

conjunction with an NADA-field alert report, within these same time periods. The applicant shall submit the information on Form FDA 1932.

(e) *Access to records and reports.* The applicant shall upon request from any designated officer or employee of the Department of Health and Human Services at all reasonable times, permit such officer or employee to have access to and copy and verify any records and reports established and maintained under this section.

(f) *Withdrawal of approval.* If an applicant fails to establish and maintain records and make reports required under this section, or refuses to permit access to, or copying or verification of, such records and reports, FDA may withdraw approval of the application to which they relate.

(Information collection requirements in this section were approved by the Office of Management and Budget (OMB) and assigned OMB control number 0910-0019)

§ 514.82 Records and reports concerning experience with new animal drugs from manufacturers, packers, labelers, and distributors other than the applicant.

(a) *Applicability.* For the purpose of this section, a manufacturer, packer, labeler, or own-label (private label) distributor of an approved new animal drug other than the applicant is a nonapplicant. Each nonapplicant shall establish and maintain records and make reports for each approved new animal drug as required under this section to facilitate a determination by FDA whether there may be grounds for invoking section 512(c)(2)(G) or 512(e) of the act to suspend or withdraw approval of an NADA or whether any applicable regulation should be amended or revoked. The nonapplicant shall maintain adequately organized and indexed files containing full reports of all information pertinent to the safety or effectiveness of the new animal drug

that is received or otherwise obtained by the nonapplicant from any source, whether foreign or domestic, and shall report all such information, whether from a foreign or a domestic source, as is required by this section.

(b) *Definitions.* The definitions included in § 514.80 of this part are applicable to the terms used in this section.

(c) *Records to be maintained.* The nonapplicant shall maintain records of all information required by this section for a period of 10 years.

(d) *Reporting requirements.* The nonapplicant shall submit to FDA or, alternatively, in the case of 15-day alert reports, to the applicant, at the specified times, one copy of the following reports:

(1) *NADA-field alert reports.* Information on any manufacturing defect shall be submitted to the FDA district office that is responsible for the facility involved within 3 working days from the day that the nonapplicant first becomes aware that a defect may exist. The information may be provided by telephone or other telecommunication means, with prompt written followup. The report and its mailing cover are to be plainly marked: "NADA-field alert report." The following are examples of information required to be reported by this paragraph:

(i) Information concerning any incident that causes the distributed animal drug product or its labeling to be mistaken for, or applied to, another article.

(ii) Information concerning any bacteriological contamination, or any significant chemical, physical, or other change or deterioration in the distributed animal drug product, or any failure of one or more distributed batches of the animal drug product to meet the specifications established for it in the application.

(2) *Fifteen-day alert reports.* (i) Each serious, unexpected drug experience,

regardless of the source of the information, as soon as possible, but in any case within 15 working days of initial receipt of the information. If the nonapplicant elects to report to FDA, the nonapplicant shall submit the information to FDA on Form FDA 1932 (Adverse Reaction, Lack of Effectiveness, Product Defect Report) and shall identify the report as a "15 day alert report." If the nonapplicant elects to report to the applicant rather than to FDA, it shall submit each report to the applicant within 3 working days of its receipt by the nonapplicant, and the applicant shall then comply with the requirements of § 514.80. Under this circumstance, the nonapplicant shall maintain a record of this action. The record shall include:

(A) A copy of the drug experience report.

(B) The date the report was submitted to the nonapplicant.

(C) The date the report was submitted to the applicant.

(D) The name and address of the applicant.

(ii) [Reserved]

(e) *Access to records and reports.* The nonapplicant shall upon request from any designated officer or employee of the Department of Health and Human Services, at all reasonable times, permit such officer or employee to have access to and copy and verify any records and reports established and maintained under this section.

(Information collection requirements in this section were approved by the Office of Management and Budget (OMB) and assigned OMB control number 0910-0019)

Editorial Note: This document was received by the Office of the Federal Register on December 9, 1991.

Dated: July 1, 1991.

David A. Kessler,

Commissioner of Food and Drugs.

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Part III

Environmental Protection Agency

40 CFR Part 73

**Auctions, Direct Sales, and Independent
Power Producers Written Guarantee
Regulations and Request for Delegation
Proposals To Administer the Auctions
and Direct Sale; Rule and Notice**

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 73

[FRL-4039-2]

Auctions, Direct Sales, and Independent Power Producers Written Guarantee Regulations

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: Pursuant to title IV of the Clean Air Act as amended by Public Law 101-549, the Clean Air Act Amendments of 1990 ("the 1990 Amendments") ("the Act"), the Administrator must promulgate regulations to reduce emissions of sulfur dioxide (SO₂) and nitrogen oxides (NO_x), precursors of acid rain. The regulations promulgated today are part of the Title IV program to reduce SO₂ emissions. The centerpiece of this control program is the allocation of transferable allowances, or authorizations to emit SO₂, which are distributed by the Administrator in limited quantities for existing utility units and which eventually must be held by all utility units to cover their SO₂ emissions. These allowances may be transferred among polluting sources and others, so that market forces may govern their ultimate use and distribution, resulting in the most cost-effective sharing of the emissions control burden. In order to stimulate and support such a market in allowances, and to provide a public source of allowances, particularly to new units for which no allowances are allocated, the Administrator is directed under section 416 of the Act to conduct annual sales and auctions of allowances.

Today, EPA is promulgating the regulations for conducting these sales and auctions, as well as regulations under which certain independent power producers ("IPP") may obtain written guarantees of the availability of allowances and may exercise priority in purchasing allowances through the direct sale.

EFFECTIVE DATE: This rule becomes final effective December 17, 1991.

FOR FURTHER INFORMATION CONTACT: Linda Reidt Critchfield, EPA/OAIAP/Acid Rain Division (ANR-445), 401 M St., SW., Washington, DC 20460 (202) 260-7915.

SUPPLEMENTARY INFORMATION:

I. Background

Acid rain is the accepted term which encompasses a complex set of

phenomena that begin with fossil fuel emissions, include the transport and transformation of those emissions through the atmosphere, and end with the effects of those emissions and their resulting transformation products on the environment. Specifically, the burning of fossil fuels, particularly coal and oil, releases emissions of sulfur dioxide (SO₂) and nitrogen oxide (NO_x) into the atmosphere. In the atmosphere, SO₂ and NO_x may undergo various chemical reactions, resulting in the transformation of the emissions into chemical products including sulfates, nitrates, sulfuric acid and nitric acid. These compounds can fall to earth near the source or be transported hundreds of miles. They may be deposited during any stage of their transformation, returning to earth as dry deposition in the form of gases, aerosols, and particles of these emissions and their transformation products in the atmosphere contributes to reduced visibility and is suspected of posing a threat to human health at current levels. The acidic deposition resulting from SO₂ and NO_x emissions and their byproducts damages both ecosystems and man-made materials. Of the approximately 23 million tons of SO₂ and 19 million tons of NO_x emitted annually from all sources in the United States in 1985, about 16 million tons of SO₂ and 7 million tons of NO_x were emitted by electric utilities.

Title IV, which sets forth the acid rain control program of the 1990 Amendments, establishes a national cap on utility SO₂ emissions of 8.95 million tons per year (aside from 530,000 tons of additional emissions authorized for each year between 2000 and 2009). This cap will result in SO₂ emissions reductions of ten million tons from 1980 levels, which will be achieved in two phases. Phase I will begin in 1995 and mainly affects large, high-emitting coal-fired utility plants which are listed specifically in the statute. Phase II will begin in 2000 and affects virtually all utility units with output capacity greater than 25 megawatts, and new utility units of any size. In addition, SO₂ sources not explicitly affected by phase II requirements (e.g., industrial facilities) may opt into the allowance trading program.

The centerpiece of the acid rain control program is an innovative system of marketable allowances. An allowance authorizes the emission of up to one ton of SO₂ in one year. The Act explicitly requires "affected" units (most units in operation prior to passage of the Act) to meet an annual sulfur dioxide emissions tonnage limitation expressed for each unit in the language of title IV itself. At the same time, the Act requires

the Administrator to allocate annually for each affected unit allowances to emit sulfur dioxide in a number equal in tons to the unit's statutory emissions limitation requirement. Once allowances are allocated, the Act requires that a unit's total annual SO₂ emissions be less than, or equal to, the number of allowances held for that unit. Allowances may be transferred to and from affected units and to and from any person. Allowances not used for compliance in the year in which they are allocated may be banked for future use. As a result, each unit may meet its SO₂ emissions limitation requirements by the most economically efficient means possible, either by selecting the most efficient method of controlling emissions or by purchasing allowances from other units that can reduce emissions more efficiently. In addition, the marketable value of allowances is expected to create incentives for units to achieve greater reductions than required or to achieve reductions through improved or innovative methods.

To maintain the total emissions cap, the Act requires new units (most units commencing operation after passage of the Act) to obtain allowances from existing allowance holders or through the auctions and sales programs, which are the two methods the Act provides for making allowances available in addition to the statutory allocations.

Because the availability of allowances is crucial to assure both the economic efficiency of the emissions limitation program and the addition of new electric generating capacity, title IV mandates that the Administrator hold yearly auctions and direct sales of allowances for a small portion (2.8 percent) of the total allowances required by the statute to be allocated each year. It also requires the Administrator to provide a written guarantee assuring priority for certain new IPPs in purchasing allowances in the direct sales. The auctions, sales, and IPP guarantee provisions of title IV should provide some certainty that units, including new IPPs, will have a public source of allowances beyond those which are allocated initially for existing units. In addition, the auctions are expected to help signal price information to the allowance market early in the regulatory program.

EPA will sell allowances pursuant to section 416(d) of the Act at a once-a-year public auction, to be held no later than March 31 of each calendar year beginning in 1993. Each auction is required to include allowances in an amount prescribed by statute, and obtained from the Auction Subaccount

of the Special Allowance Reserve, as set forth in section 416(d)(1). It may also include allowances offered for sale by private parties pursuant to section 416(d)(4), as well as allowances that are not sold in the direct sale program under section 416(c). The direct sale will begin on June 1 of each calendar year and continue until all allowances are sold or until the last day on which allowances may be transferred for purposes of compliance (as specified in a separate rulemaking; see 40 CFR part 73). Each allowance will be offered for sale at \$1500 (indexed yearly to inflation), a price fixed by the Act. Allowances not sold in an annual direct sale will be added to those auctioned in the following year. A crucial element of the direct sales program is the special priority afforded to certain IPPs. As required by the Act, the Administrator will guarantee these IPPs the right to purchase direct sale allowances before the allowances are offered for sale to others. To qualify for the written guarantee, an IPP must meet certain criteria set forth in the Act and incorporated in this regulation. The proceeds from the auctions and direct sales, and any allowances remaining after their completion, will be distributed on a pro rata basis to those from whose allowance allocation allowances were withheld for purposes of creating the Special Allowance Reserve.

At a future date, EPA will propose and promulgate regulations establishing a Special Reserve of Allowances for the purpose of auctions, direct sales, and the IPP written guarantee. As required by section 416(b), those regulations will specify that the Administrator withhold from original allowance holders 2.8% of the total allowances to be allocated each year from 1995 to 1999 and 2.8% of the basic Phase II allowance allocations beginning in the year 2000. That reserve will comprise a subaccount for auctions of 150,000 allowances annually for phase I and 200,000 allowances annually for phase II and a subaccount for direct sales of 50,000 allowances for phase II. The direct sale reserve will be subject to the IPP guarantee.

The calculations for the pro rata distribution of proceeds from, and any allowances remaining after, the auctions and direct sale will also be included in the rulemaking establishing the Special Allowance Reserve.

Table 1 below summarizes the standard auctions and sales schedule required by section 416.

TABLE 1.—ALLOWANCES OFFERED AT AUCTIONS AND SALES

Year of purchase	Spot sale	Advance sale ¹	Spot auction	Advance auction ¹
1993.....		25,000	≈ 50,000	100,000
1994.....		25,000	≈ 50,000	100,000
1995.....		25,000	50,000	100,000
1996.....		25,000	150,000	100,000
1997.....		25,000	150,000	100,000
1998.....		25,000	150,000	100,000
1999.....		25,000	150,000	100,000
2000 and after.....	25,000	25,000	100,000	100,000

¹ Not useable until 7 years after purchase.

² Not useable until 1995.

The regulations made final today are to be Subpart E of 40 CFR Part 73. Part 73 governs the allowance system and includes several components, the balance of which are being proposed and promulgated according to the schedule listed below:

TABLE 2.—ALLOWANCE SYSTEM RULE [40 CFR part 73]

Subpart	Proposed rule (date published)	Final rule (target date for publication)
A: Background.....	December, 1991.	May, 1992.
B: Allocation.....	March, 1991.....	December, 1992.
C: Tracking.....	December, 1991.	May, 1992.
D: Transfers.....	December, 1991.	May, 1992.
E: Auction and sales.	May 23, 1991.....	December, 1991.
F: Conservation and renewable energy reserve.	December, 1991.	May, 1992.
G: Small diesel refineries.	March, 1992.....	December, 1992.

On May 23, 1991, EPA published a notice of proposed rulemaking (NPRM) in the Federal Register (56 FR 23744) proposing regulations for conducting the auction and sale of allowances, as well as regulations governing the IPP written guarantee. The comment period for this notice expired on July 5, 1991. The comments received in response to this notice, as well as the procedures and conditions that are being adopted in this final rule, are discussed below. Editorial comments will not be discussed, but editorial changes have been incorporated where EPA believes appropriate.

II. Discussion of Comments

Thirty-four commenters with one hundred and twenty-nine comments responded to the May 23, 1991 notice.

Commenters included twelve utilities, eight utility or energy-related trade associations, four public utility commissions, two environmental groups, one state environmental agency, one unaffiliated individual, one potential broker for allowances, and one commodity futures trading exchange.

Section 73.3 Definitions

In the rule, EPA has deleted the definition of "qualified applicant" because it was superfluous. EPA has added definitions for "owner" and "owner or operator" for the convenience of the reader. These definitions are proposed in the Allowance System Rule (40 CFR part 73, § 73.3) and commenters will have the opportunity to comment on them and on all other definitions that appear both here and in that rulemaking during the comment period for that rulemaking. Such definitions will become final when the Allowance System Rule is promulgated; should there be any changes in those definitions as a result of the comment period, the definitions printed here will be changed accordingly.

Section 73.7 Auctions

The Private Auction

The Act allows any person holding allowances to sell those allowances in auctions held by EPA [section 416(d)(4)], but requires that allowances from the auction subaccount must be sold before other offerings may be sold. Unlike EPA, other allowance holders may specify a minimum price for the allowances they offer. Subject to these two statutory provisions, EPA proposed to treat allowances offered from others as part of the total annual supply of allowances for sale in each auction held by EPA, including requiring that only allowances allocated for the year of the auction (or allowances banked from previous years' allocations) and seven-year-advance allowances may be offered.

EPA proposed that all bids to the auctions be ranked from highest to lowest on the basis of bid price. EPA would allocate and sell all the allowances in the auction subaccount on the basis of this ranking; when all such allowances were sold, EPA would match contributed allowances offered for sale with any remaining bids, as described in the next section.

Eleven commenters believe that EPA has interpreted incorrectly section 416(d)(4) of the Act, which governs the sale of contributed allowances, by proposing to sell the allowances offered from others, immediately following the sale of EPA allowances in a combined

auction. They argue that while this section does not specify that such private allowances should be sold in a separate auction, it does state that allowances shall be sold after the EPA auction is complete. Their preferred interpretation of this section would require EPA to hold a separate private auction so that sellers could offer a variety of allowance packages, including, for example, multi-year "streams" of allowances (i.e., X allowances/year for Y years), rather than being limited to offering spot and seven-year-advance allowances. In addition, these commenters believe that separating the private part of the auction would allow participants time to evaluate bids and offers based on the results of the EPA auction.

Some of these same commenters have expressed concern that the facilitating mechanisms of the private market might be slow to develop in the early years of the regulatory program. This prospect would justify a separate, EPA-sponsored auction to "jump-start" the market, by facilitating contact between buyers and sellers who might not have other, more efficient means for making contact, and to provide the public with information concerning both offers and the market's response to such offers. In fact, some of these commenters argued that those brokers who will be active in the near term will offer only a proprietary and costly brokering function, mediating transactions based on limited, closely-held information, rather than providing their clients and the market with a broad vision of the entire market. Some public utility commissions (PUCs) expressed concern that they will not be able to evaluate utilities' decisions concerning allowances because of the lack of widely available price information.

Response: The rule remains unchanged from the proposal concerning the separation of private allowances from the EPA auction and the role of EPA in facilitating information exchange. EPA believes that incorporation of allowances offered from others as part of the total annual supply of allowances complies with the language in section 416(d)(4) of the Act. The language in the Act is broad and places few requirements on the conduct of the auction, all of which are met in the EPA proposal.

In the NPRM, EPA anticipated the comments expressed above and requested comment on an EPA-sponsored catalogue auction, catalogue exchange, and bulletin board. The catalogue auction was proposed to serve as the private auction where a variety of

allowance packages could be offered and EPA would determine winners based on the highest bid price. The catalogue exchange and bulletin board are non-regulatory instruments designed to facilitate the exchange of information among potential market participants and other interested parties such as PUCs which EPA is free to institute at any time without engaging in a formal rulemaking. Though the Agency received some comments in favor of those options, EPA has decided not to adopt a catalogue auction in the final rule or implement at this time a catalogue exchange or bulletin board.

EPA's rejection of the catalogue exchange rests on EPA's clear commitment to promoting, or at least not impeding or competing with, private market solutions. To the extent that an allowance bulletin board or catalogue exchange would be valuable, EPA believes the market itself can be expected to provide such mechanisms. In fact, on July 17, 1991 the Chicago Board of Trade (CBOT) publicly announced its intention to create a futures market for allowances. The announcement is a strong, early indication that a sophisticated, self-sustaining private market for allowances is developing. As expressed in its comments to EPA, the CBOT also intends to offer market participants an electronic bulletin board system that will distribute information on allowances offered.

The CBOT's announced intention to create an allowance exchange is clear evidence that private enterprise will respond to real or anticipated needs. EPA also believes that other devices will enable the market to avoid the higher transaction costs associated with using brokers and their reliance on proprietary, closely-held information. Specifically, utilities and others seeking to buy or to sell can publish requests for proposal offering purchases or sales and inviting counter-offers. This approach would result in wider dissemination of information, while leaving the parties free to negotiate the terms of a proposed transaction.

EPA rejected sponsoring a separate catalogue auction because a strict auction format, in contrast to a party's ability to publish offers to sell or buy and to entertain counter-offers allowing for negotiation between parties, would be unsuitable for all but a negligible number of transactions. To satisfy the requirements of an auction format, sellers would be required to offer their allowance packages at a single price, and bidders would be compelled to accept an offer without a single variance

or amendment. Given the complexity and variety of potential allowance packages and the number of variable terms (e.g., timing of payment and delivery) from both buyers' and sellers' perspectives, EPA believes that most transactions could only be the result of direct negotiations between buyers and sellers. In addition to mechanisms that publish offers to buy and sell, the private market has brokerages and consulting firms to facilitate the matching of, and negotiations between, buyers and sellers.

Four commenters supported EPA's position of limiting its role in the development of information exchange mechanisms. PSI Energy stated in its comments:

* * * That a private market for emission allowances will evolve without EPA needing to play a major role in its establishment. The utility industry has already seen several offers to sell allowances, as well as solicitation to purchase allowances. As the compliance deadline grows nearer and the first few transactions are finished, a robust market should develop.

In fact, three of these commenters believe that administration of an allowance market by the EPA would discourage the natural emergence of private trading mechanisms and could possibly be detrimental to the development of the allowance market.

These commenters believe, and EPA agrees, that since the Agency has no experience in constructing trading systems and monitoring markets to protect against fraud, market participants might be hesitant to participate in an EPA-sponsored catalogue auction or exchange. The allowance market is best served, they argue, if trading and information mechanisms are administered by experienced and proven private entities. These entities would not only facilitate individual transactions, but promote price and information discovery, which would lead, in turn, to increased market liquidity.

Finally, some analysts suggest that uncertainties concerning compliance costs, PUC action and future growth of electricity demand are likely to be the primary inhibitors of allowance trading. Uncertainties stemming from inadequate dissemination of information are less likely to pose a threat simply because, given the wide-spread belief that allowance trading can reduce costs, the market is very likely to solve problems involving the sharing of information quickly, efficiently and effectively. In view of that possibility, both the bulletin board and catalogue exchange, as well as the catalogue auction, could prove to

be superfluous at best, if not damaging to the development of mechanisms that the private market has fostered and will continue to foster.

The Matching of Private Allowances With Bids

With regard to the auction of SO₂ allowances, EPA proposed a matching scheme in which allowances with the lowest minimum prices (reservation price) offered by private parties would be matched with the highest bids that remained after the allowances in the Auction Subaccount were sold. Under this approach, privately offered allowances would be matched, in ascending order of minimum price, with remaining bids until either all bids are awarded, all privately contributed allowances are sold, or privately contributed allowances can no longer be matched with bids because the minimum price is higher than remaining bids.

Most commenters did not address this issue. However, some commenters suggested that an alternative matching scheme, one in which privately contributed allowances would be matched in descending order with the bids that remained after the auction of EPA allowances was completed (*i.e.*, offers of allowances with the highest minimum prices would be matched to the highest bids first) would be preferable. They argued that: (1) The proposed matching scheme is confusing and may result in no matches being made; (2) the alternative matching scheme could result in more allowances being sold in the auction; and (3) the proposed matching scheme encourages private offerors to specify minimum prices that are lower than they truly are willing to accept so as to be matched to the highest bids in order to increase the revenue generated from the sale. One commenter was concerned that this activity might result in artificially low price signals being sent to the market.

Response: As discussed above, EPA believes that in the trading of allowances, it is more likely that private mechanisms will be relied upon to sell allowances rather than the EPA auctions, regardless of the matching scheme employed in such auctions.

EPA proposed the low-offer-to-high-bid matching scheme, in part, to simplify the design of the "private" auction and to minimize EPA's burden in administering the auction. The proposed matching scheme is straightforward—the "offer curve" for private allowances takes the shape of a supply curve used in standard economic analysis and this allows offers to be matched unambiguously with bids. Further, the

only time matches would fail under the proposed matching scheme is when the minimum prices specified by all offerors are higher than the highest bid remaining after the allowances in the Auction Subaccount are sold. In this situation no matching schemes, including high-offer-to-high-bid, would result in matches between offers and bids because minimum prices would still be higher than the remaining bids.

EPA believes that the high-offer-to-high-bid matching system that some commenters have suggested as an alternative would prove to be more complicated and could create difficulties in matching offers with bids. Under such a system, EPA would order the offers from high minimum price to low minimum price. Any offers with minimum prices higher than the highest bid remaining after allowances in the Auction Subaccount are sold would be discarded, and the remaining offers would be matched, in descending order, with the remaining bids. The problem with this approach is that separate segments of the resulting "descending offer curve" could be both above and below the bid curve depending on the bids and offers submitted in the auction. For example, if the bid prices for allowances decline more rapidly than the minimum prices specified in offers, a segment of the offer curve will be above the bid curve and no matches would be feasible; if the minimum prices declined by more than bid prices, the "offer curve" would cross over the bid curve and lie below it and matches would occur. It is not clear, however, how offers and bids should be matched in situations where bid and offer curves exhibited this "overlapping" behavior.

Table 3 below illustrates the concerns of adopting a high-offer-to-high-bid matching scheme:

TABLE 3.—HYPOTHETICAL EXAMPLE FOR MATCHING OPTIONS

Bids	Low to high ordering		High to low ordering	
	Minimum price	Bid successful?	Minimum price	Bid successful?
500	150	Yes.....	500	Yes.
500	175	Yes.....	500	Yes.
450	200	Yes.....	475	No.
400	200	Yes.....	450	No.
350	200	Yes.....	300	Yes.
300	300	Yes.....	200	Yes.
250	450	No.....	200	Yes.
200	475	No.....	200	Yes.
150	500	No.....	175	No.
100	500	No.....	150	No.

Table 3 assumes each bid and private offer are for an equal number of

allowances. Under the low-offer-to-high-bid matching scheme, the sample auction clears 6 of the 10 bids, with a clearing price of \$300, with the 4 offers with the highest minimum prices rejected. Under the high-offer-to-high-bid matching scheme, the sample auction clears 6 of the 10 bids. The lowest clearing price is \$200, but two bids at much higher prices, \$400 and \$450, are rejected because the offers matched against them had set higher minimum prices. Such a result seems arbitrary and imposes considerable uncertainty on the bidders at the auctions. Such outcomes would in fact, make the high-offer-to-high-bid matching scheme a random selection process for filling bids, rather than a rational system that assured allowances to high bidders.

If a high-offer-to-high-bid matching scheme was adopted, the Administrator would have to develop a method for matching bids and offers that might require making partial matches or, alternatively, shifting the "offer curve" so that the offers with the lowest minimum prices could be matched with bids. Either approach would make administering the auction more difficult.

With regard to the second point made by commenters, standard supply-demand analysis suggests that the alternative high-offer-to-high-bid matching mechanism could result, in some situations, in more allowances being sold in the auction, but with a lower auction clearing price. This would create an anomaly, however, since this same analysis also suggests that those offerors able to sell their allowances at the auction would subsequently have an incentive to purchase allowances in the market that are available at the lower auction-clearing price (*i.e.* the lowest price at which allowances are sold at the auction). That is, sellers offering allowances at higher prices (presumably representing their marginal cost of reducing sulfur dioxide emissions) and selling them to the higher price bidders would then have an incentive to purchase other allowances at the lower auction-clearing price (which would presumably be lower than the sellers' marginal reduction costs). Such repurchasing would negate the higher sales volume promoted by the commenter as a virtue of high offer to high bid matching.

The third point made by commenters is that the incentives created by the low-offer-to-high-bid matching system will lead to a systematic reduction in the expressed minimum prices that in fact will understate the offeror's true reduction costs. EPA believes this type of bidding behavior is unlikely in an

allowance market with even minimum activity. If an active allowance market is established apart from the EPA auctions, as EPA believes will occur, offerors are more likely to profit from sale of their allowances in a private transaction, in any event, than they could in a sale made in the EPA auctions. For this reason, EPA anticipates that more activity will occur in the market than in the auction of private allowances. In addition, a strategy of offering allowances at auction at a minimum price that understates actual reduction costs would make sense only if the offeror were assured that the auction would yield a better price for the allowances than would the private market. Such an outcome would not be likely: since offered allowances are sold after all EPA allowances have been sold, private offerors necessarily will receive a price that is lower than the clearing price in the auction of EPA allowances. Such a strategy could pose risks for the offeror, especially if the demand for allowances is uncertain, since the offeror must commit to the private auction before the bidding begins. If demand fluctuates, the offeror could end up selling allowances at a lower price than could be found in the market. Thus, EPA does not believe that a systematic reduction in requested minimum prices will occur. EPA will monitor each of the auctions, however, and identify any necessary changes to the design of the auction that may be required to assure an orderly and competitive market.

In sum, EPA believes that there are persuasive practical reasons for preferring the proposed low-offer-to-high-bid matching scheme. The proposed matching scheme offers more rational matching patterns and avoids the administrative difficulties that are likely to arise under the alternative matching scheme in the situation when bid and offer curves overlap. In addition, sales of allowances made under the proposed matching scheme might more approximate the genuine economic incentives of the allowance market. Some sales under the alternative matching scheme, in contrast, might not.

