

FEDERAL REGISTER: 52 FR 10898 (April 6, 1987)

DEPARTMENT OF THE INTERIOR

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

30 CFR Part 733

Petition to Initiate Rulemaking on Surface Coal Mining and Reclamation Operations;
Permanent Regulatory Program; Procedures for Evaluating State Programs,
Substituting Federal Enforcement of State Programs and Withdrawing Approval of State Programs

ACTION: Notice of decision on petition for rulemaking.

SUMMARY: The Office of Surface Mining Reclamation and Enforcement (OSMRE) is making available to the public its final decision on a petition for rulemaking from ten citizens' organizations. The petitioners requested that OSMRE amend existing regulations concerning procedures for evaluating State programs, substituting Federal enforcement of State programs and withdrawing approval of State programs. On April 1, 1987, the Director made a decision to deny the petition.

ADDRESS: Copies of the petition, and other relevant materials comprising the administrative record of this petition are available for public review and copying at OSMRE, Administrative Record, Room 5315, 1100 "L" Street, NW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Mr. Arthur W. Abbs, Chief, Division of State Program Assistance, Office of Surface Mining Reclamation and Enforcement, 1951 Constitution Avenue, NW., Washington, DC 20240; Telephone: (202) 343-5351.

SUPPLEMENTARY INFORMATION:

I. PETITION FOR RULEMAKING PROCESS

Pursuant to section 201(g) of the Surface Mining Control and Reclamation Act, any person may petition the Director of OSMRE for a change in OSMRE's regulations. Under the applicable regulations for rulemaking petitions, 30 CFR 700.12, if the Director determines the petition has a reasonable basis, he shall publish notice in the Federal Register seeking comments on the petition and the Director may hold a public hearing, conduct an investigation, or take other action to determine whether the petition should be granted. If the petition is granted, the Director initiates a rulemaking proceeding. If the petition is denied, the Director notifies the petitioner in writing setting forth the reasons for denial. Under Section 700.12(d), the Director's decision constitutes the final decision of the Department of the Interior.

II. PETITION SUBMITTED BY TEN CITIZENS' ORGANIZATIONS ON NOVEMBER 13, 1985

On November 13, 1985, OSMRE received a petition submitted by ten citizen's organizations to amend OSMRE's existing regulations under 30 CFR Part 733 concerning procedures for evaluating State programs, substituting Federal enforcement of State programs and withdrawing approval of State programs.

The petitioners are: The Dakota Resource Council, Environmental Policy Institute, Illinois South Project, Legal Environmental Assistance Foundation, Northern Plains Resource Council, Powder River Basin Resource Council, Public Lands Institute, Save Our Cumberland Mountains, Western Colorado Congress, and Western, Organization of Resource Councils.

On January 3, 1986, OSMRE published on notice in the Federal Register (*51 FR 272*) requesting comments on the petition. The comment period closed on February 3, 1986. A number of interested parties requested that additional time be provided to submit comments. Therefore, on February 4, 1986, OSMRE published a second notice extending the comment period until March 5, 1986 (*51 FR 4390*).

Subsequently, as part of its ongoing efforts to implement the Phase II actions recommended in the 1985 management report of the House Committee on Interior and Insular Affairs, OSMRE held a conference in Washington, DC on August

13 and 14, 1986. The purpose of the conference was to have an exchange of views on two topics: (1) OSMRE's use of ten-day notices and Federal notices of violation, and (2) criteria and procedures for substituting Federal enforcement and withdrawing approval of a State regulatory program under SMCRA. OSMRE published a notice in the Federal Register on July 29, 1986 (*51 FR 27059*), to announce its intent to sponsor the conference and to announce that comments from the conference would be considered in OSMRE's review of the petition for rulemaking.

Following the conference, OSMRE on September 2, 1986, extended the public comment period until September 29, 1986, on the conference topics and on the portion of the petition related to substitution of Federal enforcement and withdrawal of approval of State programs (*51 FR 31140*). OSMRE received 39 comments during the comment periods.

For the reasons discussed in the appendix to this notice, the Director is denying the petition to initiate rulemaking. Therefore, no further rulemaking action will occur.

The Director's letter to the petitioners on this rulemaking petition appears as an appendix to this notice. This letter reports the Director's decision to the petitioners. It also contains a summary description of the issues raised by the petitioners, a discussion of the applicable statutory provisions, OSMRE's current regulatory program, an analysis of the petitioners' proposed regulatory changes, an analysis of the petitioners' reasons why the petition should be granted and a discussion of comments on the petition.

Arthur W. Abbs,
Acting Assistant Director, Program Policy Office of Surface Mining Reclamation and Enforcement.

APPENDIX

The Director's letter dated April 1, 1987, to the petitioners on the rulemaking petition is as follows:

April 1, 1987.

Ms. Rose Sickler,
Dakota Resource Council,
29 Seventh Avenue, West,
Dickenson, North Dakota 58901.

Dear Ms. Sickler:

This letter is in response to the September 3, 1985 petition for rulemaking submitted to the Office of Surface Mining Reclamation and Enforcement (OSMRE) by the Dakota Resource Council, Environmental Policy Institute, Illinois South Project, Legal Environmental Assistance Foundation, Northern Plains Resource Council, Powder River Basin Resource Council, Public Lands Institute, Save Our Cumberland Mountains, Western Colorado Congress, and Western Organization of Resource Councils (petitioners) requesting amendments to the Federal regulations concerning oversight of State regulatory programs.

