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DEPARTMENT OF THE INTERIOR

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

30 CFR Chapter VII: Subchapter L – Inspection and Enforcement: Parts 840, 842, 843, 845
Surface Coal Mining and Reclamation Operations Permanent Regulatory Program

ACTION: Proposed rules.

SUMMARY: The Office of Surface Mining Reclamation and Enforcement is seeking comments on these proposed rules which would implement a nationwide permanent program for the regulation of surface and underground mining operations by the States and the Federal Government as required by the Surface Mining Control and Reclamation Act of 1977 (SMCRA). These proposed rules are intended to strike a balance between protection of the environment and agricultural productivity and the Nation's need for coal as an essential source of energy.

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{Preamble: 43 FR 41792}

SUBCHAPTER L – INSPECTION AND ENFORCEMENT

A brief outline of the major features of the proposed regulations follows:

Part 840 contains the minimum requirements for inspection and enforcement by a State where the State is the regulatory authority under a State program or a cooperative agreement. Included in this Part are provisions relating to the types and frequency of inspections, enforcement authority and the availability of records, reports, inspection materials or information obtained by a State.

Part 842 sets forth the procedures applicable to Federal inspections in the permanent regulatory program. Section 842.11 describes the circumstances under which Federal inspections are to take place as well as the frequency and nature of those inspections. Section 842.12 outlines the requirements for Federal inspections following citizen requests as well as notification to citizens of the results of the inspections. Sections 842.13 842.16 contain rules pertaining to the right of entry of Federal inspectors onto the mine property, informal review by the Regional Director of any alleged inadequate or incomplete Federal inspections and the availability to the public of records or information obtained by the office.

Part 843 relates to Federal enforcement in the permanent program pursuant to Federal programs, the Federal lands program and all State programs being enforced by the Office pursuant to Sections 504(b) or 521(b) of the Act. The regulations in this Part address the specifics of cessation orders, notices of violation, suspension and revocation of permits, service of notices and orders and informal mine site review of notices and orders which require cessation of mining. Additionally, Sections 843.18 843.20 deal with the effect of an operator's inability to comply on the validity of notices of violation, cessation orders and show cause orders; those instances when the Secretary may request the Attorney General to institute civil actions against operators; and the rules relating to the institution of criminal proceedings under the Act.

Part 845 contains regulations regarding the assessment of civil penalties under Section 518 of the Act. {41792}

PART 840 – INSPECTION AND ENFORCEMENT BY THE STATE REGULATORY AUTHORITY

Section 840.11(a) relates to the minimum frequency of inspections by the State regulatory authority based upon the requirements of Section 517(c) of the Act. This section also sets forth definitions for complete and partial inspections by the State regulatory authority.

Section 840.11(c) outlines minimal requirements for inspections in conformity with Section 517 of the Act. Specifically, Section 840.11(c)(1) requires State inspections to be carried out on an irregular basis, so as to monitor compliance at all operations, including those which operate nights, weekends, or holidays. The purpose for this requirement is to insure that operations which conduct mining operations at non-typical times or hours, such as weekends, holidays or nights will be subjected to routine inspections by State inspection personnel. In other words, States must adjust their inspection schedules to match the production of the regulated operations.

Numerous comments were received regarding the draft language. This language has been changed to reflect the above statement.

Section 840.13 states what must be contained in the penalty and enforcement provisions of State programs and cooperative programs. These requirements are taken from the Act, including Sections 518(i), 503(a) and 521(d), as well as from the legislative history. Many of the requirements made upon the States in Part 840 as to civil and criminal penalties, suspension and revocation of permits, injunctive relief and the forfeiture of bonds are general in nature, echoing the actual language contained in the Act. For example, Section 840.13(a) requires that State and cooperative programs contain civil and criminal penalties which are ""no less stringent than those set forth in Section 518 of the Act and in Section 843.20 and Part 845 of this chapter."

An alternative approach which was considered by the Office was to make very specific requirements upon the States as to the content of their enforcement programs. Such an approach would give the States and the public a clearer idea of what will be required in the State enforcement programs. On the other hand, some flexibility may be sacrificed in proceeding in this manner. The Office is still considering such an approach and solicits public comment both on the feasibility of this detailed approach and on specific requirements which are recommended for inclusion. {41793}

One suggestion which was received was to require the states to allow citizens to accompany state inspectors in the permanent regulatory program. The Office believes that persons who have filed a complaint that leads to an inspection must be allowed to accompany State inspectors under an approved State program and that the right is covered by the general requirements of Section 732.15. The Office solicits comments on whether the regulations should contain more specific statements of this right either in Parts 731, 732 or 840.

Section 840.14 details the requirements for State regulatory authorities to make available to the Office and to the public various records and information. These requirements are based upon provisions contained in Section 517 of the Act. One alternative to Section 840.14(a) which was considered was to require each State regulatory authority to routinely forward to the Office copies of all documents relating to applications for and approvals of existing, new or revised permits and all documents relating to inspection and enforcement actions. The Office considered it more workable and less time-consuming and costly for the States to forward only the material which is requested by the Director or Regional Director. This would allow the individual regions of the Office to determine the specific needs of each region vis-a-vis the State regulatory authorities. {41793}

PART 842 – FEDERAL INSPECTIONS

Sections 842.11(a) and (b) list the instances in which Federal inspections are to occur in the permanent regulatory program. One of the questions in drafting these provisions was whether Congress intended to waive the 10-day notice requirements where there is adequate proof of either imminent danger or significant, imminent environmental harm (not ""imminent danger of significant environmental harm" as stated in Section 521(a)(1) of the Act). Pages 35 36 of Senate Report 95 128 (May 10, 1977) contain the text of Section 421(a)(1) which uses the phrase imminent danger or significant environmental harm. The House Bill, H.R. 2, did not provide for waiver of the 10-day notice to the State regulatory authority. Since no subsequent changes in this language were made, it seems clear that the use of the word ""of" instead of ""or" can be fairly characterized as a typographical or printing error. Other congressional references to the need of the Secretary to protect against imminent dangers to the public to prevent the occurrence of such disasters as the Buffalo Creek flood disaster lend credence to such an interpretation.

Section 842.11(b)(1)(ii) provides that the Office must inspect when it has notified a State of a possible violation but the State has failed to inform the Office within 10 days that appropriate action has been taken. Under the proposed regulation, if the person supplying the information provides adequate proof that an imminent danger to the public or significant, imminent environmental harm exists and the State has failed to Act, the 10-day notification period is waived. This is based upon Section 521(a)(1) of the Act. It was pointed out that the proposed regulation does not contain the requirement of Section 521(a)(1) that the federal inspection be conducted immediately. This change was made so as to comport with the statute.

Additionally, language was offered by a commenter to state that the ""adequate proof" required by Section 521(a)(1) for a federal inspection is the same proof required for a citizen to initiate a federal inspection in the interim program (30 C.F.R. Section 721.13(a)(1)). The suggested language is not required to obtain the desired results since language is already contained in this Section which describes when ""adequate proof" is established.

Section 842.11(c) reflects the statutory mandate in Section 517(c) for a minimum frequency of Federal inspections under a Federal program of one partial inspection per month and one complete inspection per calendar quarter.

Section 842.11(d) contains general provisions as to the timing and spacing of Federal inspections. Numerous comments were received objecting to the wording of the draft proposed regulation that inspections be carried out on an irregular basis, including ""a reasonable number of inspections on weekends and holidays and at unusual hours." The commenters complained that most operations occur during normal daytime hours and on normal work days and that no purpose would be served in inspecting premises at which no mining was occurring.

Some modification in the language of the proposed regulation was made and the Office will continue to consider the proper wording of this section. The intent of the proposed regulation is to provide for inspections at irregular times and dates so that there will be no advance notice as to when inspections will occur. Many operations work multiple shifts and illegal or ""wildcat" non-permitted operators frequently work on nights and weekends to avoid detection. It will be impossible to stop violations from occurring at these operations if inspections are limited to Monday through Friday, 9 to 5.

It is intended that inspections will occur at reasonable hours and times and will merely match the particular operation schedule of the mine in question. The proposed regulation merely affords inspectors the necessary flexibility to inspect in those instances when operations or violations occur at unusual times and/or dates.

Section 842.12 governs those occurrences which will necessitate a Federal inspection as a result of a citizen complaint pursuant to Section 842.11(b)(1). These requirements are based upon the language contained in Sections 517 and 521 of the Act as well as the legislative history of the Act. Consideration was given to requiring all citizen complaints to be initiated by written statements. However, the convenience of the public and the necessity for prompt action in the case of imminent hazards seem to justify the use of oral reports followed by signed written statements.

