

**4310-05-P**

**DEPARTMENT OF THE INTERIOR**

**Office of Surface Mining Reclamation and Enforcement**

**30 CFR Parts 733, 736, and 842**

**[Docket ID: OSM-2019-0010; S1D1S SS08011000 SX064A000 212S180110; S2D2S SS08011000 SX064A00 21XS501520]**

**RIN 1029-AC77**

**Clarification of Provisions Related to the Issuance of Ten-Day Notices to State Regulatory Authorities and Enhancement of Corrective Action for State Regulatory Program Issues**

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

**ACTION:** Final rule.

**SUMMARY:** On May 14, 2020, the Office of Surface Mining Reclamation and Enforcement (OSMRE) published a proposal (85 FR 28904) to clarify the Federal regulations about how OSMRE notifies State regulatory authorities, via issuance of a ten-day notice (TDN), of possible violations of any requirement of the Surface Mining Control and Reclamation Act of 1977 (SMCRA). This final rule adopts, with minor adjustments, much of OSMRE's proposals to streamline the process for OSMRE's coordination with State regulatory authorities in order to minimize duplication of inspections, enforcement, and administration of SMCRA. This final rule comports with the specific language of SMCRA, remedies internal disparate application of existing regulations, and will operate to ensure more effective enforcement of SMCRA. Additionally, the final rule will enhance the procedures for early identification of, and implementation of corrective action to address, State regulatory program issues.

**DATES:** This rule is effective on [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**FOR FURTHER INFORMATION CONTACT:** Kathleen G. Vello, OSMRE, Division of Regulatory Support, 1849 C Street, NW, Mail Stop 4558, Washington, D.C. 20240, telephone number: (202) 208-1908. If you use a telecommunications device for the deaf (TDD), call the Federal Relay Service at: (800) 877-8339.

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**I. Background and Overview of the Final Rule**

**A. Background**

SMCRA requires the Secretary of the Interior, acting through OSMRE, to, among other things, “publish and promulgate such rules and regulations as may be necessary to carry out the provisions of [SMCRA]” and to “cooperate with...State regulatory authorities to minimize duplication of inspections, enforcement, and administration of [SMCRA].” 30 U.S.C. 1211(c)(2) and (12). Consistent with these statutory obligations, based on OSMRE’s 43 years of experience administering SMCRA, after consultation with OSMRE’s State regulatory authority partners, and after consideration of public comments received on the proposed rule, OSMRE is finalizing its proposal to enhance the early identification of State regulatory program issues and clarify the regulations found at 30 CFR 842.11 and 842.12 to state, among other things, that, before issuing a notification to a State regulatory authority when a possible violation exists, OSMRE will consider any information readily available. OSMRE’s final rule will reduce inefficiencies by ensuring that, before OSMRE issues a TDN to a State regulatory authority, OSMRE considers any readily available information about the alleged violation, including information that a State regulatory authority may provide. OSMRE’s consideration of this information is critical because a State regulatory authority has primary enforcement responsibility under its State regulatory program. Thus, the final rule eliminates duplication of inspection and enforcement under SMCRA by clarifying that OSMRE’s authorized representative will consider all readily available

information, from any source, including any information provided by the State regulatory authority, before issuing a notification of an alleged violation, in the form of a TDN, to that State regulatory authority. Also, the final rule clarifies the meaning of the statutory terms “appropriate action” and “good cause,” as used in 30 CFR 842.11, to better describe the State regulatory authority’s action that will qualify as “appropriate action” or scenarios in which a State regulatory authority’s inaction may have “good cause” after OSMRE notification that a possible violation exists. Examples of what constitutes a State regulatory authority’s “appropriate action” in response to a TDN or “good cause” for not taking an action in response to a TDN are in the existing regulations; however, in OSMRE’s experience, the existing examples and explanations of what qualify as an “appropriate action” or “good cause” for inaction are not exhaustive and do not fully reflect the array of in-the-field scenarios.

In addition, because OSMRE must evaluate whether a State regulatory authority has taken appropriate action or has good cause for inaction with respect to a possible violation, OSMRE has observed that not all issues that are raised in the TDN process warrant a Federal inspection,<sup>1</sup> but they may require further evaluation and action as they may raise issues with how a State is implementing its approved State regulatory program. To address these issues comprehensively and to ensure more complete and efficient enforcement of SMCRA, OSMRE has expanded 30 CFR Part 733 to add procedures for corrective action of State regulatory program issues, including implementation of action plans. As finalized, 30 CFR Part 733 includes definitions of the terms “action plan” and “State regulatory program issue” and adopts a mechanism for early identification and corrective action to address State regulatory program issues. We refer to these added procedures and definitions in this preamble as the “enhanced

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<sup>1</sup> A Federal inspection in the context of 30 U.S.C. 1271(a) is an inspection of a surface coal mining and reclamation operation conducted by an OSMRE authorized representative.

Part 733 process.”

The final rule is consistent with SMCRA and will add transparency to OSMRE’s oversight responsibilities; promote regulatory certainty for State regulatory authorities, regulated entities, and the public; enhance OSMRE’s relationship with the State regulatory authorities; reduce redundancy in inspection and enforcement; and streamline the process for notifying State regulatory authorities of possible violations.

**B. Key Provisions of the Final Rule**

OSMRE is adopting the following key provisions from the proposed rule in this final rule:

- *Enhancement of 30 CFR Part 733: Early Identification and Corrective Action.*

The regulations at existing 30 CFR Part 733 establish requirements for the maintenance of State regulatory programs, as well as the procedures for the rare remedy of substituting Federal enforcement for State enforcement of State regulatory programs and withdrawing approval of State regulatory programs. In coordination with State regulatory authorities, OSMRE has determined that mechanisms exist for addressing identified State regulatory program issues to avoid the need to substitute Federal enforcement for State enforcement of a State regulatory program. In this final rule at section 733.12, OSMRE is codifying this existing OSMRE practice of identifying State regulatory program issues and ensuring that prompt corrective action is taken.

- *Clarification of Distinction Between OSMRE Enforcement Actions under 30 U.S.C. 1271(a) and (b).*

The TDN and Federal inspection process in 30 U.S.C. 1271(a) applies to oversight enforcement of alleged violations at specific sites. In this preamble, we refer to these types of OSMRE oversight actions (TDNs and Federal inspections) that OSMRE may

take under 30 U.S.C. 1271(a) as “site-specific” enforcement actions. Congress differentiated these site-specific enforcement actions from the type of actions that OSMRE may take under the State regulatory program enforcement provisions of 30 U.S.C. 1271(b), which are aimed at ensuring that a State regulatory authority is properly enforcing its approved State program. This type of OSMRE oversight action under 30 U.S.C. 1271(b) is intended to address what we will refer to in this preamble as a “State regulatory program issue” and which could, in the most serious circumstances, result in revocation of all or part of a State program. OSMRE recognizes that its review of State regulatory authority permit issuance guidelines and practices generally are systemic in nature and that those guidelines and practices squarely fall within a State regulatory authority’s implementation, administration, enforcement, and maintenance of an approved program. In this final rule, OSMRE further clarifies the distinction between the situations to which 30 U.S.C. 1271(a) and (b) apply, while also recognizing that there may be situations in which OSMRE becomes aware of a State regulatory authority that is not adequately implementing, administering, maintaining, or enforcing a part or all of a State program (governed by 30 U.S.C. 1271(b) and the implementing regulations at 30 CFR Part 733) in the course of OSMRE’s oversight enforcement of alleged violations at specific mine sites (governed by 30 U.S.C. 1271(a) and the implementing regulations at 30 CFR Part 842). In acknowledgement of OSMRE’s obligation to resolve 30 U.S.C. 1271(a) site-specific violations and 30 U.S.C. 1271(b) State regulatory program issues using two separate mechanisms, this final rule clarifies in 30 CFR 842.11(b)(1)(ii)(B)(3) that a State regulatory authority may be deemed to have taken appropriate action in response to a TDN if corrective action to resolve an identified State regulatory program

issue has been initiated consistent with the final rule section 733.12.

- *Nothing in this Final Rule Prevents OSMRE From Issuing A TDN for a Site-Specific Violation.*

Despite the two separate enforcement mechanisms outlined in 30 U.S.C. 1271(a) and (b), these SMCRA enforcement provisions may still overlap in practice. As alluded to above, and discussed more thoroughly in response to public comments below, OSMRE maintains its legal position that SMCRA authorizes OSMRE to issue a TDN to a State regulatory authority, if a State regulatory program issue results in or may imminently result in a violation of an approved State program. Specifically, in these situations, under final section 733.12(d), OSMRE may still take a direct site-specific enforcement action.

- *Before issuing a TDN, OSMRE Will Consider All Readily Available Information from Any Source.*

OSMRE proposed to clarify that when formulating a decision about whether there is reason to believe that a possible violation exists for purposes of direct enforcement under 30 U.S.C. 1271(a)(1), it will consider all readily available information, including information it receives from the State regulatory authority, about an alleged violation. (Throughout this preamble, we will, at times, use an abbreviated way of referring to this decision-making process about whether there is reason to believe that a possible violation exists as “formulating reason to believe” or simply as “reason to believe” in quotation marks). OSMRE is adopting this clarification in this final rule, with a minor modification, which specifies that OSMRE will consider all readily available information it receives from “any source” in order to promote more efficient and effective enforcement of SMCRA.

### **C. Summary of Changes Since the Proposed Rule**

OSMRE has made 11 revisions to the proposed rule in preparing this final rule. These

revisions are based on a process of reasoned decision-making, including reliance on over 43 years of OSMRE experience overseeing the implementation of SMCRA, including review of past OSMRE data and practices, meaningful consideration of the 93 comments received from the public, and adherence to plain language principles to ensure regulatory clarity. Specific details of the final rule are discussed in finer detail in the section-by-section analysis below. For the ease of the public, a summary of the changes from the proposed rule to the rule being finalized today (organized by section, brief summary of the change, and succinct rationale for change) include:

<b>Section Number</b>	<b>Brief Summary of Change</b>	<b>Rationale</b>
30 CFR 733.5 (definition of “Action plan”)	Insert “State” before “regulatory authority”.	OSMRE maintaining consistency and clarity.
30 CFR 733.12(a)(1)	Substitute “any source” for “any person”.	Accommodate citizen comments to allow the subsection to be more inclusive consistent with the intent of the proposed rule.
30 CFR 733.12(b)	Change “State regulatory program issues” to singular “a State regulatory program issue”.	OSMRE maintaining consistency and clarity.
30 CFR 733.12(b)	Substitute “a violation of the approved State program” for “an on-the-ground violation”.	Accommodate citizen comments and OSMRE evaluation to ensure OSMRE preserves the ability to take enforcement action.
30 CFR 733.12(b)(1)-(3)	Change “action plans” to singular “action plan” in three instances.	OSMRE maintaining consistency and clarity.

30 CFR 733.12(c)	Insert “any associated action plan” after “State regulatory program issues”.	OSMRE evaluation and accommodates citizen comments requesting transparency and review of action plans that are found in Annual Evaluation reports.
30 CFR 733.12(c)	Acknowledge that Annual Evaluations reports will be accessible on OSMRE’s website and at the applicable OSMRE office.	Accommodate citizen comments and OSMRE evaluation to ensure transparency to the public.
30 CFR 733.12(d)	Substitute “a violation of the approved State program” for “an on-the-ground violation”.	OSMRE evaluation and accommodates citizen comments about State regulatory program issues that may also result in a site-specific violation.
30 CFR 842.11(b)(1)	Substitute “must” for “will”.	OSMRE maintaining consistency with the <b>Federal Register</b> and Plain Language Act.
30 CFR 842.11(b)(1)(i)	Add, “from any source, including any information a citizen complainant or the relevant State regulatory authority submits,”	OSMRE evaluation to specifically state the intention of the clarification.
30 CFR 842.11(b)(2)	Change to conform to 30 CFR 842.11(b)(1)(i).	Accommodate citizen comments requesting consistency between this subsection and 30 CFR 842.11(b)(1)(i).

## **II. Summary of Public Comments**

### **A. Overview of Comments**

OSMRE received 93 written comments on the proposed rule, consisting of hundreds of pages of text. The majority of the comments received were from individuals, who reside in many different States, including some States that do not have coal mining. The States in which these commenters reside include: Alaska, California, Colorado, Illinois, Indiana, Kentucky, Massachusetts, Missouri, Montana, New Mexico, North Carolina, North Dakota, Pennsylvania, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, and Wyoming. The majority of the individual comments originated from citizens residing in Montana. The 39 comments received from Montana residents were almost identical in nature. As discussed further below, these commenters generally objected to the proposed rule, requested an extended comment period, and suggested that public hearings should be held in the “4 coal regions” within the United States. Additionally, several other individual commenters referenced support for non-governmental organizations (NGOs) within their comments that generally disapproved of the proposed rule without giving specific rationale. For example, six commenters supported Coal River Mountain Watch and provided very similar comments opposed to the proposed rule. Additionally, many comments either supported other comments and incorporated them by reference or were submitted on behalf of multiple parties. Most of the comments representing multiple parties were submitted on behalf of NGOs. OSMRE received comments from the following NGOs: Alaska Center, Alaska Community Action on Toxics, Appalachian Citizens’ Law Center, Appalachian Mountain Advocates, Appalachian Voices, Black Warrior Riverkeeper, Inc., Castle Mountain Coalition, Center for Biological Diversity (CBD), Citizens Against Longwall Mining, Citizens Coal Council (CCC), Coal River Mountain Watch,

Conservation Council for Hawaii, Cook Inlet Keeper, Dakota Resource Council, Earthworks, Eastern Pennsylvania Coalition for Abandoned Mine Reclamation, Endangered Habitats League, Foundation for Pennsylvania Watersheds, Gila Resources Information Project, Great Old Broads for Wilderness, Heartwood, Kentuckians for the Commonwealth, Kentucky Resources Council, Inc., National Wildlife Federation, Native Plant Conservation Campaign, NH Audubon, Northern Plains Resource Council, NY4WHALES, Ohio Valley Environmental Coalition, Oil Change International, Powder River Basin Resource Council, Save Our Sky Blue Waters, Save the Scenic Santa Ritas, Sierra Club, Stand Up to Coal, The Lands Council, Trustees for Alaska, Turtle Island Restoration Network, West Virginia Highlands Conservancy, West Virginia Rivers Coalition, Western Nebraska Resources Council, Western Organization of Resource Councils, Western Watersheds Project, WildEarth Guardians, and Wilderness Workshop. With few exceptions, most of these commenters generally objected to the proposed rule, requested that the comment period be extended, and advocated for public hearings. A few of these commenters made suggestions on how to improve the proposed rule. As discussed in detail below, OSMRE has considered these suggestions and, in some circumstances, is adopting the suggestions in the final rule.

The following industry and trade groups submitted comments: Indiana Coal Council, Kentucky Coal Association, National Mining Association (NMA), and Virginia Coal and Energy Alliance. Generally, as discussed more fully below, these commenters supported the proposed rule and made suggestions for improvements. In some circumstances, OSMRE is incorporating suggestions made by these organizations in the final rule.

A few State and quasi-governmental organizations provided comments, including the Central Illinois Healthy Community Alliance and the Interstate Mining Compact Commission

(IMCC) representing the following 27 States: Alabama, Alaska, Arizona, Arkansas, Colorado, Illinois, Indiana, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, Tennessee, Texas, Utah, Virginia, West Virginia, and Wyoming. One of these commenters was generally opposed to the proposed rule, while the other, IMCC, supported the proposed rule.

**B. OSMRE Provided an Adequate Period to Comment on the Proposed Rule and Hearings Were Not Necessary**

OSMRE provided a 30-day comment period for the proposed rule. OSMRE received many comments requesting an extension of the comment period from an additional 30 days to an additional 180 days. One commenter, citing one of the purposes of SMCRA at 30 U.S.C. 1202(i), essentially suggested that the alleged absence of “a reasonable comment period” deprived the public of meaningful participation in this rulemaking. OSMRE is aware of this statutory provision, but, as explained below, finds that the 30-day comment period was adequate for meaningful participation in this rulemaking. In contrast to the other commenters, a commenter stated that this rule was “long overdue” and that “additional time is not necessary for the formulation and submittal of comments on a 14-page Federal Register notice.” Additionally, many commenters requested that public hearings—virtual or in person when “safe”—be held, and many of those commenters, particularly the 39 commenters from Montana, requested that at least four public hearings be held in different coal regions across the country. Other commenters suggested that SMCRA requires OSMRE to offer to hold public hearings for rulemakings affecting SMCRA’s permanent regulatory program. These commenters opine that holding public hearings has been the standard and expected practice.

Section 553(c) of the Administrative Procedure Act (APA) requires that agencies, such as

OSMRE, provide “interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without an opportunity for oral presentation.” 5 U.S.C. 553(c). Notably, the APA does not contain a requirement to hold public hearings. It is squarely within OSMRE’s discretion to decline to either extend the comment period or offer public hearings or meetings. Additionally, the Office of the Federal Register states that comment periods generally last 30 to 60 days. *See* Office of the Federal Register, “A Guide to the Rulemaking Process,” *available at* [https://www.federalregister.gov/uploads/2011/01/the\\_rulemaking\\_process.pdf](https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf) (last accessed August 12, 2020). As discussed above, OSMRE received a diverse set of substantive comments from a diverse set of commenters within the 30-day comment period. Based on this and several other reasons, regardless of what other agencies have done with regard to extension requests, the public had a meaningful opportunity to comment with sufficient time to prepare their comments.

First, OSMRE’s proposed revisions would not significantly alter OSMRE’s implementation of the SMCRA program. As stated in the proposed rule, the proposed changes were primarily intended to clarify a potential ambiguity in OSMRE’s existing regulations, eliminate duplicative efforts of OSMRE and the State regulatory authorities when responding to citizen complaints, and enhance procedures for corrective action of State regulatory program issues. *See, e.g.*, 85 FR at 28905, 28910. Previously, OSMRE has addressed these issues through guidance documents, such as the memorandum from Director Joseph G. Pizarchik to Regional Directors regarding Application of the Ten-Day Notice Process and Federal Enforcement to Permitting Issues Under Approved Regulatory Programs, which were issued without any opportunity for advance public comment. Memorandum from Director Joseph G. Pizarchik (Nov. 15, 2010). By addressing these issues through the APA rulemaking process, OSM has

provided the public an opportunity to comment.

Second, the proposed rule proposed to make only limited changes to the Federal regulations. The changes OSMRE proposed primarily occurred in three sections—30 CFR 733.12, 842.11, and 842.12. The other proposed changes were conforming changes. If this rule was significant, the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB) would have classified it as such; however, it has not because this final rule is not expected to have a \$100 million annual impact on the economy, raise novel legal issues, or create significant impacts. *See* “Procedural Determinations” below.

Third, as stated in section 6(a)(1) of Executive Order (E.O.) 12866, “before issuing a notice of proposed rulemaking, each agency should, where appropriate, seek the involvement of those who are intended to benefit from and those expected to be burdened by any regulation (including, specifically, State, local, and tribal officials).” The State regulatory authorities were the parties most likely to be affected if the changes in the proposed rule were finalized. As such, before publishing the proposed rule, OSMRE involved the State regulatory authorities by seeking their suggestions on what the proposed rule should accomplish. For example, as part of a program efficiency work group, OSMRE requested that State regulatory authorities provide information about the number of citizen complaints received; the number of TDNs received; whether duplication exists between citizen complaints the State regulatory authority receives directly from citizens and TDNs received from OSMRE; and the amount of time State regulatory authority personnel expend responding to TDNs and citizen complaints that the State regulatory authority receives directly from citizens. In addition, OSMRE directly engaged with its State regulatory authority partners by requesting input on the development of internal OSMRE guidance about TDNs, which, when finalized, were made publicly available on OSMRE’s

website at <https://www.osmre.gov/lrg/directives.shtm>.

*Comment:* Although most of the commenters seeking extensions of time or public hearings were general in nature, some of the commenters provided specific rationales for the requests for extensions of time or public hearings. In most circumstances, these specific requests for extensions of time or hearings were prompted by the impacts of the COVID-19 pandemic, including the potential for lack of access to the internet due to library closures and obligations associated with caring for family members infected with COVID-19. Some of these commenters cited other Federal agencies' decisions to extend comment periods because of COVID-19. Other commenters supported an extension of the comment period because the 30-day comment period included the Memorial Day holiday. Finally, as indicated above, a group of commenters suggested that 30 U.S.C. 1251(b), through its reference to section 1251(a), requires OSMRE to offer to hold public hearings for rulemakings affecting SMCRA's permanent regulatory program. These commenters also opine that holding public hearings has been the standard and expected practice.

*Response:* OSMRE recognizes that the comment period for this rule occurred during the COVID-19 pandemic, which may have changed the manner in which people and organizations would have traditionally reviewed and submitted comments on the proposed rule. Although it is true that the pandemic may have changed operating procedures, it is also true that OIRA recognized that "work on behalf of the American people must continue during this period, including work on regulations . . . ." See Memorandum from Paul J. Ray, OIRA Administrator

(March 23, 2020). OIRA, therefore, declined to issue a “wholesale extension of the comment periods of pending notices of proposed rulemakings . . . .” *Id.* Despite the hardships posed by the pandemic and the existence of a Federal holiday within the comment period, OSMRE received 93 comments from a representative group of interests. In total, these comments presented a thorough examination of the limited number of changes proposed, and the commenters did not appear to be hampered by the length of the comment period.

In addition, OSMRE disagrees with the comment that SMCRA, at 30 U.S.C. 1251(b), requires OSMRE to offer to hold public hearings for rulemakings such as this one. On its face, section 1251(b) applies to the permanent regulatory program that OSMRE promulgated long ago. While OSMRE can still hold public hearings with regard to proposed rules that are published after the permanent program regulations were promulgated, it is not required to do so. For many of the same reasons a 30-day comment period was adequate, including receipt of a diverse set of substantive comments from a diverse set of commenters within the 30-day comment period, OSMRE also finds that public hearings were not necessary to inform OSMRE of the various issues and viewpoints at play. Instead, as explained above, OSMRE obtained a full range of comments from a diverse group of commenters. In sum, OSMRE values public participation in its rulemaking efforts and finds that there was reasonable and adequate public participation in this particular rulemaking.

*Comment:* A few commenters stated that OSMRE should extend the comment period beyond 30 days because Federal employees’ teleworking arrangements as a result of the COVID-19 pandemic impinged on the commenting process.

*Response:* Despite the challenges posed by the COVID-19 pandemic, OSMRE has been diligent in responding to inquiries regarding the proposed rulemaking either via email or telephone. As previously stated, OIRA has made clear that “work on behalf of the American people must continue during this period, including work on regulations . . . .” See Memorandum from Paul J. Ray, OIRA Administrator (March 23, 2020). OSMRE did not shut down or stop its work on behalf of the American people as a result of the COVID-19 pandemic. As is its customary practice, OSMRE specified the methods for submitting comments in the proposed rule. 85 FR at 28904. This included submission of comments via *regulations.gov* or hard copy. The submission of comments on *regulations.gov* was not affected by the pandemic, and OSMRE personnel still regularly collected the comments that were submitted in hard copy.

*Comment:* A few commenters cited the Native American population as being disproportionately affected by the COVID-19 pandemic. According to commenters, many of these same population centers are located adjacent to coal mine sites, are affected by the coal mine operations, and need to voice their comments on the proposed rulemaking. Commenters cited the lack of developed information technology infrastructure and widespread COVID-19 illnesses within the Native American community as sufficient reasons to extend the comment period. OSMRE appreciates the commenters’ focus on, and is sensitive to, the COVID-19 pandemic’s effect on Native American populations.

*Response:* No Tribe currently has primacy to regulate surface coal mining operations within its jurisdiction. Because this rule relates to OSMRE’s enforcement in primacy States, these

revisions will have no direct impact on any Tribe. Once a Tribe obtains primacy, that Tribe would be in the same position as a State regulatory authority. 30 U.S.C. 1300(j). Therefore, OSMRE would consider information from a Tribal regulatory authority, just as OSMRE considers information from a State regulatory authority, in determining whether to issue a TDN to the Tribal regulatory authority. Despite this final rule not affecting any Tribe directly, OSMRE directly engaged with the three Indian Tribes that have either expressed an interest in achieving primacy or that have traditionally had surface coal mining operations—the Navajo Nation and the Hopi and Crow Tribes. See “Procedural Determinations,” E.O. 13175—Consultation and Coordination With Indian Tribal Governments, below. In addition, Tribes were able to comment on the proposed rule. To the extent the commenters were concerned about the rule’s effects on individual Native Americans, as opposed to Indian Tribes, OSMRE’s final rule will not hamper any citizen’s ability to submit a citizen complaint to OSMRE. Thus, any citizen, including a Tribal member, can continue to raise concerns to OSMRE about potential SMCRA violations.

*Comment:* One commenter cites the ongoing improvements to *regulations.gov*, one of the methods of submitting comments on the proposed rule to OSMRE, as a rationale for extending the comment period.

*Response:* OSMRE is aware that *regulations.gov* has been undergoing beta testing since July 2019, and it is fully cooperating with the U.S. General Services Administration (GSA) in its ongoing efforts to improve the experience of a user while participating in the Federal government rulemaking process. Contrary to the commenter’s assertions, the core functionality of *regulations.gov* has not been affected by the beta testing. In fact, the

*regulations.gov* site has merely been updated to be more accessible to the public and improve the public interface. GSA has characterized the beta testing and associated improvements as efforts to create transparency and expose the public to improvements contemplated for the website and to solicit feedback. *See* Beta Frequently Asked Questions available at <https://beta.regulations.gov/faq?type=beta> (last accessed August 17, 2020). Moreover, the standard *regulations.gov* site is still available, and users may choose the “classic” version if they prefer. *Id.* Therefore, the improvement process for *regulations.gov* was not a basis for extending the comment period.

For all of these reasons, including the limited nature of this rulemaking and the sufficient time available to provide meaningful comment, as evidenced by the diverse and thorough comments received, neither an extension of time nor public hearings were warranted.

### **C. This Final Rule is Properly Characterized as a Clarification**

In the proposed rule, OSMRE characterized the provisions related to 30 CFR Part 842 as clarifications because OSMRE primarily sought to remove ambiguity as to what information should be considered by the OSMRE authorized representative when formulating reason to believe that any person is in violation of any requirement of [SMCRA] or any permit condition required by [SMCRA].” 30 U.S.C. 1271(a). Many commenters objected to OSMRE’s use of the term clarification to describe the changes to Part 842; however, some industry commenters supported this characterization. OSMRE maintains that clarification is an appropriate descriptor. As discussed in more detail in specific comment responses below, several citizen group commenters alleged that OSMRE invented ambiguity in the existing regulations where none existed to justify the regulatory changes. OSMRE strongly disagrees with this assertion.

Due to the complex nature of SMCRA, and coal mining in general, ambiguity has arisen about how OSMRE should perform some of its oversight functions. Through this final rulemaking, OSMRE is seeking to end any ambiguity. Notably, over the years, OSMRE has had varying interpretations of how to administer 30 U.S.C. 1271(a) and the implementing regulations at 30 CFR Part 842. An example of disparate implementation of the existing regulations by OSMRE is evidenced by the fact that OSMRE has revised its primary Directive on the TDN process, INE-35, eight times in 33 years—an average of approximately once every four years – each time without taking prior public comment. Tellingly, the various interpretations documented within OSMRE policy have the common theme of attempting to define the right balance of expertise and professional discretion and due diligence. With this final rulemaking, OSMRE has achieved better balance. In proposing this rule, OSMRE closely examined the concepts of expertise and professional discretion and due diligence in its enforcement of SMCRA. For example, when considering an early draft of SMCRA, the House of Representatives recognized the importance of formulating “reasonable belief” based on available information.

When the Secretary receives information from any source that would give rise to a reasonable belief that the standards of the Act are being violated, the Secretary must respond by either ordering an inspection by Federal inspectors during the interim period or, after the interim, notice to the States in the follow-up inspection that the State’s response is inadequate. It is anticipated that “reasonable belief” could be established by a snapshot of an operation in violation or other simple and effective documentation of a violation.

H.R. REP. NO. 93-1072, at 11 (May 20, 1974).

If OSMRE simply passes along a citizen complaint without considering available information, it is not establishing the requisite reasonable belief that was Congress’ intent. Congress recognized the value of relying on the professional competence and

capacity of OSMRE staff to ensure effective and efficient processing of citizen complaints. In fact, the Senate Report recognized the importance of OSMRE experts in achieving the twin goals of efficiency and effectiveness for State enforcement programs:

Efficient enforcement is central to the success for the surface mining control program contemplated by S.7. For a number of predictable reasons—including insufficient funding and the tendency for State agencies to be protective of local industry—State enforcement has in the past often fallen short of the vigor necessary to assure adequate protection of the environment. The Committee believes, however, that the implementation of minimal Federal standards, the availability of Federal funds, and the assistance of the experts in the Office of Surface Mining Reclamation and Enforcement in the Department of Interior, will combine to greatly increase the effectiveness of State enforcement programs operating under the Act. While it is confident that the delegation of primary regulatory authority to the States will result in adequate State enforcement, the Committee is also of the belief that a limited Federal oversight role as well as increased opportunity for citizens to participate in the enforcement program are necessary to assure that the old patterns of minimal enforcement are not repeated.

