



**4310-05-P**

**DEPARTMENT OF THE INTERIOR**

**Office of Surface Mining Reclamation and Enforcement**

**30 CFR Parts 733, 736, and 842**

**[Docket ID: OSM-2019-0010; S1D1S SS08011000 SX064A000 201S180110; S2D2S SS08011000 SX064A00 20XS501520]**

**RIN 1029-AC77**

**Clarification of Provisions Related to the Issuance of Ten-Day Notices to State Regulatory Authorities and Enhancement of Corrective Action for State Regulatory Program Issues**

**AGENCY:** Office of Surface Mining Reclamation and Enforcement, Interior.

**ACTION:** Proposed rule.

**SUMMARY:** The Office of Surface Mining Reclamation and Enforcement (OSMRE) proposes to clarify the regulations about notifying regulatory authorities of possible violations of any requirement of the Surface Mining Control and Reclamation Act of 1977 (SMCRA). This action would streamline the process for OSMRE's coordination with regulatory authorities in order to minimize duplication of inspections, enforcement, and administration of SMCRA. Additionally, the proposed rule would enhance the procedures for early identification of, and implementation of corrective action to address, State regulatory program issues.

**DATES:** OSMRE will accept comments received or postmarked on or before 11:59 p.m. Eastern Daylight Time (EDT), [insert 30 days after publication in the **Federal Register**] (the closing date). OSMRE must receive comments submitted electronically using the Federal eRulemaking Portal (see **ADDRESSES** below) by 11:59 p.m. EDT on the closing date.

**ADDRESSES:** You may submit comments, identified by RIN 1029-AC77, by any of the

following methods:

(1) *Electronically*: Go to the Federal eRulemaking Portal: <https://www.regulations.gov>. In the search box, enter RIN 1029-AC77, which is the docket number for this proposed rulemaking. Then in the search panel on the left side of the screen, under the Document type heading, click on the Proposed Rules link to locate this document. You may submit a comment by clicking on “Comment Now!”

(2) *By hard copy*: Submit by U.S. mail, other mail delivery service, or hand-delivery to:  
U.S. Department of the Interior, Office of Surface Mining Reclamation and Enforcement,  
1849 C Street NW, Mail Stop 4550, Room 4558, Main Interior Building, Washington,  
D.C. 20240, Attention: Division of Regulatory Support.

OSMRE requests that you send comments only by the methods described above. OSMRE will post all comments on <https://www.regulations.gov>. This generally means that OSMRE will post any personal information you provide (see **Public Comment Procedures**, below, for more information).

**FOR FURTHER INFORMATION CONTACT:** Kathleen G. Vello, OSMRE, Division of Regulatory Support, 1849 C Street, NW, Mail Stop 4550, Room 4558, Washington, D.C. 20240, telephone number: (202) 208-1908. If you use a telecommunications device for the deaf (TDD), call the Federal Relay Service at: (800) 877-8339.

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##### I. Public Comment Procedures

You may submit written comments, identified with the RIN 1029-AC77, by any of the methods described in the **ADDRESSES** section. Written comments submitted on the proposed rule should be specific, confined to issues pertinent to the proposed rule, and should explain the reason for any recommended change. Where possible, your comments should reference the specific section or paragraph of the proposal that you are addressing. The comments and recommendations that will be most useful and likely to influence agency decisions are those: supported by quantitative information or studies; based on specific, identifiable experience; and that include citations to, and analyses of, the applicable laws and regulations.

Comments received after the close of the comment period (see the **DATES** section) or delivered to addresses other than those listed above (see the **ADDRESSES** section) may not be considered or included in the Administrative Record for the final rule.

Comments, including names and street addresses of respondent commenters, will be available for public review at the address listed under **ADDRESSES** during regular business hours (7:00 a.m. to 4:00 p.m.), Monday through Friday, except holidays.

Please be advised that OSMRE may make your entire comment—including your personal identifying information such as your name, phone number, or email address—publicly available at any time. While you may ask OSMRE in your comment to withhold your personal identifying information from public view, OSMRE cannot guarantee that your request will be granted.

