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U. S. DEPARTMENT OF THE INTERIOR
OFFICE OF SURFACE MINING
RECLAMATION AND ENFORCEMENT

DIRECTIVES SYSTEM

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Subject: Ten-Day Notices

Approval: [signature]

Title: Director

1. PURPOSE. This Directive establishes procedures for the issuance, evaluation, and informal review of ten-day notices in States with approved regulatory programs.

2. SUMMARY. This Directive consolidates agency ten-day notice policy contained in Directives INE-35 (Ten-Day Notices) and INE-27 (Use of Ten-Day Notices to Address Permit Revisions). It also incorporates policy and procedures necessary to implement the July 14, 1988 amendment to 30 CFR Parts 842 and 843: Evaluation of State Responses to Ten-Day Notices.

3. DEFINITIONS.

a. Ten-day Notice. Standard form IE-160 (3/81) or an equivalent approved by the Assistant Director for Field Operations used in accordance with 30 CFR 842.11 and 843.12(a)(2) to notify a State regulatory authority that an authorized representative of the Secretary has reason to believe that a person is in violation of any requirement of the State program or any permit condition imposed under that program.

b. Reason to believe. An authorized representative of the Secretary shall have reason to believe that a condition, practice, or violation exists if available information, including facts alleged by an informant, would, if true, constitute an imminent danger or harm or a violation of the State program. See 30 CFR 842.11(b)(2).

c. Arbitrary, capricious, or an abuse of discretion means with respect to a State response to a ten-day notice, that a State's action cannot reasonably be construed as rational, or adhering to correct procedures, or consistent with applicable law, or with proper evaluation of relevant criteria.

d. Appropriate action. As provided under 30 CFR 842.11(b)(1)(ii)(B)(3), means enforcement or other action authorized under the State program to cause a violation to be corrected. "Other action" to cause a violation to be corrected could include such things as the initiation of the process to require a permit revision under 30 CFR 774.11(b) where the original permit contained a defect or the commencement of a proceeding to forfeit the performance bond if the bond amount is adequate to correct the violation and achieve reclamation as authorized under 30 CFR 800.50.

e. Good cause. As provided under 30 CFR 842.11(b)(1)(ii)(B)(4), includes (i) under the State program, the possible violation does not exist; (ii) the regulatory authority requires a reasonable and specified additional time to determine whether a violation of the State program exists; (iii) the regulatory authority lacks jurisdiction under the State program over the possible violation or operation; (iv) the 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 temporary relief standards of section 525(c) or 526(c) of the Act have been met; or (v) with regard to abandoned sites as defined in 30 CFR 840.11(g), the regulatory authority is diligently pursuing or has exhausted all appropriate enforcement provisions of the State program.

4. POLICY/PROCEDURES.

a. Background. On August 15, 1988, a final rule became effective (53 FR 26728, July 14, 1988), which amended the Federal inspection and enforcement regulations to establish a uniform standard by which OSMRE will evaluate State responses to ten-day notices. According to this standard, a State response to a ten-day notice will be accepted as constituting appropriate action or good cause unless the State has acted in a manner which is arbitrary, capricious, or an abuse of discretion under the State program. The rule also contains examples of certain measures taken by the State which would comprise "appropriate action" and "good cause" and establishes a process by which State may request informal review of OSMRE's determination that the State response to a ten-day notice did not constitute appropriate action or show good cause for such failure. See 30 CFR 842.11(b)(1)(ii)(B)(1) and 843.12(a)(2).

b. Policy. Except as provided in the paragraphs below, an authorized representative shall issue a ten-day notice to the regulatory authority whenever there is reason to believe that a violation of the State program or a permit condition exists. A regulatory authority's response to a ten-day notice in which it claims to have taken appropriate action or shown good cause for such failure shall be accepted unless a determination is made in writing that the regulatory authority's response is arbitrary, capricious, or an abuse of discretion under the State program.

