

**FEDERAL REGISTER: 53 FR 24872 (June 30, 1988)**

DEPARTMENT OF THE INTERIOR

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

30 CFR Parts 840, 842 and 843

Surface Coal Mining and Reclamation Operations; Initial and Permanent Regulatory Programs; Abandoned Sites

ACTION: Final rule.

**SUMMARY:** The Office of Surface Mining Reclamation and Enforcement (OSMRE) of the United States Department of the Interior is amending its regulations to define "abandoned site," to specify the inspection frequency for abandoned sites, and to allow regulatory authorities to refrain from issuing additional notices of violation or cessation orders for abandoned sites under certain limited circumstances.

An abandoned site, which must meet the criteria set out in the rule, is an incompletely reclaimed surface coal mining and reclamation operation where mining and reclamation activities have ceased and that has been abandoned. The rule requires regulatory authorities to inspect abandoned sites as necessary to monitor for changes in environmental conditions or operational status. The rule will enable regulatory authorities to reduce the number of unproductive inspections, as well as duplicative notices and orders, and thus concentrate resources on inspection and enforcement activities that are more likely to secure compliance with the Act.

EFFECTIVE DATE: August 1, 1988.

FOR FURTHER INFORMATION CONTACT: Art Abbs, Office of Surface Mining Reclamation and Enforcement, U.S. Department of the Interior, 1951 Constitution Avenue NW., Washington, DC 20240; Telephone: 202-343-5351 (Commercial or FTS).

**SUPPLEMENTARY INFORMATION:**

- I. Background
- II. Discussion of Rule and Response to Comments
- III. Procedural Matters

**I. BACKGROUND**

The Surface Mining Control and Reclamation Act of 1977 (the Act), in section 517, *30 U.S.C. 1267*, requires OSMRE and State regulatory authorities to inspect surface coal mining and reclamation operations. To implement this requirement, on March 13, 1979, OSMRE promulgated rules at 30 CFR Part 840 for State regulatory authority inspection and enforcement (*44 FR 15294 and 15445*), and at 30 CFR Part 842 for Federal inspections (*44 FR 15297 and 15456*). These 1979 rules applied to permitted and unpermitted permanent program surface coal mining and reclamation operations. They required regulatory authorities to inspect all operations on an average of not less than one partial inspection per month and one complete inspection per calendar quarter.

The 1979 rules were revised by OSMRE on August 16, 1982 (*47 FR 35620*), to define "inactive surface coal mining and reclamation operation," and to reduce the partial inspection frequency for inactive operations to those "necessary to ensure effective enforcement of the approved State program," while retaining the prior frequency for complete inspections. This approach was adopted because OSMRE had found that inactive minesites presented inspection and enforcement problems that differed from those of active sites, both in kind and degree. (*47 FR 35627* and proposed rule at *46 FR 58466* (December 1, 1981)). In the 1982 rulemaking, OSMRE declined to modify the inspection frequency for abandoned sites, concluding that "[t]he 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." *47 FR 35627*. As a result, a significant number of abandoned sites continued to be considered active, and to receive monthly partial inspections, of which one per quarter must be a complete inspection.

OSMRE has reevaluated its previous position on abandoned sites as a result of its experience in implementing the 1982 rules. Thus, on August 28, 1987 (*52 FR 32758*), OSMRE proposed a rule that defined "abandoned site" and

required regulatory authorities to inspect such sites as necessary to monitor environmental conditions or changes of status at the site. OSMRE also proposed to allow regulatory authorities to refrain from issuing additional notices of violation or cessation orders at abandoned sites provided the abatement of any newly observed violation could be required as part of the abatement of a notice or order already issued.

The comment period for the proposed rule initially was scheduled to end on November 6, 1987. On October 28, 1987 (*52 FR 41471*), at the request of commenters, the comment period was extended to November 30, 1987. Comments were received from ten persons, representing public interest groups, industry, and the States. No public hearing was requested and none was held.

## **II. DISCUSSION OF RULE AND RESPONSE TO COMMENTS**

### **INTRODUCTION**

This section of the preamble describes the final rule, explains how it differs from the proposal, and summarizes and responds to public comments. After an over-view of the rule, the general comments on the rule are discussed, and then the rule and specific comments are discussed by individual section. Because Sections 840.11 and 842.11 contain similar provisions for State and Federal programs, respectively, they are cited as Section 840.11/842.11 and discussed together.

While the rule in some instances uses the term "the Office" to identify OSMRE in its capacity as regulatory authority, to simplify the discussion this preamble uses the term "regulatory authority" generally in referring to both OSMRE and the States.

A number of commenters suggested alternative criteria for the Section 840.11(g)/842.11(e) definition of "abandoned site." Those alternatives which are similar to the criteria in the rule are discussed with the corresponding section of the rule. Criteria which have no particular counterpart in the rule are discussed with Section 840.11(g)(4)/842.11(e)(4), under the heading Alternative Criteria.

A number of minor stylistic changes were made to improve the grammar and punctuation of the proposed rule. These changes do not affect the substance of the rule, and are not discussed further. Other changes, which do affect the substance of the rule, are discussed in the subsequent section-by-section analysis.

### **OVERVIEW OF RULE**

This rule amends the existing OSMRE inspection regulations at 30 CFR 840.11/842.11 by adding a definition of the term "abandoned site" and allowing a different inspection frequency for these sites. For a site to qualify as abandoned under the definition, the regulatory authority must make a written finding concerning its status. Generally, the regulatory authority must find that surface coal mining and reclamation activities at the site have ceased, and that certain enforcement measures either have been or are being taken. Once this finding is made, the regulatory authority may inspect the site at a frequency as necessary to monitor for changes of environmental conditions or operational status at the site. Before it may reduce the inspection frequency at an abandoned site, the regulatory authority must evaluate the environmental conditions and operational status of the site, and document in writing both the inspection frequency necessary to comply with the rule and the reasons for selecting that frequency.

In addition, this rule adds to the Federal enforcement regulations in 30 CFR Part 843 a new Section 843.22 which authorizes OSMRE to refrain from issuing a notice of violation or cessation order for a violation at an abandoned site if abatement of the violation is required under any previously issued notice or order.

### **OVERVIEW OF BASIS, PURPOSE, AND LEGAL AUTHORITY**

A significant purpose of the Surface Mining Control and Reclamation Act of 1977 (the Act) is to "protect society and the environment from the adverse effects of surface coal mining operations \* \* \*." Section 102(a), *30 U.S.C. 1202(a)*. OSMRE believes a rigid inspection frequency requirement for abandoned sites is inconsistent with this purpose because it causes regulatory authorities to allocate their inspection resources in a manner which no longer is effective to enforce the Act's environmental performance standards.

The time inspectors spend at abandoned sites detracts from the time they can spend at other sites working with operators to abate present violations and to prevent future violations, thus improving the quality of inspections. The inspection frequency established by this rule will allow more effective use of inspector's time, while maintaining the protection afforded to society and the environment at abandoned sites.

In conducting inspections under the previous regulations, OSMRE has found that inspectors normally cite all significant violations soon after a site is abandoned. The persons responsible for abating these violations typically are financially insolvent or cannot be located. In such instances, even when diligent efforts are made to enforce the Act, no one is available to abate violations or to perform or pay for the needed reclamation. Continuing regular partial and complete inspection of these sites serves no useful purpose and wastes finite resources. To illustrate the extent of this waste, OSMRE has conducted approximately 2,900 inspections each year at 236 abandoned sites in Tennessee. This effort comprises approximately 32 percent of the inspections in that State; however, few of these inspections resulted in abatement of violations or completion of reclamation.

Environmental conditions at most abandoned sites will not significantly degrade beyond that which has been observed in prior inspections. While these sites do not comply with the Act, many become reasonably well stabilized through natural settlement and revegetation processes because of their age or because they were partially reclaimed prior to being abandoned. In approximately 6,000 inspections conducted at abandoned sites in Tennessee, OSMRE inspectors observed no condition which posed an imminent danger to the public health or safety, or an imminent environmental harm to land, air or water resources.

