

FEDERAL REGISTER: 47 FR 35620 (August 16, 1982)

DEPARTMENT OF THE INTERIOR

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

30 CFR Parts 840, 842, 843 and 845

Permanent Regulatory Program Modifications;

Inspection and Enforcement; Civil Penalty Assessments

ACTION: Final rules.

SUMMARY: The Office of Surface Mining (OSM) is revising the standards and procedures governing State and Federal inspection and enforcement, and civil penalty assessments.

These revisions are a result of the Secretary's review of all regulations promulgated by the Department under the Surface Mining Control and Reclamation Act of 1977 (the Act). The Secretary believes that, in order to remove burdensome or counter-productive requirements, fundamental changes to these rules are necessary.

These final rules provide for: (1) Aerial inspections to be recognized as partial inspections under the Act; (2) mail responses to requests for information which is in the possession of the regulatory authority; (3) a lesser frequency of inspections to be conducted at inactive surface coal mining operations; (4) joint inspections to be conducted by OSM and State personnel, where practical and where the State so requests; (5) a person requesting a Federal inspection (in a State where a State program is in force) to notify the State regulatory authority prior to, or simultaneously with, such request.

EFFECTIVE DATE: September 15, 1982.

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SUPPLEMENTARY INFORMATION:

BACKGROUND

The Secretary of the Interior has decided to review all regulations promulgated by the Department under the Surface Mining Control and Reclamation Act of 1977, *30 U.S.C. 1201 et seq.* (the Act). He intends to administer the Act in a manner which ensures the protection of society and the environment, but does not unnecessarily restrict coal development or improperly intrude upon the role of the States. This approach attempts to reconcile the potentially competing mandates of the Act, which require the Secretary to (1) establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining (Section 102(a)); (2) recognize that the primary governmental responsibility for developing, authorizing, issuing and enforcing regulations for surface coal mining and reclamation operations should rest with the States (Section 101(f)); and (3) ensure that coal supplies are adequate to meet the Nation's requirements (Section 102(f)).

To implement the provisions of Sections 501(b), 503 and 504 of the Act, the Secretary promulgated Parts 840, 842, 843 and 845 of Title 30, Code of Federal Regulations (CFR) (*44 FR 15455-15463*, March 13, 1979). Part 840 contains the minimum requirements for inspection and enforcement by a State where the State is the regulatory authority under an approved State program or cooperative agreement. Part 842 sets forth the procedures applicable to Federal inspections in the permanent regulatory program. Part 843 relates to Federal enforcement in the permanent regulatory program pursuant to Federal programs, the Federal lands program and any State program being enforced by OSM pursuant to sections 504(b) or 521(b) of the Act. Part 845 contains regulations regarding the assessment of civil penalties by OSM under section 518 of the Act.

In an effort to streamline the rules, remove burdensome or counter-productive requirements and provide editorial clarity, OSM proposed revisions to 30 CFR Parts 840, 842, 843 and 845 on December 1, 1981 (*46 FR 58464*). In the preamble to the proposed rules, OSM requested comments from all interested persons. Public hearings were held on January 13, 1982 in Denver, Colorado, Lexington, Kentucky and Washington, D.C. The public comment period ended

on February 1, 1982. The rules adopted and responses to comments received are described below. As a matter of convenience to the reader, all of the provisions of 30 CFR Parts 840, 842, 843 and 845 are repromulgated, including the sections that are not being revised.

In a notice of intent published on April 21, 1982 (*47 FR 17269*), OSM announced that it had already made determinations regarding certain issues contained in the December 1, 1981 proposal, and would defer other issues raised by the proposal. Further details of the actions announced in the April 21, 1982 notice, together with responses to comments on those issues, are provided in this preamble.

In addition, OSM has: (1) Postponed action on a petition for rulemaking seeking to eliminate the requirement that States pay costs and expenses, including attorneys' fees, to persons who participate in proceedings under State programs; (2) decided not to adopt proposals which would have given States the option of denying to citizens the rights to bring suit in State courts and to accompany State inspectors on inspections which result from information provided by citizens; (3) deferred action on its proposal to eliminate its authority to issue notices of violation in oversight; (4) planned further study of alternatives to address the problems which result from the requirement that proposed penalties be paid into an escrow account prior to the granting of administrative review. OSM has modified other aspects of its December 1, 1981 proposal, as described herein.

Also, certain of the proposed changes contained in the December 1, 1981 proposal regarding citizens' participation were also addressed in a December 4, 1981 proposal (*46 FR 59482*) concerning State and Federal programs (30 CFR Chapter VII, Subchapter C). This preamble addresses the proposed changes regarding citizens' participation that were raised in the December 1 and December 4 proposals.

RULES ADOPTED AND DISPOSITION OF COMMENTS

PART 840 -- STATE REGULATORY AUTHORITY INSPECTION AND ENFORCEMENT

1. SECTION 840.1 - SCOPE.

The only revision proposed for Section 840.1, which contains the scope of Part 840, was to insert the word "approved" before the words "State program." This change is being adopted.

One commenter stated that inserting "approved" before the words "State program" was redundant because section 701(25) of the Act clearly defines "States program" as one that is approved under section 503 of the Act.

OSM disagrees. Section 701(25) of the Act does not use the term "approved" in defining "State programs." OSM added this term to clarify and emphasize that the State programs referred to in these regulations are those which the Secretary has approved.

Another commenter would revise this section to give only States the authority to regulate inspection and enforcement of coal exploration operations. OSM proposed no such change. However, this issue is discussed in the preamble to Section 840.11, below.

2. SECTION 840.11 - INSPECTIONS BY STATE REGULATORY AUTHORITY.

The changes to this section are being adopted by OSM as proposed, except as described in the responses to comments, below. Paragraph (a) has been revised to allow States to use aircraft in conducting the partial inspections required under section 517(c) of the Act. Paragraph (a) eliminates the previous requirement for an average of one partial inspection per month of inactive operations. States still must inspect inactive operations as necessary to ensure effective enforcement of their programs. (See discussion of this issue in the preamble to Section 842.11(c).) As described below, new paragraph (f) defines active and inactive operations.

Standards and procedures governing aerial inspections are contained in Paragraph (d), which has been adopted as proposed with one addition (discussed below) to clarify that an on-site investigation of a potential violation observed during an aerial inspection will not be considered an additional partial or complete inspection. Paragraph (c), also

adopted as proposed, alters the standards for frequency of inspections of coal exploration operations from "periodic" to "as necessary," in order to provide flexibility based on regional differences in the surface impacts of exploration activities.

The remaining revisions which were proposed for this section, and are adopted today, are essentially grammatical. No substantive change is intended. In paragraphs (a), (b) and (c), the language mandating collection of evidence during inspections is being deleted, since such language is superfluous. In paragraph (e) (former paragraph (d)), the cumbersome phrase "person being inspected" is replaced by the word "permittee." In paragraph (e)(3) (former paragraph (d)(3)), the phrase "the State program, the Act, this Chapter, the exploration approval and the permit" is replaced with "the approved State program." The change is being made for greater editorial precision and clarity.

Four commenters, while agreeing that partial inspections should include aerial inspections, stated that paragraph (a) should allow a State to inspect inactive mines less frequently than active mines, as OSM can do under Section 842.11(c). These commenters wrote that the same policy considerations of efficiency in Federal programs apply to State programs. One commenter recommended that a specific inspection frequency for active and inactive mines be included in the rules.

OSM agrees with the first comment. The final rule allows States to distinguish between active and inactive mines in the same manner as was proposed and is being adopted for OSM when acting as the regulatory authority. This is accomplished through the changes in Paragraph (a) and new paragraph (f), discussed above. A discussion of the comments addressing the question of active and inactive mines is found below, under the discussion of Section 842.11(c).

Three other commenters agreed that partial inspections should include aerial inspections, and two commenters stated that the rule should require notice of an aerial inspection where necessary to avoid blasting or other hazards.

OSM disagrees with the latter two commenters. Advance notice is impermissible when the regulatory authority intends to count an aerial inspection as one of the partial inspections mandated by the Act. Section 517(c)(2) of the Act requires that such inspections occur "without prior notice to the permittee or his agents or employees." OSM expects that the regulatory authority will be able to coordinate aerial inspections with the operator's announced blasting schedule, or take other steps short of advance warning, to ensure safety.

Two other commenters stated that, although aerial reconnaissance may be useful, it cannot be defined as a "partial inspection" under Section 517 of the Act. These commenters stated that section 517 and its legislative history contemplate on-site review, which is inconsistent with aerial inspections that do not allow inspection of required blasting records, seismic data, hydrologic monitoring information, and other vital records which must be monitored. One of these commenters recommended that, if OSM is determined to allow aerial inspections, aerial inspections should be limited to one per calendar quarter.

OSM does not believe that defining partial inspections to encompass aerial inspections is inconsistent with the Act. Aerial inspections are an effective and efficient means of monitoring an operator's compliance with certain parts of a regulatory program. In certain cases, an aerial inspection can disclose more in less time than would an on-site inspection. However, aerial inspections are inappropriate for determining compliance with some aspects of the State program (e.g., water quality).

Access to records of blasting, discharges and similar matters, which are obviously not inspectible from the air, is accomplished by requiring the operator to make these records available to the regulatory authority, under regulations found throughout 30 CFR Chapter VII. With respect to other types of conditions which can be inspected only on site, OSM will expect States to conduct a sufficient number of on-site inspections to insure on an annual basis that the State's inspection cycle, as a whole, meets the requirements of section 517 of the Act. OSM will not, however, place a specific limit on the number of allowable aerial inspections, since the utility of aerial inspections, and consequently the appropriate mix of aerial and on-site partial inspections, will vary from State to State as a result of diverse geographic conditions.

One commenter stated that the requirement of Section 840.11(d)(1) that aerial inspections ensure "the identification and documentation of conditions" is too general and does not specifically preclude use of a fixed-wing aircraft. Two other commenters stated that performance standards for aerial inspections should be provided.

OSM recognizes that regional variations both in terrain and in the characteristics of surface mining make fixed-wing aircraft more effective for aerial inspections in the West than in Appalachia. Consequently, the Office does not at present consider the use of fixed-wing aircraft for aerial inspections in Appalachia as reasonably ensuring the identification of

on-the-ground conditions. However, OSM does not believe it would be appropriate to designate by regulation which aircraft should be used by the various States.

Four commenters objected to the deletion of the requirement that State and Federal inspectors "collect evidence of every violation" when conducting an inspection. They contended that the provision is required by sections 517 and 521 of the Act, and is necessary to determine if a State is adequately enforcing its program. One commenter, however, favored the deletion of the language mandating collection of evidence.

As OSM stated in the preamble to the proposed regulations (*46 FR 58465*), the deleted clause is superfluous and is subsumed by the requirement that a State adequately enforce its program, as reflected in Section 840.11(e)(3) of these regulations.

One commenter would clarify that the regulatory authority has jurisdiction over unpermitted, as well as permitted, sites.

OSM does not believe that clarification is necessary. The definition of "permittee" contained in 30 CFR 701.5 makes it clear that a permittee is any person who holds, or is required to hold, a permit. See the discussion of this issue in the preamble to the proposed rules (*46 FR 58465*).

One commenter stated that the number of partial inspections made during a year should be totaled to establish the "average" number of complete inspections per quarter required by this section, in order to avoid "duplicative" inspections and to conserve State resources.

OSM disagrees. Section 517(c) of the Act plainly requires four complete and eight partial inspections per year. Complete inspections are on-site reviews of a person's compliance with all permit conditions and requirements imposed under an approved State program, within the entire area disturbed or affected by the operations. Partial inspections, on the other hand, are either on-site or aerial reviews of a person's compliance with only some of the permit conditions and requirements imposed under the State program. There is no assurance that several partial inspections will encompass a review of all applicable performance standards. The complete and partial inspections do not, therefore, represent duplicative efforts. Thus several "partial" inspections will not, nor did the Act contemplate that they would, satisfy the requirement for "complete" inspections.

Another commenter would clarify that the inspections required under paragraph (b) cover affected areas outside the disturbed area.

OSM does not believe further changes to this section are necessary. Since paragraph (b) uses the words "entire area disturbed or affected," it is sufficiently clear that all areas, affected or disturbed, inside or outside of the permit area, are covered.

Three commenters stated that the requirement in paragraph (c) for inspection of coal exploration operations lacks any statutory basis. One of these commenters proposed regulatory language to give the State discretionary authority to regulate coal exploration operations which substantially disturb the natural land surface and which do not involve core drilling operations. Another commenter, however, supported the requirement for inspection of coal exploration operations, which the commenter saw as plainly covered by the requirements of sections 512 (a) and (c) of the Act.

OSM believes that inspection of coal exploration operations is clearly required under section 512 of the Act. Section 512(a) provides that these operations must be conducted in accordance with exploration regulations issued by the regulatory authority. In addition, section 512(c) provides that persons conducting illegal coal exploration activities shall be subject to the imposition of civil penalties under section 518 of the Act. In order to insure compliance of coal exploration operations with section 512 of the Act and corresponding regulations, and to determine when civil penalties are appropriate, the regulatory authority must inspect such operations. This requirement, together with the general grant of rulemaking authority in sections 201(c) and 501(b) of the Act, provides the basis for OSM's regulations addressing the inspection of coal exploration operations. The propriety of inspections of coal exploration sites was affirmed by the opinion of the United States District Court for the District of Columbia in *In Re: Permanent Surface Mining Regulation Litigation*, Civ. No. 79-1144, February 26, 1980.

Three commenters supported the change (in paragraph (c)) in the frequency of inspections at coal exploration operations from "periodic" to "as necessary," and five opposed the change. Those supporting the change agreed with OSM's statement in the preamble to the proposed rules (46 FR 58465) that it would allow regional flexibility in determining the appropriate frequency of coal exploration inspections. Those opposing the change stated that the phrase "as necessary" would not guarantee that any inspection of coal exploration operations will be conducted and that, under the previous rules, allowing the State to establish the frequency of periodic inspections already provided flexibility and also permitted effective oversight.

The Act does not specify that coal exploration operations be inspected on a periodic basis, as it does for surface coal mining and reclamation operations. Section 512(a) of the Act states only that coal exploration operations be conducted in accordance with regulations issued by the regulatory authority. OSM interprets this provision to mean that both OSM and States have broad discretion in formulating these regulations, including inspection measures. The promulgated regulation affords State regulatory authorities the flexibility to determine a frequency of inspections which reflects regional differences in the surface impacts of exploration activities.