On January 3, 1986, OSMRE published a notice in the Federal Register (*51 FR 272*) requesting public comments on the petition. A number of interested parties requested that additional time be provided to submit comments. Therefore, on February 4, 1986, OSMRE published a second notice extending the comment period until March 5, 1986 (*51 FR 4390*).

Subsequently, as part of its ongoing efforts to implement the Phase II actions recommended in the 1985 management report of the House Committee on Interior and Insular Affairs, OSMRE held a conference in Washington, DC, on August 13 and 14, 1986. The purpose of the conference was to have an exchange of views on two topics: 1) OSMRE's use of ten-day notices and Federal notices of violation, and 2) criteria and procedures for substituting Federal enforcement and withdrawing approval of a State regulatory program under SMCRA. OSMRE published a notice in the Federal Register on July 29, 1986 (*51 FR 27059*), to announce its intent to sponsor the conference and to announce that comments from the conference would be considered in OSMRE's review of the petition for rulemaking.

Following the conference, OSMRE on September 2, 1986, extended the public comment period until September 29, 1986, on the conference topics and on the portion of the petition related to substitution of Federal enforcement and withdrawal of approval of State programs (*51 FR 31140*). OSMRE received 39 comments during the comment periods.

For the reasons discussed in the enclosed analysis, I am denying the petition to initiate rulemaking. OSMRE already has regulations in place which sufficiently detail the criteria and procedures for evaluating State regulatory programs. The petitioners have not persuaded me that the issues that concern them, previously considered in two rulemakings on the same subject, warrant revision of the regulations. Therefore, no further rulemaking action will occur. As provided in 30 CFR 700.12(d), my decision constitutes the final decision of the Department of the Interior.

I appreciate your interest in the surface coal mining and reclamation program.

Sincerely,
Jed. D. Christensen,
Director.

Enclosure: (identical letter provided to 9 other addressees).

Identical letter provided to the below listing:

Ms. Suellen Keiner, Environmental Policy Institute, 218 D. Street, SE., Washington, DC 20003

Ms. Melanie Baise, Illinois South Project, 116- 1/2 West Cherry, Herrin, Illinois 62948

Ms. Carol Nickle, Legal Environmental Assistance Foundation, 530 South Gay Street, #204, Knoxville, Tennessee 37902

Mr. Keith Powell, Northern Plains Resource Council, 419 Stapleton, Billings, Montana 59101

Mr. Dan Flaherty, Powder River Basin Resource Council, 48 North Main, Sheridan, Wyoming 8280

Ms. Carolyn R. Johnson, Public Lands Institute, 286 South Gilpin Street, Denver, Colorado 80209

Ms. Susan Williams, Save Our Cumberland Mountains, Box 457, Jacksboro, Tennessee 37757

Ms. Teresa Ericson, Western Colorado Congress, P.O. Box 472, Montrose, Colorado 81402

Mr. Pat Sweeney, Western Organization of Resource Councils, 412 Stapleton Building, Billings, Montana 59101

Decision on Petition to Initiate Rulemaking on Procedures for Evaluating State Programs, Substituting Federal Enforcement of State Programs and Withdrawing Approval of State Programs

BACKGROUND ON PETITION

On November 13, 1985, the Office of Surface Mining Reclamation and Enforcement (OSMRE) received a petition to initiate rulemaking submitted by ten citizens organizations. The petitioners proposed that OSMRE amend its regulations under 30 CFR Part 733 concerning procedures for evaluating State programs, substituting Federal enforcement of State programs and withdrawing approval of State programs. The petition was published in the Federal Register on January 3, 1986 (*51 FR 272*), and public comment sought for 30 days. On February 4, 1986, the comment period was extended for an additional 30 days (*51 FR 4390*) until March 5, 1986.

Subsequently, as part of its ongoing efforts to implement the Phase II actions recommended in the July 1985 report prepared by the staff of the Committee on Interior and Insular Affairs entitled "Management Review of the Office of Surface Mining", OSMRE held a conference in Washington, DC, on August 13 and 14, 1986. The purpose of the conference was to have an exchange of views on two topics: (1) OSMRE's use of ten-day notices and Federal notices of violation, and (2) criteria and procedures for substituting Federal enforcement and withdrawing approval of a State regulatory program under the Surface Mining Control and Reclamation Act of 1977 (SMCRA). OSMRE published a

notice in the Federal Register on July 29, 1986 (*51 FR 27059*), to announce its intent to sponsor the conference and to announce that comments from the conference would be considered in OSMRE's review of the petition for rulemaking.

Following the conference, OSMRE on September 2, 1986, extended the public comment period until September 29, 1986, on the conference topics and on the portion of the petition related to substitution of Federal enforcement and withdrawal of approval of State programs (*51 FR 31140*). OSMRE received 39 comments during the comment periods.

