

FEDERAL REGISTER: 53 FR 26728 (July 14, 1988)

DEPARTMENT OF THE INTERIOR

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

30 CFR Parts 842 and 843

Surface Coal Mining and Reclamation Operations; Evaluation of State Responses to Ten-Day Notices

ACTION: Final rule.

SUMMARY: The Office of Surface Mining Reclamation and Enforcement (OSMRE) of the U.S. Department of the Interior is amending certain portions of its rules on the federal inspection of coal mines and federal monitoring of state programs for regulating coal mine reclamation under the Surface Mining Control and Reclamation Act of 1977 (SMCRA, the Surface Mining Act, or the Act). This action is being taken in response to a petition for rulemaking, filed by several organizations representing members of the coal mining industry, and is designed to assure consistent treatment of states and surface coal mining and reclamation operations throughout the country.

The amended rules establish a uniform standard by which OSMRE will evaluate state responses to federal notices of possible violations of the Surface Mining Act. Under the amended rules, OSMRE will accept a state regulatory authority's response to such a notice, called a ten-day notice, as constituting appropriate action to cause a possible violation to be corrected or showing good cause for failure to act unless OSMRE makes a written determination that the state's response was arbitrary, capricious, or an abuse of discretion under the state program. The rules also provide a process by which a state regulatory authority can request informal review of OSMRE's written determination that the state response did not constitute appropriate action or show good cause for such failure.

EFFECTIVE DATE: August 15, 1988.

ADDRESSES: Office of Surface Mining Reclamation and Enforcement, U.S. Department of the Interior, 1951 Constitution Avenue, NW., Washington, DC 20240.

FOR FURTHER INFORMATION CONTACT: George M. Stone, Jr., Chief, Branch of Inspection and Enforcement, Office of Surface Mining Reclamation and Enforcement, U.S. Department of the Interior, 1951 Constitution Avenue, NW., Washington, DC 20240; Telephone: 202/343-4295 (Commercial or FTS).

SUPPLEMENTARY INFORMATION:

- I. Background
- II. Discussion of Final Rule and Response to Comments
- III. Procedural Matters

I. BACKGROUND

When Congress enacted the Surface Mining Control and Reclamation Act of 1977, *30 U.S.C. 1201 et seq.*, it established a complex regulatory structure for protecting the environment from the surface effects of coal mining.

Although Congress could have enacted a statute mandating only federal regulation of coal mining, it did not. Instead, "the Surface Mining Act 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." *Hodel v. Virginia Surface Mining and Reclamation Association*, *452 U.S. 264, 289 (1981)* (emphasis added). This final rule implements the cooperative federalism intended by Congress and clarifies OSMRE's role in overseeing the states' administration of their regulatory programs.

Because this final rule must be viewed and implemented in the context of the structure provided by Congress, it is important to keep in mind the statutory and regulatory framework on which the rule is based.

A. STATUTORY BACKGROUND

1. ROLE OF THE STATES AND THE SECRETARY

The Surface Mining Act authorizes the federal government, acting through the Interior Department and OSMRE, to delegate primary responsibility for enforcing the Act on non-federal and non-Indian lands to the coal-producing states. In Section 101(f), Congress found that "because of the diversity in terrain, climate, biologic, chemical, and other physical conditions in areas subject to mining operations, the primary governmental responsibility for developing, authorizing, issuing, and enforcing regulations for surface mining and reclamation operations should rest with the States; * * *." 30 U.S.C. 1201(f).

While establishing nationwide standards for reclamation, the Act gives the states an opportunity to develop and propose their own programs for regulating the surface effects of coal mining. Once a state program is approved by the Secretary of the Interior (the Secretary), the state assumes primary responsibility for enforcing the Act on non-federal and non-Indian lands within its borders.

Section 503 of the Act provides the standards on which the Secretary is to base his approval. As described by the U.S. Court of Appeals, "[t]he Secretary may only approve a program if he determines that the state 'has the capability of carrying out the provisions of this Act and meeting its purposes.' Act Section 503(a). The proposed state program must include 'a State law which provides for the effective implementation, maintenance, and enforcement of a permit system,' Act section 503(a)(4), and 'rules and regulations consistent with regulations issued by the Secretary pursuant to this Act' Act section 503(a)(7)." In re: *Permanent Surface Mining Regulation Litigation*, 653 F.2d 514, 520 (D.C. Cir., 1981), cert. denied Oct. 5, 1981.

Once the Secretary approves a state program, the state takes the lead role, issuing permits, approving or disapproving reclamation plans, setting bond amounts, and inspecting mines to determine compliance.

2. STATE LAW APPLIED

In primacy states, a mine operator's compliance is measured against the approved state program, rather than directly against the Act. As the court explained in *In re: Permanent Surface Mining Regulation Litigation*, "it is with an approved state law and with state regulations consistent with the Secretary's that surface mine operators must comply." 653 F.2d at 519.

This interpretation of the law is supported by the legislative history of the Act. In discussing the promulgation of federal regulatory programs, a Senate committee stated that "[s]urface mine operators need to know which regulations -- Federal or State -- they must follow at any given point in time." Senate Report No. 128, 95th Congress, 1st Sess., 72 (1977). The clear implication is that in primacy states, operators are responsible for complying with state regulations.

In the same report, the Senate committee also stated that "[i]n order to prevent federal-state overlap, the federal inspector is only to use his authority under section 421(a)(3) [subsequently enacted as Section 521(a)(3)] where the Secretary is the regulatory authority. However in other circumstances the Secretary must insure, in accordance with the provisions of section 421(a)(1), that the State is notified of the compliance problem so that it may act under the terms of the approved state program." *Id.* at 92 (emphasis added).

The sections of the Act providing for citizen suits also reflect Congressional intent that operators in primacy states should only be liable for compliance with the state program. Section 520(a)(1) authorizes citizen suits against operators for violations of the applicable regulations, but not of the Act. Such suits may be brought "against any other person who is alleged to be in violation of any rule, regulation, order or permit issued pursuant to this title * * *." Section 520(a)(1) of SMCRA.

The U.S. Court of Appeals for the 3rd Circuit reached the same conclusion in *Haydo v. Amerikohl Mining*, 830 F.2d 494 (3rd Cir., 1987). In that case, private landowners sued a mining company in federal court for damage to a water well, claiming the damage was caused by the company's exploration drilling. The court concluded there was no federal jurisdiction over the case, declaring:

"Section 512 [of SMCRA] makes the requirements of section 515 [of SMCRA] applicable to certain coal exploration operations. By their very terms these sections of the statute merely prescribe minimum performance standards which must be required of applicants for permits under a state or federal regulatory program before the program may be approved by the Secretary. They do not themselves create any rights and duties as between operators and other persons. The SMCRA itself is not violated by an operator's violation of a permit condition, even though the SMCRA requires that the condition be imposed." *Haydo*, 830 F.2d at 498 (footnote omitted).

3. THE FEDERAL ROLE

Once a state has been granted primacy, the federal role becomes one of oversight. As described by the U.S. Court of Appeals, "[t]he 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 Mining 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.

PROGRAM OVERSIGHT. THE ACT SETS FORTH AN OVERSIGHT ROLE FOR THE SECRETARY AS FOLLOWS:

Section 517(a) of SMCRA authorizes oversight inspections by the federal government as necessary to evaluate the administration of approved State programs. Section 517(e) requires that when an inspector detects a violation of any requirement of any State or Federal program or of the Act, he informs the operator in writing, and also reports in writing any such violation to the regulatory authority. Given Congress' more specific enunciation in section 521(a) of SMCRA of the Secretary's enforcement role in primacy states, section 517(e), taken alone, does not require an OSMRE inspector to issue a federal notice of violation (NOV) against the operator in a primacy state. The relationship between sections 517(e) and 521 will be discussed further in a subsequent section of this preamble.

MINE-SPECIFIC FEDERAL INSPECTION AND ENFORCEMENT. Federal inspection and enforcement actions regarding possible violations are specified in section 521 of SMCRA. Under section 521(a)(1), if the Secretary has reason to believe that a person is in violation of the Act or of any permit condition required by the Act, he must notify the State regulatory authority in the primacy states. "If no such state authority exists or 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, the Secretary shall immediately order federal inspection * * *." Section 521(a)(1) (emphasis added).

Although the Secretary's obligation to notify the state arises with his belief that a violation of the Act or required permit condition exists, the Secretary's obligation to order a federal inspection only arises if the Secretary believes that the violation continues to exist after the state responds to the ten-day notice and the state has failed to take appropriate action to compel its correction, or the state did not show good cause for failing to take appropriate action.

Thus, three conditions are required before the Secretary must order a federal inspection under section 521(a)(1) in primacy states, absent an imminent danger of significant environmental harm or danger to the public health or safety:

1. The state fails to take appropriate action to cause correction of the violation following notification of a possible violation;
2. The state does not show good cause for failing to act; and
3. The Secretary believes that the violation continues to exist. Absent any one of those three, the Secretary has no obligation to order a federal inspection.

An exception to the 10-day notification requirement exists where the Secretary is provided proof that an imminent danger of significant environmental harm or danger to the public health or safety exists and the state has failed to take appropriate action. Act section 521(a)(1). In a case of imminent danger of significant environmental harm, or danger to the health or safety of the public, section 521(a)(2) provides the Secretary with authority to issue cessation orders.

As seen from the preceding paragraphs, two concepts become central to the Secretary's responsibilities: "Appropriate action," and "good cause" for the failure to take appropriate action. Neither the statute nor OSMRE's regulations define the terms "appropriate action" or "good cause" for failure to take appropriate action. Providing those definitions is a primary focus of this rulemaking.

In addition to the sections of the Act described above, an understanding of other related provisions is helpful in determining what may constitute appropriate action and good cause and in responding to the numerous comments received.

Section 521(a)(3) details the conditions under which OSMRE is expressly obligated to issue federal notices of violation. That duty arises during the enforcement of a federal program in states without an approved state program; during the enforcement of an interim program (before the state had an approved permanent program); and on federal lands.

The responsibility also arises under section 521(a)(3) of the Act where a federal inspection is carried out pursuant to section 504(b). Section 504(b) states that "in the event that a state has a State program for surface coal mining, and is not enforcing any part of such program, the Secretary may provide for the Federal enforcement, under the provisions of section 521, of that part of the State program not being enforced by such State."

Finally, section 521(a)(3) authorizes OSMRE to issue NOV's when an inspection is carried out during federal enforcement of a state program in accordance with section 521(b). Section 521(b) provides procedures for the Secretary when he has reason to believe that violations of all or any part of the state program result from the state not effectively enforcing the state program. Under such circumstances, the Secretary is to notify the state, hold a hearing, provide public notice of the findings required by Section 521(b), and, until such time as the state shows its capability and intent to enforce the state program, the Secretary is required to enforce "any permit condition required under this Act." The section includes the proviso, however, that where a permittee has met his obligations under a state permit that was not willfully secured through fraud or collusion, he will be given a reasonable amount of time to "conform ongoing surface mining and reclamation to the requirements of this Act before suspending or revoking the State permit."

Thus, where OSMRE takes over an inadequately enforced state program, Congress clearly envisioned a time lag in the suspension or revocation of permits in situations where an operator was in violation because of a permit not requiring full compliance with the state program. Rather than penalizing the operator when the state is at fault, OSMRE must allow a reasonable time for a permittee to comply with additional permit conditions required by OSMRE when the permittee has been complying with the original permit conditions. Although the proviso expressly addresses suspensions and revocations, it naturally follows that during the reasonable period for compliance, OSMRE would refrain from issuance of NOV's and cessation orders related to the problem being corrected. The same principle is also established in Section 504(d) of SMCRA.

