

that producers whose milk has long been associated with the Southern Illinois-Eastern Missouri marketing area will continue to benefit from pooling and pricing under the order.

It is hereby found and determined that thirty days' notice of the effective date hereof is impractical, unnecessary and contrary to the public interest in that:

(a) The suspension is necessary to reflect current marketing conditions and to assure orderly marketing conditions in the marketing area, in that such rule is necessary to permit the continued pooling of the milk of dairy farmers who have historically supplied the market without the need for making costly and inefficient movements of milk;

(b) This suspension does not require of persons affected substantial or extensive preparation prior to the effective date; and

(c) Notice of proposed rulemaking was given interested parties and they were afforded opportunity to file written data, views or arguments concerning this suspension. One comment letter supporting the proposed suspension was received.

Therefore, good cause exists for making this order effective less than 30 days from the date of publication in the **Federal Register**.

List of Subjects in 7 CFR Part 1032

Milk marketing orders.

For the reasons set forth in the preamble, the following provision in Title 7, Part 1032, is amended as follows:

PART 1032—MILK IN THE SOUTHERN ILLINOIS-EASTERN MISSOURI MARKETING AREA

1. The authority citation for 7 CFR Part 1032 continues to read as follows:

Authority: Secs. 1-19, 48 Stat. 31, as amended; 7 U.S.C. 601-674.

§ 1032.7 [Suspended in part]

2. In § 1032.7(c), the words "each of", the letter "s" at the end of the word "months", and the words "through January" and "for the months of February", are suspended for the period of January 1, 1995, through January 31, 1995.

Dated: January 27, 1995.

Patricia Jensen,

Acting Assistant Secretary, Marketing and Regulatory Programs.

[FR Doc. 95-2447 Filed 1-31-95; 8:45 am]

BILLING CODE 3410-02-P

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 926

Montana Regulatory Program

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

ACTION: Final rule; approval of amendment.

SUMMARY: OSM is approving, with certain exceptions and additional requirements, a proposed amendment to the Montana regulatory program (hereinafter referred to as the "Montana program") under the Surface Mining Control and Reclamation Act of 1977 (SMCRA). Montana proposed revisions to statutes pertaining to ownership and control of operations, violation history updates, notices of intent for prospecting, and consent to surface mining by surface owner. The amendment is intended to revise the Montana program to be consistent with the corresponding Federal regulations and SMCRA, improve operational efficiency, and comply with a decision by the State Supreme Court.

EFFECTIVE DATE: February 1, 1995.

FOR FURTHER INFORMATION CONTACT: Guy V. Padgett, Telephone: (307) 261-5776.

SUPPLEMENTARY INFORMATION:

I. Background on the Montana Program

On April 1, 1980, the Secretary of the Interior conditionally approved the Montana program. General background information on the Montana program, including the Secretary's findings, the disposition of comments, and conditions of approval of the Montana program can be found in the April 1, 1980, **Federal Register** (45 FR 21560). Subsequent actions concerning Montana's program and program amendments can be found at 30 CFR 926.15 and 926.16.

II. Proposed Amendment

By letters dated June 16 and July 28, 1993 (Administrative Record No. MT-11-01), Montana submitted a proposed amendment to its program pursuant to SMCRA.

Montana submitted the proposed amendment in response to statutory changes adopted by the Montana 1993 Legislature regarding notices of intent for "prospecting," ownership and control provisions, violation history updates, surface owner consent, and editorial changes. OSM announced

receipt of the proposed amendment in the August 27, 1993, **Federal Register** (58 FR 45303), provided an opportunity for a public hearing or meeting on its substantive adequacy, and invited public comment on its adequacy (Administrative Record No. MT-11-09). Because no one requested a public hearing or meeting, none was held. The public comment period ended September 27, 1993.

During its review of the amendment, OSM identified concerns relating to the proposed deletion of Montana Code Annotated (MCA) 82-4-224 concerning surface owner consent and the proposed provisions of MCA 82-4-226(8) concerning coal exploration ("prospecting") under notices of intent. OSM notified Montana of these concerns by letter dated January 19, 1994 (Administrative Record No. MT-11-18).

Montana responded in a letter dated July 28, 1994 (Administrative Record No. MT-11-19) by submitting additional explanatory information for the two statutory provisions noted above and concerning MCA 82-4-203 (definitions).

Based upon the additional explanatory information for the proposed program amendment submitted by Montana, OSM reopened the public comment period in the August 11, 1994, **Federal Register** (59 FR 41262; Administrative Record No. MT-11-20). The public comment period ended on August 26, 1994.

III. Director's Findings

As discussed below, the Director in accordance with SMCRA and 30 CFR 732.15 and 732.17 finds, with certain exceptions and additional requirements, that the proposed program amendment submitted by Montana on June 16 and July 28, 1993, and as clarified by it on July 28, 1994, is no less effective in meeting SMCRA's requirements than the corresponding Federal regulations and no less stringent than SMCRA. Accordingly, the Director approves the proposed amendment, with certain exceptions and additional requirements.

1. Nonsubstantive Revisions to Montana's Statutes

Montana proposed revisions to the following previously-approved statutes that are nonsubstantive in nature and consist of minor editorial, punctuation, or grammatical changes (corresponding Federal regulation and/or SMCRA provisions are listed in parentheses): 82-4-203, MCA, subsections (14), (16), (21), (23), (29), (34), (35), and (36) (SMCRA Section 701, 301 CFR 700.5 & 701.5), definitions;

82-4-226, MCA, subsections (2), (3), (5), and (6) (SMCRA Section 512 and 30 CFR Part 732), coal exploration ("prospecting") permits and notices of intent; and

82-4-227, MCA, subsections (1), (2), (3), (7), (8), and (9) (SMCRA Section 510), permit approval/denial.