SUBSTANCE OF PETITION

The petitioners's proposals can be categorized as follows. First, they proposed that OSMRE amend its regulations under 30 CFR Part 733 to provide detailed procedures for OSMRE's annual evaluation of State programs under SMCRA. Secondly, they proposed that OSMRE modify the existing procedures under 30 CFR Part 733 regarding the withdrawal of approval of State programs.

With regard to the annual evaluation of State programs, the petitioners proposed that the Director develop uniform procedures for conducting the annual evaluations. Under the petitioners' proposal, each annual evaluation of a State program would contain statistical information and analysis of major categories and subcategories. The procedures developed by the Director would ensure a comprehensive evaluation of State programs and provide for the evaluation of all major categories and subcategories. The petitioners' proposal also called for the establishment of acceptable performance levels for each program subcategory evaluated. In addition, the petitioners proposed that the Director provide a hearing opportunity and a 45-day comment period on draft evaluation reports. In preparing the annual reports the Director would be required to consider all relevant information, including public comment, issue written findings on all parts of the State program, respond to all public comments in the final report, publish notice of availability of the final report in the Federal Register and send the final report to all persons who commented.

With respect to OSMRE's procedures regarding the withdrawal of approval of State programs, the petitioners proposed that OSMRE modify its rules to require that whenever OSMRE or any interested person identifies any failure of the State to achieve a performance level in administering any part of its program, the Director would notify the State in writing and establish a period of time for correcting deficiencies not to exceed 90 days. They also proposed adoption of a requirement that pending completion of any changes in a State program required by the Director, the State would act in accordance with the required changes. The petitioners' proposed rules further provided that within 30 days after the period set for remedial action, the Director would publish written findings in the Federal Register and if the findings showed the State had failed to implement its program, the Director would hold a hearing within 30 days. In the event of negative findings, the Director would revoke the Secretary's approval of the State program. The petitioners also requested modification of OSMRE's rules to allow the decision to issue a State program evaluation or revoke a State program to be appealed by any person to the Interior Board of Land Appeals. Finally, the petitioners proposed adoption of a regulatory requirement which provides that the Director hold a hearing 30 days prior to revoking or returning a program.

APPLICABLE STATUTORY PROVISIONS

OSMRE's statutory obligations with respect to the evaluation of approved State regulatory programs under SMCRA are set forth under a number of sections of the Act. The key provisions are contained in sections 201, 504, 517 and 521. Section 201(c) authorizes the Secretary to make those investigations and inspections necessary to ensure compliance with the Act. Section 517(a) of SMCRA specifies that the Secretary shall make such inspections of any surface coal mining and reclamation operations as may be necessary to evaluate the administration of the approved State programs. Section 521(a) establishes the Secretary's authority to enforce the Act if the State fails to do so. Section 521(a)(1) states that if the Secretary has reason to believe that any person is in violation of any requirement of SMCRA or any permit required by SMCRA he shall notify the State regulatory authority. It further provides that the Secretary or his authorized representative shall order a Federal inspection of a mine if the State regulatory authority fails within ten days after notification by OSMRE to take appropriate action to cause violations to be corrected or show good cause for its failure to do so. Section 521(a)(2) provides that the Secretary or his authorized representative shall issue a cessation order for any violation which creates an imminent danger to the health or safety of the public or is causing or can reasonably be expected to cause significant imminent environmental harm to land, air, or water resources. Sections 504(b) and 521(b) require the Secretary to enforce any part of a State program not being enforced by the State and section 504(a)(3) provides authority for the Secretary to prepare and promulgate a Federal program if a State fails to implement, enforce,

or maintain its approved State program. OSMRE's statutory responsibility to report on its "oversight" activities is set forth in section 706 of SMCRA, which provides that the Secretary shall submit annually to the President and Congress a report concerning the activities conducted by the Federal government and the States pursuant to the Act.

CURRENT OSMRE REGULATORY PROGRAM

OSMRE's State program evaluation policies and procedures are set forth in regulations, directives, and policy and guidance documents.

The regulations governing the evaluation of State programs, the substitution of Federal enforcement of State programs and the withdrawal of approval of State programs are contained in 30 CFR Part 733 of OSMRE's regulations. The regulations were adopted on March 13, 1979 (*44 FR 15328*) and revised on June 17, 1982 (*47 FR 26366*). These regulations provide that OSMRE shall evaluate the administration of each State program at least annually. They further provide that upon the request of any interested person, OSMRE will conduct an evaluation of a State program after verifying the fact presented by the person establishing the need for the evaluation. Also contained in this section of OSMRE's rules are the requirements and procedures pertaining to Federal enforcement of any part of a State program not being enforced by the State and to withdrawal of approval of a State program if a State fails to administer or enforce its program.

The requirements pertaining to Federal inspection and enforcement activities in States with approved regulatory programs are contained in 30 CFR Parts 842 and 843. The regulations were adopted on March 13, 1979 (*44 FR 15456*) and revised on August 16, 1982 (*47 FR 35635*). Under 30 CFR 842.11(a)(1) authority is provided for OSMRE to conduct inspections of surface coal mining and reclamation operations as necessary to monitor and evaluate the administration of approved State programs. Under 30 CFR 842.11(b) OSMRE is required to conduct a Federal inspection upon the request of a person who has presented information to OSMRE about a possible violation or imminent danger or harm, and under 30 CFR 843.11 and 843.12 to enforce requirements of SMCRA, 30 CFR Chapter VII, the State program and permit conditions under a State program not being enforced by a State.