##### II. Background

###### A. Proposed Rule Summary

As set forth in section 201(c)(12) of SMCRA, Congress requires OSMRE to, among

other responsibilities, “cooperate with...State regulatory authorities to minimize duplication of inspections, enforcement, and administration of this Act.” 30 U.S.C. 1211(c)(12). Consistent with this statutory obligation and based on OSMRE’s 42 years of experience administering SMCRA, the proposed rule would clarify the regulations found at 30 CFR 842.11 and 842.12 to state that, before issuing a notification to a State regulatory authority when a possible violation exists, OSMRE will consider any information readily available. This proposed modification would reduce inefficiencies by ensuring that OSMRE considers any readily available information, including information that a State regulatory authority may choose to provide, before OSMRE issues a notification to a State regulatory authority. Our consideration of this information is critical because a State regulatory authority has primary enforcement responsibility under a State regulatory program. Thus, the proposed rule would enable OSMRE to eliminate duplication of inspection and enforcement under SMCRA by clarifying that OSMRE would consider all readily available information, including any information provided by the State regulatory authority and other readily available information, before issuing a notification of a possible violation to that State regulatory authority. Furthermore, the proposed rule would clarify the meaning of the statutory terms “appropriate action” and “good cause,” as used in 30 CFR 842.11, to describe the State regulatory authority’s action or inaction after OSMRE notifies the State regulatory authority that a possible violation exists. Examples of what constitutes appropriate action and good cause exist in the existing regulations; however, in OSMRE’s experience, the existing, example explanations are not exhaustive and do not fully reflect the array of in-the-field scenarios. Within the context of evaluating whether a State regulatory authority has taken appropriate action with respect to a possible violation, OSMRE has observed that not all State regulatory program issues OSMRE identifies warrant a Federal inspection, but

may require further evaluation. To address these issues comprehensively and to ensure more complete and efficient enforcement of SMCRA, the proposed revision of 30 CFR Part 733 would add procedures for corrective action of State regulatory program issues, including implementation of action plans. The proposed revisions to 30 CFR Part 733 include adding definitions of the terms “action plan” and “State regulatory program issue” and introducing a mechanism for early identification and corrective action to address State regulatory program issues.

For ease of organization, the preamble describes the proposed changes to Part 842 first, then it describes the proposed changes to Part 733.

In the spirit of cooperative federalism, OSMRE has developed each of the proposed modifications and clarifications in close coordination with State regulatory authorities. The proposed clarifications are also consistent with Executive Order 13777 of February 24, 2017, 82 FR 12285 (March 1, 2017), because the proposed clarifications would modify the existing regulations to alleviate unnecessary regulatory burden.

The proposed changes in this rulemaking are consistent with SMCRA and will add transparency to OSMRE’s oversight responsibilities; promote regulatory certainty for State regulatory authorities, regulated entities, and the public; enhance OSMRE’s relationship with the State regulatory authorities; reduce redundancy in inspection and enforcement; and streamline the process for notifying State regulatory authorities of possible violations and other issues.

#### *B. Statutory Background*

When Congress enacted SMCRA, 30 U.S.C. 1201 *et seq.*, it established a regulatory structure for protecting the environment from the surface effects of coal mining. Specific to this proposed rulemaking, Title V of SMCRA embodies a regulatory relationship between the

Federal Government, through OSMRE, and the States and Tribes (collectively referred to as “State regulatory authority” throughout this proposed rule because no Tribes currently have regulatory programs) known as cooperative federalism. SMCRA’s mandate of cooperative federalism authorizes States (or Tribes)—within limits established by Federal minimum standards—to enact and administer regulatory programs structured to satisfy each State’s individual needs. Under section 503(a) of SMCRA, States may submit proposed State regulatory programs to the Secretary of the Interior (Secretary) for approval. 30 U.S.C. 1253(a). The Secretary acts through OSMRE to review and approve or not approve a State’s proposed State regulatory program. 30 U.S.C. 1211(c)(1). After approval of a proposed State regulatory program, the State has achieved “primacy.” When a State achieves primacy, the State becomes the regulatory authority and has primary jurisdiction over the regulation of surface coal mining and reclamation operations on non-Federal lands within its borders, except as provided in sections 521 and 523 and Title IV of SMCRA. 30 U.S.C. 1271, 1273, and 1231-1244. In general, a State can assume primary jurisdiction if the Secretary, acting through OSMRE, approves a proposed State regulatory program that demonstrates the State’s capability to carry out SMCRA’s provisions and satisfy its purposes.

