DEPARTMENT OF THE INTERIOR

Bureau of Land Management

43 CFR Part 3800

[WO–300–1990–PB–24 1A]

RIN 1004–AD44

Mining Claims Under the General Mining Laws; Surface Management

AGENCY: Bureau of Land Management, Interior.

ACTION: Proposed rule.

SUMMARY: The Bureau of Land Management (BLM or ''we'') proposes to amend its regulations governing mining operations involving metallic and some other minerals on public lands. The purpose of the proposed rule is to obtain further public comment on changes to these regulations that BLM is adopting in a final rule that appears elsewhere in today's **Federal Register**. We are also seeking comment on other changes in the hardrock mining surface management regulations that were not directly addressed in today's final rule.

DATES: You should submit your comments by December 31, 2001. BLM will not necessarily consider comments postmarked or received by messenger or electronic mail after the above date in the decisionmaking process on the proposed rule.

ADDRESSES: Mail: Director (630), Bureau of Land Management, Administrative Record, Room 401 LS, 1849 C Street, NW, Washington, DC 20240.

Personal or messenger delivery: Room 401, 1620 L Street, NW, Washington, DC 20036.

Internet e-mail: *WOComment@blm.gov.* (Include ''Attn: AD44'')

FOR FURTHER INFORMATION CONTACT: Robert M. Anderson, 202/208–4201; or Michael Schwartz, 202/452–5198. Individuals who use a telecommunications device for the deaf (TDD) may contact us through the Federal Information Relay Service at 1–800/877–8339, 24 hours a day, 7 days a week.

SUPPLEMENTARY INFORMATION:

I. Public Comment Procedures

A. How Do I Comment on the Proposed Rule?

If you wish to comment, you may submit your comments by any one of several methods.

- You may mail comments to Director (630), Bureau of Land Management, Administrative Record, Room 401 LS, 1849 C Street, NW, Washington, DC 20240.
- You may deliver comments to Room 401, 1620 L Street, NW, Washington, DC 20036.
- You may also comment via the Internet to *WOComment@blm.gov.* Please submit Internet comments as an ASCII file avoiding the use of special characters and any form of encryption. Please also include ''Attn: AD44'' and your name and return address in your Internet message. If you do not receive a confirmation that we have received your Internet message, contact us directly at 202/452–5030.

Please make your comments on the proposed rule as specific as possible, confine them to issues pertinent to the proposed rule, and explain the reason for any changes you recommend. Where possible, your comments should reference the specific section or paragraph of the proposal that you are addressing.

BLM may not necessarily consider or include in the Administrative Record for the final rule comments that BLM receives after the close of the comment period (*see* **DATES**) or comments delivered to an address other than those listed above (*see* **ADDRESSES**).

B. May I Review Comments Submitted by Others?

Comments, including names and street addresses of respondents, will be available for public review at the address listed under ''**ADDRESSES:** Personal or messenger delivery'' during regular business hours (7:45 a.m. to 4:15 p.m.), Monday through Friday, except holidays.

Individual respondents may request confidentiality, which we will honor to the extent allowable by law. If you wish to withhold your name or address, except for the city or town, you must state this prominently at the beginning of your comment. We will make all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, available for public inspection in their entirety.

II. Background

On November 21, 2000 (65 FR 69998), BLM adopted a final rule revising the hardrock mining surface management regulations in 43 CFR subpart 3809 (hereinafter referred to as the ''2000 rule''). These regulations became effective on January 20, 2001. On March 23, 2001 (66 FR 16162), BLM proposed to make changes to the 2000 rule because of substantial concerns raised by the mining industry, the western states and environmental groups. The preamble to that proposed rule explains in detail the nature of the concerns. The regulatory text in this proposed rule, with exceptions we will discuss later in this preamble, is identical to that in a final rule published elsewhere in today's **Federal Register**. You should refer to that document for a complete discussion of the background of the final rule.

While we are providing this additional opportunity for interested parties to comment on changes to the hardrock mining regulations, we decided that it was important to make final some changes today in order to resolve uncertainties resulting from pending legal challenges. This will ensure a continued reliable supply of minerals. This benefits all affected parties by clarifying the Department's position on several issues involved in the litigation challenging the 2000 rules. However, we recognize that because of the high level of interest in this rule among affected industry groups, environmental organizations, and states, we might benefit from providing a further opportunity to comment on the specific changes we are adopting today. If comments on this proposed rule indicate that additional changes to the regulations are warranted, we will make these changes in a subsequent final rule.

In addition to the specific issues addressed in the proposed rule language, we are particularly interested in comments on the following topics:

- Whether we should amend the regulations regarding BLM's relationship to states and the delegations these rules provide.
- Whether additional innovative means are available to provide sound and reliable financial guarantees.
- Whether BLM should always perform a validity examination before approving a plan of operations on withdrawn lands.
- Whether we should add a specific reference to cave resources in the performance standards.
- Whether the 3809 regulations published today contain other provisions which are either overly burdensome or fail to provide adequate environmental protection.

We may address these issues and others in a future proposed rule.

III. The Proposed Rule

This proposed rule gives you an additional opportunity to comment on the provisions contained in the final rule published elsewhere in today's

Federal Register. See that document for a more complete discussion of the changes to the 2000 rule and our rationale for not making additional changes. Because the rule we are proposing today also was the subject of the March 23, 2001, proposed rule, you do not need to resubmit comments that you sent in response to that proposal. We will include all comments submitted in response to the March 23, 2001, proposed rule in the administrative record for today's proposed rule.