B. REGULATORY BACKGROUND

The statutory roles discussed above are implemented through regulations promulgated at 30 CFR Parts 842 and 843.

Section 842.11(a)(1) implements section 517(a) of the Act, authorizing oversight inspections. Section 842.11(a)(3) implements the inspection requirements of sections 521(b) and 504(b) of the Act, where the federal government concludes the state is not adequately enforcing its program.

Section 842.11(b) implements section 521(a)(1) of the Act, and is the focus of this final rulemaking. Under that regulation, the authorized representative of the Secretary is to notify the state regulatory authority of a possible violation and to conduct a federal inspection immediately if the state fails within ten days to "take appropriate action to cause the violation to be corrected or to show good cause for such failure and to inform the authorized representative of its response." 30 CFR 842.11(b)(1)(ii)(B).

If there is adequate proof that an imminent danger to the public health and safety, or danger of a significant, imminent environmental harm to land, air or water resources exists, and that the state regulatory authority has failed to take appropriate action, the Secretary will order a federal inspection. 30 CFR 842.11(b)(1)(ii)(C).

Section 843.12(a)(1) implements section 521(a)(3) of the Act, including the issuance of federal NOV's in certain circumstances.

Section 843.12(a)(2) implements section 517(e) of the Act, by requiring the authorized representative to notify the state and the permittee of violations of the Act, the state program, or any condition of a permit. The section also provides the authority for OSMRE to issue federal NOV's in primacy states, but only where the state fails to take appropriate action to cause a violation to be corrected, or to show good cause for such failure.

The agency has concluded previously that it has authority to issue federal NOV's in primacy states under Section 843.12(a)(2), based on the Secretary's enforcement discretion. The Secretary chose to implement that power, not by requiring an immediate federal NOV for every possible violation detected, but instead by allowing the state regulatory authority to take appropriate action or to show good cause for its failure to do so. By so doing, the Secretary is respecting the goal of state primacy, while preserving the authority to protect the environment if a state should fail to implement its program. Thus, while the regulation uses the word "shall" to denote the Secretary's authority, that authority is exercised following a Federal inspection after the Secretary has determined that a state has failed to take appropriate action or to show good cause. The Secretary's authority to issue NOV's under Section 843.12(a)(2) is not the subject of this rulemaking.

SUMMARY OVERVIEW OF REGULATORY STRUCTURE. Combining these separate statutory and regulatory references produces the following structure: Once the Secretary approves a state regulatory program, the state has the primary enforcement role, and OSMRE oversees the implementation of the program. If a state is not enforcing its program adequately, the law provides a mechanism by which OSMRE can review and, if needed, enforce the state program. In the meantime, mine operators must comply with the requirements of the state program. If OSMRE has reason to believe a violation of the state program, or of the Act exists, it must notify the state except in the case of imminent danger to the public or the environment, where OSMRE can immediately inspect and issue a cessation order when a state has failed to take appropriate action. Once notified of a possible violation, the state then has ten days in which to take appropriate action to cause the violation to be corrected, or to show good cause for its failure to take such action.

C. BACKGROUND OF THIS RULE

On May 30, 1986, the Mining and Reclamation Council of America (now part of the National Coal Association) and the Regulatory Assistance Program, an organization of ten state coal associations, submitted a petition for rulemaking to OSMRE. The petition sought amendments and modifications to regulations found at 30 CFR Parts 701, 842, and 843. In particular, the petitioners asked that OSMRE repeal its regulations authorizing the issuance of federal notices of violations in primacy states -- those with approved regulatory programs. The Director denied that portion of the petition on June 8, 1987 (52 FR 21598). The denial of that portion of the rulemaking petition is currently being litigated in the case of *N.C.A. v. Gentile*, No. 87-2076 (D.D.C.).

The petitioners also requested that OSMRE adopt a uniform standard for reviewing state responses to federal ten-day notices. In particular, the petitioners asked that OSMRE adopt an "arbitrary, capricious, or abuse of discretion" standard of review in determining whether a state had taken appropriate action or shown good cause for failing to do so.

The petitioners argued that the lack of a uniform standard for evaluating appropriate action and good cause led to considerable disparity in the treatment of coal operators and state regulatory authorities, and failed to reflect the goals and principles of the congressionally mandated primacy.

On June 8, 1987 (52 FR 21598), the Director granted the petitioners request for an "arbitrary, capricious, or abuse of discretion" standard of review, and, in accordance with federal regulations, began rulemaking proceedings to implement that standard.

On September 9, 1987, OSMRE proposed a rule to implement the decision (52 FR 34050), and requested comments on the proposed rule. On October 27, 1987, in response to a request from the petitioners, OSMRE extended the public comment period on the proposed rule. The extended comment period closed November 20, 1987.

II. DISCUSSION OF FINAL RULE AND RESPONSE TO COMMENTS

A. GENERAL

The final rule establishes a uniform standard by which OSMRE will evaluate state responses to federal ten-day notices. It defines "appropriate action" on the part of the state to cause a violation to be corrected, lists five situations that will constitute good cause for a state failing to take appropriate action, and provides an opportunity for informal review before a federal inspection will occur following a ten-day notice to a state.

OSMRE received 42 comments on the proposed rule, representing the views of 39 groups and individuals.

Of those, 34 expressed general support for the proposed rule, while, in some instances, requesting modification. Many expressed their belief that the rule as proposed more closely reflects congressional intent behind the concept of primacy than the regulations then in effect.

Eight commenters disagreed with the proposal, requesting that the rule not be adopted. Most directed their opposition at specific provisions in the proposed rulemaking, and those comments will be discussed in detail in the following sections. Several commenters expressed broader concerns.

Several individuals described their personal experiences and frustrations in dealing with specific state regulatory authorities. Those persons, while not addressing specific provisions in the rulemaking, expressed general concern over the willingness of states to enforce the law. They suggested that the states would be incapable or unwilling of adequate enforcement without the federal government playing a strong, active role on a day-to-day basis.

A coalition of commenters forwarded descriptions of specific instances in which OSMRE inspections, following ten-day notices, were instrumental in preventing environmental harm. Such examples, the commenters contend, show that ongoing violations of the Act that are not subject to enforcement action by state regulatory agencies, for whatever reason, will be left uncorrected if the rule is adopted as proposed.

Other commenters relayed their concerns over coal mine operators being "caught in the middle" in disagreements between state and federal authorities.

Those points of view reflect clearly the dichotomy of the surface mining law. The law was enacted, in part, because some states did not have reclamation requirements as strict as others, thus creating a competitive disadvantage to those states that had strict reclamation requirements. Yet, as discussed above, the law gives the states the lead, with the federal government playing an oversight role once a state program is approved. What that federal oversight should entail has been a continuing source of debate. This rulemaking is an attempt to reach a proper balance, recognizing the lead role of the primary states, while at the same time providing the federal presence that Congress intended, to assure the law, through the approved state programs, if effectively enforced.

OSMRE disagrees with the comments that argue the federal government must have primary enforcement responsibility in primacy states. As enacted, the law allows the Secretary to give the lead to the states. The U.S. Court of Appeals succinctly described the Secretary's role: "Once 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." In re: *Permanent Surface Mining Regulations Litigation*, 653 F.2d at 523 (1981).

The law also provides mechanisms for resolving problems with state implementation of the program: Amendments to state programs (described in 30 CFR 732.17), federal enforcement of state programs, and withdrawal of federal approval for a state program (described in 30 CFR 733.12). With this final rule, OSMRE expects that use of 732 and 733 actions may increase, as the regulatory focus shifts from individual situations to a broader evaluation of a state's overall program. Such a shift in focus, and a willingness on the part of OSMRE to require program amendments and to process those amendments expeditiously, as well as ongoing program oversight, answers the concern that states will not effectively implement, enforce, or maintain their programs.

At the same time, the likelihood of operators being given conflicting orders from state and federal officials should decrease, without hampering federal oversight of state implementation of the regulatory programs.

In other general comments, a coalition of commenters opposed the rule as a whole because they say it would do more than codify a standard for OSMRE review of state responses to ten-day notices. Instead, they contend that the rule attempts to remove the mandatory obligation to issue NOV's that the Act imposes on both OSMRE and the states. In particular, the commenters argue that the agency has, without proper notice and explanation of the authority for such action, proposed to alter the mandatory enforcement requirements of sections 517 and 521 of the Act. As a result, they argue that the rule is in derogation of the Administrative Procedure Act.

OSMRE disagrees with the commenters' characterization of the proposed rule. The rule, as proposed and as adopted, does not remove any obligation to issue a notice of violation. Where the Secretary is the regulatory authority, the Secretary has a duty to issue an NOV for each violation detected. In primacy states, a state inspector continues to have an obligation to issue a notice of violation when the inspector detects a violation.

That obligation on the state inspector is included in the requirements of an approved state program, and is incorporated into this rule by defining appropriate action as "enforcement or other action authorized under the State program," in Section 842.11(b)(1)(ii)(B)(3). Thus only actions authorized under state programs may be considered appropriate.

As stated above, it is important to view this rule in the context of the Surface Mining Act and the regulations that implement it. The rule addresses the issue of when a federal inspection is required in OSMRE's oversight capacity in primacy states. It is not an effort to weaken the enforcement scheme imposed by other sections of the Act or regulations. In enacting the Surface Mining Act, Congress clearly envisioned a regulatory structure in which states would bear the primary responsibility for enforcing the law, but with oversight by the federal government. That oversight must be based on respect for the role of the states.

States are expected to implement their programs fully, including all the applicable enforcement provisions. If they do not do so, the Act provides mechanisms by which OSMRE can address inadequacies in the state's implementation. Those mechanisms allow the inadequacies to be corrected, however, without placing the mine operator in the middle of conflicting orders from state and federal officials.

The purpose of the rule is as was stated in the preamble to the proposed rule (*52 FR 34050*). That purpose is to establish a uniform standard for OSMRE's evaluation of responses by state regulatory authorities to ten day notices, not to remove enforcement obligations.

Other general comments addressed language in the preamble to the proposed rule. That preamble had stated that the rule would not affect a decision to inspect based on Section 842.11(b)(1)(ii)(C) when adequate proof is supplied that an imminent danger to the public health and safety or a significant imminent environmental harm exists. The preamble also stated that the rule was not intended to interfere with OSMRE's issuance of NOV's as required by court orders in *Save Our Cumberland Mountains v. Clark*, No. 81-2134 (D.D.C. 1985) and *Save Our Cumberland Mountains v. Clark*, No. 81-2238 (D.D.C. 1985).

A group of commenters requested clarification on this point, asking that OSMRE clearly state whether the standard for review, if finalized, would apply to the two cases.

The standards of review adopted in this rule under sections 842.11(b)(1)(ii)(B)(2), (3), and (4) do not apply to OSMRE evaluation of state responses to ten day notices issued under the two aforementioned cases. Although OSMRE could have proposed to modify OSMRE's responsibilities under those orders, OSMRE elected not to do so. As stated in the preamble to the proposed rule, application of the final rule will be consistent with the court orders in the two cited cases.

With regard to the first case cited, this final regulation is not intended to modify the procedures of paragraph 3 of the court order -- commonly called the "Parker Order," -- except that a state may request informal review from the OSMRE

deputy director, in accordance with procedures established by this rule, of an OSMRE determination relating to a state response to a ten day notice. For the situations covered by the Parker Order, paragraph 3 establishes which state actions are considered appropriate following an OSMRE ten day notice.

The second case cited involves the 2-acre settlement agreement. Promulgation of this final rule will not modify implementation of that agreement in the manner agreed upon by the parties.

The same group of commenters asserted that the proposed rule -- if applied to the two cases cited -- would not only interfere with the issuance of NOV's, but would hamper the enforcement process.

