

Placement of Coal Combustion Byproducts on Active and Abandoned Coal Mine Sites

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

ACTION: Proposed rule.

SUMMARY: We, the Office of Surface Mining Reclamation and Enforcement (OSM), are seeking comments on proposed regulations pertaining to permit application requirements and performance standards related to the placement of coal combustion byproducts (CCBs) on sites with permits for surface coal mining operations under Title V of the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act) or in the reclamation of abandoned mine lands (AML) as part of projects funded or approved under Title IV of the Act. This rule is designed to ensure that operations or reclamation projects where these CCBs are placed adequately protect the public and the environment. The proposed regulations are based on existing SMCRA authorities.

DATES: To ensure consideration, we must receive your comments on or before 4:30 p.m. on [INSERT date 60 days after date of publication in the FEDERAL REGISTER].

Public hearings: If you wish to testify at a public hearing, you must submit a request before 4:30 p.m., Eastern time, on [Insert date 30 days after date of publication in the FEDERAL REGISTER]. We will hold a public hearing only if there is sufficient interest. Hearing arrangements, dates and times, if any, will be announced in a subsequent Federal Register notice.

If you are a disabled individual who needs reasonable accommodation to attend a public hearing, please contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

ADDRESSES: You may submit comments by any of the following methods:

- Federal e-Rulemaking Portal: www.regulations.gov. The notice is listed under the agency name “Office of Surface Mining Reclamation and Enforcement.” The proposed rule has been assigned Docket ID: OSM-2008-0005.

If you would like to submit comments through the Federal e-Rulemaking Portal, go to www.regulations.gov and do the following. Click on the “Advanced Docket Search” button on the right side of the screen. Type in the Docket ID OSM-2008-0005 and click the “Submit” button at the bottom of the page. The next screen will display the Docket Search Results for the rulemaking. If you click on OSM-2008-0005, you can view the proposed rule and submit a comment. You can also view supporting material and any comments submitted by others.

- Mail/Hand-Delivery/Courier to: Office of Surface Mining Reclamation and Enforcement, Administrative Record, Room 252-SIB, 1951 Constitution Avenue, NW, Washington, DC 20240. Please include the Docket ID (OSM-2008-0005) with your comment.

Comments received after the close of the comment period (see **DATES**) or sent to an address other than those listed above will not be included in the docket for this rulemaking and considered.

For additional information on the rulemaking process and the public availability of comments, see “III. Public Comment Procedures” in the **SUPPLEMENTARY INFORMATION** section of this document.

If you wish to comment on the information collection aspects of this proposed rule, submit your comments to the Office of Management and Budget, Office of Information and Regulatory Affairs, Attention: Interior Desk Officer, via electronic mail, to

OIRA_DOCKET@omb.eop.gov or via fax at (202) 395-6566. Please refer to OMB control numbers 1029-xxx1, 1029-xxx2, and 1029-0113 in your correspondence.

FOR FURTHER INFORMATION CONTACT: John Craynon, P.E., Chief, Division of Regulatory Support, Office of Surface Mining Reclamation and Enforcement, 1951 Constitution Ave, NW, MS-202 SIB, Washington, DC 20240; Telephone 202-208-2866.

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I. What are CCBs?

The Energy Policy Act of 1992 defined coal combustion byproducts (CCBs) as “the residues from the combustion of coal, including ash, slag, and flue gas desulfurization materials.” 42 U.S.C. 13364(a). CCBs are produced when coal is burned. Electrical generating facilities are the primary producers of CCBs. CCBs from power plants consist of four large-volume residue streams—fly ash, bottom ash, boiler slag, and flue gas emission control residue.

The University of North Dakota Coal Ash Research Center lists the following five categories of CCBs on its website (<http://www.undeerc.org/carrc/html/Terminology.html>):

[1] Boiler slag is a molten ash collected at the base of slag tap and cyclone boilers that is quenched with water and shatters into black, angular particles having a smooth glassy appearance.

[2] Bottom ash consists of agglomerated ash particles formed in pulverized coal boilers that are too large to be carried in the flue gases and impinge on the boiler walls or fall through open grates to an ash hopper at the bottom of the boiler. Bottom ash is typically gray to black in color, is quite angular, and has a porous surface structure.

[3] Fluidized-bed combustion materials consist of unburned coal, ash, and spent bed material used for sulfur control. The spent bed material (removed as bottom ash) contains reaction products from the absorption of gaseous sulfur oxides (SO_2 and SO_3).

[4] Flue gas desulfurization materials are derived from a variety of processes used to control sulfur emissions from boiler stacks. These systems include wet scrubbers, spray dry scrubbers, sorbent injectors, and a combined sulfur oxide (SO_x) and nitrogen oxide (NO_x) process. Sorbents include lime, limestone, sodium-based compounds, and high-calcium coal fly ash.

[5] Fly ash is the coal ash that exits a combustion chamber in the flue gas and is captured by air pollution control equipment such as electrostatic precipitators, baghouses, and wet scrubbers.

CCBs are also known as coal combustion products (CCPs), “coal combustion wastes” (CCWs), and “coal combustion residues” (CCRs). CCR is the term preferred by the National Research Council.

II. What is the background for this rulemaking proposal?

In 2003, Congress directed the Environmental Protection Agency (EPA) to commission an independent study of the health, safety, and environmental risks associated with the placement of

CCWs in active and abandoned coal mines in all major U.S. coal basins.¹ As a result, the National Research Council (NRC) established the Committee on Mine Placement of Coal Combustion Wastes in September 2004. The NRC published the committee's findings on March 1, 2006, in a report entitled "Managing Coal Combustion Residues in Mines" (NRC Report) which is available online at <http://newton.nap.edu/openbook/0309100496/html/index.html>.

As stated on page one of the NRC Report, the committee "concluded that putting CCRs in coal mines as part of the reclamation process is a viable management option as long as (1) CCR placement is properly planned and is carried out in a manner that avoids significant adverse environmental and health impacts and (2) the regulatory process for issuing permits includes clear provisions for public involvement." NRC Report, pp. 1-2. The committee also notes that the placement of CCRs in coal mines "can assist in meeting reclamation goals (such as remediation of abandoned mine lands)" and "avoids the need, relative to landfills and impoundments, to disrupt undisturbed sites." NRC Report, p. 2. However, the committee cautioned that "an integrated process of CCR characterization, site characterization, management and engineering design of placement activities, and design and implementation of monitoring is required to reduce the risk of contamination moving from the mine site to the ambient environment." NRC Report, p. 12.

The committee also concluded that "although SMCRA does not specifically regulate CCR placement at mine sites, its scope is broad enough to encompass such regulation during

¹ For purposes of this preamble, we use the term "active" mine to refer to surface coal mining and reclamation operations, as defined in 30 CFR 700.5, for which there is a valid permit under Title V of SMCRA, and the term

reclamation activities.” NRC Report, p. 11. Accordingly, the committee recommended that federal standards be established to dispose of CCRs in minefills and provided suggestions for implementation of that recommendation. Specifically, the NRC Report states:

Furthermore, while SMCRA and its implementing regulations indirectly establish performance standards that could be used to regulate the manner in which CCRs may be placed in coal mines, neither the statute nor those rules explicitly address regulation of the use or placement of CCRs, and some states have expressed concern that they do not have the authority to impose performance standards specific to CCRs. Therefore, **the committee recommends that enforceable federal standards be established for the disposal of CCRs in minefills.** Enforceable federal standards will ensure that states have adequate, explicit authority and that they implement adequate minimum safeguards. As with current federal regulations, these rules should provide sufficient flexibility to allow states to adapt permit requirements to site-specific conditions, while providing the needed focus on the protection of ecological and human health.

* * *

In all cases, guidance documents will also be necessary to help states implement their responsibility for managing CCR. However, guidance alone is not adequate to achieve the needed improvements in state programs for CCR minefills. Only through enforceable standards can acceptable minimum levels of environmental protection for CCR placement in coal mines be guaranteed nationally.

NRC Report, pp. 11-12.

At the same time, the committee identified three potential regulatory schemes that could be used to develop enforceable standards:

- Specifically addressing CCRs through revisions to the SMCRA regulations;
- OSM and EPA engaging in a joint rulemaking pursuant to the authority of SMCRA; or

“abandoned” mine to refer to lands and waters eligible under 30 CFR 874.12 for reclamation under Title IV of

- Implementing rules through Subtitle D of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. 6901-6992k, which are enforceable through a SMCRA permit.

Id. at 12. However, the committee also stated that:

OSM and its SMCRA state partners should take the lead in developing new national standards for CCR use in mines because the framework is in place to deal with mine-related issues. *** Regardless of the regulatory mechanism selected, coordination between OSM and EPA efforts is needed and would foster regulatory consistency with EPA's intended rule proposals for CCR disposal in landfills and impoundments.

NRC Report, p. 185. Consistent with this recommendation, we are proposing this rule in order to develop national standards under SMCRA for the placement of CCBs in active and abandoned mine sites. We are working closely with EPA to ensure regulatory consistency between the two agencies.

The committee also made other recommendations that relate to and expand upon the recommendation for enforceable federal standards. Those recommendations include:

- Characterizing² CCRs before placing significant amounts in mine sites and for each new source of CCRs (NRC Report, p. 6);

SMCRA.

²The term "characterizing" means the use of testing, analysis, etc. in order to determine the physical, chemical, and other salient properties.

- Characterizing CCRs “periodically throughout the mine placement process to assess any changes in CCR composition and behavior” (NRC Report, p. 6);
- Comprehensively characterizing all mine sites before placing substantial amounts of CCRs (NRC Report, p. 7);
- Creating management plans for the CCR placement in mine sites on a site-specific basis, with site-specific performance standards (NRC Report, p. 7);
- Ensuring that the CCR placements in mine sites are designed to minimize reactions with water and the flow of water through CCRs (NRC Report, p.8);
- Carefully determining for each mine site “[t]he number and location of monitoring wells, the frequency and duration of sampling, and the water quality parameters selected for analysis” in order “to accurately assess the present and potential movement of CCR-associated contaminants” (NRC Report, p. 9);
- Tailoring reasonable site-specific performance standards “to address potential environmental problems associated with CCR management” in mine sites (NRC Report, p. 9);
- Subjecting the placement of CCRs in abandoned and remining mine sites “to the same CCR characterization, site characterization, and management planning standards recommended for active coal mines” (NRC Report, pp. 9-10); and
- Treating the placement of substantial amounts of CCRs in mine sites as a “significant alteration of the reclamation plan” as defined by SMCRA in order to “ensure that the public is afforded adequate notice of, and an opportunity to comment on, the CCR placement proposal” (NRC Report, p. 11).

On March 14, 2007, we published an advance notice of proposed rulemaking in response to the NRC Report. 72 FR 12026-12030. At that time, we invited comment on how we should implement the recommendations in the NRC Report. For example, we solicited comment on how we should revise the regulations implementing Titles IV and V of SMCRA to regulate the placement of CCBs on active and abandoned coal mine sites and what type of guidance documents we should issue, if any. 72 FR 12030. We also sought comment on our tentative preferred approach regarding the proposed regulations or whether other approaches would be more appropriate. Id.

After extending the comment period on our advance notice of proposed rulemaking, we received approximately 1,900 separate comments, which are summarized in Part VII of this preamble. Following receipt of those comments, we consulted with the EPA, State regulatory and abandoned mine land authorities, representatives of citizen and environmental groups, and representatives of the coal mining and electrical utilities industries as a part of developing today's proposed regulations.

III. Background on SMCRA.

In fashioning SMCRA, Congress created two major programs:

- An abandoned mine land reclamation program created primarily by Title IV of the Act, which imposes a reclamation fee that is paid by operators on each ton of coal produced. Generally, these fees are used to reclaim land and water resources adversely affected by coal mines abandoned or left in an inadequately reclaimed condition before August 3, 1977. See, generally, 30 U.S.C. 1231-1244.

- A regulatory program created primarily by Title V of the Act, which attempts to ensure that surface coal mining operations initiated or in existence after the effective date of the Act (generally August 3, 1977) are conducted and reclaimed in an environmentally sound manner. See, generally, 30 U.S.C. 1251-1279.

Section 101(f) of SMCRA specifies that, because of the diversity in terrain, climate, biology, geochemistry, and other physical conditions under which mining operations occur, the primary governmental responsibility for regulating surface mining and reclamation operations should rest with the States. 30 U.S.C. 1201(f). To achieve primary regulatory responsibility, often referred to as primacy, a State must develop and obtain Secretarial approval of a regulatory program under section 503 of the Act that meets the requirements of the Act and that is no less effective than the Federal regulations in achieving the requirements of the Act. 30 U.S.C. 1253. To date, 24 of the 26 coal-producing States have achieved primacy. The SMCRA Amendments Act of 2006, which was enacted on December 20, 2006, as part of Public Law No. 109-432, revised section 710(i) of SMCRA and added a new section 710(j) to authorize Indian tribes to assume primacy for the regulation of surface coal mining and reclamation operations on reservation lands within the jurisdiction of the tribe. 30 U.S.C. 1300(i) and (j). No tribe has received primacy as of the date of publication of this proposed rule.

Following approval of a State regulatory program, we assume an oversight role. Section 517(a) of SMCRA requires that we make such inspections as are necessary to evaluate the administration of approved State programs. 30 U.S.C. 1267(a). The primary purpose of both the State program review and approval process and oversight of State programs is to ensure that all

States attain and maintain environmental protection requirements and inspection and enforcement efforts consistent with the Act.

