh out' the statute, must 'flesh out' his explanation so that we can review the rationality of his decision." *Id.* at 83-84 (footnote omitted, emphasis in original).

In affirming the district court remand of the thin and thick overburden regulations, the court of appeals said:

"Section 515(b)(3) of the Act directs mine operators to return land to its 'approximate original contour.' The provision contains an exemption, however, for situations where the spoil is either so thin or thick relative to the coal seam that there is insufficient or too much spoil to permit return to approximate original contour. * * * In 1979, the Secretary issued regulations that defined numerically when a variance from the approximate original contour requirement for too little or too much spoil could be granted. 30 CFR 816.104 and 816.105 (1982).

"In 1983, the Secretary eliminated the numerical definition, permitting a variance whenever the mine operator demonstrates that spoil is either 'insufficient' or 'more than sufficient' to restore land to its approximate original contour. 30 CFR 816.104 and 816.105 (1986). The sole support we have found for this revision is the Secretary's cryptic observation that '[t]he mathematical limit * * * has proved to be impractical because of its preciseness.' * * * We do not know from this unadorned statement why no adjusted (less precise) or alternative nationwide rule was ordered in place of the one found impractical. Absent fuller statement of the reason for the revision, we cannot intelligently determine whether the Secretary has a 'satisfactory explanation' for his action." *Id.* at 84-87 (footnotes omitted, brackets in original).

OSMRE now proposes to amend §§ 816.100, 816.104 and 816.105, and to add a new § 816.101, in conformance with the district court and court of appeals decisions.

III. Discussion of Proposed Rule

The proposed rule includes a number of similar sections in Part 816, which applies to surface mining activities, and Part 817, which applies to underground mining activities. For convenience, these similar sections are cited together in the following headings as §§ 816.[]/817.[], but in most cases only Part 816 is discussed in the text. In such cases the discussion applies equally to Part 817 unless otherwise noted.

A. Section 761.5—Definitions

OSMRE proposes to revise its 30 CFR 761.5 definition of *significant recreational, timber, economic, or other values incompatible with surface coal mining operations*. The revised definition would comply with the court of appeals decision upholding the district court remand of this definition. (See related discussion in II. Background, under the heading, A. Value Incompatible with Surface Coal Mining Operations.) In conformance with those decisions, OSMRE proposes to delete from the definition the phrase "beyond an operator's ability to repair or restore." As the courts have ruled, the operator's ability to reclaim the land may not be used as a criterion for determining compatibility under this definition.

B. Section 785.16—Permits Incorporating Variances from AOC Restoration Requirements for Steep Slope Mining

(For a related proposal, see the subsequent heading, I. Sections 816.133/817.133—AOC Variances)

1. Section Heading

OSMRE proposes to revise the section heading of 30 CFR 785.16 to include the phrase "for steep slope mining," and thus emphasize that this section authorizes variances from approximate original contour (AOC) only for steep slope surface coal mining and reclamation operations.

2. Section 785.16(a)

Section 785.16 authorizes the regulatory authority to issue a permit which includes a variance from certain AOC restoration requirements. The district court ruled, and the court of appeals agreed, that such a variance is authorized by the Act only for steep slope mining. (See related discussion in II. Background, under the heading, B. AOC Variances.)

In accordance with these court decisions, OSMRE proposes to revise § 785.16(a) to limit the granting of AOC variances to "steep slope surface coal mining and reclamation operations."

The quoted phrase duplicates the corresponding wording of the 1979 regulation.

OSMRE further proposes to remove the November 20, 1986, suspension of § 816.16, which the proposed revision would render superfluous. (See II. Background, regarding suspension). The remainder of § 816.16 would remain unchanged.

C. Sections 816.74/817.74—Disposal of Excess Spoil: Preexisting Benches

OSMRE proposes to revise § 816.74 to conform its requirements for the disposal of excess spoil on preexisting benches with the backfilling and grading requirements of 30 CFR 816.102. This proposal was prompted by public comment received in response to an OSMRE draft study on reining initiatives and at a related public meeting. (See related discussion in II. Background, under the heading, C. Disposal of Excess Spoil on Preexisting Benches.)

The proposed rule would redesignate §§ 816.74(b), (c), (d) and (e) as §§ 816.74(c), (d), (e) and (g), respectively; would revise §§ 816.74(a) and (f); and would add new §§ 816.74(b) and (h). A discussion of each of these proposed changes follows under separate subheadings for each paragraph of this section.

1. Sections 816.74(a)/817.74(a)

OSMRE proposes to substitute for the existing references in § 816.74(a) to the general requirements for the disposal of excess spoil, new references to the corresponding general requirements for backfilling and grading. Also, to account for difference in the existing and newly-referenced sections, OSMRE proposes to add to § 816.74(a) a requirement that the affected portion of the preexisting bench be permitted. A detailed explanation follows.

Currently, § 816.74(a) authorizes the regulatory authority to approve the disposal of excess spoil through placement on preexisting benches "provided that all the standards set forth in § 816.71(a), (b)(1) [and] (d) through (i) * * * are met." The referenced § 816.71 contains general requirements for the disposal of excess spoil.

The proposed rule would replace the current references to § 816.71 with references to § 816.102 (c), (e) through (h), and (j). Section 816.102 contains the backfilling and grading counterparts to the excess spoil disposal regulations in § 816.71. This substitution would conform the requirements for the disposal of excess spoil on a preexisting bench with the existing requirements for

the backfilling and grading of an active mining bench. As explained subsequently in greater detail, OSMRE proposes to do this in recognition of the similar characteristics of preexisting and active mining benches.

Currently-referenced § 816.71(a) requires that the disposal of excess spoil occur "within the permit area." The substituted paragraphs of § 816.102 do not explicitly refer to the permit area. To account for this difference, proposed § 816.74(a) would explicitly require that "the affected portion of the preexisting bench is permitted." Under this provision, the affected portion of the preexisting bench could be either within the permit area where the excess spoil was generated, or in another permit area.

Currently-referenced § 816.71(a) also covers adverse effects on surface and groundwater, mass stability and movement, and the suitability of the final fill for reclamation and revegetation. The proposed rule addresses effects on surface and ground water by reference to §§ 816.102 (c), (e) through (h), and (j), and by the addition of § 816.74(e)(3). (See subsequent discussion of § 816.74(e)(3).)

The proposed rule addresses effects on mass stability and movement by reference to §§ 816.102 (c), (e), (g) and (j), and by the addition of § 816.74(e)(4). (See subsequent discussion of § 816.74(e)(4).) The suitability of the final fill for reclamation and revegetation are addressed in the proposed rule by reference to § 816.102 (e) through (h), and (j).

Currently-referenced § 816.71(b)(1) requires that excess spoil fill and appurtenant structures be designed using current, prudent engineering practices; meet any design criteria established by the regulatory authority; and be certified by a qualified registered professional engineer. OSMRE proposes to delete from § 816.74(a) the reference to § 816.71(b)(1) because existing § 816.74(c), which requires that "[t]he fill shall be designed, using current, prudent engineering practices," itself provides sufficient design standards. Note, however, that under referenced § 816.102(e), which itself references 30 CFR 816.81, the requirement of § 816.81(c) for design certification would apply to any fill constructed on a preexisting bench using coal processing waste or underground development waste.

Currently-referenced §§ 816.71 (d) and (e)(2) require foundation analysis, keyway cuts, and rock toe buttresses, and prescribe spoil placement and the thickness of spoil lifts. These measures are appropriate where excess spoil is

disposed of on sloping ground and there is a need to ensure stability of the fill structure. Corresponding requirements do not appear in § 816.102 since backfilling and grading operations typically are conducted on relatively flat benches where these special measures are not needed to ensure stability. Because preexisting benches are similar to active contour mining benches that are regulated under § 816.102, the reference to the requirements of §§ 816.71 (d) and (e)(2) was deleted from the proposed rule.

Currently-referenced § 816.71(e)(1) provides for the removal of vegetative and organic materials prior to the placement of excess spoil; the removal, segregation, storage and redistribution of topsoil; and the use of organic material as mulch or as an additive to topsoil. Proposed new § 816.74(b) contains corresponding requirements. (See subsequent discussion of § 816.74(b).)