The comment was made that an oral complaint followed by a written one was in violation of Section 517(b)(1) of the Act if a federal inspection can occur before the written report is received. The Office believes that inspections can occur under those circumstances. It is believed that as long as the inspector receiving the oral complaint requests full information so he can properly evaluate the complaint, the inspection can begin while the written report is on its way. Since a mine is subject to inspection at any time, no prejudice can result if complete information is first obtained in oral form. The necessity to proceed promptly is particularly acute where imminent hazards and rapidly deteriorating conditions are present and can be quickly addressed and remedied. 111The requirement contained in Section 842.12(c) that the identity of persons supplying information to the Office shall remain confidential with the Office, if requested, is based upon a belief that some citizens will be reluctant to come forward if they are concerned about harassment, black-listing or physical abuse. Additional language was inserted, however, to state that disclosure would not be made unless required under the Freedom of Information Act or by other Federal law. The provision regarding confidentiality of persons supplying information to OSM was criticized as not exempting those persons electing to accompany the federal inspector during an inspection. It was reasoned that a person ""waives his privilege of confidentiality once he enters the mine property." The Office believes that it is reasonable for a mine operator to know who is coming on his property and that it cannot reasonably honor a request for anonymity if the person accompanies the inspector onto another's property. However, the Office solicits further comment as to whether a change in the proposed language is appropriate and in accord with the rights of citizens as stated in the Act. {41794}

Subsections 842.12 (d) and (e) describe what rights the Office must accord to a complainant if a Federal inspection is conducted as a result of the information provided.

Section 842.13 relates to the right of entry of authorized representatives of the Secretary onto the minesite to conduct inspections pursuant to Section 842.11. Consideration was given to obtaining search warrants for each inspection to be conducted pursuant to Section 842.11. However, this alternative was not proposed because the Office believes it might significantly impair effective enforcement under the Act and because it was deemed legally unnecessary to obtain search warrants prior to entering minesites.

The language of the inspection provisions and pertinent legislative history demonstrate that Congress intended to authorize the Secretary to exercise broad powers to enter minesites to inspect expeditiously and without advance notice. This was deemed essential by Congress to obtain adequate compliance with the Act. Further, the coal industry is a pervasively-regulated industry and, consequently, has impliedly consented to warrantless searches. Also, the areas and equipment to be inspected are located in open areas and are routinely occupied and used by various persons and, therefore, no significant privacy interest is adversely affected by warrantless inspections. Moreover, the United States District Court for

the District of Columbia ruled on August 24, 1978, that warrantless inspections may be conducted in the permitted area. However, the reference in the preproposed draft regulation to warrantless inspections of premises in which records are located was deleted.

A change to the language contained in Section 842.13(b) regarding the right of entry to have access to and copy records required under the Act was proposed to add the concept of "relevant records, directly relating to surface coal mining operations." The commenter expressed concern that certain proprietary data, such as geologic information or coal sales contracts might otherwise be subject to inspection. This recommended change is not believed necessary to protect the information about which the commenters were concerned. The only records which may be inspected are those "required under the Act, this Chapter, the applicable program or any permit condition imposed under such program." As such, no idle search or review of records could occur unless specifically authorized by law.

Several commenters stated their belief that Section 517(b)(3) requires inspectors to present their credentials before commencing their inspections, regardless of whether an employee of the operator is present or whether any person requests to see the credentials. If Section 517(b)(3) were so interpreted, it would seriously undermine and impede OSM's ability to enforce the law in that it would enable an operator to prevent an inspection by removing his men from the site while serious environmental or other harm might be occurring. An operator might also delay an inspector long enough to cover up or cease illegal practices, thus avoiding detection. Certain violations are difficult to prove unless they are observed in the commission.

One commenter contends that "for safety and liability reasons," inspectors should be required to present their credentials before commencing inspections. The presentation of credentials would have a minimal effect, if any, on safety and liability. We interpret Section 517(b)(3) as meaning that the operator who encounters the inspector on the permit area is entitled to expect the inspector to present appropriate credentials if requested to do so.

The proposed regulations also provide for informal review by the Regional Director of an alleged inadequate or incomplete Federal inspection or of a decision not to inspect or enforce. The statutory basis for these provisions is found in Section 517(h) of the Act and is discussed in the legislative history.

Comment was received on Section 842.14 relating to adequate and complete inspection review. It was pointed out that Section 517(h)(2) of the Act, upon which this section is based, requires not only Office response to citizen complaints about inadequate or incomplete inspections, but also procedures for adequate and complete inspections whether or not a citizen complaints. In other words, there should be management review procedure to assess the adequacy and completeness of inspection. OSM believes that such a review procedure would be in keeping with the wording of Section 517(h)(2) and solicits additional comments on criteria for determining what constitutes an adequate and complete inspection and on language for the regulations to reflect this statutory obligation.

The proposed regulations also provide in Section 842.16 for the availability to the public of all records, reports, inspection materials or other information obtained by the Office. This Section is in accord with the requirements of Section 517(f) of the Act. It is the Office's belief that this section does not prevent the Office from withholding material generated by the preparation of hearings and other special enforcement activity, except as available under discovery and the Freedom of Information Act.

A commenter suggested that this section could be deleted in its entirety without the loss of any person's rights since Section 517 of the Act and the Freedom of Information Act guarantee these rights in any event. Retention of this section was deemed essential to spell out the location and manner of storage of information as well as a statement of what information will not be available. See Section 842.12(b). Additionally, this section will act as guidance to states as far as adoption of similar regulations governing availability of records. {41794}

PART 843 – FEDERAL ENFORCEMENT

Section 843.11 relates to the circumstances in which cessation orders are to be issued and the requirements of such orders. This section is based upon the wording of Section 521(a)(2), (a)(3), and (a)(5) of the Act and the legislative history relating to cessation orders.

Changes were suggested as to Subsection 843.11(a) and (b) relative to the issuance of cessation orders under Sections 521(a)(2) and (a)(3) of the Act. The commenter suggested that references to ceasing the entire operation, to abating in the

most expeditious manner possible and to the use of affirmative obligations be deleted from this section.

The deletion of these provisions is rejected since the proposed language in each instance is taken from the Act. Subsections 521(a)(2) and (a)(3) of the Act provide for cessation of surface coal mining and reclamation operations or any portion thereof. These subsections also require the use of affirmative obligations where cessation of mining will not completely abate the imminent hazard. Section 521(a)(3) of the Act requires abatement in the most expeditious manner possible.

This commenter also requested the deletion of subsection 843.11(c)(2) which requires use of remedial action in orders of cessation issued under Sections 521(a)(2) and 521(a)(3) of the Act. This comment is rejected since such a requirement is contained in Section 521(a)(5) of the Act.

It was also suggested that the word "may" be changed to "shall" in Section 843.11(e) as regards extending the time for abatement if the failure to abate within the time previously set was not caused by the operator's lack of diligence. This comment was not accepted since Section 521(a)(3) of the Act does not require an extension of time to abate a notice of violation in all cases where some minimal amount of diligence is shown. Where diligence and good faith are demonstrated, the Office expects that extensions of time generally will be appropriate. {41795}

Subsection 843.11(f) was recommended for change by adding the word "immediately" before the words "terminate a cessation order" under the theory that an inspector should be available immediately upon abatement of a condition, practice or violation. While it is expected that federal inspectors will terminate cessation orders as quickly as possible following abatement, consideration of when the Office is notified that abatement is completed, the driving distance and conditions on the way to the mine site and other variables including whether the order has the effect of cessation of mining must be taken into account. For instance, if the cessation order affects only a small portion of the operation which does not cease actual production of coal, there may be no practical necessity to terminate the order instantaneously upon its abatement. It should be emphasized that the Office expects reinspections and terminations, if appropriate, to take place as quickly as possible so as to minimize adverse impact on the operator after compliance.

One commenter states that in deciding on the affirmative obligation to be imposed in an order, the inspector should be required to take into consideration the costs involved. There is no authority for this in the Act. However, an inspector acting reasonably would not knowingly require an operator to use a more expensive means of abatement if a less expensive method could accomplish the same regulatory result in the same time. If the operator knows of such a method, he should inform the inspector and ask him to modify his order. If the inspector agrees with the operator he should modify his order. However, the affirmative obligation should be aimed at assuring that abatement will be accomplished as promptly as possible because of the imminent danger or harm. If the inspector thinks the method suggested by the operator, though less expensive, will take a longer time to abate the violation, he would be perfectly justified in not modifying the order.

A new Subsection 843.12(b) was suggested which would require tolling of the time for abatement of a violation when an event outside the control of the permittee occurs – such as labor disputes, unavailability of equipment and acts of God. It was argued that the 90-day limit on abatement will create unnecessarily harsh results.

An authorized representative of the Secretary may extend the time for abatement up to 90 days, in situations where failure to abate was not due to an operator's lack of diligence. The Act and legislative history make clear, however, that no extension beyond 90 days may occur. This is not to say, however, that the Secretary cannot take the facts of the case into account when calculating a civil penalty since the statutory criteria of negligence and good faith presumably would be relevant.

Section 843.12 contains provisions pertaining to notices of violation authorized under Section 521(a)(3) of the Act. It is noteworthy that the proposed regulation only allows a Federal inspector to issue a notice of violation as part of the enforcement of a Federal program, Federal lands program or during enforcement of a State program pursuant to Sections 504(b) or 521(b) of the Act. Subsection (d) provides that a violation (which is not an imminent hazard) which is observed during a Federal inspection in connection with evaluation of a State program under Section 842.11(a)(1) or conducted pursuant to Section 842.11(b)(1), should be reported in writing to the State regulatory authority and the person responsible for the violation but that no notice of violation may be issued. An alternative approach which was considered was to provide that a Federal inspector could simply issue a notice of violation to the operator under these circumstances. Comment is invited as to whether the proposal language is a correct interpretation of the Act and the legislative history.

