4310-05-P

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Parts 816 and 817

[Docket ID: OSM-2014-0003; S1D1S SS08011000 SX066A00067F 134S180110; S2D2S SS08011000 SX066A00 33F 13XS501520]

Petition to Initiate Rulemaking; Use of Explosives on Surface Coal Mining Operations

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

ACTION: Decision on petition for rulemaking.

SUMMARY: We, the Office of Surface Mining Reclamation and Enforcement (OSMRE or OSM), are announcing our final decision on a petition for rulemaking that was submitted by WildEarth Guardians. The petition requested that we revise our current regulations to prohibit visible nitrogen oxide clouds during blasting. The Director has decided to grant the petition in principle, and although we do not intend to propose the

specific rule changes requested in the petition, will instead initiate a rulemaking to address this issue as discussed more fully below.

DATES: [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: Copies of the petition and other relevant materials comprising the administrative record of this petition are available for public review and copying at the Office of Surface Mining Reclamation and Enforcement, Administrative Record, Room 252 SIB, 1951 Constitution Avenue, N.W., Washington, DC 20240.

FOR FURTHER INFORMATION CONTACT: Joshua Rockwell, Division of Regulatory Support, 1951 Constitution Ave., N.W., Washington, DC 20240; Telephone: 202-208-2633; E-mail: jrockwell@osmre.gov.

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I. How does the petition process operate?

On April 18, 2014, we received a petition from WildEarth Guardians (petitioner) requesting that OSMRE promulgate rules to prohibit the production of visible nitrogen oxides (NO_x) emissions (including nitric oxide and nitrogen dioxide) during blasting at surface coal mining operations in order to protect the health, welfare, and safety of the public and of mine workers and to prevent injury to persons. WildEarth Guardians submitted this petition pursuant to section 201(g) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C 1201(g), which provides that any person may petition the Director of OSMRE to initiate a proceeding for the issuance, amendment, or repeal of any regulation adopted under SMCRA. OSMRE adopted regulations at 30 CFR 700.12 to implement this statutory provision.

In accordance with our regulation at 30 CFR 700.12(c), we determined that WildEarth Guardians' petition set forth "facts, technical justification and law" establishing a "reasonable basis" for amending our regulations. Therefore, on July 25, 2014, we published a notice in the Federal Register (79 FR 43326) seeking comments on whether we should grant or deny the petition. The comment period closed on September 25, 2014. One hundred nineteen persons submitted comments during the public comment period.

After reviewing the petition and public comments, the Director has decided to grant WildEarth Guardians' petition. Pursuant to 5 U.S.C. § 553(e) and section 201(c)(2) of

SMCRA, 30 U.S.C. 1211(c)(2), we plan to initiate rulemaking and publish a notice of proposed rulemaking with an appropriate public comment period. Although we are still considering the content of the proposed rule, we expect that it will contain clarifications to our regulations to ensure that operators and surface coal mining regulatory authorities protect people and property from toxic gases and fumes generated by blasting at surface mine sites. However, OSMRE does not intend to propose the petitioner's suggested rule language because the petitioner's language focused solely on nitrogen oxide emissions, instead of all blast-generated fumes and toxic gases.

II. What is the substance of the petition?

WildEarth Guardians' petition states: "Too often, blasting at coal mines leads to the production of dangerous levels of nitrogen dioxide emissions, which are seen as orange to red clouds. These clouds of toxic gas represent significant threats to public health and welfare and must be curtailed to prevent injuries to persons as required by SMCRA." The petition requests that OSMRE amend our regulations at 30 CFR 816.67 (surface mining) and 817.67 (underground mining) to prohibit visible NO_x emissions during blasting and to require that the operator visually monitor all blasting activities and report all instances of visible emissions of NO_x to the regulatory authority. The petitioner asserts that exposure to low levels of NO_x gases may cause "irritation of eyes, nose, throat, and lungs." According to the petitioner, exposure to high levels of NO_x gases may cause "rapid burning, spasms, and swelling of the throat and upper respiratory tract issues, as well as death."

In support of its petition, petitioner cites SMCRA section 102(a), 30 U.S.C. 1202(a), which lists one of SMCRA's goals as "protect[ing] society and the environment from the adverse effects of surface coal mining operations," as well as SMCRA section 515(b)(15)(C)(i)-(ii), 30 U.S.C. 1265(b)(15)(C)(i)-(ii), which states that blasting activities should be limited in order to "prevent injury to persons. . . and damage to public and private property outside the permit area."

The petitioner asserts that revisions to our existing regulations are necessary to close a gap with regard to regulation of NO_x emissions. The petitioner requested that we "remedy this regulatory gap and promulgate explicit and enforceable standards to ensure that when explosives are used at coal mining operations, emissions of nitrogen oxides are controlled to prevent injury to persons and to protect the general health, welfare, and safety of the public and mine workers."

The petitioner suggested that we revise 30 CFR 816.67 and 817.67 by adding a new paragraph (f) to read:

> (1) Blasting shall be conducted so as to prevent visible emissions of nitrogen oxides, including nitrogen dioxide, and (2) The operator shall visually monitor all blasting activities (through the use of remote surveillance or other acceptable methods for detecting visible emissions) and within 24-hours report in writing any instances of visible emissions of nitrogen oxides to the regulatory authority.

III. What do our current regulations regarding the use of explosives require?

Our current regulations at 30 CFR 816.67 and 817.67 establish a framework for addressing the adverse effects associated with the use of explosives. Paragraph (a) of both sections mirrors the language in SMCRA section 515(b)(15)(C)(i)-(ii),30 U.S.C. 1265(b)(15)(C)(i)-(ii). It states that blasting shall be conducted to prevent injury to persons, damage to public or private property outside the permit area. The remaining paragraphs in 30 CFR 816.67 and 817.67 contain specific performance standards for airblast, flyrock, and ground vibration.