OSMRE disagrees with this characterization of the rule, generally and as applied to the two cited cases. The previous rule already accepted appropriate action and good cause as reasons for not ordering a federal inspection. This rule clarifies the meaning of those terms and establishes a process for review. These changes will allow state and federal regulatory authorities to implement the law more effectively. As stated previously, OSMRE retains its right to inspect based on Section 842.11(b)(1)(ii)(C), when adequate proof is supplied that an imminent danger to the public health and safety or a significant imminent environmental harm exists. In addition, OSMRE retains the authority to inspect under Section 842.11 and issue federal NOV's under Section 843.12. OSMRE also retains significant authority, through the procedures of 30 CFR 732.17 and 733.12 to require amendments of state programs and to substitute federal enforcement of the program if needed to protect the environment and enforce the law.

B. PART 842 -- FEDERAL INSPECTIONS AND MONITORING

1. WRITTEN DETERMINATION

Section 842.11(b)(1)(ii)(B)(1) of the final rule provides that OSMRE will make a written determination that a state has failed to take appropriate action to cause a violation to be corrected or has failed to show good cause for its failure to do so, before ordering an inspection that could lead to direct Federal enforcement against an operator in a primacy state. The proposal reflects a change from the previous rule because it requires that the determination be in writing.

The language of final Section 842.11(b)(1)(ii)(B)(1) is the same as that of the proposed rule, but will one minor change to clarify the meaning. That change consists of one sentence that has been added to clarify that the failure of a state to respond to a ten day notice will not prohibit OSMRE from acting.

OSMRE was concerned that the language as proposed left the implication that only after receiving a response from the state regulatory authority could OSMRE then make a determination as to whether the standards for appropriate action or good cause for such failure were met. This left an ambiguity as to what OSMRE would do if a state did not respond. The added sentence is intended to make clear that OSMRE will not be prevented from acting merely because the state regulatory authority fails to respond within ten days. The failure to respond to a ten day notice will constitute a waiver of the state regulatory authority's right to request informal review under Section 842.11(b)(1)(iii). If a state simply fails to respond to a ten day notice, it would not be reasonable to delay federal inspections for another five days to give the state time to request review.

2. ARBITRARY OR CAPRICIOUS STANDARD OF REVIEW

Section 842.11(b)(1)(ii)(B)(2) defines appropriate action and good cause to include any action that is not arbitrary, capricious, or an abuse of discretion, as judged by the approved state program. After considering the comments, OSMRE is adopting the language of Section 842.11(b)(1)(ii)(B)(2) as proposed, but with one editorial change. The proposed language had stated the definitions of appropriate action and good cause would apply for purposes of Part 842. The final rule has been revised to clarify that the definitions are applicable to the subchapter. The change was necessary because the same terms are used in 30 CFR Part 843, notably in Section 843.12(a)(2) as the standard upon which to determine whether a federal reinspection is required. OSMRE intends that the terms be applied consistently, regardless of whether Part 842 or 843 is applied.

Under the final rule, the state program is the standard for judging the appropriateness of a state response because once such a program is approved, a state is expected to act in accordance with that program. It is therefore the approved state program, rather than the Act, that will be used to determine whether a state action, taken in response to a federal ten day

notice, is appropriate or constitutes good cause. See, Sen. Rep. 128, 95th Cong., 1st Sess., 92 (1977), quoted earlier in this preamble.

In comments on Section 842.11(b)(1)(ii)(B)(2), several commenters asked that OSMRE clarify the rule to ensure that state interpretations of non-federal standards are controlling.

Implementation of the goal of state primacy requires that OSMRE defer to a state's interpretation of its own regulations, as long as that deference occurs within the framework of careful oversight, as provided by the statute. OSMRE will recognize a state's interpretation of its own program as long as it is not inconsistent with the terms of the program approval or any prior state interpretation recognized by the Secretary and as long as the state interpretation is not arbitrary, capricious, or an abuse of discretion. Terms of the program approval are codified in the Code of Federal Regulations, and are explained in the Federal Register preamble accompanying the approval, as well as in other correspondence between OSMRE and the state.

If the state interpretation is inconsistent with SMCRA or the Federal regulations, the Secretary must notify the state that its program needs to be modified, under the program amendment provisions of 30 CFR 732.17, and may supersede the inconsistent provision under 30 CFR 730.12(a).

Another group of commenters voiced support for the proposed language, noting that it is in keeping with the Court of Appeals' decision in *In re: Permanent Surface Mining Regulation Litigation*, 653 F.2d 514, 523 (D.C. Cir. 1981), where the court concluded "[o]nce a state program has been approved, the state 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." The commenters also mentioned a decision from the U.S. District Court for the Northern District of Alabama (*Drummond Coal v. OSM*, No. 85-Ar-1411-S (N.D. Ala., June 5, 1985)) as showing that an abuse of discretion standard is appropriate for evaluating responses to ten-day notices. The commenter then suggested that to guard against erosion of the deferential standard, OSMRE should emphasize in the preamble to the final rule that "arbitrary and capricious" and "abuse of discretion" mean that actions by a state regulatory authority are to be accorded the same deference by OSMRE as the Secretary's regulations are by federal courts.

OSMRE has considered the comment, but has decided that the suggested language is unnecessary for purposes of this rule. The rule states clearly that the standard of review will be "arbitrary, capricious, or abuse of discretion." Concerns about future application of those words will best be decided when specific fact situations have arisen and can be evaluated.

Other comments addressed language in the preamble to the proposed rule that explained that "an arbitrary or capricious response, or one that is an abuse of discretion under the state program, would be one in which the state regulatory authority has acted irrationally, or without adherence to correct procedures, or inconsistently with applicable law, or without proper evaluation of relevant criteria."

A group of commenters requested that the language in the preamble be deleted because it implied that state action which occasionally departs from the procedures approved in the state program will render the state response inappropriate. They argued that such a departure may constitute a proper exercise of discretion, particularly if it ultimately allows correction of a violation.

OSMRE disagrees with this comment. Approved programs should contain ample discretion for the state. If additional options are needed, an amendment to the state program would be the appropriate mechanism to resolve the issue, not deviation from the program on a case-by-case basis.

Other commenters also asked that state interpretations of state laws be given deference, but then suggested that where a state program is more stringent than the Act, OSMRE should only require compliance with the less stringent federal requirements.

OSMRE disagrees with this comment. In primacy states, the law to be applied is the entire state program, not merely parts of the state program. In addition, in its oversight role, OSMRE is charged with evaluating how well a state implements its state program -- including all provisions of that program. Under section 517(e) of the Act, federal

inspectors are required to notify the state regulatory authority of violations of "any State * * * program * * *." Therefore, while OSMRE does not have an immediate obligation to issue an NOV upon detecting a possible violation in a primacy state, it is obligated to notify the state of the possible violation of any part of the state program and to evaluate the appropriateness of the state response.

3. APPROPRIATE ACTION

Section 842.11(b)(1)(ii)(B)(3) of the final rule defines "appropriate action" as being enforcement or other action authorized under the state program to cause the violation to be corrected. This definition expands appropriate action to include more than just enforcement actions, but only if the other action is 1) authorized under the state program, and 2) will cause the violation to be corrected.

In the 1982 Federal Register preamble to OSMRE's revised inspection and enforcement regulations, OSMRE declined to spell out in greater detail what appropriate action meant. The agency did conclude, however, that "[t]he crucial response of a State is to take whatever enforcement action is necessary to secure abatement of the violation." (47 FR 35627-35628, August 16, 1982.)

The 1982 decision not to define the term "appropriate action" did not reflect the experience that has since been gained by OSMRE in implementing the primacy concept. The first state program was not approved until 1980, with 15 others approved by the end of fiscal year 1981. The last of the 25 state program approvals occurred in 1983. The agency has now applied the 1982 rules for six years, and has found the absence of a well-established review standard has resulted in disparate treatment of states and coal mine operators nationwide.

Because of its experience with primacy over the past six years, OSMRE rejects the concept that appropriate action to cause a violation to be corrected can only include responses showing that at the time of the state response either the condition constituting the possible violation of the Act no longer exists or the state has issued an NOV or cessation order. Instead, OSMRE recognizes that situations vary and may, in some cases, either be so complex or otherwise allow other actions to resolve the situation.

For example, "other action" to cause the violation to be corrected could include the initiation of the process to require a revision or modification to the operator's permit under 30 CFR 774.11(b) where the original permit contained a defect. Other actions might also include the commencement of a proceeding to forfeit the performance bond if the bond amount is adequate to correct the violation and achieve reclamation, as allowed under 30 CFR 800.50. In both examples, the actions will be appropriate only if they are authorized under the state law in lieu of enforcement action and if they will cause the violation to be corrected.

A coalition of commenters argued that the proposal to broaden the definition of "appropriate action" to include actions in addition to enforcement actions abridges the duty of the state regulatory authority immediately to issue a notice of violation upon detecting a violation. They argued that the only "appropriate" response to cause a violation to be abated is an enforcement response, consistent with section 517(e) and 521(a)(1) of the Act.

Furthermore, the commenters claim that the state and OSMRE lack authority to waive the mandatory citation of a violation, and say that the rule, if adopted, would permit a "free bite" for operators who will violate the conditions of a permit or the state program, knowing that they will have the opportunity to correct the error if caught. To support their position, the commenters cite the legislative history and OSMRE's past construction of the Act, as reflected in the 1982 preamble discussed previously. In addition, they cite *Thomas J. FitzGerald, 88 IBLA 24*, and quote the Interior Board of Land Appeals as saying that a "state regulatory authority has failed to take appropriate action * * * where it fails to initiate an enforcement action."

OSMRE has considered the comment but disagrees with the conclusion. A State regulatory authority continues to have an obligation to take the actions provided in the approved state program to cause a violation to be corrected. In most situations, that means issuing an NOV. In a few instances, other action may be appropriate, if it is authorized by the state program and if it will cause the violation to be corrected. The rule does not change that obligation.

Instead, the rule focuses on the goal of the Act itself -- to see that violations are corrected. In doing so, the rule allows state discretion in how best to accomplish that goal -- but only if those means are authorized under the state program.

OSMRE is not permitting a "free bite", but is simply saying that the federal government will not substitute its judgment and second-guess the states on a case-by-case basis, unless the state action is arbitrary, capricious or an abuse of discretion under its program. The Act entrusts primary implementation of the law in primacy states to the state regulatory authority. The Secretary's obligation to inspect arises only after the Secretary makes the determination that the state has failed to take appropriate action or to show good cause for failing to take such action.

The commenters' assertion that sections 521(a)(1) and 517(e) of the Act do not allow OSMRE to accept anything but State issuance of an NOV or cessation order as appropriate action is incorrect.

As mentioned earlier, the term "appropriate action" is not defined in the Act. The context of the term as used in section 521(a)(1) is action which causes the violation to be corrected. If the state takes action to cause the violation to be corrected, no need exists for the Secretary to conduct an inspection of the site. For purposes of that subsection, the nature of the action is not necessarily relevant, as long as an authorized action causes abatement to occur.

OSMRE has reviewed *Thomas J. FitzGerald, supra*, and finds the case inapplicable to the rule in question. That case involved mines operating without a permit, but affecting more than two acres. Under 30 CFR 843.11(a)(2), operations without a permit pose a condition that can be expected to cause significant imminent environmental harm. The FitzGerald case raised the issue of whether a state has taken appropriate action when it fails to enforce a cessation order in a situation posing imminent environmental harm because of a state court injunction issued in a situation where section 525(c) of SMCRA would not provide a basis for temporary relief.

The Board of Land Appeals concluded that the state did not take appropriate action, relying in part upon the 1982 preamble which is rejected by this rule. The Board also specifically said that 30 CFR 842.11(b)(1)(ii)(B) -- the section addressed by this rulemaking -- was "inapplicable" because the case involved a question of imminent harm.