Because the proposed revisions to these previously-approved statutory provisions are nonsubstantive in nature, the Director finds that these proposed Montana statutes are no less effective in meeting SMCRA's requirements than the Federal regulations and no less stringent than SMCRA. The Director approves these proposed statutes.

2. Unintentional Substantive Revision to 82-4-227, MCA, subsection (10)

Montana proposed a revision to 82-4-227(10), MCA, that the State labels, and presumably intended, as a nonsubstantive grammatical change. The provision is proposed to be revised, in part, as follows:

A permit or major permit revision for a strip- or underground-coal-mining operation may not be issued unless the applicant has affirmatively demonstrated by its coal conservation plan that no failure to conserve coal will not occur.

The last part of this proposal, by requiring the conservation plan to demonstrate that no failure to conserve coal will not occur, would require the conservation plans to demonstrate that all such failures will occur. Such a revision would reverse the meaning of the existing provision, which requires the conservation plan to demonstrate that no failure to conserve coal will occur.

This proposed requirement would contradict one purpose of the Montana statute as stated at MCA 82-4-202(g): "[i]t is the declared policy of this state and its people to * * * prevent the failure to conserve coal." For this reason, OSM believes that the proposal represents an unintended grammatical error, and that Montana either (1) meant to delete the word "no" in the phrase "* * * that no failure to conserve coal * * *" or (2) did not mean to add the word "not" in the phrase "* * * failure to conserve coal will not occur." Based on this believe, the Director is approving the proposed provision, with the understanding that the coal conservation plan must affirmatively demonstrate that failure to conserve coal will be prevented. The Director is also requiring Montana to further revise this provision to clarify this intent.

3. MCA 82-4-224, Consent or Waiver by Surface Owner

Montana proposes to repeal statutory Section 82-4-224, MCA, which provides that:

[I]n those instances in which the surface owner is not the owner of the mineral estate proposed to be mined by strip-mining operations, the application for a permit shall include the written consent or a waiver by the owner or owners of the surface lands involved to enter and commence strip-mining operations on such land, except that nothing in this section applies when the mineral estate is owned by the federal government in fee or in trust for an Indian tribe.

Montana proposes this action (effective October 1, 1993) in accordance with a decision in the case of *Western Energy Co. v. Genie Land Co.*, 227 Mont. 74, 737 P.2d 478 (1987). In that case the Montana Supreme Court found the statutory section, and any rules adopted for the implementation thereof, to be unconstitutional and in violation of the Montana constitution, in that it permitted a taking without due process, permitted the taking of private property without just compensation, and permitted the impairment of the obligation of a contract. This statutory provision was originally approved as a counterpart provision to Section 510(b)(6) of SMCRA (45 FR 21560; April 1, 1980; see Administrative Record No. MT-1, Appendix C).

While Montana has repealed this statutory provision, it continues to provide regulations at ARM 26.4.303(15) and 26.4.405(6)(k) that impose requirements which are substantively equivalent to those imposed by Section 510(b)(6) of SMCRA. SMCRA Section 510(b)(6) requires that in cases where the private mineral estate has been severed from the private surface estate, no permit shall be approved unless the application demonstrates, and the regulatory authority finds, that the applicant has submitted to the regulatory authority either (1) the written consent of the surface owner to coal extraction by surface mining, (2) a conveyance that expressly grants or reserves the right to coal extraction by surface mining, or (3) if the conveyance does not expressly grant the right to coal extraction by surface mining, the surface-subsurface legal relationship shall be determined in accordance with State law.

In cases where the mineral and surface estates are severed, ARM 26.4.303(15) requires each application to contain either (1) a written consent by the surface owner to mineral extraction by strip mining, (2) a conveyance that expressly grants or reserves the right to

mineral extraction by strip mining, or (3) if the conveyance does not expressly grant the right to mineral extraction by strip mining, documentation that under Montana law the applicant has the legal right to mineral extraction by strip mining. In those same cases (where the mineral and surface estates are severed), ARM 26.4.405(6)(k) provides that the Department of State Lands (DSL) may not approve a permit unless the application demonstrates, and DSL's findings confirm, that the applicant has submitted the documentation required by ARM 26.4.303.

In its letter of January 19, 1994 (Administrative Record No. MT-11-18), OSM requested that Montana address (1) whether it intended, in response to the Montana Supreme Court decision discussed above, to propose the repeal of ARM 26.4.303(15) and 26.4.405(6)(k), and (2) whether Montana retained the statutory authority to promulgate and enforce those regulations, given the repeal of 82-4-224, MCA.

In its response of July 28, 1994, (Administrative Record No. MT-11-19), DSL's Chief Legal Counsel states that the statutory authority for ARM 26.4.303(15) lies in 82-4-222(1)(d), MCA, which requires that a permit application state the source of the applicant's legal right to mine the mineral on the land affected by the permit. Montana further states that the statutory authority for ARM 26.4.405(6)(k) lies in 82-4-231(4), MCA; that provision requires DSL to determine whether each application is administratively complete, which means, among other things, that it contains information addressing each application requirement in 82-4-222, MCA, and the rules implementing that section. Montana further states that since neither of the two regulatory provisions is based on the repealed statutory section (82-4-224, MCA), Montana has no plans to repeal those regulatory provisions.

In its review of this proposed amendment, OSM noted that the Montana program also contains, at MCA 82-4-203(35) and (36), statutory definitions of "waiver" and "written consent," and found no use of these terms other than in the repealed section 82-4-224, MCA. In its January 19, 1994, letter (Administrative Record No. MT-11-18), OSM requested that Montana address the meaning of these terms in the absence of the repealed provision. In its July 28, 1994, response (Administrative Record No. MT-11-19), DSL's Chief Legal Counsel states that these statutory definitions no longer serve any purpose within the statute, but that their presence poses no

problem for the administration of the statute.

