FEDERAL REGISTER: 46 FR 53376 (October 28, 1981)

DEPARTMENT OF THE INTERIOR
AGENCY: Office of Surface Mining Reclamation and Enforcement (OSM)

30 CFR Parts 730, 731, and 732
Permanent Regulatory Programs for Non-Federal and Non-Indian Lands

ACTION: Final rules.

SUMMARY: The Office of Surface Mining Reclamation and Enforcement (OSM), U.S. Department of the Interior, is amending 30 CFR 730.5 and 732.15 and deleting 731.13 to give States more flexibility in the development of regulations for surface coal mining and reclamation operations within their borders. Many State agencies have complained that the current regulations are not sufficiently flexible to respond to the particular needs of the individual States. The rule being finalized today eliminates the so-called "State window" and replaces it with provisions that would allow States to adopt any provisions that are as effective as the Federal regulations.

EFFECTIVE DATE: November 27, 1981.

FOR FURTHER INFORMATION CONTACT:
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SUPPLEMENTARY INFORMATION:

1. PUBLIC PARTICIPATION

A draft of the proposed rule was made available to State regulatory authorities and groups representing industry and citizens. In addition, a notice was published in the Federal Register *(46 FR 22399-22400*, April 17, 1981) announcing the availability of the draft proposed rule and inviting comments on its applicability. Forty-five comments were received during the pre-proposed comment period which closed on May 8, 1981.

On July 1, 1981, the Secretary published proposed rules to amend 30 CFR 730.5 and 732.15 and delete 731.13 that would give the States more flexibility in the development of regulations for surface coal mining and reclamation operations within their borders *(46 FR 34348-34351)*. Public comments were invited for 30 days ending July 31, 1981, and a public hearing was held in Washington, D.C. on July 28, 1981.

In order to allow discussion of the proposed rule to take place between OSM representatives and members of the House Subcommittee on Energy and Environment during oversight hearings held on August 5, 1981, and September 22, 1981, the comment period was extended until August 12, 1981 *(46 FR 40706)* and reopened from September 21, 1981, through September 23, 1981 *(46 FR 46596)*.

Two speakers offered testimony at the public hearing and 20 written comments were received. In addition there was discussion concerning the rulemaking by witnesses, members of Congress and OSM officials during the House Subcommittee oversight hearings. All testimony, discussion and comments were analyzed. A transcript of the hearing held on July 28, 1981, notes of discussion during oversight hearings and copies of all comments received are on file in the Administrative Record Room at the address listed below.

2. BACKGROUND

Section 503(a) of the Surface Mining Control and Reclamation Act (the Act) permits a State to assume primacy for the regulation of coal mining and reclamation operations on non-Federal and non-Indian lands within its borders by demonstrating that its State program includes, among other things, "a State law which provides for the regulation of surface coal mining and reclamation operations in accordance with the requirements of the Act . . ." and "rules and regulations consistent with regulations issued by the Secretary pursuant to this Act." *30 U.S.C. 1253*(a)(1) and (7) (Emphasis added).

By this provision, Congress intended to establish the specific requirements of the Act and the regulations promulgated thereunder as the minimum national standards for the regulation of surface mining reclamation operations. Acceptable State

programs could exceed these minimum standards, but could not fail to meet them.

(See H.R. Rep. 95-493, 95th Cong., 1st Sess. 102 (1977), S. Rep. 95-128, 95th Cong., 1st Sess. 49, 52-54, 63 (1977).)

To implement the provisions of Section 503 and to insure a balance among the competing mandates of the Act, the Secretary promulgated Parts 730-732 is the permanent regulatory program *(44 FR 15323-15328*, March 13, 1979). Under the regulations a State must submit its proposed permanent program to OSM pursuant to the procedures contained in 30 CFR Parts 730, 731, and 732 to assume primary jurisdiction under the Act for the regulation of surface coal mining and reclamation operations on non-Federal and non-Indian lands within its borders. OSM reviews the proposal and recommends approval or disapproval to the Secretary of the Interior of Each State program according to procedures contained in 30 CFR Part 732.

State alternatives to the Federal regulations are acceptable if they meet the requirements of 30 CFR 731.13, are "in accordance with" the requirements of the Act, and are "consistent with" the Federal regulations (30 CFR 732.15(a)). The current regulation at 30 CFR 730.5 gives "consistent with" and "in accordance with" the same definition:

"Consistent with" and "in accordance with" mean:

(a) With regard to the Act, the State laws and regulations are no less stringent than, meet the minimum requirements of and include all applicable provisions of the Act, and (b) With regard to the Secretary's regulations, the State laws and regulations area no less stringent than and meet the applicable provisions of the regulations of 30 CFR Chapter VII.

The regulations at 30 CFR 731.13 provide standards and procedures for approving alternatives to provisions of the regulations of 30 CFR Chapter VII. These provisions have been informally labelled as the "State window." A State may request approval for an alternative by meeting the following conditions:

(a) Identifying the provision in the regulation of this Chapter for which the alternative is requested;

(b) Describing the alternative proposed and providing statutory or regulatory language to be used to implement the alternative; and

(c) Explaining how and submitting data, analysis and information, including identification of sources, demonstrating --

(1) that the proposed alternative will be in accordance with the applicable provisions of the Act and consistent with the regulations of Chapter VII, and

(2) that the proposed alternative is necessary because of local requirements or local environmental or agricultural conditions.

Many State agencies have complained that the current regulations are not sufficiently flexible to respond to the particular needs of the individual States. In particular, they object that the interpretation given by the Department to Section 503 of the Act has limited the flexibility of the States in developing and submitting proposed State programs.

3. SCOPE OF RULE

The amendments to Parts 730-732 are designed to address the concerns of the States and their criticism that the State window unnecessarily restricts their ability to propose alternatives to the Federal regulations. The amendments make it clear that States are not required to adopt the Secretary's regulations; that within limits described herein, they are free to develop and adopt regulations which meet their special needs. States are no longer required to demonstrate that each alternative is necessary because of local requirements or local environmental or agricultural conditions. In addition, States are not required to mirror all applicable provisions of the Secretary's regulations. A State program, including its laws and regulations will, however, have to be as effective as the Secretary's regulations in meeting the requirements of the Act in order to be approved. This implements Congress' intent that the Secretary's regulations serve as the benchmark for evaluating State proposals.

