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DEPARTMENT OF THE INTERIOR

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

30 CFR Parts 840 and 842

Surface Coal Mining and Reclamation Operations; Initial and Permanent Programs; Abandoned Sites, Part III

ACTION: Final rule.

SUMMARY: This rule will change the minimum inspection frequency for surface coal mining and reclamation operation that have been abandoned without completion of reclamation or abatement of violations. The change enables regulatory authorities to eliminate ineffective inspections to redirect resources to minesites where inspection and enforcement will achieve intended results. Before an abandoned site can qualify for a change in inspection frequency under this rule, the regulatory authority must make a written finding that a site is abandoned and that the change in inspection frequency is appropriate based on specified environmental and public health and safety criteria.

EFFECTIVE DATE: December 28, 1994.

FOR FURTHER INFORMATION CONTACT: Daniel Stocker, Office of Surface Mining Reclamation and Enforcement, 1951 Constitution Avenue NW., Washington, DC 20240, Telephone: 202-208-2550 (Commercial or FTS).

SUPPLEMENTARY INFORMATION:

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

I. BACKGROUND

Section 517(c) of the Surface Mining Control and Reclamation Act of 1977 (the Act) states that the regulatory authority shall inspect on an irregular basis averaging not less than one partial inspection per month and one complete inspection per quarter each surface coal mining and reclamation operation covered by a permit. To implement this requirement, OSM first promulgated rules at 30 CFR 840.11 for State regulatory authorities and at 30 CFR 842.11 for OSM where it is the regulatory authority in a State. *44 FR 15455* (March 13, 1979). These rules essentially mirrored the inspection frequency requirements of the Act.

These rules were revised on August 16, 1982 (*47 FR 35620*). Among other things, the 1982 rules carved out for inspection frequency purposes a distinct category of surface coal mining and reclamation operations where reclamation was in the advanced stages. While retaining the quarterly requirement for complete inspections, these rules allowed regulatory authorities to reduce the number of partial inspections required at these "inactive" operations from an average of one per month to a frequency "as necessary to ensure effective enforcement of the regulatory program." Since abandoned sites are incompletely reclaimed surface coal mining and reclamation operations where the operators will not or cannot return to the minesite to complete reclamation or correct violations, they remain in an "active" status, and, therefore, must continue to be inspected at the full mandated frequency of twelve times per year.

To address the issue of inspection frequency at abandoned sites, the rules were again revised in 1988. (*53 FR 24872*, June 30, 1988). This time the rules defined an "abandoned site" as a distinct category at surface coal mining and reclamation operations and enabled regulatory authorities to reduce the inspection frequency at these sites and to refrain from issuing additional enforcement actions at abandoned sites under certain conditions. The definition of "abandoned site" specifies that, before a site can be considered abandoned, it must first meet certain criteria which ensure that the regulatory authority has taken or is in the process of taking all enforcement action available to it under the applicable regulatory program to compel abatement of violations and completion of reclamation. Sites meeting the definition could then, instead of twelve times per year, be inspected "as necessary to monitor for changes of environmental conditions or operational status at the site."

The 1988 final rule was subsequently challenged in Federal District Court. On August 30, 1990, the United States District Court for the District of Columbia issued an order in the case of *National Wildlife Federation, et al., v. Manuel Lujan, Jr., et al.*, 31 *Env't Rep. Cas. (BNR)* 2034, 2042 (D.D.C. 1990) (NWF v. Lujan). The district court remanded the rule to the Secretary to be withdrawn or revised on the basis that the Secretary's arguments supporting the rule were inconsistent with the inspection frequency requirements of Section 517(c) of the Act. However, the district court conceded that the rule was practical, that it comported with common sense, and that it is not wise to spend a lot of time and effort inspecting abandoned sites every month when nothing changes. To implement the court's order, OSM suspended those parts of the 1988 rule that related to inspection frequency at abandoned sites. The definition of "abandoned site" at 30 CFR 840.11(g) and 842.11(e) and the provision at 30 CFR 843.22 allowing regulatory authorities to refrain from issuing additional enforcement actions at abandoned sites were unaffected by the court order and remain intact today (56 *FR* 25036, June 3, 1991).

In appealing the district court decision, the Secretary asked the United States Court of Appeals to vacate the district court's remand in order to allow him to promulgate a new regulation redefining "abandoned sites" to include only those sites where a permit has expired or been revoked. Under this approach, Section 517(c) of the Act would not apply to abandoned sites because the inspection frequency requirements of that section speak only to surface coal mining and reclamation operations covered by a permit and a permit that is expired or revoked is no longer considered to be in existence. Without expressing any view about whether the Secretary's proposed reading of Section 517(c) of the Act was permissible, the court of appeals pointed out that the district court remanded the 1988 rule to the Secretary "to be withdrawn or revised" and, in light of this statement, the district court's decision does not stand in the way of the Secretary proceeding with an alternative rulemaking on the subject of inspection frequently at abandoned sites. See *NWF v. Lujan*, Civ. Action Nos. 890136, 88-3345 & 88-2416, U.S. App. Ct. (DC Circ., December 10, 1991) mem. op. at 10. Accordingly, on December 18, 1992, OSM proposed for public comment an alternative abandoned sites rule upon which today's final rule is based (57 *FR* 60410).

The Secretary is required under section 201(c)(2) of the Act, 30 *U.S.C.* 1211(c)(2), to publish necessary implementing rules. Since regular inspections of abandoned sites are a counterproductive use of limited resources, and since fewer inspections are not likely to result in increased environmental harm, the rule being promulgated today is necessary and is consistent with the district court's opinion in *NWF v. Lujan*, which struck down the previous 1988 abandoned sites rule.