One of the exceptions outlined in 30 U.S.C. 1271(a) is the primary subject of this proposed rulemaking. This provision of SMCRA authorizes OSMRE to issue a notification to a State regulatory authority—commonly known as a Ten-Day Notice (TDN)—if OSMRE has reason to believe, based on any information available, that any person is in violation of any requirement of SMCRA or any permit condition required by SMCRA. The State regulatory authority must, within ten days, take appropriate action to cause the violation to be corrected or the State regulatory authority must demonstrate good cause for not correcting the violation. The

State regulatory authority is obligated to transmit this response to OSMRE for further evaluation as dictated by OSMRE’s regulations (discussed below in section II. *C. Regulatory Background*).

Relevant to the proposed revisions to the regulations at 30 CFR Part 733, as discussed below, section 504 of SMCRA, 30 U.S.C. 1254, in general, directs the Secretary to prepare and implement a Federal program if a State regulatory authority, among other reasons, fails to implement, enforce, or maintain its approved program. Furthermore, section 521(b) of SMCRA generally requires OSMRE to enforce the requirements of SMCRA when a State regulatory authority fails to enforce an approved State regulatory program effectively and certain other criteria are satisfied. 30 U.S.C. 1271(b).

### *C. Regulatory Background*

Section 201(c)(2) of SMCRA authorizes OSMRE to “publish and promulgate such rules and regulations as may be necessary to carry out the purposes and provisions of this Act.” 30 U.S.C. 1211(c)(2). OSMRE has implemented the statutory requirements discussed above through the existing regulations, including 30 CFR Parts 842 and 733.

OSMRE has implemented section 521(a)(1) of SMCRA, in part, through the existing regulations at 30 CFR 842.11(b)(1) and (b)(2). These regulations outline the procedures for an authorized representative of the Secretary to notify a State regulatory authority of a possible violation and possible Federal enforcement. In addition, the existing regulation at § 842.11(b)(2) provides that “[a]n authorized representative shall have reason to believe that a violation, condition or practice exists if the facts alleged by the informant would, if true, constitute a condition, practice or violation referred to in paragraph (b)(1)(i) of this section.” As discussed below, in conjunction with the proposed revision to § 842.11(b)(2), the proposed rule would modify that section to recognize that OSMRE considers other readily available information in

addition to the facts that a citizen complainant alleges when the authorized representative of the Secretary is determining whether there is reason to believe a violation exists.

An administrative case before the Interior Board of Land Appeals (IBLA) has interpreted SMCRA and these regulations, holding that OSMRE “retains a significant oversight role to ensure compliance with SMCRA’s mandates.” *Frank Hubbard*, 145 IBLA 49, 52 (1998). In *Hubbard*, the IBLA also stated: “[w]here pursuant to a citizen’s complaint, OSM[RE] has reason to believe that a permittee is in violation of a [S]tate regulatory program, OSM[RE] is required to issue a TDN to the appropriate [S]tate regulatory authority.” *Id.* at 53. However, neither SMCRA nor the regulations clearly define the phrase “reason to believe,” and both are ambiguous as to what information OSMRE may consider when determining whether OSMRE has “reason to believe” that a permittee is in violation of applicable requirements.

The proposed rule would clarify areas of the regulations discussed above, which have resulted in disparate application, regulatory uncertainty, redundancy, and duplicative investigation and enforcement by OSMRE and State regulatory authorities.

