

## List of Subjects

## 30 CFR Part 785

Reporting and recordkeeping requirements, Surface mining, Underground mining.

## 30 CFR Part 827

Coal, Environmental protection, Surface mining.

Accordingly, it is proposed to amend 30 CFR Parts 785 and 827 as set forth below.

Date: April 29, 1988.

James E. Cason,

Acting Assistant Secretary—Land and Minerals Management.

**PART 785—REQUIREMENTS FOR PERMITS FOR SPECIAL CATEGORIES OF MINING**

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

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

2. Section 785.21 is amended by revising paragraph (a) to read as follows:

**§ 785.21 Coal preparation plants not located within the permit area of a mine.**

(a) This section applies to any person who operates or intends to operate a coal preparation plant in connection with a coal mine but outside the permit area. Any person who operates such a preparation plant shall obtain a permit from the regulatory authority in accordance with the requirements of this section.

**PART 827—PERMANENT PROGRAM PERFORMANCE STANDARDS—COAL PREPARATION PLANTS NOT LOCATED WITHIN THE PERMIT AREA OF A MINE**

3. The authority citation for Part 827 is revised to read as follows:

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

4. Section 827.1 is revised to read as follows:

**§ 827.1 Scope.**

This part sets forth requirements for coal preparation plants operated in connection with a coal mine but outside the permit area.

[FR Doc. 88-13926 Filed 6-21-88; 8:45 am]

BILLING CODE 4310-05-M





Wednesday  
June 22, 1988

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## Part V

# Department of the Interior

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Office of Surface Mining Reclamation and  
Enforcement

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30 CFR Parts 772, 815, and 942  
Requirements for Coal Exploration;  
Permanent Program Performance  
Standards—Coal Exploration; Tennessee  
Federal Program—Requirements for Coal  
Exploration; Proposed Rule



## DEPARTMENT OF THE INTERIOR

## 30 CFR Parts 772, 815, and 942

Requirements for Coal Exploration;  
Permanent Program Performance  
Standards—Coal Exploration;  
Tennessee Federal Program—  
Requirements for Coal Exploration

**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 rules pertaining to coal exploration operations. The amendments are being proposed to comply with recent court decisions, to clarify limitations on commercial use or sale of coal obtained by exploration, to increase regulatory control of exploration on certain lands where mining is prohibited or limited and to clarify which permit information requirements pertain to exploration. The exploration rules for the Tennessee Federal program would be revised to bring them into conformance with the notice requirements of the proposed rule. The rules for all other Federal program States cross-reference the coal exploration rules at 30 CFR Part 772; therefore all changes to the Federal rules would automatically apply in these States.

**DATES:**

*Written Comments:* OSMRE will accept written comments on the proposed rule until 5:00 p.m. Eastern time on August 8, 1988.

*Public Hearings:* Upon request, OSMRE will hold a public hearing on the proposed rule in Washington, DC on August 1, 1988, beginning at 9:30 a.m. Eastern time. Upon request, OSMRE will also hold hearings in the States of Georgia, Idaho, Massachusetts, Michigan, North Carolina, Oregon, Rhode Island, South Dakota, Tennessee, and Washington, at times and on dates to be announced prior to the hearings.

OSMRE will accept requests for a public hearing until 4:00 p.m. Eastern time on July 17, 1988. Individuals wishing to attend, but not testify at the 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 Ave. NW., Washington, DC 20240.

*Public Hearing:* Department of the Interior Auditorium, 18th and C Streets NW., Washington, DC. The addresses for any hearings requested to be scheduled at other locations will be announced prior to the hearings.

*Request for Public Hearing:* Submit orally or in writing to the person and address specified under "FOR FURTHER INFORMATION CONTACT."

**FOR FURTHER INFORMATION CONTACT:** Dr. Fred Block, Office of Surface Mining Reclamation and Enforcement, U.S. Department of the Interior, 1951 Constitution Ave. NW., Washington, DC 20240; Telephone: 202-343-4553 (Commercial or FTS).

**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 necessarily 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 time, date and address for the hearing to be held in Washington, DC has been specified previously in this notice (see "DATES" and "ADDRESSES"). The times, dates and addresses for other hearings that may be requested at other locations have not yet been scheduled, but will be announced in the *Federal Register* at least seven days prior to any such hearings.

Any person interested in participating at a hearing should inform Dr. Block (see "FOR FURTHER INFORMATION CONTACT") either orally or in writing by 4:00 p.m. Eastern time July 17, 1988. If no one has contacted Dr. Block to express an interest in participating in a hearing, 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 wishing to testify have been heard. The hearing will be transcribed. To assist the transcriber and to 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.

Persons interested in attending the hearing, but not testifying, should contact the individual listed under "FOR FURTHER INFORMATION CONTACT" prior to the scheduled hearing date to verify that the hearing will be held.

**II. Background***General Requirements for Exploration*

The Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. 1201 *et seq.*, requires that each State or Federal program ensure that coal exploration operations that substantially disturb the natural land surface are conducted in accordance with exploration rules issued by the regulatory authority. Section 512 of SMCRA sets forth the notice, permit, reclamation, and other requirements for conducting coal exploration operations. In addition to the general requirements to file a notice of intent to conduct coal exploration, the removal of more than 250 tons of coal during exploration requires the specific written approval of the regulatory authority. The informational requirements for a notice of intent to explore and for an exploration permit are contained in 30 CFR 772.11 and 772.12, and are distinct from the more expansive permit requirements for a surface coal mining operation contained in 30 CFR Parts 773, 777-780, and 783-785 of the OSMRE regulations. These differing requirements reflect the fact that the definition of surface coal mining operations in section 701(28) of SMCRA excludes coal exploration operations, which are subject to the requirements of section 512 of SMCRA.

OSMRE first promulgated rules establishing general requirements for coal exploration at 30 CFR Part 776, and permanent program performance standards for coal exploration at 30 CFR Part 815, on March 13, 1979 (44 FR 15311). These 1979 exploration rules were revised on September 8, 1983 (48



FR 40622), and Part 776 was redesignated as Part 772.

### III. Discussion of Proposed Rule

OSMRE has reviewed the legislative history of SMCRA, the Administrative Record for the rules, and the pertinent court opinions. As a result, OSMRE is proposing to revise its rules at § 772.11, 772.12, 772.14, and 942.772 and to add § 815.2 concerning notice and permit requirements for coal exploration under the OSMRE permanent program and the Federal program for Tennessee. Changes to these rules are discussed in detail below.

#### *Section 772.11(a)—Notice requirements for exploration removing 250 tons or less of coal.*

Section 776.11(a) of the 1979 rules required all persons who would conduct coal exploration during which 250 tons or less of coal would be removed to file a notice of intent to explore. Those who would extract in excess of 250 tons were required to obtain a coal exploration permit. The 1979 rules also required that any persons who conducted coal exploration activities under a notice of intent which substantially disturbed the natural land surface were to comply with the exploration performance standards under 30 CFR Part 815.