States with primacy are eligible to apply for the authority to administer AML reclamation programs within their borders. Once the Secretary approves their AML reclamation plans under section 405 of SMCRA those States become eligible to receive grants for AML reclamation programs and projects.³ 30 U.S.C. 1235. SMCRA does not establish requirements for AML reclamation projects analogous to the permitting requirements and performance standards that apply to surface coal mining operations. However, in consultation with the States, we have developed a guidance document entitled, “Final Guidelines for Reclamation Programs and Projects,” which contains provisions and recommendations relating to protection of public health, safety, and the environment as part of project planning, design, and construction. See 66 FR 31250-31258. Our regulations at 30 CFR 874.13(a) encourage the use of the guidelines, but, as stated in the introduction to the guidelines document, the guidelines do not establish new legal requirements or obligations.

³The SMCRA Amendments Act of 2006, which was enacted as part of Public Law No. 109-432 on December 20, 2006, amended section 402(g)(8)(B) of SMCRA to allow Tennessee and Missouri to retain eligibility for grants for AML reclamation programs and projects even if those States do not have an approved regulatory program. 30 U.S.C. 1232(g)(8)(B).

IV. Which provisions of SMCRA authorize the adoption of regulations governing the placement of CCBs in active and abandoned mine sites?

SMCRA does not directly address the placement of CCBs in active or abandoned coal mines. Sections 515(b)(11) and 516(b)(4) of SMCRA contain requirements applicable to the “surface disposal of mine wastes, tailings, coal processing wastes, and other wastes” on permitted mine sites, but only when those wastes are placed in “areas other than the mine workings or excavations ***.” 30 U.S.C. 1265(b)(11) and 1266(b)(4) (emphasis added). These provisions would not apply to most CCB placements in active mines because CCBs are most frequently placed in mine workings or excavations. However, as discussed below, we believe that other provisions of SMCRA provide adequate authority for the adoption of regulations governing the placement of CCBs with respect to both active mines and abandoned mine reclamation projects conducted under an AML reclamation plan approved under section 405 of SMCRA.

A. Provisions applicable to both active mines and AML reclamation projects

Section 201(c)(2) of SMCRA authorizes the Secretary, acting through OSM, to “publish and promulgate such rules and regulations as may be necessary to carry out the purposes and provisions of the Act.” 30 U.S.C. 1211(c)(2). The purposes of SMCRA are enumerated in section 102, 30 U.S.C. 1202. In relevant part, that section provides that—

It is the purpose of this Act to—

(a) establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations;

(d) assure that surface coal mining operations are so conducted as to protect the environment;

(e) assure that adequate procedures are undertaken to reclaim surface areas as contemporaneously as possible with the surface coal mining operations;

(h) promote the reclamation of mined areas left without adequate reclamation prior to the enactment of this Act and which continue, in their unreclaimed condition, to substantially degrade the quality of the environment, prevent or damage the beneficial use of land or water resources, or endanger the health or safety of the public.

The placement of CCBs into active and abandoned mine sites could aid in the reclamation of surface areas on active mines or inadequately reclaimed mined areas left abandoned prior to the enactment of SMCRA. However, this placement could have the potential to adversely impact the environment and the public if not conducted properly. Therefore, we believe it necessary to

propose these rules to achieve the purposes listed in section 102 of the Act, in particular the purposes quoted or summarized above. Section 201(c)(2) provides us with a basis for the adoption of rules governing the placement of CCBs both as part of surface coal mining and reclamation operations for which a permit is required under Title V of SMCRA and on abandoned mine lands where the placement occurs in connection with a project conducted under an abandoned mine reclamation program approved and funded under section 405 of SMCRA.

B. Provisions applicable only to active mines (Title V of SMCRA)

Section 501(b) of SMCRA requires the Secretary to publish regulations “covering a permanent regulatory procedure for surface coal mining and reclamation operations performance standards based on and conforming to the provisions of title V ***.” 30 U.S.C. 1251(b). This provision, taken together with, at a minimum, sections 507(b)(11), 508(a)(13), 510(b)(3), 515(b)(10) and (14), and 516(b)(9) and (10) of SMCRA provides express authority to impose performance standards to protect the hydrologic balance and to require sufficient permit application information to conclude that the proposed surface coal mining and reclamation operations will be conducted in a manner that protects the hydrologic balance. 30 U.S.C. 1257(b)(11), 1258(a)(13), 1260(b)(3), 1265(b)(10) and (14), and 1266(b)(9) and (10). Mine site placement of CCBs has the potential to impact the hydrologic balance if not done properly. Therefore, we believe SMCRA authorizes the adoption of regulations containing specific requirements to monitor and control the placement of CCBs in mines with SMCRA permits to protect against adverse impacts to surface waters and groundwater.

C. Provisions applicable only to AML reclamation projects (Title IV of SMCRA)

With respect to the reclamation of AML sites, section 405(a) of SMCRA requires the Secretary to publish “regulations covering implementation of an abandoned mine reclamation program * * * and [to] establish[] procedures and requirements for * * * annual submissions of projects.” 30 U.S.C. 1235(a). Also, section 413(a) authorizes the Secretary “to do all things necessary or expedient, including promulgation of rules and regulations, to implement and administer the provisions of [Title IV].” 30 U.S.C. 1242(a).

Sections 403(a) and 411(c) of SMCRA do not provide any rulemaking authority, but they do establish priorities for project funding, with an emphasis first on protection of public health and safety from the adverse effects of past mining practices followed by restoration of land and water resources and the environment previously degraded by the adverse effects of mining practices. 30 U.S.C. 1233(a) and 1240a(c). By logical extension, AML reclamation projects involving the placement of CCBs should be designed and constructed in a manner that would not create new threats to public health or safety or the environment. However, our authority to establish requirements for AML reclamation project designs is somewhat limited by section 405(i), which provides that “States shall not be required at the start of any project to submit complete copies of plans and specifications.” 30 U.S.C. 1235(i).

V. How is the placement of CCBs currently regulated at mines with SMCRA permits?

Generally, CCB disposal operations are regulated under State solid waste management programs under Subtitle D of RCRA. If the disposal site is a mine with a SMCRA permit, the requirements of the applicable SMCRA regulatory program also apply.

In 1993, EPA published a Regulatory Determination for coal combustion wastes that concluded that the State industrial solid waste management programs implemented under Subtitle D of RCRA contained adequate regulatory controls for managing the disposal of those CCBs, and thus, regulation of CCBs under the hazardous waste provisions of RCRA was not warranted. See 58 FR 42466 for further discussion regarding EPA's basis for reaching this conclusion. However, this determination applied only to large-volume coal combustion wastes generated at electric utility and independent power-producing facilities that manage the wastes separately from certain other low-volume and uniquely associated coal combustion wastes. Id.

On May 22, 2000, EPA published another regulatory determination that addressed those CCBs that were not addressed in the 1993 Regulatory Determination. This Regulatory Determination similarly concluded that regulation of all other types of CCBs as hazardous waste under Subtitle C of RCRA was not warranted. See 65 FR 32214. However, EPA also concluded that establishment of national regulations to govern the placement of CCBs to fill surface and underground mines was appropriate. EPA reached this decision because it found that CCBs placed in mines could present a danger to human health or the environment under certain circumstances and because there were few states that currently operate comprehensive programs that specifically address the unique circumstances of minefilling with CCBs. See 65 FR 32231.

EPA noted that a comprehensive national program could be developed by adopting regulations under Subtitle D of RCRA, by modifying SMCRA regulations, or by a combination of both. See 65 FR 32215, 32232. Currently, EPA and OSM are coordinating with each other and with other interested parties in the implementation of this determination. You can find more information regarding the history of CCB regulation under RCRA, including links to referenced documents, on EPA's website at <http://www.epa.gov/epaoswer/other/fossil/index.htm>.

There is no express mention of CCBs in SMCRA and only two of our current regulations directly reference CCBs: 30 CFR 816.41(i)(2)(iii) and (v) and 30 CFR 817.41(h)(2)(iii) and (v), which specify that fly ash from a coal-fired facility and flue-gas desulfurization sludge may be discharged into an underground coal mine if certain demonstrations are made. The paucity of references to CCBs does not mean that SMCRA regulatory programs do not apply to placement of CCBs on permitted mine sites. In fact, the opposite is true, as litigation has established that any material placed in mine pits or otherwise used to reclaim a permitted mine site must comply with SMCRA permitting requirements and performance standards, regardless of whether the material originates within the permit area or whether it is imported from outside the permit area, and that we have the authority to establish monitoring and analysis requirements for those materials. See Pacific Coast Coal Co. v. OSM, Civ. No. 03-0260Z (W.D. Wash. Feb. 2, 2004).

In luncheon remarks published in the proceedings of the interactive forum on Coal Combustion By-Products Associated with Coal Mining (October 29-31, 1996), Katherine L. Henry, then the Acting Director of OSM, summarized the SMCRA requirements that apply to CCB disposal in a mine with a SMCRA permit:

When the use or disposal of coal combustion by-products happens at surface coal mines, state coal mining regulators are involved to the extent that SMCRA requires:

- The mine operator to ensure that all toxic materials are treated, buried, and compacted, or otherwise disposed of, in a manner designed to prevent contamination of the ground or surface water.
- Making sure the proposed land use does not present any actual or probable threat of water pollution.
- And ensuring the permit application contains a detailed description of the measures to be taken during mining and reclamation to assure the protection of the quality and quantity of surface and ground water systems, both on- and off-site, from adverse effects of the mining and reclamation process, also to assure that rights of present users of such water are protected.

See <http://www.mcrcc.osmre.gov/PDF/Forums/CCB/Luncheon.PDF>.

On February 6, 2001, OSM's Western Region issued a policy guidance document that applies to CCB disposal operations being conducted concurrently with surface coal mining and reclamation operations on lands where OSM's Western Region is the regulatory authority under SMCRA; i.e., on Indian lands for which the Indian tribe does not have primacy, in states with Federal programs, and on Federal lands in states without a cooperative agreement under section 523 of SMCRA. This document provides permitting guidance to ensure that CCB disposal permitted at surface coal mines will comply with the requirements of SMCRA and the applicable regulatory program promulgated under SMCRA. The document, which is entitled "Guidance On Disposal of Coal Combustion Byproducts In the Western United States When OSM Western Region is the Regulatory Authority," may be reviewed online at <http://www.wrcc.osmre.gov/Guidances/CCBguidance.html>.

OSM has no authority to regulate CCB placement in mines for which no permit is required under Title V of SMCRA. However, we believe regulation under Title V of SMCRA can serve as a template for State regulation of other mine sites, in coordination with EPA, under other authorities available to the States.

As a supplement to the regulatory efforts discussed above, OSM has taken an active role in encouraging and promoting technological advances, research, and technology transfer related to the placement of CCBs in mines. A multi-interest group known as the Coal Combustion By-Product Steering Committee has conducted six national interactive forums on CCB-related topics and edited, published, and distributed the forum proceedings. The Committee also provided technical assistance to the American Society of Testing Methods on draft guidance for CCB use in mines and developed and manages a website (<http://www.mcrcc.osmre.gov/ccb/>) dedicated to providing a user-friendly guide to CCB literature, organizations, EPA rulemaking, and educational events.

VI. What are the benefits of placing CCBs in active and abandoned coal mines?

The use of properly managed CCBs on both active and abandoned mines can contribute to successful reclamation. For example, alkaline CCBs with cement-like properties can be used to encapsulate acid-forming or other toxic-forming materials to isolate those materials from contact with water and thus reduce or eliminate the formation of acidic or toxic mine drainage.

When used as an alkaline addition to mine spoil, CCBs can improve soil quality and productivity as a medium for vegetation. In addition, CCBs can serve as base material for the construction of haul and access roads to support the heavy trucks and machinery used in mining. In thin overburden situations, the use of CCBs to backfill the pit can assist in restoring mined lands to elevations and grades similar to those that existed before mining, i.e., the approximate original contour.

Abandoned mine lands with exposed acidic spoils that result in acid mine drainage (AMD), contaminated streams, and barren or unproductive land also can benefit from the addition of CCBs. Alkaline CCBs can neutralize acidic and toxic-forming materials, thereby reducing AMD formation and improving the ability of the land to support a wider array of vegetation and land uses.

Even when there is no site-specific beneficial aspect to CCB placement in mines, the use of CCBs as nontoxic minefill in support of reclamation benefits the environment by preventing the surface disruption that would otherwise result from disposal of CCBs in landfills and surface impoundments, which normally are constructed on previously undisturbed sites or sites with productive land uses.

VII. What comments were received on our advance notice of proposed rulemaking?

In response to our request for comments on the advance notice of proposed rulemaking, we received approximately 1,900 comments, many of which stressed the need for collaboration with the EPA, preparation of an environmental impact statement (EIS), formation of a federal advisory committee, and the development of a proposed rule that protects groundwater sources.

Additionally, we received comments from various industry and environmental groups suggesting parameters and methodologies that could be incorporated in the proposed rule. At the end of the comment period, we met with State agencies to provide them with an opportunity to offer input into the regulatory process. In order to summarize the public comments, we have grouped them separated into three categories: industry comments, individual and environmental organization comments, and State comments.

Industry comments

Several commenters supported the regulation of CCB mine placement by OSM and the States. Generally, these commenters observed that OSM and the States already regulate active and abandoned surface coal mining operations under SMCRA; thus, the proposed rule should clarify that OSM and the States are the primary regulators of the CCB placement on these mine sites. If EPA also regulated CCB placement in mines, one commenter pointed out that the efforts of the agencies would be duplicative. Furthermore, the commenters explained that the RCRA Amendments Act of 1980 deems any valid SMCRA permit to be a valid RCRA permit.