Withdrawal of Bids During the EPA Auction

One commenter questioned EPA's failure to propose to afford private offerors of allowances the option of withdrawing their offers from the EPA auction if fewer than the full number of allowances offered would be sold. EPA proposed to allow bidders to withdraw their bid if the full number requested cannot be supplied. EPA agrees that

private offerors should be allowed to withdraw their offers if fewer than the full number of allowances offered would be sold. Accordingly, the final rule incorporates this suggestion.

The Contract or Delegation of the Auction Function

Section 416(f) of the Act authorizes the Administrator to provide, by delegation or contract, for the conduct of sales and auctions by other departments or agencies of the United States Government or by nongovernmental agencies, groups, or organizations.

One commenter suggested that EPA should contract out the auction function if EPA committed to offering a catalogue auction as addressed in the private auction discussion. The commenter proposed that the contractor charge a fee for administering the auction to offset the added expense of running a catalogue auction. At the same time, a second commenter expressed concern that EPA would contract out the auction function to an entity that would charge large fees for administering the auction. This commenter also suggested that the contract or delegation should be formally proposed through public rulemaking.

Response: As stated in the NPRM and reiterated herein, EPA has not yet made a determination as to the managing agent, if any, for the conduct of the auctions and direct sale. If the auctions and direct sale are administered by another entity on EPA's behalf, that entity would be unable to charge fees to cover its expenses. Finally, the Act does not require the Administrator to contract or delegate the administration of the auction through public rulemaking.

Section 73.71 Bidding

Publishing Losing Bidders Names

The Administrator is required by section 416(d)(5) of the Act to "publicly report the nature, prices, and results of each auction * * * including the prices of successful bids * * * EPA proposed to publish the names of all bidders, their bids and the lowest price at which allowances are sold in each auction.

Three commenters were supportive of EPA's proposal to publish the names of all bidders and their bids. They believe full disclosure of this information is important to the functioning of the market and will assist state PUCs in their evaluation of utilities' decisions concerning allowances. They suggest that bidders could use the names of agents, surrogates, or brokers submitting bids on their behalf if they wished to avoid disclosure.

Ten commenters thought that EPA should not disclose losing bidders' names because this public information may put the losing bidder at a competitive disadvantage in negotiating to buy or sell allowances in a private transaction. These commenters also argued that the public disclosure of losing bidders' names is not useful to the allowance market.

Response: EPA agrees that publishing losing bidders' names could compromise the interests of these bidders in private negotiations and that the publication of this information is not important to the operation of the market. Therefore, EPA has decided not to publish losing bidders' names after each auction. This change is reflected in the final rule. EPA will be required, however, to respond to requests for this information under the Freedom of Information Act (FOIA) if such requests are received by EPA.

In the NPRM, EPA requested comment on a two-envelope bid process which would separate names from bids. This bidding process was proposed to avoid subjecting the identity of losing bidders to Freedom of Information Act (FOIA) requests, which EPA would be compelled to fulfill even if EPA received information identifying losing bidders simply in carrying out the mechanics of the auction. EPA received comments in favor of the two-envelope bidding process because losing bidders' names would not be published. EPA has concluded, however, that this process would pose substantial difficulties for both bidders and the Agency. As was pointed out by some commenters, it would be very difficult for EPA to segregate fully the identity of bidders from the information minimally necessary to process each bid. Each bidder necessarily would be identified in connection with the payment instruments required to be submitted with the bid or through the information supplied for purposes of return of payment. Even if a method for avoiding such an exchange of information could be devised, EPA believes the burden both bidders and EPA would incur to implement the two-envelope bid process would impair substantially the efficiency and speed with which each auction could be conducted. EPA does not believe such a burden is justified when other suitable options, such as that of using a surrogate's name, are available if bidders wish to avoid disclosure of their identities.

Method of Payment

EPA proposed that each auction bid must be accompanied by a certified check or a letter of credit (LOC) for the

total bid price or by some method of electronic transfer or other instrument, which EPA, following public notice, may require or permit at some future time.

Six commenters suggested that EPA presently allow electronic transfer as a method of payment for allowances after they had been awarded at the auctions since, compared to an LOC or a certified check, electronic transfer methods lower costs and processing time.

Response: The rule remains unchanged from the proposal. Electronic payment, as envisioned by the commenters, could not guarantee future payment and would only be executed after the allowance awards were made. No matter how quickly payment could be executed through electronic transfer, such a method would not fully preclude defaults by winning bidders if payment were not required with the submission of each bid.

EPA is requiring payment guaranteed either with a certified check or an LOC prior to the award of allowances to ensure integrity of each auction. Such an approach is implied by the express elements of section 416 of the Act. The Act makes no provision for the awarding of allowances to a successful bidder by any method other than certain, direct, and immediate payment. If EPA did not require guaranteed payment with bids, winning bidders could default on their payments, requiring EPA to recalculate allowance awards. Such a process could delay the resolution of pending bids and undermine the stability of the auction process. However, EPA, following public notice, may require or permit at some future time a method or methods of electronic transfer or other instrument for payment of allowances awarded at the auctions if such methods can ensure guaranteed payment prior to the calculation of the allowance awards.

EPA proposed that to qualify as an LOC, such instrument must ensure that EPA will receive full payment for allowances awarded at the auction no later than 24 hours after the results of the auctions are announced in the Allowance Tracking System. Two commenters stated that 24 hours may not be enough time to process the funds transfer; it may also be impossible if the results of the auction are announced on a Friday. They suggest that 2 business days following the announcement of the results of the auctions in the Allowance Tracking System is a more reasonable time period to ensure EPA will receive full payment for allowances. EPA agrees with these comments and has incorporated this suggestion in the final rule accordingly.

Unrestricted Bidding

EPA proposed no restrictions on who may bid in the auctions or the number of allowances that may be sought in any one bid. One commenter suggested that EPA restrict bidding to only affected units needing allowances for compliance purposes. The commenter argues that an auction with unlimited participation could create artificially high prices for allowances. The commenter also suggested that EPA restrict the number of allowances a bidder may seek to a number no greater than 120% of the utility's average sulfur dioxide emissions for the preceding five years. Such a restriction, the commenter argued, would prevent hoarding of allowances or price-fixing by a group of utilities.

Response: The final rule remains unchanged from the proposal. Section 416 of the Act imposes no restrictions on who may bid in the auction and gives EPA no express authority to do so. EPA, however, is well aware of the recent controversy surrounding the auction of government securities conducted by the Federal Reserve on behalf of the Department of Treasury. The most important problems that have surfaced regarding these auctions are that:

- (1) Major bidders may have shared information and may have colluded in setting bids in some auctions; and
- (2) Limitations on the share of a given bond issue that any one bidder can obtain at auction were violated on several occasions. In view of this situation, EPA believes it is important to highlight the differences between the Treasury auction and the EPA auctions and explain how the problems occurring in the Treasury auction are unlikely in the EPA auctions.

Critics of Treasury auctions recently have argued that the auction design as discriminating, rather than as uniform, increases the incentives for bidders to collude. Although EPA's allowance auction is also a discriminating price auction, EPA believes a number of factors distinguish it from the Treasury auctions and reduce the likelihood of collusion among bidders.

In the Treasury auction, a limited number of primary bidders have an advantage in placing bids and in consulting with Treasury in regards to its financial strategy. In the EPA auctions, in contrast, any party may participate. Participation is not limited to a specific class of bidders (e.g., utilities), nor are any special privileges accorded to any class of bidders. Thus, a potentially large number of geographically dispersed bidders are likely to participate in the EPA auctions

and the group of bidders is likely to vary from year to year. Additionally, the EPA auctions will be run once per year, rather than many times per year as is characteristic of Treasury auctions, which will tend to make the EPA auctions involve a greater number of bidders. This will tend to limit the ability of participants to familiarize themselves with competing bidders and should raise the cost of coordinating bidding strategies, as compared to that in auctions held more frequently and involving a census of bidders that is smaller and more well defined. Hence, free entry to the EPA auctions should make collusion to influence the auction clearing price a difficult and ineffective strategy.

Second, EPA will computerize all bids and will make public the names of, and prices paid by, winning bidders. This procedure will further reduce the incentive for bidders to collude because such bidding practices would be readily detectable.

Unlike the Treasury auction, EPA's auctions will have no limits on the share of allowances that any one bidder may obtain in the auction. At this time, EPA does not believe there are any compelling reasons to restrict the number of allowances for which a single bidder may bid, or restrict the submission of multiple bids. In particular, attempts at hoarding or price-fixing allowances would be subject to anti-trust laws and, to the extent utilities are involved with such practices, subject to review by public utility commissions. Restrictions on bidding without good cause may inhibit the efficiency of the EPA auctions and signal unsubstantiated distrust of the new allowance market.

Although EPA excepts the allowance auction, as designed, to function properly, EPA will monitor each of the auctions and identify any necessary changes to the design of the auction that may be required to assure an orderly and competitive market.

Timing of the Annual Auction

EPA proposed to hold the spot auction and the advance auction on the same day, no later than March 31, in each calendar year beginning in 1993. One commenter suggested that EPA hold the auction some time during the period between December 31 and the allowance transfer deadline which is the last day allowance transfers may be submitted to EPA for recordation in affected units' accounts for use in meeting their emissions limitations requirements for the preceding year. This would enable allowances sold in

the auction to be used for end-of-year compliance needs. Another commenter suggested that EPA hold the auctions in late summer for the same purpose.

Four commenters supported the EPA proposal.

Response: The final rule remains unchanged from the proposal. Holding the auctions prior to March 31 will allow those needing to acquire allowances, such as the operators of new IPP units, the opportunity to do so at an auction price before having to resort to buying allowances for \$1,500 in the direct sale, which will immediately follow the auctions. Holding auctions early in the year will also allow new and existing units time to plan for end-of-the-year compliance. If utilities need to buy spot allowances for end-of-the-year compliance, the direct sale will serve that purpose for those unable to purchase allowances in the private market.

Disposition of Unsold Allowances

Section 416(c)(6) of the Act mandates that any unsold allowances from the direct sale must be transferred from the direct sale into the Auction Subaccount. EPA proposed that the unsold spot allowances will be sold in the following year's spot auction and that any unsold advance sale allowances be transferred into the Auction Subaccount and be sold as spot allowances when the allowances became useable for offsetting SO₂ emissions, according to their compliance use dates. EPA proposed this approach because advance allowances transferred from the advance sale into the Auction Subaccount would, at the time of their transfer, have a compliance use date of six years in the future, which would be inconsistent with the seven-year advance auction mandated by the Act.

Eight commenters objected, however, to the holding of advance sale allowances for seven years until they could be sold as spot allowances. They argued that holding allowances deprives utilities of their statutory compensation either in the form of payment from sale of their allowances or return of their allowances if they remain unsold in the annual auction. EPA's proposal, they argued, would also be inconsistent with the policy, established elsewhere in the proposal, of distributing both the proceeds of the sale and unsold allowances promptly.

Response: EPA agrees with the commenters' objections. Because the Act simply mandates the transfer of unsold allowances to the Auction Subaccount, EPA does not believe the Act bars the sale, at auction, of advance allowances on a six-year basis if such

allowances are first offered for sale, but are not sold, as seven-year advance allowances.

The final rule reflects EPA's intention to offer in the advance auction, as six-year advance allowances, any allowances initially offered as seven-year allowances in the direct sale but not sold, as well as seven-year advance allowances. Bidders in the advance auction will simply indicate on their bid form which allowances (six- or seven-year advance) they are seeking. Bids for these allowances will be ranked from highest to lowest and awarded accordingly. The method of processing and awarding bids for these allowances, and the distribution of the proceeds from the auction, will be the same as those for seven-year advance and spot allowances. EPA believes that this approach responds to the commenters' objections since it eliminates the retention of unsold allowances in the Auction Subaccount for six years.

Section 73.72 Direct Sales

In anticipation of the possibility that the Direct Sales Subaccount may be oversubscribed by the total number of applications submitted in any one year, EPA proposed to create a "waiting list," on a first come, first served basis. EPA proposed that "wait-listed" applicants only be approved if previously reserved allowances become available and if ample time (at minimum, five business days) for payment and transfer remains in the direct sale period.

As authorized under section 416(c)(2) of the Act, applicants may reserve allowances for direct sale without paying a deposit until six months after approval of their application; therefore, applicants could reserve allowances less than six months prior to the end of the direct sale and cancel their reservation at the very end of the sale without penalty. Wait-listed applicants could fail to acquire allowances simply as a result of the proposed time constraints, even though allowances would in fact remain unpurchased by those whose applications had initially been approved. For this reason, eight commenters argued that EPA's proposal reduced the value of the waiting list while doing nothing to discourage potential buyers from reserving more allowances than they needed. Commenters suggested that full payment for reserved allowances be required thirty days prior to the end of the direct sale "wait-listed" applicants an opportunity to purchase allowances from the direct sale.

Response: EPA agrees with the commenters' position. As reflected in the final rule, the Administrator will

assess the allowance reservation status of the direct sale subaccount on December 1 of each year the direct sale is held. In the event that the direct sale is oversubscribed by December 1, the Administrator will require full payment for reserved allowances no later than 30 calendar days prior to the allowance transfer deadline ("the oversubscription payment deadline") for those applicants whose applications were previously approved and for whom allowances were reserved. The Administrator will transfer allowances to applicants at the time full payment is received. The reservation of direct sales allowances and the waiting list process remain the same as proposed. After the oversubscription payment deadline has passed, the Administrator will reserve allowances, if any, for the wait-listed applicants according to the applicants' rank on the waiting list. The Administrator will notify such applicants of their rank and the amount of allowances reserved for them. If applicants without reserved allowances wish to contact those wait-listed applicants for whom allowances have been reserved, in case such applicants choose not to purchase their reserved allowances, EPA will make such information available upon request. Full payment for allowances must be received by EPA on or before the allowance transfer deadline.

If the direct sale is not oversubscribed by December 1, the Administrator will continue to reserve allowances remaining in the direct sale subaccount in the order of receipt of the applications, up to 10 calendar days prior to the allowance transfer deadline. Ten business days are necessary for EPA to notify approved applicants and receive payment prior to the end of the direct sale. Full payment must be received by EPA on or before the allowance transfer deadline.

Distribution of Proceeds From the Direct Sale and the Annual Auctions

The Act mandates that the Administrator distribute all proceeds from the direct sale (including deposits by approved applicants who fail to complete purchases) within 90 days after the direct sale ends, and proceeds from the annual auction within 90 days after the auction ends. Proceeds are distributed on a pro rata basis to units that had allowances withheld from their initial allocation of allowances for purposes of the direct sale and annual auctions. EPA proposed to carry out these redistributions by the statutory deadline although the Agency, as expressed in the NPRM, intends to

distribute proceeds more quickly. EPA also proposed to transfer proceeds to the owners of contributed allowances shortly after the auction.

A few commenters requested that EPA specify a regulator deadline for returning proceeds from the sale and auctions that is shorter than the 90 days allowed by section 416 of the Act. One commenter suggested a deadline of 10 business days to return proceeds after the sale and auction.

Response: The final rule remains unchanged from the proposal. Although EPA is unwilling to impose a shorter regulatory deadline, it intends to return the proceeds as expeditiously as possible, well before the maximum 90 days permitted under the Act. Establishing a shorter period by regulation would not accelerate the rapid distribution of proceeds, which the Agency already intends, nor would it afford those entitled to the proceeds any additional practicable remedy or recourse.

Section 73.73 Independent Power Producers Written Guarantee

Termination of the Written Guarantee

EPA proposed that IPPs issued written guarantees demonstrate to EPA the following, to continue to hold their guarantees:

1. *Continued good faith efforts to obtain allowances.* Section 416(c)(4)(b) states that the Administrator may terminate a written guarantee if continued efforts to obtain allowances are not pursued.

2. *Timely commencement of commercial operations.* EPA proposed to terminate a written guarantee if the unit for which a guarantee is issued has not commenced commercial operation by the later of January 1, 2000 or within two years of the date stated in the guarantee.

3. *Notification of continued need for the guarantee.* Lastly, EPA proposed to terminate a written guarantee if the responsible official for the IPP fails to notify EPA semi-annually until 1993 and annually thereafter of the continued need for the guarantee. The notification would include information on any allowances acquired through other means; EPA would deduct the number of allowances from the number initially guaranteed. EPA proposed in effect, to terminate guarantees, at least in part, to the extent, and only to the extent, the acquisition of allowances met part, or all, of the unit's allowance needs.

Comments and responses: One commenter requested that EPA allow IPPs to petition EPA for a deferral of termination of the guarantee if the

projected start-up date of the unit is delayed beyond the two years allowed after the date stated in the guarantee. EPA has concluded, however, that such a concern is merely speculative and that the two-year delay is sufficient to accommodate whatever setbacks may be faced by units nevertheless destined to begin operation. Accordingly, the final rule remains unchanged from the proposal on this issue.

One commenter stated that EPA should add the failure of an IPP project as a condition for termination of the guarantee. EPA believes that project failure would be revealed in the certification of the continued need for the guarantee, prompting EPA to terminate the guarantee.

The commenter also argued that IPP certification of the continuing need of the guarantee was an excessive requirement and that EPA could simply require IPPs to notify EPA when their project had failed or when they obtained some or all of the needed allowances. EPA believes that the certification requirements are important in the likely event that there is an oversubscription to the guarantee program. EPA, seeking to safeguard the interests of IPPs waiting to obtain guarantees following initial oversubscription of the program, cannot rely on IPPs with guarantees to notify EPA as soon as their status has changed, since the IPPs may have little incentive to do so. The certification of continued need as a prerequisite for continuing the guarantee assures IPPs' diligence in notifying EPA of any changes in their status.

One commenter apparently misunderstood the NPRM, believing that EPA proposed to terminate a guarantee if allowances were obtained in a number only partially fulfilling the unit's needs. EPA believes the language in the rule to be clear, but that the wording in the preamble was misconstrued. As proposed and as reflected in the final rule, EPA will reduce only the number of allowances guaranteed for that year or years by the number of allowances obtained from other sources.

Issuing Guarantees to Units

EPA proposed that guarantees be issued for a unit and not to the unit's owners and may only be transferred with the unit itself. One commenter suggested that EPA issue guarantees to developers of IPP projects since such projects are typically owned by developers initially. The commenter also stated that guarantees should be able to be applied to any other project that the developer may own or initiate.

The commenter also asked whether operational changes made to, or planned

for, a unit subsequent to the issuance of a guarantee would affect the guarantee.

Response: Under the Act, allowances are required for affected units to offset their sulfur dioxide emissions. In addition, the Act makes clear that a unit's eligibility for a guarantee and the number of allowances subject to the guarantee are to be determined on the basis of required showings concerning facts specific to the unit. Since each guarantee application pertains to one specific unit, there would thus be no justification for transferring guarantees to other units or entities.

The commenter's second question concerned operational changes made to a unit subsequent to the issuance of a guarantee, and the possibility that such changes could result in the guarantee failing to ensure that the unit's future allowance needs will be met. An IPP needing additional allowances because of unforeseen circumstances must obtain the additional allowances in the private market, in the EPA auction or direct sale, or reapply to the guarantee program for the new number of allowances needed. EPA will not add allowances to the number guaranteed for a unit for changed operations after issuance of the guarantee. Usually such changes require new financing. If EPA issued additional allowances without new information, EPA and IPP financiers could not ensure that the showings presented for the previous unit corresponded to the characteristics and circumstances of the changed unit. In addition, adjustments to guarantees already issued would jeopardize the certainty in the reservation of allowances and the integrity of the guarantee program.

"Useful life" of the Unit

EPA proposed that duration of the guarantee is up to 30 years (the useful life of the unit), beginning in the year 2000. One commenter thought that EPA should conduct a separate rulemaking on what constitutes the "useful life" of the unit and not simply declare it to be 30 years.

Response: EPA has chosen 30 years as the operating life of the unit in order to be consistent with the time period commonly chosen by financial institutions for the purposes of financing IPP projects. Since the guarantee is a means for IPPs to demonstrate to their financial lenders that they have access to a sufficient number of allowances to operate planned facilities fully, the guarantee must continue for the duration of the financing. EPA intends that the definition of "useful life" of the unit apply only for purposes of determining

the duration of the written guarantee. The final rule remains unchanged from the proposal.

Application for a Written Guarantee

EPA proposed that written guarantees be processed and approved according to the order in which applications are received, beginning with the date the regulations go into effect. EPA will time- and date-stamp applications as they are received.

As mandated by section 416(c)(3) of the Act, the Administrator must provide written guarantees to qualified applicants within 30 days of receiving the application. Applicants who have filed applications that are deficient will have their applications returned as soon as the deficiencies are discovered and those applicants will receive a new time- and date-stamp upon their resubmission. Revised applicants will be processed according to the date on which they are filed.

One commenter suggested that EPA allow IPP applications with minor errors to be allowed to retain their original time- and date-stamp while the errors are being corrected instead of having to reapply and begin again with a new time- and date-stamp.

Response: As is stated in the rule, the Agency retains discretion in determining whether an error defeats the approval of an applicant or whether some action short of complete resubmission may suffice to correct the error. EPA believes it must be stringent with respect to deficient applications because EPA is mandated by the Act either to disapprove an application or to issue a guarantee within 30 days after receipt. EPA believes that its primary obligation is to IPPs that submit complete applications and that it should not delay the issuance of guarantees to those IPPs with approvable applications in effect for the benefit of an earlier applicant whose initial submission was not complete.

"Responsible Official"

EPA proposed that certification of all requirements in the application for a written guarantee shall be made by a president, secretary, treasurer, or vice-president of the corporation in charge of a principal business function, or any other person who performs similar policy- or decision-making functions for the corporation. For a partnership a general partner would make the certification. The responsible official will be the contact person for all correspondence between EPA and the IPP concerning the written guarantee. Changes to the name of the responsible official must be made in writing to EPA.

One commenter asked why EPA did not allow or require the designated representative to be the responsible official.

Response: The final rule remains unchanged from the proposal except that the term "responsible official" has been changed to "certifying official" in order to avoid confusion with the term "responsible official" used in regulations issued under title V under the Act. The definition, however, has been expanded slightly to be usable for all of part 73. The rule neither prohibits nor requires the naming of the designated representative as the certifying official. When IPPs apply for written guarantees in 1991-1993, they may not yet have submitted their designated representative certifications.

Payment For Guaranteed Allowances

EPA proposed that allowances purchased pursuant to guarantees must be purchased by certified check for the total amount. One commenter questioned why EPA did not allow electronic transfer or other instruments to be announced, following public notice, to pay for these allowances, as it proposed for the auction and direct sale.

Response: The final rule is changed from the proposal to allow for electronic transfer or other instruments to be announced following public notice, which EPA may require or permit at some future time for the payment of allowances purchased through an IPP written guarantee. EPA did not intend to exclude this option for the IPP written guarantee; it was an oversight.

Miscellaneous

One commenter mistakenly thought that the proposed regulations provided that IPPs would have to pay 50% of the allowances guaranteed within six months after they were issued the guarantee. Direct sale applicants are required by the Act to pay 50% of the total purchase price within six months after their request to purchase has been approved by EPA.

As was stated in the NPRM, EPA interprets the Act to require no payment or deposit upon the issuance of a guarantee. Section 416(c)(2) of the Act requires that each applicant shall be required to pay the first half of the total purchase price within 6 months after the approval of the request to purchase. EPA does not believe the word "applicant" in section 416(c)(2) refers to holders of written guarantees, who, by definition, have been granted the purchase rights under the program. Any other interpretation would defeat the apparent overall purpose of the guarantee program: to provide certain

assurances to IPPs, before they secure financing, while affording them subsequent opportunities to obtain allowances in the market. In addition, IPPs with guarantees do not need the six months delay to pay the first half of the total purchase price in order to secure a better purchase price for allowances while holding a place in the direct sale, because the guarantee affords them the right of first refusal. Therefore, EPA simply requires IPPs to pay full price for their allowances when they choose to exercise their guarantee.

As part of the application for an IPP written guarantee, EPA proposed that an IPP demonstrate it has met any one of the following milestones:

- (1) It has been selected as a winning bidder in a utility competitive bid solicitation;
- (2) It has entered into a fully binding power sales agreement;
- (3) It has entered into a fully binding fuel supply agreement;
- (4) It has received a site lease or proof of land acquisition;
- (5) It has entered into a fully binding steam sales agreement; or
- (6) It has submitted a complete environmental permit(s) application or has received such a permit(s).

One commenter asked the question whether escape clauses in power sales agreements could be construed to mean not "fully binding."

EPA added the words "fully binding" to the requirements listed above to ensure that the power, fuel, or steam sales agreements do not contain major contingencies or conditions that could jeopardize the implementation of the agreement. EPA does not consider clauses in contracts that protect lenders' and utilities' interests prior to the operation of the plant to compromise binding agreements. These types of clauses are considered standard in legally binding contracts. Since the words "fully binding" could be construed to disallow standard exemption clauses in IPP project development contracts, EPA has changed the words in the power, fuel and steam sales agreements from "fully binding" to "legally binding."

III. Regulatory Assessment Requirements

A. Executive Order 12291

Under Executive Order 12291, the Administrator must judge whether a regulation is "major" and therefore subject to the requirement to conduct a regulatory impact analysis. This final rule is not major as defined in section 1(b) of E.O. 12291, because of the

following reasons: the annual effect of the rule on the economy will be less than \$100 million; it will not cause any significant increase in costs or prices for any sector of the economy or for any geographic region; and it will not result in any significant adverse effects on competition, investment, productivity, or innovation or on the ability of United States enterprises to compete with foreign enterprises in domestic or foreign markets. EPA's economic analysis estimates that the total impact for participants in the auctions, direct sales, and IPP written guarantee program are minimal. The estimated number of bidders for each auction will be between 200 and 400, and each bidder is estimated to submit one to three bids. The number of direct sale applicants is estimated at 100 over two years. The number of applicants for the IPP written guarantee program is estimated to total 100 and is assumed to occur in the first year, 1992.

The total estimated annual costs to each auction participant range from \$14,100 to \$84,600. The estimated total costs for each direct sale applicant is \$14,100 over two years. Assuming all IPP guarantee applications occur in the first year, the total cost to IPP guarantee applicants is estimated to be \$235,000. The Agency anticipates that these proposed regulations will not have a significant effect on competition, costs, or prices. Therefore, EPA has determined that these final regulations are not "major."

The analysis is contained in the Economic Analysis of the Proposed Acid Rain Regulations for Auctions, Direct Sales, and IPP Written Guarantees, March 1991, EPA, Office of Atmospheric and Indoor Air Programs.

This final rule was submitted to the Office of Management and Budget (OMB) for review prior to publication as required by E.O. 12291.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 requires each Federal agency to perform a Regulatory Flexibility Analysis for all rules that are likely to have a "significant impact on a substantial number of small entities."