One commenter supported the requirement in proposed paragraph (d)(2) for a mandatory on-site follow-up investigation within three days after the observation of any potential violation during an aerial inspection. This commenter stated that such prompt follow-up is necessary to ensure that violations will be cited and provable. Another commenter stated that allowing three days to cite the violation conflicts with the Act's requirement that every violation be cited immediately. On the other hand, two commenters stated that the on-site follow-up inspection should be done within three days only "where possible" because aerial inspections may detect numerous potential violations which could not be followed up within three days. Another commenter stated that it should be clarified that where an aerial inspection identifies a violation (as opposed to a potential violation), an on-site follow-up inspection is not necessary.

OSM believes that a three-day deadline for an on-site follow-up of an aerial inspection is appropriate, and has adopted the proposal. While on-site follow-up inspections should be performed promptly, OSM agrees that if numerous potential violations are detected at a number of locations, it may take as long as three days to conduct all required follow-up inspections. OSM also agrees that, when an aerial inspection clearly identifies a violation, an on-site follow-up inspection may not be necessary. In such a case, the regulatory authority should promptly issue a citation for the violation based on the aerial inspection. An on-site follow-up inspection is mandatory only when a potential violation which requires closer inspection is detected from the air.

One commenter stated that OSM should clarify that the on-site follow-up inspection required by paragraph (d)(2) should not count as a second inspection for purposes of the required "average" of not less than one partial inspection per month required under paragraph (a). This commenter reasoned that, since the aerial inspection in which potential violations are observed is ineffective without the on-the-ground follow-up, counting both of them would violate section 517(c) of the Act.

OSM agrees that an on-site follow-up inspection should not count as a separate partial inspection for the purpose of meeting the monthly average required under paragraph (a), and has modified paragraph (d) accordingly. OSM does not agree with the commenter's rationale, however. OSM believes that, rather than being ineffective, aerial inspections are simply incomplete until any potential violations observed from the air are confirmed by an on-site follow-up inspection.

Two commenters noted that the requirement in paragraph (e)(1) for access to the mine site on weekends and holidays is impracticable because a supervisor must accompany the inspector and a supervisor may not always be available at those times.

OSM disagrees. Nothing in the Act or OSM's regulations requires that a mine supervisor accompany an inspector on an inspection.

One commenter opposed the change in paragraph (e)(2) from "person being inspected" to "permittee" because it would be ambiguous as to whether unpermitted operators are covered. A second commenter opposed paragraph (e)(2) as inconsistent with Congress' intent to prohibit the State from providing prior notice to the person being inspected. This second comment distinguished the rule of *Claypool Construction Company v. OSM* (1 IBSMA 259, September 26, 1979) (see discussion of this issue in the preamble to the proposed rules, 46 FR 58465, December 1, 1981), on the basis that the situations contemplated by this rule involve State programs, rather than OSM's regulations. The same commenter also

opposed the proposal to use the phrase "approved State program" in paragraph (e)(3) because it does not cover certain terms and purposes of the Act which sections 503 and 517 require to be enforced.

OSM disagrees with these comments. The term "permittee" is defined in 30 CFR 700.5 to include persons who are required to have a permit as well as those who in fact have a permit. Thus, a person who fails to obtain a required permit is nevertheless a "permittee" under this definition. As for the question of prior notice, the language employed in paragraph (e) is essentially the same as that found in section 517(c)(2) of the Act, and clearly requires that prior notice is not to be given except for necessary on-site meetings with the permittee.

The phrase "approved State program" has been adopted in the rule. A State program approved by OSM in accordance with the Act encompasses all of the requirements, terms and purposes of the Act which a State is expected to enforce and carry out.

Another commenter stated that in paragraph (e)(3), which requires "prompt" filing of inspection reports adequate to "enforce" the State's program, OSM should delete "prompt" because it has no precise meaning, and substitute "meet" for "enforce" because inspection reports are filed to meet, not enforce, State program requirements.

OSM disagrees. The word "enforce" is appropriate because inspection reports are a part of enforcement necessary to ensure that the regulatory program's requirements are being carried out by the permittee. The word "enforce" is also used in section 517(c)(3) of the Act, which is the basis for paragraph (e)(3). The word "prompt," although not found in section 517(c), properly requires States to act expeditiously in filing inspection reports.

3. SECTION 840.12 - RIGHT OF ENTRY.

OSM is promulgating this section as proposed. Paragraphs (a) and (b) will now require the State regulatory authority to "have authority," rather than "have statutory authority," to enter upon surface coal mining operations. OSM does not believe that a State statute necessarily provides the only basis for a right of entry. State programs may set forth other valid bases of such authority.

In paragraph (b), the phrase "the approved State program" replaces the former reference to "the Act, this Chapter, the State program, the exploration approval, or the permit." This change has been made throughout these rules; no substantive change is intended.

Four commenters stated that warrantless inspections are required and have been judicially upheld, and that OSM should require States to have statutory authority for such inspections. These commenters contended that reliance on State common law provides inadequate assurance that warrantless searches will be upheld by State courts in the future. Four other commenters wrote that a State should have discretion to require search warrants where its laws so provide because the Act does not require warrantless searches.

Although OSM agrees that the Act requires States to be able to conduct warrantless inspections, as discussed above, OSM does not believe that it is necessary to require that a State's authority to conduct warrantless inspections be based on statute. OSM will not disapprove a State program on the basis of speculation that a State court may not in the future uphold a State's authority to conduct warrantless inspections. In such an event, the State would have to modify its laws to provide for warrantless inspections or face termination of its program under Section 504 of the Act.

Two of these commenters also stated that Section 840.12 should require an inspector to present his credentials to the person in charge of the operation at the time of an inspection.

OSM disagrees. It is OSM's policy, in the absence of extenuating circumstances, that its inspectors present their credentials to the person in charge at a site. (See *Consolidation Coal Co. v. Watt*, Civ. No. 80-3037, S.D. Ill., filed February 8, 1982. See also the discussion of this issue in the preamble to Section 842.13, below.) If no such person is present, the inspectors should proceed to conduct their inspections. OSM expects States to follow this policy.

These same two commenters also stated that OSM should require that all inspectors be employees of the State or OSM. They stated that third-party contractors are not subject to the confidentiality and tort liability standards of State

and Federal employees, and their use would violate the constitutional requirements that searches and inspections be conducted only by government agents.

OSM agrees that all inspectors must be duly authorized representatives of the appropriate governmental agency. OSM is not aware of any instance in which a State has proposed to have its inspections conducted by individuals other than State employees.

One commenter stated that OSM should require that duplication of records be paid for by the State regulatory authority because small company budgets could be seriously affected by unexpectedly large copying requests.

OSM disagrees. OSM has no authority to require States to pay for duplicating records which operators are required by law to submit. Of course, States have the option to provide this service if they so desire.

4. SECTION 840.13 - ENFORCEMENT AUTHORITY.

The minor grammatical changes proposed for this section are being promulgated. An additional modification is also being made based on comments received, as discussed below.

Two commenters objected to the transfer of the reference to bonding (30 CFR Part 808) from paragraph (b) to paragraph (c). Both stated that State bond forfeiture sanctions must be consistent with those of the Federal government, as required by section 503(a)(2) of the Act.

The commenters are incorrect; there was no proposed transfer of the reference to Part 808 from paragraph (b) to paragraph (c). In both paragraphs, the references to 30 CFR Part 808 are replaced by reference to 30 CFR Subchapter J, which contains Part 808.

Two commenters suggested that OSM indicate that although State programs must have penalties as stringent as those provided by the Act, they may nevertheless differ in format from the Federal scheme.

OSM agrees. Judge Thomas Flannery held, in *In re: Permanent Surface Mining Regulation Litigation*, Civ. No. 79-1144, D.D.C., February 26, 1980 at p. 15, on appeal Civ. No. 80-1810 et seq., D.C. Cir., that OSM has no authority to require State programs to include a civil penalty scheme identical to OSM's.

In response to the decision, on August 4, 1980 (*45 FR 51548*) OSM suspended Section 732.15(b)(7) and 840.13(a) insofar as both regulations required State programs to establish a point system for assessing civil penalties or to impose civil penalties as stringent as those appearing in 30 CFR 843.15. States must, however, apply the four criteria for civil penalties included in section 518(a) of the Act, and employ procedures which are the same as or similar to those contained in 30 CFR 845.17 through 845.20. States also must assess a penalty for all cessation orders, including a minimum of \$750 per day for a cessation order issued for failure to abate a previously-cited violation (see section 518(h) of the Act). Generally, section 518(i) of the Act requires State programs to incorporate the penalties and procedures of section 518 of the Act.

Several commenters noted that paragraph (b) refers to Section 843.19, which does not exist.

The reference to Section 843.19 has been deleted.

5. SECTION 840.14 - AVAILABILITY OF RECORDS.

As described below, OSM has amended paragraph (c) to allow the mailing of responses to requests for information submitted by interested persons. This will assist States, principally in the West, which do not have offices throughout coal mining regions. Paragraph (b) limits the time during which records must be made immediately available to the public in the area of mining to five years after expiration of the period during which an operation is active or covered by any portion of a reclamation bond.

Three commenters stated that the proposal to allow mailing of records violates section 517(f) of the Act, which requires records to be "conveniently available" in "central and sufficient" locations. These commenters noted that,

without a way to review the files, residents cannot intelligently request particular documents. One commenter stated that citizens should be able to obtain an index to records. Two commenters stated that the State should be able to charge for mailing and copying documents, except in cases of hardship.

OSM believes that allowing States the alternative of mailing records to persons who request them satisfies the requirement of section 517(f) of the Act that such records be made conveniently available to residents in the area of mining. Using the mailing method actually affords greater convenience to interested persons than does placing the records in an office. OSM agrees, however, that a description of the records available and how to obtain them by mail should be provided in each county so that interested persons may conveniently determine what is in fact available.

This requirement can be found in paragraph (c)(2). OSM does not believe that it would be proper for States to charge for copying and mailing services where the State exercises its option to mail documents, since this might inhibit persons from requesting documents which they are entitled to inspect.

One commenter stated that records should be available to the public only through Reclamation Phase II as defined in Section 807.12(e), and not through the entire reclamation bond period, as was proposed. On the other hand, three commenters stated that there should be no limit on the public availability of records because such constraints could preclude access to records necessary to develop a pattern of non-enforcement under sections 525 or 521. These commenters contended that such data is also essential in the preparation of petitions filed under section 522 of the Act (to designate lands unsuitable for mining), and that microfiche and data-base search methods could mitigate concerns about cost and storage space.

OSM agrees in part. In response to these latter comments, paragraph (b) has been modified to require maintenance of these records for at least five years beyond the full release of the bond.

One commenter recommended deletion of paragraph (d) on the ground that "agreements" to limit public access to OSM-held documents violate section 517(f) of the Act and may conflict with OSM's procedures regarding discovery (43 CFR Part 4.1130 et seq.), which vest authority in the administrative law judge to determine procedures for handling information involved in administrative proceedings.

OSM disagrees with this comment. No change was proposed to be made to Paragraph (d). In addition, regulatory authorities routinely cooperate with each other concerning the handling of investigations and enforcement actions. This cooperation is not intended to abridge the provisions of section 517(f).

Comments were received which recommended that (1) OSM replace "immediately" with "reasonably" in paragraph (b); (2) OSM limit public availability of records to those which the operator is required to maintain, and not those which he or she maintains for his own purposes; (3) OSM change "county" in paragraph (c)(1) to "area" since some States do not have offices in each county; and (4) OSM should clarify that, where records are available at a county office, the State may charge for mailing and copying expenses.

OSM disagrees with these comments. It is implicit in the regulations that those records which are required to be publicly available are only those which the Act and these regulations require to be submitted. If an operator has records which are extraneous to the requirements and purposes of the Act and these regulations, the question of their public availability is up to the State regulatory authority. Offices where records must be made publicly available in the area of mining include public offices (such as courthouses) and are not limited to offices of the regulatory authority. In some States, however, it is conceivable that one area office may actually be at least as convenient to interested persons as would several county offices. OSM is willing to consider this alternative on a State-by-State basis, through the State program review process.

As for the word "immediately" contained in paragraph (d), section 517(f) of the Act allows for no lesser standard of availability.

Finally, nothing in Section 840.14 would prohibit a State from imposing reasonable charges for mailing and copying of records which are publicly available for inspection at the appropriate county office.

5. SECTION 840.15 - PUBLIC PARTICIPATION

OSM proposed two changes to this section: State programs would not be required to (1) grant citizens the right to participate in inspections which result from citizens' requests; and (2) provide for citizen suits in State courts similar to the provision for citizens' suits found in Section 520 of the Act. Similar changes were proposed to Section 732.15(b)(10) in the December 4, 1981 notice (see Background, above). After considering the issues raised by these proposals, together with the public comments, OSM has decided not to adopt these proposed changes. See Notice of Intent, *47 FR 17269* (April 21, 1982). OSM's reasons for this decision are given below, in its responses to the public comments received for these proposals.

On June 25, 1982 (see Proposed Rules, *47 FR 27699*), OSM proposed Section 773.17(d) and indicated it was proposing to delete the requirement in existing Section 786.27(b)(2) that provides that private persons may accompany a State or Federal inspector when the inspection is in response to an alleged violation reported by that person.

Based on OSM's decision, the proposed deletion in Section 786.27(b)(2) will not be made and the existing condition of permit issuance, that a private person reporting an alleged violation be allowed to accompany an inspector, will be retained.

In addition to proposing these two changes, OSM invited public comment on the question whether to grant the petition of the State of Colorado to amend OSM's interpretation of Section 840.15. OSM presently requires State programs to provide for the award of appropriate costs and expenses, including attorneys' fees, consistent with 43 CFR 4.1294(b). In the same Notice of Intent referred to above, OSM announced that it is deferring a decision on the petition, and will respond to all comments in a later rulemaking.

The two proposed changes to this section concerning citizen participation generated more comments than any other aspect of the proposal. After reviewing the comments and the issues raised by the proposals, OSM has decided to retain without change Section 840.15 and its preamble (*44 FR 15297*), and the citizens' rights provisions of Section 732.15 and its preamble (*44 FR 14965*).

(a) Citizens' Right to Accompany Inspector.

Those opposing the proposal to eliminate the right of a citizen to accompany an inspector during an inspection resulting from information provided by that citizen stated that this right is contained in section 521(a)(1) of the Act, which pertains to Federal inspections, and section 521(d), which requires that State programs contain "the same or similar" procedural requirements relating to enforcement. These commenters stated that Congress provided, and Judge Flannery held, that citizen access is a proper condition for approval of a State program.