The ten-day notice requirement will be waived where a person provides proof that an imminent danger or harm exists and the regulatory authority has failed to take appropriate action or where a State inspector agrees to promptly take appropriate action to cause a violation to be corrected as a result of a joint State/OSMRE inspection.

Ten-day notices shall not be issued where alleged omissions or other defects are identified during the course of administrative reviews of permits issued by the regulatory authority. Instead, such alleged problems shall be addressed through programmatic discussion. However, where omissions or defects are identified as a result of individual

field inspections, a ten-day notice should be issued. In both cases, appropriate action by the regulatory authority may consist of notifying the permittee in writing (in lieu of an enforcement action) that a permit revision is required and if necessary, imposing interim steps to minimize any potential environmental harm.

c. Procedures.

(1) Issuance of Ten-day Notices.

(a) Where the information used as the basis for a ten-day notice originates from administrative review of State inspection and enforcement documents, the authorized representative shall take all reasonable steps to ensure such information is current, which may first require contacting the regulatory authority to verify case facts.

(b) Ten-day notices shall be either hand delivered or sent certified mail to the appropriate official at the local State office with jurisdiction over the operation. Concurrently, a copy of each ten-day notice shall be provided to the permittee in accordance with Directive INE-3. OSMRE evidence collected to support a ten-day notice shall be made available to the State for its discretionary use.

(c) The ten-day notice period shall commence on the day following receipt by the State and expire ten calendar days thereafter in accordance with the time computation provisions under 30 CFR 700.15.

(d) Field Office Directors shall establish systems to effectively monitor ten-day notice expiration dates. For each ten-day notice, a separate case file shall be established which contains chronologically all documents and correspondence associated with the case.

(2) Evaluation of State Ten-day Notice Responses.

(a) Ten-day notices require a written response from the regulatory authority within the ten-day period. Interim responses may be accepted as good cause in accordance with 30 CFR 842.11(b)(1)(ii)(B)(4)(ii) where the regulatory authority requires a reasonable and specified additional time to perform technical or laboratory analysis, to make a finding to support a permit revision under 30 CFR 774.11(c) where a permittee is operating in compliance with a defective permit, or to otherwise determine whether a violation of the State program exists.

(b) Evaluation of State ten-day notice responses shall only consider the record established in the case. Authorized representatives may not inspect or visit the operation as part of the evaluation since the decision resulting from the evaluation must be a decision whether or not to reinspect. An authorized representative shall accept a regulatory authority's response to a ten-day notice as constituting appropriate action or good cause unless it can be shown in

writing that the regulatory authority's response is inconsistent with the definitions of appropriate action and good cause and that the regulatory authority's response is arbitrary, capricious, or an abuse of discretion under the State program. While the definitions of appropriate action and good cause should provide clear guidance for evaluating ten-day notice responses in most cases, the examples are not necessarily exhaustive.

(c) Where a ten-day notice has been issued because the permittee is conducting a practice which appears inconsistent with the approved mining and reclamation plan or otherwise violates a condition of the permit, appropriate action by the regulatory authority would include issuing an appropriate enforcement action. Such enforcement action may provide a reasonable time for the permittee to cease the unauthorized practice and either perform any remedial actions necessary to conform with the approved permit or submit and diligently pursue approval of a permit revision which, if approved, would authorize the practice.

(d) If no response is received near the end of the ten-day period, the Field Office shall contact the regulatory authority to determine the status of the response. Failure by the regulatory authority to respond to a ten-day notice shall not prevent the authorized representative from making a determination whether the standards for appropriate action or good cause have been met and will constitute a waiver of the regulatory authority's right to request informal review under 30 CFR 842.11(b)(1)(iii).

(e) Violations alleged in a ten-day notice which have been corrected or no longer are present when the regulatory authority conducts its inspection, will constitute good cause for not taking appropriate action except where laboratory analysis of samples taken during a joint State/OSMRE inspection subsequently confirms the existence of a violation.