EPA has three reasons for expecting that the auctions, direct sales, and IPP guarantee regulations will not have significant impacts on small entities. First, the costs to any one entity of participating in the auctions, direct sales, or IPP guarantees are too small to affect the financial health of a participating firm of any size. Second, because participation is voluntary, entities can choose not to incur any of the costs if they do not expect to gain

from participation. Finally, the benefits of the programs are likely to flow disproportionately to small entities, as the intended target of assistance from the direct sales and IPP guarantee programs. The auction is designed to ensure that all entities have an essentially equal chance to secure allowances, with minimal transaction costs. Based on this analysis and pursuant to the provisions of 5 U.S.C. 605(b), I hereby certify that this attached rule will not have a significant economic impact on a substantial number of small entities.

C. Paperwork Reduction Act

The information collection requirements in this rule have been approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq* and have been assigned control number 2060-0221.

The public reporting burden for this collection of information is estimated to average 48.5 hours per IPP guarantee application including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, completing the collection of information, and securing means of payment.

The information collection requirements associated with the letter of credit form in this rule have been submitted for approval to OMB under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq*. EPA proposed that bidders submit a letter of credit. EPA has since determined that a standard form for the letter of credit will be less burdensome for bidders and will facilitate EPA review of bid applications. An Information Collection Request document has been prepared by EPA (ICR No. 1584.03) and a copy may be obtained from Sandy Farmer, Information Policy Branch, EPA; 401 M St., SW. (PM-223Y); Washington, DC 20460 or by calling (202) 260-2740. These requirements are not effective until OMB approves them and a technical amendment to that effect is published in the Federal Register.

Public reporting burden for this collection of information is estimated to vary from 1 to 9 hours per response with an average of 5 hours per response, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing the collection of information.

Send comments regarding these burden estimates or any other aspect of this collection of information, including suggestions for reducing these burdens, to Chief, Information Policy Branch, PM-

223Y, U.S. Environmental Protection Agency, 401 M St., SW., Washington, DC 20460; and to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503, marked "Attention: Desk Officer for EPA."

List of Subjects in 40 CFR Part 73

Acid rain, Air pollution control, Electric utilities, Sulfur dioxide, Reporting and record-keeping requirements.

Dated: December 4, 1991.

F. Henry Habicht, II,
Acting Administrator.

For the reasons set forth in the preamble, title 40, chapter I of the Code of Federal Regulations is amended by adding part 73 as follows:

PART 73—SULFUR DIOXIDE ALLOWANCE SYSTEM

Subpart A—Background and Summary

Sec.

- 73.1 Purpose. [Reserved]
- 73.2 Applicability. [Reserved]
- 73.3 Definitions.
- 73.4 Deadlines.

Subpart B—Allowance Allocations [Reserved]

73.11–73.29 [Reserved]

Subpart C—Allowance Tracking System [Reserved]

73.30–73.49 [Reserved]

Subpart D—Allowance Transfers [Reserved]

73.50–73.69 [Reserved]

Subpart E—Auctions, Direct Sales, and Independent Power Producers Written Guarantee

- 73.70 Auctions.
- 73.71 Bidding.
- 73.72 Direct sales.
- 73.73 Delegation of auctions and sales and termination of auctions and sales.
- 73.74 Independent power producers written guarantee.
- 73.75 Application for an IPP written guarantee.
- 73.76 Approval and exercise of IPP written guarantee.
- 73.77 Relationship of independent power producers written guarantee to the direct sale subaccount.

Subpart F—Conservation and Renewable Energy Reserve [Reserved]

73.80–73.89 [Reserved]

Authority: 42 U.S.C. 7651.

Subpart A—Background and Summary**§ 73.1 Purpose. [Reserved]****§ 73.2 Applicability. [Reserved]****§ 73.3 Definitions.**

The terms used in this subpart shall have the meaning given in the Act, and in this section, as follows:

Additional advance auction means the auction of advance allowances that were offered the previous year for sale in an advance sale.

Administrator means the Administrator of the United States Environmental Protection Agency or the Administrator's duly authorized representative.

Advance allowance means an allowance that may be used for purposes of compliance with a unit's sulfur dioxide emissions limitation requirements beginning no earlier than seven years following the year in which the allowance is first offered for sale.

Advance Auction means an auction of an advance allowance.

Advance Sale means a sale of an advance allowance.

Affiliate is defined as in section 2(a)(11) of the Public Utility Holding Company Act of 1935, 15 U.S.C. 79b(a)(11).

Allowance means an authorization, allocated by the Administrator under the Acid Rain program, to emit up to one ton of sulfur dioxide during or after a specified calendar year.

Allowance Tracking System means the system by which the Administrator allocates, records, and tracks allowances.

Allowance Tracking System account means an account in the Allowance Tracking System established by the Administrator for purposes of allocating, holding, transferring, and using allowances.

Allowance transfer deadline means midnight of January 30 or, if January 30 is not a business day, midnight of the first business day thereafter, and is the last day on which allowances may be submitted for recordation in an affected unit's compliance subaccount for the purposes of meeting sulfur dioxide emissions limitation requirements for the previous calendar year.

Auction Subaccount means an account in the Special Allowance Reserve, as specified in section 416(b) of the Clean Air Act. The Auction Subaccount shall contain allowances to be sold at auction in the amount of 150,000 per year from 1995 through 1999, inclusive, and 200,000 per year for each year beginning in the calendar year 2000, subject to modifications noted in these regulations.

Authorized account representative means a natural person who may transfer and otherwise dispose of allowances held in an account in the Allowance Tracking System, including, in the case of a unit account, the designated representative of the owners and operators of an affected unit.

Certifying official, for purposes of part 73, means:

(1) for a corporation, a president, secretary, treasurer, or vice-president of the corporation in charge of a principal business function, or any other person who performs similar policy- or decision-making functions for the corporation;

(2) for a partnership or sole proprietorship, a general partner or the proprietor, respectively; and

(3) for a local government entity or State, Federal or other public agency, either a principal executive officer or ranking elected official.

Commenced commercial operation means to have begun to generate electricity for sale, including test generation.

Compliance use date means the first calendar year for which an allowance may be used for purposes of meeting a unit's sulfur dioxide emissions limitation requirements.

Consumer Price Index (CPI) means the United States government's primary indicator of the monetary inflation rate as published monthly by the U.S. Department of Labor, Bureau of Labor Statistics, Consumer Price Indices Branch, in the CPI Detailed Report and in the Monthly Labor Review. For purposes of part 73, the Administrator will use the "Consumer Price Index for all urban consumers for the US City Average, for all items on the Official Reference Base" (CPI-U), or if such index is no longer published, such other index as the Administrator in his discretion determines meets the requirements of the Clean Air Act Amendments of 1990.

(1) CPI (1990) means the most recently adjusted CPI for all urban consumers as of August 31, 1989. The CPI for 1990 is 124.6 (with 1982-1984 = 100).

(2) CPI (year) means the most recently adjusted CPI for all urban consumers as of August 31 of the previous year.

Direct Sale Subaccount means an account in the Special Allowance Reserve, as defined in section 416(b) of the Clean Air Act. The Direct Sale Subaccount will contain Phase II allowances to be sold in the amount of 25,000 per year, beginning in calendar year 1993 and of 50,000 per year beginning in the calendar year 2000.

Fuel supply agreement means a legally binding document between a

firm associated with a new independent power production facility (IPPF) or a new IPPF and a fuel supplier that establishes the terms and conditions under which the fuel supplier commits to provide fuel to be delivered to a specific new IPPE.

New independent power production facility means, for purposes of this part, a unit(s) that:

(1) Commences commercial operation on or after November 15, 1990;

(2) Is nonrecourse project-financed, as defined in 10 CFR part 715;

(3) Sells 80% of electricity generated at wholesale; and

(4) Does not sell electricity to any affiliate or, if it does, demonstrates it cannot obtain the required allowances from such an affiliate.

Owner means any of the following persons:

(1) Any holder of any portion of the legal or equitable title in an affected unit; or

(2) Any holder of a leasehold interest in an affected unit; or

(3) Any purchaser of power from an affected unit under a life-of-the-unit, firm power contractual arrangement as that term is used in section 408(i) of the Act. However, unless expressly provided for in a leasehold agreement, owner shall not include a passive lessor, or a person who has an equitable interest through such lessor, whose rental payments are not based, either directly or indirectly, upon the revenues or income from the affected unit.

Owner or operator means any person who is an owner or who operates, controls, or supervises in any way an affected unit or affected source of which an affected unit is a part, and shall include, but not be limited to any holding company, operating company, utility system, designated representative, or plant manager of an affected unit or affected source.

Oversubscription payment deadline means 30 calendar days prior to the allowance transfer deadline.

Power sales agreement is a legally-binding document between a firm associated with a new independent power production facility (IPPF) or a new IPPF and a regulated electric utility that establishes the terms and conditions for the sale of power from a specific new IPPF to the utility.

Site lease is a legally-binding document signed between a firm associated with a new independent power production facility (IPPF) or a new IPPF and a site owner that establishes the term and conditions under which the firm associated with the new IPPE has the binding right to

utilize a specific site for the purposes of operating or constructing the new IPPF.

Spot allowance means an allowance that may be used for purposes of compliance with a unit's sulfur dioxide emissions limitations requirements beginning in the year in which the allowance is offered for sale.

Spot Auction means an auction of a spot allowance.

Spot Sale means a sale of a spot allowance.

Steam sales agreement is a legally-binding document between a firm associated with a new independent power production facility (IPPF) or a new IPPF and an industrial or commercial establishment requiring steam that sets the terms and conditions under which a specific new IPPF will provide steam to the establishment.

Unit means a fossil fuel-fired combustion device.

Utility competitive bid solicitation is a public request from a regulated electric utility for offers to the utility for meeting future capacity needs. A new independent power production facility (IPPF) may be regarded as having been "selected" in such solicitation pursuant to section 405(g)(6)(A)(iv) if the utility has named the IPPF as a project with which it intends to negotiate a power sales agreement.

§ 73.4 Deadlines.

In any year in which the deadline for an action authorized or required under this Part falls on a non-business day, the deadline will be the first business day after the date stated in this part.

Subpart B—Allowance Allocations [Reserved]

§§ 73.11–73.29 [Reserved]

Subpart C—Allowance Tracking System [Reserved]

§§ 73.30 to 73.49 [Reserved]

Subpart D—Allowance Transfers [Reserved]

§§ 73.50 to 73.69 [Reserved]

Subpart E—Auctions, Direct Sales, and Independent Power Producers Written Guarantee

§ 73.70 Auctions.

(a) **Allowances to be auctioned.** Every year the Administrator will auction allowances from the Auction Subaccount, established pursuant to Subpart B of this Part, according to the following schedule:

TABLE 1.—ALLOWANCE SCHEDULE FOR AUCTIONS

Year of purchase	Spot auction	Advance auction
1993	50,000	100,000
1994	50,000	100,000
1995	50,000	100,000
1996	150,000	100,000
1997	150,000	100,000
1998	150,000	100,000
1999	150,000	100,000
2000 and after	100,000	100,000

* Not useable until 7 years after purchase.

† Not useable until 1995.

In addition to the allowances listed above, the Administrator will auction allowances pursuant to paragraph (c) of this section and § 73.72(q) in the amounts and at the times provided for therein.

(b) **Timing of the auctions.** The spot auction and the advance auction, and, if required pursuant to § 73.72(q), an additional advance auction will be held on the same day, selected each year by the Administrator, but no later than March 31 of each year. The Administrator will conduct one spot auction and one advance auction, and, if required to § 73.72(q), one additional advance auction in each calendar year.

(c) **Submission for other allowances for auction.** Authorized account representatives may offer allowances for sale at auction, provided that allowances are dated for the year in which they are offered or for any previous year or for seven years following the year in which they are offered. Such authorized account representatives may specify a minimum price for the allowances offered at the auctions. The authorized account representative must notify the Administrator fifteen business days prior to the auctions, using the SO₂ Allowance Offer Form published by the Administrator, or by means of electronic communication if the Administrator, following public notice, so requires or permits at some future time. The notification shall include:

(1) The compliance use date of the allowances offered;

(2) The number of allowances to be sold and any other information identifying the allowances offered that may be required by Subpart C of this Part;

(3) Any minimum price in whole dollars; and

(4) Whether the authorized account representative is willing to sell fewer allowances than the number stated in paragraph (c)(2) of this section, if the full amount cannot be sold. After notification, the Administrator will

deduct allowances from the appropriate Allowance Tracking System account from which allowances are being offered and place them in a separate subaccount for such allowances.

(d) **Conduct of the auctions.** (1) The Administrator will rank all bids in descending order of bid price starting with the highest. Allowances will be sold from the Auction Subaccount in this order at the amounts specified in the bids until there are no allowances in the subaccount. If all allowances are sold from the Auction Subaccount, including unsold allowances transferred from the preceding year's direct sale, and if bids still remain, the Administrator will sell allowances offered by the authorized account representatives, beginning with those offered at the lowest minimum price. Allowances offered at the lowest minimum price will be matched with the highest bid remaining after the Auction Subaccount is exhausted. Sales of offered allowances, including, but not limited to, allowances offered by more than one offeror at the same minimum bid price, will continue in ascending order of minimum price, starting with the lowest, and descending order of remaining bids, starting with the highest, until:

(i) All allowances are sold,

(ii) No bids remain, or

(iii) Prices of remaining bids do not meet minimum prices required in remaining offers.

(2) In the event that there is more than one bid submitting the same price and the total number of allowances requested in all such bids exceeds the number of allowances remaining, the Administrator will award the remaining allowances by lottery to such bidders.

(3) In the event that there are more offers of sale at the minimum price than there are bids meeting that price, allowances from all such offers will be sold to cover the bids, according to each such offeror's pro rata share of all allowances so offered.

(4) In the event that fewer allowances remain than are requested in a bid, the Administrator will sell such remaining allowances to the bidder provided that, pursuant to § 73.71(b)(4), the bid states the bidder's willingness to purchase fewer allowances than requested in the bid.

(5) In the event that fewer than all allowances included in an offer for sale would be sold to remaining bids based on price, the Administrator will sell such allowances to the bidder(s), provided that, pursuant to § 73.70 (c)(4), the offer states the offeror's willingness to sell

fewer allowances than were offered for sale.

(e) *Announcement of results.*

Following each auction, the Administrator will publish the names of winning bidders and their bids, the amounts of losing bids, and the lowest price at which allowances are sold. The Administrator will announce the results of each auction through the Allowance Tracking System. The results will also be published in the *Federal Register* and in the *Commerce Business Daily*.

(f) *Transfer of allowances.*

Allowances will be transferred from the Auction Subaccount and from the subaccount for allowances offered by authorized account representatives to the Allowance Tracking System accounts of successful bidders as soon as payment is collected by the Administrator.

(g) *Return of Unsuccessful Bids.* The Administrator will return payment to unsuccessful bidders and to bidders unwilling to purchase fewer allowances than requested following the conclusion of each auction.

(h) *Transfer of Proceeds.* The Administrator will return all proceeds from the auction as follows:

(1) Allowances auctioned from the Auction Subaccount. Not later than 90 days following each auction, the Administrator will pay a pro rata share of the proceeds of each auction to the authorized account representative of each unit from whose annual allowance allocation allowances were withheld for the purposes of establishing the Auction Subaccount. Each unit's pro rata share will be calculated pursuant to regulations to be promulgated under subpart B.

(2) Allowances contributed from others. Not later than 90 days following each auction, the Administrator will transfer the full amount of the proceeds of each sale of allowances offered by authorized account representatives to such representatives. Proceeds from the sale of allowances that were offered with the same specified minimum price will be distributed according to each such offeror's pro rata share of the sale of such allowances.

(3) The Administrator will pay no interest on any payment made pursuant to paragraphs (h)(1) and (2) of this section.

(i) *Return of unsold allowances.* The Administrator will return all unsold allowances from the auction as follows:

(1) Allowances in the Auction Subaccount. At the conclusion of each auction, the Administrator will transfer to the Allowance Tracking System account of each unit specified in paragraph (h)(1) of this section its pro rata share of any allowances remaining in the Auction Subaccount. Each unit's pro rata share will be calculated pursuant to regulations to be promulgated under subpart B.

(2) Allowances contributed from others. At the conclusion of each auction, the Administrator will return unsold allowances to the appropriate offerors' Allowance Tracking System accounts. Any unsold allowances that were offered with the same specified minimum price will be distributed according to each such offeror's pro rata share of all such allowances offered.

§ 73.71 Bidding.

(a) *Who may participate in the auctions.* Any person may participate in the auctions by submitting a bid or bids pursuant to this section.

(b) *Bidding.* Sealed bids shall be sent to the Administrator using the Bid Form for SO₂ Allowance Auctions, or some method of electronic transfer if the Administrator, following public notice, so requires or permits at some future time. The bid form shall state:

(1) The number of allowances sought and the price;

(2) Whether spot or advance allowances are sought;

(3) Allowance Tracking System account number;

(4) Whether the bidder is willing to purchase fewer allowances than the number of allowances stated in (b)(1) of this section if the full amount is not available. Where the bidder holds no Allowance Tracking System account, a New Account/New Authorized Account Representative Form must accompany the bid. New account information shall include at a minimum: Name, address, telephone number, facsimile number, organization or company name (if applicable), type of organization, and the authorized account representative for purposes of the account.

(c) *Payment.* Each bid must include a certified check or letter of credit for the total bid price, or may specify a method of electronic transfer or other method of payment, if the Administrator, following public notice, so requires or permits at some future time. The certified check should be made payable to the U.S.

EPA. To meet the requirements of this paragraph bidders must submit a completed SO₂ Allowance Auction Letter of Credit Form. If such Form is used, the Administrator must receive full payment for allowances awarded at the auctions, either by wire transfer or certified check, no later than 2 business days after the results of the auction are announced in the Allowance Tracking System.

(d) *Bid amount and number of bids.*

Bidders may request any number of allowances up to the amount of allowances available for auction. Any person may submit more than one bid in each auction, provided that each bid meets the requirements of this section.

(e) *Submission of bids.* The Administrator will publish in the *Federal Register* and in the *Commerce Business Daily* the address of where to submit bids and payment not later than 60 calendar days before each auction.

(f) *Deadline for bids.* All bids must be revised by the Administrator no later than 3 business days prior to the date of the auctions.

§ 73.72 Direct sales.

(a) *Allowances to be sold.* The Administrator will sell allowances every year according to the following schedule:

TABLE 2.—ALLOWANCE SCHEDULE FOR THE DIRECT SALE

Year of purchase	Spot sale	Advance sale
1993		* 25,000
1994		* 25,000
1995		* 25,000
1996		* 25,000
1997		* 25,000
1998		* 25,000
1999		* 25,000
2000 and after	25,000	* 25,000

* Not useable until 7 years after purchase.

(b) *Adjustment of the direct sale schedule.* The schedule listed in paragraph (a) of this section will be adjusted to reflect allowances subject to IPP written guarantees pursuant to § 73.74.

(c) *Price.* Allowances in the direct sale will be sold at \$1,500 per allowance, adjusted by the Consumer Price Index (CPI). The following formula will be used each year to calculate the price:

$$\$1500 \times [1 + \text{CPI}(\text{year}) - \text{CPI}(1990)]$$

CPI(1990)

(d) *Form and timing of the direct sale.* The Administrator will begin accepting applications for the direct sale on June 1st of each calendar year and will continue to accept applications up to 10 calendar days prior to the allowance transfer deadline.

(e) *Who may purchase from the direct sale.* Any person may apply to purchase allowances from the direct sale.

(f) *Amount allowed to purchase.* Applicants may request to purchase any number of allowances up to the amount available for sale in the Direct Sale Subaccount.

(g) *Request to purchase allowances.* Applicants shall submit the Direct Sale Application Form to request to purchase allowances from the Administrator, or shall make such request by some method of electronic transfer if the Administrator, following public notice, so requires or permits at some future time. The Direct Sale Application Form shall state:

(1) The number of allowances sought;
(2) Whether spot or advance allowances are sought;

(3) The Allowance Tracking System account number; and

(4) Whether the applicant is willing to purchase fewer allowances than the number of allowances stated in (g)(1) of this section, if the full amount is not available. Where the applicant holds no Allowance Tracking System account, a New Account/New Authorized Account Representative Form must accompany the application. New account information shall include at a minimum: name, address, telephone number, facsimile number, organization or company name (if applicable), type of organization, and the authorized account representative for purposes of the account.

(h) *Submission of direct sale applications.* The Administrator will publish in the *Federal Register* and in the *Commerce Business Daily* the address of where to submit Direct Sale Application Forms no later than 60 calendar days before each direct sale.

(i) *First come, first served.* Applications will be approved in order of receipt, indicated by the date and time stamped on the applications upon arrival at the destination indicated pursuant to paragraph (h) of this section.

(j) *Partial fulfillment of requests.* In the event the number of allowances requested for a purchase exceeds the

number of allowances remaining in the Direct Sale Subaccount, the Administrator will approve the request for the number of allowances remaining, provided that, pursuant to paragraph (g)(4) of this section, the application states the applicant's willingness to purchase fewer allowances than the number stated in its application. In all other cases, the Administrator will place applicants on the waiting list pursuant to paragraph (n) of this section.

(k) *Notification of approval.* After approving an application, the Administrator will notify the applicant of the amount and type of allowances that may be purchased, the date on which the approval was made, the exact price of allowances for purchase from the direct sale, and instructions for making payment.

(l) *Payment.* Applicants shall submit 50% of the total purchase price by six months after the date of approval of their request to purchase. Pursuant to paragraph (m) of this section, the remaining 50% must be paid on or before the allowance transfer deadline. In the event that approval is granted less than six months prior to the allowance transfer deadline, payment shall be made on or before the allowance transfer deadline, pursuant to paragraph (m) of this section. The Administrator will terminate the approval of any request to purchase upon failure to pay the 50% deposit within six months. Upon failure to submit timely payment for the remaining balance, the Administrator will terminate the sale and the deposit will be forfeited. The 50% deposit and the final payment shall be made by certified check or by some method of electronic transfer or other instrument if the Administrator, following public notice, so requires or permits at some future time. The certified check should be made payable to the U.S. EPA.

(m) *Oversubscription payment deadline.* The Administrator will assess the status of the allowance reservations to the Direct Sale Subaccount on December 1 of each year the direct sale is held. In the event that the direct sale is oversubscribed by December 1, the Administrator will require full payment for reserved allowances no later than the oversubscription payment deadline for those applicants whose applications were previously approved and for whom allowances were reserved. Allowances

will be transferred immediately upon such payment.

(n) *Oversubscription to the direct sales program.* Applications received after all allowances in the Direct Sale Subaccount are subject to approved applications shall be included on a waiting list and ranked in order of receipt, as indicated by the time and date stamped on the application upon arrival at the destination indicated pursuant to paragraph (h) of this section. In the event that an approved application is terminated pursuant to paragraph (l) of this section, applications on the waiting list will be approved according to the order in which they are ranked, subject to paragraph (i) of this section. Approved applicants will be notified pursuant to paragraph (k) of this section. If applicants without reserved allowances wish to contact those wait-listed applicants for whom allowances have been reserved, in case such applicants choose not to purchase their reserved allowances, the Administrator will make such information available upon request. Full payment for allowances must be collected by the Administrator on or before the allowance transfer deadline.

(o) *Transfer of allowances.* Allowances will be transferred to purchasers' Allowance Tracking System accounts from the Direct Sale Subaccount as soon as full payment is collected.

(p) *Transfer of proceeds.* Not later than 90 days after the conclusion of the direct sale, the Administrator will pay a pro rata share of the total proceeds of the direct sale (including forfeited deposits) to the authorized account representatives of each unit from whose annual allocation allowances are withheld for the purposes of establishing the Direct Sale Subaccount. The Administrator will pay no interest on such payment. Each unit's pro rata share will be calculated pursuant to regulations to be promulgated under subpart B of this part.

(q) *Unsold allowances in the Direct Sale Subaccount.* If allowances remain in the Direct Sale Subaccount after the allowance transfer deadline, the Administrator will transfer those allowances to the Auction Subaccount. All allowances remaining from the spot sale will be sold in the spot auction in

the following year. Advance allowances transferred from the direct sale will be sold in an additional advance auction the following year, in which allowances usable for compliance in six years will be sold. This additional auction will be conducted before allowances offered by authorized account representatives are auctioned.

§ 73.73 Delegation of auctions and sales and termination of auctions and sales.

(a) *Delegation.* The Administrator may, in the Administrator's discretion, by delegation or contract provide for the conduct of sales or auctions under the Administrator's supervision by other departments or agencies of the United States Government or by nongovernmental agencies, groups, or organizations.

(b) *Termination of sales.* If the Administrator determines that, during any period of 2 consecutive calendar years, fewer than 20 percent of the allowances available in the subaccount for direct sales have been purchased, the Administrator shall terminate the Direct Sale Subaccount and transfer such allowances to the Auction Subaccount.

(c) *Termination of auctions.* The Administrator may, in the Administrator's discretion, terminate the withholding of allowances and the auctions if the Administrator determines, that, during any period of 3 consecutive years after 2002, fewer than 20 percent of the allowances available in the Auction Subaccount have been purchased.

§ 73.74 Independent power producers written guarantee.

(a) *Nature of guarantee.* The written guarantee is a right to purchase allowances from the Direct Sale Subaccount for \$1,500 (CPI adjusted) prior to the time in each calendar year that such allowances are offered for sale to others.

(b) *Issuance of a guarantee.* IPP written guarantees will be issued for a unit and not to the unit's owners and may only be transferred with the unit itself. Each guarantee application pertains to one specific unit.

(c) *Yearly total number guaranteed.* The number of allowances which may be subject to such written guarantees each year will be equal to the total number of allowances in the Direct Sales Subaccount for that year (50,000).

(d) *Duration of the guarantee.* Applicants may request a guarantee for the useful life of the unit, up to 30 years, beginning in the year 2000.

(e) *Termination of the guarantee.* The Administrator will terminate a written

guarantee if the unit for which a guarantee is issued has not commenced commercial operation by January 1, 2000 or within two years of the planned start-up date of the unit, whichever is later, or if the holder of the guarantee fails to make a continuing good faith effort to obtain allowances, including participation in the annual auctions, as required under section 416(c)(4) of the Act. The Administrator will also terminate a guarantee if the holder of the guarantee fails to notify the Administrator of the continued need for the guarantee pursuant to § 73.76(e).

§ 73.75 Application for an IPP written guarantee.

(a) *Application requirements.* Applicants shall demonstrate the following by filling out the Application for an IPP Written Guarantee for SO₂ Allowances:

(1) *Certification of Qualifications.* Each applicant shall certify that it is the owner or operator of a new independent power production facility and that it meets the criteria set forth in the definition of new independent power production facility, and, where applicable, submit a certified statement from a senior manager (who shall meet the requirements of "certifying official" set forth in § 73.3) of its affiliate that it cannot supply all or any of the required allowances.

(2) *Proof of "propose to construct" a new unit.* Each applicant shall demonstrate any one of the following:

- (i) That it has been selected as a winning bidder in a utility competitive bid solicitation;
- (ii) That it has entered into a legally binding power sales agreement or such agreement has been entered into on its behalf;
- (iii) That it has entered into a legally binding fuel supply agreement or such agreement has been entered into on its behalf;
- (iv) That it has received a site lease or proof of land acquisition;
- (v) That it has entered into a legally binding steam sales agreement or such agreement has been entered into on its behalf; or
- (vi) That it has submitted a complete environmental permit application or has received such a permit.