These commenters also stated that the proposal violates the purpose of section 102(i) of the Act to assure public participation in the enforcement of surface coal mining regulatory programs. Citizen participation in inspections reduces OSM's oversight burden and does not compromise the operator's legitimate business interests. The commenters pointed out that citizens have contributed to the effectiveness of enforcement under the interim program, and that Congress certainly did not intend to return primary regulatory responsibility to the States without providing this safeguard.

Finally, these commenters stated that the proposal would add to the problem of State program credibility and strain the fragile relationship between industry and citizens on the local level.

Those supporting the proposal stated that section 521(a)(1) of the Act clearly restricts citizen accompaniment of inspectors to Federal inspections. These commenters stated that Congress' objective of assuring adequate citizen participation in enforcement proceedings is achieved through section 521(a)(1) of the Act, which creates a Federal oversight role in which the citizen is involved. Moreover, the proposal is consistent with Congress' judicially recognized desire to vest in the States primary regulatory and decision making authority.

OSM has carefully examined the question of citizen access under State programs. OSM agrees with these commenters that section 521(a)(1) of the Act, considered alone, refers only to Federal inspections. However, when section 521(a)(1) is read in conjunction with section 521(d), it becomes evident that the citizen access provisions of section 521(a)(1) are also applicable to State programs. Section 521(d) requires that State programs include procedures which are the same as

or similar to enforcement procedures contained in the Act. The citizen access provisions of section 521(a)(1) are included among such enforcement procedures. This was the express holding of Judge Flannery in *In Re: Permanent Surface Mining Regulation Litigation*, cited above.

For a discussion of the legislative history pertaining to public participation in enforcement, see the preamble to Section 840.15 (*44 FR 15297*, March 13, 1979).

Two commenters who opposed the proposal recommended that OSM address industry concerns by (1) clarifying the operator's liability for any harm a citizen may suffer while on the site, (2) limiting a citizen's access to that area on the site related to the complaint, (3) limiting the number of persons who may accompany an inspector, and (4) providing reasonable protection against disclosure of confidential information.

OSM does not agree that Section 840.15 should attempt to address these matters. As for the question of confidentiality, States may not classify as confidential any material submitted under the Act which is not permitted by Federal law to be held confidential. The question of operator liability for injuries a person may suffer while on a mine site is one to be decided under general principles of State tort law. OSM does agree that a State may not adopt a different standard of liability for citizens who accompany inspectors on inspections than for others. With respect to the other concerns expressed by these commenters, OSM does not intend to place specific limitations on State regulatory authorities. Since States have the primary responsibility for providing citizen access consistent with Section 840.15, they may develop reasonable regulations on these matters, subject to OSM's program review authority.

(b) Citizen Suits in State Courts.

Those commenters opposing the proposal to eliminate the citizen suit provisions of section 520 of the Act as a requirement of State programs contended that these are enforcement provisions. It was asserted that those provisions are a requirement of State programs under section 521(d) of the Act and State programs must include similar provisions which are "no less stringent" than those contained in the Act. These commenters asserted that the proposal would thus violate the Act. The commenters added that the Senate report and floor debates list citizen suit provisions as a requirement of State programs.

OSM agrees that the legislative history of the Act indicates that Congress intended provisions for citizen suits in State courts to be a requirement of State programs. Representative Morris K. Udall, a primary sponsor of the Act, described State programs as including "enforcement, administrative and judicial review; public notice and hearing; citizen suits * * * 123 Cong. Rec. 24422 (1977). Additional discussion of the legislative history pertaining to public participation in enforcement actions under the Act is set forth in the preamble to Section 840.15 (*44 FR 15297*, March 13, 1979). OSM is therefore retaining the existing language and interpretation of Section 840.15 in this respect. OSM believes that the commenters are mistaken, however, in their characterization of citizen suits as being enforcement provisions which, under section 521(d) of the Act, States must duplicate with "no less stringent" provisions. The "no less stringent" standard applies only to the sanctions called for under section 521. Citizen suits, under section 520, are enforcement procedures as Judge Flannery expressly held in *In Re: Permanent Surface Mining Regulation Litigation*, cited above. The standard which the Act requires and the court upheld as applicable to enforcement procedures, should be the "same or similar" standard contained in section 521(d). This standard will be employed by OSM in reviewing State programs on this subject.

Two commenters stated that eliminating citizens' recourse to State courts would undermine State primacy by forcing citizens to seek Federal review in routine enforcement matters. Thus there would be more suits filed in Federal courts, more requests for Federal inspections pursuant to sections 517(h) and 521(a)(1) of the Act, and less direct interaction between citizens and State officials.

OSM agrees. One of OSM's primary goals in retaining the language and interpretation of Section 840.15 is to encourage more direct interaction between interested persons and State officials. The public's concerns about the adequacy of State enforcement efforts should be resolved at the State level wherever possible. OSM is hopeful that this approach will result in less Federal enforcement and litigation.

Those supporting the proposal to eliminate citizens' recourse to State courts commented that section 520 of the Act, which creates the Federal citizen suit provision, make no mention that such a provision is a condition of State program

approval. They contended that it merely creates Federal-court jurisdiction of a statutorily-created cause of action. Moreover, these commenters stated, the present rule unconstitutionally intrudes on the States' sovereign power by requiring States to expand the jurisdiction of their courts to entertain citizen suits.

OSM agrees that section 520 of the Act refers only to suits in Federal courts, and does not expressly require similar proceedings in State courts as a condition of State program approval. As explained above, however, the District Court held in *In Re: Permanent Surface Mining Regulation Litigation* (cited above), that citizen suits are enforcement procedures which, under section 521(d) of the Act, must be incorporated into State programs under the "same or similar" standard.

OSM does not agree that Section 840.15 unconstitutionally intrudes on a State's sovereign power by requiring expansion of State court jurisdiction to include citizen suits against the regulatory authority. By establishing a comprehensive program to regulate surface coal mining operations, Congress has preempted this area of regulation. States may engage in this area of regulation, but they must do so in accordance with the conditions specified by Congress. A provision for citizens' suits in State courts, the same as or similar to that provided for in section 520 of the Act, is one such condition. If States desire to retain regulatory authority over surface coal mining operations, they must allow citizens' suits in their courts.

6. SECTION 840.16 - COMPLIANCE CONFERENCE.

Proposed Section 840.16 would authorize the inclusion in a State program of a provision for "compliance conferences," in an effort to provide guidance to surface coal mine operators in conforming planned activities to the requirements of the Act. OSM is promulgating new Section 840.16 as proposed, with one modification concerning the manner and frequency of compliance conferences, discussed below.

Six commenters objected to compliance conferences, stating that they (1) would be an unwarranted subsidy of operators by providing free engineering advice that should be obtained in the private marketplace; (2) would drain OSM and State resources away from statutory responsibilities; (3) are unnecessary under the permanent program because any proposed practices will have been planned and approved by the regulatory authority; and (4) will be likely to lead to violations of section 521(a)(3) of the Act, since in practice no regulatory authority will cite a violation which it has discussed with an operator where the operator is taking some action to abate it. It was suggested that an operator could assert that a State is estopped from penalizing it for violations found during an inspection where such violations had been overlooked or expressly excused at a prior compliance conference. These commenters would have States ensure that a compliance conference (1) not constitute an inspection under Section 517 of the Act; (2) may be refused by the regulatory authority for any reason; (3) pertain only to prospective conditions; (4) be limited to one per year; and (5) not affect the amount of any assessment. Another commenter, while supporting the concept of compliance conferences, would delete this section because States are already using them and there are no problems which call for OSM regulation.

Twelve commenters generally supported compliance conferences, but most argued that the provisions should be made more flexible by (1) permitting them to cover existing conditions, as well as proposed practices and new mines, and (2) increasing or removing the allowable frequency of compliance conferences, because a particular operation may encounter unique or recurring technical problems which warrant multiple conferences.

Several commenters opposed limiting the use of compliance conferences to newly opened mines. OSM agrees and has not adopted regulations to limit compliance conferences to newly opened mines.

Several of these commenters also stated that the conferences would be most useful if they were conducted by technical personnel, rather than inspectors. They stated that, to be fair, an operator should be able to rely on the representations of technical personnel with regard to any condition reviewed at the conference. Four other commenters suggested that the State determine whether to use technical persons or inspectors. One commenter stated that the State must provide reasons for refusing to hold a conference in order to ensure equal treatment. Three other commenters argued that the State must be required to hold such conferences upon request, and another stated that the State should also be able to request compliance conferences.

OSM believes compliance conferences, if conducted within certain minimum guidelines, are not inconsistent with the terms and requirements of the Act, and can serve as a means to encourage and facilitate compliance with the regulatory

program. OSM believes that compliance conferences should only address prospective activities; however, any violation observed must be cited. The compliance conference cannot affect the enforcement rights and obligations of the regulatory authority or the validity of any enforcement action taken, and are not considered as inspections required under Section 840.11.

Beyond these basic guidelines, OSM agrees that the manner and frequency of compliance conferences are best left to the discretion of the regulatory authority. OSM plans to review the use of compliance conferences as part of the oversight process, and if abuses or problems develop, it will take appropriate action to correct them. The final rule has been modified to reflect this approach, by not adopting the proposed requirement that a maximum of one compliance conference be held in any six-month period.

7. SECTION 842.11 - FEDERAL INSPECTIONS AND MONITORING.

Several changes are being adopted as proposed for Section 842.11. Paragraph (a)(1) requires joint OSM -- State regulatory authority inspections, where practical and where the State so requests. This change does not affect OSM's obligations under the Act to conduct inspections, with or without State inspectors. Paragraph (c) enables OSM to include aerial inspections within its schedule of partial inspections, as provided for State programs under 30 CFR 840.11, discussed above. Paragraphs (c) (1) and (2) allow OSM to establish different frequencies of inspection between active and inactive mine sites. This change is based on OSM's experience that inactive mine sites present fewer problems than active mines. Paragraph (c)(3) expressly limits regulatory jurisdiction over coal exploration operations to those operations which substantially disturb the natural land surface, in accordance with section 512(a) of the Act. The remaining changes to this section are similar to the grammatical revisions adopted in 30 CFR 840.11, discussed above, and do not involve substantive changes.

Finally, one change is being made in paragraph (c)(2)(ii)(B) based on a comment, as discussed below.

One commenter proposed that Section 842.11(a)(2) should be limited by including the phrase "when the Office is the regulatory authority" However, this proposal is outside the scope of this rulemaking. OSM agrees with the essence of the comment. OSM will conduct inspections as necessary to develop or enforce a Federal program or a Federal lands program. When there is a cooperative agreement for Federal lands with the State regulatory authority, inspections will be conducted as necessary and as stipulated in the cooperative agreement.

Several commenters opposed the provision for joint State and Federal inspections as violative of section 517 of the Act. They contended that this provision would impede Federal evaluation of a State's administration of its program, and exacerbate both State and Federal staffing problems with duplicative efforts. Two of these commenters stated that if the joint inspection concept is promulgated, it should be entirely discretionary with OSM, and should require that a specific percentage (such as 50-75%) of the oversight inspections be conducted only by OSM.

The several commenters who supported the proposal stated that joint inspections would lead to more accurate Federal evaluations of State enforcement because the State inspector could explain his actions and thereby eliminate misunderstandings.

OSM appreciates the concerns of those commenters who oppose joint inspections. However, the Act does not prohibit joint inspections. OSM notes that the provision for joint inspections "where practical" is intended to allow OSM to determine the extent to which joint inspections might hamper OSM's responsibility to conduct inspections "necessary to evaluate the administration of approved State programs," as required by section 517(a) of the Act. OSM will not conduct joint inspections where the State regulatory authority is necessary for effective oversight.

Several commenters stated that the distinction between active and inactive mines violates section 517(a) of the Act, which requires the regular inspection of "surface coal mining and reclamation operations," and section 517(c), which requires that the annual frequency of inspection be twelve partial and four complete inspections for each permitted surface coal mining operation. One of these commenters stated that inactive sites often require more, not less, scrutiny because sedimentation ponds are not regularly dredged, slides may develop, and water quality is not regularly monitored. At the very least, this commenter concluded, OSM should determine how many mines qualify as "inactive," and provide that the inactive status of any mine be denied or revoked if any outstanding violation exists or if two violations occur within any one year.

For the most part, OSM disagrees with these comments. In administering the Act and regulations, OSM has found that, in general, inactive mines present fewer problems than active mines, and consequently do not require the same frequency of inspections as active mines. Other than in situations involving temporary cessation of mining, reclamation on inactive mines will be in Phase III, which is the minimum five- or ten-year period of operator responsibility for vegetation. OSM believes that an average of one complete inspection per calendar quarter is sufficient during this period, and accordingly is promulgating Section 842.11(c) as proposed. Monthly partial inspections will not be required for inactive mines; however, in cases where the nature of the site or the past history of compliance suggest that more frequent inspections are needed to enforce effectively the regulatory program, OSM will perform them. The rule has been modified to reflect this principle. OSM believes that this rule is reasonable and consistent with the Act.

Several commenters supported the distinction between active and inactive mines, but recommended that reference to the percentage of liability of the permittee relative to the performance bond for Reclamation Phase II (proposed paragraph(c)(2)(ii)(B)) be deleted. It was argued that tying less frequent inspections to actual reduction of liability may cause OSM to continue monthly inspections long after Phase II reclamation is completed.

OSM agrees. In view of the broad discretion granted to OSM in releasing a portion of the performance bond following completion of Reclamation Phases I and II, the determination of a mine's status as active or inactive should be based solely on the completion of Reclamation Phase II. Section 842.11(c)(2)(iii)(B) has been modified accordingly.

Another commenter would permit portions of active surface mining operations to be treated as inactive.

OSM agrees in part; to the extent that reclamation is being conducted in discrete increments, those portions of the permit area on which reclamation Phase II is complete may be treated as inactive for purposes of Section 842.11.

One commenter would amend this section to include abandoned sites as inspectible units in Reclamation Phase III, since this phase occurs only after all mining has ceased.

OSM disagrees. The fact that a mine has been abandoned does not mean that it is in compliance or that there is no one against whom enforcement action can be taken. Thus a reduction in inspection frequency would be inappropriate.

One commenter stated that the phrase "to enforce any requirement of the Act" should be restored to Section 842.11(b)(1) to make the enforcement purpose explicit.

OSM disagrees. Since the bases and purposes of Federal inspections are set forth in paragraphs (b), (c) and (d) of Section 842.11, the deleted language was superfluous.

