

**FEDERAL REGISTER: 52 FR 21598 (June 8, 1987)**

DEPARTMENT OF THE INTERIOR

AGENCY: Office of Surface Mining Reclamation and Enforcement (OSM)

30 CFR Parts 701, 842, and 843

Petition To Initiate Rulemaking; Surface Coal Mining and Reclamation Operations;  
Permanent Regulatory Program; Federal Inspection and Enforcement Authority

ACTION: Notice of decision on petition for rulemaking.

**SUMMARY:** The Office of Surface Mining Reclamation and Enforcement (OSMRE) is making available to the public its final decision on a petition for rulemaking from the Mining and Reclamation Council of America (now part of the National Coal Association) and the Regulatory Assistance Program. The petitioners requested that OSMRE repeal existing regulations authorizing Federal notices of violation in States with approved regulatory programs and establish a uniform standard of review for evaluating State responses to ten-day notices. On May 29, 1987, the Director made a decision to grant that part of the petition which requests a uniform standard of review of State responses to ten-day notices and deny that part of the petition concerning repeal of OSMRE's authority to issue notices of violation in oversight.

**ADDRESS:** Copies of the petition and other relevant materials comprising the administrative record of this petition are available for public review and copying at OSMRE, Administrative Record, Room 5315, 1100 "L" Street NW., Washington, DC.

**FOR FURTHER INFORMATION CONTACT:** Mr. George Stone, Chief, Branch of Inspection and Enforcement, Office of Surface Mining Reclamation and Enforcement, 1951 Constitution Avenue NW., Washington, DC 20240; Telephone: (202) 343-4295.

**SUPPLEMENTARY INFORMATION:**

**I. PETITION FOR RULEMAKING PROCESS**

Pursuant to section 201(g) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), any person may petition the Director of OSMRE for a change in OSMRE's regulations. Under the applicable regulations for rulemaking petitions, 30 CFR 700.12, if the Director determines that the petition has a reasonable basis, the Director shall publish a notice in the Federal Register seeking comments on the petition, and may hold a public hearing, conduct an investigation, or take other action to determine whether the petition should be granted. If the petition is granted, the Director initiates a rulemaking proceeding. If the petition is denied, the Director notifies the petitioner in writing setting forth the reasons for denial. Under 30 CFR 700.12(d), the Director's decision constitutes the final decision of the Department of the Interior.

**II. PETITION SUBMITTED BY THE MINING AND RECLAMATION COUNCIL OF AMERICA AND THE REGULATORY ASSISTANCE PROGRAM ON MAY 30, 1986**

OSMRE received a letter dated May 30, 1986 transmitting a petition for rulemaking on behalf of the Mining and Reclamation Council of America (now part of the National Coal Association) and the Regulatory Assistance Program to amend OSMRE's existing regulations under 30 CFR Parts 701, 842, and 843 concerning Federal inspections and enforcement when a State regulatory program is in effect and to establish a uniform standard of review for evaluating State responses to ten-day notices.

The petitioners are the Mining and Reclamation Council of America, a national trade association, and the Regulatory Assistance Program, comprised of the Alabama Coal Association, Coal Operators and Associates, Facts About Coal in Tennessee, Illinois Coal Association, Indiana Coal Council, Kentucky Coal Association, the Ohio Coal and Energy Association, Ohio Mining and Reclamation Association, Pennsylvania Coal Mining Association and West Virginia Mining and Reclamation Association.

On July 30, 1986, OSMRE published a notice in the Federal Register (*51 FR 27197*) requesting comments on the petition and announcing its intent to hold a conference during the comment period for the purpose of exchanging views on two topics: (1) OSMRE's use of ten-day notices and Federal notices of violation, and (2) criteria and procedures for substituting Federal enforcement and withdrawing approval of a State regulatory program under SMCRA. The conference was held on August 13 and 14, 1986, and the comment period closed on September 29, 1986. OSMRE received 35 comments during the public comment period.