Each applicant shall submit the relevant document in support of the demonstration. If the document is longer than 10 pages, only the signature page(s) and the first 10 pages of the document shall be submitted.

(3) *Pledge to apply for financing.* The applicant shall certify that it will apply for, or has applied for, financing for the

unit after January 1, 1990 and before the date of the 1993 auction.

(4) *Submission of written offers at \$750.* The applicant shall certify that it has made offers to purchase some or all of the required allowances at \$750 each from all phase I utilities, but that it received no unconditional acceptances within 180 days from the date on which each offer was made.

(5) *Other information required.* The applicant shall submit the following information for the unit:

- (i) The proposed location (complete address);
- (ii) The proposed production capacity and fuel source;
- (iii) Sulfur dioxide emissions limitations under which the unit will be required to operate;
- (iv) Projected annual emissions of sulfur dioxide;
- (v) Annual allowances requested;
- (vi) The proposed date on which the unit will commence commercial operation; and
- (vii) The unit's expected operating lifetime.

(b) *Application submitted after the 1993 Auction.* An application may be submitted after the date of the 1993 auctions provided that it meets all the requirements of paragraph (a) of this section and includes Supplement A of the Application For An IPP Written Guarantee For SO₂ Allowances which requests the name of the financial entity(ies) to whom application for financing was made.

(c) *Submittal location.* Completed applications shall be submitted to: U.S. Environmental Protection Agency, Acid Rain Division (ANR-445), 401 M Street, SW., Washington, DC 20460, attn.: IPP Written Guarantee.

(d) *Certification.* Certification of all requirements shall be made by a certifying official upon his/her verification of all information and documentation submitted. Changes by an applicant in the name of the certifying official must be made in writing to the Administrator.

(e) *Recordkeeping requirements.* Applicants shall maintain and make available to the Administrator, at the Administrator's request, copies of the \$750 written offers to Phase I utilities, any responses to such offers, and copies of documents showing the project milestones set forth in paragraph (a)(2) of this section that have been attained. Holders of written guarantees shall retain copies of their bids in the annual auctions and any written offers made to other allowance holders and shall make such documents available to the

Administrator at the Administrator's request.

§ 73.76 Approval and exercise of the IPP written guarantee.

(a) *First come, first served.* The Administrator will process and approve or disapprove, in whole or in part, applications received on or after the effective date of the regulations. The Administrator will issue guarantees pursuant to approved applications according to the order in which applications are received, as indicated by the date and time stamped on the applications upon arrival at the destination indicated in § 73.75(c).

(b) *Oversubscription to the IPP written guarantee program.* Applications received after all allowances in the Direct Sale Subaccount have become subject to written guarantees or when there is an insufficient number of allowances available to satisfy the amount requested for any year covered by the guarantee will be included on a waiting list and ranked in order of time and date of receipt. In the event that an IPP guarantee is terminated pursuant to § 73.74(e), the Administrator will process applications on the waiting list by rank order and will issue guarantees pursuant to any approved application.

(c) *Deficient applications.* The Administrator may, in his or her discretion, return applications that fail to meet the requirements set forth in §§ 73.75 (a), and (b) if applicable. Revised applications will be processed according to the date and time of receipt of such revised applications.

(d) *Notification of approval.* The Administrator will issue a written guarantee pursuant to each approved application within 30 calendar days of receipt, provided that there is a sufficient number of allowances available to satisfy the guarantee for each year covered by the guarantee at the time the application is processed.

(e) *Certification of continued need for the guarantee.* (1) By no later than June 30 and December 31 of 1992 and no later than December 31 of each year thereafter, the certifying official for a unit for which a guarantee has been issued shall certify, through written notification, to the Administrator that the unit continues to require allowances subject to the guarantee pursuant to § 73.75.

(2) As soon as a unit for which a guarantee has been issued is no longer in need of any or all of the allowances subject to the guarantee, the certifying

official shall notify the Administrator, in writing, of the number of allowances that are no longer needed. Pursuant to the terms of the notification, the Administrator will reduce the number of allowances subject to the guarantee or terminate the guarantee.

(f) *Exercise of guarantee.* Allowances may be purchased in each year for those years for which the guarantee has been issued provided that they are purchased for the unit for which the guarantee has been issued. In any year, the certifying official of a unit for which a guarantee is issued may purchase any number of allowances up to the maximum number specified in the guarantee for such year. Allowances purchased through guarantees will be fully transferable.

(1) *Notification and response.* To exercise a written guarantee, the certifying official shall notify the Administrator of the number of allowances to be purchased. Such notification shall be in writing and signed by the certifying official pursuant to § 73.75(d). The Administrator, following public notice, may require or permit a method or methods of electronic transfer of this information. The Administrator will respond to the written notification within 5 business days after receipt by sending the certifying official a statement of the exact price for the allowances and where to send payment. If the certifying official does not have an account in the Allowance Tracking System, the New Account/New Authorized Account Representative Form shall be completed and mailed with payment.

(2) *Payment.* Certifying officials shall purchase allowances by certified check for the total amount or by some method of electronic transfer or other instrument, if the Administrator, following public notice, so requires or permits at some future time. The certified check shall be made payable to U.S. EPA.

(3) *Time period to exercise.* Notification to exercise a guarantee shall be received by the Administrator no later than April 15th of the calendar year in which allowances are to be purchased. Payment for allowances shall be collected by the Administrator no later than May 15th of that same year. If the direct sales program has been terminated pursuant to § 73.73(b), notification and payment may occur at any time prior to the allowance transfer deadline for each year in which allowances are to be purchased.

(g) Transfer of allowances.

Allowances will be transferred into the unit's allowance system account as soon as full payment is collected.

(h) *Transfer of proceeds.* The Administrator will pay all proceeds from the exercise of written guarantees pursuant to § 73.72(p).

§ 73.77 Relationship of the independent power producers written guarantees to the direct sale subaccount.

(a) *Reserving allowances in the Direct Sale Subaccount.* The Administrator will make available up to 50,000 yearly allowances in the direct sales subaccount for written guarantees. The Administrator will first reserve for IPP guarantees the 25,000 yearly allowances in the advance sale category. If more than 25,000 yearly allowances are subject to guarantees, the excess allowances needed will be reserved from the spot allowance category, up to 25,000 each year.

(b) *Adjustment of the direct sale schedule.* If fewer than 25,000 advance allowances are subject to written guarantees for any year from 2000 through 2006, any remaining advance allowances will be sold in the advance sale seven years preceding that year. If all 25,000 advance allowances are reserved for written guarantees for 2000 through 2006, the direct sale will begin in the year 2000 and will consist only of spot sales of allowances not sold pursuant to written guarantees.

(c) *Continuation of the guarantee.* Termination of the direct sale will not affect IPP written guarantees which will continue in effect for the operating life of the unit or 30 years, whichever is shorter, unless terminated pursuant to § 73.74(e).

(d) *Guaranteed allowances not sold.* If a certifying official of a unit for which a guarantee is issued chooses not to exercise the guarantee for a year in which allowances are reserved, the allowances will be offered for sale in the direct sale beginning on June 1 of that year. In the event the direct sale is terminated, any unsold allowances will be transferred to the Auction Subaccount pursuant to § 73.72(q).

Subpart F—Conservation and Renewable Energy Reserve [Reserved]

§§ 73.80-73.89 [Reserved]

[FR Doc. 91-29744 Filed 12-18-91; 8:45 am]

BILLING CODE 6560-50-M

ENVIRONMENTAL PROTECTION AGENCY

(FRL-4039-3)

Request for Delegation Proposals to Administer the Auctions and Direct Sale and Request for Public Comment

AGENCY: Environmental Protection Agency.

ACTION: Notice of EPA request for delegation proposals to administer the auctions and direct sale under section 416 of the Clean Air Act amendments of 1990, and request for public comment.

SUMMARY: Pursuant to title IV of the Clean Air Act Amendments of 1990 ("the Act"), the Administrator must promulgate regulations to reduce emissions of sulfur dioxide (SO₂) and nitrogen oxides (NO_x), precursors of acid rain. The centerpiece of the SO₂ control program is the allocation of transferable allowances, or authorizations to emit SO₂, which are distributed in limited quantities for existing utility units and which eventually must be held by all utility units to cover their SO₂ emissions. These allowances may be transferred among polluting sources and others, so that market forces may govern their ultimate use and distribution, resulting in the most cost-effective sharing of the emissions control burden. In order to stimulate and support such a market in allowances, and to provide a public source of allowances particularly to new units for which no allowances are allocated, the Administrator is directed under section 416 of the Act to conduct an annual sale and auctions of allowances.

Today, the Administrator promulgated regulations for conducting such sales and auctions, as well as regulations under which certain independent power producers ("IPP") may obtain written guarantees of the availability of allowances and may exercise priority in purchasing allowances through the direct sale (see 40 CFR part 73).

Along with the publication of these regulations, EPA is, in this notice: (1) Notifying the public of its intent to request proposals for the delegation of the administration of the auctions and direct sale, (and the issuance of allowances for persons holding Independent Power Producer guarantees) under the authority of section 416(f) of the Act; (2) requesting such proposals; and (3) seeking, from any member of the public, comments, with regard to this notice before deciding whether to delegate these functions. EPA reserves its discretion to decline to delegate these functions

following review of proposals and comments submitted pursuant to this notice.

Delegation of these functions shall be administered without compensation from EPA. A delegatee will not be allowed to retain any portion of the monies collected for the sale or auction of allowances or to charge fees to administer these functions. In addition, the delegation will require a strict adherence to the regulations as promulgated today in 40 CFR part 73. EPA will be accepting proposals to administer these programs from candidates who meet the criteria specified in section III of this notice. Demonstration of these criteria will be made by the completion of a delegation application which will explain in more detail the evaluation criteria, the corresponding emphasis EPA places on those criteria, and procedural requirements. Delegation applications may be obtained from EPA at the address listed below.

EPA will hold a public meeting on this notice on the date listed below. The purpose of the public meeting is to explain further, and answer questions about, the objectives and requirements for the delegation.

DATES: Complete proposals, in the form of delegation applications, for undertaking administration of the auctions, direct sale, and IPP written guarantee program, and public comments, must be received, in writing, on or before February 21, 1992. Proposals and public comments should be sent to the address listed below. The public meeting on this notice will be held on January 13, 1992 from 2 p.m. to 4 p.m.

ADDRESSES: U.S. EPA Acid Rain Division (ANR-445), 401 M St., SW., Washington, DC 20460, Attn: Auctions and Direct Sale Delegation.

The public meeting will be held at the address given above in the EPA Conference Center Room 3 North.

FOR FURTHER INFORMATION CONTACT: Linda Reidt Critchfield, EPA/OAIAP/Acid Rain Division (ANR-445), 401 M St., SW., Washington, DC 20460 (202) 260-7915.

SUPPLEMENTARY INFORMATION:

I. Authority

Pursuant to section 416(f) of the Clean Air Act Amendments of 1990, the Administrator may, in his or her discretion, delegate, or contract for, the conduct of sales or auctions under the Administrator's supervision by other departments or agencies of the United States Government or by nongovernmental agencies, groups, or

organizations. The Administrator is considering whether to exercise this discretion under section 416(f) and 40 CFR part 73, § 73.73(a) and to delegate the administration of the auctions, direct sale, and IPP program to the candidate determined by the Administrator to be the most qualified. The Administrator will base this determination on the public comments received and the proposals, in the form of delegation applications, submitted to meet the criteria contained in the delegation application.

II. Functions of the Delegatee in Conducting the Auctions and Direct Sale

In addition to adhering to the applicable requirements for the auctions, direct sale, and IPP program set forth in the regulations promulgated today, and summarized below, a major component in administering the auctions and direct sale would be the interaction between a delegatee's information system and EPA's Allowance Tracking System (ATS). The ATS will issue, record, and track allowances and will be the official computer system for the supply of allowances. For a complete discussion of the ATS, see subpart C (Allowance Tracking System) of the proposed Sulfur Dioxide Allowance System regulations which were published in the Federal Register on December 3, 1991.

The specific duties and the interactions between the ATS and a delegatee would be fully developed when such duties are discussed with the appointed delegatee and when Subpart C (Allowance Tracking System) of 40 CFR part 73 is promulgated. The information system used by a delegatee would need to interface with the ATS in a form compatible with the ATS format.

Listed below are the major steps in conducting the auctions, direct sale, and IPP written guarantee program, pursuant to 40 CFR part 73, subpart E. Though not included in these steps, recordkeeping and tracking functions are also required in the administration of the auctions and direct sale. Almost all the duties listed below would be carried out by a delegatee through electronic methods, unless otherwise specified.

A. Conducting the Auctions

Pursuant to 40 CFR part 73, §§ 73.70 through 73.71, a delegatee would conduct the auctions as follows:

1. The delegatee will receive notice from others offering to sell their allowances in the EPA auctions. The delegatee will notify the ATS of these contributions so that the ATS can place

them in a separate subaccount for offered allowances.

2. EPA will publish notice in the *Federal Register* and *Commerce Business Daily* of the date that the auctions will be held, the total number of allowances to be auctioned, including both those in the EPA Auction Subaccount and those offered by private parties, and any minimum prices specified by private parties. Information about allowances offered by private parties will be provided by the delegatee.

3. The delegatee will receive sealed auction bid forms and a prescribed form of payment from those seeking to purchase allowances in the EPA auctions. The delegatee will deposit certified checks in an EPA-specified bank account. If a letter of credit (LOC) is submitted, the delegatee will hold the LOC until the auctions are completed.

4. The delegatee will review bid forms; if incomplete or incorrect, the delegatee will return the bid form and payment.

5. The delegatee will conduct the auctions by matching allowances and bids.

6. The delegatee will notify the ATS of the results of each auction for the purpose of transferring allowances to winning bidders' accounts and publishing the results of each auction. The delegatee will also notify the ATS of any winning bidders for whom a new account must be established.

7. Within 2 business days of publication of the auction results in the ATS, the delegatee will collect payment from winning bidders using an LOC.

8. The delegatee will deposit the total proceeds from the auctions in an EPA-specified bank account and inform the ATS of this amount.

9. EPA will publish the results of each auction in the *Federal Register* and the *Commerce Business Daily*.

10. The delegatee will return LOCs or send refund checks to losing bidders.

B. Conducting the Direct Sale and Fulfilling the IPP Written Guarantee

Pursuant to 40 CFR part 73, §§ 73.72 through 73.77, a delegatee would conduct the direct sale and the IPP written guarantee program as follows:

Implementing the IPP Written Guarantee

1. The delegatee will receive notification from IPPs choosing to exercise their written guarantees.

2. Not later than five business days after receipt of such notification, the delegatee will send the IPP a statement

confirming the amount and type of allowances requested, the exact price, and payment instructions.

3. The delegatee will receive from IPPs, payment for the total amount of allowances they are requesting to purchase at that time.

4. The delegatee will notify the ATS of the purchases from the IPPs, and deposit all payment proceeds in an EPA-specified bank account.

Implementing the Direct Sale

1. EPA will publish in the *Federal Register* and in the *Commerce Business Daily* notice of the beginning and ending date of the direct sale, and the amount of allowances for sale.

2. The delegatee will receive requests to purchase allowances and notify applicants of approved requests. The delegatee will reserve requested allowances on a first come, first served basis as applications are approved. The delegatee will send notice to approved applicants of the amounts and type of allowances reserved, the date on which approval was made, the exact price, and payment instructions. If the direct sale is oversubscribed, the delegatee will establish a waiting list.

3. The delegatee will process deposits and final payments. The delegatee will transmit to the ATS, account numbers of buyers and purchase amounts as sales are completed. The delegatee will deposit all payments in an EPA-specified bank account.

III. Criteria To Be Used in Selecting an Organization for Delegation

In exercising his or her discretion to delegate the administrations of the auctions, direct sale, and IPP written guarantee program, the Administrator would evaluate applicants based on the following criteria:

1. Ability to process and manage financial instruments such as letters of credit, certified checks, and electronic payment.

2. Knowledge of administering a sealed bid, discriminating form of auction.

3. Experience in developing and using transactional information systems and information transaction processing in commercial applications, comparable to automated bid matching program and interface with the ATS.

4. Experience developing and managing a document control system for recordkeeping and information tracking.

5. Adequate resources, staff, and facilities to meet the implementation requirements of section 416 of the Act.

6. Ability to produce summary reports and analysis of auctions and direct sale results.

7. Knowledge of the Clean Air Act title IV, Section 416 and its implementing regulations and programs.

The delegation application will include a more detailed statement of these criteria and how they will be applied to the proposals. Applicants will also be required to agree to provide the Administrator with advance notice of termination of the delegation not later than eighteen months prior to the time of termination. Applicants must also agree to provide a complete surrender of all documentation, computer software, and any other critical information associated with the administration of the auctions, direct sale, and IPP written guarantee program. Applicants will also be required to explain the linkage the delegation would have to their other ongoing or planned activities or to the interests of any constituency represented by the applicant. The proposal should indicate what legitimate advantage the delegatee will derive from running the auctions, direct sale, and IPP written guarantee program.

IV. Requests for Public Comment

EPA is seeking to delegate the administration of the auctions, direct sale, and IPP written guarantee program for a variety of reasons. EPA has heard from the Acid Rain Advisory Committee (ARAC), utilities, and others, concerns about a government agency such as EPA, with no experience in conducting auctions, administering such functions. This concern was voiced even prior to enactment and is reflected by language in the Act that gives EPA broad discretion to delegate or contract out these functions. As an alternative to EPA administering these functions, EPA explored various options for administering the auctions and direct sales, including other Federal Agencies and Departments, and contracts.

EPA therefore requests comment from the public on the option for delegating the functions described in this notice to a private entity. Such comments will be considered in the review of individual proposals and EPA's decision whether to delegate this program.

Dated: December 4, 1991.

Michael Shapiro,

Acting Assistant Administrator for Air and Radiation.

[FR Doc. 91-29743 Filed 12-16-91; 8:45 am]

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Registered Federal Trapper

Tuesday
December 17, 1991

Part IV

Department of the Interior

Office of Surface Mining Reclamation and
Enforcement

30 CFR Parts 761 et al.

Initial and Permanent Regulatory
Programs: Special Categories of Mining;
Surface and Underground Mining
Activities; Final Rule

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Parts 761, 780, 784, 785, 816 and 817

RIN 1029-AA57

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

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

ACTION: Final rule.

SUMMARY: The Office of Surface Mining Reclamation and Enforcement (OSM) of the U.S. Department of the Interior (DOI) is amending its permanent program permitting and performance standards regulations in several technical areas. The technical areas affected are (1) Backfilling and grading, (2) Approximate original contour (AOC) variances, (3) Disposal of coal mine waste, (4) Definition of values incompatible with surface coal mining operations, (5) Disposal of excess spoil on preexisting benches, and (6) Contemporaneous reclamation practices. Except for the area of disposal of excess spoil on preexisting benches, the amendments are in response to U.S. District Court and Court of Appeals decisions.

In the area of values incompatible with surface coal mining operations, the rule amends the definition of "no significant recreational, timber, economic, or other values incompatible with surface coal mining operations" to eliminate reclamation as a criterion in determining compatibility with surface coal mining operations.

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

In the area of disposal of excess spoil on preexisting benches, the rule revises special regulations governing the disposal of excess spoil on preexisting benches for conformance with OSM's generic backfilling and grading regulations. OSM is revising the rules to encourage the reclamation of abandoned highwalls by removing impediments to the use of excess spoil on preexisting benches.

In the area of disposal of coal mine waste, the rule revises former requirements for the disposal of coal mine waste by adding the requirement that coal mine waste be hauled or

conveyed for final placement to the point of disposal. This addition prohibits the final placement of coal mine waste by end or side dumping in any area other than mine workings and excavations. The rule also removes regulatory language cross-referencing the requirements for handling of hazardous noncoal coal mine waste in accordance with the Environmental Protection Agency's (EPA's) Resource Conservation and Recovery Act (RCRA) and its implementing regulations.

In the areas of contemporaneous reclamation and backfilling and grading, the final rule reestablishes backfilling and grading time and distance requirements. The rules require the completion of backfilling and grading within certain times or distances following coal removal, or, for mining methods other than area and contour mining under a schedule established by the regulatory authority, or under case by case time and distance variances approved by the regulatory authority. Also in the context of backfilling and grading to AOC, the rules define "thin overburden" and "thick overburden", and establish performance standards for backfilling and grading in areas of thin and thick overburden.

Finally, existing suspensions of previous regulations are removed where they are superseded by these final regulations.

EFFECTIVE DATE: January 16, 1992.

FOR FURTHER INFORMATION CONTACT: Mr. Dennis M. Hunter, Jr., Office of Surface Mining Reclamation and Enforcement, U.S. Department of the Interior, 1951 Constitution Ave. NW, Washington, DC 20240.

SUPPLEMENTARY INFORMATION:

- I. Background
- II. Discussion of Final Rule and Comments
- III. Procedural Matters

I. Background

These rules amend several technical areas in 30 CFR, chapter VII. These areas have been combined in this rulemaking for administrative convenience. Therefore, the pertinent legislative, regulatory and litigation background for each technical area is discussed separately below.

Where the discussion concerns similarly or identically constructed sections in part 816, which applies to surface mining activities, and part 817, which applies to underground mining activities, these sections are cited together in the heading as §§ 816, [] and 817, []. In such cases the subsequent discussion, while only referring to § 816, [], nevertheless

applies identically to both parts 816 and 817 unless otherwise noted.

A. Section 761.5 Values Incompatible with Surface Coal Mining Operations

Section 522(e)(2) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act), 30 U.S.C.

1272(e)(2), with certain exceptions, prohibits surface coal mining operations on any Federal lands within the boundaries of any national forest [unless] the Secretary finds that there are no significant recreational, timber, economic, or other values which may be incompatible with such surface [coal] mining operations * * *.

The corresponding OSM permanent program regulation appears at 30 CFR 761.11(b).

In implementing this requirement, the 1979 OSM regulations at 30 CFR 761.5 defined the emphasized language in section 522(e)(2) in part to mean:

[T]hose significant values which could be damaged by, and are not capable of existing together with, surface coal mining operations because of the undesirable effects mining would have on those values, either on the area included in the permit application or on off-site areas which could be affected by mining * * *. (44 FR 15341, March 13, 1979).

On June 10, 1982 (47 FR 25278) OSM proposed, and on September 14, 1983 (48 FR 41312) OSM promulgated, a rule revising the 1979 definition. The revised definition dropped the introductory term "no" as unnecessary, changed the phrase "significant values" to "values to be evaluated for their significance," changed the term "offsite areas which could be affected by mining" to "affected areas," and of particular relevance to this proposed rule, inserted after the word "damage" the phrase "beyond an operator's ability to repair or restore."

Thus, following revision in 1983, the corresponding portion of the definition read:

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

This revised definition was challenged by the citizen and environmental plaintiffs in *In re Permanent Surface Mining Regulation Litigation* (*In re Permanent II* (Round III)), 620 F. Supp. 1519 at 1556-57 (D.D.C. July 15, 1985). The challengers contended that the definition was contrary to the Act

because under it mining could be permitted in national forests as long as reclamation was possible. The U.S. District Court for the District of Columbia agreed with this contention and remanded the definition. *Id.* at 1557. On November 20, 1986, (51 FR 41952) OSM suspended the definition "insofar as the listed values are evaluated for compatibility solely in terms of reclamation." *Id.* at 41960-41961.

OSM appealed, and the U.S. Court of Appeals for the District of Columbia Circuit affirmed the district court ruling. *National Wildlife Federation (NWF) v. Hodel*, 839 F.2d 694, 751-53 (D.C. Cir. 1988). Like the district court, the court of appeals ruled that the revised regulation was contrary to the intent of the Congress and to elementary principles of statutory construction.

On October 31, 1988 (53 FR 43970), OSM proposed to revise the § 761.5 definition of "no significant recreational, timber, economic, or other values incompatible with surface coal mining operations" in conformance with the district court and court of appeals decisions.

B. Sections 785.16, 816.133(d), and 817.133(d)—AOC Variances

Section 515(b)(3) of the Act, 30 U.S.C. 1265(b)(3), generally requires

*** all surface coal mining and reclamation operations [to] backfill, compact (where advisable to insure stability or prevent leaching of toxic materials), and grade in order to restore the approximate original contour of the land with all highwalls, spoil piles, and depressions eliminated (unless small depressions are needed in order to retain moisture to assist revegetation or as otherwise authorized pursuant to this Act).

For steep slope mining, section 515(d)(2), 30 U.S.C. 1265(d)(2), imposes an additional requirement for

[c]omplete backfilling with spoil material *** to cover completely the highwall and return the site to the approximate original contour ***.

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

Sections 515(e)(1) through (e)(6) of the Act, 30 U.S.C. 1265(e)(1) through (e)(6), allow regulatory authorities to permit variances from AOC under certain

circumstances. Section 515(e)(1) allows State regulatory programs, and requires Federal regulatory programs, to include procedures for permitting variances for the purposes set forth in section 515(e)(3). Section 515(e)(2) explicitly allows the regulatory authority to grant a variance from the steep-slope requirement of section 515(d)(2).

Accordingly, on March 13, 1979 (44 FR 15372), OSM promulgated at 30 CFR 785.16 a regulation which authorized the regulatory authority to grant a variance, when certain specified conditions were met, from AOC for steep slope mining which does not involve mountaintop removal. This regulation was challenged by the coal industry in *In re Permanent Surface Mining Regulation Litigation* (In re Permanent I), No. 79-1144, slip op. at 69-70 (D.D.C. February 26, 1980), as unduly restrictive.

In upholding the § 785.16 limitation of AOC variances to steep slope mining, the U.S. District Court for the District of Columbia in *In re Permanent I* said:

Section 515(e) of the Act contains one variance provision: it applies to steep slopes. Rather than calling for a general variance mechanism, section 515(e)(1) establishes the right to apply for a variance * * *. Section 514(e)(2) restricts the variance application to the contour restoration requirements of subsection 515(d)(2) (steep slopes). Whatever ambiguity may be read into section 515 is dispelled upon examination of the legislative history. *Id.* at 69-70.

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

These revised regulations were challenged by the citizen and environmental plaintiffs in *In re Permanent II* (Round III), 620 F. Supp. at 1574-78. In response, the district court remanded the revised regulations "as inconsistent with law to the extent they permit[ted] a variance beyond the

variance for steep slopes embodied in 515(e)(2) [of the Act]." *Id.* at 1577-78.

On November 20, 1986 (51 FR 41952), OSM suspended §§ 785.16 and 816.133(d) insofar as they authorized any variance from AOC outside a steep slope area. The district court remand was appealed by the coal industry, and affirmed by the court of appeals in *NWF v. Hodel*, 839 F.2d at 761-64. In affirming the district court, the court of appeals "relied] on the text of sec. 515(e)(2), which specifically states that variances may be granted from the AOC requirements of section 515(d)(2), the steep slope mining provision; it does not, as enacted, state that non-steep slope mining AOC requirements may be waived or excused, and neither does it reference section 515(b)(3), the general AOC provision." *Id.* at 763. The court of appeals found nothing in the legislative history that would change its reading of section 515(e). *Id.* at 764.

On October 31, 1988, OSM proposed to revise § 785.16, and to remove the suspension of that section and of §§ 816.133(d) and 817.133(d), in conformance with the district court and court of appeals decisions (53 FR 43970).