Based on Montana's representations in its July 28, 1994, response (Administrative Record No. MT-11-19), OSM finds that the Montana program contains provisions at ARM 26.4.303(15) and 26.4.405(6)(k) that are no less stringent than the requirements of Section 510(b)(6) of SMCRA, and that Montana has adequate statutory authority for the promulgation and enforcement of these regulatory provisions. Therefore the Director finds that the proposed repeal of 82-4-224, MCA, does not render the Montana program any less stringent than SMCRA, and is approving the proposed repeal of that section.

4. MCA 82-4-226(1), Requirement for Prospecting Permit

Montana proposes to delete the introductory phrase "[o]n and after March 16, 1973," from the beginning of this subsection, which (with an exception discussed in Finding No. 5 below) makes it unlawful to prospect on land not included in a valid strip-mining or underground-mining permit without the possession of a valid prospecting permit. Under the proposed revision, the requirement for a prospecting permit would not be limited to the period after March 16, 1973.

Since any current or future prospecting would be subject to this subsection either with or without this time-limiting introductory phrase, the Director finds this proposed revision to be nonsubstantive in nature, and thus that the proposed revised statute is no less effective in meeting SMCRA's requirements than the Federal regulations and no less stringent than SMCRA. The Director approves the proposed revision.

5. MCA 82-4-226(1) and (8), Prospecting Under Notice of Intent

At MCA 82-4-226(1), Montana proposes an exception to the provision that it is unlawful to conduct prospecting operations without a prospecting permit; the exception proposed is provided in proposed new subsection MCA 82-4-226(8). Proposed subsection MCA 82-4-226(8) would provide as follows:

(8) Prospecting that is not conducted in an area designated unsuitable for coal mining pursuant to 82-4-227 or 82-4-228 and that is not conducted for the purpose of determining the location, quality, or quantity of a natural mineral deposit is not subject to subsections (1) through (7). However, a person who conducts this prospecting shall file with the department a notice of intent to prospect, containing the information required

by the department, before commencing prospecting operations. If this prospecting substantially disturbs the natural land surface, it must be conducted in accordance with the performance standards of the department's rules regulating the conduct and reclamation of prospecting operations that remove coal. The department may inspect these prospecting and reclamation operations at any reasonable time.

OSM notes that subsections (1) through (7) of MCA 82-4-226 currently specify the requirements for prospecting permits, bonds, and reports; these requirements currently apply to all prospecting operations.

Montana is not at this time proposing as a program amendment any regulations to implement this proposed statutory provision. In its July 28, 1994, letter (Administrative Record No. MT-11-19), Montana expressed its intent to promulgate such rules in the near future. Further, OSM is aware that Montana has in fact initiated State rulemaking proceedings to promulgate such rules. Because Montana is not now proposing regulations to implement these proposed statutory revisions, but has initiated efforts to do so, OSM has reviewed the proposed statutory provisions only in comparison to the requirements of SMCRA, where they exist, rather than in comparison to the requirements of the implementing Federal regulations. Therefore, the Director notes here that, to the extent he approves these statutory provisions (as discussed below), Montana may not implement these statutory provisions concerning prospecting under notices of intent, until such time as Montana proposes, and OSM approves, State regulations that (in conjunction with these statutory provisions) are no less stringent than SMCRA Section 512 and no less effective in achieving those requirements than the implementing Federal regulations at 30 CFR Part 772.

OSM notes that under MCA 82-4-203(20), "mineral" means coal and uranium. OSM also notes that it has codified at 30 CFR 926.16(f) a requirement that Montana amend its definition of the term "prospecting" to be no less effective in implementing SMCRA's requirements than the Federal definition of the term "coal exploration."

a. Prospecting (Coal Exploration) Under Notices of Intent

Section 512(a) of SMCRA requires that each State and Federal program include a requirement that coal exploration operations which substantially disturb the natural land surface be conducted in accordance with exploration regulations issued by

the regulatory authority. Moreover, section 512(a) of SMCRA provides that such regulations must include, at a minimum: (1) The requirement that prior to conducting any exploration, a person must file with the regulatory authority notice of intention to explore (including a description of the proposed area and the proposed time period); and (2) provisions of reclamation in accordance with the performance standards of SMCRA Section 515. Section 512(d) requires that no operator shall remove more than 250 tons of coal pursuant to an exploration permit without the specific written approval of the regulatory authority. As noted above, OSM has promulgated regulations implementing these statutory provisions at 30 CFR Part 772; but Montana's proposed statutory provisions are being reviewed in comparison to the statutory requirements of SMCRA rather than to the Federal regulatory requirements.

The proposed Montana statute would prohibit prospecting (coal exploration) under notices of intent on lands designated as unsuitable for mining, and would additionally prohibit prospecting under notices of intent if the prospecting is conducted for the purpose of determining the location, quality, or quantity of a coal deposit, no matter on what lands or the degree of disturbance. There is a prohibition against exploring under a notice of intent on land designated as unsuitable for mining in the Federal regulations at 30 CFR 772.11(a) and 772.12(a), but there is no Federal prohibition against exploring under a notice of intent when the purpose is to determine the location, quality, or quantity of a coal deposit. Under SMCRA Section 505(b), no State law which provides for more stringent land use and environmental controls than SMCRA shall be construed as being inconsistent with SMCRA.