Currently-referenced §§ 816.71(e) (3), (4) and (5) address final fill configuration and terraces, prohibit permanent impoundments, authorize small depressions, and require adequate covering of acid-, toxic-forming and combustible materials. Proposed § 816.74(a) substitutes references to § 816.102(f) through (h), which contain corresponding requirements. Although the rule would not explicitly prohibit permanent impoundments, § 816.74(a) does not reference § 816.102(i), which authorizes permanent impoundments in certain circumstances, and the regulatory authority would not be authorized to allow permanent impoundments on preexisting benches.

Currently-referenced § 816.71(f) addresses drainage control, including diversions and underdrains. Deleting the reference to § 816.71(f), proposed new § 816.74(e)(4) would require that "[t]he preexisting bench shall be backfilled and graded to * * * [p]revent water infiltration into the backfill from springs, water courses, or seeps, and ensure stability." (See subsequent discussion of § 816.74(e)(4).)

Currently-referenced § 816.71(g) addresses surface area stabilization, erosion and revegetation. Proposed § 816.74(a) substitutes a reference to § 816.102(j), the backfilling and grading counterpart in terms of stabilization and erosion. In addition, the last sentence of § 816.71(g) would be replicated as new § 816.74(f) to require that "[a]ll disturbed areas, including diversion channels that are not ripped or otherwise protected, shall be revegetated upon completion of construction." (See subsequent discussion of § 816.74(f).)

Currently-referenced § 816.71(h) addresses periodic inspections of excess spoil fill structures during construction. OSMRE proposes to delete this requirement from § 816.74 since the backfilling and grading regulations at § 816.102 do not require these inspections. Because a preexisting bench provides a relatively flat surface, the design and construction of fill structures on preexisting benches are not as critical as for structures regulated under § 816.71, and inspections during construction are not necessary. Note, however, that under referenced § 816.102(e), which itself references 30 CFR 816.83, the requirement of § 816.83(d) for design inspection during construction would apply to any fill constructed on a preexisting bench using coal processing waste or underground development waste.

Currently-referenced § 816.71(i) addresses the disposal of coal mine waste in excess spoil fills. Proposed § 816.74(a) substitutes a reference to § 816.102(e), the backfilling and grading counterpart. While § 816.71(i) requires disposal of coal mine waste only in accordance with § 816.83, § 816.102(e) requires disposal in accordance with both §§ 816.81 and 816.83, and thus is more inclusive. While § 816.71(i) limits disposal to coal mine waste that is nontoxic and nonacid forming, proposed § 816.74 would allow the disposal of such materials as long as they were covered adequately, as provided in referenced § 816.102(f).

2. Sections 816.74(b)/817.74(b)

Currently-referenced § 816.71(e)(1) addresses the removal of vegetative and organic materials from the disposal area, and the removal, segregation, storage and the redistribution of topsoil. In place of this reference, proposed new § 816.74(b) would require that "[a]ll vegetation shall be removed from the affected portion of the preexisting bench prior to placement of the excess spoil," would cross-reference the permanent program topsoil performance standards at 30 CFR 816.22, and would allow the use of topsoil substitutes in accordance with § 816.22(b) where insufficient topsoil was available on the preexisting bench.

3. Sections 816.74(c)/817.74(c)

Existing § 816.74(b) would be redesignated as proposed § 816.74(c).

4. Sections 816.74(d)/817.74(d)

Existing § 816.74(c) would be redesignated as proposed § 816.74(d).

5. Sections 816.74(e)/817.74(e)

Existing § 816.74(d) (1) and (2) require that the preexisting bench be backfilled and graded to achieve the most moderate slope possible which does not exceed the angle of repose, and to eliminate the highwall to the maximum extent technically practical. Only minor editorial revisions are proposed for the corresponding redesignated §§ 816.74(e) (1) and (2).

Proposed new § 816.74(e)(3) would require that the preexisting bench be backfilled and graded to "[m]inimize erosion and water pollution both on and off the site." This replicates the backfilling and grading provision at § 816.102(a)(4), which is not referenced by the rule. This requirement, in conjunction with other previously discussed provisions, would provide the requisite hydrologic balance protection.

Proposed new § 816.74(e)(4) would require that the preexisting bench be backfilled and graded to "[p]revent water infiltration into the backfill from springs, water courses, or seeps, and ensure stability." This corresponds with § 816.71(f), which currently is referenced by existing § 816.74(a). (See preceding discussion of § 816.74(a).)

6. Sections 816.74(f)/817.74(f)

Proposed new § 816.74(f) would require that "[a]ll disturbed areas, including diversion channels that are not ripped or otherwise protected, shall be revegetated upon completion of construction." This replicates the last sentence of § 816.71(g), which currently is referenced by § 816.74(a). (See preceding discussion of § 816.74(a).)

7. Sections 816.74(g)/817.74(g)

Existing § 816.74(e) would be redesignated as proposed § 816.74(g).

D. Sections 816.81/817.81—Coal Mine Waste: General Requirements

This rule would amend § 816.81 in response to the district court decision concerning end or side dumping of coal mine waste. (See related discussion in II. Background, under the heading, D.1. Controlled Transport of Coal Waste.) As previously noted, the district court said that OSMRE was not required to prohibit end or side dumping, but need only explain why this practice was reasonable. Nevertheless, OSMRE proposes to reintroduce into § 816.81 the placement method of "hailed or conveyed" as it appeared prior to the 1983 rule, and thus to prohibit the final placement of coal mine waste by end or side dumping, consistent with the discussion of this issue in the preamble

to the 1979 rule at 44 FR 15209-10 (March 13, 1979).

OSMRE continues to maintain, as it did in the preamble to the 1983 rule (48 FR 44011), that the controlled gravity placement of coal mine waste is not inconsistent with the Act, and that the legislative history of the Act does not indicate that the Congress intended to regulate the means of transporting coal mine waste to the disposal site.

The practice of transporting coal mine waste through methods other than direct hauling is well documented in the technical literature. (See, for example, "Engineering and Design Manual—Coal Refuse Disposal Facilities," pp. 8.22-8.75, by E. D'Appolonia Consulting Engineers for the Mine Safety and Health Administration.) These methods include conveyor belts and tramways and particularly useful in mountainous terrain where haul road construction is difficult, or where steep grades greatly decrease the efficiency of individual hauling units. (See *id.* at p. 8.45; and "Pit Slope Manual," "Chapter 9: Waste Embankments," p. 96, by the Canada Center for Mineral and Energy Technology.)

However, OSMRE is aware of the dangers associated with the end or side dumping of coal mine waste, and of the need for placement in a controlled manner. Thus, the requirement of proposed § 816.81 that "[c]oal mine waste shall be hailed or conveyed and placed in a controlled manner" would preclude final placement of material by means of gravity through end or side dumping.

E. Sections 816.89(d)/817.89(d)—EPA Regulations on Hazardous Wastes

The district court, without considering the merits of § 816.89(d), concluded that it was promulgated without adequate notice and comment as required by the Administrative Procedure Act. (See related discussion in II. Background, under the heading, D.2. EPA Regulations on Hazardous Wastes.)

OSMRE proposes to remove § 816.89(d) as superfluous because all noncoal mine waste defined as "hazardous" under section 3001 of the Resource Conservation and Recovery Act (RCRA), P.L. 94-580, as amended, and 40 CFR Part 261 is regulated by EPA in accordance with the requirements of Subtitle C of RCRA and its implementing regulations.

F. Section 816.100—Contemporaneous Reclamation

OSMRE proposes to revise existing § 816.100 to remove a requirement which

duplicates a requirement in proposed § 816.101(b).

Proposed new § 816.101 would govern the scheduling of backfilling and grading. (See the immediately following heading, G. Section 816.101—Backfilling and Grading: Time and Distance Requirements.) Proposed § 816.101(b) would authorize the regulatory authority to establish alternative backfilling and grading schedules. This same authorization currently appears as the last sentence of § 816.100, but is more appropriate in the context of § 816.101.

