

Rohr, and Cass determined that Commission business required the change in time and date of the meeting originally scheduled for August 4, 1988, and affirmed that no earlier announcement of the change to the date and time was possible, and directed the issuance of this notice at the earliest practicable time.

CONTACT PERSON FOR MORE INFORMATION: Kenneth R. Mason, Secretary, (202) 252-1000.
Kenneth R. Mason,
Secretary.
July 19, 1988.

[FR Doc. 88-17502 Filed 8-1-88; 9:34 am]
BILLING CODE 7020-02-M

INTERSTATE COMMERCE COMMISSION
TIME AND DATE: 10:00 a.m., Tuesday, August 9, 1988.
PLACE: Hearing Room A, Interstate Commerce Commission, 12th &

Constitution Avenue, NW., Washington, DC 20423.

STATUS: Open Special Conference.

PURPOSE: The purpose of the conference is for the Commission to discuss among themselves, and to vote on, the agenda item. Although the conference is open for public observation, no public participation is permitted.

MATTERS TO BE DISCUSSED:

Finance Docket No. 32000.
Rio Grande Industries, Inc., SPTC Holding, Inc., The Denver and Rio Grande Western Railroad Company—Control—Southern Pacific Transportation Company.

CONTACT PERSON FOR MORE INFORMATION: Alvin H. Brown, Office of Government and Public Affairs, Telephone: (202) 275-7252.

Noreta R. McGee,
Secretary.

[FR Doc. 88-17550 Filed 8-1-88; 12:28 pm]
BILLING CODE 7035-01-M

STATE JUSTICE INSTITUTE

TIME AND DATE:

9:00 a.m. to 5:00 p.m., August 18, 1988.
9:00 a.m. to 5:00 p.m., August 19, 1988.
9:00 a.m. to 3:00 p.m., August 20, 1988.

PLACE: State Justice Institute, 120 South Fairfax Street, Alexandria, Virginia.

STATUS: The meeting will be open to the public.

MATTERS TO BE CONSIDERED:

Consideration of Applications submitted for Institute funding.

CONTACT PERSON FOR MORE

INFORMATION: David I. Tevelin, Executive Director, State Justice Institute, 120 South Fairfax Street, Alexandria, Virginia 22312, (703) 684-6100.

David I. Tevelin,
Executive Director.

[FR Doc. 88-17597 Filed 8-1-88; 3:51 pm]
BILLING CODE 6820-SC-M

Corrections

Federal Register

Vol. 53, No. 149

Wednesday, August 3, 1988

This section of the FEDERAL REGISTER contains editorial corrections of previously published Presidential, Rule, Proposed Rule, and Notice documents and volumes of the Code of Federal Regulations. These corrections are prepared by the Office of the Federal Register. Agency prepared corrections are issued as signed documents and appear in the appropriate document categories elsewhere in the issue.

DEPARTMENT OF AGRICULTURE

Commodity Credit Corporation

7 CFR Part 1408

Setoff, Withholding and Stop Payment Policies

Correction

In proposed rule document 88-15330 beginning on page 26081 in the issue of Monday, July 11, 1988, make the following correction:

§ 1408.11 [Corrected]

On page 26082, in the second column, in the introductory text of § 1408.11, in the second line, "will be" should read "will not be".

BILLING CODE 1505-01-D

ENVIRONMENTAL PROTECTION AGENCY

[OPTS-51707; FRL-3405-7]

Toxic and Hazardous Substances; Certain Chemicals Premanufacture Notices

Correction

In notice document 88-14381 beginning on page 24143 in the issue of Monday, June 27, 1988, make the following corrections:

1. On page 24144, in the second column, under P 88-1337, in the third line, "pheyl" should read "phenyl".
2. On the same page, in the third column, under P 88-1346, in the second line, "Anthracendione" should read "Anthracenedione". Also under P 88-1348, in the fifth line, "Use/Import." should read "Use/Production".
3. On page 24145, in the second column, under P 88-1367, in the seventh line, "toxicity" was misspelled.
4. On the same page, in the third column, under P 88-1375, in the fifth line, "(S) Industrial" should read "(G) Industrial".
5. On page 24146, in the first column, under P 88-1379, in the first line, "Ciba-Deigy" should read "Ciba-Geigy". Also in the fifth line, "(S) Textile" should

read "(G) Textile"; and under P 88-1389, in the fifth line, "(S) Ink" should read "(G) Ink".

BILLING CODE 1505-01-D

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[AZ-020-08-4321-01; A 23376]

Realty Action; Exchange of Public Lands; Apache County, AZ

Correction

In notice document 88-15107 beginning on page 25387 in the issue of Wednesday, July 6, 1988, make the following corrections:

1. On page 25388, in the first column, in the first bold heading "Meridian" was misspelled.
2. On the same page, in the second column, in the fifth line "Sec. 36" should read "Sec. 32".
3. On page 25389, in the first column, in the eighth line, "Sec. 12" should read "Sec. 32".

BILLING CODE 1505-01-D

Registered Federal Land

Wednesday
August 3, 1988

Part II

Department of the Interior

Office of Surface Mining Reclamation
and Enforcement

30 CFR Parts 701 and 785
Surface Coal Mining and Reclamation
Operations; Permanent Regulatory
Program; Permits for Special Categories
of Mining; Special Permanent Program
Performance Standards; Proposed Rule

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Parts 701 and 785

Surface Coal Mining and Reclamation Operations; Permanent Regulatory Program; Permits for Special Categories of Mining; Special Permanent Program Performance Standards

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

ACTION: Proposed rule.

SUMMARY: The Office of Surface Mining Reclamation and Enforcement (OSMRE) of the United States Department of the Interior (DOI) proposes to establish separate definitions of the terms "agricultural activities" and "farming" to replace the suspended definition of "agricultural activities or farming." Related changes are proposed to conform these new definitions with the existing regulations governing mining on Alluvial Valley Floors (AVF's).

Also, OSMRE proposes to amend its regulations to specify the essential hydrologic functions of AVF's for which information must be provided in a permit application.

DATES:

Written comments: OSMRE will accept written comments on the proposed rule until 5:00 p.m. Eastern time on September 19, 1988.

Public hearings: Upon request, OSMRE will hold public hearings on the proposed rule in Washington, DC and Denver, Colorado at 9:30 a.m. local time on August 31, 1988. In addition, if requested OSMRE also will hold public hearings in the States of Georgia, Idaho, Massachusetts, Michigan, North Carolina, Oregon, Rhode Island, South Dakota, and Washington at times and on dates to be announced prior to the hearings. OSMRE will accept requests for hearings at these additional locations until 5:00 p.m. Eastern Time on August 24, 1988. Individuals wishing to attend but not testify at any 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 5131L, 1100 L Street NW., Washington, DC; or mail to the Office of Surface Mining Reclamation and Enforcement, Administrative Record, Room 5131L,

1951 Constitution Avenue NW., Washington, DC 20240.

Public Hearings: Department of the Interior Auditorium, 18th and C Streets, NW., Washington, DC; and Brooks Towers, 2nd Floor Conference Room, 1020 15th St., Denver, Colorado. The addresses for any hearings scheduled in the States of Georgia, Idaho, Massachusetts, Michigan, North Carolina, Oregon, Rhode Island, South Dakota and Washington, will be announced prior to the hearings.