However, SMCRA Section 512(d) explicitly prohibits the removal of more than 250 tons of coal pursuant to exploration activities without the specific written approval of the regulatory authority. OSM interprets this requirement for "specific written approval," together with the title of SMCRA Section 512 ("Coal Exploration Permits"), as a requirement that a coal exploration permit be obtained for exploration activities that will remove more than 250 tons of coal (see 48 FR 40622, 40622, 40626; September 8, 1983). The proposed Montana provision does not correspondingly prohibit prospecting under notices of intent when more than 250 tons of coal will be removed. In its letter of July 28, 1994 (Administrative Record No. MT-11-19),

Montana argues that, while it would be legally possible under its proposed statute for a drilling operation conducted to characterize or overburden or an overburden sampling pit to remove more than 250 tons of coal, it is extremely improbable that such an operation would do so, and further that no prospecting operation in Montana has ever done so. However, SMCRA Section 512(d) is a clear and absolute requirement. Montana's proposed provision fails to prohibit the removal of more than 250 tons of coal by prospecting (exploration) activities under a notice of intent, and thus does not contain all applicable provisions of SMCRA Section 512, and hence is inconsistent with SMCRA.

In summary, proposed 82-4-226(1) and the first two sentences of proposed 82-4-226(8), MCA, are as stringent as the provisions of SMCRA in prohibiting prospecting activities under notices of intent on lands designated as unsuitable for mining, and more stringent in prohibiting such activities on any lands when the purpose is to determine the location, quality, or quantity of a coal deposit. However, these proposed Montana provisions are less stringent than SMCRA Section 512(d) in failing to prohibit prospecting operations under a notice of intent when more than 250 tons of coal will be removed.

Based on the above discussion, the Director is approving proposed 82-4-226(1) and the first two sentences of proposed 82-4-226(8), MCA, with the following proviso: Montana may not implement these provisions until Montana has promulgated, and OSM has approved, State regulations to implement these statutory revisions, to be no less effective than 30 CFR Part 772 in meeting SMCRA's requirements. Further, the Director is requiring Montana to amend its program to prohibit prospecting activities under notices of intent when more than 250 tons of coal are to be removed.

b. Specification of Which Prospecting Activities Are Required To Meet Performance Standards and Specification of Applicable Performance Standards

As noted above, Montana proposes at MCA 82-4-226(8) that "[i]f this prospecting substantially disturbs the natural land surface, it must be conducted in accordance with the performance standards of the department's rules regulating the conduct and reclamation of prospecting operations that remove coal." Montana is not at this time proposing any definition of "substantially disturbs" although in its letter of July 28, 1994

(Administrative Record No. MT-11-19), Montana states its intention to do so in the near future. OSM notes that the existing Montana program at ARM 26.4, Subchapter 10, contains prospecting performance standards; however, the Montana program does not specify which of these are performance standards for prospecting operations that remove coal and which are not.

The existing Montana statute contains no requirement that prospecting operations be conducted in accordance with performance standards, and the statute as proposed for revision would contain no such requirement for prospecting conducted under a prospecting permit. The existing Montana rules at ARM 26.4 Subchapter 10 require all prospecting operations to meet specified performance standards; these performance standards apply even to prospecting that does not substantially disturb the natural land surface. This is more stringent than SMCRA Section 512(a), which only requires that coal exploration operations which substantially disturb the natural land surface be conducted under regulatory programs that include regulations requiring that all lands disturbed be reclaimed in accordance with the performance standards of SMCRA Section 515. However, Montana is not proposing to revise its statute so that not all prospecting operations would be regulated in the same way. In particular, not all prospecting would require a permit; and under the proposal, prospecting under a notice of intent would be required to be conducted in accordance with performance standards only if it substantially disturbs the natural land surface.

In order to be consistent with the proposed statute, Montana's performance standards at ARM 26.4 Subchapter 10 could no longer be interpreted to apply to all prospecting operations. As a result, the Montana program would contain no requirement that prospecting operations conducted under prospecting permits be conducted in accordance with performance standards if they substantially disturb the land surface. In its letter of July 28, 1994 (Administrative Record No. MT-11-19), Montana argues that under MCA 82-4-226(1) & (2), all prospecting operations under prospecting permits are subject to reclamation requirements and to bonding requirements. OSM has reviewed these provisions; they specify reclamation plan requirements for prospecting permit applications, and posting of performance bond before the permit is issued. While the posting of bond provides an economic incentive to

complete the approved reclamation plan, these Montana provisions do not provide a requirement that the prospecting be conducted in accordance with performance standards. In one example, if a defective permit is issued that does not address one or more performance standards, there would be no requirement for the prospecting operation to meet those missing performance standards. Additionally, prospecting operations conducted illegally (with neither a permit nor a notice) would not be required to meet performance standards.

The Federal provision of SMCRA Section 512(a) requires that all exploration that substantially disturbs the natural land surface be conducted in accordance with performance standard of SMCRA Section 515; this applies to both exploration under notices of intent and exploration under exploration permits. As noted above, OSM has promulgated regulations implementing these statutory provisions at 30 CFR Part 772 and at 30 CFR 701.5 (definition of the term "substantially disturb"); however, as noted above Montana's proposed statutory provisions are being reviewed only in comparison to the Federal statutory requirements of SMCRA where they exist.

In summary, both the SMCRA provision at Section 512(a) and the proposed Montana provision require adherence to performance standards by prospecting (exploration) operations conducted under notices of intent that substantially disturb the natural land surface; however, by referring to "performance standards * * * regulating * * * prospecting operations that remove coal," the Montana proposal is unclear regarding which performance standards are applicable, whereas the Federal provisions clearly specify the performance standards of SMCRA Section 515. Secondly, the Federal provisions further require adherence to performance standards for exploration operations conducted under exploration permits that substantially disturb the natural land surface. But the Montana program, as proposed to be revised, would contain no such requirement for prospecting operations conducted under prospecting permits that substantially disturb the natural land surface. OSM believes it is possible for Montana to remedy these deficiencies in promulgating implementing regulations.