In promulgating the 1988 rule on abandoned sites, OSM concluded that repeated inspections of abandoned sites at the frequency required under the existing rules are ineffective expenditures of resources and that fewer inspections would not result in increased harm to the environment or reduce the likelihood of ultimate compliance at abandoned sites. The time inspectors spend at abandoned sites detracts from the time they can spend at other active or inactive sites working with viable operators to abate present violations and prevent future violations. Thus, reducing the frequency of abandoned sites improves the overall quality and effectiveness of inspection programs under the Act.

Enforcement actions issued as a result of inspections at abandoned sites have proven to be ineffective at compelling abatement of violations or achieving reclamation. Moreover, inspectors normally have cited all violations prior to or shortly after a site becomes abandoned. The persons responsible for abating these violations typically are financially insolvent or cannot be located. In such instances, even when diligent efforts are made to enforce the Act, no one is available to abate violations or to perform or pay for the needed reclamation. Continuing regular partial and complete inspection of these sites serves no useful purpose and wastes finite inspection resources. To illustrate the extent of this waste, OSM has in the past conducted approximately 2,900 inspections each year on an average of 236 abandoned sites in Tennessee. This effort comprises approximately 32 percent of the inspections in that State; however, few, if any, of these inspections have resulted in abatement of violations or completion of reclamation.

OSM experience has shown that environmental conditions at most abandoned sites do not significantly degrade what has been observed during prior inspections and that violations of substantive performance standards do not necessarily deteriorate to imminent danger or harm situations. While these sites do not comply with the Act, many, due to their age or because they were partially reclaimed prior to abandonment, become reasonably well stabilized through natural settlement and revegetation occurring over time.

While the stated goal of section 517 of the Act is to "enforce the requirements of and carry out the purposes of [the] Act," inspecting abandoned sites as frequently as other sites covered by a permit frustrates rather than furthers this goal. Among the mechanisms provided by the Act to achieve the stated goals of section 517(c) are civil penalties under section

518, performance bonds under section 509 and 519, citizen suits under section 520, and enforcement under section 521. Each of these mechanisms has as its underlying premise the existence of a person against whom an action can be taken, or of a bond that can provide the funds to abate violations and secure reclamation. If no such person can be found, or if the regulatory authority is taking other appropriate legal actions to ensure reclamation or abatement, and any permit has been revoked and any bond is being forfeited, issuing multiple violation notices and cessation orders and assessing uncollectible penalties as a result of the fixed inspection frequency requirement are not productive tools to enforce the Act. The waste of resources also extends beyond the inspector level as other units within the regulatory authority must assess and attempt to collect civil penalties. Under the foregoing circumstances, inspections of abandoned sites performed at a minimum frequency less than that for other sites based on the particular characteristics of the site are a far more reasonable and realistic alternative. Moreover, the conservation of resources that will flow from this rule promotes the principles embodied in OSM's mission and vision statement by creating fair and more efficient and effective processes for achieving the objectives of the Act.

II. DISCUSSION OF FINAL RULE AND RESPONSE TO PUBLIC COMMENTS

SECTION 840.10

Section 840.10 is being revised to include an estimate of the average public reporting burden for the collections of information under all of Part 840 as such part is revised by this final rule. The section also lists the addresses for OSM and the Office of Management and Budget where comments on the information collection requirements may be sent.

COMBINED SECTION-BY-SECTION ANALYSIS

Since the revisions adopted for State regulatory authorities at 840.11 are identical to those adopted at 842.11 where OSM is the regulatory authority, they will be combined for ease of discussion.

SECTION 840.11(g)(4)(i)/842.11(e)(i).

These sections are being adopted as proposed. They require that before a site could meet the definition of "abandoned site," the permit covering the surface coal mining and reclamation operation must be either revoked or expired. The existing rules allow a site to be classified as abandoned on the basis that permit revocation proceedings have only been initiated and are being pursued diligently.

The final provision will have two effects. First, a person who has not or will not respond to enforcement action issued by the regulatory authority and who cannot or will not meet his/her obligations to abate violations or complete reclamation will not be entitled to resume coal production under a valid permit. Second, the constraints of section 517(c) of the Act would be lifted for abandoned sites since the fixed inspection frequency requirements of that section apply only to surface coal mining and reclamation operations covered by each permit. The preamble to OSM's final rule at 30 CFR 773.11, Requirements to obtain permits, articulated and codified the concept that a surface coal mining permit is required only where surface coal mining operations defined under section 701(28) of the Act are occurring and that if this authorization to extract coal expires or is revoked, it amounts to the absence or the non-existence of the permit that once was in force (i.e. the minesite is no longer considered to be covered by a permit). Of course, this does not affect the permittee's legal obligation to reclaim a site that has been abandoned, since, in accordance with 30 CFR 773.11, that obligation continues until all reclamation is completed, regardless of whether the authorization to conduct surface coal mining operations has expired or has been revoked. See *54 FR 13814* (April 5, 1989).

The National Wildlife Federation and the Kentucky Resources Council, Inc. (hereafter NWF) concurred with this change to the definition of abandoned site to the extent that the plain language of the term "abandoned site" suggests that there should not be an existing permit that is renewable or revisable by the operator.

The Joint National Coal Association and American Mining Congress on Surface Mining Regulations (NCA/AMC), the National Coal Association (NCA) and the Kentucky Coal Association supported this revision saying that the proposed rule differs significantly from the abandoned sites rule remanded in 1990 because the proposed rule defines "abandoned sites" to include only those sites whose permits have either expired or been revoked. Because the Act's inspection requirements only apply to operations under permit, they believe that the revised definition can no longer be considered inconsistent with section 517(c) of the Act and consequently, the district court's earlier criticism of OSM's statutory

interpretation is no longer valid. They added that neither the language nor legislative history of the statute indicates any intent that the regulatory authority continue to expend its resources to inspect an abandoned site where no activities listed in section 701(28) of the Act are currently conducted and enforcement action has proven futile in compelling the correction of prior violations. Finally, they believed that the U.S. Court of Appeals for the District of Columbia gave tacit approval for OSM's revised reading of the "covered by each permit" language of section 517(c) because the court clearly would have rejected OSM's announced efforts before the court to undertake a curative rulemaking using this revised reading if it perceived such a reading as inconsistent with the Act.