Detailed procedures for conducting Federal inspections and other evaluation activities and for preparing the annual reports to Congress presenting OSMRE's evaluation findings for each State with an approved regulatory program are contained in directives and policy and guidance documents. These documents are discussed below under "Analysis of Petitioners' Proposals."

ANALYSIS OF PETITIONERS' PROPOSALS

1. Proposed 733.12(a)

(a) Proposal: The petitioners proposed that OSMRE promulgate specific uniform procedures to evaluate State regulatory programs on an annual basis.

Response: OSMRE has already promulgated regulations to implement its oversight responsibilities after providing opportunity for public comment. The regulations at 30 CFR Parts 733, 842 and 843, among others, implement the oversight requirements of the Act. Detailed procedures for evaluating State programs have been established through directives and other policy and guidance documents. OSMRE has developed the following documents in an effort to ensure consistent and comprehensive evaluations of State programs: "Plans and Procedures for the Evaluation of the States' Permanent Programs" (March 5, 1982); "Sampling Method for Conducting Federal Inspections in States with Approved Surface Mining Regulatory Programs" (March 13, 1981); "Format and Outline for the Annual Evaluation Reports" (July 30, 1986); "Procedures for the Evaluation of State Permitting Operations" (July 30, 1986). Two of these are directives and two are policy and guidance documents. The "Format and Outline for Annual Evaluation Reports" is revised annually on the basis of comments received from OSMRE staff, States and the public concerning problems or concerns in implementing the prior year's guidance and to alter the focus or emphasis of OSMRE's review of certain program areas as circumstances point to the need for such change. Thus, the petitioners' concern has already been met in that OSMRE has established detailed procedures for evaluating State programs.

Detailed procedures have been established through directives and other policy and guidance documents rather than rules for two reasons. First, the use of guidance documents allows OSMRE the necessary flexibility to revise its

procedures to respond to changing needs and concerns relating to the States' implementation of their programs and to devise and incorporate evaluation techniques which recognize the variability of surface coal mining operations in States with approved regulatory programs. Each year, efforts are made to draw on the experience of OSMRE staff and the knowledge and expertise of groups and individuals outside the agency to improve the quality of OSMRE's evaluation methods and reporting techniques. Second, it allows OSMRE's Field Office Directors discretion in applying the established policies and procedures. Such discretion is necessary as each State program includes provisions which reflect unique environmental conditions or other State-specific factors which must be taken into consideration.

In summary, it is OSMRE's position that the evaluation of State regulatory programs should be conducted in accordance with standard procedures to ensure fair, comprehensive and consistent evaluations. OSMRE has developed policy and guidance documents which are intended to accomplish this while allowing for the variability in State programs. OSMRE does not support the adoption of additional detailed oversight procedures as rules as this would restrict the Director's discretion to modify its evaluation procedures to respond to changing circumstances or needs, and the Field Office Directors' discretion to adjust procedures to reflect State-specific factors.

(b) Proposal: The petitioners recommended that each annual evaluation of a State regulatory program contain statistical information and analysis of all major program categories and subcategories.

Response: No need exists to accept petitioners' recommendation. OSMRE's existing procedures provide for the collection and analysis of statistical information for many, although not all, program categories evaluated. OSMRE has prepared and distributed to its field offices two documents which provide guidance on statistical sampling techniques relevant to the evaluation of State programs. These documents are entitled "General Guidance Memorandum on Statistical Sampling" (February 4, 1985) and "Specific Guidance Memorandum on Statistical Sampling" (February 26, 1985).

In addition, as mentioned under (1) above, OSMRE has prepared a document entitled "Sampling Method for Conducting Federal Inspections in States with Approved Surface Mining Regulatory Programs."

OSMRE's oversight procedures do not provide for the collection of statistical information for all categories of State programs evaluated. For example, analyses of a State's processes for permitting or for designating lands unsuitable for surface coal mining do not lend themselves to statistical analysis. OSMRE favors data collection and analysis when these are suitable evaluation techniques. The outline for OSMRE's annual evaluation reports on State programs provides for the inclusion of statistical information in numerous tables throughout the reports and OSMRE's analysis of this statistical information provides, to a large extent, the basis for OSMRE's conclusions about the State's performance for any given evaluation period. OSMRE staff will continue to seek improvement of its data analyses techniques to ensure that conclusions drawn from the data collected and analyzed by OSMRE accurately reflect the States' performance.

(c) Proposal: The petitioners advocated that the Director develop evaluation procedures which ensure a comprehensive evaluation of State programs, provide for the evaluation of major categories and subcategories, and define acceptable performance levels for each subcategory.

Response: As discussed under (a) above, OSMRE has developed policy and guidance documents which establish the procedures to be utilized by OSMRE in evaluating State regulatory programs on an annual basis. In particular, the "Format and Outline for Annual Evaluation Reports" provides for the review and evaluation of all major categories and subcategories of State regulatory and AML programs and ensures that OSMRE's evaluations of State programs are comprehensive. Thus, the existing procedures accomplish two of the petitioners' objectives. OSMRE relies on the provisions of each approved State program as the criteria for evaluating the State's administration of its program. OSMRE has not established performance levels for each major category and subcategory of State programs evaluated. OSMRE reviews the State's performance in each area, identifies deficiencies and works with the State to develop action plans and timetables for resolution of all identified problems. The underlying assumption of OSMRE's evaluation strategy is that States shall fully comply with all approved program provisions.