In addition to the same language that is also contained in the final rule published today, this proposed rule includes several technical or clerical changes and other modifications. One is the provision for including drywashers under 10 horsepower in casual use as defined in section 3809.5. Following is a section-by-section summary of the provisions that have changed from the 2000 rule. Today's final rule contains additional discussion of those provisions.

Section 3809.5 How Does BLM Define Certain Terms Used In this Subpart?

We are proposing changes in the definition of ''casual use,'' ''operator,'' and ''unnecessary or undue degradation'' found at section 3809.5.

Casual Use

Several comments on the March 23, 2001, proposed rule from persons who engage in small scale placer mining objected to the definition of ''casual use'' in the 2000 rule allowing employment of only hand or battery-powered dry washers as casual use. Many recreational miners use dry washers powered by small gasoline motors that are roughly equivalent to lawn mower motors. The comments said that this definition would bar these miners from using public lands for their activities due to the cost of either having to file a plan of operations or acquiring battery-powered drywashers. In this rule we propose to amend the definition of ''casual use'' to accommodate this use of small motorized drywashers (under 10 horsepower) that cause negligible disturbance. To ensure that such disturbances are negligible, we propose a 10-horsepower engine limit. The use of drywashers powered by motors of less than 10 horsepower would be considered casual use. The use of any drywasher powered by an engine with 10 or more horsepower would not be casual use. This change was not included in today's final rule.

Today's final rule contains the same language as the 2000 rule, which in turn was consistent with the 1980 regulations, which stated that casual use does not include the use of ''mechanized earth-moving equipment.'' However, the purpose of this change is to reflect BLM's agreement with comments that said that the disturbance created by these small drywashers, largely used by individual recreational miners, is negligible in most areas, and thus should qualify as casual use. This type of dry washing activity would be unfairly burdened under the 2000 rule, under which all activities that are not classified as casual use must file a plan of operations and a bond. Since these portions of the 2000 rule have been retained, this change to the casual use definition corresponds to a similar 2000 rule treatment of some small suction dredgers, and is not significantly different in its impacts from those corresponding provisions analyzed in the Environmental Impact Statement alternative that would have retained the 1980 regulations.

Operator

We propose to define the term ''operator'' to mean any person who is conducting or proposing to conduct operations. This definition, which appeared in the regulations that were in effect before January 20, 2001 (the 1980 regulations), is familiar to regulators and the regulated community alike, and did not cause problems. It does not contain the 2000 rule provisions that expressly include mining claimants, persons who manage or direct operations and corporate parents and affiliates who materially participate in the operations. This proposed definition of ''operator'' is the same as the one in today's final rule.

BLM is concerned that the 2000 rule definition of the term ''operator,'' by referencing ''parent'' entities and affiliates, appeared to authorize BLM routinely to breach the corporate veil that generally is established under state corporate laws to protect such entities. As explained in the **Federal Register** preamble to the 2000 rule (65 FR 70013), BLM adopted the ''material participation'' standard in the 2000 rules based on a concept authorized under CERCLA, as enunciated in a recent Supreme Court decision. However, there is no indication that Congress intended to override state laws in this regard under FLPMA. Unlike statutes such as the Surface Mining Control and Reclamation Act (*see*, e.g., 30 U.S.C. 1260(c)) that expressly focus on ''ownership'' and ''control'' of entities, neither the mining laws nor FLPMA expressly holds parent entities and affiliates responsible for activities which occur at mining operations conducted by other entities. Thus, we decided we will not include the concept of ''parent'' or ''affiliate'' responsibility in the definition of the term ''operator'' in subpart 3809. Under today's final rule and these proposed rules, we will hold the appropriate entity liable through established state common law principles.

The 2000 rule also included the statement that the operator can also be the claimant. That provision also is unnecessary and therefore is removed by today's final rule, and does not appear in this proposed rule. Both mining claimants and operators, however, are still responsible for any liability arising from obligations relating to the project area that accrue while they hold their interests, as stated in section 3809.116. The claimant may operate his or her mining claim, but stating that in the definition is unnecessary.

The change in this proposed rule, and in today's final rule, removes the presumption that any person who was ever associated with the site will be 100 percent liable, and allows for a case-by-case factual determination of an appropriate level of responsibility. After reviewing comments received, and re-evaluating our policy direction, we have decided that the public interest is better served by this more equitable approach to establishing liability. It will ensure fairness to all parties while allowing enforcement against responsible parties.

The definition of operator in this proposed rule is the same as the one in today's final rule, and we request comment on whether we should reinstate the definition in the 2000 rule or incorporate some other definition.

Unnecessary or Undue Degradation

We propose a definition of the term ''unnecessary or undue degradation'' that excludes paragraph (4) of the 2000 rule definition. That paragraph included in the definition conditions, activities, or practices that occur on mining claims or millsites located after October 21, 1976 (or on unclaimed lands), and result in substantial irreparable harm (SIH) to significant scientific, cultural, or environmental resource values of the public lands that cannot be mitigated (the ''SIH'' standard). This paragraph created significant uncertainty by giving BLM broad authority to deny plans of operation even if all of the other standards could be satisfied. Of all the provisions in the 2000 rule, this one paragraph had more projected economic impacts than all of the other sections combined. Further analysis of this issue is set forth in the preamble to today's final rule. In addition, the Interior

Department Solicitor has issued an opinion (M–37007) addressing the legal authority of the SIH standard. This opinion has been placed in the Administration Record.