OSM agrees with the commenters, except for the proposition that the U.S. Court of Appeals decision concerning the remanded 1988 abandoned sites rule amounts to tacit approval of the Secretary's "covered by each permit" reading of Section 517(c). The Secretary requested the appeals court to vacate the district court's opinion remanding the 1988 abandoned sites rule because he believed that step was necessary before engaging in a new rulemaking based on the interpretation that abandoned sites for which the permits have expired or been revoked are not subject to section 517(c) of the Act. In declining the Secretary's request to vacate, the appeals court stated "We express no view about the validity of the Secretary's proposed reading. The significant point on this appeal is that the district court's decision does not stand in the way of the Secretary adopting it in a new rulemaking." Whether or not the revised reading set forth as a basis for this rule would be sustained by the appeals court will only be known if this rule becomes ripe for a decision before that judicial body.

A State regulatory authority (SRA) said it would make more sense to require the permit to be revoked/expired "or" actually be forfeited. This could be accomplished by replacing the word "and" by the word "or" and deleting the phrase "has initiated and is diligently pursuing forfeiture of" in subparagraph (ii). The commenter explained that bond forfeiture proceedings may not always be accomplished concurrently with permit expiration, that if a permit expires there may not be a reason to immediately forfeit the bond and by requiring both expiration and forfeiture to occur simultaneously could be a waste of manpower and funds. This comment is not being adopted. As discussed above, allowing a reduction from the inspection requirements of section 517(c) of the Act under this rule is based on the premise that revocation or expiration of a permit is a necessary prerequisite in order for an abandoned site not to be considered "covered by a permit." If, as the commenter suggests, bond forfeiture is an alternative to revocation or expiration, an abandoned site could not escape the constraints of section 517(c) of the Act since bond forfeiture does not necessarily require permit revocation. In view of the often prolonged process of bond forfeiture, this final section of the rule does not require that bond forfeiture be completed, but rather that it be initiated and diligently pursued and thus, the rule will have more immediate applicability.

SECTION 840.11(g)(4)(ii)/842.11(e)(4)(ii).

To qualify under the definition of "abandoned site," the existing rules require that the regulatory authority has initiated and is diligently pursuing forfeiture of, or has forfeited, the performance bond. These sections are being revised by adding the phrase "any available" before the phrase "performance bond." This change is minor and is intended to recognize that there is a relatively small number of sites that are or were permitted, but for which a performance bond was never required or no longer exists. The absence of a performance bond has no bearing on whether a site should be classified as abandoned for inspection purposes.

NWF supported the addition of the phrase "any available" agreeing that the absence of a performance bond has no bearing on whether a site should be classified and abandoned for inspection purposes. One SRA, noting the time lag between initiation of bond forfeiture and actual collection, supported the proposal to allow reduction of inspections while the regulatory authority is diligently pursuing bond forfeiture. This commenter believed that inspection resources would be used much more efficiently by this change. Another SRA commented that this provision should include those sites where no reclamation bond is available due to insolvency of surety companies. These sections are being adopted as proposed. To address the latter SRA's concern, if no performance bond exists because of the insolvency of a surety company, then under this rule a performance bond would not be considered available.

SECTIONS 840.11(h) INTRODUCTORY TEXT/842.11(f) INTRODUCTORY TEXT

These sections as proposed provided that the regulatory authority shall inspect each abandoned site at a rate of no less than one complete inspection per calendar year. This minimum inspection frequency is being retained under this final rule. However, the language has been revised to provide that the regulatory authority shall inspect each abandoned site on a

set frequency commensurate with the public health and safety and environmental considerations present at each specific site, but in no case shall the inspection frequency be set at less than one complete inspection per calendar year. This revised language emphasizes the requirement that the regulatory authority must tailor an appropriate frequency to the site-specific conditions that exist at each mine. That frequency could vary from one to twelve or more per calendar year.

Most commenters supported a reduced inspection frequency for abandoned sites and commended OSM for taking the initiative on this rulemaking. Eight SRAs voiced strong support for the rule. One SRA stated that, based on its long history of regulating coal mining operations, it supported OSM's conclusions that fewer inspections of certain abandoned sites would not harm the environment; the States' finite resources could be used more effectively; all significant violations are cited prior to abandonment; and that abandoned sites often remain stable over the course of several years. Another SRA stated that its inspection staff is being required to inspect abandoned sites regularly under circumstances that serve absolutely no purpose other than to meet an arbitrary inspection mandate and that eliminating or curtailing redundant inspections will greatly improve the efficiency of its inspection staff. A third SRA said that in these days of increasingly restrictive State and Federal budgets, it is imperative that our resources are effectively allocated to further the purposes of the Act and that the time spent inspecting abandoned sites detracts from the time that can be spent to ensure compliance at non-abandoned sites. Finally, a fourth SRA maintained that the States continue to be best suited and capable of deciding the appropriate frequency for inspection of abandoned sites where all other enforcement measures have failed to force compliance.

The Interstate Mining Compact Commission (IMCC), which represents the natural resource interests of its 17 member States, strongly supported the rule agreeing with OSM's analysis and conclusions in the preamble to the proposed rule and noting that the States would not support a situation where environmentally sensitive sites are left unattended, unabated, or without meaningful followup in the way of alternative enforcement proceedings such as those required in the proposed rule.

The NCA and the Kentucky Coal Association fully supported the proposed rule, characterizing it as a proper exercise of OSM's discretion to provide regulatory authorities the necessary flexibility to deploy limited resources in an efficient manner. The NCA/AMC also supported the rule pointing out that along with the rules practical benefits, the regulatory history of the Act shows that there is precedent for the selective inspection of mines that pose no threat to the environment as exemplified by the 1982 revised Federal rules that allowed a reduction in the partial inspection frequency for "inactive" operations.