Objection was made to the use of interim steps for abatement in notices of violation. Sections 521(a)(3) (a) (5) provide that notices and orders should set forth with reasonable specificity any remedial action to be taken and a reasonable time period for abatement. This language, especially when read in conjunction with the purposes of the Act, is ample to authorize the use of interim steps and interim times for abatement. The reason why the Act provides not only for penalties, but also for abatement, is to ensure that the violation will be corrected, and in the shortest reasonable time. By specifying interim steps and times for parts of the remedial action, the inspector furthers the objective of gaining abatement in the shortest reasonable time. Normally, interim steps would not be used for cases in which the abatement period was short.

One commenter objected to the interim steps provision because it is unnecessary considering that it had instructed all of its employees to comply with the law and that every responsible operator does the same. Unfortunately such instructions, though to be greatly encouraged, are not always carried out by an operator's employees. Also, this disregards the many operators who do not wish to comply with the law.

The proposed regulations also specify the conditions under which an order to show cause shall issue regarding the suspension and revocation of permits. Consideration was given to a regulatory scheme which would tie the issuance of show cause orders to those instances when an operator exceeded a national or regional norm. Such a scheme is suggested in the legislative history. This approach was not adopted in the draft proposed regulations because it was considered potentially unwieldy and unworkable. Comments are invited, however, as to the national or regional norm approach or to other methods of establishing a pattern of violations which would result in suspension or revocation of a permit.

The proposed language would call for the discretionary issuance of show cause orders by the Director based on certain criteria enumerated in Section 843.13(a)(2). Comments are requested as to these or other possible criteria to guide the Director in the issuance of discretionary show cause orders. In addition, mandatory show cause orders are specified after a certain number of violations in a given period of time. These specific times were proposed based upon some predictions as to the number and frequency of violations which are expected in the permanent regulatory period. Other numbers may be applicable and comments are invited in this regard.

Subsection 843.13(a)(2) was criticized because the commenter believed that a pattern of violations should not hinge on the number of federal inspections within a 12-month period. This comment would be more valuable, however, if some other criteria for establishing a "pattern" of violations were suggested. The Office believes that what constitutes a pattern is still an open question and will examine other suggestions which develop during formal rulemaking.

Additionally, the Office was urged to reconsider its entire approach to suspension and revocation of permits. Again, absent any specific recommendations, it is difficult to evaluate a comment of this type.

Another commenter expressed fears that the Office will apply the pattern of violations provisions as the Mining Enforcement and Safety Administration (MESA) did under 1969 Coal Mine Health and Safety Act. This comment is inappropriate because Section 521(a)(4) of the Surface Mining Act bears no similarity to any enforcement provision of the 1969 Health and Safety Act. While the term "unwarrantable" appeared in Section 104(c) of the 1969 Act, it was not used in the context of a pattern-of-violations concept or the suspension or revocation of permits. "Unwarranted failure" under Section 521(a)(4) of the Surface Mining Act is defined in Section 701(29) of that Act and will be utilized by the Office in accordance with that definition. {41796}

One commenter suggest that "pattern of violation" should be defined as a reliable sample of traits, acts or other observable features characterizing an individual's behavior. The comment is rejected as unnecessary because the definition given in the regulations is adequate and will in fact result in a "reliable sample."

A commenter expressed the hope that inspectors will not abuse their discretion in determining unwarranted failure and suggested that unwarranted failure should be found only where there is substantial negligence on behalf of the company and not when the violation was caused by an individual employee acting contrary to the law or company direction. Regarding substantial negligence, the position argued by the commenter is contrary to the definition of unwarranted failure contained in Section 701(29) of the Act. With regard to the case of an individual acting contrary to the Act, if the position argued were adopted, it would never be possible for a corporation to be found to have violated the Act, because a corporation is an artificial entity which can act only through the acts of its employees and agents.

Section 843.14 relates to requirements regarding the service of notices of violation and cessation orders issued by Federal inspectors. The word "citation" was deleted as being confusing since the 1977 Mine Safety and Health Amendments Act uses the term in a different context.

It was recommended that Section 843.14(a)(2)(i) be amended to clarify that service of notices and orders may only be accomplished by mail if service cannot be made at the mine site. The language of this Section has been modified, however, to make clear that as an alternative to service at the minesite, service may be made by certified mail and that refusal to accept the mail would not defeat service.

Section 845.15 relates to the informal review by the Office of notices and orders which require cessation of mining as specified in Section 521(a)(5) of the Act. As proposed, the regulation would only require informal review to be conducted if the operator requests such a hearing is requested.

The proposed regulations contained in Section 843.15 relate to the hearing within 30 days of receipt of the notice or order. The proposed language states that the hearing will be deemed to be waived unless a request is received in that period. Additionally, the time for hearing will be extended if the request is not received within 21 days of the notification. The Office considered the alternative of conducting such a hearing in every instance regardless of an operator's interest in such a hearing. This alternative was not proposed, however, because experience to date indicates that such a procedure results in an unreasonable waste of manpower. The Office has scheduled numerous minesite review hearings at which no one showed up.

The proposed regulations specify the non-adjudicatory nature of these public hearings and that they are not governed by the Administrative Procedures Act. This is based upon a reading of Section 525 and the language contained in the legislative history of the Act. It is emphasized that this in no way interferes with a party's right to formal review under Section 525(a)(1) of the Act. Moreover, the United States District Court for the District of Columbia in the Surface Mining Regulation Litigation held on August 24, 1978, that the Act and the legislative history support the Secretary's interpretation that Section 521(a)(5) of the Act only requires an informal hearing to be conducted.

The draft proposed regulations state in Section 843.18 that inability to comply may not serve as a defense to various enforcement actions but may be used in mitigation of the amount of a civil penalty or in reducing the duration of the suspension of a permit.

Section 843.18 was criticized as being an arbitrary and capricious construction of Section 521(a)(3) of the Act. The commenter raised the same or similar objections to this section as were raised to Section 843.12(b), namely, that the coal industry had historically been exposed to labor disputes, unavailability of equipment and adverse weather conditions. The drafters believe, however, that such occurrences, as well as others, should not necessarily bar enforcement actions for failure to comply with the law. There is authority in the Act and the legislative history to support the view that Congress believed that the only alternative that operators have is to comply or not conduct operations. This interpretation was upheld by the United States District Court for the District of Columbia on August 24, 1978. However, as previously mentioned, unforeseen circumstances can be weighed and considered when the assessment of a civil penalty occurs. These can also be taken into account in extending previously-issued abatement times so long as these do not exceed 90 days. {41796}

PART 845 – CIVIL PENALTIES

The basic structure of the civil penalty assessment program is a point system which takes into account the four statutory criteria contained in Section 518: History of previous violations at the particular mine; seriousness; negligence; and demonstrated good faith in achieving rapid abatement after notification of the violation.

Various alternatives were considered by the Office for determining whether to assess a penalty. First, the Office considered using one specific criterion such as seriousness or negligence for the determination of whether to assess a penalty. Another alternative which the Office explored was judging each violation on a case-by-case basis without specific criteria. These two alternatives were not adopted in the proposed regulations in favor of using the point system both as the determination of whether to assess and as to the amount of the assessment. This proposed system contains a threshold number of points above which penalties must be assessed. The Office believes that this system provides a reasonable degree of specificity without eliminating the required flexibility to adjust when appropriate. The Office solicits comments regarding the proposed system or any other assessment system deemed suitable.

The point system contained in the regulations is similar to the system used for years by MSHA and its predecessor, MESA. The main difference between OSM's system and MSHA's system is that the OSM system uses only four criteria compared with MSHA's six, and the values assigned to points are higher under the OSM system than under the MSHA system. So far as can be determined, this system has worked reasonably well in the past.

The Assessment Office is currently making assessments under the point system contained in the interim regulations, which is similar to that proposed for the permanent regulations. While we find the permanent system to be straight-forward and not ""mind-boggling" as alleged, we will be looking critically at the operation of the interim system to see if improvements can be made. If future commenters could be more specific about what features of the point system are found difficult to understand or objectionable, OSM would be better able to evaluate them. {41797}

The amounts of penalties are to be determined by the same point system. An alternative method which was considered is the setting of proposed civil penalty amounts by the same inspectors who issue the notices and orders. The Office retained the concept of a point system from the initial regulations because it believed that such a system maximizes both consistency and rationality of assessments, given the requirement of Section 518 that the four statutory criteria be considered on each assessment.

The proposed regulations provide for a permissive assessment for each day from the date of issuance of a notice or order to the date set for abatement. In determining whether to make such an assessment, the factors in Section 845.13 are to be considered.

Subsections 845.12(b) and (c) were criticized for several reasons. First, the commenter stated that no threshold cut-off point on mandatory assessment of notices of violation should be established until after OSM has gained a violation and assessment history. Secondly, the commenter felt that if a threshold number must be established, beyond which a penalty shall be established, then a notice of violation with points totaling less than that threshold number should not be assessed in any event.