For the reasons discussed in the appendix to this notice, the Director is granting the petition in part, with respect to establishing a ten-day notice review standard. OSMRE will initiate rulemaking on this subject. The Director is denying that part of the petition seeking repeal of OSMRE's authority to issue Federal notices of violation in States with approved regulatory programs. Therefore, no rulemaking will occur on this issue.

The Director's letter to the petitioners on this rulemaking petition appears as an appendix to this notice. This letter reports the Director's decision to the petitioners. It also contains a summary description of the issues raised by the petitioners, a discussion of the applicable statutory provisions and regulatory background, an analysis of and response to the petitioners' reasons why the petition should be granted, and a summary of the comments on the petition.

Dated: May 29, 1987.

Brent Wahlquist,

Assistant Director, Program Policy Office of Surface Mining Reclamation and Enforcement.

#### **APPENDIX**

Mr. Daniel R. Gerkin,  
Senior Vice President,  
National Coal Association,  
1130 17th Street, NW., Washington, DC 20036

Dear Mr. Gerkin:

This letter is in response to the May 30, 1986 petition for rulemaking submitted to the Office of Surface Mining Reclamation and Enforcement (OSMRE) on behalf of the Mining and Reclamation Council of America (now part of the National Coal Association) and the Regulatory Assistance Program (petitioners). The petition requests that OSMRE repeal all existing regulations which authorize the issuance of Federal notices of violation in States with approved regulatory programs and establish a uniform standard of review for OSMRE's evaluation of State responses to ten-day notices.

On July 30, 1986, OSMRE published a notice in the Federal Register (*51 FR 27197*) requesting public comments on the petition. OSMRE also sponsored a conference in Washington, DC, on August 14, 1986, to have an exchange of views on OSMRE's use of ten-day notices and Federal notices of violation in States with approved regulatory programs. The proceedings and relevant supporting documents from the conference were entered into the Administration Record for the petition.

After careful consideration of the positions and arguments presented in both the petition and public comments, I have decided to grant the petitioners' request to propose establishing a uniform standard of review for OSMRE's evaluation of State responses to ten-day notices. OSMRE will initiate a rulemaking proceeding on this subject. I am denying the petitioners' request with respect to the repeal of existing regulations which authorize the issuance of Federal notices of violation in States with approved regulatory programs. Therefore, no rulemaking proceeding will be initiated on this subject. The reasons for my decision are discussed in the enclosed analysis. As provided in 30 CFR 700.12(d), my decision constitutes the final decision for the Department of the Interior.

Sincerely,

Jed D. Christensen,

Director.

Mining and Reclamation Council of America Regulatory Assistance Program

## **PETITION FOR RULEMAKING DECISION ANALYSIS**

### **I. BACKGROUND**

On May 30, 1986, the Mining and Reclamation Council of America (now part of the National Coal Association) and the Regulatory Assistance Program petitioned the Director of the Office of Surface Mining Reclamation and Enforcement (OSMRE) to: (1) Repeal the existing regulations which authorize Federal notices of violation (NOV's) in States with approved regulatory programs; and (2) amend the Federal regulations to establish a uniform standard of review for OSMRE's evaluation of State responses to ten-day notices (TDN's).

Section 201(g) of the Surface Mining Control and Reclamation Act (the Act) and 30 CFR 700.12 provide that any person may petition the Director to initiate a proceeding for the issuance, amendment, or repeal of a rule promulgated under the Act. The Federal regulations at 30 CFR 700.12 require the petition to set forth the facts, technical justification and law which require the issuance, amendment or repeal of a regulation. 30 CFR 700.12(b). Based on this information, the Director shall determine if the petition provides a reasonable basis for the proposed action. The Federal regulations further provide that facts, technical justification or law previously considered in a petition or rulemaking on the same issue shall not provide a reasonable basis. 30 CFR 700.12(c). If a reasonable basis exists, a Federal Register notice must be published seeking comments from the public on the proposed change. The Director may hold a public hearing or conduct other investigations or proceedings in order to determine whether the petition should be granted. If the petition is granted, the Director is required to commence a rulemaking proceeding. 30 CFR 700.12(d)(1). If the petition is denied, the Director is required to notify the petitioner in writing of the reasons for denial. 30 CFR 700.12(d)(2).