S. REP. NO. 95-128, at 90 (May 10, 1977). These factors have weighed heavily in OSMRE's analysis and the formulation of this final rule. In order to achieve an effective balance of these concepts, OSMRE has always focused on the mandates of SMCRA, including expeditious enforcement. In the final rule, OSMRE's clarifications act to resolve the internal struggle to exercise expertise and professional judgment and due diligence to best implement the existing regulations at 30 CFR Part 842, despite the potential ambiguities contained within those regulations. Strategies employed in versions of the INE-35 Directive have included various interpretations of the "reason to believe" standard, what constitutes appropriate action, and how to address various types of violations. The regulations that OSMRE is finalizing today aim to remove the potential ambiguity related to the "reason to believe" standard that made those various

interpretations possible. OSMRE's final rule is crafted to create a more uniform, efficient, and transparent process for resolving citizen complaints. These changes do not diminish the public's access to enforcement or reinvent the TDN process.

In response to a commenter's suggestion that OSMRE should provide objective support for this rule, including data, OSMRE notes that it proposed this rulemaking to clarify issues raised by State regulatory authorities and identified by OSMRE's own experience. Additionally, a goal of the proposed rulemaking is to ensure OSMRE uniformly applies the statute and regulations and no disparate application occurs within the agency. Recognizing that there may have been inconsistent application of the existing regulations, analysis of past data is not germane to the rulemaking as the commenter suggests. For example, if various OSMRE authorized representatives applied the existing regulatory language inconsistently, relying on data related to the number of citizen complaints that led to the issuance of TDNs would not illustrate how those authorized representatives might have interpreted the existing regulations in formulating "reason to believe". Because ensuring that information from the State regulatory authority is considered when formulating "reason to believe" is a major component of this final rule, revisiting individual TDN analyses under previous interpretations of the existing regulations or internal OSMRE policies is not useful or informative.

OSMRE's clarifications harmonize the implementing regulations with congressional intent. These improvements were needed because one possible interpretation of 30 CFR 842.11(b)(2) was that OSMRE's authorized representative was required to find that reason to believe that a violation exists whenever any information submitted to OSMRE would, if true, constitute a violation. Under this possible

interpretation, OSMRE would merely serve as a conduit to the State regulatory authority, eviscerating the authority bestowed upon OSMRE by Congress to act with “professional competence and capacity to administer the provisions of [SMCRA].” 30 U.S.C. 1211(a). In practice, if this interpretation were implemented, OSMRE would almost always be required to immediately issue a TDN to the State regulatory authority. This interpretation removes any aspect of an OSMRE authorized representative’s discretion and prevents the authorized representative from exercising best professional judgment. OSMRE’s clarification reduces ambiguity in the regulations that could lead to this unwarranted interpretation. Instead, the final rule makes clear that OSMRE’s authorized representative, a qualified, trained, professional with SMCRA expertise, is in the best position to consider all readily available information available to him or her before making a determination about whether there is reason to believe a violation exists before deciding whether to issue a TDN. Instead of simply accepting what is submitted to OSMRE as true, under this final rule, OSMRE’s authorized representative can review all readily available information, regardless of the source of that information. This change also better aligns the Federal regulations with the carefully crafted language of 30 U.S.C. 1271(a), and, as explained below, reduces duplication of effort between OSMRE and a State regulatory authority as mandated by 30 U.S.C. 1211(c)(12).

The ambiguity in the regulations was leading to inconsistent interpretations of the “reason to believe” standard in the regulations. As discussed more thoroughly below, the comments to the proposed rule illustrate the inconsistent interpretations that existed within OSMRE and among the State regulatory authorities, citizens, and industry. Some have interpreted the regulatory standard in a way that would make OSMRE a mere conduit of citizen complaints to

the State regulatory authority while others interpreted the regulatory “reason to believe” standard to evoke more discretion, in the form of OSMRE’s authorized representative exercising professional judgment. Additionally, there have been varying views about the type of information that OSMRE’s authorized representative should consider and from whom that information originates, with some groups claiming that OSMRE should only consider citizen information while others found it essential that OSMRE also consider information provided by the State regulatory authority—the primary SMCRA enforcement authority under approved State programs. This inconsistency has manifested itself in the various internal directives that OSMRE has issued throughout the years, which have contained various interpretations of the regulations regarding, among other things, what information should be considered when determining if the OSMRE authorized representative has a “reason to believe.”

With the assistance and comments of OSMRE’s State regulatory authority partners, citizens, and industry, OSMRE identified these inconsistent interpretations as significant enough to warrant a resolution through a clarifying rulemaking.

*Comment:* A commenter expressed concern that the current TDN process was not working and gave an example of a TDN that seemingly took many years to resolve. The commenter further opined that the proposed rulemaking was not a step in the right direction and will result in “protracted delays” of enforcement to correct on-the-ground issues.

*Response:* OSMRE agrees with the commenter that the existing process needed to be clarified to avoid unnecessary delays, and that is one of the reasons why OSMRE is issuing this final rule.

OSMRE notes that this final rule will improve the TDN process by, among other things, increasing collaboration and coordination between OSMRE and the State regulatory authorities. OSMRE acknowledges that, historically, there have been challenges associated with the TDN process, and sometimes TDN issues were not resolved as quickly as OSMRE would have liked. However, while this final rule will not eliminate all future delays in TDN outcomes, just as the existing regulations did not, this final rule is intended to enhance the overall efficiency of the TDN process going forward in addressing violations. Because State regulatory program issues will be more appropriately addressed through the enhanced Part 733 process, rather than through the TDN process, OSMRE and the State regulatory authorities will be able to focus more quickly on site-specific violations that arise.

To be clear, neither the proposed rule nor the final rule substantively impacts the TDN process. Instead, in the final rule, OSMRE removes ambiguity by clarifying that the OSMRE authorized representative can review information received from any source, including the State regulatory authority, when deciding whether he or she has reason to believe a violation exists as contemplated by SMCRA. 30 U.S.C. 1271(a). When an OSMRE authorized representative has reason to believe a violation exists, the information about the alleged violation will continue to be transmitted to the State regulatory authority via a TDN. The distinction between the existing regulations and the final rule is that, under the final rule, the OSMRE authorized representative will consider all readily available information when formulating reason to believe. Most importantly, all readily available information includes information that the OSMRE authorized representative may receive from the State regulatory authority.

OSMRE also notes that some of the other revisions that OSMRE proposed and is finalizing today, namely the enhancement to 30 CFR Part 733 related to State regulatory

authority action plans to address State regulatory program issues, are a variation of an administrative process that has been contained in OSMRE's Directives REG-8 and REG-23 since as early as 1988. Given OSMRE's longstanding use of these action plans, the changes to these regulations also are not a material alteration of the administrative process that OSMRE has already used to interact with State regulatory authorities to enforce SMCRA. OSMRE is codifying these practices to avoid ambiguity about when these State regulatory authority corrective action plans are appropriate to use.

In summary, Merriam-Webster Dictionary defines clarify as, "to make understandable; to free from confusion." *See Clarification, Merriam Webster Online Dictionary, available at merriam-webster.com/dictionary/clarification* (last accessed August 14, 2020). Because of the varying interpretations of what information may be considered when formulating reason to believe, not only by SMCRA stakeholders, but by OSMRE itself, a clarification is certainly warranted. Moreover, codifying the enhancements to early identification of corrective action to address State regulatory program issues will remove ambiguity as to when this process should be applied. OSMRE finds it essential to be transparent and make the regulations "understandable" and "free from confusion" so that the TDN process pursuant to 30 U.S.C. 1271(a) and the enhanced 30 CFR Part 733 process pursuant to 30 U.S.C. 1271(b) work efficiently and effectively. This clarification is necessary to remove ambiguity.

#### **D. This Final Rule Neither Inhibits a Citizen's Ability to Report Violations to OSMRE Nor Limits OSMRE's Ability to Exercise Oversight Enforcement**

OSMRE received comments that evidence a misconception by many commenters that the changes OSMRE proposed, if finalized, would alter the obligations of 30 U.S.C. 1271. As discussed below, in response to specific comments, the statutory obligations under SMCRA are

not altered by this rulemaking, and OSMRE will continue to take action on citizen complaints and engage in oversight enforcement consistent with statutory mandates and the Federal regulations.

*Comment:* Many commenters, including citizen group commenters, suggested that the proposed rule clarification would eliminate the ability of the public to report violations directly to OSMRE. According to several commenters, the proposed clarification would alter the process citizens would use to report alleged violations, make it prohibitively difficult, impair enforcement, and would lengthen the amount of time for a State regulatory authority to respond to a TDN from 10 days to unlimited, and make a TDN response from the State regulatory authority discretionary instead of mandatory. A commenter also opined that the clarification of the TDN process that OSMRE proposed explicitly contradicts the letter and intent of SMCRA. Similarly, another commenter suggested that, under the proposal, OSMRE would be able to simply ignore complaints against mining companies.

*Response:* OSMRE disagrees with the premise of these comments. The rule, as proposed and finalized today, does not materially alter the manner in which OSMRE already enforces SMCRA. Specifically, OSMRE disagrees with the commenters who suggested that the proposed provisions and clarifications in 30 CFR Parts 733 and 842 would impair, weaken, or eliminate the ability of the public to report violations directly to OSMRE. To the contrary, the public will be able to continue to report possible violations directly to OSMRE, and OSMRE will continue to take such complaints seriously and issue a TDN to the State regulatory authority when appropriate. OSMRE's consideration of all readily available information before issuing a TDN will make the process more

efficient and effective by making correction of the violation the objective.

Indeed, the purpose of this final rule is to ensure that both alleged violations and potential State regulatory program issues are corrected promptly and effectively. After working closely with State regulatory authority partners for over 40 years, OSMRE has learned that, within the cooperative federalism framework established by SMCRA, effective enforcement requires close cooperation with primacy states. Furthermore, OSMRE notes that the United States Supreme Court has recognized that SMCRA has established a system of cooperative federalism involving an essential relationship between OSMRE in an oversight capacity and State regulatory authorities. In *Hodel v. Va. Surface Mining and Reclamation Ass'n*, 452 U.S. 264, 289 (1981) (citing *In re Permanent Surface Min. Regulation Litigation*, 617 F.2d 807, 808 (1980)), the Supreme Court explained that SMCRA “established a program of cooperative federalism that allows the States, within limits established by federal minimum standards, to enact and administer their own regulatory programs, structured to meet their own particular needs.” Given the unique nature of cooperative federalism embodied in SMCRA, coupled with the specific requirements within SMCRA to consider “any information available” when formulating reason to believe in the TDN context, it makes sense for OSMRE to consider available information from the State regulatory authority. 30 U.S.C. 1271(a)(1).

OSMRE’s clarification in the final rule to provide explicitly that OSMRE will consider all “readily available information,” including any information that a State regulatory authority provides, promotes the goal of ensuring that the entities with primary jurisdiction over respective State programs supply OSMRE with information essential to its assessment of alleged violations. After OSMRE considers readily available information, including any information that a State regulatory authority provides, OSMRE will continue to make an

independent assessment regarding whether it has reason to believe a possible violation exists. Further, the basic principle of SMCRA and the implementing regulations at 30 CFR 842.11 remains unchanged – OSMRE will continue to issue a TDN to a State regulatory authority when it concludes there is reason to believe a violation exists. As OSMRE explained in the proposed rule, and as embodied in this final rule, any information that OSMRE considers must be “readily” available to ensure that the process proceeds as quickly as possible and does not become open-ended.

The existing regulations at 30 CFR 842.12(a) already require that, if a citizen requests a Federal inspection, then the citizen is required to notify a State regulatory authority of a possible violation before or simultaneously with notification to OSMRE. In fact, OSMRE’s proposal, and ultimately this final rule, is fundamentally no different from the existing rule because it retains language that requires citizens to notify the State regulatory authority prior to, or simultaneously with, reporting violations to OSMRE. The language in existing 30 CFR 842.12(a) requires citizens, as part of a request for Federal inspection, to do several things, including furnishing OSMRE with:

a signed, written statement ... giving the authorized representative reason to believe that a violation, condition or practice referred to in § 842.11(b)(1)(i) exists and that the State regulatory authority, if any, has been notified....

Moreover, contrary to some commenters’ assertions that this proposed rule clarification would institute a new requirement for citizen complainants to contact the State regulatory authority before requesting a Federal inspection under section 842.12, the requirement for citizens to contact the State regulatory authority, before or simultaneously with a request to OSMRE for a Federal inspection, has been in 30 CFR 842.12(a) since August 16,

1982. 47 FR 35620. Because OSMRE continues to believe, as OSMRE has since 1982, that most alleged violations will be resolved by a State regulatory authority without intrusion by OSMRE (47 FR at 35628), OSMRE strongly encourages a citizen also to report a violation to the State regulatory authority first. However, neither the proposed rule nor the final rule mandates that a citizen report an alleged violation to the State regulatory authority before reporting it to OSMRE. The proposed rule clarification, which is adopted in this final rule, does not change or alter the requirement for citizen complainants to contact the State regulatory authority before or simultaneously with requesting a Federal inspection from OSMRE.

SMCRA confers exclusive jurisdiction upon a State regulatory authority after that State has achieved primacy. *See Bragg v. W. Va. Coal Ass'n*, 248 F.3d 275, 288 (4th Cir. 2001) (explaining that once a State achieves primacy, it has ““exclusive jurisdiction over the regulation of surface coal mining’ within its borders”) (citing 30 U.S.C. 1253(a)). However, a State’s exclusive jurisdiction is subject to the statutory exceptions outlined in SMCRA sections 521 and 523 and Title IV of SMCRA, 30 U.S.C. 1271, 1273, and 1231-1244. Given the prominent role that the States play in administering and enforcing SMCRA, OSMRE has found, in its experience, that including a State regulatory authority early in the process is advantageous to both the State regulatory authority and OSMRE because it reduces duplicative efforts to address potential violations. In OSMRE’s experience, when a citizen first contacts the State regulatory authority, violations are often promptly and effectively resolved without OSMRE’s direct involvement.

In OSMRE’s experience implementing SMCRA, it has witnessed instances when citizens filed complaints for the same or similar alleged violations on the same permit with both

the State regulatory authority and OSMRE. Resolution of the violation was not efficient or effective because the State regulatory authority was simultaneously trying to use the same resources to respond to the citizen complaints and the various TDNs issued by OSMRE. For example, in one instance, OSMRE issued six TDNs on the same permit in less than six months. Instead of focusing directly on correcting the alleged violations at the site, both OSMRE and the State regulatory authority were subsumed by the paperwork exercise of issuing TDNs, responding to TDNs, and evaluating the State's responses to the TDNs; correcting the alleged violations became secondary to following the TDN process. Specifically, under one interpretation of the "reason to believe" standard in the existing regulations, the OSMRE authorized representative considered information in OSMRE's possession but ultimately issued separate TDNs, automatically assuming the allegations in the complaints to be true and without considering all readily available information—most importantly, the information that the State regulatory authority, with primary regulatory authority over the mine site, had available. Because the State regulatory authority knows its specific permits best, this is a perfect example of why considering any information the State regulatory authority provides is essential. In the anecdote above, had the State regulatory authority provided all "readily available information" to OSMRE up front, both OSMRE and the State regulatory authority could have better understood the alleged violations, cooperated effectively, and spent valuable time and resources addressing the alleged violations and not simply generating duplicative paperwork. Tellingly, in this example, the OSMRE field office ultimately found no violations of the approved program. The citizens filed a request for informal review with an OSMRE regional director, and, ultimately, the regional director affirmed the OSMRE field office's original decision. This duplication of effort unnecessarily diminished OSMRE and State regulatory authority resources

that could have better been directed to resolving real issues, not merely preparing and exchanging paperwork. Thus, under this final rule, OSMRE must consider all readily available information, including any information the State regulatory may provide, when the authorized representative determines whether there is reason to believe that a violation exists.

As noted above, the removal of the language that essentially required OSMRE to automatically accept citizen complaints as true removes a potential ambiguity in the existing regulations and clarifies the information OSMRE can consider in forming a “reason to believe.” Finalizing the rule in this manner does not hinder the ability of citizens to report a violation directly to OSMRE. Because the regulations continue to require that the citizen notify the State regulatory authority before or simultaneously with requesting that OSMRE initiate a Federal inspection, a primacy State will have an opportunity to address an alleged violation before OSMRE, which is advantageous because the State regulatory authorities are more familiar with the operations in their States and can typically respond to alleged violations faster than OSMRE. This is consistent with primacy, as described by a U.S. Court of Appeals:

the Secretary is initially to decide whether the proposed state program is capable of carrying out the provisions of the Act but is not directly involved in local decision making after the program has been approved.

*In re Permanent Surface Min. Regulation Litigation*, 653 F.2d 514, 518 (D.C. Cir. 1981). The court further stated that:

[o]nce a state program has been approved, the state regulatory agency plays the major role, with its greater manpower and familiarity with local conditions. It exercises front-line supervision, and the Secretary will not intervene unless its discretion is abused.

*Id.* at 523. Although a State plays the major role in enforcing its State program, the court did note that: “Ultimate responsibility for guaranteeing effective state enforcement of uniform nationwide

minimum standards lies with the Secretary.” *Id.* States are expected to fully implement their programs, including all applicable enforcement provisions. OSMRE will exercise its oversight responsibility, in part, through this final rule and will continue to issue TDNs when it has reason to believe a possible violation exists; the relevant provisions of this final rule clarify the process that OSMRE will use to arrive at a “reason to believe.” Further, if a State does not effectively enforce its State program, Congress authorized OSMRE to address such inadequacies in the State’s implementation through SMCRA section 521(b). 30 U.S.C. 1271(b).

Some commenters asserted that the time frames for responding to TDNs have been extended or made indefinite by the proposed rule. While it is true that there is no time frame set forth in the final rule for OSMRE’s authorized representative to make a determination about whether they have reason to believe a violation exists, it is also true that there has never been a stringent time frame imposed. Further, as OSMRE explained in the proposed rule, OSMRE proposed, and is finalizing, inclusion of the word “readily” to the revised regulations at 30 CFR 842.11(b)(1)(i) to modify the phrase “available information” to ensure that the process proceeds as quickly as possible and does not become open-ended. 85 FR at 28907; *see also* OSMRE’s response to a request to specifically define “readily available.” Once OSMRE’s authorized representative has determined that they have reason to believe that a possible violation exists, the State regulatory authority will still have only ten days to respond to the TDN. *See* 30 CFR 842.11(b)(1)(ii)(B)(1). Thus, this rule ensures that reported alleged violations will be responded to in a reasonable amount of time.

Finally, this rule neither makes a State regulatory authority’s response to a TDN discretionary nor impinges on OSMRE’s ability to perform oversight of a State

regulatory program. OSMRE is not changing the nondiscretionary requirement that a State regulatory authority must respond to a TDN with good cause for inaction or by taking appropriate action within ten days. 30 CFR 842.11(b)(1)(ii)(B)(I). OSMRE is, however, revising its regulations to ensure a more uniform and efficient process when OSMRE receives a citizen complaint. The revised regulation clarifies what the OSMRE authorized representative should consider when they receive a citizen complaint, which eliminates the possibility that different OSMRE offices will apply different standards when determining whether to issue a TDN. This revised process also ensures that the OSMRE authorized representative who receives a citizen complaint is able to apply their independent, professional judgment to determine whether they have reason to believe a possible violation exists based on all readily available information before them. Once an OSMRE authorized representative determines that they have “reason to believe,” they must issue a TDN to the State regulatory authority. *See* 30 CFR 842.11(b)(1). Therefore, OSMRE’s oversight of alleged violations is not materially altered.

*Comment:* Very similar to the comment addressed above, a citizens’ group commenter expressed the opinion that the rule gives the coal industry a free pass to break environmental laws and provides no meaningful way for citizens to bring potential violations to the attention of OSMRE. As evidence for this claim, the commenter references a statement by OSMRE in regard to the spirit of cooperative federalism, at 85 FR at 28905 in the preamble of the proposed rule, “to alleviate unnecessary regulatory burden” consistent with E.O. 13777.

*Response:* This rulemaking does not, and could not, alter OSMRE’s statutory responsibilities to enforce SMCRA. Moreover, this rulemaking does not impair, weaken, or eliminate OSMRE’s ability to enforce SMCRA and the implementing regulations or the public’s ability to report alleged violations directly to OSMRE. *See also* OSMRE’s further explanations in this section.

To the extent that OSMRE referred to the spirit of cooperative federalism in the preamble, it was a recognition of the fundamental importance of cooperative federalism to SMCRA’s administrative and enforcement framework. *See, e.g., Bragg*, 248 F.3d at 288 (SMCRA “accomplishes [its] purposes through [] ‘cooperative federalism,’ in which responsibility for the regulation of surface coal mining in the United States is shared between the U.S. Secretary of the Interior and State regulatory authorities.”). It was in this spirit that we coordinated with our State regulatory partners as we conceptualized this rulemaking. This spirit also informed how we chose to clarify any potential ambiguities in the existing regulations and develop a more efficient process for addressing alleged violations of SMCRA within the limits of our statutory authority. Cooperative federalism does not mean that OSMRE will no longer perform its statutory duty to oversee a State regulatory authority’s implementation, administration, enforcement, and maintenance of its State program. Instead, it means that, given the prominent role that the States play in administering and enforcing SMCRA, including State regulatory authorities early in the process is advantageous to both the State regulatory authority and OSMRE because it reduces duplicative efforts to address potential violations. Also, as stated above, in OSMRE’s experience, when a citizen first

contacts the State regulatory authority, violations are often promptly and effectively resolved without OSMRE's direct involvement.

Likewise, the fact that this action is consistent with E.O. 13777 and helps to alleviate unnecessary regulatory burdens does not mean that OSMRE will fail to perform its statutory responsibilities set forth in SMCRA—including its oversight responsibilities. It simply means that by removing a potential ambiguity from the Federal regulations and creating a more uniform process for OSMRE authorized representatives to follow when determining whether they have “reason to believe,” OSMRE is reducing the likelihood of duplicative processes between OSMRE and the State regulatory authorities. It does not mean that permittees will be held to a lesser standard for abating SMCRA violations when they occur.

*Comment:* In the same vein, a citizen commenter states that United States citizens and taxpayers have a right to seek accountability for violations of mining laws that protect citizens and the environment. As a rationale for not finalizing the proposed rule, the commenter also cites to a State constitution and asserts that there is a provision that is aimed at protecting citizens' rights to a “clean and healthful environment.”

*Response:* Nothing in this final rule diminishes a citizen's ability to bring potential violations of SMCRA or State counterparts to SMCRA to OSMRE's attention. Further, when OSMRE has reason to believe that a violation exists, OSMRE will continue to send a TDN to the relevant State regulatory authority and take appropriate enforcement action. This final rule is fully authorized by SMCRA. In order for a State to be granted primacy

of an approved SMCRA State program, the State must follow the procedures of section 503 of SMCRA, 30 U.S.C. 1253; however, “[n]o State law or regulation...shall be superseded by any provision of [SMCRA] or any regulation issued pursuant thereto, except insofar as such State law or regulation is inconsistent with the provisions of [SMCRA],” and State laws and regulations may be more stringent than SMCRA and its implementing regulations. *See* 30 U.S.C. 1255. Therefore, nothing in SMCRA prevents any State from adopting laws and regulations related to surface coal mining operations that are more stringent than SMCRA or its implementing regulations, including this final rule. Moreover, this final rule is consistent with SMCRA’s purpose of protecting society and the environment from the adverse effect of surface coal mining operations, which is similar to the State constitutional provision cited by the commenter.

*Comment:* A citizen commenter expressed concern that OSMRE’s proposed rule, if finalized, would reduce the efficacy of OSMRE’s oversight of approved State programs. Similarly, another commenter opined that the proposed rule, if finalized, would reduce or hinder OSMRE’s ability to conduct oversight of State regulatory programs.

*Response:* OSMRE disagrees with these commenters’ characterization of the impacts of the regulatory clarification that OSMRE proposed and is finalizing today. As explained in response to other comments within this section, OSMRE drafted the regulatory revisions to improve the efficiency and effectiveness of OSMRE’s oversight by focusing State and OSMRE resources on addressing alleged violations and not on simply generating paperwork. Nothing in the final rule prevents OSMRE from exercising the full panoply of

oversight actions that Congress authorized in SMCRA. To the contrary, OSMRE's regulatory revisions seek to build on the oversight responsibilities at 30 U.S.C. 1254(b) and 1271(b), which authorize OSMRE to provide Federal enforcement when a State is not enforcing all or part of its approved program or to take over all or part of a State regulatory program if the State regulatory authority fails to enforce the approved State program. Specifically, OSMRE is adding the concept of action plans to 30 CFR 733.12, which enhances the tools available to OSMRE to ensure the approved State program continues to be effectively implemented, maintained, enforced, and administered. This addition will codify an existing OSMRE practice and result in more accurate and concise solutions to State regulatory program issues.

*Comment:* One citizen commenter expressed concerns that SMCRA does not intend the citizen complaint process to be so complicated that it would impair citizens' access to filing complaints or inhibit citizens from filing complaints. This citizen was particularly concerned that the clarification as proposed would make the filing of a citizen complaint more difficult for those who are not experts in SMCRA and SMCRA procedures. For example, the citizen alleges that, as proposed, the clarification would be similar to a legal filing instead of an informational filing as SMCRA intended. Similarly, another citizen commenter expressed concern that the proposed requirement to specify the basis for the person's assertion that the State regulatory authority has not taken action with respect to the possible violation is too burdensome upon the public and will reduce the number of Federal inspections.

*Response:* OSMRE disagrees with the commenters' views; the clarification adopted in this final rule has very little practical effect on how citizens may file complaints and places no additional burden on the citizen complaint process from a complainant's perspective. The majority of the proposal finalized today only affects OSMRE's process after receipt of a citizen complaint. For a citizen, the finalized regulation at 30 CFR 842.12(a) reconfirms the requirement in existing 30 CFR 842.12(a) that, when requesting a Federal inspection, the citizen must include a statement that the citizen has informed the State regulatory authority of the existence of the possible violation, condition, or practice. As proposed, the final rule will also require the citizen to provide the basis for the citizen's assertion that the State regulatory authority has not taken action with respect to the possible violation. OSMRE finds this necessary because any information the citizen can provide to OSMRE about the State regulatory authority's response would be very helpful in OSMRE's efforts to efficiently resolve the alleged violation. OSMRE is not suggesting that a citizen complainant enter a mine to verify whether or not the State regulatory authority has acted on the possible violation. To the contrary, OSMRE asks citizens not to do so and is merely asking the requester of the Federal inspection to provide any information he or she may have about the State regulatory authority's action or inaction. By no means is this requirement aimed at reducing requests for Federal inspections; it is intended to ensure that OSMRE has all readily available information.

Furthermore, OSMRE does not expect a citizen to provide the level of information that would be required for a legal filing. For instance, just as in the existing regulations, under the final regulation at 30 CFR 842.12(a), OSMRE specifies that an oral report is sufficient for submitting a citizen complaint that requests a Federal inspection as long as it is followed up by a written statement. Of course, the more detail that a citizen can provide to OSMRE, the more

information the authorized representative will have when he or she determines whether there is reason to believe there is a violation, which could expedite the correction of any violation that the citizen complaint brings to OSMRE's attention. However, OSMRE recognizes that obtaining significant information is frequently beyond most citizens' ability, and the final rule does not require any more information than the citizen has available, such as information explaining why the citizen believes there is a violation, that the State regulatory authority was notified, and, possibly, the State regulatory authority's response.

*Comment:* One commenter interpreted OSMRE's preamble statement at 85 FR at 28910 that "OSMRE should never be acting as a mere conduit for transmitting a citizen complaint to a State regulatory authority in the form of a TDN" to mean that OSMRE's proposed rule would eliminate the ability of a citizen to seek Federal relief.

*Response:* As explained in the response immediately above, citizens can still avail themselves of the citizen complaint process set forth in 30 U.S.C. 1267(h)(1). This rule does not materially alter the ability of a citizen to contact OSMRE about an alleged violation. OSMRE included the language quoted by the commenter in the preamble of the proposed rule because 30 U.S.C. 1271(a)(1) requires OSMRE's authorized representative to use their discretion to make an independent, professional judgment based on all readily available information, including information provided by a citizen, to determine if they have reason to believe a violation exists before issuing a TDN. In other words, OSMRE has the discretion to determine whether it has reason to believe a violation exists. *See, e.g., Castle Mountain Coal. v. OSMRE*, No. 3:15-CV-00043, 2016 WL 3688424, at \*6

(D. Alaska July 7, 2016) (30 U.S.C. 1271(a)(1) “does not assign any non-discretionary duties to the agency unless and until the Secretary has found ‘reason to believe’ that a violation exists.”). Once OSMRE determines it has reason to believe a violation exists, the final rule still recognizes that OSMRE has a mandatory duty to issue a TDN to a State regulatory authority.

This comment, in fact, highlights one of the reasons that OSMRE is revising its regulations—to clarify a potential ambiguity in its existing regulations. This commenter appears to interpret OSMRE’s existing ambiguous regulations as requiring OSMRE to automatically issue a TDN every time it receives a citizen complaint. To the extent that this is the case, the commenter is not alone. The ambiguity in the existing regulations has, in some instances, created the impression that the existing regulation at 30 CFR 842.12(a) means that OSMRE will be merely serving as a conduit for a citizen complaint, i.e., automatically issuing a TDN anytime it receives a citizen complaint. *See, e.g., W. Va. Highlands Conservancy*, 152 IBLA 158, 187 (Apr. 25, 2000) (When examining the existing regulations, the IBLA stated: “[W]e agree with appellants that *the regulations* do not envision ‘fact-finding’ to determine if a violation exists before deciding whether a ‘possible’ violation may exist. Rather, the preamble language to the 1982 rule makes clear that the possibility of a violation triggers *the regulatory requirements* to notify the State.” (emphasis added)). To the extent that our existing regulations were interpreted, by the Interior Board of Land Appeals and others, to mandate a TDN on receipt of every citizen complaint, that interpretation is in clear contrast with the language of 30 U.S.C. 1271(a)(1), which requires an OSMRE authorized representative to use his or her discretion to determine whether there is “reason to believe” before issuing a TDN.