Section 772.11(a) as revised on September 8, 1983, required that any person who intends to conduct coal exploration operations outside a permit area during which 250 tons or less of coal will be removed and which may substantially disturb the natural land surface must file a notice of intent to explore with the regulatory authority. Thus, a notice of intent was not required in every case, but only where coal exploration may substantially disturb the land surface. The 1983 rules also required that exploration operations removing 250 tons or less of coal for which notices of intent are filed shall comply with 30 CFR Part 815.

The 1983 requirement that of those exploration operations removing 250 tons or less of coal only those which may substantially disturb the natural land surface must file a written notice of intent to explore was challenged in the District Court of the District of Columbia. The plaintiffs claimed that under the challenged rule coal operators were, in effect, in the position of making the determination of whether their operations would substantially disturb the land surface, a decision that should be made by the regulatory authority. The plaintiffs pointed to comments from three States who asserted that if the regulatory authority does not have notice of a proposed exploration, it

would not know about the existence of the coal exploration operation and therefore could not enforce the provisions of SMCRA. The court remanded § 772.11(a) because it found that OSMRE had failed to explain adequately its departure from the previous rules or to address adequately the concerns raised by commenters. *In Re: Permanent Surface Mining Regulation Litigation II*, No. 79-1144, (D.D.C. July 15, 1985) (*In Re: Permanent (II)*).

As a result of the Court's decision, OSMRE suspended § 772.11(a) insofar as it limits the responsibility to submit a notice of intent to explore to those persons who may substantially disturb the natural land surface (51 FR 41952, November 20, 1986). Consequently, all persons conducting exploration during which 250 tons or less of coal will be removed are required to submit a notice of intent to explore regardless of whether the exploration will substantially disturb the natural land surface.

In responding to the July 15, 1985 court ruling, OSMRE proposes to reinstate the requirement that any person who conducts operations where 250 tons or less of coal are removed must file a notice of intention to explore, rather than only those which may substantially disturb the natural land surface. OSMRE believes that coal operators should not be in a position of making a determination for the regulatory authority of whether or not their operations substantially disturb the natural land surface. Furthermore, for effective monitoring and enforcement, the regulatory authorities should know about all exploration occurring within their jurisdictions, and this can best be accomplished through notification by all who explore.

For the purposes of clarity, proposed § 772.11(a) would also provide that persons who intend to conduct coal exploration removing 250 tons or less of coal on lands designated as unsuitable for surface coal mining operations under Subchapter F, Areas Unsuitable for Mining, must apply for and receive an exploration permit under § 772.12. This additional language is needed to alert anyone contemplating exploration removing 250 tons or less of coal on those lands that the requirements of § 772.12 apply. This revision does not change or add any regulatory requirement. Section 772.12(a) currently requires a permit for any coal exploration which will take place on lands designated unsuitable for mining. Also for clarity, proposed § 772.11(a) contains a statement that exploration under a notice of intent shall be subject

to the limitations on commercial sale or commercial use of coal obtained by exploration, as prescribed under § 772.14, and to the compliance requirements prescribed under § 772.13.

#### *Section 772.11(b)(3)—Narrative or map in a coal exploration notice.*

The 1979 rules required that a narrative and a map be submitted as a part of an exploration notice. In response to a challenge to these requirements, the District Court for the District of Columbia ruled that OSMRE had erred in its 1979 rules by requiring both a narrative description and a map. *In Re: Permanent Surface Mining Regulation Litigation*, No. 79-1144 (D.D.C. May 16, 1980). As a result, OSMRE revised its exploration regulations on September 8, 1983, to require "a narrative or map" under § 772.11(b)(3).

OSMRE's 1983 rule was challenged because it did not require a narrative description of the exploration area in all instances. The plaintiffs contended that a map alone is insufficient to describe a proposed exploration area. As a result of this challenge, the Court remanded OSMRE's rules.

However, the court noted in its decision that either a map or narrative would meet the statutory requirement of a "description" of the exploration area as required in section 512(a)(1) of the Act, but determined that the map provisions set forth in 30 CFR 772.11(b)(3) were not specific enough to satisfy the requirements of SMCRA. The decision stated that these rules contained no standards explaining the level of detail for a map to be used in place of a narrative describing the exploration area, and that it was not clear that any existing standards contained in other sections of the regulations were intended to be applied. *In Re: Permanent (II)*, July 15, 1985 Mem. op. at 139-140.

OSMRE suspended § 772.11(b)(3) insofar as it allows a coal exploration notice or application to be submitted which does not include a narrative describing the exploration area (51 FR 41952, November 20, 1986). As a result, notices of intent for coal exploration operations must include narratives.

Proposed § 772.11(b)(3) would continue to require either a narrative or a map describing the exploration area in a notice of intent to explore. In conformance with the court's ruling, the proposed rule would define the minimal information to be shown when a map is submitted in a notice of intent. At a minimum, such maps would be at a scale of 1:24,000 or larger, and would



include the proposed area of exploration, the location of drill holes and trenches, existing and proposed roads, occupied dwellings, topographic features, bodies of surface water, and pipelines. These information requirements are being added to satisfy the court's concerns that the regulation explain the level of detail to be provided in a map which serves as the description of an exploration area.

*Section 772.12(a)—Permit requirements for exploration removing more than 250 tons of coal.*

Proposed § 772.12(a) would be revised by adding a statement to clarify that any coal exploration during which more than 250 tons of coal would be removed, or which will take place on lands designated as unsuitable for mining, would be subject to the limitations prescribed under § 772.14 concerning prohibitions on commercial sale or use of coal obtained through exploration and to the compliance requirements prescribed under § 772.13. This revision does not add or change any regulatory requirement.

*Section 772.12(b)(3)—Narrative or map in a coal exploration permit application.*

The 1979 rules required that a narrative and a map be submitted as a part of an exploration permit. As discussed under § 772.11(b)(3), in response to a challenge to these requirements, the District Court for the District of Columbia ruled that OSMRE had erred in its 1979 rules by requiring both a narrative description and a map. *In Re: Permanent Surface Mining Regulation Litigation*, No. 79-1144 (D.D.C. May 16, 1980). As a result, OSMRE revised its exploration regulations on September 8, 1983, to require "a narrative of map" under § 772.12(b)(3). A subsequent challenge to this 1983 rule resulted in a Court decision (*In Re: Permanent (II)*, July 15, 1985 Mem. op. at 139-140) to remand § 772.12(b)(3). This decision is discussed above with respect to the remanded equivalent requirement under § 772.11(b)(3) for an exploration notice. Because the Court determined that the map provisions set forth in 30 CFR 772.12(b)(3) were not specific enough to satisfy the requirements of SMCRA, OSMRE suspended § 772.12(b)(3) insofar as it allows a coal exploration permit application to be submitted which does not include a narrative describing the exploration area (51 FR 41952, November 20, 1986). As a result, coal exploration permit applications must include narratives.