OSMRE can find nothing in the Act or its legislative history which suggests that the Congress expected regulatory authorities to continue to inspect abandoned sites with uncompromising frequency after diligent inspection and enforcement measures have proven ineffective to abate violations and secure reclamation.

While section 517(c) of the Act appears to direct regulatory authorities to inspect all sites at the same set frequency, its stated goal is to "enforce the requirements of and carry out the purposes of [the] Act." Inspection of abandoned sites as frequently as other sites does nothing to achieve, but on the contrary frustrates, this goal.

Among the mechanisms provided by the Act to achieve the stated goals of section 517(c) are penalties under section 518, performance bonds under sections 509 and 519, citizen suits under section 520, and enforcement under section 521. Each of these mechanisms implicitly has as its underlying premise the existence of a person against whom an action can be taken, or of a bond that can provide the funds, to abate violations and secure reclamation. If no such person can be found after diligent effort, or the regulatory authority otherwise is taking appropriate action to ensure that abatement occurs, and any permit has been revoked and any bond is being forfeited, issuance of multiple notices of violation and cessation orders generated by the fixed inspection frequency requirement and the subsequent assessment of uncollectible penalties are not productive tools to "enforce the requirements of and carry out [the] purposes of the Act." Under these circumstances, inspections performed at a frequency determined by the particular characteristics of the site are a far more reasonable and realistic alternative. The U.S. Court of Appeals for the District of Columbia Circuit, in *NWF v. Hodel*, No. 84-5743, slip op. at 41 (D.C. Cir. January 29, 1988), has noted that "courts should avoid reading statutes in a manner that renders passages functionless." OSMRE believes that regulatory agencies should do likewise, and that the interpretation of section 517(c) embodied in this rule is a reasonable application of that judicial precept.

Section 201(c)(2) of the Act, *30 U.S.C. 1211(c)(2)*, requires the Secretary of Interior to publish and promulgate such rules and regulations as may be necessary to carry out its purposes and provisions.

Since regular partial and complete inspections of abandoned sites are a counterproductive use of limited enforcement resources, and since fewer inspections of such sites are not likely to result in increased environmental harm or otherwise to effect compliance with the Act, this rule is a necessary and reasonable interpretation of the purposes and provisions of the Act.

## **GENERAL COMMENTS**

General comments on the proposed rule are discussed here. Specific comments are discussed in the subsequent section-by-section analysis.

## **SUPPORT FOR RULE**

Most commenters supported a reduced inspection frequency for abandoned sites as a means to achieve more productive use of limited inspection and enforcement resources. One commenter said that the rule was contrary to the Act, but at the same time appeared to support a reduced frequency if a more stringent definition of "abandoned site" were adopted.

One State commenter welcomed the relief the rule would provide from "the mandate to conduct inspections month after month on abandoned sites which didn't change from one time to the next." This commenter had found that continued enforcement action at the inspector level did nothing to increase the reclamation of abandoned sites.

## **MISDIRECTED COMMENT**

One commenter accurately cited the proposed rule, but then limited his comments to issues concerning termination of operator liability upon bond release, for which OSMRE proposed a different rule on June 26, 1987 (*52 FR 24092*). OSMRE will address these comments, as well as other comments on the June 26 proposal, in a separate final rule.

## **ADMINISTRATIVE RECORD**

The preamble to the proposed rule stated that numerous inspections of abandoned sites in Tennessee have not revealed any imminent harm situations (*52 FR 32759*). One commenter asked OSMRE to place the data supporting this statement in the administrative record for the rule. These data, which also are publicly available in OSMRE's Knoxville, Tennessee, Field Office, have been placed in the administrative record, and are part of the basis and purpose for this rule.

## **RESPONSIBILITY FOR INITIAL PROGRAM SITES**

One commenter said that under this rule OSMRE would be responsible for determining whether initial regulatory program sites which have not achieved permanent program status qualified as abandoned. Citing section 502(e) of the Act, *30 U.S.C. 1252(e)*, the commenter concluded that OSMRE is the regulatory authority for all operations that were left unreclaimed during the initial program.

OSMRE disagrees in part with the commenter. By its own terms, section 502(e) governs the inspection of initial program sites in a State only "until the State program has been approved pursuant to [the] Act \* \* \*." While OSMRE retains jurisdiction over a limited number of initial program sites, such as those in Federal program states and on Federal lands in States without cooperative agreements, responsibility for the majority of them was transferred to the States when their permanent programs were approved. This rule applies only to sites covered by Parts 840 and 842.

## **SECTION-BY-SECTION ANALYSIS**

### **SECTION 840.11/842.11 - INSPECTIONS BY STATE REGULATORY AUTHORITY/FEDERAL INSPECTIONS AND MONITORING.**

OSMRE is amending its existing State inspection rules at 30 CFR 840.11 by adding new paragraphs (g) and (h) and the Federal program counterpart at 30 CFR 842.11 by adding new paragraphs (e) and (f). This rule adds to the previous inspection requirements a definition of the term "abandoned site," and allows a reduced inspection frequency for abandoned sites. For a site to qualify as abandoned under the definition, the regulatory authority must make a written finding concerning its status. Generally, the regulatory authority must find that surface coal mining and reclamation activities at the site have ceased, and that specified enforcement measures have been taken.

After finding that a site is abandoned, the regulatory authority must inspect the site as necessary to monitor for changes of environmental conditions or operational status at the site. Before the regulatory authority may inspect the site at this reduced frequency, however, it first must evaluate the environmental conditions and operational status of the site, and document in writing both the inspection frequency necessary to comply with the rule and the reasons for selecting that frequency.

## SECTION 840.11(g)/840.11(e).

Section 840.11(g)/842.11(e) defines the term "abandoned site" in terms of specific criteria set out in paragraphs (g)(1)/(e)(1) to (g)(4)/(e)(4). The second paragraph is the same as proposed. The first, third and fourth were revised in response to public comment.

The introductory paragraph of Section 840.11(g)/842.11(e) also was revised to eliminate an inconsistency. The proposed rule required the regulatory authority to find in writing "that all of the following criteria apply \* \* \*." *52 FR 32760* (emphasis added). However, paragraph (4) applied only conditionally "[w]here the site was permitted and bonded \* \* \*." So while paragraphs (1) to (3) applied to unpermitted or unbonded sites, arguably paragraph (4) did not.

To eliminate this inconsistency, the phrase "all of the following criteria apply" was deleted from the final rule. The revised language requires the regulatory authority to find in writing that the site meets the criteria of paragraphs (1) to (3) in all cases, and that it meets the criterion of paragraph (4) only under the specified conditions.

### **WRITTEN FINDING**

One commenter said that the requirement for a written finding on all four criteria in the definition of "abandoned site" imposed an unnecessary burden on the regulatory authority. The commenter suggested alternative language which did not include a written finding.

OSMRE disagrees with the commenter's suggestion. A written finding is needed to verify that the regulatory authority has rigorously evaluated whether a potential abandoned site meets the criteria of the rule. It also is needed to document that the regulatory authority's decision is not arbitrary and capricious, and to provide a suitable record for oversight or other review.

OSMRE intends that the written finding prepared by the regulatory authority when classifying a site as abandoned will be brief but thorough. The finding should succinctly describe the site in terms of the criteria in the rule, setting out verifiable facts which support the required conclusions. In addition to a written narrative, the finding may include photographs or other appropriate tangible evidence. Supporting documents or other evidence should be clearly cited, and copies attached if not otherwise readily available.

## SECTION 840.11(g)(1)/842.11(e)(1).

This section of the rule requires the regulatory authority to find in writing that all surface coal mining and reclamation activities at the site have ceased.