Whenever OSMRE has facts indicating that a State is not in full compliance, OSMRE seeks to bring the State into conformance. OSMRE cannot find any support in SMCRA for establishing performance levels other than the standards established by the approved program provisions. The Act and OSMRE's regulations do provide a certain degree of flexibility with respect to the nature of the approved program provisions. Under the standards for approval of State

program provisions at 30 CFR 732.15, OSMRE may approve alternatives to the Federal regulations provided these are consistent with SMCRA and no less effective than the Federal regulations. States may amend their programs at any time provided these standards are met. Each State program incorporates provisions which reflect the environmental conditions unique to the State or other factors such as preexisting State legislation which has a bearing on the State's surface mining program. Because the criteria for evaluating States' performance are the approved program provisions, the mechanism for overseeing implementation of the program already exists.

2. Proposed 733.12(c)-(e): The petitioners proposed that the Director provide a hearing opportunity and a 45-day comment period on draft State program evaluation reports. They also recommended that in preparing the annual evaluation reports, OSMRE consider all relevant information, including public comment, and respond to all public comments in the final reports.

Response: Under the existing procedures OSMRE seeks public input at the beginning of the evaluation period in developing the State-specific oversight strategy for the upcoming year. Upon completion of the report, OSMRE publishes notice in the Federal Register that the report is available to any interested person upon request. OSMRE is concerned that publication of draft reports with request for comments would unduly delay and complicate the evaluation process. Each year, the evaluation process involves 24 States with approved regulatory programs. If a public comment period were provided, the States would seek further time to respond. These steps, together with OSMRE's need to review additional material provided using available resources would unduly impede the timely issuance of the final reports. So long as the final annual evaluation is made publicly available, the public has an opportunity to participate. If any person is dissatisfied with the result of an annual evaluation, he has the right under 30 CFR 733.12(a) to request further review and analysis based upon any available information.

3. Proposed 733.12(f): The petitioners proposed regulatory language which provides that whenever OSMRE or any interested person identifies any failure of the State to achieve a performance level in administering any part of its program the Director shall notify the State in writing and establish a period of time for correcting deficiencies not to exceed 90 days.

Response: Under the petitioners' proposal, the Director would be required to notify States upon any person's allegation of a State failure to meet a performance level. A similar proposal was previously considered by OSMRE (*44 FR 14967*, March 13, 1979). OSMRE's regulation at 30 CFR 733.12(a)(2) as originally proposed provided that a request by any person could trigger an evaluation. Commenters criticized the proposed evaluation provisions as being cumbersome and obstructive. After consideration of these comments OSMRE determined that verification is necessary to avoid the initiation of proceedings for unsubstantiated complaints. Thus, the present regulations require the Director to verify the allegations prior to performing an evaluation.

OSMRE believes the present regulations at 30 CFR 733.12(b) contain a reasonable threshold for initiating the process under 30 CFR Part 733. Under current rules, the Director is required to notify a State in writing when he has reason to believe that a State is not effectively administering, maintaining, or enforcing any part of its approved State program. Any attempt to further define the circumstances under which the Director must notify the State in writing of program deficiencies (through the use of performance levels) would essentially lock OSMRE into a non-discretionary oversight role. Under the petitioners' proposal, even trivial matters could become the subject of "733" notices.

Section 102(g) of the Act makes it clear that Congress intended for OSMRE to assist the States in developing and implementing State programs. OSMRE must carefully weigh all circumstances prior to initiating the process to withdraw approval of a State's program. OSMRE believes that the Director must have discretion to decide what course of action is appropriate in each unique situation and to consider the State's capability and intent to enforce its program when initiating the process under 30 CFR Part 733. OSMRE has developed a range of options to deal with deficiencies in a State's administration of its program. OSMRE considers the petitioners' proposal to be an unworkable and ineffective approach.

With respect to the petitioners' proposal that States be limited to 90 days to correct deficiencies, OSMRE cannot find any basis for adopting this proposal. The present regulations allow the Director discretion to establish a timetable for remedial actions appropriate to the deficiencies. The proposed 90-day limit for correcting deficiencies would be unworkable in certain cases. For instance, any problems requiring regulatory or statutory changes would almost certainly

not be resolved in 90 days. The Director must retain the necessary flexibility to establish a reasonable time period which reflects the nature and extent of the identified deficiencies.

4. Proposed 733.12(b)(3): The proposed regulation provides that pending completion of any changes in a State program required by the Director, the States shall act in accordance with the required changes.

Response: OSMRE finds that the petitioners' proposal conflicts with the process established for the review and approval of State program amendments set forth under Section 732.17 of OSMRE's regulations. The Federal rules explicitly prohibits a State from implementing any changes until approved as program amendments. Such program amendments cannot be approved until there has been an opportunity for public participation. In essence, petitioners are advocating State implementation of program changes before operators and other members of the public are able to comment on such changes. Furthermore, the petitioners' proposal would almost certainly be illegal under State law in many, if not all, States. For these reasons, OSMRE does not support adoption of the proposal.