Proposed § 772.12(b)(3) would require a narrative describing the exploration

area in an exploration permit application. The option to provide a map describing the proposed exploration area instead of a narrative would be deleted. Existing § 772.12(b)(12), which would be retained without revision, requires a map at a scale of 1:24,000 or larger showing the areas of land to be disturbed by the proposed exploration and reclamation. This map would include the essential features that would be required to satisfy the July 15, 1985, court decision concerning § 772.12(b)(3). Therefore, it is not necessary under § 772.12(b)(3) to provide for an optional map. OSMRE believes that the above proposed revisions satisfy the requirements of section 512(a) of SMCRA for a description of the exploration area.

Under the existing requirements of § 772.12(b)(12), maps must show the location of all areas to be disturbed by exploration, and shall specifically show existing roads, occupied dwellings, topographic and hydrologic features, roads and structures to be constructed, the location of land excavations, exploration holes, etc. Exploratory surveying and sampling areas that would not cause land to be disturbed would not necessarily be included on the map. However, any geochemical, soil, water, vegetation, or other sampling and survey activities would be included in the narrative description of the exploration area.

*Sections 772.12(b)(14) and (d)(2)(iv)—Additional requirements for exploration in areas unsuitable for surface coal mining operations under section 522(e)(1) of SMCRA.*

Sections 522(e) of SMCRA and 30 CFR 761.11 prohibit surface coal mining operations within certain designated lands, including units of the National Park System, unless the operator demonstrates valid existing rights (VER) to mine. However, under the existing regulatory provisions of § 762.14, coal exploration is not prohibited in these areas, and there is no requirement to prove VER prior to exploration. Thus, an operator could, through an exploration permit, extract coal that he might otherwise be prohibited from mining if VER could not be proved.

The National Park Service (NPS) of the Department of the Interior (DOI) has been concerned about exploration activities on lands covered by section 522(e). OSMRE and NPS have conferred on this issue. As a result, OSMRE is proposing new requirements at § 772.12(b)(14) and (d)(2)(iv) to assure that NPS units and other areas covered by section 522(e)(1) are protected from

exploration activities where no valid existing right to mine has been proved.

Proposed § 772.12(b)(14) would require an applicant for an exploration permit within a 522(e)(1) area to provide documentation of valid existing rights under 30 CFR 761.11(a) to conduct surface coal mining operations in the proposed exploration area. Proposed section 772.12(d)(2)(iv) would add a requirement that the regulatory authority must, prior to approval of exploration in 522(e)(1) areas, determine in writing that the applicant possesses valid existing rights to conduct surface coal mining operations in the 522(e)(1) area.

*Section 772.14 Commercial use or sale.*

The commercial sale of coal obtained during exploration is generally prohibited under 30 CFR 772.14, unless a surface coal mining and reclamation operations permit is first obtained. Section 772.14 allows an exception to the requirement for this permit if the regulatory authority determines that the purpose of the sale is to test for coal properties necessary for the development of mining operations for which a permit application will be submitted at a later time. Concern has been raised about abuses occurring under such exceptions for "testing purposes." OSMRE has found that the current regulations do not require the applicant to provide sufficient information and assurances to enable the regulatory authority to determine whether the extraction of coal for commercial sale is necessary for testing purposes.

Therefore, OSMRE is proposing to revise the regulations at 772.14 by adding specific information requirements that must be met for approval of such testing.

Proposed § 772.14 would be retitled "Commercial Use or Sale" and expanded to include the commercial use of coal in addition to the sale of coal. Commercial use of coal encompasses those activities which provide a commercial benefit to the person conducting the exploration, such as when the owner of a power generating plant conducts coal exploration directly or indirectly through an agent or subsidiary company.

Proposed § 772.14(a) would provide that in addition to the prohibition on commercial sale, any person who intends to commercially use coal extracted during exploration under either a notice of intent to explore or an exploration permit must first obtain a surface coal mining and reclamation operations permit, unless otherwise



exempted by the proposed regulation under § 772.14(b). Commercial use or sale of coal would include any of its derivative forms, such as coke or liquid or gaseous fuel.

Under proposed § 772.14(b), an exception to § 772.14(a) would be provided when the purpose of the commercial use or sale is for the testing of coal for its quality. OSMRE is proposing new regulatory language under § 772.14(b) to prevent abuse of coal exploration rules allowing the use or sale of coal for such testing purposes. Proposed § 772.14(b) would provide that no surface coal mining and reclamation operations permit is necessary for coal extracted during exploration if the regulatory authority determines that the sale or use is for coal testing. An application for approval of the commercial use or sale of coal extracted for testing purposes would be required to demonstrate that the coal testing is necessary for the development of a surface coal mining and reclamation operation for which a permit application will be submitted in the near future, and that coal extraction is solely for the purposes of testing the quality of the coal.

Proposed § 772.14(b)(1) would require that the application contain the name of the firm at which the coal will be tested and the locations for testing. Proposed § 772.14(b)(2) would require that if the coal is sold directly to the intended end user, the end user submit a statement that provides the specific reasons for the test, including why the coal may be so different from the intended user's other coal supplies as to require the testing; the amount of coal necessary for the test and why a lesser amount is not sufficient; and a description of the specific tests that will be conducted. Proposed § 772.14(b)(3) would require that if the coal is sold indirectly to the intended end user through an agent or broker, the agent or broker must submit the statement as described above.

Paragraph (b)(4) would require that the application also contain evidence that sufficient reserves of coal are available to the operator for future commercial use or sale by the intended end user to demonstrate that the amount of coal to be removed is not the total reserve, but is a sampling of a larger reserve.

Finally, under proposed paragraph (b)(5), the application would be required to contain an explanation as to why other means of prospecting or exploration, such as core drilling, are not adequate to determine the quality of the coal and/or the feasibility of future surface coal mining operations.

The information required under proposed §§ 772.14(b)(2) and (b)(3) would be obtained from the intended end user (e.g. a utility) of the coal being tested or his/her agent or broker, as independent verification of the need for testing and the kind of testing necessary. The proposed rule recognizes that in some cases, such as when the coal is to be exported, a broker would obtain the coal for an end-user. The proposed rule would allow a broker to verify the validity of the testing at either the end-user's facilities or at an appropriate other location. Typically, a coal broker would assemble a test shipment by blending coal from various sources to suit the end-user's needs, and a test burn or other test may be needed to verify the coal quality for such shipments. Such testing of coal could be considered appropriate under the proposed rule. The required documentation on the need for the testing provided by a broker acting for an end-user, could also be considered sufficient.

The intent of these proposed new requirements is to continue to allow valid testing, while eliminating abusive practices whereby testing is used as a means to circumvent the prohibition of commercial use or sale of coal obtained during exploration. Any exploration operation which sells or uses coal commercially without a valid testing exemption would be in violation of these rules, unless a permit for a surface coal mining and reclamation operation were first obtained.

#### *Section 815.2 Permitting information.*

OSMRE is proposing to add a provision to 30 CFR Part 815, Exploration Performance Standards, that would clarify the extent of the information required to be submitted in an application for an exploration permit. The performance standards for coal exploration at 30 CFR 815.15 currently contain requirements which cross-reference certain requirements in 30 CFR Part 816. The cross-referenced rules in Part 816 contain further cross references to permit application requirements for surface coal mining operations and, in particular, to those at 30 CFR Part 780. However the cross-referenced permit application requirements are intended for surface coal mining operations and need not be applied to exploration operations because of the much more limited nature and scope of exploration activity.