Commenters also indicated that our rulemaking should incorporate CCB management into the existing SMCRA regulatory structure and confirm that CCB placement in mines is a fully acceptable practice and subject to SMCRA regulation. They indicated that management plans for CCB placement should be site-specific with flexibility for States to establish additional permit requirements for unique conditions. Additionally, the commenters indicated that States' authority to adopt regulations that account for regional differences in environmental conditions, including climate, geology, and ash composition should not be excessively restricted by our

actions. Since hydrogeologic and other environmental conditions vary greatly in the West compared to the East and the potential for impacts to groundwater is much lower in the West than in the East, industry commenters indicated that the rules must accommodate flexibility, particularly with respect to mitigation and monitoring.

Individual and environmental organization comments

Numerous commenters stated that SMCRA was intended to regulate mining, not waste disposal, which is how they view CCB placement. Thus, some commenters asserted that promulgating regulations on CCB placement in mine sites would fundamentally change the purpose of SMCRA because SMCRA provides that mining is to be a temporary use of the land, not a permanent dedication of the land for waste disposal. Viewed in that light, these commenters often stated that any rules governing CCB placement in mines must comply with RCRA as well as SMCRA, and EPA must be involved in their drafting and enforcement. One commenter also raised environmental justice concerns. In addition, many commenters suggested the creation of an advisory committee, comprised of representatives from many stakeholder constituencies, to determine the contents of the regulations.

Most commenters stressed that the proposed regulations should include, at a minimum, all of the recommendations contained in the NRC report, such as CCB characterization, site characterization, site-specific CCB management plans and performance standards, and robust water monitoring of CCB sites. One commenter pointed out the OSM Western Region policy guidance document, as discussed in Part V of this notice, was not an appropriate model for the proposed regulations because it does not address those NRC recommendations. Furthermore,

most commenters stated that an EIS should be prepared pursuant to the National Environmental Policy Act, 42 U.S.C. 4321 et seq., to adequately address the scope of CCB mine filling impacts and alternatives. These commenters maintained that an EIS is needed because CCBs differ from mine spoil and other materials used in mine reclamation in several important respects, including their greater concentration of leachable toxic constituents such as heavy metals, a higher surface area to volume ratio, and different hydraulic conductivity. Thus, these commenters were often concerned with the effect of CCBs on groundwater supplies, and one commenter suggested that placement of CCBs should be limited only to the non-active areas of the mine sites so as to facilitate monitoring. Such concerns also led at least one commenter to request that we completely ban CCB placement at mine sites.

State comments

Several States indicated that they have experience in regulating CCB placement and therefore offered comments on provisions they require companies to follow. State commenters indicated that CCBs placed at active or abandoned mine sites should provide a benefit to the mine site, although that benefit may include providing fill material. They stated that the beneficial use approach assures that reclamation is accomplished, pollution is prevented, and mine sites do not become inappropriate waste disposal facilities. One commenter suggested that to qualify as a beneficial use, CCB material must not be placed in a manner equivalent to placement in a disposal system.

Many of the State commenters focused on issues related to water flow and monitoring. For example, one State commenter indicated that the CCB placement plan at active mines should

take into account changes in surface water flow (and possibly groundwater movement) as a result of future mining and reclamation activities on adjoining areas of the mine. The commenter also suggested that the proposed rules require both upgradient and downgradient surface and ground water monitoring locations on active mine sites, but that we should consider reducing monitoring or making monitoring discretionary at abandoned mine sites. Another commenter maintained that the proposed regulations should allow States to determine the frequency of the monitoring, while a different commenter suggested that monitoring should be required at least quarterly. In addition, State commenters suggested that we identify the particular parameters that should be monitored, which would include those elements identified in the CCB characterization process that could pose a risk to the public health or the environment. Another commenter suggested that the proposed rule define “minimize reactions with water.” One commenter suggested that no coal ash should be placed within eight feet of the groundwater, unless there are exceptional circumstances. Further, some State commenters indicated that the proposed rule should include time requirements for the duration of monitoring at mine sites with CCB placement.

State commenters also provided suggestions for the proposed regulations as they relate to CCB characterization. For example, the commenters pointed out that coal ash is different than flue gas desulfurization materials and should be treated in a different manner. In addition, one State commenter suggested that we include a list of acceptable tests to determine the CCB characterization, so as to allow each State to choose the best method. For situations where the coal ash is used to mitigate AMD, one State also recommended that companies be responsible for demonstrating that the CCBs will create the proper alkaline conditions.

Although most of the comments from the States involved issues related to water monitoring and CCB characterization, these commenters also raised additional points. State commenters provided input on various aspects of the CCB placement. One suggestion requested we propose definitions for “significant mine placement” and “substantial placement of CCRs” as those phrases were used in the NRC recommendations. In addition, these commenters believe that site characterization requirements should be expanded, especially for AML projects, to include more comprehensive surface and ground water baseline data and additional local geologic information. One commenter also asserted that the proposed rule should include the NRC recommendation that documents be recorded with the deeds for CCB placement sites to identify the property as having been used for CCB placement. This State commenter suggested that the regulations require public notification whenever a large volume of coal ash would be placed at a mine site.

VIII. How do we propose to revise our regulations?

In its 2000 regulatory determination, the EPA indicated that regulation of CCB mine placement could be accomplished under either RCRA, SMCRA, or a combination of those authorities. OSM and EPA worked together with the States to determine what regulatory approach was appropriate. In 2003, Congress mandated the NRC Report which was released in March, 2006. The NRC also indicated that the regulation of CCB placement in mine sites could be accomplished either under RCRA, SMCRA, or a combination of those authorities. The NRC Report indicated that regulations were essential and that “OSM and its SMCRA state partners should take the lead in developing new national standards.” (See page 185 of the NRC Report). After discussions with EPA and State regulatory authorities under SMCRA and receipt of comments on our March 14, 2007, advance notice of proposed rulemaking, we have decided to

propose revisions to our regulations so that they will expressly provide for the placement of CCBs as part of surface coal mining and reclamation operations permitted under Title V of SMCRA and in the reclamation of abandoned mine lands under an AML reclamation program approved and funded under section 405 of the Act. We intend for these regulations to minimize the possibility that the placement of CCBs could cause adverse impacts on public health and the environment.

A. Section 700.5 – Definitions.

We are proposing to amend section 700.5 to include two definitions (“CCBs” and “coal combustion byproducts”) in order to define the variety of materials that may be suitable for placement under these proposed rules. As part of the definition for “coal combustion byproducts,” we are proposing to list and describe five types of CCBs (“fly ash,” “bottom ash,” “boiler slag,” “fluidized-bed combustion ash,” and “flue gas desulfurization materials”) as the types of materials we consider to be CCBs. The definitions of these five types of CCBs are adapted from the definitions used by the University of North Dakota Coal Ash Research Center, as described in Part I of this preamble, and the ASTM definitions of these terms. We have shortened and revised those definitions to adapt them to the purpose of this rulemaking. In addition, we are proposing to define “ASTM” which refers to ASTM International (formerly the American Society for Testing and Materials). Other provisions of this proposed rule rely on testing and characterization procedures which were created by ASTM International.

B. Section 700.10 – Information collection.

We are not proposing any changes to the information collection requirements for part 700. We are revising the wording to be consistent with Office of Management and Budget-approved clearances.

C. Section 774.9 – Information collection.

We are proposing to modify section 774.9 to reflect the new information collection requirements related to this part that result from today's proposal. As the revisions to this part are minor, the changes to the information collection requirements are also minor.

D. Section 774.10 – Permit review.

Based on input from the States, we are proposing modifications to section 774.10(a)(4) to specify that the regulatory authority must review the placement of CCBs as a part of a midterm permit review to ensure that the placement is being carried out in compliance with the other regulatory requirements proposed today.

E. Part 787 – Requirements for placement of coal combustion byproducts.

With respect to CCB placement in mines with SMCRA permits, we are proposing the adoption of regulations that would specifically identify the permit application requirements through addition of a new part 787. The proposed requirements add explanations of which activities involving CCBs require compliance with this new part, define the types of information that must be included in any permit application which contemplates placement of CCBs, detail what determinations, decisions and findings will be required by the regulatory authority prior to

authorization of placement of CCBs, and designates permit revisions for permits incorporating the placement of CCBs as significant permit revisions.

F. Section 787.1 – Scope: what does this part do?

Section 787.1 establishes the need and purpose of this part by explaining its scope. It explains that this part contains the minimum requirements that apply to operations that include the placement of CCBs.

G. Section 787.2 – Information collection.

OSM and State regulatory authorities will need information from operations seeking to place CCBs on mine sites in order to decide whether the CCB placement conforms to the regulations. In section 787.2, we set forth the information collection requirements for this part approved by the OMB as required by the Paperwork Reduction Act.

H. Section 787.3 – When must I comply with the requirements of this part?

Proposed section 787.3(a) details the types of CCB placement activities to which the regulatory requirements will apply. In general terms, this section applies to surface coal mining operations that seek a permit or permit revision to allow the placement of CCBs in the mined out areas, as part of the construction or reclamation of coal mine waste disposal facilities, or on the sites of coal refuse reprocessing facilities.

However, there are five exceptions to section 787.3(a) which are listed in proposed section 787.3(b). The first proposed exception is for the use of CCBs as soil amendments, as long as

they comply with applicable ASTM standards. This exception for soil amendments is based on EPA's 2000 regulatory determination. 65 FR 32214. The second exception involves the use of CCBs for roads or for other construction purposes. We are proposing this exception because the usage for those purposes is likely to be de minimus, and the use of CCBs as a constituent of construction materials is an accepted beneficial use. The third exception is for the placement of CCBs in underground mine voids under the provisions of sections 816.41(i) or 817.41(h) and any applicable Federal or State underground injection control requirements under 40 CFR part 144 or other State authority. This exception is based upon the fact that OSM, EPA, and the States have specific existing regulatory requirements covering this practice and which provide protection to public health and the environment, but we specifically invite comment on whether we should revise sections 816.41(i) and 817.41(h) to adopt terminology consistent with the definition of CCBs that we are proposing today. The fourth exception is for CCB placement in accordance with a RCRA solid waste permit. This exception recognizes that CCB disposal occurring in conjunction with a RCRA permit is governed by an existing regulatory framework aimed at protecting public health and the environment, albeit under RCRA rather than SMCRA. We see no value in regulating CCB placement under both laws. The final exception allows the continued placement of CCBs in approved areas under a SMCRA permit that was issued before the effective date of these rules. This exception makes clear that this rule has only prospective application.

Proposed section 787.3(c) indicates that if an operator places CCBs on a mine site pursuant to one of the exceptions enumerated in section 787.3(b), the operator still must comply with all

other applicable requirements of the regulatory program. This provision provides that permits with excepted placement of CCBs are regulated as are any other surface coal mining permits.

I. Section 787.4 – What additional information must I include in my application for a permit or permit revision for placement of CCBs?

Section 787.4 identifies the specific permit application information requirements we are proposing for operators seeking to place CCBs on mine sites. We believe the requirements detailed will provide the regulatory authority with appropriate information to be able to make the required determinations, decisions, and findings that CCB placement is protective of human health and the environment as required by SMCRA. In proposed section 787.4(a), we require an applicant to provide one or more detailed maps of the area where the CCBs will be placed.

These maps will help the regulatory authority to evaluate whether the proposed placement area is suitable and the conditions into which the CCBs will be placed.

In section 787.4(b), we are proposing to require descriptions of the applicant's legal right to place CCBs on the permit area. This proposed requirement is in response to the NRC recommendation that landowner consent be required and that the deed for the property be modified to include notice that CCBs have been placed on the property. Although RCRA contains similar requirements, there is nothing in SMCRA that would authorize us to adopt provisions for landowner consent and deed notification. However, section 102(b) of SMCRA provides that one of the purposes of SMCRA is to "assure that the rights of surface landowners and other persons with a legal interest in the land or other appurtenances thereto are fully protected from [surface coal mining] operations." 30 U.S.C 1202(b). Accordingly, we believe

that it is reasonable to require that an applicant proposing to place CCBs on a mine site as part of the reclamation process provide the same right-of-entry demonstration for CCB placement as is required for surface mining operations under section 507(b)(9) of SMCRA. 30 U.S.C. 1257(b)(9).

In section 787.4(c), we are proposing to require detailed descriptions and cross-section drawings showing the geometry of how the CCBs will be placed and by what methods. This information is appropriate for the regulatory authority to evaluate the potential impact of placement and whether the placement will be conducted in a prudent manner.

Proposed section 787.4(d) requires information on the volumes of materials to be placed and the anticipated or actual starting and ending dates of CCB placement. This information is to be incorporated into the mining and reclamation plan already required in sections 780.18(b)(1) and 784.13(b)(1). This information helps the regulatory authority evaluate the potential impacts of the placement of CCBs and how the placement fits within the schedule of the operation.

In section 787.4(e), we are proposing to require detailed information on the source of the CCBs, including the type of combustion and emissions control processes in use at the source. As different CCB sources, combustion methods, and emissions control processes result in CCBs with different physical and chemical characteristics, this information is useful for the regulatory authority to evaluate the suitability of the particular CCBs to be placed in the locations contemplated in the permit application.

Additionally, we are proposing in section 787.4(f) that an applicant provide a description of the type of the CCBs which are being proposed for placement at the identified locations on the mine site. We expect the applicant to use the definitions of CCBs as contained in the proposed changes to section 700.5. Along with the CCB source information, such information will help the regulatory authority evaluate the characteristics of the CCBs in order to make a determination as to the suitability of placement of the CCBs.