The United States Environmental Protection Agency (EPA) stated that it is not unreasonable for OSM to conduct complete inspections twice a year at a minimum on sites causing or likely to cause water pollution or other nonpoint source problems. However, the EPA recommended that the rule include criteria upon which the frequency of inspections would be based, including the potential for the site to become further degraded. As discussed later in this preamble, the final rule will incorporate criteria, including a criterion similar to that suggested by EPA, that must be taken into consideration and documented before regulatory authorities can reduce inspection frequencies at abandoned sites.

One commenter said that OSM'S statement in the preamble to the proposed rule that reducing inspections at abandoned sites "would allow the regulatory authorities to redirect those inspection resources to operations where inspection and enforcement would achieve the intended results" points to the failure of regulatory authorities to achieve the intended results in the first place by preventing non-compliance through inspection and enforcement during the mining and reclamation phases. The commenter questioned why OSM is not concerning itself with how to prevent abandonment rather than a way to assist operators through reduced inspections. The commenter added that since existing regulations require adequate bond be in place, abandonment becomes irrelevant if those regulations are properly implemented.

OSM concurs with the commenter's view that not enough has been done in the past to prevent abandonment and will place greater emphasis on prevention. Prevention of environmental problems and inadequate performance bonds often associated with abandoned sites are priorities to OSM and the agency will work with the States to improve efforts in these key areas. This rule promotes a policy of prevention because it frees resources that can focus on existing or potential problems at high risk sites that would result in long term adverse effects or reclamation difficulties in the event of abandonment.

The NWF opposed the proposed reduction in the minimum inspection frequency for abandoned sites because it allegedly fails to provide adequately for the protection of public health and safety and the environment from the adverse impacts of improperly conducted coal mining and operations, and therefore contravenes the underlying purpose of the Act. They maintained that the dramatic reduction in frequency or even elimination of inspections altogether at abandoned sites as proposed would unquestionably heighten the risk that site conditions may worsen to create an imminent harm and trigger violations of on-or-off site performance standards in addition to those violations already cited by a regulatory authority. NWF stated that abandoned sites need to be monitored to avert deterioration of site conditions into imminent harms, to ensure no uncited violations exist, to provide early warning to the public in the event of imminent harm and to determine or prioritize sites that are eligible for abandoned mine lands funding. They urged that OSM withdraw this proposal, or at a minimum, that a more carefully designed, comprehensive clear and precise rule, explained in greater detail, be substituted.

NWF asserts that the proposed rule is deficient because: (1) It is excessively permissive in delegating decision making to the regulatory authority without a meaningful check based on specified criteria or site characteristics guiding reductions in frequency; (2) there is an absence of binding criteria for "tailoring" inspection schedules for sites requiring more than the minimum one inspection per year, but less than currently required 12 per year; and (3) while OSM indicates in the preamble that regulatory authorities may subsequently readjust a reduced frequency as new information about the conditions at a site become available, there are no criteria for what would trigger such a readjustment.

NWF agrees, however, for some abandoned sites, rigid adherence to the inspection requirements under Section 517(c) of the Act may be a poor expenditure of limited inspection resources and to the extent that the change to the definition of "abandoned site" enables regulatory authorities to make limited reductions in inspection frequencies without offending the language of Section 517(c), the rule is a sensible one. However, they state that any change to the definition of "abandoned site" in order to allow reductions in inspection frequencies must be accompanied by a comprehensive regulatory program such as that they outline below. They assert that failure of OSM to promulgate abandoned site inspection rules fitting this description would offend the purpose of the Act as a whole, even where the "covered by each permit" definitional change of "abandoned site" has rendered Section 517(c) no longer at issue.

NWF asserts that, as part of their suggested program, any attempt to reduce inspection frequencies must begin by creating a categorical exclusion for which there can be no reduction from the existing requirements of 12 inspections per year. This exclusion should at a minimum include sites with potentially unstable structures, such as impoundments or hollow or valley fills, and sites with existing on-or-off site impacts, such as acid mine drainage. Moreover, NWF urged that, where abandoned sites are not categorically excluded from any reduction in inspection frequency, they should remain subject to an absolute minimum frequency of one complete inspection per year and not have their inspection frequencies eliminated altogether as the rule would allow.

The comprehensive detailed inspection program suggested by NWF would also need to include the following: (1) Quantitative inspection requirements like the existing rule including an absolute minimum (e.g. one complete inspection per year); (2) a standardized or regionalized protocol so that criteria are applied consistently across different inspectors and different regulatory authority jurisdictions or regions; (3) specific written findings for all relevant on-and-off site performance standard parameters and public health and safety concerns; (4) based on quantitative inspection data charted over time, a published table for which the regulatory authority could proceed to the appropriate coordinates to determine the appropriate inspection frequency and trigger any necessary subsequent adjustments; and (5) traceable written documentation relating to inspection frequencies at abandoned sites amenable to administrative review.

Finally, NWF's suggested comprehensive program also would include opportunities for structured public participation in the decision making process. NWF contends that OSM's regulation should begin with a rebuttable presumption that inspection frequencies should not be reduced from currently required levels unless that presumption can be overcome by an affirmative showing of reasonableness and general public notice, specific personal notice to identifiable parties that might be adversely affected by on-or-off site impacts, and public comment periods for all proposed changes in frequency. Also, if the regulatory authority demonstrates that a reduced frequency is appropriate, NWF asserts that there should be a general provision granting reasonable citizen access, when requested in writing, to inspect any areas of the site that would otherwise be inaccessible except to the regulatory authority.