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

FOR FURTHER INFORMATION CONTACT: Douglas Growitz, Office of Surface Mining Reclamation and Enforcement, U.S. Department of the Interior, 1951 Constitution Avenue NW., Washington, DC 20240; Telephone: 202-343-1507 (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 rules, 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 or delivered to addresses other than those listed above (see "DATES") 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 upon request only. The times, dates and addresses for two scheduled hearings are specified previously in this notice (see "DATES" and "ADDRESSES"). The times, dates and addresses for any additional hearings which may be requested for the remaining locations have not been determined, but will be announced in the *Federal Register* at least 7 days prior to any hearings held at those locations. Persons who wish to participate in a hearing at any of these additional locations for which no hearing has been pre-scheduled, should notify Mr. Growitz (see "FOR FURTHER INFORMATION CONTACT") either orally or in writing of the desired hearing location by 5:00 p.m. Eastern time August 24, 1988.

If no one has contacted Mr. Growitz to express an interest in participating in a hearing at any given location by August 24, 1988, 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. To assist the transcriber and ensure an accurate record, OSMRE requests that persons who testify at a hearing give the transcriber a written 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*Statutory Provisions*

In addition to the general environmental protection performance standards applicable to all lands, the Surface Mining Control and Reclamation Act of 1977 (the Act), 30 U.S.C. 1201 *et seq.*, provides specific protection for alluvial valley floors (AVF's). Section 701(1) of the Act, 30 U.S.C. 1291(1), defines "alluvial valley floors" as "unconsolidated stream laid deposits holding streams where water availability is sufficient for subirrigation or flood irrigation agricultural activities * * *".

Subject to a number of exceptions, section 510(b)(5) of the Act, 30 U.S.C. 1260(b)(5), requires a surface coal mining operation permit application to demonstrate affirmatively, and the regulatory authority to find in writing, that a number of requirements unique to AVF's would be satisfied by the proposed operation. Section 510(b)(5)(A) requires that the application demonstrate that the surface coal mining operation would "not interrupt, discontinue, or preclude farming on alluvial valley floors that are irrigated or naturally subirrigated * * *". In addition, section 510(b)(5)(B) requires a demonstration that the operation would not materially damage the quantity or quality of water in surface or underground water systems that supply the AVF's referred to in paragraph (5)(A).

As provided in section 510(b)(5), these requirements do not apply to:

- (1) Surface coal mining operations located east of the 100th meridian west longitude;

(2) Undeveloped range lands which are not significant to farming on the AVF's;

(3) Lands for which the regulatory authority finds that the mining operation will only interrupt, discontinue or preclude farming of "such small acreage as to be of negligible impact on the farm's agricultural production[...]" and

(4) Those surface coal mining operations which in the year preceding the enactment of the Act (August 3, 1977) produced coal in commercial quantities, and were located within or adjacent to AVF's or had specific permit approval from the State regulatory authority to conduct surface coal mining operations on AVF's.

Another exemption from the section 510(b)(5) requirements is provided by section 506(d)(2) of the Act, 30 U.S.C. 1256(d)(2), for new operations proposed in an application for renewal or revision of a permit issued under the Act where the new operations extend to land beyond the boundaries authorized in the original permit. This exemption applies only if (1) the new land previously was identified in the reclamation plan submitted under section 508 of the Act, and (2) the original operations were exempt from the requirements of section 510(b)(5) of the Act under the section 510(b)(5) proviso for operations which produced coal in commercial quantities in the year preceding enactment of the Act.

Irrespective of whether the standards of section 510(b)(5) for the protection of farmed AVF's apply to a particular surface coal mining operation, the hydrologic protection requirements of section 515(b)(10) of the Act, 30 U.S.C. 1265(b)(10), do apply. Section 515(b)(10) requires that mining operations take certain steps to minimize disturbances to the prevailing hydrologic balance at the mine site and in associated off site areas, and to the quality and quantity of water in surface and ground water systems. This requirement applies both during and after surface coal mining operations and during reclamation. The required steps include, as specified in section 515(b)(10)(F), preserving throughout the mining and reclamation process the essential hydrologic functions of AVF's in the arid and semiarid areas of the country.

Regulatory History and Court Decision

Section 701.5 Definition of "agricultural activities or farming".

The term "agricultural activities" was first defined in a final rule published on March 13, 1979 (44 FR 15317). The rule did not define the term "farming." On

June 28, 1983 (48 FR 29820), the substance of the definition was revised somewhat, and its scope was expanded to cover either "agricultural activities or farming." Under the revised definition the term "agricultural activities or farming" meant:

[W]ith respect to alluvial valley floors, the use of any tract of land for the production of animal or vegetable life, based on regional agricultural practices, where the use is enhanced or facilitated by subirrigation or flood irrigation. These uses include, but are not limited to, pasturing or grazing of livestock, and the cropping, cultivation, or harvesting of plants whose production is aided by the availability of water from subirrigation or flood irrigation. Those uses do not include agricultural activities which have no relationship to the availability of water from subirrigation or flood irrigation practices.

The preamble to the June 28, 1983 rule (48 FR 29803) stated that although the Act and OSMRE's regulations use both the terms "agricultural activities" and "farming," their meaning with respect to AVF's is the same.

Coal industry plaintiffs in *In Re: Permanent Surface Mining Regulation Litigation (II)* (*In Re: Permanent II*), No. 79-1144 (D.D.C. October 1, 1984), challenged the combined definition of "agricultural activities or farming" arguing that the term "agricultural activities" is more general than the term "farming," and thus encompasses more land uses.

Reasoning that the use of two different terms in the Act indicated a congressional intent to prescribe a different meaning to each, the court in *In Re: Permanent II* remanded the definition of "agricultural activities or farming." Slip op. at 30-31. The court held that the Secretary must reconsider the definition and any additional regulations necessary to conform them to congressional intent. On February 21, 1985 (50 FR 7274), OSMRE suspended the definition. OSMRE since has reconsidered the definition and is now proposing separate definitions for "agricultural activities" and "farming." OSMRE is also proposing other rule changes needed for conformity with the proposed definitions.

Section 785.19(d)(2)(i) Information on the essential hydrologic functions of alluvial valley floors.

The March 13, 1979, permanent program rules at 30 CFR 785.19(d)(3) (44 FR 15375) described specific information, surveys and analyses that a surface coal mining and reclamation permit application was required to include concerning the geologic, hydrologic and biologic characteristics

that support the essential hydrologic functions of AVF's. These rules were revised by OSMRE on June 28, 1983 (48 FR 29821) as part of a major revision of the AVF rules. The revised regulation at 30 CFR 785.19(d)(2)(i) required that the permit application include detailed surveys and baseline data required by the regulatory authority for a determination of the characteristics of AVF's which are necessary to preserve their essential hydrologic functions throughout the mining and reclamation process. However, the details formerly contained in § 785.19(d)(3) of precisely what such surveys and baseline data should consist of had been deleted.

The citizen and environmental plaintiffs in *In Re: Permanent II* challenged the deletion of the specific requirements from the rule on the grounds that the preamble to the rule contained inadequate justification for the revision. The court remanded 30 CFR 785.19(d)(2)(i) for OSMRE to provide guidance to operators and regulatory authorities as to what type of information was required. Slip op. 30-40. The United States Court of Appeals for the District of Columbia Circuit affirmed the district court remand, concluding that the Secretary did not adequately explain why such guidance was not needed. *NWF v. Hodel*, No. 84-5743, Slip op. at 67-73. (D.C. Cir. January 29, 1988). OSMRE now proposes to amend § 785.19 accordingly.

III. Discussion of Proposed Rule

General

In developing the proposed rule, OSMRE solicited and received comments on draft rule language from citizen and environmental groups, industry trade associations, and State regulatory authorities. These comments have been considered in drafting the rule.

The proposed rule would remove from 30 CFR 701.5 the definition of the term "agricultural activities or farming" and replace it with separate definitions of the terms "agricultural activities" and "farming." This change is being proposed in response to the court's suggestion that "the use of different words does connote an intent [by the Congress] to prescribe a different meaning" for these terms. Slip op. at 31.

