

DEPARTMENT OF THE INTERIOR**Office of Surface Mining Reclamation and Enforcement****30 CFR Parts 701, 773, 785, 816, and 817**

RIN 1029-AB74

Lands Eligible for Remining**AGENCY:** Office of Surface Mining Reclamation and Enforcement, Interior.**ACTION:** Final rule.

SUMMARY: The Office of Surface Mining Reclamation and Enforcement (OSM) is issuing final rules at 30 CFR chapter VII implementing changes made to Title V of the Surface Mining Control and Reclamation Act of 1977 (the Act or SMCRA) by the Energy Policy Act of 1992. The final rules are intended to provide incentives for the remining and reclamation of previously mined and inadequately reclaimed lands eligible for expenditures under section 402(g)(4) or 404 of SMCRA.

EFFECTIVE DATE: December 27, 1995.

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I. Background

On October 24, 1992, the President signed into law the Energy Policy Act of 1992, Pub. L. 102-486. Section 2503 of the Energy Policy Act, Coal Remining, in part amended sections 404, 510, 515(b)(20), and 701 of SMCRA in order to provide the following incentives to encourage, in an environmentally-sound manner, the remining of lands eligible for expenditures under sections 402(g)(4) and 404 SMCRA: (1) The permittee of such remaining operations shall not be subject to permit blocking under section 510(c) of SMCRA for any violation resulting from an unanticipated event or condition occurring on the remaining site; and (2) The period of responsibility for successful revegetation for such remining operations is reduced to five years in the West and two years in the East.

The relevant portion of section 2503 provides as follows:

Section 510 is amended by adding the following new subsection at the thereof:

(e) MODIFICATION OF PROHIBITION— After the date of enactment of this subsection, the prohibition of subsection (c) shall not apply to a permit application due to any violation resulting from an unanticipated event or condition at a surface coal mining operation on lands eligible for remining under a permit held by the person making such application. As used in this subsection, the term "violation" has the same meaning as such term has under subsection (c). The authority of this section and section 515(b)(20)(B) shall terminate on September 30, 2004.

Section 515(b)(20) is amended to insert (A) after (20) and add the following new subparagraph at the end thereof:

(B) on lands eligible for remining assume the responsibility for successful revegetation for a period of two full years after the last year of augmented seeding, fertilizing, irrigation, or other work in order to assure compliance with the applicable standards, except in those areas or regions of the country where the annual average precipitation is twenty-six inches or less, then the operator's assumption of responsibility and liability will be extended for a period of five full years after the last year of augmented seeding, fertilizing, irrigation, or other work in order to assure compliance with the applicable standards.

Section 701 is amended by adding the following two new paragraphs:

(33) the term "unanticipated event or condition" as used in section 510(e) means an event or condition encountered in a remining operation that was not contemplated by the applicable surface coal mining and reclamation permit; and

(34) the term "lands eligible for remining" means those lands that would otherwise be eligible for expenditures under section 404 or under section 412(g)(4).

The purpose of section 2503 was set forth in the House of Representatives Report from the Committee on Interior and Insular Affairs on H.R. 776, the predecessor bill in the House of Representatives (H.R. Rep. No. 102-474, 102d Cong., 2d Sess. 85 (1992)) which contains the following discussion: "The (coal remining) provisions of this section seek to make coal available that otherwise would be bypassed by providing incentives for industry to extract and reprocess, in an environmentally sound manner, coal that remains in abandoned mine lands and refuse piles. Current law reclamation performance standards were devised to address surface coal mining on undisturbed lands; the unintended result is to discourage remining. Remining also serves to mitigate the health, safety, and environmental threats posed to coal field residents by augmenting the work done under the Abandoned Mine Reclamation Program."

To implement sections 510(e) and 515(b)(20)(B) of SMCRA, OSM proposed rules on June 2, 1994 (59 FR 28744) which would: (1) Revise 30 CFR 701.5, Definitions; 30 CFR 773.15, Review of Permit Applications; 30 CFR 816.116 and 817.116, Revegetation: Standards for Success; and (2) add a new 30 CFR 785.25, Lands Eligible for Remining.

Public comments were received until August 1, 1994. No public meetings nor hearings were requested or held. OSM received letters in response to the June 2, 1994, proposed rule from eight commenters representing industry, State regulatory authorities, Federal agencies, Environmental groups, and individual citizens. OSM has reviewed each comment carefully and has considered the commenters' suggestions and remarks in writing this final rule.

OSM previously implemented another remining provision of the Energy Policy Act dealing with AML eligibility under a separate rulemaking (59 FR 28136, May 31, 1994). A provision dealing with abandoned coal refuse sites is also being addressed under a separate rulemaking.

II. Rules Adopted and Responses to Public Comments on Proposed Rules

1. 30 CFR Part 701—Permanent Regulatory Program

Section 701.5, Definitions, is being amended by adding two terms—"lands eligible for remining" and "unanticipated event or condition"—both of which were defined in section 2503(c) of the Energy Policy Act.

a. Lands eligible for remining. The definition adopted for the term "lands eligible for remining" is the same as the proposal and the definition is section 701(34) of SMCRA. Under the final rule, "lands eligible for expenditures under sections 404 or 402(g)(4) of the Act. Thus, the following lands would be included under this definition: those lands which were mined by surface coal mining operations or otherwise affected by surface or underground mining operations and which were either (1) abandoned or left in an inadequate reclamation status prior to August 3, 1977, and for which there is no continuing reclamation responsibility under State or other Federal laws; (2) abandoned or left in an inadequate reclamation status after August 3, 1977 but before State received primacy under SMCRA and for which available bond is insufficient to provide for adequate reclamation; or (3) completed being mined between August 4, 1977, and November 5, 1990, and remain unreclaimed due to the insolvency of a surety company occurring during that same period.

Many remining operations involve the surface mining or "daylighting" of underground workings. Depending on the extent that overlaying or adjacent surface lands are affected by the prior underground workings, e.g., through subsidence, those lands may or may not fall within section 701(34)'s definition of "lands eligible for remining," if, under the example above, the surface disturbances resulting from previous underground mining are so slight that the lands do not constitute "lands eligible for remining," the "daylighting" of the underground workings would then not qualify for the remining incentives provided by sections 510(e) and 515(b)(20)(B) and implemented by this rulemaking.

One commenter suggested that the definition of "lands eligible for remining" contain the phrase "under a permit issued prior to September 30, 2004." Although OSM has not made the suggested change to the definition, OSM agrees that Sections 510(e) and 515(b)(20)(B) of SMCRA apply only to permits issued before September 30, 2004. As explained below, this concept is reflected in 30 CFR 773.15(b)(4) and in 30 CFR 816.116 and 817.116.

b. Unanticipated event or condition. The definition adopted for "unanticipated event or condition" is similar to the proposal and consistent with the definition in section 701(33) of SMCRA. An "unanticipated event or condition" is defined in the final rule as an event or condition related to prior mining activity which arises from a surface coal mining and reclamation operation on lands eligible for remining and was not contemplated by the applicable permit. Pursuant to final § 773.15(b)(4), an operator will not be permit blocked for any violation resulting from an unanticipated event or condition occurring during the term of such remining permit issued before September 30, 2004, or any renewals thereof. The rationale for the final rules' use of the term "arises from" in lieu of the term "encountered in" used in the statutory definition is discussed later under the heading "Phase-out of section 510(e) permit block exemption."

(i) Related to prior mining activity. The phrase "related to prior mining" has been added to the final definition of "unanticipated event or condition" to qualify which events or conditions could give rise to violations subject to the § 773.15(b)(4) permit block exemption.

This change is made in response to several commenters, one of which asserted that the proposed definition of "unanticipated event or condition" was too broad to be of practical value and

asked whether an event or condition "causally related" to the unreclaimed or previously mined status of the area covered by the remining permit would qualify as unanticipated. A second commenter suggested that an unanticipated event or condition must arise from the previously disturbed nature of the site. A third commenter, citing the history associated with the development of the remining amendments of the Energy Policy Act, proposed that an unanticipated event or condition should embody any event or occurrence that arises from the previously disturbed nature of the site, including acid mine discharges, despite substantial adherence to the permit.

OSM agrees with these comments that only unanticipated events or conditions related to the previously disturbed nature of the site should qualify for the section 510(e) exemption. The addition of the qualifying phrase "related to prior mining activity" is consistent with Congressional intent to encourage remining by extending the permit block exemption of section 510(e) to the problem events or conditions occasioned by such prior mining operations. OSM does not believe, on the other hand, that Congress intended to exempt applicants from permit blocking for violations occurring on the remining site but resulting from conditions unrelated to previous mining activities. Applicants would thereby remain permit blocked for violations solely attributable to their own conduct.

An example of an event or condition which might arise during a remining operation but not related to the prior mining activity would be the mining of previously undisturbed toxic coal seams located below previously disturbed deposits.