Therefore, the revised regulations seek to eliminate any possible ambiguity—it is now clear, consistent with the plain language of 30 U.S.C. 1271(a)(1), that the OSMRE authorized representative has discretion to determine whether to issue a TDN based on whether they have “reason to believe” based on all readily available information. Any other interpretation would change OSMRE’s role from an independent, professional expert on mining to that of a clerical worker without the discretion to discern facts underlying a complaint and that is not contemplated by SMCRA.

*Comment:* A commenter, providing input on behalf of a citizens’ group, expressed concern that the proposed changes to OSMRE’s regulations would undermine OSMRE’s ability to perform its oversight role and prevent public participation in the process. The commenter stressed the importance of OSMRE’s ability to hold mine operators accountable in addition to what the States do to protect the public and the environment.

*Response:* OSMRE appreciates the commenter’s recognition of the important role that OSMRE plays in ensuring public safety and environmental protection. However, in a primacy State, OSMRE is secondary to the State regulatory authority. Section 503(a) of SMCRA specifies that in a primacy State, the State has “exclusive jurisdiction over the regulation of surface coal mining and reclamation operations, except as provided in sections 521 and 523 and title IV” of SMCRA. 30 U.S.C. 1253(a). Thus, in a primacy State, OSMRE’s role is limited to those functions specified in sections 521 and 523 and Title IV (30 U.S.C. 1271, 1273, and 1231-1244). Most relevant to this rulemaking, section 521 sets forth the circumstances in which OSMRE may exercise its oversight enforcement authority in a primacy State. This authority operates to better assure that the goals of SMCRA are met.

Although OSMRE's enforcement authority in a primacy State is limited to that authorized by 30 U.S.C. 1271, OSMRE disagrees that the rule, as proposed, would further limit OSMRE's ability to enforce SMCRA and to protect the public and the environment. OSMRE also disagrees that the proposed rule would, in any way, prevent public participation. Public participation is an important tenet of SMCRA. As the U.S. Court of Appeals for the Fourth Circuit stated:

SMCRA is designed in part to "assure that appropriate procedures are provided for the public participation in the development, revision, and enforcement of regulations, standards, reclamation plans, or programs established by the Secretary or any State under [the Act]." [30 U.S.C.] 1202(i). One of the "appropriate procedures" to assure public participation in enforcing SMCRA standards allows any adversely affected person to notify OSM[RE] of the existence of a SMCRA violation at any surface mining operation. *Id.* § 1267(h). The notification is commonly known as a "citizen complaint."

*W. Va. Highlands Conservancy, Inc. v. Norton*, 343 F.3d 239, 242 (4th Cir. 2003).

The final rule does not change the public's ability to submit a citizen complaint. A citizen may still submit a complaint to OSMRE just as he or she has been able to do for more than 40 years.

The final rule clarifies OSMRE's process after receipt of a citizen complaint. Specifically, it provides that OSMRE will verify the requirement that has been in our regulations since 1982 that, in a primacy State, a citizen, when requesting a Federal inspection, must notify the State regulatory authority of an alleged violation before or simultaneously with notification to OSMRE. 47 FR at 35620. Also, as described in response to comments about OSMRE's clarification that when formulating a decision about whether there is "reason to believe," "any information readily available" includes information received from the State regulatory authority, OSMRE is also removing the potential ambiguity in the existing regulations about the

information that OSMRE's authorized representative will review before determining whether he or she has reason to believe a violation exists. These clarifications to OSMRE's process after receiving a citizen complaint will allow both OSMRE and the State regulatory authority to dedicate resources toward addressing any violation alleged by a citizen instead of preparing superfluous paperwork for each other. The clarification also enhances cooperation and minimizes duplication of administration with the State regulatory authority as required by 30 U.S.C. 1211(c)(12).

OSMRE will continue to follow the requirements of 30 U.S.C. 1271(a) and the implementing regulations found at 30 CFR Parts 842 and 843 and issue a TDN when appropriate. Therefore, the final rule does not eliminate the existing TDN process or lessen OSMRE's overall oversight authority, including OSMRE's ability to enforce violations in primacy States, if that is necessary.

*Comment:* One citizen commenter emphasized that mining operations must be held accountable for daily mining practices and reclamation to ensure protection of the environment. The commenter did not support the proposed regulation in any way without explicitly stating a rationale or support for this position. Additionally, the commenter states that costs for reclamation should be secured initially and "no closure should happen before all work and costs are absorbed by the company." The commenter also asserts that a mining company "CEO should be paid what is left if there is anything."

*Response:* Although certain aspects of the comment are not entirely clear or do not relate to the proposed rule, OSMRE agrees that mining operations must be held accountable for their mining

practices to ensure that mining and reclamation are done in an environmentally protective manner. One of the stated purposes of SMCRA is to “assure that surface coal mining operations are so conducted as to protect the environment,” 30 U.S.C. 1202(d), and OSMRE always has a duty to further the purposes of SMCRA. Moreover, as stated elsewhere, this final rule will enhance OSMRE’s and the State regulatory authorities’ ability to identify and address alleged violations of State regulatory programs so that any violations can be corrected as soon as possible. Also, as we have stated in response to other comments, should a citizen have information related to an alleged violation at a specific mining operation, he or she is entitled to file a citizen complaint, and OSMRE will address any citizen complaints it receives in accordance with SMCRA and the relevant regulations to ensure that any violations are timely corrected. In addition, information in a citizen complaint may result in OSMRE identifying a State regulatory program issue, which OSMRE will address under section 733.12 of this final rule. A citizen may also request that OSMRE evaluate a State program as outlined in existing 30 CFR 733.12(a), that has been redesignated as 30 CFR 733.13(a) under this final rule. With regard to reclamation requirements and the cost of reclamation, OSMRE notes that those issues were not a part of the proposed rule, and this final rule does not alter any of the existing reclamation regulations. Importantly, SMCRA section 509, 30 U.S.C. 1259, and the existing regulations at 30 CFR Part 800, have bonding requirements to assure, among other things, completion of reclamation plans.

*Comment:* One commenter asserted that State agency personnel have been physically relocated farther from mine sites and have become less effective. The commenter also

notes that agency personnel have recently changed, which has resulted in a loss of institutional memory.

*Response:* OSMRE recognizes that the loss of staff and their institutional knowledge can be a problem for both OSMRE and State regulatory authorities. Similarly, budget savings, which may have been the reason that personnel from State regulatory authorities were relocated, is a part of government. Both reasons, however, support OSMRE revising its regulations, as OSMRE is doing here, to make them more efficient and effective, and to avoid duplication of efforts between a State regulatory authority and OSMRE. This final rule enhances OSMRE's ability to engage in appropriate oversight of State regulatory programs.

*Comment:* Several commenters offered examples of alleged OSMRE oversight enforcement failures.

*Response:* To the extent the commenters believe there is a failure of any State regulatory authority to implement, administer, enforce, or maintain an approved program, OSMRE directs the citizens to the provisions of existing 30 CFR 733.12(a) that are being redesignated as 30 CFR 733.13(a) pursuant to this final rule. Moreover, as to a concern expressed by one commenter that the proposed rule would impact an individual's ability to "protest projects going through their own or state/fed[eral] property," OSMRE's proposed rule clarification, as adopted in this final rule, will not change a citizen's ability to "protest" or comment on proposed mining projects or permitting actions of any individual mine located on private, State, or Federal property. OSMRE did not propose to revise, and is not revising, 30 CFR 773.6, which details

how citizens can participate in permit processing. Thus, the opportunities for the public to comment on proposed mining projects or permitting actions provided by SMCRA and further explained in 30 CFR 773.6 remain unchanged, including the time to file objections to individual mine permits on all property, regardless of ownership. In conclusion, OSMRE will continue to take its oversight responsibilities very seriously, in accordance with SMCRA and the implementing regulations.

**E. OSMRE’s Authorized Representative Will Continue to Formulate “Reason to Believe” As Mandated by SMCRA; This Includes Using Best Professional Judgment**

*Comment:* One citizens’ group representing many national citizen organizations and “thousands of individuals” across the country questioned OSMRE’s assertion that the information used to formulate “reason to believe” has created ambiguity within the TDN process, in particular related to on-the-ground violations. To support this contention, the citizens’ group states that “a search of all [Interior Board of Land Appeals (IBLA or the Board)] decisions fails to disclose even one instance where the Board found the long-established OSMRE Ten Day Notice procedure to be problematic.”

*Response:* As explained below, OSMRE disagrees with the commenter’s opinion that OSMRE is creating an ambiguity where it does not exist. First, this rule is being promulgated to improve OSMRE’s coordination with State regulatory authorities to minimize duplication of inspections, enforcement, and administration of SMCRA. Specifically, this rule provides a streamlined, more uniform, and efficient process for OSMRE to follow when it receives a citizen complaint. Because the IBLA typically does

not get involved until after OSMRE makes a decision on whether to issue a TDN, conduct a Federal inspection, or issue a notice of violation or cessation order, it is unsurprising that the IBLA has not identified OSMRE's internal process leading to the issuance of a TDN as a problem.

Second, some of the IBLA cases that the commenter cites illustrate how the existing regulations may result in a disparate application of OSMRE's various enforcement tools. For example, the commenter highlights a decision in which the IBLA found OSMRE's decision to defer violations for programmatic review under the 30 CFR Part 733 process was not in accordance with the existing regulations. *W. Va. Highlands Conservancy, et al.*, 152 IBLA at 193. While it is true that the commenter accurately summarized the holding of this decision, it is also true that the facts presented in that case demonstrate an OSMRE internal inconsistency when applying the existing Federal regulations. Specifically, the case focused on when it was appropriate for OSMRE to use the different enforcement tools set forth in 30 U.S.C. 1271(a) and (b) in response to complex citizen complaints. *See, e.g. id.* at 187-188 (The Board rejected OSMRE's attempt to justify its failure to issue TDNs on specific sites as required by 30 U.S.C. 1271(a) based upon its use of the programmatic review process in 30 U.S.C. 1271(b)).

The rule OSMRE is finalizing today helps to clarify to agency personnel and the public when each of the enforcement tools in 30 U.S.C. 1271(a) and (b) will be used and what information OSMRE will rely on when it makes a determination that it has reason to believe a violation exists. For instance, if a similar fact pattern to the one in *West Virginia Highlands Conservancy* arose under the regulations finalized today, OSMRE's authorized representative would make a determination whether they have reason to

believe a violation exists on a specific site based on all readily available information available to them. If they have “reason to believe,” they would then issue a TDN. However, the revisions made to 30 CFR 842.11(b)(1)(ii)(3) would also allow the State regulatory authority to respond that it has taken appropriate action because it, along with OSMRE, is immediately implementing steps to correct a programmatic issue using the action plan process set forth in revised 30 CFR 733.12. The revised regulations also clarify that OSMRE may still take enforcement action under 30 U.S.C. 1271(a) if the State regulatory program issue “results in or may imminently result in a violation of the approved State program.” Therefore, the revisions to the Federal regulations finalized today should help reduce the ambiguity that lead to the *West Virginia Highlands Conservancy* case.

Third, despite the cases cited by the commenters, there is no judicial or administrative decision defining “reason to believe” as used in 30 U.S.C. 1271(a). One case, *Castle Mountain Coalition v. OSMRE*, explicitly recognizes that OSMRE does not have a mandatory duty to act under 30 U.S.C. 1271(a) until it has determined there is reason to believe that a violation exists. 2016 WL 3688424, at \*6. In another case, a court reviewed the “reason to believe” standard in 30 U.S.C. 1271(b) and concluded that a determination as to “whether the Secretary of the Interior “has ‘reason to believe’ a violation has occurred is a matter committed to her discretion by law.” *Dacotah Chapter of Sierra Club v. Jewell*, No. 12-065, 2013 WL 12109410, at \*8 (D.N.D. Oct. 22, 2013). The rulemaking that OSMRE is finalizing today ensures that there is no debate that the OSMRE authorized representative is allowed to use their independent, professional discretion, based on all readily available information, to determine whether they have

“reason to believe.” This clarification is needed because many of the comments received in response to the proposed rulemaking show that the public misunderstands the discretion committed to OSMRE’s authorized representative by 30 U.S.C. 1271(a).

*Comment:* Many commenters, including industry groups that represent operations that mine coal through surface and underground methods, submitted questions and comments about the requisite information necessary to establish reason to believe a violation exists under the revisions to 30 CFR 842.11 and 842.12 adopted in this final rule. Within this general category of comments, one commenter requested that OSMRE include a provision in the final rule that the OSMRE authorized representative should not base his or her decision to issue a TDN on “bare allegations.” This same commenter also requested that OSMRE include language in the final rule that clarifies that the OSMRE authorized representative will use and consider information obtained from any source, including the permittee, to establish reason to believe a violation exists.

*Response:* In accordance with 30 U.S.C. 1271(a), OSMRE can formulate a decision about whether reason to believe that a violation exists “on the basis of *any information available...*, including receipt of information from *any person...*” Emphasis added. Consistent with this statutory provision, sections 842.11(b)(1)(i) and 842.12(a) of this final rule specify that OSMRE’s authorized representative will consider any readily available information when he or she is deciding whether there is reason to believe a violation exists, including information from a citizen complainant and any information that the relevant State regulatory authority submits to the authorized representative. Any

readily available information includes information from any person, including the permittee, and is not limited to information that OSMRE receives from a citizen or State regulatory authority. In addition, as OSMRE stated in the preamble to the proposed rule, other examples of sources of readily available information include permit files or public records. 85 FR at 28911. However, based on this commenter's suggestion for clarification and other commenters' similar suggestions, in the rule OSMRE is finalizing, OSMRE includes the phrase "from any source" within 30 CFR 842.11(b)(1)(i) and 842.11(b)(2). This addition will further remove any ambiguity relevant to information an OSMRE authorized representative considers when formulating reason to believe and reinforces internal consistency in the Federal regulations.

Moreover, as OSMRE explained in the proposed rule preamble, OSMRE considers "any information that is accessible without unreasonable delay" to be "readily available information." 85 FR at 28907. In the proposed rule, OSMRE chose the phrase "readily available" purposely "so that the process will proceed as quickly as possible and will not become open-ended." *Id.* OSMRE agrees with the commenter that the authorized representative should not base the decision to issue a TDN on "bare allegations." SMCRA establishes a firm foundation for an authorized representative to exercise professional judgment when formulating reason to believe a violation exists. Thus, under this final rule, OSMRE's authorized representative, while using best professional judgment, will make the "reason to believe" determination based upon readily available information, rather than bare allegations.

*Comment:* One commenter suggested that an authorized representative should not have

discretion to use his or her best professional judgment when evaluating alleged violations. The commenter also suggested that, in lieu of the authorized representative, the most appropriate person to determine that “reason to believe” a violation exists should be a qualified OSMRE career staff employee, who should have a degree in engineering, geology, environmental science, or a related field.

*Response:* This comment appears to focus on OSMRE’s authorized representative’s formulating “reason to believe.” OSMRE agrees with the commenter that an OSMRE authorized representative should be a qualified individual with the appropriate educational background and specialized experience required to be certified by the Director of OSMRE to serve as an authorized representative. However, OSMRE disagrees with the commenter’s suggestion that an authorized representative should not have discretion to use his or her best professional judgment when evaluating alleged violations. The use of best professional judgment is essential for an authorized representative.

When enacting SMCRA, Congress mandated that OSMRE “shall have a Director who shall be appointed by the President... .” 30 U.S.C. 1211(b). Congress required the Director to, among other things, “make those investigations and inspections necessary to [e]nsure compliance with this Act[.]” 30 U.S.C. 1211(c)(1). Integral to the Director carrying out these obligations is hiring appropriate, qualified employees within OSMRE. To this point, Congress mandated that “[e]mployees of the Office shall be recruited on the basis of their professional competence and capacity to administer the provisions of the Act.” 30 U.S.C. 1211(b). Ultimately, it is the OSMRE Director who must ensure that

employees of OSMRE—including a designated authorized representative—have the “professional competence and capacity” to undertake the “investigations and inspections necessary” to ensure compliance with SMCRA. *See* 30 U.S.C. 1211(b) and (c). Only an OSMRE employee who is certified as an authorized representative with inspection authority may issue a TDN pursuant to section 521(a)(1) of SMCRA. 30 U.S.C. 1271(a)(1). An employee who is certified as an authorized representative receives a badge and identification credentials that he or she carries when on duty. Outside the context of this rulemaking, only these same authorized representatives may undertake inspection and enforcement actions under section 517 of SMCRA. 30 U.S.C. 1267. OSMRE promulgated regulations specific to these tasks at 30 CFR 842 and 843. Additionally, as set forth in OSMRE’s Directive INE-18, “Authorized Representatives”, OSMRE has established a rigorous process to ensure that the best qualified candidates are selected for positions as authorized representatives and that these individuals have the “professional competence and capacity” to appropriately issue TDNs based on their best professional judgment, consistent with 30 U.S.C. 1211(b). *See* <https://www.osmre.gov/LRG/docs/directive958.pdf> (last accessed Aug. 23, 2020). Based on established OSMRE practice and procedure, the Director (or approved designee) may certify an OSMRE employee as an authorized representative only upon satisfactory completion of significant training and certification requirements. Furthermore, the Director (or approved designee) may suspend or withdraw the certification of any authorized representative. Each authorized representative with authority to issue TDNs is required to hold a four-year college degree with major study in the areas of hydrology, agronomy, geology, range conservation, forestry, ecology, civil engineering, mining

engineering, natural science, biological sciences, natural resources, environmental planning, or earth sciences as required by the U.S. Office of Personnel Management's Federal Position Classification and Qualifications. See <https://www.opm.gov/policy-data-oversight/classification-qualifications/general-schedule-qualification-standards/1800/surface-mining-reclamation-specialist-1801/> (last accessed Aug. 23, 2020). Authorized representatives with authority to issue TDNs are highly educated, highly trained individuals who must also undergo a progressive on-the-job training and mentoring plan before becoming an authorized representative. The OSMRE Director (or designee) approves the training and mentoring plan to ensure competency and capacity to administer SMCRA. This information is documented in the authorized representative's personnel file.

In sum, OSMRE authorized representatives are highly educated, trained, and qualified individuals who OSMRE hires precisely because of their ability to exercise professional judgment. Specific to this final rule, these individuals are uniquely qualified, based upon their professional judgment, to determine whether there is reason to believe a violation exists, issue TDNs when necessary, and ensure that violations of a State regulatory program are corrected in a timely manner.

*Comment:* Several citizen commenters oppose the clarification of the TDN process, alleging that the proposed rule would no longer treat citizen complaints as true. These commenters state that the proposed rule would result in citizen complaints not being formally investigated within 10 days of the complaint being filed. The commenters state that the proposed rule would result in OSMRE dismissing public concerns and

ignoring mining violations. Many commenters also suggested that the proposed rule was not simply a clarification of existing rules.

*Response:* OSMRE disagrees with these characterizations of the proposed rule and notes that, under this final rule, OSMRE will continue to take citizen complaints seriously, in recognition of the important role citizens play in the SMCRA enforcement process. When OSMRE issues a TDN to a State regulatory authority, the TDN may be based upon information that OSMRE initially received in a citizen complaint. However, to fully address this comment, OSMRE will explain the existing TDN process as authorized by section 521(a)(1) of SMCRA, 30 U.S.C. 1271(a), and implemented in OSMRE's existing regulations at 30 CFR 842.11.

Section 521(a)(1) provides that the "reason to believe" determination in the TDN context is based upon "any information available to [the Secretary], including receipt of information from any person." Likewise, under the existing regulations at section 842.11(b)(1)(i), as they pertain to the TDN process, OSMRE's authorized representative's determination of whether he or she has "reason to believe" is based upon "information available." Moreover, under existing section 842.11(b)(2), upon receipt of a citizen complaint, OSMRE's authorized representative transmits the citizen complaint to the State regulatory authority as a TDN *after* the authorized representative has formulated reason to believe that a violation, condition or practice exists." The OSMRE authorized representative's formulation of reason to believe includes analysis based on SMCRA and the Federal regulations, surface coal mining expertise, and any information readily available. OSMRE explained in the proposed rule that some might have interpreted

existing section 842.11(b)(2) to mean that all OSMRE has to do is determine whether the facts alleged in a citizen complaint would constitute a violation before issuing a TDN. However, the existing regulations are not designed to have OSMRE merely serve as a conduit to the State regulatory authority. OSMRE's authorized representative must analyze the information. In the proposed rule, OSMRE explained that when the authorized representative performs the analysis necessary to formulate reason to believe, he or she should consider all readily available information—including information ascertained from the State regulatory authority and any additional information that citizens provide. While it is accurate that OSMRE proposed to remove the phrase "if true" from existing section 842.11(b)(2), and has adopted that change in this final rule, the proposed rule was not intended to weaken the TDN rules with respect to an OSMRE authorized representative's analysis of whether he or she has "reason to believe" that a violation exists. In fact, in the proposed rule, OSMRE proposed that the authorized representative would consider information that is vital to understanding and examining an alleged violation. OSMRE's authorized representative must weigh the evidence in front of him or her, especially if some of that evidence is contradictory—this is part of the OSMRE authorized representative's exercise of professional judgment based upon readily available information in determining whether he or she has reason to believe a violation exists.

In this final rule, the removal of the phrase "if true" from 30 CFR 842.11(b)(2) coupled with the insertion of the phrase "on the basis of any information readily available" found at proposed 30 CFR 842.11(b)(1)(i) removes ambiguity in the existing TDN process, increases efficiency, and allows OSMRE's authorized representative to

more fully exercise his or her professional judgment. This approach is consistent with SMCRA and even OSMRE's existing regulations at section 842.11(b)(1)(i). In this regard, the relevant provisions that OSMRE is adopting in this final rule are a clarification of the existing regulations. However, this clarification is necessary to remove any confusion that was created by the "if true" language.

Moreover, Congress created OSMRE as the expert agency that administers SMCRA, 30 U.S.C. 1211(a) and (c), and requires that "[e]mployees of [OSMRE] shall be recruited on the basis of their professional competence and capacity to administer the provisions of this Act" (30 U.S.C. 1211(b)). Thus, it stands to reason that OSMRE, through its authorized representative, must apply expertise and professional judgment in determining whether "reason to believe" exists. Interpreting SMCRA in a manner that relegates the OSMRE authorized representative to a position of a mere conduit of a citizen complaint to the State regulatory authority is not supported by SMCRA or its implementing regulations. Therefore, the commenters' assumption that a citizen complaint must be treated "as true" ignores OSMRE's expertise in administering SMCRA and does not comport with SMCRA or even OSMRE's existing TDN regulations and practice. Nothing in SMCRA requires OSMRE to accept alleged facts as true in a vacuum; the totality of readily available information must be considered in order to prevent issuing an unwarranted TDN to a State regulatory authority, which would needlessly waste OSMRE's and the State regulatory authority's time and resources.

For these precise reasons, the proposed clarification, which OSMRE is adopting in this final rule, removes any unnecessary conflict between OSMRE and the State regulatory authority. OSMRE's experience has shown that when OSMRE works

cooperatively with State regulatory authorities, the TDN process works best, and problems are resolved more efficiently, furthering the purposes of SMCRA. *See generally*, 30 U.S.C. 1202(a) and (d). For example, under the existing TDN process, OSMRE does not always receive important information from the State regulatory authority that would inform the “reason to believe” inquiry, but it may receive such information from a citizen. Under this final rule, OSMRE must consider information the State regulatory authority provides about an alleged violation, eliminating duplication of resources and processes between Federal and State agencies. Cooperation between OSMRE and State regulatory authorities is mandated by SMCRA to “minimize duplication of inspections, enforcement, and administration of the Act.” 30 U.S.C. 1211(c)(12). This final rule does just that. Once OSMRE formulates reason to believe that a possible violation exists and sends a TDN to a State regulatory authority, the State will continue to have ten days to take appropriate action to cause the alleged violation to be corrected or to demonstrate good cause for not correcting the alleged violation. Thus, the regulations OSMRE is adopting in this final rule will continue to be in conformity with section 521(a)(1) of SMCRA.

*Comment:* Several commenters suggested that the proposed rule clarification would provide states with unlimited time to review and respond to citizen complaints. Further, these commenters alleged that the proposed rule provision would render action on citizen complaints discretionary. According to one commenter, the proposed rule would undermine SMCRA at section 521(a) by changing the specified response time and eliminating a mandated deadline.

*Response:* These characterizations neither accurately reflect the proposed rule nor reflect a proper understanding of SMCRA. The proposed rule was aimed at enhancing the coordination process between OSMRE and its State regulatory program partners to ensure that all information readily available is considered by the authorized representative before deciding whether there is reason to believe that a violation exists. The existing regulations do not specifically state that the authorized representative may consider information that a State regulatory authority provides in his or her determination of whether there is reason to believe a violation exists. Explicitly stating that information from the State regulatory authority may be considered will remove ambiguity and ensure that all stakeholders are aware of the information that OSMRE can consider when its authorized representative formulates reason to believe. Moreover, there may have been inconsistent levels of review of information across the bureau. Specifically stating that OSMRE will consider readily available information when formulating reason to believe will also ensure that it uniformly considers all simple and effective documentation of the alleged violation, condition, or practice. Historically, while OSMRE typically considered information in its possession, the potential ambiguity in OSMRE's existing regulations may have resulted in OSMRE accepting allegations in a complaint as true without the benefit of any information that the State regulatory authority may have chosen to provide. The practice of issuing TDNs without the benefit of information from the State regulatory authority increasingly resulted in the issuance of TDNs when the State regulatory authority was already investigating the issue or had previously determined that there was not a violation of the approved State regulatory program. As described in response to

other comments, this is inefficient and has resulted in duplicative processes for both OSMRE and the State regulatory authorities. OSMRE does not always receive important information from a citizen that would inform the “reason to believe” inquiry, but it may receive such information from the State regulatory authority, and the OSMRE authorized representative should be afforded this opportunity.

By way of example, a recent complaint received by an OSMRE field office involved blasting related to road construction. This complaint was ultimately found to be unrelated to a SMCRA permit. Simply generating a TDN, without considering all information readily available, resulted in a waste of OSMRE and State regulatory authority resources and taxpayer money and time; it also unnecessarily redirected resources and time away from true SMCRA-related issues. These inefficiencies could easily have been avoided by considering all readily available information, including any information the State regulatory authority chose to provide. Again, it is a basic requirement of SMCRA that OSMRE must “cooperate with...State regulatory authorities to minimize duplication of inspections, enforcement, and administration of [SMCRA].” 30 U.S.C. 1211(c)(12). Furthermore, as noted above, the Supreme Court in *Hodel*, 452 U.S. at 289, explained that: “[SMCRA] establishes a program of cooperative federalism that allows the States, within limits established by federal minimum standards, to enact and administer their own regulatory programs, structured to meet their own particular needs.”

The removal of the potential inconsistency between existing section 842.11(b)(1)(i) and existing section 842.11(b)(2) in this final rule properly enhances the cooperative federalism intended by Congress when it enacted SMCRA by allowing OSMRE to consider information that a State regulatory authority chooses to provide

when OSMRE is assessing whether it has reason to believe that a violation exists. Furthermore, removing the phrase “if true” eliminates any perception that OSMRE is a mere conduit to the State regulatory authority when in reality OSMRE should exercise best professional judgment when formulating reason to believe. The objective of the rulemaking is to minimize, to the extent possible, duplication of efforts associated with inspections, enforcement, and administration of SMCRA, while also ensuring that the public is involved in the enforcement process, which will allow potential violations of SMCRA and approved State programs to be identified and addressed as soon as possible. Of course, after the revisions to the existing regulations that OSMRE is adopting in this final rule take effect, OSMRE will continue to exercise the oversight of State regulatory programs that SMCRA requires.

OSMRE disagrees with the commenters’ suggestion that the rule change OSMRE is adopting will result in a State regulatory authority having unlimited review time. The final rule does not alter the SMCRA-mandated ten days that a State regulatory authority has to respond once OSMRE issues a TDN. 30 U.S.C. 1271(a)(1). However, the clarification does afford OSMRE an opportunity to consider all readily information, including any information the State regulatory chooses to provide, when formulating reason to believe before issuing any TDN to the State regulatory authority. Under existing section 842.11(b)(1)(i), the authorized representative already has the authority to consider “information available” before determining that reason to believe exists. In the proposed rule, OSMRE explained that information that the authorized representative considers must be “readily available, so that the process will proceed as quickly as possible and will not become open-ended.” Thus, considering “readily available

information” under this final rule may create, at most, only a modest increase in the amount of time it takes the authorized representative to decide whether he or she has “reason to believe.” Further, affording OSMRE the opportunity to easily ascertain if the State regulatory authority has been appropriately put on notice of a request for Federal inspection, including the possible violation—as is already required under the existing regulations at 30 CFR 842.12(a)—and whether or not the State regulatory authority has investigated or is actively investigating the subject of the complaint eliminates duplication and redundancy of State and Federal enforcement activities. For example, if OSMRE obtains readily available information that demonstrates that the State regulatory authority is actively investigating a citizen complaint, the OSMRE authorized representative may, using professional judgment, consider the State regulatory authority’s action before determining whether reason to believe exists.