The definition of ''unnecessary or undue degradation'' in this proposed rule is the same as the one in today's final rule, and we request comment on whether we should continue to exclude paragraph (4) from the definition.

Section 3809.31 Are There any Special Situations That Affect What Submittals I Must Make Before I Conduct Operations?

Today's final rule adds the phrase ''For other than Stock Raising Homestead Act lands'' to the beginning of paragraph (e) to make it clear that paragraph (c) does not apply to Stock Raising Homestead Act lands, which we address in paragraph (d). We made the change because it was possible to construe paragraph (e) in such a way that it could be read to include Stock Raising Homestead Act lands. This was not our intent in the 2000 rule, as demonstrated by the presence of paragraph (d), which applies only to Stock Raising Homestead Act lands. You may comment on whether we should retain this change.

We also propose to change the word ''submittals'' in the heading of this section to ''submissions.'' We are proposing this simply for grammatical reasons. This minor diction change in section 3809.31 was not included in today's final rule.

Section 3809.116 As a Mining Claimant or Operator What Are My Responsibilities Under This Subpart for My Project Area?

Today's final rule and this proposed rule delete the specific reference to joint and several liability that was added in the 2000 rule. Both mining claimants and operators are liable for compliance with the requirements of this rule. BLM will determine the appropriate degree of responsibility on a case-specific basis, guided by common law principles. The underlying liability scheme serves as a backstop, and allows for a case-by-case factual determination of an appropriate level of responsibility. After reviewing comments received and reevaluating our policy direction, we have decided that the public interest is better served by this more equitable approach to establishing liability, which will ensure fairness to all parties while encouraging enforcement against responsible parties.

We request comment on whether we should eliminate the reference included in section 3809.116(a) of the 2000 rule to ''joint and several'' liability. The 2000 rule provided a series of examples. These examples are also removed in this proposed rule and in today's final rule. Section 3809.116(a) thus would provide that ''mining claimants and operators'' (if other than the mining claimant) ''are liable for obligations under this subpart that accrue while they hold their interests.'' BLM recognizes that neither FLPMA (43 U.S.C. 1701 *et seq.*) nor the mining laws expressly provide for joint and several liability, and such an approach has not been shown to be necessary to prevent unnecessary or undue degradation of the public lands. There is sufficient authority under current law and today's final rule to fully enforce the requirements of subpart 3809 against both claimants and operators. Furthermore, the establishment of adequate financial guarantees ensures that neither the government nor taxpayer will be saddled with the costs of reclamation in the event of incomplete performance of reclamation responsibilities.

We note that subpart 3809 only covers liability for reclamation of mining operations under FLPMA and the mining laws. Unlike the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. 9601 *et seq.*, these statutes do not establish joint and several liability. To the extent obligations associated with mining operations arise under CERCLA or any other statute, such obligations are independent of those that subpart 3809 establishes. Subpart 3809 is not intended to affect any obligations established under other statutes, and liability schemes under such other statutes do not determine the entities responsible under subpart 3809. BLM will determine the appropriate degree of liability on a case-specific basis, guided by common-law principles.

Section 3809.401 Where Do I File My Plan of Operations and What Information Must I Include With It?

In today's final rule, we amend section 3809.401 only to change a cross-reference to a renumbered performance standard. You may comment on this change.

Section 3809.411 What Action Will BLM Take When It Receives My Plan of Operations?

and

Section 3809.415 How Do I Prevent Unnecessary or Undue Degradation While Conducting Operations on Public Lands?

In today's final rule, we amend sections 3809.411 and 3809.415 by removing a portion of paragraph 3809.411(d)(3)(iii) and all of paragraph 3809.415(d) of the 2000 rule, both of which would have implemented the substantial irreparable harm standard. These are corresponding changes resulting from the removal of the SIH standard from the definition of unnecessary or undue degradation. You may comment on whether we should retain these amendments.

Section 3809.420 What Performance Standards Apply to My Notice or Plan of Operations?

The performance standards of subpart 3809 are key to establishing the adequacy of environmental protection that the regulations require. In deciding which performance standards to include in the final rule, we carefully considered a congressionally-mandated report by the National Research Council (NRC), entitled *Hardrock Mining on Federal Lands* (the NRC Report). The general conclusion of the NRC Report is that the existing regulations are generally effective, although some changes are necessary. (NRC Report, p. 5.) The NRC Report further states that the ''overall structure of the federal and state laws and regulations that provide mining-related environmental protection is complicated but generally effective.'' This conclusion and the material in the NRC Report led BLM to conclude that it was unnecessary to adopt an entire new set of performance standards in the 2000 rule, and that we should reinstate the performance standards from the 1980 regulations. Thus, today's final rule reinstates the standards that were formerly set forth in sections 3809.1–3(d), 3809.2–2, and 3809.3–3 through 3809.3–5 of the regulations in effect prior to January 20, 2001. These are to be incorporated into section 3809.420, as paragraph (a)(6) and paragraphs (b)(1) through (b)(10) and (b)(13). You may comment on whether we should retain these performance standards as they are set forth in this proposed rule and today's final rule.