An example of an event or condition which might arise during a remining operation and considered related to the prior mining activity would be the discovery of hazardous materials or substances buried in depressions or pits left at an abandoned site. Such an event or condition would be considered as related to a prior mining activity because without the previous mining the hazardous materials or hazardous substances would not have been buried at the site.¹

¹ If hazardous materials or hazardous substances of any type are uncovered or released during remining, the operator must follow the requirements for notifying the National Response Center as required by the National Contingency Plan (40 CFR part 300). This would apply to the discovery or release, whether regulated under the statutory authority of the Toxic Substances Control Act (TSCA), the Resource Conservation and Recovery Act (RCRA), or the Comprehensive Environmental Response, Compensation and

OSM is broadly interpreting the qualifying phrase "related to prior mining" so as to afford some practical incentive to remining while also maintaining consistency with the provisions of the Energy Policy Act. Thus, for the purposes of this final rule, an event or condition can qualify as an "unanticipated" event or condition if it is related to prior mining at the site. One commenter asked if OSM meant only that acts of God could result in unanticipated events or conditions and requested some clarification in terms of examples. An act of God resulting in extreme hydrologic conditions might significantly vary from the permit's estimate and could reasonably qualify as one example of an unanticipated event or condition if the event or condition causing the violation is related to prior mining activity at the site.

(ii) Acid mine drainage. An industry commenter asserted that any acid mine drainage (AMD) which occurs despite substantial adherence to a permit should be included in the meaning of "unanticipated event or condition" and pointed to the legislative history of the remining legislation to further its argument. The commenter cited first to strong State and industry support for the definition of "unanticipated event or condition" in H.R. 4053 (1990) which it characterized as addressing the issue of AMD. The commenter then cites to State and industry opposition to the subsequent provisions of H.R. 1078 (1991) which would have explicitly excluded from the definition of "unanticipated event or condition" any event or condition involving more than a minimal amount of toxic overburden or pre-existing acid discharge. Industry concluded that because H.R. 4381 (1992) substantially carried forward the H.R. 4053 and 1078 definitions of "unanticipated event or condition" but deleted the objectionable H.R. 1078 exclusion for toxic overburden or pre-existing acid discharge, and that H.R. 776 (1992) incorporates that definition as the eventual Energy Policy Act definition, AMD should therefore be included within the meaning of "unanticipated event or condition."

OSM agrees with the commenter that the Energy Policy Act does not exclude AMD as a type of condition which may constitute an "unanticipated event or condition." On the other hand, although the Energy Policy Act does not include the AMD exclusion language of H.R. 1078, neither does the legislative history

Liability Act (CERCLA). These laws are administered by the U.S. Environmental Protection Agency or State environmental agencies. Additional reporting and notification requirements may exist under State or local laws.

indicate that Congress intended for all AMD to be categorically included within the meaning of "unanticipated event or condition." Clearly the issues of AMD and the allowance to be given in remining to toxic overburden and pre-existing acid discharge were high profile and controversial among environmentalist, industry and regulatory supporters during the drafting of all the cited House Bills. The hearings on these Bills reflect a recognition that the definition of "unanticipated event or condition" later incorporated into the Energy Policy Act did not address or resolve the AMD issue. (See Testimony of Dave Rosenbaum, Dept. Commissioner, Kentucky Natural Resources and Environmental Protection Cabinet, H.R. 4053, 101-72, March 13, 1990). Therefore, OSM concludes that AMD should be treated like any other condition to be evaluated on a case-by-case basis to determine whether it constitutes an "unanticipated event or condition."

2. 30 CFR Part 773—Requirements for Permits and Permit Processing

Section 773.15, Review of Permit Applications, is being amended by adding two new paragraphs, (b)(4) and (c)(13). These paragraphs will generally correspond to proposed paragraphs (f) and (c)(13) of § 773.15.

(a) § 773.15(b)(4). Final § 773.15(b)(4) (proposed § 773.15(f)) implements section 510(e) of SMCRA which establishes an exemption from the permit blocking provisions of section 510(c) of SMCRA. Subsequent to October 24, 1992, the final rule exempts from the permit-block provisions of paragraph (b) of § 773.15 situations where an unabated violation occurring after that date is attributed to an unanticipated event or condition arising from a remining site under a permit issued before September 30, 2004, or any renewals thereof. In such cases, the person holding the remining permit would not be rendered ineligible for a new surface coal mining permit at another site simply because of the unabated violation at the remining site. Responsibility to abate the violation, however, is not affected by the final rule.

(i) § 773.15(b)(4)(i). Final § 773.15(b)(4) has been divided into two paragraphs (i) and (ii). Although paragraph (b)(4)(i) was originally proposed as § 773.15(f), OSM believes the permit block exemption related to unabated violations resulting from an unanticipated event or condition is more appropriately located in

§ 773.15(b) which deals with review of violations.

Phase-In of Section 510(e) Permit Block Exemption

Comments were received seeking clarification as to the rule's phase-in *i.e.*, when must violations have occurred and when must remining permits have been issued to qualify for the section 510(e)'s permit block exemption. In addition, OSM recently approved an amendment to the Kentucky regulatory program which substantially tracked section 510(e) of the Act (60 FR 33110, June 27, 1995). This amendment, Senate Bill 208, also focussed OSM on the need for further clarification of the proposed rule's section 510(e) permit block exemption as to when remining permits need to have been issued to have violations at the site qualify for that exemption.

By its own terms, the permit block exemption in section 510(e) of SMCRA applies to all section 510(c) determinations that occur subsequent to October 24, 1992. Thus, final § 773.15(b)(4)(i) includes the introductory phrase "Subsequent to October 24, 1992," as identifying the date after which a determination can be made as to the applicability of the exemption of § 773.15(b)(4).

In partial response to comments discussed below, the final rule's § 773.15(b)(4) permit block exemption will extend to unabated violations (1) occurring after section 510(e)'s October 24, 1992, enactment date; and (2) resulting from an unanticipated event or condition occurring under remining permits issued either before or after that same date. This clarification as to the intended reach of § 773.15(b)(4) is consistent with OSM's approval of the Kentucky State program amendment substantially tracking section 510(e)'s provisions.

One commenter representing several environmental associations stated that the goals of the October 24, 1992, amendments would be best served by limiting the application of the section 510(e) permit block exemption to violations that occur on a remined site after that date and under a remining permit issued in accordance with the provisions of the amended Act. (It also made similar comments on the Kentucky amendments.) In support of these positions, the commenter made a number of assertions. With regard to limiting the permit block exemption to violations that occur after October 24, 1992, the commenter asserted that Congress intended the remining provisions of the Energy Policy Act to be forward-looking in seeking to provide

an incentive for future operations on previously mined and abandoned areas. In support thereof, it referenced the H.R. Rep. No. 102-474, at 85 (1992), as well as the existence of significant pre-Energy Policy Act mining of previously mined and abandoned areas. The commenter further asserted that Congress intended the section 510(e) permit block exemption to be narrowly interpreted and not used to excuse applicants who had been previously permit blocked because of pre-Energy Policy Act violations. It again referenced the House Report at 85.

This commenter also asserted that limiting the section 510(e) permit block exemption to violations occurring under a remining permit issued in accordance with the provisions of the amended Act would couple existing informational requirements in part 773 with those of proposed § 785.25 to provide a more comprehensive objective assessment of site conditions against which any claim of "unanticipated event" could be assessed.

Finally the commenter asserted that the Act's section 701(33) definition of the phrase "lands eligible for remining" implies a determination by the regulatory authority in advance of issuing a remining permit that the site would otherwise be eligible for AML expenditures.

OSM agrees that the plain language of the section 510(e) permit block exemption limits its application to violations that occurred on a remining site after the October 24, 1992, amendment date. Inclusion of the statutory phrase "(a)fter the date of enactment of this subsection," in section 510(e) of SMCRA evinces a clear Congressional intent that the provision be prospective from October 24, 1992, and relate to events occurring after that date. OSM also agrees with the commenter that the legislative history of the exemption supports such a limitation and that persons already permit-blocked under section 510(c) of SMCRA for violations occurring before October 24, 1992, could not become unblocked by enactment of section 510(e). Accordingly, the section 510(e) permit block exemption of final § 773.15(b)(4)(i) will be limited to violations occurring after October 24, 1992.

The incentive for future remining provided by the section 510(e) permit block exemption logically extends both to parties already conducting remining operations as of October 24, 1992, and those contemplating entirely new remining operations after that date. For the first group, section 510(e) provides some incentive to continue remining.

For the second group, section 510(e) provides an incentive to begin re-mining new properties.

OSM disagrees with the commenter's suggestion that the goals of the 1992 amendments would be best served by limiting the section 510(e) permit block exemption to post-October 24, 1992, violations occurring at a re-mining permit issued only in accordance with the provisions of the amended Act, *i.e.*, a § 785.25 permit. Although the language of section 510(e) and its legislative history limits the exemption to post-October 24, 1992, violations, neither the language of section 510(e) nor its legislative history requires that the permit be issued after October 24, 1992, or under § 785.25 or a State program equivalent.