Moreover, the existing regulations at 30 CFR 842.11(b)(1)(ii)(B)(2) through (4) further implement the requirements of section 521(a)(1) of SMCRA. 30 U.S.C. 1271(a)(1). The existing regulations are primarily the result of substantial amendments made to the regulations in 1988. Pursuant to the final rule published in the July 14, 1988, **Federal Register** (53 FR 26728), the regulations were amended to “establish a uniform standard by which OSMRE will evaluate [S]tate responses to [F]ederal notices of possible violations of [SMCRA].” The regulations established that OSMRE “will accept a [S]tate regulatory authority’s response to a [TDN] as constituting appropriate action to cause a possible violation to be corrected or showing good cause for failure to act unless OSMRE makes a written determination that the [S]tate’s response

was arbitrary, capricious, or an abuse of discretion under the [S]tate program.” *Id.* This final rule became effective on August 15, 1988.

In summary, a State regulatory authority must take appropriate action to correct a possible violation identified by OSMRE in a TDN, or the State regulatory authority must show good cause why the violation has not been corrected. Under section 521(a)(1) of SMCRA, if a State regulatory authority does not take appropriate action or show good cause, SMCRA requires us to initiate a Federal inspection of the surface coal mining operation at which the alleged violation is occurring (unless the information OSMRE has is from a previous Federal inspection of the same operation). 30 U.S.C. 1271(a)(1). Thus, OSMRE’s interpretations of what the terms “appropriate action” and “good cause” mean are essential to maintaining the proper balance between Federal enforcement and the primary role of a State regulatory authority in implementing an approved program. Although the existing regulations discuss both “appropriate action” and “good cause,” the regulations about these integral phrases have not been substantially updated in over 31 years. Based on our experience and feedback from State regulatory authorities, the proposed rule would update and clarify the meaning of the terms “appropriate action” and “good cause.”

OSMRE is also proposing to revise the regulations at 30 CFR Part 733 to add new definitions and a new section that would operate in conjunction with the Part 842 regulations, discussed above. To balance the provisions of SMCRA found at sections 503 and 504, 30 U.S.C. 1253 and 1254, and the provisions of section 517(b), 30 U.S.C. 1267(b), regulations found at 30 CFR Part 733 were promulgated. *See generally* 44 FR 15323 (March 13, 1979). States with State regulatory programs are required to implement, administer, enforce, and maintain their respective programs in accordance with SMCRA, the implementing regulations,

and the provisions of the approved program. 30 CFR 733.11. The regulations at 30 CFR Part 733 establish requirements for the maintenance of State regulatory programs and procedures for the rare remedy of substituting Federal enforcement of State regulatory programs and withdrawing approval of State regulatory programs. 30 CFR 733.1. These regulations have not been substantively revised in over 37 years. 47 FR 26366 (June 17, 1982). However, in coordination with State regulatory authorities, OSMRE determined that mechanisms exist for addressing identified State regulatory program issues to avoid reaching a threshold that would require substitution of Federal enforcement of a State regulatory program. OSMRE may identify these State regulatory program issues in the context of reviewing a State regulatory authority's response to a TDN. Therefore, the proposed rule addresses any State regulatory program issue OSMRE may find during State regulatory program reviews by adding provisions to 30 CFR Part 733 for early identification and corrective action and to refer to these State regulatory program issues in the proposed revisions to 30 CFR 842.11(b)(1)(ii)(B)(3).