C. Sections 816.74 and 817.74—Disposal of Excess Spoil on Preexisting Benches

Section 515(b)(22) of the Act, 30 U.S.C. 1265(b)(22), specifies the performance standards for disposing of excess spoil from surface coal mining and reclamation activities. Section 516(b)(10) of the Act, 30 U.S.C. 1266(b)(10), provides similar performance standards for underground mining activities.

OSM implements these statutory performance standards at 30 CFR 816.71 through 816.74 for surface mining activities and 30 CFR 817.71 through 817.74 for underground mining activities. Section 816.74 and § 817.74, which are affected by this rule, govern the disposal of excess spoil on preexisting benches.

The 1979 OSM permanent program rules did not specifically provide for the disposal of excess spoil on preexisting benches. Regulations to allow the disposal of excess spoil on preexisting benches were originally proposed by OSM on May 16, 1980 (45 FR 32331). As a result of public comment, these regulations were repropoed in substantially different form on July 20, 1981 (46 FR 37283). Final regulations were issued on April 29, 1982 (47 FR 18553), as 30 CFR 816.75.

On June 8, 1982 (47 FR 24954), as part of an overall revision of its excess spoil regulations, OSM proposed to revise § 816.75. The revised (and renumbered) regulations were promulgated on July 29, 1983 (48 FR 32910), as 30 CFR 816.74.

Paragraphs (a) through (d) of these rules were essentially the same as the 1982 regulations. A new paragraph, (e), was added to allow the disposal of excess spoil from an upper, actively-mined bench to a lower, preexisting bench by means of gravity transport in certain circumstances.

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

One of the initiatives proposed in the study and discussed at the public meeting was "Reclaiming Abandoned Mine Lands with Excess Spoil." Included under this proposal was the disposal of excess spoil on preexisting benches, and, particularly, whether the requirements for such disposal were excessive as compared to the requirements for backfilling and grading. Both in written comments and at the public meeting, commenters pointed out that the differences in the rules were inconsistent with the similarity in topography, geology, and physical and engineering characteristics between preexisting and actively mined benches.

On October 31, 1988, OSM proposed revisions to §§ 816.74 and 817.74 to conform their requirements with the backfilling and grading requirements of §§ 816.102 and 817.102 (53 FR 43970).

D. Sections 816.81, 816.89, 817.81, and 817.89—Disposal of Coal Mine Waste

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

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

On September 26, 1983 (43 FR 44006), OSM promulgated at 30 CFR 701.5 a

revised definition of "coal processing waste", and new definitions of "coal mine waste", "impounding structure", and "refuse pile". At the same time (48 FR 44006), OSM promulgated at 30 CFR 816.81, 816.83, 816.84, 816.87 and 816.89, a comprehensive revision of the 1979 regulations. These new regulations were challenged in *In re Permanent II* (Round III), 620 F. Supp. at 1534-38.

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

1. Sections 816.81(a) and 817.81(a)—Controlled Transport of Coal Waste

In *In re Permanent II* (Round III) the district court rejected §§ 816.81(a) and 817.81(a) as arbitrary and capricious to the extent they allowed end or side dumping of coal mine waste, a mining practice in "hill and valley" topographic areas of placing material at a disposal site by means of gravity. 620 F. Supp. at 1534-35.

On November 20, 1986 (51 FR 41952), OSM suspended §§ 816.81(a) and 817.81(a) insofar as they allowed end or side dumping of coal mine waste. On October 31, 1988 (53 FR 43970), OSM proposed to amend these sections by prohibiting end or side dumping of coal mine waste in regard to final placement disposal, and to simultaneously remove the suspension of the earlier version in conformance with the district court decision.

2. Sections 816.89(d) and 817.89(d)—EPA Regulations on Hazardous Wastes

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

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

Industry challenges this rule because it contends that Congress gave the Secretary exclusive responsibility to regulate every kind of waste at coal mines in SMCRA permits, and expressly provided that EPA's

regulations for hazardous wastes under RCRA shall not be applied to coal mines.

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

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

On November 20, 1986 (51 FR 41952), OSM suspended §§ 816.89(d) and 817.89(d). OSM proposed to remove these sections from its regulations on October 31, 1988 (53 FR 43970).

E. Sections 816.100, 816.101, 816.104(a) and 816.105(a)—Contemporaneous Reclamation and Backfilling and Grading

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

In addition, section 515(b)(3) of the Act, 30 U.S.C. 1265(b)(3), with two exemptions, provides for general performance standards requiring that "all surface coal mining operations backfill, compact (where advisable to insure stability or to prevent leaching of toxic materials), and grade in order to restore the approximate original contour of the land with all highwalls, spoil piles, and depressions eliminated (unless small depressions are needed in order to retain moisture to assist revegetation or as otherwise authorized pursuant to this Act)."

As described under heading B., above, the phrase "approximate original contour" is defined as "that surface configuration achieved by backfilling and grading of the mined area so that the reclaimed area, including any terracing or access roads, closely resembles the general surface configuration of the land prior to mining and blends into and complements the drainage pattern of the surrounding terrain * * *."

The previously noted exemptions to the AOC restoration requirements of section 515(b)(3) pertain to operations

involving either "thin" or "thick" overburden. With respect to thin overburden, section 515(b)(3) provides

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

With respect to thick overburden, section 515(b)(3) provides

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

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

On May 24, 1983 (48 FR 23356), OSM revised its regulations governing contemporaneous reclamation and backfilling and grading. The revision deleted § 816.101 from the regulations,

and added to § 816.100 a provision authorizing regulatory authorities to establish schedules for defining contemporaneous reclamation. At the same time the numerical limits on thin and thick overburden that appeared in §§ 816.104 and 816.105, *i.e.*, plus or minus twenty percent, were deleted (48 FR 23355, May 24, 1983).

The 1983 regulations were challenged in *In re Permanent Surface Mining Regulation* (In re Permanent II (Round II)), 21 ERC 1724, 1744-1746 (D.D.C. October 1, 1984). As a result, the U.S. District Court for the District of Columbia remanded the regulations governing contemporaneous reclamation (§ 816.100; 21 ERC at 1745-46), cut and fill terraces (§ 816.102(g); 21 ERC 1744-45), thin overburden (§ 816.104(a); 21 ERC at 1746), and thick overburden (§ 816.105(a); 21 ERC at 1746). Generally, the district court found that the remanded regulations lacked sufficient guidance to regulatory authorities beyond what was provided in the Act.

OSM appealed the district court ruling, and the court of appeals in *NWF v. Hodel* affirmed the remand with respect to contemporaneous reclamation and thin and thick overburden, but reversed with respect to cut and fill terraces. 839 F.2d at 734-739. The court of appeals said:

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

We note that the Act expressly commands the Secretary to flesh out certain statutory provisions * * *. Nothing in the Act, however, expressly requires the Secretary to flesh out Sections 515(b)(3) or (b)(16). *Id.* at 734. (Emphasis in original).

"In short," the court of appeals continued,

we read the Act, in light of its legislative history * * * to afford the Secretary discretion, absent an express statutory instruction to regulate, to decide whether fleshing out is appropriate in light of other concerns. Chief among those concerns is the need to accommodate widely varying local conditions that will not admit of a single, nationwide rule * * *. *Id.* at 735. (Footnote omitted).

* * * Under *[Motor Vehicle Mfrs. Ass'n v.] State Farm [Mut. Auto. Inc. Co.]*, 463 U.S. 29, 43 (1983), 'the agency must examine the relevant data and articulate a satisfactory explanation' for the revised regulations * * *. The Secretary's accounting for his actions regarding the contemporaneous reclamation, and thin and thick overburden regulations

fails to meet this standard; we do not find in the rulemaking record any identified factual basis for, or satisfactory explanation of, the Secretary's conclusion that the variety of local conditions warrants regulations on these matters that simply reiterate the relevant prescriptions in sections 515(b)(3) and (b)(16) of the Act. In contrast, we find that the Secretary adequately explained his revision of the terracing regulation. *Id.* at 735.

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

Section 515(b)(16) of the Act directs mine operators to reclaim land 'as contemporaneously as practicable [to the] mining operations.' In 1979, the Secretary had issued both a general instruction that reclamation occur 'as contemporaneously as practicable with mining operations,' 30 CFR 816.100 (1982), and specific 'time and distance' standards for backfilling and grading spoil at contour and area strip mines, 30 CFR 816.101 (1982). *Id.* (Footnotes omitted, brackets in original).

The 1983 revision retained the general prescription in § 816.100, but eliminated § 816.101 entirely * * *. To support his deletion, the Secretary commented that "contemporaneous reclamation" is a relative term which must be interpreted by each State on the basis of the mining conditions in its territory. * * * Because § 816.101 was devised to account for local differences, we do not find entirely satisfying, as an explanation for scrapping the regulations entirely, the observation that "contemporaneous reclamation" is a relative term whose precise meaning depends on local conditions. The core deficiency, however, is that the Secretary has published barely more than a *conclusion* that the variety of mining conditions across the nation made § 816.101 of the regulations infeasible. State Farm requires a 'satisfactory explanation,' one that informs us *why* he drew his conclusion. The Secretary, in other words, if he determines there is no need to 'flesh out' the statute, must 'flesh out' his explanation so that we can review the rationality of his decision. *Id.* at 736. (Footnote omitted, emphasis in original).

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

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

In 1983, the Secretary eliminated the numerical definition, permitting a variance whenever the mine operator demonstrates that spoil is either 'insufficient' or 'more than sufficient' to restore land to its approximate

original contour. 30 CFR 816.104 and 816.105 (1986). The sole support we have found for this revision is the Secretary's cryptic observation that "[t]he mathematical limit * * * has proved to be impractical because of its preciseness." * * * We do not know from this unadorned statement why no adjusted (less precise) or alternate nationwide rule was ordered in place of the one found impractical. Absent fuller statement of the reason for the revision, we cannot intelligently determine whether the Secretary has a 'satisfactory explanation' for his action. *Id.* at 736-737. (Footnotes omitted, brackets in original).

OSM proposed to amend §§ 816.100, 816.104 and 816.105, and to add a new § 816.101, on October 31, 1988 (53 FR 43970), in conformance with the district court and court of appeals decisions.

II. Discussion of Final Rule and Comments

A. General Comments

One commenter requested a 60-day time extension to the comment period in order to allow adequate time to evaluate the nationwide effects of the proposed regulations. The comment period originally was scheduled to end on December 30, 1988. OSM acceded in part to this request by granting an extension of the comment period by 30 days. The extended comment period closed January 30, 1989 (53 FR 52433, December 28, 1988). OSM believes that this extension of time was adequate to meet the needs of the reviewers.

B. Section 761.5 Definitions: Significant Recreational, Timber, Economic, or Other Values Incompatible with Surface Coal Mining Operations

The definition of "significant recreational, timber, economic, or other values incompatible with surface coal mining operations" in final § 761.5 was not changed from that in the proposed rule. In response to the court of appeals decision upholding the district court remand of this definition (see related discussion in I. Background, under the heading A. Values Incompatible with Surface Coal Mining Operations), OSM has amended § 761.5 to eliminate the phrase "beyond an operator's ability to repair." In accordance with the courts' decisions, an operator's ability to reclaim the land may no longer be used as criterion for determining compatibility under this definition.

One commenter supported the deletion or reclaimability as required by section 522(e)(2) of the Act and court decisions. The commenter cautioned OSM against making further changes to this rule without providing for public comment. OSM thanks the commenter for submitting the cautionary remark. No

changes have been made by OSM to § 761.5 following its proposal of October 31, 1988.

C. Section 785.16 Permits Incorporating Variances from AOC: Restoration Requirements for Steep Slope Mining

[Note: For related rulemaking, the reader is directed to heading J., entitled Sections 816.133 and 817.133—AOC Variances]

1. Section Heading

This section heading for § 785.16 has been revised as proposed by adding the phrase "for steep slope mining". The heading reads:

Section 785.16 Permits Incorporating Variances from Approximate Original Contour Restoration Requirements for Steep Slope Mining.

The revision is made to emphasize that variances from approximate original contour are authorized only for steep slope surface coal mining and reclamation operations.

2. Section 785.16(a)

Final § 785.16(a) limits the granting of AOC variances to "steep slope, surface coal mining and reclamation operations." The quoted phrase duplicates the corresponding wording of the 1979 regulation and is unchanged from the proposed rule. The November 20, 1988, suspension of § 785.16 which prevented the variance from being applied in non steep slope areas is removed. The variance is itself now limited to steep slope areas.

The language in final § 785.16(a) has been revised from the October 31, 1988 proposed language by adding a cross-reference to § 816.105. This change was made in response to a comment as discussed below.

Thick Overburden

A commenter recommended that § 785.16(a) include a reference to § 816.105, Backfilling and grading: Thick overburden, along with existing references to §§ 816.102, 816.104, 816.107, 817.102 and 817.107 because § 816.105 contains the requirement that not less than AOC be achieved during backfilling and grading in thick overburden situations.

The cross-reference to § 816.105 at § 785.16(a) was inadvertently omitted from the October 31, 1988 proposed rule through a typographical error. A correction to the proposed rule was published (54 FR 19632, May 8, 1989), and the cross-reference to § 816.105 is restored in the final rule.

Restriction to Steep Slope Areas

A commenter stated that the proposed AOC and thin overburden rules do not

account for coal operations in which the overburden is composed in part of noncoal economic minerals which are removed prior to coal extraction. In such cases, according to the commenter, insufficient spoil may remain with which to return to AOC. The commenter asserted that section 515(e)(1) of the Act does not restrict the granting of AOC variances to steep slope areas, and imposing that restriction is contrary to the purpose of the Act.

Contrary to the commenter's assertion that section 515(e)(1) of the Act does not limit AOC variances to steep slope areas, the Federal courts have consistently ruled that this section limits AOC variances to steep slope areas (see discussion at I. Background, under heading B. Sections 785.16, 816.133(d), and 817.133(d)—AOC Variances). OSM will discuss the relationship between thin overburden and recovery of noncoal minerals in the section of this preamble that discusses the thin overburden exemption.

Small Depressions

A western commenter suggested that the scope of AOC variances be expanded in non steep slope areas to include small depressions needed to retain moisture for reclamation or approved postmining land uses such as livestock production which were felt to be authorized by section 515(b)(3). The commenter claimed that the alternative to such depressions is the construction of impoundments through the use of earthen dams and that such construction is not as cost effective or beneficial as depression development and increases the potential both for erosion on constructed slopes and spillways and for dam failure.

As previously noted, the courts have interpreted the provisions of section 515(e) of the Act as restricting AOC variances to steep slope areas. A discussion of the small depressions authorized by section 515(b)(3) is not germane to this rulemaking.

Effects on State Programs and Permitted Operations

The same commenter asserted that limiting variances from AOC to steep slope areas without regard to depression development would threaten the effectiveness of his State reclamation program.

In response to this concern, OSM reviewed the commenter's State program's amendment history. OSM found that the State did not have an approved program amendment which corresponded to previous § 785.16 that allowed variances from AOC for non-

steep slope areas. Accordingly, limiting variances from AOC to steep slope areas should not adversely affect that program.

Another commenter requested that OSM clarify in the final rule that § 785.16 applies prospectively to operations applying for a permit as of the date a State adopts the rule in their program. The commenter pointed out that, in light of prior OSM regulations authorizing variances from AOC for non-steep slope areas, it would be unjust to apply the final rule retroactively to operations which had previously obtained such variances.

OSM cannot agree with the commenter's recommendation that the final rule be applied prospectively. As previously discussed, in I. Background B. Sections 785.16, 816.133(d), and 817.133(d)—AOC Variances, the district and appeals courts have held that the Act restricts the AOC variance provisions of 515(e) to steep slopes. Thus, OSM has no discretion on the issue as to whether to apply the rule prospectively. On two previous occasions, OSM attempted to implement court decisions prospectively. Both attempts were overturned. *NWF v. Lujan*, Nos. 87-1051, 87-1814, and 88-2788, slip op. at 35-51 (D.C.C. February 12, 1990).

OSM further believes the commenter overestimates the impact the final rule will have on the coal industry. Previous § 785.16, which authorized variances from the AOC requirement in non-steep slope areas, was not approved as an amendment to any State program between its promulgation on September

1, 1983, and its suspension by OSM on November 20, 1986.

From the time of promulgation of the previous rule on September 1, 1983 through its suspension on November 20, 1986, that rule was under legal challenge. Even if operators somehow relied upon variances granted under the 1983 rule, there can be little equity in relying upon a position not justified by statute, particularly when such position is contrary to a prior rule upheld by the courts as correctly interpreting the statute. Therefore, in the light of the 1985 district court remand of the 1983 rule as inconsistent with the Act to the extent that they permitted AOC variances in non-steep slope areas, OSM has no legal alternative but to revoke such variances.

D. Sections 816.74 and 817.74 Disposal of Excess Spoil: Preexisting Benches

OSM is revising § 816.74 to conform the requirements for the disposal of excess spoil on preexisting benches with the backfilling and grading requirements of § 816.102 within the framework allowed by section 515(b)(22) of the Act. This action was prompted by public comment to an OSM study on reining initiatives and at a related public meeting. (See related discussion in II. Background, under the heading, C. Disposal of Excess Spoil on Preexisting Benches.)

Comments to the proposed rule suggested that the proposal did not meet the minimum requirements of the Act contained in section 515(b)(22) governing the disposal of excess spoil. In substituting the backfilling and grading sections for the excess spoil disposal references in § 816.74(a),

several provisions required by the Act for disposal of excess spoil that do not have counterparts in the backfilling and grading regulations had to be restored. In preparing the final rule, many of those provisions which were formerly invoked through the cross reference to § 816.71 have now been specifically included in § 816.74.

OSM has maintained the principle of utilizing the backfilling and grading requirements wherever possible because preexisting benches are similar to active mining benches in the regulator controls required. The final rules contain no new regulatory requirements beyond the proposal. In some cases, as will be discussed later, proposed changes are being withdrawn because they could not be accommodated under current law.

Final § 816.74 contains 7 paragraphs. Paragraphs (a) and (b), with one exception, are being issued as they were proposed. Final paragraph 816.74 (c) is the result of combining former paragraphs (b) and (c) with certain requirements from formerly cross-referenced provisions of 816.71 which had been proposed to be deleted but are being retained. Proposed paragraph (e) is being issued as paragraph (d) with one change in addition to the paragraph designation. Final paragraphs (e), (f), and (g) have been added to § 816.74 to account for provisions in 816.71 which do not have counterparts in § 816.102. Final paragraph (h) is former paragraph (e) which has been redesignated.

Table 1 contains a cross reference which shows the derivation of each section of the new final rules. This table also contains a column which shows where the change is explained.

TABLE 1.—CROSS REFERENCE, FORMER PROVISIONS VS NEW PROVISIONS, DISPOSAL OF EXCESS SPOIL ON PREEXISTING BENCHES

Former provision	New provision	Section where change is discussed
816.71(a)	816.74(a)	816.74(a)
816.71(a)(1)	816.102(f)	816.74(a)
816.71(a)(2)	816.102(c) and 816.74(c)	816.74(a) and 816.74(c)
816.71(a)(3)	816.74(g)	816.74(g)
816.71(b)(1)	816.74(c)	816.74(c)
816.71(d)	Deleted	816.74(c)
816.71(e)(1)	816.74(b)	816.74(b)
816.71(e)(2)	816.74(c)	816.74(c)
816.71(e)(3)	816.102(g) and 816.74(g)	816.74(a) and 816.74(g)
816.71(e)(4)	816.102(h) and 816.74(f)	816.74(a) and 816.74(f)
816.71(e)(5)	816.102(f)	816.74(a)
816.71(f)(1)	816.74(d)(4)	816.74(d)(4)
816.71(f)(2)	816.43	816.74(d)
816.71(f)(3)	816.74(d)	816.74(d)
816.71(g)	816.102(j) and 816.74(e)	816.74(a) and 816.74(e)
816.71(h)	Deleted	816.74(c)
816.71(i)	816.102(e)	816.74(a)
816.74(b)	816.74(c)	816.74(c)
816.74(c)	816.74(c)	816.74(c)
816.74(d)(1)	816.74(d)(1)	816.74(d)(1)
816.74(d)(2)	816.74(d)(2)	816.74(d)(2)
816.74(e)	816.74(h)	816.74(h)
816.102(a)(4)	816.74(d)(3)	816.74(d)(3)

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

Final § 816.74(a) is being issued as proposed. In it, OSM has substituted references to the backfilling and grading rules in place of the references to the general requirements for the disposal of excess spoil.

Former § 816.74(a) authorized the regulatory authority to approve the disposal of excess spoil on preexisting benches "provided that all the standards set forth in § 816.71(a), (b)(1) [and] (d) through (j) . . . are met." The references to § 816.71 contain the general requirements for the disposal of excess spoil. The final rule substitutes references to § 816.102 (c), (e) through (h), and (j) for the § 816.71 references. Section 816.102 contains the backfilling and grading counterparts to the excess spoil disposal regulations of § 816.71. The substitution has the effect of conforming the requirements for disposal of excess spoil on a preexisting bench with the requirements for backfilling and grading spoil on an actively mined bench.

As proposed, OSM is adding a requirement to final § 816.74(a) that the affected portion of the preexisting bench be permitted. Because § 816.71 (a) requires that the disposal of excess spoil occur "within the permit area," and the substituted references to § 816.102 do not refer to the permit area, final § 816.74(a) has been written to explicitly require that "the affected portion of the preexisting bench is permitted." Thus, the final rule requires, as did the former rule, that the affected portion of the preexisting bench be permitted. This provision allows the affected area to be either within the permit area where the excess spoil was generated, or in a separately permitted area.

Section 816.102(c) requires compaction of material where advisable to ensure the stability of the spoil material and to prevent leaching of toxic materials. The section generally replaces the former requirement in § 816.71(a)(2). OSM is adding to a later paragraph (816.74(c)) the requirement in § 816.71(a)(2) that the spoil be placed in a controlled manner.

The reference to § 816.102(e) requires that the disposal of coal processing waste and underground development waste be in accordance with §§ 816.81 through 816.83, except that a long term static safety factor of 1.3 be achieved. This reference replaces the former reference to § 816.71(i) which provided similar requirements.

Section 816.102(f) protects surface and groundwater from the adverse effects of acid, toxic and combustible materials by requiring that exposed coal seams, acid

or toxic forming materials and combustible materials be covered. The new reference replaces the reference to §§ 816.71(a)(1) and 816.71(e)(5) which have similar requirements.

Section 816.102(g) allows cut and fill terraces to be constructed in the backfill if certain conditions are satisfied. This reference replaces the provisions of § 816.71(e)(3) which allowed cut and fill terraces on excess spoil disposal areas. Section 816.71(e)(3) contains a requirement that the outslope of the terrace be limited to a maximum slope of 2h:1v, a requirement not in § 816.102(g). As proposed, OSM is deleting this limitation from cut and fill terraces constructed on preexisting benches. The limit on the outslope, as proposed, will be the angle of repose as detailed in § 816.74(d)(2).

The reference to § 816.102(h) allows small depressions to be constructed on the fill material. Section 816.71(e)(4) provided a similar authorization. The one difference between the two provisions is that § 816.71(e)(4) prohibits the construction of permanent impoundments on excess spoil disposal areas. In the preamble to the proposed rule OSM explained:

although the rule would not explicitly prohibit permanent impoundments, § 816.74(a) does not reference § 816.102(i) which authorizes permanent impoundments in certain circumstances and the regulatory authority would not be authorized to allow permanent impoundments on preexisting benches. (53 FR 43975, October 31, 1988)

In response to a comment, which is addressed in the discussion of final § 816.74(f), OSM is adding a paragraph, final § 816.74(f), to the rule which prohibits permanent impoundments on preexisting benches.

The final rule references § 816.102(j), the backfilling and grading rule for controlling stabilization and erosion. This replaces the requirement in § 816.71(g) which addresses surface area stabilization, erosion and revegetation. The last sentence of § 816.71(g) which requires that "[a]ll disturbed areas, including diversion channels that are not riprapped or otherwise protected, shall be revegetated upon completion of construction" does not have a counterpart in § 816.102 and has been added as proposed as final § 816.74(e).

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

Section 816.74(b) is being issued as proposed except for one change. The proposed rule required the removal of "vegetation." The final rule has been changed to require the removal of "vegetation and organic materials." This returns the final rule to the former language in § 816.71(e)(1). The change

from the proposal results from a comment which noted that the Act at section 515(b)(22)(B) requires the removal of all "organic matter". OSM agrees that there is a distinction between the terms "organic matter" and "vegetation." The final rule, therefore, requires removal of all vegetation and organic material as required by the former rules and the statute.

Final § 816.74(b) requires the removal of all vegetation and organic material from the affected portion of the preexisting bench prior to the placement of the excess spoil; it cross-references the permanent program topsoil performance standards at 30 CFR 816.22; and it allows the use of topsoil substitutes in accordance with § 816.22(b) where insufficient topsoil is available on the preexisting bench.

Formerly, the cross reference to § 816.71(e)(1) provided for the removal of vegetative and organic materials prior to the placement of excess spoil, the removal, segregation, storage and redistribution of topsoil, and the use of organic material as mulch or as an additive to topsoil. These requirements are not in § 816.102, therefore, they have been added as final § 816.74(b).

3. Sections 816.74(c) and 817.74(c) (Proposed as §§ 816.74 (b) and (c) and 817.74 (b) and (c))

Final § 816.74(c) contains six provisions which state—

- The fill shall be designed and constructed using current, prudent engineering practices.
- The design shall be certified by a registered professional engineer.
- Spoil shall be placed only on the solid portion of the bench.
- Spoil shall be placed in a controlled manner and concurrently compacted as necessary.
- The spoil shall achieve a long term static safety factor of 1.3.
- Spoil deposited on any fill portion of a bench shall be treated as excess spoil under § 816.71.

a. *The fill shall be designed and constructed using current, prudent engineering practices.* Final § 816.74(c)'s first sentence tracks the language of § 816.74(c) with the phrase "and constructed" added. As proposed, the specialized inspection requirements in § 816.71(h) for excess spoil are being replaced by the normal inspection requirements for all permitted areas. OSM is also adding through the new rule a requirement that fills be constructed using current, prudent engineering practices. The additional language is included in response to a comment to the proposed rules which

expressed concern over the deletion of the inspections formerly required by § 816.74(a)'s reference to § 816.71(h).

The environmental hazards posed by disposing of excess spoil on the solid portion of existing level benches are no greater than the hazards posed by backfilling spoil on an active bench. A regulatory authority inspects backfilling of active benches under the requirements in 30 CFR 840.11. These inspections have proven to be an effective means of controlling against the hazards of backfilling on an active bench and of ensuring compliance with the performance standards and with the reclamation plan. OSM believes that these inspections will be an equally effective means of protecting against the hazards posed by disposing of excess spoil on preexisting benches. Therefore, the final rule replaces the inspections described in § 816.71(h) with the normal inspection process described in § 840.11. OSM continues to believe that the additional safeguards provided in § 816.71(h) are appropriate for those excess spoil disposal areas which pose significantly greater risk of environmental harm such as valley fills and head-of-hollow fills.

b. *The design shall be certified by a registered professional engineer.* The second provision of final § 816.74(c) provides for the certification of the design by a registered professional engineer. OSM did not include this requirement in its proposed rule. However, certification is required for all excess spoil disposal areas by section 515(b)(22)(H) of the Act as was pointed out by a commenter to the proposed rule. Certification was formerly required by cross reference to § 816.71(b)(1). In order to retain the statutory requirement while avoiding cross reference to the excess spoil rules, the sentence is being added to this paragraph.