While the commenter's suggestion of limiting the permit block exemption to § 785.25 permits would provide enhanced information on site conditions, there are practical considerations which would weigh against such a suggestion. For primary States, limiting the permit block exemption to § 785.25 permits would further postpone the availability of the exemption until 1996 or 1997 because of the time normally needed to submit and gain approval of a state program amendment. The commenter's suggestion of limiting the permit block exemption to § 785.25 permits would, therefore, not accommodate the plain language of the Act and clear legislative intent that the re-mining amendments provide a timely incentive for the re-mining of previously abandoned mine lands.

The commenter's suggestion that the section 510(e) exemption be limited to § 785.25 permits would also conflict with its previously discussed position that the section 510(e) exemption be limited to post-October 24, 1992, violations occurring on re-mining sites. For the re-mining incentive of section 510(e) to apply to violations occurring immediately following the October 24, 1992, enactment date, the underlying re-mining permit would have had to have been issued prior to that date. Accordingly, OSM does not interpret section 510(e) as imposing a post-October 24, 1992, limitation on when permits must have been issued to qualify for the permit block exemption.

In addition, contrary to the commenter's assertion, the Act's section 701(33) definition for "lands eligible for re-mining" does not establish the requirement for a determination by the regulatory authority in advance of issuing a re-mining permit that the site would otherwise be eligible for AML expenditures. While final

§ 773.15(c)(13) will require a "lands eligible" finding before issuance of re-mining permits in the future under § 785.25, the determination of "lands eligible" for re-mining will also have to be made for existing permittees seeking to avail themselves under § 773.15(b)(4)(i) of the section 510(e) permit block exemption.

On the basis of the above discussion, the phase-in for the section 510(e) permit block exemption at § 773.15(b)(4)(i) will be tied to the date of violation but not to the date of permit issuance. Violations must have occurred after October 24, 1992, and resulted from an unanticipated event or condition arising from surface coal mining and reclamation operations on lands eligible for re-mining under a permit issued either before or after that date.

Phase-Out of Section 510(e) Permit Block Exemption

Final paragraph (b)(4)(i) does not contain the language of proposed paragraph (f) that the permit block prohibition of paragraph (b) shall not apply "(u)ntil September 30, 2004." In its place, final paragraph (b)(4)(i) provides that the permit block prohibitions of paragraph (b) shall not apply to "* * * any violation resulting from an unanticipated event or condition * * * under a permit, issued before September 30, 2004, or any renewal thereof * * *." Thus final § 773.15(b)(4)(i) provides that the permit block exemption will continue to be available for violations occurring on lands eligible for re-mining under a re-mining permit issued before September 30, 2004, or any renewals thereof, even if the § 772.15(b)(4) determination occurs after that date.

This change in the final regulatory text from the proposed rule implements the phase-out provision of section 510(e) and is made in response to comments received from industry and State regulatory authorities. These commenters questioned the apparent intent of the proposed rule language that the permit block exemption would continue only until September 30, 2004. The effect of such provision was seen as allowing a company to be permit blocked on October 1, 2004, and thereafter, for a violation occurring on an eligible re-mining site permitted before September 30, 2004, which had earlier been exempted from the permit block section. The industry commenter asserted that Congress could not have intended an anomalous result such that one violation would be excluded from causing a permit block and subsequently form the basis for causing

a permit block. Viewing the whole of the language of section 510(e) and not limiting itself solely to the provision which provided that "(t)he authority of (that) section shall terminate on September 30, 2004," that commenter asserted that what Congress intended was to provide an exemption from the permit blocking provisions of section 510(c) for violations resulting from unanticipated events or conditions under permits issued prior to September 30, 2004, and not to provide such an exclusion on a temporary basis for violations occurring prior to September 30, 2004, but which exemption would suddenly disappear after September 30, 2004.

The commenter cited to the following language of section 510(e) as confirming this intent since it renders section 501(c) inapplicable to "any violation resulting from an unanticipated event of condition *at a surface coal mining operation on lands eligible for re-mining under a permit held by the person * * **" (emphasis added by commenter).

The commenter reasoned that this language clearly ties the exemption to the date of issuance of the re-mining permit, not the violation. Accordingly, the commenter stated that the language of section 510(e) terminating the authority of the section on September 30, 2004, should be construed to foreclose the permit block exemption to violations under a permit issued subsequent to that date. In turn, the final regulatory rule language should clearly set forth that the exemption applies to any violation arising from an unanticipated event or condition at a re-mining operation under a permit issued prior to September 30, 2004.

While OSM does not view the discerning of Congressional intent as to the termination of authority provisions of section 510(e) to be as clear-cut as portrayed by the commenter, OSM agrees with the principal arguments set forth above. Viewing the permit blocking exemption of section 501(e) as a whole, the emphasis should not be on whether the violation occurred before September 30, 2004, but whether the re-mining permit was issued before authority to grant such exemption terminated on September 30, 2004. Congress could not have reasonably intended for the small violation a "now you are not permit blocked, now you are permit blocked" approach. Scant incentive for re-mining would be provided if the permit block exemption for violations at a re-mining site would be temporary and expire on September 30, 2004. OSM interprets the termination date, September 30, 2004,

as the last date upon which a remining permit may be issued for which violations resulting from an unanticipated event or condition may be excluded from future permit block determinations.

In support of this statutory interpretation, OSM notes that by 2004, an increasingly large proportion of remining permits will meet the standards of § 785.25. These permits' enhanced requirements for site condition information and identification of event/condition-specific mitigation measures will go far to ensure that the section 510(e) permit block exemption will not be abused. Interpreting the section 510(e) permit block exemption so as to tie its termination of authority provision to the date of issuance of the remining permit, not to the date of the violation or to the date of the section 510(c) determination, promotes a clear Congressional intent with respect to the remining amendments to SMCRA to provide, in an environmentally sound manner, a meaningful incentive for the remining of previously abandoned sites. H.R. Rep. No. 102-474, at 85 (1992).

Accordingly, final paragraph (b)(4)(i) provides that the exclusion will continue to be available for violations occurring on lands eligible for remining under a remining permit issued prior to September 30, 2004, and any renewals thereof.

Final paragraph (b)(4)(i) also includes the term "and any renewals thereof" to indicate that the permit block exemption will apply to unabated violations occurring under permits issued before September 30, 2004, and subsequently renewed. The baseline information from which a § 773.15(b)(4) determination will be made as to whether a violation results from an unanticipated event or condition also does not change if the violation occurs during the original permit term or its renewal. While the "and renewals thereof" provision is consistent with Congressional intent to provide a remining incentive for operations on lands eligible for remining, OSM does not anticipate many occurrences when a qualifying § 773.15(b)(4) violation would first occur during the permit renewal period. In most cases, the mining on lands eligible for remining will be accomplished well within the original 5-year permit term.

Final paragraph (b)(4)(i) uses the term "arises from" in lieu of the term "encountered at" used in the statutory definition of "unanticipated event or condition" indicating that a violation resulting from an unanticipated event or condition can arise from a remining operation and does not have to be

encountered at that remining operation in order to qualify for the permit block exemption. For further discussion of when a violation may arise away from a remining operation but as a result of an unanticipated event or condition occurring at the remining operation, see a. (ii) *Abatement obligation continues.*

(ii) § 773.15(b)(4)(ii). Final § 773.15(b)(4)(ii) represents provisions taken from other parts of the proposed rule relocated in this paragraph. Final paragraph (b)(4)(ii) provides that events or conditions arising subsequent to permit issuance related to prior mining which were not identified in the permit issued under § 785.25 shall be presumed to constitute unanticipated events or conditions for the purposes of § 773.15(b). This provision is derived from proposed § 773.15(c)(13) and has been moved in the final rule to paragraph (b)(4)(ii) as proper part of the regulatory authority's § 773.15(b)(4) determination of whether events or conditions are unanticipated. The "may be presumed" language of proposed § 773.15(c)(13) was changed in the final rule to "shall be presumed" as discussed below in response to comments.

The final rule drops the proposed heading for paragraph (b)(4), "Lands eligible for remining" to be consistent with the format of other paragraphs.