### **UNLIKELY TO RESUME**

The proposed rule included the additional criterion that activities "are unlikely to resume." *52 FR 52760 and 61*. Several commenters said that this criterion was speculative, subjective, and would be difficult to document, and recommended that OSMRE delete it. OSMRE agrees. The criterion that operations are unlikely to resume originally was intended, in part, to clarify that the rule would not apply to sites where operations temporarily were suspended under 30 CFR 816.131 and 817.131. However, even without the criterion it is clear that such sites do not qualify as abandoned. To avoid the problems noted by the commenters, this criterion was deleted from the rule. One of these commenters also said that the "unlikely to resume" criterion failed to set minimum standards to guide State regulatory discretion. OSMRE has concluded that, because this criterion required the regulatory authority to predict uncertain future events, it would not be possible to set appropriate minimum standards, and therefore has deleted the criterion as impracticable.

### **NEED FOR AFFIDAVITS**

Several commenters questioned the need for affidavits to document that a site is abandoned. Affidavits were suggested in the preamble to the proposed rule (*52 FR 32759*) as one possible basis for the regulatory authority's written finding under Section 840.11(g)(1)/842.11(e)(1). Affidavits were not required by the proposed rule, and are not required by this final rule. However, affidavits may be utilized under this final rule if deemed appropriate by the regulatory authority.

## SECTION 840.11(g)(2)/842.11(e)(2).

As the second criterion for abandoned status, Section 840.11(g)(2)/842.11(e)(2) requires that the regulatory authority have issued at least one notice of violation or the initial program equivalent for the operation, and either is unable to serve the notice despite diligent efforts to do so, or the notice has progressed to a failure-to-abate cessation order (FTACO) or the initial program equivalent. OSMRE is promulgating this section of the definition as proposed.

### **INABILITY TO SERVE NOTICE**

Several commenters said that basing abandoned status on the inability of the regulatory authority to serve a notice of violation was inconsistent with the service requirements of 30 CFR 843.14. These commenters said that under Section 843.14(a) service is complete upon mailing the notice to the violator's last known address, and cannot be deemed incomplete because of a refusal to accept. One commenter also said that terminating subsequent enforcement because the permittee refused to accept the notice of violation was inconsistent with the mandatory enforcement provisions of section 521 of the Act and its implementing regulations.

Under Section 843.14(a) service can be made either by tendering a copy of a notice of violation or order to certain individuals at the site of the operation, or by sending a copy by certified mail or by hand to the permittee or his designated agent. Service is complete upon tender of the notice, or of the mail, and is not rendered incomplete because of a refusal to accept. Where service is by certified mail, for which the signature of the addressee ordinarily is required as a condition of delivery, Section 843.14(a) is not satisfied merely by sending the notice. The post office must locate the addressee and attempt to tender the notice for signature. If the notice is returned as "unclaimed" or "address unknown" or "left no forwarding address" OSMRE believes that the agency issuing the citation should make every reasonable effort to determine whether the mail truly was undeliverable or was refused. If the mail was unclaimed, the agency should make and record repeated attempts to find the correct address.

The criterion of Section 840.11(g)(2)(i)/842.11(e)(2)(i) does not reduce the effectiveness of Section 843.13(a) and enable violators to frustrate enforcement by refusing service; it merely recognizes that under certain limited circumstances, service becomes impossible. Circumstances may exist where a responsible party, because of death, relocation, or disappearance, cannot be found, and it is not possible for the regulatory authority to tender the notice, or for the post office to tender the mail. Thus, despite diligent efforts, service is impossible. Under such circumstances, and assuming that the additional criteria of the rule are met, it is reasonable for the regulatory authority to find that the site is abandoned. Only those circumstances where the regulatory authority was unable to find a responsible party to either accept or refuse the notice will satisfy the criterion of Section 840.11(g)(2)(i)/842.11(e)(2)(i). An inability to service the notice which results from a refusal to accept will not satisfy the criterion.

### **ABATEMENT OF VIOLATION**

One commenter suggested that OSMRE revise proposed Section 840.11(g)(2)/842.11(e)(2) to specify that the violation identified in the notice or cessation order remains unabated. OSMRE has not adopted this suggestion. The failure to abate is implied in the complete definition. Should abatement occur, a site would no longer meet the definition of an abandoned site. This is reasonable because the abatement would indicate the availability of a responsible person to perform reclamation.

### **UNNECESSARY CRITERIA**

One commenter said that the criterion of Section 840.11(g)(2)/842.11(e)(2), in conjunction with the criterion of Section 840.11(g)(1)/842.11(e)(1) that activities at the site have ceased, was sufficient to determine that a site was abandoned, and that the additional criteria were unnecessary. OSMRE disagrees. The criterion of paragraph (g)(2)/(e)(2) concerns enforcement at the inspector level; the criteria of paragraphs (g)(3)/(e)(3) and (g)(4)/(e)(4) concern alternative enforcement activities which are performed in addition to actions taken by inspectors. Before a site is classified as abandoned, the regulatory authority must demonstrate that it is considering the full range of enforcement available to it under the regulatory program to compel abatement of violations and reclamation of the site.

## SECTION 840.11(g)(3)/842.11(e)(3).

Section 840.11(g)(3)/842.11(e)(3) contains two separate criteria for classifying a site as abandoned. The regulatory authority must find that: (1) It is taking action to ensure that the permittee and operator, and owners and controllers of the permittee and operator, will be precluded from receiving future permits while violations continue at the site; and (2) it is taking action pursuant to section 518(e), 518(f), 521(a)(4) or 521(c) of the Act or their regulatory program counterparts to ensure that abatement of the site occurs or that there will not be a recurrence of the failure-to-abate. As an exception to the second criterion, where appropriate the regulatory authority may evaluate the circumstances and explain in writing why it concludes that further enforcement offers little or no likelihood of successfully compelling abatement or recovering any reclamation costs for the site.

This section of the proposed rule was revised explicitly to require the regulatory authority to meet the permit blocking requirements of 30 CFR 773.15(b) for abandoned sites. Based on a statement in the preamble to the proposed rule (52 FR 32759) that alternative enforcement under this section "in all cases must include blocking new permits," specific language was added to Section 840.11(g)(3)(i)/842.11(e)(3)(i) of the final rule. To satisfy this criterion, the regulatory authority must show that any persons who own or control the site are classified as violators in the system of records used by the regulatory authority to match permit applicants with violators of the Act.

This section of the proposed rule also was revised in response to a comment. Instead of the specific references to the penalty and enforcement provisions of the Act which appears in Section 840.11(g)(3)(ii)/842.11(e)(3)(ii) of the final rule, proposed Section 840.11(g)(3)/842.11(e)(3) more generally would have required that "[t]he regulatory authority is pursuing alternative enforcement measures provided under the regulatory program \* \* \*." 52 FR 52760 and 61. The basis for this revision is explained in the subsequent response to the comment.

### **ALTERNATIVE ENFORCEMENT OBLIGATIONS**

One commenter said that proposed Section 840.11(g)(3)/842.11(e)(3) abridged the alternative enforcement obligations of OSMRE and State regulatory authorities which are required by the Act, regulations, and various court orders. The commenter was concerned that OSMRE would be creating standards for what constitutes "appropriate action" for alternative enforcement under existing rules in contravention of the Administrative Procedure Act. The commenter suggested that OSMRE substitute language requiring the regulatory authority to have taken appropriate action pursuant to section 518(e), 518(f), 521(a)(4) or 521(c) of the Act, as required by 30 CFR 845.15(b)(2) and 840.13(a).

OSMRE disagrees that the proposed criterion in any way would have abridged alternative enforcement obligations. The preamble to the proposed rule explicitly referenced the alternative enforcement provisions of 30 CFR 845.15(b)(2) as applying to this criterion. (52 FR 32759). Since the applicable language of Section 845.15(b)(2) is essentially the same as that suggested by the commenter for inclusion in the rule, the suggested language merely states directly a requirement that indirectly was included in the proposed rule. Nevertheless, to prevent misinterpretation, OSMRE has added most of the commenter's suggested language to the definition in place of the more general proposed requirement.