In addition, proposed section 787.4(g) requires tests and analyses be conducted that provide the regulatory authority with adequate information to evaluate the suitability of the particular CCB proposed for placement in the locations on the mine site which were previously identified. Specifically, an applicant must provide detailed analyses of the chemical, engineering, and physical properties of the CCBs, including a specific list of parameters to be included in the analysis, which is proposed section 787.4(h). The required tests in this proposed section must conform to pertinent ASTM standards. The CCBs must be tested in the form in which they are to be placed on the mine site. That is, if the materials are to be placed in a slurry, they must be analyzed in slurry form; if dry, in dry form. While we are not proposing to require specific leaching protocols, we are soliciting input on whether there are specific testing and leaching protocols that should be adopted. In particular, we are interested in leaching protocols that best reflect the behavior of CCBs under conditions in the mine to which the CCBs may be exposed.

In section 787.4(h), we are proposing that an applicant provide the regulatory authority with detailed baseline hydrologic information for the proposed CCB placement area (including a specific list of parameters to be included in the analysis). The list of parameters in section

787.4(h) is based upon specific recommendations in the NRC Report, comments received on our advance notice of proposed rulemaking, and our technical expertise. We believe that this information will help to the regulatory authority make informed determinations about the baseline surface and ground water quality on the mine site, and to allow for ongoing evaluation of possible impacts of CCB placement on water quality. We are soliciting comments on whether the parameters listed in this section are necessary and sufficient.

Because suspended solids are often carried in flowing surface waters, in section 787.4(i), we are proposing that, for surface waters, applicants provide both total and dissolved concentrations of the parameters listed in section 787.4(h). Groundwater does not carry suspended solids, so we only propose requiring dissolved concentrations of the solids listed in section 787.4(h) be provided for groundwater. By having this information, we believe the regulatory authority should be able to accurately characterize the water quality on the mine site.

In section 787.4(j), we are proposing to require detailed geologic descriptions of the proposed CCB placement area, with an emphasis on factors that may impact the mass stability or leaching behavior of the CCBs. This information will help the regulatory authority assess the suitability of the proposed placement location.

We are proposing in section 787.4(k) to require detailed flow descriptions for surface water and groundwater through and adjacent to the placement area. Additionally, in section 787.4(l), we are proposing to also collect predictions of post-reclamation surface and groundwater flows. This information is critical for a regulatory authority to evaluate and model the current

hydrologic balance of the mine site as well as the predicted hydrologic impacts as a result of CCB placement.

Proposed section 787.4(m) would require descriptions of the anticipated effects of CCBs that come into contact with surface water or groundwater, if contemplated. Specifically, this section requires that if contact is contemplated between CCBs and surface water or groundwater, that contact must be predicted to either improve or not adversely impact the quality of the groundwater. This proposed section reflects one issue about which there was considerable interest both in the NRC Report and in the comments received in our ANPR. Many commenters suggested that we prohibit the placement of CCBs where they would come into contact with water. However, we believe that CCBs are useful in some situations such as the treatment and/or prevention of AMD. In other cases, CCBs may be inert when in contact with water. Thus, we are proposing to allow placement of CCBs in contact with surface water or groundwater provided the applicant demonstrates to the satisfaction of the regulatory authority that contact would either improve water quality or have no adverse impact to water quality.

In proposed section 787.4(n), we are requiring a description of how placement of CCBs would impact the determination of probable hydrologic consequences under section 780.21(f) or 784.14(e) and the hydrologic reclamation plan prepared under section 780.21(h) or 784.14(g). This information will assist the regulatory authority in evaluating the specific hydrologic impacts predicted to result from CCB placement and will allow the regulatory authority to make an informed determination of whether the required analyses properly account for the placement of CCBs.

Further, in section 787.4(o), we are proposing that the applicant describe how CCB placement will comply with the performance standards of the regulatory program, given the information provided under sections 787.4(g) through 787.4(n) above. This analysis will provide the regulatory authority with a basis for evaluating how CCB placement fits within the overall surface mining and reclamation operation, and how the requirements of the regulations will be fulfilled.

In section 787.4(p), we are proposing a requirement for a detailed groundwater monitoring plan focused on identifying impacts which may result specifically from CCB placement. This section specifies the monitoring parameters to be included, requires both upgradient and downgradient monitoring, and details the need for downgradient monitoring points in sufficient number and location to allow monitoring of all potential leachate flow paths. This plan is necessary to ensure that there is sufficient monitoring to detect potential impacts to groundwater that may result from CCB placement and that the groundwater resources are adequately protected to prevent material damage to the hydrologic balance.

Finally, in section 787.4(q), we are proposing that the applicant describe how the operation will comply with the performance standards in part 826, including the modifications proposed today. This proposed requirement parallels current permit application requirements in part 785 and allows the regulatory authority to determine whether an operation that includes the placement of CCBs is capable of meeting the requirements of the Act and the regulations and should be approved.

We believe the requirements detailed above will help the regulatory authority to determine whether CCB placement will protect human health and the environment as required by SMCRA.

J. Section 787.5 – What special responsibilities does the regulatory authority have under this part?

Proposed section 787.5 sets forth the specific requirements that a regulatory authority must meet before it may approve an application for CCB placement. We believe this section will guide regulatory authorities and will ensure that all factors relating to CCB placement are thoroughly and specifically considered before placement is approved. Further, we believe these requirements will ensure that the public is informed of the analyses and information used by the regulatory authority in determining whether the placement of CCBs is being done in a manner that protects the public and the environment.

In section 787.5(a), we propose to require that the regulatory authority make detailed determinations and findings before approving an application for a permit or a permit revision that proposes the placement of CCBs. These determinations relate to the types of CCBs suitable for placement at that location, the establishment of criteria for analysis and placement of CCBs, the revision of the cumulative hydrologic impact assessment to address CCB placement, the selection of groundwater monitoring parameters based on the results of analysis of the CCBs and the site, and a written finding that the proposed operation meets the requirements of the applicable regulations. We are inviting comment on whether these determinations and written findings are necessary.

In addition, consistent with the NRC recommendation emphasizing the need for public involvement in permitting decisions, we are proposing section 787.5(b) to specify that permit revision applications proposing the placement of CCBs or modifying the expansion of the area or volume of CCBs to be placed must be processed as significant revisions; i.e., they would be subject to the same notice and public participation requirements as a new permit application.

K. Part 800 – Bonding and insurance requirements for surface coal mining and reclamation operations.

Apart from a specific requirement that we are adding related to CCBs, the other changes we are proposing to this section are editorial in nature and do not alter the substantive meaning of the existing rule. We are making these editorial changes to accommodate the addition of the new requirements on CCBs and to aid reading comprehension by adopting appropriate plain language. In proposed section 800.10, we are addressing the information collection requirements related to this part, as required by the Paperwork Reduction Act.

To address concerns about the financial responsibility for mine sites with CCB placement, we are proposing modifications to section 800.40(c)(3). For mine sites with CCB placement, we propose to prohibit Phase III bond release until (1) the collection of at least 5 years of groundwater monitoring data following the cessation of CCB placement and (2) the analysis of the collected monitoring data shows no significant adverse trends in the quality of the surface water and groundwater downgradient of the placement site. Based on our experience, we believe that this requirement will ensure that there is sufficient time for any detrimental impacts of CCB

placement to be observed before allowing the release of reclamation bonds. We believe 5 years is sufficient to identify issues created by CCB placement, particularly considering that includes the completion of all other requirements for bond release, such as demonstration of revegetation success.

We are also proposing to add a provision that bond release is permissible when the approved postmining land use is a solid waste landfill that involves placement of CCBs. This proposed addition reflects that the SMCRA bond release will occur upon completion of reclamation for an industrial postmining land use involving a solid waste landfill regulated under RCRA Subtitle D or other authority.

L. Part 826 – Special program performance standards - placement of coal combustion byproducts

We are proposing a new part 826, which identifies additional specific performance standards that apply to the placement of CCBs in active mine sites. We believe the proposed performance standards in this part will ensure that CCB placement plays an integral part in complying with other applicable provisions of the regulatory program, including the requirements for backfilling, hydrologic protection, and revegetation. The sampling and monitoring provisions we are proposing will provide information that will help the regulatory authority to ensure that operations are being conducted in accordance with the approved plan, and that the placement of CCBs meets the requirements of the Act for the protection of human health and the environment. In addition, we believe that these proposed sections will provide the necessary flexibility for

regulatory authorities to accommodate regional and site-specific differences in implementation of the regulatory program.

In section 826.1, we are proposing to identify the operations that these provisions apply to, which include those that place CCBs into the mined-out area of a surface coal mining operation, use CCBs in the construction or reclamation of a coal waste disposal facility, or return CCBs to the site of a coal refuse reprocessing operation as indicated in proposed section 787.3. This section also states that all the provisions of subchapter K of 30 CFR Chapter VII are applicable to these operations in addition to these proposed provisions. The applicability is limited to those permits which are approved in accordance with proposed 30 CFR part 787.

In proposed section 826.10, we are identifying the information collection requirements which apply to this part in accordance with the Paperwork Reduction Act, and clarifying that the information must be supplied in order to receive the benefit of being allowed to place CCBs at active mine sites.

In section 826.11, we are proposing detailed performance standards for operations that include the placement of CCBs. Specifically, in section 826.11(a), we propose to require generally: (i) quarterly testing of CCB materials to be placed on the mine site; (ii) the testing of materials when the type, source or process producing the materials changes; (iii) the tests be equivalent to the analyses required under section 787.4(g); and, (iv) the results of testing be submitted to the regulatory authority on a timely basis. With regard to proposed section 826.11(a)(i), we propose that the sampling of the CCBs be completed quarterly to be consistent with existing water

monitoring frequency requirements. However, we will allow the regulatory authority to reduce the frequency of the testing to semiannually or annually if the test results for a 5-year period show little variation or if the generating facility receives all its coal from a single source with consistent characteristics. We invite comments on whether the sampling frequency should be quarterly, semi-annually, or annually. We believe the requirements in proposed section 826.11(a)(ii)-(iv) are important because they would ensure that the regulatory authority will have adequate information to determine the characteristics of the CCBs actually being placed on the mine site. After receiving this information, the regulatory authority should be able to determine whether the permittee is properly implementing the regulatory and permit requirements for CCB placement in that mine site and whether the implementation is adequate to protect the public and the environment over an extended period of time.

In section 826.11(b), we are proposing requirements for groundwater monitoring. Monitoring is to continue either until the impact of placement on groundwater has stabilized or for a minimum of 5 years following the cessation of CCB placement. We believe that this requirement will assure that any detrimental impact of CCB placement on groundwater will be detected.

Information collected as a result of monitoring will assist the regulatory authority in determining whether the CCB placement was conducted at the mine site in a manner which protected human health and the environment.

Proposed section 826.11(c) would require the operator to take remedial actions if the monitoring demonstrates an unanticipated adverse impact. Additionally, this section would authorize the

regulatory authority to require permit revisions to address any problems, including cessation or modification of CCB placement. We believe this requirement will compel the operator to address any adverse impacts that result from the CCB placement and authorize the regulatory authority to take any actions necessary to protect human health and the environment.

Proposed section 826.11(d), would require that the regulatory authority regularly review, evaluate, and interpret monitoring data to identify adverse trends with respect to the parameters identified in section 787.4(h) and ensure prompt detection of groundwater problems created by CCB placement. These new requirements will, we believe, ensure that the regulatory authority reviews the monitoring data regularly and takes appropriate actions to protect the public and the environment from any adverse impacts of CCB placement.

Proposed section 826.11(e) clarifies that, for purposes of the contemporaneous reclamation requirements of section 816.100 and the Act, the regulatory authority may consider the use of CCBs to backfill the mined-out area as a reclamation activity. In determining whether a proposed reclamation timetable under section 780.18(b)(1) meets the contemporaneous reclamation requirements, the regulatory authority may consider the projected availability and rate of production of the CCBs to be used as backfill. In addition, the regulatory authority must solicit and consider the landowner's wishes. These requirements will help ensure that lands no longer needed for surface coal mining operations are reclaimed in order to protect human health and the environment and to achieve the post mining land use approved in the permit.

In section 826.11(f), we propose to prohibit the placement of CCBs if it would cause additional excess spoil to be placed outside the mined-out area. We believe that this creation of excess spoil might have detrimental impacts on the environment.

Proposed section 826.11(g) would require covering the CCBs with a minimum of 2 feet of overburden and soil material to allow for proper revegetation. Based on our experience with revegetation, we believe that this minimum depth of cover will be sufficient to prevent CCB materials from having any adverse impact on the establishment of vegetation on the reclaimed site.

In section 826.11(h), we propose to require that, at all stages of the placement process, CCBs be protected from erosion and air pollution attendant to erosion. This requirement will minimize the amount of CCBs eroding into surface water or becoming airborne, which can create pollution. We are also proposing in section 826.11(i) that CCB placement operations comply with other applicable federal, state, tribal or local laws or regulations. These provisions are intended to ensure protection of air and water resources and compliance with other requirements which may exist for CCB placement.

M. Part 874 – General reclamation requirements

We are proposing to add a section to part 874 to include minimum requirements that would apply to any AML reclamation project funded or otherwise conducted under an AML reclamation plan and program approved under section 405 of SMCRA. We are proposing these requirements in part to respond to the recommendation in the NRC Report that “placement of CCRs in

abandoned and remaining sites be subject to the same CCR characterization, site characterization, and management planning standards recommended for active coal mines”. NRC Report, pp. 9-10. The requirements would apply to any reclamation project funded under grants awarded pursuant to Title IV of SMCRA, to no-cost reclamation projects approved under the AML program that involve the disposal of excess spoil from a Title V operation, and to AML reclamation projects conducted under the provisions of 30 CFR 874.17. The requirements would not apply to other types of AML reclamation projects, as those projects would be outside the scope of SMCRA. We believe that the proposed requirements may be appropriate to serve as a template for States that wish to impose comparable requirements for the placement and use of CCBs on other abandoned mine lands under other provisions of law. Our proposed additions to part 874 are based on discussions we have had with State AML agencies and their requests for more detailed requirements.