The new rule uses the term "registered professional engineer" instead of the term "qualified registered professional engineer" which appears in § 816.71(b)(1). In 1983 when § 816.71 was published, the preamble explained that OSM had found some practicing registered professional engineers involved in design and certification of excess spoil fills who did not have sufficient experience to certify all phases of design and construction (48 FR 32913, July 19, 1983). OSM continues to believe that the risks posed by certain types of excess spoil disposal areas require specialized knowledge beyond the minimum standards posed by state certification boards. The particular specialized knowledge needed for excess spoil fills relates to the design of

the underdrain system to prevent water infiltration from springs or seeps into the fill and the design of rock toe buttress or keyway cuts to insure stability of the fill on a downslope. However, these risks do not exist when excess spoil is disposed on the solid level foundation required to invoke this rule. For this reason, this rule only provides that the design be certified by a registered professional engineer. OSM does not mean to suggest that the registered professional engineer does not have to be qualified. OSM intends merely that the qualifications necessary to design the disposal of excess spoil on a solid level pre-existing bench may not necessarily be the same as those required for the design and construction of structures covered by § 816.71(b).

c. *Spoil shall be placed only on the solid portion of the bench.* This requirement was proposed as § 816.74(c). It formerly appeared as § 816.74(b). Some concern was expressed by commenters that preexisting benches may contain areas composed of filled areas which may not have the stability of true rock floored benches. The rules being issued today only apply to disposal on solid preexisting benches. Although the requirement for foundation examinations in § 816.71(d) has been deleted as proposed, the professional engineer responsible for designing the fill and the regulatory authority approving the permit are still responsible for ensuring that disposal under these rules is limited to solid portions of the bench. In order to invoke the provisions of this section, the professional engineer's design must certify that the disposal area is a solid bench. Therefore, any foundation analysis necessary to establish the qualification of the proposed disposal site under this section must have already been performed and any additional foundation analysis would be redundant.

d. *Spoil shall be placed in a controlled manner and concurrently compacted as necessary.* The proposed rule did not require, as does the statute in section 515(b)(22)(A) and the former rules in § 816.71(e)(2) placement in a controlled manner and concurrent compaction as necessary. OSM has added these provisions in the final rules as required by the Act. The former rules provide for this requirement in § 816.71(e)(2). Additional discussion on spoil placement and compaction is given in response to a comment at 12.b of this rulemaking.

e. *The spoil shall achieve a long-term static safety factor of 1.3.* Excess spoil disposed on preexisting benches must

achieve a long-term static safety factor of 1.3. Obtaining a minimum long-term safety factor of 1.3 is a general requirement for all backfilling and grading as specified in § 816.102 and was a requirement for disposal of excess spoil on preexisting benches in prior § 816.74(c).

f. *Spoil deposited on any fill portion of a bench shall be treated as excess spoil under § 816.71.* The final sentence has been added in response to a comment to provide further guidance on situations in which there are both a solid bench and a fill area to be used to dispose of excess spoil. In such cases the solid portion of a preexisting bench is governed by § 816.74 while the fill portion is governed by § 816.71.

4. Sections 816.74(d) and 817.74(d) (Proposed as §§ 816.74(e) and 817.74(e))

Final § 816.74(d) (1) and (2) require that the preexisting bench be backfilled and graded to achieve the most moderate slope possible which does not exceed the angle of repose, and to eliminate the highwall to the maximum extent technically practical. These two paragraphs appear in the former rules and are being issued as proposed.

Final § 816.74(d)(3) requires, as proposed, that the preexisting bench be backfilled and graded to "[m]inimize erosion and water pollution both on and off the site." This paragraph picks up the backfilling and grading provision at § 816.102(a)(4), which is not otherwise referenced by the rule. This requirement protects the hydrologic balance.

Proposed § 816.74(d)(4) required that the preexisting bench be backfilled and graded to "[p]revent water infiltration into the backfill from springs, water courses, or seeps, and ensure stability." This corresponded with the requirements of § 816.71(f) which had been referenced by former § 816.74(a). Final § 816.74(d)(4) has been changed to quote the language from § 816.71(f)(1). The language of final § 816.71(d)(4) is closer to the statutory requirement of section 515(b)(22)(D) than the proposed language. The other two requirements formerly referenced by § 816.74, that is, § 816.71(f)(2) and § 816.71(f)(3), are expressly incorporated into the final rule through the provisions of § 816.74(d)(4). Section 816.71(f)(2) provides only a cross reference to § 816.43 which applies in all cases to permitted areas. Section 816.71(f)(3) provides design standards for underdrains when they are needed. The preamble to the final § 816.71(f)(3) clearly states that:

these specific requirements apply to all underdrain systems whether or not the disposal area falls within the definition of a

head-of-hollow or valley fill. (48 FR 32917, July 19, 1983)

(See the preceding discussion of § 816.74(a).) A comment relevant to issues addressed in this paragraph appears under section 12.d of this rulemaking.

5. Sections 816.74(e) and 817.74(e)
(Proposed as §§ 816.74(f) and 817.74(f))

Final § 816.74(e) is being issued as proposed with the exception that its section number has been changed as noted above. It requires that

[a]ll disturbed areas, including diversion channels that are not ripped or otherwise protected, shall be revegetated upon completion of construction.

This adds as an express provision to § 816.74 the last sentence of § 816.71(g), which was formerly referenced in § 816.74(a). (See preceding discussion of § 816.74(a).)

6. Former Sections 816.74(e) and 817.74(e)

Former § 816.74(e) is redesignated as final § 816.74(h). The proposed rule redesignated § 816.74(e) as § 816.74(g).

7. Sections 816.74(f) and 817.74(f)

Final § 816.74(f) prohibits the construction of permanent impoundments on preexisting benches backfilled with excess spoil. As stated in the preamble to the proposed rule and as mentioned earlier in the discussion of § 816.74(a), it is OSM's policy to prohibit the construction of permanent impoundments on preexisting benches backfilled with excess spoil. However, the proposed rule did not explicitly prohibit impoundments constructed on excess spoil as the former rules did. In response to the suggestion of a commenter, OSM is explicitly stating that policy by adding such a prohibition as § 816.74(f).

8. Sections 816.74(g) and 817.74(g)

Final § 816.74(g) requires that the [f]inal configuration of the backfill must be compatible with the natural drainage patterns and the surrounding area and support the approved postmining land use.

This section is issued in response to a comment received and comports with the requirements of section 515(b)(22)(G) of the Act. Similar requirements were specified at formerly referenced §§ 816.71(e) (2) and (3), and replicate others found at § 816.102(a)(5) but not cross-referenced. OSM agrees that the provision is needed for completeness and has included it with the final rules.

9. Sections 816.74(h) and 817.74(h)
(Proposed as § 816.74(g) and § 817.74(g))

Former § 816.74(e) is redesignated as final § 816.74(i).

10. Conforming Changes to Parts 780 and 784

After review of the proposed rules, OSM determined that additional conforming changes are required. OSM is making three changes to these permitting rules to accommodate the changes proposed and made to the performance standards at final § 816.74.

a. *Section 780.14(c)*. OSM is inserting "816.74(c)" into the list of cross referenced sections which are excepted from this rule allowing qualified registered professional engineers, professional land geologists or land surveyors to prepare and certify cross sections, maps and plans. Included among these exceptions is a reference to § 816.71(b) which, after today's rule, no longer applies to the disposal of excess spoil on preexisting benches. The effect of the insertion of § 816.74(c) into § 780.14(c) would be to continue the previous exception afforded by the reference to § 816.71(b). The insertion of § 816.74(c) would require that the cross sections, maps and plans prescribed by § 780.14(c) for the disposal of excess spoil on preexisting benches be certified by a registered professional engineer. This would make consistent the permitting and performance standards certification requirements for such disposal on preexisting benches.

b. *Section 780.35*. Section 780.35 governs the disposal of excess spoil. OSM is adding a phrase to the start of paragraph (b) which will read "[e]xcept for the disposal of excess spoil on preexisting benches." The change conforms the permitting requirements for disposal of excess spoil on preexisting benches at § 780.35 to the changes made to the performance standards for disposal of excess spoil on preexisting benches at § 816.74. The deletion from § 816.74 of the foundation analysis formerly required by its reference to § 780.71(d), as discussed earlier, obviates the need for a permit application to submit the results of a geotechnical investigation.

Preexisting bench areas used for the disposal of excess spoil are, of course, still subject to all the other permit application requirements that apply to surface coal mining operations including the requirement of § 780.35(a) to submit a description (with maps and drawings) of the disposal area. As discussed earlier, the use of § 816.74 to govern an excess spoil disposal site is limited to those areas which are established as

solid, rock floored benches by the design certified by the registered professional engineer.

c. *Section 784.23(c)*. OSM is inserting "817.84(c)" into the list of cross referenced sections which are excepted from this rule allowing qualified registered professional engineers, professional land geologists or land surveyors to prepare and certify sections, maps and plans. Included among these exceptions is a reference to § 817.71(b) which, after today's rule, no longer applies to the disposal of excess spoil on preexisting benches. The effect of the insertion of § 817.74(c) and § 784.23(c) would be to continue the previous exception afforded by the reference to 817.71(b). The insertion of § 717.74(c) would require that the cross sections, maps and plans prescribed by § 784.23(c) for the disposal of excess spoil on preexisting benches be certified by a registered professional engineer. This would make consistent the permitting and performance standards certification requirements for such disposal on preexisting benches.

11. Other Comments

A commenter, supportive of the proposed rule, noted that the proposed revisions remove a significant impediment to reclaiming previously mined areas. The commenter also recommended OSM not apply the rule in a manner that would discourage voluntary reclamation by industry through no-cost AML contracts with the State Regulatory Authorities (SRA).

The requirements in this final rule for the disposal of excess spoil material on preexisting benches are designed to parallel the backfilling and grading rules and to provide an incentive for industry to reclaim preexisting areas which otherwise may not be reclaimed through reining. OSM has no intention to apply this rulemaking in a manner that would discourage voluntary reclamation by industry. Any disposal of excess spoil from active mining operations must be performed in accordance with the requirements of this rule and any other applicable requirements of the regulatory program and the Act. The use of no-cost contracts under the Abandoned Mine Lands Program however is not germane to this rulemaking since projects supervised under that program are not subject to jurisdiction under title V.

Several commenters expressed concern about the placement of excess spoil on preexisting benches many preexisting benches are, in part, fill benches resulting from the pushing of material over the outslope. Since fill

benches often lack the stability to support further placement of spoil material, the commenters fear that excess spoil will be placed on the fill portion of the preexisting benches, not just on the rock bench, and will create the potential for mass movement.

Other commenters indicated they believed, in general, that the proposed rules adequately address foundation preparation and placement requirements. Nevertheless, these commenters also emphasized that care should be taken to insure that excess spoil material be placed only on the solid portion of the bench.

OSM recognizes that there are areas where there is material on the downslope from previous mining operations. There are also areas where material from previous operations remains on the bench. Therefore, OSM expressly states in final §§ 816.74(c) and 817.74(c) that this section of the rules only applies when excess spoil is placed on the solid portion of a bench and that § 816.17 applies when excess spoil is placed on a fill portion. OSM has included in the final rule a requirement that the design must be certified by a registered professional engineer. This is a requirement of the former rules but was not included in the proposed rule. OSM is retaining the professional engineer certification because of the need to establish that the foundation of the preexisting bench is a solid foundation.

A commenter stated that the proposed rule would encourage preexisting highwall reclamation without sacrificing environmental quality. However, the commenter recommended inclusion of the contemporaneous requirements of 30 CFR 816/817.100 as well as the time and distance limitations of proposed § 816.101.

OSM agrees the proposed language will encourage the reclamation of preexisting highwalls. While the general principles of contemporaneous reclamation in § 816.100 apply to all surface coal mining operations, the specific schedules in 816.101 for area and contour mines do not apply to disposal of excess spoil on preexisting benches.

Commenters also raised a related issue of seepage and its adverse affect on stability of the backfilled areas and, therefore, strongly recommended OSM create a separate provision for disposal of excess spoil on preexisting benches incorporating the ten (10) requirements described and discussed below.

a. *The disposal area must be permitted and bonded.* OSM agrees. Proposed and final § 816.74(a) require the disposal areas to be permitted.

Section 30 CFR 800.11(a) requires that all areas of the permit be covered by a bond prior to issuing the permit.

b. *The spoil must be transported and placed in a controlled manner, compacted concurrently and in such a way as to assure mass stability and to prevent mass movement, as required by section 515(b)(22) of the Act.* Section 515(b)(22)(A) specifies that

spoil [be] transported and placed * * * in position for concurrent compaction and in such a way as to assure mass stability * * *.

OSM agrees it is necessary to require spoil to be placed in a controlled manner and, if necessary for stability, compacted concurrently. The language of the Act does not, however, require concurrent compaction as the commenter alleges. Section 515(b)(22) specifies that

spoil [be] transported and placed * * * in position for concurrent compaction and in such a way as to assure mass stability. (emphasis added).

The emphasized language does not specifically require concurrent compaction. It only requires that the spoil be placed in position for concurrent compaction. The manifest concern of this statutory provision is that mass stability be assured. Final § 816.74(c) addresses that concern by providing that the spoil be placed in a controlled manner and compacted concurrently as necessary to attain the required stability. It may further be noted that the general requirements for disposal of excess spoil at § 816.71 have contained a similar provision since their promulgation in 1979. (44 FR 15311, March 13, 1979). Final § 816.74 (c) also provides that the fill shall be designed and constructed, using current, prudent engineering practices to attain a long-term static safety factor of 1.3 for all portions of the fill. Finally, the design must be certified by a registered professional engineer.

OSM also agrees that spoil must be transported and placed on preexisting benches "in such a way as to assure mass stability and to prevent mass movement." This means that under this section of the rules spoil may be placed only over rock floored portions of benches and not over fill areas which extend over the outslope. It also means that preexisting bench surfaces must be prepared prior to placement of the excess spoil. Preparation includes drainage of any existing impoundments and the removal of organic materials and vegetation. The regulatory authority has both the responsibility and the authority to require these actions under §§ 816 and 817.74 of the final rule and the §§ 816 and 817.102(c), (f) through (h),

and (j) requirements cross-referenced therein.

c. *All organic material must be removed prior to spoil placement as mandated by section 515(b)(22) of the Act.* OSM agrees. The requirement in §§ 816.74(b) and 817.74(b) of the final rule has been amended to add the term organic material to the term vegetation. Prior rules have used the terminology "vegetation and organic material" which is being retained in the final rule.

d. *The disposal area must not contain springs, wet weather seeps, natural water courses or their lateral water discharges (i.e., from auger or old underground mine workings) unless section 515(b)(22)(D) of the Act is complied with.* OSM agrees. The prevention of adverse effects from seepage on a backfill's stability is addressed in §§ 816.74(d)(4) and 817.74(d)(4) of the final rule. The final rule was changed from the proposed language to quote the requirement imposed by the former reference to § 816.71(f)(1). Therefore there is no change to this existing requirement under the new rule.

e. *The design of the spoil disposal area on the preexisting bench must be certified by a qualified registered professional engineer in conformance with professional standards, as mandated by section 515(b)(22)(H) of the Act, and not merely those fills using coal mine waste as proposed.* OSM agrees. Final 816.74(c) provides that backfills must have their design certified by a registered professional engineer. Certification is a statutory requirement in section 515(3)(22)(H) of the Act which, while not in the proposed rule, is included in the final.

f. *Standards for foundation and bench stability analyses for the proposed disposal area must be tailored to the nature of the proposed disposal areas.* OSM agrees that preexisting bench disposal areas may differ depending on age and the mining methods employed during the past mining operation and may require different preparation prior to placing the spoil in the backfill. OSM remains satisfied that the performance standard in § 816.74(c) for the use of prudent engineering practices during design and construction, coupled with a requirement to achieve a long term static factor of safety of 1.3 and limiting the rule to cover only disposal on the solid portion of the bench will provide the necessary regulatory controls to ensure stability. Nevertheless, the regulatory authorities may tailor additional program requirements to their individual needs. Further, nothing will prohibit the regulatory authority from

conditioning permits with more stringent criteria based on site specific conditions.

g. *There must be an explicit prohibition on the creation of permanent impoundments on preexisting benches.* OSM agrees. Accordingly, proposed §§ 816.74 and 817.74 were revised by adding a new paragraph (f). The final rule expressly prohibits permanent impoundments on the backfill areas of preexisting benches. For further information see II. D. 8., addressing §§ 816.74(f) and 817.74(f), of this final rulemaking.

h. *There must be a requirement that the final configuration of the backfill be compatible with the natural drainage pattern and surroundings and be suitable for its intended uses.* OSM agrees. Since a similar requirement does not exist in §§ 816.102 and 817.102, OSM has added this requirement as §§ 816.74(g) and 817.74(g) of the final rule. As discussed earlier (II. D. 9. addressing §§ 816.74(g) and 817.74(g) of this final rulemaking) paragraph (g) of §§ 816.74 and 817.74 requires the final configuration of the backfill be compatible with the natural drainage

patterns of the surrounding area and support the approved post mining land use.

i. *There must be compliance with all other requirements of section 515(b)(22) of the Act.* OSM agrees that compliance with the applicable requirements of section 515(b)(22) of the Act is necessary. Table 2 is a cross reference between the subsection of the Act and the former and new regulatory requirement.

TABLE 2.—CROSS REFERENCE THE ACT VERSUS FORMER AND NEW IMPLEMENTING RULES FOR EXCESS SPOIL DISPOSAL

The Act provision	Former rule	New rule
515(b)(22)(A).....	30 CFR 816.71 (a)(2), (e)(2).....	30 CFR 816.74(c) and 816.102(c)
515(b)(22)(B).....	816.71 (a), (e)(1).....	816.74 (a), (b)
515(b)(22)(C).....	816.71(f)(1).....	816.74(d)(4)
515(b)(22)(D).....	816.71(f)(1).....	816.74(d)(4)
515(b)(22)(E)*.....	Not applicable*.....	Not applicable*
515(b)(22)(F)*.....	Not applicable*.....	Not applicable*
515(b)(22)(G).....	816.71(e) (2) and (3).....	816.74(g)
515(b)(22)(H).....	816.71(b)(1).....	816.74(c)
515(b)(22)(I).....	816.71(a).....	816.74(a)

*The Act sections 515(b)(22) (E) and (F) apply to slopes, OSM rules for disposal of excess spoil on preexisting benches only apply to solid portions of existing level benches.

j. *There must be a requirement for inspection of the spoil disposal area prior to placement of spoil to ensure that factors which potentially could lead to the creation of an unstable fill are considered and properly treated.* OSM agrees that factors which could lead to the creation of an unstable fill must be considered prior to approving a permit for the site. Inspection of the spoil disposal area prior to placement of spoil to ensure that such factors are properly treated is a reasonable measure. Final § 816.74(c) requires that the fill shall be designed and constructed using current, prudent engineering practices * * * be certified by a registered professional engineer * * * and the spoil be placed * * * to attain a long term static safety factor of 1.3 for all portions of the fill.

These provisions ensure that the design and construction of spoil fills includes the proper treatment of factors which potentially could lead to the creation of an unstable fill.

E. Sections 816.81, 817.81 and 816.89, 817.89 Coal Mine Waste: General Requirements

1. Section 816.81(a)

OSM is amending § 816.81(a) in response to the district court decision concerning end or side dumping of coal mine waste in re Permanent II (Round III), 620 F. Supp. at 1534-38. As proposed, the final rule now requires

that coal mine waste be "hailed or conveyed" instead of the former language which only required coal mine waste to be "placed." The final rule adds two additional phrases to the proposed rule. Both changes have been made in response to comments and will be discussed more fully later. First, the phrase, "disposed of in an area other than the mine workings or excavations" has been added to the first sentence of § 816.81(a). Second, the phrase, "with final placement in a controlled manner" has been added to the second sentence of § 816.81(a).

OSM believes the final placement of coal mine waste by end or side dumping is inherently dangerous. As discussed in the preamble to the 1979 rule (44 FR 15209, March 13, 1983), the lack of control over compaction when material is end or side dumped may lead to instability and permeability. Instability or permeability may in turn lead to combustion, erosion, and oxidation of pyrite resulting in water quality degradation. As will be discussed later in greater detail, OSM will allow controlled gravity transport of coal waste when its final placement is accompanied by such additional steps as may be required to meet the performance standards of § 816.81.

OSM maintains, as it did in the preamble to the 1983 rule (48 FR 44011, September 26, 1983), that the controlled gravity transport of coal mine waste is

consistent with the Act. The legislative history of the Act does not indicate that the Congress intended OSM to regulate the transportation of coal mine waste to the disposal site.

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

One commenter supported the language in § 816.81(a) of the proposed rule which requires that coal mine waste must be hauled and conveyed and placed in a controlled manner. The commenter stated that the possibility of spontaneous combustion from improper compaction, increased potential for saturation and (stability) failure, and the difficulty of effectively and evenly compacting end dumped material, described in the 1979 preamble, continue

to be valid reasons to reject end and side dumping of coal and to require controlled placement after hauling or conveying the waste.

On January 29, 1988, the D.C. Court of Appeals considered the threats of fill instability and spontaneous combustion. *NWF v. Hodel*, 839 F.2d 694, 731. The court upheld the 1983 revisions to 30 CFR 816.81 and 816.83 which eliminated the specific absolute design criteria prescribing compaction density, lift thickness and other "how to" rules on the basis of existing performance standards prescribing minimum satisfactory end results. The specific performance standards cited by the court as reasonably promoting fill stability and incombustibility were the requirements that the coal mine waste be placed in a controlled manner to prevent combustion and that the disposal facility be designed to obtain a minimum long-term static safety factor of 1.5. 30 CFR 816.81(a)(5) and (c)(2). These performance standards continue in the current regulations.

The provisions of final § 816.81(a)(1) that require coal mine waste to be "hailed or conveyed and placed for final placement in a controlled manner * * *" preclude end and side dumping as a means of final placement of coal waste. As will be subsequently discussed in response to other comments, additional steps following the transportation of coal waste to a storage facility would invariably be required to achieve the performance standards specified in § 816.81.

Four commenters objected to what they described as OSM's intention to regulate the transportation of coal waste by preventing the disposal of coal waste using end or side dumping. Those commenters asserted that Congress did not intend OSM to regulate the transport of coal waste and that the court did not ask OSM to prohibit end or side dumping, but only required OSM to explain why this practice is reasonable. One of these commenters also contended that OSM was reversing its position by preventing controlled gravity transport in the proposed rule. The commenter strongly recommended that OSM reevaluate the proposed rule and repropose it with adequate rationale in the preamble to support the rulemaking.

OSM believes that these commenters, in the main, have misunderstood the meaning of the terms "hailed or conveyed" as applied to this rule. "Hailed or conveyed" includes virtually all forms of transporting coal waste including trucks and systems such as conveyor belts and tramways. OSM is not prohibiting any form of transportation of coal waste but rather

is regulating its final placement. OSM rules have sought to protect against the problems associated with coal mine waste which occur in its placement rather than its transportation. OSM is not changing that policy.

One commenter who objected to the proposed change asked whether additional steps taken by the operators following end or side dumping would be acceptable to OSM. The commenter stated that it is unclear from the preamble of the proposed rule whether end or side dumping is prohibited as a method of placement prior to spreading (i.e., transportation) or only as a method of final placement. The commenter suggested that, if end or side dumping is prohibited as a method of final placement and not transportation, OSM insert the phrase "with final placement in a controlled manner" after the terms "hailed or conveyed". This commenter also submitted that the use of conveyor belts and tramways should be considered acceptable methods of controlled placement of coal waste under any final rule.

In response to the commenter's suggestion, the words: "for final placement" have been inserted between the word "placed" and "in a controlled manner" in the final rule. OSM has made the addition to emphasize that the regulatory controls of activities which place the coal mine waste for disposal are distinguished from the regulatory controls for activities which transport coal mine waste to a storage facility. OSM is unaware of any means of transporting coal mine waste to a storage facility which would achieve the performance standards required by § 816.81 for disposal without some additional steps being taken. These steps, however, may vary depending on the design of the disposal area, the individual site conditions, and the characteristics of the waste. However, the performance standards in § 816.81 cannot be achieved by gravity alone, as would be the case if end or side dumping were the means of final placement. Therefore, while there may be a variety of acceptable ways of transporting the coal mine waste to the disposal area, the final placement of the coal mine waste must be controlled so that the disposal achieves all the performance standards in § 816.81. Thus, final § 816.81 will read

[c]oal mine waste shall be hailed or conveyed and placed for final placement in a controlled manner to * * *.

One commenter stated that the rule does not apply to the material disposed in the mine workings or excavations as indicated in sections 515(b)(11) and

516(b)(4) of the Act. The commenter maintained that the rule applies only to the surface disposal of coal mine waste in areas other than the mine workings and excavations and recommended that appropriate rule language be added to this section to make that clear.

The commenter is correct. OSM does not intend for this rule to apply to material disposed in the mine workings or excavations. The language in proposed § 816.81(a) has been changed by adding the phrase "disposed of in areas other than the mine working or excavation." The new text is taken from the statutory limitation on the application of these rules contained in sections 515(b)(11) and 516(b)(4) of the Act.

2. Sections 816.89(d) and 817.89(d) EPA Regulations on Hazardous Waste

As proposed, OSM is deleting paragraph (d) from §§ 816.89 and 817.89. As stated in the Background section, these paragraphs were added to the regulations in 1983 and suspended in 1986 when the district court ruled that OSM had failed to follow the notice and comment provisions of the Administrative Procedures Act. The paragraphs required that any noncoal mine waste defined as "hazardous" under section 3001 of the Resource Conservation and Recovery Act (RCRA) must be handled in accordance with subtitle C and any implementing regulations of that Act.

OSM received two comments on the deletion. A commenter opposed the deletion on the basis that OSM was obligated to coordinate the implementation of the Act with other Federal laws, including RCRA, and must continue to require compliance by permit applicants with the applicable waste laws. Another commenter supported the deletion stating that the Act operates in concert with, but not in place of, other environmental laws and regulations.

Section 816.89(d) was originally issued at the request of EPA. In reassessing § 816.89(d) for the purpose of this rulemaking, OSM has decided to delete the paragraph for the following reasons. The incorporation by reference of certain RCRA provisions in § 816.89(d) would have required OSM and State regulatory authorities to assume permitting, inspection and enforcement responsibilities over those RCRA provisions which are assigned by Congress to EPA. Assuming those responsibilities is not required by the Act nor is it a task for which the Congress appropriates funds to OSM or the State regulatory authorities.

Enforcing RCRA provisions requires regulatory units structured and staffed appropriate to the task, a task significantly different from regulating the environmental impacts of coal mining *per se*.

An operator's duties under RCRA regarding disposal of hazardous noncoal waste will continue to be regulated by EPA. OSM, for its part, will continue, consistent with its jurisdiction under the Act, to coordinate its regulatory program with EPA to facilitate the implementation of RCRA regulations.