The suggested reference to Sections 845.15(b)(2) and 840.13(a) is not included in the final rule for several reasons. The revised language of this criterion essentially duplicates the applicable portion of Section 845.15(b)(2) and the consistency requirement of Section 840.13(a); thus a reference to these regulations would be redundant. Also, a reference to Section 845.15(b)(2) would limit the coverage of this criterion to only those sites for which an FTACO had been issued and was unabated for 30 days, excluding any sites for which the regulatory authority was unable to serve a notice of violation and thus did not issue an FTACO. The requirement of this criterion for alternative enforcement does not depend on the issuance of an FTACO, but, as provided by Section 840.11(g)(2)/842.11(e)(2), includes any site where the regulatory authority has issued at least one notice of violation or the initial program equivalent.

### **EXCEPTION TO ALTERNATIVE ENFORCEMENT**

Like the proposed rule, Section 840.11(g)(3)(ii)/842.11(e)(3)(ii) authorizes the regulatory authority to find that a site is abandoned without pursuing alternative enforcement "where after evaluating the circumstances it concludes that further enforcement offers little or no likelihood of successfully compelling reclamation or recovering any reclamation costs \* \* \*" One commenter said that this exception required the regulatory authority to make arguable assumptions, and

recommended that OSMRE delete it. Another commenter said that the exception would abridge established alternative enforcement obligations of OSMRE and the States, and also recommended that OSMRE delete it.

OSMRE disagrees. The purpose of this exception is to minimize the expenditure of enforcement resources on sites which clearly have little or no enforcement potential. It does not require the regulatory authority to make arguable assumptions, but rather to set out in writing facts that would lead a reasonable person to conclude that further pursuit of alternative enforcement offered little or no likelihood of success.

The exception is not intended to, and does not, abridge Federal or State alternative enforcement obligations established under the Act, regulations, and court orders. OSMRE intends that the regulatory authority will apply the exception in a manner consistent with these existing obligations.

OSMRE has retained this exception in the rule because without it many sites arbitrarily would be excluded from abandoned status. It is not always possible to implement alternative enforcement for a site. In some instances the permittee and other responsible persons may have no net worth, for example, or the permittee may not be incorporated, so that individual civil penalties do not apply, or it may be impossible to prove knowing and willful violations. By requiring the regulatory authority to demonstrate in writing the futility of pursuing alternative enforcement, the rule incorporates reasonable safeguards against abuse.

### **RELEVANCE OF CRITERION**

One commenter said that including a criterion based on alternative enforcement had no rational connection to determining abandoned status.

OSMRE disagrees. The rule is intended to reduce inspections, but not alternative enforcement. A basic premise of the rule is to allow the inspection frequency to be reduced for an abandoned site only when the regulatory authority is pursuing alternative enforcement with regard to the site in a manner consistent with its alternative enforcement obligations. Such a tradeoff correctly focuses the regulatory authority on the activities which will be the most productive in compelling compliance with the Act.

### **NATIONWIDE APPLICABILITY**

One commenter questioned the nationwide applicability of the alternative enforcement measures under Section 845.15(b)(2) referred to in the proposed rule.

The question concerning the applicability of Section 845.15(b)(2) was mooted by the specific references to sections 518(e), 518(f), 521(a)(4), and 521(c) of the Act that were added to this criterion in the final rule. All State and Federal programs must contain the same or similar enforcement procedures and enforcement sanctions no less stringent than those set forth in this criterion.

### **REOPENING OLD ENFORCEMENT CASES**

The same commenter said that to meet this proposed criterion the regulatory authority should not have to reopen old enforcement cases previously closed prior to the adoption of an alternative enforcement regulation.

Although the final rule now includes direct references to the Act and its regulatory program counterparts, rather than the proposed general reference to alternative enforcement, the question of how this criterion applies to "closed enforcement cases" remains pertinent.

This criterion requires that, to classify a site as abandoned for purposes of reducing the inspection frequency, "the regulatory authority \* \* \* is taking action pursuant to sections 518(e), 518(f), 521(a) or 521(c) of the Act or their regulatory program counterparts \* \* \*." Previous compliance with these provisions satisfies this criterion, in which case the regulatory authority need only explain the written finding how compliance already has been achieved.

Absent previous compliance, however, the regulatory authority may have to take further enforcement action, regardless of whether the case was considered closed, if it wishes to classify the site as abandoned. As an alternative, in

appropriate cases the regulatory authority may satisfy this criterion by explaining in writing why further enforcement offers little or no likelihood of successfully compelling abatement or recovering any reclamation costs.

## **RECLAMATION OF ABANDONED SITES**

One commenter, characterizing abandoned sites as "a thorn in the side of legitimate operators," encouraged OSMRE to take whatever steps are necessary to reclaim them. The commenter said that the resources which currently are wasted on the reinspection of abandoned sites would be better spent in an effort to collect delinquent penalties. To promote the reclamation of these sites, the commenter recommended that OSMRE revise Section 840.11(g)(3)/842.11(e)(3) to state explicitly that OSMRE will concentrate its efforts on trying to require responsible parties to reclaim them whenever possible.

The intent of both the proposed and final rules is to ensure that responsible parties reclaim abandoned sites. While the commenter's specific language was not adopted, the final rule requires the regulatory authority to take certain steps to "ensure that abatement occurs or that there will not be a recurrence of the failure-to-abate \* \* \*." This language meets the commenter's concern that responsible parties be required to satisfy their reclamation obligations.

OSMRE emphasizes that this rule does not diminish the obligation of responsible parties to reclaim any site which is in violation of the Act. While classification of a site as abandoned will allow the regulatory authority to eliminate unproductive inspections, it will not diminish any existing abatement or reclamation requirement.

## **PERMIT BLOCKING**

The preamble to the proposed rule stated that the alternative enforcement options pursued by the regulatory authority under this criterion in all cases must include blocking new permits. (52 FR 32759). One commenter expressed concern that the regulatory authority would continue to block new permits for related entities after alternative enforcement methods had failed. The commenter asked OSMRE to identify the point at which an operation ceased to be "related," to explain what would happen if the violator no longer was in business, and to clarify the relationship OSMRE considers adequate for permit blocking.

OSMRE proposed a rule defining the terms "ownership" and "control" on April 5, 1985 (50 FR 13724) and, because of the intense public interest, reopened the comment period for the proposed rule several times. OSMRE currently is drafting the final rule defining these terms. When promulgated, that rule will govern how the regulatory authority is to apply permit blocking under Section 773.15(b) to owners or controllers of abandoned sites.

As noted in the introduction to this section, the final rule was revised to require explicitly in Section 840.11(g)(3)(i)/842.11(e)(3)(i) that the regulatory authority is taking action to ensure that the permittee and operator, and owners and controllers of the permittee and operators, will be precluded from receiving future permits while violations continue at the site. Section 510(c) of the Act and Section 773.15(b) require the regulatory authority to block the issuance of a new permit where an applicant has an ownership or control relationship with a violator. The requirement for compliance with the permit blocking requirements of the Act is not subject to the exception of Section 840.11(g)(3)(ii)/842.11(e)(3)(ii), which is consistent with the proposal to require permit blocking "in all cases." The intent of this rule is to ensure that future permit blocking will occur before any site may be classified as abandoned. This is an ongoing requirement which continues to apply after a site is classified as abandoned for as long as any violation at the site remains unabated.

### **SECTION 840.11(g)(4)/842.11(e)(4).**

Section 840.11(g)(4)/842.11(e)(4) of the abandoned site definition requires the regulatory authority to make a finding concerning the current permit and bond status of the abandoned site. While this section of the proposed rule would have applied where the site was "permitted and bonded" (52 FR 32760, 32761 (emphasis added)), the final rule was revised to apply where the site was "permitted or bonded." (Emphasis added.) The disjunctive "or" was adopted because for some sites either or both of these conditions may not apply or have applied. Where the site was not permitted or was not bonded, the regulatory authority may simply document that fact in its written finding to satisfy the corresponding portion of this criterion. The verb tense has also been modified to "is, or was," to reflect that the permit or bond may or may not exist at the time of the determination that the site is abandoned.