Another commenter would substitute "alleged" for "possible" in Section 842.11(b)(1)(ii)(B) because the word "possible" triggers OSM's inspection authority on too speculative a basis and the word "alleged" more clearly reflects section 521(a) of the Act.

OSM disagrees. OSM is required to conduct an inspection when it has "reason to believe" that a violation exists. The basis for such a belief may or may not involve an affirmative allegation. Moreover, considering the broad language of section 521(a) of the Act, OSM inspections are necessarily "speculative" until it is determined whether or not a violation exists.

Another commenter stated that OSM must have probable cause to believe the informant's statements are true before acting under Section 842.11(b), and must specify in greater detail what "appropriate action" the State must take to preclude Federal action.

OSM disagrees. Section 842.11(b)(1)(i) requires the Secretary's authorized representative to have "reason to believe on the basis of information available to him or her" that a violation exists. This language is found in section 521(a)(1) of the Act and does not require OSM to conduct an inquiry into the veracity of the complainant. OSM also disagrees with the suggestion that "appropriate action" should be spelled out in greater detail. The crucial response of a State is to take whatever enforcement action is necessary to secure abatement of the violation.

Another commenter stated that the introductory paragraph to Section 842.11(c) should replace "Part 733" with "to the extent required by Section 733.12(f)" to clarify that Federal inspections will occur only when necessary for OSM to perform its duties under sections 504(b) and 521(b) of the Act.

OSM disagrees. Section 842.11(c) specifically provides that inspections under that Section shall be conducted when OSM is " * * * enforcing a State program, in whole or in part, pursuant to section 504(b) or section 521(b) of the Act and Part 733 of this chapter * * *" Part 733 establishes the procedures for substituting Federal enforcement of State programs or withdrawing approval of State programs under sections 504(b) and 521(b) of the Act, and thus is properly cited.

Finally, two commenters stated that OSM should specify which operations Section 842.11(c)(3) "substantially" disturb the natural land surface sufficiently to give OSM jurisdiction.

OSM has proposed amendments to its coal exploration regulations (30 CFR Parts 772 and 815) and to the definitions (30 CFR 701.5) which will clarify the meaning of the term "substantially disturb." See *47 FR 21442*, May 18 1982.

10. SECTION 842.12 - CITIZENS' REQUESTS FOR FEDERAL INSPECTIONS.

The principal change proposed for Section 842.12 was to require a person who requests a Federal inspection, pursuant to section 521(a)(1) of the Act, to initially contact the State regulatory authority (if any), and to notify OSM that the State regulatory authority failed to take appropriate action.

OSM has decided to adopt a modified version of its proposal. Under revised Section 842.12(b), a person who requests a Federal inspection is required to notify the State regulatory authority in writing prior to, or simultaneously with, his or her request to OSM. However, the person is not required to wait for any action to be taken by the State regulatory authority before requesting a Federal inspection.

This change was made in response to the comments of four persons who opposed the proposal to require that a citizen seeking a Federal inspection initially contact the State, stating that it violates section 521(a) of the Act, which specifies that it is OSM's responsibility to notify the State, not the citizen's. These commenters noted that OSM has previously recognized (in the earlier preamble to the existing regulation) that there was no authority for such a requirement.

OSM believes that it is consistent with the Act to require persons to contact the State regulatory authority prior to, or simultaneously with, requesting a Federal inspection. OSM has been, and will continue to be, required to notify the State regulatory authority under the procedures of Section 842.11(b)(1). However, imposition of this citizen notification requirement will enhance the protection of citizens by giving the State an earlier opportunity to act. Information from a person can be transmitted to a State regulatory authority quickly and accurately when a citizen communicates directly with the State. OSM believes that if citizens contact the State initially, most problems will be resolved satisfactorily without the need for intrusion by the Federal government.

If a Federal inspection is required in a particular instance, there need not be any delay caused by requiring the person to notify the State, because such notification can be made at the same time the person requests the Federal inspection.

Another commenter requested that OSM explain what "appropriate action" the State must fail to take before the citizen could request a Federal inspection.

What constitutes appropriate State action is not relevant to the revision adopted because the citizen is not required to wait for the failure of the State regulatory authority to take appropriate action, as was proposed.

Six commenters supported the citizen complaint proposal generally, and several argued that under section 517(h)(1) of the Act only a citizen who is or may be adversely affected may request a Federal inspection. One of these commenters would also delete the reference to "possible violations" from paragraph (b) to reduce the number of spurious complaints likely to arise. This same commenter would also change paragraph (d) to clarify that there is no authority for a Federal inspector to issue a notice of violation when a State program is in effect. Finally, one commenter recommended replacing the term "citizen" in this section with "person" to conform to the statute and eliminate uncertainty.

OSM disagrees with the suggestion to delete the reference to "possible violations" from paragraph (b). Such a change was not proposed and is beyond the scope of this rulemaking. Furthermore, the Act does not require that a person be certain that a violation exists, but only that he have "reason to believe" that one exists. The existing language, thus, reflects the intent of the Act, i.e., that the Secretary inspect where the possibility of violations exists and that the identity of persons providing the information not be disclosed.

OSM will not require that a person requesting a Federal inspection under section 521(a)(1) of the Act be one who "is or may be adversely affected." One purpose of section 521(a)(1) is to bring information concerning possible violations to the attention of the regulatory authority, regardless of whether the source of that information has an affected interest. The question of whether OSM can issue notices of violation when a State program is in effect has been deferred, as will be discussed later in this preamble regarding proposed changes to 30 CFR 843.12(a)(2).

OSM agrees that, since section 521(a)(1) of the Act (which is the basis of this rule) uses the term "person," that term should be used in Section 842.12.

11. SECTION 842.13 - RIGHT OF ENTRY.

All of the changes proposed for Section 842.13 are being adopted. Paragraph (a)(1) is simplified and makes it clear that an authorized representative of the Secretary has a right of entry under the Act onto coal exploration operations when conducting inspections pursuant to 30 CFR 842.11. Paragraph (a)(3) confirms the right of the authorized representative to gather evidence in order to document observed conditions, practices and violations.

One commenter would amend this section (and Section 840.12) to require that all persons entering the mine site have proper training and equipment. Another commenter disagreed because, in the case of a citizen accompanying an inspector, safety concerns are satisfied by the inspector's supervision.

OSM does not completely agree with either of these comments. OSM cannot insist that all persons accompanying a Federal inspector be trained, but it will expect such persons to wear any required safety equipment, and to adhere to any instructions which the OSM inspector may give.

Several commenters supported the creation in paragraph (a)(3) of a right to gather physical and photographic evidence, but one argued that there should be a duty, not just a right, to do so. Two other comments stated that the Act does not mention gathering physical or photographic evidence, and there is no need for the regulations to do so. OSM has promulgated the rule as proposed. The collection of specific evidence is properly left to the sound discretion of the Secretary's authorized representative.

Several commenters stated that the Act imposes upon the inspector the requirement to present appropriate credentials, not just the right of entry to the site as this section implies. Furthermore, this commenter contended, it should be clarified that access is required only to records required by the Act.

OSM agrees that, generally, the presentation of appropriate credentials is a necessary prerequisite for entry to a mine site and also for access to and copying of records, and inspection of monitoring equipment and methods of operation. However, the Act and OSM's regulations clearly contemplate circumstances under which the normal display of credentials prior to inspection might necessarily be postponed (*Consolidation Coal Co. v. Watt*, cited above). For instance, such circumstances would include situations where presentation of credentials would be tantamount to advance notice or where no one is present at the site.

Another commenter would modify paragraph (b) to require a search warrant where necessary under Federal law.

OSM disagrees. Search warrants are not legally required for access to mine sites, except where entry into buildings is otherwise denied by the permittee. In *Re: Surface Mining Regulation Litigation*, 456 F. Supp. 1301, 1317, (D.D.C. 1978). Section 842.13(b) conforms to this principle, and accordingly has not been modified.

12. SECTION 824.14 - REVIEW OF ADEQUACY AND COMPLETENESS OF INSPECTIONS.

This section, which has been rephrased to eliminate redundancy, is being adopted as proposed; no change in effect is intended.

Two commenters objected to deleting the requirement that, where the Director finds that an adequate and complete inspection has not been made, remedial inspections will be ordered. They stated that this requirement was not redundant.

OSM disagrees with all of these comments. Regarding the deletion of language referring to "remedial inspections," OSM believes that 30 CFR 842.11 sufficiently spells out OSM's obligations to conduct adequate and complete inspections. It is redundant to reiterate this obligation in 30 CFR 842.14. If the Director or his or her designee finds that inspectors are not carrying out OSM's responsibilities under these rules, then the Director will take whatever steps are necessary to remedy the situation.

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

New paragraph (d) is being promulgated as proposed with minor editorial changes. This paragraph provides that any determination made under this section constitutes a "Decision of OSM" within the scope of 43 CFR 4.1281, and shall contain a right of appeal to the Office of Hearings and Appeals in accordance with 43 CFR Part 4.

One commenter suggested editorial changes to paragraph (a) to track more closely the language of section 517(h)(1) of the Act, and two other commenters supported the appeal provisions of paragraph (d). One of these commenters stated that the final preamble should clarify that the right to appeal does not grant a permittee the right to appeal a decision to inspect.

OSM believes that the language of Section 842.15 is sufficiently clear and in accordance with the Act so as to render further changes unnecessary. OSM agrees with the comment that a permittee does not have the right to appeal a decision to inspect its operations, since a decision to inspect or enforce does not in itself adversely affect a permittee; the permittee is protected, however, because if an enforcement action is taken during an inspection, the permittee will have appeal rights in respect to that action.

14. SECTION 842.16 - AVAILABILITY OF RECORDS.

OSM is adopting the changes proposed for this section, which were the same as those proposed for Section 840.14. Additional modifications are being made as a result of comments received, and parallel those made to Section 840.14.

Several commenters repeated here recommendations urged under Section 840.14 to: (1) Allow public access only to records required to be kept; and (2) alter the mailing option provisions.

The discussion under Section 840.14 of this preamble responds to these comments. In cases where OSM determines it would be more economical to mail copies of records on request (rather than place them in the county of mining) OSM will maintain a description of records in that county. The promulgated regulation is amended to reflect this approach. Other commenters stated that paragraph (a) should be revised to: (1) Replace the specific exceptions to availability of records with a general exception; (2) require an index of all documents that are withheld; and (3) clarify the phrase "active or as covered by any portion of a reclamation bond" so that records will remain available on illegal operations, abandoned operations, operations for which no bond was posted, and operations on which the bond was forfeited but reclamation never done.

OSM believes it is appropriate to refer to specific exceptions to the availability of records, as has been done in Section 842.16(a). The references to specific exceptions serve to direct persons concerned with the question of availability of records to those exceptions which are likely to be the most relevant. OSM also disagrees that it is necessary to maintain an index of documents that are withheld. The specific exceptions to availability set forth in Section 842.16(a) sufficiently apprise interested persons of the type of information being withheld. Finally, OSM believes that, for the purposes of Section 842.16, the phrase "active or as covered by any portion of a reclamation bond" is sufficiently broad to cover any operation subject to the Act.

PART 843 -- FEDERAL ENFORCEMENT

15. SECTION 843.1 - SCOPE.

No substantive changes were proposed to this section; the reference to Part 845 has been removed as proposed because it was unnecessary.

Two commenters would remove the implication that OSM could enforce an entire State program only if a State program is totally inadequate. These commenters would add "any portions of" before the words "State programs." A third commenter stated that the reference to "the Federal lands program" should be limited to where OSM is acting as the regulatory authority.

OSM agrees with the first comment, and has clarified Section 843.1 by adding the words "in whole or in part." OSM has the authority under sections 504(b) and 521(b) of the Act to enforce whatever parts of a State program are not being adequately enforced by a State. A State's refusal or inability to enforce a part of its program does not necessarily mean that State enforcement is totally inadequate. In fact, the State program may be quite adequate, but for various reasons the State may be failing to enforce some part of it. The Act specifically authorizes OSM to enforce any part of a State program when the State fails to do so. In such a case, OSM will enforce the State's program until the State satisfies the Secretary that it will enforce its program or the Secretary determines that a Federal program should be implemented in that State. With respect to Federal lands, OSM agrees that, where there is an approved State-Federal cooperative agreement established pursuant to 30 CFR Part 745, the State regulatory authority will enforce its program on Federal lands, except as otherwise required by Federal law.

16. SECTION 843.5 - DEFINITIONS.

This new section contains the definitions of "unwarranted failure to comply" and "willful violation" previously found in Section 843.13. The definitions are unchanged.

One commenter would revise the definition of "significant, imminent environmental harm to land, air or water resources" found in Section 701.5. The commenter stated that, since a cessation order is an extreme exercise of government power, the conditions under which such action may be taken should be more precise, understandable and restrained. The present definition, the commenter concluded, could be interpreted to apply to almost any activity related to removing coal or overburden, although Congress recognized that any surface mining operation disturbs the environment. Thus, the commenter suggested that, in determining significant harm, the regulatory authority must consider its intensity, long-lasting effect and geographic scope.

OSM cannot make the changes requested by the commenter in this rulemaking, since these definitions were not proposed to be changed. OSM appreciates the concerns expressed by this commenter and will consider them for possible inclusion in future rulemakings.

17. SECTION 843.11 - CESSATION ORDERS.

Paragraph (a)(2) of Section 843.11, as proposed on December 1, 1981, was promulgated separately on April 29, 1982 (*45 FR 18555*). A summary of the public comments concerning this paragraph and OSM's responses to them are contained in that final rule. The remainder of Section 843.11 is being promulgated at this time as proposed. OSM believes that these changes more closely reflect the provisions for cessation orders contained in section 521 of the Act.

Several commenters objected to deleting from proposed paragraph (a)(3) the requirement for use of "existing or additional personnel and equipment," because section 521(a)(2) of the Act requires OSM to "impose affirmative obligations on the operator requiring him to take whatever steps the Secretary deems necessary to abate the imminent danger or significant environmental harm."

OSM disagrees. OSM does not believe that it is ordinarily appropriate or desirable for it to specify the method of abatement, and thus is removing the language as proposed. It is generally preferable for OSM to state only what must be accomplished (including time limits), and allow the operator to determine the means of achieving abatement. Moreover,

any limitations on a permittee's resources are no defense to a cessation order or notice of violation, since 30 CFR 843.18 expressly provides that inability to comply is no defense.

One commenter submitted editorial changes for paragraphs (a)(1), (a)(3), (b)(1), (b)(2), (c) and (f) to eliminate overbroad language and track the statute more closely.