Presumption of Unanticipated Event or Condition

OSM recognizes that without a reasonable degree of certainty as to their regulatory application, the remining provisions proposed as incentives for remining operations would not serve as an effective incentive for remining. Thus, certain changes from the proposed to the final rules reflect an intent to provide such certainty for remining operations. Most particularly is the change from the language of proposed § 773.15(c)(13) that events or conditions arising subsequent to permit issuance "may be presumed" to constitute unanticipated events or conditions to the language of final § 773.15(b)(4)(ii) that such events or conditions arising subsequent to permit issuances "shall be presumed" to constitute unanticipated events or conditions. Operators will be able to rely on the provision that once a § 785.25 permit has been issued, events or conditions not identified in the permit shall be presumed to constitute unanticipated events or conditions for the purposes of the permit block exemption of § 773.15(b). This is primarily predicated upon the operator performing a due diligence investigation to determine which events or conditions

are reasonably anticipated and then identifying such events or conditions in the permit application. This presumption could be rebutted if a permit applicant fails to identify significant potential environmental or safety problems related to prior mining activity at the site which could have been reasonably anticipated to occur and were known to the applicant or should have been known to the applicant through the due diligence investigation required under § 785.25.

This change of language in final § 773.15(b)(4)(ii) to the words "shall be presumed" is not intended to diminish the substantial flexibility available to, and the responsibility of, a regulatory authority prior to permit issuance to make its own informed judgment as to which events or conditions should be properly identified in the permit application. Final § 785.25(b) requires an identification of potential environmental and safety problems which could be reasonably anticipated to occur at the site. The identification would be based on a due-diligence site-specific investigation. Under final § 773.15(c)(13), the regulatory authority is required to make a finding for § 785.25 permits that the permit application contains an identification of the particular environmental and safety problems which could reasonably be anticipated to occur at the site.

The Presumption for Permits Not Issued Under Section 785.25

As discussed above under the *Phase-in of Section 510(e) permit block exemption*, the permit block exemption of § 773.15(b)(4)(i) extends to permits in existence on October 24, 1992, and is not limited to permits solely issued under § 785.25. Permits for lands eligible for remining not originally issued under § 785.25 but subsequently revised and upgraded to satisfy the permit information and permit finding requirements of §§ 785.25 and 773.15(c)(13) would qualify for the § 773.15(b)(4)(ii) presumption.

Permits for lands eligible for remining not originally issued under § 785.25 and not subsequently revised to satisfy the permit information and permit finding requirements of §§ 785.25 and 773.15(c)(13) would not qualify for the § 773.15(b)(4)(ii) presumption. An applicant for a new permit in such circumstances would have the burden of establishing that any violation which arose at one of these non-§ 785.25 permits resulted from an unanticipated event or condition. OSM agrees with a commenter that it is likely to be more difficult to establish for these permits that violations resulted from

unanticipated events or conditions than for future permits issued or revised in accordance with § 785.25 which will have identified reasonably anticipated problems and for which the § 773.15(b)(4)(ii) presumption applies.

Several comments to the proposed rule were received regarding application of the "unanticipated event or condition" language. One industry group asserted that events or conditions should be considered unanticipated for the purposes of the section 510(e) exemption if the operator substantially adheres to its operation and reclamation plans. The industry commenter stated that this was Congress' initial understanding of such events or conditions and cited statements made by Rep. Rahall both in introducing H.R. 4053 (101st Cong., 1990), an early predecessor to the Energy Policy Act, and later in hearings on that bill. Rep. Rahall is quoted as stating that H.R. 4053's provision were intended to free a qualified operator from responsibility to address an event or condition encountered during a remining operation that was not originally anticipated under an approved reclamation plan. Furthermore, the H.R. 4053 provisions were stated as intending to provide the regulatory authority with some "wobble room" as to what constitutes an unanticipated event or condition.

OSM agrees with the commenter's position but not for the reasons asserted. OSM agrees that where a permit applicant diligently conducted an investigation to identify conditions that are reasonably anticipated, and references such conditions in the permit application, the operator should be able to have a degree of comfort that he will not be permit blocked for violations resulting from non-identified conditions which occur despite compliance with the operation and reclamation plans. This is the presumption set forth in § 773.15(4)(ii). A permit not predicated upon such complete information, however, will not be entitled to the presumption.

OSM does not agree with the commenter that the legislative history of the Energy Policy Act mandates that an event or condition that occurs despite an operator's adherence to its operations and reclamation plans should always constitute an "unanticipated event or condition" for the purposes of the section 510(e) exemption. Rep. Rahall's referenced introduction to H.R. 4053 would have tied reduced operator liability to full compliance with the reclamation plan but only with regard to providing operators a date-certain release of their reclamation bond. While

earlier H.R. 2791 (101st Cong., 1989) did contain specific provisions terminating (all) operator liability for compliance with all the requirements of the permit and reclamation plan, such provisions were not carried forward to H.R. 4053 (1990), H.R. 1078 (102nd Cong., 1991), H.R. 4381 (102nd Cong., 1992), H.R. 776 (102nd Cong., 1992), or to the Energy Policy Act of 1992.

Penalties To Be Assessed

One commenter suggested that OSM has discretion not to require a civil penalty for violations tied to unanticipated events or conditions. The commenter further suggested that OSM should adopt a policy whereby civil penalties are not assessed for violations arising from unanticipated events or conditions. OSM finds no basis in the Energy Policy Act or its legislative history to support either suggestion.

Delinquencies Not Covered by Exemption

In the preamble to the proposed rule OSM posed the question of whether the nonpayment of delinquent penalties assessed after a notice of violation or a failure-to-abate cessation order based on an "on the ground" violation resulting from an unanticipated event or condition should be covered by the Energy Policy Act permit block exemption. OSM stated in the proposed rule that it intended that such delinquencies, which are violations themselves, would be covered by the exemption if they were construed as "resulting from an unanticipated event or condition at a surface coal mining operation." OSM sought comments on this issue but no comments were received.

Upon consideration, OSM concludes that the non-payment of delinquent civil penalties assessed because of an unabated violation resulting from an unanticipated event or condition should not be construed as resulting from the underlying unanticipated event or condition. OSM has reached this conclusion because non-payment of penalties is a violation solely within an operator's control and is independent of the underlying on-the-ground violation caused by the unanticipated event or condition. This construction of the permit block exemption will still afford substantial incentive for remining while limiting the exemption to unabated violations resulting from events or conditions which could not reasonably have been anticipated at the time of the remining permit's issuance.

Abatement Obligation Continues

Another commenter asked whether an operator cited for a violation related to an unanticipated event or condition occurring on land eligible for remining would have an obligation to reclaim or resolve such violation even though the operator would not be permit blocked because of it. Nothing in the Energy Policy Act nor this final rulemaking insulates the operator from his existing responsibilities to abate his violations whether or not they stem from anticipated or unanticipated events or conditions. Neither is that operator insulated from other enforcement actions stemming from these unabated violations.

A third commenter questioned particular preamble discussion in the proposed rule and asked that the final rule clarify that a violation occurring off the remining site that results directly from an unanticipated event or condition occurring on the remining site is also subject to the permit-block exemption. The commenter correctly noted that the Energy Policy Act requires only that the unanticipated event or condition, not necessarily the violation itself, be at a surface coal mining operation on lands eligible for remining. In response to this comment and consistent with substantial preamble discussion in the proposed rule and as discussed elsewhere in this final preamble, OSM confirms that a violation that occurs off-site but as a direct result of an unanticipated event or condition occurring on the remining site is also covered by the § 773.15(b)(4) permit block exemption.

As discussed in the proposed rule, if a mining operator on a previously undisturbed site contributes to a violation occurring on that site but originating from an unanticipated event or condition on an adjacent or nearby remining operation, and if the operator of the previously undisturbed site did not abate the violation, he would be permit blocked. On the other hand, if the operator of the previously undisturbed site did not contribute to the unabated violation occurring on his site, he would not be permit blocked.

OSM's proposed rule sought comments on this and other possible examples of interplay between remining operations and adjacent operations which needed to be explained in the final rulemaking. Two commenters responded. The first stressed that the operator of a previously undisturbed site should not be held responsible for any condition on his own site that originated from a nearby remining operation, whether the originating event

or condition is anticipated or not. OSM agrees that the liability of operators for events or conditions originating on a nearby re-mining site should not be a function of whether or not the originating event or condition was anticipated. As discussed above, an operator of a previously undisturbed site would be responsible for events or conditions on his site that originated from a nearby site only if his operation contributed to that event or condition.

The same commenter asserted that operators should not be held responsible for correcting conditions that are caused by or stem from existing abandoned mine lands. SMCRA, as amended by the Energy Policy Act, provides, under restricted circumstances, for an exemption to the permit block provisions of section 510(c) and for reduced periods of responsibility for successful revegetation. These amended SMCRA sections (510(e) and 515(b)(20)(B)) do not, however, provide exemption from other existing regulatory standards as the commenter would suggest. OSM's position on this issue is also consistent with the second commenter who correctly noted that an operator is responsible for meeting effluent limits where runoff from other sites is commingled with runoff from his own site.

c. Section 773.15(c)(13). A new final § 773.15(c)(13) will require the regulatory authority to make three findings in order to issue permits under new 30 CFR 785.25: (1) The permit application contains lands eligible for re-mining; (2) The permit application identifies potential environmental and safety problems reasonably anticipated to occur at the site; and (3) The permit application contains mitigation plans to address the identified potential environmental and safety problems in order to ensure that the required reclamation can be accomplished.