In addition to reinstating the previous performance standards in today's final rule, we retain the general performance standards (paragraphs (a)(1) through (a)(5)) from the 2000 rule because they provide an overview of how an operator should conduct operations under an approved plan of operations and clarify certain basic responsibilities, including the operator's responsibility to comply with applicable land use plans and BLM's responsibility to specify necessary mitigation measures. We also included a paragraph (a)(6) in the general standards to make clear that

operators must comply with pertinent state and Federal laws and regulations. This paragraph is derived from the introductory text of former section 3809.2–2. These standards, while general in nature, provide ample guidance on how to conduct operations. In addition, in today's final rule we retain from the 2000 rule the performance standards which address acid-forming, toxic, and deleterious materials and the standards governing leaching operations and impoundments. These latter standards reflect and codify BLM's acid rock and cyanide policies, which have been in effect since before the 2000 rule was published. They have been redesignated as sections 3809.420(c)(11) and (c)(12). BLM would appreciate comment on the combination of performance standards from the 1980 regulations and the 2000 rule that is included in today's final rule.

BLM expects that implementation of the performance standards will be straightforward because today's final rule and this proposed rule do not introduce new performance standards. We recognize that some confusion could exist as to which performance standards apply to particular operations. The following table clarifies which set of performance standards you should follow:

If	Then
BLM approved your plan of operations prior to the effective date of today's final rule.	Continue to operate under your approved plan.
Your plan of operations was pending prior to January 20, 2001.	If approved, you must conduct your plan of operations under the performance standards in place before January 20, 2001.
You filed an application on or after January 20, 2001 and BLM has not acted on it as of the effective date of today's final rule.	If approved, you must conduct your plan of operations under the performance standards in place as of the effective date of today's final rule.

We should also note we did not change the plan content requirements in section 3809.401.

Section 3809.421 Enforcement of Performance Standards

Related to restoring provisions from the 1980 regulations containing performance standards, we also would add section 3809.421, which contains language on enforcing the performance standards. This section is taken from section 3809.1–3(f) of the regulations in effect prior to January 20, 2001. The new section is helpful to remind operators that failure to comply with the performance standards subjects them to enforcement under this subpart. This amendment is included in today's final rule, but you may comment on whether we should retain it. We included this provision in today's final rule and this proposed rule as a separate section because it does not fit into the structure of revised section 3809.420.

Section 3809.598 What If the Amount Forfeited Will Not Cover the Cost of Reclamation?

In today's final rule we remove a reference in section 3809.598 to joint and several liability to conform to changes in section 3809.116. Under the amended provision, we will determine on a case-by-case basis the apportionment of liability between operators and mining claimants to cover the full cost of reclamation. You may comment on whether we should retain this amendment.

Section 3809.604 What Happens If I Do Not Comply With a BLM Order?

In today's final rule we remove a reference in paragraph (a) of this section to civil penalties in section 3809.702 of the 2000 rule, because this proposed rule would remove that section, as discussed below. You may comment on whether we should retain this change.

Section 3809.702 What Civil Penalties Apply to Violations of This Subpart?

and

Section 3809.703 Can BLM Settle a Proposed Civil Penalty?

In today's final rule we remove sections 3809.702 and 3809.703 of the 2000 rule. We made this change because there is merit to the point made by comments that stated that FLPMA does not contain a section expressly addressing administrative civil penalties. Although in the November 2000 **Federal Register** preamble we made an argument in support of the agency's authority to assess administrative penalties, this is an unsettled area for which it is prudent to await clear guidance from Congress before promulgating rules. You may comment on whether we should retain this amendment of the 2000 rule.

Finally, as a technical matter, under **Federal Register** rules, we cannot publish in this proposed rule the regulatory amendments for some of the changes we made in the final rule published elsewhere in today's **Federal Register** and referred to in this preamble. Nevertheless, you may comment on these changes. These include the removal of paragraph (d) from § 3809.415, a change made to conform to the proposed revision of the definition of ''unnecessary or undue degradation,'' and the removal of §§ 3809.702 and 3809.703 on civil penalties. In addition, you may comment on the cross-reference changes and corrections made in the final rule in §§ 3809.2, 3809.31, and 3809.604.

III. How Did BLM Fulfill Its Procedural Obligations?

Executive Order 12866, Regulatory Planning and Review

BLM found in the 2000 rule that the new subpart 3809 regulations were a significant regulatory action under section 3(f) of Executive Order 12866 and require an assessment of potential costs and benefits under section 6(a)(3) of that Executive Order. The impacts caused by today's final action and proposed action remain within the range of alternatives analyzed for the 2000 rule. Since we propose to retain most of the 2000 rule, while amending selected provisions, we rely on the regulatory impact analysis and benefit-cost analysis prepared for the 2000 rule and summarized in that rule, to evaluate today's final rule and this proposed rule. The full analyses remain on file in the BLM Administrative Record at the address specified in the **ADDRESSES** section. In the following paragraphs, we describe how the changes presented in today's rule affect these analyses.

The estimated costs associated with this rule are significantly lower than those associated with the 2000 rule. Over the 10 year period that we analyzed, we do not expect today's rule to have significant annual impacts on the economy.

The lower expected costs arise primarily from removing the SIH provision of the 2000 rule. Relative to the 2000 rule, substantial production benefits could accrue as a result of eliminating the SIH standard. However, uncertainty exists with respect to how eliminating the SIH provision will affect net economic benefits. Uncertainty about how the SIH provision would have been implemented, site specific factors, and any exploration and production effects (and the timing of these effects) make evaluating net economic benefits very difficult.