OSM rejected these suggested changes. The present wording of these paragraphs is, in OSM's opinion, sufficiently specific and meets the intent of the Act.

18. SECTION 843.12 - NOTICES OF VIOLATION

The principal change proposed for Section 843.12 was to modify paragraph (a)(2), in order to raise the question of OSM's authority to issue a notice of violation to a permittee when a State with an approved program fails to take action to abate a violation. OSM has decided to study this question further in the context of the preparation of a supplemental Environmental Impact Statement. (See *47 FR 17269*, April 21, 1982.) Pending a final decision on the matter, OSM is adopting Section 843.12 with all changes as proposed except the change in OSM's authority to issue notices of violation. OSM has issued a notice (*47 FR 20631*, May 13, 1982) providing the public an opportunity to comment further on the question of OSM's authority to issue notices of violation under Section 843.12(a)(2) where a State program is in force.

Several comments were received on extended abatement periods in Sections 843.12(c) and 843.12(f). OSM proposed no change to these sections; therefore, they are outside the scope of this rulemaking. A discussion of the rationale supporting 30 CFR 843.12(c) and (f) is found in the preamble published at *46 FR 41702* (August 17, 1981).

Section 843.12(d), which has been adopted as proposed, removes the mandatory issuance of a cessation order to a permittee who fails to meet an interim abatement step imposed in a notice of violation. Instead, the issuance of a cessation order under these circumstances is discretionary with the authorized representative of the regulatory authority.

Four commenters supported proposed Section 843.12(d). Others opposed it on the basis that failure to accomplish an interim step often means that timely abatement will not occur, and thus the interim step is "necessary to abate the violation in the most expeditious manner possible," as the Act requires. These latter commenters noted that flexibility already exists in setting interim steps in a notice of violation and in extending abatement periods for good cause.

OSM is promulgating this paragraph as proposed. The previous language, which mandated the issuance of a cessation order for failure to meet interim steps specified in a notice of violation, was inflexible and not required by section 521 of the Act. The change promulgated today provides flexibility to establish and enforce interim steps as the authorized representative deems appropriate.

Two commenters would require (under Section 843.12(e)) OSM to reinspect an operation within 30 days after notice from the permittee that violations have been abated. It was urged that operators could be adversely affected by officially unresolved violations in their compliance histories, especially with respect to obtaining future permits.

OSM is not amending its rule to provide a specific time limitation for reinspection. OSM appreciates the concern of the commenters, but believes that its inspectors are able to monitor adequately the status of compliance at an operation, without the need for specific time limitations. Moreover, in most cases reinspection already occurs within 30 days.

19. SECTION 843.13 - SUSPENSION OR REVOCATION OF PERMITS.

OSM is adopting all of the proposed changes to 30 CFR Section 843.13.

Section 843.13(a)(3) is revised to eliminate the mandatory determination by the Director that a pattern of violations exists if he finds that there were violations of the same or related requirements of the Act, regulatory program or permit during three or more Federal inspections of the permit area within any 12-month period. Under the revision if the Director finds such violations, he is required to review promptly the history of violations of the permittee, and make a determination of whether a pattern of violations exists. The key change is that the Director is given discretion in determining the existence of a pattern of violations.

Under previous Section 843.13(b), once the Director determined that a pattern of violations existed, he could only vacate or decline to issue a show cause order based on a finding of demonstrable injustice. Because the Director's discretion in determining the existence of a pattern of violations encompasses a finding of demonstrable injustice, the previous Section 843.13(b) has been removed and the succeeding paragraphs of the section have been redesignated accordingly. The regulation continues to provide that, once a pattern of violations is found to exist, a show cause order must be issued.

Section 843.13(a)(4)(ii) was proposed to be revised to conform to section 521(a)(4) of the Act, which allows a determination of the existence of a pattern of violations to be based only on Federal inspections carried out (1) during enforcement of a Federal program or a Federal lands program; (2) during the interim program and before the applicable State program was approved under section 502 or 504 of the Act; or (3) during Federal enforcement of a State program in accordance with section 504(b) or 521(b) of the Act. Prior to its revision, Section 843.13(a)(4)(ii) allowed the Director to consider violations issued as a result of inspections other than those enumerated above in determining the existence of a pattern of violations. Revised Section 843.13(a)(4)(ii) makes clear that such other violations may be considered only as evidence of whether the pattern of violations was caused by the permittee willfully or through his unwarranted failure to comply, and may not be considered in determining the existence of the pattern itself.

Several commenters supported the proposal for essentially the same reasons stated in OSM's preamble. It was also stated that, because the previous mandatory language of paragraph (a)(3) would not allow the regulatory authority to examine extenuating circumstances, inspectors would be tempted to refrain from issuing a citation where the inspector felt the result would be too harsh.

Two commenters would revise proposed Section 843.13(a)(2) to preclude a finding of a pattern of violations based on violations of different requirements. A third commenter also would delete this paragraph because it is unworkable and the Act provides protection via other provisions against operators who continually and willfully violate conditions of their permits or requirements of the Act.

OSM disagrees with all of these comments. OSM believes that, under appropriate circumstances, a number of violations of different requirements can support a finding of a pattern of violations. OSM has no evidence that Section 843.13(a)(2) is "unworkable." OSM believes that it is a reasonable implementation of section 521(a)(4) of the Act.

Several commenters opposed the proposal to delete the requirement for mandatory show cause orders because it would weaken the show cause provision. One commenter noted that the proposal is unenforceable because there are no circumstances under which a show cause order must issue. That commenter also stated that the "issuance and vacation" problem of a show cause order known to be demonstrably unjust could be avoided by explicitly requiring the Director to find that a show cause order would not be demonstrably unjust under section 521 before determining that a pattern of violations exists. Another commenter stated that this section violates the mandate of section 521(a)(4) for notice and opportunity for hearing upon issuance of a show cause order.

OSM disagrees with all of these comments. The changes in Section 843.13 do not alter OSM's obligation to issue show cause orders for patterns of violation, but they do eliminate issuance of show cause orders under circumstances where such orders would be inappropriate. Nor do they violate section 521(a)(4)'s mandate for notice and opportunity for hearing, which is implemented in the redesignated Section 843.13(b).

One commenter would delete paragraph (a)(4)(i)(B) because violations during an "unsettled" interim program should not lead to suspension or revocation of permanent program rights. Another commenter objected to the requirement in paragraph(c) (1) and (2) for reclamation after suspension or revocation of a permit because if the right to perform "surface coal mining operations" is suspended or revoked, so is the duty to reclaim.

OSM disagrees. Section 521(a)(4) of the Act expressly refers to violations of any requirement of the Act for the purpose of establishing a pattern of violations. This language encompasses the interim program

Regarding reclamation and abatement after the suspension or revocation of a permit, OSM believes that the operator continues to be legally responsible for these tasks. The permit issued under the Act is a permit to mine coal under specified conditions. Suspension of the right to mine does not suspend the obligation to reclaim under the Act.

Reclamation and the abatement of violations are obligations of the permittee which must be satisfied even where cessation of its mining activities is the result of suspension or revocation of its permit.

20. SECTION 843.14 - SERVICE OF NOTICES OF VIOLATION, CESSATION ORDERS, AND SHOW CAUSE ORDERS.

The changes proposed for this section were intended to eliminate unnecessary distinctions between notices of violation, cessation orders and show cause orders with respect to proper service. Other changes were also proposed to achieve greater clarity. This section has been promulgated as proposed.

Several commenters stated that the right to due process under the United States Constitution requires that cessation orders, notices of violation, and orders to show cause be served only on the permittee or its designated agent because other employees at the mine site do not have the authority to accept service of such documents. One commenter, however, supported the proposed service provisions as workable and functional.

OSM appreciates the concern of these commenters, but has decided not to modify this section beyond the changes that were proposed. Section 843.14(b) provides for designation of an agent for service, but service on the designated agent is optional. The Office does not have to serve the designated agent if, for instance, it has served the person in charge of the operation as provided in Section 843.14(a)(1). The Office believes that the operator should be able to rely on its own employees and agents to inform it promptly of the issuance of citations. If requested, OSM would usually mail copies, as a courtesy, to a central office of the permittee. But OSM does not believe that the right to due process requires this.

21. SECTION 843.15 - INFORMAL PUBLIC HEARING

The minor grammatical changes proposed for this section are being adopted; no change in effect is intended. In addition, a change in paragraph (a), described below, is being made, on the basis of a commenter's suggestion.

Two commenters supported the proposal; another stated that the term "mining" used in paragraph (a) is improper under the statute.

OSM does not agree. The word "mining" is used in section 521(a)(5) of the Act, which is the basis for Section 843.15(a).

One commenter would amend paragraph (a) to allow an informal hearing even if a condition has been abated since the operator may nevertheless believe no violation occurred.

OSM disagrees. If an operator believes that it was incorrectly cited for a violation and wants to try to clear its record, the right of review referenced in paragraph (g) is adequate to accomplish this purpose.

22. SECTION 843.19 - INJUNCTIVE RELIEF.

As proposed, this section has been deleted as superfluous. The Secretary's right to seek injunctive relief and the jurisdiction of the United States District Courts to grant such relief are fixed by section 521(c) of the Act.

23. SECTION 843.20 - COMPLIANCE CONFERENCE.

This new section is being promulgated as proposed, except as modified as a result of comments received. The modification of Section 843.20 is the same, and was made for the same reasons, as the modification of Section 840.16, summarized above. The comments on this Section were also identical to those received on Section 840.16. The responses to these comments may be found in the preamble to that section.

PART 845 -- CIVIL PENALTIES

24. SECTION 845.17 - PROCEDURES FOR ASSESSMENT OF CIVIL PENALTIES.

The proposed change to this section provided that OSM's failure to serve any proposed penalty assessment within 30 days after a citation is issued does not require vacation of the assessment, absent actual prejudice to, and objection by, the permittee. This proposal is being adopted.

Three commenters objected to the proposal stating that it violates the requirement of section 518(c) of the Act that OSM "shall inform the operator within 30 days of the proposed amount of (the) penalty." Three commenters supported the proposal because a showing of actual prejudice is important to ensure that inadvertent and non-prejudicial procedural delays do not result in vacation of otherwise proper penalties.

OSM believes that the 30-day-notice provision in section 518(c) of the Act is directory, and not mandatory. An operator should not escape the imposition of a civil penalty merely because the proposed assessment was not served within 30 days. In most such cases, the operator is not harmed by OSM's failure to serve the notice, since the operator is under no obligation to pay the penalty, or contest it, until the notice is served. See *Sahara Coal Co. v. OSM* (3 IBSMA 371 (1981)), in which the Interior Board of Surface Mining and Reclamation Appeals held, with respect to the corresponding provision in the interim regulatory program, that anyone desiring to interpose the failure to serve a proposed assessment within thirty days as a bar to an assessment must show actual prejudice.

25. SECTION 845.18 - PROCEDURES FOR ASSESSMENT CONFERENCE.

The change proposed for this section provided that OSM's failure to hold an assessment conference within 60 days after a request for a conference does not require vacation of the assessment, absent actual prejudice as a result of the delay. This proposal, which implements OSM's interpretation that 30 CFR 845.18(b) is directory rather than mandatory, is being adopted.

One commenter supported the changes, and another would revise paragraph (f) to permit statements of fact made by the parties at the conference to be admissible in any subsequent hearings.

OSM disagrees with the latter comment, and does not believe further changes to Section 845.18 are warranted. Paragraph (f) was not deleted, because OSM desires to encourage informality and open and frank discussion at the assessment conference in order to facilitate a satisfactory settlement. The requested change would require that transcripts be made of conferences and would discourage candid discussions.

A third commenter recommended certain editorial changes, deletion of the second sentence in paragraph (b)(2) on the basis that it lacks statutory support, and deletion of the word "raise" in paragraph (b)(3)(ii) because the conference officer should not be able to second-guess a decision made by his office regarding the maximum amount of the penalty. This commenter would also delete paragraph (e) because it implies that the conference officer's only duties at the conference concern settlement, and paragraph (f) because it is unnecessary given well-recognized pleading and practice rules.

Another commenter would (1) increase the number of days within which an operator must request a conference; (2) delete from paragraph (b)(4) the requirement for approval of penalty changes greater than 25% or \$500; and (3) clarify that the conference officer may attempt to settle and solicit payment.

One commenter stated that 30 days is the minimum reasonable time within which a permittee should be required to decide whether to contest a proposed penalty. Another commenter stated that 15 days (as presently provided) is sufficient since the permittee will already have had more than two months from the time the violation is cited to the time the conference decision is received.

OSM is retaining all of the language as proposed. Discussion of the issues surrounding informal public hearings is contained in the original preamble to 30 CFR 843.15, *44 FR 15304*, (March 13, 1979).

26. SECTION 845.19 - REQUEST FOR HEARING.

In the preamble to the proposed regulations (*46 FR 58468*), OSM stated it was considering a provision for waiver of the penalty prepayment requirement of this section where prepayment would prevent the person charged with the penalty from continuing in business. OSM also stated that it was considering, as an alternative, an amendment to this section which would require prepayment by all permittees only with respect to proceedings which occur after an administrative law judge has determined that a penalty is lawfully due. The basis for both approaches was OSM's concern that rigid adherence to the present rule may violate constitutional due process requirements. OSM solicited public comments on this issue. After further study of the issue and the public comments received, OSM has decided to defer final rulemaking action on this subject. OSM will summarize and respond to all public comments in a subsequent rulemaking action.

27. MISCELLANEOUS ISSUES.

Several commenters addressed parts of the rules for which OSM proposed no change. These comments are summarized below.

One commenter stated generally that OSM should not use civil penalties (Part 845) as a primary enforcement tool, but should reserve civil penalties for violations resulting in cessation orders and use the criminal system for most routine violations.

On the contrary, OSM has found that a mix of civil penalties and criminal sanctions results in the most effective enforcement.

One commenter would increase the State's flexibility in determining the amount of the penalty assessed (Section 845.13). Another commenter would relate the penalties more to the extent of the damage to health, including mandatory restitution of damages. A third commenter recommended that all four categories in the statute receive equal weight.

OSM knows of no authority for an administrative award of damages in restitution. As discussed above, OSM has amended Section 840.13 of these rules to allow States greater flexibility in determining the amount of civil penalties. Nothing in the Act requires that equal weight be given to the four criteria set forth in section 518(a) of the Act.

One commenter asked OSM to identify the "base year" for the value of the dollars used in Section 845.14, and how the dollars are to be adjusted for inflation.