NWF charges that the absence of any discussion of why OSM has not developed a more comprehensive and structured abandoned sites inspection program is offensive to established principles of administrative law. Citing *National*

Wildlife Federation v. Hodel, 839 F.2d 694 (1988), NWF points out that the court condemned precisely the type of conclusory rulemaking OSM has undertaken with its current proposal, "The Secretary * * * if he determines that there is no need to flesh out' the statute, must flesh out' his explanations so that we can review the rationality of his decision." In light of this clear directive, NWF asserts OSM must at a minimum, repropose this rule and explain to the public why it is declining to establish a detailed regulatory program.

OSM set forth an adequate explanation of its rationale underlying the proposed rule that has been greatly supplemented with the preamble discussion and response to comments in this final rule. OSM appreciates NWF's views and has decided to adopt most of the elements of NWF's program in this final rule. OSM will include in the final rule NWF's recommendation for an absolute minimum inspection frequency of not less than one complete inspection per calendar year, criteria for "tailoring" inspection schedules for sites requiring more than one inspection per year, and a requirement for specific and traceable written findings by the regulatory authority based on relevant environmental and public health and safety concerns and newspaper advertisement providing the opportunity for public comment on any proposed reduction in inspections of abandoned sites. These adopted provisions are discussed below and under the discussion of final Sections 840.11(h)(1)/842.11(f)(1). OSM considered, but is not adopting, NWF's request for quantitative fixed inspection frequencies in the form of categorical exclusions, standardized or regionalized protocols, published "matrix" tables, or public access to abandoned sites for inspection purposes in light of the opportunities already available under existing regulations.

Under this final rule the responsibility for selection of the appropriate inspection frequency necessary to comply with this rule rests with the expertise and judgment of each regulatory authority, guided by specific written findings required in the final rule. With site-specific historical knowledge at hand and through their experience with local conditions and informal consultations with affected residents, the regulatory authorities are well qualified to identify sites with the potential for harm and to carefully tailor an appropriate inspection frequency for individual abandoned sites, each of which is unique, both in terms of its physical environment and the problems it presents. This rule will maintain the regulatory authority's responsibility for administering its regulatory program consistent with congressional intent to have primary regulatory authority rest with the States.

OSM is not adopting categorical exclusions or other fixed inspection frequencies for abandoned sites beyond the minimum one per year because to do so would merely substitute one inflexible frequency for another and thus fail to achieve fully the goal of eliminating counterproductive inspections. An arbitrary fixed inspection frequency cannot account for the unique physical environment at each abandoned site nor the variation of problems that each abandoned site may pose. A fixed predetermined frequency is just as likely to yield too many inspections, or too few inspections, as it is to yield a suitable number. Categorical exclusions or inclusions also would almost certainly result in inappropriate applications of the rule in many cases. Further, the U.S. Court of Appeals explicitly acknowledged the legal defensibility of OSM's "flexible" implementation of statutes that allow regulatory authorities to consider the myriad site specific situations that cannot be fully anticipated in writing a Federal regulation. *NWF v. Hodel*, 839 F.2d 694, 745 (D.C. Cir. 1988). However, nothing in this rule would preclude regulatory authorities from establishing for administrative convenience categories of sites with similar characteristics and evaluating and documenting the necessary inspection frequency for each category as a whole.

As previously discussed, the reason inspections of abandoned sites at the frequency imposed under section 517(c) of the Act are counterproductive and a waste of resources is that enforcement actions at the inspector level are no longer effective. Alternative enforcement that must be initiated beyond the level of inspectors is generally the only viable means to compel abatement of violations or completion of reclamation at abandoned sites, even if conditions deteriorate. Where the regulatory authority is taking all appropriate enforcement action available to it as required under the definition of "abandoned site," nothing more can be done through repeated inspections to reclaim a site or abate violations than is already occurring. Thus, while a fixed inspection frequency like that for active sites under the existing rules might cause the regulatory authority to be informed of a problem at an abandoned site more quickly, it will not provide any new remedy to compel compliance. Accordingly, OSM believes that the inspection frequency program under this rule strikes a sound balance between the fixed inspection frequency required for active and inactive sites and the need to periodically, but not less than once per year, inspect abandoned sites to monitor environmental conditions or other changes in the status of a site and to ensure bond forfeiture reclamation priorities are adjusted as necessary.

Since OSM is accepting NWF's suggestion to set an absolute minimum inspection frequency of not less than one complete inspection per year, Sections 840.11(h)(1)/842.11(f)(1) will not be adopted as proposed. Those proposed

sections would have enabled the regulatory authority to further reduce the minimum inspection frequency required under paragraphs (h) introductory text and (f) introductory text, possibly to zero, if, based on no less than three consecutive complete annual inspections conducted during a three-year period before or after the effective date of this rule, the regulatory authority would have found in writing that an abandoned site satisfies two criteria. The first criterion would have been that no conditions or structures existed at the site that could have created an imminent danger to the health or safety of the public or an imminent harm to the environment. The second criterion would have been that the site had become reasonably stable through natural settlement or revegetation processes.

Eight SRAs, the NCA/AMC, the NCA and the Kentucky Coal Association supported these proposed provisions without providing substantive comments. The NWF was strongly opposed. It commented that under this proposal, inspections at some abandoned sites could be discontinued altogether even where serious deterioration of conditions occurred subsequent to the decision to suspend inspections indefinitely. They said that no State or Federal regulatory authority would have the duty to revisit the abandoned site and would have every administrative and budgetary incentive not to.

OSM acknowledges NWF's concern over the potential for misapplication of these proposed sections. While some abandoned sites may be so stable and so operationally defunct as to make further inspections completely unnecessary, OSM believes that deletion of these provisions will act as a safeguard against premature termination of inspections at what could be a large number of abandoned sites where conditions do not justify ending inspections altogether. OSM believes that monitoring each abandoned site at least once per year to evaluate the environmental conditions, operational status, and the bond forfeiture reclamation priority is reasonable public policy that would not excessively strain the resources of Federal or State regulatory authorities, especially since many abandoned sites are located near active and inactive sites requiring frequent inspections. Moreover, there must be some minimum in place to ensure that each abandoned site continues to be inspected at a frequency commensurate with public safety and environmental considerations present at each specific site as required under the final rule. Also, if there were no minimum frequency, the regulatory authority might not become aware, other than from information provided by citizens, that conditions had worsened to the point that a higher alternative frequency would need to be set in order for the frequency to be commensurate with the deteriorating conditions.