The need for more careful specification of exploration permitting information was recently demonstrated by an administrative appeal to an exploration permit issued to Chatham

Coal Co. The appeal alleged that the regulatory authority failed to require the Part 780 permitting information cross-referenced by the exploration performance standards. The Administrative Law Judge's decision held, in part, that, as written, the cross-referenced permit information requirements which were in question applied to coal exploration. *Chatham County v. OSMRE*, No. NX 7-1-A (August 24, 1987).

OSMRE is proposing to add a new provision to the exploration performance standards to clarify that notwithstanding cross-references in other parts which may be otherwise construed, Part 772 establishes the permit information requirements for coal exploration. As a result of the addition of this provision, the cross-references in Part 816 to the surface coal mining permit application requirements (which are cross-referenced in the exploration performance standards in 30 CFR 815.15) would not apply to exploration permits.

#### *Section 942.772 Requirements for coal exploration in the Federal program for Tennessee.*

The Tennessee Federal program, promulgated on October 1, 1984 (49 FR 38874), added a provision to the coal exploration rules for Tennessee at 30 CFR 942.772(b) requiring that any person who intends to use mechanized earth moving equipment or explosives to conduct coal exploration activities must file a written notice of intent with OSMRE. This provision is in addition to the requirements of 30 CFR 772.1(a) requiring a written notice of intention to explore from a person intending to conduct coal exploration activities that may substantially disturb the natural land surface. The additional provision in the Tennessee program rules was added to aid enforcement, and because the use of mechanized earth moving equipment or explosives is a fairly reliable indicator that substantial disturbance would be likely to occur during exploration. This provision, however, is inconsistent with the proposed revisions to the OSMRE permanent program regulations requiring all who would explore for 250 tons or less of coal to file a notice of intent. Therefore, OSMRE is proposing to revise the exploration rules for the Tennessee Federal program to make those provisions consistent with the proposed revisions to the OSMRE permanent program contained in this proposed rule.

Section 942.772 would be revised to state that Part 772 of this chapter, Requirements for Coal Exploration, shall apply to any person who conducts or



seeks to conduct coal exploration operations in Tennessee. The provisions under existing § 942.772(b) would be removed and replaced by a provision which would state that OSMRE shall make every effort to act on an exploration application within 60 days of its receipt, or such longer time as may be reasonably required, and if additional time is needed, OSMRE will notify the applicant that additional time is needed to complete the review, setting forth the reasons for the additional time that is needed. This provision is proposed to provide consistency with the exploration application processing provisions contained in the other Federal programs for States.

#### IV. Procedural Matters

##### *Effect in Federal Program States*

The proposed rules under 30 CFR Parts 772 and 815 would apply through cross-referencing in those States with Federal programs. These include Georgia, Idaho, Massachusetts, Michigan, North Carolina, Oregon, Rhode Island, South Dakota, Tennessee and Washington. The Federal programs for these States appear at 30 CFR Parts 910, 912, 921, 922, 933, 937, 939, 941, 942 and 947, respectively. Comments are specifically solicited as to whether unique conditions exist in any of these States which should be reflected as changes to the national rules or as specific amendments to any or all of the Federal programs.

OSMRE has proposed to implement a Federal program for the State of California (52 FR 39594, October 22, 1987). The proposed exploration rules would apply through cross-referencing to the Federal program for California. Comments are also specifically solicited as to whether conditions exist in California that should be reflected in the proposed Federal program for that State.

##### *Effect on State Programs*

Following promulgation of the final rule, OSMRE will evaluate permanent State regulatory programs approved under section 503 of SMCRA to determine whether any changes in these programs will be necessary. If the Director determines that certain State program provisions should be amended in order to be made no less effective than the revised Federal rules, the individual States will be notified in accordance with the provisions of 30 CFR 732.17.

##### *Federal Paperwork Reduction Act*

The information collection requirements in the proposed 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. The information is needed to meet the requirements of section 512 of Pub. L. 95-87, and will be used by the regulatory authority to assess the impact of the proposed exploration operations on the environment. The obligation to respond is mandatory.

##### *Executive Order 12291 and Regulatory Flexibility Act*

The U.S. Department of the Interior (DOI) has determined that this proposed rule is not a major rule under the criteria of Executive Order 12291 (February 17, 1981) and certifies that it would 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 does not distinguish between small and large entities. The economic effects of the proposed rule are estimated to be minor and no incremental 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 (FONSI) 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"). An EA will be completed on the final rule and a finding will be made on the significance of any resulting impacts prior to promulgation of the final rule.

##### *Author*

The principal author of this proposed rule is Dr. Fred Block, Branch of Federal and Indian Programs, Office of Surface Mining Reclamation and Enforcement, 1951 Constitution Avenue NW., Washington 20240; Telephone: 202-343-4553 (Commercial or FTS).

##### *List of Subjects*

##### *30 CFR Part 772*

Reporting and recordkeeping requirements, Surface mining, Underground mining.

##### *30 CFR Part 815*

Reporting and recordkeeping requirements, Surface mining.

##### *30 CFR Part 942*

Intergovernmental relations, Reporting and recordkeeping requirements, Surface mining, Underground mining.

Accordingly, it is proposed to amend 30 CFR Parts 772, 815 and 942 as set forth below:

Dated: April 28, 1988.

James E. Cason,

Acting Assistant Secretary-Land and Minerals Management.

#### **PART 772—REQUIREMENTS FOR COAL EXPLORATION**

1. The authority citation for Part 772 is revised to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*, as amended; 16 U.S.C. 470 *et seq.*; and Pub. L. 100-34.

2. Section 772.11 is amended by revising paragraphs (a) and (b)(3) and republishing paragraph (b) introductory text to read as follows:

##### **§ 772.11 Notice requirements for exploration removing 250 tons of coal or less.**

(a) Any person who intends to conduct coal exploration operations outside a permit area during which 250 tons or less of coal will be removed, shall, before conducting the exploration, file with the regulatory authority a written notice of intention to explore. Exploration which will take place on lands designated as unsuitable for surface coal mining operations under Subchapter F of this chapter, shall be subject to the permitting requirements under § 772.12. Exploration conducted under a notice of intent shall be subject to the requirements prescribed under §§ 772.13 and 772.14.

(b) The notice shall include—

(3) A narrative describing the proposed exploration area or a map at a scale of 1:24,000, or greater, showing the proposed area of exploration and the location of drill holes and trenches, existing and proposed roads, occupied dwellings, topographic features, bodies of surface water, and pipelines;

3. Section 772.12 is amended by revising paragraphs (a) and (b)(3); adding paragraph (b)(14); revising the heading for paragraph (d); removing the word "and" at the end of paragraph (d)(2)(ii); replacing the period at the end of paragraph (d)(2)(iii) with "; and"; and



adding paragraph (d)(2)(iv), to read as follows:

**§ 772.12 Permit requirements for exploration removing more than 250 tons of coal.**

(a) *Exploration permit.* Any person who intends to conduct coal exploration outside a permit area during which more than 250 tons of coal will be removed or which will take place on lands designated as unsuitable for surface mining under Subchapter F of this chapter, shall, before conducting the exploration, submit an application and obtain written approval from the regulatory authority in an exploration permit. Such exploration shall be subject to the requirements prescribed under §§ 772.13 and 772.14.