Under these final regulations, as under the previous rules, the Secretary would base his decision to approve a State program on the information contained in the State program submission and other relevant information in the Department's administrative record for that State program. To obtain approval of alternatives to the Federal regulations, however, the record need only contain sufficient information and data to support the conclusion that the State's proposals are as effective in meeting the requirements of the Act as are the Federal regulations.

OSM will make every effort to assist the States with compilation of information and data, but it remains the responsibility of the State seeking approval of an alternative to establish the necessary record.

The revisions increase the flexibility of the States in the development of their State programs by eliminating the requirements of 30 CFR 731.13 that a State alternative must be justified by local needs and by introducing the concept of "no less effective than" as the operative definition of the term "consistent with" in Section 503(a)(7) of the Act. The increased flexibility which results from the elimination of Sec. 731.13 is obvious. However, the meaning of the phrase "no less effective than" merits further elaboration.

To be "no less effective in meeting the requirements of the Act" the State program must provide assurance that the State provisions will be as effective in meeting the requirements of the Act as the Federal regulations. The standards for judging the effectiveness of the State proposals are the appropriate Federal regulations; however, the State approach no longer need duplicate the approach in the Federal regulations.

In response to public comment (see details under "Public Comments on Proposed Rule"), the meaning of the amendment is further clarified as follows:

With respect to judging the effectiveness of State provisions which are alternatives to the Secretary's regulations, the type or purpose of the provision will affect the Secretary's review. In judging the effectiveness of an alternative to the Secretary's regulations dealing with mining and reclamation operations performance standards, OSM will analyze whether the Secretary's regulatory objective is as likely to be achieved by the State alternative as by the comparable Federal regulation. Alternatives to procedural provisions in the Secretary's regulations will be evaluated from the point of view of their similarity to the Secretary's rules in affording rights and remedies to persons. Where Sections 518(i) and 521(d) do not apply, the effectiveness of alternatives to the enforcement and penalty provisions will be evaluated from the standpoint of whether operators will be as likely to maintain compliance under the State program as under a program containing the Federal rules. Monetary and other penal provisions of a State program must be similar in severity to those in the Act and as effective as the Federal regulations in meeting the requirements of the Act.

The rule being published today is not intended to take the place of a detailed review of the individual requirements of the permanent program rules at 30 CFR Chapter VII. In accordance with President Reagan's Executive Order 12291, OSM has begun reviewing its regulations and will continue to propose rule changes to modify regulations that are determined to be unnecessary and burdensome. Rather, this final rule is intended to ensure that the States can exercise the lead role contemplated for them under the Act.

Currently, sixteen (16) State programs have been approved by the Secretary. Under the rule being published today, States with approved programs may develop regulations meeting their specific needs. Such regulations can be incorporated into the approved State program by amendment under procedures of 30 CFR 732.17. States without approved programs can also develop State-specific regulations for incorporation into future program submissions based on the changed standard of this rule. Virginia's State program is currently under consideration by OSM and the Secretary. It was resubmitted to OSM on August 13, 1981, and notices were published in the Federal Register on August 17, 1981 *(46 FR 41525-41527)* and August 31, 1981 *(46 FR 43698)* establishing a period for public comment which closed September 8, 1981, at 4:00 p.m. The Virginia State program will be evaluated on the basis of the rule being published today. Because the rule was not in effect during the initial stages of the review period an additional 15 days will be provided for the public to consider the Virginia State program in light of the new rule. A separate notice will be published in the Federal Register reopening the comment period. All later resubmitted programs will be evaluated on the basis of this new rule.

4. PUBLIC COMMENTS ON PROPOSED RULE

In response to release of the proposed rule in draft form, 45 comments were received during the comment period which closed on May 8, 1981. Twenty-five statements supported the proposed change as it was drafted and recommended that it be adopted. Seventeen additional comments were supportive of the draft rule, but recommended further clarification or changes. Three commenters recommended that the rule not be adopted. The concerns expressed by industry representatives, State officials, citizens, groups and agencies that reviewed the draft proposed rule, and the revisions which they suggested were given full consideration in preparing the rule as proposed in the Federal Register on July 1, 1981 *(46 FR 34349)*. The main points and rationale offered by these commenters were summarized in the preamble to the proposed rule. Although the comments received on the draft rule are not addressed here, they are available to anyone who wishes to review them in the OSM Administrative Record Room at the address above.

The proposed rule was published in the Federal Register on July 1, 1981 *(46 FR 34349)*. Twenty comments were received during the public comment period. Ten statements supported the rule as it was proposed and recommended that it be adopted. An additional four commenters were supportive of the proposed rule, but recommended further clarification or changes. Six commenters recommended that the rule not be adopted. Resolution of the comments is as follows:

The Sierra Club, Environmental Policy Institute (EPI), the National Wildlife Federation (NWF), the Village of Catlin and the Township of Catlin, Illinois, the Applachian Research Fund, the Technical Information Project and other groups asserted that the proposed change would eliminate use of OSM's regulations as a standard for approval of State programs as required by section 503(a)(7) of the Act. Some of the commenters contended that the proposed rule would eliminate comparison of the proposed State programs with the Secretary's regulations, and substitute comparison solely with the Act.

The Secretary disagrees. The proposed change will not eliminate the comparison of the State's provisions with the permanent program rules, but will merely redefine the purpose of that comparison. To be approved under the old rule, a State's provisions were required to be as stringent as the requirements of the Act and as stringent as the provisions in the Secretary's regulations. This resulted in State program provisions which were virtually identical to SDM's regulations. A State's program must still have provisions as stringent as the requirements in the Act. But under the revised rules a State's program will be compared to the Secretary's regulations to insure that the objective or purpose of the requirements of the Act (to protect the environment, to induce operators to comply, to afford citizen rights, etc.) is as likely to be achieved by the State's provisions as by the Secretary's regulations. While the State is no longer required to match each component part of its provisions with a corresponding part of the Secretary's regulations, it must be able to demonstrate that its rules afford the same protections or guarantees that the Secretary's rules provide.