Based on the above discussion, the Director is approving the third sentence of proposed 82-4-226(8), MCA, with the following proviso: Montana may not implement this provision until Montana has promulgated, and OSM has

approved, implementing State regulations that are no less effective in meeting SMCRA's requirements than 30 CFR Part 772 and 30 CFR 701.5.

c. Right of Entry of Inspect

As noted above, Montana proposes at MCA 82-4-226(8) that "[t]he department may inspect these prospecting and reclamation operations [i.e., prospecting under notices of intent] at any reasonable time."

SMCRA Section 512 does not directly address right of entry requirements for coal exploration operations. The Federal regulations at 30 CFR 840.12(a) require that State regulatory program have authorities that grant their representatives the right of entry to, upon, and through any coal exploration operation without advance notice and upon presentation of appropriate credentials. This right of entry is not limited to "reasonable times." At 30 CFR 840.12(b), the Federal regulations further require State program to have authority for their representatives to inspect any monitoring equipment or method of exploration and to have access to and copy any records required under the approved State program, at reasonable times without advance notice, upon presentation of appropriate credentials. Both paragraphs further provide that no search warrant is required for right of entry, except that a state may provide for its use with respect to entry into a building.

Montana's proposed provision, by providing right of entry to prospecting operations (under notices of intent) only at "reasonable times," would grant right of entry at fewer times than required by the Federal regulation. Further, Montana's proposal does not provide authority for inspection of monitoring equipment or prospecting methods, nor authority for access to and copying of any records required by the Montana program, for prospecting operations conducted under notices of intent. Nor does the proposal address the issue of warrants.

Based on the above discussion, the Director finds that, in regard to prospecting under notices of intent, the Montana proposal is less effective than the Federal regulations in implementing SMCRA's requirements. The Director is approving the last sentence of Montana's proposed statutory provision at MCA 82-4-226(8) except the word "reasonable." However, the Director is requiring Montana: (1) To amend this enacted provision to remove the word "reasonable;" (2) to amend this statutory provision, or otherwise amend its program, to provide authority for the inspection of monitoring equipment and

prospecting methods for prospecting conducted under notices of intent, and access to and copying of any records required by the Montana program, at any reasonable time without advance notice upon presentation of appropriate credentials; and (3) to provide for warrantless right of entry in a manner no less effective in achieving SMCRA's requirements than the Federal regulations at 30 CFR 840.12.

6. MCA 82-4-227(11), *Refusal of Permit; Scope of Operations on Which Violations Require Permit Denial*

Existing 82-4-227(11), MCA, requires that when information available to DSL indicates that strip- or underground-coal-mining operations owned or controlled by the applicant is currently in violation of certain specified Federal or State laws or rules, DSL shall not issue a permit or major revision until the applicant submits certain proofs regarding the abatement of those violations. Montana is proposing to revise this provision to add the same requirement for violations on strip- or underground-coal-mining operations owned or controlled by any person who owns or controls the applicant. Montana also proposes nonsubstantive editorial revisions to the provision.

SMCRA Section 510(c) requires that when specified violations exist on any surface coal mining operation owned or controlled by the applicant, the permit shall not be issued without submission of certain proofs regarding the abatement of those violations. The Federal regulations at 30 CFR 773.15(b)(1) interpret this requirement to include existing violations on any surface coal mining and reclamation operation owned or controlled by either the applicant or by any person who owns or controls the applicant.

Therefore both the Federal and the proposed Montana provisions require that permits be denied (without submission of certain proofs) for specified violations, not only on operations owned or controlled by the applicant, but additionally on operations owned or controlled by any person who owns or controls the applicant. Therefore the Director finds Montana's proposed addition of the phrase "or by any person who owns or controls the applicant" to be no less stringent than SMCRA Section 510(c) and no less effective in implementing those SMCRA requirements than the Federal regulations at 30 CFR 773.15(b)(1), and the Director is approving the proposed addition of the phrase.

7. MCA 82-4-227(11) & (12), *Refusal of Permit; Scope of Permitting Actions Subject to Denial*

Existing 82-4-227(11), MCA, requires that under the circumstances discussed in Finding No. 6 above, DSL shall not issue a "strip- or underground-coal-mining permit or major revision." Montana is proposing to revise this provision to require, under the specified circumstances, denial of a "strip- or underground-coal-mining permit or amendment, other than an incidental boundary revision." Similarly, existing 82-4-227(12), MCA, requires that when DSL finds (after opportunity for hearing) that the applicant owns or controls any strip- or underground-coal-mining operation which has demonstrated a pattern of willful violations (of specified character) of certain Federal or State laws, DSL shall not issue a "strip- or underground-coal-mining permit or major revision" until the applicant submits certain proofs regarding the abatement of violations. Montana is proposing to revise this provision to require, in those circumstances, denial of a "strip- or underground-coal-mining permit or amendment, other than an incidental boundary revision." Montana is also proposing nonsubstantive editorial revisions to this provision.

In both proposed provisions, Montana's revisions would have the effect of allowing the issuance of major revisions under the specified circumstances, but prohibit the issuance of "amendments," except that incidental boundary revisions could be issued.

OSM notes that under MCA 82-4-225, "amendments" are increases or decreases in the acreage to be affected under a permit; the same procedures required of new permits apply to amendments (except for incidental boundary revisions). Additionally, an existing provision of the Montana program, ARM 26.4.412(4)(a), prohibits approval of the transfer, sale, or assignment of permit rights under both sets of circumstances described above (current violations and patterns of violations).

SMCRA Section 510(c) and the Federal regulations at 30 CFR 773.15(b) prohibit the issuance of permits under both sets of specified circumstances, but do not address permit revisions. SMCRA Section 511, which specifies the requirements for permit revisions, does not prohibit the approval of permit revisions under the specified circumstances; and the Federal regulations at 30 CFR 773.15(b), 774.13, and 773.17 do not prohibit permit revision approval, but do prohibit the

approval of transfer, assignment, or sale of permit rights, under the specified circumstances. SMCRA Section 511(a)(3) and 30 CFR 774.13(d) provide that incidental boundary revisions do not require application for a new permit, and hence are not prohibited under the specified circumstances; conversely, those Federal provisions require that extensions to the permit area other than incidental boundary revisions require application for a new permit, which would subject such extensions to denial under SMCRA 510(c) and 30 CFR 773.15(b).