The drafters believe that sufficient knowledge has been gained in the initial regulatory period to establish a meaningful cut-off level for assessment of notices of violation. Additionally, the Office is contemplating the use of specific criteria for when to assess a penalty when a notice of violation totals less than 30 points. Comments are requested as to whether such criteria would be appropriate and as to what the criteria should be.

One commenter requested that with regard to Section 845.13(b)(1), no history of previous violations should be compiled as to notices of violations which are not assessed. This comment is rejected as being inconsistent with the meaning of history of previous violations. The decision as to whether to assess a penalty is not based on a decision that the violation never occurred or that the notice was erroneously issued but rather that the criteria points were under 30. Therefore, all violations which were validly issued should be counted for purposes of an operator's past history.

A suggestion was made to either delete the final sentence in Section 845.16(a) or to provide that the Director shall not waive the civil penalty formula to either increase or reduce the proposed penalty on the basis of an argument that an increase or reduction could be used to abate violations of the Act. As proposed, the proviso prohibits a reduction only. This comment is not adopted because the purpose of the proviso is to assure that penalties are not lowered on the basis of an economic argument that a lower penalty would result in more money being available to accomplish abatement of violations in the future. Thus, it would be incongruous to insert the word ""increase" in the last sentence of Section 845.16(a).

The procedures for assessment of civil penalties and the procedure for assessment conference are set out in Sections 845.17 and 845.18 respectively. With regard to the procedure for the assessment conferences, no provision is made for a tolling of the time within which to request a formal hearing. Therefore, the proposed rules require one to pay the amount of the proposed assessment into escrow within 30 days of receipt of the assessment regardless of whether one is participating in a conference. Comment is requested as to the proposed conference and hearing procedure.

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{Regulations: 43 FR 41927}

SUBCHAPTER L – INSPECTION AND ENFORCEMENT

PART 840 – STATE REGULATORY AUTHORITY INSPECTION AND ENFORCEMENT

Section

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| 840.1 | Scope. |
| 840.11 | Inspections by State regulatory authority. |
| 840.12 | Right of entry. |

- 840.13 Enforcement authority.
840.14 Availability of records.

Authority: Sections 102, 201, 501(b), 503, 517, 518, 521, and 523 of Pub. L. 95 87, 91 Stat. 448, 449, 468, 470, 498, 499, 504, 510 (30 U.S.C. 1202, 1211, 1251, 1253, 1267, 1268, 1271, 1273).

SECTION 840.1 - SCOPE.

This Part sets forth the minimum requirements for inspection and enforcement by a State, where a State is the regulatory authority under a State program or a cooperative agreement.

SECTION 840.11 - INSPECTIONS BY STATE REGULATORY AUTHORITY.

(a) The State regulatory authority shall conduct, on at least one partial inspection per month of each surface coal mining and reclamation operation under its jurisdiction. A partial inspection is an on-site review of a person's compliance with some of the permit conditions and requirements imposed under the State program or the cooperative agreement during which the inspector collects evidence with respect to every violation of any such condition or requirement he observed.

(b) The State regulatory authority shall conduct at least one complete inspection per calendar quarter of each surface coal mining and reclamation operation under its jurisdiction. A complete inspection is an on-site review of a person's compliance with all permit conditions and requirements imposed under the State program or the cooperative agreement, within the entire area disturbed or affected by surface coal mining and reclamation operations, including the collection of evidence with respect to every violation of any such condition or requirement.

(c) The inspections required under paragraphs (a) and (b) of this section shall:

- (1) Be carried out on an irregular basis so as to monitor compliance at all operations, including those which operate nights, weekends, or holidays;
- (2) Occur without prior notice to the person being inspected or any agent or employee of such person, except for necessary on-site meetings; and
- (3) Include the prompt filing of inspection reports adequate to enforce the requirements of and to carry out the terms and purposes of the applicable program, the regulations and the Act.

SECTION 840.12 - RIGHT OF ENTRY.

(a) Within its jurisdiction, the State regulatory authority shall have statutory authority that grants its representatives a right of entry to, upon, and through any surface coal mining and reclamation operation without advance notice or search warrant, upon presentation of appropriate credentials.

(b) The State regulatory authority shall have statutory authority that authorizes its representatives to inspect any monitoring equipment or method of operation and to have access to and copy any records required under the State program or the cooperative program or a permit issued the program. The statutory authority shall provide that the representatives may exercise such rights at reasonable times, without advance notice or a search warrant, upon presentation of appropriate credentials.

SECTION 840.13 - ENFORCEMENT AUTHORITY.

(a) Each State program and each cooperative agreement program shall contain civil and criminal penalties which are no less stringent than those set forth in Section 518 of the Act and in 30 CFR 843.20 and Part 845.

(b) The enforcement provisions of each State program and cooperative agreement program shall contain sanctions no less stringent than those set forth in Section 521 of the Act and in 30 CFR 843.11, 843.12, 843.19, Part 808, and subchapter G.

(c) Each State program and each cooperative program shall contain procedural rights relating to the penalties and sanctions in paragraphs (a) and (b) of this section which shall be consistent with those provided in 30 CFR 843 and 845 and subchapter G.

(d) Nothing in the Act or this Part shall be construed as eliminating any additional enforcement rights or procedures which are available under State law to a State regulatory authority but which are not specifically enumerated in Section 518 and Section 521 of the Act.

SECTION 840.14 - AVAILABILITY OF RECORDS.

(a) Each State regulatory authority shall make available to the Director and the Regional Director, upon request, copies of all documents relating to applications for and approvals of existing, new, or revised permits and all documents relating to inspection and enforcement actions.

(b) Copies of all records, reports, inspection materials, or information obtained by the State under a State program or a cooperative program, except information mentioned in paragraphs (c) and (d) of this section shall be immediately made available to the public in the area of mining so that they are conveniently available to residents in the area of mining. Copies shall be deemed conveniently available if they are furnished upon request within 5 days, in the case of a county or multi-county location, or 24 hours, in the case of a State or central location.

(c) Information as to coal seams, test borings, core samplings, or soil samples which is required under a State program or a cooperative program under Section 507(b)(17) of the Act and pertains only to analysis of the chemical and physical properties of the coal, except information regarding mineral or elemental content which is potentially toxic in the environment, shall be kept confidential and shall not be made a matter of public record.

(d) In order to protect preparation for hearings and enforcement proceedings, the Director and the State regulatory authority may enter into agreements regarding procedures for the special handling of investigative and enforcement reports and other materials. {41928}

PART 842 – FEDERAL INSPECTIONS

Section

842.1	Scope.
842.11	Federal inspections.
842.12	Citizens' requests for federal inspections.
842.13	Right of entry.
842.14	Review of inspections.
842.15	Review of decisions not to inspect or enforce.
842.16	Availability of records.

Authority: Sections 102, 201, 501(b), 504, 507, 517, 518, 521 and 523 of Pub. L. 95 87, 91 Stat. 448, 449, 468, 471, 474, 499, 504, 510 (30 U.S.C. 1202, 1211, 1251, 1254, 1257, 1267, 1268, 1271, 1273).

SECTION 842.1 - SCOPE.

This Part sets forth general procedures governing Federal inspections under the permanent regulatory program.

SECTION 842.11 - FEDERAL INSPECTIONS.

(a) Authorized representatives of the Secretary shall conduct inspections of surface coal mining and reclamation operations as are necessary:

- (1) To evaluate the administration of approved State programs and cooperative programs;
- (2) To develop or enforce Federal programs and Federal lands programs;

(3) To enforce those requirements and permit conditions imposed under a State program or cooperative program not being enforced by a State, under Section 504(b) or section 521(b) of the Act; and

(4) To determine whether the citations issued during an inspection authorized under this section have been complied with.

(b) An authorized representative of the Secretary shall immediately conduct a Federal inspection to enforce any requirement the Act, this Chapter, any State, Federal, cooperative or Federal lands program or any permit condition imposed under such program:

(1) When the authorized representative has reason to believe, on the basis of information available, other than information resulting from a previous Federal inspection, that such a violation exists and_

(i) There is no State regulatory authority; or

(ii) The authorized representative has notified the State regulatory authority of the possible violation and within 10 days after notification the State regulatory authority has failed to take appropriate action to have the violation corrected and to inform the authorized representative that it has taken such action or has a valid reason for its inaction; or

(iii) The person supplying the information provides adequate proof that an imminent danger to the public health and safety or a significant imminent environmental harm exists and that the State regulatory authority has failed to act.

(c) The Office, when acting as the regulatory authority under a Federal program or a Federal lands program and when enforcing a State program or a cooperative program in whole or in part pursuant to Section 504(b) or section 521(b) of the Act, shall conduct inspections of all surface coal mining and reclamation operations under its jurisdiction. These inspections shall average at least:

(1) One partial inspection per month of each surface coal mining and reclamation operation under its jurisdiction. A partial inspection is an onsite review of a person's compliance with some of the permit conditions and requirements imposed under the applicable program, during which the inspector collects evidence with respect to every violation of any such condition or requirement he observed; and

(2) One complete inspection per calendar quarter. A complete inspection is an onsite review of a person's compliance with all permit conditions and requirements imposed under the applicable program within the entire area disturbed or affected by surface coal mining and reclamation operations, including the collection of evidence with respect to every violation of any such condition or requirement.