F. Section 816.100 Contemporaneous Reclamation

As proposed, the final sentence in § 816.100 has been deleted. This change conforms § 816.100 to the addition of § 816.101. The sentence being deleted authorized the regulatory authority to establish schedules for defining contemporaneous reclamation. This authorization is being replaced with the guidance contained in § 816.101.

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

On October 31, 1988, OSM proposed § 816.101 which contained four paragraphs. Section 816.101(a) contained time and distance schedules for contour and area mines as well as provisions for the regulatory authority to establish schedules for other mining methods. Section 816.101(b) allowed the regulatory authority to submit alternative schedules in lieu of those in section (a). Section 816.101(c) defined the parameters under which alternative schedules submitted under section (b) would be evaluated. Section 816.101(d) allowed the regulatory authority to extend the backfilling and grading time limit for a portion of the permit area if the permittee demonstrated through the permit application that additional time was necessary.

On April 17, 1990, OSM published a Notice of Inquiry in the *Federal Register* to provide an opportunity for public comment on whether additional regulations were needed to control the contemporaneous reclamation of multiple seam and mountaintop removal mining operations (55 FR 14319, April 17, 1990). OSM published the Notice of Inquiry because of comments received on this proposed rule and reports of problems in enforcing contemporaneous reclamation at multiple seam and mountaintop sites. A further discussion of this notice of inquiry appears in section G. 5., Notice of Inquiry on Multiple Seam Mining and Mountaintop Removal Operations, of this preamble.

The final rule contains two paragraphs. As proposed, final § 816.101(a) provides the time and distance schedules for area and contour mines and requires regulatory authorities to establish schedules for other mining methods permitted in their State. Final § 816.101(b) authorizes the regulatory authority to approve extensions to time for rough backfilling and grading for a permit area or a portion of a permit areas, similar to proposed § 816.101(d). OSM is withdrawing proposed § 816.101(b) which would have allowed a regulatory authority to submit schedules in lieu of those in § 816.101(a). Proposed § 816.101(c) detailing the criteria to evaluate alternative schedules has likewise been withdrawn. As will be discussed later, OSM believes the language of the final rule, which is very similar to the rule issued in 1979, provides sufficient guidance to States, while allowing sufficient flexibility to deal with any State- or site-specific problem.

1. Section 816.101(a) Time and Distance Schedules

Final § 816.101(a) contains time and distance schedules for contour and area mining and requires the regulatory authority to establish schedules for other methods of surface mining. For contour mining, § 816.101(a)(1) requires the completion of backfilling and grading within 60 days or 1,500 linear feet following coal removal. For area mining, § 816.101(a)(2) requires completion within 180 days following coal removal, and not more than four spoil ridges behind the pit being worked, the spoil from the active pit constituting the first ridge. Sections 816.101(a) (1) and (2) are identical to the proposed rule. Under § 816.101(a)(3), backfilling and grading schedules for other mining methods shall be established by the regulatory authority. Any schedule established by the regulatory authority must incorporate an inspectable standard between coal removal and the completion of backfilling and grading.

One commenter wanted OSM to clarify that an operation completing the "rough" backfilling and grading stage, but not the final grading stage, would be considered to be in compliance with the time and distance requirements. The commenter also mentioned that final grading must at times be combined with topsoil placement and seeding in order to minimize erosion. Because the 1979 Federal rules recognized this distinction (44 FR 15411, March 13, 1979), the commenter requested OSM clarify the issue in this final rule.

OSM intends backfilling and grading to mean that all of the spoil material has been placed in the mined-out area and the backfilled material is ready for final grading as specified in § 816.102(j). Thus, backfilling and grading does not include final grading, placing topsoil, and seeding. The 1979 preamble and rules used the phrase "rough backfilling and grading" but did not explain the meaning of the term "rough". Since it was not explained in 1979, OSM chose not to include this wording in the proposed rule. In response to the commenter's request for clarification, OSM has adopted language similar to the 1979 rules; therefore, final § 816.101 reads " * * * rough backfilling and grading for surface mining * * *."

A commenter stated that time standards should be eliminated since the distance limitations were felt to be sufficient to ensure contemporaneous reclamation. The commenter believes that the elimination of time standards would eliminate difficulties in inspection related to tracking the number of days between coal removal and backfilling and grading.

OSM disagrees with the comment. The establishment of distance limits without concomitant time limits would not sufficiently ensure that contemporaneous reclamation would occur. For instance, an operator could cease coal extraction prior to proceeding four spoil ridges or 1,500 linear feet. In circumstances such as these, where a distance limit would not apply, a time limit would ensure that reclamation would proceed properly. Alleged enforcement difficulties do not constitute sufficient reason for OSM to retreat from this important performance standard. Moreover, required monthly inspections make it unlikely that the time limits will be abused to any great degree.

The commenter also stated that the term "coal removal" also needs to be defined, so that whatever time standard is applied, it is applied at a clearly defined point. The commenter stated that it is not clear if the time period starts when coal is removed from a point or if it starts when coal removal is completed for a cut or pit.

In a similar vein, several commenters asked OSM to clarify the phrase "following coal removal" for area mining so as to assure that reclamation follows disturbance of the land surface in a timely manner. Citing *Save Our Cumberland Mountains, Inc. (Rith Energy)*, 108 IBLA 70 (1989), these commenters objected to OSM's explanation in that case that the 180-day deadline for backfilling and grading did

not start until after all minable coal was removed from the mine cut. The commenters claimed the OSM's interpretation of "following coal removal" to mean following final removal of all coal from a pit, rather than from any point in the cut or pit, is in contradiction with the Secretary's 1979 interpretation and Congressional intent. Therefore, the commenters contended that reclamation of an area must follow within 180 days of the disturbance of land and coal removal at any point of land within the mine cut, rather than following removal of all coal within the mine cut or pit. On the other hand, another commenter suggested applying the 180 day limit only after final coal removal to ensure that the last pit or cut is reclaimed in a timely fashion.

The time and distance schedules for area and contour mining begin following the completion of coal removal. The phrase "following coal removal" means that no minable coal is left in a particular area of the mine. In the *Rith Energy* case, referred to by the commenter, the board held that backfilling and grading attaches to an area of land at the time of coal removal, and not at the time of final coal removal from a mining cut. *Id.* 108 IBLA at 80. Therefore, the key to enforcing time and distance schedules is to focus on the area of land rather than coal removal. Practical application of this concept requires that time and distance schedules be calculated from a moving "point", i.e., a small area, of a coal seam from which coal is being removed. In the case of multiple seam mining, the moving "point" would be established as coal is extracted from the lowest coal seam.

A commenter claimed that there is no justification given for the numerical time standards in §§ 816.101(a)(1) and (a)(2) (60 and 180 days, respectively, for contour and area mining). The commenter noted that contemporaneous reclamation is so dependent upon site-specific conditions (e.g., type of mining, equipment, geology, climate, speed of mining), that it cannot be tied to such specific time constraints as OSM proposed. Therefore, the commenter wanted OSM to outline steps for determining contemporaneous reclamation for each operation on a site-by-site basis. In the commenter's view the permit is the place to specify time standards because site and operating conditions are too variable for generic Federal or State rules to be appropriate.

Similarly, another commenter objected to the reimposition of nationwide time and distance

requirements for completion of backfilling and grading operations at surface coal mining operations. The commenter stated that OSM deleted identical 1979 regulations in 1983 on the premise that the variety of local conditions in mining States precluded the imposition of national standards, and because the Act does not mandate uniform, nationwide time and distance requirements. The commenter pointed out that the legislative history of the Act fails to mention the necessity for nationwide time and distance requirements to define contemporaneous reclamation. The commenter asserted that it is apparent from the 1988 appeals court decision in *NWF v. Hodel*, 839 F.2d 694, (D.C. Cir. 1988) that the Act does not require a national time and distance standard. Therefore, OSM was asked to remove what the commenter described as the arbitrary reference to the nationwide standards, which bear no resemblance to on-the-ground conditions or to OSM's prior position.

The same commenter argued that OSM failed to provide adequate justification in the proposed rule for the reversal in agency position. The commenter insisted that OSM's reliance upon the States' requests for guidance on time and distance schedules and various State programs' adoption of the 1979, or more stringent standards, does not constitute sufficient justification for the rule change. The commenter claimed OSM's reliance upon such State action was flawed because (1) the States had to adopt the 1979 rules to keep their programs consistent with the rules of the Secretary and (2) the States have not wanted to change their rules while the issue remained in the courts and unsettled.

The commenter recommended OSM adopt rules which would allow States to set their own requirements for contemporaneous reclamation based on local conditions and would contain flexible standards to accommodate the distinct circumstances of individual surface coal mining operations.

In establishing a regulatory framework for implementing the Congressional prescriptions for contemporaneous reclamation at section 515(b)(16) OSM has, in the past, adopted two alternatives. In 1979, the regulations provided a nationwide limit on time and distance for contour and area mines and allowed for time limit extensions for specific permit areas in accordance with § 780.18(b)(3). In 1983, OSM removed the time and distance limitations from the national program and provided regulatory authorities with the

responsibility for determining schedules for their individual States. The legal challenge to this second alternative resulted in the district court's remand of the regulations for failure to provide States with sufficient guidance in defining contemporaneous reclamation beyond that which was provided in the Act. In *Re Permanent Surface Mining Regulation Litigation (II)*, No. 79-1144 (D.D.C. Oct. 1, 1984).

In affirming the remand with regard to contemporaneous reclamation, the circuit court held that, while the Act does not automatically and inevitably require the Secretary to "flesh out" the contemporaneous reclamation prescriptions of section 515(b)(3) and (b)(16), he did not adequately explain why guidance beyond the statutory requirements sensibly could not be given to local regulators. *NWF v. Hodel*, 839 F.2d 694, (D.C. Cir. 1988).

This final rule has a sufficient basis and purpose to be valid. The commenter who asserted that the Secretary failed to justify his reversal from his 1983 rules misconstrues the posture of the issue. The position taken in the 1979 rules on time and distance limits is the only one to which the current rule may properly be weighed against. The Secretary is not now required to justify a reversal from a 1983 policy which the court invalidated. OSM has always intended that there will be an inspectable contemporaneous reclamation standard which will apply to every mining site. In final § 816.101(a) OSM has reestablished national standards for area and contour mines (§ 816.101(a) (1) and (2)) and required the States to set State standards for other types of mining (§ 816.101(a)(3)).

Final § 816.101 is modeled on the 1979 rules. The time and distance schedules for contour and area mining in final § 816.101(a) are identical to those in the 1979 rule. The preamble to that rule (44 FR 15226, March 13, 1979), explained how these schedules were developed. Among other things, OSM stated that "(i)t is necessary to establish a maximum time limit for backfilling and grading to ensure that toxic-forming material in the spoil will not remain exposed to surface runoff over an indefinite period of time. 44 FR 15226 (1979). In light of the substantial additional experience gained with these rules at the State and Federal level since 1983, OSM has reconsidered their utility for providing workable national time and distance standards for which reasonable accommodations can be made for local differences. In this light, OSM has affirmed its earlier conclusions and modeled final § 816.101(a)(1) and (2) after the 1979 rules.

Despite the commenter's assertions of the States' motivation for retaining the 1979 schedules, States, when given the option of removing them from their rules in 1983, did not do so. OSM believes the State rules were not changed because the 1979 provisions are viable and workable for a great majority of contour and area mines. These provisions and schedules simplify mine planning, bonding and inspecting and provide a uniform playing field across State lines for operations which are substantially similar in scope. Permit applicants have found retention of State program provisions governing time and distance schedules as an aid to complying with the permit information requirements of § 780.18. Many permits cite the program time and distance schedule as a means of demonstrating their adherence to backfilling and grading reclamation timetable requirements. In short, where appropriate, nationwide standards have substantial administrative benefits for all concerned.

To the degree that flexibility is required, the final rule in § 816.101(b) provides for such flexibility based upon specific showings by a permittee. This allows for site-specific conditions to be taken into account. For types of mining other than area and contour operations, the State is required to establish State standards in accordance with § 816.101(a)(3). OSM has not defined national standards for mining operations other than area and contour mines. Limits for the remaining types of mining operations, if and where they are conducted, are to be determined on a state-by-state basis. OSM believes that contemporaneous reclamation standards for these operations are best defined by the State regulatory authority.

One commenter complained that, although area mining can be conducted either as a truck and shovel or as a dragline operation, the standard for contemporaneous reclamation of area mines in § 816.101(a)(2) is suitable only for dragline operations. The commenter did not explain the basis for this opinion. OSM disagrees with this comment. In the case of area mining that uses truck and shovel operations, the four spoil ridge criteria would not apply but the time schedule would be appropriate to ensure contemporaneous reclamation.

On a similar tack, another commenter claimed the time and distance requirements for area mining are not adequate in all cases. This commenter wanted the rules to clarify that the 180-day period would not include periods when the operation is temporarily shut down through circumstances beyond the

control of the operator (e.g., as a result of labor disputes, weather, etc.).

The provisions of 30 CFR 816.131 on temporary cessation are to be used for temporary shutdown. Anytime an operation is in temporary cessation for 30 days or more because of circumstances such as adverse weather or labor problems or similar reasons the person conducting the surface mining activity is required to notify the regulatory authority. Since the 30 day provision of § 816.131 is within either the 60 or 180 day provisions of § 816.101, there should be no conflict with this provision and the contemporaneous reclamation time limits.

Another commenter questioned the use of "or" instead of "and" in § 816.101(a)(1). The commenter wondered if OSM really intended the time and distance requirements for backfilling and grading in contour mines to be alternatives (i.e., within 60 days or 1500 linear feet). Instead, the commenter suggested that "and" would be more suitable since its use would parallel its use in § 816.101(a)(2) for area mines where backfilling and grading are to be completed with both a specified time and a specified distance.

There is no reason to change the conjunction of § 816.101(a)(1) from "or" to "and". OSM believes that the meaning of this provision is clear that backfilling and grading must be completed within either 60 days or 1500 linear feet following coal removal, whichever comes first.

To have interpreted § 816.101(a)(1) otherwise would have opened its provisions to grave abuse. As previously noted, an operation could have ceased mining short of 1500 linear feet and never have been required to backfill and grade the disturbed area. Such a scenario would conflict with the intent of the Act to compel reclamation as "contemporaneously as practicable" (section 515(b)(16)), "and * * * as possible." (Sec. 102(e)).

2. Section 816.101(a)(3) Schedules for Other Mining Methods

Final § 816.101(a)(3) requires the regulatory authority to establish backfilling and grading schedules for other surface mining methods. This section requires a schedule if mining other than contour or area mining is being conducted within the State. Section 816.101(a)(3) has been revised from the proposed rule to clarify that schedules for mining methods other than contour or area mines also apply where OSM is the regulatory authority.

OSM interprets these provisions as requiring the regulatory authority

establish schedules that are inspectable standards.

Because of the diversity which exists in types of operations and areas where such operations are conducted, it is infeasible to suggest that OSM establish national schedules for all methods of operations. The conditions placed on the regulatory authority are—if the regulatory authority is going to approve permits for mining method other than contour and area mining—then the regulatory program must contain an inspectable contemporaneous reclamation standard for the type of mining proposed.

At a public meeting, a commenter asked OSM to state in the preamble to the final rule that schedules for other mining methods are required, and not merely authorized, under proposed § 816.101(a)(3). OSM acknowledges that the preamble to the proposed rule was not clear as to whether the development of schedules was required or merely authorized. However, the rule language, both proposed and final, is clear that regulatory authorities shall provide schedules for mining methods other than area and contour mining. OSM believes that final § 816.101(a)(3) is clear that such schedules are required and not merely authorized.

A commenter asked what OSM will do in Tennessee (a Federal program State) as a result of proposed § 816.101(a)(3) which provides for the establishment through the State program approval process of schedules for operations which are neither contour nor area operations. OSM agrees that the proposed rule language did not make it clear how, or whether, mining operations requiring schedules established by the regulatory authority are to be treated when OSM is the regulatory authority. Consequently, § 816.101(a)(3) was revised to remove the word "state" from the phrase "state regulatory authority". OSM will establish the schedules for operations on Federal or Indian lands or a Federal Program State where OSM is the regulatory authority. For example, 30 CFR 942.816(e) contains the time and distance schedules for the State of Tennessee.

3. Extensions of Time Final § 816.101(b) (Proposed as § 816.101(d))

Final § 816.101(b), authorizes the regulatory authority to extend the time allowed for backfilling and grading for the entire permit area or for a specified portion of the permit area if the permittee demonstrates, in accordance with 30 CFR 780.18(b)(3), that additional time is necessary. OSM recognizes that

not all mining operations can meet a time or distance limit set on either a national or State basis. However, the extension must be requested by the permit applicant, who must demonstrate its necessity in the permit application and it must be approved by the regulatory authority as a part of the permit process.

The 1979 rules at § 816.101(a)(1) and (3) for contour and area strip mining, respectively, made similar provision for granting additional time (44 FR 15411, March 13, 1979). The preamble to those rules indicated the regulatory authority may allow additional time for rough backfilling and grading if, for example, the permittee demonstrates that the time limit established under § 816.101(a) is too restrictive because of local conditions (44 FR 15226, March 13, 1979).

One commenter stated that the flexibility provided in proposed § 816.101(d) (Final § 816.101(b)) was needed to handle unexpected delays due to unique site specific conditions such as weather, equipment, and to protect the safety of the miners. However, the commenter also insisted that the regulations in proposed § 816.101(d) should allow the regulatory authority to grant extensions for the entire permit area, and not limit such extensions to specific portions of the permit area. Also, another commenter wanted OSM to include special provisions for seasonal operations that backfill the previous mining area during the next operating period which may be 9 months later. The commenter stated that no backfill is available until the next pit is started and that the economics of coal extraction would be destroyed by having to backfill the existing pit before the start of the next pit.

OSM adopted the suggestion to modify final § 816.101(b) to allow the regulatory authority to grant time extensions for the entire permit area instead of limiting that authority to a specified portion of the permit area. Final § 816.101(b) is to be used by the regulatory authority to grant an extension because the operator cannot meet either the national standard for area or contour mines or the State standard for other types of mines because of the site-specific conditions of the permit area. In addition, these extensions are granted through the permit process in accordance with § 780.18(b)(3). To reiterate an earlier point, extensions of time are not granted to accommodate temporary shut downs resulting from adverse weather, market condition, labor problems or similar reasons. These conditions are governed

under the temporary cessation provisions of 30 CFR 816.131.

A commenter suggested adding a new subsection which would allow for a specific backfilling and grading schedule as part of a postmining land use change. The commenter wanted the regulatory authority to have the flexibility to approve schedules for specific land uses on a case-by-case basis. The commenter maintained that postmining land uses such as industrial land for utility ash disposal require detailed schedules for backfilling and grading which are outside of the norm.

Another commenter recommended extending the time and distance requirements where noncoal mining operations occur within the same pit area. The commenter cited an example where sand and clay are extracted above a seam of coal (lignite) by a different company than the one mining the lignite. Additional flexibility is required, the commenter stated, where more than one operation has valid rights in the same pit area.

OSM believes these comments illustrate why flexibility in the time and distance requirements for backfilling and grading the permit area is needed. The time and distance requirements for a permit area as those described above may be extended under final § 816.101(b) for either an entire permit area or for a portion of a permit area, whichever is appropriate, depending on specific circumstances.

4. Withdrawal of Proposed §§ 816.101(b) and 816.101(c)

OSM has withdrawn proposed §§ 816.101(b) and 816.101(c) in the final rule. Proposed § 816.101(b) would have allowed a regulatory authority to establish, subject to the State program approval process, alternative backfilling and grading schedules in lieu of those prescribed in § 816.101(a). Proposed § 816.101(c) would have allowed regulatory authorities to incorporate one of two standards governing the completion of backfilling and grading in any schedule it established. The two standards were either a time interval or distance function.

As indicated in the preamble to the proposed rule, OSM considered providing this option in response to comments received during outreach briefings in which States, in their comments regarding backfilling and grading guidelines, asked to retain discretion in determining alternative schedules. These proposed provisions would have given State regulatory authorities the flexibility to adopt backfilling and grading schedules which meet State-specific conditions, but

would not have established a standard for OSM to measure the sufficiency of the alternate schedules.

These proposals are withdrawn in favor of the final rules promulgated today. OSM believes the final rule's context of national schedules for area and contour mines, State schedules for other types of mining, and permit-based exemptions, when required, for special circumstances accomplishes the goal of ensuring contemporaneous reclamation while, at the same time, providing sufficient flexibility to adapt to special circumstances. After a careful analysis of the comments to the proposed rule, OSM has concluded that all potential problems with time and distance schedules could be accommodated under the final rule's structure and the additional flexibility provided in the proposed rule was unnecessary.

5. Notice of Inquiry on Multiple Seam Mining and Mountaintop Removal Operations

On April 17, 1990, OSM published a Notice of Inquiry (NOI) in the Federal Register to provide an opportunity for public comment on whether additional regulations were needed to control the contemporaneous reclamation of multiple seam and mountaintop removal mining operations (55 FR 14319, April 17, 1990). OSM published the Notice of Inquiry because of comments received on this proposed rule and reports of problems in enforcing contemporaneous reclamation at multiple seam and mountaintop sites. According to the Notice, OSM was receiving reports from field inspectors about mine sites which appeared not to be contemporaneously reclaimed. In response to those complaints, OSM solicited public comments on whether to add information requirements to the permitting rules which would require specific data on the methods of mining and schedule for completion.

Promulgation of time and distance schedules in this rule is not intended to resolve the concerns raised in the NOI concerning contemporaneous reclamation at multiple-seam operations. The issues identified in the NOI were primarily associated with enforcing contemporaneous reclamation requirements prior to the commencement of the removal of coal from the lowest permitted seam. This rule does sufficiently address, however, what it was intended to cover: Contemporaneous reclamation of sites were coal removal from the lowest permitted seam has begun. Solutions to the issue raised in the April 1991 NOI are thus beyond the scope of the

October 31, 1988 proposal, and need not be part of the basis and purpose of this rule.

Having examined the issues raised in the NOI in light of the comments received on the NOI, OSM has concluded that other existing OSM rules are sufficient to address the issues raised in the NOI. Therefore, OSM has decided not to initiate further rulemaking at this time. The sufficiency of other existing rules is explained in the following discussion. The discussion covers OSM permitting, enforcement, and oversight rules.

How Existing Regulations Ensure Contemporaneous Reclamation.—a. Permitting. The permitting regulations in 30 CFR 780.18(b)(1) require a detailed timetable for the completion of each major step in the reclamation plan. Paragraph 780.18(b)(3) requires a plan for backfilling, soil stabilization, compacting and grading that shows the final surface contours of the proposed permit area. In the Notice of Inquiry, OSM considered amending the permitting information regulations to require more detailed information on the mining methods and backfilling and grading sequence and schedule. Three States commenting to the Notice of Inquiry believed that OSM has adequate regulations in place to ensure contemporaneous reclamation of multiple seam and mountaintop removal operations. One commented that further rulemaking is unnecessary and not likely to accomplish the intended goal.

One commenter to the Notice of Inquiry expressed the opinion that a review of the current regulations shows that OSM has already promulgated a very comprehensive set of requirements for the permitting of surface coal mining operations to assure contemporaneous reclamation. The commenter further stated that the provision of § 780.18(b)(3) empowers State regulatory authorities to require that the operator fully remove all seams of coal and accomplish reclamation in a timely manner, in accordance with the timetable required in each permit.

OSM agrees with the commenter. In addition to § 780.18, under which operators have to submit a reclamation plan for approval, 30 CFR 780.12 and 780.14 require the submittal of operation plans and maps describing the projected progress and sequence of the permitted operation. See, e.g., § 780.14(b)(2). Plans submitted and approved under all of these sections become part of the approved permit and are enforceable by the regulatory authority. Thus regulatory authorities are empowered to assure that mining operations proceed in a

timely manner and that reclamation be performed contemporaneously.

To the extent that the lack of time and distance requirements may have contributed to problems, under the final rule States are required to have time and distance schedules for all types of mining being permitted within their State. Area and contour mines have national time and distance schedules (§ 816.101(a)(1)&(2)) and other types of mines must have State schedules (§ 816.101(a)(3)).

b. Enforcement. OSM regulations at § 840.11(b) require four complete and 12 partial inspections of all mine sites yearly. Inspectors visiting a mine monthly can readily ascertain whether mining and reclamation is progressing contemporaneously, and whether an operator is following the approved operation and reclamation plans. Thus enforcement of the permit conditions that an operator must follow should assure that reclamation will occur in a timely manner.

c. Oversight. In accordance with § 842.11(a)(1), OSM has the authority to conduct inspections of surface coal mining and reclamation operations to monitor and evaluate the administration of the approved State programs.

A commenter to the Notice of Inquiry addressed the issue of additional oversight. Since the commenter believed that the issue of timely reclamation was confined to one State, they recommended that a better course of action appears to be oversight where the problem is allegedly occurring. The commenter can be assured that if additional oversight efforts are indicated by OSM's evaluation of a State's implementation of its program, these efforts will be undertaken.

d. Multiple seam mining. As stated earlier, the final rules provide for the application of time and distance schedules to contour and area mines with more than one seam. States may elect to have a separate schedule for multiple seam mines, which are also area or contour mines, if the State schedule adheres to the limits in § 816.101(a)(1) or (2) for those mines.

Two commenters stated that the proposed regulations failed to address multiple-seam mining. For a variety of reasons the commenters asked that the final rules include explicit standards for applying time and distance limitations to multiple-seam operations in both contour mining and mountaintop removal operations.

The same commenters contended OSM must provide, as required by the district court in its remand of the regulations governing contemporaneous

reclamation, justification for its failure to establish minimum national backfilling and grading standards for multiple seam mining whether in area and contour mines or mountaintop removal operations. The commenters claimed the States, in the absence of Federal standards, will establish the weakest standards possible in order to assist their local industry.

A commenter to the Notice of Inquiry stated that when the proposed rule on time and distance schedules is adopted it will establish standards applicable to all types of mining operations, including multiple seam and mountaintop removal. The commenter continued by making the observation that many of the multiple seam coal mining operations occur within contour or area operations for which specific time and distance requirements are already in place.

As stated earlier, the time and distance schedules for contour and area mines apply whether the mine is a single or multiple seam situations. When these schedules are applied to mines with more than one seam, the time or distance standard will start with the removal of coal within the last seam. Also, if a permit applicant believes that the national schedules for contour and area mines which apply to a particular multiple seam operation are unworkable they have the ability to request a site-specific extension to the time limit under § 816.101(b).

Commenters to the proposed rules, pointed out a situation where a lower seam is permitted without any intention of mining the seam. The commenters asserted that after mining the next to last seam, the operator applies for inactive status and leaves the mountain with no reclamation.

With regard to the above comment, the time and distance limits apply when the requirement to reclaim begins. Until coal removal occurs at an area, the particular limits in § 816.101(a) do not apply. However, OSM has rules which govern not only contemporaneous reclamation but also temporary and permanent cessation and bonding all of which may apply to the type of situation described. Operators are required to follow their approved plans of operation. If they do not, the regulatory authority can step in to ensure that the rules are complied with and the violations based upon misrepresentations in such plans are corrected.

e. Mountaintop removal operations. Commenters to the proposed rule stated that OSM must provide justification for its failure to establish minimum national backfilling and grading standards for

mountaintop removal operations as required by the district court in its remand or to explain its failure to do so as required by the circuit court.