(b) *Application information.* \* \* \*

(3) A narrative describing the proposed exploration area.

(14) For an application proposing coal exploration activities within an area covered by § 761.11(a) of this chapter, documentation that the person has valid existing rights to conduct surface coal mining operations in the proposed exploration area.

(d) *Decisions on applications for exploration.*

(2) \* \* \*

(iv) For areas covered by § 761.11(a) of this chapter, be conducted by or on behalf of a person who possesses valid existing rights to conduct surface coal mining operations within the proposed exploration area.

4. Section 772.14 is revised to read as follows:

**§ 772.14 Commercial use or sale.**

(a) Except as provided under §§ 772.14(b) and 700.11(a), any person who intends to commercially use or sell coal extracted during coal exploration operations under a notice of intent to explore or under an exploration permit, shall first obtain a surface coal mining and reclamation operations permit for those operations from the regulatory

authority under Parts 773-785 of this chapter.

(b) With the prior written approval of the regulatory authority, no surface coal mining and reclamation operations permit is required for the sale or commercial use of coal extracted during exploration operations if such sale or commercial use is for coal testing purposes only. The person conducting the exploration shall file an application for such approval with the regulatory authority. The application shall demonstrate that the coal testing is necessary for the development of a surface coal mining and reclamation operation for which a surface coal mining and reclamation operations permit application is to be submitted in the near future, and that the proposed commercial use or sale of coal extracted during exploration operations is solely for the purpose of testing the coal. The application shall contain the following:

(1) The name of the testing firm and the location at which the coal will be tested.

(2) If the coal is sold directly, or commercially used directly, by the intended end user, a statement from the intended end user that provides:

(i) The specific reasons for the test, including why the coal may be so different from the intended user's other coal supplies as to require testing;

(ii) The amount of coal necessary for the test and why a lesser amount is not sufficient; and

(iii) A description of the specific tests that will be conducted.

(3) If the coal is sold indirectly to the intended end user through an agent or broker, a statement from the agent or broker that provides:

(i) The specific reasons for the test, including why the coal may be so different from the intended user's other coal supplies as to require testing;

(ii) The amount of coal necessary for the test and why a lesser amount is not sufficient; and

(iii) A description of the specific tests that will be conducted.

(4) Evidence that sufficient reserves of coal are available to the operator for future commercial use or sale to the intended end user, or agent or broker of such user, identified above to demonstrate that the amount of coal to

be removed is not the total reserve, but is a sampling of a larger reserve.

(5) An explanation as to why other means of prospecting or exploration, such as core drilling, are not adequate to determine the quality of the coal and/or the feasibility of developing a surface coal mining operation.

**PART 815—PERMANENT PROGRAM PERFORMANCE STANDARDS—COAL EXPLORATION**

5. The authority citation for Part 815 is revised to read as follows:

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

6. Section 815.2 is added to read as follows:

**§ 815.2 Permitting information.**

Notwithstanding cross-references in other parts which may be otherwise construed, Part 772 establishes the notice and permit information requirements for coal exploration.

**SUBCHAPTER T—PROGRAMS FOR THE CONDUCT OF SURFACE MINING OPERATIONS WITHIN EACH STATE**

**PART 942—TENNESSEE**

7. The authority citation for Part 942 is revised to read as follows:

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

8. Section 942.772 is revised to read as follows:

**§ 942.772 Requirements for coal exploration.**

(a) Part 772 of this chapter, Requirements for Coal Exploration, shall apply to any person who conducts or seeks to conduct coal exploration operations.

(b) The Office shall make every effort to act on an exploration application within 60 days of receipt or such longer time as may be reasonable under the circumstances. If additional time is needed, OSMRE shall notify the applicant that the application is being reviewed, but that more time is necessary to complete such reviews, setting forth the reasons and the additional time that is needed.

[FR Doc. 88-13924 Filed 6-21-88; 8:45 am]

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Wednesday  
June 22, 1988

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**Part VI**

**Department of Labor**

Employment Standards Administration,  
Wage and Hour Division

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**29 CFR Part 505**

**Labor Standards on Projects or  
Productions Assisted by Grants From the  
National Endowments for the Arts and  
Humanities; Final Rule**



**DEPARTMENT OF LABOR****Employment Standards  
Administration, Wage and Hour  
Division****29 CFR Part 505****Labor Standards on Projects or  
Productions Assisted by Grants From  
the National Endowments for the Arts  
and Humanities****AGENCY:** Wage and Hour Division, ESA,  
Labor.**ACTION:** Final rule.

**SUMMARY:** The Department of Labor is revising regulations 29 CFR Part 505 to extend the labor standards provisions now applicable to professional performers and related or supporting professional personnel employed on projects funded by the National Endowment for the Arts (NEA) to such performers and supporting personnel employed on projects funded by the National Endowment for the Humanities (NEH). Other revisions include broadening the definition of "amateur" to include those performers and supporting personnel who may receive reimbursement for expenses, simplification of the procedures for obtaining exceptions from the prevailing minimum compensation standards, and conforming the references to safety and health standards with currently applicable requirements.

**EFFECTIVE DATE:** July 22, 1988.**FOR FURTHER INFORMATION CONTACT:**

Paula V. Smith, Administrator, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Room S-3502, 200 Constitution Avenue, NW, Washington, DC 20210, (202) 523-8305 (this is not a toll-free number).

**SUPPLEMENTARY INFORMATION:** On September 21, 1987, the Department of Labor published in the *Federal Register* (52 FR 35447) proposed changes to 29 CFR Part 505, entitled "Labor Standards on Projects or Productions Assisted by Grants From the National Endowments for the Arts and Humanities." Persons interested in the rulemaking were allowed 30 days to submit comments. Two comments were received. This document provides the text of the final rule and explains the comments received on the proposal.

**Background**

Since issued in 1967, the existing regulations, 29 CFR Part 505, Labor

Standards on Projects or Productions Assisted by Grants from the National Endowment for the Arts, have provided that the minimum compensation (including fringe benefits) set forth in collective bargaining agreements negotiated by ten national or international labor organizations or their local affiliates named in the regulations constitute the prevailing minimum compensation required to be paid under the Act to professional performers and related or supporting professional personnel employed on projects receiving financial assistance from the National Endowment for the Arts. Provisions were included to permit any professional performer, supporting personnel, or grant applicant to challenge that determination and obtain a variation from the negotiated rates upon written application to the Administrator of the Wage and Hour Division.