Turning to NWF's recommendation that the rule contain enhanced opportunities for public participation in the abandoned sites inspection process, OSM is including a public notice provision that provides the general public with the opportunity to submit written comments to the regulatory authority when concerns are raised as to a particular inspection frequency adjustment. This enhancement coupled with opportunities for private citizen involvement in the inspection process already provided under other regulations and discussed below will provide ample public participation in the inspection of abandoned sites. 30 CFR 842.14 provides that any person who is or may be adversely affected by a surface coal mining and reclamation operation may notify the Director in writing of any alleged failure on the part of OSM to make adequate and complete periodic inspections and the Director must respond with a determination including any actions to be taken to remedy any noncompliance. When a person provides OSM with reason to believe that there exists any violation at an abandoned site, that person may request a Federal inspection and has the right to accompany the inspector during the inspection. To the extent a person is not satisfied with a Federal inspector's decision not to inspect or enforce, the person is entitled to informal review of that decision by the Director of OSM, and can subsequently appeal to the Office of Hearings and Appeals within DOI. Finally, 30 CFR 840.15 provides that each State program shall provide for public participation in the enforcement of the State program consistent with the Federal provisions cited above.

OSM encourages States to work with potentially affected citizens where a concern arises for a particular minesite. The ability and willingness of State regulatory authorities to work closely with citizens is clearly recognized in OSM's mission and vision statement and is a key part of making the Act work successfully. As part of its oversight duties, OSM will monitor the willingness of States to be responsive to the concerns of citizens and to allow them full access to information needed to evaluate the effect of mining on their health, safety, general welfare and property.

FINAL SECTIONS 840.11(h)(1)/842.11(f)(1)

As discussed above, sections 840.11(h)(1)/842.11(f)(1) are not being adopted as proposed, but instead are being revised. Under the final rule, before proceeding to reduce the inspection frequency at any abandoned site as authorized under 840.11(h) introductory text/842.11(f) introductory text, the regulatory authority must first conduct a complete inspection of the site. On that basis and on the basis of comments received during the public notice period required under

this paragraph, the regulatory authority shall prepare and maintain for public review and Federal oversight purposes a written finding justifying the alternative inspection frequency selected. The prerequisite complete inspection is an on-site status review of all applicable performance standards conducted with an eye towards the long term effects of reducing the inspection frequency. Regulatory authorities shall make the written finding immediately available to OSM and the public in the area of mining in accordance with 30 CFR 840.14, Availability of records. To assist the public and OSM in reviewing written findings in a meaningful and expeditious manner, regulatory authorities are expected under this provision to maintain or be able to generate within a reasonable time a current compilation or index of all abandoned sites for which an inspection frequency adjustment has been made under this rule. Each written finding shall justify a reduced inspection frequency by affirmatively addressing in detail all of the following criteria.

(h)(1)(i)/(f)(1)(i)

As a prerequisite to any reduction in inspection frequency, the regulatory authority must explain how the site meets each of the criteria under the definition of an abandoned site under 30 CFR 840.11(g)/842.11(e). Meeting these criteria demonstrates that the regulatory authority has taken, and continues to be in the process of taking, all available enforcement within its reach under its regulatory program to secure abatement of violations and completion of reclamation at an abandoned site.

(h)(1)(ii)/(f)(1)(ii)

The regulatory authority must document whether there exist impoundments, earthen structures or other conditions such as acid mine drainage that pose, or reasonably may be expected to progress into, imminent dangers to the health and safety of the public or significant environmental harms to land, air, or water resources as defined under 30 CFR 701.5. Depending on the circumstances, this criterion alone may be sufficient to warrant no reduction in inspection frequency or at least selection of a frequency in the high range. Even though there may be no remedy immediately available to abate any such dangers or harms, frequent monitoring can serve to give advance warning to the public or appropriate government agencies and serve as a basis to expedite reclamation or abatement of dangers or harms through the bond forfeiture process.

(h)(1)(iii)/(f)(1)(iii)

The regulatory authority must document the extent to which existing impoundments or earthen structures were constructed and certified in accordance with prudent engineering practices and designs approved in the permit. This could be beneficial in support of a reduced frequency since structures such as ponds, head of hollow and valley fills, coal waste refuse piles, backfills or impoundments pose less risk of failure when constructed as designed and certified than structures that were not.

(h)(1)(iv)/(f)(1)(iv)

This criterion addresses the degree to which erosion and sediment control are present and functioning. Monitoring for damage caused by off-site sedimentation may need to be more frequent where there are extensive or critically located areas of loose soils that are not controlled by any or by non-functioning sediment controls.

(h)(1)(v)/(f)(1)(v)

Another factor to be considered by the regulatory authority is the proximity of the abandoned site to urbanized areas, communities, occupied dwellings, schools, and other public or commercial buildings and facilities. This criterion will become either more or less important depending on the regulatory authority's findings under the other criteria.

(h)(1)(vi)/(f)(1)(vi)

This criterion concerns the extent of reclamation conducted prior to abandonment and the degree of stability of unreclaimed areas. Abandoned sites vary widely in this respect, ranging from no reclamation at all to various combinations of backfilling, grading, revegetation, and bond release.

(h)(1)(vii)/(f)(1)(vii)

This last criterion requires the regulatory authority to document the rate at which adverse environmental or public health and safety conditions have and can be expected to progressively deteriorate based on the record of complete and partial inspection reports during the last two consecutive years of inspections of the site. This snapshot through time can be useful in predicting whether adverse conditions can be expected in the future and their rate of acceleration, which may have an important bearing on justifying any reduction in inspection frequency.