(i) Comparison of proposed and final § 773.15(c)(13). Final § 773.15(c)(13) differs from proposed paragraph (c)(13) in the following ways: Final paragraph (c)(13) does not contain the references to parts 779, 780, 783, and 784 found in the proposal. These parts are included implicitly in the phrase "Any application for a permit under this section shall be made according to all requirements of this subchapter applicable to surface coal mining and reclamation operations" contained in proposed and final § 785.25(b). The proposed reference to these Parts at § 773.15(c)(13) was therefore duplicative of § 785.25 provisions. The final rule also does not contain the proposed requirement that the regulatory

authority set a threshold beyond which conditions or events arising subsequent to the issuance of the re-mining permit may be presumed to constitute unanticipated events or conditions for the purposes of § 773.15(f). As will be discussed later under the analysis for final rule § 785.25, the majority of the environmental, industry, and regulatory commenters strongly opposed the proposed threshold. In lieu of requiring the regulatory authority to set some threshold, OSM will instead at paragraph (c)(13)(ii) require the regulatory authority to make a permit finding, based on permit information required in new § 785.25(b)(1), that the application identifies the potential environmental and safety problems related to prior mining activity which could reasonably be anticipated to occur at the site.

Final § 773.15(c)(13)(iii) requires the regulatory authority to make a finding based on the permit information required in new § 785.25(b)(2) that the application contains sufficient mitigation plans for each of the previously identified environmental or safety problems to ensure that the required reclamation can be accomplished. This required finding as to the sufficiency of the mitigation plans is expected to increase the likelihood that the targeted environmental or safety problems will be fully reclaimed by the operator. Such reclamation would not require a subsequent draw on the Abandoned Mine Reclamation funds and thus could extend the reach of these limited monies.

3. 30 CFR Part 785—Requirements for Permits for Special Categories of Mining

The final rule adds a new 30 CFR 785.25, Lands eligible for re-mining.

Final § 785.25 (a) identifies this section as containing the permitting requirements necessary for the regulatory authority to make a § 773.15(b)(4) determination. Paragraph (a) also requires that any person who submits a permit application to conduct a surface coal mining operation on lands eligible for re-mining must comply with the provisions in paragraphs (b) and (c).

Final § 785.25(b) prescribes that a § 785.25 permit application comply with all applicable 30 CFR subchapter G permitting requirements for surface coal mining and reclamation operations. Paragraph (b)(1) requires that the application identify potential environmental and safety problems at the proposed site related to past mining which could be reasonably anticipated to occur based on all available data, including visual observations at the site, a record review of past mining at the

site, and sampling tailored to current site conditions. Paragraph (b)(2) requires that the application describe the mitigative measures which will be taken to ensure that the requisite reclamation of the previously identified environmental and safety problems can be achieved.

Final § 785.25(c) provides that the requirements of this section shall not apply after September 30, 2004.

(i) Comparison of proposed and final § 785.25. The final rule differs from proposed § 785.25 in the following ways: First, the language of proposed paragraph (a) applying this section to any person who conducts or intends to conduct a surface coal mining operation on lands eligible for re-mining has been replaced in final paragraph (a)(1) with more direct language obligating such persons to comply with this section's requirements. Final paragraph (a)(2) also includes new language to reflect the rule's reorganization from one in which the regulatory authority's section 510(e) permit block exemption determination was based on a threshold set by that authority in proposed § 773.15(c)(13) to one in which the permit block exemption determination is based foundationally on the site condition information contained in a § 785.25 permit application and the permit finding requirements of § 773.15(c)(13).

Reasonably Anticipated Problems

The proposed § 785.25(b)(1) requirement for an identification of all potential environmental and safety problems associated with the site has, in response to comments, been eliminated in favor of the final § 785.25(b)(1) which requires identification of all reasonably anticipated environmental and safety problems which might occur at the site. Proposed paragraph (b)(1) would have required an open-ended quantitative risk analysis. From the data gained from this analysis and the data provided under other specific permitting sections, the regulatory authority would have, under proposed § 773.15(c)(13), set a threshold beyond which subsequent conditions or events may be presumed to be unanticipated for the purposes of the section 510(e) permit block exemption.

Final § 785.25(b)(1) requires a due-diligence investigation by the applicant tailored to each re-mining site from which the applicant is expected to generate a list of environmental and safety problems related to past mining which could be reasonably anticipated to occur at the site. The due-diligence investigation requires a review of all available data including visual observations, a review of records

associated with past mining, and necessary environmental sampling. The list of problems will be the basis of the regulatory authority's finding in final § 773.15(c)(13) and any subsequent § 773.15(b)(4) permit block exemption determination.

Although the proposed rule's risk analysis/threshold approach may have proven to be the most protective of the environment in its determination of anticipated events or conditions, OSM's preamble to the proposed rule reflected the agency's reservation as to the practicability of its implementation. These reservations were confirmed by the weight of comment response.

Two commenters provided qualified endorsement of the proposed risk analysis/threshold approach. The first commenter supported that approach because it required consideration of the previous disturbed character of the land, which was felt to be lacking under existing regulations. In suggesting an alternative expression of probability, the commenter was, however, careful to exclude from consideration events or conditions which might be deemed highly unlikely to occur.

The second commenter was concerned that the proposed requirement to establish maximum impacts would dramatically increase the risk of permit block to the point where remaining would not occur and could limit the flexibility of regulators to account for site-specific conditions. This commenter felt that restructuring the proposed rule's threshold should be based instead on considerations of events or conditions that could be "reasonably foreseen based on available information" and allowing for the use of "best professional judgement by the applicant and regulator" would significantly improve the proposed rule's ability to meet the intent of the Energy Policy Act to provide specific incentives for re-mining.

Three commenters, including environmental and industry associations, strongly opposed the risk analysis/threshold approach of proposed §§ 785.25(b)(1) and 773.15(c)(13). They characterized its components—the probability and maximum degree of impact analyses, the identification of all potential problems, and the setting of a threshold—all to be unrealistic, too costly and time-consuming, an invitation to litigation, and lacking readily-available supporting technical methodology for conducting the requisite undertakings. One of these commenters questioned the statutory basis for the proposal's reliance on the aforementioned component parts as

creating an all-inclusive term seen as expanding the limited standards set by Congress for the term "unanticipated event or condition."

All three commenters represented that existing regulatory permitting requirements provided sound basis upon which to assess and characterize pre-mining site conditions. The commenter representing the industry association suggested that a "good faith" listing of potential problems could be made on the basis of such baseline information. The whole of the industry's comment seemed to indicate that this information must necessarily include sound site-specific data on hydrology, soils, geology, etc.

The commenter representing the environmental association also submitted that, based on visual inspection and proper sampling tailored to the site and a record review of prior mining at the site, potential problems could be reasonably anticipated. Such site-specific investigations were characterized as necessary for establishing a comprehensive, objective assessment of site conditions from which a reclamation plan could be developed and against which any later claims of "unanticipated event" could, in turn, be assessed.

In response to the objections posed by these commenters to the risk analysis/threshold approach of the proposed rule, the final rule will reflect many of the commenters' suggestions for an alternative approach for determining when an event or condition is unanticipated. Final § 785.25(b)(1) will require site-specific development of baseline data based on visual inspection, environmental sampling, and a review of records of past mining to identify potential problems related to prior mining activity at the site which could reasonably be anticipated to occur. A requirement for these site-specific investigations could be construed to exist already as part of the permanent program regulations. OSM believes, however, that the potential for environmental problems occurring is particularly high at re-mining sites. Therefore, these investigations have sufficient importance that they should be expressly required by rule as preconditions to all § 785.25 re-mining operations.

OSM submits that the final rule's approach of identifying "reasonably anticipated" potential problems will be as effective as the proposed rule's approach of identifying (all) potential problems in providing a level of protection commensurate with a reasonable expectation that certain environmental and safety problems

might occur. The final rule's reliance upon more of reasonably anticipated standard for identifying potential problems will also substantially reduce the information gathering burden associated with the analyses that would have been required under the proposed rule.

Degree of Variance from Anticipated Problem

OSM intends that the final § 785.25(b)(1) identification of potential problems reasonably anticipated to occur will extend not only to an identification of the *type* of such problems but also the *degree* of such problems, e.g., that AMD is anticipated at a rate of 150 gallons per minute (gpm).

The allowable degree of variance from an anticipated problem is an issue indirectly raised by associations representing both environmental and industry interests. The commenter representing the environmental association opposed the risk analyses required under the proposed rule. This commenter asserted that with adequate data collection, potential problems can be reasonably anticipated and there should be very few instances where an "unanticipated" event or condition occurs.