On July 30, 1986, OSMRE published a notice in the Federal Register requesting comments on the petition because of the public interest in the petition. In the notice, OSMRE announced its intent to hold a conference during the comment period for the purpose of exchanging views on: (1) The effectiveness of the agency's use of TDN's and Federal NOV's, and (2) the criteria for substituting Federal enforcement for, or withdrawing approval of, State regulatory programs. The notice stated that the conference proceedings and supporting documents would be entered into the Administrative Record on the petition (*51 FR 27197*).

The conference was held in Washington, DC on August 13 and 14, 1986, and the comment period closed on September 29, 1986. OSMRE received 35 public comments on the petition from coal companies and coal mining associations, State government agencies, environmental groups, and others. These public comments have been made a part of the Administrative Record.

After thorough analysis of the arguments and positions presented by the petitioners and public commenters, and after reviewing OSMRE's use of TDN's and NOV's in primacy States, the Director has decided to grant the petition in part and deny it in part for the reasons discussed below.

### **II. SUBSTANCE OF THE PETITION**

The petitioners' proposals will be discussed separately. First, they requested the repeal of regulations authorizing Federal NOV's in States with approved regulatory programs (primacy States). Second, they requested the adoption of a uniform standard of review for OSMRE's evaluation of State responses to TDN's. With regard to the regulations authorizing Federal NOV's in primacy States, the petitioners assert that OSMRE lacks statutory authority to issue such NOV's, and that issuance of Federal NOV's undermines primacy, unfairly places operators between two disputing regulatory authorities, fails to resolve underlying programmatic problems, and renders superfluous the other tools provided by the Act to resolve problems. With respect to the petitioners' second request, they assert that lack of a TDN review standard has led to disparate treatment of coal operators and States, substitution of OSMRE's judgment for that of the State, and a lack of deference to the State's discretion in the interpretation and enforcement of its regulatory program.

### **III. APPLICABLE STATUTORY PROVISIONS**

OSMRE's statutory obligations with respect to the evaluation and enforcement of approved State regulatory programs are set forth under a number of sections in the Act. The key provisions are set forth in sections 201, 504, 517 and 521. Section 201(c) authorizes the Secretary, acting through OSMRE, to make those investigations and inspections necessary

to ensure compliance with the Act, and to promulgate such regulations as may be necessary to carry out the purposes and provisions of the Act. Section 504(b) provides that if a State is not enforcing any part of its State program, the Secretary may provide for Federal enforcement of that part of the State program, under the provisions of section 521.

Section 517 specifies that the Secretary shall make such inspections of any coal mining operations as are necessary to evaluate the administration of approved State programs. Section 521(a)(1) provides that if the Secretary has reason to believe that any person is in violation of the Act, he must notify the State regulatory authority. It further provides that the Secretary shall order an immediate Federal inspection if the State fails, within ten days after notification, to take appropriate action to cause the violation to be corrected or to show good cause for such failure. Section 521(a)(2) specifies when the Secretary or authorized representative is required to issue an order ceasing surface coal mining and reclamation operations. Section 521(a)(3) specifies when the Secretary or authorized representative is required to issue an NOV.

Finally, section 521(b) provides that the Secretary shall enforce all or any part of a State program upon a finding that the State has failed to enforce effectively and has not demonstrated its capability and intent to do so.

#### **IV. REGULATORY BACKGROUND**

OSMRE's first rulemaking on its enforcement authority in oversight occurred in 1978 with the publication of the proposed permanent program regulations. *43 FR 41662* (September 18, 1978). The proposed regulations provided that a violation observed during a Federal oversight inspection should be deferred to the State and the operator so that the State could take appropriate action to cause correction of the violation. The preamble to the proposed rule explained that a violation observed in a primacy State:

“Should be reported in writing to the State regulatory authority and the person responsible for the violation but that no notice of violation may be issued. An alternative approach which was considered, was to provide that a Federal inspector could simply issue a notice of violation to the operator under these circumstances. Comment is invited as to whether the proposal language is a correct interpretation of the Act and the legislative history.”

(Emphasis added.) *43 FR 41795*.