In summary, this final rule clarifies the existing TDN regulations set forth at 30 CFR 842.11 and 842.12. Nothing in this final rule nullifies the statutory requirements that OSMRE must issue a TDN when it determines that there is reason to believe that a violation exists and that a State regulatory authority has ten days to respond. As is true with the existing regulations, the final rule requires that there are only two possible outcomes when an authorized representative reviews a citizen complaint: 1) the authorized representative issues a TDN because there is reason to believe a possible violation exists, or 2) the authorized representative declines to issue a TDN because he or she does not have reason to believe a possible violation exists. Under this final rule, the authorized representative does not have discretion to not issue a TDN to the State regulatory authority once he or she determines, based on professional judgment, that there is reason to believe that a violation exists; issuance of a

TDN then becomes mandatory. If the information in the citizen complaint, along with any other readily available information, is not sufficient to formulate reason to believe, the authorized representative will not issue a TDN. Finally, to ensure transparency, OSMRE will continue the practice of sending a letter to the citizen complainant explaining the decision to issue or not issue a TDN and the rationale for this decision. It is standard OSMRE practice, absent a citizen complainant's request for confidentiality, to also provide the State regulatory authority a copy of the letter to facilitate collaboration.

**F. It is Important to Clarify that “Any Information” Under 30 U.S.C. 1271(a) Includes Information from the State Regulatory Authority**

*Comment:* A coal industry group comprised of several companies in an Appalachian Basin-based coal State offered significant support for OSMRE's proposed clarification of the existing regulations related to the issuance of TDNs and the proposed enhancement of corrective action for State regulatory program issues. This group remarked that the proposed clarification to the existing regulations would allow regulatory authorities to use more information as part of their decision-making. Because, under the proposal, the regulations would clearly set forth that OSMRE will consider all readily available information prior to issuing a TDN, the commenter expressed that view that the proposed clarification would provide more transparency about the TDN process and allow for more cooperation between the State regulatory authority and OSMRE. The commenter also noted that the enhanced cooperation between OSMRE and the State regulatory authority would ensure that mine operations comply with SMCRA.

The coal industry group commenter noted that allowing State regulatory authorities to provide information that is directly relevant to citizen complaints before

OSMRE issues TDNs is positive and improves the process. The commenter pointed out that the clarification would be an improvement and would promote efficiency because the existing process may result in the issuance of a TDN despite the fact that the State regulatory authority has valuable information that is directly related to the alleged violation. The commenter noted that without relevant information from the State regulatory authority, OSMRE may not have an opportunity to consider the totality of the situation in advance, and such an omission decreases efficiency. The commenter also noted that frequently the State regulatory authority and OSMRE receive the same complaint resulting in both agencies undertaking duplicative investigations, which the commenter claimed is in contravention of section 201(c)(12) of SMCRA, 30 U.S.C. 1211(c)(12).

*Response:* OSMRE concurs with these comments as they highlight the value of coordination between the primary SMCRA regulatory authority, which is the State regulatory authority, and OSMRE as the oversight authority. Although, in the TDN context, OSMRE is exercising oversight of State regulatory authorities, there is still room for up front cooperation between OSMRE and the State regulatory authority to minimize duplication of inspections, enforcement, and administration of SMCRA, as section 201(c)(12) of SMCRA, 30 U.S.C. 1211(c)(12), contemplates. Most importantly, OSMRE values the commenter's recognition of the positive impacts of the clarification OSMRE is adopting in this final rule as it will improve compliance with SMCRA by promoting cooperative federalism and ensuring that OSMRE considers all readily available information. For four decades OSMRE has observed that protecting society and the

environment from the adverse effects of surface coal mining operations is accomplished more effectively and efficiently when State regulatory authorities—that have direct authority to administer SMCRA within their borders—and OSMRE work cooperatively, rather than working in isolation, to ensure timely resolution of issues. Not only does this coordination promote the cooperative federalism construct established within SMCRA, it more effectively achieves the purposes of SMCRA as outlined in section 102 of SMCRA, 30 U.S.C. 1202. Specifically, considering a State regulatory authority’s unique position to assess its approved State program, it makes sense to consult with the State regulatory authority to determine if steps have already been taken or are underway to address alleged violations. This commenter understands that, with OSMRE’s consideration of all readily available information, including information provided by the State regulatory authority, the existing process is improved. However, OSMRE notes that being able to consider “readily available information” is not the same as being able to consider “the totality of the situation in advance.” Considering only “readily available information” up front will allow the process to proceed relatively quickly. Even with this distinction, OSMRE is confident that the clarification that OSMRE is adopting in this final rule will achieve the intended result of greater cooperation and a more efficient and effective enforcement of SMCRA.

*Comment:* Several commenters objected to OSMRE’s proposal to add “readily available” to provisions at 30 CFR 842.11(b)(1)(i), 842.11(b)(2), and 842.12(a), raising concerns that information that is not currently in OSMRE’s possession and that has to be gathered does not constitute “readily available information.” Furthermore, one of these

commenters opined that any delay resulting from gathering information was not acceptable and directly conflicts with the “shall immediately” order a Federal inspection language found in 30 U.S.C. 1271(a)(1) and the existing regulations. Another commenter suggested that OSMRE’s explanation of the proposed provision inserts more uncertainty into the TDN process because it does not define what OSMRE deems “accessible without unreasonable delay.” A commenter further opined that the language “shall immediately” in 30 U.S.C. 1271(a) requires OSMRE to accept only information submitted in a citizen complaint, rather than readily available information, to establish reason to believe that a violation exists.

*Response:* With respect to the information OSMRE can consider when making a “reason to believe” determination, the statutory language is not as specific as the commenter suggests. As explained throughout this final rule notice, SMCRA grants the Secretary, acting through OSMRE, the authority to promulgate regulations that may be necessary to carry out the purposes and provisions of SMCRA. 30 U.S.C. 1211(c)(2). OSMRE is using SMCRA’s rulemaking authority, in part, to specify the information that OSMRE’s authorized representative can obtain and consider when making a “reason to believe” determination. The proposed rule language, which OSMRE is adopting in this final rule, is consistent with the statutory language at 30 U.S.C. 1271(a)(1) and allows an authorized representative to review information that is readily available. A more detailed discussion of the information that OSMRE considers to be “readily available” is contained elsewhere in the proposed rule preamble (85 FR at 28911) and in this final rule, but most certainly includes information that the OSMRE authorized representative can easily and

promptly access, such as permit documentation about the specific mine site, OSMRE's inspection history, and data retrieved from the State regulatory authority. Fundamentally, as to the commenter's other point about the "shall immediately" language in 30 U.S.C. 1271(a), OSMRE notes that the statute provides, absent an imminent harm scenario, that OSMRE "shall immediately order Federal inspection" in a primacy State only after it issues a TDN to the State regulatory authority, and OSMRE finds that a violation remains uncorrected at the conclusion of the TDN process. The aspect of the final rule that the commenters take issue with – OSMRE's consideration of readily available information as part of the "reason to believe" determination – occurs before OSMRE issues a TDN to a State regulatory authority and is therefore consistent with SMCRA. Importantly, at the conclusion of the TDN process, OSMRE will immediately undertake a Federal inspection if it finds that a violation continues to exist.

Moreover, accepting only information contained in a citizen complaint as the basis for a "reason to believe" determination is not in accordance with prudent regulatory implementation as explained in the proposed rule. 85 FR at 28908, 28910-11. If OSMRE were to accept only information contained in a citizen complaint to establish "reason to believe," OSMRE could be in a situation of issuing a TDN to a State regulatory authority when a complainant lacks information or knowledge concerning the possible violation that OSMRE may be able to readily ascertain under this final rule. OSMRE could also be in a situation of concluding that the citizen complaint does not establish "reason to believe" and refusing to issue a TDN, but for readily available information from the State regulatory authority that might otherwise establish "reason to believe." Moreover, if OSMRE considers only information in a citizen complaint, the complaint process could

be misused, unwittingly or otherwise, resulting in frivolous and unfounded allegations and unnecessary TDNs. Also, a fair reading of the legislative history supporting the passage of SMCRA indicates that considering only information in a citizen complaint when formulating reason to believe in association with the TDN process is not consistent with congressional intent. This issue was addressed in 1977 in House Report 95-218: “[i]t is anticipated that ‘reasonable belief’ could be established by a snapshot of an operation or *other simple and effective documentation* of a violation.” Emphasis added. As noted in the proposed rule, while this passage from the legislative history appears to be referring to information that a citizen may provide, it is reasonable to apply the same principle to 30 U.S.C. 1271(a)(1), as enacted. This final rule is consistent with congressional intent in the formulation of SMCRA, and, more importantly, consistent with SMCRA, as enacted, with respect to information that can be used to establish reason to believe that a violation exists.

*Comment:* A commenter indicated that OSMRE should consider all available information, not just readily available information, and should include information from any person and not just the State regulatory authority.

*Response:* OSMRE has considered this comment and agrees that OSMRE should consider information from any source; however, as explained below, OSMRE disagrees that it should consider “all available information” rather than readily available information. OSMRE has revised the final rule text at 30 CFR 842.11(b)(1)(i) to further clarify that the authorized representative will consider all readily available information “from any source, including any information a citizen complainant or the relevant State

regulatory authority submits[.]” This change reflects OSMRE’s intent with respect to readily available information obtained from *any* source. For consistency, OSMRE has also incorporated the phrase “from any source” into revised 30 CFR 842.11(b)(2). The plain language of this revised text makes clear that OSMRE will consider information from any source and not just the two possible sources of information that OSMRE proposed to list as examples of sources—the State regulatory authority and a citizen. As OSMRE stated in the preamble to the proposed rule, other examples of sources of readily available information may also include permit files or other public records. 85 FR at 28911.

The only limitation as to the source of information that OSMRE’s authorized representative can consider is that the information must be readily available. As stated in the proposed rule, inclusion of the word “readily available” to modify “any information” is important to ensure that the process of making a “reason to believe” determination proceeds as quickly as possible and does not become open-ended. 85 FR at 28907; *see also* OSMRE’s other responses in this section. If OSMRE were to delay its “reason to believe” determination until all available information was discovered, there could be substantial delays in the process, which would be contrary to the process Congress set forth in 30 U.S.C. 1271(a)(1). Substantial delays in determining “reason to believe” would also be contrary to a goal of this rulemaking—ensuring that alleged violations are addressed quickly, effectively, and efficiently. Thus, OSMRE is not making a change to its proposed rule to consider all information that could possibly be obtained; OSMRE will consider only that information which is readily available.

*Comment:* One commenter expressed doubt about OSMRE’s rationale for clarifying that a State regulatory authority should be a source of information necessary to formulate reason to believe. Specifically, the commenter expressed doubt that OSMRE and the State regulatory authorities are inundated with duplicative complaints.

*Response:* SMCRA provides that OSMRE will issue a TDN “[w]henever, *on the basis of any information available to him, including receipt of information from any person*, the Secretary has reason to believe that any person is in violation of any requirement of this Act . . . .” 30 U.S.C. 1271(a)(1) (emphasis added). A plain reading of this provision is that OSMRE can consider any information it has available regardless of the source. It is only natural that a State regulatory authority could be a source of information that OSMRE’s authorized representative uses to formulate reason to believe.

OSMRE has not claimed that it is “inundated” with citizen complaints that have also been issued to the State regulatory authority. However, OSMRE has experienced many instances where it has received a citizen complaint that was identical to a citizen complaint received by a State regulatory authority. When this has occurred, oftentimes OSMRE has learned that the State regulatory authority was either already investigating the alleged violation or had reached a decision about the alleged violation. Such information would be useful to OSMRE in formulating reason to believe. It has been a regulatory requirement since 1982 that, when requesting a Federal inspection, citizens are required to submit complaints to the State regulatory authority before or simultaneously with submitting the complaint to OSMRE. 47 FR at 35628. In OSMRE’s experience, and based upon data acquired over 43 years of implementing SMCRA, it has become

obvious, as OSMRE expected in 1982, that “if citizens contact the State initially, most problems will be resolved satisfactorily without the need for intrusion by the Federal government.” *Id.* Thus, it only makes sense for OSMRE to revise the SMCRA implementing regulations to allow OSMRE’s authorize representative to consider readily available information from the State regulatory authority that is relevant to the possible violation before OSMRE issues a TDN. That way, OSMRE and the State regulatory authority can avoid an unnecessary exchange of paperwork instead of resolving alleged violations. This simple change will make the process more effective and will conserve scarce government resources.

*Comment:* A commenter supported the proposed rule clarification at 30 CFR 842.11(b)(1)(i) and 842.11(b)(2) that would allow OSMRE to consider any information readily available when determining whether there is reason to believe that a violation exists. The commenter, which represents the coal industry, added that it is appropriate for OSMRE to provide these clarifications to the process so that OSMRE can determine whether information submitted in a citizen complaint constitutes documentation of alleged violations; the commenter also notes that OSMRE must have the authority to evaluate information objectively in order to determine the validity of allegations. Further, the commenter supports OSMRE’s ability to review readily available information, from any source, including information that may be available to the State regulatory authorities. The commenter finds that this would allow OSMRE to more accurately identify the specific nature of an alleged violation or program issue identified by a citizen. Moreover, the commenter stated that the clarification would provide OSMRE an

opportunity to apply a remedy that most appropriately corresponds to the alleged violation—whether it is a permit specific violation, on-the-ground violation, or is better characterized as a State regulatory program issue.

*Response:* OSMRE agrees with the commenter that it is necessary for the OSMRE authorized representative to consider any information readily available when formulating reason to believe. This clarification specifies that information provided by the State regulatory authority is included in the “any information” that an OSMRE authorized representative may consider, consistent with 30 U.S.C. 1271(a), while also highlighting the importance of timely formulation of reason to believe to ensure prompt resolution of a possible violation. The latter point is clarified by OSMRE adopting the proposal to include the word “readily” in 30 CFR 842.11(b)(1)(i) and 842.11(b)(2). Also, the clarification of 30 CFR 842.11(b)(2), which OSMRE is adopting in this final rule, codifies OSMRE’s flexibility to more appropriately analyze and identify the existence of violations, and, if necessary, to issue a TDN or use the enhanced Part 733 process for a State regulatory program issue. The ability to efficiently and effectively differentiate between violations addressed under revised section 842.11 and State regulatory program issues, as defined in this final rule and addressed under revised section 733.12, is an important point. As the regulations currently exist, there is ambiguity related to these two distinct resolutions of problems that may be alleged in citizen complaints—those outlined in section 521(a) of SMCRA (site-specific) and those outlined in section 521(b) of SMCRA (program issue). As the commenter notes, it is important to clearly differentiate between site-specific alleged violations governed by section 521(a) and 30 CFR Part 842,

under which the TDN process is invoked, and State regulatory program issues related to a State regulatory authority's alleged failure to implement, administer, maintain, or enforce its approved program governed by section 521(b) of SMCRA and 30 CFR Part 733. In this final rule, OSMRE is seeking to eliminate this ambiguity and afford OSMRE the discretion to resolve site-specific violations and program issues by the most appropriate method while working in coordination with the State regulatory authority.

#### **G. Citizens' Ability to Request Federal Inspections Is Not Diminished**

As discussed throughout OSMRE's responses to comments received, several commenters expressed concern over the impact of the proposed rule on Federal inspections, while other commenters offered suggestions for further altering the regulations related to requesting Federal inspections pursuant to 30 CFR 842.12.

*Comment:* A commenter challenged OSMRE's proposed language in section 842.12(a) requiring a citizen, when requesting a Federal inspection, to provide the basis for their assertion that a State regulatory authority failed to act upon an alleged violation.

*Response:* As proposed and finalized in this rule, this provision will not be overly burdensome for a citizen complainant. For example, if the complainant notifies the State regulatory authority simultaneously with filing a complaint with OSMRE, the basis for the person's assertion could be as simple as restating the allegations in the complaint made to the State regulatory authority, coupled with the action, if any, taken by the State regulatory authority in response. However, OSMRE notes that a citizen complainant

should provide as much information as possible, as that information will inform the OSMRE authorized representative's "reason to believe" determination. In all cases, OSMRE's authorized representative will consider readily available information, in addition to any information that the complainant may provide, as part of the authorized representative's "reason to believe" determination. As noted previously, requiring the citizen complainant to notify the State regulatory authority before or simultaneously with filing a request for a Federal inspection with OSMRE will give the State regulatory authority an opportunity to address the issue raised. This requirement is not unreasonable and should help prevent duplicative efforts.

*Comment:* A commenter requested that OSMRE amend section 842.12(a) to incorporate text contained in 30 U.S.C. 1267(h)(1) by inserting the phrase "at the surface mining site" after the word "exists" in the first sentence in proposed section 842.12(a), so that it would read: Any person may request a Federal inspection under § 842.11(b) by providing to an authorized representative a signed, written statement (or an oral report followed by a signed written statement) setting forth information that, along with any other readily available information, may give the authorized representative reason to believe that a violation, condition, or practice referred to in § 842.11(b)(1)(i) exists [at the surface mining site]. The commenter suggested that the same change be made to proposed section 842.11(b)(1)(i) by inserting the same phrase in the first sentence after the first appearance of the word "exists" and before the term "a violation" in the middle of the first sentence to limit citizen complaints, and any accompanying inspection, to on-the-ground impacts.

*Response:* OSMRE declines to make the suggested change because SMCRA does not include this language in 30 U.S.C. 1271(a). As explained elsewhere in this final rule, if a citizen complainant makes OSMRE aware of a State regulatory program issue that has not resulted in actual or imminent violation of the approved State program that often manifests as an on-the-ground impact at a specific site, OSMRE will handle the issue initially through the enhancements to the 30 CFR Part 733 process adopted in this final rule. However, as noted repeatedly, OSMRE will still initiate an appropriate Federal enforcement action, such as issuance of a TDN, if the State regulatory program issue results in, or may imminently result in, a violation of the approved State program.

*Comment:* A commenter requested that OSMRE clarify that a request for a Federal inspection under 30 CFR 842.12 may be denied if it is clear that the request is a repeat of substantially identical requests made by the same person on the same issue.

*Response:* This rulemaking does not provide that OSMRE will automatically deny a request for a Federal inspection simply because a substantially identical request has been made previously. Instead, this rulemaking requires OSMRE to make a fact-specific determination each time it receives a citizen complaint or other allegation of a violation.

First, the OSMRE authorized representative must determine whether the alleged violation would constitute imminent harm. If so, OSMRE will bypass the TDN process and will proceed directly to a Federal inspection if the person supplying the information (usually in the form of a citizen complaint) provides adequate proof that there is an

imminent danger to the public health and safety or a significant, imminent environmental harm and the State has failed to take appropriate action. *See* 30 U.S.C. 1271(a)(1) and (2). Nothing in this final rule is intended to modify these essential provisions of SMCRA and the existing regulations, which are aimed at immediately identifying and correcting imminent harm scenarios.

Second, the OSMRE authorized representative must issue a TDN to a State regulatory authority whenever he or she has reason to believe a violation exists. 30 U.S.C. 1271(a)(1) and 30 CFR 842.11(b)(1). The final rule makes clear that when determining whether he or she has “reason to believe,” OSMRE’s authorized representative must make a fact-specific inquiry based on readily available information. 30 CFR 842.11(b)(1)(i). If OSMRE has already received a similar citizen complaint or if a substantially identical complaint has been filed with the State regulatory authority, and the State regulatory authority has investigated the matter, OSMRE may have more information readily available to determine if it has reason to believe a violation exists. Such information could lead the OSMRE authorized representative to determine that he or she does not have “reason to believe” because earlier, similar complaints had not revealed a violation. Similarly, if OSMRE has already issued a TDN based on a previously received similar complaint, it is unlikely that OSMRE will have reason to believe that another violation exists; without the requisite “reason to believe,” the authorized representative will not issue another TDN. Instead, as has been OSMRE’s practice, OSMRE will inform the citizen in writing that subsequent citizen complaints are already being resolved through an existing TDN process, and a new TDN process will not be initiated. OSMRE will retain all citizen complaints in the record of the existing

TDN process. It is also possible, however, that the OSMRE authorized representative will review what seems to be a similar complaint and formulate reason to believe that a different or renewed violation exists. In that scenario, the OSMRE authorized representative will issue a new TDN. Although many variations are possible, the OSMRE authorized representative will consider the facts alleged in each citizen complaint and any other readily available information before deciding if he or she has reason to believe a violation exists.

*Comment:* A commenter suggested that OSMRE clarify the final rule text at 30 CFR 842.12 to require citizens to exhaust all remedies afforded to them under each respective State regulatory program before requesting a Federal inspection. The commenter further opined that OSMRE should better delineate between the process it will follow when it receives a request for a Federal inspection in a State where OSMRE operates a Federal program and a primacy State. For primacy States, the commenter states that OSMRE should defer to the State process under which the alleged violation occurs, including the exhaustion of all State remedies.

*Response:* Nothing in SMCRA authorizes OSMRE to require that a citizen exhaust their remedies under a State regulatory program before requesting a Federal inspection. *See* 30 U.S.C. 1267(h)(1) and 1271(a)(1). Thus, OSMRE did not propose and is not finalizing a rule that would require a citizen to exhaust its remedies under a State program before requesting a Federal inspection from OSMRE. OSMRE notes, however, that by clarifying that OSMRE's authorized representative can review information from a State regulatory

authority before determining whether he or she has “reason to believe,” OSMRE is recognizing that a State regulatory authority, as the primary SMCRA enforcement agency within its jurisdiction, is likely to have relevant information. Although the OSMRE authorized representative will make an independent determination of his or her “reason to believe,” this change better recognizes the State regulatory authority’s expertise.

In response to the commenter’s suggestion that OSMRE should delineate between situations where the State regulatory authority is the primacy enforcement authority—as in most situations—and when OSMRE is the primary regulatory authority, such as in the State of Tennessee, OSMRE reviewed its regulations and concluded that 30 CFR Part 842, as finalized today, clearly distinguishes between OSMRE’s oversight function in monitoring and evaluating the administration of approved State programs, including inspections and enforcement of Federal programs. *Compare* 30 CFR 842.11(b)(1)(ii)(A) (Federal program states) *with* 842.11(b)(1)(ii)(B) (primacy states). As specified in these regulations, the TDN process does not apply to Federal programs, where OSMRE is the regulatory authority.

*Comment:* One commenter supported the proposed addition to 30 CFR 842.12(a) requiring that a citizen provide an email address, if the citizen possesses one, when submitting the statement required to accompany a request for a Federal inspection.

*Response:* OSMRE agrees and is adopting this proposal in the final rule to allow for a more expeditious manner to contact citizen complainants, if necessary.

#### **H. OSMRE’s Enhancement to the Existing 30 CFR Part 733 Process is Aimed at**

## **Addressing State Regulatory Program Issues Early and Promptly Resolving the Issues**

*Comment:* Several commenters opine that the 30 CFR Part 733 process is an inadequate method of dealing with State regulatory program issues because it creates a delay in enforcement. These same commenters also claim that the existing 30 CFR Part 733 process does not require prompt action by the State regulatory authority because of the public notice requirement found in existing 30 CFR 733.12(d).

*Response:* OSMRE agrees with the commenters that use of the existing 30 CFR Part 733 process can take more time than is warranted to address issues requiring a timely response. However, the use of action plans as described in the finalized and redesignated section 733.12 does not have the same time requirements that are associated with existing section 733.12, which will be redesignated as 30 CFR 733.13 under this final rule. This will promote more prompt resolution of State regulatory program issues, as these issues will be identified prior to the issues escalating to the point where substitution of Federal enforcement or withdrawing part or all of a State program are necessary. Moreover, as OSMRE has repeatedly noted, even if OSMRE and the State regulatory authority are engaged in the corrective action process, including developing an action plan pursuant to the enhanced provisions of 30 CFR Part 733, finalized in this rulemaking, the State regulatory authority and OSMRE will still take an appropriate enforcement action if there is an actual or imminent violation of the approved State program. In OSMRE's experience, a violation of the approved State program often manifests itself as an on-the-ground impact, but may also manifest by other means, such as a failure to submit a required certification or monitoring report.

*Comment:* A few commenters asserted that the existing process outlined in 30 CFR Part 733 has only been used 10 times in the history of SMCRA.

*Response:* OSMRE agrees with the commenters that OSMRE has used the 30 CFR Part 733 process infrequently since the inception of SMCRA. Prior to the enhancements to 30 CFR Part 733, finalized in this rulemaking, the existing 30 CFR Part 733 process, which was limited to substituting Federal enforcement of State programs or withdrawing approval of part or all of a State program, was a lengthy process that involved significant OSMRE and State regulatory authority interaction over a long period. The seriousness of substitution or withdrawal of State regulatory programs (whether in whole or in part), when necessary, should not be minimized, and OSMRE continues to find that this process is prudent. However, this type of enforcement mechanism is not well-suited to smaller, non-imminent harm issues that may require a much shorter time frame to effectuate resolution. This final rule does not change the fact that imminent harm issues will continue to be addressed promptly through Federal enforcement, as appropriate, to protect public health and safety. OSMRE's proposal to use early identification of State regulatory program issues and implement corrective action through action plans and to use Federal enforcement for site-specific violations bridges the two enforcement mechanisms of the existing 30 CFR 733 process, as outlined in 30 U.S.C. 1271(b), and the TDN process, as outlined in 30 U.S.C. 1271(a). Development of a definition of "State regulatory program issue" and the use of compliance strategies and action plans to address State regulatory program issues *before* these issues develop into a more systemic,

and potentially more environmentally harmful program issue requiring substitution of Federal enforcement or withdrawal of a State program, is much more efficient, addresses issues earlier, and potentially reduces the need to invoke the rare remedies of existing 30 CFR Part 733. The intermediate process adopted in this final rule should minimize or prevent any unnecessary burdens as OSMRE and the State regulatory authority promptly resolve the State regulatory program issue.

*Comment:* A commenter supported the proposed addition at 30 CFR 733.5 of the definition of “action plan” and the explanation in the proposed rule that an “action plan” would be an efficient means of addressing State regulatory program issues. The commenter also favors the concept of identifying these issues early to avoid OSMRE exercising its oversight authority in the form of substitution or withdrawal of an approved State program.

*Response:* OSMRE agrees with these comments because, overall, OSMRE’s final rule clarifications and enhancements at 30 CFR Parts 733 and 842 will enable OSMRE to more quickly identify whether an alleged violation requires more immediate resolution through 30 CFR Part 842 and the potential issuance of a TDN or whether the problem should be more appropriately and effectively handled through the 30 CFR Part 733 process because it is a State regulatory program issue, as defined in this final rule, or a systemic problem within the approved program. This is a necessary distinction as set forth in SMCRA at 30 U.S.C. 1271(a) and (b). The latter statutory provision—30 U.S.C. 1271(b)—is aimed at correcting systemic, programmatic issues with State programs. Under this final rule, OSMRE will handle State regulatory program issues under the authority of section 1271(b). It is imperative for the

Federal regulations to comport with this distinction. One of the reasons OSMRE proposed to specifically define the term “State regulatory program issue” is that, after four decades of oversight enforcement, citizens have sometimes conflated the provisions of sections 1271(a) and 1271(b), resulting in frustration, duplication, and unnecessary complication of the TDN process, which was designed to quickly address on-the-ground impacts. Moreover, not properly distinguishing the actions available under 30 U.S.C. 1271 has resulted in inefficient use of Federal and State resources, as it frequently resulted in duplication of State and OSMRE efforts without any clear environmental benefit. OSMRE’s enhancements and clarifications in this final rule that distinguish features of the remedies for potential violations and State regulatory program issues will improve efficiency and effectiveness by appropriately narrowing the focus of 30 CFR Part 842 because, under this final rule, State regulatory program issues will be addressed using the “action plan” process in final 30 CFR 733.12. OSMRE’s “action plan” concept, which OSMRE is adopting in this final rule through the definition of “action plan” at 30 CFR 733.5 and the regulatory provisions at 30 CFR 773.12(b), will enhance OSMRE’s ability to resolve programmatic issues as quickly as possible, resulting in better implementation of SMCRA. Furthermore, the addition of this enhancement will result in OSMRE taking action in advance of the rare remedies of withdrawal or substitution of an approved State program.

*Comment:* Similar to other commenters, as discussed above, that recognize the value in the enhancement of the existing 30 CFR Part 733 process, a commenter also agrees with the proposed rule clarification that would allow programmatic concerns that OSMRE may identify involving a State regulatory authority to be handled outside the TDN process because programmatic concerns are more appropriately addressed under section

521(b) of SMCRA, 30 U.S.C. 1271(b), and the Federal regulations implementing that section. The commenter also supports OSMRE's proposed, minor revision to the circumstances that constitute "good cause" at existing section 842.11(b)(1)(ii)(B)(4) and OSMRE's proposed clarification of what constitutes "reason to believe" at existing section 842.11(b)(2). The commenter supported the proposed, minor revisions to the "good cause" provisions at existing 30 CFR 842.11(b)(1)(ii)(B)(4)(ii) because, after OSMRE issues a TDN to a State regulatory authority, "good cause" for the State regulatory authority not taking appropriate action to cause an alleged violation to be corrected includes a State regulatory authority's initiation of an investigation into the alleged violation, and a reasonable amount of time is required to complete that investigation before OSMRE initiates a Federal inspection.