In response to a comment, this section was revised to include permitted sites for which permit revocation proceedings have been initiated and are being diligently pursued. The revision makes the requirement for permit revocation consistent with the corresponding requirement for bond forfeiture. OSMRE believes that for purposes of this rule the initiation and diligent pursuit of permit revocation will serve the same purpose as the actual revocation itself. Such action demonstrates that the regulatory authority is responsibly fulfilling its obligations with regard to the site. Also in response to a comment, this section was revised to require the regulatory authority to have initiated forfeiture proceedings for any outstanding bond. OSMRE concludes that the initiation of forfeiture proceedings is an inescapable component of diligent pursuit.

Finally, OSMRE emphasizes that as long as any violation at an abandoned site remains unabated, neither permit revocation nor collection of the bond in any way relieves the regulatory authority from the continuing obligation to inspect the site as necessary to comply with this rule.

### **INITIAL PROGRAM SITES**

One commenter said that forfeiture of the performance bond could not be the basis for a reduction of inspection frequency at initial program operations because a bond was not required for those operations. Moreover, the commenter asserted that the criterion is invalid for initial program sites because the obligation to comply with initial program standards was not linked to State bonding of those operations.

OSMRE agrees that this criterion is not relevant for unbonded initial program sites. As noted in the introduction to this section, the final rule was revised to reflect the lack of a bond for these sites. OSMRE believes that the lack of a bond, or the lack of a permit, should not prevent the regulatory authority from finding that a site is abandoned. The purpose of this criterion is to ensure that the regulatory authority is diligently taking all available steps to compel abatement and secure reclamation of the site.

Where there is no bond or permit for a site, however, the options of forfeiture and revocation are not available to the regulatory authority, and thus they have no relevance to abandoned status.

On the other hand, if an initial program bond exists for a site, the regulatory authority should be diligently pursuing its forfeiture regardless of whether such a bond was required by the initial program. Requiring such action is consistent with the purpose of this rule to allow a reduction in inspection frequency only where all available action is being taken to compel compliance. Such a requirement is appropriate in these circumstances, and, contrary to the commenter's assertion, is not intended to diminish any person's obligations to comply with initial program standards.

### **TENNESSEE SITES**

Another commenter was concerned that under this criterion previously bonded interim program sites in Tennessee might not qualify as abandoned. The commenter said that the Tennessee initial program was unique in that initial program operations had been permitted and bonded by the State regulatory authority.

Since OSMRE does not require performance bonds for initial program operations under the current Tennessee Federal program, however, the State has returned these bonds to the operators. Thus, although these initial program sites originally were bonded, the criterion should not apply because there no longer are any bonds to forfeit.

OSMRE agrees that this criterion should to apply to initial program sites in Tennessee where the bond was returned to the operators, and will interpret the rule accordingly. The rule will apply only to those permits and bonds against which the regulatory authority is empowered to take action.

### **EXCLUSIVE CRITERION.**

One commenter said that any site where the bond had been or was being forfeited should qualify as abandoned, regardless of whether the other criteria of the rule applied to the site. OSMRE disagrees. A reduced inspection frequency is not justified for an abandoned site merely because the operator has left the site and forfeited the bond. The other criteria are needed to ensure that the regulatory authority has taken all appropriate action to have violations abated and the site reclaimed.

## **PERMIT REVOCATION**

One commenter recommended that the rule include diligent pursuit of permit revocation as equivalent to ultimate revocation. As explained above, OSMRE agrees that for purposes of this rule the two are equivalent and has revised the final rule accordingly.

## **DILIGENT PURSUIT**

One commenter, noting that the process leading to bond forfeiture can be lengthy and arduous, asked OSMRE to clarify what was meant by the phrase "diligently pursuing forfeiture." The commenter also asked whether the definition of "abandoned site" would apply to sites where the bond was forfeited but not yet collected.

OSMRE recognizes that bond forfeiture often is a slow process, which varies among regulatory authorities and with the type of bond and the parties involved. To satisfy the requirement for diligent pursuit of bond forfeiture, and of permit revocation as well, the regulatory authority must have taken the initial steps required by the regulatory program, and any subsequent steps, in a timely manner if sufficient time has elapsed to do so. Section 840.11(g)(4)/842.11(e)(4) does not require the regulatory authority either to complete forfeiture or to collect the bond before a site is classified as abandoned. As long as the regulatory authority establishes that forfeiture proceedings have been initiated and are being pursued diligently, this criterion is satisfied.

Another commenter said that OSMRE must set minimum standards on what will qualify as diligent pursuit of bond forfeiture. It appeared that the commenter was concerned over delays that might occur between final enforcement action and the initiation of bond forfeiture proceedings. OSMRE disagrees that putting minimum standards for diligent pursuit in the rule is either necessary or desirable, whether for bond forfeiture or for permit revocation.

As with bond forfeiture proceedings, discussed previously, permit revocation proceedings can vary. Minimum standards that would account for this variation would unduly complicate the definition of "abandoned site," thus making implementation of this rule unnecessarily difficult. The regulations governing forfeiture and revocation, and not this definition, are the appropriate place for any minimum standards.

However, OSMRE recognizes the commenter's concern over prompt initiation of bond forfeiture proceedings, and has revised the final rule to accommodate it. The final rule requires the regulatory authority to initiate forfeiture proceedings whenever applicable as a prerequisite to finding that a site is abandoned.

OSMRE has concluded that this requirement is the best way to ensure that the regulatory authority is diligently pursuing forfeiture of the bond.

## **ALTERNATIVE CRITERIA**

Several commenters said that a site should not have to meet all of the criteria of the definition to qualify as abandoned. Some commenters said that one or another of the criteria was sufficient, while others suggested various alternative combinations. OSMRE disagrees that any of these alternatives would be superior to this rule in ensuring compliance with the Act for abandoned sites.

The criteria OSMRE has adopted for the definition of "abandoned site" are intended to achieve two major objectives: First, to establish that regular monthly and complete inspections of abandoned sites are no longer effective to achieve compliance with the purposes and provisions of the Act; and second, to ensure that all other enforcement options available to the regulatory authority are being pursued to secure abatement of any violations and, ultimately, reclamation of the site.

The criteria of the definition cover ascending levels of enforcement. If abatement or reclamation are not achieved through enforcement at the inspector level, the regulatory authority is required to consider, and in appropriate circumstances, to take the additional enforcement steps of permit blocking, alternative enforcement, permit revocation, and bond forfeiture.

Only when all of these available steps are being exhausted is it reasonable to conclude that a reduced inspection frequency will not affect compliance with the purposes and provisions of the Act. The enforcement mechanisms covered by these criteria already are in place in existing regulatory programs. Therefore, applying the criteria to abandoned sites will not impose an unreasonable burden on regulatory authorities.

Another commenter suggested imposition of a mandatory, six-month, inspection frequency for abandoned sites, but only if the definition of "abandoned site" included the following substitute criteria:

1. The surface coal mining operation currently is subject to a failure-to-abate cessation order (FTACO) which:
  - (a) Has been issued against the permittee, operator and all persons with an ownership or control interest in the operation;
  - (b) Includes citations for all outstanding violations on the site;
  - (c) Has been outstanding for more than thirty days; and
  - (d) For which the requirements for alternative enforcement in 30 CFR 845.15(b)(2) have been satisfied.
2. If the operation was permitted and/or bonded, the permit has been revoked or has expired and the regulatory authority has initiated and diligently is pursuing bond forfeiture; and
3. A determination has been made after a complete inspection that the site has stabilized and that no offsite damage from fill instability, erosion, slides or other offsite damage to land or water resources is occurring or is likely to occur in the six month period before another inspection is required.