Thus under two sets of circumstances (existing violations on operations owned or controlled by the applicant or by any person who owns or controls the applicant, as discussed in Finding No. 6 above, or demonstrated pattern of violations by the applicant, as discussed above), both the Federal provisions and the proposed Montana provisions prohibit the issuance of new permits, extensions to the permit area other than incidental boundary revisions, and approval of the transfer, sale, or assignment of permit rights. And in those circumstances, both the Federal and the proposed Montana provisions would allow the approval or issuance of permit revisions.

Based on the above discussion, the Director finds that Montana's proposed revisions at MCA 82-4-227 (11) and 12 regarding the scope of permitting actions subject to denial are no less stringent than the scope of permitting actions subject to denial under SMCRA Section 510(c), and are no less effective than the scope of permitting actions subject to denial under the Federal regulations at 30 CFR 773.15(b), 774.13, and 773.17 in implementing those requirements of SMCRA. Therefore the Director is approving the proposed revisions.

8. MCA 82-4-227(13), Lands Designated by Congress as Unsuitable for Surface Coal Mining

Subject to valid existing rights, existing 82-4-227(13), MCA, prohibits strip- or underground-coal-mining operations "on private lands within the boundaries" of certain specified Federal land management areas designated by Congress (national park system, national wildlife refuge system, etc.). Montana proposes to revise this provision by deleting the word "private," so that it would read "on lands within the boundaries" of those areas (see Administrative Record No. MT-11-04). Montana also proposes a nonsubstantive editorial change to the provision.

SMCRA Section 552(e)(1) provides that, subject to valid existing rights, no

surface coal mining operations shall be permitted "on any lands within the boundaries" of the specified land management areas.

Montana's proposed revision, by removing the word which limited the applicability of the provision to only a specified subset of lands, would extend the applicability to all lands within the boundaries of the specified areas; this is the equivalent of the Federal provision, which is applicable to "any" lands within the specified boundaries. Therefore the Director finds that Montana's provision as revised is no less stringent than SMCRA Section 552(e)(1), and is approving the proposed revisions.

IV. Summary and Disposition of Comments

Following are summaries of all substantive written comments on the proposed amendment that were received by OSM, and OSM's responses to them.

1. Public Comments

OSM invited public comments on the proposed amendment, but none were received.

2. Federal Agency Comments

Pursuant to 732.17(h)(11)(i), OSM solicited comments on the proposed amendment from various Federal agencies with an actual or potential interest in the Montana program.

a. The Billings Area Office of the Bureau of Indian Affairs responded on August 11, 1993, with suggestions for additional editorial revisions (Administrative Record No. MT-11-06). The State Conservationist of the Soil Conservation Service (SCS) responded on August 18, 1993 (Administrative Record No. MT-11-08) with similar suggestions for additional editorial revisions.

Some of the instances where additional revision was suggested by these comments are interpreted by OSM as typographical errors in the preparation of this submittal. For instance, the second sentence of MCA 82-4-227(2) (introductory text) as contained in this submittal appears to be redundant of the last sentence and should be deleted. Similarly, 82-4-227(2)(d) as contained in this submittal has a typographical error in the parenthetical provision. OSM interprets these as typographical errors in the preparation of this submittal because they are not indicated as intentional proposed changes by strikeout or underline. These errors do not exist in the enacted statutes previously approved by OSM. Others of these

comments did address provisions that Montana does propose to revise; one of these items in BIA's comments has been addressed in Finding No. 2 above. BIA's and SCS's remaining suggestions will be forwarded to Montana for its consideration. However, except for the instance addressed in Finding No. 2, OSM does not find that any of the editorial imperfections identified in these agency comments render the proposed Montana statutes less stringent than SMCRA or less effective than the Federal regulations in meeting SMCRA's requirements.

b. The Mine Safety and Health Administration responded on August 12 and 26, 1993, that it did not find any apparent conflict with its regulations (Administrative Record Nos. MT-11-07 and MT-11-11).

c. The Office of Trust Responsibilities of the Bureau of Indian Affairs stated in a response dated on September 24, 1993, that they had no objection to the proposed amendment because they did not believe it would affect Indian Lands (Administrative Record No. MT-11-16).

d. The Montana State Office of the Bureau of Land Management responded on September 1, 1993 (Administrative Record No. MT-11-15), that it supports the proposed amendment, but offered no detailed comments.

e. Two agencies responded that they had no comments: U.S. Fish and Wildlife Service (August 26, 1993; Administrative Record No. MT-11-10); Bureau of Mines (August 30, 1993; Administrative Record Nos. MT-11-13 and MT-11-14).

3. Environmental Protection Agency (EPA) Concurrence and Comments

Pursuant to 30 CFR 732.17(h)(11)(ii), OSM is required to solicit the written concurrence of EPA with respect to those provisions of the proposed program amendment that relate to air or water quality standards promulgated under the authority of the Clean Water Act (33 U.S.C. 1251 *et seq.*) or the Clean Air Act (42 U.S.C. 7401 *et seq.*). None of the revisions that Montana proposed to make in its amendment pertain to air or water quality standards. Therefore, pursuant to 732.17(h)(11)(i), OSM solicited comments on the proposed amendment from EPA (Administrative Record No. MT-11-03). EPA responded on August 27, 1993, that it had no comments (Administrative Record No. MT-11-12).