Other commenters generally supported the proposal, but requested clarification that appropriate action by a state in response to a ten-day notice for permit deficiencies can consist of a request for a permit revision rather than enforcement action. Another commenter specifically objected to the preamble language that would allow an application for permit revision to constitute appropriate action. That commenter argued that "appropriate action to cause the violation to be corrected" in section 521(a)(1) of the Act implies that the violation must either be abated or a citation issued within ten days. The commenter thus concluded that merely initiating a permit revision within the ten days would not be sufficient. The permit, the commenter argued, must be approved during the ten days in order to meet the terms of the Act.

The same commenter also asserted that while the Act allows a permit to be revised, the Act does not provide an exemption for the operator while he seeks a permit revision. Instead, the commenter argues that 30 CFR 773.17(c) requires a permittee to comply with the terms and conditions of a permit, and section 521(a)(3) of the Act requires state and federal officials to cite violations of permit conditions. Therefore, the commenter concludes, the only "appropriate action" a state can take when faced with a permittee's failure to comply with a permit is to issue a notice of violation.

Section 521(a)(1) of the Act provides that a state must take action to cause a violation to be corrected after receiving a ten-day notice. It does not provide that abatement must occur during the ten days. Therefore, in limited circumstances, obtaining an application for a permit revision may be appropriate to cause the violation to be corrected.

For instance, in a case where the state regulatory authority erred in issuing the permit and the permittee is performing in accordance with the permit, the appropriate state response to a ten-day notice could be to require interim steps if needed to minimize any potential environmental harm, to notify the permittee in writing that a revision is required, and then to receive an application for the required revision and establish a time period for its decision on the application. In other words, processing a permit revision rather than taking enforcement action would be appropriate action only if the state had erred in approving the permit or otherwise determines that revision is needed. On the other hand, if the operator is violating a condition of a permit, the appropriate response by the state will continue to be to issue an NOV.

Another group of commenters stated general support for the evaluation standard, but also recommended several changes with respect to the definition of appropriate action under the proposed rule. First, they requested that the definition of appropriate action in the final rule reflect the situation where the state adequately demonstrates that a condition or practice does not constitute a violation. They argue that such a request would mitigate the tendency of

OSMRE to substitute its subjective judgment for that of the states and would be in accordance with court decisions that indicate that the state is in a better position to apply its approved program because of its familiarity with local conditions.

OSMRE agrees with the commenters' concern but, after considering the comment, has concluded that such situations are already covered under the definition of good cause, provided in Section 842.11(b)(1)(ii)(B)(4)(i). A showing that no violation exists under the state program would constitute good cause for failure to take action to have a violation corrected. It would not fall under the category of appropriate action to cause a violation to be abated.

The same commenters also requested that the rule reflect that actual abatement of a violation is not the standard for determining whether a state response is appropriate.

OSMRE agrees with this comment. The rule provides that appropriate action is action to cause the violation to be corrected. Thus, actual abatement is not required within the ten days. Initiating an action within the ten days that would lead to abatement within a reasonable time would also be acceptable.

The commenters also requested that the definition of appropriate action in the final rule explicitly indicate that any definition of appropriate action is not exhaustive. The commenters suggested specific language that would show that the definition is not exhaustive.

After considering the comments, OSMRE has concluded that the rule already reflects the concerns of the commenters. As proposed and as adopted, Section 842.11(b)(1)(ii)(B)(3) states that appropriate action includes enforcement or other action authorized under the state program. The language "other action" clearly shows that the definition is not exhaustive. "Other action" is confined, however, to actions that are authorized under the state program to cause the violation to be corrected. If the "other action" cannot meet those criteria, it will not be considered appropriate because it would be arbitrary, capricious, or an abuse of discretion because of inconsistency with the state program.

In similar remarks, another commenter offered support for the proposed rule, but suggested that the definition of appropriate action be expanded to include other alternatives. The commenter, however, did not offer specific suggestions as to what those additional examples might include.

Other commenters requested specific additions to the definition of appropriate action. One coalition of commenters asked that the definition of appropriate action include agreed-upon abatement or reclamation plans. Another commenter asked that the definition of appropriate action include "state-dictated action by the operator which indicates enforcement or other action or efforts undertaken pursuant to the state program."

Both comments appear to be addressing the situation where the state regulatory authority and the permittee have agreed on abatement or reclamation plans to correct a violation.

To the extent that the abatement or reclamation plan is authorized under and follows the procedures of the approved state program, OSMRE agrees that such a plan could qualify as appropriate action. The agency is not changing the regulatory language, however, because such an example is included in the phrase "enforcement or other action authorized under the state program * * *." It should be emphasized again, however, that this rule is not intended to eliminate enforcement obligations which exist under any state program.

4. GOOD CAUSE

Section 842.11(b)(1)(ii)(B)(4) of the final rule lists five situations that will be considered "good cause" for the state regulatory authority to fail to take action to have a violation corrected. Those actions are: (a) Under the state program, the possible violation does not exist; (b) the state regulatory authority requires a reasonable and specified additional time to determine whether a violation of the state program exists; (c) the state regulatory authority lacks jurisdiction under the state program over the possible violation or operation; (d) the state regulatory authority is precluded by an administrative or judicial order from an administrative body or court of competent jurisdiction from acting on the possible violation, where that order is based on the violation not existing or where the temporary stay standards of section 525(c) or 526(c) of the Act have been met; or (e) with regard to 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 program.

The first three items under good cause were adopted as proposed. The fourth and fifth items have been revised in response to comments, as discussed below. A sixth item in the proposed rule, which would have included as good cause situations where "extraordinary circumstances preclude or render futile enforcement against the possible violation," is not included in the final rule.

In comments on the proposed language, a coalition of commenters opposed any attempt to list situations that will constitute good cause for a state failing to take appropriate action. They argued that the only appropriate action that can be taken by a state in response to a violation-in-fact is enforcement action that will cause the violation to be abated, so there can never be a situation where the state's failure to issue a notice of violation for a violation-in-fact will constitute good cause.

The commenters cited the Act's legislative history to support their contention that the "state must take action to have the violations corrected," rather than show good cause for failing to do so.

OSMRE disagrees with the commenters' interpretation of SMCRA because it ignores the plain language of the Act. By including the phrase "or to show good cause for such failure * * *", Congress clearly recognized there would be situations when neither the state nor OSMRE will act immediately under section 521(a)(1) of SMCRA. Therefore, the agency's effort to define what specific situations constitute good cause is clearly authorized. In situations where good cause is based upon a problem with the state program, OSMRE will take whatever action is needed to resolve the programmatic issue.

The same commenters asserted that the only situation where a state would have good cause for failing to take appropriate action is where the state asserts that, in fact, no violation exists. In such a case, the commenters argued, OSMRE would still be obligated to inspect the site to determine whether the state response was justified.

Again OSMRE disagrees with the commenters' interpretation of the Act. In effect, the commenters themselves define good cause, but include just one of OSMRE's five categories. Although this may be the commenter's preferred policy choice, the Act allows and supports OSMRE's practical and reasonable definition of good cause.

In cases where a state concludes that no violation exists, OSMRE will defer to the state's decision unless it determines that the state conclusion was arbitrary, capricious, or an abuse of discretion. That is in keeping with the statutory framework, the congressionally mandated concept of primacy, and with the decision in *In re: Permanent Surface Mining Regulation Litigation*, quoted earlier.

As discussed earlier, in determining whether a state action is arbitrary or capricious, the Secretary will continue to make independent determinations, based on the facts in each case. Such determinations are not required to be made on the basis of inspections, however. The federal duty to inspect only occurs after the Secretary determines that the state action was not appropriate and the state did not have good cause for failing to take appropriate action. The Act does not require a federal inspection to determine whether to inspect.

Other commenters addressed the specific examples that were included in the proposed rule. Those are discussed below.

Section 842.11(b)(1)(ii)(B)(4)(i). Section 842.11(b)(1)(ii)(B)(4)(i) is the first item in the category of good cause and provides that a state regulatory authority has good cause for failing to take appropriate action to have a violation corrected if "under the state program, the possible violation does not exist." The proposed rule would have referred to whether the violation "did not," as well as does not, exist. The "did not" language has not been adopted because the key to judging the state response is how it responded to an existing violation.

A coalition of commenters opposed this provision because, it appears, they oppose any deference to the states in determining whether site conditions constitute a violation. The commenters argued that Congress intended that a federal inspection would occur in all instances as a follow-up to the ten-day notice, so that OSMRE could independently determine whether the facts constitute a violation of the program or of the Act. Thus, the commenters concluded that there "is no authority for interposing any review procedure of state inaction between the state response and subsequent immediate federal inspection."

As discussed earlier, OSMRE's role in primacy states is one of oversight, in which it evaluates the manner in which a state implements the state program, rather than OSMRE taking the lead role in implementing either the program or the Act. After issuing a ten-day notice, OSMRE independently determines whether the state has taken appropriate action or shown good cause for such failure, based upon the state response.

OSMRE disagrees with the commenter's contention that OSMRE's independent determination must be based on an inspection of the site. Section 521(a)(1) states that "the Secretary shall immediately order Federal inspection" of a mine site with an alleged violation if the state regulatory authority fails within ten days after notification of the possible violation to take appropriate action or show good cause for failing to act. Thus the Act clearly envisioned that the Secretary would make a determination as to whether the state action was appropriate, before ordering a federal inspection. The commenters, on the other hand, appear to be arguing that an inspection is required in every instance in order to determine whether to inspect. Such a conclusion is contrary to the language and purpose of the statute.

With regard to the commenter's contention that good cause should be based upon whether a violation of the Act exists, a state should only be expected to act under the terms of its state program, which was approved by the Secretary as being consistent with the Act following the opportunity for public participation. If any aggrieved person believed that the approved state program was not consistent with the Act and the Secretary's regulations, the program approval was subject to challenge under section 526(a)(1) of SMCRA. At this point, such challenges have almost all been resolved. Also, adversely affected persons may continue to bring actions under section 520(a)(2) to address Secretarial or state regulatory authority failure to perform non-discretionary duties arising out of program deficiencies.

In situations which do not involve significant imminent environmental harm or danger to the public health and safety, neither an obligation nor a compelling reason exists for OSMRE to conduct a federal inspection with regard to facts which, even if true, do not constitute a violation of the state program. The proper course of conduct under such circumstances is for OSMRE to inquire whether the state program accords with the Act. If not, the state program should be changed and, when necessary, may be superseded by OSMRE under 30 CFR 730.11(a).

OSMRE recognizes that situations which ultimately will become violations of the state program might continue until the required state program change occurs. With respect to requirements that should be included in a state program, however, neither section 521(a)(1) nor any other section of the Act requires the issuance of a notice of violation until the state program undergoes modification.

Because the requirements of the Act are implemented in a primacy state through the state program, operators in a state are directly answerable under the state program. See *Haydo, supra*.

To judge whether the state has taken appropriate action, or has shown good cause, under the terms of the Act instead of under the state program, is not fair to the operator performing in accordance with the state program. The operator should be responsible under one set of standards, and not be subject to enforcement sanctions for violating other standards when he was not on notice of such standards.

Section 842.11(b)(1)(ii)(B)(4)(ii). Section 842.11(b)(1)(ii)(B)(4)(ii) includes as good cause situations where state regulatory authorities require reasonable and specified additional time to determine whether a violation of the state program exists. Several commenters expressed support for this provision and viewed the example as one illustrating the "traditional discretion afforded administrative agencies."