There is no "base year" for the value of the dollars in the schedule contained in Section 845.14. Civil penalties are to be paid when due in the amount determined by the regulatory authority. Amounts are not adjusted for inflation.

One commenter would change Section 845.15(a) to (1) delete the last sentence because it is burdensome and few violations are assigned more than 70 points; and (2) change "date of issuance" to "date of service" to be fair to the operator. Another commenter recommended that an operator be given 30 days, rather than 15, to pay the difference for an increased penalty (Section 824.20(d)).

Although OSM is sympathetic to the substance of these comments, implementation of the suggested rule changes would be beyond the scope of the proposal. OSM stated at *45 FR 58464* that it was "neither proposing substantive change to, nor soliciting comments on" several sections of Subchapter L, including those sections which are the subject of these comments. OSM will, however, consider making these suggestions a part of a later rulemaking action.

The current regulations will remain in effect pending the effective date of these rules.

PROCEDURAL MATTERS

E.O. 12291 and Regulatory Flexibility Act

The Department of the Interior has determined that this document is not a major rule under Executive Order 12291 and does not require a small entity flexibility analysis under the Regulatory Flexibility Act.

National Environmental Policy Act

An environmental assessment (EA) of the cumulative impacts on the human environment of these rules has been prepared, together with a Finding of No Significant Impact (FONSI). These documents are on file in Room 5315, 1100 L Street, N.W., Washington, D.C., and were made publicly available for comment on May 3, 1982 (*47 FR 18920*). A final FONSI covering this rule was issued on July 2, 1982, and pertains to all the issues contained in this rulemaking, other than the issue of OSM's authority to issue notices of violation in oversight.

Paperwork Reduction Act

The information collection requirements contained in 30 CFR Parts 842 and 845 do not require approval by the Office of Management and Budget under *44 U.S.C. 3507*, because there are fewer than 10 respondents.

The information collection requirements in existing 30 CFR Subchapter L were approved by the Office of Management and Budget (OMB) under *44 U.S.C. 3507*. Those approvals were identified in "notes" at the introduction to 30 CFR Parts 840 and 843. OSM has deleted those "notes" and codified the OMB approvals under new Sections 840.10 and 843.10.

The information required by 30 CFR Part 840 will be used by States in assessing penalties, as evidence in enforcement cases and as an inspection management record. The information required by 30 CFR Part 843 is needed to ensure that violations can be corrected in a timely manner, to afford the operator an opportunity to respond to those violations, and to provide fairness in the enforcement process. The information required by 30 CFR Parts 840 and 843 is mandatory.

Drafting Information: These regulations were drafted by Murray Newton, Chief, Branch of Regulatory Programs, and Neil Stoloff, Enforcement Specialist, Branch of Inspection.

LIST OF SUBJECTS

30 CFR Part 840

Coal mining, Intergovernmental relations, Law enforcement, Reporting requirements, Surface mining, Underground mining;

30 CFR Part 842

Coal mining, Law enforcement, Surface mining, Underground mining;

30 CFR Part 843

Administrative practice and procedure, Coal mining, Law enforcement, Reporting requirements, Surface mining, Underground mining;

30 CFR Part 845

Administrative practice and procedure, Coal mining, Law enforcement, Penalties, Surface mining, Underground mining.

Accordingly, for the reasons contained in this preamble, 30 CFR Parts 840, 842, 843 and 845 are amended as set forth herein.

Dated: July 14, 1982.

William P. Pendley, Deputy Assistant Secretary, Energy and Minerals.

Subchapter L of 30 CFR, consisting of Parts 840, 842, 843 and 845, is revised as follows:

SUBCHAPTER L -- PERMANENT PROGRAM INSPECTION AND ENFORCEMENT PROCEDURES

PART 840 -- STATE REGULATORY AUTHORITY INSPECTION AND ENFORCEMENT

Section	
840.1	Scope.
840.10	Information collection.
840.11	Inspections by State regulatory authority.
840.12	Right of entry.
840.13	Enforcement authority.
840.14	Availability of records.
840.15	Public participation.
840.16	Compliance conference.

Authority: Sections 102, 201, 501(b), 503, 512, 517, 518, and 521 of Pub. L. 95-87, 91 Stat. 448, 449, 468, 470, 483, 498, 499 and 504 (*30 U.S.C. 1202, 1211, 1251, 1253, 1262, 1267, 1268 and 1271*).

SECTION 840.1 - SCOPE.

This Part sets forth the minimum requirements for the Secretary's approval of the provisions for inspection and enforcement by a State of surface coal mining and reclamation operations and of coal exploration operations which substantially disturb the natural land surface, where a State is the regulatory authority under an approved State program.

SECTION 840.10 - INFORMATION COLLECTION.

The information collection requirements contained in 30 CFR 840.11(e), 840.14(a) and 840.14(b) have been approved by the Office of Management and Budget under *44 U.S.C. 3507* and assigned clearance number 1029-0051. The information is being collected by States for use in assessing penalties as evidence in enforcement cases and as an inspection management record. The obligation to respond is mandatory.

SECTION 840.11 - INSPECTIONS BY STATE REGULATORY AUTHORITY.

(a) The State regulatory authority shall conduct an average of at least one partial inspection per month of each active surface coal mining and reclamation operation under its jurisdiction, and shall conduct such partial inspections of each inactive surface coal mining and reclamation operation under its jurisdiction as are necessary to ensure effective enforcement of the approved State program. A partial inspection is an on-site or aerial review of a person's compliance with some of the permit conditions and requirements imposed under an approved State program.

(b) The State regulatory authority shall conduct an average of at least one complete inspection per calendar quarter of each active or inactive 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, within the entire area disturbed or affected by the surface coal mining and reclamation operations.

(c) The State regulatory authority shall conduct such inspections of coal explorations as are necessary to ensure compliance with the approved State program.

(d)(1) Aerial inspections shall be conducted in a manner which reasonably ensures the identification and documentation of conditions at each surface coal mining and reclamation site inspected.

(2) Any potential violation observed during an aerial inspection shall be investigated on site within three days: provided, that any indication of a condition, practice or violation constituting cause for the issuance of a cessation order under section 521(a)(2) of the Act shall be investigated on site immediately, and provided further, that an on-site

investigation of a potential violation observed during an aerial inspection shall not be considered to be an additional partial or complete inspection for the purposes of paragraphs (a) and (b) of this section.

(e) The inspections required under paragraphs (a), (b), (c) and (d) 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 permittee or any agent or employee of such permittee, except for necessary on-site meetings; and
- (3) Include the prompt filing of inspection reports adequate to enforce the requirements of the approved State program.

(f) For the purposes of this section, an inactive surface coal mining and reclamation operation is one for which:

- (1) The State regulatory authority has secured from the permittee the written notice provided for under Section 816.131(b) or Section 817.131(b) of this chapter; or
- (2) Reclamation Phase II as defined at Section 807.12(e) of this chapter has been completed and the liability of the permittee has been reduced by the State regulatory authority in accordance with the State program.

SECTION 840.12 - RIGHT OF ENTRY.

(a) Within its jurisdiction, the State regulatory authority shall have authority that grants its representatives a right of entry to, upon, and through any coal exploration or surface coal mining and reclamation operation without advance notice upon presentation of appropriate credentials. No search warrant shall be required, except that a State may provide for its use with respect to entry into a building.

(b) The State regulatory authority shall have authority that authorizes its representatives to inspect any monitoring equipment or method of exploration or operation and to have access to and copy any records required under the approved State program. This authority shall provide that the representatives may exercise such rights at reasonable times, without advance notice, upon presentation of appropriate credentials. No search warrant shall be required, except that a State may provide for its use with respect to entry into a building.

SECTION 840.13 - ENFORCEMENT AUTHORITY.

(a) The civil and criminal penalty provisions of each State program shall contain penalties which are no less stringent than those set forth in section 518 of the Act and shall be consistent with 30 CFR Part 845.

(b) The enforcement provisions of each State program shall contain sanctions which are no less stringent than those set forth in section 521 of the Act and shall be consistent with Sections 843.11, 843.12, and 843.13, and Subchapters G and J of this chapter.

(c) The procedural requirements of each State program relating to the penalties and sanctions mentioned in paragraphs (a) and (b) of this section shall be the same as or similar to those provided in sections 518 and 521 of the Act, respectively, and consistent with Parts 843 and 845 and Subchapters G and J of this chapter.

(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 sections 518 and 521 of the Act.

SECTION 840.14 - AVAILABILITY OF RECORDS.

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

(b) Copies of all records, reports, inspection materials, or information obtained by the regulatory authority shall be made immediately available to the public in the area of mining until at least five years after expiration of the period during which the subject operation is active or is covered by any portion of a reclamation bond so that they are conveniently available to residents of that area, except --

(1) As otherwise provided by Federal law; and

(2) For information not required to be made available under Sections 776.17 and 786.15 of this chapter or paragraph (d) of this section.

(c) The State regulatory authority shall ensure compliance with Paragraph (b) by either:

(1) Making copies of all records, reports, inspection materials, and other subject information available for public inspection at a Federal, State or local government office in the county where the mining is occurring or proposed to occur; or,

(2) At the regulatory authority's option and expense, providing copies of subject information promptly by mail at the request of any resident of the area where the mining is occurring or is proposed to occur, provided, that the regulatory authority shall maintain for public inspection, at a Federal, State or local government office in the county where the mining is occurring or proposed to occur, a description of the information available for mailing and the procedure for obtaining such information.

(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 such materials.

SECTION 840.15 - PUBLIC PARTICIPATION.

Each State program shall provide for public participation in enforcement of the State program consistent with that provided by 30 CFR Parts 842, 843 and 845 and 43 CFR Part 4.

SECTION 840.16 - COMPLIANCE CONFERENCE.

(a) The State program may provide for compliance conferences between a permittee and an authorized representative of the regulatory authority as described in paragraph (b) -- (e) of this section.

(b) A permittee may request an on-site compliance conference with an authorized representative of the regulatory authority to review the compliance status of any condition or practice proposed at any coal exploration or surface coal mining and reclamation operation. Any such conference shall not constitute an inspection within the meaning of section 517 of the Act and section 840.11.

(c) The State regulatory authority may accept or refuse any request to conduct a compliance conference under paragraph (b).

(d) The authorized representative at any compliance conference shall review such proposed conditions and practices in order to advise whether any such condition or practice may become a violation of any requirement of the Act, the approved State program, or any applicable permit or exploration approval.

(e) Neither the holding of a compliance conference under this section nor any opinion given by the authorized representative at such a conference shall affect:

(1) Any rights or obligations of the regulatory authority or of the permittee with respect to any inspection, notice of violation or cessation order, whether prior or subsequent to such compliance conference; or

(2) The validity of any notice of violation or cessation order issued with respect to any condition or practice reviewed at the compliance conference.

PART 842 -- FEDERAL INSPECTIONS AND MONITORING

Section	
842.1	Scope.
842.11	Federal inspections and monitoring.
842.12	Requests for Federal inspections.
842.13	Right of entry.
842.14	Review of adequacy and completeness of inspections.
842.15	Review of decision not to inspect or enforce.
842.16	Availability of records.

Authority: Sections 102, 201, 501(b), 504, 507, 512, 517, 518, 521, and 523 of Pub. L. 95-87, 91 Stat. 448, 449, 468, 471, 474, 483, 498, 499, 504, 510 (*30 U.S.C. 1202, 1211, 1251, 1254, 1257, 1262, 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 AND MONITORING.

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

- (1) To monitor and evaluate the administration of approved State programs. Such monitoring and evaluation inspections shall be conducted jointly with the State regulatory authority where practical and where the State so requests;
- (2) To develop or enforce Federal programs and Federal lands programs;
- (3) To enforce those requirements and permit conditions imposed under a State program not being enforced by a State, under section 504(b) or section 521(b) of the Act, Part 733 of this chapter, or as provided in this section; and
- (4) To determine whether any notice of violation or cessation order issued during an inspection authorized under this section has been complied with.

(b)(1) An authorized representative of the Secretary shall immediately conduct a Federal inspection:

(i) When the authorized representative has reason to believe on the basis of information available to him or her (other than information resulting from a previous Federal inspection) that there exists a violation of the Act, this Chapter, the applicable program, or any condition of a permit or an exploration approval, or that there exists any condition, practice, or violation which creates an imminent danger to the health or safety of the public or is causing or could reasonably be expected to cause a significant, imminent environmental harm to land, air or water resources and --

(ii)(A) There is no State regulatory authority or the Office is enforcing the State program under section 504(b) or 521(b) of the Act and Part 733 of this chapter; or

(B) 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 abated and to inform the authorized representative that it has taken such action or has a valid reason for its inaction; or

(C) The person supplying the information supplies adequate proof that an imminent danger to the public health and safety or a significant, imminent environmental harm to land, air or water resources exists and that the State regulatory authority has failed to take appropriate action.

(2) An authorized representative shall have reason to believe that a violation, condition or practice exists if the facts alleged by the informant would, if true, constitute a condition, practice or violation referred to in paragraph (b)(1)(i) of this section.

(c) The Office, when acting as the regulatory authority under a Federal program or a Federal lands program and when enforcing a State program, in whole or in part, pursuant to section 504(b) of section 521(b) of the Act and Part 733 of this chapter, shall conduct inspections of all coal exploration and surface coal mining and reclamation operations under its jurisdiction. The Office shall --

- (1) With respect to active surface coal mining and reclamation operations:

(i) Conduct an average of at least one partial inspection per month of each active surface coal mining and reclamation operation. A partial inspection is an on-site or aerial review of a person's compliance with some of the permit requirements and conditions imposed under an applicable program.

(A) Aerial inspections shall be conducted in a manner which reasonably ensures the identification and documentation of conditions at each surface coal mining and reclamation site inspected.

(B) Any potential violation observed during an aerial inspection shall be investigated on site within three calendar days: PROVIDED, that any indication of a condition, practice or violation constituting cause for issuance of a cessation order under section 521(a)(2) shall be investigated on site immediately, and provided further, that an on-site investigation of a potential violation observed during an aerial inspection shall not be considered to be an additional partial or complete inspection for the purposes of paragraphs (a) and (b) of this section.

(ii) Conduct an average of at least one complete inspection per calendar quarter of each active surface coal mining and reclamation operation. A complete inspection is an on-site 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.

(2) With respect to inactive surface coal mining and reclamation operations:

(i) Conduct an average of at least one complete inspection per calendar quarter of each inactive surface coal mining and reclamation operation; and

(ii) Conduct such partial inspections of each inactive surface coal mining and reclamation operation as are necessary to ensure effective enforcement of the regulatory program and the Act.