*Response:* OSMRE agrees with the commenter's statements about how the proposed rule would clarify the terms "reason to believe" and "good cause," which should greatly reduce the number of situations when these terms, as implemented under the existing regulations, may have thwarted successful collaboration between OSMRE and the relevant State regulatory authority. OSMRE appreciates the commenter's support for the provision that OSMRE is adopting in this final rule that allows initiation of an investigation into an alleged violation to establish good cause. Moreover, successful collaboration between OSMRE and the State regulatory authority is a lynchpin to successful enforcement of SMCRA and State regulatory programs and is necessary under SMCRA's cooperative federalism framework. The provisions OSMRE is adopting in this final rule will enhance OSMRE's ability to consult with the State regulatory authority to

efficiently and effectively solve problems. Implementation of OSMRE's proposed changes, which OSMRE is adopting in this final rule, will result in OSMRE being able to act more quickly to differentiate between violations that need immediate attention, and systemic program problems that are appropriately addressed through the existing 30 CFR Part 733 process. In OSMRE's experience, OSMRE has observed that the existing TDN process frequently results in a State regulatory authority and OSMRE engaging in unnecessary duplication of effort and processes rather than working cooperatively to quickly resolve problems. This is contrary to the intent of section 201(c)(12) of SMCRA, which requires OSMRE to "cooperate with...State regulatory authorities to minimize duplication of inspections, enforcement, and administration of [SMCRA]." 30 USC 1211(c)(12). Furthermore, the implementation of the relevant clarifications in OSMRE's proposed rule, which OSMRE is adopting in this final rule, is consistent with E.O. 13777 of February 24, 2017, 82 FR 12285 (March 1, 2017). E.O. 13777 is aimed at alleviating unnecessary regulatory burdens placed on the American people, and this final rule achieves that goal by removing unwarranted duplication of processes by OSMRE and State regulatory authorities.

*Comment:* Unlike other commenters supporting the enhancement of 30 CFR Part 733, regarding OSMRE's proposal to codify the process of early identification and corrective action to address State regulatory program issues as authorized by 30 U.S.C. 1271(b), a citizen commenter asserts that historically OSMRE had stronger oversight capabilities and that the proposed rule clarification is an attempt to redress OSMRE's alleged loss of oversight authority to resolve problems with State regulatory enforcement and recapture

OSMRE oversight capabilities after State primacy is achieved. The citizen commenter expressed the concern that the 30 CFR Part 733 process is like using a club to fix what is wrong with State enforcement. As an alternative, the commenter suggests repealing OSMRE's Directive REG-8 as a more effective tool than trying to enhance 30 CFR Part 733. The commenter provided an example of the alleged slowness of a State regulatory authority's response to a recently filed citizen complaint. The commenter also asserts that OSMRE is attempting to address on-the-ground violations through the 30 CFR Part 733 process, not through the TDN process. Notably, the citizen acknowledges that the rationale for citizens to notify both the State regulatory authority and OSMRE serves a positive purpose—essentially to ensure checks and balances resulting in more prompt resolution of issues.

*Response:* SMCRA and the implementing regulations provide OSMRE with two primary tools to ensure that a State regulatory authority is enforcing its approved program appropriately. First, SMCRA provides that, in certain circumstances, OSMRE may issue a notice of violation or cessation order directly to a permittee in a primacy State; the circumstances in which OSMRE can exercise direct Federal enforcement are outlined in 30 U.S.C. 1271(a) and 30 CFR Parts 842 and 843. One relevant example of OSMRE's ability to engage in direct Federal enforcement is OSMRE performing a Federal inspection after determining that the State regulatory authority lacked good cause or did not take appropriate action to cause a violation to be corrected after OSMRE reviews the State regulatory authority's response to a TDN. 30 U.S.C. 1271(a)(1) and 30 CFR 842.11. The second tool OSMRE can use is outlined in 30 U.S.C. 1254(b), 1271(b), and

30 CFR Part 733. This tool allows OSMRE to address a failure of a State to effectively enforce all or part of its State program. Under these provisions, OSMRE may substitute Federal enforcement for all or part of a State regulatory program or withdraw approval of all or part of a State program.

These two mechanisms are distinct and should not be conflated—one involves potential violations at specific sites, and one involves more systemic issues in State program enforcement. While it is true that, sometimes, a systemic issue with a State program can manifest itself in a violation at a site, it is also true that the TDN process is not the appropriate tool for resolving systemic, programmatic issues. Instead, the TDN process is designed to address alleged violations associated with individual permits. Importantly, however, section 733.12(d), as proposed and adopted in this final rule, provides that nothing in section 733.12 “prevents a State regulatory authority from taking direct enforcement action in accordance with its State regulatory program, or OSMRE from taking appropriate oversight enforcement action, in the event that a previously identified State regulatory program issue results in or may imminently result in a violation of the approved State program.” This provision will ensure that actual or imminent violations of an approved State program that often manifest in on-the-ground impacts, but may manifest by other means, are properly addressed even as OSMRE and a State regulatory authority are working to correct State regulatory program issues.

Despite the distinction between a site-specific violation and a systemic issue, OSMRE has received citizen complaints (i.e., the site-specific process) that allege a State regulatory program issue (i.e., a systemic issue). The regulatory revisions that OSMRE proposed, and that OSMRE is finalizing today, help to clarify the distinction between

when OSMRE will use specific oversight tools—such as direct enforcement through the TDN process as opposed to an action plan under revised section 733.12. Specifically, the revision to the description of “appropriate action” at 30 CFR 842.11(b)(1)(ii)(B)(3) clarifies that, if OSMRE issues a TDN, and the State responds that it is working with OSMRE to “immediately and jointly” initiate steps to correct the systemic State regulatory program issue under 30 CFR Part 733.12, that response will be considered appropriate action, and OSMRE will not continue with the direct Federal enforcement process and will not perform a Federal inspection. Instead, OSMRE and the State regulatory authority will work to develop an action plan as set forth in revised 30 CFR 733.12 to address the underlying State regulatory program issue. To the extent that a systemic problem has resulted in a violation of the approved State program at a particular site, OSMRE will continue to use its direct Federal enforcement authority, including the TDN process, if warranted, to ensure such violation is corrected. This final rule serves to differentiate more accurately between the two distinct processes of oversight outlined in 30 CFR Part 733 and 30 CFR Parts 842 and 843. OSMRE’s existing approach has demonstrated that a clarification of the distinction between these two processes is necessary to ensure that proper enforcement of SMCRA is achieved.

OSMRE understands the commenter’s concern that 30 CFR 842.11(b)(1)(ii)(B)(3) refers to 30 CFR Part 733, and OSMRE agrees with the commenter that, traditionally, using the existing Part 733 process to cause the Federal enforcement of State regulatory programs or the withdrawal of approval of State regulatory programs is fairly severe and has been rarely used. However, OSMRE also proposed, and is finalizing, the addition of section 733.5 that specifically defines “action

plan” and “State regulatory program issue” as used in final section 733.12, which specifically provides a process for OSMRE and a State regulatory authority to enter into an action plan to address systemic problems. The addition of the action plan process will allow OSMRE to more easily address, with the cooperation of the State regulatory authority, situations where an alleged violation can be traced to a systemic problem within an existing State regulatory program. This addition is consistent with SMCRA’s cooperative federalism approach, and OSMRE expects to use revised 30 CFR 733.12 more frequently than it has traditionally used its authority to substitute Federal enforcement or withdraw State program approval because it will allow OSMRE to work with a State regulatory authority to cooperatively correct a State regulatory program issue.

The commenter also suggested that repealing OSMRE’s Directive REG-8 would be a more effective tool for ensuring enforcement of SMCRA than the proposed revisions to 30 CFR Part 733. OSMRE’s Directive REG-8 is a detailed instructional document advising OSMRE staff on best practices for performing oversight consistent with 30 U.S.C. 1271. Within Directive REG-8, OSMRE identifies two types of regular oversight activities it uses to ensure a State regulatory authority is effectively administering, implementing, maintaining, and enforcing its approved regulatory program consistent with 30 U.S.C. 1271(b) and 30 CFR Part 733. First, OSMRE prepares a report annually evaluating each State regulatory program. As set forth in Directive REG-8, each year, OSMRE uses certain fixed topics, such as off-site impacts and reclamation success, to evaluate the State regulatory authority. Each year, OSMRE also selects special topics for review. These special topics are chosen, in part, based on suggestions from the public.

Second, OSMRE conducts inspections of surface coal mining and reclamation operations as necessary to monitor and evaluate the administration of approved State programs in accordance with 30 CFR Part 842. This Directive is an internal document that OSMRE uses to ensure consistency across the bureau and to provide transparency to stakeholders on how OSMRE operates with respect to its routine evaluation of State regulatory authorities. Elimination of Directive REG-8 would increase the likelihood that various OSMRE offices would approach annual evaluation reports and oversight inspections differently, which could result in a lack of clarity for the public. For this reason, elimination of Directive REG-8 would not be a more effective method to implement change.

The regulations, as finalized, better distinguish between the distinct oversight tools authorized by 30 U.S.C. 1271, by better explaining when OSMRE will use each tool. As such, the finalized regulations encourage efficiency and effectiveness when resolving alleged violations and State regulatory program issues by categorizing them appropriately and eliminating wasteful administrative processes that may hinder prompt resolution.

OSMRE also acknowledges that citizens may determine that filing citizen complaints with both OSMRE and a State regulatory authority may be beneficial. However, in OSMRE's experience, State regulatory authorities are typically in a better position to respond quickly and ensure that violations are corrected. OSMRE has long since acknowledged that "if citizens contact the State initially, most problems will be resolved satisfactorily without the need for intrusion by the Federal government." 47 FR at 35628. That is why, since 1982, OSMRE has required that a citizen notify a State

regulatory authority “in writing, of the existence of the violation, condition or practice” before or simultaneously with notifying OSMRE of a request for Federal inspection. OSMRE still finds, as it did in 1982, that “this citizen notification requirement will enhance the protection of citizens by giving the State an earlier opportunity to act. Information from a person can be transmitted to a State regulatory authority quickly and accurately when a citizen communicates directly with the State.” *Id.* Thus, OSMRE has maintained the requirement in 30 CFR 842.12(a) to require a citizen, when requesting a Federal inspection, to inform OSMRE that the citizen has contacted the State regulatory authority. Additionally, OSMRE is finalizing the proposal that a citizen, when requesting a Federal inspection, also provide a basis for why the citizen asserts that the State regulatory authority has not taken action. This information will help OSMRE’s authorized representative better ascertain whether the citizen followed the regulation by notifying the State regulatory authority and what information may exist that would be useful in determining whether the authorized representative has reason to believe a violation exists.

*Comment:* One commenter opined that OSMRE needs to codify the process for the action plan.

*Response:* Through this rulemaking, OSMRE is codifying the process for developing and using action plans to correct systemic State regulatory program issues. Currently, OSMRE uses a variation of this process as set forth in its Directives REG-8 and REG-23. As long as they are not arbitrary and capricious or contrary to SMCRA’s specific statutory language, section 201(c)(2) of SMCRA confers on the Secretary of the Interior

broad authority to “publish and promulgate such rules and regulations as may be necessary to carry out the purposes and provision of this Act.” 30 U.S.C 1211(c)(2); *see also In re Permanent Surface Min. Regulation Litig.*, 653 F.2d 514, 523 (D.C. Cir. 1981) (*en banc*); *Nat’l Min. Ass’n v. U.S. Dep’t of the Interior*, 105 F.3d 691, 695 (D.C. Cir. 1997).

Section 521(b) of SMCRA provides that “[w]henver on the basis of information available to him, the Secretary has reason to believe that violations of all or any part of an approved State program result from a failure of the State to enforce such State program or any part thereof effectively,” the Secretary must initiate a process that could result in OSMRE substituting Federal enforcement for all or part of a State regulatory program or withdrawing approval of all or part of a State regulatory program. 30 U.S.C. 1271(b); *see also* 30 U.S.C. 1254(a). This rulemaking is not contrary to these provisions of SMCRA because it allows OSMRE to work with a State to correct a systemic issue that OSMRE has identified with a State program. The mere fact that a State is willing to work with OSMRE in good faith to correct a problem shows that it is working to adequately implement, administer, enforce, and maintain its approved program. Logically then, OSMRE would not have “reason to believe” under 30 U.S.C. 1271(b) that the State is failing to enforce its program effectively. Thus, no statutory change is needed for OSMRE to promulgate this regulation.

*Comment:* One commenter suggested specific changes to OSMRE’s proposed definition of “action plan” at 30 CFR 733.5 to mean a “detailed list of specific actions and the schedule OSMRE prepares to identify specific actions . . .” The suggested definition of

“action plan” would also list examples of specific actions such as: compliance with what the commenter has classified as “Federal environmental regulations” that the commenter later defines as “Federal regulations,” but which actually consist of Federal environmental statutes, that include, among others, the Migratory Bird Treaty Act and the Clean Water Act; public notification and involvement; and dates in which State regulatory issues are to be resolved. The commenter requested that its proposed definition of “action plan” include “specific information on compliance measures including timelines, success criteria, and contingency plans in the event the success criteria are not reached.” The commenter also suggested the addition of new definitions at section 733.5 for many of the terms included in its proposed definition of “action plan,” such as “adequate funding” and “public notification and involvement.” According to the commenter, these definitions would work in conjunction with the commenter’s suggested revisions to the term “action plan.” For instance, the commenter indicated that an “adequate funding” definition would be useful to ensure that the State regulatory authority has sufficient funds to carry out compliance and mitigation measures described in the action plan. Likewise, the commenter suggested that the addition of “public notification and involvement” would include a list of various public notification methods and techniques relating to notifying the public.

*Response:* OSMRE disagrees that the appropriate location for the items suggested by the commenter is within the definitions at 30 CFR 733.5. OSMRE proposed most of the items suggested by the commenter at revised 30 CFR 733.12(b), which details what should be included in an action plan, such as the requirements that an action plan contain

specific dates and timelines of when the State regulatory program issue is to be resolved and contingency plans if success is not achieved.

As to the suggested definition of “adequate funding,” State regulatory authorities must demonstrate that they have “sufficient funding to enable the State to regulate surface coal mining and reclamation operations in accordance with the requirements of this Act.” 30 U.S.C. 1253(a)(3). OSMRE provides administration and enforcement grants to State regulatory programs annually. 30 U.S.C. 1295(a). In addition, OSMRE conducts an annual oversight review of each State program, and, if necessary, OSMRE can evaluate the sufficiency of a State regulatory authority’s funding, including the sufficiency of funding to carry out any action plans. For these reasons, OSMRE declines to add a definition of “adequate funding” to 30 CFR 733.5.

OSMRE also disagrees with the need to include a definition for “public notification and involvement.” Any definition of this term in 30 CFR 733.5 would only be applicable to the sections of Part 733; OSMRE’s general definitions for its permanent regulatory program are found in 30 CFR 700.5 and 701.5 and neither contains a definition of public notification and involvement or a similar term. SMCRA contains many provisions related to public participation. *See, e.g., W. Va. Highlands Conservancy, Inc. v. Norton*, 343 F.3d at 242. SMCRA’s public notification and participation procedures have long been understood in the context of their usage and as part of each State’s approved regulatory program. Moreover, while OSMRE’s regulations do not provide for public involvement in the development of an action plan, revised 30 CFR 733.12(c) requires each State regulatory program issue, and benchmarks related to the resolution of that issue, to be tracked in each State’s Annual Evaluation report, which is a

public document published on OSMRE's website. Thus, the public will have access to any action plans that are developed.

*Comment:* A commenter suggested that OSMRE add a definition in section 733.5 for "Federal regulations." The suggested definition makes reference to several Federal environmental regulations with which a State regulatory authority must comply, including the Endangered Species Act of 1973, the Migratory Bird Treaty Act, the Clean Water Act, and the Archaeological Resources Protection Act. The commenter also suggests the addition of a definition in section 733.5 for "Listed species" and refers to the meaning of the term under the Endangered Species Act of 1973. The commenter also requested that OSMRE define "Migratory bird" and make reference to the meaning of the term under the Migratory Bird Treaty Act. The same commenter also suggested adding a sentence to the end of OSMRE's definition of "State regulatory program issue." The added sentence would state that "State regulatory program issue" would include "the potential failure to comply with or completely implement Federal regulations."

*Response:* These terms exist outside of SMCRA and are not part of this rulemaking effort. States must comply with all applicable Federal and State laws. For these reasons, OSMRE declines to include them in this rule.

*Comment:* Similar to the comment above, the same commenter, representing an NGO, suggested that OSMRE list specific Federal regulations that could result in a State regulatory program issue and a subsequent action plan in the commenter's proposed

definition of “Federal regulations.” This commenter also suggested rule changes to reflect inclusion in the action plan of any mitigation measures “that are necessary to return the affect[ed] area to pre-project conditions.” The commenter also suggested that OSMRE include specific criteria to determine if the State regulatory program issue has been remedied or mitigated.

*Response:* OSMRE declines to add a definition of “Federal regulations” to 30 CFR 733.5 because the language at revised 30 CFR 733.12 is sufficiently broad to address whatever SMCRA program deficiency needs correction, and the regulation at final 30 CFR 733.12(b)(1) requires the action plan to “be written with specificity to identify the State regulatory program issue . . . .” Thus, any SMCRA provision or implementing regulation that is the subject of the program issue will be identified at that time. As to the suggestion to require the return of the affected area to pre-project conditions, there is no provision in SMCRA that requires the return of a mine site to its pre-project condition. Instead, SMCRA requires permit applicants to reclaim the mine site as required by the Act and the State or Federal program. 30 U.S.C. 1260(b)(2). SMCRA further requires, for example, restoration of the land affected by mining “to a condition capable of supporting the uses which it was capable of supporting *prior to any mining, or higher or better uses of which there is a reasonable likelihood . . . .*” 30 U.S.C. 1265(b)(2) (emphasis added). The commenter’s suggestion is directly contrary to these provisions of SMCRA; therefore, OSMRE rejects this comment.

OSMRE agrees with the commenter that specific criteria should be included as part of each action plan so that OSMRE can evaluate whether the problem has been

remedied. OSMRE, however, declines to adopt the specific language proposed by the commenter because, as proposed and finalized today, 30 CFR 733.12(b)(3)(iii) already includes language requiring actions plans to contain “[e]xplicit criteria for establishing when complete resolution [of the State regulatory program issue] will be achieved.”

*Comment:* A commenter suggested that OSMRE not adopt “Early identification and corrective action to address State regulatory program issues” at proposed section 733.12 and instead incorporate OSMRE’s suggested changes into existing OSMRE Directive REG-23. The commenters suggested varying degrees of positive and negative experiences with State-OSMRE action plans and their effectiveness.

*Response:* OSMRE declines to make this change. The enhanced 30 CFR Part 733 process that OSMRE is finalizing today is an important part of clarifying when OSMRE will use its authority under 30 U.S.C. 1271(a) and when it will use its authority under 30 U.S.C. 1271(b). Codifying this procedure in the Federal regulations versus an internal guidance document will give OSMRE a transparent mechanism that has gone through public review and comment to resolve State regulatory program issues. OSMRE acknowledges the commenter’s varying experiences with action plans, but OSMRE is expecting to obtain positive results from this regulatory process as adopted in this final rule.

*Comment:* A commenter made several specific suggestions to OSMRE’s wording in proposed 30 CFR 733.12. These suggestions included wording related to actions taken by the Director to make some actions mandatory rather than discretionary and adding terms

related to timing, such as “immediately” and “without delay.” The commenter also suggested reducing the specific timeframe in which State regulatory program issues need to be resolved to 30 days calendar days as opposed to the 180 days as proposed by OSMRE.

*Response:* The purpose behind OSMRE’s proposed new 30 CFR 733.12 is to give OSMRE a new tool, the development of an “action plan,” to use to ensure that systemic issues with State regulatory programs are addressed in a measured, but no less accountable, manner. This tool provides OSMRE with another means to better manage situations where a SMCRA problem may exist but does not require immediate action under the TDN process, though it needs to be addressed in a shorter time frame than the traditional 733 process. An action plan is the vehicle to use in these situations. Adoption of the commenter’s suggested changes to proposed section 733.12 would result in the loss of flexibility, which is the purpose of this section; thus, OSMRE is not making the suggested changes.

*Comment:* A group of commenters requested that OSMRE revise proposed section 733.12(a)(2) to “fully reflect the flexibility in the Part 733 process and avoid any inference that OSM[RE] can skip steps in the process.” The commenters suggested that subparagraph (a)(2) should be revised as follows (commenters’ suggested language in italics):

(a)(2) If the Director *has reason to believe* [as opposed to “concludes” in the proposed rule] that the State regulatory authority is not effectively implementing, administering, enforcing, or maintaining all or a portion of its State regulatory program, the Director may *initiate proceedings to*

substitute Federal enforcement of a State regulatory program or withdraw approval of a State regulatory program as provided in Part 733.

*Response:* OSMRE declined to make the requested changes because final 30 CFR 733.12 will allow for the development of action plans to resolve State regulatory program issues; in contrast, the complete 30 CFR Part 733 process is aimed at larger programmatic issues. An action plan is designed to prompt action *before* the full process for substituting Federal enforcement or withdrawing a part or whole State program occurs as outlined in existing 30 CFR Part 733 is necessary or initiated. To include the steps associated with existing section 733.12 would muddy the distinction between an action plan used to resolve regulatory program issues, which can be at the permit level, and a programmatic problem involving a deeper systemic issue.

*Comment:* One commenter suggested revisions to proposed 30 CFR 733.12(b)(3) and (4) to specify that OSMRE notify the public when OSMRE identifies a State regulatory program issue by posting all relevant documents on OSMRE's website. The commenter further requested that the regulation be revised to allow public review and comment on action plans before they are adopted. Finally, the commenter suggested revising the regulation to require OSMRE to post action plans and State regulatory authority Annual Evaluation reports on OSMRE's website.

*Response:* As addressed above, the proposed regulation at 30 CFR 733.12(c), which is adopted with modifications in this final rule, will provide that “[a]ll identified State regulatory program issues and any associated action plan must be tracked and reported in the applicable State regulatory authority’s Annual Evaluation report.” OSMRE already

posts Annual Evaluation reports on OSMRE's website. *See* <https://www.odocs.osmre.gov/>. OSMRE also intended to post any action plans developed between OSMRE and a State regulatory authority on OSMRE's website. Therefore, OSMRE is revising the final rule to provide that OSMRE will make all Annual Evaluation reports available on OSMRE's website and at the applicable OSMRE office. Thus, the public will be notified of each identified State regulatory program issue and associated action plan.

While public participation is an essential and routine part of many aspects of OSMRE's regulatory program, public input in the development of an action plan would hamper OSMRE's ability to timely address identified State regulatory program issues. Even though OSMRE's process of developing an action plan does not include a public comment element, the inclusion of the term "any source" in revised 30 CFR 733.12(a)(1) makes it clear that a citizen, an organization, or any other source may provide information to OSMRE that could lead the Director to conclude that there may be a State regulatory program issue, which could result in an "action plan."

*Comment:* A commenter recommended the deletion of proposed section 733.12(d) because it would allow OSMRE to take an oversight enforcement action before a violation exists. The commenter referred to the portion of the proposed rule that read, "*may imminently result in an on-the-ground violation.*" Emphasis in original.

*Response:* OSMRE declines to make this change. Under this final rule, OSMRE retains the right to issue a TDN to a State regulatory authority if a previously identified State

regulatory program issue has not been adequately addressed and results in an actual or imminent violation of the approved State program. In the final rule, as discussed in the section-by-section analysis, OSMRE has removed the reference to “on-the-ground violation” and replaced it with “a violation of the approved State program.” OSMRE recognizes that these violations often manifest as an on-the-ground impact, but OSMRE also recognizes that these violations may manifest by other means. For example, a permittee’s failure to submit required monitoring reports or submit annual certifications may be a site-specific violation of the approved State program. Specific to the comment, when OSMRE determines that a violation of the approved State program is imminent, it makes sense for OSMRE to take action to prevent actual problems. One of the primary purposes of SMCRA is to protect society and the environment from the harmful effects of surface coal mining operations, and OSMRE will be able to fulfill that purpose, in part, under section 733.12(d), which is being adopted in this final rule.

#### **I. Interrelationship of 30 CFR Part 733 and 30 CFR Part 842**

Despite the distinct processes outlined in 30 U.S.C. 1271(a) and (b) for handling site-specific violations and those violations of a programmatic nature, the reality of OSMRE enforcement is that, in practice, the nature of these violations may sometimes blur. This overlap may occur as a result of circumstances, stakeholders conflating the processes, and complicated issues associated with coal mining. Thus, although a multi-state governmental organization commenter found OSMRE’s inclusion of reference to one distinct process when discussing the other process to be “perplexing,” OSMRE’s experience—and other comments received on this topic—demonstrate that the interrelationship must be considered.

*Comment:* Similar to a comment discussed above in Section II., H., a group of commenters claimed that the use of the proposed 30 CFR Part 733 process to deal with any on-the-ground issue is inconsistent with SMCRA and will be more disruptive than using a TDN as directed by 30 CFR Part 842. This group of commenters also claimed that a TDN is needed when a State regulatory authority fails to act on a violation.

*Response:* OSMRE agrees with the commenters that existing 30 CFR 733.12, now redesignated as 30 CFR 733.13 in this final rule, and entitled, “Procedures for substituting Federal enforcement of State programs or withdrawing approval of State programs,” does not quickly effectuate change. However, OSMRE notes that this is a distinct process that must be implemented carefully and prudently. To bridge this gap, OSMRE proposed 30 CFR 733.12, which is being finalized today, as an early identification process for a prompter resolution of State regulatory program issues than under the existing regulations. This enhancement to the 30 CFR Part 733 process serves to identify issues before the issues warrant the rare remedies of substitution of Federal enforcement or withdrawal of an approved State program. As previously discussed, the development and use of action plans in 30 CFR 733.12, as finalized, will resolve State regulatory program issues. In addition, even when OSMRE and a State regulatory authority are engaged in an action plan process, OSMRE will still take appropriate enforcement actions to address imminent harm situations and will issue TDNs for actual or imminent violations of an approved State program, such as those that have on-the-ground impacts. State regulatory program issues may also result in a direct Federal

enforcement action under revised section 733.12(d) if the State regulatory authority does not address issues as outlined in the action plan and there is an actual or imminent violation of the approved State program.

*Comment:* OSMRE received a number of comments on what constitutes a “State regulatory program issue.” A commenting group requested that OSMRE clearly express the delineation between a “violation” as used in section 521 of SMCRA and a “State regulatory program issue” as proposed in section 733.5 and redesignated as section 733.12. The group further suggested that OSMRE consider adding language to the definition of State regulatory program issue that states that State regulatory program issues are not “violations” in the context of section 521(a)(1) of SMCRA.

*Response:* OSMRE declines to make this requested delineation and associated change because OSMRE is afforded a degree of discretion to determine if something is a State regulatory program issue that should be addressed under the enhanced and finalized 30 CFR Part 733 process or is site-specific with on-the-ground impacts that fall under the TDN process outlined in Part 842. Moreover, finalized section 733.12(d) continues to grant OSMRE the authority to take enforcement action to address an actual or imminent violation of an approved State program that often manifests as an on-the-ground impact. To do as the commenter suggests, i.e., the wholesale exclusion of State regulatory program issues from the TDN process, would create a regulatory loophole and be inconsistent with congressional intent. Further, as stated previously, what constitutes a violation is well understood by OSMRE, State regulatory authorities, and permittees.

Thus, no change to the definition of State regulatory program issue is needed.

*Comment:* A commenter suggested that OSMRE overtly state that State regulatory program issues are not the basis for a TDN.

*Response:* While at least initially, a State regulatory program issue will not result in the issuance of a TDN, OSMRE is reserving the right to conduct Federal enforcement in accordance with final rule section 733.12(d) in the event that a State regulatory authority does not adhere to an action plan or if a State regulatory program issue results in an actual or imminent violation of the approved State program that often manifests as an on-the-ground impact. Therefore, OSMRE declines to make the overt statement that the commenter requested.

*Comment:* A commenter group requested that OSMRE reconsider defining “appropriate action” for a “State regulatory program issue” under section 842.11 as an “appropriate action” in response to a TDN under 30 CFR Part 842. The group noted that OSMRE spent considerable time in preamble text delineating OSMRE’s authority for the TDN process under 30 U.S.C. 1271(a) and 30 CFR Part 842 and the 30 CFR 733 process as required by 30 U.S.C. 1271(b). The group further suggested that State regulatory program issues are not to be the basis for a TDN; therefore, the inclusion of an action plan to address a State regulatory program issue, as an element of the TDN process, seemed to conflate the apparent distinction OSMRE was making between the TDN and 30 CFR Part 733 processes.

*Response:* As OSMRE understands the comment and associated request, OSMRE declines to accept this change. If a State regulatory authority, operating under final section 733.12, including development of an action plan, does not address the program issues identified in the action plan in the manner, and in accordance with the dates, outlined in the action plan, OSMRE may need to institute Federal enforcement to address the issue if there is an actual or imminent violation of the approved State program. The action plan process in final section 733.12 is not a vehicle to avoid Federal enforcement; instead, it is a tool to address State regulatory program issues promptly.

