

FEDERAL REGISTER: 48 FR 9199 (March 3, 1983)

DEPARTMENT OF THE INTERIOR

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

30 CFR Part 843

Surface Mining and Reclamation Operations; Permanent Regulatory Program;
Federal Enforcement during Oversight of Approved State Programs

ACTION: Statement of policy.

SUMMARY: Notice is given that the Department of the Interior has determined that the Surface Mining Control and Reclamation Act requires a federal inspector to issue a notice of violation to an operator if the state has been notified of the existence of a violation and has failed to take appropriate action or show good cause for such failure within ten days of notification (ten day notice).

FOR FURTHER INFORMATION CONTACT: William Schmidt, Assistant Director, Inspection and Enforcement, Office of Surface Mining, U.S. Department of the Interior, Washington, D.C. 20240; (202-343-4225).

SUPPLEMENTARY INFORMATION:

On March 13, 1979, OSM published regulations (*44 FR 14901 et seq.*) implementing the permanent regulatory program of Title V of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), Pub. L. 95-87, *30 U.S.C. 1251-1279*. One subsection of those regulations addressed a federal inspector's authority to issue notices of violation and "failure to abate" cessation orders under Section 521(a)(3) of SMCRA in situations in which the coal mine where the violation existed was located in a state with an approved state program. The relevant provision, 30 CFR 843.12(a)(2), which resolved this question states:

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 an exploration approval required by the Act or the State program which does not create an imminent danger or harm for which a cessation order must be issued under 30 CFR 843.11, the authorized representative may give a written report of the violation to the State and the person responsible for the violation, so that appropriate enforcement action can be taken by the States. 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 may 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 30 CFR 842.11(b)(1)(ii)(B).

On December 1, 1981, the Department indicated that it intended to reconsider the issue as part of its new rulemaking to revise the inspection and enforcement regulations for the permanent regulatory program. *46 FR 58464*. However, as a result of a settlement agreement in *National Wildlife Federation v. Watt*, Civil Action No. 82-0320 (D.D.C.) the Department agreed to consider the issue in the Environmental Impact Statement (EIS) to be done in connection with the regulatory review currently underway at the Department of the Interior. Consequently, the Department deferred consideration of the issue in the inspection and enforcement final rule published on August 16, 1982. *47 FR 35620*. The issue was analyzed in OSM's Final Environmental Impact Statement OSM EIS-1: Supplement. This notice serves as the record of decision based upon the EIS and is consistent with the preferred alternative published in Volume III of the EIS.

STATEMENT OF POLICY

Upon examination of the issue, the Department has concluded that the regulation contained at 30 CFR 843.12(a)(2) was properly and lawfully promulgated; therefore there is no need to reconsider the issue.

It is the Department's opinion, as set forth in the original preamble to 30 CFR 843.12, that "Congress did (not) intend OSM to sit idly by while . . . violations ripen into imminent hazards." *44 FR 15302*, March 13, 1979. Rather as the preamble stated, the legislative history indicates that when "an OSM inspector discovered a violation at the mine, he must

report the violation to the operator and the state and give the state 10 days to take appropriate action to require the operator to correct the violation. If the State takes such action, OSM does nothing further." *44 FR 15303*. However, if the state fails to take adequate action or show good cause for such failure, OSM under 30 CFR 843.12 shall issue a notice violation. As the preamble further stated, in situations where "the State had already been given an opportunity to take 'appropriate action' and had failed to do so in ten days, the OSM inspector could issue the notice on the spot without re-referring the case to the State." *44 FR 15303*. n1

n1 As the Office of Surface Mining has previously stated in papers filed with the Interior Board of Surface Mining and Reclamation Appeals, any OSM determination as to the adequacy or inadequacy of state action or whether an OSM inspection is required as a result of a citizen complaint is reviewable by the Office of Hearings and Appeals without regard to the existence, or invocation, of state administrative or judicial remedies. See Reply in Opposition, Donald St. Clair, et al v. OSM, IBSMA No. 82-33 at 11.

Dated: February 28, 1983.

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

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