Congress amended the National Foundation of the Arts and the Humanities Act of 1965 (NFAHA) in 1976 (Sec. 105, Pub. L. 94-462, 90 Stat. 1971; 20 U.S.C. 956(g)), to provide that professional performers and related or supporting professional personnel employed under Humanities grants would also be subject to prevailing minimum compensation standards. The Department published a regulatory proposal in the *Federal Register* on December 19, 1980 (45 FR 83914) to carry out the provisions of these amendments. However, that proposal was subsequently withdrawn from the Department's Semiannual Agenda of Regulations of October 28, 1982 (47 FR 48538).

On December 20, 1985, the Arts, Humanities, and Museums Amendments of 1985, Pub. L. 99-194, 99 Stat. 1332, were enacted which, among other things, directed the Secretary of Labor to prescribe prevailing minimum compensation standards for professional performers and related or supporting professional personnel employed on projects or productions assisted by grants from the National Endowment for the Humanities. These revisions to 29 CFR Part 505 extend the existing prevailing minimum compensation standards now applicable to professional performers and related or supporting professional personnel employed on projects receiving financial assistance from the National Endowment for the Arts to such employees employed on projects

receiving assistance from the National Endowment for the Humanities.

Other revisions will ease the administrative procedures and minimize burdens associated with obtaining approval to provide prevailing minimum compensation as an alternative to the compensation negotiated by the labor organizations named in the regulations.

In addition, the definition of amateur has been revised to include those performers and supporting personnel who may receive reimbursement for expenses but who do not work for compensation, and the references to safety and health standards have been conformed to currently applicable requirements.

**Summary of Comments**

The NEH recommended changes to proposed § 505.3(b)(4), pertaining to decisions of the Wage and Hour Administrator on requests for variances from the prevailing minimum compensation negotiated by the labor organizations named in § 505.3(a)(1). The section as proposed provided that the Administrator would respond to such requests within 30 days of receipt by issuing a determination of alternative prevailing minimum compensation or denying the request, or advising that additional time would be required for a decision. NEH suggested that the rule should specify the amount of additional time that may be required for a decision, and that the additional time should not exceed 14 days.

Requiring that a final decision be rendered in all cases within NEH's suggested timeframe is not feasible. While we anticipate that most decisions on variance requests will be rendered within the specified 30 days of receipt, there will necessarily be instances where more time is required to obtain additional data from the interested parties, verify information submitted, or resolve disputes over the factual basis on which the decision is to be made. It should also be recognized that NFAHA is only one of a number of labor standards programs administered by the Wage and Hour Division, and priority demands which are placed on the agency arising under these other programs would make the proposed 14-day timeframe under NFAHA unworkable. Therefore, the suggestion from NEH is not adopted.

The Department for Professional Employees (DPE), AFL-CIO, objected to the proposed revision to the definition of



the term "professional" in § 505.2(e), which is replaced the phrase "teaching process" with "teaching profession" in describing those persons employed as regular faculty members by educational institutions who are excluded from coverage. We believe the proposed change is an appropriate clarification which will more accurately convey the intended meaning and it will, therefore, be adopted.

The DPE also questioned the interpretation of the language in § 505.3(a)(2), which concerns establishment of prevailing minimum compensation by agreement of the affected parties for employees who perform activities that are not covered by a collective bargaining agreement. The intent of this section is to provide a mechanism for establishing prevailing minimum compensation for persons engaged in activities that are not identified under the terms of any of the applicable collective bargaining agreements (i.e., for *classifications* of employees who are outside the scope of the agreements). If an activity to be performed by professional performers or related personnel is identified in one of the agreements negotiated by the labor organizations named in § 505.3(a)(1), the compensation provided for in that agreement would be applicable to the activity in question.

The DPE opposed the revision to § 505.7, regarding the listings of grantees who, by virtue of their failure to comply with the labor standards of NFAHA, become ineligible to receive future grants. The present regulations provide for an indefinite term of ineligibility, and removal from the ineligible lists can be achieved only through appropriate application to the Secretary of Labor. The Department determined in its review of the existing regulations that an indefinite term of ineligibility is inappropriate. Revisions were proposed to provide a maximum three-year term of ineligibility, or a shorter period if an ineligible grantee applies to the Secretary for removal from the ineligible list and demonstrates that the violations have been corrected and that the grantee possesses a current responsibility to comply with NFAHA. This change was made to conform the NFAHA regulations to the administrative debarment provisions under other labor standards programs administered by the Wage and Hour Division (see, e.g., the Davis-Bacon and Related Acts Regulations at 29 CFR 5.12), and it is in keeping with governmentwide principles and guidelines for debarment and suspension procedures (see also the procurement debarment and suspension

system under the Federal Acquisition Regulations, at 48 CFR 9.406-4). Accordingly, this section will be adopted as proposed.

#### Classification—Executive Order 12291

This rule is not a "major rule" under Executive Order 12291 on Federal Regulations because it is not likely to result in: (1) An annual effect on the economy of \$100 million or more; (2) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets. Accordingly, no regulatory impact analysis is required.

#### Regulatory Flexibility Act

This rule, if promulgated will have no "significant economic impact on a substantial number of small entities" within the meaning of section 3(a) of the Regulatory Flexibility Act, Pub. L. 96-354, 91 Stat. 1164 (5 U.S.C. 605(b)). The Secretary of Labor has certified to the Chief Counsel for Advocacy of the Small Business Administration to this effect. This conclusion is based on the fact that the number of affected small entities receiving grants under which professional performers and related or supporting professional personnel are employed subject to the prevailing minimum compensation requirements is not believed to be substantial.

#### Paperwork Reduction Act

The recordkeeping and information collection requirements that are included in this regulation are a restatement of requirements contained in 29 CFR Part 516 (Records to be Kept by Employers Under the Fair Labor Standards Act), which have been previously cleared by the Office of Management and Budget (OMB) under the Paperwork Reduction Act and assigned OMB control number 1215-0017.

This document was prepared under the direction and control of Paula V. Smith, Administrator, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor.

#### List of Subjects in 29 CFR Part 505

Arts and crafts, Education, Foundations, Grant programs, Minimum wages, Occupational safety and health.

Accordingly, 29 CFR Part 505 is revised as set forth below.

Signed at Washington, DC, on this 15th day of June 1988.

Ann D. McLaughlin,

Secretary of Labor.

Fred W. Alvarez,

Assistant Secretary for Employment Standards.

Paula V. Smith,

Administrator, Wage and Hour Division.

### PART 505—LABOR STANDARDS ON PROJECTS OR PRODUCTIONS ASSISTED BY GRANTS FROM THE NATIONAL ENDOWMENTS FOR THE ARTS AND HUMANITIES

#### Sec.

- 505.1 Purpose and scope.
- 505.2 Definitions.
- 505.3 Prevailing minimum compensation.
- 505.4 Receipt of grant funds.
- 505.5 Adequate assurances.
- 505.6 Safety and health standards.
- 505.7 Failure to comply.

Authority: Sec. 5(j), Pub. L. 89-209, 79 Stat. 848 (20 U.S.C. 954(i)); sec. 7(g), Pub. L. 94-462, 90 Stat. 1971, as amended by Sec. 107(4), Pub. L. 99-194, 99 Stat. 1337 (20 U.S.C. 956(g)); Secretary's Order 9-83 (48 FR 35736) and Secretary's Order 6-84 (49 FR 32473).