### **III. Discussion of the Proposed Rule and Section-by-Section Analysis**

#### *A. Overview*

While most States with significant surface coal mining operations have obtained primacy to regulate surface coal mining within their borders, OSMRE still plays a significant oversight role in regulating the coal mining industry. When OSMRE is not the primary agency regulating surface coal mining in a State, OSMRE assumes a direct oversight role. If OSMRE has reason to believe that any person has violated the applicable requirements, section 521(a)(1) of SMCRA requires OSMRE to notify the relevant State regulatory authority of the potential violation. In this context, "any person" includes the SMCRA permit holder, an operator contracted to conduct the surface coal mining activity, or certain officials related to these entities who have

responsibilities under SMCRA. However, “any person” does not include State regulatory authorities, OSMRE, or employees or agents thereof, unless they are acting as permit holders. A reasonable reading of section 521(a)(1) is that the referenced violations are those that permittees, and related entities or persons, commit in contravention of State regulatory programs. Therefore, within the context of section 521(a) of SMCRA and the TDN regulations, the proposed rule would clarify that OSMRE will not send TDNs to State regulatory authorities based on allegations or other information that indicates that a State regulatory authority may have taken an improper action under the State’s regulatory program. OSMRE concludes that this approach is consistent with the plain language of section 521(a). However, if OSMRE becomes aware that there is a State regulatory program issue that calls into question a State regulatory authority’s effective administration of its State regulatory program, even with respect to a single operation, OSMRE intends to clarify that OSMRE would address the issue programmatically under the proposed revisions to 30 CFR Part 733, rather than through the TDN process. Moreover, as explained below in the discussion of the proposed revisions to 30 CFR Part 733, the proposed rule would clarify that even when OSMRE is engaged in a corrective action process with a State regulatory authority, the State regulatory authority may take direct enforcement action under its State regulatory program. Additionally, OSMRE can take appropriate oversight enforcement actions, in the event that there is, or may be, an imminent on-the-ground violation.

One of the instances when OSMRE may issue a TDN is when OSMRE receives a complaint from a citizen about an alleged violation at a surface coal mining operation. When OSMRE receives such a citizen complaint, OSMRE will issue a TDN to the State regulatory authority if OSMRE has reason to believe that any person is in violation of any requirement of SMCRA, the implementing regulations, the applicable State regulatory program, or a permit

condition required by SMCRA. Based on 42 years of regulatory and oversight experience, OSMRE finds that unnecessary duplication exists in the current TDN process that can be eliminated by ensuring OSMRE examines all readily available information, including the information the State regulatory authority possesses. This is critical because in some instances in the past, OSMRE has issued a TDN after receipt of a citizen complaint even though the State regulatory authority had received a simultaneous complaint about the same possible violation. This resulted in the State regulatory authority and OSMRE initiating two parallel processes and engaging in duplicative effort without any significant benefit. Further, the relevant State regulatory authority and OSMRE were actively investigating the same issue. If OSMRE issues a TDN when a State regulatory authority is already investigating the same allegation, it can divert the State regulatory authority's efforts away from addressing a potential problem to instead responding to OSMRE's TDN. OSMRE could minimize or avoid redundancy and duplication of time and resources by ensuring that a State regulatory authority is involved early in the process, thus, freeing both OSMRE and the State regulatory authority to redirect time and allocate limited resources more effectively to ensure that potential violations are addressed. Accordingly, the proposed rule would clarify that, if OSMRE's authorized representative, while using his or her best professional judgment, is aware that a State regulatory authority has investigated or is actively investigating the possible violation, the authorized representative would consider the State regulatory authority's action before determining if there is reason to believe a violation exists.

*B. Proposed 30 CFR 842.11(b)(1)*

Existing 30 CFR 842.11(b)(1) explains the circumstances when OSMRE "shall" conduct a Federal inspection, but the paragraph primarily focuses on the process leading up to a Federal

inspection, including the process for OSMRE's issuance of a TDN to a State regulatory authority. In general (when there is no imminent danger or harm scenario), consistent with section 521(a) of SMCRA, when OSMRE issues a TDN to a State regulatory authority, OSMRE evaluates the State regulatory authority's response to the TDN before deciding whether to conduct a Federal inspection. Consistent with the existing regulations, OSMRE will issue a TDN to a State regulatory authority when an authorized representative of OSMRE has reason to believe that there is a violation of SMCRA, the implementing regulations, the applicable State regulatory program, or any condition of a permit or an exploration approval. In general, OSMRE may also issue a TDN when there is any condition, practice, or violation that creates an imminent danger to the health or safety of the public or is causing, or that OSMRE reasonably expect to cause, a significant, imminent, environmental harm to land, air, or water resources. In the latter situation, OSMRE will bypass the TDN process, and proceed directly to a Federal inspection, if the person supplying the information provides adequate proof that there is an imminent danger to the public health and safety or a significant, imminent environmental harm.