We are proposing to modify existing part 874.10 to incorporate the new information collection requirements that are associated with today’s proposed regulations. The information is being collected to ensure that reclamation projects that incorporate the placement of CCBs are conducted in an environmentally appropriate fashion.

The proposed regulations add a new section 874.18. The requirements of this new section, applicable to the AML reclamation projects specified above, parallel the requirements in proposed part 787 which are designed to ensure that applicants for surface coal mining operations that propose to place CCBs as a part of the reclamation process do so in a responsible manner. Because these AML projects are being conducted under the auspices of the State AML

agencies and are based on priorities identified by those agencies, some of the requirements in proposed part 787 are not appropriate for inclusion in this section. The proposed sections 874.18(a)-(c) clarify the scope of reclamation projects and activities to which these regulations apply.

In proposed section 874.18(d), we detail the information that the agency must have in order to evaluate the appropriateness of CCB placement as a part of the reclamation project. Although these requirements are parallel to those in proposed section 787.4, the proposed water monitoring requirements are modified to reflect the fact that AML projects are conducted to address existing impairment of land and/or water. The AML agency may reduce or waive the water monitoring requirement if it makes a documented finding that significant adverse impacts on water quality are unlikely to occur. In proposed section 874.8(d)(12), we identify the particular determinations that the State AML agency must make before commencing a reclamation project. This paragraph parallels the proposed requirements in section 787.5 discussed above.

In section 874.18(e), we propose to adopt requirements for reclamation projects similar to those in proposed section 826.11, discussed above. Because of the limited scope of reclamation projects and the inherent differences between reclamation projects and active mining operations, the details of these requirements have been modified.

We believe the requirements proposed in section 874.18 will ensure that State AML agencies have the information to design and conduct reclamation projects that include CCB placement in a manner that protects human health and the environment.

IX. What actions is the Environmental Protection Agency taking with regard to CCB placement at coal mines?

Consistent with the NRC Report, we have consulted with the EPA throughout the development of our rule proposal, and we believe that our proposal adequately regulates the placement of CCBs at active coal mining operations under Title V of SMCRA or in reclamation of abandoned mines as a part of projects funded or approved under Title IV of SMCRA. In a separate notice which will be published in the FEDERAL REGISTER, the EPA will be proposing similar requirements for any abandoned coal mining sites or coal-related sites not subject to either Title IV or Title V of SMCRA. This proposal by EPA will be a completely separate action, and comments on its proposal must be submitted as indicated in that proposal.

X. What do I need to know about the public comment process?

Written Comments: If you submit written comments, they should be specific, confined to issues pertinent to the proposed regulations, and explain the reason for any recommended change(s).

We appreciate any and all comments, but those most useful and likely to influence decisions on the final regulations will be those that either involve personal experience or include citations to and analyses of SMCRA, its legislative history, its implementing regulations, case law, other pertinent State or Federal laws or regulations, technical literature, or other relevant publications or information on the use and disposal of CCBs.

Comments received after the close of the comment period (see “**DATES**”) or sent to an address other than those listed above (see “**ADDRESSES**”) will not be included in the docket for this

rulemaking and considered. Comments sent to one of the authorized addresses during the comment period may be viewed in the docket for the rulemaking (OSM-2008-0005) at <http://www.regulations.gov>.

Public Availability of Comments: Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment – including your personal identifying information – may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Public hearings: We will only hold a public hearing on the proposed rule upon request only. The time, date, and address for any hearing will be announced in the Federal Register at least 7 days prior to the hearing. Any person interested in participating in a hearing should inform Mr. Craynon (see **FOR FURTHER INFORMATION CONTACT**), either orally or in writing by 5:00 p.m., Eastern Time, on [Insert date 21 days after date of publication in the **FEDERAL REGISTER**]. If no one has contacted Mr. Craynon to express an interest in participating in a hearing by that date, a hearing will not be held.

If a public hearing is conducted, it will continue until all persons scheduled to speak have been heard. If you are in the audience and have not been scheduled to speak and wish to do so, you will be allowed to speak after those who have been scheduled. We will end the hearing after all persons scheduled to speak and persons present in the audience who wish to speak have been

heard. To assist the transcriber and ensure an accurate record, we request, if possible, that each person who testifies at a public hearing provide us with a written copy of his or her testimony.

Public meeting: If there is only limited interest in participating in a public hearing, a public meeting or teleconference rather than a hearing may be held, and a written summary of the meeting or teleconference will be included in the docket for the rulemaking.

XI. Procedural Matters and Required Determinations

A. Executive Order 12866—Regulatory Planning and Review

This proposed rule is considered a “significant regulatory action” under the criteria of section 3(f) of Executive Order 12866 and has been reviewed by the Office of Management and Budget.

Based on the criteria for a “significant regulatory action” found in section 3(f), we have made a preliminary determination that:

- a. The rule may raise novel legal or policy issues arising from legal mandates, the President’s priorities, or the principles set forth in the Executive Order.
- b. The rule would not create a serious inconsistency or otherwise interfere with an action taken or planned by another agency.
- c. The rule would not materially alter the budgetary impacts of entitlements, grants, user fees, or loan programs or the rights or obligations of their recipients.
- d. The rule would not adversely affect in a material way the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or Tribal governments or communities.

Assessment of Potential Costs and Benefits

Executive Order 12866 requires OSM to conduct an assessment of the potential costs and benefits of any regulatory action deemed significant under Executive Order 12866. OMB Circular A-4 provides guidance to Federal agencies on the development of a regulatory analysis. It requires us to identify a baseline because benefits and costs are defined in comparison with a clearly stated alternative. OMB has stated that “this normally will be a ‘no action’ baseline: what the world will be like if the proposed rule is not adopted.” OMB Circular A-4, Regulatory Analysis (Sept. 17, 2003). For comparison purposes, OSM will use as the “no action baseline” the current SMCRA regulatory program in Chapter VII of Title 30 of the Code of Federal Regulations. We will refer to this as the “Old Regulations” or the “No Action Alternative.” The second alternative we will analyze consists of the requirements in today’s proposed regulations, which we will refer to as the “Proposed Alternative.”

The primary economic difference between the two alternatives is that the Proposed Alternative will create additional costs for coal operators that apply and receive permits to place CCBs on mine sites and for State regulatory authorities that implement SMCRA through their delegated primacy programs. Generally, these costs would be for implementing new permitting and monitoring requirements and for complying with the new performance standards for CCB placement. Additional costs arise from implementing the new requirements for AML projects that utilize funding under Title IV of SMCRA and that involve the placement of CCBs. The cost estimates below are based on the projected wages and other costs that we have estimated would be necessary to comply with the regulatory requirements contained in today’s proposed rules.

The details of how these estimates were developed are included in our supporting statements documenting our compliance with the Paperwork Reduction Act.

OSM has estimated that eight operations annually will seek approval to place CCBs on active mine sites and would have to comply with the new permitting requirements contained in the Proposed Alternative. We have estimated the labor costs to the coal industry for these additional requirements as \$5,280, the industry's costs for laboratory services as \$160,000, and the costs to State regulatory authorities as \$1,036 annually, for a total of \$166,316. In addition, we estimate the cost of Federal oversight for these permitting activities to be \$8,640 annually. Thus, the total cost for implementing the new permitting requirements of the Proposed Alternative, including the cost to the Federal government, is estimated as \$174,956.

In addition, the performance standards contained in proposed 30 CFR Part 826 would impose costs on the coal industry, the State regulatory authorities, and the Federal government. We estimate that these proposed performance standards would apply to 20 operations annually. Compared to the old regulations, the costs under the Proposed Alternative would include additional wage costs for collecting, preparing, and evaluating water monitoring data. In addition, State regulatory authorities would incur additional costs for reviewing the monitoring data. The wage costs to industry are estimated at \$66,000 annually, and to the State regulatory authorities at \$19,000 annually, for a total of \$85,000 in additional wage costs. We estimate that it would cost the Federal government \$9,000 to ensure implementation of these performance standards. Thus we estimate that the total wage costs for all parties, including the Federal government would be \$94,600. In addition to the wage costs borne by industry, we estimate that

it would cost the coal industry an additional \$400,000 annually to have private laboratories test the collected samples. Thus we estimate that the total costs of complying with the proposed performance standards requirements, including wages and sampling and analysis costs associated with the Proposed Alternative, would be \$494,600.

The Proposed Alternative also includes additional requirements for AML projects that are conducted under 30 CFR part 874 and include the placement of CCBs. These requirements are estimated to cost State AML agencies a total of \$101,460 annually in wages and an additional \$200,000 annually in laboratory and analysis costs. We estimate that the Federal government's costs for oversight of these projects would be \$8,160 annually. Therefore, we estimated the total costs of implementing the AML project requirements under the Proposed Alternative would be \$309,620.

Based on the additional costs of implementing each of these new requirements of the Proposed Alternative, we estimate that, over and above the costs of the No Action Alternative, it would cost all parties \$979,176 annually to implement the Proposed Alternative.

The benefits of the Proposed Alternative are generally unquantifiable and relate to protecting the public and the environment from any detrimental impacts of placing CCBs at coal mining sites.

These benefits include:

- Reduction or elimination in health and safety problems, which would benefit nearby residents;

- Prevention of adverse environmental effects created by placement of CCBs at active coal mining sites;
- Reduction or elimination of adverse environmental effects such as acid mine drainage and erosion and sedimentation;
- Improved habitat for fish and wildlife;
- An increase in the number of potential land uses at these sites and a reduction or elimination of hazardous features that are often attractive but dangerous to outdoor recreationists; and
- A general increase in the quality of life in nearby communities and adjacent property values.

Additionally, using CCBs in AML reclamation can reduce the cost of reclamation projects, remove physical hazards, such as mine openings and dangerous highwalls, and mitigate water quality problems. The Proposed Alternative imposes requirements that allow for the evaluation of potential impacts of mine placement of CCBs and for coal mining and reclamation operations and reclamation projects to be conducted in a manner resulting in a higher level of environmental and public protection benefits than the No Action Alternative.

Summary of Costs and Benefits

The following table summarizes the estimated additional costs above the No Action Alternative associated with each section of the Proposed Alternative.

PROPOSED REGULATION	WAGE COSTS TO INDUSTRY	WAGE COSTS TO STATE REGULATORS	WAGE COSTS TO FEDERAL GOVERNMENT	LABORATORY AND ANALYSIS COSTS*	TOTAL COSTS
30 CFR 787	\$ 5,280	\$ 1,036	\$ 8,640	\$ 160,000	\$ 174,956
30 CFR 826	\$ 66,000	\$ 19,000	\$ 9,600	\$ 400,000	\$ 494,600
30 CFR 874	\$ 0	\$ 101,460	\$ 8,160	\$ 200,000	\$ 309,620
TOTAL	\$ 71,280	\$ 121,496	\$ 26,400	\$ 760,000	\$ 979,176

* Laboratory and analysis costs are borne by industry under the proposed 30 CFR parts 787 and 826 and by state AML agencies under the proposed 30 CFR part 874 amendments.

B. Executive Order 13211—Actions Concerning Regulations that Significantly Affect Energy Supply, Distribution, or Use

This proposed rule is not considered a significant energy action under Executive Order 13211.

The revisions contained in this proposed rule would not have a significant effect on the supply, distribution, or use of energy.

C. Regulatory Flexibility Act

The Department of the Interior certifies that this proposed rule would 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.*). For the reasons previously stated (see the discussion under Executive Order 12866—Regulatory Planning and Review), the revisions would not be expected to have a significant adverse economic impact on the regulated industry including small entities. Further,

the rule would produce 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.

D. Small Business Regulatory Enforcement Fairness Act

This proposed rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. For the reasons stated above, the proposed rule would not—

- a. Have an annual effect on the economy of \$100 million or more.
- b. Cause a major increase in costs or prices for consumers, individual industries, Federal, state, or local government agencies, or geographic regions.
- c. Have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

E. Unfunded Mandates

This proposed rule would not impose an unfunded mandate on state, local, or tribal governments or the private sector of more than \$100 million per year. The rule would not have a significant or unique effect on state, tribal, or local governments or the private sector. A statement containing the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1534) is not required.

F. Executive Order 12630—Takings

Because of the nature of the rules that would be revised, the proposed rule would not have significant takings implications.

G. Executive Order 13132—Federalism

We have reviewed the proposed rule under the criteria specified in Executive Order 13132 and have determined that the rule does not have sufficient federalism implications to warrant the preparation of a federalism assessment. The proposed rule is based on existing SMCRA authorities and is designed to ensure that mining operations and AML reclamation projects where CCBs are placed adequately protect the public and the environment.

The proposed rule does not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. With regard to the issue of the preemption of State law, SMCRA delineates the roles of the Federal and State governments with regard to the regulation of surface coal mining and reclamation operations and provides for the preemption of State laws and regulations considered inconsistent with SMCRA. Generally, CCB disposal operations are regulated under State solid waste management programs under Subtitle D of RCRA. The proposed rule contains an exception which specifies that its provisions do not apply to situations where coal combustion byproducts are placed on mine sites in accordance with a solid waste permit or other authorization issued by a State that regulates such placement under subtitle D of the Resource Conservation and Recovery Act, 42 U.S.C. 6941-6949a.

The proposed rule does not impose substantial direct compliance costs on State and local governments. The estimated annual costs to the States is approximately \$121,000 per year, half of which is funded by the Federal government

H. Executive Order 12988—Civil Justice Reform

The Office of the Solicitor for the Department of the Interior has determined that this proposed rule would not unduly burden the judicial system and that it meets the requirements of sections 3(a) and 3(b)(2) of the Executive Order.