Thus, upon promulgation of § 816.101 the final sentence of existing § 816.100, which states that "[t]he regulatory authority may establish schedules that define contemporaneous reclamation," would become superfluous and be removed.

G. Section 816.101—Backfilling and Grading: Time and Distance Requirements

As discussed previously, in 1983 OSMRE deleted from its regulations § 816.101, which in paragraph (a) set out time and distance requirements for backfilling and grading. (See II. Background, under the heading, E. Contemporaneous Reclamation/Backfilling and Grading; for a related proposal, also see the immediately preceding heading, F. Section 816.100—Contemporaneous Reclamation.) The district court remanded the deletion of § 816.101, and the court of appeals agreed. OSMRE now proposes to add a new § 816.101 in conformance with the district court and court of appeals decisions.

1. Section 816.101(a)

Proposed § 816.101(a) would establish surface coal mining backfilling and grading time and distance schedules for contour and area mining, and authorize the regulatory authority to establish schedules for other surface mining methods. For contour mining, § 816.101(a)(1) would require the completion of backfilling and grading within 60 days or 1,500 linear feet following coal removal. For area mining, § 816.101(a)(2) would require completion within 180 days following coal removal, and not more than four spoil ridges behind the pit being worked, the spoil from the active pit constituting the first ridge.

Under § 816.101(a)(3) the schedules for surface mining methods other than contour or area mining would be as established by the regulatory authority through the State program approval process. Any schedule established by the regulatory authority under § 816.101(a)(3) would have to

incorporate one of the two standards set out in § 816.101(c).

The time and distance requirements of proposed § 816.101(a) are the same as in the 1979 rule. The preamble to that rule (44 FR 15224 (March 13, 1979)) stated that its backfilling and grading schedules were based on an analysis of existing State regulations. During preparation of this proposed rule, OSMRE again reviewed the backfilling and grading schedules in approved State programs. All State programs have adopted either the 1979, or more stringent, schedules. Based on almost ten years of experience, these schedules are fully adequate to meet the goals of the Act for contemporaneous reclamation.

2. Section 816.101(b)

Proposed § 816.101(b) would allow the regulatory authority to establish, through the State program approval process, alternative backfilling and grading schedules in lieu of those set out in § 816.101(a). This responds to comments received during outreach briefings, in which the States requested backfilling and grading guidelines, but also asked to retain discretion in determining alternative schedules. OSMRE is proposing this provision to give State regulatory authorities the flexibility to adopt backfilling and grading schedules which meet State-specific conditions.

The alternative schedules, which would have to be consistent with the schedules set out in § 816.101(a), could apply to geographic units, mining methods, or other categories selected by the regulatory authority. As required by subsequently discussed § 816.101(c), each alternative schedule would be based on either (1) the maximum time interval between removal of the coal and the completion of backfilling and grading; or (2) the maximum extent of the operation between coal removal and the completion of backfilling and grading, as measured in linear feet, number of spoil ridges, or other quantifiable criteria.

Alternative backfilling and grading schedules would be established as State program regulations approved by the Secretary. During the approval process each alternative schedule, with supporting justification, would be reviewed by OSMRE to determine whether it would meet the requirements for contemporaneous reclamation. The review would be based on the climate, terrain, mining methods and other physical conditions in the area to which the schedule would apply.

Under § 816.101(b), for example, a State may wish to demonstrate that the

requirement for backfilling and grading to follow coal removal by not more than sixty days is unrealistic for contour mining operations in that State. In that case the Secretary might approve a longer duration as consistent with § 816.101(a).

3. Section 816.101(c)

Proposed § 816.101(c) would require the regulatory authority to incorporate in any backfilling and grading schedule it established either of the two alternative standards set out in the rule. These standards would apply both to schedules for other surface mining methods established under § 816.101(a)(3), and to alternative schedules established under § 816.101(b).

The two alternative standards are (1) the maximum time interval between coal removal and the completion of backfilling and grading; and (2) the maximum extent of the operation between initial coal removal and the completion of backfilling and grading, as measured in linear feet, number of spoil ridges, or other quantifiable equivalent. These standards correspond with the schedules set out in §§ 816.101(a) (1) and (2), but lack specific numerical requirements, which would be added by the regulatory authority.

4. Section 816.101(d)

Proposed § 816.101(d) would authorize the regulatory authority to extend the time allowed for backfilling and grading a specified portion of the permit area if the permittee demonstrated in accordance with 30 CFR 780.18(b)(3) that additional time was necessary. The 1979 rules at §§ 816.101(a) (1) and (3) for contour and area strip mining, respectively, made similar provision for granting additional time. 44 FR 15411. As under the 1979 rule the regulatory authority could allow additional time for backfilling and grading if, for example, the permittee demonstrated that the time limit of the rule was too restrictive because of weather or local soil conditions. 44 FR 15226.

H. Section 816.104—Backfilling and Grading: Thin Overburden, Section 816.105—Backfilling and Grading: Thick Overburden

As discussed previously, in 1983 OSMRE replaced the numerical limits on thin and thick overburden in §§ 816.104 and 816.105, respectively, with the more general statutory language. (See II. Background, under the heading, E. Contemporaneous Reclamation/Backfilling and Grading.) The district court remanded these sections, and the

court of appeals agreed, seeking a fuller statement of the reasons for the revision. OSMRE now proposes to revise §§ 816.104 and 816.105, and to explain fully its reasons for doing so, in conformance with the district court and court of appeals decisions.

For convenience, the proposed definitions of *thin overburden* and *thick overburden* in §§ 816.104(a) and 816.105(a), respectively, are discussed together under the following combined subheading. The backfilling and grading performance standards for thin and thick overburden in §§ 816.104(b) and 816.105(b), respectively, are then discussed under separate subheadings.

I. Section 816.104(a)—Definition of Thin Overburden, Section 816.105(a)—Definition of Thick Overburden

OSMRE has reorganized §§ 816.104 and 816.105 so that paragraphs (a) of these sections contain definitions of *thin overburden* and *thick overburden*, respectively, and paragraphs (b) contain the corresponding backfilling and grading performance standards. The definitions were not relocated to 30 CFR 701.5 because of their limited applicability. The term *spoil*, which is used in the definitions, is defined at § 701.5 to mean "overburden that has been removed during surface coal mining operations."

Proposed § 816.104(a) defines *thin overburden* as "insufficient spoil and other waste materials available from the entire permit area to restore the disturbed area to its approximate original contour. Insufficient spoil and other waste materials occur where the overburden thickness times the swell factor, plus the thickness of other available waste materials, is less than the combined thickness of the overburden and coal bed prior to removing the coal, so that after backfilling and grading the surface configuration of the reclaimed area would not: (1) [C]losely resemble the surface configuration of the land prior to mining; or (2) [b]lend into and complement the drainage pattern of the surrounding terrain".

Proposed § 816.105(a) defines *thick overburden* as "more than sufficient spoil and other waste materials available from the entire permit area to restore the disturbed area to its approximate original contour. More than sufficient spoil and other waste materials occur where the overburden thickness times the swell factor exceeds the combined thickness of the overburden and coal bed prior to removing the coal, so that after backfilling and grading the surface configuration of the reclaimed area

would not: (1) [C]losely resemble the surface configuration of the land prior to mining; or (2) [b]lend into and complement the drainage pattern of the surrounding terrain".

Each of these two definitions includes three standards which incorporate the requirements of sections 515(b)(3) and 701(2) of the Act. The first standard is the sufficiency of the overburden, and in the case of thin overburden, other waste materials, to restore approximate original contour (AOC). The second and third standards, which are elements of the first, concern the definition of AOC in terms of the surface configuration and drainage pattern off the reclaimed area. OSMRE proposes to adopt these general standards for the following reasons.

The exemptions in section 515(b)(3) of the Act for areas of thin and thick overburden are based on the sufficiency of the overburden to restore the land to AOC. Thin overburden is insufficient to restore AOC; thick overburden is more than sufficient. Thus, whether thin or thick overburden occurs depends fundamentally on the definition of AOC.