In 1979, OSMRE promulgated final regulations at 30 CFR 843.12(a)(2) which require it to issue an NOV in a primacy State if the State fails within ten days after notification to take appropriate action or show good cause for such failure. The preamble to the final regulation stated that:

“A major issue was raised with respect to the authority of the Office to issue notices of violation during the permanent program. The proposed regulation Section 843.12(d) provided for mere reporting of a violation to the State and the operator, rather than the issuance of a notice of violation, when a violation is found by OSM in a State with an approved State program. The preamble to the proposed regulations stated, however, that OSM was considering the alternative approach of issuing regular notices of violation and invited comments on how to correctly interpret the Act and the legislative history.”

*44 FR 15302*, March 13, 1979.

OSMRE received numerous comments on the issue, including extensive comments on the legislative history. OSMRE concluded that although the legislative history "does give conflicting statements on this issue \* \* \* the Office reads the legislative history, when considered in conjunction with the Act, as allowing OSM to issue notices of violation, at least in some circumstances, during a State program."

Id.

OSMRE considered the argument that because section 521(a)(3) does not specifically include Federal oversight inspections among those requiring the issuance of NOV's, the "point of the Federal inspection in such a situation is to gather information for a section 521(b) proceeding (OSM taking over all or a portion of a State program)." OSMRE rejected this argument, however, because:

“\* \* \* as a practical matter, it would leave a large gap in the enforcement scheme of the Act. The Office's ability to take over a part of a State program as a result of the State's refusal or inability to take action in isolated cases may be limited and may require a great deal of time. If this is true, then during the interim violations which are not imminent hazards could go totally unpunished and unabated. It should be pointed out that some of these notice-of-violation situations could be potentially serious or widespread, even though a hazard to life or significant environmental harm was not "imminent" at the time of the Federal inspection. There is no reason to believe that Congress intended that such a gap exist in the permanent program or that Congress intended OSM to sit idly by while these violations ripen into imminent hazards so that OSM can act under the provisions of section 521(a)(2) of the Act.”

Id.

OSMRE concluded that:

“As a legal matter, issuance of notices of violation fills a void or gap in the Federal enforcement scheme -- a gap between the uncorrected violation and the prerequisite showing for Section 521(b) proceedings to take over enforcement of a State program.”

Id.

In 1981, OSMRE proposed amendments to the enforcement regulations as part of its extensive program of regulatory reform. OSMRE proposed to remove Federal NOV authority in oversight and stated:

“This proposed change is intended to raise the question whether \* \* \* OSM's recourse may be with the State rather than the permittee \* \* \*. OSM may lack authority to issue citations directly to permittees except in those limited circumstances \* \* \* (which) justify issuance of a cessation order under section 521(a)(2) of the Act.”

*46 FR 58467*, December 1, 1981.

OSMRE noted that, alternatively, it was considering retaining NOV authority and again solicited public comment on both the advisability of and authority for either removing or retaining the requirement. *Id. at 58468*.

In 1982, OSMRE entered into a settlement agreement which obligated it to prepare a supplemental environmental impact statement (EIS) on a number of proposed regulations, including the authority to issue NOV's in oversight of approved State programs. *National Wildlife Federation v. Watt*, Civ. No. 82-0320, April 16, 1982 (D.D.C.). OSMRE again solicited public comment on NOV authority by a notice published in the Federal Register on May 13, 1982. *47 FR 20631*. On August 16, 1982, OSMRE promulgated final inspection and enforcement rules, but noted that it was deferring action on the issue of NOV authority in oversight pending preparation of the supplemental EIS. *47 FR 35630*.

On March 3, 1983, OSMRE announced in a Statement of Policy that "(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." *48 FR 9199*.