(iii) For purposes of this section, an inactive surface coal mining and reclamation operation is one for which --

(A) The Office has secured from the permittee the written notice provided for under Sections 816.131(b) or 817.131(b) of this chapter; or,

(B) Reclamation Phase II as defined at Section 807.12(e) of this chapter has been completed.

(3) With respect to coal exploration operations, conduct such inspections as are necessary to ensure compliance with the Act by those coal explorations which substantially disturb the natural land surface.

(d) The inspections required under paragraphs (a), (b), and (c) 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 permittee or any agent or employee of such permittee, except for necessary on-site meetings; and

(3) Include the prompt filing of inspection reports adequate to enforce the requirements of the applicable program.

SECTION 842.12 - REQUESTS FOR FEDERAL INSPECTIONS.

(a) A person may request a Federal inspection under Section 842.11(b) by furnishing to an authorized representative of the Secretary a signed, written statement (or an oral report followed by a signed, written statement) giving the authorized representative reason to believe that a violation, condition or practice referred to in Section 842.11(b)(1)(i) exists and that the State regulatory authority, if any, has been notified, in writing, of the existence of the violation, condition or practice. The statement shall set forth a phone number and address where the person can be contacted.

(b) 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 that person, unless that person elects to accompany the inspector on the inspection, or unless disclosure is required under the Freedom of Information Act (*5 U.S.C. section 552*) or other Federal law.

(c) If a Federal inspection is conducted as a result of information provided to the Office by a person as described in paragraph (a) of this Section, the person shall be notified as far in advance as practicable when the inspection is to occur and shall 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 coal exploration or surface coal mining and reclamation operation about which he or she supplied information, but only if he or she is in the presence of and is under the control, direction and supervision of the authorized representative while on the mine property. Such right of entry does not include a right to enter buildings without consent of the person in control of the building or without a search warrant.

(d) Within ten days of the Federal inspection or, if there is no Federal inspection, within 15 days of receipt of the person's written statement, the Office shall send the person the following.

(1) If a Federal 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 person's right, if any, to informal review of the action or inaction of the Office under Section 842.15.

(e) The Office shall give copies of all materials in paragraphs (d)(1) and (d)(2) of this section within the time limits specified in those paragraphs to the person alleged to be in violation, except that the name of the person supplying information shall be removed unless disclosure of his or her identity is permitted under paragraph (b) of this section.

SECTION 842.13 - RIGHT OF ENTRY.

(a) Each authorized representative of the Secretary conducting a Federal inspection under Section 842.11:

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

(2) May, at reasonable times and without delay, have access to and copy any records, and inspect any monitoring equipment or method of exploration or operation required under the applicable program; and,

(3) Shall have a right to gather physical and photographic evidence to document conditions, practices or violations at the site.

(b) No search warrant shall be required with respect to any activity under paragraph (a) of this section, except that a search warrant may be required for entry into a building.

SECTION 842.14 - REVIEW OF ADEQUACY AND COMPLETENESS OF INSPECTIONS.

Any person who is or may be adversely affected by a surface coal mining and reclamation operation or a coal exploration operation may notify the Director or his or her designee in writing of any alleged failure on the part of the Office to make adequate and complete or periodic Federal inspections. The notification shall include sufficient information to create a reasonable belief that the regulations of this part are not being complied with and to demonstrate that the person is or may be adversely affected. The Director or his or her designee shall within 15 days of receipt of the notification determine whether adequate and complete or periodic inspections have been made. The Director or his or her designee shall furnish the complainant with a written statement of the reasons for such determination and the actions, if any, taken to remedy the noncompliance.

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

(a) Any person who is or may be adversely affected by a coal exploration or surface coal mining and reclamation operation may ask the Director or his or her designee to review informally 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 include a statement of how the person is or may be adversely affected and why the decision merits review.

(b) The Director or his or her designee shall conduct the review and inform the person, in writing, of the results of the review within 30 days of his or her receipt of the request. The person alleged to be in violation shall also be given a copy of the results of the review, except that the name of the person who is or may be adversely affected shall not be disclosed unless confidentiality has been waived or disclosure is required under the Freedom of Information Act or other Federal law.

(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.

(d) Any determination made under paragraph (b) of this section shall constitute a decision of OSM within the meaning of 43 CFR 4.1281 and shall contain a right of appeal to the Office of Hearings and Appeals in accordance with 43 CFR Part 4.

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 Federal lands program, and a State program being enforced by the Office under section 504(b) or 521(b) of the Act and Part 733 of this chapter or Sections 842.11 or 842.12 shall be made immediately available to the public in the area of mining until at least five years after expiration of the period during which the subject operation is active or is covered by any portion of a reclamation bond so that they are conveniently available to residents of that area, except --

- (1) As otherwise provided by Federal law; and
- (2) For information not required to be made available under Sections 776.17, 786.15, or 840.14(d) of this chapter.

(b) The Office shall ensure compliance with paragraph (a) of this section by either:

- (1) Making copies of all such records, reports, inspection materials, and other information available for public inspection at a Federal, State or local government office in the county where the mining is occurring or is proposed to occur; or
- (2) At the Office's option and expense, providing copies of such information promptly by mail at the request of any resident of the area where the mining is occurring or is proposed to occur, provided that the Office shall maintain for public inspection at a Federal, State, or local government office in the county where the mining is occurring or is proposed to occur a description of the information available for mailing and the procedure for obtaining such information.

(c) Copies of documents and information required to be made available under paragraph (a) of this section shall be provided to the State regulatory authority, if any.

PART 843 -- FEDERAL ENFORCEMENT

Section	
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843.10	Information collection.
843.11	Cessation orders.
843.12	Notices of violation.
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843.15	Informal public hearing.
843.16	Formal review of citations.
843.17	Failure to give notice and lack of information.
843.18	Inability to comply.
843.20	Compliance conference.

Authority; Sections 102, 201, 501(b), 503, 504, 510, 517, 518, 520, 521, 523, 526 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, any Federal program, the Federal lands program, State programs being enforced by the Office in whole or in part under section 504(b) or 521(b) of the Act and Part 733 of this chapter and (in limited circumstances) under Sections 842.11 or 842.12 of this chapter, and all conditions of permits and coal exploration approvals or permits imposed under any of these programs, the Act, or this chapter.

SECTION 843.5 - DEFINITIONS.

As used in this Part, the following terms have the specified meanings:

UNWARRANTED FAILURE TO COMPLY means the failure of a permittee to prevent the occurrence of any violation of his or her permit or any requirement of the Act due to indifference, lack of diligence, or lack of reasonable care, or the failure to abate any violation of such permit of the Act due to indifference, lack of diligence, or lack of reasonable care.

WILLFUL VIOLATION means an act or omission which violates the Act, this chapter, the applicable program, or any permit condition required by the Act, this chapter, or the applicable program, committed by a person who intends the result which actually occurs.

SECTION 843.10 - INFORMATION COLLECTION.

The information collection requirements contained in Section 843.14(c) and 843.16 have been approved by the Office of Management and Budget under *44 U.S.C. 3507* and assigned clearance number 1029-0052. The information is needed to ensure that violations can be corrected in a timely manner, to afford the operator an opportunity to respond to those violations, and to provide fairness in the enforcement process. The obligation to respond is mandatory.

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 thereof, if he or she 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 condition of an exploration approval or permit imposed under any such program, the Act, or this chapter 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) Surface coal mining and reclamation operations conducted by any person without a valid surface coal mining permit constitute a condition or practice which causes or can reasonably be expected to cause significant, imminent environmental harm to land, air or water resources, unless such operations:

(i) Are an integral, uninterrupted extension of previously permitted operations, and the person conducting such operations has filed a timely and complete application for a permit to conduct such operations; or

(ii) Were conducted lawfully without a permit under the interim regulatory program because no permit has been required for such operations by the State in which the operations were conducted.

(3) 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 physically possible, the authorized representative of the Secretary shall impose affirmative obligations on the permittee to abate the imminent danger or significant environmental harm. The order shall specify the time by which abatement shall be accomplished.

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

(2) A cessation order issued under this paragraph (b) shall require the permittee 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 physically possible.

(c) A cessation order issued under paragraphs (a) or (b) of this section shall be in writing, signed by the authorized representative who issues it, and shall set forth with reasonable specificity: (1) The nature of the condition, practice or violation; (2) the remedial action or affirmative obligation required, if any, including interim steps, if appropriate; (3) the time established for abatement, if appropriate; and (4) a reasonable description of the portion of the coal exploration or surface coal mining and reclamation operation to which it applies. The order shall remain in effect until the condition, practice or violation resulting in the issuance of the cessation order has been abated or until vacated, modified or terminated in writing by an authorized representative of the Secretary, or until the order expires pursuant to section 521(a)(5) of the Act and Section 843.15.

(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 permittee.

(f) An authorized representative of the Secretary shall terminate a cessation order by written notice to the permittee when he or she determines that all conditions, practices or violations listed in the order have been abated. Termination shall not affect the right of the Office to assess civil penalties for those violations under Part 845 of this chapter.

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 section 504(b) or 521(b) of the Act and Part 733 of this chapter, he finds a violation of the Act, this chapter, the applicable program or any condition of a permit or an exploration approval imposed under such program, the Act, or this Chapter, which does not create an imminent danger or harm for which a cessation order must be issued under Section 843.11.

(2) When, on the basis of any Federal inspection other than one described in paragraph (a)(1) of this section, an authorized representative of the Secretary determines that there exists a violation of the Act, the State program, or any condition of a permit or exploration approval required by the Act which does not create an imminent danger or harm for which a cessation order must be issued under Section 843.11, the authorized representative shall give a written report of the violation to the State and to the permittee so that appropriate enforcement action can be taken by the State. Where the State fails within ten days after notification to take appropriate action to cause the violation to be corrected, or to show good cause for such failure, the authorized representative shall reinspect and, if the violation continues to exist, shall issue a notice of violation or cessation order, as appropriate. No additional notification to the State by the Office is required before the issuance of a notice of violation, if previous notification was given under Section 842.11(b)(1)(ii)(B) of this chapter.

(b) A notice of violation issued under this section shall be in writing 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 required, which may include interim steps;
- (3) A reasonable time for abatement, which may include time for accomplishment of interim steps; and
- (4) A reasonable description of the portion of the coal exploration or surface coal mining and reclamation operation to which it applies.

(c) 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 permittee. The total time for abatement under a notice of violation, including all extensions, shall not exceed 90 days from the date of issuance, except upon a showing by the permittee that it is not feasible to abate the violation within 90 calendar days

due to one or more of the circumstances in paragraph (f) of this section. An extended abatement date pursuant to this section shall not be granted when the permittee's failure to abate within 90 days has been caused by a lack of diligence or intentional delay by the permittee in completing the remedial action required.

(d)(1) If the permittee fails to meet the time set for abatement the authorized representative shall issue a cessation order under Section 843.11(b).

(2) If the permittee fails to meet the time set for accomplishment of any interim step the authorized representative may issue a cessation order under Section 843.11(b).

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

(f) Circumstances which may qualify a surface coal mining operation for an abatement period of more than 90 days are:

(1) Where the permittee of an ongoing permitted operation has timely applied for and diligently pursued a permit renewal or other necessary approval of designs or plans but such permit or approval has not been or will not be issued within 90 days after a valid permit expires or is required, for reasons not within the control of the permittee;

(2) Where there is a valid judicial order precluding abatement within 90 days as to which the permittee has diligently pursued all rights of appeal and as to which he or she has no other effective legal remedy;

(3) Where the permittee cannot abate within 90 days due to a labor strike;

(4) Where climatic conditions preclude abatement within 90 days, or where, due to climatic conditions, abatement within 90 days clearly would cause more environmental harm than it would prevent; or

(5) Where abatement within 90 days requires action that would violate safety standards established by statute or regulation under the Mine Safety and Health Act of 1977.

(g) Whenever an abatement time in excess of 90 days is permitted, interim abatement measures shall be imposed to the extent necessary to minimize harm to the public or the environment.

(h) If any of the conditions in paragraph (f) of this section exists, the permittee may request the authorized representative to grant an abatement period exceeding 90 days. The authorized representative shall not grant such an abatement period without the concurrence of the Director or his or her designee and the abatement period granted shall not exceed the shortest possible time necessary to abate the violation. The permittee shall have the burden of establishing by clear and convincing proof that he or she is entitled to an extension under the provisions of Section 843.12(c) and (f). In determining whether or not to grant an abatement period exceeding 90 days the authorized representative may consider any relevant written or oral information from the permittee or any other source. The authorized representative shall promptly and fully document in the file his or her reasons for granting or denying the request. The authorized representative's immediate supervisor shall review this document before concurring in or disapproving the extended abatement date and shall promptly and fully document the reasons for his or her concurrence or disapproval in the file.

(i) Any determination made under paragraph (h) of this section shall contain a right of appeal to the Office of Hearings and Appeals in accordance with 43 CFR 4.1281 and the regulations at 43 CFR Part 4.

(j) No extension granted under paragraph (h) of this section may exceed 90 days in length. Where the condition or circumstance which prevented abatement within 90 days exists at the expiration of any such extension, the permittee may request a further extension in accordance with the procedures of paragraph (h) of this section.

SECTION 843.13 - SUSPENSION OR REVOCATION OF PERMITS.

(a)(1) The Director shall issue an order to a permittee requiring him or her to show cause why his or her permit and 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, this chapter, the applicable program, or any permit condition required by the Act exists or has existed, and that the violations were caused by the permittee willfully or through unwarranted failure to comply with those requirements or conditions. Violations by any person conducting surface coal mining operations on behalf of the permittee shall be attributed to the permittee, unless the permittee establishes that they were acts of deliberate sabotage.

The Director shall promptly file a copy of any order to show cause with the Office of Hearings and Appeals and the State regulatory authority, if any.

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

(i) The number of violations, cited on more than one occasion, of the same or related requirements of the Act, this chapter, the applicable program, or the permit;

(ii) The number of violations, cited on more than one occasion, of different requirements of the Act, this chapter, the applicable program, or the permit; and

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

(3) The Director shall promptly review the history of violations of any permittee who has been cited for violations of the same or related requirements of the Act, this chapter, the applicable program, or the permit during three or more Federal inspections of the permit area within any 12-month period. If, after such review, the Director determines that a pattern of violations exists or has existed, he or she shall issue an order to show cause as provided in paragraph (a)(1) of this section.