*Comment:* Several commenters challenged the use of the 30 CFR Part 733 process, as it existed in the pre-existing regulations and with the enhancements finalized today, to address State regulatory program issues that result from State permitting deficiencies. Various commenters asserted that OSMRE has used TDNs (under 30 CFR Part 842) for years to address such State regulatory program issues. One commenter opined that an “enormous loophole” will be created by addressing all State regulatory program issues through the 30 CFR Part 733 process instead of through the TDN process.

*Response:* OSMRE disagrees with these comments. OSMRE has acknowledged that, at various times, it has addressed State permitting issues through the TDN process. When it did so, OSMRE followed internal policies. Under this final rule, OSMRE is clarifying that it will not use the TDN process for alleged issues with a State regulatory authority’s implementation of its approved State program, unless there is an actual or imminent

violation of the approved State program. In OSMRE's experience, these violations often manifest in on-the-ground impacts. Instead, OSMRE will initially address such issues through the enhanced 30 CFR Part 733 process. After all, if a permittee obtained a permit from the State regulatory authority on the basis of an accurate and complete application, the permittee has initially fulfilled the requirements of SMCRA and the State regulatory program. *See, e.g., Coal River Mountain Watch v. Republic Energy, LLC*, No. 5:18-CV-01449, 2019 WL 3798219, at \*8 (S.D.W. Va. Aug. 12, 2019). However, as this final rule provides, even if OSMRE and the State regulatory authority are engaged in the State regulatory program issue or action plan processes, the State and OSMRE can still take appropriate enforcement actions if a violation of the approved State program has occurred or is imminent. By using action plans as an additional regulatory tool, the intent of sections 504 and 521 of SMCRA will be met without any damage to the environment or to the detriment of permittees. As described and contained in this final rule, action plans are regulatory instruments to accomplish specific objectives and have required timelines to resolve issues at hand. If a State regulatory program issue cannot be resolved through an action plan, the issue could result in a Federal substitution or takeover of a State regulatory program. The State regulatory program issue and action plan processes in this final rule, coupled with the TDN process, should ensure a more complete and timely enforcement of State regulatory programs.

*Comment:* One commenter stated that violations emanating from “permit defects” should be handled through the TDN process set forth in 30 CFR Part 842 and not under the proposed early identification and corrective action process outlined in the enhancements

to 30 CFR Part 733 or through the existing 30 CFR Part 733 process. One commenter expressed concern that excluding the State regulatory authority from the TDN process undermines the balance between primacy and Federal oversight and the intent of Congress. Other commenters, pointing to past OSMRE decisions reviewing requests for Federal inspections related to State permitting decisions, requested that OSMRE clearly state that permit defects are totally excluded from the TDN process.

*Response:* In general, OSMRE interprets the term “permit defect” to be a deficiency in a permit-related action taken by a State regulatory authority. The term does not appear in SMCRA and is not contained in the existing regulations. Rather, OSMRE has used the term in internal documents over the years, though OSMRE no longer uses the term in its existing Directive INE-35, entitled “Ten-Day Notices” and dated May 3, 2019. Section 521(a)(1) of SMCRA refers to “reason to believe any person is in violation of any requirement of [SMCRA]....” As explained in the proposed rule, 85 FR at 28906-07, and in this final rule, “any person,” in the context of who can be in violation of SMCRA or a State regulatory program, does not include a State regulatory authority, unless it is acting as a permit holder. OSMRE acknowledges that the term “any person” also appears earlier in the same sentence of 30 U.S.C. 1271(a), but, in that context, SMCRA is referring to “any person” that provides information to the Secretary about possible violations; the term in that context is broader and can include a State regulatory authority. Under this final rule, OSMRE generally will not issue a TDN to a State regulatory authority for an identified State regulatory program issue. More specific to the context of this comment, under this final rule, a so-called “permit defect” will typically be handled as a State

regulatory program issue, unless there is an actual or imminent violation of the approved State program. OSMRE will continue to take an appropriate direct enforcement action under the TDN or imminent harm processes, even if the impact stems from an underlying State regulatory program issue.

Under this final rule, OSMRE will follow the statutory delineation of sections 521(a) (the site-specific TDN process at 30 CFR Part 842) and 521(b) (the State regulatory program issue 30 CFR Part 733 process) with respect to Federal enforcement. Although OSMRE has taken varying positions over the years, the best reading of SMCRA is that Congress intended the section 521(a) TDN process to be limited to violations at a specific site. In contrast, State regulatory program issues, which are more systemic in nature and could include alleged issues related to one or more permits issued by a State regulatory authority but do not result in site-specific violations of the approved State program, should be addressed under section 521(b) and the process outlined in finalized 30 CFR 733.12. In the proposed rule, OSMRE proposed to retain the ability to take Federal enforcement action if any issue being addressed as a State regulatory program issue, as outlined in redesignated 30 CFR 733.12, results in, or may imminently result in, on-the-ground violation. OSMRE is adopting this proposal in this final rule but has changed the terminology in section 733.12(b) to read, “in violation of the approved State program.” OSMRE has made this modification in response to public comments and because this change best addresses identified issues that are not specific to an individual site but are more systemic in nature. This is important because OSMRE will still take appropriate enforcement action for actual or imminent violations of an approved State program that often manifest as on-the-ground impacts even while OSMRE and a State

regulatory authority are pursuing corrective actions for State regulatory program issues. A multi-state governmental organization representing the natural resource and related environmental protection interests of its 27 member States agreed that OSMRE can “issue a TDN for an alleged permit defect that has resulted in an on-the-ground violation of a performance standard at a mine.” Under section 733.12 of this final rule, OSMRE will use any number of compliance strategies, including action plans when appropriate, to address regulatory program issues that result from State regulatory authority permitting actions while also preserving OSMRE’s ability to take enforcement action in the event that a previously identified State regulatory program issue results in or may imminently result in a violation of the approved State program. As a commenter pointed out, the 30 CFR Part 733 process has historically been used after back and forth discussions between OSMRE and a State regulatory authority to identify and institute any necessary changes to a State program. The last resort in this situation, which is unaffected by this final rule, is for Federal substitution or withdrawal of all or part of a State regulatory program under the existing 30 CFR Part 733 process. In OSMRE’s view, the introduction of a definition for the phrase “State regulatory program issue,” combined with various compliance strategies, including action plans when appropriate, is an intermediary step between a Federal substitution or withdrawal of a State regulatory program under the 733 process and the section 521(a) TDN process. An action plan, with associated issue-specific time frames, serves as a beneficial and productive middle ground. It is important to keep the goals of regulatory oversight in mind: address issues as they arise while causing correction and minimization of on-the-ground impacts as soon as possible. The revisions to 30 CFR Parts 733 and 842 in this final rule achieve those goals by providing OSMRE

with more tools to more appropriately, efficiently, and quickly address the range of regulatory issues that arise.

*Comment:* A commenter opined that the citizen complaint process contained in 30 CFR Part 842 should not be used to challenge state permitting issues under the guise of a “violation of the Act or program.”

*Response:* As has been previously stated, Congress intended public participation in the implementation and enforcement of SMCRA and specifically added section 521(a) to the statute to account for that participation. The language of 30 U.S.C. 1271(a)(1) is clear that the TDN process should be used for a non-imminent harm situation when “the Secretary has reason to believe that any person is in violation of any requirement of this Act or any permit condition required by this Act . . . .” However, if the alleged violation satisfies the definition of “State regulatory program issue,” which could include issues related to State permitting, OSMRE will use the process set forth in 30 CFR 733.12, as finalized, to address the issue. If it is not clear, at the time the citizen complaint is received, whether the alleged violation is actually a State regulatory program issue, OSMRE, if it has the requisite “reason to believe,” will still issue a TDN to a State regulatory authority. If, after review of the information provided in the State’s response to the TDN, it turns out that the alleged violation is properly characterized as a State regulatory program issue, under revised 30 CFR 842.11(b)(1)(ii)(B)(3), the State will have taken appropriate action in response to the TDN by working with OSMRE to resolve the issue; thus, OSMRE will not conduct a Federal inspection. Of course, under

finalized 30 CFR 733.12(d), if the State regulatory program issue manifests itself as a violation of the approved State program that often results in an on-the-ground impact, OSMRE can still take direct enforcement action.

*Comment:* A commenting group suggested that OSMRE revise the proposed definition of “State regulatory program issue” to exclude all programmatic and permitting issues from the TDN process found in 30 CFR Part 842. The group also offered language at specific sections in proposed 30 CFR Part 842 to effectuate this understanding. The suggested changes included adding a definition section to 30 CFR Part 842 that defines the following phrases and terms: “State regulatory program issue” and “violation” as used in 30 CFR Parts 733 and 842. The commenter also suggested deleting the proposed revisions to the term “appropriate action” regarding joint inspections and to the term “good cause,” which references 30 CFR Part 733 State regulatory program issues. OSMRE infers from the comments that these suggested changes are presumably to indicate that State regulatory program issues are not appropriate subjects for a TDN.

*Response:* OSMRE declines to make these changes because, as already stated in this preamble, under this final rule, OSMRE will not follow the process in 30 CFR 842.11 for State regulatory program issues, unless there is an actual or imminent violation of the approved State program. However, as noted above, sometimes OSMRE may initially issue a TDN for something that turns out to be a State regulatory program issue.

## **J. Specific Responses to Other Comments Received About the Proposed Rule**

*Comment:* One commenter questioned the validity of OSMRE’s intention for clarifying the existing regulations. Specifically, this commenter alleged that despite OSMRE’s rationale, the true rationale behind the proposed rulemaking is to “reduce the workload of federal and state regulatory authorities due to lack of adequate funding to implement the Act as Congress intended it be done.”

*Response:* The commenter provided no evidence that the State regulatory authorities have insufficient funding to carry out their obligations under SMCRA. For this and many other reasons stated throughout the proposed rule and this final rule preamble, OSMRE disagrees with the commenter. To the contrary, this rulemaking is intended to add transparency to OSMRE’s oversight responsibilities; promote regulatory certainty for State regulatory authorities, regulated entities, and the public; enhance OSMRE’s relationship with the State regulatory authorities; reduce redundancy in inspection and enforcement; and streamline the process for notifying State regulatory authorities of possible violations and other issues. With respect to the commenter’s allegation that insufficient funding is provided to State regulatory authorities, OSMRE notes that Federal administration and enforcement grants are awarded to State regulatory authorities based, in part, on the anticipated workload, such as permitting and inspection, that is necessary for State regulatory authorities to administer and enforce their approved State programs under SMCRA. *See* 30 CFR Part 735 and OSMRE’s Federal Assistance Manual, Chapter 5-200, The Application Process for a Regulatory Grant. In the event that OSMRE has reason to believe that a State regulatory authority is not effectively implementing, administering, maintaining, or enforcing any part of its approved program—including not sufficiently funding the approved State program, OSMRE may initiate procedures for substituting Federal enforcement of State programs or withdrawing approval of State programs as detailed in redesignated 30 CFR 733.13.

*Comment:* A commenter expressed concern that the proposed change from “shall” to “will” in 30 CFR 842.11(b)(1) converts a previously mandatory duty into a discretionary duty.

*Response:* As explained in the preamble to the proposed rule, the purpose of changing “shall” to “will” in 30 CFR 842.11(b)(1) was to clarify potential ambiguity with the word “shall.” 85 FR at 28907. As Justice Ginsburg explained in *Gutierrez de Martinez v. Lamagna*, “[t]hrough ‘shall’ generally means ‘must,’ legal writers sometimes use, or misuse, ‘shall’ to mean ‘should,’ ‘will,’ or even ‘may.’” 515 U.S. 417, 432-33, n.9 (1995). Even in an enforcement provision like this one, the use of the word “shall” does not necessarily give rise to a mandatory, nondiscretionary duty. *See, e.g., Heckler v. Chaney*, 470 U.S. 821, 835 (1985); *Sierra Club v. Jackson*, 724 F. Supp. 2d 33, 38 n.1 (D.D.C. 2010) (“the mandatory meaning of ‘shall’ has not been applied in cases involving administrative enforcement decisions”); FED. R. CIV. P. 1, Advisory Committee Notes (2007) (“The restyled rules minimize the use of inherently ambiguous words. For example, the word “shall” can mean “must,” “may,” or something else, depending on context. The potential for confusion is exacerbated by the fact that “shall” is no longer generally used in spoken or clearly written English.”).

To guard against this potential ambiguity, OSMRE proposed to replace the word “shall” with the word “will” because “will” indicates an event (*i.e.*, a Federal inspection) that is to occur in the future under specific circumstances (*i.e.*, when the OSMRE authorized representative issues a TDN, and the State regulatory authority fails to respond with good cause or appropriate action). This word choice clarification was not intended to render the action at 30 CFR 842.11(b)(1) as anything but mandatory.

However, in consideration of the comment, OSMRE is adopting this suggestion to remove any ambiguity over the mandatory nature of the authorized representative's responsibility to issue a TDN when "reason to believe" is formulated. However, instead of replacing "shall" with "will," as proposed, OSMRE will substitute the word "shall" with "must" in order to more affirmatively communicate the mandatory requirement. The Federal Register Document Drafting Handbook provides, "use 'must' instead of 'shall' to impose a legal obligation to your reader." Additionally, the Federal Plain Language Guidelines—referred to in the Federal Plain Writing Act of 2010—also direct Federal agencies to use "must" not "shall" to indicate requirements.

*Comment:* A commenting group suggested that OSMRE incorporate regulatory language that defines the term "violation." The commenter asserted that, in the TDN context, a violation only occurs in the context of on-the-ground violations of a State regulatory program, rather than to infractions of SMCRA generally.

*Response:* OSMRE disagrees that changes to the existing regulations are necessary. The term "violation" has been used for greater than 40 years in SMCRA enforcement and has a common understanding that is not a subject of this rulemaking. However, as explained in the proposed rule, "[a] reasonable reading of section 521(a)(1) is that the referenced violations are those that permittees, and related entities or persons, commit in contravention of State regulatory programs. Therefore, within the context of section 521(a) of SMCRA and the TDN regulations, the proposed rule would clarify that OSMRE will not send TDNs to State regulatory authorities based on allegations or other

information that indicates that a State regulatory authority may have taken an improper action under the State’s regulatory program.” 85 FR at 28907. OSMRE reasserts that position here. OSMRE did not propose to define the term violation and finds that such a definition is unnecessary.

Further, OSMRE agrees that it will issue TDNs to State regulatory authorities only when it has reason to believe there is a violation of the applicable State program, but this result is already clear in the existing regulations. In other words, when OSMRE is determining whether it has reason to believe that there is a violation of SMCRA in the TDN context, it makes that determination under the requirements of the approved State program. This longstanding practice does not require regulatory clarification. Of course, State programs must consist of elements that are no less stringent than SMCRA and no less effective than its implementing regulations. *See* 30 CFR 732.15(a) (a State program must be “in accordance with” SMCRA and “consistent with” the Federal regulations) and 30 CFR 730.5 (defining “in accordance with” and “consistent with”). As such, if there would be a violation under SMCRA and the Federal regulations, a violation of an approved State program is also likely. However, if OSMRE discovers that a State program is not as stringent as SMCRA, it will take appropriate action, such as requiring a State program amendment under 30 CFR 732.17. With regard to the commenter’s reference to “on-the-ground violations,” that issue is discussed elsewhere in this final rule.

*Comment:* A commenter requested that OSMRE modify existing section 842.11 to ensure deference is given to the State regulatory authority when OSMRE is evaluating alleged

violations, especially those stemming from what the commenter characterizes as “permit defects.” While the commenter noted that the existing regulations contain an “arbitrary and capricious” standard, the commenter suggested that OSMRE and the Department’s Office of Hearings and Appeals (OHA) often ignore or pay lip service to the standard. The commenter suggested that OSMRE amend 30 CFR 842.11(b)(1)(ii)(B)(2) to make certain that deference is given to the State regulatory authority by adding a second sentence to read as follows: “[t]he authorized representative will accord the State regulatory authority substantial deference in evaluating whether the response is arbitrary capricious or an abuse of discretion under the State program.”

*Response:* As explained above, under this final rule, OSMRE will not address problems with a State-issued permit through the TDN process, unless there is an actual or imminent violation of the approved State program. OSMRE agrees with the commenter that OSMRE should afford substantial deference to State regulatory authorities during the TDN process. This is a practice that OSMRE has routinely followed in conformity with the various provisions of SMCRA relevant to this issue. Under the “arbitrary, capricious, or an abuse of discretion” standard in the existing regulations, which is not affected by this final rule, OSMRE already affords substantial deference to State regulatory authorities that the commenter seeks, which is consistent with SMCRA’s cooperative federalism model. After all, in primacy States, the State is the primary SMCRA regulatory authority, and OSMRE’s role is one of oversight. Because the existing regulations already recognize the States’ significant role in enforcing SMCRA, and OSMRE is appropriately deferential to the States, no change to the regulations is

necessary to accomplish the commenter's goal. OSMRE also notes that, contrary to the commenter's assertion, neither OHA nor OSMRE is free to ignore or merely pay lip service to requirements in duly promulgated regulations. Likewise, OSMRE acknowledges that it must follow applicable provisions of SMCRA and relevant administrative and judicial case law. OSMRE already recognizes and applies the requisite deference owed to State regulatory authorities during the TDN process, and the TDN regulations and OSMRE's practice are fully in accord with SMCRA and court decisions.

*Comment:* A commenter questioned why OSMRE proposed changes to four of the five examples of what can constitute "good cause" at 30 CFR 842.11(b)(1)(ii)(B)(4) and made no changes to one of the five elements. The commenter also questioned OSMRE's proposal to include the term "demonstrates" in subparagraphs (iii) and (iv) because it did not appear to change the meaning of the provisions.

*Response:* OSMRE has found it difficult to substantiate State regulatory authority's jurisdictional claims under existing subparagraph (iii) and claims of preclusion to act under existing subparagraph (iv). OSMRE does not intend to change the meaning of these provisions or its interpretation of what constitutes good cause for not taking an action under these subparagraphs. OSMRE added "demonstrate" to these subparagraphs of section 842.11(b)(1)(ii)(B)(4) to ask State regulatory authorities to provide OSMRE with a measure of certainty for their claims of good cause for not taking an action to correct a violation.

*Comment:* One commenter indicated general support for the proposed clarifications of “good cause” as set forth in 30 CFR 842.11(b)(1)(ii)(B)(4). However, the commenter recommended that the provisions related to good cause could be made more effective with the addition of language requiring the State regulatory authority to demonstrate it has “dedicated all resources necessary to complete the investigation as soon as possible.”

*Response:* OSMRE understands that the commenter is requesting a defined time frame for the State regulatory authority to complete an investigation into a possible violation as outlined in 30 CFR 842.11(b)(1)(ii)(B)(4)(ii) and also is requesting that the State regulatory authority make an affirmative showing that all resources necessary are used to complete the investigation. OSMRE does not accept the suggestion made by the commenter as it would place general, unreasonable expectations on the State regulatory authority to complete often complicated and fact-specific investigations. To be clear, the existing regulations require that when a State regulatory authority requires additional time to analyze the allegations in a TDN, this must be performed in a “reasonable and specified additional time.” The proposed rule, as finalized today, also contains this limit on a State regulatory authority’s investigation time frame and takes a further step to ensure expeditious resolution of possible violations. In an effort to express the urgency of promptly resolving alleged violations, the final rule grants the OSMRE authorized representative discretion to “determine how long the State regulatory authority should reasonably be given to complete its investigation...and [the authorized representative] will communicate to the State regulatory authority the date by which the investigation must be completed.” At the conclusion of the specified time, the OSMRE authorized

representative will re-evaluate the State regulatory authority's response. This reflects an appropriate balance of the State regulatory authority's knowledge of specific issues, the need to thoroughly gather information necessary to evaluate a possible violation, and the prompt resolution of possible violations. Furthermore, it does not place unreasonable expectations on State regulatory authorities to dedicate "all resources" to one issue.

*Comment:* One commenter suggested revisions to the "good cause" provisions in proposed section 842.11(b)(1)(ii)(B)(4)(iv) to address what the commenter has characterized as a shortcoming in the existing and proposed language that was identified during recent coal company bankruptcy proceedings. According to the commenter, during bankruptcy proceedings, evidence was discovered of collusion between State officials and coal companies that were self-bonded. The commenter alleged that either through this alleged collusion, or by direct action of the State officials, judicial action was taken to shield these companies from complying with the requirements of 30 CFR 800.16(e) (General terms and conditions of bond) and 30 CFR 800.23(g) (Self-bonding). The commenter surmised that these alleged actions could be prevented by revising section 842.11(b)(1)(ii)(B)(4)(iv) to include the requirement that the State regulatory authority "demonstrate that no state official has coordinated with the mining company and or acted independently to secure an administrative review body or court of competent jurisdiction to preclude the State regulatory authority from taking action on the violation."

*Response:* OSMRE declines to accept this suggestion because this proposed revision to the good cause requirements of 30 CFR Part 842 is outside the scope of this rulemaking

as OSMRE did not propose to substantively change the requirement in section 842.11(b)(1)(ii)(B)(4)(iv). OSMRE notes that if OSMRE discovers, at any time, that a State regulatory authority is failing to adequately implement, administer, maintain, or enforce a part or all of a State program, including enforcing the general bonding and self-bonding requirements established in 30 U.S.C. 1259 and 30 CFR Part 800, OSMRE may initiate the existing 30 CFR Part 733 process in accordance with 30 U.S.C. 1271(b).

*Comment:* A multi-state governmental organization that characterizes itself as supporting the natural resource and related environmental protection and mine safety and health interests of its 27 member States suggested that OSMRE develop a more thorough discussion of why the proposed regulations at 30 CFR Parts 733 and 842 represent OSMRE's interpretation of SMCRA with respect to the procedures for substituting Federal enforcement of State programs or withdrawing approval of State programs and the TDN process.

*Response:* OSMRE has already discussed the clarifying changes to 30 CFR Parts 733 and 842 in the preamble to the proposed rule (85 FR 28904). These two rule sections have also been the subject of several previous rulemakings and associated **Federal Register** notices. *See, e.g.*, 44 FR 14902 (March 13, 1979), 47 FR 35620 (Aug. 16, 1982), 52 FR 34050 (Sept. 9, 1987), and 53 FR 26728 (July 14, 1988). Additionally, OSMRE has expanded upon the rationale for its clarifying changes, above.

*Comment:* A coal industry group comprised of several companies in an Appalachian Basin-based coal State offered its support for OSMRE's proposed clarification that

OSMRE will not send TDNs to State regulatory authorities based on allegations that the State regulatory authority itself has acted improperly under the approved State program.

*Response:* As discussed briefly above, OSMRE agrees with the commenter's observations. Specifically, the commenter accurately recognizes that within the context of section 521(a)(1) of SMCRA, a State regulatory authority should not be considered "any person" who may be "in violation of any requirement of this Act." 30 U.S.C. 1271(a)(1). As discussed in the proposed rule, but not commented upon, in this context, "any person" does not include OSMRE, State regulatory authorities, or employees or agents thereof, unless they are acting as permit holders. To be clear, OSMRE will not issue a TDN to a State regulatory authority for an alleged violation by the State regulatory authority, unless the State regulatory authority is acting as a permit holder because it is operating a surface coal mining operation or the State regulatory authority is standing in the shoes of the permittee due to bond forfeiture or any other unforeseen reason. This interpretation is consistent with the plain language of 30 U.S.C. 1271(a) that differentiates between "any person" providing information and "any person [that] is in violation of any requirement of this Act...." However, OSMRE cautions that this interpretation does nothing to diminish OSMRE's authority to act if OSMRE becomes aware that there is a State regulatory program issue. Specifically, if OSMRE becomes aware that there is a State regulatory program issue that undermines a State regulatory authority's effective administration, maintenance, implementation, or enforcement of its State regulatory program, even with respect to a single operation, OSMRE may address the issue programmatically under the enhanced 30 CFR Part 733 that is being finalized in this

rulemaking while also taking enforcement action as prescribed by 30 U.S.C. 1271(a)(1) when there is a violation of the approved State program.

*Comment:* A citizen commenter suggested that OSMRE should define the terms “readily available information” and “effective documentation.”

*Response:* Definitions for these two terms are unnecessary as the terms have generally accepted definitions and no specialized technical meaning in this rule. For example, “readily” is defined as “without hesitating; without much difficulty.” *Readily, Merriam Webster Online Dictionary, available at merriam-webster.com/dictionary/readily* (last accessed August 4, 2020). Moreover, as OSMRE explained in the preamble to the proposed rule, OSMRE considers “any information that is accessible without unreasonable delay” to be “readily available information.” 85 FR at 28907. Furthermore, OSMRE’s authorized representative needs the flexibility to use his or her best professional judgment to determine what information is readily available based on the specific facts of each situation.

Similarly, it is also not necessary for OSMRE to define “effective documentation” as it is used in section 842.11(b)(2) to describe the type of information referenced in 43 U.S.C. 1271(a)(1) that a complainant should submit to OSMRE to show a possible violation because determining what constitutes “simple and effective documentation” will be a fact-specific consideration that OSMRE will take into account in formulating reason to believe on a case-by-case basis. Congress, when enacting SMCRA, recognized that OSMRE’s authorized representative will consider “a snapshot of an operation in

violation or *other simple and effective documentation of a violation*” in order to formulate reason to believe before issuing a TDN. H.R. REP. No. 95-128, at 129 (April 22, 1977) (emphasis added). As used in the final rule at 30 CFR 842.11(b)(2), OSMRE adopts the language proffered by Congress; thus, OSMRE’s authorized representative will be assessing both whether the complainant has submitted “simple and effective documentation” and whether “facts that are otherwise known to the authorized representative” constitute simple and effective documentation before formulating whether there is reason to believe a violation exists. However, that simple and effective documentation can also come from any other readily available source, in addition to the complainant. This may include, for example, information in OSMRE’s files, from the public domain, provided by a State regulatory authority, or in a citizen complaint. Depending on the alleged violation, simple and effective documentation could also be a photograph of the alleged violation, boundary identifiers, water monitoring reports, or any other information readily available to OSMRE’s authorized representative.

*Comment:* A citizen commenter stated that the proposed changes to section 842.11(b)(2) coupled with the “new proposed ‘reason to believe’ standard” will make it more likely that legitimate complaints will be rejected because the complaint may not include “simple and effective documentation.” Further, the commenter reasoned that the term “simple and effective documentation” is a new term that is undefined and that will place an unreasonable burden on citizens seeking to file a citizen complaint.

*Response:* OSMRE disagrees with this comment and notes that section 842.11(b)(2) states the authorized representative will be able to formulate reason to believe “if the facts that a complainant alleges, *or facts that are otherwise known to the authorized representative*, constitute simple and effective documentation of the alleged violation, condition, or practice.” (Emphasis added). The commenter has missed the portion of this provision that allows the authorized representative to rely on facts that are otherwise known to the authorized representative that may constitute simple and effective documentation, in addition to the facts that the complainant submits. Moreover, as OSMRE noted in response to a previous comment, the concept of “simple and effective documentation” was first introduced in 1977 when SMCRA was being drafted by Congress. This phrase was used to describe the type of information that could be used to document a possible violation. OSMRE is not imposing a new requirement or a burden on citizens when filing a citizen complaint and views this standard as a low bar describing the nature of documentation that may be used to show that a violation has taken or is taking place. In addition, OSMRE has clarified in this final rule that it will consider any “simple and effective documentation”—including readily available information from the State regulatory authority or any other source—when formulating reason to believe.

*Comment:* OSMRE received several comments suggesting that OSMRE does not have statutory authority to issue a notice of violation (NOV) in a primacy State due to the construction and relationship between sections 504(b) and 521(b) of SMCRA. One of these commenters further suggested that once a State program is approved, and the State

earns primacy, the approved State program becomes the operative law; therefore, Federal actions against a State permittee amount to a Federal takeover of the approved State program. Another one of these commenters echoed the same sentiment and added that Federal oversight in a primacy State created an unfair playing field relative to States that have not achieved primacy and therefore have only Federal enforcement. A commenter further suggested that OSMRE repeal the regulation authorizing NOV's in primacy states (30 CFR 843.12) and initiate a rulemaking to do so.

*Response:* The issue of OSMRE's statutory authority to issue NOV's is well-settled, and nothing in OSMRE's proposed rule suggested that OSMRE was reconsidering whether it has authority to issue NOV's in primacy States. *See* 48 FR 9199 (Mar. 3, 1983) (“[u]pon examination of the issue, the Department has concluded that the regulation contained at 30 CFR 843.12(a)(2) was properly and lawfully promulgated; therefore there is no need to reconsider the issue.”); *see also* 44 FR 14902. Over thirty years ago, OSMRE considered a rulemaking petition, which sought the repeal of all of the regulations “authorizing Federal notices of violation in States with approved regulatory programs . . . .” 52 FR at 21598. OSMRE denied this petition. 52 FR at 21601 (“After careful consideration of the Act, the legislative history, and public comments. . . , OSMRE determined that it has the authority to issue Federal NOV's in primacy States.”); *see also Nat'l Min. Ass'n v. U.S. Dep't of Interior*, 70 F.3d 1345, 1353 (D.C. Cir. 1995) (upholding OSMRE's rulemaking petition denial). Given OSMRE's longstanding interpretation of its authority and the lack of anything in the proposed rule that would indicate a change to this position, OSMRE considers this comment to be outside the

scope of this rulemaking, and OSMRE is not adopting the suggestions made by these commenters.