EPI, NWF and other commenters also pointed out that the proposed rule change would establish two different standards, one for comparing State program submissions with the Federal statute and another for comparing the State's submission with the Federal regulations. The commenters asserted that the Act requires the same standard to be used when comparing a State program with either the Federal statute or the Federal regulations.

OSM agrees that the standard for evaluating a State's submission in terms of the Act will be the comparative stringency of the provisions whereas the revised standard for evaluating a State's program in terms of OSM's regulations will be the relative effectiveness of the rules in meeting the provisions of the Act. OSM disagrees that this is contary to the intent of Congress. It is essential that States' programs contain provisions that closely parallel the requirements of the Act to insure that the fundamental aspects of regulating surface mining are uniform throughout the States. With respect to the permanent program regulations, the Secretary believes that the standard for evaluating State programs should not require that the State's provisions mirror OSM's but that they achieve the goal or level of performance established by each of the Secretary's rules. This approach will enable States to adopt regulations that meet particular individual needs without compromising the standards mandated by the Act and OSM's rules. Section 101(f) of the Act makes clear Congress' intent to establish uniform standards while still allowing States flexibility to attune their programs to their unique circumstances.

Several commenters, including the Sierra Club, the Illinois Department of Mines and Minerals, the EPI, the NWF, the Appalachian Research Defense Fund, the Technical Information Project and other groups, commented that further clarification of the meaning of "as effective as" was needed. The Secretary agrees. The preamble discussion of what is meant by "effectiveness" has been expanded from that provided in the proposed rule. (See above under "Scope of Rule.")

In addition to its other comments discussed above, the Sierra Club asserted that the proposed changes introduced too much bureaucratic discretion at both State and Federal levels for objective regulation. Another objection was that the proposed changes, if adopted, would be unfair to those citizens, legislators, and operators in the 16 States with programs already approved under the existing rules. The commenter also stated that the proposed changes would create a patchwork quilt of regulations unlikely to be favored even by coal operators.

With regard to the commenter's first point, Congress clearly intended, as stated at several points throughout the Act, such as section 101(f) and section 201(c)(9), that the regulatory authority (State or Federal as the case may be) should have discretion with respect to certain procedures and practices in the regulatory process. In a similar vein, the revised rule will permit States to adopt alternatives which may allow State officials a degree of freedom to judge what procedures or practices are appropriate for the individual State. By allowing such discretion, however, the Secretary is not granting the regulatory authority the right to ignore the standards of the Act and OSM's regulations. It merely allows certain flexibility with respect to deciding how best to meet the purposes of the Act and the Secretary's regulations. Congress explicitly allowed for such flexibility to accommodate the wide differences among States.

With regard to the commenter's second point, the 16 States with approved programs may also develop regulations meeting their specific needs. Such regulations can be incorporated into the approved State program by amendment under the procedures at 30 CFR 732.17.

The commenter's concern that the revised rules will create a patchwork quilt of regulations from one State to the next is unwarranted. The Secretary will require that all States strictly adhere to the provisions of the Act and insure that State programs provide protections or guarantees equivalent to the Secretary's regulations. In addition, State provisions will be judged against the Secretary's regulations which will result in the degree of uniformity between State programs intended by Congress.

The rule changes will merely allow States the necessary flexibility to design programs to meet special circumstances.

The Consolidation Coal Company and the Joint Committee for Surface Mining of the American Mining Congress and National Coal Association recommended that, in addition to the other changes, 30 CFR 730.11(a) be modified to eliminate use of the words "no less stringent than," in reference to the Secretary's regulations. The Secretary agrees that retaining the phrase here while eliminating it elsewhere may cause confusion. OSM will propose in a separate rulemaking that the words "inconsistent with" be substituted for the words "no less stringent" so that the proposed language of the regulations is the same as that used at section 505(a) of the Act.

The Illinois Department of Mines and Minerals, in addition to its other comments discussed above, stated that the proposed rule changes fail to eliminate areas of the Secretary's regulations not required by the Act, or otherwise not truly necessary for inclusion in State programs. Several examples of such regulations were submitted. While further revision of the Secretary's regulations may be beneficial, it is outside the scope of this rulemaking. The appropriate forum for the commenter's suggestion is a petition for rulemaking pursuant to Sec. 700.12 of the Secretary's regulations.

The Village of Catlin and the Township of Catlin, Illinois, commented that the "no less effective than" standard is virtually the same test as the "capable of achieving the same regulatory result" test which was considered but rejected by the Secretary at the time the permanent regulatory program was under consideration. (See *44 FR 14952* (March 13, 1979)). The "regulatory result" test and other tests that were analyzed at that time were being considered to be applicable for both the requirements of the Act and the Secretary's regulations. The "no less effective" test is similar to the "capable of achieving the same regulatory result" test but does not pose a problem when it is applied to just the Secretary's regulations as is the case with the change being made here.

OSM believes that the "as effective as" standard does not limit OSM to utilizing the "result" as the only evaluation criterion in deciding the acceptability of State alternatives. In determining the effectiveness of some rules OSM may be primarily concerned that the State's regulations achieve the same result as OSM's rules regardless of the methods or processes leading to that result. This would likely be the case with certain mining operations performance standards. In evaluating other rules, however, OSM may be most concerned that the procedures or processes prescribed by the State regulations are comparable to those established by OSM's rules. Rules intended to implement enforcement provisions to protect citizen rights would more likely fall into this category, especially where sections 518(i) and 521(d) apply. Hence, the "as effective as" test does not restrict OSM to relying on the "regulatory result" as the only evaluation guideline.

The Village of Catlin and the Township of Catlin, the EPI, the NWF and other groups contended that the effect of the rule changes will be to allow States to employ alternatives as they see fit until the Secretary demonstrates the approach taken is not in accordance with the Act or is not as effective as the Secretary's regulations. The commenters asserted that States will be relieved of the burden of demonstrating that alternative approaches meet the Federal statutory and regulatory standards contrary to section 503(a) of the Act.

The Secretary agrees that the proposed rule did not make sufficiently clear that the burden is placed on the State for proving that alternative approaches to regulations will be as effective in meeting the Federal statutory standards. The explanation of the "Scope of Rule" above clarifies that the State must submit, with any proposed alternative, a written explanation or justification of how it will be as effective as the Secretary's rule in meeting the standards of the Act. In the event the State's explanation is not adequate, OSM will request further clarification before making a final determination on the proposed alternative.