(d) The inspections required under paragraph (c) shall:

(1) Be carried out on an irregular basis so as to monitor compliance at all operations, including those which operate nights, weekends, or holidays;

(2) Occur without prior notice to the person being inspected or any of his agents or employees, except for necessary onsite meetings; and

(3) Include the prompt filing of inspection reports adequate to enforce the requirements of and to carry out the terms and purposes of the applicable program, any permit condition imposed under such program, this Chapter and the Act.

SECTION 842.12 - CITIZENS' REQUESTS FOR FEDERAL INSPECTIONS.

(a) A citizen may request a Federal inspection under 30 CFR 842.11(b) by furnishing to an authorized representative of the Secretary:

(1) A signed written statement giving the authorized representative reason to believe a violation exists, and a phone number and address where the citizen can be contacted; or

(2) An oral report, followed by a signed written statement, giving that information, phone number and address.

(b) The information provided under paragraph (a) of this section shall be considered as furnishing reason to believe a violation exists if it alleges facts that are credible and would, if true, be sufficient to show a violation of the Act, this chapter, any applicable program or any permit condition imposed under such program.

(c) The identity of any person supplying information to the Office relating to a possible violation or imminent danger or harm shall remain confidential with the Office if requested by such person, unless disclosure is required under the Freedom of Information Act (5 U.S.C. Section 552) or other Federal law;

(d) If a Federal inspection is conducted as a result of information provided to the Office by a citizen as described in paragraph (a) of this section, the person who provided the information shall be notified when the inspection is to occur and be allowed to accompany the authorized representative of the Secretary during the inspection. Such person has a right of

entry to, upon and through the surface coal mining and reclamation operations about which he supplied information, but only if he is in the presence of and is under the control, direction and supervision of the authorized representative while on the mine property.

(e) Within 10 days of the Federal inspection, or, if there is no inspection, within 15 days of receipt of the citizen's written statement, the Office shall send the citizen the following:

(1) If an inspection was made, a description of the enforcement action taken, which may consist of copies of the Federal inspection report and all notices of violation and cessation orders issued as a result of the inspection or an explanation of why no enforcement action was taken;

(2) If no Federal inspection was conducted, an explanation of the reason why; and

(3) An explanation of the citizen's right, if any, to informal review of the action or inaction of the Office under 30 CFR 842.14.

(f) The Office shall give copies of all materials in paragraphs (e)(1) and (2) of this Section to the person inspected, except that the name of the citizen shall be removed unless disclosure of the citizen's identity is permitted under paragraph (c) of this section.

SECTION 842.13 - RIGHT OF ENTRY.

Each authorized representative of the Secretary conducting a Federal inspection under 30 CFR 842.11:

(a) Shall have a right of entry to, upon, and through any surface coal mining and reclamation operations without advance notice or a search warrant, upon presentation of appropriate credentials; and

(b) May, at reasonable times and without delay, have access to and copy any records, and inspect any monitoring equipment or method of operation required under the Act, this Chapter, the applicable program or any permit condition imposed under such program. {41929}

SECTION 842.14 - REVIEW OF ADEQUACY AND COMPLETENESS OF INSPECTIONS.

Any person who is or may be adversely affected by a surface coal mining operation may notify the Regional Director in writing of any alleged failure on the part of the Office to make adequate and complete Federal inspections as provided in 30 CFR 842.11(c) and (d). The notification shall include sufficient information to create a reasonable belief that 30 CFR 842.11(c) and (d) are not being complied with and to demonstrate how the person is or may be adversely affected. The Regional Director shall within 15 days of receipt of the notification determine whether 30 CFR 842.11(c) and (d) are being complied with, and if not, shall immediately order a Federal inspection to remedy the noncompliance. The Regional Director shall also furnish the complainant with a written statement of the reasons for his determination and the actions, if any, he has taken.

SECTION 842.15 - REVIEW OF DECISION NOT TO INSPECT OR ENFORCE.

(a) Any person who is or may be adversely affected by a surface coal mining operation may ask the Regional Director to informally review an authorized representative's decision not to inspect or take appropriate enforcement action with respect to any violation alleged by that person in a request for Federal inspection under Section 842.12. The request for review shall be in writing and shall include a statement of how the person is or may be adversely affected and why the decision merits review.

(b) The Regional Director shall conduct the review and inform the person in writing of the results of the review within 30 days of his receipt of the request.

(c) Informal review under this Section shall not affect any right to formal review under Section 525 of the Act or to a citizen's suit under Section 520 of the Act.

SECTION 842.16 - AVAILABILITY OF RECORDS.

(a) Copies of all records, reports, inspection materials, or information obtained by the Office under Title V of the Act, this chapter, a Federal program or a Federal lands program, or a State program being enforced by the Office under Sections 504(b) or 521(b) of the Act, except information in paragraph (b) of this section, shall be immediately made available to the public at Regional, district and field offices of the Office, or other locations designated by the Office, in the area of mining so that they are conveniently available to residents in the area of mining. All such copies shall be deemed conveniently available if they are provided upon request within 5 days, in the case of a district, field or other local office, and 24 hours in the case of a Regional or central office.

(b) Information as to coal seams, test borings, core samplings, or soil samples which is required under Section 507(b)(17) of the Act, and pertains only to the analysis of the chemical and physical properties of the coal, except information regarding mineral or element content which is potentially toxic in the environment, shall be kept confidential and shall not be made a matter of public record. {41929}

PART 843 – FEDERAL ENFORCEMENT

Section

843.1	Scope.
843.5	Definitions.
843.11	Cessation orders.
843.12	Notices of violation.
843.13	Suspension or revocation of permits.
843.14	Notices of violation and cessation orders.
843.15	Informal mine site hearing.
843.16	Formal review of citations.
843.17	Failure to give notice and lack of reasonable relief.
843.18	Inability to comply.
843.19	Injunctive relief.

Authority: Sections 102, 201, 501(b), 503, 504, 510, 517, 518, 521, 523, 525 and 701 of Pub. L. 95 87, 91 Stat. 448, 449, 468, 470, 471, 480, 498, 499, 504, 510, 511, and 516 (30 U.S.C. 1202, 1211, 1251, 1253, 1254, 1260, 1267, 1268, 1271, 1273, 1275, and 1291).

SECTION 843.1 - SCOPE.

This Part sets forth general rules regarding enforcement by the Office of the Act, this Chapter, all Federal programs, the Federal lands program, all State programs being enforced by the Office under Section 504(b) or Section 521(b) of the Act, and all permit conditions imposed under any of these programs. Civil penalties in connection with notices of violation and cessation orders issued under this Part are set forth in 30 CFR 845.

SECTION 843.5 -DEFINITIONS.

Authorized representative of the Secretary means a person designated by the Secretary as his authorized representative to act with respect to matters mentioned in this Chapter.

SECTION 843.11 - CESSATION ORDERS.

(a)(1) An authorized representative of the Secretary shall immediately order a cessation of surface coal mining and reclamation operations or of the relevant portion, if he finds, on the basis of any Federal inspection, any condition or practice or any violation of the Act, this Chapter, any applicable program, or any permit condition imposed under any such program, which:

- (i) Creates an imminent danger to the health or safety of the public; or

(ii) Is causing or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources.

(2) If the cessation ordered under paragraph (a)(1) of this section will not completely abate the imminent danger or harm in the most expeditious manner possible, the authorized representative of the Secretary shall impose affirmative obligations on the person to whom it is issued to abate the condition, practice, or violation. The order shall specify the time by which abatement shall be accomplished and may require, among other things, the use of existing or additional personnel and equipment.

(b)(1) An authorized representative of the Secretary shall immediately order a cessation of surface coal mining and reclamation operations, or of the relevant portion, when a notice of violation has been issued under 30 CFR 843.12(a) and the permittee fails to abate the violation within the abatement period fixed or subsequently extended by the authorized representative.

(2) A cessation order issued under this paragraph shall require the person to whom it is issued to take all steps the authorized representative of the Secretary deems necessary to abate the violations covered by the order in the most expeditious manner possible.

(c) A cessation order issued under paragraphs (a) or (b) of this section shall be in writing, shall be signed by the authorized representative who issues it and shall set forth with reasonable specificity: (1) the nature of the violation; (2) the remedial action or affirmative obligation required, if any; (3) the time established for abatement including interim steps, if appropriate; and (4) a reasonable description of the portion of the surface coal mining and reclamation operation to which it applies. The order shall remain in effect until the condition, practice or violation has been abated or until vacated, modified or terminated in writing by an authorized representative of the Secretary.

(d) Reclamation operations and other activities intended to protect public health and safety and the environment shall continue during the period of any order unless otherwise provided in the order.

(e) An authorized representative of the Secretary may modify, terminate or vacate a cessation order for good cause, and may extend the time for abatement if the failure to abate within the time previously set was not caused by lack of diligence on the part of the person to whom it was issued. {41930}

(f) An authorized representative of the Secretary shall terminate a cessation order, by written notice to the person to whom the order was issued, when he determines that all conditions, practices or violations listed in the order have been abated. Termination shall not affect the right of the Assessment Office to assess civil penalties for those violations under 30 CFR 845.