In the introductory sentence at 30 CFR 842.11(b)(1), the proposed rule would replace the word "shall" with the word "will" because it explains an action that OSMRE will take under the specified circumstances.<sup>1</sup> In the context of the existing provision at § 842.11(b)(1), OSMRE already treats "shall" as "will." Consequently, because other revisions are proposed to this section, the proposed rule would change "shall" to "will" to remove any possible ambiguity.

The proposed rule would also modify existing 30 CFR 842.11(b)(1)(i) to clarify that when an authorized representative assesses whether he or she has reason to believe a violation exists, the authorized representative would consider any information that is accessible without

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<sup>1</sup> The U.S. Government Publishing Office recommends against using the word "shall" because it can mean may, will, or must depending on the context and can create ambiguity.

unreasonable delay. The proposed rule would achieve this clarification by inserting the word “readily” between the existing words “information” and “available.”

OSMRE finds that these proposed revisions would be consistent with section 521(a)(1) of SMCRA, which sets forth that OSMRE can form reason to believe “on the basis of any information available to [the Secretary], including receipt of information from any person.” 30 U.S.C. 1271(a)(1). Based on SMCRA’s plain language, such information is not restricted to information OSMRE receives from a citizen complainant. Rather, the information includes any information OSMRE receives from a citizen or the applicable State regulatory authority, or any other information OSMRE is aware exists. Also, the proposed rule would clarify that such information must be readily available, so that the process will proceed as quickly as possible and will not become open-ended.

In addition, the House of Representatives discussion of proposed section 521(a)(1) attempted to illustrate one way to establish “reason to believe” in the context of TDNs:

In addition to normally programmed inspections, section 521(a)(1) of the bill also provides for special inspections when the Secretary receives information giving him reason to believe that violations of the act or permit have occurred. **It is anticipated that “reasonable belief” could be established by a snapshot of an operation in violation or other simple and effective documentation of a violation.**

By mandating primary enforcement authority to field inspectors, this bill recognizes that inspectors are in the best position to recognize and control compliance problems.

H. Rept. No. 95-218, at 129 (April 22, 1977) (emphasis added). *See also* H. Rept. No. 94-1445, at 74-75; H. Rep. No. 94-896, at 76-77; and H. Rept. No. 94-45, at 118-119. The proposed revision to § 842.11(b)(1)(i) is consistent with this reference to the Secretary’s consideration of “other simple and effective documentation of a violation” in determining whether there is reason to believe that a violation exists. While this language from the legislative history relates to the

information that a citizen provides, it is reasonable to apply the same principle to section 521, as enacted. In addition, in practice, citizen complaints do not always include simple and effective documentation of a violation. Instead, citizen complaints sometimes present a combination of documentation and bare allegations. Under the existing regulations, in cases where OSMRE has determined “reason to believe” that a violation exists at a particular operation, it was often because OSMRE only accepted the alleged facts. To ensure OSMRE obtains effective documentation, the proposed rule would expand our consideration to include a broader array of readily available information.

As mentioned above, section 521(a)(1) allows OSMRE to consider “any information available..., including receipt of any information from any person” when OSMRE is determining whether it has reason to believe that a violation exists. Congress provided that when States achieve primacy, they are the primary SMCRA regulatory authorities; therefore, it is important for OSMRE to be able to consider any readily available information that OSMRE receives from a State regulatory authority when OSMRE is determining whether OSMRE has reason to believe that a violation exists. Indeed, the above quoted passage from the House Report notes inspectors, based on on-the-ground observations, are “in the best position to recognize” violations. In the overall context of SMCRA, any information OSMRE receives from a State regulatory authority is often integral to the assessment of whether a violation exists. During the course of OSMRE oversight enforcement history, the knowledge and information provided by a State regulatory authority has been critical to OSME’s understanding of a possible violation.