To conform related AVF rules with these proposed definitions OSMRE is also proposing to revise the definition of "materially damage the quantity or quality of water" and to revise 30 CFR 785.19(b)(2)(ii) and (b)(3).

OSMRE also proposes to revise 30 CFR 785.19(d)(2)(i) in response to the

court order that specific guidance to operators and regulatory authorities as to what type of information about potentially affected AVF's must be placed in a permit application.

Each of these proposed changes is discussed in detail below.

A. Section 701.5 Definitions of "agricultural activities" and "farming"

The proposed rule at 30 CFR 701.5 would remove the suspended definition of the term "agricultural activities or farming" and replace it with separate definitions of the terms "agricultural activities" and "farming." OSMRE is proposing this change following reexamination of the legislative history of the Act in response to the remand order issued by the district court.

1. Court Decision

The district court in *In Re: Permanent* II stated:

Congress used the term "agricultural activities" in its definition of AVF's, 30 U.S.C. § 1291(1), and "farming" in describing permit requirements. *Id.* at § 1260(5)(A). This court will not presume to define these terms, but the use of different words does connote an intent to prescribe a different meaning. (Slip op. at 31, citation omitted.)

Thus, separate definitions of these two terms are required by the court's decision if they are needed to conform the OSMRE regulations with congressional intent.

2. Legislative History

To determine congressional intent OSMRE reexamined the legislative history of the Act as it relates to AVF's. Based on the legislative history of section 510(b)(5) of the Act, OSMRE has concluded that separate definitions are appropriate.

The Congress used the term "agricultural activities" in section 701(1) of the Act in defining "alluvial valley floors." The term "farming" was used in section 510(b)(5)(A) of the Act in the AVF permit finding provision. In an attempt to strike a balance between the need to preserve the productive use of AVF's and the need to recover coal beneath them, it appears that the Congress intended section 510(b)(5) of the Act to protect only those AVF's which support farming, and not those which support other agricultural activities such as ranching.

Early versions of section 510(b)(5)(A) of the Act would have protected ranching as well as farming on AVF's. Both the House and Senate bills at one time prohibited the regulatory authority from approving a permit unless it found that the proposed surface coal mining operation, if located west of the 100th meridian west longitude, would "not

have a substantial adverse effect on valley floors * * * where farming can be practiced * * * (excluding undeveloped range lands), where such valley floors are significant * * * farming and ranching operations * * * H.R. Rep. No. 45, 94th Cong., 1st Sess. 22 (1975) (Report accompanying H.R. 25); S. Rep. No. 128, 95th Cong., 1st Sess. 20 (1977) (Report accompanying S. 7) (emphasis added). Additionally, both bills extended this prohibition to potential as well as present farming and ranching.

The language extending the coverage to "ranching operations" was deleted by the House in 1976 and by the Senate in 1977. After H.R. 25 was reported out in 1975, a controversy arose concerning the scope of section 510(b)(5). In the next session the House adopted language very similar to the provision as was finally enacted on August 3, 1977. It provided that the regulatory authority could not approve the permit unless it found that the operation would not "interrupt, discontinue, or prevent farming on alluvial valley floors, * * * but, excluding undeveloped range lands * * * and those lands as to which the regulatory authority finds that if the farming that will be interrupted * * * is of such small acreage as to be of negligible impact on the farm's agricultural production * * *." Section 510(b)(5) of the 1976 House bill also contained a provision grandfathering certain operations which existed prior to the enactment of the Act. See H.R. Rep. No. 896, 94th Cong., 2nd Sess. 2 (1976) (Report accompanying H.R. 9725).

Although the deletion of the term "ranching" was not specifically discussed, the debates on the floor indicate that the Congress amended the AVF permit finding provision largely in response to the Administration's concern that the provision in the 1975 House bill could be read to "close some existing mines and * * * lock up significant coal reserves." 121 Cong. Rec. 12958, 62-64 (May 5, 1975); H.R. Rep. No. 896, 94th Cong., 2d Sess. 3 (1976). The effect of the amendment was to increase the recoverability of coal underlying AVF's by deleting both the protection for present and potential ranching, and by adding the grandfather provisions and the small acreage exemption.

The Senate did not delete the ranching protection from the AVF permit finding provision of its bill until May of 1977 when it passed a compromise amendment introduced by Senator Melcher. Senator Johnston first introduced an amendment which required a finding that the operation would not interrupt, discontinue or prevent farming on AVF's unless, among

other matters, "the total value of the coal mined * * * would exceed, by a ratio of 100 to 1, the total value of the farming or ranching products that would be produced from said acreage * * *." 123 Cong. Rec. S 8030 (daily ed.) (May 19, 1977) (emphasis added). Senator Hart then offered an amendment which would have banned all mining on AVF's irrespective of the agricultural use of the land, with a limited grandfather provision. 123 Cong. Rec. 15691 (May 20, 1977). These two amendments were defeated.

A third amendment, introduced by Senator Melcher and ultimately adopted by the Senate, contained the identical language of the 1976 House bill, including the deletion of the protection for ranching, and the addition of the grandfather provision and the small acreage exemption. The Senator emphasized that this language was designed to protect lands where there was farming that depended on irrigation. He further stated that in 1976 this language had been carefully reviewed and represented a compromise among environmental and labor groups, coal companies, individual landowners and government agencies. 123 Cong. Rec. 15751 (May 20, 1977). The Senator characterized his amendment as a "middle ground [between the Hart and the Johnston amendments] * * * because it does retain the restrictions on keeping the alluvial valley floor farming operations intact. But it allows enough discretion through the regulatory authority to allow [mining] in those instances where the mining operation would not violently disturb a farming operation on a valley floor * * *." 123 Cong. Rec. at 15752 (emphasis added).

The legislative history of section 510(b)(5), therefore, indicates that the Congress twice rejected language which would have broadened the scope of the AVF permit finding provision to encompass ranching as well as farming activities. OSMRE's 1983 combined definition of "agricultural activities or farming" therefore appears inconsistent with congressional intent. Accordingly, OSMRE has proposed to define "farming" as a subset of "agricultural activities" distinct from ranching.

3. Definitions Proposed

As described above, it appears from the debates leading to adoption of the Melcher amendment that the Congress intended to protect only those AVF's being farmed and not those being ranching. (See A.2. *Legislative history*, above.) Therefore, in proposing separate definitions of "agricultural activities" and "farming" consistent with the

legislative history it is necessary to distinguish farming from ranching. OSMRE believes the most practical way to make that distinction is to consider "pasturing or grazing of livestock" in the arid and semi-arid areas west of the 100th meridian as ranching, and to limit farming to activities which involve raising plants. That concept is embodied in the proposed definitions described below.

"Agricultural activities". The definition proposed for "agricultural activities" is similar to the remanded definition of "agricultural activities or farming." However, the specific terms "cultivation," "cropping," and "harvesting" found in the definition of "agricultural activities or farming" are replaced in the proposed definition by the generic term "farming." Therefore, the proposed definition of "agricultural activities" reads as follows:

Agricultural activities means, with respect to alluvial valley floors, the use of any tract of land for the production of animal or vegetable life, based on regional agricultural practices, where the use is enhanced or facilitated by subirrigation or flood irrigation. These uses include, but are not limited to, farming and the pasturing or grazing of livestock. These uses do not include agricultural activities which have no relationship to the availability of water from subirrigation or flood irrigation practices.

"Farming". For consistency with the definition of "agricultural activities" described above, OSMRE proposes to define "farming" in terms of the "cultivation," "cropping" and "harvesting" of plants.