Section 701(2) of the Act and the corresponding regulation at 30 CFR 701.5 generally define AOC as "that surface configuration achieved by backfilling and grading of the mined area so that the reclaimed area including any terracing or access roads, [1] closely resembles the general surface configuration of the land prior to mining and [2] blends into and complements the drainage pattern of the surrounding terrain, with all highwalls and spoil piles eliminated * * *." (Emphasis added.)

Under this definition the two principal standards for determining AOC are whether the surface configuration of the reclaimed area would (1) closely resemble the surface configuration of the land prior to mining; and (2) blend into and complement the drainage pattern of the surrounding terrain. In restoring AOC, both of these standards must be met.

The proposed definitions of *thin overburden* and *thick overburden* incorporate these two standards from the definition of AOC as the measure of whether the spoil and other available waste materials are sufficient to restore AOC. The definitions apply these two standards for AOC in the disjunctive, using the term *or*, because a failure to meet either standard would prevent the restoration of AOC, and thus establish the occurrence of thin or thick overburden.

Unlike the proposed rule, the 1979 regulations defined thin and thick overburden in precise numerical terms as having a final thickness of twenty

percent less or more, respectively, than the initial thickness of the overburden and coal. 44 FR 15412-13. As it did in 1983, OSMRE again rejects those precise numerical terms as impractical for evaluating the utility of the overburden and other available waste materials to restore AOC. As the Congress has stated, "[AOC] is, of necessity, a flexible standard which contemplates different mining circumstances". H.R. Rep. No. 95-218, 95th Cong., 1st Sess. 96 (1977).

Defining thin and thick overburden in precise numerical terms is impractical because of the diversity of surface configurations and drainage patterns to which the proposed rule would apply throughout the coal mining regions of the United States. What might constitute a gross variation from AOC on flat prairie land might be barely perceptible in rugged mountain terrain. Depending on the circumstances, inflexible numerical standards might be either too loose or too stringent, and seldom ideal.

The use of the word *approximate* in the term AOC in itself supports the adoption of a subjective standard. OSMRE is aware of no technical basis for universally relating a standard of twenty percent more or less overburden, or any other numerical standard, to the restoration of AOC. The previously quoted definitions of AOC at section 701(2) of the Act and 30 CFR 701.5 employ no such numerical standard. The existing backfilling and grading performance standards at 30 CFR 816.102, which in paragraph (a) require backfilling and grading to "[a]chieve the approximate original contour," employ no such numerical standard.

Evaluations of post-mining surface configuration and drainage pattern involve subjective professional judgments that must be custom-tailored to approximate the terrain at any given mine. The responsible regulatory authority is best equipped to determine the sufficiency of overburden to restore AOC in its own jurisdiction on a case-by-case basis using general standards.

For these reasons OSMRE believes it is preferable to define *thin overburden* and *thick overburden* generally to conform with the standards of the Act, while giving the regulatory authority sufficient discretion to apply these standards in a sound professional manner to the diverse conditions which prevail at individual mines in each particular State.

2. Section 816.104(b)—Thin Overburden Performance Standards

Proposed § 816.104(b) sets out the performance standards that apply where thin overburden, as defined in

§ 816.104(a), occurs within the permit area. The permittee would establish the occurrence of thin overburden in accordance with 30 CFR 780.18(b)(3), which governs the content of the permit application reclamation plan as it relates to backfilling, soil stabilization, compacting and grading.

Where the occurrence of thin overburden was established, § 816.104(b) would require the permittee at a minimum to (1) use all spoil and other waste materials available from the entire permit area to attain the lower practicable grade, but not more than the angle of repose; and (2) meet the general backfilling and grading requirements of 30 CFR 816.102 (a)(2) through (j).

The performance standards in §§ 816.104(b) (1) and (2) are the same as were adopted by OSMRE in 1983 (48 FR 23369), and are intended to complement the general backfilling and grading performance standards in § 816.102. Section 816.104(b)(1) derives directly from the thin overburden exemption in section 515(b)(3) of the Act. Section 816.104(b)(2) incorporates all of the requirements of § 816.102, which sets out the general requirements for backfilling and grading, except for those in § 816.102(a)(1), which requires the restoration of AOC, and those in § 816.102(k), which lists a number of exemptions, including one for thin overburden.

The only practicable difference between the general performance standards in § 816.102 and those for thin overburden in § 816.104(b) is that for the latter the achievement of AOC is not required. Together, §§ 816.104(b) (1) and (2) incorporate all of the requirements for backfilling, grading and compacting thin overburden that appear in section 515(b)(3) of the Act.

3. Section 816.105(b)—Thick Overburden Performance Standards

Proposed § 816.105(b) sets out the performance standards that apply where thick overburden, as defined in § 816.105(a), occurs within the permit area. The permittee would establish the occurrence of thick overburden in accordance with 30 CFR 780.18(b)(3), which governs the content of the permit application reclamation plan as it relates to backfilling, soil stabilization, compacting and grading.

Where the occurrence of thick overburden was established, § 816.105(b) would require the permittee at a minimum to (1) restore the approximate original contour and then use the remaining spoil and other waste materials to attain the lowest practicable grade, but not more than the angle of repose; (2) meet the general

backfilling and grading requirements of 30 CFR 816.102 (a)(2) through (j); and (3) dispose of any excess spoil in accordance with 30 CFR 816.71 through 816.74.

The performance standards in §§ 816.105(b) (1) through (3) are the same as were adopted by OSMRE in 1983 (48 FR 23369), and are intended to complement the general backfilling and grading performance standards in § 816.102. Section 816.105(b)(1) derives directly from the thin overburden exemption in § 515(b)(3) of the Act. Section 816.105(b)(2) incorporates all of the requirements of § 816.102, which sets out the general requirements for backfilling and grading, except for those in § 816.102(a)(1), which requires the restoration of AOC, and those in § 816.102(k), which lists a number of exemptions, including one for thick overburden. Section 816.105(b)(3) references the existing regulations governing the disposal of excess spoil, and would ensure that any spoil and other waste materials that would exceed the angle of repose are disposed of in accordance with the requirements of the Act.

The only practical differences between the general performance standards in § 816.102 and those for thick overburden in § 816.105(b) are that under the latter (1) after AOC is restored the permittee may continue to use any remaining spoil and other waste materials to attain the lowest practicable grade, but not more than the angle of repose; and (2) the permitted must dispose of any excess spoil in accordance with §§ 816.71 through 816.74. Together, these sections incorporate all of the requirements for backfilling, grading and compacting thick overburden that appear in section 515(b)(3) of the Act.

I. Sections 816.133(d)/817.133(d)—AOC Variances

Existing §§ 816.133(d)/817.133(d) set out criteria for the granting of a variance from the requirement to restore disturbed areas to their approximate original contour, including in paragraphs (d)(1) that the variance be granted in accordance with § 785.16. This reference to remanded § 785.16 promoted the district court to remand §§ 816.133(d)/817.133(d) to the extent they permitted a variance other than for steep slope mining. (See related discussion in II. Background, under the heading, B. AOC Variances, and in this section of the preamble under the heading, B. Section 785.16—Permits Incorporating Variances from AOC Restoration Requirements for Steep Slope Mining.)

As explained previously, OSMRE suspended §§ 816.133(d)/817.133(d) in compliance with the district court decision. The proposed revision of § 785.16 would render these suspensions superfluous. Thus, OSMRE proposes to remove the suspensions of §§ 816.133(d)/817.133(d) upon promulgation of final § 785.16.

IV. Procedural Matters

Federal Paperwork Reduction Act

The collections of information contained in this rule have been submitted to the Office of Management and Budget for approval as required by 44 U.S.C. 3501 *et seq.* The collection of this information will not be required until it has been approved by the Office of Management and Budget.

Public reporting burden for this collection of information is estimated to average 10 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information including suggestions for reducing the burden to, Information Collection Clearance Officer, Office of Surface Mining Reclamation and Enforcement, 1951 Constitution Ave., NW., Washington, DC 20240; and the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503.

Executive Order 12291 and Regulatory Flexibility Act

The DOI has determined that the proposed rule is not a major rule under the criteria of Executive Order 12291 (February 17, 1981), and certifies 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 rule would affect a relatively small number of surface coal mining operations. The rule does not distinguish between small and large entities. The economic effects of the proposed rule are estimated to be minor, and no incremental economic effects are anticipated as a result of the rule.