Such statement suggests, for instance, that if any AMD is identified as a potential problem, then the eventual amount or degree of AMD experienced is immaterial for the purposes of qualifying for the section 510(e) permit block exemption. All such experienced AMD, however large the amount, would be considered anticipated and the operator would not qualify for the exemption.

The industry association commenter also opposed the risk analyses required under the proposed rule, but addressed the issue of degree of unanticipated problem somewhat differently. This commenter focussed on the difficulties in accurately predicting the likelihood of potential problems occurring and the associated maximum degree of impact. Even with good baseline data, there appeared to be too many variables to accurately assess a potential problem's maximum degree of impact. This commenter's solution was for the applicant to provide a list of potential problems that it could in "good faith" identify. Any problem that then arose from the previous disturbed nature of the site, including AMD, despite the operator's substantial adherence to the permit, would be considered to be unanticipated.

Such statement suggests that if any AMD is identified as a potential

problem and it occurs despite the operator's substantial adherence to its operation and reclamation plans, the actual amount or degree of the post-treatment problem is immaterial for the purposes of qualifying for the section 510(e) permit block exemption. All such AMD, however small the amount, would be considered unanticipated and the operator would qualify for the exemption.

OSM rejects both environmental and industry comments regarding the degree of problem anticipated and experienced at the remining site. Because the AMD problem is recognized as the largest deterrant to remining, and some AMD can be anticipated from many remining sites, the environmental approach would substantially narrow the remining incentive which OSM believes Congress intended in providing the section 510(e) exemption. Conversely, the industry approach would substantially broaden the incentive beyond which OSM believes Congress intended for this exemption.

The final rule seeks to implement the "(reasonably) anticipated event or condition" language of section 510(e). The rule's reliance upon the permit information and permit finding requirements of §§ 785.25 and 773.15(c)(13) maps a middle course between the environmental and industry approaches and provides a flexibility which accounts for the realities of remining operations where environmental and safety problems may reasonably be anticipated only in terms of degrees or relative amounts.

Under the final rule it falls to the regulatory authority to determine whether the degree of problems experienced in excess of that which was originally anticipated and identified in the permit would qualify as unanticipated for the purposes of the section 510(e) exemption. For example, if on the basis of available baseline information required under existing permit application rules and the site-specific investigations required by new § 785.25, the operation and reclamation plans reasonably anticipate an AMD discharge of 150 gpm to occur with mitigation plans set forth to handle that amount, a later occurrence of a discharge of 1500 gpm may reasonably be said to have not been contemplated by those plans and, therefore, qualifies as an unanticipated event or condition for the purposes of the § 773.15(b)(4) (section 510(e)) exemption. This fact-specific inquiry would be made by the regulatory authority on a case-by-case basis. Regardless of the level of discharge, the operator would, however, be responsible for abating any violation

related to the discharge and providing appropriate treatment.

There can be no hard and fast rules for what degree of variance from the permit estimate reasonably qualifies as an unanticipated event or condition. The final rule recognizes that each site has its unique characteristics and must be investigated accordingly. The final decision as to whether an event or condition was unanticipated will be made by the regulatory authority conducting the § 773.15(b) permit review.

Required Mitigation Measures

Final § 785.25 differs from the proposed rule in that paragraph (b)(2) requires a description of the mitigation measures which will be taken to ensure that the reclamation required by the applicable requirements of the regulatory program can be met rather than the description required by proposed paragraph (b)(2) of how such measures will meet applicable performance standards. This change focuses the required description on ensuring that the applicant is prepared to reclaim the reasonably anticipated potential environmental and safety problems identified in paragraph (b)(1).

Phase-Out of Section 785.25 Requirements

Final § 785.25 also differs from the proposal in that a new paragraph (c) has been added providing that the requirements of that section shall not apply after September 30, 2004. The effect of this provision will be that no § 785.25 remining permits will be issued after September 30, 2004. This is consistent with OSM's interpretation of the Energy Policy Act amendments to SMCRA as allowing violations resulting from an unanticipated event or condition arising on lands eligible for remining under a permit issued before September 30, 2004, and any renewals thereof, to be eligible for the permit block exemption of section 510(e).

4. 30 CFR Part 816—Permanent Program Performance Standards—Surface Mining Activities and Part 817—Permanent Program Performance Standards—Underground Mining Activities

The final rule amends paragraphs (c)(2) and (c)(3) of §§ 816.116 and 817.116, *Revegetation: Standards for Success*, by adding paragraphs (c)(2)(ii) and (c)(3)(ii) which implement section 515(b)(20)(B) of SMCRA. Paragraph (c)(2) deals with areas receiving more than 26.0 inches of average annual precipitation. Final paragraph (c)(2)(i) is identical to former paragraph (c)(2),

with the addition of a reference to the exception to the regular five-year revegetation responsibility period provided at final paragraph (c)(2)(ii) for lands eligible for remining included in permits issued before September 30, 2004, and any renewals thereof. Final paragraph (c)(2)(ii) reduces the revegetation responsibility period to two years for lands eligible for remining included in such permits. Final paragraph (c)(2)(ii) also provides that to the extent that the success standards for certain lands previously disturbed by mining are established by §§ 816/817.116(b), the lands shall equal or exceed those standards during the growing season of the last year of the responsibility period. Because OSM anticipates that in most cases the post-mining land use for lands eligible for remining will be as specified in paragraph (b)(5), final paragraph (c)(2)(ii) merely includes the paragraph (b)(5) success standards. This does not preclude the regulatory authority from prescribing paragraph (c)(2)(ii) two-year success standards when the post-mining lands use is grazing, crop, or pastureland.

Final paragraph (c)(3) relates to areas of less than 26.0 inches of annual average precipitation and incorporates language similar to paragraph (c)(2) except that the period of responsibility has been reduced from ten years to five years.

The changes in these periods of responsibility for revegetation are mandated by section 515(b)(20)(B) of SMCRA as amended by section 2503(b) of the Energy Policy Act.

a. Comparison of proposed and final §§ 816.116 and 817.116. The format of the proposed rule apparently created some confusion for commenters with respect to distinguishing between the responsibility periods for revegetation and success standards for revegetation intended by the proposed rule for lands eligible for remining. The final rule seeks to clarify this situation for lands eligible for remining by placing the requirements for both responsibility periods for revegetation and success standards for revegetation in one paragraph, either (c)(2)(ii) for areas of more than 26.0 inches of average annual precipitation or (c)(3)(ii) for areas of 26.0 inches or less average annual precipitation.

Each of these paragraphs also contain the statement that if the success standards are established by paragraph (b)(5), then the lands eligible for remining shall equal or exceed these standards during the growing season of the last year of the responsibility period (paragraph (c)(2)(ii) or of the last two

consecutive years of the responsibility period (paragraph (c)(3)(ii)). This reformatting change should make clear that the final rule is not intended to vary the success standards for revegetation of the existing rules.

Phase-In for Reduced Revegetation Responsibility Periods

Final §§ 816/817.116 (c)(2)(ii) and (c)(3)(ii) tie the reduced revegetation responsibility periods for lands eligible for remining to permits issued before September 30, 2004, and any renewals thereof. Because the statutory language of section 515(b)(20)(B) does not contain the triggering language of section 510(e): "[a]fter the date of enactment of this subsection," OSM is interpreting final §§ 816/817.116(c)(2)(ii) and (c)(3)(ii) as requiring existing permits to obtain a permit revision to qualify for the rule's reduced revegetation responsibility periods. This permit revision would require a § 773.13(c)(13)(i) finding by the regulatory authority that the permit covers lands eligible for remining. Permits issued under new § 785.25 would also require a similar § 773.13(c)(13)(i) finding. Whether for existing permits or those issued under § 785.25, the reduced revegetation responsibility periods would apply only to lands within the permit found to be eligible for remining.

OSM is aware that, for existing operations on lands eligible for remining which have ceased mining and have already begun reclamation, the above interpretation of final §§ 816/817.116 would allow for reduced revegetation responsibility periods without operating as an incentive for future remining. This interpretation is, however, permissible under the language of section 515(b)(20)(B), whose only qualification for the reduced revegetation responsibility periods is that the affected land be eligible for remining, and is structurally consistent with OSM's implementation of the Energy Policy Act's other remining provision at section 510(e) (§ 773.15.(b)(4)(i)).

Phase-Out for Reduced Revegetation Responsibility Periods

Because final §§ 816/817.116(c)(2)(ii) and (c)(3)(ii) tie the reduced revegetation responsibility periods to remining permits issued before September 30, 2004, or any renewals thereof, the reduced revegetation responsibility provisions will not cease to be operative on September 30, 2004, for permits issued before that date as would have been the case under the proposed rule. Under the final rule, as long as the permit was issued before

September 30, 2004, the reduced revegetation responsibility periods could extend beyond that date through the prescribed duration of the remining permit or any renewals thereof.