I. Executive Order 13175—Consultation and Coordination with Indian Tribal Governments

We have evaluated the potential effects of this proposed rule on federally recognized Indian tribes and have determined that its provisions would not have substantial direct effects on the relationship between the Federal Government and Indian tribes or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

J. Paperwork Reduction Act

In accordance with 44 U.S.C. 3507(d), we have submitted the information collection and recordkeeping requirements of 30 CFR parts 787, 826 and 874 to OMB for review and approval.

30 CFR Part 787

Title: 30 CFR Part 787 - Requirements for placement of coal combustion byproducts.

OMB Control Number: 1029-xxx1.

Summary: The information is being collected to meet the requirements of sections 507, 508, 510, 515, 701, and 711 of Public Law No. 95-87, which require applicants for special types of mining activities to provide descriptions, maps, plans, and data of the proposed activity. This

information will be used by the regulatory authority in determining if the applicant can meet the applicable performance standards for the special type of mining activity.

Without this information, OSM and state regulatory authorities could not approve surface coal mining permit applications for special types of mining and related facilities. Responses are required to obtain a benefit.

Bureau Form Number: None.

Frequency of Collection: Once.

Description of Respondents: Applicants for surface coal mining permits and State regulatory authorities.

Total Annual Respondents: 8 applicants and 8 State regulatory authorities.

Total Annual Burden Hours: 152.

Non-Labor Cost Burden: \$ 160,000 for applicants.

INFORMATION COLLECTION SUMMARY FOR 30 CFR PART 787

Section	Number of Responses	Hours Per Response	Total Hours Requested
787.4 – Applicants	8	15	120
787.5 - States	8	4	32
TOTAL	16		152

30 CFR Part 826

Title: 30 CFR Part 826 – Special Permanent Program Performance Standards – Placement of Coal Combustion Byproducts

OMB Control Number: 1029-xxx2.

Summary: The information collected in this proposed section is used by regulatory authorities to evaluate the types of CCBs and placement of CCBs within the boundaries of a permit for surface coal mining and reclamation operations. The performance standards in this part ensure that CCB placement allows for the compliance with all other provisions of the regulatory program, including the requirements for backfilling, hydrologic protection, and revegetation. The sampling and monitoring allow the regulatory authority to ensure that operations are being conducted in accordance with the approved plan, and that the placement of CCBs meets the requirements of the Act for protection of human health and the environment. Unless otherwise specified, the performance standards in this part apply in addition to the requirements of subchapter K of this chapter. Responses are required to obtain a benefit.

Bureau Form Number: None.

Frequency of Collection: Once.

Description of Respondents: Applicants for surface coal mine permits and State regulatory authorities.

Total Annual Respondents: 20 applicants and 20 State regulatory authorities.

Total Annual Burden Hours: 2,500.

Non-Labor Cost Burden: \$400,000 for applicants.

30 CFR Part 874

Title: 30 CFR Part 874 - General reclamation requirements.

OMB Control Number: 1029-0113.

Summary: Part 874 establishes land and water eligibility requirements, reclamation objectives and priorities and reclamation contractor responsibility for abandoned mine land projects. The

information collected is used to ensure compliance with sections 402, 404 and 405 of the Surface Mining Control and Reclamation Act of 1977, as amended. Responses are required to obtain a benefit.

Bureau Form Number: None.

Frequency of Collection: Once.

Description of Respondents: State regulatory authorities and Indian tribes.

Total Annual Respondents: 45.

Total Annual Burden Hours: 2,670

Non-Labor Cost Burden: \$200,000.

INFORMATION COLLECTION SUMMARY FOR 30 CFR PART 874

Section	Number of Respondents	Hours Per Response	Total Hours Requested	Total Non-Wage Costs
874.17	23	70	1,610	0
874.18 - new	2	20	40	
- active	10	100	1,000	\$200,000
- complete	10	2	20	
TOTAL	45		2,670	\$200,000

Comments are invited on:

(a) Whether the proposed collection of information is necessary for SMCRA regulatory authorities to implement their responsibilities, including whether the information will have practical utility.

(b) The accuracy of our estimate of the burden of the proposed collection of information.

(c) Ways to enhance the quality, utility, and clarity of the information to be collected.

(d) Ways to minimize the burden of collection on the respondents.

Under the Paperwork Reduction Act, we must obtain OMB approval of all information and recordkeeping requirements. No person is required to respond to an information collection request unless the form or regulation requesting the information has a currently valid OMB control (clearance) number. These numbers appear in sections 787.2, 826.10, and 874.10, respectively. To obtain a copy of our information collection clearance requests contact John A. Trelease at (202) 208-2783 or by email at jtrelease@osmre.gov.

By law, OMB must respond to us within 60 days of publication of this proposed rule, but it may respond as soon as 30 days after publication. Therefore, to ensure consideration by OMB, you must send comments regarding these burden estimates or any other aspect of these information collection and recordkeeping requirements by [Insert date 30 days from date of publication in the FEDERAL REGISTER] to the Office of Management and Budget, Office of Information and Regulatory Affairs, Attention: Interior Desk Officer, via e-mail to OIRA_DOCKET@omb.eop.gov, or via facsimile to (202) 395-6566. Also, send a copy of your comments to John Trelease, Office of Surface Mining Reclamation and Enforcement, 1951 Constitution Ave, N.W., Room 202 SIB, Washington, DC 20240, or electronically to jtrelease@osmre.gov. Please include the corresponding OMB control numbers at the top of your correspondence.

K. National Environmental Policy Act

We intend to complete an environmental assessment and make a finding on the significance of any potential impacts before we publish a final rule. At this time, we are soliciting comments on

the nature of the alternatives that we should consider as a part of assessing the potential impacts of today's proposal on the human environment. In addition, we are seeking comments on potential impacts, if any, which might be associated with today's proposal. After reviewing the comments to this proposed rule, we may decide to prepare a draft environmental assessment for public comment at a later date.

L. Data Quality Act

In developing this rule we did not conduct or use a study, experiment, or survey requiring peer review under the Data Quality Act (Public Law 106-554).

M. Clarity Of This Regulation

Executive Order 12866 requires each agency to write regulations that are easy to understand. We invite your comments on how to make this proposed rule easier to understand, including answers to questions such as the following:

- (1) Are the requirements in the proposed rule clearly stated?
- (2) Does the proposed rule contain technical language or jargon that interferes with its clarity?
- (3) Does the format of the proposed rule (grouping and order of sections, use of headings, paragraphing, etc.) aid or reduce its clarity?
- (4) Would the rule be easier to understand if it were divided into more but shorter sections (a "section" appears in bold type and is preceded by the symbol "§" and a numbered heading; for example, "§ 780.14 Operation plan: Maps and plans")?

(5) Is the description of the proposed rule in the **SUPPLEMENTARY INFORMATION** part of this preamble helpful in understanding the proposed rule?

(6) What else could we do to make the proposed rule easier to understand?

Send a copy of any comments that concern how we could make this proposed rule easier to understand to: Office of Information and Regulatory Affairs, Department of the Interior, Room 7229, 1849 C Street N.W., Washington, DC 20240. You may also email the comments to this address: Exsec@ios.doi.gov.

List of Subjects

30 CFR Part 700

Administrative practice and procedure, Reporting and recordkeeping requirements, Surface mining, Underground mining

30 CFR Part 774

Reporting and recordkeeping requirements, Surface mining, Underground mining

30 CFR Part 787

Reporting and recordkeeping requirements, Surface mining, Underground mining

30 CFR Part 800

Insurance, Reporting and recordkeeping requirements, Surety bond, Surface mining,
Underground mining

30 CFR Part 826

Reporting and recordkeeping requirements, Surface mining, Underground mining

30 CFR Part 874

Abandoned Mine Reclamation Fund, Indian lands, Reclamation fees, Reporting and
recordkeeping requirements, Surface mining, Underground mining

Dated: October 15, 2008

C. Stephen Allred */Signed/*

Assistant Secretary

Land and Minerals Management

For the reasons given in the preamble, we are proposing to amend 30 CFR Parts 700, 774, 787,
800, 826, and 874 as forth below:

PART 700–GENERAL

1. The authority citation for part 700 is revised to read as follows:

AUTHORITY: 30 U.S.C. 1201 et seq.

2. In section 700.5, insert the following definitions in alphabetical order to read as set forth below:

§ 700.5 Definitions.

* * * * *

ASTM refers to ASTM International, which was originally formed as the American Society for Testing and Materials.

* * * * *

CCBs mean coal combustion byproducts. CCB is the adjective form of this acronym.

* * * * *

Coal combustion byproducts means fly ash, bottom ash, boiler slag, fluidized-bed combustion ash, or flue gas desulfurization material produced from the combustion of coal or the cleaning of the stack gases resulting from the combustion of coal. The five components of coal combustion byproducts are further defined below:

(a) Fly ash means coal ash that exits a combustion chamber in the flue gas and is captured by air pollution control equipment such as electrostatic precipitators, baghouses, and wet scrubbers.

(b) Bottom ash means agglomerated ash particles formed in pulverized coal boilers that are too large to be carried in the flue gases and that collect on the boiler walls or fall through open grates to an ash hopper at the bottom of the boiler. Bottom ash has not melted and is typically grey to black in color, is quite angular, and has a porous surface structure.

(c) Boiler slag means a molten ash collected at the base of slag tap boilers or cyclone boilers that is quenched with water and shatters into black, angular particles having a smooth, glassy appearance.

(d) Fluidized-bed combustion ash means the fly ash and bed ash produced by a fluidized-bed combustion boiler, which involves the combustion of coal in the direct presence of limestone.

(e) Flue gas desulfurization materials means the product of a flue gas desulfurization process. Flue gas desulfurization is the removal of gaseous sulfur dioxide from boiler exhaust gas. The process may involve the use of wet scrubbers, dry scrubbers, and sorbent injections. Sorbents include lime, limestone, sodium-based compounds, and high-calcium coal fly ash. The physical nature of flue gas desulfurization materials varies from a wet thixotropic sludge (a

gelatinous material that liquefies upon agitation or the application of pressure) to a dry powdered material, depending on the process.

* * * * *

3. Section 700.10 is revised to read as follows:

§ 700.10 Information Collection.

The collections of information contained in part 700 have been approved by the Office of Management and Budget under 44 U.S.C. 3501 et seq. and assigned control number 1029-0094. OSM and the states use the information collected under § 700.11(d) to determine when regulatory jurisdiction may end because a mine site is no longer a surface coal mining and reclamation operation. OSM uses the information collected under § 700.12(b) to evaluate and make a decision on a petition for rulemaking. OSM and the states use the information collected under § 700.13 to identify the person filing a citizen's suit and the nature of that suit so that OSM or the state can respond appropriately. Respondents are required to respond to obtain a benefit in accordance with SMCRA. A Federal agency may not conduct or sponsor, and you are not required to respond to, a collection of information unless it displays a currently valid OMB control number.

**PART 774—REVISION, RENEWAL, TRANSFER, ASSIGNMENT, OR SALE OF
PERMIT RIGHTS; POST-PERMIT ISSUANCE REQUIREMENTS; AND OTHER
ACTIONS BASED ON OWNERSHIP, CONTROL, AND VIOLATION INFORMATION**

4. The authority citation for part 774 continues to read as follows:

AUTHORITY: 30 U.S.C. 1201 et seq.

5. Section 774.9 is revised to read as follows:

§ 774.9 Information collection.

(a) The collections of information contained in part 774 have been approved by the Office of Management and Budget under 44 U.S.C. 3501 et seq., and assigned control number 1029-0116. Regulatory authorities use this information to:

- (1) Determine if the applicant meets the requirements for revision; renewal; transfer, assignment, or sale of permit rights;
- (2) Enter and update information in AVS following the issuance of a permit; and
- (3) Fulfill post-permit issuance requirements and other obligations based on ownership, control, and violation information.

(b) Response is required to obtain a benefit in accordance with SMCRA. A Federal agency may not conduct or sponsor, and no one is required to respond to, a collection of information unless it displays a currently valid OMB control number.

6. Amend § 774.10 by adding paragraph (a)(4) to read as follows:

§ 774.10 Regulatory authority review of permits.

(a) * * *

(4) Coal combustion byproducts. When the permit provides for the placement of coal combustion byproducts under part 787 of this chapter, the review must evaluate whether the placement plan approved under part 787 of this chapter is adequate to ensure that the operation meets all applicable requirements of the regulatory program. The review must be based upon a site inspection, an evaluation of water monitoring records, and any other available information.

* * * * *

7. Add part 787 to read as follows:

**PART 787—REQUIREMENTS FOR PLACEMENT OF COAL COMBUSTION
BYPRODUCTS**

Sec.

787.1 Scope: What does this part do?

787.2 Information collection.

787.3 When must I comply with the requirements of this part?

787.4 What additional information must I include in my application for a permit or permit revision for placement of CCBs?

787.5 What special responsibilities does the regulatory authority have under this part?

AUTHORITY: 30 U.S.C. 1201 et seq.

§ 787.1 Scope: What does this part do?

This part establishes the minimum requirements for regulatory program provisions for permits for surface coal mining and reclamation operations that include placement of coal combustion byproducts as part of those operations. The requirements in this part apply in addition to the other requirements of subchapter G of this chapter unless this part specifically provides otherwise.

§ 787.2 Information collection.

The collections of information contained in part 787 have been approved by the Office of Management and Budget under 44 U.S.C. 3501 et seq. and assigned control number 1029-xxx1. This collection implements Title V of SMCRA with respect to situations in which coal combustion byproducts are used as part of the reclamation of surface coal mining operations. Persons intending to place coal combustion byproducts at surface coal mining and reclamation operations must respond to obtain a benefit. A Federal agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

§ 787.3 When must I comply with the requirements of this part?