National Environmental Policy Act

OSMRE has prepared a draft environmental assessment (EA), and has made an interim finding that the proposed rule would not significantly affect the quality of the human environment under section 102(2)(C) of the National Environmental Policy Act

of 1969 (NEPA), 42 U.S.C. 4332(2)(C). It is anticipated that a finding of no significant impact will be approved for the final rule in accordance with OSMRE procedures under NEPA. The EA is on file in the OSMRE Administrative Record at the address specified previously (see "ADDRESSES"). The EA will be completed, and a finding on the significance of any resulting impacts will be made, prior to promulgation of the final rule.

Author

The principal author of this proposed rule is Albert A. Kashinski, Division of Surface Mining, Office of the Solicitor, U.S. Department of the Interior, Washington, DC. 20240.

List of Subjects

30 CFR Part 761

Historic preservation, National forests, National parks, National trails system, National wild and scenic rivers system, Surface mining, Underground mining, Wilderness areas, Wildlife refuges.

30 CFR Part 785

Reporting and recordkeeping requirements, Surface mining, Underground mining.

30 CFR Part 816

Environmental protection, Reporting and recordkeeping requirements, Surface mining.

30 CFR Part 817

Environmental protection, Reporting and recordkeeping requirements, Underground mining.

Accordingly, it is proposed to amend 30 CFR Parts 761, 785, 816 and 817 as set forth below:

Dated: August 16, 1988.

James E. Cason,

Acting Assistant Secretary—Land and Minerals Management.

PART 761—AREAS DESIGNATED BY ACT OF CONGRESS

1. The authority citation for Part 761 continues to read as follows:

Authority: 30 U.S.C. 1201, *et seq.*

§ 761.5 [Amended]

2. Section 761.5 is amended by removing from the definition of *significant recreational, timber, economic, or other values incompatible with surface coal mining operations* the phrase "beyond an operator's ability to repair or restore."

PART 785—REQUIREMENTS FOR PERMITS FOR SPECIAL CATEGORIES OF MINING

3. The authority citation for Part 785 is revised to read as follows:

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

4. The suspension published in the Federal Register of November 20, 1986 at 51 FR 41961 is removed for § 785.16.

5. Section 785.16 is amended by revising the heading and the first sentence of paragraph (a) to read as follows:

§ 785.16 Permits incorporating variances from approximate original contour restoration requirements for steep slope mining.

(a) The regulatory authority may issue a permit for nonmountaintop removal, steep slope, surface coal mining and reclamation operations which includes a variance from the requirements to restore the disturbed areas to their approximate original contour that are contained in §§ 816.102, 816.104, and 816.107, or 817.102 and 817.107 of this chapter. * * *

PART 816—PERMANENT PROGRAM PERFORMANCE STANDARDS—SURFACE MINING ACTIVITIES

6. The authority citation for Part 816 continues to read as follows:

Authority: Pub. L. 95-87 (30 U.S.C. 1201 *et seq.*), and Pub. L. 100-34, unless otherwise noted.

7. Section 816.74 is amended by redesignating paragraphs (b), (c), (d) and (e) as paragraphs (c), (d), (e) and (g), respectively, by revising paragraphs (a) and (f), and by adding paragraphs (b) and (f) to read as follows:

§ 816.74 Disposal of excess spoil: Preexisting benches.

(a) The regulatory authority may approve the disposal of excess spoil through placement on a preexisting bench if the affected portion of the preexisting bench is permitted and the standards set forth in §§ 816.102 (c), (e) through (h), and (j), and the requirements of this section are met.

(b) All vegetation shall be removed from the affected portion of the preexisting bench prior to placement of the excess spoil. Any available topsoil on the bench shall be removed, stored and redistributed in accordance with § 816.22 of this part. Substitute or supplemental materials may be used in accordance with § 816.22(b) of this part. * * *

(e) The preexisting bench shall be backfilled and graded to—

(1) Achieve the most moderate slope possible which does not exceed the angle of repose;

(2) Eliminate the highwall to the maximum extent technically practical;

(3) Minimize erosion and water pollution both on and off the site; and

(4) Prevent water infiltration into the backfill from springs, water courses, or seeps, and ensure stability.

(f) All disturbed areas, including diversion channels that are not ripped or otherwise protected, shall be revegetated upon completion of construction.

8. Section 816.81 is amended by revising the introductory text of paragraph (a) to read as follows:

§ 816.81 Coal mine waste: General requirements.

(a) *General.* All coal mine waste shall be placed in new or existing disposal areas within a permit area, which are approved by the regulatory authority for this purpose. Coal mine waste shall be hauled or conveyed and placed in a controlled manner to—

§ 816.89 [Amended]

9. Section 816.89 is amended by removing paragraph (d).

§ 816.100 [Amended]

10. Section 816.100 is amended by removing the last sentence.

11. Section 816.101 is added to read as follows:

§ 816.101 Backfilling and grading: Time and distance requirements.

(a) Except as provided in paragraphs (b) and (d) of this section, backfilling and grading for surface mining activities shall be completed according to one of the following schedules:

(1) *Contour mining.* Within 60 days or 1,500 linear feet following coal removal;

(2) *Area mining.* Within 180 days following coal removal, and not more than four spoil ridges behind the pit being worked, the spoil from the active pit constituting the first ridge; or

(3) *Other surface mining methods.* In accordance with the schedule established by the regulatory authority through the State program approval process.

(b) In lieu of the schedules set out in paragraph (a) of this section, the regulatory authority may establish through the State program approval process alternative backfilling and grading schedules which are consistent

with that paragraph. Alternative schedules may apply to geographic units, mining methods, or other categories selected by the regulatory authority.

(c) Each backfilling and grading schedule established by the regulatory authority shall incorporate one of the following two standards governing the completion of backfilling and grading:

(1) Maximum time interval between coal removal and the completion of backfilling and grading; or

(2) Maximum extent of the operation between coal removal and the completion of backfilling and grading, as measured in linear feet, number of spoil ridges, or other quantifiable equivalent.

(d) The regulatory authority may extend the time allowed for backfilling and grading a specified portion of the permit area if the permittee demonstrates in accordance with § 780.18(b)(3) of this chapter that additional time is necessary.

12. Section 816.104 is revised to read as follows:

§ 816.104 Backfilling and grading: thin overburden.

(a) *Definition.* *Thin overburden* means insufficient spoil and other waste materials available from the entire permit area to restore the disturbed area to its approximate original contour. Insufficient spoil and other waste materials occur where the overburden thickness times the swell factor, plus the thickness of other available waste materials, is less than the combined thickness of the overburden and coal bed prior to removing the coal, so that after backfilling and grading the surface configuration of the reclaimed area would not:

(1) Closely resemble the surface configuration of the land prior to mining; or

(2) Blend into and complement the drainage pattern of the surrounding terrain.

(b) *Performance standards.* Where thin overburden occurs within the permit area, the permittee at a minimum shall:

(1) Use all spoil and other waste materials available from the entire permit area to attain the lowest practicable grade, but not more than the angle of repose; and

(2) Meeting the requirements of §§ 816.102 (a)(2) through (j) of this part.

13. Section 816.105 is revised to read as follows:

§ 816.105 Backfilling and grading: Thick overburden.

(a) *Definition.* *Thick overburden* means more than sufficient spoil and other waste materials available from the entire permit area to restore the disturbed area to its approximate original contour. More than sufficient spoil and other waste materials occur where the overburden thickness times the swell factor exceeds the combined thickness of the overburden and coal bed prior to removing the coal, so that after backfilling and grading the surface configuration of the reclaimed area would not:

(1) Closely resemble the surface configuration of the land prior to mining; or

(2) Blend into and complement the drainage pattern of the surrounding terrain.

(b) *Performance standards.* Where thick overburden occurs within the permit area, the permittee at a minimum shall:

(1) Restore the approximate original contour and then use the remaining spoil and other waste materials to attain the lowest practicable grade, but not more than the angle of repose;

(2) Meet the requirements of §§ 816.102 (a)(2) through (j) of this part; and

(3) Dispose of any excess spoil in accordance with §§ 816.71 through 816.74 of this part.