FINAL SECTIONS 840.11(h)(2)/842.11(f)(2)

In response to public comment, this section is being added to require the regulatory authority to advertise each proposed frequency reduction in the newspaper with the broadest circulation in the locality of the abandoned site. The public will be provided a 30 day period in which to submit written comments. Paragraph (h)(2)(ii)/(f)(2)(ii) specifies the nature of the information that at a minimum must be contained in the public notice. Nothing in this section precludes the regulatory authority from consolidating more than one permit into the same advertisement as long as all the information required reflects site-specific differences in the permits included. It is expected that the regulatory authority will give careful consideration to the comments it receives and work with the public to arrive at an inspection frequency acceptable to all parties with an interest.

III. PROCEDURAL MATTERS

Effect in Federal Program States and on Indian Lands

These final rules will apply through cross-referencing in those States with Federal programs and on Indian lands. The programs with Federal programs are California, Georgia, Idaho, Massachusetts, Michigan, North Carolina, Oregon, Rhode Island, South Dakota, Tennessee, and Washington. The Federal programs for these States appear at 30 CFR parts 905, 910, 912, 921, 922, 933, 937, 939, 941, 942, and 947 respectively. The Indian lands program appears at 30 CFR part 750.

Executive Order 12778 on Civil Justice Reform

This rule has been reviewed under the applicable standards of Section 2(b)(2) of Executive Order 12778, Civil Justice Reform (*56 FR 55195*). In general, the requirements of Section 2(b)(2) of Executive Order 12778 are covered by the preamble discussion of this rule. Additional remarks follow concerning individual elements of the Executive Order:

A. What is the preemptive effect, if any, to be given to the regulation?

The rule would not preempt State law or regulation. States would not be required to adopt similar provisions and could continue to inspect abandoned sites at the current frequency required by existing regulations if they so choose.

B. What is the effect on existing Federal law or regulation, if any, including all provisions repealed or modified?

The proposed rule modifies the implementation of the Act as described herein, and is not intended to modify the implementation of any other Federal statute. The preceding discussion of this rule specifies the only Federal regulatory provisions that are affected by this proposed rule.

C. Does the rule provide a clear and certain legal standard for affected conduct rather than a general standard, while promoting simplification and burden reduction?

The standards established by this rule are as clear and certain as practicable, given the complexity of the topics covered and the mandates of the Act.

D. What is the retroactive effect, if any, to be given to the regulation?

The inspection reduction provisions of this rule may be applied to any surface coal mining and reclamation operation conducted after the effective date of the Act.

E. Are administrative proceedings required before parties may file suite in court? Which proceedings apply? Is the exhaustion of administrative remedies required?

No administrative proceedings are required before parties may file suit in court challenging the provisions of this rule under section 526(a) of the Act, *30 U.S.C. 1276(a)*. Prior to any judicial challenge to the application of the rule, however, administrative procedures must be exhausted. In situations involving OSM application of the rule, applicable administrative procedures may be found at 43 CFR part 4. Applicable administrative procedures may be found at 43 CFR part 4.

F. Does the rule define key terms, either explicitly or by reference to other regulations or statutes that explicitly define those items?

Terms which are important to the understanding of this rule are set forth in 30 CFR 700.5 and 701.5.

G. Does the rule address other important issues affecting clarity and general draftsmanship of regulations set forth by the Attorney General, with the concurrence of the Director of the Office of Management and Budget, that are determined to be in accordance with the purposes of the Executive Order?

The Attorney General and the Director of the Office of Management and Budget have not issued any guidance on this requirement.

Federal Paperwork Reduction Act

The collections of information contained in this rule have been approved by the Office of Management and Budget under *44 U.S.C. 3501* et seq. and assigned clearance number 1029-0051.

Executive Order 12866

This rule has been reviewed under the Executive Order 12866.

Regulatory Flexibility Act

The DOI certifies that this rule will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act, *5 U.S.C. 601* et seq. The rule does not distinguish between small and large entities. This determination is based on the findings that the regulatory changes contained in this rule would serve to reduce the costs incurred by OSM and State regulatory authorities in making routine inspections of abandoned sites. Therefore, the rule will not add to the cost of operating a mine under an approved regulatory program.

National Environmental Policy Act

OSM has prepared an environmental assessment (EA) of the rule and has made a finding that it would not significantly affect the quality of the human environment under section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), *42 U.S.C. 4332(2)(C)*. A finding of no significant impact (FONSI) has been approved in accordance with OSM procedures under NEPA. The EA is on file in the OSM Administrative Record at the address previously specified (see ADDRESSES).

Author

The author of this rule is Daniel Stocker, Chief, Branch of Inspection and Enforcement with assistance from Frederick W. Fox. The author may be reached at the Office of Surface Mining Reclamation and Enforcement, 1951 Constitution Avenue NW., Washington DC 20240; Telephone 202-208-2550.

LIST OF SUBJECTS

30 CFR Part 840

Intergovernmental relations, Reporting and recordkeeping requirements, Surface mining, Underground mining.

30 CFR Part 842

Law enforcement, Surface mining, Underground mining.

Dated: October 14, 1994.

Bob Armstrong, Assistant Secretary for Land and Minerals Management.

Accordingly, 30 CFR Parts 840 and 842 are amended as set forth below:

PART 840 - STATE REGULATORY AUTHORITY-INSPECTION AND ENFORCEMENT

1. The authority citation for Part 840 continues to read as follows:

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

2. Section 840.10 is revised to read as follows:

SECTION 840.10 -- INFORMATION COLLECTION.

(a) The collections of information contained in part 840 have been approved by the Office of Management and Budget under *44 U.S.C. 3501* et seq. and assigned clearance number 1029-0051. The information is being collected by States for use in assessing penalties as evidence in enforcement cases and as an inspection management record. The obligation to respond is required to obtain a benefit in accordance with *30 U.S.C. 1201* et seq.