The Environmental Policy Institute, the National Wildlife life Federation, Technical Information Project and other groups commented on the example provided in the proposed rule of an alternative State regulation that could be approved by OSM under the revised rule. The example was an alternative to OSM's approach to assuring an adequate stocking of trees where the postmining land use of the mine site would be forest land. The proposed alternative provided that the State forester approve proposed tree stocking plans. The commenters contended that the alternative would allow the State forester to make judgments

without having standards. As discussed above, OSM will require a State to provide a justification of how its alternative rule would be as effective as the Secretary's rule in meeting the standards of the Act. If a State's explanation does not demonstrate how this would be achieved, OSM would request further clarification. Presumably, in the case of the tree stocking example, the State submitting the alternative would explain what criteria the State forester would use in making a judgment. If not, OSM would ask the State to address that question. Regardless of what criteria the State forester elected to use, the State would have to demonstrate that its approach would be no less effective in meeting the standards of the Act than the Secretary's rules.

5. EXAMPLES OF ALTERNATIVES UNDER THE NEW RULE AMENDING THE STANDARD FOR STATE PROGRAM RESUBMISSIONS

The preamble to the proposed rule offered two alternatives as examples of changes that might be approved under the new standard. With elaboration and justification by the States resubmitting the alternatives both examples could be accepted. Of course, consideration of approving the alternatives would be subject to review procedures for a State program submission or State program amendment, in which case the public could comment upon the proposal.

Example 1: One State program submitted to OSM last year had a different approach from the Secretary's rules for the assurance of adequate stocking of trees where the postmining land use of the mine site would be forest land. While the Federal regulations specify the minimum tree count per acre, the State's rule would have required only that the State forester approve the proposed stocking plan. Under the existing rules this State approach was found inadequate by the Secretary, in spite of evidence that the State forester would look to assuring that there would be stocking comparable to existing forestland in the State. Under the new rule being published today, the State's approach might well have been approved. (See *45 FR 86466,* New Mexico Conditional Approval.) As explained above under "Public Comments," the State would be required to submit additional details as to the criteria the State forester would employ in evaluating each proposed stocking plan.

Example 2: Another State program submitted to OSM last year proposed fewer inspections of certain types of sediment pond dams than are required by the Secretary's regulations at 30 CFR 816.46(t). The proposal by Kentucky would have required inspections for these dams "as required by the Department" rather than the four times per year mandated by the Federal rule. Due to small size and low hazard location, the State proposal would have resulted in fewer than four inspections for certain ponds. Under the current rules this State approach was found inadequate by the Secretary. The disapproval cited lack of evidence in the submission that conditions exist in Kentucky justifying less than four inspections per year for all sediment pond dams. Under the new rule, the State's approach might well have been approved if more information were offered to justify fewer inspections and a reasonable basis were presented for the conclusion that it was as effective as the Federal requirement. (See *45 FR 69948-69949,* Kentucky Partial Approval.)

The Secretary also solicited additional examples of possible State program provisions that might be acceptable under the new rule. The preamble to the proposed rule stated that representative examples submitted would be addressed in the preamble to the final rule to afford the public further guidance as to the scope and meaning of the rule.

Many of the examples offered were not alternatives to the Secretary's regulations. Instead they are proposals which violate a minimum requirement of the Act or are appeals to change particular aspects of the Secretary's regulations without offering actual alternative language. Other offerings are proposals to delete certain requirements for State programs such as the requirement that States afford State employees protection consistent with the offered Federal employees under section 704 of the Act. To the extent possible a finding has been made either accepting or rejecting the alternative proposal. Findings have been made only for proposals that contained sufficient information. In some cases, the proposal submitted has been supplemented with the addition of certain language which would allow it to be accepted.

1. Illinois proposed to substitute "siltation structure" for "sediment pond" throughout its permanent program regulations. The proposal noted that the alternative will permit operators to identify the individual siltation control measures that will best meet the siltation standard in the most cost effective manner. Sedimentation ponds are required under 30 CFR 816.46 in implementation of section 515(b)(10)(B)(i). The regulations do not allow for alternatives to sedimentation ponds. Under the rule being published today, the Secretary could find the use of "siltation structures" to be as effective as his requirement for "sediment ponds" provided the State program demonstrated that the particular siltation structures would be the best technology currently available and that the effluent standards would be met. In addition, the State program must include details governing each type of siltation structure to be used.

2. Illinois proposed to define "affected area" as it pertains to underground mining in an alternative way. The proposal listed several reasons why the State believes an alternative definition is necessary but did not include a specific definition for consideration. The State claims that it is not necessary to extend all the Secretary's permitting and performance standard

requirements to the entire surface area overlying the underground coal mine. The State asserts that a strict interpretation of the regulations requires that all the affected area for an underground mine be included in a permit and that in applying for a permit the applicant must submit proof of a right to enter the lands and conduct mining -- proof which they may not be able to produce for all surface area overlying the subsurface workings. Without specific language for an alternative definition, the Secretary cannot make a judgement as to its acceptability under the new rule. The definition of the term now found in the regulations, 30 CFR 701.5, includes all of the area of land overlying the underground workings.

3. Illinois proposed to accept the certifications, inspection reports, etc., of the Mine Safety and Health Administration (MSHA), which are maintained at the mine site, as meeting the requirements of certain of the Secretary's regulations. The Secretary could find a State's use of MSHA certifications and inspection reports as effective as provisions contained in the Secretary's regulations where they duplicate MSHA certification or requirements. Items that are required by the Secretary's regulations and are not included in the MSHA reports must be furnished separately.

4. Illinois proposed an alternative to the reference area concept for evaluating revegetation success contained in 30 CFR 816.111-117 and 817.111-117. Illinois suggested that success of revegetation of all postmining land uses except agricultural could be based upon achieving acceptable ground cover.