SECTION 843.12 - NOTICES OF VIOLATION.

(a)(1) An authorized representative of the Secretary shall issue a notice of violation if, on the basis of a Federal inspection carried out during the enforcement of a Federal program or Federal lands program or during Federal enforcement of a State program under Sections 504(b) or 521(b) of the Act, he finds a violation of the Act, this Chapter, the applicable program, or any permit condition imposed under such program, which does not create an imminent danger or harm for which a cessation order shall be issued under 30 CFR 843.11.

(2) A notice of violation issued under this section shall be in writing, shall be signed by the authorized representative who issues it, and shall set forth with reasonable specificity:

(i) The nature of the violation;

(ii) The remedial action required which may include interim steps;

(iii) A reasonable time for abatement which may include time for accomplishment of interim steps; and

(iv) A reasonable description of the portion of the surface coal mining and reclamation operation to which it applies.

(b) An authorized representative of the Secretary may extend the time set for abatement or for accomplishment of an interim step if the failure to meet the time previously set was not caused by lack of diligence on the part of the person to whom it was issued. The total time for abatement under a notice of violation, including all extensions, shall not exceed 90 days from the date of issuance.

(c) If the person to whom the notice was issued fails to meet any time set for abatement or for accomplishment of an interim step, the authorized representative shall issue a cessation order under 30 CFR 843.11(b).

(d) When, on the basis of a Federal inspection conducted to evaluate an approved State program under 30 CFR 842.11(a)(1) or conducted under 30 CFR 842.11(b)(1) as a result of State inaction, an authorized representative of the Secretary finds a violation for which a notice of violation cannot be issued under this Section, the authorized representative shall give written notice of the violation to the State regulatory authority and the person responsible for the violation, so that appropriate enforcement action can be taken by the State regulatory authority. The State regulatory authority shall, within 10 days of receipt of the notice, give written notice to the authorized representative of the action it has taken and plans to take with respect to the violation.

(e) An authorized representative of the Secretary shall terminate a notice of violation by written notice to the person to whom it was issued, when he determines that all violations listed in the notice of violation have been abated. Termination shall not affect the right of the Assessment Office to assess civil penalties for those violations under 30 CFR Part 845 (civil penalties).

SECTION 843.13 - SUSPENSION OR REVOCATION OF PERMITS.

(a)(1) Except as provided in paragraph (b) of this section, the Director shall issue an order to a permittee requiring him to show cause why his permit and his right to mine under the Act should not be suspended or revoked, if the Director determines that a pattern of violations of any requirements of the Act, these regulations, or any permit conditions by the permittee exists or has existed, and that the violations were willful or were caused by the permittee's unwarranted failure to comply with such requirements or conditions. A willful violation is a violation resulting from an intentional act or omission. Unwarranted failure to comply means the failure of the permittee to prevent the occurrence of any violation due to indifference, lack of diligence, or lack of reasonable care.

(2) The Director may determine that a pattern of violations exists or has existed, based on two or more Federal inspections of the permit area within any 12-month period, after considering the circumstances, including:

(i) The number of violations, on more than one occasion, of one or more provisions of the Act, this Chapter, the applicable program or the permit, which relate to the same general topic;

(ii) The number of violations, on more than one occasion, of one or more provisions of the Act, this Chapter, the applicable program or the permit, which are not related to the same general topic; and

(iii) The extent to which the violations were isolated departures from lawful conduct.

(3) The Director shall determine that a pattern of violations exists if he finds that there were violations of provisions of the Act, this Chapter, the applicable program or the permit relating to the same general topic during three or more Federal inspections of the permit area within any 12-month period.

(b) The Director shall not issue a show cause order if he finds that to do so would not further enforcement of the Act.

(c) At the same time as the issuance of the order, the Director shall:

(1) File a copy of the order to show cause with the Office of Hearings and Appeals and the State regulatory authority, if any;

(2) If practicable, publish notice of the order, including a brief statement of the procedure for intervention in the proceeding, in a newspaper of general circulation in the area of the mine; and

(3) Post the notice at the regional, district or field office closest to the mine site.

(d) If the permittee files an answer to the show cause order and requests a hearing under 43 CFR Part 4, a public hearing shall be provided as set forth in that Part. The Office of Hearings and Appeals shall give thirty days' written notice of the date, time and place of the hearing to the Director, the permittee, the State regulatory authority, if any, and any intervenor. Upon receipt of the notice the Director shall publish it, if practicable, in a newspaper of general circulation in the area of the mine, and shall post it at the Regional, district or field office closest to the mine site.

(e) Within sixty days after the hearing, and within the time limits set forth in 43 CFR Part 4, the Office of Hearings and Appeals shall issue a written determination as to whether a pattern of violations exists and, if appropriate, an order. If the Office of Hearings and Appeals revokes or suspends the permit and the permittee's right to mine under the Act, the permittee shall immediately cease surface coal mining operations on the permit area and shall:

(1) If the permit and the right to mine under the Act are revoked, complete reclamation within the time specified in the order; or

(2) If the permit and the right to mine under the Act are suspended, complete all affirmative obligations to abate all conditions, practices or violations, as specified in the order.

(f) An order issued under this Section by the Office of Hearings and Appeals or by a court, upon review of that order, may assess against either party, at the request of any person, a sum equal to the aggregate amount of all costs and expenses including attorneys' fees, reasonably incurred by that person for or in connection with his participation in proceedings under this section including any judicial review thereof, as the Office of Hearings and Appeals or the court deems proper. {41931 }

SECTION 843.14 - NOTICES OF VIOLATION AND CESSATION ORDERS.

(a) A notice of violation or cessation shall be served on the person to whom it is directed or his designated agent promptly after issuance, as follows:

(1) By tendering a copy at the mine site to the designated agent or to the individual who, based upon reasonable inquiry by the authorized representative, appears to be in charge of the surface coal mining or reclamation operation referred to in the notice or order. If no such individual can be located at the mine site, a copy may be tendered to any individual at the mine site who appears to be an employee of the person to whom the notice or order is issued. Service shall be complete upon tender of the notice or order.

(2) As an alternative to paragraph (a)(1) of this section, service may be made by sending a copy of the notice or order by certified mail or by hand to the person to whom it is issued or his designated agent. Service shall be complete upon tender of the mail and shall not be incomplete because of refusal to accept.

(b) A show cause order may be served on the person to whom it is issued in either manner provided in paragraph (a)(2) of this section.

(c) Designation by any person of an agent for service of notices and orders shall be made in writing to the appropriate regional, district or field office of the Office.

(d) The Office shall furnish copies of notices and orders to the State regulatory authority, if any, promptly after their issuance. The Office may furnish copies to any person having an interest in the surface coal mining and reclamation operation or the permit area, such as the owner of the fee, a corporate officer of the permittee or the bonding company.

SECTION 843.15 - INFORMAL MINE SITE HEARING.

(a) Except as provided in paragraphs (b) and (c), a notice of violation or cessation order which requires cessation of mining, expressly or by necessary implication, shall expire within 30 days after it is served unless an informal public hearing has been held within that time at or reasonably close to the mine site so that it may be viewed during the hearing. For purposes of this section, mining means extracting coal from the earth or coal waste piles and transporting it within or from the permit area.

(b) Paragraph (a) of this section shall not apply if the condition, practice or violation in question has been abated or if the mine site hearing has been waived.

(c) The mine site hearing shall be deemed waived if the person to whom the notice or order is issued:

(1) Is informed in the notice or order that he will be deemed to have waived a mine site hearing unless he requests one in writing within 30 days after he has actual notice of the notice or order; and

(2) Fails to request a mine site hearing within that time.

(d) The person to whom the notice or order is issued shall be deemed to have consented to an extension of time for the mine site hearing if his request is received on or after the 21st day after he has actual notice of the notice or order. The extension of time shall equal to the number of days elapsed after the 21st day.

(e) The Office shall give notice of the time, place and subject matter of the mine site hearing, at least five days in advance of the hearing to:

(1) The person to whom the notice or order was issued,

(2) Any person who filed a report which led to that notice or order; and

(3) The State regulatory authority, if any.

(f) The Office shall also, at least five days before the hearing, post notice of the hearing at the regional, district or field office closest to the mine site, and publish it, to the extent practicable, in a newspaper of general circulation in the area of the mine.

(g) Section 554 of Title 5 of the United States Code, regarding requirements for formal adjudicatory hearings, shall not govern mine site hearings. A mine site hearing shall be conducted by a representative of the Office, who may accept oral or written arguments and any other relevant information from any person attending.

(h) Within five days of the close of the mine site hearing, the Office shall affirm, modify, or vacate the notice or order in writing. The decision shall be sent to:

- (1) The person to whom the notice or order was issued;
- (2) Any person who filed a report which led to the notice or order; and
- (3) The State regulatory authority, if any.

(i) The granting or waiver of a mine site hearing shall not affect the right of any person to request formal review under Sections 518(b), 525, 521(a)(4) of the Act.