This change was made in response to commenters who recommended that the period of responsibility should apply to any remining permit issued prior to September 30, 2004, even if the mining and/or period of responsibility extended past that date.

Both the reduced revegetation responsibility period provisions of section 515(b)(20)(B) and the permit block exemption provisions of section 510(e) are tied to lands eligible for remining. The same provision in section 510(e) terminates the authority for both sections on September 30, 2004. This termination provision suggests that Congress intended sections 510(e) and 515(b)(20)(B) to operate in tandem, providing structurally consistent incentives for remining operations on lands eligible for remining.

Interpreting the phase-out provisions of section 515(b)(20)(B) as ending the reduced responsibility periods on September 30, 2004, would, for remining operations existing on that date, render the shortened responsibility period meaningless. A reduced two or five-year period which runs past September 30, 2004, would be transformed on October 1, 2004, into a five and ten-year period. Thus no relief would be afforded operations who would otherwise rely upon that statutory provision. Such an interpretation would, particularly for potential remining operations in the arid West and less so for those in the East, provide severely limited incentive for remining. For instance, assuming one year would be spent permit processing, one-half a year for preparing the site, one and one-half years for actual remining, seven years to satisfy the five-year responsibility period resulting in bond release, a Western operator would then have had to have begun the permitting process in September of 1994 to have availed himself of a section 515(b)(20)(B) incentive if that incentive ended on September 30, 2004. If this hypothetical remining schedule were in any way delayed, the operator would run the risk of exceeding the 2004 barrier and being held to the standard ten-year responsibility period.

Rather than such an interpretation, OSM interprets consistently the permit block exemption of section 510(e) and the reduced responsibility provisions of section 515(b)(20)(B) by tying both to a remining permit issued before September 30, 2004, or any renewals

thereof. In other words, the reduced responsibility period can extend beyond that date if the permit is issued before September 30, 2004.

One commenter correctly noted that the Energy Policy Act amendments to section 515(b)(20) "abridged the duration of the period of responsibility, but did not alter the provisions relating to demonstrating achievement of the revegetation standards." On the other hand, several commenters suggested that OSM incorrectly interpreted the requirements of the Energy Policy Act in the proposal with regard to what the commenters referred to as "success standards" for revegetation. Another commenter asked whether "both ground cover and productivity must meet standards for both years of the two-year maintenance period * * *"

In response to both groups of comments, OSM stresses that the Energy Policy Act only reduces the "periods of responsibility" for revegetation from five to two years for areas of more than 26.0 inches of average annual precipitation and from ten to five years for areas of 26.0 inches or less average annual precipitation. The Energy Policy Act amendments to SMCR do not prescribe any changes to revegetation standards, success standards, or productivity standards. All of these standards are unaffected by both the proposed and final rule. Thus, in the proposal as well as the final rule, OSM has adopted the success standards of the existing rules. OSM recognizes that the success standard applicable to remining sites will likely be that of existing 30 CFR 816.116(b)(5) and 817.116(b)(5).

Several commenters noted two editorial problems at §§ 816/817.116(c)(2) of the proposal: (1) Remining was misspelled; and (2) The word "not" was inadvertently omitted. The text has been corrected to read "In areas of more than 26.0 inches of annual average precipitation, the period of responsibility shall continue for a period of not less than: * * * (ii) Two full years for lands eligible for remining * * *."

5. Other Comments

One commenter stated that parts 816 and 817 should require that rivers and streams within 20 miles of a remining site be capable of sustaining fish populations and that wetlands destroyed during remining must be replaced and added to. These comments go well beyond the proposed rule and are not accepted.

Two commenters recommended that the final rule provide for a date-certain bond release. One commenter stated that for operators with previous

reclamation success on remined lands there would be little additional risk for bond releases tied to time versus bond releases tied to success standards. The other commenter stated that H.R. 4053, a predecessor to the Energy Policy Act, contained language relating to "date-certain release of an operator's bond" and this language established requisite Congressional intent in the Energy Policy Act for a date-certain bond release. This language was not, however, carried forward into H.R. 4381 (1992), H.R. 776 (1992), or the Energy Policy Act. No provisions in the Energy Policy Act can be construed to authorize a date-certain bond release and OSM rejects this recommendation.

One commenter recommended that adoption of final rules should be delayed until all aspects of incentives dealing with abandoned coal refuse sites have been worked out. The incentives and requirements for removal and/or reprocessing of material at abandoned coal refuse sites are mandated by section 2503(e) of the Energy Policy Act and are being developed under a separate rulemaking. The statutory authority and the subject matter for both the coal refuse and the current rulemaking are sufficiently distinct and independent of each other so that there is no need nor advantage gained by delaying this rule until resolution of all coal refuse issues.

Another commenter suggested the use of negotiated compliance schedules to address abatement of unanticipated events prior to issuing a violation. This suggested procedure was not included in the proposal and, therefore, is beyond the scope of this rulemaking.

Several commenters recommended inclusion in the final rule of additional incentives which they felt would encourage remining. The commenters provided no legal basis for the following recommendations: (1) Creating minimum requirements for information on environmental resources. This is based on the commenter's assertion that remining operations are intended to mitigate or correct adverse effects of mining while operations on previously undisturbed areas are intended to prevent adverse effects; (2) Promulgating a new standard that would encourage the most environmentally effective use of spoil as opposed to current standards which require spoil to be used for highwall elimination as a first priority; (3) Providing a bonding advantage for remining operations; (4) Reducing the potential for bond forfeiture resulting from unanticipated events or conditions by allowing the AML program and not the operator to be responsible for final

abatement of preexisting conditions. OSM does not accept these comments. The recommended incentives were not included in the proposal and are beyond the scope of this rulemaking.

III. Procedural Matters

Federal Paperwork Reduction Act

The collections of information contained in this rule have been approved by the Office of Management and Budget under 44 U.S.C. 3501 *et seq* and assigned clearance numbers 1029-0040 and 1029-0041.

Executive Order 12778; Civil Justice Reform Certification

This rule has been reviewed under the applicable standards of section 2(b)(2) of Executive Order 12778, Civil Justice Reform (56 FR 55195). In general, the requirements of section 2(b)(2) of Executive Order 12778 are covered by the preamble discussion of this final rule. Additional remarks follow concerning individual elements of the Executive Order:

A. What is the preemptive effect, if any, to be given to the regulation?

The rule would have the same preemptive effect as other standards adopted pursuant to SMCRA. To retain primacy, States have to adopt and apply standards for their regulatory programs that are no less effective than those set forth in OSM's rules. Ordinarily, any State law that is inconsistent with, or that would preclude implementation of a new Federal rule, would be subject to preemption under SMCRA section 505 and implementing regulations at 30 CFR 730.11. However, any State law which provides for more stringent land use and environmental controls and regulation of coal exploration and surface mining and reclamation operations than do the provisions of the Act and any rules issued pursuant thereto, shall not be construed as inconsistent with those rules. Because the current amendments to SMCRA contained in the Energy Policy Act are intended to ease certain requirements of the Act, these rules will not preempt more stringent State laws.

B. What is the effect on existing Federal law or regulation, if any, including all provisions repealed or modified?

This rule modifies the implementation of SMCRA, as described herein, and is not intended to modify the implementation of any other Federal statute. The preceding discussion of this rule specifies the Federal regulatory provisions that are affected by this rule.

C. Does the rule provide a clear and certain legal standard for affected conduct rather than a general standard,

while promoting simplification and burden reduction?

The standards established by this rule are as clear and certain as practicable, given the complexity of the topics covered and the mandates of SMCRA.

D. What is the retroactive effect, if any, to be given to the regulation?

This rule implements portions of the Energy Policy Act that were effective on October 24, 1992. Although this rule may be considered retroactive to the extent it covers actions occurring October 24, 1992, the Energy Policy Act requires such effects. OSM also recognizes that the rule may allow revisions to existing permits to change revegetation responsibility periods. This impact was explained above.

E. Are administrative proceedings required before parties may file suit in court? Which proceedings apply? Is the exhaustion of administrative remedies required?

No administrative proceedings are required before parties may file suit in court challenging the provisions of this rule under section 526(a) of SMCRA, 30 U.S.C. 1276(a).

Prior to any judicial challenge to the application of the rule, however, administrative procedures must be exhausted. In situations involving OSM application of the rule, applicable administrative procedures may be found at 43 CFR part 4. In situations involving State regulatory authority application of provisions equivalent to those contained in this rule, applicable administrative procedures are set forth in the particular State program.

F. Does the rule define key terms, either explicitly or by reference to other regulations or statutes that explicitly define those items?

Terms which are important to the understanding of this rule are set forth in 30 CFR 700.5 and 701.5.

G. Does the rule address other important issues affecting clarity and general draftsmanship of regulations set forth by the Attorney General, with the concurrence of the Director of the Office of Management and Budget, that are determined to be in accordance with the purposes of the Executive Order?