The net economic effects associated with eliminating joint and several liability, civil penalties, and revising the performance standards (with the exception of the acid rock drainage and cyanide standards, which would be retained) are equally difficult to

quantify but are not significant because the economic costs associated with these provisions are likely to be overshadowed by the potential economic costs associated with the SIH provision. We estimated the net effect of modifying the performance standards from the 1980 rule to the 2000 rule as being limited. Similarly, changing the 2000 standards back to the 1980 standards will result in negligible impact.

Clarity of the Regulations

Executive Order 12866 requires each agency to write regulations that are simple and 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 regulations clearly stated?

(2) Do the regulations contain technical language or jargon that interferes with their clarity?

(3) Does the format of the regulations (grouping and order of sections, use of headings, paragraphing, etc.) aid or reduce their clarity?

(4) Would the regulations be easier to understand if they 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 ''§ 3809.420 What performance standards apply to my notice or plan of operations?'')

(5) Is the description of the proposed regulations in the **SUPPLEMENTARY INFORMATION** section of this preamble helpful in understanding the regulations? How could this description be more helpful in making the final regulations easier to understand?

Please send any comments you have on the clarity of the proposed regulations to the address specified in the **ADDRESSES** section.

National Environmental Policy Act

The 2000 rule found that the new subpart 3809 regulations constituted a major Federal action significantly affecting the quality of the human environment under section 102(2)(C) of the National Environmental Policy Act of 1969, 42 U.S.C. 4332(2)(C). BLM prepared an environmental impact statement (EIS), which remains on file and is available to the public in the BLM Administrative Record at the address specified in the **ADDRESSES** section.

Because today's final rule and this proposed rule retain most of the provisions of the 2000 rule, we rely on the findings in the EIS. In today's final rule, we discuss in considerable detail the extent to which we expect this rule to change the impacts on the human environment that we anticipated in the 2000 rule. The final rule also contains a discussion of comments we received on the March 23, 2001, proposal. We have found that the impacts resulting from the final rule, with respect to the baseline established by the 1980 standards as well as the change from the 2000 rule, would fall within the range of impacts analyzed, and thus are not significantly different. No significant new information or change in circumstances has occurred that would alter the analysis or findings in the final EIS.

The definition of casual use in this proposed rule, which would specify that a gas powered drywasher of less than 10 horsepower qualifies as casual use, would not change impacts appreciably.

Although today's final rule and this proposed rule remove the substantial irreparable harm provision in the definition of unnecessary or undue degradation, BLM retains ample authority to protect surface resources and the environment. As discussed in today's final rule, BLM has ample statutory and regulatory means of preventing harm to significant scientific, cultural, or environmental resource values: the Endangered Species Act, the Archaeological Resources Protection Act, establishment of areas of critical environmental concern in land use plans under the FLPMA, withdrawal under Section 204 of FLPMA, the performance standards in section 3809.420, and so forth. Many of these are invoked in the performance standards in section 3809.420 and in the requirements for submission of Plans of Operations in section 3809.401.

The revision of section 3809.420 removes requirements for environmental protection that might conflict with or duplicate existing Federal or State laws or regulations. For example, paragraph (b)(2), which provided for minimizing water pollution via source control rather than treatment, and (b)(3), on jurisdictional wetlands protection, are addressed by the Clean Water Act, and the relevant programs are administered by the Environmental Protection Agency or the state or both, and the Corps of Engineers, respectively. Therefore, the requirements that the operator must comply with the Clean Water Act, Clean Air Act, and other environmental laws and regulations will have the same effect. The final rule and this proposed rule remove unnecessary language.

Regulatory Flexibility Act

Congress enacted the Regulatory Flexibility Act of 1980 (RFA), as amended, 5 U.S.C. 601–612, RFA to ensure that Federal Government regulations do not unnecessarily or disproportionately burden small entities. The RFA requires a regulatory flexibility analysis if a rule would have a significant economic impact, either detrimental or beneficial, on a substantial number of small entities. BLM prepared a regulatory flexibility analysis on the expected impact of the 2000 rule on small entities, determined that the 2000 rule will have a significant economic effect on a substantial number of small entities, and summarized it in the 2000 rule (65 FR 69998, 70103). The regulatory flexibility analysis remains on file in the BLM Administrative Record at the address specified in the **ADDRESSES** section. In today's final rule and this proposed rule we have made changes that should reduce the burdens on small entities. The regulations no longer provide for joint and several liability for violations of the regulations, no longer provide for civil liability for violations, simplify the definition of ''operator,'' and reduce the burdens of performance standards.

The Small Business Administration (SBA) commented in support of the March 23, 2001, proposed rule to suspend the 2000 rule. The principal substantive objection of the SBA to the 2000 rule was to the definition of ''unnecessary or undue degradation'' and the inclusion in it of ''substantial irreparable harm'' as an element. Removing this element from the definition in this proposed rule should obviate this objection.

Small Business Regulatory Enforcement Fairness Act

Evaluated against the baseline of the 2000 rule, BLM has concluded that today's final rule and this proposed rule will not have a significant economic impact on a substantial number of small entities. This rule should reduce the costs borne by small entities relative to the 2000 rule. However, the magnitude of the cost reductions depends on site and operation specific factors. The removal of the SIH provision will benefit small entities. As stated earlier, the SBA objected to the 2000 rules primarily because of the SIH provision. This proposed rule obviates that objection and benefits small entities.