4. State Historic Preservation Officer (SHPO) and the Advisory Council on Historic Preservation (ACHP)

Pursuant to 30 CFR 732.17(h)(4), OSM solicited comments on the proposed

amendment from the SHPO and ACHP (Administrative Record No. MT-11-03). Neither SHPO and ACHP responded to OSM's request.

V. Director's Decision

Based on the above findings, the Director approves, with certain exceptions and additional requirements, Montana's proposed amendment as submitted on June 16 and July 28, 1993, and as supplemented with additional explanatory information on July 28, 1994.

The Director does not approve, as discussed in Finding No. 5.c., the word "reasonable" in the last sentence of proposed MCA 82-4-226(8), concerning the right of entry to inspect prospecting operations under notices of intent.

The Director approves, as discussed in: Finding No. 1, proposed MCA 82-4-203 (14), (16), (21), (23), (29), (34), (35), and (36), concerning definitions; proposed MCA 82-4-226 (2), (3), (5), and (6), concerning coal exploration ("prospecting") permits and notices of intent; proposed MCA 82-4-227 (1), (2), (3), (7), (8), and (9), concerning permit approval/denial; Finding No. 3, proposed deletion of MCA 82-4-224, concerning surface owner consent; Finding No. 4, proposed MCA 82-4-226(1), concerning the requirement to obtain prospecting permits; Finding Nos. 6 and 7, proposed MCA 82-4-227 (11) and (12), concerning refusal of permitting actions for current violations or patterns of violations; and Finding No. 8, proposed MCA 82-4-227(13) concerning refusal of permit on lands designated as unsuitable for mining.

With the requirement that Montana further revise its program, the Director approves, as discussed in: Finding No. 2, proposed MCA 82-4-227(10) concerning permit issuance requirements for coal conservation plan, with the requirement that Montana further revise the provision to clarify that the coal conservation plan must affirmatively demonstrate that failure to conserve coal will be prevented; Finding No. 5.a., proposed MCA 82-4-226 (1) and (8) (first and second sentence) concerning prospecting under notices of intent, with the proviso that Montana may not implement these provisions until Montana promulgates and OSM approves State implementing regulations that in conjunction with these provisions are less stringent than SMCRA Section 512 and no less effective in implementing SMCRA Section 512 than the Federal regulations at 30 CFR Part 772, and with the requirement that Montana further revise its program to prohibit prospecting under notices of intent when more than

250 tons of coal are to be removed; Finding No. 5.b., proposed MCA 82-4-226(8) (third sentence) concerning performance standard compliance requirements for prospecting under notices of intent, with the proviso that Montana may not implement these provisions until Montana promulgates and OSM approves State implementing regulations that in conjunction with these provisions are no less stringent than SMCRA Section 512 and no less effective in implementing SMCRA Section 512 than the Federal regulations at 30 CFR Part 772 and 30 CFR 701.5; and Finding No. 5.c., proposed MCA 82-4-225 (1) and (8) (fourth [last] sentence) concerning right of entry to inspect prospecting operations under notices of intent, with the requirement that Montana further revise the provision to delete the word "reasonable," additionally revise its program to provide authority for the inspection of monitoring equipment and prospecting methods for prospecting conducted under notices of intent, and access to and copying of any records required by the Montana program, at any reasonable time without advance notice upon presentation of appropriate credentials, and additionally revise its program to provide for warrantless right of entry in accordance with 30 CFR 840.12 for prospecting operations conducted under notices of intent.

In accordance with 30 CFR 732.17(f)(1), the Director is also taking this opportunity to clarify in the required amendment section at 30 CFR 926.16 that, within 60 days of the publication of this final rule, Montana must either submit a proposed written amendment, or a description of an amendment to be proposed that meets the requirements of SMCRA and 30 CFR Chapter VII and a timetable for enactment that is consistent with Montana's established administrative or legislative procedures.

The Federal regulations at 30 CFR Part 926, codifying decisions concerning the Montana program, are being amended to implement this decision. This final rule is being made effective immediately to expedite the State program amendment process and to encourage States to bring their programs into conformity with the Federal standards without undue delay. Consistency of State and Federal standards is required by SMCRA.

Effect of Director's Decision

Section 503 of SMCRA provides that a State may not exercise jurisdiction under SMCRA unless the State program is approved by the Secretary. Similarly, 30 CFR 732.17(a) requires that any

alteration of an approved State program be submitted to OSM for review as a program amendment. Thus, any changes to the State program are not enforceable until approved by OSM. The Federal regulations at 30 CFR 732.17(g) prohibit any unilateral changes to approved State programs. In the oversight of the Montana program, the Director will recognize only the statutes, regulations and other materials approved by OSM, together with any consistent implementing policies, directives and other materials, and will require the enforcement by Montana of only such provisions.

VI. Procedural Determinations

1. Executive Order 12866

This rule is exempted from review by the Office of Management and Budget (OMB) under Executive Order 12866 (Regulatory Planning and Review).

2. Executive Order 12778

The Department of the Interior has conducted the reviews required by section 2 of Executive Order 12778 (Civil Justice Reform) and has determined that this rule meets the applicable standards of subsections (a) and (b) of that section. However, these standards are not applicable to the actual language of State regulatory programs and program amendments since each such program is drafted and promulgated by a specific State, not by OSM. Under sections 503 and 505 of SMCRA (30 U.S.C. 1253 and 1255) and the Federal regulations at 30 CFR 730.11, 723.15, and 732.17(h)(10), decisions on proposed State regulatory programs and program amendments submitted by the States must be based solely on a determination of whether the submittal is consistent with SMCRA and its implementing Federal regulations and whether the other requirements of 30 CFR Parts 730, 731, and 732 have been met.

3. National Environmental Policy Act

No environmental impact statement is required for this rule since section 702(d) of SMCRA (30 U.S.C. 1292(d)) provides that agency decisions on proposed State regulatory program provisions do not constitute major Federal actions within the meaning of section 102(2)(C) of the National Environmental Policy Act (42 U.S.C. 4332(2)(C)).