(j) At such hearings no evidence as to statements made or evidence produced at a mine site hearing shall be introduced as evidence or to impeach a witness. Expiration of a notice or order shall not affect the Director's right to assess civil penalties for the violations mentioned in the notice or order under 30 CFR 845, civil penalties.

SECTION 843.16 - FORMAL REVIEW OF CITATIONS.

(a) A person issued a notice of violation or cessation order under 30 CFR 843.11 or 843.12 or a person having an interest which is or may be adversely affected by the issuance, modification, vacation or termination of a notice or order, may request review of that action by filing an application for review and request for hearing, under 43 CFR Part 4, within 30 days after receiving notice of the action.

(b) The filing of an application for review and request for a hearing under this Section shall not operate as a stay of any notice or order, or of any modification, termination or vacation of either.

SECTION 843.17 - FAILURE TO GIVE NOTICE AND LACK OF REASONABLE RELIEF.

No notice of violation, cessation order or order revoking or suspending a permit may be vacated in an administrative review proceeding for failure to give the notice to the State regulatory authority required under 30 CFR 842.11(b)(1)(ii) or because it is subsequently determined that the Office did not have information sufficient, under 30 CFR 842.11(b)(1)(i), to justify an inspection.

SECTION 843.18 - INABILITY TO COMPLY.

(a) No order to show cause, cessation order or notice of violation issued under this Part may be vacated because of inability to comply.

(b) Unless caused by lack of diligence, inability to comply may be considered only in mitigation of the amount of civil penalty under 30 CFR 845 and of the duration of the suspension of a permit under 30 CFR 842.16(d).

SECTION 843.19 - INJUNCTIVE RELIEF.

The Office may request the Attorney General of the United States to institute a civil action for relief, including a permanent or temporary injunction, restraining order or any other order, in the district court of the United States for the district in which the surface coal mining and reclamation operation is located or in which the person to whom the notice of violation or order has been issued has his principal office, whenever that person or his agent in violation of the Act, this Chapter, any applicable program, or any permit condition imposed under that program:

(a) Violates or fails or refuses to comply with any order or decision of the Secretary or an authorized representative of the Secretary under the Act, this Chapter or any applicable program for which the Office is the regulatory authority;

(b) Interferes with, hinders or delays the Secretary or an authorized representative of the Secretary;

- (c) Refuses to admit an authorized representative of the Secretary to a mine; {41932}
- (d) Refuses to permit inspection of a mine by an authorized representative of the Secretary;
- (e) Refuses to furnish any required information or report;
- (f) Refuses to permit access to or copying of any required records; or
- (g) Refuses to permit inspection of monitoring equipment. {41932}

PART 845 – CIVIL PENALTIES

Section

- 845.1 Scope.
- 845.2 Objective.
- 845.11 How assessment are made.
- 845.12 When penalty will be assessed.
- 845.13 Point system for penalties.
- 845.14 Determination of amount of penalty.
- 845.15 Assessment of separate violations for each day.
- 845.16 Waiver of use of formula to determine civil penalty.
- 845.17 Procedures for assessment of civil penalties.
- 845.18 Procedures for assessment conference.
- 845.19 Request for hearing.
- 845.20 Final assessment and payment of penalty.

Authority: Sections 102, 201, 501(b), 517, 518, 521, 523 and 525 of Pub. L. 95 87, 91 Stat. 448, 449, 468, 498, 499, 504, 510, and 511 (30 U.S.C. 1202, 1211, 1251, 1267, 1268, 1271, 1273 and 1275.)

SECTION 845.1 - SCOPE.

This Part covers the assessment of civil penalties under Section 518 of the Act with respect to cessation orders and notices of violation issued under Part 843 (Federal enforcement).

SECTION 845.2 - OBJECTIVE.

Civil penalties are assessed under Section 518 of the Act and this Part to deter violations and to ensure maximum compliance with the terms and purposes of the Act on the part of the coal mining industry.

SECTION 845.11 - HOW ASSESSMENT ARE MADE.

The Assessment Office shall review each notice of violation and cessation order in accordance with the assessment procedures described in 30 CFR 845.12, 845.13, 845.14, 845.15, and 845.16 to determine whether a civil penalty will be assessed, the amount of the penalty, and whether each day of a continuing violation will be deemed a separate violation for purposes of the total penalty assessed.

SECTION 845.12 - WHEN PENALTY WILL BE ASSESSED.

- (a) The Assessment Office shall assess a penalty for each violation contained in a cessation order.
- (b) The Assessment Office shall assess a penalty for each violation contained in a notice of violation, if the violation is assigned 31 points or more under the point system described in 30 CFR 845.13.

(c) The Assessment Office may assess a penalty for a violation assigned 30 points or less under the point system described in 30 CFR 815.13. In determining whether to assess a penalty, the Assessment Office shall consider the factors listed in 30 CFR 845.13.

SECTION 845.13 - POINT SYSTEM FOR PENALTIES.

(a) The Assessment Office shall use the point system described in this section to determine the amount of the penalty and, in the case of notices of violation, whether a mandatory penalty should be assessed as provided in 30 CFR 845.12(b).

(b) Points shall be assigned as follows:

(1) History of previous violations. The Assessment Office shall assign up to 30 points based on the history of previous violations. One point shall be assigned for each past violation contained in a notice of violation. Five points shall be assigned for each violation, but not a condition or practice, contained in a cessation order. The history of previous violations, for the purpose of assigning points, shall be determined and the points assigned with respect to a particular surface coal mining operation. Points shall be assigned as follows:

(i) Except as provided in paragraph (b)(1)(ii) of this section, only violations for which notices or orders were issued within 1 year preceding the violation under consideration shall be counted;

(ii) A violation which is the subject of pending administrative or judicial review shall not be counted until termination of such review, and the period of time during which the violation was under review shall not be counted in computing the one-year period;

(iii) No violation for which the notice or order has been vacated shall be counted; and

(iv) Each violation shall be counted without regard to whether it led to a civil penalty assessment.

(2) Seriousness. The Assessment Office shall assign up to 30 points based on the seriousness of the violation, according to the following schedules:

(i) Probability of occurrence. The Assessment Office shall assign up to 15 points based on the probability of the occurrence of the event which a violated standard is designed to prevent. Points shall be assessed as follows:

Probability of occurrence	Points
None or insignificant	0-4
Unlikely	5-9
Likely	10-14
Occurred	15

An example of the concept of the phrase "the event which a violated standard is designed to prevent" is as follows: failure to remove topsoil is a violation of the topsoil standard in 30 CFR 816.22; however, delay in and failure of revegetation and resulting environmental harm are events which the topsoil standard in 30 CFR 816.22 is designed to prevent.

(ii) Extent of potential or actual damage. The Assessment Office shall assign up to 15 points based on the extent of the potential or actual damage, in terms of area and impact on the public or environment, as follows:

(A) If the damage or impact which the violated standard is designed to prevent would remain within the permit area, the Assessment Office shall assign zero to seven points depending on the duration and extent of the damage or impact.

(B) If the damage or impact which the violated standard is designed to prevent would extend outside the permit area, the Assessment Office shall assign eight to fifteen points depending on the duration and extent of the damage or impact.

(iii) Alternative. In the case of a violation of an administrative requirement, such as a requirement to keep records, the Assessment Office shall, as an alternative to paragraphs (i) and (ii), assign up to 15 points for seriousness based upon the extent to which enforcement is obstructed by the violation.

(3) Negligence.

(i) The Assessment Office shall assign up to 25 points based on the degree of fault of the person to whom the citation was issued in causing or failing to correct the violation, condition or practice which led to the citation, either through act or omission. Points shall be assessed as follows:

(A) A violation which occurs through no negligence shall be assigned no penalty points for negligence;

(B) A violation which is caused by negligence shall be assigned 12 points or less, depending on the degree of negligence;

(C) A violation which occurs through a greater degree of fault than negligence shall be assigned 13 to 25 points depending on the degree of fault.

(ii) In determining the degree of negligence involved in a violation and the number of points to be assigned, the following definitions apply:

(A) No negligence means an inadvertent violation which was unavoidable by the exercise of reasonable care.

(B) Negligence means failure to prevent or correct a violation due to indifference, lack of diligence, or lack of reasonable care, or the commission of an act which results in a violation with indifference, lack of diligence or lack of reasonable care. {41933}

(C) A greater degree of fault than negligence means reckless, knowing or intentional conduct.

(iii) In calculating points to be assigned for negligence, the actions of all persons working on the mine site shall be attributed to the person to whom the citation was issued.

(4) Good faith in attempting to achieve compliance. (i) The Assessment Office shall subtract or add points based on the degree of good faith of the person to whom the citation was issued in attempting to achieve rapid compliance after notification of the violation. Points shall be assigned as follows: 015

Degree of Good Faith	Points
Rapid compliance	1 to 10
Normal compliance	0
Lack of good faith	1 to 10

(ii) The following definitions shall apply under paragraph (b)(4)(i) of this section:

(A) Rapid compliance means that the person to whom the citation was issued took extraordinary measures to abate the violation in the shortest possible time and that abatement was achieved before the time set for abatement.