In addition, our regulation 30 CFR 843.11(a)(1)(i) requires that an inspector order the cessation of any surface coal mining and reclamation operations if an imminent danger to the health or safety of the public exists.

IV. What comments did we receive and how did we address them?

We received 119 comments on the petition for rulemaking. These comments can be divided into two major groups: those in favor of the rulemaking (over two-thirds) and those opposed (less than one-third). The comments in favor of the petition generally came from citizens and groups that seek to protect the public and environment. In contrast, those comments opposed generally came from citizens, state regulatory authorities, and organizations related to the explosives, manufacturing, and mining industries.

Those in support of the petition were primarily concerned that our current regulations do not provide for adequate protection from fumes generated by blasting, including, but not limited to, NO_x fumes. Additionally, some of these commenters alleged

that not all of the state regulatory authorities are willing to regulate toxic gases produced during blasting. These commenters contend that the lack of regulation by some state regulatory authorities is due to OSMRE's regulatory silence on the specific issue of NO_x emissions.

The comments received from those opposed to the rulemaking expressed concern that the petitioner's suggested rule language would create, "an unlawful, unnecessary, and unattainable emissions standard under OSMRE's federal regulatory program" that would effectively prevent operators from coal mining altogether. Several of the comments opposing the petition referred to *In re Permanent Surface Min. Regulation Litig. I, Round II*, 1980 U.S. Dist. LEXIS 17660 at *43-44 (D.D.C., May 16, 1980), which held that we could not regulate fugitive dust from blasting. These commenters contend that this precedent prevents OSMRE from regulating visible NO_x clouds produced by blasting. In addition, the commenters opposing the petition noted that SMCRA and the implementing regulations already contain adequate protection from the effects of blasting; as support for this position, they cite primarily to section 515 of SMCRA, 30 CFR 780.13, 816.61-816.68, 817.61-817.68, part 842, and part 850, as well as the equivalent provisions in the state regulatory programs.

V. What is the Director's Decision?

After reviewing the petition and supporting materials, and after careful consideration of all comments received, the Director has decided to grant the petition. However, we do not plan to propose adoption of the specific regulatory changes suggested by the petitioner. Instead, we intend to propose regulatory changes to ensure

that operators and regulatory authorities prevent injury to people and damage to property from any harm that could result from *all* toxic gases generated by blasting at coal mines, including NO_x and carbon monoxide (CO).

It is undisputed that when blasting is not properly conducted, it can cause damage to property and injury to people. Despite this fact, during our evaluation of the petition and the comments, we discovered that there is a difference in how the state regulatory authorities are addressing toxic fumes generated by blasting. Some, but not all, state regulatory authorities have taken permitting or enforcement actions in response to toxic fumes released during blasting. Others, however, are hesitant to act because they believe our regulations, as currently written, are ambiguous as to whether and how toxic gases should be controlled. Likewise, while a number of mine operators and blasters recognize the dangers posed by toxic gases from blasting and take precautions to manage the risks, many do not. We have concluded that the current silence in our regulations on toxic gases released during blasting is no longer acceptable and only perpetuates the disparities between the various practices of the state regulatory authorities. In light of these findings, OSMRE intends to propose a number of changes to our regulations. We plan to propose a definition of "blasting area" to help ensure that the areas affected by blasting are properly secured and that the public is adequately protected. We also intend to specify that toxic gases are one of the dangers posed by blasting. We anticipate clarifying that 30 CFR 816.67(a) and 817.67(a) require the proper management of toxic blasting gases in order to protect people and property from the adverse effects of coal mining. Lastly, we expect to propose amendments to the training

and testing requirements for certified blasters at 30 CFR 850.13 to ensure that blasters can identify and mitigate the impacts of blast fumes.

We believe that revisions to our regulations, such as those described above, will better (1) ensure a level playing field as described in section 101(g) of SMCRA, 30 U.S.C. § 1201(g), which specifies that national standards are essential in order to ensure "that competition in interstate commerce among sellers of coal produced in different States will not be used to undermine the ability of the several States to improve and maintain adequate standards on coal mining operations within their borders;" and, most importantly, (2) prevent harm to people and property from blasting associated with surface coal mining operations.

VI. Procedural Matters and Required Determinations.

This notice is not a proposed or final rule, policy, or guidance. Therefore, it is not subject to the Regulatory Flexibility Act, the Small Business Regulatory Enforcement Fairness Act, the Paperwork Reduction Act, the Unfunded Mandates Reform Act, or Executive Orders 12866, 13563, 12630, 13132, 12988, 13175, and 13211. We will conduct the analyses required by these laws and executive orders when we develop a proposed rule.

In developing this notice, we did not conduct or use a study, experiment, or survey requiring peer review under the Information Quality Act (Pub. L. 106-554, section 15).

This notice is not subject to the requirement to prepare an Environmental Assessment or Environmental Impact Statement under the National Environmental Policy

Act (NEPA), 42 U.S.C. 4332(2)(C), because no proposed action, as described in 40 CFR 1508.18(a) and (b), yet exists. This notice only announces the Director's decision to grant the petition and initiate rulemaking. We will prepare the appropriate NEPA compliance documents as part of the rulemaking process.

Dated: February 3, 2015

Joseph G. Pizarchik

Director, Office of Surface Mining Reclamation and Enforcement

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