Unfunded Mandates Reform Act

In the 2000 final rule (65 FR 69998, 70109), BLM found that those final regulations do not impose an unfunded

mandate on state, local, or tribal governments or the private sector of more than $100 million per year; nor do those final regulations have a significant or unique effect on State, local, or tribal governments or the private sector. The impacts of this proposed rule do not change that finding. Therefore, BLM is not required to prepare a statement containing the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1531 *et seq.*)

Executive Order 12630, Governmental Actions and Interference With Constitutionally Protected Property Rights (Takings)

In the 2000 final rule (65 FR 69998, 70109), BLM found that those final regulations do not represent a government action capable of interfering with constitutionally protected property rights. We stated that it doesn't affect property rights or interests in property, such as mining claims; it governs how an individual or corporation exercises those rights. However, one comment on the March 23, 2001, proposal to amend the 2000 rule stated that the joint and several liability provision in section 3809.116(a) would diminish the property value by severely restraining alienation and thus amount to a taking in violation of the Fifth Amendment of the Constitution. We have removed this provision in today's final rule and would maintain that change in this proposed rule. Because today's final rule and this proposed rule do not make any changes that increase the burdens on mining claim owners or other property owners, the Department of the Interior has determined that this proposed rule would not cause a taking of private property or require further discussion of takings implications under this Executive Order.

Executive Order 13132, Federalism

In the 2000 rule, BLM found (65 FR 69998, 70109) that it would have federalism implications in that in certain circumstances it may preempt State law. However, we concluded that it would not have a substantial direct effect on the States, on the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government. The 2000 rule describes the consultation BLM engaged in with the States and the results of that consultation. The changes made in this proposed rule will not increase burdens on States, and will facilitate cooperation between States and the United States in the area of surface management of mining operations on public lands.

The 2000 rule described the consultation between BLM and the States in aid of developing that rule. This proposed rule does not change the findings in that rule. This rule does not change the regulations in a manner contrary to the interests of the States as found from consultation with the States.

Further, we received comments from governors, agencies, or legislatures of or Members of Congress from the following Western States, as well as the Western Governors' Association: Alaska, Idaho, Nevada, Utah, and Wyoming. These comments were critical of the 2000 regulations and supported their suspension and revision. Only one of these provided detailed recommendations that largely tracked those of the NRC. To the extent that those specific recommendations pertain to BLM, or are within the legal responsibility of BLM, we believe this proposed rule follows those recommendations. We are also willing to engage in further consultation with states as may be appropriate.

BLM's full Federalism assessment, performed on the 2000 rule, remains on file in the BLM Administrative Record at the address specified in the **ADDRESSES** section, along with the written public comments on the assessment.

Executive Order 12988, Civil Justice Reform

Under Executive Order 12988, the Office of the Solicitor 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 Order.

Executive Order 13175, Consultation and Coordination With Indian Tribal Governments

We rely in part on Tribal consultation that occurred before publication of the 2000 rule. In accordance with Executive Order 13175, we have also found that this proposed rule does not include policies that have significant tribal implications. We have made clear that plans of operations under these regulations must comply with State, local, Tribal, and other Federal requirements. Removing the SIH standard will not significantly affect Native American cultural resources on the public lands because these resources can be protected under other provisions. In addition, in most instances mitigation measures will be possible to reduce such impacts. Today's final rule responds to comments received from Tribes on the March 23, 2001, proposal. We are willing to engage in further consultation with Tribes as may be appropriate.

E.O. 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

This rule is not a significant energy action. It will not have an adverse effect on energy supplies. The principal changes proposed in the rule address (1) the definition of an operator, what entities are responsible for reclamation and other duties, (2) the definition of unnecessary or undue degradation, and (3) performance standards that operators must follow. To the extent that the rule affects the mining of energy minerals (i.e., uranium and other fissionable metals), they will tend to increase production marginally.

Paperwork Reduction Act

The 2000 final rule (65 FR 69998, 70111) stated that it required collection of information from 10 or more persons. It went on to discuss our compliance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)), and the public comments that discussed the information collection requirements. We continue to rely on the discussion in the 2000 rule as to information collection requirement matters. The Office of Management and Budget has approved those information collection requirements in the final rule under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 *et seq.*, and has assigned clearance number 1004–0194. This proposed rule does not contain additional information collection requirements that the Office of Management and Budget must approve under the Paperwork Reduction Act of 1995.

Author

The principal authors of this rule are members of the Departmental 3809 Task Force, chaired by Robert M. Anderson, Deputy Assistant Director, Minerals, Realty, and Resource Protection, Bureau of Land Management.

List of Subjects in 43 CFR Part 3800

Administrative practice and procedure, Environmental protection, Intergovernmental relations, Land Management Bureau, Mines, Public lands-mineral resources, Reporting and record keeping requirements, Surety bonds, Wilderness areas.

P. Lynn Scarlett,

Assistant Secretary, Policy, Management, and Budget.

Accordingly, for the reasons stated in the Preamble, and under the authorities cited below, BLM proposes to amend

Title 43 of the Code of Federal Regulations, part 3800 as set forth below:

PART 3800—MINING CLAIMS UNDER THE GENERAL MINING LAWS

Subpart 3809—Surface Management

1. The authority citation for subpart 3809 continues to read as follows:

Authority: 16 U.S.C. 1280; 30 U.S.C. 22; 30 U.S.C. 612; 43 U.S.C. 1201; and 43 U.S.C. 1732, 1733, 1740, 1781, and 1782.