Another group of commenters opposed this category. They asserted that failure of a state to take enforcement action within ten days in a situation that OSMRE believes constitutes a violation-in-fact would, by definition, be an inappropriate response because the state exceeded the time certain allotted by Congress. Congress, they said, has already given the state ten days in which to act and if Congress had wanted to give states more time, or to allow a period of "non-decision," it would have done so explicitly.

OSMRE agrees that the state's response to a ten-day notice is required within ten days, as specified by Congress in section 521(a) of the Act, but has concluded it may be reasonable for a state, in certain cases, to respond that it needs a specified amount of additional time to determine whether a violation does, in fact, exist. This situation might arise, for example, where technical analysis or laboratory work must be conducted on soil or water samples collected at a mine site

in order to establish that a violation exists or to enable the regulatory authority to make the finding to support a permit revision under 30 CFR 774.11(c) where an operator is acting in compliance with a defective permit.

Under section 521(a)(1) of the Act, the state regulatory authority has an obligation within 10 days to take action to cause a violation to be corrected or to show good cause why it has failed to take such action. Thus, Congress clearly provided for a situation where the state was unable to act within the 10 days to have the violation corrected, but where the state had good cause for its inability to act. OSMRE's obligation to immediately inspect the site arises only after the state regulatory authority fails to take appropriate action or fails to show good cause for such failure within 10 days. If the state has good cause for not acting, such as needing additional time for technical or laboratory analysis, then OSMRE's obligation to inspect has not yet arisen.

A ten-day notice only describes the existence of a possible violation. Before an enforcement action can be taken, the state or OSMRE must be able to prove a violation exists, which in some cases may require more than 10 days. Where a state regulatory authority has shown that it is diligently pursuing the facts to determine whether a violation exists, it would be improper to require the state to take enforcement action before the state concludes a violation exists.

Another commenter expressed concern that allowing states more time in which to make a determination would offer an opportunity for abuse and would allow unlimited time for violations to be forgotten or abated without ever being cited as required under sections 521 (a)(3) and (d) of the Act.

OSMRE agrees that the need for more time must not be allowed to become an abused provision. The rule allows the need for additional time to constitute good cause only where the state regulatory authority demonstrates that it requires a reasonable and specified amount of additional time -- not unlimited time. By limiting the additional time allowed to a reasonable and specified amount, OSMRE has reduced the potential for abuse.

Section 842.11(b)(1)(ii)(B)(4)(iii). Section 842.11(b)(1)(ii)(B)(4)(iii) includes as good cause, "the state regulatory authority lacks jurisdiction under the state program over the possible violation or operation."

One group of commenters asserted that even if a state lacks jurisdiction, OSMRE would still have jurisdiction and would be required to order a federal inspection.

The commenters are wrong in focusing on OSMRE's jurisdiction to conduct federal inspections. As mentioned earlier, section 517(a) of the Act provides authority for the Secretary to conduct inspections in primacy states to evaluate the administration of state programs. The issue under section 521(a)(1), however, is not whether authority exists for a federal inspection, but whether the state has shown good cause so as not to trigger the Secretary's obligation to inspect.

The same commenters also said that section 517(e) of SMCRA calls for a federal inspector to issue an NOV whenever the inspector sees a violation of a state program or of the Act.

As can be inferred from the earlier discussion of section 517(e), OSMRE disagrees with the commenters' interpretation of that section. Section 517(e) does not separately require the Secretary to issue a notice of violation in a primacy state. In determining the Secretary's enforcement role in primacy states, section 517(e) must be read together with section 521. Thus, in situations covered by section 521(a)(3), the issuance of a federal NOV would implement section 517(e). Under section 521(a)(1), however, instead of immediately issuing an NOV in a primacy state, the Secretary provides a state and the permittee with a "ten-day notice," the notice of the possible violation, and gives the state the opportunity to have the violation corrected. In such circumstances, providing the ten-day notice implements the section 517(e) requirement.

If section 517(e) required the issuance of an NOV upon detection of each violation by every Federal inspector during oversight and other inspections, it would make superfluous both the state notification provisions of section 521(a)(1) and the carefully drafted language prescribing the applicability of section 521(a)(3) of SMCRA.

This interpretation of section 517(e) is not new and is consistent with OSMRE's previous regulations. In the 1979 adoption of 30 CFR 843.12(a)(2), the section which provided a procedure for the issuance of federal NOV's in a primacy state, OSMRE specifically adopted a procedure whereby a federal NOV would not be written on an initial inspection, but would await until notification was provided to the state for the state to act. (44 FR 15303, March 13, 1979.)

The commenters also said that the state programs, in theory, have jurisdictional provisions identical to those required by the Act and, to the extent that they do not, OSMRE should require corrective amendments under 30 CFR Part 732. In the absence of state jurisdiction, however, the commenters asserted that OSMRE would continue to have an obligation to inspect, because the state took no action to cause the violation to be corrected. The commenters also argued that Congress could not have intended violations to go uncorrected during pendency of the amendment process.

OSMRE agrees that where a state lacks jurisdiction because of deficiencies in the approved state program, OSMRE must require a program amendment under 30 CFR 732.17, to assure that the state program is in accordance with the Act and consistent with the federal regulations.

OSMRE disagrees with the commenters' view that a jurisdictional deficiency in the state program imposes an inspection duty on OSMRE. Under section 521(a)(1), OSMRE's responsibility to inspect following a ten-day notice arises when the state fails to take appropriate action to cause a violation to be corrected and fails to show good cause for such a failure. If the state lacks jurisdiction, then the state has good cause for failing to act. If a state has good cause, then OSMRE's obligation to inspect a site, other than through oversight inspections or in cases of imminent harm, has not come into being.

Disagreements over the jurisdictional reach of state programs and the Federal Act and regulations should be few and far between. But the federal/state experience over the last several years has shown that the disagreements do occur, however, seldom. Under the previous ten-day-notice rules, which did not define "good cause" and "appropriate action," operators could be given conflicting directions from two different governing entities. By this final rulemaking, OSMRE intends to allow a consistent and rational process to resolve disagreements and to avoid unnecessary issuance of a federal NOV to an operator merely because OSMRE and the state cannot resolve the disagreement between them on the eleventh day.

In theory, disagreements should never exist. Before the Secretary may approve a state program, the state program must be consistent with, and cover the same ground as, the federal Act and regulations. While adopted in the first instance by a state, a state program becomes Federal law when approved by the Secretary and promulgated as Federal regulation. (*44 FR 15023*, March 13, 1979.) The State program must be "no less stringent than, meet the minimum requirements of, and include all applicable provisions of the Act" and be "no less effective than the Secretary's regulations in meeting the requirements of the Act." 30 CFR 730.5 and 732.15(a). Federal standards imposed by the Act are thus enforced through the state program. If, in practice, jurisdictional reach disagreements arise, most likely these are the fault of either the Secretary or the state, and not the fault of the operator. Rather than sort out disagreements after operators have been issued federal NOVs, OSMRE intends this rulemaking to allow disagreements, to be sorted out without unnecessary issuance of federal NOVs. (It should be understood that notwithstanding these procedures, Federal enforcement action will be taken to resolve imminent harm situations.)

Comments asserted that OSMRE has an obligation to issue an NOV for a violation of the Act in a primacy state, even if the condition is not a violation of the state program.

The commenters are wrong in asserting that OSMRE must issue NOVs for "violations of the Act" which are required to be, but have not yet been, incorporated into a state program. Until jurisdictional deficiencies are resolved, the state program governs state and operator actions. Congress clearly intended operators to be responsible for complying with only one set of regulations -- either state or federal, but not both. As a result, in primacy states the Act is implemented through the approved state program rather than directly. Thus factual situations which the commenters characterize as "violations of the Act" are not enforceable against operators until incorporated, as required, into the state program. This was recently recognized by the U.S. Court of Appeals for the Third Circuit when it stated that "Sections 512 and 515 [of SMCRA] set forth standards for approved regulatory programs and impose no duties on operators themselves." *Haydo v. Amerikohl Mining, supra*, 830 F.2d at 498, n.2.

The limitations under which OSMRE can issue NOVs in primacy states do not apply to situations involving imminent harm. Significant imminent harm to the environment or danger to public health or safety, is prevented through OSMRE's power to issue cessation orders under 30 CFR 842.11(b)(1)(ii)(C) and 843.11(a). Under Section 843.11, and under section 521(a)(2) of the Act, OSMRE may issue cessation orders for conditions or practices, as well as violations, which create an imminent danger to the health or safety of the public, or is causing, or can be reasonably be expected to cause

significant imminent environmental harm. Thus the Act provides a mechanism through which to abate significant harm or dangerous conditions, regardless of whether the state program prohibits the condition or practice causing such harm or danger.

Similarly OSMRE is not precluded from taking enforcement action with respect to requirements of the Act directly imposed upon an operator which are not required to be included in state programs. One example would be the obligation to pay Abandoned Mine Reclamation Fees and otherwise comply with Title IV of the Act, *30 U.S.C. 1231-1243*, which exists regardless of its inclusion in a state program.

Another commenter asserted that lack of jurisdiction might be "good cause" for the state not acting, but not for OSMRE to fail to act. To support that contention, the commenter cited section 504(b) of the Act, which provides that where a state, with an approved state program, is not enforcing a part of its program, the Secretary may provide for federal enforcement under the provisions of section 521. Section 521(a)(3), the commenter then points out, states that federal inspectors shall issue NOV's where a federal inspection is carried out pursuant to section 504(b), among other reasons. From this, the commenter concludes that even where a state is justified for not correcting a violation because of lack of jurisdiction, OSMRE is required to inspect.

OSMRE agrees in part and disagrees in part with the comment. OSMRE agrees with the commenter's apparent acceptance that lack of jurisdiction by the state constitutes good cause for the state's failure to act. That is all a state has to show in response to a ten day notice under section 521(a)(1) of SMCRA.

OSMRE disagrees with the commenter's view that OSMRE must take enforcement action despite the good cause showing by the state. Such an interpretation reads the good cause provision out of the Act. Section 521(a)(1) plainly provides that if good cause exists, then OSMRE is not obligated to perform an inspection under that section in non-imminent harm situations.

It is possible, however, that in certain limited circumstances a state may not have jurisdiction to take enforcement action because particular facts, which are required by the Act to constitute a violation of the state program, are not in fact a violation of the state program. Under such circumstances, the operator is not subject to the issuance of an NOV by OSMRE because the violation of a requirement of the Act results from the state program deficiency, not the conduct by the operator.

Future jurisdictional disputes should be rare because, after six years of primacy, OSMRE oversight has resolved major issues stemming from deficiencies in the state programs. Generally, the only remaining areas of difference relate to OSMRE adopting new regulations -- typically the result of policy changes or court orders -- after the state program approvals. Although such new rules must be reflected in state programs, operators are ordinarily given time to comply before enforcement action is taken following necessary state program changes.

OSMRE also disagrees with commenter's interpretation of section 504(b) of SMCRA. That section refers to a state's failure to enforce any part of its approved program. Where the state's approved program fails to provide jurisdiction, the state is not failing to enforce its approved program, and therefore section 504(b) does not apply.

Section 521(a)(1) is not the only provision of the Act under which congress allowed corrective action, such as a state program amendment, to occur without enforcement action being taken immediately. For instance, Section 521(b) provides the mechanism through which the Secretary assumes responsibility for enforcing a state program if the state's enforcement is found to be inadequate. The section provides, however, that permittees who are in compliance with a state permit are to be given a reasonable time to conform to the Act. Thus Congress recognized that a period would exist during which regulatory requirements would not be met -- and Federal NOV's would not be issued -- because of a lapse in enforcement of a state program.

