

Montana argues that, while it would be legally possible under its proposed statute for a drilling operation conducted to characterize overburden or an overburden sampling pit to remove more than 250 tons of coal, it is extremely improbable that such an operation would do so, and further that no prospecting operation in Montana has ever done so. However, SMCRA Section 512(d) is a clear and absolute requirement. Montana's proposed provision fails to prohibit the removal of more than 250 tons of coal by prospecting (exploration) activities under a notice of intent, and thus does not contain all applicable provisions of SMCRA Section 512, and hence is inconsistent with SMCRA.

In summary, proposed 82-4-226(1) and the first two sentences of proposed 82-4-226(8), MCA, are as stringent as the provisions of SMCRA in prohibiting prospecting activities under notices of intent on lands designated as unsuitable for mining, and more stringent in prohibiting such activities on any lands when the purpose is to determine the location, quality, or quantity of a coal deposit. However, these proposed Montana provisions are less stringent than SMCRA Section 512(d) in failing to prohibit prospecting operations under a notice of intent when more than 250 tons of coal will be removed.

Based on the above discussion, the Director is approving proposed 82-4-226(1) and the first two sentences of proposed 82-4-226(8), MCA, with the following proviso: Montana may not implement these provisions until Montana has promulgated, and OSM has approved, State regulations to implement these statutory revisions, to be no less effective than 30 CFR Part 772 in meeting SMCRA's requirements. Further, the Director is requiring Montana to amend its program to prohibit prospecting activities under notices of intent when more than 250 tons of coal are to be removed.

#### b. Specification of Which Prospecting Activities Are Required To Meet Performance Standards and Specification of Applicable Performance Standards

As noted above, Montana proposes at MCA 82-4-226(8) that "[i]f this prospecting substantially disturbs the natural land surface, it must be conducted in accordance with the performance standards of the department's rules regulating the conduct and reclamation of prospecting operations that remove coal." Montana is not at this time proposing any definition of "substantially disturbs" although in its letter of July 28, 1994

(Administrative Record No. MT-11-19), Montana states its intention to do so in the near future. OSM notes that the existing Montana program at ARM 26.4, Subchapter 10, contains prospecting performance standards; however, the Montana program does not specify which of these are performance standards for prospecting operations that remove coal and which are not.

The existing Montana statute contains no requirement that prospecting operations be conducted in accordance with performance standards, and the statute as proposed for revision would contain no such requirement for prospecting conducted under a prospecting permit. The existing Montana rules at ARM 26.4 Subchapter 10 require all prospecting operations to meet specified performance standards; these performance standards apply even to prospecting that does not substantially disturb the natural land surface. This is more stringent than SMCRA Section 512(a), which only requires that coal exploration operations which substantially disturb the natural land surface be conducted under regulatory programs that include regulations requiring that all lands disturbed be reclaimed in accordance with the performance standards of SMCRA Section 515. However, Montana is not proposing to revise its statute so that not all prospecting operations would be regulated in the same way. In particular, not all prospecting would require a permit; and under the proposal, prospecting under a notice of intent would be required to be conducted in accordance with performance standards only if it substantially disturbs the natural land surface.

In order to be consistent with the proposed statute, Montana's performance standards at ARM 26.4 Subchapter 10 could no longer be interpreted to apply to all prospecting operations. As a result, the Montana program would contain no requirement that prospecting operations conducted under prospecting permits be conducted in accordance with performance standards if they substantially disturb the land surface. In its letter of July 28, 1994 (Administrative Record No. MT-11-19), Montana argues that under MCA 82-4-226(1) & (2), all prospecting operations under prospecting permits are subject to reclamation requirements and to bonding requirements. OSM has reviewed these provisions; they specify reclamation plan requirements for prospecting permit applications, and posting of performance bond before the permit is issued. While the posting of bond provides an economic incentive to

complete the approved reclamation plan, these Montana provisions do not provide a requirement that the prospecting be conducted in accordance with performance standards. In one example, if a defective permit is issued that does not address one or more performance standards, there would be no requirement for the prospecting operation to meet those missing performance standards. Additionally, prospecting operations conducted illegally (with neither a permit nor a notice) would not be required to meet performance standards.

The Federal provision of SMCRA Section 512(a) requires that all exploration that substantially disturbs the natural land surface be conducted in accordance with performance standards of SMCRA Section 515; this applies to both exploration under notices of intent and exploration under exploration permits. As noted above, OSM has promulgated regulations implementing these statutory provisions at 30 CFR Part 772 and at 30 CFR 701.5 (definition of the term "substantially disturb"); however, as noted above Montana's proposed statutory provisions are being reviewed only in comparison to the Federal statutory requirements of SMCRA where they exist.

In summary, both the SMCRA provision at Section 512(a) and the proposed Montana provision require adherence to performance standards by prospecting (exploration) operations conducted under notices of intent that substantially disturb the natural land surface; however, by referring to "performance standards \* \* \* regulating \* \* \* prospecting operations that remove coal," the Montana proposal is unclear regarding which performance standards are applicable, whereas the Federal provisions clearly specify the performance standards of SMCRA Section 515. Secondly, the Federal provisions further require adherence to performance standards for exploration operations conducted under exploration permits that substantially disturb the natural land surface. But the Montana program, as proposed to be revised, would contain no such requirement for prospecting operations conducted under prospecting permits that substantially disturb the natural land surface. OSM believes it is possible for Montana to remedy these deficiencies in promulgating implementing regulations.

Based on the above discussion, the Director is approving the third sentence of proposed 82-4-226(8), MCA, with the following proviso: Montana may not implement this provision until Montana has promulgated, and OSM has