## **V. PETITIONERS' STATEMENT OF FACTS AND LAW IN SUPPORT OF THE PETITION REGARDING REGULATIONS AUTHORIZING FEDERAL NOTICES OF VIOLATION (NOV'S) IN PRIMACY STATES**

The petitioners assert that OSMRE should repeal the regulations authorizing Federal NOV's in primacy States because (1) the Act does not authorize the issuance of Federal NOV's in primacy States, except under section 521(b), and (2) sound policy reasons dictate the use of other tools to ensure compliance. The petitioners state that the administrative history of the issue indicates doubt in OSMRE's mind as to its statutory authority because the 1978 proposed rules did not include the authority for issuing Federal NOV's in primacy States, and because OSMRE revisited the issue in 1981. The petitioners also analyze the Act and the legislative history, and cite case law to support their contention that OSMRE lacks the authority to issue NOV's in primacy States.

Furthermore, the petitioners state that use of Federal NOV's ignores the range of policy options available to OSMRE to compel States to implement and enforce their programs, such as requiring a State to amend its program when the program is found to be deficient, requiring an operator to revise a permit when the permit is found to be defective, and

initiating the process leading to the Federal enforcement of all or part of a State program as provided in section 521(b). These oversight tools, argue the petitioners, would address the typical situations in which OSMRE now issues Federal NOV's. These situations include disagreement with the State's interpretation of its program or the manner in which the State compels abatement, alleged discrepancies in State-issued permits, deficiencies in the approved program, and programmatic enforcement issues. Therefore, the petitioners assert that OSMRE not only does not have, but has substituted for more appropriate responses, the authority to issue Federal NOV's.

Petitioners contend that the existing regulations should be repealed because OSMRE's use of Federal NOV's when legitimate disputes exist between a State regulatory authority and OSMRE, subjects operators to Federal enforcement when they have relied in good faith on the State's interpretation. Moreover, the petitioners contend that OSMRE's substitution of its judgment for the State's on a case-by-case basis has resulted in reluctance on the part of OSMRE to address programmatic or systematic problems in approved State programs.

## **VI. RESPONSE TO PETITIONERS' ASSERTIONS REGARDING FEDERAL NOV AUTHORITY**

### **A. SUMMARY OF REASONS FOR DENIAL REGARDING FEDERAL NOV AUTHORITY**

1. The petition presents arguments on law previously considered in rulemaking (1979, 1982, 1983) and therefore fails to provide a sufficient basis under 30 CFR 700.12 for reopening the issue in a proposed rulemaking. In this instance, administrative finality clearly outweighs the benefits of proposing repeal.

2. Some commenters have supported the petition based on the argument that use of Federal oversight NOV's should be revisited because of the experience gained in oversight or that circumstances have changed over the years. However, neither the commenters nor the petitioners have provided any new information such as statistics or case facts sufficient to persuade the Director that NOV's issued in primacy States are symptomatic of generic program deficiencies.

3. OSMRE (with support of some States) believes that NOV authority is beneficial because it acts as an intangible deterrent which contributes to operator cooperation with State regulatory authorities and enhanced compliance with State program requirements.

4. To the extent that the problems associated with the use of NOV's as alleged in the petition could occur, these can be resolved through adopting a ten-day notice (TDN) review standard, defining good cause, and issuing other appropriate guidance.

5. Federal NOV authority is needed for OSMRE to comply with two court orders. In accordance with the terms of the January 31, 1985 Order in *Save Our Cumberland Mountains, Inc. v. Clark*, No. 81-2134 (D.D.C. 1985), OSMRE is required to issue Federal NOV's where any State does not suspend or revoke improvidently issued permits. In addition, under the terms of another case of the same name, *Save Our Cumberland Mountains, Inc. v. Clark*, No. 81-2238 (D.D.C. 1985), OSMRE is required to issue Federal NOV's directly at certain sites in Virginia and in Kentucky, where the State fails to take appropriate action on a TDN.

6. OSMRE's oversight NOV statistics do not show a pervasive use of Federal NOV's in primacy States. The number has decreased each year since 1984 and is expected to continue to decline, especially if proposed ten-day notice review standards are implemented. In fiscal year 1986, a total of 67 oversight NOV's were issued. Of these, 62 (93%) were issued in four States, the remaining 5 issued in three States and none were issued in the other 17 States.

7. It is unlikely that the procedures established in 30 CFR Part 733 for substituting Federal enforcement of State programs and withdrawing approval of State programs can be significantly streamlined. Therefore, such a process represents a lengthy and impractical approach to resolving problems on site-by-site basis. Moreover, such a practice is likely to result in greater confusion and Federal intervention than if a limited number of NOV's were judiciously issued.