(f) Any ten-day notice for which it appears the regulatory authority has responded in a manner which is arbitrary, capricious, or an abuse of discretion under the State program shall be immediately reviewed by the Field Office Director who will be responsible for concurring in the final written determination.

(g) Upon conclusion of each State ten-day notice response evaluation, the authorized representative shall immediately notify the regulatory authority by certified mail of his or her written determination. To the extent possible, this response should be returned to the State within ten days. Unless a cessation order for an imminent danger/harm is required pursuant to 30 CFR 843.11 or unless the regulatory authority has failed to respond to the ten-day notice, no Federal inspection nor enforcement action shall be taken with respect to any ten-day notice until the time to request informal review of the written determination by the Deputy Director - Operations and Technical Services has expired or if informal review has been requested, until the Deputy Director - Operations and Technical Services has rendered a decision.

(3) Informal Review of Written Determinations.

(a) Where the regulatory authority disagrees with the Field Office's written determination and requests an informal review by the Deputy Director - Operations and Technical Services under 30 CFR 842.11(b)(1)(iii), such request must be received at the appropriate Field Office within five days after receipt of the written determination. The five day period shall commence on the day following receipt of the authorized representative's written determination and expire five calendar days thereafter in accordance with the time computation provisions under 30 CFR 700.15.

(b) Field Office Directors shall be responsible for:

1. Recording the date of receipt when a request is submitted to the Field Office;

2. Forwarding a copy of any request to the Assistant Director for Field Operations; and

3. Within three days after the receipt of any request or notification that a request has been submitted to the Deputy Director - Operations and Technical Services preparing and forwarding to the Assistant Director for Program Policy:

(a) The original and complete request for informal review when the request is filed with the Field Office;

(b) A synopsis which contains a chronological discussion of all significant facts and events in the case, a detailed discussion of the Field Offices rationale supporting its written determination, and any comments on additional or supplemental materials submitted by the regulatory authority in its request for review;

(c) All relevant documents and correspondence associated with the case file; and

(d) copies of maps, relevant portions of permits, or photographs which may be available to illustrate the case.

(c) The Assistant Directors for Field Operations shall be responsible for providing any comments to the Deputy Director - Operations and Technical Services within three days after notification that a request for informal review has been submitted.

(d) The Assistant Director for Program Policy shall be responsible for:

1. Immediately notifying the appropriate Field Office Director and Assistant Director for Field Operations when a request for informal review has been received at Headquarters and requesting that the information required under section C.(3)(b)3.(a)-(d) must be forwarded to the Assistant Director for Program Policy within three days;

2. Providing for the Deputy Director - Operations and Technical Services an analysis of informal review cases, including recommendations and necessary briefings; and

3. Preparing the written explanation of the Deputy Director - Operations and Technical Services decision.

(e) The Deputy Director - Operations and Technical Services shall be responsible for:

1. Affirming, reversing, or modifying the written determination by the Field Office within 15 days after receipt of any request for informal review;

2. Ordering a Federal inspection where it is decided that the regulatory authority has failed to take appropriate action or show good cause; and

3. Providing a written explanation of the informal review decision to the regulatory authority, the permittee, the Field Office, and if the ten-day notice resulted from a request for a Federal inspection under 30 CFR 842.12, to the person who made the request.

5. REPORTING REQUIREMENTS. None.

6. EFFECT ON OTHER DOCUMENTS. Supersedes Directives INE-35, Transmittal Number 401, November 11, 1987 and INE-27, Transmittal Number 397, November 10, 1987.

7. REFERENCES. 30 CFR 700.15; 842.11(b)(1)(ii)(B)(1); 842.11(b)(iii); 843.12(a)(2); and 53 FR 26728, July 14, 1988.

8. EFFECTIVE DATE. Upon Issuance.

9. CONTACT. Chief, Branch of Inspection and Enforcement, FTS 343-4550.

10. KEYWORDS. Ten-day notices, appropriate action, good cause, arbitrary, capricious, or abuse of discretion, informal review.

11. LIST OF APPENDICES. None.