The Attorney General and the Director of the Office of Management and Budget have not issued any guidance on this requirement.

Regulatory Flexibility Act

The Department of the Interior has determined that the final rule 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*. This determination is based on the findings that the regulatory

additions in the rule will not change costs to industry or to the Federal, State, or local governments. Furthermore, the rule produces no adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States enterprises to compete with foreign-based enterprises in domestic or export markets.

Executive Order 12866

This final rule has been reviewed under Executive Order 12866.

National Environmental Policy Act

OSM has prepared an environmental assessment (EA) of this final rule and has made a finding that it will not significantly affect the quality of the human environment under section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4332(2)(C). The EA and finding of no significant impact are on file in the OSM Administrative Record, Room 101, 1951 Constitution Avenue, NW., Washington, DC.

Author

The principal author of this final rule is: Douglas J. Growitz, P.G., Hydrologist, Branch of Research and Technical Standards, Office of Surface Mining Reclamation and Enforcement, Room 110 SIB, 1951 Constitution Avenue, NW., Washington, DC 20240, Telephone: 202-208-2561.

List of Subjects

30 CFR Part 701

Law enforcement, Surface mining, Underground mining.

30 CFR Part 773

Administrative practice and procedure, Surface mining, 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.

Dated: October 11, 1995.

Bob Armstrong,

Assistant Secretary, Land and Minerals Management.

Accordingly, 30 CFR parts 701, 773, 785, 816 and 817 are amended as set forth below:

PART 701—PERMANENT REGULATORY PROGRAM

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

Authority: 30 U.S.C. 1201 *et seq.*, as amended; Pub. L. 100-34; and Pub. L. 102-486.

2. Section 701.5 is amended by adding alphabetically definitions of "lands eligible for remining" and "unanticipated event or condition" as follows:

§ 701.5 Definitions.

* * * * *

Lands eligible for remining means those lands that would otherwise be eligible for expenditures under section 404 or under section 402(g)(4) of the Act.

* * * * *

Unanticipated event or condition, as used in § 773.15 of this chapter, means an event or condition related to prior mining activity which arises from a surface coal mining and reclamation operation on lands eligible for remining and was not contemplated by the applicable permit.

* * * * *

PART 773—REQUIREMENTS FOR PERMITS AND PERMIT PROCESSING

3. The authority citation for part 773 is revised to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*, as amended, Pub. L. 100-34; 16 U.S.C. 470 *et seq.*; 16 U.S.C. 1531 *et seq.*; 16 U.S.C. 661 *et seq.*; 16 U.S.C. 703 *et seq.*; 16 U.S.C. 668a; 16 U.S.C. 469 *et seq.*; 16 U.S.C. 470aa *et seq.*; and Pub. L. 102-486.

4. Section 773.15 is amended by adding new paragraphs (b)(4) and (c)(13) to read as follows:

§ 773.15 Review of permit applications.

(b) * * *

(4)(i) Subsequent to October 24, 1992, the prohibitions of paragraph (b) of this section regarding the issuance of a new permit shall not apply to any violation that:

- (A) Occurs after that date;
 - (B) Is unabated; and
 - (C) Results from an unanticipated event or condition that arises from a surface coal mining and reclamation operation on lands that are eligible for remining under a permit:
- (1) Issued before September 30, 2004, or any renewals thereof; and
- (2) Held by the person making application for the new permit.

(ii) For permits issued under § 785.25 of this chapter, an event or condition shall be presumed to be unanticipated for the purposes of this paragraph if it:

- (A) Arose after permit issuance;
 - (B) Was related to prior mining; and
 - (C) Was not identified in the permit.
- (c) * * *

(13) For permits to be issued under § 785.25 of this chapter, the permit application must contain:

- (i) Lands eligible for remining;
- (ii) An identification of the potential environmental and safety problems related to prior mining activity which could reasonably be anticipated to occur at the site; and
- (iii) Mitigation plans to sufficiently address these potential environmental and safety problems so that reclamation as required by the applicable requirements of the regulatory program can be accomplished.

* * * * *

PART 785—REQUIREMENTS FOR PERMITS FOR SPECIAL CATEGORIES OF MINING

5. The authority citation for part 785 is revised to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*, as amended; Pub. L. 100-34; and Pub. L. 102-486.

6. Section 785.25 is added to read as follows:

§ 785.25 Lands eligible for remining.

(a) This section contains permitting requirements to implement § 773.15(b)(4). Any person who submits a permit application to conduct a surface coal mining operation on lands eligible for remining must comply with this section.

(b) Any application for a permit under this section shall be made according to all requirements of this subchapter applicable to surface coal mining and reclamation operations. In addition, the application shall—

(1) To the extent not otherwise addressed in the permit application, identify potential environmental and safety problems related to prior mining activity at the site and that could be reasonably anticipated to occur. This identification shall be based on a due diligence investigation which shall include visual observations at the site, a record review of past mining at the site, and environmental sampling tailored to current site conditions.

(2) With regard to potential environmental and safety problems referred to in paragraph (b)(1) of this section, describe the mitigative measures that will be taken to ensure that the applicable reclamation requirements of the regulatory program can be met.

(c) The requirements of this section shall not apply after September 30, 2004.

PART 816—PERMANENT PROGRAM PERFORMANCE STANDARDS—SURFACE MINING ACTIVITIES

7. The authority citation for part 816 is revised to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*, as amended; sec 115 of Pub. L. 98-146, 30 U.S.C. 1257; Pub. L. 100-34; and Pub. L. 102-486.

8. Section 816.116 is amended by revising paragraphs (c)(2) and (c)(3) to read as follows:

§ 816.116 Revegetation: Standards for success.

* * * * *

(c) * * *
(2) In areas of more than 26.0 inches of annual average precipitation, the period of responsibility shall continue for a period of not less than:

(i) Five full years, except as provided in paragraph (c)(2)(ii) of this section. The vegetation parameters identified in paragraph (b) of this section for grazing land, pasture land, or cropland shall equal or exceed the approved success standard during the growing season of any 2 years of the responsibility period, except the first year. Areas approved for the other uses identified in paragraph (b) of this section shall equal or exceed the applicable success standard during the growing season of the last year of the responsibility period.

(ii) Two full years for lands eligible for remining included in permits issued before September 30, 2004, or any renewals thereof. To the extent that the success standards are established by paragraph (b)(5) of this section, the lands shall equal or exceed the standards during the growing season of the last year of the responsibility period.

(3) In areas of 26.0 inches or less average annual precipitation, the period

of responsibility shall continue for a period of not less than:

(i) Ten full years, except as provided in paragraph (c)(3)(ii) below. Vegetation parameters identified in paragraph (b) of this section shall equal or exceed the approved success standard for at least the last two consecutive years of the responsibility period.

(ii) Five full years for lands eligible for remining included in permits issued before September 30, 2004, or any renewals thereof. To the extent that the success standards are established by paragraph (b)(5) of this section, the lands shall equal or exceed the standards during the growing seasons of the last two consecutive years of the responsibility period.

* * * * *

PART 817—PERMANENT PROGRAM PERFORMANCE STANDARDS—UNDERGROUND MINING ACTIVITIES

9. The authority citation for part 817 is revised to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*, as amended; sec. 115 of Pub. L. 98-146, 30 U.S.C. 1257; Pub. L. 100-34; and Pub. L. 102-486.

10. Section 817.116 is amended by revising paragraphs (c)(2) and (c)(3) to read as follows:

§ 817.116 Revegetation: Standards for success.

* * * * *

(c) * * *
(2) In areas of more than 26.0 inches of annual average precipitation, the period of responsibility shall continue for a period of not less than:

(i) Five full years, except as provided in paragraph (c)(2)(ii) of this section. The vegetation parameters identified in paragraph (b) of this section for grazing

land, pasture land, or cropland shall equal or exceed the approved success standard during the growing season of any 2 years of the responsibility period, except the first year. Areas approved for the other uses identified in paragraph (b) of this section shall equal or exceed the applicable success standard during the growing season of the last year of the responsibility period.

(ii) Two full years for lands eligible for remining included in permits issued before September 30, 2004, or any renewals thereof. To the extent that the success standards are established by paragraph (b)(5) of this section, the lands shall equal or exceed the standards during the growing season of the last year of the responsibility period.

(3) In areas of 26.0 inches or less average annual precipitation, the period of responsibility shall continue for a period of not less than:

(i) Ten full years, except as provided in paragraph (c)(3)(ii) of this section. Vegetation parameters identified in paragraph (b) of this section shall equal or exceed the approved success standard for at least the last two consecutive years of the responsibility period.

(ii) Five full years for lands eligible for remining included in permits issued before September 30, 2004, or any renewals thereof. To the extent that the success standards are established by paragraph (b)(5) of this section, the lands shall equal or exceed the standards during the growing seasons of the last two consecutive years of the responsibility period.

* * * * *

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