2. Amend § 3809.5 by removing from paragraph (1) of the definition of ''casual use'' the phrase ''hand and battery-powered drywashers'' and adding in its place the phrase ''less than 10 horsepower drywashers,'' and by revising the definitions of ''operator'' and ''unnecessary or undue degradation'' to read as follows:

§ 3809.5 How does BLM define certain terms used in this subpart?

* * * * *

Operator means a person conducting or proposing to conduct operations.

* * * * *

Unnecessary or undue degradation means conditions, activities, or practices that:

(1) Fail to comply with one or more of the following: the performance standards in § 3809.420, the terms and conditions of an approved plan of operations, operations described in a complete notice, and other Federal and state laws related to environmental protection and protection of cultural resources;

(2) Are not ''reasonably incident'' to prospecting, mining, or processing operations as defined in § 3715. 0–5 of this chapter; or

(3) Fail to attain a stated level of protection or reclamation required by specific laws in areas such as the California Desert Conservation Area, Wild and Scenic Rivers, BLM-administered portions of the National Wilderness System, and BLM-administered National Monuments and National Conservation Areas.

3. Amend § 3809.31 by removing the word ''submittals'' in the section title and adding the word ''submissions''.

4. Amend § 3809.116 by revising paragraph (a) to read as follows:

§ 3809.116 As a mining claimant or operator, what are my responsibilities under this subpart for my project area?

(a) Mining claimants and operators (if other than the mining claimant) are liable for obligations under this subpart that accrue while they hold their interests.

* * * * *

5. Amend § 3809.411 by revising paragraph (d)(3)(iii) to read:

§ 3809.411 What action will BLM take when it receives my plan of operations?

* * * * *

(d) * * *

(3) * * *

* * * * *

(iii) Proposes operations that would result in unnecessary or undue degradation of public lands.

6. Revise § 3809.420 to read as follows:

§ 3809.420 What performance standards apply to my notice or plan of operations?

The following performance standards apply to your notice or plan of operations:

(a) *General performance standards.* (1) *Technology and practices.* You must use equipment, devices, and practices that will meet the performance standards of this subpart.

(2) *Sequence of operations.* You must avoid unnecessary impacts and facilitate reclamation by following a reasonable and customary mineral exploration, development, mining and reclamation sequence.

(3) *Land-use plans.* Consistent with the mining laws, your operations and post-mining land use must comply with the applicable BLM land-use plans and activity plans, and with coastal zone management plans under 16 U.S.C. 1451, as appropriate.

(4) *Mitigation.* You must take mitigation measures specified by BLM to protect public lands.

(5) *Concurrent reclamation.* You must initiate and complete reclamation at the earliest economically and technically feasible time on those portions of the disturbed area that you will not disturb further.

(6) *Compliance with other laws.* You must conduct all operations in a manner that complies with all pertinent Federal and state laws.

(b) *Specific standards.*

(1) *Access routes.* Access routes shall be planned for only the minimum width needed for operations and shall follow natural contours, where practicable to minimize cut and fill. When the construction of access routes involves slopes that require cuts on the inside edge in excess of 3 feet, the operator may be required to consult with the authorized officer concerning the most appropriate location of the access route prior to commencing operations. An operator is entitled to access to his operations consistent with provisions of the mining laws. Where a notice or a plan of operations is required, it shall specify the location of access routes for operations and other conditions necessary to prevent unnecessary or undue degradation. The authorized officer may require the operator to use existing roads to minimize the number of access routes, and, if practicable, to construct access roads within a designated transportation or utility corridor. When commercial hauling is involved and the use of an existing road is required, the authorized officer may require the operator to make appropriate arrangements for use and maintenance.

(2) *Mining wastes.* All tailings, dumps, deleterious materials or substances, and other waste produced by the operations shall be disposed of so as to prevent unnecessary or undue degradation and in accordance with applicable Federal and state Laws.

(3) *Reclamation.* (i) At the earliest feasible time, the operator shall reclaim the area disturbed, except to the extent necessary to preserve evidence of mineralization, by taking reasonable measures to prevent or control on-site and off-site damage of the Federal lands.

(ii) Reclamation shall include, but shall not be limited to:

(A) Saving of topsoil for final application after reshaping of disturbed areas have been completed;

(B) Measures to control erosion, landslides, and water runoff;

(C) Measures to isolate, remove, or control toxic materials;

(D) Reshaping the area disturbed, application of the topsoil, and revegetation of disturbed areas, where reasonably practicable; and

(E) Rehabilitation of fisheries and wildlife habitat.

(iii) When reclamation of the disturbed area has been completed, except to the extent necessary to preserve evidence of mineralization, the authorized officer shall be notified so that an inspection of the area can be made.

(4) *Air quality.* All operators shall comply with applicable Federal and state air quality standards, including the Clean Air Act (42 U.S.C. 1857 *et seq.*).

(5) *Water quality.* All operators shall comply with applicable Federal and state water quality standards, including the Federal Water Pollution Control Act, as amended (30 U.S.C. 1151 *et seq.*).