5. Proposed 733.12(g): The petitioners advocate that OSMRE publish written notice in the Federal Register of informal conferences held by OSMRE upon request of the State following the Director's written notice to the State pursuant to 30 CFR 733.12(b) of OSMRE's regulations.

Response: The preamble to the 1978 proposed rule stated that informal conference between OSMRE and the State would be open to the public. *43 FR 41678* (September 18, 1978). As a matter of policy, OSMRE has implemented that commitment and publishes notice in the Federal Register of all informal conferences to be held in connection with proceeding initiated under 30 CFR Part 733 and invites the public to attend. Therefore, OSMRE believes there is insufficient reason to conduct a rulemaking on the proposal as the public interest is adequately protected by OSMRE's practice under the current regulation.

6. Proposed 733.12(d): The proposed regulation stipulates that within 30 days after the period set for remedial action, the Director shall publish written findings in the Federal Register. If the findings show the State has failed to implement its program, the Director shall hold a hearing within 30 days.

Response: The existing regulation at 30 CFR 733.12(d) provides that if following any informal conference, the Director still has reason to believe the State is failing to implement its program adequately, OSMRE shall notify the State and the public specifying the basis for that belief and hold a public hearing within 30 days of the period set for remedial action. Under the petitioners' proposal the hearing would not be held until 60 days following the period set for remedial action, whereas under the current Federal rule the hearing would be held within 30 days following the remedial action period. Under the current rules, notice of the hearing would be published in the Federal Register together with an explanation of the reasons why OSMRE has determined a hearing is necessary. OSMRE believes the current rules provide for a more expeditious process than that proposed by the petitioners while providing for adequate public participation. The petitioners have not demonstrated problems with the current process or explained why their suggested process would be better.

7. Proposed 733.12(i): The petitioners proposed that upon completion of the hearing, the Director shall issue findings and in the event of negative findings, the Director shall revoke the Secretary's approval of the State program.

Response: The agency already has regulations at 30 CFR 733.12(e) which prescribe the agency's alternatives following the hearing held under 30 CFR 733.12(d). These procedures have worked in the past and have resulted in direct Federal enforcement of portions of two State programs (Tennessee and Oklahoma) and promulgation of a Federal program for Tennessee. Petitioners have not demonstrated why the current procedures are inadequate or that their suggested alternative is better.

In addition, the proposal would eliminate OSMRE's option under existing 30 CFR 733.12(e)(1) of substituting Federal enforcement of all or part of the State program and would permit only the complete withdrawal of program approval. OSMRE previously considered and rejected adding language to Section 733.12 allowing immediate withdrawal of a State program when failure in administration results in a serious threat to the environment or public (*44 FR 14969*, March 13, 1979). OSMRE determined that such a proposal is outside the authority of the Act. Sections 504(b) and 521(b) of the Act specifically authorize direct Federal enforcement and require certain procedural steps to be taken before the Secretary may withdraw approval of a State program. Eliminating the Federal enforcement option removes a valuable

tool that allows for alleviation of serious problems in a State, while permitting a State to retain certain functions. Moreover, elimination of direct Federal enforcement leaves the agency without any transitional enforcement authority between the time OSMRE withdraws program approval and implements a Federal program should the Secretary decide that complete or partial withdrawal of program approval is necessary.

The proposal also eliminates the option of partial withdrawal of a State program. OSMRE has previously considered and rejected the suggestion to delete this alternative (*44 FR 14969*, March 13, 1979). The provision allowing partial withdrawal is considered a necessary response for more serious breakdowns in administration where only a certain part of the program is affected. Authority for this requirement is contained in sections 201(c), 503, 504 and 521 of the Act. In addition, the proposal would be contrary to Section 521(b) of the Act which requires a finding that not only has the State failed to effectively administer and enforce its program, but that it has also failed to demonstrate its capability and intent to do so.

8. Proposed 733.12(i)(3): The proposed regulation provides that the decision to issue a State program evaluation or revoke a State program may be appealed by any person to the Interior Board of Land Appeals.

Response: Under section 526(a) of SMCRA, the Secretary's decision to withdraw program approval is reviewable by the Federal district courts. The jurisdiction of the Interior Board of Land Appeals as set forth under 43 CFR 4.1101 has not been expanded to include the authority to exercise final decision making power of the Secretary with regard to decisions on State programs. Petitioners have not demonstrated why the current process is inadequate or that their suggested alternative would be better. With respect to evaluation findings, if any person is dissatisfied with the result of an annual evaluation, he has the right under 30 CFR 733.12(a) to request further review and analysis based upon any available information.

9. Proposed 733.12(i) (4) and (5): The proposed provisions specify that the Director will hold a hearing 30 days prior to revoking or returning a program.

Response: The current rules already provide that a hearing shall be held prior to approving or revoking a State's program. OSMRE's regulation at 30 CFR 733.12(d) provides that the Director shall hold a public hearing prior to making any determination that Federal enforcement of the State's program or withdrawal of approval of the State program, in whole or in part, is necessary. In the event a State program is revoked, the State would be required to submit a new program for the Secretary's approval under 30 CFR Part 732 in order to regain primary authority for regulating surface mining activities in the State. Under 30 CFR 732.11(b), the Director is required to conduct a hearing on a State program submission prior to the Secretary's decision to approve or disapprove it.