Congress recognized, in various sections of the Act, that the Federal/State relationship and the actions of the regulatory authority may not be perfect. The Act includes a number of procedures, all of which take time, to remedy the potential imperfections. The current rules implementing the Act provide, basically, four mechanisms to sort out potential Federal/State disagreements: (1) 30 CFR Part 732, (2) 30 CFR 730.11, (3) 30 CFR Part 733, and (4) the rules affected by this final rulemaking. Which of these four mechanisms is most apt for resolving a particular disagreement, of course, depends on the facts.

When State law itself is the problem, and not just its implementation, Congress explicitly provided procedures in sections 504 and 505 of the Act to resolve them. Those sections have been implemented at 30 CFR 730.11, regarding federal preemption, and at 30 CFR Part 733, regarding federal programs. Also, 30 CFR Part 732 provides the process for State program amendments when appropriate. When state program implementation is the problem, Congress explicitly provided procedures in sections 504(a)(3), 504(b) and 521(b) of the Act to deal with the failure of a state to implement, enforce, or maintain the approved state program. Again, all of these mechanisms take time. See section 504(c), 30 CFR 733.12. In the sections Congress explicitly recognized that a permittee might not be in compliance because of state regulatory mistake and through no fault of his own, sections 504(d) and 521(b) of the Act, Congress directed the Secretary to give the permittee a reasonable time for compliance.

In sections 521(b), 521(a), and 520(a)(2) of the Act Congress has implied that permittees should not always be responsible for error authorized by the regulatory authority. The "reasonable time" allowed in section 521(b), the ten day period for a state to show "appropriate action" or "good cause" in section 521(a), and the limitations on citizen suits in 521 for violations of "any rule, regulation, order or permit", rather than violations of the Act, all point to the conclusion that Congress intended a procedural time "buffer" before making an operator responsible for the consequences of a mistake by the state regulatory authority or OSMRE. In keeping with this congressional recognition and intent, this final rulemaking provides an explicitly consistent and rational procedures concerning federal intervention on a mine by mine basis in a primacy state.

Section 842.11(b)(1)(B)(4)(iv). Section 842.11(b)(1)(B)(4)(iv), the fourth category listed for good cause, provides that where the state regulatory authority is precluded from acting on the possible violation because of an order issued by administrative body or court of competent jurisdiction, good cause will exist for the state's failure to act.

To reflect the concerns expressed by the commenters, OSMRE has revised the language of the final rule, in Section 842.11(b)(1)(ii)(B)(4)(iv), to articulate more clearly the basis on which OSMRE will conclude an injunction is good cause. OSMRE will view the state regulatory authority as having good cause for not taking action to have a violation corrected when it is precluded from doing so by an order from an administrative body or court of competent jurisdiction, but only where that order is based on the violation not existing or on the temporary stay standards of section 525(c) or 526(c) of the Act being met. Such circumstances would demonstrate that the state court or administrative body was acting within the confines of the approved state program and no need exists for mine-specific federal intervention. The category as adopted is narrower than the proposed rule, which did not contain the latter constraints.

Commenters opposed the proposed provision, arguing that it conflicts with OSMRE's independent obligation to inspect and enforce, as mandated by sections 517(e) and 521(a)(1) of the Act. The commenters cited *Thomas J. FitzGerald, supra*, and quoted the Interior Board of Land Appeals as saying that a regulatory authority has failed to take appropriate action under section 521(a)(1) of the Act not only where it fails to initiate enforcement action, but also where it is unable to pursue that action because of a court injunction. The commenters concluded that if a thwarted attempt to take enforcement action is not appropriate action, then failure of the state to take action in the first instance because of a bar to such action would not constitute good cause for the inaction.

Other commenters reflected the opposite opinion, expressing support for the proposal. They cited *Midwestern Mining Consultants, Inc. v. DNR of Indiana and OSM, Civ. No. EV 83-102-C (S.D. Ind. July 17, 1984)*, to support their conclusion that a state will have already met the statutory requirement for taking appropriate action based on the initial enforcement action which was later enjoined.

The FitzGerald case, discussed earlier, addressed the question of "appropriate action" when a situation exists posing imminent environmental harm. The Board found that 30 CFR 842.11(b)(1)(ii)(B), the subject of this rulemaking, was inapplicable because the state had taken action to secure abatement of the violation by issuing cessation orders. It went on to find that the state had failed to take "appropriate action," even though it had issued cessation orders, because it was later enjoined from enforcing those orders by a state court, which did not apply the temporary relief standards in the state program. The Board concluded that, based on the facts, temporary relief would not have been available under section 525(c) of *SMCRA*. 88 *IBLA* 24, 29 at n.4. Given these considerations, the result reached in the FitzGerald case appears consistent with this rule.

Midwestern involved a mine operating without a permit, and therefore, under 30 CFR 843.11(a)(2), posed a danger of imminent environmental harm. As in FitzGerald, a state court had enjoined the state regulatory authority from enforcing cessation orders against the operator. In Midwestern, OSMRE attempted to take enforcement actions, and issued a federal NOV against the operator. The court found that OSMRE had no jurisdiction in the situation and stated that "[t]he Secretary must contact the state regulatory board and wait for that board to take appropriate action. This requirement is only waived if there is evidence of 'imminent danger of significant environmental harm' and 'if the State has failed to take appropriate action' * * * ." Midwestern, Slip op. at 6. The court went on to conclude "the State of Indiana had taken action against plaintiff for certain violations, and a state court had promptly granted a preliminary injunction against the State * * * . The State did take appropriate action; it was simply enjoined from enforcing that action. Since there was no imminent environmental danger and the state had taken appropriate action, the Secretary could not avoid his obligation to allow the State regulatory authority to remedy this situation." Id.

Thus the court in Midwestern reached a conclusion contrary to that of the Interior Board of Land Appeals in FitzGerald on similar facts. However, the Board in FitzGerald based its decision on the fact that not only was imminent environmental harm posed, but also that the state court made no finding that the operators were likely to prevail on the merits.

Some commenters supported the rule but expressed concern over language in the preamble to the proposed rule. In the preamble to the proposed rule, OSMRE said that if a state were seeking to overturn the injunction, good cause would exist, but if a state was not seeking to overturn the restraint, OSMRE would examine the state action and determine whether it was arbitrary, capricious, or an abuse of discretion under the state program.

The commenters asked that OSMRE delete any reference in the final rule to a federal examination of state decisions not to appeal restraining orders or adverse decisions. They argued that for OSMRE to override the relief granted the operator at the state level would completely undermine the relief provisions set forth in section 525 of the Act and would subject an operator to double jeopardy by having to prevail at both the state and federal level.

OSMRE has considered the conflicting comments and court decisions, and believes that a state regulatory authority has good cause for not taking action when it is enjoined from doing so by a state administrative or judicial body acting within the scope of its authority under the state program. A state regulatory authority is enforcing state law and a state regulatory program, and state courts have jurisdiction to interpret those state laws. Although a state regulatory authority cannot disregard an injunction issued for any reason by a state court, OSMRE concludes that good cause exists for the regulatory authority not acting only where the order has a proper basis. Such a basis would exist if the temporary relief criteria of the state program (which presumably would reflect those in sections 525 and 526 of SMCRA) are satisfied or if the state court concluded the violation does not exist.

OSMRE is aware of concerns that a limited number of courts might not base their decisions on the temporary relief criteria of the state program. Those concerns were the basis for the language in the proposed preamble that OSMRE would review state decisions not to appeal in determining whether an injunction constituted good cause. After considering the comments, OSMRE has concluded that consideration of whether an appeal was taken is unnecessary to the determination of whether the state administrative or judicial review body acted properly within the authority of the state program.

As a result, OSMRE will examine decisions by the state not to appeal judicial or administrative orders barring state enforcement action only to the extent that such decisions illustrate state program effectiveness or ineffectiveness. In other words, if OSMRE disagrees with a decision of the state not to appeal an administrative or judicial restraint, actions provided under Parts 732 and 733 will be the appropriate mechanism for resolution of that particular disagreement.

In other comments on Section 842.11(b)(1)(ii)(B)(4)(iv), a commenter suggested that OSMRE may want to reconsider the proposal to the extent it would permanently bar OSMRE from taking action when the state is administratively or judicially precluded from acting. The commenter pointed out that, given the wide variety of administrative and judicial procedures among the states, some regulatory authorities could be precluded from acting for unreasonable lengths of time, which would be unfair to those states with more expeditious procedures. Therefore, the commenter suggested that OSMRE consider imposing a reasonable, maximum time limit for state inaction, after which OSMRE would have the option, but not necessarily the duty, to initiate federal action.

OSMRE disagrees and will not impose a time limit as suggested by the commenter. OSMRE will not intervene in a case because of the duration of injunctive relief granted by state administrative or judicial review authorities. Rather, OSMRE will examine the basis for the relief, and OSMRE will closely watch for patterns of departure from the state's administrative and judicial procedures.

Section 842.11(b)(1)(ii)(B)(4)(v). As proposed, Section 842.11(b)(1)(ii)(B)(4)(v) provided that the state has good cause for failing to take action against a violation if the state regulatory authority is diligently pursuing or has exhausted other appropriate enforcement provisions of the state program. The final rule has been revised to make it clear that this category will only apply to abandoned sites, as defined in 30 CFR Section 840.11(g), promulgated June 30, 1988 (FR 24872) in a separate rulemaking.

Commenters asserted that proposed categories v and vi under good cause, would eliminate the obligation of state regulatory authorities to issue a notice of violation for every violation observed, regardless of whether enforcement actions for previous unrelated violations are pending. The commenters argued that the agency is without authority to abridge this enforcement obligation. They cite case law, the legislative history of the Act, and past OSMRE policy to support their contention that sections 517(e), 521(a)(3), and 521(d) of the Act make issuance of an NOV by states mandatory and unconditional for each violation detected, in all cases.

Furthermore, the commenters argued that the rule, if adopted, would be an "open invitation to abuse" by state regulatory authorities, and point to the history of "two-acre" enforcement efforts in Kentucky to support their contention.

OSMRE agrees with this comment when applied to violations of the state program at all but abandoned sites, and has revised the final rule accordingly. For all sites, except those which qualify as abandoned, good cause would not ordinarily exist where a violation of the state program exists, state action is not causing the violation to be corrected, and the state has not taken enforcement action.

Abandoned sites present a more complicated situation. Under the final abandoned sites rule, abandoned sites include those at which surface and underground coal mining and reclamation activities have ceased, an unabated failure-to-abate cessation order remains outstanding (or service of a notice of violation could not be completed), alternative enforcement is proceeding, permits no longer are current, and bond forfeiture is proceeding. These criteria describe sites at which the regulatory authority has been unsuccessful at achieving reclamation despite diligent efforts to do so. Under the abandoned sites rule, sites that are classified as abandoned may be inspected at a frequency of less than eight partial and four complete per year because inspections of such sites are unlikely to lead to the resolution of problems at the sites.

In the abandoned sites rule, OSMRE provides in 30 CFR 843.22 that a notice of violation or cessation order need not be issued for a violation at an abandoned site if abatement of the violation is required under any previously issued notice or order. Thus, if in response to a ten day notice a state regulatory authority informs OSMRE that the site in question is an abandoned site and an earlier order requires abatement of the violation detected, then good cause would exist for no further enforcement action to be taken.

The preamble to the abandoned sites rule makes it clear that in situations not covered by Section 843.22, the regulatory authority would continue to be obligated to take enforcement action when it observed a violation at an abandoned site, even though the issuance of either a notice of violation or a cessation order is unlikely to cause additional reclamation and would almost certainly generate uncollectible penalties. OSMRE reached this conclusion because it concluded that the Act mandates the regulatory authority to take such action.

With regard to the present rule, if in response to a ten day notice a state regulatory authority informs OSMRE that it has classified a site as abandoned because it meets the criteria enumerated above, the Secretary may consider such a response good cause under section 521(a)(1). Good cause would exist because a Federal inspection followed by Federal enforcement action would likely be as fruitless as state enforcement action in such circumstances.