OSMRE disagrees that these alternatives are an improvement on the criteria of this rule, or that they would result in any measurable difference in enforcement, abatement or reclamation at abandoned sites. Like these alternatives, Section 840.11(g)(2)/842.11(e)(2) of the rule requires that the regulatory authority has issued an FTACO before a site is classified as abandoned -- unless the regulatory authority is unable to serve the underlying notice of violation (NOV) despite diligent efforts to do so. For sites where the service of an NOV is impossible, the mandatory issuance of a cessation order for failing to perform the abatement specified in the unserved notice is a pointless exercise.

Likewise, the requirement that, before a site may be classified as abandoned, an FTACO must have been issued against all persons potentially responsible for an abandoned site, where typically no responsible person can be located, would effectively impose an impractical obligation which does not currently exist. Neither the Act nor the rules require listing on an FTACO of the name of every responsible person, such as officers and directors.

This rule is not intended indirectly to impose enforcement obligations that do not currently exist. The commenter's concern that all responsible parties be held accountable for abandoned sites will be satisfied by Section 840.11(g)(3)/842.11(e)(3) regarding alternative enforcement.

OSMRE has not accepted the suggested alternative of requiring the FTACO to include all citations for all violations before a site is classified as abandoned. As explained earlier, one purpose of the rule is to establish when monthly partial and quarterly complete inspections are no longer effective in achieving compliance with the Act. In conjunction with the other criteria of this rule, one unabated FTACO documents the inability to compel reclamation at the site. Thus it demonstrates the futility of maintaining the frequency of regular partial and complete inspections, regardless of the number of violations set forth in the FTACO.

Additionally, requiring the regulatory authority to cite all outstanding violations as a condition precedent to finding the site abandoned is not included in this rule because the abandoned status of a site will not preclude the issuance of additional citations, and alternative enforcement is also proceeding.

The alternative of requiring that the FTACO has been outstanding for more than thirty days was offered by the commenter without explanation, and OSMRE cannot see how it would improve enforcement at abandoned sites. The passage of an arbitrary period of time such as thirty days after the issuance of an FTACO has no relevance in determining

whether or not a site is abandoned and inspections "as necessary" are warranted. The commenter may have intended that the 30-day waiting period be included to correspond to the 30-day period in Section 845.15(b)(2), after which time an alternative enforcement obligation is triggered under the Federal rules. If this was the commenter's concern, it is expressly addressed by inclusion in Section 840.11(g)(3)/842.11(e)(3) of the requirement that the regulatory authority is taking alternative enforcement action.

#### SECTION 840.11(h)/842.11(f).

Section 840.11(h)/842.11(f) establishes an "as necessary" inspection frequency for abandoned sites, and for each site requires the regulatory authority to select a specific inspection frequency to comply with this rule and to document in writing the reasons for selecting the specific inspection frequency. Paragraph (h)(1) requires the regulatory authority to inspect each abandoned site as necessary to monitor for changes of environmental conditions or operational status at the site.

Paragraph (h)(2) requires the regulatory authority to document the inspection frequency for each site. Before ceasing to perform inspections at an abandoned site at the frequency required by the previous regulations, the regulatory authority must evaluate the environmental conditions and operational status of the site, and document in writing both the necessary inspection frequency and the reasons for selecting that frequency. This explicit documentation requirement was added to the language of the proposed rule in response to a comment.

Under this rule the inspection frequency for abandoned sites may, depending on the nature of the site, vary from never to as often as was required under the previous regulations. Some sites may be so stable and so operationally defunct as to make further inspections completely unnecessary. Other sites may have environmental characteristics or operational features that warrant frequent inspections. The rule does not specify either "partial" or "complete" inspections, but instead requires the regulatory authority to inspect each abandoned site as thoroughly as is necessary to comply with the specified inspection criteria.

OSMRE experience indicates that the majority of sites will require inspection only at a minimum frequency. In primacy states, the state regulatory authorities, with all of the pertinent site-specific information at hand, are best qualified and responsible for determining the necessary frequency for each abandoned site. Placing this responsibility upon the states is consistent with congressional intent to have primary regulatory authority rest with the States.

The written record prepared by the regulatory authority to document compliance with this requirement should be brief but thorough, and may include narrative discussion, photographs, or other appropriate tangible evidence. It should describe in general terms the environmental conditions and operational status of the site to the extent they are likely to affect the need for inspection, both at present and in the future. It should identify any potential latent hazards to on- or off-site conditions affecting public health and safety. And it should be made available to and reviewed by the inspector prior to future inspections of the abandoned site.

For administrative convenience, the regulatory authority might choose to establish one or more categories of sites with similar characteristics, and evaluate and document the necessary inspection frequency for each category as a whole. The regulatory authority would then need to document only why a given abandoned site fell into a particular category.

The frequency with which an abandoned site is inspected under this rule may increase or decrease as new information becomes available or changes in the characteristics of the site occur. The regulatory authority is required to inspect abandoned sites "as necessary" and, if significant new information or changes at a site develop, the regulatory authority may reevaluate the site and modify the inspection frequency. The requirements of existing Sections 841.11(e) and 842.11(d) apply to inspections performed under this rule, particularly with respect to the filing of prompt inspection reports.

#### **MINIMUM INSPECTION FREQUENCY**

One commenter characterized the proposed rule as an attempt to eliminate any mandatory inspection frequency for abandoned sites in contravention of the inspection requirements of section 517(c) of the Act. The commenter said that in contrast to the regulations that specify a reduced inspection frequency for inactive sites, the proposed rule lacked safeguards against abuse and eliminated entirely, rather than merely reduced, mandatory inspections. The commenter

urged OSMRE to withdraw the proposal or, at a minimum, to substitute the commenter's "more carefully crafted and precise rule" which included alternative criteria for defining "abandoned site," and a minimum inspection frequency of every six months.

This final rule includes neither the commenter's suggested criteria nor the six month inspection frequency. However, OSMRE appreciates the commenter's concern over the potential for misinterpretation of the proposed rule and has revised the final rule accordingly. The reasons for rejecting a fixed, six-month, inspection frequency and for the related changes in the final rule are presented below. For the text and a discussion of the commenter's alternative criteria for defining "abandoned site," see the preceding discussion of Section 840.11(g)(4)/842.11(e)(4) under the heading Alternative Criteria.

OSMRE did not adopt a six month inspection frequency, or any other fixed frequency, for abandoned sites because to do so would merely substitute one inflexible frequency for another, and thus fail to achieve the goal of eliminating unnecessary and counterproductive inspections. Each abandoned site is unique, both in terms of its physical environment and the problems it presents. An arbitrary, fixed, inspection frequency cannot account for these unique characteristics. A fixed frequency is just as likely to yield too few inspections, or too many, as it is to yield a suitable number.

The commenter's concern that the rule would eliminate mandatory inspections appears to derive from the lack of an explicit provision in the proposed rule requiring the regulatory authority to document the frequency at which it would inspect each abandoned site. While this requirement was implicit in the proposed rule, OSMRE has revised the final rule explicitly to require the regulatory authority to evaluate the environmental conditions and operational status of the site, and based on those considerations to document in writing not only the inspection frequency necessary to comply with the rule, but also the reasons for selecting that frequency. The regulatory authority has to adopt and implement a specific inspection frequency carefully tailored to the unique characteristics of such sites. Thus, the rule maintains the regulatory authority's responsibility for administering its regulatory program with respect to abandoned sites.