Farming means, with respect to alluvial valley floors, the primary use of those areas for the cultivation, cropping and harvesting of plants which benefit from irrigation, or natural subirrigation, that results from the increased moisture content in the alluvium of the valley floors. For purposes of this definition harvesting does not include the grazing of livestock.

This proposed definition of "farming" differs significantly from the former definition of "agricultural activities or farming." Under the former definition there was no distinction made between ranching and farming, and all agricultural activities, including ranching, that could occur on an AVF were considered to be farming. In this proposed definition farming is limited to the "cultivation, cropping, and harvesting of plants." Also, the terms "cultivation," "cropping" and "harvesting" are used in a different way from how they were used in the former definition. The use of "and" instead of

"or" in linking the terms requires that all three activities (i.e. cultivation, cropping and harvesting) must occur for an AVF to qualify as farmed. For purposes of this rule OSMRE presumes that each is a distinct activity, and that cultivation means the preparation of the land for planting, cropping means planting and tending, and harvesting means the gathering in of the crop.

Requiring all three activities to be performed to establish that an AVF is farmed helps to ensure that there is a distinction maintained between ranching and farming. If only one of the three were required for farming to exist, then those grazed AVF's that are merely improved by cultivation or cropping activities could be considered as farmed although their primary use is the grazing of livestock, a ranching activity. For the same reason OSMRE also presumes, for purposes of this rule, that the "pasturing or grazing of livestock" is not a method of harvesting. Under this proposed rule the production of forage would only be considered a farming activity when the forage crop is mechanically harvested (i.e., cut and either stacked or baled).

Farming as the "primary use" of an AVF. The phrase "primary use" in the definition of "farming" is intended to cover those AVF's which are farmed in most years but not in others due to an unsatisfactory yield, excess production, or some other factor. The use of an AVF for the "pasturing or grazing of livestock" in some years does not preclude the AVF from being classified as farmed and thereby entitled to the protection of section 510(b)(5) of the Act.

However, the "cultivation, cropping and harvesting" of plants constitute "farming" only where such activities are actually the primary use of an AVF. The suspended definition placed all "cultivation, cropping or harvesting" within the scope of "agricultural activities or farming." This proposal differs since occasional farming activities on AVF's not primarily used for "cultivation, cropping and harvesting," and not capable of producing crops on a regular basis, would not be considered farming.

Plants not benefitting from irrigation or subirrigation. "Farming," under the proposed definition, is limited to those "plants * * * which benefit from irrigation, or natural subirrigation, that results from the increased moisture content in the alluvium of the valley floors." Therefore, although an AVF is used for the cultivation, cropping and harvesting of plants, it would not qualify as "farmed" if the plants being cultivated, cropped and harvested do not benefit from irrigation or subirrigation.

4. Effect of Proposal

The chief consequence of defining "farming" separately from "agricultural activities" is that whenever 30 CFR 785.19 or 822.12 refers to "farming," it no longer would apply to all "agricultural activities." For example, § 822.12(b)(1) provides an exclusion from the prohibitions of § 822.12(a) "[w]here the premining use of an alluvial valley floor is undeveloped rangeland which is not significant to farming. * * *". Under the proposed definitions, this provision would not apply to every agricultural activity, but only to those activities which involve the "cultivation, cropping and harvesting" of plants. Furthermore, the provision in § 822.12(a) prohibiting mining when operations would "interrupt, discontinue, or preclude farming" on AVF's would apply only to those areas in which "farming" would be affected. The "farmed" AVF areas being affected so as to invoke the § 822.12(a) prohibition can include areas which were not being mined but would have their "farming" interrupted, discontinued, or precluded by a mining operation located on a nearby portion of the same AVF. The net effect of these proposed definitions would be to remove from those areas used for agricultural activities other than "farming" some protection afforded AVF's by the suspended rules.

5. Request for Comments

The proposed rule interprets the pasturing and grazing of livestock as a non-farming (ranching) agricultural activity and limits "farming" to those situations where cultivation, cropping and harvesting practices are all employed. Comments are solicited on whether any other meaningful or practical distinctions, consistent with the court order and the legislative history, can be made between "agricultural activities" and "farming."

B. Section 701.5 Definition of "materially damage the quantity or quality of water"

As required by the district court in *In Re: Permanent II*, slip op. at 31, for conformity with the proposed definitions of "agricultural activities" and "farming" OSMRE proposes to amend the definition of "materially damage the quantity or quality of water" by substituting the term "farming" for the term "agricultural activities." The revised definition would read as follows:

Materially damage the quantity or quality of water means, with respect to alluvial valley floors, to degrade or reduce by surface coal mining and reclamation operations the

water quantity or quality supplied to the alluvial valley floor to the extent that resulting changes would significantly decrease the capability of the alluvial valley floor to support farming.

OSMRE believes, based on its previously discussed review of the legislative history of the Act and decision of the district court in *In Re: Permanent II*, that the material damage finding required by section 510(b)(5)(B) of the Act applies only to AVF's which support "farming." Therefore, the definition of "material damage" should be limited to decreases in the capability of those AVF's to support "farming" instead of all "agricultural activities." The result of this change would be to narrow the protection afforded to AVF's by eliminating protection for AVF's primarily used for non-farming (i.e., ranching) agricultural activities such as grazing.

C. Section 785.19(b) Applicability of statutory exclusions

Revisions also are needed to conform existing 30 CFR 785.19(b) to the proposed definitions of "agricultural activities" and "farming." Section 785.19(b)(2) provides for mining on AVF's under two of the section 510(b)(5) statutory exclusions described above. The first exclusion applies to undeveloped rangelands which are not significant to farming; the second exclusion applies to mining when the regulatory authority finds that mining activities would affect farming of "such small acreage as to be of negligible impact on the farm's agricultural production." Proposed § 785.19(b)(2)(ii) would require the regulatory authority to base its determination of whether an impact was "negligible"; on the relationship between the loss of production from the affected farmland areas to the farm's total agricultural production over the life of the mine.

This proposed provision includes several changes, but remains very similar to the 1983 final rule. Because this paragraph deals with the impact of surface coal mining on "farming," and the proposed definition of "farming" does not include the use of AVF's for grazing, OSMRE is proposing that the reference to grazing be deleted from § 785.19(b)(2)(ii). Further, because the use of AVF's for hay production falls within the proposed definition of "farming" as previously discussed, this paragraph has been reorganized and the term "hayed AVF area" deleted.

Two other editorial changes are also being proposed for clarity and consistency with the proposed definition of "farming." First, the word "total" has been added as a modifier to the term

"agricultural production" to emphasize that the basis by which any impact is measured is a farm's total agricultural production over the life of the mine. Second, the phrase "vegetation and water of the developed grazed or hayed alluvial valley floor area" has been changed to "farmland areas" because the former can be construed to be related to areas which are not farmed under the proposed definition of "farming." The use of "farmland areas" is consistent with terms found in existing § 785.19(b)(3).

Proposed § 785.19(b)(3) defines a farm as a land unit on which farming is conducted. The requirements of this section are the same as those in the suspended rule except that the term "farming" has been substituted for the term "agricultural activities."

Otherwise § 785.19(b)(3) remains unchanged from the suspended rule. This revision is proposed to conform this paragraph with section 510(b)(5) of the Act, as well as with the proposed definition of "farming."

D. Section 785.19(d)(2)(i) Information on the essential hydrologic functions of alluvial valley floors

The district court in *In Re: Permanent II*, Slip op. at 38-40, remanded 30 CFR 785.19(d)(2)(i) to the Secretary to provide guidance to operators and regulatory authorities as to what type of information was required.