(4)(i) In determining the number of violations within any 12-month period, the Director shall consider only violations issued as a result of a Federal inspection carried out --

(A) During enforcement of a Federal program or a Federal lands program;

(B) During the interim program and before the applicable State program was approved pursuant to Section 502 or 504 of the Act; or

(C) During Federal enforcement of a State program in accordance with section 504(b) or 521(b) of the Act.

(ii) The Director may not consider violations issued as a result of inspections other than those mentioned in paragraph (a)(4)(i) of this section in determining whether to exercise his or her discretion under paragraph (a)(2) of this section, except as evidence of the willful or unwarranted nature of the permittee's failure to comply.

(b) 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 surface coal mining and reclamation operations, and shall post it at the State or field office closest to those operations.

(c) 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.

(d) Whenever a permittee fails to abate a violation contained in a notice of violation or cessation order within the abatement period set in the notice or order or as subsequently extended, the Director shall review the permittee's history of violations to determine whether a pattern of violations exists pursuant to this section, and shall issue an order to show cause as appropriate pursuant to Section 845.15(b)(2) of this chapter.

SECTION 843.14 - SERVICE OF NOTICES OF VIOLATION, CESSATION ORDERS, AND SHOW CAUSE ORDERS.

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

(1) By tendering a copy at the coal exploration or surface coal mining and reclamation operation to the designated agent or to the individual who, based upon reasonable inquiry, appears to be in charge. If no such individual can be located at the site, a copy may be tendered to any individual at the site who appears to be an employee or agent of

the person to whom the notice or order is issued. Service shall be complete upon tender of the notice or order and shall not be deemed incomplete because of refusal to accept.

(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 permittee or his or her designated agent. Service shall be complete upon tender of the notice or order or of the mail and shall not be deemed incomplete because of refusal to accept.

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

(c) 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 coal exploration, surface coal mining and reclamation operation, or the permit area.

SECTION 843.15 - INFORMAL PUBLIC HEARING.

(a) Except as provided in paragraphs (b) and (c) of this section, 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. The hearing shall be held at or reasonably close to the mine site so that it may be viewed during the hearing or at any other location acceptable to the Office and the person to whom the notice or order was issued. The Office of Surface Mining office nearest to the mine site shall be deemed to be reasonably close to the mine site unless a closer location is requested and agreed to by the Office. Expiration of a notice or order shall not affect the Office's right to assess civil penalties with respect to the period during which the notice or order was in effect. No hearing will be required where the condition, practice, or violation in question has been abated or the hearing has been waived. For purposes of this section only, "mining" includes (1) extracting coal from the earth or from coal waste piles and transporting it within or from the permit area, and (2) the processing, cleaning, concentrating, preparing or loading of coal where such operations occur at a place other than at a mine site.

(b) A notice of violation or cessation order shall not expire as provided in paragraph (a) of this section if the informal public hearing has been waived, or if, with the consent of the person to whom the notice or order was issued, the informal public hearing is held later than 30 days after the notice or order was served. For purposes of this subsection:

(1) The informal public hearing will be deemed waived if the person to whom the notice or order was issued:

- (i) Is informed, by written notice served in the manner provided in paragraph (b)(2) of this section, that he or she will be deemed to have waived an informal public hearing unless he or she requests one within 30 days after service of the notice; and
- (ii) Fails to request an informal public hearing within that time.

(2) The written notice referred to in paragraph (b)(1)(i) of this section shall be delivered to such person by an authorized representative or sent by certified mail to such person no later than 5 days after the notice or order is served on such person.

(3) The person to whom the notice or order is issued shall be deemed to have consented to an extension of the time for holding the informal public hearing if his or her request is received on or after the 21st day after service of the notice or order. The extension of time shall be equal to the number of days elapsed after the 21st day.

(c) The Office shall give as much advance notice as is practicable of the time, place, and subject matter of the informal public 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.

(d) The Office shall also post notice of the hearing at the State or field office closest to the mine site and, where practicable, publish it in a newspaper of general circulation in the area of the mine.

(e) Section 554 of Title 5 of the United States Code, regarding requirements for formal adjudicatory hearings, shall not govern informal public hearings. An informal public 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.

(f) Within five days after the close of the informal public 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.

(g) The granting or waiver of an informal public hearing shall not affect the right of any person to formal review under section 518(b), 521(a)(4), or 525 of the Act.

(h) The person conducting the hearing for the Office shall determine whether or not the mine site should be viewed during the hearing. In making this determination the only consideration shall be whether a view of the mine site will assist the person conducting the hearing in reviewing the appropriateness of the enforcement action or of the required remedial action.

SECTION 843.16 - FORMAL REVIEW OF CITATIONS.

(a) A person issued a notice of violation or cessation order under Sections 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 INFORMATION.

No notice of violation, cessation order, show cause order, or order revoking or suspending a permit may be vacated for failure to give the notice to the State regulatory authority required under Section 842.11(b)(1)(ii)(B) of this chapter or because it is subsequently determined that the Office did not have information sufficient, under Sections 842.11(b)(1) and 842.11(b)(2) of this chapter, to justify an inspection.

SECTION 843.18 -INABILITY TO COMPLY.

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

(b) Inability to comply may not be considered in determining whether a pattern of violations exists.

(c) Unless caused by lack of diligence, inability to comply may be considered only in mitigation of the amount of civil penalty under Part 845 of this chapter and of the duration of the suspension of a permit under Section 843.13(c).

SECTION 843.20 - COMPLIANCE CONFERENCE.

(a) A permittee may request an on-site compliance conference with an authorized representative to review the compliance status of any condition or practice proposed at any coal exploration or surface coal mining and reclamation operation. Any such conference shall not constitute an inspection within the meaning of section 517 of the Act and section 842.11.

(b) The Office may accept or refuse any request to conduct a compliance conference under paragraph (a). Where the Office accepts such a request, reasonable notice of the scheduled date and time of the compliance conference shall be given to the permittee.

(c) The authorized representative at any compliance conference shall review such proposed conditions and practices as the permittee may request in order to determine whether any such condition or practice may become a violation of any requirement of the Act of any applicable permit or exploration approval.

(d) Neither the holding of a compliance conference under this section nor any opinion given by the authorized representative at such a conference shall affect:

(1) Any rights or obligations of the Office or of the permittee with respect to any inspection, notice of violation or cessation order, whether prior or subsequent to such conference; or

(2) The validity of any notice of violation or cessation order issued with respect to any condition or practice reviewed at the compliance conference.

PART 845 -- CIVIL PENALTIES

Section

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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 ASSESSMENTS ARE MADE.

The 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 Office shall assess a penalty for each cessation order.

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

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

SECTION 845.13 - POINT SYSTEM FOR PENALTIES.

(a) The 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 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 coal exploration or surface coal mining operation. Points shall be assigned as follows:

(i) A violation shall not be counted, if the notice or order is the subject of pending administrative or judicial review or if the time to request such review or to appeal any administrative or judicial decision has not expired, and thereafter it shall be counted for only one year.

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

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

(2) Seriousness. The Office shall assign up to 30 points based on the seriousness of the violation, as follows:

(i) Probability of occurrence. The 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 according to the following schedule:

Probability of Occurrence	Points
None	0
Insignificant	1-4
Unlikely	5-9
Likely	10-14
Occurred	15

(ii) Extent of potential or actual damage. The 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 coal exploration or permit area, the 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 coal exploration or permit area, the 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 Office shall, in lieu of paragraphs (b)(2) (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 Office shall assign up to 25 points based on the degree of fault of the person to whom the notice or order was issued in causing or failing to correct the violation, condition, or practice which led to the notice or order, 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 the failure of a permittee to prevent the occurrence of any violation of his or her permit or any requirement of the Act or this Chapter due to indifference, lack of diligence, or lack of reasonable care, or the failure to abate any violation of such permit or the Act due to indifference, lack of diligence, or lack of reasonable care.

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

(iii) In calculating points to be assigned for negligence, the acts of all persons working on the coal exploration or surface coal mining and reclamation site shall be attributed to the person to whom the notice or order was issued, unless that person establishes that they were acts of deliberate sabotage.

(4) Food faith in attempting to achieve compliance.

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

Degree of good faith	Points
Rapid compliance	-1 to -10.
Normal compliance	0.

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

(A) Rapid compliance means that the person to whom the notice or order 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 notice or order was issued abated the violation within the time given for abatement.

(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 reassessed after the violation has been abated.

SECTION 845.14 - DETERMINATION OF AMOUNT OF PENALTY.

The 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
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 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 Office shall consider the factors listed in 30 CFR 845.13 and may consider the extent to which the person to whom the notice or order was issued gained any economic benefit as a result of a failure to comply. For any violation which continues for two or more days and which is assigned more than 70 points under Section 845.13(b), the Office shall assess a penalty for a minimum of two separate days.

(b) In addition to the civil penalty provided for in paragraph (a), whenever a violation contained in a notice of violation or cessation order has not been abated within the abatement period set in the notice or order or as subsequently extended pursuant to section 521(a) of the Act, a civil penalty of not less than \$750 shall be assessed for each day during which such failure to abate continues, except that:

(1)(i) If suspension of the abatement requirements of the notice or order is ordered in a temporary relief proceeding under section 525(c) of the Act, after a determination that the person to whom the notice or order 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 Office of Hearings and Appeals issues a final order with respect to the violation in question; and

(ii) If the person to whom the notice or order was issued initiates review proceedings under section 526 of the Act with respect to the violation, in which the obligations to abate are suspended by the court pursuant to section 526(c) of the Act, the daily assessment of a penalty shall not be made for any period before entry of a final order by the court;

(2) Such penalty for the failure to abate the violation shall not be assessed for more than 30 days for each such violation. If the permittee has not abated the violation within the 30-day period, the Office shall take appropriate action pursuant to section 518(e), 518(f), 521(a)(4), or 521(c) of the Act within 30 days to ensure that abatement occurs or to ensure that there will not be a reoccurrence of the failure to abate.

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 15 days of issuance of a notice of violation or a cessation order, may waive the use of the formula contained in 30 CFR 845.13 to set the civil penalty, if he or she determines that, taking into account exceptional factors present in the particular case, the penalty is demonstrably unjust. However, the Director shall not waive the use of the formula or 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, this chapter, any applicable program, or any condition of any permit or exploration approval. The basis for every waiver shall be fully explained and documented in the records of the case.

(b) If the Director waives the use of the formula, he or she shall use the criteria set forth in 30 CFR 845.13(b) to determine the appropriate penalty. When the Director has elected to waive the use of the formula, he or she 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 15 days of service of a notice or order, the person to whom it was issued may submit written information about the violation to the Office and to the inspector who issued the notice of violation or cessation order. The Office shall consider any information so submitted in determining the facts surrounding the violation and the amount of the penalty.

(b) The 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 notice or order was issued, by certified mail, within 30 days of the issuance of the notice or order.

(1) 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 or she 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.

(2) Failure by the Office to serve any proposed assessment within 30 days shall not be grounds for dismissal of all or part of such assessment unless the person against whom the proposed penalty has been assessed –

(i) Proves actual prejudice as a result of the delay; and,

(ii) Makes a timely objection to the delay. An objection shall be timely only if made in the normal course of administrative review.

(c) Unless a conference has been requested, the Office shall review and reassess any penalty if necessary to consider facts which were not reasonably available on the date of issuance of the proposed assessment because of the length of the abatement period. The Office shall serve a copy of any such reassessment and of the worksheet showing the computation of the reassessment in the manner provided in paragraph (b), within 30 days after the date the violation is abated.

SECTION 845.18 - PROCEDURES FOR ASSESSMENT CONFERENCE.

(a) The Office shall arrange for a conference to review the proposed assessment or reassessment, upon written request of the person to whom notice or order was issued, if the request is received within 15 days from the date the proposed assessment or reassessment is mailed.

(b)(1) The Office shall assign a conference officer to hold the assessment conference. The assessment conference shall not be governed by section 554 of Title 5 of the United States Code, regarding requirements for formal adjudicatory hearings. The assessment conference shall be held within 60 days from the date of issuance of the proposed assessment or the end of the abatement period, whichever is later, PROVIDED: that a failure by the Office to hold such conference within 60 days shall not be grounds for dismissal of all or part of an assessment unless the person against whom the proposed penalty has been assessed proves actual prejudice as a result of the delay.

(2) The Office shall post notice of the time and place of the conference at the State 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.

(3) The conference officer shall consider all relevant information on the violation. Within 30 days after the conference is held, the conference officer shall either:

(i) Settle the issues, in which case a settlement agreement shall be prepared and signed by the conference officer on behalf of the Office and by the person assessed; or

(ii) Affirm, raise, lower, or vacate the penalty.

(4) An increase or reduction of a proposed civil penalty assessment of more than 25 percent and more than \$500 shall not be final and binding on the Secretary, until approved by the Director or his or her designee.

(c) The conference officer shall promptly serve the person assessed with a notice of his or her action in the manner provided in 30 CFR 845.17(b) and shall include a worksheet if the penalty has been raised or lowered. The reasons for the conference officer's action shall be fully documented in the file.

(d)(1) 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 for in the settlement agreement. The settlement agreement shall contain a clause to this effect.

(2) If full payment of the amount specified in the settlement agreement is not received by the Office within 30 days after the date of signing, the Office may enforce the agreement or rescind it and proceed according to paragraph

(b)(3)(ii) within 30 days from the date of the rescission.

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

(f) At formal review proceedings under sections 518, 521(a)(4), and 525 of the Act, no evidence as to statements made or evidence produced by one party at a conference shall be introduced as evidence by another party or to impeach a witness.

SECTION 845.19 - REQUEST FOR HEARING.

(a) The person charged with the violation may contest the proposed penalty or the fact of the violation by submitting a petition and an amount equal to the proposed penalty or, if a conference has been held, the reassessed or affirmed penalty to the Office of Hearings and Appeals (to be held in escrow as provided in paragraph (b) of this section) within 30 days from receipt of the proposed assessment or reassessment or 15 days from the date of service of the conference officer's action, whichever is later. The fact of the violation may not be contested if it has been decided in a review proceeding commenced under 30 CFR 843.16.

(b) The Office of Hearings and Appeals shall transfer all funds submitted under paragraph (a) of this section to the Office, which shall hold them in escrow pending completion of the administrative and judicial 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 notice of violation or cessation order is issued fails to request a hearing as provided in Section 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 allowed 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 (c) of this section, the escrowed funds shall be transferred to the Office in payment of the penalty, and the escrow shall end.

(c) If the final decision in the administrative and judicial review results in an order reducing or eliminating the proposed penalty assessed under this part, the 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 results in an order increasing the penalty, the person to whom the notice or order was issued shall pay the difference to the Office within 15 days after the order is mailed to such person.

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