§ 816.133 [Amended]

14. In § 816.133, the suspension of paragraph (d) is removed.

PART 817—PERMANENT PROGRAM PERFORMANCE STANDARDS—UNDERGROUND MINING ACTIVITIES

15. The authority citation for Part 817 continues to read as follows:

Authority: Pub. L. 95-87 (30 U.S.C. 1201 *et seq.*), and Pub. L. 100-34, unless otherwise noted.

16. Section 817.74 is amended by redesignating paragraphs (b), (c), (d) and (e) as paragraphs (c), (d), (e) and (g), respectively, by revising paragraphs (a) and (f), and by adding paragraphs (b) and (f) to read as follows:

§ 817.74 Disposal of excess spoil: preexisting benches.

(a) The regulatory authority may approve the disposal of excess spoil through placement on a preexisting bench if the affected portion of the preexisting bench is permitted and the standards set forth in §§ 817.102 (c), (e) through (h), and (j), and the requirements of this section are met.

(b) All vegetation shall be removed from the affected portion of the preexisting bench prior to placement of the excess spoil. Any available topsoil on the bench shall be removed, stored and redistributed in accordance with § 817.22 of this part. Substitute or supplemental materials may be used in accordance with § 817.22(b) of this part.

(e) The preexisting bench shall be backfilled and graded to—

(1) Achieve the most moderate slope possible which does not exceed the angle of repose;

(2) Eliminate the highwall to the maximum extent technically practical;

(3) Minimize erosion and water pollution both on and off the site; and

(4) Prevent water infiltration into the backfill from springs, water courses, or seeps, and ensure stability.

(f) All disturbed areas, including diversion channels that are not ripped or otherwise protected, shall be revegetated upon completion of construction.

17. Section 817.81 is amended by revising the introductory text of paragraph (a) to read as follows:

§ 817.81 Coal mine waste: General requirements.

(a) *General.* All coal mine waste shall be placed in new or existing disposal areas within a permit area, which are approved by the regulatory authority for this purpose. Coal mine waste shall be hauled or conveyed and placed in a controlled manner to—

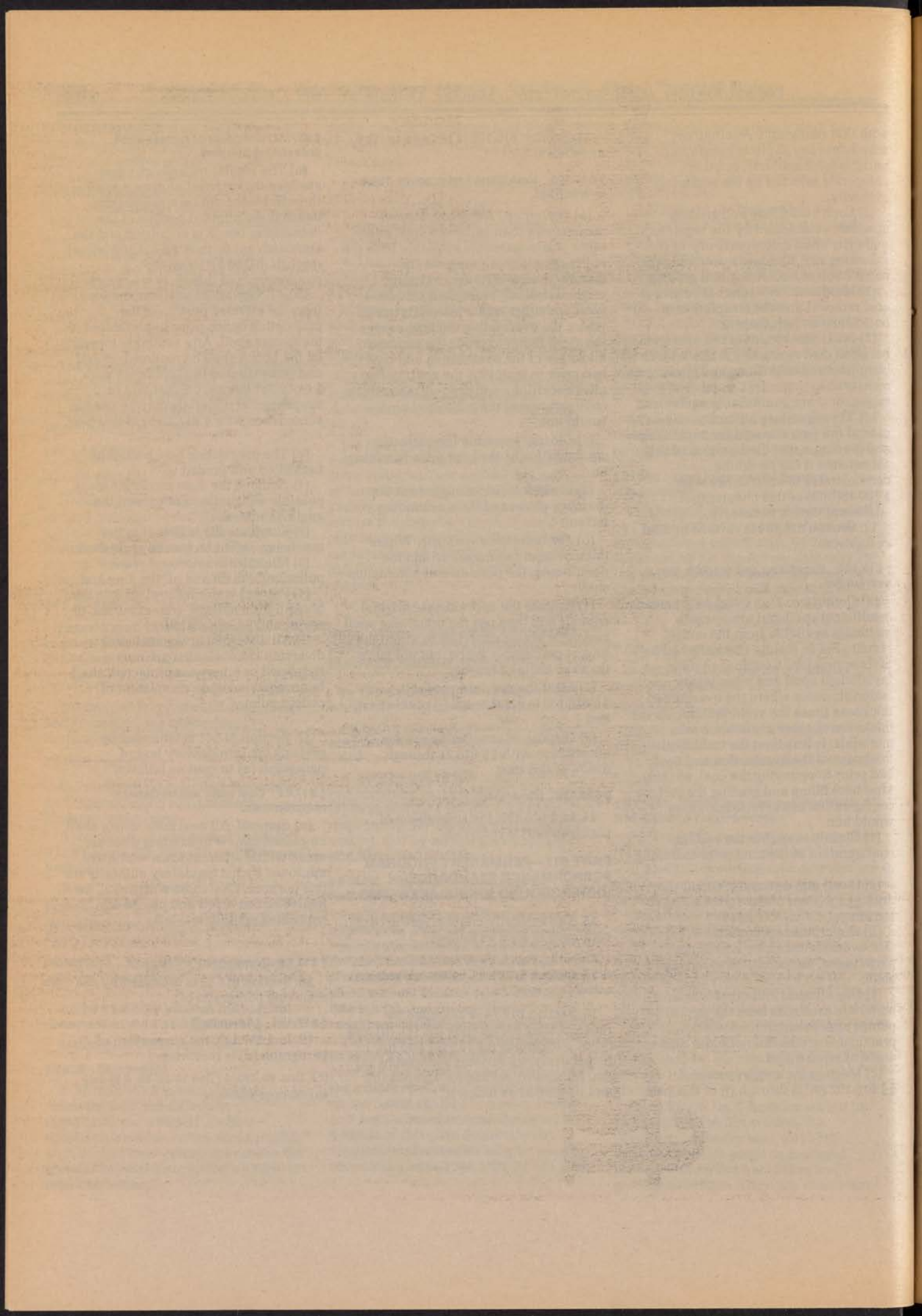
§ 817.89 [Amended]

18. Section 816.89 is amended by removing paragraph (d).

§ 817.133 [Amended]

19. In § 817.133, the suspension of paragraph (d) is removed.

[FR Doc. 88-24976 Filed 10-28-88; 8:45 am]
BILLING CODE 4310-05-M



Federal Register

**Monday,
October 31, 1988**

Part III

Department of Justice

Immigration and Naturalization Service

8 CFR Part 100 et al.

**Applicant Processing for the Legalization
Program; Conforming Amendments and
Adjustment of Status for Certain Aliens;
Interim Rules With Requests for Comment**

DEPARTMENT OF JUSTICE

Immigration and Naturalization Service

8 CFR Parts 100, 103, 264, and 299

[INS Number: 1020R-88]

Applicant Processing for the Legalization Program; Conforming Amendments

AGENCY: Immigration and Naturalization Service, Justice.

ACTION: Interim rule with request for comments.

SUMMARY: This rule amends certain regulations to conform to regulation changes published elsewhere in this issue. These provisions relate to the processing of applicants for permanent residence under the Legalization Program as authorized by the Immigration Reform and Control Act of 1986 (IRCA). The purpose of this rule is to effect the necessary changes to the regulations brought about by the Service's intent to process applications for adjustment of temporary resident aliens for lawful permanent residence status.

DATES: Interim rule is effective November 7, 1988. Comments must be received on or before November 30, 1988.

ADDRESSES: Written comments should be mailed in triplicate to Assistant Commissioner, Legalization, Immigration and Naturalization Service, 425 "I" Street, NW., Washington, DC 20536 or delivered to Room 5250 at the same address.

FOR FURTHER INFORMATION CONTACT: Raymond B. Penn, Assistant Commissioner, Legalization, (202) 786-3658.

SUPPLEMENTARY INFORMATION: The Immigration Reform and Control Act of 1986 (IRCA), Pub. L. 99-603 was enacted on November 6, 1986. The Service published implementing regulations at 52 FR 16205, May 1, 1987, and amending regulations at 52 FR 43843, November 17, 1987; 53 FR 9274, March 21, 1988; 53 FR 9862, March 28, 1988, and at 53 FR 23382, June 22, 1988.