OSM disagrees with the characterization of the October 1984 district court opinion and the 1988 Circuit court opinion. In their discussion of contemporaneous reclamation, both courts focused on the removal of time and distance limits of area and contour mines. Neither discussion requires the establishment of such standards for mountaintop removal where such standards did not exist previously.

The commenters also maintained that the States would establish the weakest standard possible to help their industry in the absence of Federal standards. They stated that OSM must provide some national minimum standard for mountaintop removal operations so that the Congressional mandate of contemporaneous reclamation is met. In a meeting with OSM, these same commenters claimed that the rules should require State regulatory authorities to establish mountaintop removal requirements which specifically contain standards for contemporaneous reclamation.

The above commenters also acknowledged the difficulty of establishing time or distance limitations for mountaintop removal operations. They said that backfilling and grading operations and the resulting time and distance limitations for these operations will vary depending on whether multiple seams are involved and whether the spoil is being stored on the mountain, or placed entirely in fills. In either case, they concluded, the area would be graded or the surface prepared for revegetation.

Mountaintop removal operations are outside the scope of this rulemaking. However, in response to comments it is noted that the regulatory controls for mountaintop removal operations are based on the premise that the exemption from AOC is the result of an approved, specific post mining land use. The key to timely reclamation therefore is linking the mining and reclamation with the attainment of the post mining land use.

Post mining land use is, of course, evaluated on a site-by-site basis. Land use is determined by the needs of the local area as well as the compatibility of the use with the surrounding environment. Since the mountaintop removal exemption is based on the approved post mining land use and the reclamation is tied to that approval, the reclamation would be coordinated with the development of that land use.

The decision on how to achieve contemporaneous reclamation and how

to inspect the permitted site to ensure adherence to timely reclamation is provided for in the 1987 amendment to the permitting requirements for mountaintop removal operations (52 FR 39182, October 21, 1987).

§ 785.14(c)(1)(iii)(F) requires the applicant for a mountaintop removal permit to attach a schedule to the reclamation plan as to integrate the mining operation and the reclamation with the post mining land use. To approve a permit for mountaintop removal operations a regulatory authority must evaluate that schedule against the general prescriptions covering contemporaneous reclamation in § 816.100. Following the approval of the permit, the schedule forms the inspectable basis to ensure the operation is being contemporaneously reclaimed.

In summary, mountaintop removal operations are subject to the contemporaneous reclamation standards in § 816.100. That performance standard is achieved through a site-by-site analysis of the requirements for attaining the post mining land use which formed the basis for the exemption from AOC in the permit. Each permit for mountaintop removal operations must contain a schedule, attached to the reclamation plan, which integrates the mining operation and the reclamation with achieving the post mining land use. Mine sites will be inspected against that schedule to ensure that the site is being contemporaneously reclaimed.

H. Thin or Thick Overburden

The final rules for §§ 816.104 and 816.105 remain unchanged from the rules proposed. OSM has reorganized former §§ 816.104 and 816.105 so that paragraph (a) of these sections defines thin overburden and thick overburden, respectively, and paragraph (b) contains the corresponding backfilling and grading performance standards. For convenience, the definitions of thin overburden and thick overburden in §§ 816.104(a) and 816.105(a), respectively, are discussed concurrently under the following subheading. The backfilling and grading performance standards for thin and thick overburden in § 816.104(b) and § 816.105(b), respectively, are then discussed under consecutive separate subheadings.

1. Section 816.104(a)—Definition of Thin Overburden; Section 816.105(a)—Definition of Thick Overburden

In preparing the proposed rule on §§ 816.104(a) and 816.105(a) OSM considered moving the definitions of thin overburden and thick overburden to the definition section in 30 CFR 701.5.

However, because of their limited application, OSM decided to not do so. However, the term "spoil", which is used in both definitions, continues to be defined at § 701.5.

Thin overburden is defined in final § 816.104(a) as the condition where there is

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

Final § 816.105(a) defines thick overburden as

more than sufficient spoil and other waste materials available from the entire permit area to restore the disturbed area to its approximate original contour. More than sufficient spoil and other waste materials occur where the overburden thickness times the swell factor less the settlement exceeds the combined thickness of the overburden and coal bed prior to removing the coal, so that after backfilling and grading the surface configuration of the reclaimed area would not: (1) [c]losely resemble the surface configuration of the land prior to mining; or (2) [b]lend into and complement the drainage pattern of the surrounding terrain.

Both definitions contain three standards incorporating the requirements of sections 515(b)(3) and 701(2) of the Act. The first is whether there is sufficient overburden and, in the case of thin overburden, other waste materials, to restore the approximate original contour. The second standard is whether the resulting surface configuration closely resembles the land prior to mining. The third is whether the drainage pattern of the reclaimed area complements the surrounding terrain. OSM has adopted these standards for the reasons discussed below.

The exemptions in section 515(b)(3) of the Act are based on whether there is sufficient overburden to restore the land to AOC. Thin overburden means there is too little material to restore AOC; thick overburden means there is too much. Thus, whether a permit area qualifies for a thick or thin overburden exemption fundamentally depends on the definition of AOC.

Section 701(2) of the Act and the corresponding regulation at 30 CFR 701.5 define AOC as

that surface configuration achieved by backfilling and grading of the mined area so that the reclaimed area including any terracing or access roads, [1] closely resembles the general surface configuration of the land prior to mining and [2] blends into and complements the drainage pattern of the surrounding terrain, with all highwalls and spoil piles eliminated * * *.

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

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

As it did in 1983, OSM rejects the precise numerical limits which were included in the 1979 rules as being impractical for evaluating the utility of the overburden and other available waste materials to restore AOC. Defining thin and thick overburden in precise numerical terms is impractical because of the diversity of surface configurations and drainage patterns to which the final rule would apply

throughout the coal mining regions of the United States. Depending on the circumstances, inflexible numerical limits might be either too loose or too stringent, and seldom ideal.

OSM's first attempt at defining thick or thin overburden relied solely on the percentage change in overburden volume. In 1977, the proposed initial program rules prescribed thick or thin overburden as existing when the final thickness exceeded 1.2 of the initial thickness for thick overburden and when the final thickness was less than 0.8 of the initial thickness for thin overburden. (42 FR 44931, September 7, 1977). However, as acknowledged in the preamble to that rule, while OSM was using a numerical value as the standard, the primary purpose of the rules were to ensure that sites met approximate original contour. (42 FR 44921, September 7, 1977).

OSM altered its position in the final initial program rule, acknowledging at that time, that the precise numerical limits were insufficient by themselves. This position is discussed in the preamble to the final initial program rule.

Some concern was expressed over the distinction between thick and thin overburden. In particular, reviewers were concerned that not all operations needed modification of the requirement to achieve AOC. The regulations have been revised to require that whether thin or thick overburden conditions exist operations must achieve AOC whenever possible. (42 FR 62645, Dec. 27, 1977).

The final initial program rule (30 CFR 715.14(f)) added the following sentence to the proposed initial program rule.

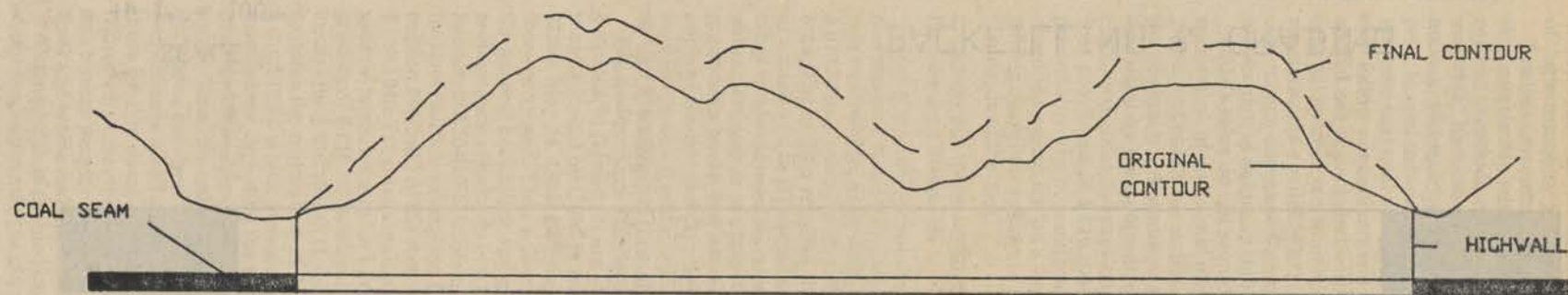
The provisions of paragraphs (g) and (h) [performance standards for thick and thin overburden] apply only when operations cannot be carried to comply with the requirements of paragraph (a) of this section to achieve AOC.

The 1979 final permanent regulatory program rules mirrored the final initial regulatory program by using the two pronged test, i.e., greater than 1.2 and achieve AOC or less than 0.8 and achieve AOC. By 1982, OSM recognized that this artificially constructed two pronged test was impractical. The numerical limits were only one part of a complex, site specific determination as to whether or not an operation could achieve AOC. In addition to being only one part of the decision there are situations in which the sites could qualify under the numerical limit but not meet the AOC criteria.

Figures 1 and 2 give examples of where reliance on precise numerical limits to determine whether thin or thick overburden conditions exist would lead to improper regulatory determinations as to whether the disturbed land should be returned to AOC. Figure 1 shows a situation where more than 20% of the premining volume has been lost but AOC can still be obtained. Figure 2 shows a situation where the post mining volume is more than 20% greater than the premining volume but AOC can still be obtained. In these situations an exemption from AOC for thin or thick overburden based on a precise 20% numerical limit would be inappropriate.

BILLING CODE 4310-05-M

AVAILABLE FILL > 120%
NO ADC VARIANCE NECESSARY

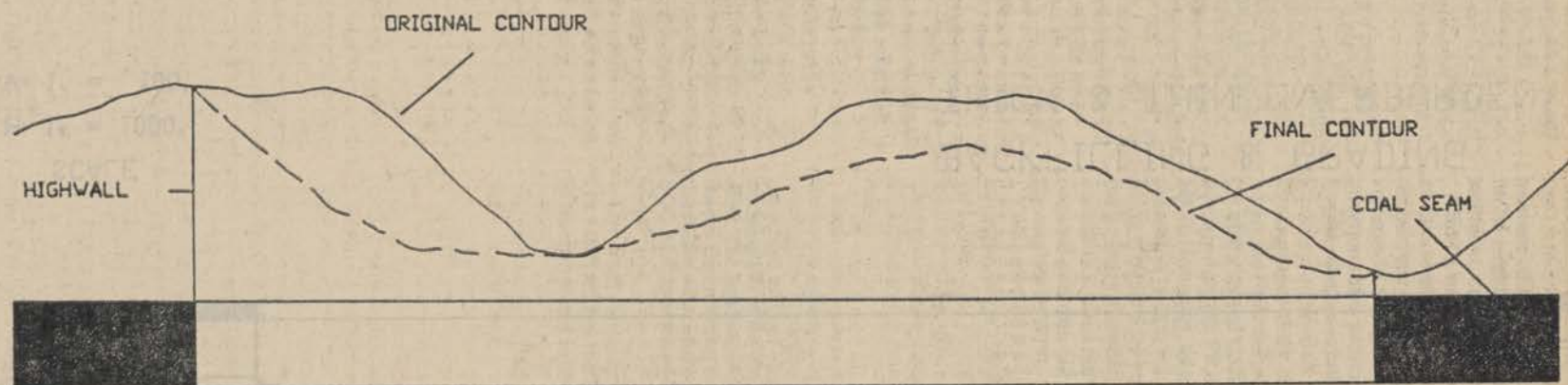


SCALE
H: 1" = 1000'
V: 1" = 100'

BACKFILLING & GRADING
THICK & THIN OVERBURDEN

FIGURE 1

AVAILABLE FILL < 80%
NO ADC VARIANCE NECESSARY



SCALE
H: 1" = 1000'
V: 1" = 100'

BACKFILLING & GRADING
THICK AND THIN OVERBURDEN

FIGURE 2

Evaluations of post-mining surface configuration and drainage pattern involve subjective professional judgments that must be custom-tailored to approximate the terrain at any given mine. The responsible regulatory authority is best equipped to determine the sufficiency of overburden to restore AOC in its own jurisdiction on a case-by-case basis. For these reasons OSM believes it is preferable to define "thin overburden" and "thick overburden" in a way so as to conform with the standards of the Act, while giving the regulatory authority sufficient discretion to apply these standards in a sound professional manner to the diverse conditions which prevail at individual mines in each particular State.

One commenter supported OSM's deletion of the numerical standards for thin and thick overburden and the rationale that no set of rigid numerical standards could possibly apply to all types of terrain. Another commenter supported OSM's functional approach to defining thin or thick overburden and deleting the numerical limitations of the 1979 regulations. The latter commenter also claimed that section 515(b)(3) of the Act provides all the guidance regulators can be given, and that OSM should adopt that explanation in order to avoid excessive detail in the performance standards.

Another commenter objected to deleting the numerical limitations contained in the 1979 regulations for determining what constitutes thin and thick overburden. This commenter asserted that OSM's proposed rule failed to justify deletion of the 1979 standards because OSM had not presented data showing these standards to be unworkable. The commenter claimed that such data is what the Court of Appeals had in mind in remanding the 1983 regulations on thin and thick overburden.

As discussed earlier, a precise 20% numerical limit calculated from a comparison of pre and post mining volumes is an impractical test for determining the existence of a thin or thick overburden exemption because such a percentage limit cannot always accommodate the diversity of surface configurations and drainage patterns to which the final rule applies. The appropriateness of a thin or thick exemption from the requirement to return to AOC must instead be evaluated on the ability of available overburden, following backfilling and grading, to return the surface configuration of the reclaimed land to that closely resembling the surface configuration of the land prior to mining

and to blend into the drainage patterns of the surrounding terrain.

Another commenter proposed that the thin overburden minimum standards be revised to include overburdens which are "thin" because of the removal of noncoal minerals by other operators prior to coal extraction. The commenter asserted that coal mining operations that follow noncoal mineral removal should not be excluded from the relaxed original contour reclamation requirements available to other surface coal mining operations where the overburden is naturally thin.

OSM's rules do not require the excavation of additional pits for the sole purpose of obtaining material to backfill the original pit. A situation such as described by the commenter should be evaluated under the previously mined area provisions of § 816.106, since, presumably, the noncoal mining operation would not be a "surface coal mining operation subject to the standards of the Act."

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

Final § 816.104(b) contains the performance standards that apply where thin overburden, as defined in § 816.104(a), occurs within the permit area. The section requires the permittee at a minimum to (1) use all spoil and other waste materials available from the entire permit area to attain the lowest practicable grade, but not more than the angle of repose; and (2) meet the general backfilling and grading requirements of 30 CFR 816.102 (a)(2) through (j).

The performance standards in § 816.104(b) (1) and (2) are identical to those adopted by OSM in 1983 (48 FR 23369, May 24, 1983) and are identical to those proposed. They will complement the general backfilling and grading performance standards in § 816.102. Section 816.104(b)(1) implements the thin overburden exemption found at section 515(b)(3) of the Act, while § 816.104(b)(2) stipulates that all of the general requirements for backfilling and grading of § 816.102 are applicable except for § 816.102(a)(1), which requires the restoration of AOC, and § 816.102(k), which provides exemptions, including the thin overburden exemption that do not apply. Thus, the only practical difference between the general performance standards in § 816.102 and those for thin overburden in § 816.104(b) (1) and (2) is that the latter section establishes priority for the use of limited spoil and waste material in reclamation.

A commenter expressed concern about the requirement to place spoil so as to achieve the lowest practicable

grade in §§ 816.104(b) and 816.105(b). The commenter interpreted lowest practicable grade to mean flat and pointed out that flat land may reduce landscape diversity, which reduces wildlife habitat, and may be geomorphically incompatible with upstream and downstream drainage characteristics. The commenter stated that § 515(b)(3) of the Act has a built-in contradiction (i.e., requires spoil be backfilled to "the lowest practicable grade" in order to achieve "an ecologically sound land use compatible with the surrounding region"). The commenter wanted the regulations to resolve this conflict and require backfilling in a manner compatible with the approved postmining land use and surrounding undisturbed land.

OSM agrees that "flat land" may not resemble the general configuration of the land prior to mining or complement the drainage pattern of the surrounding terrain. Nevertheless, the provisions of § 816.104(b) and 105(b), as taken from section 515(b)(3) of the Act, require the backfilled area to attain the lowest practicable grade, but not more than the angle of repose. The phrase "lowest practicable grade" does not require flat land. It requires the lowest grade that is compatible with the surrounding terrain. In describing reclamation in a thin overburden situation, Congress indicated that the final regrading of the mine site should resemble the original landscape. H.R. No. 95-218, 95th Cong., 1st Sess. 103 (1977). Thus, the regulations already do what the commenter wishes them to do.

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

Final § 816.105(b) contains the performance standards that apply where thick overburden, as defined in § 816.105(a), occurs within the permit area.

Where the reclamation plan indicates the occurrence of thick overburden, § 816.105(b) requires the permittee at a minimum to (1) restore the approximate original contour and then use the remaining spoil and other waste materials to attain the lowest practicable grade, but not more than the angle of repose; (2) meet the general backfilling and grading requirements of 30 CFR 816.102(a)(2) through (j); and (3) dispose of any excess spoil in accordance with 30 CFR 816.71 through 816.74.

The performance standards in § 816.105(b)(1) through (3) are identical to those adopted by OSM in 1983 (48 FR 23369, May 24, 1983), and as proposed. They complement the general backfilling

and grading performance standards in § 816.102. Section 816.105(b)(1) implements the thick overburden exemption found at section 515(b)(3) of the Act, while § 816.105(b)(2) provides that all of the general requirements for backfilling and grading of § 816.102 are applicable. Section 816.105(b)(3) references the former regulations governing the disposal of excess spoil, and ensures that all spoil and other waste materials that would exceed the angle of repose are disposed of in accordance with the requirements of the Act.

The only practicable differences between the general performance standards in § 816.102 and those for thick overburden in § 816.105(b) are that under the latter (1) after AOC is restored the permittee may continue to use any remaining spoil and other waste materials to attain the lowest practicable grade, but not more than the angle of repose; and (2) the permittee must dispose of any excess spoil in accordance with §§ 816.71 through 816.74.

I. Sections 816.133(d) and 817.133(d) AOC Variances

Final § 816.133(d), which is identical to proposed § 817.133(d), contains criteria for granting a variance from the requirement to restore disturbed areas to their approximate original contour. Included in paragraph (d)(1) is the stipulation that the variance be granted in accordance with § 785.16, thus limiting such variances to steep slope areas. Final § 785.16 renders the previous suspension of § 816.133(d) void, as it was based upon the suspension of former § 785.16.

A commenter recommended that § 816.133(d) be further clarified by adding language to limit its application to steep slope mining operations.

OSM disagrees. There is no need for additional language in § 816.133(d) to clarify that the section is limited in applicability to steep slope mining operations. That fact is indicated by the cross-reference to § 785.16 found at § 816.133(d)(1). Surface coal mining operations which qualify for a variance from AOC requirements under this section are obligated to adhere to § 785.16 which limits variances for steep slope operations.

III. Procedural Matters

A. Effect in Federal Program States and on Indian Lands

The rule applies through cross-referencing to those States with Federal programs. This includes California, Georgia, Idaho, Massachusetts,

Michigan, North Carolina, Oregon, Rhode Island, South Dakota, Tennessee, and Washington. The Federal programs for these States appear at 30 CFR parts 905, 910, 912, 921, 922, 933, 937, 939, 941, 942, and 947, respectively. The rule also applies, through cross-referencing, to Indian lands under the Federal program for Indian lands as provided in 30 CFR part 750.

B. Effect on State Programs

Following promulgation of this final rule, OSM will evaluate permanent State regulatory programs approved under section 503 of the Act 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.

C. Federal Paperwork Reduction Act

This rule does not contain collections of information which require approval by the Office of Management and Budget under 44 U.S.C. 3501 *et seq.*

D. Executive Order 12291 and Regulatory Flexibility Act

The Department of the Interior has determined that the proposed rule is not a major rule under the criteria of Executive Order 12291 (February 17, 1981), and certifies that it will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). The rule would affect a relatively small number of surface coal mining operations. The rule does not distinguish between small and large entities. The economic effects of the proposed rule are estimated to be minor, and no incremental economic effects are anticipated as a result of the rule.

E. National Environmental Policy Act

OSM has prepared environmental assessments and has made a finding that the final rules will not significantly affect the quality of the human environment under section 102(2)(C) of the National Environmental Policy Act of 1969, 42 U.S.C. 4332(2)(C). The environmental assessments are on file in the OSM Administrative Record, room 5131, 1100 L Street, NW., Washington, DC.

F. Agency Approval

Section 516(a) requires that, with regard to rules directed toward the surface effects of underground mining, OSM must obtain written concurrence from the head of the department which

administers the Federal Mine Safety and Health Act of 1977, the successor to the Federal Coal Mine Health and Safety Act of 1969. OSM has obtained the written concurrence of the Assistant Secretary for Mine Safety and Health, U.S. Department of Labor.

G. Author

The final author of this rule is Mr. Dennis M. Hunter, Jr., Chief, Research and Technical Standards Branch, Office of Surface Mining Reclamation and Enforcement.

List of Subjects

30 CFR Part 761

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

30 CFR Part 780

Reporting and recordkeeping requirements, Surface mining.

30 CFR Part 784

Reporting and recordkeeping requirements, Underground mining.

30 CFR Part 785

Reporting and recordkeeping requirements, Surface mining, Underground mining.

30 CFR Part 816

Environmental protection, Reporting and recordkeeping requirements, Surface mining.

30 CFR Part 817

Environmental protection, Reporting and recordkeeping requirements, Underground mining.

Accordingly, 30 CFR Parts 761, 780, 784, 785, 816 and 817 are amended as set forth below:

Dated: October 21, 1991.

David O'Neal,

Assistant Secretary—Land and Minerals Management.

PART 761—AREAS DESIGNATED BY ACT OF CONGRESS

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

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

§ 761.5 [Amended]

2. Section 761.5 is amended by removing from the definition of Significant recreational, timber, economic, or other values incompatible with surface coal mining operations the

phrase "beyond an operator's ability to repair or restore."

PART 780—SURFACE MINING PERMIT APPLICATIONS—MINIMUM REQUIREMENT FOR RECLAMATION AND OPERATION PLAN

3. The authority citation for part 780 continues to read as follows:

Authority: Pub. L. 95-87, 30 U.S.C. 1201 *et seq.*, as amended; sec. 115 of Pub. L. 98-146, 30 U.S.C. 1257; 16 U.S.C. 470 *et seq.*; and Pub. L. 100-34.

§ 780.14 [Amended]

4. Section 780.14 paragraph (c) is amended by adding a comma and the citation "816.74(c)" after the citation "816.73(c)" in the first sentence.

§ 780.35 [Amended]

5. Section 780.35 paragraph (b) introductory text is amended by adding the words "except for the disposal of excess spoil on pre existing benches," to the beginning of the sentence.

PART 784—UNDERGROUND MINING PERMIT APPLICATIONS—MINIMUM REQUIREMENTS FOR RECLAMATION AND OPERATION PLAN

6. The authority citation for part 784 continues to read as follows:

Authority: Pub. L. 95-87, 30 U.S.C. 1201 *et seq.*, as amended; sec. 115 of Pub. L. 98-146, 30 U.S.C. 1257; 16 U.S.C. 470 *et seq.*; and Pub. L. 100-34.

§ 784.23 [Amended]

7. Section 784.23 paragraph (c) is amended by adding a comma and the term "817.74(c)" after the term "817.73(c)" in the first sentence.

PART 785—REQUIREMENTS FOR PERMITS FOR SPECIAL CATEGORIES OF MINING

8. the authority citation for part 785 is revised to read as follows:

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

§ 785.16 [Amended]

9. The suspension of § 785.16, published in the Federal Register of November 20, 1986 (51 FR 41961), is removed effective January 16, 1992.

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

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

(a) The regulatory authority may issue a permit for non-mountaintop removal, steep slope, surface coal mining and

reclamation operations which includes a variance from the requirements to restore the disturbed areas to their approximate original contour that are contained in §§ 816.102, 816.104, 816.105, and 816.107, or 817.102 and 817.107 of this chapter. * * *

PART 816—PERMANENT PROGRAM PERFORMANCE STANDARDS—SURFACE MINING ACTIVITIES

11. The authority citation for part 816 continues to read as follows:

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

§ 816.74 [Amended]

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

§ 816.74 Disposal of excess spoil: Preexisting benches.

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

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

(c) The fill shall be designed and constructed using current, prudent engineering practices. The design will be certified by a registered professional engineer. The spoil shall be placed on the solid portion of the bench in a controlled manner and concurrently compacted as necessary to attain a long term static safety factor of 1.3 for all portions of the fill. Any spoil deposited on any fill portion of the bench will be treated as excess spoil fill under § 816.71.

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

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

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

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

(4) If the disposal area contains springs, natural or manmade water

courses, or wet weather seeps, the fill design shall include diversions and underdrains as necessary to control erosion, prevent water infiltration into the fill, and ensure stability.

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

(f) Permanent impoundments may not be constructed on preexisting benches backfilled with excess spoil under this regulation.

(g) Final configuration of the backfill must be compatible with the natural drainage patterns and the surrounding area, and support the approved postmining land use.

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

§ 816.81 Coal mine waste: General Requirements.

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

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

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

16. Section § 816.101 is added to read as follows:

§ 816.101 Backfilling and grading: Time and distance requirements.

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

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

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

(3) Other surface mining methods. In accordance with the schedule established by the regulatory authority. For States with approved State programs, schedules are subject to the State program approval process.

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

17. Section 816.104 is revised to read as follows:

§ 816.104 Backfilling and grading: Thin overburden.

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

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

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

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

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

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

18. Section 816.105 is revised to read as follows:

§ 816.105 Backfilling and grading: Thick overburden.

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

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

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

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

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

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

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

§ 816.133 [Amended]

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

PART 817—PERMANENT PROGRAM PERFORMANCE STANDARDS—UNDERGROUND MINING ACTIVITIES

20. The authority citation for part 817 continues to read as follows:

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

§ 817.74 [Amended]

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

§ 817.74 Disposal of excess spoil: Preexisting benches.

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

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

(c) The fill shall be designed and constructed using current, prudent engineering practices. The design will be certified by a registered professional engineer. The spoil shall be placed on

the solid portion of the bench in a controlled manner and concurrently compacted as necessary to attain a long term static safety factor of 1.3 for all portions of the fill. Any spoil deposited on any fill portion of the bench will be treated as excess spoil fill under § 817.71.

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

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

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

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

(4) If the disposal area contains springs, natural or manmade water courses, or wet weather seeps, the fill design shall include diversions and underdrains as necessary to control erosion, prevent water infiltration into the fill, and ensure stability.

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

(f) Permanent impoundments may not be constructed on preexisting benches backfilled with excess spoil under this regulation.

(g) Final configuration of the backfill must be compatible with the natural drainage patterns and the surrounding area, and support the approved postmining land use.

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

§ 817.81 Coal mine waste: General requirements.

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

23. Section 817.89 is amended by removing paragraph (d).

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

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