Proposed Section 842.11(b)(1)(ii)(4)(vi). The final rule does not include the provision proposed as Section 842.11(b)(1)(ii)(4)(vi). As proposed, that paragraph provided that a state would have good cause for failing to take action to cause a violation to be corrected if "extraordinary circumstances preclude or render futile enforcement against the possible violation." The state would have had to show that further enforcement action would not likely cause the correction of a violation in such circumstances or serve any other useful purpose.

One commenter expressed concern that including "extraordinary circumstances" as good cause is "neither clear nor adequately justified in the proposal." The commenter also stated that in the case of abandoned sites, the proposal would allow a state to take no enforcement action simply because of an operator's inability to comply, contradicting 30 CFR

843.18(a), which provides that no cessation order or notice of violation issued under Part 843 may be vacated because of inability to comply.

Another commenter supported the provision but recommended replacing the word "extraordinary" with language reflecting merely that further enforcement actions are unlikely to achieve compliance. The commenter cited cases where enforcement action is futile even though all available enforcement actions have not been exhausted. As an example of such a situation, the commenter points to interim program violations that remain because the operator has fled or has declared bankruptcy and has no assets with which to correct the violations.

After considering the comments, OSMRE has concluded that the proposed category was too broad. The category was originally intended to provide flexibility in responding to unique situations that can occur in enforcing the Act at mining operations. The result of the item, however, would have been to create a standard which would not necessarily have covered all possible situations which constitute good cause and which could have included circumstances that do not constitute good cause. OSMRE has decided not to adopt a sixth category because it is not possible to specify precisely what would be contained in it.

The five items listed in Section 842.11(b)(1)(ii)(B)(4) as constituting good cause for a state's failure to act are not meant to be exhaustive. However, any other situations that will constitute good cause will have to be determined on a case-by-basis under the standard of whether they are arbitrary, capricious or an abuse of discretion under the state program.

Requests for Additional Examples. In addition to the comments on the specific instances proposed as constituting good cause, OSMRE received a number of comments asking that other examples be included as well. Some asked that specific situations be included, while other merely asked for additional, but unspecified, examples.

A large number of the commenters requested the addition of four specific categories of good cause. Those were: (1) Prior state administrative or judicial adjudication that a condition or practice does not constitute a violation of the state program; (2) the state has terminated its notice of violation for the same condition identified in a ten day notice; (3) state enforcement action is currently under administrative or judicial appeal; and (4) the state has released the reclamation bond. The commenters pointed out that these are examples where the state has taken some action. The regulations authorizing federal enforcement, the commenters said, were promulgated to address only those situations where a state fails or refuses to take action in the first instance, not for purposes of overriding state action or decisions.

OSMRE agrees that prior adjudications that a condition or practice does not constitute a violation of the state program would be good cause for the state not to take action. That situation, however, is already included in the first category of the proposed rule, namely, that "under the state program, the possible violation does not exist". Before concluding that good cause has been shown, OSMRE will ensure that the possible violation which is the subject of the ten day notice would be governed by the prior adjudication.

The issuance by the state of a notice of violation, and the subsequent termination by the state of the notice of violation, where the violation is fully abated, would constitute appropriate action on the part of the state -- not good cause for failure to act. If, on the other hand OSMRE determines that the termination was premature, the issuance and termination would constitute neither appropriate action nor good cause for failure to act.

The next situation suggested by the commenters -- state enforcement action under administrative or judicial appeal -- would represent appropriate action in the absence of a stay because the filing of an appeal does not stay a permittee's obligation to abate a violation. Moreover, if a permittee received temporary relief based upon the state counterpart to the SMCRA standards, good cause would exist under section 842.11(b)(1)(ii)(B)(4)(iv), which provides that good cause for failing to take appropriate action includes the state regulatory authority being precluded from acting on the possible violation by an administrative or judicial order based on SMCRA's temporary relief standards.

The issue of bond release -- the fourth item the commenters asked to be added -- turns on the point at which a state regulatory authority has concluded that reclamation has been achieved in accordance with the state program, and an operation is no longer a surface coal mining and reclamation operation as defined in the Act. Whether bond release constitutes good cause for failing to take appropriate action, will depend on the conditions surrounding the bond release. Under normal circumstances, bond release would constitute good cause. Where charges are made of collusion or impropriety in the bond release, however, OSMRE would evaluate how the state responds to those charges in determining whether the state response is arbitrary, capricious or an abuse of its discretion. A separate final rule is currently being prepared which will address the relation between final bond release and termination of regulatory jurisdiction.

5. INFORMAL REVIEW PROCESS

The final rule adds an informal review process in Section 842.11(b)(1)(iii). The final rule is substantially the same as was proposed. Changes are discussed below.

REQUEST FOR REVIEW. Section 842.11(b)(1)(iii)(A) requires OSMRE's authorized representative to notify the state regulatory authority immediately in writing of any determination by OSMRE that the state has failed to take appropriate action to cause a possible violation to be corrected or to show good cause for such failure. The rule allows the state regulatory authority five days to request an informal review by the Deputy Director of OSMRE. The state request must be received by OSMRE within five days of the state's receipt of OSMRE's written determination.

Inspection stayed. Section 842.11(b)(1)(iii)(B) provides that no federal inspection will take place, nor will a notice of violation be issued, regarding the ten-day notice until the time to request informal review has passed, or, if informal review has been requested, until the deputy director has completed the review. The provision is the same as that proposed except for the addition of a clarification that the stay in inspecting during the time allowed for requesting review will not apply if a cessation order is required under Section 843.11 or if the state has waived its right to appeal by failing to respond to the ten-day notice.

DECISION ON REVIEW. Section 842.11(b)(1)(iii)(C) provides that OSMRE's deputy director will review the written determination of the authorized representative and the state's request for informal review, and will either affirm, reverse, or modify the determination within 15 days. A written explanation of the decision will be provided to the state and to the permittee, and if the decision is to affirm the previous decision, the deputy director will immediately order a federal inspection or reinspection. If the ten-day notice resulted from a request for a federal inspection under 30 CFR 842.12, the person requesting the inspection will be notified of the deputy director's decision.

One commenter asserted that the times proposed for requesting review and for the deputy director to make a decision are too restrictive. That commenter suggested that the regulatory authority should have fifteen days instead of five to file a request for review of the written determination. In addition, the commenter suggested the deputy director should have thirty days instead of fifteen to either affirm, modify, or reverse the written determination. The commenter stated that the suggested time requirements are similar to other filing requirements in the Act, and would increase the likelihood that disagreements between the state and OSMRE can be settled without involving the deputy director.

Another commenter also expressed concern that five days is insufficient time in which to file a written request for an informal review if that notice must be delivered to Washington, D.C. or otherwise out-of-state. The commenter recommended expanding the time limit from five to ten days. The commenter also suggested adding a provision that would authorize the deputy director to request additional information within a reasonable time.

OSMRE disagrees with the suggestion for expanding the time to request review. While the agency recognizes that five days is a short period of time, any longer delay could increase the potential for environmental harm. To help alleviate the time constraints, however, a provision has been included in the final rule allowing a state to submit a request for review by the deputy director either to the nearest OSMRE field office or to Washington, DC.

OSMRE also disagrees with the suggestion that the deputy director needs to be expressly authorized to request additional information. The written record of the ten-day notice, the state response, the authorized representative's written determination on the adequacy of the state response, and the original inspection (if applicable) should be

sufficient for the deputy director to render a fair decision. If these are not sufficient, however, additional information can be required under the rule.

A group of commenters supported the proposed provision but requested that the permittee be afforded the opportunity to submit written information to the Deputy Director to assist in evaluating the state request for review.

Another commenter asked that the permittee be allowed to request review of the written determination, even if the state regulatory authority chooses not to request informal review.

A separate group of commenters argued that because Congress intended that citizens be involved in administrative processes under the Act, any informal review procedure must provide the opportunity to participate to persons having an interest that may be adversely affected by the review. The group also sought clarification of the rule's impact on the public's right, provided by other sections of the Act, to seek informal and formal review of a decision by OSMRE not to take inspection or enforcement action.

OSMRE disagrees with both the request for public and permittee participation in the informal review process. A ten-day notice is not an enforcement action. Instead, it is a communication device between OSMRE and the states. The informal review process is intended as a mechanism for states and OSMRE to resolve programmatic disagreements prior to mine-specific federal intervention. Public participation, whether for private citizens or for permittees, could tend to convert the process into an adversarial proceeding, which could delay a decision and unnecessarily divert the focus. Thus OSMRE has decided not to provide additional participation in the informal review process.

To the extent that OSMRE decides not to inspect, based on a state having taken appropriate action or shown good cause, 30 CFR 842.15 continues to apply and provides that any adversely affected person may ask the OSMRE Director for informal review of a decision not to inspect. Thus the public is protected.

Similarly, if a state chooses not to request review of a determination that it had not taken appropriate action or shown good cause or, if, following such a review, the OSMRE deputy director concludes that a federal inspection is required, a potentially affected permittee is not aggrieved. The permittee will continue to have the right to seek administrative review of any federal NOV's that may later be issued to it.

Several commenters expressed support for Section 842.11(b)(1)(iii). They asserted that if federal inspection and enforcement proceeded during the pendency of a state appeal, the possibility would arise to simultaneous review by the deputy director and the Office of Hearings and Appeals (OHA) if the permittee appealed the citation under Section 525. Although OSMRE appreciates the commenters' support, the purpose of the rule is not so much to avoid simultaneous review, but to avoid making the deputy director's review meaningless. It does not make sense for a federal inspection to be conducted while the deputy director is reviewing the determination which, if not reversed, will lead to a federal inspection.

Other commenters expressed concern with the provision. One pointed out that while OSMRE's determination as to the adequacy of the state response may sometimes be made solely on the record in the case, in other cases it would be difficult to make a proper evaluation without an inspection. The commenter cites as an example a situation where a state claims that an alleged violation does not exist. In such a case, the commenter points out, it may be very difficult for OSMRE to evaluate such a response without first-hand knowledge about the conditions at the site. To resolve the problem, the commenter suggests that OSMRE make inspections for "information gathering purposes only" that would not lead to issuance of a federal NOV to the permittee.

OSMRE has considered the comment, but has concluded the proposed change would defeat the purpose of the inquiry which is to decide whether a federal inspection is required, or to defer to the state. The Secretary's duty to inspect under section 521(a)(1) arises only after the Secretary makes a determination as to the adequacy of the state response. It does not make sense for OSMRE to conduct an inspection only to decide whether to conduct an inspection.

Another group of commenters noted that while they have no objection to a review procedure per se, they consider the proposed procedure illegal because it delays the "mandatory obligation of OSMRE to conduct a federal inspection on the eleventh day after the ten-day notice is sent and to take all required enforcement until such review is completed * * *." Another commenter pointed out that totaling the 10 days allowed for a state to investigate after receiving a ten-day

notice, the five days to appeal a written determination of inappropriate response, and the fifteen days for the deputy director to review the issue, allows 30 days to elapse, during which no federal inspection will take place. This, the commenter asserted, does not include additional time for mailing delays or time needed for the authorized representative to make the initial written determination as to whether the state response was appropriate. This time frame, the commenter stated, falls outside the time allowed under section 521(a)(1) of the Act.

OSMRE appreciates the commenters' concerns over the time required to implement the review procedure, but concludes the time is justified and is consistent with the Act.

As an initial matter, the commenters misinterpret the time limits imposed by the Act. Two time directives are set forth in section 521(a)(1) of the Act, which states if "the state regulatory authority fails within ten days after notification" to take appropriate action or show good cause, then the Secretary shall immediately order federal inspection. The "ten days" requirement establishes the response time for state regulatory authorities, but creates no duty upon the Secretary.