At 53 FR 18096, May 20, 1988, the Service published in the *Federal Register* a notice making available to the public the preliminary working draft regulations. More than 170 copies of the preliminary working draft were forwarded to requesters. As a result, 135 individuals and interested organizations submitted written comments. The comments were received and given serious consideration.

In response to the comments received on the preliminary working draft, the Service published a notice of proposed rulemaking at 53 FR 29818 in the *Federal Register* on August 8, 1988. The proposed rule changed the list of legalization offices; included other Service offices besides legalization offices where interviews will occur; allowed for the approval or denial of permanent resident applications at the district director level; set the application fee; provided the display control number and edition date for Form I-698; allowed for the district director to certify decisions to the Administrative Appeals Unit; and allowed for the submission of I-695, Application for Replacement of Form I-688A, Employment Authorization, or Form I-688, Temporary Residence Card (Under Pub. L. 99-603), to other Service offices besides legalization offices. Eighty-six comments, representing the views and concerns of 183 individuals, attorneys, state agencies, special interest groups, educational and other interested organizations and associations were received in response to the proposed rule. All comments were reviewed and seriously considered in preparing this interim rule. The Service appreciates the time and significant efforts put forth by all concerned parties.

Summary of the Interim Rule

On November 6, 1986, the Immigration Reform and Control Act of 1986, Pub. L. 99-603 was enacted to provide the opportunity for certain aliens to apply for temporary resident status in the United States, and, under certain conditions, to subsequently apply for permanent resident status.

Section 100.4(f) is amended to provide a list of legalization offices which will accommodate applicants for permanent residence. Several commentors stressed that the Service seriously reconsider the decision to close any legalization office for various reasons such as convenience to the public. The Service has carefully considered decisions to close legalization offices. The volume of application receipts (including Special Agricultural Worker applications) is a main factor studied before a decision is made to close a legalization office. The Service agrees with the commentors that the maximum number of legislation offices should remain open within funding constraints. In addition to the legalization offices listed in § 100.4(f) the following Service offices will conduct interviews for permanent residence.

Eastern Region

District offices—Baltimore, MD; Buffalo, NY; Philadelphia, PA; Portland, ME, and San Juan, PR; Sub-offices—Albany, NY;

Charlotte Amalie, VI; Christiansted, VI; Camden, NJ; Hartford, CN; Norfolk, VA; Pittsburgh, PA; St. Albans, VT; and Syracuse, NY.

Northern Region

District offices—Anchorage, AK; Cleveland, OH; Detroit, MI; Helena, MT; Kansas City, MO; Omaha, NE; Portland, OR; Seattle, WA; Denver, CO; and Saint Paul, MN; Sub-offices—Boise, ID; Cincinnati, OH; Indianapolis, IN; Milwaukee, WI; Salt Lake City, UT; St. Louis, MO; and Yakima, WA.

Southern Region

District offices—Atlanta, GA; and New Orleans, LA; Sub-offices—Charlotte, NC; Jacksonville, FL; Louisville, KY; Memphis, TN; and Oklahoma City, OK.

Western Region

District offices—Honolulu, HI; Sub-offices—Agana, GU; Reno, NV; and Tucson, AZ.

Section 103.1(n) is amended to provide for the approval or denial of applications for permanent residence by the district directors at both legalization and other Service offices. Numerous commentors raised concerns about the physical and administrative security of conducting permanent resident interviews at INS district and suboffices. Specific concerns were addressed regarding the possible breach of confidentiality of legalization casework and if district office personnel are used, the lack of experience in legalization matters. During the first phase of the program the Service received numerous compliments for the manner in which the program was handled and for not having breached the confidentiality provisions of the legislation. In developing the permanent resident phase of the legalization program, the Service is once again stressing the confidentiality provisions of IRCA to all employees of the Service. In addition, the public can be assured that wherever possible, the legalization operations at district offices will be separate and distinct operations. However, it must be understood that due to physical restrictions at certain field sites such distinct operation may not be feasible.

Section 103.4(b) is amended to provide for the certification of decisions by the district director as well as the Regional Processing Director to the Administrative Appeals Unit.

Section 103.7(b) is amended to provide for an application fee for the filing of an I-698, Application to Adjust Status from Temporary to Permanent Resident (Under the Immigration Reform and Control Act of 1986). Nineteen comments were received concerning the fee structure proposed for the permanent resident program. Eighteen commentors clearly stated that the application fee of

\$75.00 per application was excessive and if the Service held to such an amount that there should be a cap on the fees for a family. After careful consideration and a review of all projected expenditures, the Service will raise the application fee to \$80.00 per application but will limit the filing cost for a family to the first three members of a family (including husband, wife, and minor (under 18 years of age) children living at home) for a "family cap" of \$240.00 per family. The increase in the per application fee is necessary to offset the creation of a "family cap".

Section 103.37 is removed with the information formally contained in this section now being incorporated into § 299.5.

Section 264.1(c) is amended to provide for the submission of Form I-695, (Application for Replacement of Form I-688A, Employment Authorization, or Form I-688, Temporary Residence Card (Under Pub. L. 99-603)), to legalization and other Service offices. Five comments were received requesting the appeal rights be extended to replacement of temporary resident card (I-688s). This process was established following the standards that currently exist for individuals who submit Applications for Replacement of Alien Registration Receipt Card (I-551). As individuals who will be adjusted will be lawful permanent residents of the United States they will no longer be entitled to the I-688 and would therefore not have a need for replacement. Further, if an individual has his or her permanent resident application denied and any subsequent appeal dismissed they would not be entitled to such documentation. Therefore, after careful consideration the Service will not modify this section.

Section 299.1 is amended to provide for the edition date for Form I-698, Application to Adjust Status from Temporary to Permanent Resident (Under the Immigration Reform and Control Act of 1986).

Section 299.5 is amended to include Form I-698, Application to Adjust Status from Temporary to Permanent Resident (Under section 245A of Pub. L. 99-603); Form I-699, Certificate of Satisfactory Pursuit; and Form I-803, Petition for Attorney General Recognition to Provide Course of Study for Legalization: Phase II.

In accordance with 5 U.S.C. 605(b), the Commissioner certifies that this rule will not have a significant economic impact on a substantial number of small entities. This rule is not a major rule within the definition of section 1(b) of EO 12291, nor does this rule have federalism implications warranting the

preparation of a Federal Assessment in accordance with E. O. 12612.

The information collection requirements contained in this regulation have been cleared by the Office of Management and Budget (OMB) under the provisions of the Paperwork Reduction Act. The Office of Management and Budget control numbers for these collections are contained in 8 CFR 299.5

List of Subjects

8 CFR Part 100

Administrative practice and procedure, Authority delegations (Government agencies).

8 CFR Part 103

Administrative practice and procedure, Authority delegations (Government agencies), Fees, Reporting and recordkeeping requirements.

8 CFR Part 264

Reporting and recordkeeping requirements.

8 CFR Part 299

Forms, Reporting and recordkeeping requirements.

Accordingly, Chapter I of Title 8 of the Code of Federal Regulations is amended as follows:

PART 100—STATEMENT OF ORGANIZATION

1. The authority citation for Part 100 continues to read as follows:

Authority: 66 Stat. 173; 8 U.S.C. 1103.

2. Section 100.4(f) is amended by revising the list of legalization offices to read as follows:

§ 100.4 Field service.