*Comment:* One commenter suggested that OSMRE repeal 30 CFR 842.15(d) pertaining to formal appeals to OHA of the Director's informal review of an inspector's decision in response to a request for a Federal inspection. The commenter opined that SMCRA authorizes informal review of an authorized representative's decision to not inspect or not take enforcement action, but SMCRA does not authorize formal appeals, as the existing OSMRE regulations authorize. The commenter further stated that these "formal" appeals of OSMRE decisions not to inspect or enforce often languish for years while being resolved through the administrative litigation process of the OHA and the appellate administrative board, the Interior Board of Land and Appeals. In support of this proposed revision, the commenter cited efficiency and points out that long resolution times unnecessarily prolong uncertainty for operators and State regulatory authorities.

*Response:* OSMRE did not propose any revisions to 30 CFR 842.15 in response to this comment. OSMRE considers this comment to be outside the scope of this rulemaking and is not making any changes to the final rule as a result. Changes to the administrative review process for informal review decisions were neither proposed by OSMRE in the proposed rule nor would be a logical outgrowth of the current rulemaking effort. Therefore, OSMRE will not be addressing this comment or including the provisions proposed by the commenter in this final rule.

*Comment:* One individual commenter, representing the interests of a citizens' group, cites data from the U.S. Energy Information Administration (EIA) that predicts a 25 percent decline in domestic coal production from 2019 through 2020 and the “financial demise of the coal industry” as a rationale for why OSMRE should maintain appropriate regulations to safeguard and protect the environment from “careless mining endeavors.”

*Response:* OSMRE agrees that it should maintain appropriate regulations to safeguard the environment and asserts that this final rule and the other Federal regulations accomplish that goal. Fundamentally, this final rule will enhance OSMRE's and the State regulatory authorities' ability to adequately administer and enforce SMCRA. To clarify, EIA estimates that U.S. coal consumption will decrease by 26 percent in 2020 and increase by 20 percent in 2021. Further, EIA estimates that coal production in 2020 will decrease by 29 percent from 2019 levels. *See* U.S. Energy Information Administration, “Short-Term Energy Outlook,” *available at* <https://www.eia.gov/outlooks/steo/> (last accessed August 10, 2020). OSMRE's obligations under SMCRA are informed by its purposes outlined at 30 U.S.C. 1202. SMCRA's purposes are not dependent upon the amount of coal consumption or production. Regardless of the amount of consumption or production of coal, OSMRE's oversight and enforcement responsibilities remain the same. Therefore, the estimated annual variance in coal production does not impact OSMRE's statutory obligations, which include, most relevant to this final rule, “administer[ing] the programs for controlling surface coal mining operations...” and “cooperat[ing] with other Federal agencies and State regulatory authorities to minimize duplication of inspections, enforcement, and administration of [SMCRA].” *See* 30 U.S.C. 1211(c)(1) and (12). This final rule will enhance administration and enforcement of SMCRA and State regulatory programs and

also enhance cooperation between OSMRE and the State regulatory authorities.

Further, the commenter's recognition of decreased coal production, at least in the short term, supports the need for this rulemaking. As coal production decreases, coal mine operators may revise their mine plans or permanently cease operations and either commence final reclamation or, in the event of financial insolvency, forfeit their reclamation bond. In such cases, State regulatory authority workloads may initially increase due to higher volumes of permit revisions, inspection and enforcement activities, bond releases, and potential actions surrounding permit revocation and bond forfeiture. Due to the structure of the SMCRA program, the State regulatory authority will have permitting and inspection obligations on every mine site for a minimum of five to ten years after coal production ceases. Only after final bond release may a permit be terminated and the State regulatory authority relieved of its responsibilities. Federal administration and enforcement grants awarded by OSMRE to State regulatory authorities are based, in part, on the anticipated workload, such as permitting and inspection, that is necessary for State regulatory authorities to administer and enforce their approved State programs under SMCRA. *See* 30 CFR Part 735 and OSMRE's Federal Assistance Manual, Chapter 5-200, The Application Process for a Regulatory Grant. As production decreases, permitting and associated costs may decrease over time; thus, State regulatory authorities may not receive the same level of funding as they do currently. This highlights the need to be more efficient with the resources that are available. This final rule should help to increase efficiency in inspections and enforcement.

*Comment:* Several commenters questioned the authority of Casey Hammond, serving in his capacity as Principal Deputy Assistant Secretary, to issue the proposed rulemaking.

*Response:* Mr. Hammond acted within the authority of the Assistant Secretary for Land and Minerals Management (ASLM) authority that was properly delegated to him when signing the proposed rulemaking. Reorganization Plan No. 3 of 1950 provides that “all functions of all other officers of the Department of the Interior . . .” are “transferred to the Secretary of the Interior. . .” 64 Stat. 1262 at § 1. The Secretary may then “make such provisions as he shall deem appropriate authorizing the performance by any other officer, or by any agency or employee, of the Department of the Interior of any function of the Secretary, including any function transferred to the Secretary by the provisions of this reorganization plan.” *Id.* at § 2. Indeed, Congress codified and affirmed the Secretary’s ability to transfer “all” functions to “any” officer or employee of the Department in 1984 via Public Law No. 98-532.

SMCRA authorizes the Secretary to promulgate rules and regulations necessary to carry out the Act. See 30 U.S.C. 1211(c)(2). The Secretary has delegated this responsibility to the ASLM. 209 Departmental Manual (DM) 7.1.A. The Secretary delegated “all functions, duties, and responsibilities” of the ASLM to Mr. Hammond via Secretary’s Order 3345 Amendment No. 32 on May 5, 2020, two weeks before he signed the proposed rulemaking. This delegation of authority excludes functions and duties that are required by statute or regulation to be performed only by the ASLM. The signing of the proposed rulemaking is not such an exclusive function or duty. Although the Secretary and OSMRE Director also have such authority (216 DM 1.1.B), that does not divest the ASLM from his properly delegated authority. 200 DM 1.9. Therefore, Mr. Hammond properly exercised the delegated authority of the Secretary in signing this proposed rulemaking. Mr. Hammond continues to exercise the delegable, non-exclusive functions, duties, and responsibilities of the ASLM pursuant to a Succession Order signed by the Secretary (latest version signed June 3, 2020).

*Comment:* One citizens' group representing many national citizen organizations and "thousands of individuals" across the country contends that the proposed rule required an Environmental Impact Statement (EIS) or Environmental Assessment (EA) to comply with the National Environmental Policy Act (NEPA). 42 U.S.C. 4321 *et seq.* In support of this assertion, the citizens' group states that the proposed rule would result in unabated violations due to an alleged delay in TDN issuance.

*Response:* We disagree with the premise of this comment. This final rule is designed to allow a State regulatory authority and OSMRE the ability to more efficiently address alleged violations at surface coal mining operations. As stated in the proposed rule, the final rule will allow a State regulatory authority to investigate an alleged violation before needing to divert resources away to respond to a TDN. 85 FR at 28907. As a result, any violations should be abated more quickly and more efficiently than under the existing rules.

Moreover, as discussed further in "Procedural Determinations" below, OSMRE has re-evaluated its compliance with NEPA after reviewing the comments received on the proposed rule. OSMRE still finds that this rulemaking falls within the Department's categorical exclusion at 43 CFR 46.210(i) because the clarifications of 30 CFR Part 842 and enhancement of 30 CFR Part 733 are of an administrative and procedural nature. Fundamentally, this final rule clarifies aspects of the procedures that OSMRE uses to evaluate citizen complaints to determine if it should issue a TDN and adds procedures for State regulatory authorities to take corrective action of State regulatory program issues. However, as explained above in response to other comments, none of these clarifications or enhancements materially alters OSMRE's enforcement of SMCRA in primacy states. Therefore, this rulemaking falls within this

categorical exclusion. In addition, no extraordinary circumstances exist that would prevent OSMRE from using the categorical exclusion. 43 CFR 46.215.

It is true that the last time OSMRE proposed to substantively revise the TDN regulations, it did not use a categorical exclusion but instead prepared an environmental assessment. *See* 1987 Environmental Assessment entitled, *U.S. Department of the Interior, Office of Surface Mining Reclamation and Enforcement, Environmental Assessment for Amending Rules in 30 CFR 842.11 and 843.12 on Evaluation of State Responses to Ten-Day-Notices*. Similar to OSMRE's final rule today, the 1988 final rule was aimed at improving cooperative federalism. Specifically, in the 1987 environmental assessment, OSMRE found, "[t]o the extent that the revised procedures foster a better working relationship between OSMRE and the States in implementing SMCRA, the environmental consequences of the proposed action should be positive." Moreover, in the 1987 environmental assessment, OSMRE concluded that no significant environmental impacts were associated with the action. *Id.* This past analysis supports OSMRE's determination that no extraordinary circumstances apply that would preclude OSMRE's use of an applicable categorical exclusion. It also is consistent with the Department's goals of streamlining its NEPA reviews. *See, e.g.,* Secretarial Order No. 3355 (Aug. 31, 2017); *see also* Council for Environmental Quality, Memorandum, Establishing, Applying, and Revising Categorical Exclusions under the National Environmental Policy Act (Nov. 23, 2010), at 2-3 ("[C]ategorical exclusions provide an efficient tool to complete the NEPA environmental review process for proposals that normally do not require more resource-intensive EAs or EISs. The use of categorical exclusions can reduce paperwork and delay, so that EAs or EISs are targeted toward proposed actions that truly have the potential to

cause significant environmental effects.”).

## **V. Discussion of the Final Rule and Section-by-Section Analysis**

This part of the preamble provides a section-by-section analysis of the regulations promulgated in this final rule.

### **PART 733—EARLY IDENTIFICATION OF CORRECTIVE ACTION, MAINTENANCE OF STATE PROGRAMS, PROCEDURES FOR SUBSTITUTING FEDERAL ENFORCEMENT OF STATE PROGRAMS, AND WITHDRAWING APPROVAL OF STATE PROGRAMS**

OSMRE proposed to revise the title for this Part and to redesignate certain sections of the existing Part to accommodate the addition of a definitional section at 30 CFR 733.5 and OSMRE’s proposed enhancement to the 30 CFR Part 733 process—a new proposed section 733.12, entitled, “Early identification and corrective action to address State regulatory program issues.”

The existing regulations at 30 CFR Part 733 establish requirements for the maintenance of State programs and the procedures for substituting Federal enforcement of State programs and withdrawing approval of State programs. Citing OSMRE’s 40-plus years of implementing and overseeing SMCRA and State regulatory programs, OSMRE proposed to add an enhancement to this Part—the codification of an existing OSMRE internal policy aimed at early identification of and corrective action to address State regulatory program issues. When formulating the proposed rule, OSMRE reasoned that if issues remain unaddressed, these issues may result in a State regulatory authority’s ineffective implementation, administration, enforcement, or maintenance of its State regulatory program. To prevent this from occurring and to encourage a more complete and more efficient implementation of SMCRA, OSMRE proposed to enhance existing 30 CFR Part 733 by adding section 733.5 that would define the terms “action plan” and “State

regulatory program issue.” Additionally, OSMRE proposed to redesignate existing section 733.12 as section 733.13, redesignate existing section 733.13 as section 733.14, and add a new section 733.12 to address how early identification of and corrective action for State regulatory program issues can be achieved. Further, in the sections proposed to be added or revised throughout 30 CFR Part 733, OSMRE proposed to add the term “regulatory” between the terms “State” and “program” for consistency purposes. As discussed in the specific sections below, all of these changes are not substantive and are made for the purpose of clarity to differentiate between a regulatory program administered by OSMRE and a State regulatory program that is administered by a State that has achieved primacy after approval by OSMRE.

As discussed above in response to specific comments, OSMRE considers the enhancements to the existing regulations at 30 CFR Part 733 to be beneficial for early identification, evaluation, and resolution of potential issues that may impact a State regulatory authority’s ability to effectively implement, administer, enforce, or maintain its State regulatory program. Further, OSMRE finds that these mechanisms should avoid unnecessary substitution of Federal enforcement or withdrawal of State regulatory programs and minimize the number of on-the-ground impacts. Therefore, OSMRE is adopting, with minor modifications, based upon comments received from the public and further OSMRE analysis, the proposal to enhance 30 CFR Part 733.

*Final Rule § 733.5 Definitions.*

OSMRE proposed to add a definition section to 30 CFR Part 733 that would define the terms “action plan” and “State regulatory program issue.” In short, under the proposed definition, the term “action plan” would mean “a detailed schedule OSMRE prepares to identify specific requirements a regulatory authority must achieve in a timely manner to resolve State regulatory

program issues identified during oversight of State regulatory programs.” OSMRE proposed to define the term “State regulatory program issue” to mean:

an issue OSMRE identifies during oversight of a State or Tribal regulatory program that could result in a State regulatory authority not effectively implementing, administering, enforcing, or maintaining all or any portion of its State regulatory program, including instances when a State regulatory authority has not adopted and implemented program amendments that are required under 30 CFR 732.17 and 30 CFR Subchapter T, and issues related to the requirement in section 510(b) of the Act that a State regulatory authority must not approve a permit or revision to a permit unless the State regulatory authority finds that the application is accurate and complete and that the application is in compliance with all requirements of the Act and the State regulatory program.

As discussed above in OSMRE’s responses to public comments, OSMRE received many comments on the enhanced 30 CFR Part 733 process in general, including comments on the proposed definitions. As OSMRE explained in response to specific comments, the proposed definitions are appropriate and it is adopting 30 CFR 733.5 as proposed, with one minor exception. In the definition of “action plan,” OSMRE is inserting the word “State” between “a” and “regulatory authority” to be consistent with the remainder of the Part and to differentiate between situations when OSMRE is the regulatory authority. Thus, the final definition will read, “[*a*]ction plan means a detailed schedule OSMRE prepares to identify specific requirements a State regulatory authority must achieve in a timely manner to resolve State regulatory program issues identified during oversight of State regulatory programs.”

OSMRE most frequently identifies issues that it will now classify as State regulatory program issues during oversight of a State regulatory program, but OSMRE may also be alerted to a State regulatory program issue from a citizen complaint or a request for a Federal inspection. State regulatory program issues are those that may result in a State regulatory authority not adhering to its approved State regulatory program. Other examples of a State regulatory program

issue include when a State regulatory authority does not adopt and implement program amendments that are required under 30 CFR 732.17 and 30 CFR Subchapter T. The proposed definition of State regulatory program issue, which OSMRE is finalizing in this rule, includes issues related to the requirement in SMCRA section 510(b), 30 U.S.C. 1260(b), that a State regulatory authority must not approve a permit or permit revision, unless the State regulatory authority finds that the application is accurate and complete and is in compliance with all of SMCRA's requirements and those of the State regulatory program.

To provide greater context in which the term "State regulatory program issue" is used, the next two paragraphs will describe how the State regulatory program issues covered by 30 CFR Part 733 sometimes overlap with the TDN and Federal inspection process provided for in 30 CFR Part 842. As discussed below in relation to finalized 30 CFR Part 842, the TDN and Federal inspection process in section 521(a) of SMCRA and the State regulatory program enforcement provisions in section 521(b) of SMCRA, along with the existing implementing regulations, differentiate between issues related to a State regulatory authority's failure to implement, administer, maintain, and enforce all or a part of a State regulatory program and possible violations that could lead to a TDN or Federal inspection. Most notably, the State regulatory program enforcement provisions of section 521(b) of SMCRA generally address systemic programmatic problems with a State regulatory program, not specific violations exclusive to an individual operation or permit as detailed in section 521(a) of SMCRA. However, citizens sometimes identify State regulatory program issues in citizen complaints under section 521(a) of SMCRA and 30 CFR Part 842 that may result in a TDN. OSMRE may also become aware of a State regulatory program issue while overseeing enforcement of specific operations or permits.

SMCRA and the existing regulations provide a remedy for systemic programmatic issues at 30 CFR Part 733 by identifying procedures for substituting Federal enforcement of State regulatory programs or withdrawing approval of State regulatory programs. The proposed addition of early identification and corrective action plans to address State regulatory program issues that OSMRE is adopting under this final rule will enhance OSMRE's ability to ensure prompt resolution of issues, which, if unattended, may result in OSMRE exercising the rare remedy of substituting Federal enforcement or withdrawing a State program. The definition of "action plan," as finalized in section 733.5, will dovetail in practice with the concept of "appropriate action" found in section 842.11(b)(1)(ii)(B)(3), in that a State regulatory authority's action plan may qualify as appropriate action in response to a TDN under that finalized section 842.11(b)(1)(ii)(B)(3). In addition, the definition of "State regulatory program issue," as finalized in section 733.5, helps to further clarify the differences between the types of violations or issues that will be addressed under the TDN and Federal inspection process in section 521(a) and the State regulatory program enforcement provisions in section 521(b) of SMCRA, respectively.

*Final Rule § 733.10 Information collection.*

OSMRE is adopting this section as proposed. As discussed more fully in the Procedural Determinations below, no additional burden is placed on the public as a result of the enhancements to 30 CFR Part 733. Moreover, no public comments were received on this section.

*Final Rule § 733.12 Early identification and corrective action to address State regulatory program issues.*

OSMRE proposed to redesignate certain sections of existing 30 CFR Part 733 to accommodate both the proposed new definition section at 30 CFR 733.5, discussed above, and the enhancement to 30 CFR Part 733, proposed to be added as section 733.12

entitled, “Early identification and corrective action to address State regulatory program issues.” This redesignation is being adopted as proposed because both sections—*Definitions* and *Early identification and corrective action to address State regulatory program issues*—are being finalized.

Final section 733.12 contains substantive mechanisms and compliance strategies that OSMRE may use to resolve a State regulatory program issue (as defined in finalized 30 CFR 733.5). Although OSMRE and State regulatory authorities have historically worked closely and used similar approaches, incorporating these approaches into the regulations provides a clear mechanism for early identification and resolution of issues that will enable OSMRE to achieve regulatory certainty and uniform implementation of the procedures among State regulatory authorities. This addition to the regulations includes procedures for developing an action plan so that OSMRE can ensure that State regulatory program issues are timely resolved. When OSMRE identifies a State regulatory program issue, final section 733.12(a) provides that the OSMRE Director should take action to make sure that the issue is corrected as soon as possible in order to ensure that it does not escalate into an issue that would give the Director reason to believe that the State regulatory authority is not effectively implementing, administering, enforcing, or maintaining all or a portion of its State regulatory program. The unresolved issue could otherwise trigger the process that might lead to substituting Federal enforcement of a State regulatory program or withdrawing approval of a State regulatory program as provided in 30 CFR Part 733.

OSMRE is finalizing subsection 733.12(a)(1) as proposed with one minor modification. As proposed, this paragraph provided that “[t]he Director may become

aware of State regulatory program issues through oversight of State regulatory programs or as a result of information received from any person.” In response to public comments, discussed in more detail above, OSMRE has substituted “any source” for the proposed language “any person.” OSMRE agrees with the commenter that this terminology is more expansive and inclusive and will likely result in OSMRE considering any information, no matter the source, about an alleged State regulatory program issue.

In general, final section 733.12(b) allows the OSMRE Director, or his or her delegate, as set forth in OSMRE’s guidance, to “employ any number of compliance strategies to ensure that the State regulatory authority corrects a State regulatory program issue in a timely and effective manner.” This finalized language reflects a minor, grammatical change from the proposed rule. OSMRE has added “a” before “State regulatory program” and removed the “s” from “issues” to clarify the meaning of the sentence and place the sentence in the singular tense.

OSMRE has made another change to final section 733.12(b). This change is in the second sentence that, as proposed, read: “However, if the Director or delegate does not expect that the State regulatory authority will resolve the State regulatory program issue within 180 days after identification or that it is likely to result in an on-the-ground violation, then the Director or delegate will develop and institute an action plan.” In the final rule, OSMRE has modified the second sentence to read: “However, if the Director or delegate does not expect that the State regulatory authority will resolve the State regulatory program issue within 180 days after identification or that it is likely to result in a *violation of the approved State program*, then the Director or delegate will develop and institute an action plan.” (Emphasis added to show the revised language). OSMRE has

adopted this final language due to the variety of comments, discussed above, raising concerns about OSMRE's differentiation between violations outlined in 30 U.S.C. 1271(a)—subject to the 30 CFR Part 842 TDN process—and violations outlined in 30 U.S.C. 1271(b)—subject to 30 CFR Part 733. Specifically, many commenters raised questions about how OSMRE would treat what the commenters characterized as “permit defects,” which might be informally viewed, as mentioned above, as a deficiency in a permit-related action taken by a State regulatory authority or problems in a permit that do not align with the approved State regulatory program. However, OSMRE is not defining the term “permit defects” in this preamble or in the final rule and it is not defined in SMCRA, OSMRE regulations, or current internal OSMRE policies and should not be viewed as a distinct form of violation. To avoid confusion and the possibility of creating further ambiguity by introducing the new term “on-the-ground violation” into OSMRE regulations, OSMRE is removing this proposed phrase. The term “on-the-ground violation” is also not defined in SMCRA, OSMRE regulations, or OSMRE internal documents and OSMRE declines to define this term as it may be misconstrued as a distinct type of violation. Therefore, OSMRE has decided, in response to comments, that it is best to substitute the phrase “violation of the approved State program” for the proposed phrase “on-the-ground violation.” The finalized phrase comports with the existing and finalized regulations at 30 CFR Part 842 and bridges the gap between violations identified during the 30 U.S.C. 1271(a) TDN process that may actually be systemic in nature (and thus addressed in the 30 CFR 733 State regulatory program issue process as finalized and authorized by 30 U.S.C. 1271(b)), but later results in a site-specific violation of an approved State program. OSMRE acknowledges that a site-

specific violation of an approved State program often manifests as an on-the-ground impact. However, these violations may also manifest in other ways, such as a permittee's failure to submit required design plans, monitoring reports, or annual certifications. OSMRE offers these as examples and not as an exhaustive list of potential violations of the approved State program that may result in OSMRE exercising site-specific enforcement under 30 U.S.C. 1271(a), rather than continuing to address them as State regulatory program issues under 30 U.S.C. 1271(b).

As proposed, subsections 733.12(b)(1)-(3) provided details about requirements of action plans. OSMRE is substantively adopting the proposed requirements for an action plan. Specifically, OSMRE will prepare a written action plan with "specificity to identify the State regulatory program issue and an effective mechanism for timely correction." When OSMRE is preparing the action plan, OSMRE will consider any input it receives from the State regulatory authority. When selecting corrective measures to integrate into the action plan, OSMRE may consider any established or innovative solutions, including the compliance strategies referenced above. Additionally, finalized section 733.12(b)(2), states that an action plan will identify any necessary technical or other assistance that the Director or his or her delegate can provide and remedial measures that a State regulatory authority must take immediately. Moreover, final subsection 733.12(b)(3), describes the contents of an action plan. To ensure that OSMRE can adequately track action plans and that the underlying State regulatory program issue is resolved, each action plan, under the proposed rule, was to include: "An action plan identification number"; "A concise title and description of the State regulatory program issue"; "Explicit criteria for establishing when complete resolution will be achieved"; "Explicit and orderly sequence of actions

the State regulatory authority must take to remedy the problem”; “A schedule for completion of each action in the sequence”; and “A clear explanation that if the action plan, upon completion, does not result in correction of the State regulatory program issue, the provisions of 30 CFR 733.13 may be triggered.” The only modification OSMRE is making to final paragraphs 30 CFR 733.12(b)(1)-(3) is to add the preposition “an” before “action plan” and remove the plural tense of action plan at the beginning of paragraphs (b)(1)-(3) to be grammatically correct and reflect the singular tense.

OSMRE has made modifications to final section 733.12(c) in response to a request by a NGO commenter to affirmatively state that OSMRE will track all identified State regulatory program issues and any associated action plans. Although it was OSMRE’s intention to track and report both, OSMRE did not specifically state in the proposed rule that any action plan associated with identified a State regulatory program issue would be tracked and reported in the applicable State regulatory authority’s Annual Evaluation report. OSMRE has removed this ambiguity by stating in the final rule that “any associated action plan” must also be tracked and reported in addition to the State regulatory program issues. Also, in response to the NGO commenter’s request, OSMRE is including a requirement that the “State regulatory authority Annual Evaluation reports will be accessible thorough OSMRE’s website and at the applicable OSMRE office.” OSMRE agrees with the commenter that this modification to the proposed rule promotes transparency and accountability.

OSMRE is adopting section 733.12(d) as proposed with one modification to comport with the change discussed above in relationship to final subsection 733.12(b). Specifically, final section 733.12(d) states that nothing in section 733.12 “prevents a

State regulatory authority from taking direct enforcement action in accordance with its State regulatory program, or OSMRE from taking appropriate oversight enforcement action, in the event that a previously identified State regulatory program issue results in or may imminently result in a violation of the approved State program.” OSMRE relies on the same rationale described above for the removal of the term “on-the-ground violation” and the substitution of the phrase, “a violation of the approved State program.” In the context of finalized section 733.12(d), determining whether a violation is imminent depends on the circumstances, and OSMRE will rely on the authorized representative to use his or her professional judgment to determine whether a violation of the approved State program is imminent in a given situation.

In sum, finalized 30 CFR Part 733 will ensure a more complete enforcement of SMCRA and provide guidance on early detection of potential problems that may, if left unaddressed, escalate to the point that OSMRE considers instituting the process that might result in OSMRE substituting Federal enforcement or withdrawing all or a portion a State program as outlined in finalized 30 CFR 733.13 through 733.14 while preserving (through 30 CFR 733.12(d)) the ability to take direct enforcement action in the event that a previously identified State regulatory program issue results in or may imminently result in a violation of the approved State program.

*Final Rule Part 736 Federal Program For A State*

OSMRE is updating the cross-reference in finalized section 736.11(a)(2) as proposed to account for the redesignation of existing “§ 733.12” to finalized “§ 733.13.”

*Final Rule § 842.11(b)(1)*

In the proposed rule, OSMRE explained that existing 30 CFR 842.11(b)(1) describes the circumstances when OSMRE “shall” conduct a Federal inspection, but the

paragraph primarily focuses on the process leading up to a Federal inspection, including the process for OSMRE's issuance of a TDN to a State regulatory authority. In general, consistent with section 521(a) of SMCRA, when there is no imminent harm situation and OSMRE issues a TDN to a State regulatory authority, OSMRE evaluates the State regulatory authority's response to the TDN before deciding whether to conduct a Federal inspection. Consistent with the existing regulations, and the regulations finalized today, OSMRE will issue a TDN to a State regulatory authority only when an authorized representative of OSMRE has reason to believe that there is a violation of SMCRA, the implementing regulations, the applicable State regulatory program, or any condition of a permit or an exploration approval. In general, OSMRE will also conduct a Federal inspection whenever there is any condition, practice, or violation that creates an imminent danger to the health or safety of the public or is causing, or that OSMRE reasonably expects to cause, a significant, imminent, environmental harm to land, air, or water resources. In the latter situation, OSMRE bypasses the TDN process and proceeds directly to a Federal inspection, if the person supplying the information provides adequate proof that there is an imminent danger to the public health and safety or a significant, imminent environmental harm and that the State regulatory authority has failed to take appropriate action.

OSMRE proposed to alter the introductory sentence at existing 30 CFR 842.11(b)(1), by replacing the word "shall" with the word "will." However, after consideration of public comments, discussed in more detail above, and based on OSMRE's own expertise and analysis, OSMRE has determined that the word "must" is more appropriate because it explains an action that OSMRE is obligated to institute as

prescribed by SMCRA under the circumstances described in 30 CFR 842.11(b)(1).

Therefore, the final rule substitutes the word “must” for “will” to better communicate the mandatory nature of the authorized representative’s action.

*Final Rule § 842.11(b)(1)(i)*

In the proposed rule, OSMRE also proposed to clarify that when an authorized representative assesses whether he or she has reason to believe a violation exists, the authorized representative will make that determination on the basis of “any information readily available to him or her.” This clarification is consistent with section 521(a)(1) of SMCRA, which sets forth that OSMRE can formulate reason to believe “on the basis of any information available to [the Secretary], including receipt of information from any person.” 30 U.S.C. 1271(a)(1). Based on SMCRA’s plain language, such information is not restricted to information OSMRE receives from a citizen complainant. Rather, the information includes any information OSMRE receives from a citizen, the applicable State regulatory authority, or any other information OSMRE is aware exists. Also, the final rule and the preamble discussion above that is associated with this section clarifies that such information must be readily available, so that the process will proceed as quickly as possible and will not become open-ended. OSMRE is adopting this section as proposed, with one exception. In response to several comments, discussed in more detail above, OSMRE is further clarifying this section by adding to the final rule the phrase, “from any source, including any information a citizen complainant or the relevant State regulatory authority submits, ...” This addition to the final rule now makes section 842.11(b)(1)(i) harmonize with final rule section 842.11(b)(2) that now includes the same phraseology.

*Final Rule § 842.11(b)(1)(ii)(A)*

Existing 30 CFR 842.11(b)(1)(ii)(A) reads as follows: “There is no State regulatory authority or the Office is enforcing the State program under section 504(b) or 521(b) of the Act and part 733 of this chapter[.]” OSMRE proposed only minor grammatical and conformity changes to this section. Specifically, OSMRE proposed to add the word “regulatory” between the words “State” and “program” to promote consistency throughout this rulemaking and clarify that OSMRE is referring to State regulatory programs. OSMRE has finalized this section as proposed.