Section 785.19(d)(3) of the 1979 rules had included specific information requirements to describe the characteristics which support the essential hydrologic functions of alluvial valley floors. Those specific information requirements had been deleted from § 785.19(d) when it was revised in 1983. The U.S. Court of Appeals for the District of Columbia Circuit in *NWF v. Hodel*, No. 85-5743, slip op. at 68-73 (D.C. Cir. January 29, 1988), "affirm[ed]" the remand so that the Secretary may provide appropriate, official guidance to the operators and regulatory authorities, or conversely, explain why such guidance is not needed. Slip op. at 73.

The special protections afforded to AVF's by the Act are described in two sections: Section 510(b)(5) prohibits a regulatory authority from approving a permit unless the applicant submits information which affirmatively demonstrates that certain protections to farming on AVF's are provided. Section 515(b)(10)(F) requires the preservation throughout mining and reclamation of the "essential hydrologic functions" of AVF's. In section 515(b)(10)(F) the Congress identified special protections to be afforded all AVF's independent of the protections for farming on alluvial

valley floors provided by section 510(b)(5).

In *NWF v. Hodel* the court of appeals upheld the Secretary's view that the protection of essential hydrologic functions extended to all alluvial valley floors rather than just those significant to farming. Slip op. at 105-108. The court stated that "it seems entirely plausible * * * that Congress intended * * * to protect all alluvial valley floors in arid and semi-arid areas with a performance standard while also providing special protection at the permit stage for those alluvial valley floors significant to farming." Slip op. at 108. The court went on to say that "[a]lthough the legislative history cited by Industry clearly supports the notion that Congress intended special protection for farms dependent on alluvial valley floors, it does nothing to refute the notion that other alluvial valley floors are also subject to protection, albeit not at the permitting stage." Slip op. at 108 (emphasis added). This is consistent with the fact that the Act requires no permitting information on the essential hydrologic functions of AVF's.

Although the Act does not require any permit information on essential hydrologic functions, and does not require the Secretary to further elaborate or "flesh out" this performance standard, it remains within the Secretary's discretion to add corresponding permit information requirements. *NWF v. Hodel*, slip op. at 79-80. Therefore, OSMRE intends to continue to require permit information relative to preserving and reestablishing the essential hydrologic functions of all AVF's. The information requirement now being proposed, which differs from that required under the 1979 and 1983 rules, is described below.

In the 1979 rules OSMRE regulated the protection of essential hydrologic functions in three ways: First, by promulgating at 30 CFR 701.5 an extensive definition of "essential hydrologic functions" which read as follows:

Essential hydrologic functions means the role of an alluvial valley floor in collecting, storing, regulating, and making the natural flow of surface or ground water, or both, usefully available for agricultural activities by reason of the valley floor's topographic position, the landscape and the physical properties of its underlying materials. A combination of these functions provides a water supply during extended periods of low precipitation.

(a) The role of the valley floor in collecting water includes accumulating runoff and discharge from aquifers in sufficient amounts to make the water available at the alluvial

valley floor greater than the amount available from direct precipitation.

(b) The role of the alluvial valley floor in storing water involves limiting the rate of discharge of surface water, holding moisture in soils, and holding ground water in porous materials.

(c)(1) The role of the alluvial valley floor in regulating the natural flow of surface water results from the characteristic configuration of the channel flood plain and adjacent low terraces.

(2) The role of the alluvial valley floor in regulating the natural flow of ground water results from the properties of the aquifers which control inflow and outflow.

(d) The role of the alluvial valley floor in making water usefully available for agricultural activities results from the existence of flood plains and terraces where surface and ground water can be provided in sufficient quantities to support the growth of agriculturally useful plants, from the presence of earth materials suitable for the growth of agriculturally useful plants, from the temporal and physical distribution of water making it accessible to plants throughout the critical phases of the growth cycle either by flood irrigation or by subirrigation, from the natural control of alluvial valley floors in limiting destructive extremes of stream discharge, and from the erosional stability of earth materials suitable for the growth of agriculturally useful plants.

44 FR 15318 (March 13, 1979)

Second, by promulgating a performance standard at 30 CFR 822.11 requiring the preservation or reestablishment of the geologic, hydrologic, and biologic characteristics that support those functions. In the pertinent part, that standard read as follows:

(a) Surface coal mining and reclamation operations shall be conducted to preserve * * * the essential hydrologic functions of alluvial valley floors not within an affected area * * * by maintaining those geologic, hydrologic and biologic characteristics that support those functions.

(b) Surface coal mining and reclamation operations shall be conducted to reestablish * * * the essential hydrologic functions of alluvial valley floors within an affected area * * * by reconstructing those geologic, hydrologic and biologic characteristics that support those functions.

(c) The characteristics that support the essential hydrologic functions of alluvial valley floors are those in 30 CFR 785.19(d)(3) * * *

44 FR 15450 (March 13, 1979)

And third, by promulgating, at 30 CFR 785.19(d), permit information requirements to describe those characteristics. See 44 FR 15375 and 15376 (March 13, 1979).

In 1983, OSMRE revised the AVF rules with respect to essential hydrologic functions in four ways: First, the definition of "essential hydrologic functions" was shortened and simplified to read as follows:

Essential hydrologic functions means the role of an alluvial valley floor in collecting, storing, regulating, and making the natural flow of surface or ground water, or both, usefully available for agricultural activities by reason of the valley floor's topographic position, the landscape, and the physical properties of its underlying materials. A combination of these functions provides a water supply during extended periods of low precipitation.

Second, the § 822.11 performance standards were rewritten to relate *directly to protection of the essential hydrologic functions*, rather than to the "geologic, hydrologic, and biologic characteristics that support those functions." In pertinent part, § 822.11 was revised to read as follows:

(a) The operator * * * shall minimize disturbances to the hydrologic balance by preserving * * * the essential hydrologic functions of an alluvial valley floor not within the permit area.

(b) The operator * * * shall minimize disturbances to the hydrologic balance within the permit area by reestablishing * * * the essential hydrologic functions of alluvial valley floors.

Third, former paragraph § 822.11(c) containing the cross reference to § 785.19(d)(3), which specified the detailed information requirements to describe those "geologic, hydrologic, and biologic" characteristics, was removed. See 48 FR 29820 (June 28, 1983).

And fourth, the § 785.19(d) permitting requirements were revised. That revision removed: (1) The detailed information requirements previously contained in § 785.19(d)(2), which primarily related to the use of an alluvial valley floor for farming; and (2) § 785.19(d)(3), which required detailed information describing those geologic, hydrologic, and biologic characteristics necessary to support the essential hydrologic functions. See 48 FR 29820 (June 28, 1983). The 1983 revision of § 785.19(d)(2)(i) did retain, however, the requirement for detailed survey and baseline data to determine those characteristics of alluvial valley floors necessary to preserve the essential hydrologic functions, but did not specify what those surveys and baseline data should address.

In its October 1, 1984 decision, the district court in *In Re: Permanent II* remanded § 785.19(d)(2)(i) to the Secretary to provide guidance as to what type of information would satisfy this requirement in the absence of previous § 785.19(d)(3). Slip op. at 39-40. Although the court of appeals in *NWF v. Hodel* noted the deletions of both § 785.19(d)(2) and § 785.19(d)(3) (see slip op. at 69, note 51), only the deletion of previous § 785.19(d)(3), which specified

permit information requirements to describe those characteristics which support the essential hydrologic functions, was the subject of the district court remand. Therefore, the scope of this rulemaking is limited to providing the necessary degree of guidance as to what information must be submitted on the permit application to describe the essential hydrologic functions of alluvial valley floors, and to explaining the deviation from the requirements of § 785.19(d)(3) of the 1979 rules. Since the 1983 changes to the information requirements contained in § 785.19(d)(2) of the 1979 rules were not related to the characteristics supporting essential hydrologic functions, and were not covered by the district court remand, this rule does not address them.