#### § 505.1 Purpose and scope.

(a) The regulations contained in this part set forth the procedures which are deemed necessary and appropriate to carry out the provisions of section 5(i) and section 7(g) of the National Foundation on the Arts and Humanities Act of 1965, as amended, 20 U.S.C. 954(i), 20 U.S.C. 956(g). As a condition to the receipt of any grant, the grantees must give adequate assurances that all professional performers and related or supporting professional personnel employed on projects or productions assisted by grants from the National Endowment for the Arts and the National Endowment for the Humanities shall receive not less than the prevailing minimum compensation as determined by the Secretary of Labor.

(b) Regulations and procedures relating to wages on construction projects as provided in section 5(j) and section 7(j) of the National Foundation on the Arts and Humanities Act of 1965, as amended, may be found in Parts 3 and 5 of this title.

(c) Standards of overtime compensation for laborers or mechanics may be found in the Contract Work Hours and Safety Standards Act, 76 Stat. 357, 40 U.S.C. 327 *et seq.* and Part 5 of this title.

#### § 505.2 Definitions.

(a) The term "Act" means the National Foundation on the Arts and the Humanities Act of 1965, as amended, 79



Stat 848, as amended, 20 U.S.C. 951 *et seq.*

(b) The term "Secretary" means the Secretary of Labor.

(c) The term "Administrator" means the Administrator of the Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, or authorized representative, to whom is assigned the performance of functions of the Secretary pertaining to wages under the National Foundation on the Arts and the Humanities Act of 1965, as amended.

(d) The term "Assistant Secretary" means the Assistant Secretary for Occupational Safety and Health, U.S. Department of Labor, or authorized representative, to whom is assigned the performance of functions of the Secretary pertaining to safety and health under the National Foundation on the Arts and the Humanities Act of 1965, as amended.

(e) "Professional" in the phrase "professional performer and related or supporting professional personnel" shall include all those who work for compensation on a project or production which is assisted by a grant from the National Endowment for the Arts or the National Endowment for the Humanities regardless of whether paid out of grant funds. It shall not include those whose status is "amateur" because their engagement for performance or supporting work contemplates no compensation. Compensation does not include reimbursement of expenses (i.e., meals, costumes, make-up etc.). The words "related or supporting . . . personnel" in the same phrase shall include all those whose work is related to the particular project or production such as musicians, stage hands, scenery designers, technicians, electricians and moving picture machine operators, as distinguished from those who operate a place for receiving an audience without reference to the particular project or production being exhibited, such as ushers, janitors, and those who sell and collect tickets. The phrase does not include laborers and mechanics employed by contractors or subcontractors on construction projects, whose compensation is regulated under section 5(j) and section 7(j) of the Act. The phrase "professional performers and related or supporting professional personnel" shall not include persons employed as regular faculty or staff of an educational institution primarily performing duties commonly associated with the teaching profession. It shall include persons employed by educational institutions primarily to engage in activities customarily performed by performing artists or by

those who assist in the presentation of performances assisted by grants from the National Endowment for the Arts or the National Endowment for the Humanities.

#### § 505.3 Prevailing minimum compensation.

(a)(1) In the absence of an alternative determination made by the Administrator under paragraph (b) of this section, and except as provided in paragraph (a)(2) of this section, the prevailing minimum compensation required to be paid under the Act to the various professional performers and related or supporting professional personnel employed on projects or productions assisted by grants from the National Endowment for the Arts and the National Endowment for the Humanities shall be the compensation (including fringe benefits) contained in collective bargaining agreements negotiated by the following national or international labor organizations or their local affiliates:

Actors' Equity Association.  
Screen Actors Guild, Inc.  
Screen Extras Guild, Inc.  
American Guild of Musical Artists, Inc.  
International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators.  
American Federation of Musicians.  
National Association of Broadcast Employees and Technicians.  
American Federation of Television and Radio Artists.  
International Brotherhood of Electrical Workers.  
American Guild of Variety Artists.  
Writers Guild.

(2) Professional performers and related or supporting professional personnel who are to perform activities which do not come within the jurisdiction of any collective bargaining agreement negotiated by the labor organizations named in paragraph (a)(1) of this section shall be paid minimum compensation as determined by agreement of the grant applicant or grantee and the personnel who will perform such activities or their representatives. Evidence of the agreement reached by the parties shall be submitted by the grant applicant to the grant agency, together with evidence of the prevailing minimum compensation for similar activities. If the parties do not agree on the minimum compensation to be paid to such personnel, the matter shall be referred to the Administrator of the Wage and Hour Division for final determination.

(b)(1) Interested parties, including grant applicants, grantees, professional

performers or related or supporting professional personnel and their representatives, may at any time submit to the Administrator a request for a determination of prevailing minimum compensation. The Administrator will make a determination concerning each such request in accordance with paragraph (b)(4) of this section.

(2) Any request for a determination of prevailing minimum compensation shall include or be accompanied by information as to the locality or localities, the class or classes of professional performers or related or supporting professional personnel for the project or production in question, the names and addresses (to the extent known) of interested parties, and all available information relating to prevailing minimum compensation currently being paid to such persons or to persons employed in similar activities. No particular form is prescribed for submission of information under this section.

(3) If the information specified in paragraph (b)(2) of this section is not submitted with a request for an alternative determination of prevailing minimum compensation or is insufficient to permit a determination, the Administrator may deny the request or request additional information, at the Administrator's discretion. Pertinent information from any source may be considered by the Administrator in connection with any request.

(4) The Administrator will respond to a request for determination under this section within 30 days of receipt, by issuing a determination of alternative prevailing minimum compensation or denying the request or advising that additional time is necessary for a decision. If the Administrator determines from a preponderance of all relevant evidence obtained in connection with the request that the compensation provided for in the agreements negotiated by the labor organizations set forth in paragraph (a) of this section does not prevail for any professional performer or related or supporting professional personnel employed on similar activities in the locality, the Administrator will issue a determination of the prevailing minimum compensation required to be paid under the Act to such persons. If the Administrator finds that the compensation provided for in the agreements negotiated by the labor organizations set forth in paragraph (a) of this section does prevail for the professional performers or related or supporting professional personnel in



question, the requesting party will be so notified.

(c) All professional performers and related or supporting professional personnel (other than laborers or mechanics with respect to whom labor standards are prescribed in section 5(j) and 7(j) of the Act) employed on projects or productions which are financed in whole or in part under section 5 or section 7 of the Act will be paid, without subsequent deduction or rebate on any account, not less than the prevailing minimum compensation determined in accordance with paragraph (a) of this section, unless an alternative determination is made under paragraph (b) of this section. Pending the decision of the Administrator on a request for determination under paragraph (b) of this section, the grantee may be required to set aside in a separate escrow account sufficient funds to satisfy the difference between the compensation (including fringe benefits) actually paid to the employee(s) in question, and the compensation (including fringe benefits) required under the applicable collective bargaining agreement negotiated by the labor organization named in paragraph (a) of this section, or furnish a bond with a surety or sureties satisfactory to the Administrator for the protection of the compensation of the affected employees.