### **B. ANALYSIS**

OSMRE's legal authority to issue Federal NOV's in primacy States has been considered in two past rulemakings, as discussed above under "Regulatory Background." After careful consideration of the Act, the legislative history, and

public comments during both rulemakings, OSMRE determined that it has the authority to issue Federal NOV's in primacy States.

Neither rulemaking was challenged in court as provided for in Section 526 of the Act. The petitioners have presented the same legal arguments that were considered previously in the two earlier rulemakings on this issue.

## LEGISLATIVE HISTORY

The petitioners attempt to refute OSMRE's conclusion in 1979 as to the conflicting nature of the legislative history. However, no new material was provided. Moreover, petitioners' analysis of the Act's legislative history is incomplete. In fact, the legislative history of the Act contains a number of passages indicating that Congress foresaw the probability that the Secretary would need to take enforcement action on a mine-by-mine basis, including issuance of NOV's, to ensure compliance with the standards of the Act in situations not meriting Federal enforcement of all or part of a State's program. The final Senate Report on the Act introduces its discussion of the Federal enforcement provision with the following:

The Federal enforcement system contained in this section, while predicated upon the States taking the lead with respect to program enforcement, at the same time provides sufficient Federal back-up to reinforce and strengthen State regulation as necessary. Federal standards are to be enforced by the Secretary on a mine by mine basis for all or part of the State as necessary without a finding that the State regulatory program should be superseded by a Federal permit and enforcement program.

S. Rep. 95-128, 95th Cong. 1st Sess. at 88 (1977) (emphasis added). That Senate report adopts, verbatim, a statement contained in a prior House of Representatives Committee report, H.R. Rep. 94-896, 94th Cong. 2d Sess. at 119 (1976). Similarly, in its report on section 404(b) of S.7 (identical to 504(b), *30 U.S.C. 1254(b)*, in the final version of the Act), the Senate stated:

The committee fully intends that under subsection 404(b) the Secretary will use the enforcement authority granted him under subsections 421(a)(1) through (4) [these sections are identical to 521(a)(1) through (4) [*30 U.S.C. 1271(a)(1) through (4)*] in the final version of the Act], if a State with an approved program fails to enforce against an operator who is violating the Act.

S. Rep. 95-128, 95th Cong. 1st Sess. at 72 (1977) (emphasis added). The reference to a single operator supports OSMRE's position that in a State with an approved program, enforcement by OSMRE may be on a mine-by-mine basis rather than requiring the Secretary first to take over all or part of a State's program.

## CASE LAW

The case law cited by the petitioners also does not refute OSMRE's earlier conclusion that the rules establishing Federal NOV authority find support in the Act. The principal case relied upon by the petitioners, *Clinchfield Coal Company v. Hodel*, No. 85-0113-A (W.D.Va. 1985), was reversed by the U.S. Court of Appeals for the Fourth Circuit since the filing of the petition. See *Clinchfield Coal Company v. DOI*, No. 85-2205 (4th Cir. 1986). The petitioners also rely upon a 1981 decision in *In Re: Permanent Surface Mining Regulation Litigation*, 653 F.2d 514 (D.C. Cir. 1981) (en banc), cert. denied, 454 U.S. 822 (1981). This case was decided prior to OSMRE's 1982 and 1983 reconsideration of Federal NOV authority and should not be viewed now as new material to be considered by OSMRE. Moreover, that decision does not address the issue of whether rules establishing Federal NOV authority are lawful and a proper exercise of the Secretary's rulemaking authority. In short, the cases referred by the petitioners have been reviewed by OSMRE and do not provide a sufficient basis for the Secretary to propose repeal of NOV authority.

Turning to the petitioners' other assertions, OSMRE does not agree, nor have the petitioners provided persuasive evidence, that the use of Federal NOV's has rendered superfluous other oversight tools, unnecessarily placed coal operators in the middle of policy or program interpretational disputes between OSMRE and the States, or failed to resolve underlying programmatic problems. Neither the petitioners nor public commenters have provided facts or quantitative analysis sufficient to support these contentions.