In light of the court of appeals decision upholding the district court remand of § 785.19(d)(2)(i) to the Secretary for further guidance, OSMRE has reconsidered the requirements of that section and is proposing a substantial revision. Since this rule is to address those permit application information requirements necessary for a regulatory authority to determine projected compliance with the performance standards, the proposed information requirement is structured to support the definition of essential hydrologic functions at 30 CFR 701.5 and the performance standard requiring their protection at 30 CFR 822.11, as they exist today. Since the performance standard no longer is written in terms of the characteristics which support the essential hydrologic functions, it would be inappropriate to return to the information requirements previously contained in § 785.19(d)(3), which was written in terms of those "characteristics." Instead, proposed § 785.19(d)(2)(i) is structured to reflect the revised definition of essential hydrologic functions and the performance standard requiring direct protection or restoration of those functions.

Proposed § 785.19(d)(2)(i) expands upon the 1983 rule and identifies those specific requirements for AVF information that must be included in a permit application. It requires the applicant to include in the application specified information on essential hydrologic functions of the AVF. This proposal has an emphasis different from the 1983 rule, which contained requirements to provide information on those characteristics of AVF's necessary to support their essential hydrologic functions. OSMRE believes this change is appropriate since the performance standard is no longer structured around

those characteristics, but is now built around the essential hydrologic functions themselves, and those factors related to the AVF that contribute to them. Therefore, OSMRE proposes to revise 30 CFR 785.19(d)(2)(i) (A) through (D) as described below to specify those functions of AVF's for which information is required in a permit application.

Paragraph A requires a description of those factors contributing to the collection of water within the AVF, such as the amount, rate and frequency of rainfall and runoff, surface roughness, slope and vegetative cover, infiltration and evapotranspiration, relief, and slope and density of drainage channels.

Paragraph B requires a description of those factors contributing to storing of water within the AVF, such as permeability, infiltration, depth and direction of ground water flow, porosity, and water holding capacity.

Paragraph C requires a description of those factors contributing to the regulation of the flow of surface and ground water within the AVF, such as longitudinal profile and slope of the valley and channels, the sinuosity and cross sections of the channels, interchange of water between streams and associated alluvial and bedrock aquifers, and rates and amount of water supplied by the aquifers.

Paragraph D requires a description of those factors contributing to the availability of water in the AVF, such as the presence of floodplains and terraces suitable for agricultural activities.

OSMRE believes that the detailed language added to proposed § 785.19(d)(2)(i) (A) through (D), although different from the information required under § 785.19(d)(3) of the March 13, 1979 rule, would provide the necessary guidance to operators and regulatory authorities, consistent with the revised definition and performance standards. Thus, the level of guidance sought by the district court would be provided.

IV. Procedural Matters

Effect in Federal Program States and on Indian Lands

This rule, if adopted, would be applicable through cross-referencing in those States with Federal programs and on Indian lands. Federal program States include Georgia, Idaho, Massachusetts, Michigan, North Carolina, Oregon, Rhode Island, South Dakota, Tennessee, and Washington. The Federal programs for these States are found at 30 CFR Parts 910, 912, 921, 922, 933, 937, 939, 941, 942, and 947, respectively. The Indian

lands program is found at 30 CFR Part 750.

Comments are solicited as to whether unique conditions exist in any of these States or on Indian lands relating to this proposal which should be reflected either as changes to the national rules or as State-specific amendments to any or all of the Federal programs or the Indian lands program.

OSMRE has proposed to implement a Federal program for the State of California. 52 FR 39594 (Oct. 22, 1987). Comments are also specifically solicited as to whether conditions exist in California that should be reflected in the proposed Federal program for that State.

Federal Paperwork Reduction Act

The information collection requirements contained in paragraph 785.19(d)(2)(i) of 30 CFR 785.19 of the proposed rule have been approved by the Office of Management and Budget under 44 U.S.C. 3501 *et seq.* and assigned clearance number 1029-0040.

Executive Order 12291

The DOI has examined the proposed rule according to the criteria of Executive Order 12291 (February 17, 1981) and has determined that it is not major and does not require a regulatory impact analysis.

Regulatory Flexibility Act

The DOI has determined, pursuant to the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, that the proposed rule will not have a significant economic impact on a substantial number of small entities.

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(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 listed in the "ADDRESSES" section of the preamble. An EA will be completed on the final rule and a conclusion reached on the significance of any resulting impacts before promulgation of the final rule.

Author

The principal author of this rule is Douglas Growitz, Division of Reclamation Technology, Office of

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List of Subjects

30 CFR Part 701

Law Enforcement, Surface mining, Underground mining.

30 CFR Part 785

Reporting and recordkeeping requirements, Surface mining, Underground mining.

Accordingly, it is proposed to amend 30 CFR Parts 701 and 785 as set forth below.

Date: June 24, 1988.

J. Steven Griles,
Assistant Secretary—Land and Minerals
Management.

PART 701—PERMANENT REGULATORY PROGRAM

1. The authority citation for Part 701 is revised to read as follows:

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

2. In § 701.5 the definition of "agricultural activities or farming" is removed, definitions of "agricultural activities" and "farming" are added in alphabetical order, and the definition of "materially damage the quantity or quality of water" is revised to read as follows:

§ 701.5 Definitions.

Agricultural activities means, with respect to alluvial valley floors, the use of any track of land for the production of animal or vegetable life, based on regional agricultural practices, where the use is enhanced or facilitated by subirrigation or flood irrigation. These uses include, but are not limited to, farming and the pasturing or grazing of livestock. These uses do not include agricultural activities which have no relationship to the availability of water from subirrigation or flood irrigation practices.

Farming means, with respect to alluvial valley floors, the primary use of those areas for the cultivation, cropping and harvesting of plants which benefit from irrigation, or natural subirrigation, that results from the increased moisture content in the alluvium of the valley floors. For purposes of this definition harvesting does not include the grazing of livestock.

Materially damage the quantity or quality of water means, with respect to alluvial valley floors, to degrade or reduce by surface coal mining and reclamation operations the water quantity or quality supplied to the alluvial valley floor to the extent that resulting changes would significantly decrease the capability of the alluvial valley floor to support farming.

PART 785—REQUIREMENTS FOR PERMITS FOR SPECIAL CATEGORIES OF MINING

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

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

4. Section 785.19 is amended by revising paragraphs (b)(2)(ii), (b)(3) and (d)(2)(i) to read as follows:

§ 785.19 Surface coal mining and reclamation operations on areas or adjacent to areas including alluvial valley floors in the arid and semiarid areas west of the 100th meridian.

(b) * * *

(2) * * *

(ii) Any farming on the alluvial valley floor that would be affected by the surface coal mining operation is of such small acreage as to be of negligible impact on the farm's agricultural production. Negligible impact of the proposed operation on farming will be based on the relative importance of the affected farmland areas of the alluvial valley floor area to the farm's total agricultural production over the life of the mine; or

(3) For the purpose of this section, a farm is one or more land units on which farming is conducted. A farm is generally considered to be the combination of land units with acreage and boundaries in existence prior to August 3, 1977, or, if established after August 3, 1977, with those boundaries based on enhancement of the farm's agricultural productivity and not related to surface coal mining operations.