(6) *Solid wastes.* All operators shall comply with applicable Federal and state standards for the disposal and treatment of solid wastes, including regulations issued pursuant to the Solid Waste Disposal Act as amended by the Resource Conservation and Recovery Act (42 U.S.C. 6901 *et seq.*). All garbage, refuse or waste shall either be removed from the affected lands or disposed of or

treated to minimize, so far as is practicable, its impact on the lands.

(7) *Fisheries, wildlife and plant habitat.* The operator shall take such action as may be needed to prevent adverse impacts to threatened or endangered species, and their habitat which may be affected by operations.

(8) *Cultural and paleontological resources.* (i) Operators shall not knowingly disturb, alter, injure, or destroy any scientifically important paleontological remains or any historical or archaeological site, structure, building or object on Federal lands.

(ii) Operators shall immediately bring to the attention of the authorized officer any cultural and/or paleontological resources that might be altered or destroyed on Federal lands by his/her operations, and shall leave such discovery intact until told to proceed by the authorized officer. The authorized officer shall evaluate the discoveries brought to his/her attention, take action to protect or remove the resource, and allow operations to proceed within 10 working days after notification to the authorized officer of such discovery.

(iii) The Federal Government shall have the responsibility and bear the cost of investigations and salvage of cultural and paleontology values discovered after a plan of operations has been approved, or where a plan is not involved.

(9) *Protection of survey monuments.* To the extent practicable, all operators shall protect all survey monuments, witness corners, reference monuments, bearing trees and line trees against unnecessary or undue destruction, obliteration or damage. If, in the course of operations, any monuments, corners, or accessories are destroyed, obliterated, or damaged by such operations, the operator shall immediately report the matter to the authorized officer. The authorized officer shall prescribe, in writing, the requirements for the restoration or reestablishment of monuments, corners, bearing and line trees.

(10) *Fire.* The operator shall comply with all applicable Federal and state fire laws and regulations, and shall take all reasonable measures to prevent and suppress fires in the area of operations.

(11) *Acid-forming, toxic, or other deleterious materials.* You must incorporate identification, handling, and placement of potentially acid-forming, toxic or other deleterious materials into your operations, facility design, reclamation, and environmental monitoring programs to minimize the formation and impacts of acidic, alkaline, metal-bearing, or other deleterious leachate, including the following:

(i) You must handle, place, or treat potentially acid-forming, toxic, or other deleterious materials in a manner that minimizes the likelihood of acid formation and toxic and other deleterious leachate generation (source control);

(ii) If you cannot prevent the formation of acid, toxic, or other deleterious drainage, you must minimize uncontrolled migration of leachate; and

(iii) You must capture and treat acid drainage, or other undesirable effluent, to the applicable standard if source controls and migration controls do not prove effective. You are responsible for any costs associated with water treatment or facility maintenance after project closure. Long-term, or post-mining, effluent capture and treatment are not acceptable substitutes for source and migration control, and you may rely on them only after all reasonable source and migration control methods have been employed.

(12) *Leaching operations and impoundments.* (i) You must design, construct, and operate all leach pads, tailings impoundments, ponds, and solution-holding facilities according to standard engineering practices to achieve and maintain stability and facilitate reclamation.

(ii) You must construct a low-permeability liner or containment system that will minimize the release of leaching solutions to the environment. You must monitor to detect potential releases of contaminants from heaps, process ponds, tailings impoundments, and other structures and remediate environmental impacts if leakage occurs.

(iii) You must design, construct, and operate cyanide or other leaching facilities and impoundments to contain precipitation from the local 100-year, 24-hour storm event in addition to the maximum process solution inventory. Your design must also include allowances for snowmelt events and drain down from heaps during power outages in the design.

(iv) You must construct a secondary containment system around vats, tanks, or recovery circuits adequate to prevent the release of toxic solutions to the environment in the event of primary containment failure.

(v) You must exclude access by the public, wildlife, or livestock to solution containment and transfer structures that contain lethal levels of cyanide or other solutions.

(vi) During closure and at final reclamation, you must detoxify leaching solutions and heaps and manage tailings or other process waste to minimize impacts to the environment from contact with toxic materials or leachate. Acceptable practices to detoxify solutions and materials include natural degradation, rinsing, chemical treatment, or equally successful alternative methods. Upon completion of reclamation, all materials and discharges must meet applicable standards.

(vii) In cases of temporary or seasonal closure, you must provide adequate maintenance, monitoring, security, and financial guarantee, and BLM may require you to detoxify process solutions.

(13) *Maintenance and public safety.* During all operations, the operator shall maintain his or her structures, equipment, and other facilities in a safe and orderly manner. Hazardous sites or conditions resulting from operations shall be marked by signs, fenced, or otherwise identified to alert the public in accordance with applicable Federal and state laws and regulations.

7. Revise § 3809.421 effective December 31, 2001, to read as follows:

§ 3809.421 Enforcement of performance standards.

Failure of the operator to prevent unnecessary or undue degradation or to complete reclamation to the standards described in this subpart may cause the operator to be subject to enforcement as described in §§ 3809.600 thorugh 3809.605 of this subpart.

8. Revise section 3809.598 to read as follows:

§ 3809.598 What if the amount forfeited will not cover the cost of reclamation?

If the amount forfeited is insufficient to pay for the full cost of reclamation, the operators and mining claimants are liable for the remaining costs as set forth in § 3809.116. BLM may complete or authorize completion of reclamation of the area covered by the financial guarantee and may recover from responsible persons all costs of reclamation in excess of the amount forfeited.

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