4. Paperwork Reduction Act

This rule does not contain information collection requirements that require approval by OMB under the Paperwork Reduction Act (44 U.S.C. 3507 *et seq.*).

5. *Regulatory Flexibility Act*

The Department of the Interior has determined that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). The State submittal that is the subject of this rule is based upon counterpart Federal regulations for which an economic analysis was prepared and certification made that such regulations would not have a significant economic effect upon a substantial number of small entities. Accordingly, this rule will ensure that existing requirements previously promulgated by OSM will be implemented by the State. In making the determination as to whether this rule would have a significant economic impact, the Department relied upon the data and assumptions for the counterpart Federal regulations.

VII. List of Subjects in 30 CFR 926

Intergovernmental relations, Surface mining, Underground mining.

Dated: January 26, 1995.

Charles E. Sandberg,

Acting Assistant Director, Western Support Center.

For the reasons set out in the preamble, Title 30, Chapter VII, Subchapter T of the Code of Federal Regulations is amended as set forth below:

PART 926—MONTANA

1. The authority citation for Part 926 continues to read as follows:

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

2. Section 926.15 is amended by adding paragraph (l) to read as follows:

§ 926.15 Approval of amendments to State regulatory program.

* * * * *

(l) With the exception of the word "reasonable" in the last sentence of MCA 84-4-226(8), concerning right of entry to inspect prospecting operations under notices of intent, revisions of the following statutes, as submitted to OSM on June 16 and July 28, 1993, and as supplemented with explanatory information on July 28, 1994, are approved effective February 1, 1995:

- 82-4-203, MCA, subsections (14), (16), (21), (23), (29), (34), (35), and (36), definitions;
- repeal of 82-4-224, MCA, surface owner consent;
- 82-4-226, MCA, subsections (1), (2), (3), (5), (6), and (8), prospecting permits and notices of intent
- 82-4-227, MCA, subsections (1), (2), (3), (7), (8), (9), (10), (11), (12), and (13), permit approval/denial criteria.

3. Section 926.16 is amended by revising the introductory paragraph, by adding paragraphs (g) through (j), and by removing the parenthetical at the end of the section to read as follows:

§ 926.16 Required program amendments.

Pursuant to 30 CFR 732.17(f)(1), Montana is required to submit to OSM by the specified date the following written, proposed program amendment, or a description of an amendment to be proposed that meets the requirements of SMCRA and 30 CFR Chapter VII and a timetable for enactment that is consistent with Montana's established administrative or legislative procedures.

* * * * *

(g) By April 3, 1995, Montana shall revise MCA 82-4-227(10), or otherwise modify its program, to require that no permit or major permit revision may be issued unless the coal conservation plan affirmatively demonstrates that failure to conserve coal will be prevented.

(h) By April 3, 1995, Montana shall revise MCA 82-4-226(8), or otherwise modify its program, to prohibit prospecting under notices of intent when more than 250 tons of coal are to be removed.

(i) By April 3, 1995, Montana shall revise MCA 82-4-266(8) to delete the word "reasonable" in the final sentence.

(j) By April 3, 1995, Montana shall revise MCA 82-4-226(8), or otherwise modify its program, to provide authority for the inspection of monitoring equipment and prospecting methods for prospecting conducted under notices of intent, and access to and copying of any records required by the Montana program on such prospecting operations, at any reasonable time without advance notice upon presentation of appropriate credentials, and to provide for warrantless right of entry for prospecting operations conducted under notices of intent, to be no less effective in meeting SMCRA's requirements than 30 CFR 840.12 (a) and (b).

[FR Doc. 95-2445 Filed 1-31-95; 8:45 am]

BILLING CODE 4310-05-M

DEPARTMENT OF DEFENSE

Office of the Secretary

32 CFR Part 199

RIN-0720-AA18

[DoD 6010.8-R]

Civilian Health and Medical Program of the Uniformed Services (CHAMPUS); Hospice Care

AGENCY: Office of the Secretary, DoD.

ACTION: Final rule.

SUMMARY: This final rule revises DoD 6010.8-R which implements the Civilian Health and Medical Program of the Uniformed Services. The rule establishes a hospice benefit for the terminally ill that offers an alternative to traditional therapeutic treatment which may no longer be appropriate or desirable. Hospice care is palliative rather than curative, generally emphasizing home care rather than institutional care, and treating the social, psychological, spiritual, and physical needs of the entire family. **EFFECTIVE DATE:** This final rule is effective June 1, 1995.

ADDRESSES: Office of the Civilian Health and Medical Program of the Uniformed Service (OCHAMPUS), Program Development Branch, Aurora, CO 80045-6900.

FOR FURTHER INFORMATION CONTACT: David Bennett, Program Development Branch, OCHAMPUS, Aurora, Colorado 80045-6900, telephone (303) 361-1094.

SUPPLEMENTARY INFORMATION: In FR Doc. 93-21950, appearing in the **Federal Register** on September 10, 1993 (58 FR 47692), The Office of the Secretary of Defense published for public comment a proposed rule establishing a hospice benefit under CHAMPUS.

Background

The Defense Authorization Act for FY 1992-93, Public Law 102-190, directed CHAMPUS to provide hospice care in the manner and under the conditions provided in section 1861(dd) of the Social Security Act (42 U.S.C. 1395x(dd)). This section of the Social Security Act sets forth coverage/benefit guidelines, along with certification criteria for participation in a hospice program. Since it is Congress' specific intent to establish a benefit identical to that of Medicare, CHAMPUS has adopted the provisions currently set out in Medicare's hospice coverage/benefit guidelines, reimbursement methodologies (including national hospice rates and wage indices), and certification criteria for participation in