(b) Public reporting burden for this information is estimated to average 3.7 hours per response, including the time for the reviewing instructions, searching existing data sources, gathering and maintaining the data needed and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing the burden, to the Information Collection Clearance Officer, 1951 Constitution Ave, NW, Room 640, NC, Washington DC 20240; and the Office of Management and Budget, Paperwork Reduction Project 1029-0051, Washington, DC 20503.

3. Section 840.11 is amended by revising paragraphs (g)(4) and (h) to read as follows:

SECTION 840.11 -- INSPECTION BY STATE REGULATORY AUTHORITY.

* * * * *

(g) * * *

(4) Where the site is, or was, permitted and bonded:

(i) The permit has either expired or been revoked; and

(ii) The regulatory authority has initiated and is diligently pursuing forfeiture of, or has forfeited, any available performance bond.

(h) In lieu of the inspection frequency established in paragraphs (a) and (b) of this section, the regulatory authority shall inspect each abandoned site on a set frequency commensurate with the public health and safety and environmental considerations present at each specific site, but in no case shall the inspection frequency be set at less than one complete inspection per calendar year.

(1) In selecting an alternate inspection frequency authorized under the paragraph above, the regulatory authority shall first conduct a complete inspection of the abandoned site and provide public notice under paragraph (h)(2) of this section. Following the inspection and public notice, the regulatory authority shall prepare and maintain for public review a written finding justifying the alternative inspection frequency selected. This written finding shall justify the new inspection frequency by affirmatively addressing in detail all of the following criteria:

(i) How the site meets each of the criteria under the definition of an abandoned site under paragraph (g) of this section and thereby qualifies for a reduction in inspection frequency;

(ii) Whether, and to what extent, there exist on the site impoundments, earthen structures or other conditions that pose, or may reasonably be expected to ripen into, imminent dangers to the health or safety of the public or significant environmental harms to land, air, or water resources;

(iii) The extent to which existing impoundments or earthen structures were constructed and certified in accordance with prudent engineering designs approved in the permit;

(iv) The degree to which erosion and sediment control is present and functioning;

(v) The extent to which the site is located near or above urbanized areas, communities, occupied dwellings, schools and other public or commercial buildings and facilities;

(vi) The extent of reclamation completed prior to abandonment and the degree of stability of unreclaimed areas, taking into consideration the physical characteristics of the land mined and the extent of settlement or revegetation that has occurred naturally with them; and

(vii) Based on a review of the complete and partial inspection report record for the site during at least the last two consecutive years, the rate at which adverse environmental or public health and safety conditions have and can be expected to progressively deteriorate.

(2) The public notice and opportunity to comment required under paragraph (h)(1) of this section shall be provided as follows:

(i) The regulatory authority shall place a notice in the newspaper with the broadest circulation in the locality of the abandoned site providing the public with a 30-day period in which to submit written comments.

(ii) The public notice shall contain the permittee's name, the permit number, the precise location of the land affected, the inspection frequency proposed, the general reasons for reducing the inspection frequency, the bond status of the permit, the telephone number and address of the regulatory authority where written comments on the reduced inspection frequency may be submitted, and the closing date of the comment period.

PART 842 - FEDERAL INSPECTIONS AND MONITORING

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

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

5. Section 842.11 is amended by revising paragraphs (e)(4) and (f) to read as follows:

SECTION 842.11 -- FEDERAL INSPECTIONS AND MONITORING.

* * * * *

(e) * * *

(4) Where the site is, or was, permitted or bonded:

(i) The permit has either expired or been revoked; and

(ii) The Office has initiated and is diligently pursuing forfeiture of, or has forfeited, any available performance bond.

(f) In lieu of the inspection frequency established in paragraph (c) of this section, the office shall inspect each abandoned site on a set frequency commensurate with the public health and safety and environmental considerations present at each specific site, but in no case shall the inspection frequency be set at less than one complete inspection per calendar-year.

(1) In selecting an alternate inspection frequency authorized under the paragraph above, the office shall first conduct a complete inspection of the abandoned site and provide public notice under paragraph (f)(2) of this section. Following the inspection and public notice, the office shall prepare and maintain for public review a written finding justifying the alternative inspection frequency selected. This written finding shall justify the new inspection frequency by affirmatively addressing in detail all of the following criteria:

(i) How the site meets each of the criteria under the definition of an abandoned site under paragraph (e) of this section and thereby qualifies for a reduction inspection frequency;

(ii) Whether, and to what extent, there exist on the site impoundments, earthen structures or other conditions that pose, or may reasonably be expected to ripen into, imminent dangers to the health or safety of the public or significant environmental harms to land, air or water resources;

(iii) The extent to which existing impoundments or earthen structures were constructed and certified in accordance with prudent engineering designs approved in the permit;

(iv) The degree to which erosion and sediment control is present and functioning;

(v) The extent to which the site is located near or above urbanized areas, communities, occupied dwellings, schools and other public or commercial buildings and facilities;

(vi) The extent of reclamation completed prior to abandonment and the degree of stability of

unreclaimed areas, taking into consideration the physical characteristics of the land mined and the extent of settlement or revegetation that has occurred naturally with time; and

(vii) Based on a review of the complete and partial inspection report record for the site during at least the last two consecutive years, the rate at which adverse environmental or public health and safety conditions have and can be expected to progressively deteriorate.

(2) The public notice and opportunity to comment required under paragraph (f)(1) of this section shall be provided as follows:

(i) The office shall place a notice in the newspaper with the broadest circulation in the locality of the abandoned site providing the public with a 30-day period in which to submit written comments.

(ii) The public notice shall contain the permittee's name, the permit number, the precise location of the land affected, the inspection frequency proposed, the general reasons for reducing the inspection frequency, the bond status of the permit, the telephone number and address of the office where written comments on the reduced inspection frequency may be submitted, and the closing date of the comment period.

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