Quoting the legislative history of the Act, the commenter said that the inspection frequency requirement of section 517 "was intended to monitor 'the impacts of such operations including the effectiveness of reclamation activities.' " Citing H.R. Rep. No. 95-492, 95th Cong., 1st Sess. 109 (1977) (emphasis added by commenter). OSMRE believes that reducing the number of inspections at abandoned sites in accordance with this rule conforms fully with this legislative intent. The rule requires the regulatory authority to inspect abandoned sites as necessary to monitor for changes of environmental conditions or operational status at the site. This is precisely what the Congress intended to achieve. It is implicit in the quoted statement of the Congress that there is occurring at the site some change, whether as a result of mining or reclamation or natural process, that would necessitate regular monitoring at the frequency specified by section 517. When mining and reclamation activities at a site have ceased, however, and the regulatory authority is exercising all available enforcement options, inspections at the frequency set by section 517 are a senseless waste of manpower which the Congress clearly could not have intended.

The commenter also was concerned that the unreclaimed status of abandoned sites might lead to more severe impacts and to new violations which would have to be monitored to avert site deterioration and an imminent harm situation, and to assure that pending enforcement actions accurately reflected site conditions. The commenter concluded that visual observation of a minesite does not detect latent problems in areas such as hollow fill or backfill stability which occur over time and which only subsequent inspections could reveal.

OSMRE believes that a reduced inspection frequency for abandoned sites does not pose a significant risk of increased environmental harm. Sites will not be classified as abandoned unless no one is available to perform reclamation or the regulatory authority is taking all appropriate actions to have the sites reclaimed. Thus, in the event a site deteriorates, typically nothing more can be done to reclaim the site than already is occurring. Increasing the inspection frequency might cause the regulatory authority to be informed of a danger more quickly, but will not likely provide a new remedy.

In addition, the data available to OSMRE, especially as it pertains to abandoned sites in Tennessee, indicate that most abandoned sites are stable. Sites with violations of substantive performance standards do not necessarily deteriorate to imminent harm situations because many performance standards are unrelated to the potential for imminent harm or decreased public safety. Through experience with local conditions, the regulatory authority is best qualified to identify sites with such potential. This rule requires the regulatory authority to do so, and to inspect abandoned sites as frequently as is necessary to avoid the problems the commenter has identified. Also, the existing provisions in 30 CFR 840.15 and

842.14, giving private citizens the right to request inspections, will enable persons who live in the vicinity of abandoned sites to alert the regulatory authority to any potentially hazardous developments.

To address the commenter's concern that pending enforcement actions accurately reflect site conditions, the final rule requires that the regulatory authority inspect each abandoned site as necessary to monitor for changes in environmental conditions. However, as indicated above, the issuance of further notices of violation or cessation orders for abandoned sites is likely to be futile. Generally alternative enforcement is the only potentially viable means to achieve reclamation, even if abandoned sites deteriorate. To remedy environmental problems, regulatory authorities may be limited practically to trying to expedite alternative enforcement activities.

The inspection requirements of this rule strike a reasonable balance between a fixed frequency and the permissive interpretation to which the commenter found the proposed rule susceptible. OSMRE believes that by explicitly requiring the regulatory authority to select and justify a specific inspection frequency for each abandoned site, the rule provides the reasonable procedural safeguards the commenter seeks.

### **PRE-CLASSIFICATION INSPECTION**

The same commenter also said that before classifying a site as abandoned, the regulatory authority should perform a complete inspection to determine that the site is stable and that no offsite damage from fill instability, erosion, slides or other sources is occurring, or is likely to occur, to land or water resources prior to the next inspection. The commenter said that the condition of the site is germane to future enforcement action, and that a report, including narrative description and appropriate photographs, is needed to document that all violations have been cited and to avoid defenses in enforcement litigation.

The mere fact that the abandoned operation may be causing damage offsite will not preclude a site from being classified as abandoned. However, the inspection frequency specified for particular sites should account for the likelihood that environmental conditions may deteriorate at the site. Moreover, regardless of the specific frequency selected by the regulatory authority, inspections should be performed to update the documentation of site conditions when required to support ongoing alternative enforcement actions. OSMRE has noted elsewhere in this preamble that the written documents required to classify sites as abandoned may include photographs, as well as narrative and other forms of tangible evidence.

OSMRE agrees with the commenter that prior to classifying a site as abandoned the regulatory authority should evaluate and document the site conditions. However, OSMRE believes that the language added to the final rule, while not explicitly requiring a pre-classification inspection, adequately addresses the commenter's concerns. Section 840.11(h)(2)/842.11(f)(2) requires the regulatory authority to evaluate the environmental conditions and operational status of the site, and to document in writing the reasons for selecting a particular inspection frequency. If previous inspection reports contain adequate information for the regulatory authority to evaluate the site, an additional inspection would serve no useful purpose. If the information is lacking, however, the rule requires the regulatory authority to inspect the site as necessary to obtain it. Thus, the rule meets the commenter's concerns without requiring the regulatory authority to perform any unproductive pre-classification inspections.

### **OVERSIGHT**

Several commenters wanted to know how the inspection of abandoned sites would be addressed in annual evaluation reports for State regulatory programs. One commenter, characterizing the "as necessary" inspection frequency as vague, asked how OSMRE would determine whether a State was performing a sufficient number of inspections.

The final rule requires the regulatory authority to document in writing the inspection frequency necessary to comply with the rule for each abandoned site, and the reasons for selecting the frequency. In oversight, OSMRE will then review the regulatory authority's determination and monitor its compliance with that determination. This requirement answers these commenters' concerns about vagueness in the "as necessary" inspection frequency of the rule. The documentation required by Section 840.11 (g) and (h) and 842.11 (e) and (f), will provide an ample written record for OSMRE to review in overseeing State compliance with the rule.

## **SECTION 843.22 - ENFORCEMENT ACTIONS AT ABANDONED SITES.**

This rule adds to 30 CFR Part 843 -- Federal Enforcement a new Section 843.22, which authorizes OSMRE to refrain from issuing a notice of violation or cessation order for a violation at an abandoned site, as defined in Section 842.11 of this rule, if abatement of the violation is required under any previously issued notice or order. This may involve modification of required abatement measures in existing notices or orders. (Note that while Part 843 of the existing regulations ends with section number 843.20, the intervening section number 843.21 previously was assigned to proposed procedures on improperly or erroneously issued State permits. *51 FR 25822* (July 16, 1986).

The purpose of Section 843.22 is to save the regulatory authority the time and expense involved in issuing additional notices or orders and assessing uncollectible penalties for violations which already are covered by existing citations. Such duplication does not improve enforcement, secure the abatement of violations or ensure reclamation of the site. While the rule authorizes the regulatory authority to refrain from issuing notices or orders under the specified circumstances, it does not prevent the regulatory authority from issuing any notice or order that might serve the purposes of furthering compliance.

The language of new Section 843.22 derives from the preamble to the proposed rule, in which OSMRE proposed not to require further enforcement actions while a site remained in abandoned status, as long as abatement of any newly observed violation could be required as part of the abatement of a notice of violation or cessation order already issued. *52 FR 32760* (August 28, 1987). For example, if a notice of violation was issued for a general reclamation failure, such as a failure to restore the site to a condition capable of supporting pre-mining or higher or better uses, then abatement of a later more specific violation could be subsumed within the abatement of the original violation. The preamble to the proposed rule solicited comments on this enforcement approach.

### **REQUEST FOR CLARIFICATION**

One commenter asked OSMRE to clarify what would happen when a former violation (1) was more specific than, or (2) was derived from a performance standard not related to, a later violation.

In both cases Section 843.22 would not apply if abatement of the later violation could not be subsumed by abatement of the earlier violation. Even though a later violation was based on an unrelated performance standard, the regulatory authority could refrain from issuing a new notice or order as long as abatement of the new violation could, and would, be required under a previously issued notice or order.

The final rule does not affect the existing requirement that the regulatory authority issue a new notice or order whenever a later violation would not be corrected by the abatement of a previously cited violation. This requirement applies even though, as one commenter pointed out, the additional enforcement action for a more serious violation would be unlikely to secure compliance where an operator could not or would not comply with lesser requirements.