#### § 505.4 Receipt of grant funds.

(a) The grantee shall not receive funds authorized by section 5 or section 7 of the Act until adequate initial assurances have been filed with the Chairperson of the National Endowment for the Arts or the Chairperson of the National Endowment for the Humanities, pursuant to sections 5(i) (1) and (2) and sections 7(g) (1) and (2) of the Act as provided in § 505.5(a), that all professional performers and related or supporting professional personnel will be paid not less than the prevailing minimum compensation and that the safety and health requirements will be complied with. Neither shall the grantee receive any such funds if and after the Chairperson of the National Endowment for the Arts or Chairperson of the National Endowment for the Humanities is advised by the Secretary that continuing assurances as provided in § 505.5(b) are inadequate or that labor standards contemplated by sections 5(i) (1) and (2) or sections 7(g) (1) and (2) of the Act have not been observed.

(b) In order to facilitate such assurances so that the grantee may receive the grant funds promptly, the Chairpersons of the National Endowment for the Arts and the National Endowment for the Humanities

will transmit with the grant letter, to each grantee of a grant that will provide assistance to projects or productions employing professional performers or related or supporting professional personnel under section 5 or section 7 of the Act, a copy of these regulations together with two copies of the assurance form (Form No. ESA-38). The Chairperson will advise the grantee that before the grant may be received, the grantee must give assurances that all professional performers and related or supporting professional personnel (other than laborers or mechanics with respect to whom labor standards are prescribed in section 5(j) and section 7(j) of the Act), will be paid, without subsequent deduction or rebate on any account not less than the minimum compensation determined in accordance with § 505.3 (a) or (b) and that the safety and health requirements under § 505.6 will be met. The Chairpersons will maintain on file in Washington, DC, for a period of three (3) years and make available upon request of the Secretary the original signed Form ESA-38 and a copy of the grant letter together with any supplementary documents needed to give a description of the project or production to be financed in whole or in part under the grant.

#### § 505.5 Adequate assurances.

(a) *Initial assurances.* The grantee shall give adequate initial assurances that not less than the prevailing minimum compensation determined in accordance with § 505.3 will be paid to all professional performers and related or supporting professional personnel, and that no part of the project or production will be performed under working conditions which are unsanitary or hazardous or dangerous to the health and safety of the employees, by executing and filing with the Chairperson of the National Endowment for the Arts or the Chairperson of the National Endowment for the Humanities, as appropriate, Form ESA-38.

(b) *Continuing assurances.* (1) The grantee shall maintain and preserve sufficient records as an assurance of compliance with section 5(i) (1) and (2) and section 7(g) (1) and (2) of the Act and shall make such reports therefrom to the Secretary as necessary or appropriate to assure the adequacy of the assurances given. Such records shall be kept for a period of three (3) years after the end of the grant period to which they pertain. These records shall include the following information relating to each performer and related or supporting professional personnel to whom a prevailing minimum

compensation determination applies pursuant to § 505.3. In addition the record required in paragraph (b)(1)(vii) of this section shall be kept for all employees engaged in the project or production assisted by the grant.

(i) Name.

(ii) Home address.

(iii) Occupation.

(iv) Basic unit of compensation (such as the amount of a weekly or monthly salary, talent or performance fee, hourly rate or other basis on which compensation is computed), including fringe benefits or amounts paid in lieu thereof.

(v) Work performed for each pay period expressed in terms of the total units of compensation fully and partially completed.

(vi) Total compensation paid each pay period, deductions made, and date of payment, including amounts paid for fringe benefits and the person to whom they were paid, and

(vii) Brief description of any injury incurred while performing under the grant and the dates and duration of disability.

(Approved by the Office of Management and Budget under control number 1215-0017)

(2) The grantee shall permit the Administrator and the Assistant Secretary or their representatives to investigate and gather data regarding the wages, hours, safety, health, and other conditions and practices of employment related to the project or production, and to enter and inspect such project or production and such records (and make such transcriptions thereof), interview such employees during normal working hours, and investigate such facts, conditions, practices, or matters as may be deemed necessary or appropriate to determine whether the grantee has violated the labor standards contemplated by section 5(i) and section 7(g) of the Act.

(c) *Determination of adequacy:* The Administrator and Assistant Secretary shall determine the adequacy of assurances given pursuant to paragraphs (a) and (b) of this section within each of their respective areas of responsibilities, and may revise any such determination at any time.

#### § 505.6 Safety and health standards.

(a) *Standards.* Section 5(i)(2) and section 7(g)(2) of the Act provide that "no part of any project or production which is financed in whole or in part under this section will be performed or engaged in under working conditions which are unsanitary or hazardous or dangerous to the health and safety of



the employees engaged in such project or production. Compliance with the safety and sanitary laws in the State in which the performance or part thereof is to take place shall be prima facie evidence of compliance. \* \* \* The applicable safety and health standards shall be those set forth in 29 CFR Parts 1910 and 1926, including matters incorporated by reference therein. Evidence of compliance with State laws relating to health and sanitation will be considered prime facie evidence of compliance with the safety and health requirements of the Act, and it shall be sufficient unless rebutted or overcome by a preponderance of evidence of a failure to comply with any applicable safety and health standards set forth in 29 CFR Parts 1910 and 1926, including matters incorporated by reference therein.

(b) *Variances.* (1) Variances from standards applied under paragraph (a) of this section may be granted under the same circumstances in which variances may be granted under section 6(b)(6)(A)

or 6(d) of the Williams-Steiger Occupational Safety and Health Act of 1970 (29 U.S.C. 655). The procedures for the granting of variances and for related relief are those published in Part 1905 of this title.

(2) Any requests for variances shall also be considered requests for variances under the Williams-Steiger Occupational Safety and Health Act of 1970, and any variance from a standard applied under paragraph (a) of this section and in Part 1910 of this title shall be deemed a variance from the standards under both the National Foundation on the Arts and Humanities Act of 1965 and the Williams-Steiger Occupational Safety and Health Act of 1970.

#### § 505.7 Failure to comply.

The Secretary's representatives shall maintain a list of those grantees who are considered to be responsible for instances of failure to comply with the obligation of the grantees specified in section 5(i) (1) and (2) and section 7(g)

(1) and (2) of the Act, which are considered to have been willful or of such nature as to cast doubt on the reliability of formal assurances subsequently given and there shall be maintained a similar list where adjustment of the violations satisfactory to the Secretary was not properly made. Assurances from persons or organizations placed on either such list or any organization in which they have a substantial interest shall be considered inadequate for purposes of receiving further grants for a period not to exceed three (3) years from the date of notification by the Secretary that they have been placed on the lists unless, by appropriate application to the Secretary, they demonstrate a current responsibility to comply with section 5(i) (1) and (2) and section 7(g) (1) and (2) of the Act, and demonstrate that correction of the violations has been made.

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