

## History of OSMRE Air Quality Regulations

The Federal permitting regulations at 30 CFR 780.15 and 784.26 require that all permit applications contain an air pollution control plan addressing the fugitive dust control practices required under 30 CFR 816.95 and 817.95. Under 30 CFR 780.15 and 784.26, the plans for Western mines expected to produce more than one million tons of coal per year must include an air quality monitoring program to evaluate the effectiveness of the fugitive dust control practices in the air pollution control plan. Those regulations also specify that the regulatory authority has the discretionary authority to require that other mines submit air quality monitoring programs. The preamble to 30 CFR 780.15 and 784.26 makes it clear that these regulations are not intended to address any air quality aspects other fugitive dust. See 44 FR 15050-15052, March 13, 1979.

However, in In re Permanent Surface Mining Regulation Litigation,<sup>1</sup> the court remanded former 30 CFR 816.95 and 817.95 (1979), which contained performance standards for fugitive dust control, for revision because “the legislative history indicates that Congress only intended to regulate air pollution related to erosion”<sup>2</sup> and that “the Secretary’s authority to regulate [air] pollution is limited to activities related to erosion.”<sup>3</sup> In this ruling, the court was interpreting section 515(b)(4) of SMCRA, which requires that the regulatory authority promulgate performance standards requiring that all surface areas affected by surface coal mining and reclamation operations be stabilized and protected “to effectively control erosion and attendant air and water pollution.” The court did not address the parallel permitting requirements at 30 CFR 780.15 and 784.26.

In response to this remand, on January 10, 1983, OSMRE removed 30 CFR 816.95 and 817.95 (1979) in their entirety and replaced them with the statutory language without elaboration. The preamble to this rulemaking explains that, “[b]y ‘attendant air pollution,’ OSM means generally any airborne particulates or fugitive dust directly caused by erosion associated with a surface coal mining and reclamation operation” (48 FR 1162, January 10, 1983). However, the preamble specifies that this rule “will not regulate fugitive dust emissions from the operation of equipment and trucks,” noting that this issue would be addressed by revised performance standards for roads to be promulgated at a later date (48 FR 1161). As adopted on November 8, 1988, the final roads rules at 30 CFR 816.150(b)(1) and 817.150(b)(1) expressly include road dust and dust occurring on other exposed surfaces as a form of air pollution attendant to erosion and require that it be controlled or prevented.

The January 10, 1983 rulemaking removed all references to fugitive dust in 30 CFR 816.95 and 817.95 as well as the requirements for fugitive dust control practices and air quality monitoring. That rulemaking also changed the section heading of 30 CFR 816.95 and 817.95 from “Air resources protection” to “Stabilization of surface areas” and replaced the air quality performance standards formerly located in 30 CFR 816.95 with soil stabilization requirements that contain no mention of fugitive dust or air quality monitoring. See 48 FR 1160-1163 (Jan. 10, 1983).

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<sup>1</sup> PSMRL I, Round II, 1980 U.S. Dist. LEXIS 17660 at \*40-44, 19 Env’t Rep. Cas. (BNA) 1477.

<sup>2</sup> *Id.* at \*43-44.

<sup>3</sup> *Id.* at \*42.

The references to fugitive dust and the cross-references to 30 CFR 816.95 and 817.95 in 30 CFR 780.15 and 784.26, respectively, refer to provisions that OSMRE removed in the January 10, 1983 rulemaking. The preamble to that rulemaking contains the following discussion of the permitting regulations:

One commenter believed it was necessary to amend the permit application rules found at [30 CFR] 780.15 and 784.26 for consistency. These provisions require fugitive dust control plans in accordance with [30 CFR] 816.95 and 817.95 as a part of a permit application. Because the revised [30 CFR 816.95 and 817.95] will no longer specify fugitive dust control practices, OSM agrees that it will be necessary to amend the permit application rules related to erosion. OSM will consider this as a future independent rulemaking.<sup>4</sup>

To date, OSMRE has not initiated a rulemaking of this nature. However, the 1983 removal of the performance standards for fugitive dust control practices and air quality monitoring effectively rendered the corresponding Federal permitting regulations at 30 CFR 780.15 and 784.26 meaningless.

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<sup>4</sup> 48 FR 1161 (Jan. 10, 1983).