The proposal did not include sufficient detail to allow assessment of the evaluative standards offered. In any case, an alternative may not be necessary since existing 30 CFR 816.116 contains considerable built-in flexibility for the regulatory authority to select alternative means for defining revegetation success. According to this provision, comparison of ground cover and productivity may be made on the basis of reference areas or through the use of technical guidance procedures published by USDA or USDI for assessing ground cover and productivity. But if the USDA or USDI methods do not meet the State's needs, then under the rule being finalized today, States may adopt other alternatives for evaluating revegetation. These alternatives will be approved by the Secretary if they can be found to be "no less effective" in meeting the requirements of the Act than the reference area or technical guidance contained in agency literature as specified in the regulations.

5. Illinois proposed not to apply (a) the Secretary's prime farmland rules to underground mines or (b) the productivity requirements to regraded and revegetated areas. This proposal as presented cannot be considered a specific alternative for a State program. It is, instead, an appeal by Illinois for OSM to reevaluate 30 CFR 738.27, 785.17 and 823, which apply prime farmland requirements to underground mines, and 817.116, which applies a productivity requirement. OSM is assessing the appropriateness of these and other regulations in separate actions.

6. Illinois raised a question concerning 30 CFR 764.17, which establishes requirements for hearings called for in the process for designating lands unsuitable for surface coal mining. The Secretary's regulations require the hearings to be legislative and fact-finding in nature without cross-examination of witnesses. Illinois proposed to allow cross-examination and other adjudicatory procedures in the hearing. Under the rule being published today the Illinois proposal might be approved if the State demonstrated that its proposal would be as effective as 30 CFR 764.17 in protecting the public right to participate in suitability hearings. In particular, the State could allow adjudicatory hearings if the proposal was consistent with the Act and also provided procedures that offered witnesses some measure of protection from intimidation. The New Mexico State program which was conditionally approved by the Secretary *(45 FR 86474, 86475,* December 31, 1980) includes adjudicatory hearing provisions which allow the witness to select the procedures which apply to his or her testimony. However, the Secretary requested that New Mexico provide additional detail on how the hearing will operate both in spirit and in practice under this arrangement.

OSM is reassessing the requirements of 30 CFR 764.17 under its separate effort to review all regulations.

7. Complete Applications. -- Illinois stated that the meaning of "complete application" as used in 30 CFR 771.21(b)(1) is unclear. This Section establishes the filing deadlines for permit applications following the initial implementation or a permanent regulatory program. The State proposed that the words "and complete" which describe the permit application be deleted. Illinois recommended that it be left to the States to establish what is meant by "complete application" by adopting completeness criteria. This proposal could more appropriately be addressed to amending 30 CFR 771.21(b)(1). However, under the rule being published today, State programs could include criteria for establishing completeness different from those currently specified in 30 CFR 771.23, provided that the State alternatives are as effective as 771.23 in ensuring that permit applications contain all the information required by the Act.

8. Minor disturbances. -- Illinois proposed to exempt minor disturbances, such as where fence posts or power poles are located, from the topsoil removal and other requirements set in 30 CFR 816.22(b) and 817.22(b). The Secretary believes that the existing regulations do not require full treatment for minor disturbances such as those described by Illinois. The regulatory authority has discretion on a site-by-site basis to allow for separate procedures where there are minor disturbances to the lands.

9. Illinois proposed, on a case-by-case basis, to allow incline side slopes and final cut spoil surrounding impoundments to be left at a slope not to exceed the angle of repose if: (1) perimeter slopes are stable and compatible with the intended use of the impoundment and (2) the impoundment has been approved in accordance with 30 CFR 816.133(c) and 817.133(c), if necessary. The alternative is proposed to maximize the amount of relatively flat land surrounding permanent water impoundments while at the same time insuring stability of the slope.

What, in effect, the State proposes is the elimination of a design criterion set in 816.49(c) of the regulations: perimeter slopes of impoundments not to exceed 2h:1v. The related requirements in the Act include Section 515(b)(4), which requires stabilization and protection of all surface coal mining and reclamation operations to effectively control erosion and attendant air and water pollution, and section 515(b)(8)(B) of the Act which requires that impoundment dam design and construction be such as to achieve stability and insure as adequate a safety margin as such structures built in accordance with the Watershed Protection and Flood Prevention Act must achieve. Instead of the design criterion in Sec. 816.49(c), the State proposal would allow perimeter slopes up to the angle of repose and would require the impoundment to meet the general requirements for postmining land use in Sections 816.133 or 817.133 of the regulations. The proposal could well be approvable if it is "as effective as" the Secretary's regulations in assuring that (1) side slopes would only be approved where stabilization and protection of surface areas were assured so as to effectively control erosion and attendant air and water pollution and (2) the associated design and construction of the dam meets 515(b)(8)(B) of the Act. However, more information is necessary in order to evaluate whether such a proposal is no less effective than provisions in the Secretary's regulations.

The Environmental Policy Institute and the National Wildlife Federation and other groups submitted several examples that did not actually propose alternatives to the Secretary's regulations but were questions concerning the flexibility that States would be allowed under the revised rules with respect to various provisions of the Act or OSM's regulations relating to enforcement, civil penalties and citizens' rights.

These questions generally raise issues concerning requirements contained in the Act for State programs. 30 CFR 730.5(a) establishes the standard for testing provisions in a State program against the requirements of the Act and remains unchanged by this rulemaking. In order for a State program provision to be in accordance with the Act, as defined in 30 CFR 730.5(a), quoted above, it must be no less stringent than the comparable provision in the Act. In addition section 521(d) of the Act requires State program enforcement provisions to contain the same or similar procedural requirements as contained in section 521 and section 518(i) of the Act requires State program penalty provisions to contain the same or similar procedural requirements as contained in Section 518. Many of the commenters' questions relate to provisions in the Act that are specifically applicable to the Secretary and through the existing State program approval regulations in 30 CFR 732.15(b) are made requirements in State programs. The rule change being finalized today has no bearing on these requirements since they have been interpreted as requirements of the Act itself. Many of these requirements are being studied under OSM's regulatory reform effort, and changes in the current interpretations may be undertaken through separate rulemaking.

Although the commenters' examples were not submitted in the format invited, OSM has endeavored to respond to each. Below, following a restatement of each of the commenters' questions, is OSM's response.