(d) * * *

(2) * * *

(i) The essential hydrologic functions of the alluvial valley floor which might be affected by the mining and reclamation process. The information required by this subparagraph shall identify those factors which contribute to the collecting, storing, regulating and

making the natural flow of water available for agricultural activities on the alluvial valley floor and shall include, but are not limited to:

(A) Factors contributing to the function of collecting water, such as amount, rate and frequency of rainfall and runoff, surface roughness, slope and vegetative cover, infiltration, and evapotranspiration, relief, slope and density of drainage channels;

(B) Factors contributing to the function of storing water, such as permeability, infiltration, porosity, depth and direction of ground water flow, and water holding capacity;

(C) Factors contributing to the function of regulating the flow of surface and ground water, such as the longitudinal profile and slope of the valley and channels, the sinuosity and cross-sections of the channels, interchange of water between streams and associated alluvial and bedrock aquifers, and rates and amount of water supplied by these aquifers; and

(D) Factors contributing to water availability, such as the presence of flood plains and terraces suitable for agricultural activities.

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Environmental Protection Agency

Wednesday
August 3, 1988

Part III

Environmental Protection Agency

40 CFR Part 23

Designation of Office To Receive
Petitions for Review of Agency Actions;
Final Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 23

[OGL-FRL-3399-5]

Designation of Office To Receive Petitions for Review of Agency Actions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: Congress recently adopted Pub. L. 100-236, 101 Stat. 1731, amending 28 U.S.C. 2112 (a section of the United States Judicial Code). The statute requires each federal agency to receive a copy of each petition for review of a final agency action filed in the United States Courts of Appeals. That officer is then required to notify the United States Judicial Panel on Multidistrict Litigation of any petitions received within ten days of the effective date of the action. This rule designates the General Counsel as the appropriate officer for the Environmental Protection Agency.

EFFECTIVE DATE: August 3, 1988.

FOR FURTHER INFORMATION CONTACT:

Randolph Hill, Office of General Counsel (LE-132W), U.S. EPA, 401 M Street SW., Washington, DC 20460. Phone: (202) 382-7700.

SUPPLEMENTARY INFORMATION:

I. Introduction

Congress recently adopted Pub. L. 100-236, 101 Stat. 1731, amending 28 U.S.C. 2112 (a section of the United States Judicial Code). The amendment states that when a federal agency receives two or more petitions filed in two or more United States Courts of Appeals challenging a final agency action within ten days of the effective date of that action, the U.S. Judicial Panel on Multidistrict Litigation will pick at random one of the Circuit Courts in which a petition was filed, and consolidate all other appeals in the chosen court.

The amendment is designed to eliminate the so-called "race to the courthouse", which occurs when different parties attempt to file a challenge to an administrative action in one Court of Appeals before the other parties can file in a different court.

Under the amended section 2112(a)(2), each federal agency is required to designate, by rule or regulation, the office and officer to receive a copy of each petition filed. That officer is then required to notify the Judicial Panel of any petitions received within the ten day period, in accordance with Rules

20-25 of the Panel, which were adopted by the Panel following passage of the law. This rule designates the General Counsel as the appropriate officer for the Environmental Protection Agency.

II. Background of Public Law 100-236

Certain actions taken by federal agencies are subject to direct judicial review in the United States Courts of Appeals. Some federal statutes specify a particular Circuit Court where venue shall lie for a challenge to actions taken under that statute. For instance, the Clean Air Act requires that challenges to national rules be filed in the U.S. Court of Appeals for the District of Columbia (42 U.S.C. 7407(b)(1)). Other federal statutes either do not specify where challenges may be filed, or allow judicial review of agency actions in any appropriate Court of Appeals. The Clean Water Act (CWA) allows direct judicial review of certain EPA actions in the Circuit Court where the petitioner resides or transacts business (33 U.S.C. 1369(b)(1)).

Where judicial review of agency actions is not limited to a single court, challenges to agency action may be filed by several petitioners in several different Courts of Appeals. Prior to the passage of Pub. L. 100-236, these multiple petitions for review would be transferred and consolidated in the court where the first petition was filed. The "first-to-file" rule, adopted in 1958, was designed to make the selection of the court of review as fair as possible.¹ However, the rule created an unintended problem. Many petitioners appear to believe that certain Circuits will be more sympathetic to their arguments on review than other Circuits. Thus, the first-to-file rule created an incentive for them to "race" competing petitioners "to the courthouse" and file in their preferred Circuit Court as soon as the action of the agency became final.

Races to the courthouse have become both highly sophisticated and extremely amusing processes. As documented in EPA's first proposal for eliminating courthouse races under the CWA (44 FR 32006), potential petitioners often go to great lengths to ensure that they file first. Messengers may be placed at the agency to wait for notice of an action to be issued. They may be connected by phone chains, walkie-talkie chains, or people chains to other messengers who wait at the office of the court clerk, petitions for review in hand. Since a petition for review need only state who

is challenging the agency action and what action is being challenged (i.e., no reasons for the challenge need be enumerated in the petition), the petition for review can be prepared well in advance. Phone chains allow a petition for review to be filed within minutes or even seconds of when the notice of final agency action is issued. The spectacle of a courthouse race, in addition to being unseemly and somewhat unprofessional, is highly disruptive to both the agency and the U.S. Courts. Furthermore, disputes over who "won" the race have led to time-consuming litigation. In the case of one challenge to an action of the Federal Energy Regulatory Commission, an Administrative Law Judge ordered a "reenactment" of the race to determine how long it would actually have taken the petitioners to file after notice of the action was issued (see 44 FR 32010). In that same race, the ALJ also investigated how accurately the time stamps at the Fifth and D.C. Circuit Courts were calibrated to determine whether the earlier-stamped petition had actually been filed later!

In 1980, the Administrative Conference of the United States recommended statutory changes to eliminate races to the courthouse (1 CFR 305.80-5). Its recommendation, to provide for a random selection of the court of review from among those courts where petitions for review have been filed, was embodied in bills introduced in the 97th, 98th, 99th, and most recently, 100th Congresses (H.R. 1162; S. 1128). H.R. 1162 was the first of these proposals to pass both houses. The President signed the bill on January 8, 1988.

Congress had already eliminated races to the courthouse under the CWA. The Water Quality Act of 1987 (Pub. L. 100-4, passed February 4, 1987) included an amendment to the judicial review provisions of the CWA, which authorized a random selection of the reviewing court if EPA received notice that multiple petitions for review of an agency action under the CWA were filed within 30 days of the date EPA received notice of the first such petition (33 U.S.C. 1369(b)(3)). Pub. L. 100-236 repealed this provision under the CWA in favor of the generic provision in 28 U.S.C. 2112(a).

III. Past EPA Rulemakings

Prior to the amendments to the CWA, and later, the Judicial Code, EPA had already taken steps to minimize the effects of races to the courthouse. In 1979, EPA responded to requests from concerned parties and proposed a rule which specified the exact moment when

¹ Prior to 1958, if multiple petitions were filed challenging an Agency order, the Agency had the discretion to select in which Court of Appeals the petitions would be heard.

an action under the CWA would become "final" for purposes of judicial review (44 FR 32006). This rule was finalized on April 17, 1980 (45 FR 26046). In 1985, EPA extended the rule to cover all EPA-administered statutes under which the filing of petitions for review in multiple courts could occur (50 FR 7268).²

Under the 1985 rule, most final EPA actions reviewable in the Courts of Appeals were deemed to be "final" at 1:00 p.m. eastern time fourteen days after the date of publication in the *Federal Register*, or fourteen days after the date of signature for unpublished documents (40 CFR 23.2-23.10). This rule did not eliminate races to the courthouse; rather, it merely specified precisely when the starting gun would be fired. The rule eliminated phone chains, since no one had to be stationed at EPA to wait for a decision to be issued. Racing parties would merely wait at the courthouses of choice on the appropriate day, and hand their petitions to the appropriate clerk for time-stamping on or after 1:00 p.m. In other words, the 1980 and 1985 rules guaranteed that all races would end in a tie, but with minimal disruption for either the agency or the Courts of Appeals. The 1980 and 1985 rules also helped to ensure that all interested parties could compete in a courthouse race on a fair and equal basis, since no party could win the race merely by knowing of an imminent agency action before the others.