* * * * *

(f) * * *

Legalization Offices

Eastern Region

BOS—Boston, MA (XBT)
NEW—Paterson, NJ (XPT)
NYC—Manhattan, NY (XMA)
WAS—Arlington, VA (XAR)

Northern Region

CHI—Chicago, IL (XBI), Chicago, IL (XLS),
Forest Park, IL (XLI)
KS—Wichita, KS (XWI)

Southern Region

DAL—Arlington, TX (XDA), Lubbock, TX (XLU)
ELP—El Paso, TX (XEL), Albuquerque, NM (XAL)
HLC—Harlingen, TX (XHA)
HOU—Houston, TX (XHU)
MIA—(Miami) Hialeah, FL (XOP), Tampa, FL (XTA), Fort Lauderdale, FL (XWS)

SNA—Austin, TX (XAU), San Antonio, TX (XSN)

Western Region

LOS—Anaheim, CA (XAH), El Monte, CA (XEM), Los Angeles, CA (XHO), Huntington Park, CA (XHP), Indio, CA (XID), East Los Angeles, CA (XLA), Buena Park, CA (XNK), Oxnard, CA (XOX), Pomona, CA (XPO), Riverside, CA (XRV), Santa Maria, CA (XSM), Santa Ana, CA (XSA), San Fernando, CA (XSR), Gardena, CA (XTO), N. Hollywood, CA (XVN)
PHO—Phoenix, AZ (XPH), Las Vegas, NV (XLV)
SND—Escondido, CA (XES), San Diego, CA (XSD)
SFR—Bakersfield, CA (XBA) Fresno, CA (XFR), San Francisco, CA (XSF), Salinas, CA (XSI), San Jose, CA (XSO), Stockton, CA (XST)

PART 103—POWERS AND DUTIES OF SERVICE OFFICERS; AVAILABILITY OF SERVICE RECORDS

3. The authority citation for Part 103 continues to read as follows:

Authority: 5 U.S.C. 522(a); 8 U.S.C. 1101, 1103, 1201, 1301-1305, 1351, 1443, 1454, 1455; 28 U.S.C. 1746; 7 U.S.C. 2243; 31 U.S.C. 9701; E.O. 12356, 3 CFR 1982 Comp., p. 166.

4. In § 103.1, a new paragraph (n)(3) is added to read as follows:

§ 103.1 Delegations of authority.

* * * * *

(n) * * *

(3) Applications for permanent residence filed by legalization applicants pursuant to section 245A may be adjudicated by the district director having jurisdiction over the applicant's residence.

* * * * *

5. Section 103.4(b) is revised to read as follows:

§ 103.4 Certifications.

* * * * *

(b) *Certification of denials of special agricultural worker and legalization applications.* The Regional Processing Facility director or the district director may, in accordance with paragraph (a) of this section, certify a decision to the Associate Commissioner, Examinations (Administrative Appeals Unit) (the appellate authority designated in § 103.1(f)(2)) of this part, when the case involves an unusually complex or novel question of law or fact.

§ 103.7 [Amended]

6. Section 103.7(b)(1) is amended by removing "(fee amount to be determined as required)" for Form I-698, and inserting in its place "A fee of eighty dollars (\$80.00) for each application is required at the time of filing with the Immigration and Naturalization Service.

The maximum amount payable by a family (husband, wife, and any minor children (under 18 years of age living at home)) shall be two hundred and forty dollars (\$240.00)".

§ 103.37 [Removed]

7. Section 103.37 is removed.

PART 264—REGISTRATION AND FINGERPRINTING OF ALIENS IN THE UNITED STATES

8. The authority citation for Part 264 is revised to read as follows:

Authority: 8 U.S.C. 1103, 1201, 1201a, 1301-1305; 66 Stat. 173, 181, 223-225; 71 Stat. 641.

9. Section 264.1(c) is amended by replacing all existing text beginning with the fifth sentence which reads "Application by an alien lawfully admitted for temporary residence * * *" with the following:

§ 264.1 [Amended]

(c) * * * Application by an alien lawfully admitted for temporary residence for Form I-688, Temporary Resident Card, in lieu of one lost, stolen, mutilated, or destroyed, shall be made on Form I-695 accompanied by the fee required by § 103.7(b)(1) of this chapter, two color photographs, (regardless of the applicant's age, unless the requirement for such photographs has been waived by the director of the legalization or Service office in his or her discretion because of hardship to an applicant who is confined due to age or physical infirmity), and when issuance of Form I-688 is desired in a changed name, by appropriate documentary evidence of such change. Any Form I-688 in applicant's possession must also be submitted with the application. An application by an alien within the United States for replacement of evidence of registration shall be submitted to the legalization or Service office having jurisdiction over the applicant's place of residence in the United States. Prior to the issuance of Form I-688, all applicants, regardless of age, shall appear at the appropriate legalization or Service office for interview and placement of fingerprint and signature on I-688 unless these requirements are waived at the discretion of the district director because of infirmity, illiteracy, or other compelling reasons. An alien who files application Form I-695 may be required to appear in person before an immigration officer prior to the adjudication of the application and be interviewed under oath concerning his or her registration. In addition, the

applicant may also be required to present a completed fingerprint card (Form FD-258). The decision on an application for replacement of evidence of registration shall be made by the Regional Processing Facility director having jurisdiction over the alien's place of residence in the United States. No appeal shall lie from the decision of the Regional Processing Facility director denying the application. An alien outside the United States shall appear at an American Consulate or Service office abroad and present a full account of the circumstances involving the loss or destruction of Form I-688. A cable shall be sent to the Service's Central Office Records Management Branch for verification of status. Subsequent to verification that temporary residence was granted, a transportation letter will be issued to the temporary resident alien.

PART 299—IMMIGRATION FORMS

10. The authority citation for Part 299 continues to read as follows:

Authority: 66 Stat. 173; 8 U.S.C. 1103.

11. Section 299.5 is amended by adding, in sequential order, Forms I-698, I-699, and I-803 to read as follows:

§ 299.5 Display of control numbers.

I-698	 Application to Adjustment Status from Temporary to Permanent Resident (Under Section 245A of Public Law 99-603).	1115-0155
I-699	 Certificate of Satisfactory Pursuit.	1115-0154
I-803	 Petition for Attorney General Recognition to Provide Course of Study for Legalization: Phase II.	1115-0156

Dated: October 21, 1988.

Richard E. Norton,

Associate Commissioner.

[FR Doc. 88-25025 Filed 10-28-88; 8:45 am]

BILLING CODE 4410-01-M

8 CFR Part 245a

[INS No. 1022R-88]

Adjustment of Status for Certain Aliens

AGENCY: Immigration and Naturalization Service, Justice.

ACTION: Interim rule with request for comments.

SUMMARY: Section 201 of the Immigration Reform and Control Act of 1986 (IRCA) provides for the legalization of certain aliens who have been residing illegally in the United States since before January 1, 1982. This section

directs the Attorney General to adjust the status of a temporary resident alien to that of an alien lawfully admitted for permanent residence if the alien meets certain requirements. This rule addresses the adjustment of status of temporary resident aliens to that of aliens lawfully admitted for permanent residence.

DATES: Interim rule is effective November 7, 1988. Comments must be received on or before November 30, 1988.

ADDRESSES: Written comments should be mailed in triplicate to Assistant Commissioner, Legalization, Immigration and Naturalization Service, 425 "I" Street NW., Washington DC 20536 or delivered to Room 5250 at the same address.

FOR FURTHER INFORMATION CONTACT: Raymond B. Penn, Assistant Commissioner, Legalization, (202) 786-3658.

SUPPLEMENTARY INFORMATION: On November 6, 1986, the President signed into law the Immigration Reform and Control Act of 1986, Pub. L. 99-603 ("IRCA"). This legislation, the most comprehensive reform of our immigration laws since the enactment of the Immigration and Nationality Act ("INA") in 1952, reflected a resolve to strengthen law enforcement to control illegal immigration. It also reflected the Nation's concerns for certain aliens who had resided illegally in the United States. The theme of this legislation was focused upon regaining control of our Nation's borders and eliminating the illegal alien problem in this country through the firm yet fair enforcement of our Nation's laws.

The Immigration and Naturalization Service took a number of steps to ensure the new legislation would be implemented effectively, efficiently and fairly. Service officials engaged in continuing dialogue with members of the public and representatives of interested organizations on how the legalization provisions of "IRCA" would be implemented. On January 20, 1987, the Service published in the Federal Register a notice making available to the public the preliminary working draft regulation (52 FR 2115). As a result of this notice 164 comments were seriously considered by the Service and were included in the proposed rule published in the Federal Register on March 19, 1987 (52 FR 8752).

In response to the proposed rule, 549 written comments were received. After review and consideration of all comments, the Immigration and Naturalization Service published