In order to illustrate the use of Federal NOV's, OSMRE offers the following perspective regarding the number of oversight NOV's issued during fiscal years (October 1-September 30) 1984, 1985, and 1986.

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	Fiscal year		
	1984	1985	1986
Federal Oversight Inspections	2900	2700	2600
NOV's issued	117	82	67
Percent of Federal Oversight Inspections resulting in NOV's	4%	3%	2.5%
Number of States where NOV's were issued (24 primacy States)	13	10	7

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These figures clearly do not represent a pervasive use of Federal NOV's in primacy States nor do they reflect trends or patterns indicating the existence of underlying systemic State program deficiencies. The vast majority, nearly 97%, of Federal oversight inspections do not result in the issuance of Federal NOV's. Moreover, the number of oversight NOV's issued has declined during the last three years by 40 percent. Most of the oversight NOV's were issued as a result of differences between OSMRE and the States in isolated and site-specific cases. There is a significant difference between the existence of isolated violations and the need to require a State program amendment, substitute Federal enforcement, or withdraw State program approval for programmatic, widespread or systemic problems. Federal NOV authority is appropriate in such instances.

Also, contrary to the petitioners' assertions, OSMRE has used the other tools provided under the Act when it has been appropriate to do so. OSMRE has withdrawn program approval in one State (*49 FR 38874*, October 1, 1984), Substituted Federal enforcement in another (*48 FR 14674*, April 12, 1984), and initiated, but later resolved, the same process in a third State (*51 FR 4724*, February 7, 1986). In addition, OSMRE has required amendments to approved programs on several occasions based on its oversight evaluations. Thus, OSMRE has not used NOV's as a substitute for these other tools when a program amendment is required or when there is reason to believe a State is not effectively administering, implementing, or enforcing any part of its approved program.

In addition to the topics raised in the petition, deterrence is an aspect of the rules which, although not quantifiable, is an important reason for retaining OSMRE's NOV authority in primacy States. The ability of OSMRE to take enforcement action where States fail to act appropriately serves to assure overall compliance with the Act, both by the States and operators. The rulemaking petition has not dispelled the validity of this premise. OSMRE firmly believes that judicious use of NOV authority under prescribed criteria for appropriate action by States will continue to enhance compliance in a non-intrusive manner.

In summary, the facts and law presented by the petitioners do not provide sufficient reasons for OSMRE to propose repeal of the regulations.

## **VII. PETITIONERS' STATEMENT OF FACTS AND LAW IN SUPPORT OF THE PETITION REGARDING STANDARD OF REVIEW FOR OSMRE'S EVALUATION OF STATE RESPONSES TO TDN'S**

The petitioners have requested that OSMRE establish a standard of review for OSMRE's evaluation of State responses to TDN's. The absence of a standard, according to the petitioners, has led to disparate treatment of coal operators and States, substitution of OSMRE's subjective judgment for the judgment of the State regulatory authority, and a lack of deference to the State's discretion in the interpretation and enforcement of its regulatory program. The petitioners assert that this practice is contrary to the principle of State primacy and contravenes both the intent and purpose of the statute.

The petitioners requested the Director to establish a specific standard for OSMRE's evaluation of TDN's. The standard suggested by the petitioners is that the State regulatory authority will not be deemed to have failed to either take appropriate action to cause the violation to be corrected or to have shown good cause for such failure, unless a finding is made that the State's response or action was arbitrary and capricious and an abuse of its discretion under the applicable State program.

## VIII. ANALYSIS AND RESPONSE REGARDING TDN CRITERIA AND STANDARD OF REVIEW

Section 521(a) of the Act requires the Secretary to order an immediate Federal inspection if "the State regulatory authority fails within ten days after notification to take appropriate action to cause said violation to be corrected or to show good cause for such failure and transmit notification of its action to the Secretary." This statutory requirement is implemented at 30 CFR 842.11(b)(1). Neither the Act nor the Federal regulations define "appropriate action" or "good cause." OSMRE declined in 1982 to specify what "appropriate action" means. *47 FR 35627*, August 16, 1982.