(a) General applicability. Unless one of the exceptions in paragraph (b) of this section applies, you, the applicant for a permit or permit revision, must comply with this part if you intend to—

(1) Place coal combustion byproducts within the mined-out area of a surface coal mining operation;

(2) Use coal combustion byproducts in the construction or reclamation of a coal mine waste disposal facility; or

(3) Return coal combustion byproducts to the site of a coal refuse reprocessing operation.

(b) Exceptions. The requirements of this part do not apply to the—

(1) Use of coal combustion byproducts solely as a soil supplement or amendment, provided that CCBs used as soil supplements or amendments are placed in accordance with Part 7 of ASTM Standard Guide E 2278;

(2) Use of coal combustion byproducts to construct roads or foundations for structures such as buildings and parking lots;

(3) Placement of coal combustion byproducts in underground mine voids in accordance with the requirements of § 816.41(i) or § 817.41(h) of this chapter and any applicable Federal or State underground injection control requirements under 40 CFR part 144;

(4) Placement of coal combustion byproducts in accordance with a solid waste permit or other authorization issued by a state that regulates such placement under subtitle D of the Resource Conservation and Recovery Act, 42 U.S.C. 6941-6949a; or

(5) Placement of coal combustion byproducts in areas approved for such placement under a SMCRA permit issued before the effective date of this part.

(c) What regulations apply if I qualify for an exception? When you place CCBs on the site of a surface coal mining and reclamation operation under one of the exceptions in paragraph (b) of this section, you must comply with all regulatory program requirements that apply to the surface coal mining and reclamation operation where the placement occurs.

§ 787.4 What additional information must I include in my application for a permit or permit revision for placement of CCBs?

(a) One or more maps that clearly identify the portions of the permit area in which you intend to place CCBs.

(b) A description of the documents upon which you base your legal right to place CCBs in the locations identified in paragraph (a) of this section. The description must be consistent with § 778.15(a) of this chapter. It may consist of documentation of landowner consent or, in the absence of landowner consent, a description of other documents or state statutory or case law supporting your claim.

(c) A narrative and cross-section drawings describing how the CCBs will be placed.

(d) The total volume of CCBs to be placed in each designated area and the anticipated or actual starting and ending dates of placement in each area. The placement schedule must be incorporated into the detailed timetable of mining and reclamation activities required by §§ 780.18(b)(1) and 784.13(b)(1) of this subchapter.

(e) The name and location of the facility producing the CCBs, together with a description of the combustion and emission control processes.

(f) A description of which types of CCBs, as defined in paragraphs (a) through (e) of the definition of coal combustion byproducts in § 700.5 of this chapter, you propose to place at the mine site.

(g)(1) A detailed analysis of the chemical, engineering, and physical properties of the CCBs, including identification of any characteristics that might affect how the CCBs interact with their environs after placement. At a minimum, the analysis must determine—

- (i) Elemental composition, including all parameters listed in paragraph (h) of this section;
- (ii) Trace element leaching potential;
- (iii) Permeability;
- (iv) Neutralization potential;
- (v) Mass stability as demonstrated by strength and compaction under conditions likely to be found at the placement site;
- (vi) The presence or absence of cementitious or thixotropic properties; and
- (vii) Whether the CCBs may exhibit acid-forming or toxic-forming properties under conditions likely to occur at the placement site.

(2) CCBs must be tested in the form in which they are to be placed at the mine site.

(3) All tests must conform to any pertinent ASTM specifications (see Parts 6 and 8 of ASTM Standard Guide E-2243) and must be appropriate for the hydrologic and geologic conditions of the placement site. The regulatory authority must approve the testing methodology and may require any supplementary analyses that it determines necessary.

(h) Detailed baseline hydrologic data specific to the proposed CCB placement areas.

The regulatory authority may waive baseline data requirements for parameters for which there are no detectable concentrations in the CCBs to be placed at the site. You may not use the provisions of §§ 780.21(d) and 784.14(d) of this chapter to supply modeling information in lieu of actual baseline data. The baseline data must include, at a minimum the following parameters:

- (1) pH;
- (2) Total dissolved solids or specific conductance (corrected to 25 degrees Celcius);
- (3) Acidity

- (4) Alkalinity
- (5) Aluminum;
- (6) Antimony;
- (7) Arsenic;
- (8) Barium;
- (9) Beryllium;
- (10) Boron;
- (11) Cadmium;
- (12) Calcium;
- (13) Chlorides;
- (14) Chromium;
- (15) Cobalt;
- (16) Copper;
- (17) Fluorides;
- (18) Iron;
- (19) Lead;
- (20) Magnesium;
- (21) Manganese;
- (22) Mercury;
- (23) Molybdenum;
- (24) Nickel;
- (25) Nitrates and nitrites;
- (26) Potassium;

- (27) Selenium;
- (28) Silver;
- (29) Sodium;
- (30) Sulfates;
- (31) Thallium;
- (32) Vanadium;
- (33) Zinc; and
- (34) Any additional parameters that the regulatory authority deems appropriate.

(i) For surface water, the baseline data provided under paragraph (h) of this section must include total and dissolved concentrations for each applicable parameter. For groundwater, only dissolved concentrations are required.

(j) A description of the geology of the proposed placement area, with an emphasis on geologic features and overburden characteristics that may affect the mass stability or leaching behavior of the CCBs, including acid-forming materials that could react adversely with the CCBs.

(k) A description of premining surface water and groundwater flows through and adjacent to the proposed placement area. The description must include seasonal fluctuations of the water table and the rates and direction of groundwater flow in all aquifers potentially affected by the proposed placement of CCBs.

(l) A prediction of post-reclamation surface water and groundwater flows through and adjacent to the proposed placement area. The prediction must include a discussion of potential

changes in surface water and groundwater flows through the proposed placement area as a result of mining and reclamation activities on adjacent portions of the permit area.

(m) If you propose to place CCBs in an area in which they would come into contact with surface water or groundwater, a demonstration that the contact either would—

(1) Improve the quality of the surface water or groundwater; or

(2) Not adversely impact the quality of the surface water or groundwater to the extent of causing a violation of applicable state or federal water quality standards or contaminating or diminishing water supplies to the extent that those supplies would no longer be suitable for current legitimate uses.

(n) A description of how placement of CCBs would impact the determination of probable hydrologic consequences prepared under § 780.21(f) or § 784.14(e) of this chapter and the hydrologic reclamation plan prepared under § 780.21(h) or § 784.14(g) of this chapter.

(o) A description of how CCBs will be placed to achieve the requirements of the regulatory program, including those relating to the erosional stability and mass stability of the reclaimed area, protection of the hydrologic balance, postmining topography, revegetation, and postmining land use capability, taking into consideration the information required by paragraphs (g) through (n) of this section.

(p) A groundwater monitoring plan designed specifically to monitor the impacts of the placement of CCBs on groundwater downgradient of the CCB placement area along all predicted groundwater flow paths. In addition to meeting the requirements of § 780.21(i) or § 784.14(h) of this chapter, the plan must—

(1) Require monitoring of the concentration of water quality parameters of concern based upon the analyses conducted under paragraphs (g) and (h) of this section. The regulatory authority may require the monitoring of additional parameters.

(2) Include monitoring locations both upgradient and downgradient of the CCB placement area along all predicted groundwater flow paths.

(3) Include downgradient monitoring points in sufficient numbers and locations to monitor all potential leachate flow paths. The monitoring points must be located sufficiently close to the CCB placement area to ensure prompt detection of leachate migration and to determine leachate formation characteristics and transport behavior.

(q) A description of how the operation will comply with the performance standards in part 826 of this chapter.

§ 787.5 What special responsibilities does the regulatory authority have under this part?

(a) General. Before approving an application for either a permit or a significant revision of a permit that proposes the placement of CCBs as part of the reclamation plan for a surface coal mining and reclamation operation and that is subject to the requirements of this part, the regulatory authority must—

(1) Determine which types of CCBs may be placed in the proposed area.

(2) Establish criteria for the analysis and placement of CCBs to which the permittee must adhere. The criteria may be either site-specific or programmatic.

(3) Revise the cumulative hydrologic impact assessment prepared under § 773.15(e) of this chapter to include consideration of CCB placement. As provided in the referenced rule, the

regulatory authority may approve placement of CCBs only if it determines that the operation has been designed to prevent material damage to the hydrologic balance outside the permit area.

(4) Select surface water and groundwater monitoring parameters based upon the results of the analyses required by paragraphs (g) and (h) of § 787.4 of this part. The regulatory authority must ensure that the groundwater monitoring plan is adequate to identify the impacts of CCB placement on groundwater hydrology and that it is designed to provide prompt detection of leachate formation, migration, and characteristics. In addition, the regulatory authority must specify in the permit the parameter levels that will trigger reassessment of the CCB placement plan or initiation of other appropriate measures needed to address unanticipated adverse impacts.

(5) Find in writing that the proposed operation meets the requirements of this section and has been designed to meet the requirements of part 826 of this chapter.

(b) Permit revisions. (1) An application for a permit revision that involves the placement of CCBs under § 787.3(a) of this part must be processed as a significant permit revision under § 774.13(b)(2) of this chapter if the proposed revision is the initial proposal for placement of CCBs within the permit area.

(2) An application for a permit revision that proposes to expand the placement area or increase the volume of CCBs to be placed within the permit area must be processed as a significant permit revision under § 774.13(b)(2) of this chapter unless the regulatory authority determines that the proposed expansion or increase in volume is minor relative to the area or amount initially approved for placement.

**PART 800—BOND AND INSURANCE REQUIREMENTS FOR SURFACE COAL
MINING AND RECLAMATION OPERATIONS UNDER REGULATORY PROGRAMS**

9. The authority citation for part 800 is revised to read as follows:

AUTHORITY: 30 U.S.C. 1201 et seq.

10. Section 800.10 is revised to read as follows:

§ 800.10 Information collection.

The collections of information contained in part 800 have been approved by the Office of Management and Budget under 44 U.S.C. 3501 et seq. and assigned control number 1029-0043. This collection implements section 509 of the Surface Mining Control and Reclamation Act of 1977, which requires that persons planning to conduct surface coal mining operations first post a performance bond to guarantee fulfillment of all reclamation obligations under the approved permit. The regulations also establish bond release requirements and procedures consistent with section 519 of the Act, liability insurance requirements pursuant to section 507(f) of the Act, and procedures for bond forfeiture should the permittee default on reclamation obligations. Persons intending to conduct surface coal mining operations must respond to obtain a benefit in accordance with SMCRA. A Federal agency may not conduct or sponsor, and no one is required to respond to, a collection of information unless it displays a currently valid OMB control number.

11. In § 800.40, revise the section heading and paragraph (c)(3) to read as follows:

§ 800.40 What are the requirements for release of performance bonds?

* * * * *

(c) * * *

(3) At the completion of Phase III, the remaining portion of the bond. However, the regulatory authority may not fully release any bond until the reclamation requirements of the Act and the permit are fully met. Phase III is completed when—

(i) The operator has successfully completed all surface coal mining and reclamation activities;

(ii) The revegetation responsibility period under § 816.116(c) or § 817.116(c) has expired; and

(iii) If the operation included the placement of coal combustion byproducts under parts 787 and 826 of this chapter, one of the following situations exists:

(A) There are at least 5 consecutive years of groundwater monitoring data following the cessation of placement and, with respect to parameters that pose a risk to the public or the environment, those data exhibit no significant adverse trend in the quality of groundwater downgradient of the placement site;

(B) If significant groundwater degradation has occurred, there are at least 5 consecutive years of groundwater monitoring data demonstrating that appropriate measures taken by the permittee have corrected the problem; or

(C) The approved postmining land use for the site is a solid waste landfill under subtitle D of the Resource Conservation and Recovery Act, 42 U.S.C. 6941-6949a.

* * * * *

12. Add part 826 to read as follows:

**PART 826—SPECIAL PERMANENT PROGRAM PERFORMANCE STANDARDS—
PLACEMENT OF COAL COMBUSTION BYPRODUCTS**

Sec.

826.1 Scope and applicability: What does this part do and when does it apply?

826.10 Information collection.

826.11 What additional performance standards apply to the placement of coal combustion byproducts?

AUTHORITY: 30 U.S.C. 1201 et seq.

§ 826.1 Scope and applicability: What does this part do and when does it apply?

(a)(1) This part contains the additional performance standards that you, the operator or permittee, must follow when you place coal combustion byproducts on a mine site under a permit issued in accordance with part 787 of this chapter.

(2) Unless otherwise specified, the performance standards in this part apply in addition to the requirements of subchapter K of this chapter.

(3) This part does not apply to the placement of CCBs under the exceptions in § 787.3(b) of this chapter.

(b) Nothing in this part authorizes placement of CCBs mixed with solid waste, unless otherwise approved in writing by both the regulatory authority and the agency with jurisdiction over the disposal of solid waste.

§ 826.10 Information collection.

The collections of information contained in part 826 have been approved by the Office of Management and Budget under 44 U.S.C. 3501 et seq. and assigned control number 1029-xxx2. This collection implements Title V of SMCRA with respect to situations in which coal combustion byproducts are used as part of the reclamation of surface coal mining operations. Persons intending to place coal combustion byproducts at surface coal mining and reclamation operations must respond to obtain a benefit. A Federal agency may not conduct or sponsor, and no one is required to respond to, a collection of information unless it displays a currently valid OMB control number.

§ 826.11 What additional performance standards apply to the placement of coal combustion byproducts?