The Secretary's responsibility is "immediately" to order a federal inspection when he determines that the state did not take appropriate action or show good cause for such failure. Until such a determination is made, no obligation exists to conduct a federal inspection. Given the statutory goal of protecting the environment, the Secretary's determination must be made expeditiously. The statute does not specify, however, that the determination of the adequacy of the state response, or that the follow-up inspection, must occur on the eleventh day following notification to the state.

Sound reasons exist for the Secretary to establish procedures to assist him in determining the adequacy of the state response. Under the Act, state regulatory authorities bear the primary responsibility for enforcing the law. Therefore, the Secretary should not take lightly any determination that a state has abused its discretion. Where programmatic concerns surface, it is entirely appropriate to allow the state to express its views and involve agency policymakers in the decision. The review procedure does just that. The time provided for the review has been kept to a minimum, however, to assure that possible violations of state programs are not left uncorrected for any longer than necessary.

In promulgating this rule, OSMRE views as key the fact that abatement of significant imminent harm to the environment or danger to the public health and safety is unaffected by the review procedure and will continue under 30 CFR 842.11(b)(1)(ii)(C) and 843.11. Because of that protection, as well as for the other reasons discussed above, OSMRE believes the limited delays caused by the review process are reasonable.

Section 842.11(b)(1)(iii)(C) is identical to that proposed, except for editorial revisions and one change made in response to comments. Those comments were from a group of commenters who supported the proposed provision, but asked that the permittee be sent a copy of the decision by the deputy director, much as a copy of the ten-day notice to the state must be sent to the permittee.

OSMRE agrees with this comment, and has included in the final rule a provision that the permittee will be furnished with a copy of the deputy director's decision. Such an allowance is in keeping with 30 CFR 843.12(a)(2), which provides that the permittee be given copies of the ten-day notice itself. Providing a copy of the decision reached in the informal review will tend to increase communication among the parties.

One commenter expressed concern that the informal review process established in the proposed rule did not specify the basis on which the deputy director will affirm, reverse, or modify the written determination of the authorized representative. That basis, however, is provided by the rule now being promulgated -- namely, whether the state action was arbitrary, capricious, or an abuse of discretion under the state program.

C. PART 843 -- FEDERAL ENFORCEMENT

The final rule amends Section 843.12(a)(2) to make OSMRE's actions under that section subject to the informal review process established in Section 842.11(b)(1)(iii). Thus OSMRE will not reinspect or issue an NOV under that section during the pendency of the review process.

The final rule adopts the language as it was proposed for Section 843.12(a)(2), with one conforming change. In the final clause of the first sentence of Section 843.12(a)(2), OSMRE has deleted the word "enforcement." This was necessary to make section 843 conform with Section 842.11. Thus, the final rule provides that the authorized

representative shall give a ten-day notice to the state and to the permittee so that appropriate action can be taken by the state. Appropriate action is defined in Section 842.11(b)(1)(ii)(B)(3).

Comments on proposed Section 843.12(a)(2) fell into two general categories. In the first category, a number of commenters stated that the Act does not authorize federal NOV's in primacy states at all. They argued that Congress established exclusive regulatory jurisdiction for states that obtain approval of their regulatory programs -- not concurrent jurisdiction in the states and the federal government. Therefore, they claim, any reference to allowing federal NOV's in primacy states should be deleted.

OSMRE clearly stated in the preamble to the proposed rule that although it was proposing to amend a portion of Section 843.12(a)(2), it was not reopening the issue of its authority to issue NOV's in primacy States. Therefore, the request is beyond the scope of this rulemaking.

In the second category of comments on the section, several commenters recommended that both the final rule and preamble reflect that compliance is measured against the state program, rather than the Act, because they say the Act imposes no duties or obligations upon operators directly. The commenters therefore asked that the word "Act" be deleted in the two places that it appears in proposed 30 CFR 843.12(a)(2).

OSMRE agrees that an operator's compliance is measured against the state program and that notices of violation should be based upon violations of the state program. That is not the context, however, in which the word "Act" is used in Section 843.12(a)(2).

The word "Act" appears in Section 843.12(a)(2) as one basis for OSMRE giving a written report to the state and the permittee following a federal oversight inspection in a primacy state. In part the section implements section 517(e) of the Act which specifies that each inspector, upon detection of each violation of any requirement of any state program or of the Act must inform the operator in writing and report the violation in writing to the regulatory authority. In addition, section 521(a)(1) of the Act clearly states that ten-day notices are to be issued for possible violations of any requirement of the Act. That is consistent with the purpose of ten-day notices -- to be a communication device between OSMRE and the states.

If a state program does not contain a requirement of the Act that it is supposed to contain, the violation of the requirement of the Act results from the state program deficiency and not the conduct of an operator performing in accordance with the state program. In such circumstances, notification to a state that a requirement of the Act is being violated will allow the state program to be amended to include the requirement of the Act.

In addition, the suggestion to delete the word "Act" was not part of the proposed rulemaking, and is beyond the scope of this rulemaking. For all of these reasons, the word "Act" in 30 CFR 843.12 (a)(2) will not be deleted.

The commenters should not be concerned that federal NOV's will be issued in primacy states under Section 843.12(a)(2) for factual situations which do not constitute violations of the state program. Under that section, federal NOV's are required only after states fail to take appropriate action or to show good cause. If a state demonstrates that the facts which are the subject of the ten day notice do not constitute a violation of the state program, good cause will have been shown.

III. PROCEDURAL MATTERS

Executive Order 12291

The Department of the Interior (DOI) has examined the final rule, according to the criteria of Executive Order 12291 (February 17, 1981), and has determined that it is not a major rule within the standards established by the Executive Order. Therefore, no regulatory impact analysis is required.

Federal Paperwork Reduction Act

There are no information collection requirements in the final rule requiring review by the Office of Management and Budget under *44 U.S.C. 3507*.

Regulatory Flexibility Act

The Department of the Interior has determined, pursuant to the Regulatory Flexibility Act, *5 U.S.C. 601 et seq.*, that

the final rule will not have a significant economic impact on a substantial number of small entities.

National Environmental Policy Act

OSMRE has prepared an environmental assessment (EA) on the impacts on the human environment of this rulemaking. The EA is on file in the OSMRE administrative Record at the address listed in the "Addresses" section of this preamble.

Author

The principal author of this rule is Barbara Geigle, Office of Surface Mining Reclamation and enforcement, 1951 Constitution Avenue, NW., Washington, DC 20240; Telephone: 202/343-4953 (FTS or Commercial).

LIST OF SUBJECTS

30 CFR Part 842

Law enforcement, Surface mining, Underground mining.

30 CFR Part 843

Administrative practice and procedure, Law enforcement, Reporting and recordkeeping requirements, Surface mining
Underground mining.

Accordingly, 30 CFR Parts 842 and 843 are amended as set forth below.

Dated: June 13, 1988.

J. Steven Griles, Assistant Secretary for Land and Minerals Management.

PART 842 -- FEDERAL INSPECTIONS AND MONITORING

1. The authority citation of Part 842 is revised to read as follows:

Authority: Pub. L. 95-87, *30 U.S.C. 1201* et seq.; and Pub. L. 100-34.

2. In Section 842.11, paragraph (b)(1)(ii)(B) is revised and paragraph (b)(1)(iii) is added to read as follows:

SECTION 842.11 - FEDERAL INSPECTIONS AND MONITORING.

* * * * *

(b)(1) * * *

(ii) * * *

(B)(1) 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 failed to take appropriate action to cause the violation to be corrected or to show good cause for such failure and to inform the authorized representative of its response. After receiving a response from the State regulatory authority, before inspection, the authorized representative shall determine in writing whether the standards for appropriate action or good cause for such failure have been met. Failure by the State regulatory authority to respond within the ten days shall not prevent the authorized representative from making the determination, and will constitute a waiver of the state regulatory authority's right to request review under paragraph (b)(i)(iii) of this section.

(2) For purposes of this subchapter, an action or response by a State regulatory authority that is not arbitrary, capricious, or an abuse of discretion under the state program shall be considered "appropriate action" to cause a violation to be corrected or "good cause" for failure to do so.

(3) Appropriate action includes enforcement or other action authorized under the State program to cause the violation to be corrected.

(4) Good cause includes:

(i) Under the State program, the possible violation does not exist;

- (ii) the State regulatory authority requires a reasonable and specified additional time to determine whether a violation of the State program does exist;
- (iii) the State regulatory authority lacks jurisdiction under the State program over the possible violation or operation;
- (iv) the State regulatory authority is precluded by an administrative or judicial order from an administrative body or court of competent jurisdiction from acting on the possible violation, where that order is based on the violation not existing or where the temporary relief standards of section 525(c) or 525(c) of the Act have been met; or
- (v) with regard to abandoned sites as defined in Section 840.11(g) of this chapter, the State regulatory authority is diligently pursuing or has exhausted all appropriate enforcement provisions of the State program.

* * * * *

(iii)(A) The authorized representative shall immediately notify the state regulatory authority in writing when in response to a ten-day notice the state regulatory authority fails to take appropriate action to cause a violation to be corrected or to show good cause for such failure. If the State regulatory authority disagrees with the authorized representative's written determination, it may file a request, in writing, for informal review of that written determination by the Deputy Director. Such a request for informal review may be submitted to the appropriate OSMRE field office or to the office of the Deputy Director in Washington, DC. The request must be received by OSMRE within 5 days from receipt of OSMRE's written determination.

(B) Unless a cessation order is required under Section 843.11, or unless the state regulatory authority has failed to respond to the ten-day notice, no Federal inspection action shall be taken or notice of violation issued regarding the ten-day notice until the time to request informal review as provided in Section 842.11(b)(1)(iii)(A) has expired or, if informal review has been requested, until the Deputy Director has completed such review.

(C) After reviewing the written determination of the authorized representative and the request for informal review submitted by the State regulatory authority, the Deputy Director shall, within 15 days, render a decision on the request for informal review. He shall affirm, reverse, or modify the written determination of the authorized representative. Should the Deputy Director decide that the State regulatory authority did not take appropriate action or show good cause, he shall immediately order a Federal inspection or reinspection. The Deputy Director shall provide to the State regulatory authority and to the permittee a written explanation of his decision, and if the ten-day notice resulted from a request for a Federal inspection under Section 842.12 of this Part, he shall send written notification of his decision to the person who made the request.

* * * * *

PART 843 -- FEDERAL ENFORCEMENT

3. The authority citation for Part 843 is revised to read as follows:

Authority: Pub. L. 95-87, *30 U.S.C. 1201* et seq.; and Pub. L. 100-34.

4. Section 843.12(a)(2) is revised to read as follows:

SECTION 843.12 - NOTICES OF VIOLATION.

(a) * * *

(2) When, on the basis of any Federal inspection other than one described in paragraph (a)(1) of this section, an authorized representative of the Secretary determines that there exists a violation of the Act, the State program, or any condition of a permit or exploration approval required by the Act which does not create an imminent danger or harm for which a cessation order must be issued under Section 843.11, the authorized representative shall give a written report of the violation to the State and to the permittee so that appropriate action can be taken by the State. Where 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, subject to the procedures of Section 842.11(b)(1)(iii) of this chapter, the authorized representative shall reinspect and, if the violation continues to exist, shall issue a notice of violation or cessation order, as appropriate. No

additional notification to the State by the Office is required before the issuance of a notice of violation if previous notification was given under Section 842.11(b)(1)(ii)(B) of this chapter.

* * * * *

[FR Doc. 88-15670 Filed 7-13-88; 8:45 am]
BILLING CODE 4310-05-M