ANALYSIS OF PETITIONERS' REASONS WHY PETITION SHOULD BE GRANTED

In addition to the section by section analysis of the petition set forth in the preceding portion of this decision document, this portion addresses the general concerns of the petitioners. As will be seen, some of OSMRE's general responses have already been recited in the analyses of specific suggested amendments.

1. Reason: The petitioners asserted that the petition should be granted because OSMRE regulations are required by law. They further contended that OSMRE has promulgated two documents which fall within the Administrative Procedure Act (APA) definition of a "rule" but which have not been promulgated as rules in accordance with the APA.

Response: OSMRE has already promulgated regulations, as required by the APA and the Act, to implement its oversight responsibilities under the Surface Mining Act. The regulations at 30 CFR Parts 733, 842 and 843, among others, implement the oversight requirements of the Act. As to the petitioners' second contention, the two documents the petitioners refer to are not rules subject to the notice and comment requirements of section 553 of the APA. The two documents, "Plans and Procedures for the Evaluation of the States' Permanent Programs" (March 5, 1982) and "Sampling Method for Conducting Federal Inspections in States with Approved Surface Mining Regulatory Programs" (March 13, 1981), are non-binding, internal agency guidelines and procedures that are consistent with and implement the existing regulations. Neither document binds OSMRE or the States. Both documents call for the exercise of discretion and judgment in their application and the resulting analysis is itself subject to further review by agency management.

In any event, the issue of whether the two documents are rules subject to 5 U.S.C. Section 553 of the APA is not relevant to whether the amendments suggested in the petition should be granted or denied. The petition seeks amendments to OSMRE's existing regulations which should be analyzed on their own merit, independent of procedural consideration regarding two separate documents.

2. Reason: The petitioners contended the OSMRE has a statutory, non-discretionary duty to oversee State regulatory programs.

Response: OSMRE agrees that it has a statutory duty to oversee State regulatory programs and believes that it is currently fulfilling this obligation. OSMRE has promulgated rules, established systems and procedures and developed policy and guidance documents to carry out its statutory mandate to oversee State regulatory programs. Each of these has been discussed previously in this document. OSMRE does not agree, however, that successful performance of the Secretary's duties can occur without the judicious exercise of Federal authority. For example, section 521(b) clearly provides the Secretary with discretion to determine whether, on the basis of information available to him, there is adequate reason to believe that the State is failing to enforce its program. Exercise of such authority without the careful weighing of all relevant considerations and options available could constitute a failure to satisfy statutory authority.

The Surface Mining Act provides broad discretion to the Secretary to carry out his oversight responsibilities. The manner in which he has been implementing such responsibilities is consistent with judicially enunciated principles. n1

n 1 In *City of Seabrook v. Costle*, 659 F. 2d 1371, 1374 (5th Cir. 1981), the court held that where enforcement actions are concerned, administrative agencies should be afforded broad discretion both in initiating such actions and in taking "the preliminary investigatory steps that would provide the basis for enforcement action." The court was interpreting section 113 of the Clean Air Act, 42, U.S.C. 7413, which contains a provision very similar to section 521(b) of the Act. Section 113 provides:

Whenever on the basis of information available to him, the Administrator finds that violations of an applicable implementation plan are so widespread that such violations appear to result from a failure of the State in which the plan applies to enforce the plan effectively, he shall so notify the State. If the Administrator finds such failure extends beyond the 30th day after such notice, he shall give public notice of such finding.

The plaintiffs argued that the Administrator had a nondiscretionary duty to make such findings on the basis of information available to him. The court disagreed, based upon the tradition of broad prosecutorial discretion described above.

3. Reason: The petitioners advocated that OSMRE establish a systematic method to measure and evaluate the effectiveness of State programs. They contended that OSMRE's current oversight documents fail to address many aspects of State regulatory programs.

Response: The specific standards which OSMRE utilizes for State program evaluations are the approved provisions of each State program. Procedures for evaluating the States' administration of their programs are set forth in OSMRE's rules and in policy and guidance documents which have been previously referenced. OSMRE policy and procedural documents provide for a comprehensive evaluation of State programs and cover the methods to be used for data collection and analysis including sampling methodologies. OSMRE's regulations at 30 CFR Part 733 set forth the criteria and procedures for instituting Federal enforcement of a State program or withdrawing approval of a State program. Thus, a systematic process for measuring and evaluating the administration of State programs is already in place.

4. Reason: It is the petitioners' belief that OSMRE has substituted improper procedures when it has identified failures of a State to enforce all or part of its program. They asserted that OSMRE has failed to notify States in accordance with 30 CFR Part 733 when States have failed to implement, administer, maintain or enforce their programs. They indicated that the amendments which they have proposed are intended to address the problem of OSMRE substituting other actions for formal "733" letters.