## **III. PROCEDURAL MATTERS**

### **Effect in Federal Program States and on Indian Lands**

Sections 842.11 and 843.22 of this rule apply through cross-referencing in States with Federal regulatory programs. These States include Georgia, Idaho, Massachusetts, Michigan, North Carolina, Oregon, Rhode Island, South Dakota, Tennessee and Washington. The Federal programs for these States appear at 30 CFR Parts 910, 912, 921, 922, 933, 937, 939, 941, 942 and 947, respectively. Sections 841.11 and 843.22 of the rule also apply through cross-referencing on Indian Lands, as approved in 30 CFR 750.18(a).

### **Federal Paperwork Reduction Act**

The information collection requirements in this rule have been approved by the Office of Management and Budget under *44 U.S.C. 3507*, and assigned Clearance No. 1029-0051. Such information is needed to obtain the benefit of having to perform fewer inspections at abandoned sites. Although this rule adds the requirement for regulatory authorities to document the reasons for choosing a particular inspection frequency for each abandoned site, OSMRE expects a net reduction in information collection burden hours because of the smaller number of inspection reports that will likely have to be filed as a result of this rule.

#### Executive Order 12291 and Regulatory Flexibility Act

The Department of the Interior has determined that this is not a major rule under the criteria of Executive Order 12291 (February 17, 1981), and that it will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act, *5 U.S.C. 601*, et seq. This rule will reduce the costs incurred by OSMRE and the State regulatory authorities in inspecting abandoned sites. Therefore, this rule should not add to the cost of operating a mine in compliance with an approved regulatory program.

#### National Environmental Policy Act

OSMRE has prepared an environmental assessment (EA) of this rule and has made a finding that it will not significantly affect the quality of the human environment under section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), *42 U.S.C. 4332(2)(C)*. The EA is on file in the OSMRE administrative record at the address previously specified (see "ADDRESSES").

#### Authors

The principal authors of this rule are Daniel Stocker and Sandi Olsen, Division of Regulatory Programs, Office of Surface Mining Reclamation and Enforcement, 1951 Constitution Avenue NW., Washington, DC 20240; Telephone 202-343-4550 (Commercial or FTS).

#### LIST OF SUBJECTS

##### 30 CFR Part 840

Intergovernmental relations, Reporting and recordkeeping, requirements, Surface mining, Underground mining.

##### 30 CFR Part 842

Law enforcement, Surface, Underground mining.

##### 30 CFR Part 843

Administrative practice and procedure, Law enforcement, Reporting and recordkeeping requirements, Surface mining, Underground mining.

Accordingly, 30 CFR Parts 840, 842 and 843 are amended as set forth below.

Dated: May 12, 1988.

James E. Cason, Deputy Assistant Secretary for Land and Minerals Management.

#### **PART 840 -- STATE REGULATORY AUTHORITY: INSPECTION AND ENFORCEMENT**

1. The authority citation for Part 840 is revised to read as follows:

Authority: Pub. L. 95-87, *30 U.S.C. 1201* et seq., and Pub. L. 100-34, unless otherwise noted.

2. Section 840.11 is amended by adding paragraphs (g) and (h) to read as follows:

#### **SECTION 840.11 - INSPECTIONS BY STATE REGULATORY AUTHORITY.**

\* \* \* \* \*

(g) Abandoned site means a surface coal mining and reclamation operation for which the regulatory authority has found in writing that:

- (1) All surface and underground coal mining and reclamation activities at the site have ceased;
- (2) The regulatory authority or the Office has issued at least one notice of violation or the initial program equivalent, and either:
  - (i) Is unable to serve the notice despite diligent efforts to do so; or

(ii) The notice was served and has progressed to a failure-to-abate cessation order or the initial program equivalent;

(3) The regulatory authority:

(i) Is taking action to ensure that the permittee and operator, and owners and controllers of the permittee and operator, will be precluded from receiving future permits while violations continue at the site; and

(ii) Is taking action pursuant to section 518(e), 518(f), 521(a)(4) or 521(c) of the Act or their regulatory program counterparts to ensure that abatement occurs or that there will not be a recurrence of the failure-to-abate, except where after evaluating the circumstances it concludes that further enforcement offers little or no likelihood of successfully compelling abatement or recovering any reclamation costs; and

(4) Where the site is, or was, permitted or bonded:

(i) The permit has expired or been revoked, or permit revocation proceedings have been initiated and are being pursued diligently; and

(ii) The regulatory authority has initiated and is diligently pursuing forfeiture of, or has forfeited, the performance bond.

(h)(1) In lieu of the inspection frequency established in paragraphs (a) and (b) of this section, the regulatory authority shall inspect each abandoned site as necessary to monitor for changes of environmental conditions or operational status at the site.

(2) Before ceasing to perform inspections at the frequency required by paragraphs (a) and (b) of this section at an abandoned site, the regulatory authority shall:

(i) Evaluate the environmental conditions and operational status of the site; and

(ii) Document in writing the inspection frequency necessary to comply with paragraph (h)(1) of this section, and the reasons for selecting that frequency.

## **PART 842 -- FEDERAL INSPECTIONS AND MONITORING**

3. The authority citation for Part 842 is revised to read as follows:

Authority: Pub. L. 95-87, 30 U.S.C. 1201 et seq., and Pub. L. 100-34, unless otherwise noted.

4. Section 842.11 is amended by adding the following new paragraphs (e) and (f) to read as follows:

### **SECTION 842.11 - FEDERAL INSPECTIONS AND MONITORING.**

\* \* \* \* \*

(e) Abandoned site means a surface coal mining and reclamation operation for which the Office has found in writing that:

(1) All surface and underground coal mining and reclamation activities at the site have ceased;

(2) The Office has issued at least one notice of violation or the initial program equivalent, and either:

(i) Is unable to serve the notice despite diligent efforts to do so; or

(ii) The notice was served and has progressed to a failure-to-abate cessation order or the initial program equivalent;

(3) The Office:

(i) Is taking action to ensure that the permittee and operator, and owners and controllers of the permittee and operator, will be precluded from receiving future permits while violations continue at the site; and

(ii) Is taking action pursuant to sections 518(e), 518(f), 521(a)(4) or 521(c) of the Act or their regulatory program counterparts to ensure that abatement occurs or that there will not be a recurrence of the failure-to-abate, except where after evaluating the circumstances it concludes that further enforcement offers little or no likelihood of successfully compelling abatement or recovering any reclamation costs; and

(4) Where the site is, or was, permitted or bonded:

(i) The permit has expired or been revoked, or permit revocation proceedings have been initiated and are being pursued diligently; and

(ii) The Office has initiated and is diligently pursuing forfeiture of, or has forfeited, the performance bond.

(f) (1) In lieu of the inspection frequency established in paragraph (c) of this section, the Office shall inspect each abandoned site as necessary to monitor for changes of environmental conditions or operational status at the site.

(2) Before ceasing to perform inspections at the frequency required by paragraph (c) of this section at an abandoned site, the regulatory authority shall:

(i) Evaluate the environmental conditions and operational status of the site; and

(ii) Document in writing the inspection frequency necessary to comply with paragraph (f)(1) of this section, and the reasons for selecting that frequency.

#### **PART 843 -- FEDERAL ENFORCEMENT**

5. The authority citation for Part 843 is revised to read as follows:

Authority: Pub. L. 95-87, *30 U.S.C. 1201* et seq., and Pub. L. 100-34, unless otherwise noted.

6. Part 843 is amended by adding a new Section 843.22 to read as follows:

#### **SECTION 843.22 - ENFORCEMENT ACTIONS AT ABANDONED SITES.**

The Office may refrain from issuing a notice of violation or cessation order for a violation at an abandoned site, as defined in Section 842.11(e) of this chapter, if abatement of the violation is required under any previously issued notice or order.

[FR Doc. 88-14737 Filed 6-29-88; 8:45 am]  
BILLING CODE 4310-05-M