(B) Normal compliance means the person to whom the citation was issued abated the violation within the time given for abatement.

(C) Lack of good faith means the person to whom the citation was issued did not show diligence in attempting to abate the violation and the violation was not timely abated.

(iii) If the consideration of this criterion is impractical because of the length of the abatement period, the assessment may be made without considering this criterion, and may be reconsidered if the person to whom the citation was issued so requests within 10 days after the violation has been abated.

SECTION 845.14 - DETERMINATION OF AMOUNT OF PENALTY.

The Assessment Office shall determine the amount of any civil penalty by converting the total number of points assigned under 30 CFR 845.13 to a dollar amount according to the following schedule:

Points	Dollars	Points	Dollars
1	20	2	40
3	60	4	80
5	100	6	120
7	140	8	160
9	180	10	200
11	220	12	240
13	260	14	280
15	300	16	320
17	340	18	360
19	380	20	400

21	420	22	440
23	460	24	480
25	500	26	600
27	700	28	800
29	900	30	1,000
31	1,100	32	1,200
33	1,300	34	1,400
35	1,500	36	1,600
37	1,700	38	1,800
39	1,900	40	2,000
41	2,100	42	2,200
43	2,300	44	2,400
45	2,500	46	2,600
47	2,700	48	2,800
49	2,900	50	3,000
51	3,100	52	3,200
53	3,300	54	3,400
55	3,500	56	3,600
57	3,700	58	3,800
59	3,900	60	4,000
61	4,100	62	4,200
63	4,300	64	4,400
65	4,500	66	4,600
67	4,700	68	4,800
69	4,900	70 and above	5,000.

SECTION 845.15 - ASSESSMENT OF SEPARATE VIOLATIONS FOR EACH DAY.

(a) The Assessment Office may assess separately a civil penalty for each day from the date of issuance of the notice of violation or cessation order to the date set for abatement of the violation. In determining whether to make such an assessment, the Assessment Office shall consider the factors listed in 30 CFR 845.13 and the extent to which the person to whom the citation was issued gained any economic benefit as a result of a failure to comply.

(b) Whenever a violation has not been abated within the abatement period set in the citation, a civil penalty of not less than \$750 shall be assessed for each day during which such failure continues, except that if the person to whom the notice or order was issued initiates review proceedings with respect to the violation the abatement period shall be extended as follows:

41933 (1) If the Secretary orders suspension of the abatement requirements of the notice or order in a proceeding under section 525 of the Act, after determining that the person to whom the citation was issued will suffer irreparable loss or damage from the application of the requirements, the period permitted for abatement shall not end until the date on which the authorized representative of the Secretary issues a final order with respect to the violation in question; and

(2) If a court orders the suspension of the abatement requirements of the notice or order in a proceeding under section 526 of the Act, the period permitted for abatement shall not end until the date on which the court issues a final order with respect to the violation.

(c) For any violation which continues for two or more days and which is assigned more than 70 points under 30 CFR 845.12, the Assessment Office shall assess a civil penalty for a minimum of two separate days.

SECTION 845.16 - WAIVER OF USE OF FORMULA TO DETERMINE CIVIL PENALTY.

(a) The Director, upon his own initiative or upon written request received within 10 days of issuance of a notice of violation or a cessation order, may elect to waive in whole or in part the use of the formula contained in 30 CFR 845.13 to set the civil penalty if he determines that a waiver will further the enforcement objectives of the Act. However, the Director shall not

waive the use of the formula and reduce the proposed assessment on the basis of an argument that a reduction in the proposed penalty could be used to abate violations of the Act.

(b) If the Director waives the use of the formula in whole or in part, he shall give a written explanation of the basis for the assessment made to the person to whom the notice or order was issued.

SECTION 845.17 - PROCEDURES FOR ASSESSMENT OF CIVIL PENALTIES.

(a) Within 10 days of service of a notice or order, the person to whom it was issued may submit written information about the violation to the Assessment Office and to the inspector who issued the citation. The Assessment Office shall consider any information so submitted in determining the facts surrounding the violation and the amount of the penalty. {41934}

(b) The Assessment Office shall serve a copy of the proposed assessment and of the worksheet showing the computation of the proposed assessment on the person to whom the citation was issued, by certified mail, within 30 days of the issuance of the citation. If the mail is tendered at the address of that person set forth in the sign required under 30 CFR 816.11, or at any address at which that person is in fact located, and he refuses to accept delivery of or to collect such mail, the requirements of this paragraph shall be deemed to have been complied with upon such tender.

SECTION 845.18 - PROCEDURE FOR ASSESSMENT CONFERENCE.

(a) The Assessment Office shall arrange for a conference to review the proposed assessment upon written request of the person to whom the citation was issued if the request is received within 15 days from the date the proposed assessment is mailed. That person may submit additional material for consideration during the conference, and the Assessment Office may contact him to discuss the assessment prior to the conference, if necessary to expedite the review.

(b) The Assessment Office shall assign a conference officer to hold the assessment conference. He shall consider all relevant information on the violation presented by the person to whom the citation was issued and may recalculate the proposed penalty higher or lower in the manner provided in 30 CFR 845.13 or vacate the proposed penalty. The Assessment Office shall serve any notice of modification or vacation of the proposed penalty assessment on the person to whom the citation was issued, in the manner provided in 30 CFR 845.17(b). The reasons for every change in a proposed assessment shall be fully documented in the file.

(c) The Assessment Office shall post notice of the time and place of the conference at the regional, district or field office closest to the mine at least 5 days before the conference. Any person shall have a right to attend and participate in the conference.

(d) If the issues are resolved, the conference officer shall prepare a settlement agreement to be signed by the conference officer on behalf of the Assessment Office and by the person assessed. If full payment is not received by the Assessment Office within 30 days after the date of signing, the Assessment Office shall enter the agreed-upon amount as a final order of the Secretary or shall rescind the agreement and reinstate the original proposed assessment.

(e) If a settlement agreement is entered into, the person assessed will be deemed to have waived all rights to further review of the violation or penalty in question, except as otherwise expressly provided in the settlement agreement. The settlement agreement shall contain a clause to this effect.

(f) A reduction of a proposed civil penalty assessment of more than 25 percent and more than \$5 00 shall not be final and binding on the Secretary until approved by the Director or his designee.

(g) The conference officer may terminate the conference when he determines that the issues cannot be resolved or that the person assessed is not diligently working toward resolution of the issues.

(h) The Assessment Office shall notify the Office of Hearings and Appeals when a conference is terminated, the proposed penalty is raised or lowered, a settlement agreement has been entered into, or the proposed penalty has been paid in full.

SECTION 845.19 - REQUEST FOR HEARING.

(a) The person assessed may contest the proposed penalty or the fact of the violation by submitting a petition and an amount equal to the proposed penalty to the Office of Hearings and Appeals (to be held in escrow as provided in paragraph (c)) within 30 days from receipt of the proposed assessment, except that:

(1) The fact of the violation may not be contested if it has been decided under an appeal filed under 30 CFR 843.16;

(2) If the conference officer raises the penalty as provided in 30 CFR 845.18(b), the person assessed shall submit the difference to the Office of Hearings and Appeals to be held in escrow as provided in paragraph (c), within 30 days of the modification of the proposed assessment or waive his right to further review under this Section; and

(3) If the conference officer lowers the penalty, the Assessment Office shall refund the difference to the person assessed with interest, as provided in 30 CFR 845.20(d).

(b) If a conference under 30 CFR 845.18 has been requested:

(1) The hearing shall be deferred until:

(i) The Assessment Office notifies the Office of Hearings and Appeals that the conference has been terminated, or the proposed penalty has been reduced; or

(ii) If the proposed penalty has been raised, the difference is submitted as provided in paragraph (a)(2) of this section.

(2) The hearing shall be waived if a settlement agreement is entered into as provided in 30 CFR 845.18(e).

(c) The Office of Hearings and Appeals shall transfer all funds submitted under paragraph (a) to the Assessment Office, which shall hold them in escrow pending completion of the review process, at which time it shall disburse them as provided in 30 CFR 845.20.

SECTION 845.20 - FINAL ASSESSMENT AND PAYMENT OF PENALTY.

(a) If the person to whom a citation is issued fails to request a hearing as provided in 30 CFR 845.19, the proposed assessment shall become a final order of the Secretary and the penalty assessed shall become due and payable upon expiration of the time to request a hearing.

(b) If any party requests judicial review of a final order of the Secretary, the proposed penalty shall continue to be held in escrow until completion of the review. Otherwise, subject to paragraph (d) of this section, the escrowed funds shall be transferred to the Assessment Office in payment of the penalty, and the escrow shall end.

(c) If administrative and judicial review terminates in an order reducing or eliminating the proposed penalty assessed under this part, the Assessment Office shall within 30 days of receipt of the order refund to the person assessed all or part of the escrowed amount, with interest from the date of payment into escrow to the date of the refund at the rate of 6 percent or at the prevailing Department of the Treasury rate, whichever is greater.

(d) If the review terminates in an order increasing the penalty, the person to whom the citation was issued shall pay the difference to the Assessment Office within 10 days after receipt of the order.

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