Since that time, however, it has been OSMRE's experience that the maturation of the State programs and the development of the oversight process would make definitions of those terms useful in evaluating State responses to TDN's. As the petitioners note, the very language of section 521(a)(1) connotes the discretionary nature of the State action. OSMRE believes that implementing by regulation a standard of review to evaluate a State's response is a worthy concept which would reinforce State primacy. The concept is also appealing from a management perspective in that all OSMRE field offices would apply the same standards, thus providing consistency and even-handed treatment of all operators and all State regulatory authorities.

During fiscal years 1984, 1985, and 1986, OSMRE issued approximately 740, 640, and 830 ten-day notices, respectively, for alleged violations in States with approved regulatory programs. In each of these years, approximately 10 percent of the TDN's resulted in the issuance of Federal NOV's because OSMRE determined that the States had failed to take appropriate action to cause violations to be corrected or failed to show good cause for such failure. These determinations, however, rested with the discretion of each of thirteen Field Office Directors without the benefit of formalized guidance. OSMRE believes that a uniform standard would serve to ensure consistent determinations of what constitutes appropriate action or a showing of good cause for not taking corrective action.

Therefore, OSMRE will grant this portion of the petition and will initiate a rulemaking proceeding to propose a uniform TDN review standard.

## IX. PUBLIC COMMENT

OSMRE received 35 comments on this petition for rulemaking. Twenty-eight coal companies and coal associations sent comments which strongly supported the petition in full and essentially reiterated the same arguments the petitioners presented. The coal associations emphasized the need to reconsider the issue of NOV authority because circumstances have changed over the years as a result of the experience gained by both the States and OSMRE in their oversight relationship.

Five State regulatory authorities sent comments generally supporting the petition and providing three additional recommendations. One State recommended that OSMRE retain its NOV oversight authority in primacy States, but establish a TDN review standard which ensures consistency in determining whether State TDN responses constitute appropriate action or a showing of good cause for inaction. This recommendation parallels the Director's final decision on the petition. Another State recommended that OSMRE establish a separate method of conflict resolution, such as an independent review panel within each Field Office or region to review those TDN issues where a dispute exists between the State and OSMRE. OSMRE believes that an independent review panel would be impractical given the TDN procedural time frames imposed under section 521 of the Act, and furthermore, that by granting the petitioners' request to establish a TDN review standard, such potential conflicts between the States and OSMRE will be minimized. Finally, one State recommended that the Federal regulations be revised to require OSMRE to notify the State when a TDN response is considered inappropriate action or a failure to show good cause before a Federal NOV is issued. Several OSMRE Field Offices transmit such notification on a routine basis. However, OSMRE will consider requiring this of all its Field Offices in the rulemaking process for establishing a TND review standard or through policy, as appropriate.

A consortium of environmental groups submitted comments which strongly opposed granting the petition. It presented legal arguments supporting the retention of NOV authority based on its interpretation of the Act, the legislative history, and case law. With respect to the petitioners' request for a TDN review standard, it asserted that the relief sought was unnecessary because the petitioners failed to provide sufficient evidence that many NOV's are issued because of disagreements between the State and OSMRE over the interpretation of, or deficiencies in, State programs or State issued permits. OSMRE believes that imposition of a TDN review standard will not interfere with its enforcement

obligations under the Act in primacy States but, rather, will better enable it to fairly assess State TDN responses and limit unnecessary intervention in primacy States as Congress intended.

#### **X. FINAL DECISION**

Based upon the foregoing reasons, analysis, and comments, I am denying the petition with respect to repeal of OSMRE regulations authorizing issuance of NOV's in oversight. Petitioners have not persuaded me that the issues that concern them, previously considered in two rulemakings on the same subject, warrant revision of the regulations. I have decided to grant that portion of the petition requesting OSMRE to establish a standard of review to evaluate State responses to TDN's. Therefore, OSMRE will initiate rulemaking to propose such a standard.

As provided in 30 CFR 700.2(d), my decision constitutes the final decision for the Department of the Interior.

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