Response: Recognizing the need to ensure that States remedy problems identified by OSMRE during the evaluation process, OSMRE has developed a range of actions to compel State compliance. For instance, OSMRE procedures now require that OSMRE Field Office Directors work with the States to develop action plans and timetables for resolution of

all identified problems. OSMRE has also developed other mechanisms to address a State's failure to implement its program in full compliance with the approved provisions. The process under Part 733 of OSMRE's regulations for instituting Federal enforcement of a State program or withdrawing approval of a State program has been utilized in situations in which OSMRE's other attempts to bring a State program into conformance have failed. Any transfer of authority involves a severe strain on the resources and personnel of both the Federal government and the State. Revocation of a State's program is a serious action which OSMRE believes should be taken when the Secretary has determined that the State has failed both to effectively implement its program and to demonstrate the capability and intent to enforce its program. Clearly, OSMRE must monitor the enforcement of State programs but the Secretary must retain discretion with respect to initiating the revocation process.

5. Reason: The petitioners pointed out that SMCRA requires public participation in enforcement of State programs. They contended that under OSMRE's current regulations, the public has no procedure for participating in OSMRE's evaluations of State programs.

Response: OSMRE's existing regulations provide numerous opportunities for public input into the regulatory process. In fact, OSMRE's regulations are replete with opportunities for the public to review and comment on State actions. For instance, under 30 CFR 842.12, any person may request a Federal inspection, and under 30 CFR 733.12(a), any person may request the Director to evaluate a State program. Thus, if a citizen has information that contradicts evaluation findings contained in OSMRE's annual reports on State programs, the citizen may provide that information to OSMRE and request that an evaluation be conducted. Also, as a matter of policy, OSMRE seeks public input at the beginning of each evaluation period prior to formulating its oversight strategy for the upcoming year. Upon completing the annual evaluation report for a State, OSMRE publishes notice in the Federal Register announcing the availability of the report. Thus, initiation of a rulemaking action on the proposal is not necessary or justified at this time.

PUBLIC COMMENT

OSMRE received 39 comments on this petition for rulemaking. Of those, 18 were comments received from State regulatory authorities and 16 from coal companies and industry groups. The remaining five comments were received from a U.S. Congressman, a State official, an environmental group, an interested person and the petitioners. Thirty-two of the commenters supported rejection of the petition, four supported acceptance of the petition and three of the commenters did not specify a position.

The petitioners themselves were one of the four commenters supporting acceptance of the petition. The reasons they offered in their letter were essentially the same as those provided in the petition. They commented that the present oversight program has resulted in inadequate and inconsistent evaluations, has excluded the public from participation in matters that affect its interests and has violated the agency's legal mandates. For the reasons discussed above OSMRE believes that its current oversight program complies with OSMRE's statutory obligations relative to the evaluation of State programs. OSMRE's regulations, together with its oversight policy and guidance documents, provide for the evaluation of all components of State programs in accordance with uniform procedures. OSMRE continues to seek improvement of its data collection and evaluation techniques to ensure the accuracy of its findings and conclusions about the States' administration of their programs.

On an annual basis, OSMRE seeks input on its oversight procedures from the States and other interested persons, and modifications are made to policy and guidance documents to incorporate improved strategies for evaluating State performance. OSMRE believes the existing regulations and procedures provide numerous opportunities for public participation in OSMRE's evaluation process.

The West Virginia Highlands Conservancy commented that it supports the petition but did not offer any specific rationale as to why OSMRE should accept it.

The Pennsylvania Department of Environmental Resources (DER) indicated that it supports the efforts of the petitioners to set up a formalized process for OSMRE to review and evaluate State mining programs. The State commented that it believed there is a need to establish program measures to determine the adequacy of States' performance. DER encouraged OSMRE to develop a guidance document that specifies the procedures for evaluating State programs which includes the statistical approach to be utilized and the justification as to the validity of the statistical analyses.

As previously discussed, OSMRE utilizes the approved provisions of each State program as the criteria for evaluating State performance. OSMRE's "Format and Outline for State Program Evaluations" and other oversight guidance documents establish uniform procedures for the evaluation of State programs including OSMRE's statistical sampling methodologies. Efforts are being made to improve OSMRE's data collection and analysis techniques within the agency.

Maryann Lunderman, Attorney, also submitted certain comments supporting the petitioners' proposals. She supports the development of State evaluation procedures that are uniform and in accordance with the standard in SMCRA and urged OSMRE to publish proposed procedures in the Federal Register and provide the public an opportunity to review and comment on them. She further commented that the public should have the opportunity to review and comment on the annual evaluations without delaying the evaluation process.

As previously discussed OSMRE has developed and is presently using uniform procedures for evaluating the States's administration of approved programs under SMCRA. OSMRE will continue to examine mechanisms to broaden public participation in the evaluation process without sacrificing the timeliness of the evaluation reports.

FINAL DECISION

Based upon the foregoing analysis and comments, I am denying the petition to initiate rulemaking. OSMRE already has regulations in place which sufficiently detail the criteria and procedures for evaluating State regulatory programs. The petitioners have not persuaded me that the issues that concern them, previously considered in two rulemakings on the same subject, warrant revision of the regulations. OSMRE will continue its efforts to improve the quality and reliability of its evaluation methodologies. A discussion of these efforts is included in the above analysis of the petitioners' proposals. OSMRE is committed to making whatever modifications are necessary to its existing policies and procedures to ensure fair, consistent and comprehensive evaluations.

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