ENFORCEMENT

1. Must the issuance of all citations be mandatory?

Sections 521(a)(2) and (3) of the Act prescribe for the Secretary or his authorized representative mandatory issuance of all citations. 30 CFR 732.15(b)(8) of the Secretary's regulations prescribes these requirement for State programs, and section 512(d) of the Act requires State program enforcement provisions to incorporate sanctions no less stringent than those set forth in section 521 of the Act and to contain the same or similar procedural requirements relating thereto.

These provisions requiring State programs to contain procedures for mandatory issuance of citations are not altered by the rule change being finalized today.

2. Must there be issuance by a field inspector of all citations (except show cause orders) immediately upon observance of conditions or practices constituting a violation or hazard?

Section 521(a)(2) of the Act only prescribes for the Secretary or his authorized representative the requirement to immediately issue cessation orders for conditions, practices or violations creating an imminent danger to the health or safety of the public or causing, or can reasonably be expected to cause, significant imminent environmental harm to land, air or water resources. 30

CFR 732.15(b)(8) prescribes this requirement for State programs and section 521(d) of the Act requires State program enforcement provisions to incorporate sanctions no less stringent than those set forth in section 521 of the Act and to contain the same or similar procedural requirements relating thereto. These provisions governing immediate issuance of cessation orders are not altered by the rule change being finalized today. With respect to notices of violations not constituting hazards, the Act does not specifically state that these must be issued "immediately." However, Section 843.14 of the Secretary's regulations requires that all notices of violation be served promptly after issuance.

3. Must the State issue a summary cessation order for ongoing or potential environmental harm in at least the same situations in which significant imminent environmental harm cessation orders would be issued?

Section 521(a)(2) of the Act prescribes for the Secretary or his authorized representative minimum requirements with respect to the issuance of cessation orders for violations involving environmental harm. 30 CFR 732.15(b)(8) prescribes these minimum requirements for State programs and section 521(d) of the Act requires State program enforcement provisions to incorporate sanctions no less stringent than those set forth in section 521 of the Act and to contain the same or similar procedural requirements relating thereto. These requirements provide that a cessation order must be issued immediately upon detection of a condition or practice which is causing, or can be reasonably expected to cause, significant imminent environmental harm to land, air or water resources. These provisions governing cessation orders for State programs are not altered by the rule changed being finalized today.

4. Must the State issue a summary cessation order for danger to public health or safety in at least the same situations as an imminent danger order would be issued?

Section 521(a)(2) of the Act prescribes for the Secretary or his authorized representative minimum requirements with respect to the issuance of cessation orders for violations involving public safety. 30 CFR 732.15(b)(8) prescribes these requirements for State programs and section 521(d) of the Act requires State program enforcement provisions to incorporate sanctions no less stringent than those set forth in section 521 of the Act and to contain the same or similar procedural requirements relating thereto. These provisions provide that a cessation order must be issued immediately upon detection of a condition, practice, or violation which creates an imminent danger to the health or safety of the public, or is causing, or can reasonably be expected to cause, significant, imminent environmental harm. Thus, if the danger to public health or safety can reasonably be expected to cause significant imminent environmental harm a cessation order must be issued under a State program. These provisions are not altered by the rule change being finalized today.

5. Must the State issue a notice of violation with a reasonable time to abate (but no longer than 90 days) whenever a field inspector discerns a violation?

Section 521(a)(3) of the Act establishes that the Secretary or his authorized representative shall issue a notice to the permittee or his agent for a violation that does not create an imminent danger to the health or safety of the public, or cannot be reasonably expected to cause significant, imminent environmental harm to land, air or water resources and that the notice shall fix a reasonable time (but not more than 90 days) for abatement of the violation. 30 CFR 732.15(b)(8) prescribes these requirements for State programs and Section 521(d) of the Act requires State program enforcement provisions to incorporate sanctions no less stringent than those set forth in Section 521 of the Act and to contain the same or similar procedural requirements relating thereto. These requirements for State programs are not altered by the rule change being finalized today.

Subchapter L of the Secretary's regulations sets forth general rules regarding enforcement. Under the rule change being finalized today the "as effective as" test would be the standard for State alternatives to these rules.

The Secretary has found that there are certain very limited cases where, because of certain circumstances beyond a permittee's control, abatement within 90 days is not feasible or would cause greater environmental harm than would abatement at a later date. OSM believes that Congress did not intend that the 90 day requirement of section 521(a)(3) of the Act apply in such cases. Therefore, OSM promulgated a rule on August 17, 1981 *(46 FR 41703)* amending Subchapter L which identifies those limited circumstances where abatement times in excess of 90 days will be permitted and sets forth the conditions that will apply to these situations.

A state program must include a provision requiring the State regulatory authority to establish an abatement period of not longer than 90 days whenever the field inspector determines a violation exists. Exceptions to the 90-day abatement period could be allowed under the circumstances listed in the August 17, 1981, rule.

6. Must the State issue a summary cessation order whenever a violation is not abated in the time set and there is not good cause to extend the abatement period?

Section 521(a)(3) establishes for the Secretary or his authorized representative minimum requirements for enforcement for failure to abate a violation. It provides that a cessation order be issued immediately if, upon expiration of the period of time as originally fixed or subsequently extended, a violation has not been abated. 30 CFR 732.15(b)(8) of the Secretary's regulations prescribed these requirements for State programs and section 521(d) of the Act requires State program enforcement provisions to incorporate sanctions no less stringent than those set forth in section 521 of the Act and to contain the same or similar procedural requirements related thereto. These are not altered by the rule change being finalized today.

Subchapter L of the Secretary's regulations sets forth general rules regarding enforcement. Under the rule change being finalized today the "as effective as" test would be the standard for State alternatives to these rules.

7. Must the State program include a requirement that field inspectors impose affirmative obligations to abate the violation or hazard as expeditiously as physically possible where cessation of mining does not remove the danger or violation?

Section 521(a)(2) prescribes that the Secretary or his authorized representative shall, in addition to the cessation order, impose affirmative obligations on the operator if the cessation of mining and reclamation operations will not completely abate the imminent danger to the public or environment. 30 CFR 732.15(b)(8) of the Secretary's regulations prescribes these requirements for State programs, and Section 521(d) of the Act requires State program enforcement provisions to incorporate sanctions no less stringent than those set forth in section 521 of the Act and to contain the same or similar procedural requirements related thereto. These requirements are not altered by the rule change being finalized today.