IV. Today's Rule

Today's rule adds a new § 23.12 to Part 23. Section 23.12 designates the General Counsel of EPA as the appropriate officer to receive petitions for review of agency actions, and lists the address where these petitions should be sent. The General Counsel has been designated as the appropriate officer because the Office of General Counsel is responsible for representing EPA in litigation against the agency, including Circuit Court review of agency action. Staff in the Office of General Counsel will track the submission of petitions for review, and notify the Judicial Panel on Multidistrict Litigation as appropriate.

Under Pub. L. 100-236, only those petitions received by the agency within ten days of the date when an agency action becomes final are eligible for consideration in the random selection

process.³ Any other petitions received after the ten day period will be consolidated in the Court of Appeals selected by the Judicial Panel. The rule therefore specifies that all copies of filed petitions shall be delivered by personal service or by certified mail, return receipt requested. Use of either of these two methods will allow the General Counsel to ascertain the day on which the petition was received at the agency and thus determine whether it falls within the ten-day period.

The requirements of today's rule are not designed to alter or conflict with Rule 15(c) of the Federal Rules of Appellate Procedure. Rule 15(c) requires a petitioner for judicial review of agency action, *inter alia*, to furnish the clerk of the Court of Appeals with a copy of the petition or application for each respondent agency. Under normal practice, the clerk then sends that copy to the agency to formally notify it of the pending challenge. However, under the new 28 U.S.C. 2112(a)(1), "[i]f within ten days after issuance of the order, the agency * * * receives, from the person instituting the proceedings, the petition for review with respect to proceedings in at least two courts of appeals, the agency * * * shall [notify the Multidistrict Panel]." (Emphasis added). EPA reads the new statute as requiring the agency to notify the Judicial Panel only of petitions received by the agency from the petitioner. Thus, the new law places the burden on the petitioner to send an additional copy of the petition for review directly to the agency, notwithstanding the requirements of Rule 15(c), if the petitioner desires the Circuit in which he filed to be part of the random selection process.

Today's rule also does not in any way modify or change the sections of Part 23 included in EPA's 1985 rule. In other words, agency actions covered under these sections will continue to be deemed "final" for purposes of judicial review (and the ten-day period for petitions for review to enter the random selection process will begin) at 1:00 p.m. fourteen days after the date of publication or date of signature. EPA sees no reason to repeal the 1985 rule in light of the statutory amendment, given that the rule will still ensure fairness for all interested parties.

² If only one petition for review (including multiple petitions filed within a single Circuit) is received by the agency within ten days of the effective date of the order, the case will be heard in that Circuit. Any other petitions received after the ten day period will be consolidated in that Circuit. If no petition is received by the agency within the first ten days, the case will be heard in the Circuit where the first petition is filed. 28 U.S.C. 2112(a).

V. Final Agency Action and Effective Date

This rule constitutes final Agency action. EPA has determined that this rule does not necessitate notice and comment under the Administrative Procedure Act, 5 U.S.C. 553. This rule is issued in compliance with a statutory requirement to designate an officer to receive copies of petitions for review of Agency action. This rule is a non-discretionary action on the part of the Agency. Furthermore, the rule does not affect any substantive right of the public, and relates solely to the agency's internal practice and procedure. As such, the Agency believes that public comment is unnecessary.

In addition, under section 3 of Pub. L. 100-236, the new procedure for resolving multiple appeals of agency action became effective 180 days after enactment of the law, *i.e.*, July 6, 1988. Thus, challenges to final agency actions are already subject to the new law's provisions. Therefore, the Agency believes that good cause exists for making this rule immediately effective.

VI. Regulatory Impact

A. Executive Order 12291

Under Executive Order 12291, EPA must determine whether this regulation constitutes a "major rule", requiring a regulatory impact analysis. This rule requires that any person challenging Agency action send one additional copy of the petition to EPA if they wish the court in which they filed to be eligible in the random selection. It imposes no other requirements. Thus, the rule meets none of the criteria of a "major rule" under E.O. 12291. This rule has been submitted to the Office of Management and Budget for review.

B. Paperwork Reduction Act

The requirements of this rule do not constitute an "information collection activity" within the meaning of the Paperwork Reduction Act. Thus, an Information Collection Request for this rule is unnecessary and was not prepared.

C. Regulatory Flexibility Act

The requirements of this rule are extremely minor. Any entity, whether large or small, who is already challenging an Agency action in the Court of Appeals will be burdened only with the cost of a single certified letter. Thus, I certify that this rule will not have a significant impact on a substantial number of small entities.

³ The 1980 "race to the courthouse" rule for the Clean Water Act was codified in 40 CFR Part 100. The 1985 rule removed Part 100, and codified the "race to the courthouse" rules for all EPA-administered statutes in a new Part 23.

List of Subjects in 40 CFR Part 23

Judicial review, Races to the Courthouse.

Dated: July 27, 1988.

Lee M. Thomas,
Administrator.

For the reasons set forth in the preamble, Title 40 of the Code of Federal Regulations, Chapter I, is amended as follows:

PART 23—JUDICIAL REVIEW UNDER EPA-ADMINISTERED STATUTES

1. The authority citation for Part 23 is revised to read as follows:

Authority: Clean Water Act, 33 U.S.C. 1361(a), 1369(b); Clean Air Act, 42 U.S.C. 7601(a)(1), 7607(b); Resource, Conservation and Recovery Act, 42 U.S.C. 6912(a), 6976; Toxic Substances Control Act, 15 U.S.C. 2618; Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. 136n(b), 136w(a); Safe Drinking Water Act, 42 U.S.C. 300j-7(a)(2), 300j-9(a); Atomic Energy Act, 42 U.S.C. 2201, 2239; Federal Food, Drug, and Cosmetic Act, 21 U.S.C. 371(a), 346a, 348; 28 U.S.C. 2112(a), 2343, 2344.

2. Section 23.1 is amended by adding paragraph (c) to read as follows:

§ 23.1 Definitions.

()*(*)*(*)
(c) "General Counsel" means the General Counsel of EPA or any official exercising authority delegated by the General Counsel.

3. Section 23.12 is added to read as follows:

§ 23.12 Filing notice of judicial review.

(a) For the purposes of 28 U.S.C. 2112(a), a copy of any petition filed in any United States Court of Appeals challenging a final action of the Administrator shall be sent by certified mail, return receipt requested, or by personal delivery to the General Counsel. The petition copy shall be time-stamped by the Clerk of the Court when the original is filed with the Court. The petition should be addressed to: Correspondence Control Unit, Office of General Counsel (LE-130), U.S. Environmental Protection Agency, 401 M Street SW., Washington, DC 20460.

(b) If the General Counsel receives two or more petitions filed in two or more United States Courts of Appeals for review of any Agency action within ten days of the effective date of that action for purposes of judicial review (as specified under §§ 23.2 through 23.10 of this part), the General Counsel will notify the United States Judicial Panel of Multidistrict Litigation of any petitions that were received within the ten day period, in accordance with the applicable rules of the Panel.

(c) For purposes of determining whether a petition for review has been received within the ten day period under paragraph (b) of this section, the petition shall be considered received on the date of service, if served personally. If service is accomplished by mail, the date of receipt shall be considered to be the date noted on the return receipt card.

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