*Final Rule § 842.11(b)(1)(ii)(B)(1)-(4)*

OSMRE proposed non-substantive changes to existing 30 CFR 842.11(b)(1)(ii)(B)(1) for readability, including capitalizing “State” when referring to the “State regulatory authority” and adding a comma after “notification”, and changing the word “shall” to “will”. These changes have been adopted as proposed. OSMRE did not propose any modification to the existing regulation at 30 CFR 842.11(b)(1)(ii)(B)(2), but the provision is discussed above to provide context related to the proposed clarifications in 30 CFR 842.11(b)(1)(ii)(B)(3), which describes the term “appropriate action,” and 30 CFR 842.11(b)(1)(ii)(B)(4), which describes the term “good cause.” Likewise, OSMRE is not altering section 842.11(b)(1)(ii)(B)(1).

*Final Rule § 842.11(b)(1)(ii)(B)(3)*

OSMRE proposed to add a provision to existing 30 CFR 842.11(b)(1)(ii)(B)(3), that appropriate action “may include OSMRE and the State regulatory authority immediately and jointly initiating steps to implement corrective action to resolve any issue that the authorized representative and applicable Field Office Director identify as a

State regulatory program issue, as defined in 30 CFR part 733.” OSMRE is finalizing this subsection as proposed. The final rule gives the responsibility for identification of State regulatory program issues to the authorized representative and applicable Field Office Director, as these officials possess significant knowledge of the specific requirements of and responsibilities under the applicable State regulatory program. Although OSMRE has historically allowed programmatic resolution of State regulatory program issues, such as implementation of remedies under 30 CFR Part 732, to constitute “appropriate action” in a given situation, the regulations prior to this addition did not explain resolution of State regulatory program issues through corrective actions. In order to avoid confusion or uncertainty for the regulated community, State regulatory authorities, and the public at large, the finalized rule seeks to remove ambiguity and definitively states that “appropriate action” may include corrective action to resolve State regulatory program issues. This fits well with the finalized Part 733 because final section 733.12(a)(2) reaffirms that, if OSMRE concludes that the State regulatory authority is not effectively implementing, administering, enforcing, or maintaining all or a portion of its State regulatory program, OSMRE may substitute Federal enforcement of the State regulatory program or withdraw approval. Additionally, in accordance with finalized section 733.12(d), OSMRE reserves the right to reinstitute enforcement if, subsequent to a finding of appropriate action based upon a corrective action consistent with proposed 30 CFR Part 733, a violation of the approved State program occurs or may imminently occur.

*Final Rule § 842.11(b)(1)(ii)(B)(4)*

OSMRE is adopting this subsection as proposed. Specifically, the final rule makes

minor clarifications to the examples of what constitutes good cause as found in the existing regulations. First, final section 842.11(b)(1)(ii)(B)(4)(i) makes non-substantive changes for readability and consistency by adding the word “regulatory” between “State” and “program” and switching the position of two phrases in the provision. Second, the final rule revises section 842.11(b)(1)(ii)(B)(4)(ii) to provide that good cause includes: “The State regulatory authority has initiated an investigation into a possible violation and as a result has determined that it requires a reasonable, specified additional amount of time to determine whether a violation exists.” The final rule explains that an OSMRE authorized representative has discretion to determine how long the State regulatory authority should reasonably be given to complete its investigation of a possible violation. Also, under the final rule the authorized representative will communicate to the State regulatory authority the date by which the State regulatory authority’s investigation must be completed. This revision promotes prompt identification and resolution of possible violations.

As proposed, the final rule makes a minor revision to section 842.11(b)(1)(ii)(B)(4)(iii). A State regulatory authority will demonstrate that it lacks jurisdiction over the possible violation to qualify for this good cause showing.

Similarly, as proposed, the final rule makes a minor, non-substantive modifications to section 842.11(b)(1)(ii)(B)(4)(iv) for readability and to clarify that, in order to show good cause, the State regulatory authority will demonstrate that an order from an administrative review body or court of competent jurisdiction precludes it from taking action on the possible violation.

Finally, as proposed, the final rule makes minor, non-substantive modifications to

section 841.11(b)(1)(ii)(B)(4)(v) to enhance readability and clarity. Specifically, the final rule reads: “Regarding abandoned sites, as defined in 30 CFR 840.11(g), the State regulatory authority is diligently pursuing or has exhausted all appropriate enforcement provisions of the State regulatory program.”

*Final Rule § 842.11(b)(2)*

Section 842.11(b)(2) defines what is “reason to believe” when an authorized representative is determining if a possible violation exists as presented by a citizen complainant.

Because there was ambiguity surrounding this term, OSMRE proposed to revise this section to read:

An authorized representative will have reason to believe that a violation, condition, or practice referred to in paragraph (b)(1)(i) of this section exists if the facts that a complainant alleges, or facts that are otherwise known to the authorized representative, constitute simple and effective documentation of the alleged violation, condition, or practice. In making this determination, the authorized representative will consider any information readily available to him or her, including any information a citizen complainant or the relevant regulatory authority submits to the authorized representative.

As discussed in great detail in response to comments above, OSMRE is adopting this section as proposed, with one exception. Consistent with this approach, the final rule modifies section 842.11(b)(2) to clarify that OSMRE will consider any information readily available and not only the facts alleged in a citizen complaint when determining whether it has reason to believe a violation exists. Nothing in SMCRA requires OSMRE to accept alleged facts as true in a vacuum. Rather, information that a citizen provides is usually only a portion of the readily available information that OSMRE would consider when deciding whether to initiate the TDN process. Moreover, the inclusion of the phrase

“reason to believe” in section 521(a)(1) of SMCRA indicates that Congress intended for OSMRE to use discretion in determining whether to issue a TDN to a State regulatory authority. With the changes finalized today, after OSMRE receives an allegation of a violation and assess all readily available information, OSMRE will apply independent, professional judgment to determine whether OSMRE has reason to believe a violation exists. Congress created OSMRE to be the expert agency that administers SMCRA. Therefore, OSMRE should not be acting as a mere conduit for transmitting a citizen complaint to a State regulatory authority in the form of a TDN.

In response to a few commenters, OSMRE has added the phrase “from any source” in the last sentence of the finalized section. Specifically, the last sentence, will now read, “[i]n making this determination, the authorized representative will consider any information readily available to him or her, *from any source*, including any information a citizen complainant or the relevant regulatory authority submits to the authorized representative” (emphasis added to show the revised language). This change is to clarify that an authorized representative may consider any information readily available, regardless of where the information originates.

In summary, final section 842.11(b)(2) comports with finalized section 842.11(b)(1)(i), which allows OSMRE to consider “any information readily available” when making a “reason to believe” determination. Being able to read these two provisions in harmony should reduce or eliminate any conflict or confusion that the existing provisions created.

*Final § 842.12(a)*

OSMRE is adopting section 842.12(a) as proposed. Specifically, 30 CFR

842.12(a) identifies the process to request a Federal inspection. This finalized provision states that a person may request a Federal inspection by submitting a signed, written statement (or an oral report followed by a signed written statement) giving the authorized representative reason to believe that a violation, condition or practice referred to in § 842.11(b)(1)(i) exists and that the State regulatory authority has been notified in writing about the violation. The final rule includes the minor, non-substantive modifications to the provision as proposed. These provisions provide that when any person requests a Federal inspection, the person's written statement "must also set forth the fact that the person has notified the State regulatory authority, if any, in writing, of the existence of the possible violation, condition, or practice" and the requirement that the person's statement must also include "the basis for the person's assertion that the State regulatory authority has not taken action with respect to the possible violation." These provisions reflect the fact that, most often, a State regulatory authority will address a potential violation when the State regulatory authority is made aware of the situation.

Finalized 30 CFR 842.12(a) complements the clarifications outlined above in the discussion of finalized section 842.11(b)(1)'s "reason to believe" standard. Specifically, the final rule modifies the existing language in section 842.12(a) to clarify that, when a person requests a Federal inspection, the person's request must include, "information that, along with any other readily available information, may give the authorized representative reason to believe that a violation, condition, or practice referred to in § 842.11(b)(1)(i) exists."

OSMRE reiterates that under finalized section 842.12(a), when OSMRE determines whether a violation exists for purposes of issuing a TDN or determining

whether to conduct a Federal inspection, a State regulatory program issue will not qualify as a possible violation unless there is an actual or imminent violation of an approved State program. Similarly, OSMRE will not consider a State regulatory authority's failure to enforce its State regulatory program as a violation that warrants a TDN or Federal inspection. The TDN and Federal inspection process in section 521(a) applies to oversight enforcement about site-specific violations. Congress differentiated this type of individual operation oversight from the State regulatory program enforcement provisions of section 521(b). Based on this distinction, the existing 30 CFR Part 733 addresses State regulatory program issue enforcement identified in section 521(b).

## **VI. Procedural Determinations**

### **A. Statutes**

#### **1. Congressional Review Act**

Pursuant to the Congressional Review Act, 5 U.S.C. 801 *et seq.*, the Office of Information and Regulatory Affairs (OIRA) of the Office of Management and Budget (OMB) has determined that this rulemaking is not major rulemaking, as defined by 5 U.S.C. 804(2), because this rulemaking has not resulted in, and is unlikely to result in: 1) an annual effect on the economy of \$100,000,000 or more; 2) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government, or geographic regions; or 3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.

#### **2. Data Quality Act**

In developing this rule, OSMRE did not conduct or use a study, experiment, or survey

requiring peer review under the Data Quality Act (Pub. L. 106-544, app. C, sec. 515, 114 Stat. 2763, 2763A-153-154).

### **3. National Environmental Policy Act**

OSMRE has determined that the non-substantive changes finalized in this rulemaking are categorically excluded from environmental review under NEPA. 42 U.S.C. 4321 *et seq.* Specifically, OSMRE has determined that the final rule is administrative or procedural in nature in accordance with the Department of the Interior's NEPA regulations at 43 CFR 46.210(i). The regulation provides a categorical exclusion for, “[p]olicies, directives, regulations, and guidelines: that are of an administrative, financial, legal, technical, or procedural nature; or whose environmental effects are too broad, speculative, or conjectural to lend themselves to meaningful analysis... .” The final rule primarily clarifies how OSMRE formulates reason to believe in the TDN context and the information OSMRE considers in this analysis. It also enhances a process, the development of an action plan, that already exists in an internal agency document so that OSMRE can better ensure that a State regulatory authority adequately implements, administers, enforces, and maintains its approved State program. As such, the final rule merely clarifies and enhances OSMRE's existing processes. Therefore, OSMRE deems these changes to be administrative and procedural in nature. These clarifications and enhancements are aimed at improving efficiency and enhanced collaboration among State regulatory authorities and OSMRE. OSMRE has also determined that the final rule does not involve any of the extraordinary circumstances listed in 43 CFR 46.215 that would require further analysis under NEPA.

### **4. National Technology Transfer and Advancement Act**

Section 12(d) of the National Technology Transfer and Advancement Act (NTTAA) (15

U.S.C. 3701 note *et seq.*) directs Federal agencies to use voluntary consensus standards when implementing regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. This final rule is not subject to the requirements of section 12(d) of the NTTAA because application of those requirements would be inconsistent with SMCRA, and the requirements would not be applicable to this final rulemaking.

## **5. Paperwork Reduction Act**

The Paperwork Reduction Act (PRA) (44 U.S.C. 3501-3521) provides that an agency may not conduct or sponsor, and a person is not required to respond to, a “collection of information”, unless the collection of information is approved by OMB, and it displays a currently valid OMB control number. Of the existing regulations impacted by the final rule (30 CFR Parts 733, 736, and 842), 30 CFR Parts 733 and 842 have existing OMB control numbers. However, after research and input from State regulatory authorities, no additional burden is imposed by the enhancement of 30 CFR Part 733—specifically the codification of 30 CFR 733.12—Early identification of corrective action and corrective action to address State regulatory program issues. Additionally, as explained herein the only modification of 30 CFR Part 736 is to revise a cross-reference to be consistent with the redesignation of provisions within 30 CFR Part 733. Existing 30 CFR Part 842 requires an OMB information collection because it allows citizens to submit a written request for a Federal inspection using an OMB-approved form. *See* OMB No. 1029-0118 available on OSMRE’s website.

<https://www.osmre.gov/resources/forms/OMB1029-0118.pdf>. This final rule will not alter the PRA obligations under 30 CFR Part 842. Similar to the research performed by OSMRE in relationship to 30 CFR Part 733 as finalized, OSMRE has discovered that the clarification of 30 CFR Part 842 will not place any additional burden on the public, including, “individuals,

businesses, and State, local, and Tribal governments” as defined in the PRA. In fact, under this final rule, the burden will be reduced. Therefore, this final rule will not impose an additional collection of information burden, as defined by 44 U.S.C. 3502, upon any entity defined in the PRA. Moreover, no public comments were received on this matter.

#### **6. Regulatory Flexibility Act**

The Regulatory Flexibility Act generally requires Federal agencies to prepare a regulatory flexibility analysis for rules that are subject to the notice-and-comment rulemaking requirements under the Administrative Procedure Act (5 U.S.C. 553), if the rule would have a significant economic impact on a substantial number of small entities. *See* 5 U.S.C. 601-612. Based on OSMRE’s collaboration with State regulatory authorities and years of experience, OSMRE certifies that this final rule will 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.*).

#### **7. Small Business Regulatory Enforcement Fairness Act**

This final rule is not a major rule under the Small Business Regulatory Enforcement Fairness Act. 5 U.S.C. 804(2). Specifically, the final rule: 1) will not have an annual effect on the economy of \$100 million or more; 2) will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; and 3) will not have significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United-States based enterprises to compete with foreign-based enterprises in domestic and export markets.

#### **8. Unfunded Mandates Reform Act**

This final rule does not impose an unfunded mandate or have a significant or unique effect on State, local, or Tribal governments, or the private sector, that will result in the

expenditure of funds by State, local, or Tribal governments, in the aggregate, or by the private sector of \$100 million or more in any one year. To the contrary, as discussed herein, this final rule is aimed at eliminating duplication of resources and processes between Federal and State agencies and enhancing cooperation between OSMRE and State regulatory authorities. Therefore, a statement containing the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1531 *et seq.*) is not required.

## **B. Executive Orders**

### **1. Executive Order 12630—Governmental Actions and Interference with Constitutionally Protected Property Rights**

This final rule does not effect a taking of private property or otherwise have takings implications under E.O. 12630. The final rule primarily concerns Federal oversight of State regulatory programs and enforcement when permittees and operators are not complying with the law. Therefore, the final rule will not result in private property being taken for public use without just compensation. A takings implication assessment is not required.

### **2. Executive Order 12866—Regulatory Planning and Review and Executive Order 13563—Improving Regulation and Regulatory Review**

E.O. 12866 provides that OIRA in the OMB will review all significant rules. Despite being specifically briefed on this rulemaking as proposed and as finalized, both in writing and verbally, OIRA has not deemed this final rule significant because it will not have a \$100 million annual impact on the economy, raise novel legal issues, or create significant impacts. The final rule primarily clarifies and enhances the existing regulations and OSMRE's processes to reduce the burden upon the regulated community and preserve resources by allowing for greater cooperation between OSMRE and State regulatory authorities.

E.O. 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the

nation's regulatory system to promote predictability, reduce uncertainty, and use the best, most innovative, and least burdensome tools for achieving regulatory ends. The Executive Order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. E.O. 13563 emphasizes further that agencies must base regulations on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. This final rule has been developed in a manner consistent with and will further these requirements.

### **3. Executive Order 12988—Civil Justice Reform**

This final rule complies with the requirements of E.O. 12988. Among other things, this rule:

- (a) satisfies the criteria of Section 3(a) requiring that all regulations be reviewed to eliminate drafting errors and ambiguity; be written to minimize litigation; and provide clear legal standards for affected conduct; and
- (b) satisfies the criteria of Section 3(b) requiring that all regulations be written in clear language and contain clear legal standards.

### **4. Executive Order 13045—Protection of Children from Environmental Health Risks and Safety Risks**

E.O. 13045 requires that environmental and related rules separately evaluate the potential impact to children. However, this final rule is not subject to E.O. 13045 because this is not an economically significant regulatory action as defined by E.O. 12866; and this action will not concern environmental health or safety risks disproportionately affecting children.

## **5. Executive Order 13132—Federalism**

Under the criteria in Section 1 of E.O. 13132, this final rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement. While OSMRE's clarification and enhancement of the existing regulations and processes in this final rule will have a direct effect on OSMRE's relationship with the States, this effect is not significant as it neither imposes substantial unreimbursed compliance costs on States nor preempts State law. Furthermore, this final rule does not have a significant effect on the distribution of power and responsibilities among the various levels of government. In fact, the final rule will reduce burdens on State regulatory authorities and more closely align the regulations to SMCRA. Therefore, a federalism summary impact statement is not required.

## **6. Executive Order 13175—Consultation and Coordination with Indian Tribal Governments**

The Department of the Interior strives to strengthen its government-to-government relationship with Tribes through a commitment to consultation with Tribes and recognition of their right to self-governance and tribal sovereignty. OSMRE has evaluated this final rule under the Department's consultation policy and under the criteria in E.O. 13175 and has determined that it will not have substantial direct effects on federally recognized Tribes and that consultation under the Department's tribal consultation policy is not required. Currently, no Tribes have achieved primacy; therefore, OSMRE regulates all surface coal mining and reclamation operations on Indian lands with tribal input and assistance. Currently, OSMRE works in conjunction with the Crow, Hopi, and Navajo regarding enforcement of surface coal mining and reclamation operations. This final rulemaking will not directly impact the Tribes. However, because these three Tribes have expressed interest in perhaps having their own regulatory

programs in the future, OSMRE has coordinated with the Crow, Hopi, and Navajo to inform them of, and to provide updates on the final rulemaking. OSMRE attended quarterly meetings of the Tribes in order to provide an overview of the proposed rule, provide updates on the rulemaking process, and address questions posed by the Tribes.

#### **7. Executive Order 13211 – Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use**

E.O. 13211 requires agencies to prepare a Statement of Energy Effects for a rule that is: (1) considered significant under E.O. 12866, and (2) likely to have a significant adverse effect on the supply, distribution, or use of energy; or is designated as a significant energy action by OMB. Because this final rule is not deemed significant under E.O. 12866 and is not expected to have a significant adverse effect on the supply, distribution, or use of energy, a Statement of Energy Effects is not required.

#### **8. Executive Order 13771—Reducing Regulation and Controlling Regulatory Costs**

E.O. 13771 directs Federal agencies to reduce the regulatory burden on regulatory entities and control regulatory costs. Consistent with E.O. 13771 and the April 5, 2017, Guidance Implementing E.O. 13771, the final rule will have total costs less than zero. Moreover, this final rule operates to reduce the burden on State regulatory authorities by promoting coordination between OSMRE and States, eliminating duplication of processes, and increasing efficiency in resolving State regulatory authority program issues. In addition, this final rule provides compliance clarity to the regulatory community. Therefore, this final rule is a deregulatory action.

#### **9. Executive Order 13783—Promoting Energy Independence and Economic Growth**

Section 2 of E.O. 13783 requires agencies to “review all existing regulations, orders, guidance documents, policies, and any other similar agency actions” with the goal of eliminating provisions that impede domestic energy production. Section 2(a) exempts agency actions “that are mandated by law, necessary for the public interest, and consistent with the policy [to remove unnecessary regulatory burdens on domestic energy production while promoting clean air and water within the constraints of current statutes].” OSMRE, in conjunction with its State regulatory authority partners, has determined that this final rule promotes coordination “with other Federal agencies and State regulatory authorities to minimize duplication of inspections, enforcement, and administration of [SMCRA]” as specified by 30 U.S.C. 1211(c)(12) while also furthering the purposes of SMCRA including, but not limited to, assuring that surface coal mining operations are so conducted as to protect the environment and to strike the appropriate balance “between protection of the environment and agricultural productivity and the Nation’s need for coal as an essential source of energy.” *See* 30 U.S.C. 1202(d) and (f). In sum, OSMRE finds that this final rule satisfies the requirements of E.O. 13783 by appropriately removing unnecessary duplication of Federal and State efforts that impedes efficient oversight and enforcement of SMCRA and that may otherwise divert valuable time and monetary resources and impede or burden domestic energy production.

### **List of Subjects**

#### **30 CFR Part 733**

Intergovernmental relations, Surface mining, Underground mining.

#### **30 CFR Part 736**

Coal mining, Intergovernmental relations, Surface mining, Underground mining.

**30 CFR Part 842**

Law enforcement, Surface mining, Underground mining.



**David L. Bernhardt,**

*Secretary*

*U.S. Department of the Interior*

For the reasons set out in the preamble, the Department of the Interior, acting through OSMRE, amends 30 CFR parts 733, 736 and 842 as follows:

**PART 733—EARLY IDENTIFICATION OF CORRECTIVE ACTION, MAINTENANCE OF STATE PROGRAMS, PROCEDURES FOR SUBSTITUTING FEDERAL ENFORCEMENT OF STATE PROGRAMS, AND WITHDRAWING APPROVAL OF STATE PROGRAMS**

1. The authority citation for part 733 is revised to read as follows:

**Authority:** 30 U.S.C. 1201 *et seq.*

2. The heading of part 733 is revised as set forth above.
3. Add § 733.5 to read as follows:

**§ 733.5 Definitions.**

As used in this part, the following terms have the specified meanings:

*Action plan* means a detailed schedule OSMRE prepares to identify specific requirements a State regulatory authority must achieve in a timely manner to resolve State regulatory program issues identified during oversight of State regulatory programs.

*State regulatory program issue* means an issue OSMRE identifies during oversight of a State or Tribal regulatory program that could result in a State regulatory authority not effectively implementing, administering, enforcing, or maintaining all or any portion of its State regulatory program, including instances when a State regulatory authority has not adopted and implemented program amendments that are required under 30 CFR 732.17 and 30 CFR Subchapter T, and issues related to the requirement in section 510(b) of the Act that a State regulatory authority must not approve a permit or revision to a permit unless the State regulatory authority finds that the application is accurate and complete and that the application is in compliance with all requirements of the Act and the State regulatory program.

4. Revise § 733.10 to read as follows:

**§ 733.10 Information collection.**

The information collection requirement contained in 30 CFR 733.13(a)(2) has been approved by the Office of Management and Budget under 44 U.S.C. 3507 and assigned clearance number 1029-0025. The information required is needed by OSMRE to verify the allegations in a citizen request to evaluate a State program and to determine whether an evaluation should be undertaken.

5. Redesignate §§ 733.12 and 733.13 as §§ 733.13 and 733.14 respectively.

6. Add a new § 733.12 to read as follows:

**§ 733.12 Early identification and corrective action to address State regulatory program issues.**

(a) When the Director identifies a State regulatory program issue, he or she should take action to make sure the identified State regulatory program issue is corrected as soon as possible in order to ensure that it does not escalate into an issue that would give the Director

reason to believe that the State regulatory authority is not effectively implementing, administering, enforcing, or maintaining all or a portion of its State regulatory program.

(1) The Director may become aware of State regulatory program issues through oversight of State regulatory programs or as a result of information received from any source.

(2) If the Director concludes that the State regulatory authority is not effectively implementing, administering, enforcing, or maintaining all or a portion of its State regulatory program, the Director may substitute Federal enforcement of a State regulatory program or withdraw approval of a State regulatory program as provided in part 733.

(b) The Director or his or her delegate may employ any number of compliance strategies to ensure that the State regulatory authority corrects a State regulatory program issue in a timely and effective manner. However, if the Director or delegate does not expect that the State regulatory authority will resolve the State regulatory program issue within 180 days after identification or that it is likely to result in a violation of the approved State program, then the Director or delegate will develop and institute an action plan.

(1) An action plan will be written with specificity to identify the State regulatory program issue and an effective mechanism for timely correction.

(2) An action plan will identify any necessary technical or other assistance that the Director or his or her delegate can provide and remedial measures that a State regulatory authority must take immediately.

(3) An action plan must also include:

(i) An action plan identification number;

(ii) A concise title and description of the State regulatory program issue;

(iii) Explicit criteria for establishing when complete resolution will be achieved;

(iv) Explicit and orderly sequence of actions the State regulatory authority must take to remedy the problem;

(v) A schedule for completion of each action in the sequence; and

(vi) A clear explanation that if the action plan, upon completion, does not result in correction of the State regulatory program issue, the provisions of 30 CFR 733.13 may be triggered.

(c) All identified State regulatory program issues and any associated action plan must be tracked and reported in the applicable State regulatory authority's Annual Evaluation report. These State regulatory authority Annual Evaluation reports will be accessible through OSMRE's website and at the applicable OSMRE office. Within each report, benchmarks identifying progress related to resolution of the State regulatory program issue must be documented.

(d) Nothing in this section prevents a State regulatory authority from taking direct enforcement action in accordance with its State regulatory program, or OSMRE from taking appropriate oversight enforcement action, in the event that a previously identified State regulatory program issue results in or may imminently result in a violation of the approved State program.

#### **PART 736—FEDERAL PROGRAM FOR A STATE**

7. The authority citation for part 736 continues to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*, as amended; and Pub. L. 100-34.

8. Revise § 736.11(a)(2) to read as follows:

#### **§ 736.11 General procedural requirements.**

(a) \* \* \*

(2) The Director shall promulgate a complete Federal program for a State upon the

withdrawal of approval of an entire State program under § 733.13.

\* \* \* \* \*

**PART 842—FEDERAL INSPECTIONS AND MONITORING**

9. The authority citation for part 842 continues to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*

10. Amend § 842.11 by revising paragraphs (b)(1) introductory text, (b)(1)(i),

(b)(1)(ii)(A), (b)(1)(ii)(B)(*I*), (3) and (4), and (b)(2) to read as follows:

\* \* \* \* \*

(b)(1) An authorized representative of the Secretary must immediately conduct a Federal inspection:

(i) When the authorized representative has reason to believe on the basis of any information readily available to him or her, from any source, including any information a citizen complainant or the relevant State regulatory authority submits (other than information resulting from a previous Federal inspection), that there exists a violation of the Act, this chapter, the State regulatory program, or any condition of a permit or an exploration approval, or that there exists any condition, practice, or violation that creates an imminent danger to the health or safety of the public or is causing or could reasonably be expected to cause a significant, imminent environmental harm to land, air, or water resources and—

(ii)(A) There is no State regulatory authority or the Office is enforcing the State regulatory program under section 504(b) or 521(b) of the Act and part 733 of this chapter; or

(B)(*I*) The authorized representative has notified the State regulatory authority of the possible violation and more than ten days have passed since notification, and the State regulatory authority has not taken appropriate action to cause the violation to be corrected or to show good

cause for not doing so, or the State regulatory authority has not provided the authorized representative with a response. After receiving a response from the State regulatory authority, but before a Federal inspection, the authorized representative will determine in writing whether the standards for appropriate action or good cause have been satisfied. A State regulatory authority's failure to respond within ten days does not prevent the authorized representative from making a determination, and will constitute a waiver of the State regulatory authority's right to request review under paragraph (b)(1)(iii) of this section.

\* \* \* \* \*

(3) Appropriate action includes enforcement or other action authorized under the approved State program to cause the violation to be corrected. Appropriate action may include OSMRE and the State regulatory authority immediately and jointly initiating steps to implement corrective action to resolve any issue that the authorized representative and applicable Field Office Director identify as a State regulatory program issue, as defined in 30 CFR part 733.

(4) Good cause includes:

(i) The possible violation does not exist under the State regulatory program;

(ii) The State regulatory authority has initiated an investigation into a possible violation and as a result has determined that it requires a reasonable, specified additional amount of time to determine whether a violation exists. When analyzing the State regulatory authority's response for good cause, the authorized representative has discretion to determine how long the State regulatory authority should reasonably be given to complete its investigation of the possible violation and will communicate to the State regulatory authority the date by which the investigation must be completed. At the conclusion of the specified additional time, the authorized representative will re-evaluate the State regulatory authority's response including

any additional information provided;

(iii) The State regulatory authority demonstrates that it lacks jurisdiction over the possible violation under the State regulatory program;

(iv) The State regulatory authority demonstrates that it is precluded from taking action on the possible violation because an administrative review body or court of competent jurisdiction has issued an order concluding that the possible violation does not exist or that the temporary relief standards of the State regulatory program counterparts to section 525(c) or 526(c) of the Act have been satisfied; or

(v) Regarding abandoned sites, as defined in 30 CFR 840.11(g), the State regulatory authority is diligently pursuing or has exhausted all appropriate enforcement provisions of the State regulatory program.

\* \* \* \* \*

(2) An authorized representative will have reason to believe that a violation, condition, or practice referred to in paragraph (b)(1)(i) of this section exists if the facts that a complainant alleges, or facts that are otherwise known to the authorized representative, constitute simple and effective documentation of the alleged violation, condition, or practice. In making this determination, the authorized representative will consider any information readily available to him or her, from any source, including any information a citizen complainant or the relevant State regulatory authority submits to the authorized representative.

\* \* \* \* \*

**§ 842.12 Requests for Federal inspections.**

11. Revise § 842.12(a) to read as follows:

(a) Any person may request a Federal inspection under § 842.11(b) by providing to an

authorized representative a signed, written statement (or an oral report followed by a signed written statement) setting forth information that, along with any other readily available information, may give the authorized representative reason to believe that a violation, condition, or practice referred to in § 842.11(b)(1)(i) exists. The statement must also set forth the fact that the person has notified the State regulatory authority, if any, in writing, of the existence of the possible violation, condition, or practice, and the basis for the person's assertion that the State regulatory authority has not taken action with respect to the possible violation. The statement must set forth a phone number, address, and, if available, an email address where the person can be contacted.

\* \* \* \* \*