Section 843.11(b)(2) of the Secretary's regulations requires that cessation orders shall require the person to whom it is issued to take all steps deemed necessary to abate the violations in the most expeditious manner physically possible. Under the rule change being finalized today the "as effectuve as" test would be the standard for State alternatives to 30 CFR 843.11(b)(2).

8. Must the State grant authority to field inspectors to impose interim steps in the abatement process which the permittee must meet or face cessation?

Section 521(a)(1) of the Act requires that the Secretary shall, in addition to the cessation order, impose affirmative obligations on the operator requiring him to take whatever steps the Secretary deems necessary to abate the imminent danger or the significant environmental harm. 30 CFR 732.15(b)(8) of the Secretary's regulations applies this requirement to State programs and section 521(d) of the Act requires State program enforcement provisions to incorporate sanctions no less stringent than those set forth in Section 521 of the Act and to contain the same or similar procedural requirements relating thereto. These requirements are not altered by the rule change being finalized today.

Provisions for interim steps are included in Section 843.12 of the Secretary's regulations establishing that an inspector may specify interim steps that the operator must complete and the times for accomplishment of those steps. If the operator fails to accomplish the interim steps within the time established, the inspector must issue a cessation order. Under the rule change being finalized today the "as effective as" test would be the standard for State alternatives to the Secretary's provisions for interim steps. Under its separate effort toward regulatory reform, OSM is considering proposing a revision to this rule to make discretionary the issuance of a cessation order for failure to meet an interim step.

9. Must there be provisions for the suspension and revocation of permits in at least those situations and at least to the same extent that permits would be suspended or revoked under Federal law?

Section 521 of the Act prescribes for the Secretary provisions for the suspension and revocation of permits. 30 CFR 732.15(b)(8) of the Secretary's regulations prescribes these provisions for State programs and section 521(d) of the Act requires State program enforcement provisions to incorporate sanctions no less stringent than those set forth in section 521 of the Act and to contain the same or similar procedural requirements relating thereto. These requirements are not altered by the rule change being finalized today.

Subchapter L of the Secretary's regulations sets forth general provisions regarding enforcement. Under the rule change being finalized today the "as effective as" test would be the standard for State alternatives to these rules.

10. Where the enforcement sanctions are concerned, may the State program provide for more discretion to take enforcement actions than that possessed by OSM or OHA under the Federal statute and regulations?

Section 521 of the Act provides little discretion in the initiation of any notice or order. 30 CFR 732.15(b)(8) of the Secretary's regulations prescribes the requirements of section 521 for State programs. The regulatory authority must take the prescribed enforcement action under those circumstances specified in the Act and the rule change does not alter these requirements.

In the case of show cause orders for pattern of violations, the Act does not specify what constitutes a pattern of violations. OSM's regulations establish those events or conditions which constitute a pattern of violations. The rule change being finalized today would be applicable to any alternative that a State might propose to OSM's definition of "pattern of violations." That is, any alternative that a State might propose would have to be "as effective as" OSM's rule in meeting the purposes of the Act.

CITIZEN RIGHTS

1. Must the State law allow the citizen at least as much access to the mine site as he has under the Federal law?

Section 521(a)(1) of the Act prescribes for the Secretary or his authorized representative the requirement that persons who have provided information resulting in a Federal inspection be allowed to accompany the inspector during the inspection. Section 732.15(b)(8) of the Secretary's regulations prescribes this requirement for State programs. The rulemaking being finalized today does not alter this requirement.

Subchapter L of the Secretary's regulations sets forth general provisions regarding enforcement. Under the rule change being finalized today the "as effective as" test would be the standard for State alternatives to these rules.

2. Must the State law authorize compensation for citizens for participation in all adjudicatory (in accordance with 43 CFR 4.1284) and non-adjudicatory (rulemaking, permit hearing, etc.) proceedings held by the State? Must the State be required to budget adequate monies for this participation and must the State law allow fee awards against the State and against permittees in accordance with 43 CFR 4.1284?

Section 525(e) of the Act requires:

Whenever an order is issued under section 525), or as a result of any administrative proceeding under the Act, at the request of any person, a sum equal to the aggregate amount of all costs and expenses (including attorney fees) as determined by the Secretary to have been reasonably incurred by such person for or in connection with his participation in such proceedings, including any judicial review of agency actions, may be assessed against either party as the court, resulting from judicial review or the Secretary, resulting from administrative proceedings, deems proper.

30 CFR 732.15(b)(15) prescribes the above provisions and others included in section 525 of the Act as requirements for State programs and these requirements are not altered by the rulemaking being finalized today. In addition, 30 CFR 732.15(b)(15) requires State programs to be consistent with Subchapter L of the Secretary's regulations. 30 CFR 840.15 within Subchapter L requires compliance with 43 CFR Part 4. Under the rule change being finalized today States could propose alternatives to the requirements contained in 43 CFR Part 4 for compensation for citizens' participation in adjudicatory proceedings. These alternatives must be in accordance with the requirements of section 525 of the Act and would be evaluated under the "as effective as" standard.

OSM is currently reviewing the present regulatory requirement that State programs authorized compensation for citizens for participation in all adjudicatory proceedings held by the State. Any change in the present requirements would occur following a revision of the existing interpretation of the requirements in the Act and an appropriate rule change to the requirements for State programs.

There is no explicit provision in the Secretary's regulations for compensation to citizens for participation in non-adjudicatory proceedings. Therefore, there is no basis for requiring such a provision in a State program under the Secretary's regulations.

There is no requirement in either the Act or the Secretary's regulations requiring a State to budget adequate funds for citizen participation. This same question was submitted as part of a comment on the proposed State program public participation provisions of OSM's permanent program rules, 30 CFR 732.15(b)(10), and the suggestion of such a requirement was rejected. *44 FR 14964-14965* (March 13, 1979). The ground for rejection was that flexibility was needed so that States could shape the public participation provisions of their programs and select the methods best suited for their individual conditions.

3. Must the State law provide citizens with the right to request inspections and participate in the resulting inspection?