(a) CCB testing. (i) You must retest a representative sample of the CCBs placed on the mine site on a quarterly basis to assess any changes in composition or behavior. The regulatory authority may reduce this frequency to semiannual or annual if test results for a 5-year period show little variation or if the generating facility receives all its coal from a single source with consistent characteristics.

(ii) You must retest a representative sample of the CCBs before placement on the mine site whenever there is a change in the source of the coal being burned in the facility producing the CCBs or whenever there is a significant change in the way the coal is burned (boiler operation) or in the emissions control technology used.

(iii) The tests must include the analyses required under § 787.4(g) of this chapter. The regulatory authority may allow you to exclude retesting of physical properties if there is no change in the type of CCBs as that term is defined in § 700.5 of this chapter.

(iv) You must submit all test results to the regulatory authority in a timely fashion.

(v) The regulatory authority will evaluate the test results and notify you if you must revise the CCB placement plan approved under part 787 of this chapter.

(b) You must monitor surface water and groundwater in the manner approved in the permit and in accordance with § 816.41(c) or § 817.41(c) of this chapter. After CCB placement ceases, monitoring must continue until the results demonstrate that the impact of placement on groundwater downgradient of the placement site is less than can be measured using standard techniques or has stabilized. At a minimum, monitoring must continue until data for 5 consecutive years after the cessation of CCB placement show no significant adverse trends with respect to the parameters listed in § 787.4(h) that pose a risk to the public or the environment.

(c) If monitoring results indicate that CCB placement is having an unanticipated adverse impact on the hydrologic balance, you must take appropriate remedial measures approved by the regulatory authority. The regulatory authority also may require that you revise the permit to either cease placement of CCBs or modify the placement plan to address the problem.

(d) The regulatory authority must routinely review, evaluate, and interpret surface water and groundwater monitoring data to identify adverse trends with respect to the parameters listed in § 787.4(h), ensure prompt detection of any problems, and determine whether you must revise the CCB placement plan approved under part 787 of this chapter.

(e) The regulatory authority may consider the use of CCBs to backfill the mined-out area to be a reclamation activity for purposes of the contemporaneous reclamation requirements of

§ 816.100 of this chapter. In determining whether the detailed timetable submitted under § 780.18(b)(1) of this chapter meets the contemporaneous reclamation requirements of § 816.100 of this chapter, the regulatory authority may consider the availability and rate of production of the CCBs proposed for use as backfill material for the final pit. The regulatory authority must solicit and consider the landowner's wishes in making this determination.

(f) You may not use CCBs to backfill a mined-out area if doing so will result in the creation of excess spoil, as defined in § 701.5 of this chapter, that must be placed in fills outside the mined-out area.

(g) You must cover CCBs with a sufficient amount of suitable overburden and soil material (no less than 2 feet) to ensure that CCB placement will not interfere with compliance with the revegetation requirements of §§ 816.11 through 816.116 or §§ 817.111 through 817.116 of this chapter and the postmining land use requirements of § 816.133 or § 817.133 of this chapter.

(h) You must ensure that, at all stages of the placement process, CCBs are protected from erosion and air pollution attendant to erosion. You must use current prudent engineering practices to control or prevent erosion, siltation, and the air pollution attendant to erosion, including road dust and dust occurring on other exposed surfaces such as CCB storage sites, mixing areas, and application areas.

(i) You must comply with any other federal, state, tribal, or local laws or regulations that apply to the placement of CCBs.

PART 874—GENERAL RECLAMATION REQUIREMENTS

13. The authority citation for part 874 reads as follows:

AUTHORITY: 30 U.S.C. 1201 et seq.

14. Section 874.10 is revised to read as follows:

The collections of information contained in part 874 have been approved by the Office of Management and Budget under 44 U.S.C. 3501 et seq. and assigned control number 1029-0113.

This collection is needed to ensure that only appropriate reclamation projects are conducted under the provisions of § 874.17 of this part relating to the government-financed construction exemption. Collection of the information required under § 874.18 of this part is needed to ensure that the use of CCBs as part of the reclamation of abandoned mine lands and waters is conducted in an environmentally appropriate fashion. Persons intending to extract coal as part of an abandoned mine land reclamation project or use CCBs as part of an abandoned mine land reclamation project must respond to obtain a benefit. A Federal agency may not conduct or sponsor, and no one is required to respond to, a collection of information unless it displays a currently valid OMB control number.

15. Section 874.18 is added to read as follows:

§ 874.18 What requirements apply to the use of coal combustion byproducts in reclamation projects?

(a) What types of projects must comply with the requirements of this section? Except as provided in paragraph (b) of this section, this section applies to all reclamation projects included within the scope of § 874.11 of this part that involve the placement of coal combustion byproducts, as that term is defined in § 700.5 of this chapter, in abandoned mines or on abandoned mine lands for the purpose of reclaiming lands or waters adversely impacted by past mining practices.

(b) Exceptions. The requirements of this section do not apply to the—

(1) Use of coal combustion byproducts solely as a soil supplement or amendment, provided that CCBs used as soil supplements or amendments are placed in accordance with Part 7 of ASTM Standard Guide E 2278;

(2) Use of coal combustion byproducts to construct roads or foundations for structures such as buildings and parking lots;

(3) Placement of coal combustion byproducts in underground mine voids in accordance with the requirements of § 816.41(i) or § 817.41(h) of this chapter and any applicable Federal or State underground injection control requirements under 40 CFR part 144;

(4) Placement of coal combustion byproducts in accordance with a solid waste permit or other authorization issued by a state that regulates such placement under subtitle D of the Resource Conservation and Recovery Act, 42 U.S.C. 6941-6949a; or

(5) Placement of coal combustion byproducts as part of a reclamation project in areas approved for such placement before the effective date of this section.

(c) Clarification. Nothing in this section authorizes—

(1) The use of materials resulting from the combustion of coal other than those listed in the definition of coal combustion byproducts in § 700.5 of this chapter; or

(2) Placement of coal combustion byproducts for purposes other than reclamation of abandoned mine lands or waters.

(d) What requirements apply to the review and approval of reclamation projects involving placement of CCBs? Before approving the placement of CCBs, you, the agency responsible for administering the abandoned mine land reclamation program, must—

(1) Provide opportunity for public comment on the placement of CCBs on the mine site as part of the reclamation project.

(2) Document that you have the legal right to place CCBs on the site. This documentation may consist of landowner consent or, in the absence of landowner consent, a description of other documents or state statutory or case law that supports your claim.

(3) Identify the facility producing the CCBs, and document the combustion and emission control processes in use at that facility.

(4) Determine which types of CCBs, as defined in paragraphs (a) through (e) of the definition of coal combustion byproducts in § 700.5 of this chapter, are suitable for placement on the abandoned mine lands to accomplish reclamation goals without causing other environmental problems.

(5)(i) Obtain a detailed analysis of the chemical, engineering, and physical properties of the CCBs, including identification of any characteristics that might affect how the CCBs interact with their environs after placement. At a minimum, the analysis must determine—

(A) Elemental composition, including the elements listed in paragraph (d)(6) of this section;

(B) Trace element leaching potential;

(C) Permeability;

(D) Neutralization potential;

(E) Mass stability as demonstrated by strength and compaction under conditions likely to be found at the placement site;

(F) The presence or absence of cementitious or thixotropic properties; and

(G) Whether the CCBs may exhibit acid-forming or toxic-forming properties under the conditions likely to occur at the placement site.

(ii) CCBs must be tested in the form in which they are to be placed at the site.

(iii) All tests must conform to any pertinent ASTM specifications (see Part 6 of ASTM Standard Guide E-2278) and must be appropriate for the hydrologic and geologic conditions of the placement site.

(6) Obtain detailed baseline hydrologic data specific to the proposed CCB placement area, including seasonal quality and quantity variations, usage data, depth to the water table, and flow rates for springs and streams. The baseline data must include background levels of any elements of concern identified in the analysis required under paragraph (d)(5) of this section. You may waive baseline data requirements for parameters for which there are no detectable concentrations in the CCBs to be placed at the site. At a minimum, you must obtain baseline data for the following water quality parameters:

(i) pH;

(ii) Total dissolved solids or specific conductance (corrected to 25 degrees Celsius);

(iii) Acidity;

(iv) Alkalinity;

(v) Aluminum;

(vi) Antimony;

- (vii) Arsenic;
- (viii) Barium;
- (ix) Beryllium;
- (x) Boron;
- (xi) Cadmium;
- (xii) Calcium;
- (xiii) Chlorides;
- (xiv) Chromium;
- (xv) Cobalt;
- (xvi) Copper;
- (xvii) Fluorides;
- (xviii) Iron;
- (xix) Lead;
- (xx) Magnesium;
- (xxi) Manganese;
- (xxii) Mercury;
- (xxiii) Molybdenum;
- (xxiv) Nickel;
- (xxv) Nitrates and nitrites;
- (xxvi) Potassium;
- (xxvii) Selenium;
- (xxviii) Silver;
- (xxix) Sodium;

- (xxx) Sulfates;
- (xxxi) Thallium;
- (xxxii) Vanadium;
- (xxxiii) Zinc; and
- (xxxiv) Any other parameters that you determine are appropriate.

(7) For surface water, the baseline data provided under paragraph (d)(6) of this section must include total and dissolved concentrations for each applicable parameter. For groundwater, only dissolved concentrations are required.

(8) Determine the geology of the proposed placement area, with an emphasis on geologic features and characteristics that may affect the mass stability or leaching behavior of the CCBs, including acid-forming materials that could react adversely with the CCBs.

(9) Determine surface water and groundwater flows through and adjacent to the proposed placement area, including seasonal fluctuations of the water table and the rates and direction of groundwater flow in all aquifers potentially affected by the proposed placement of CCBs.

(10) Predict post-reclamation surface water and groundwater flows through and adjacent to the proposed placement area, taking into account the topographical and other changes that may result from any reclamation or other activities in the area.

(11) If the CCBs would come into contact with surface water or groundwater, make a documented finding that the contact either would—

- (i) Improve the quality of the surface water or groundwater; or

(ii) Not adversely impact the quality of the surface water or groundwater to the extent of causing a violation of applicable state or federal water quality standards or contaminating or diminishing water supplies to the extent that those supplies would no longer be suitable for current legitimate uses.

(12) Determine, after taking into consideration the information obtained under paragraphs (d)(1) through (11) of this section, that—

(i) The CCBs selected are chemically and physically appropriate for the purpose for which they are to be used;

(ii) The amount and location of CCBs proposed for placement on abandoned mine lands as part of the reclamation project would serve a legitimate reclamation purpose; and

(iii) Placement of CCBs on abandoned mine lands as part of the reclamation project would not create a hazard to the public or the environment.

(e) What requirements apply to the placement of CCBs as part of a reclamation project?

Project design specifications and the terms of the contract must incorporate the following requirements:

(1) CCB testing. (i) CCBs must be retested on a quarterly basis to assess any changes in composition or behavior. You may reduce this frequency to semiannual or annual if test results for a 5-year period show little variation or if the generating facility receives all its coal from a single source with consistent characteristics.

(ii) In addition, the CCBs must be retested whenever there is a change in the source of the coal being burned in the facility producing the CCBs or whenever there is a significant change in the way the coal is burned (boiler operation) or in the emissions control technology used.

(iii) The tests must include the analyses required under paragraph (d)(5) of this section. You may allow the exclusion of retesting of physical properties if there is no change in the type of CCBs as that term is defined in § 700.5 of this chapter.

(iv) You must evaluate the results of the tests and determine whether any changes in the project design or specifications are needed to protect the public or the environment.

(2) Water monitoring. Unless agency personnel conduct the necessary monitoring, the contract terms and specifications must require implementation of a water monitoring plan designed specifically to monitor the impacts of the placement of CCBs on surface water and groundwater downgradient of the CCB placement area along all predicted groundwater flow paths. The plan must require monitoring of pH, total dissolved solids or specific conductance (corrected to 25 degrees Celsius), and the concentration of water quality parameters of concern based upon the analyses conducted under paragraph (d)(5) of this section, as well as any additional parameters that the agency deems necessary. Surface water monitoring locations and downgradient groundwater monitoring points must be located sufficiently close to the CCB placement area to ensure prompt detection of leachate migration and any potential water-quality problems and to determine leachate formation characteristics and transport behavior. Monitoring must continue during and after placement for a time determined by the agency to be adequate to ascertain the long-term impact of CCB placement on downgradient surface water and groundwater. At a minimum, monitoring must continue until data for 5 consecutive years after the cessation of CCB placement show no significant adverse trend with respect to parameters that pose a risk to the public or the environment. The agency may reduce or waive monitoring requirements if the agency makes a documented finding that adverse impacts on surface water and groundwater quality are unlikely to occur.

(3) CCBs must be covered with a sufficient amount of overburden and soil material to ensure that CCB placement does not interfere with vegetative growth or unduly restrict future land use.

(4) CCBs must be transported, handled, and placed in a manner that avoids or minimizes air pollution resulting from dust formation.

(5) CCBs used to remediate acid mine drainage must be placed in accordance with Part 8 of ASTM Standard Guide E 2278.

(f) What requirements apply after CCB placement is completed? (1) You must routinely review, evaluate, and interpret water monitoring data to identify trends and ensure prompt detection of any water-quality problems.

(2) If a water-quality problem related to CCB placement is detected through water monitoring or by other means, you must take the steps necessary to remediate the problem to the extent that the problem may cause or contribute to a violation of applicable state or federal water quality standards or cause contamination or diminution of water supplies in use for agricultural, domestic, or industrial purposes, or another legitimate use.

(g) Compliance with other governmental requirements. Placement of CCBs on abandoned mine lands must comply with all other federal, state, tribal, or local laws and regulations that apply to the placement of CCBs.