See the answer to question number one under Citizen Rights.

4. Must the State establish an administrative review procedure similar to that contained in section 525, 43 CFR 4.2 et seq., and 30 CFR Part 722? Must this system allow for at least the same citizen access to the administrative review process as exists under Federal law? For example, must there be administrative procedures for review of civil penalties, not simply access to the State court system, as urged by at least one State?

Section 525 of the Act requires the Secretary to establish administrative review for his decisions and actions under the Act. 30 CFR 732.15(b)(15) and 840.15 prescribe these requirements for State programs. The rulemaking being finalized today does not alter these requirements.

5. Must the State law allow citizens as much access to the State courts as the Federal law allows to Federal court, in areas such as citizen suits, damage actions, review of enforcement proceedings, rulemakings, permit applications, etc?

Section 520 of the Act gives affected citizens a right to bring suits in Federal court to compel compliance with the Act. 30 CFR 732.15(b)(10) requires that State programs provide for public participation in the enforcement of State programs consistent with the requirements of the Act. The rulemaking being finalized today does not alter these requirements.

6. Must the State provide citizens with as much access to information regarding surface mining and reclamation operations and regulatory authority activities as is permitted under Federal law to Federal information and documents?

30 CFR 732.15(b)(5) establishes that State programs must include provisions of section 517 of the Act including Section 517(f) concerning the availability of records. The rule change does not alter these requirements. 30 CFR 840.14 sets the standards for information availability and the "as effective as" test could be applied to this regulation.

CIVIL PENALTY PROVISIONS

The Environmental Policy Institute and the National Wildlife Federation posed the following series of eight questions regarding the effect of the amended rule on the areas of civil penalty requirements. "Within this framework, under the proposed standard: (1) Must any civil penalty system demonstrate that it will result in fines that are at least as high as the fines assessed and collected by OSM; (2) Must any civil penalty system demonstrate that it will assess penalties for violations in circumstances in which fines would be assessed by OSM; (3) Must any civil penalty system demonstrate that it will assess daily fines in at least those situations in which such fines would be assessed by OSM; (4) Must any civil penalty system demonstrate that it has a procedure to review significant reductions in assessed fines; (5) Must any civil penalty system demonstrate that it has provisions which will result in the prepayment of fines of permittees; (6) Must any civil penalty system consider the four criteria enumerated by the statute in assessing a penalty; (7) Must any civil penalty system provide for at least as much citizen participation as permitted under the Federal system; (8) Must any civil penalty system contain procedures which are the same as or similar to Federal procedures."

As indicated in response to questions concerning other areas of a State program, requirements of the Act must be met in all cases under any alternative. As required under section 518(i) of the Act, State programs must include civil and criminal penalties no less stringent than those set forth in Section 518 and shall contain the same or similar procedural requirements relating thereto.

Any provision of the Secretary's regulations not required by section 518(i) may be varied so long as the alternative can be judged to be in accordance with the requirements of the Act and to be "no less effective" than the Secretary's provision in meeting the requirements of the Act.

The U.S. District Court for the District of Columbia in In re: Permanent Surface Mining Regulation Litigation, No. 79-1144, February 28, 1980, issued a decision regarding civil penalties and State programs. The Court indicated that while section 518(i) of the Act requires a State to incorporate the four criteria for penalty assessments found in subsection 518(a), and the procedures explicated in section 518, the Secretary does not have authority to require States to adopt a point system.

Section 518 of the Act establishes provisions for penalties for the Secretary and these requirements are prescribed for State programs under Section 732.15(b)(7) of the regulations. Section 518(i) establishes as a condition of approval, that State

programs must, at a minimum, incorporate penalties no less stringent than those set forth in section 518 and shall contain the same or similar procedural requirements relating thereto. This requirement must, however, be viewed in light of the District Court decision cited above. Therefore, the answer to the commenters' eight questions is that the rulemaking being finalized today does not alter the requirements imposed in the past.

DETERMINATION OF EFFECTS

The Department of the Interior has determined that this document is not a major rule and does not require a regulatory analysis under Executive Order No. 12291. The Department has also determined that the rule will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act, Pub. L. 96-354 *5 U.S.C. 601* et seq. In addition, the Department has determined that this rule does not constitute a major Federal action having a significant effect on the quality of the human environment under the National Environmental Policy Act.

The information collection requirements currently found in 30 CFR 731.13 have been approved by the Office of Management and Budget under *44 U.S.C. 3507* and assigned clearance number 1029-0023. Since the requirement is being deleted the reference to 30 CFR 731.13 is being deleted from the "Note:" at the beginning of 30 CFR Part 731.

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Dated: October 16, 1981.
Daniel N. Miller, Jr., Assistant Secretary, Energy and Minerals.

PART 730 -- GENERAL REQUIREMENTS

1. 30 CFR 730 is amended by revising Section 730.5(b) to read as set forth below:

SECTION 730.5 - DEFINITIONS.

* * * * *

(b) With regard to the Secretary's regulations, the State laws and regulations are no less effective than the Secretary's regulations in meeting the requirements of the Act.

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PART 731 -- SUBMISSION OF STATE PROGRAMS

SECTION 731.1 [AMENDED].

2. 30 CFR 731 is amended by revising the "Note:" paragraph immediately preceding Section 731.1 to delete the reference to Section 731.13.

SECTION 731.13 [REMOVED].

3. 30 CFR 731 is amended by removing Section 731.13 in its entirety.

PART 732 -- PROCEDURES AND CRITERIA FOR APPROVAL OR DISAPPROVAL OF STATE PROGRAM SUBMISSIONS

4. 30 CFR 732 is amended by revising Section 732.15(a) to read as follows:

SECTION 732.15 CRITERIA FOR APPROVAL OR DISAPPROVAL OF STATE PROGRAMS.

* * * * *

(a) The program provides for the State to carry out the provisions and meet the purposes of the Act and this Chapter within the State and that the State's laws and regulations are in accordance with the provisions of the Act and consistent with the requirements of the Chapter.

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(Sections 102, 210(c) et seq., Pub. L. 95-87)

[FR Doc. 81-31249 Filed 10-27-81; 8:45 am]
BILLING CODE 4310-05-M