Moreover, OSMRE’s consideration of information that it receives from the State regulatory authority promotes efficiency and avoids duplication and redundancy of investigatory and enforcement activity between OSMRE and a State regulatory authority. As discussed above

in the *Overview*, the TDN process is time-consuming for both State regulatory authorities and OSMRE. OSMRE has spent considerable time preparing TDNs and analyzing State regulatory authority TDN responses. Similarly, State regulatory authorities have spent considerable time preparing responses to TDNs issued by OSMRE, and some State regulatory authorities have reported increases in the time spent investigating and responding to TDNs. Accordingly, the proposed rule would clarify that, if OSMRE's authorized representative, while using his or her best professional judgment, is aware that a State regulatory authority has investigated or is actively investigating the possible violation, the authorized representative would consider the State regulatory authority's action before determining if there is reason to believe a violation exists.

In addition, clarification of the existing regulations is warranted because State regulatory authorities have reported varying levels of communication and approaches from our various field offices relative to consideration of a State regulatory authority's actions when assessing whether the OSMRE authorized representative has reason to believe that a violation exists. Clarifying the regulation in the manner described above will promote regulatory certainty for State regulatory authorities and permittees, as well as the public, and should foster better relationships between OSMRE and State regulatory authority personnel. Increased cooperation between OSMRE and the State regulatory authorities promotes both the common mission of effective SMCRA implementation and collaboration between Federal and State agencies. Additionally, relying on information OSMRE receives from a State regulatory authority, along with the information in a citizen complaint and other readily available information, will promote more efficient and informed decision making on our part. Thus, by making a more informed decision, the TDNs that OSMRE issues will be focused on situations with a higher likelihood of a violation, which is

a better use of OSMRE and the State regulatory authority's resources. Armed with more time, the State regulatory authorities and OSMRE could devote more resources to effective regulation of potential environmental effects of surface coal mining.

Finally, the existing regulations at § 842.12(a) require that a person requesting a Federal inspection must demonstrate that he or she has notified the applicable State regulatory authority. In the context of this rulemaking, OSMRE reiterates that, in general, OSMRE would not consider a citizen complaint until the citizen has complied with this regulation and properly notified the relevant State regulatory authority. Therefore, the provisions of existing § 842.12(a) work in conjunction with the addition of the provisions of proposed § 842.11(b) that would require an authorized representative to determine whether he or she has reason to believe that a violation exists based on "any information readily available." The "information readily available" would include information from a State regulatory authority, which a citizen complainant has notified—consistent with the existing regulations. However, if an imminent harm is present, OSMRE will take any action it deems necessary under 30 U.S.C. 1271(a) and the implementing regulations.

*C. Proposed 30 CFR 842.11(b)(1)(ii)(A)*

Existing 30 CFR 842.11(b)(1)(ii)(A) reads as follows: "[t]here is no State regulatory authority or the Office is enforcing the State regulatory program under section 504(b) or 521(b) of the Act and part 733 of this chapter." In this section, the proposed rule would only capitalize the "p" in the word "Part" and add the word "regulatory" between the words "State" and "program" to promote consistency throughout this rulemaking and clarify that OSMRE is referring to State regulatory programs.

*D. Proposed 30 CFR 842.11(b)(1)(ii)(B)(1)-(4)*

The proposed rule would make non-substantive changes to existing 30 CFR 842.11(b)(1)(ii)(B)(1) for readability. The existing language is set forth above under section II.C.

*Regulatory Background.* The proposed revision would read,

The authorized representative has notified the State regulatory authority of the possible violation and more than ten days have passed since notification, and the State regulatory authority has not taken appropriate action to cause the violation to be corrected or to show good cause for not doing so, or the State regulatory authority has not provided the authorized representative with a response. After receiving a response from the State regulatory authority, but before a Federal inspection, the authorized representative will determine in writing whether the standards for appropriate action or good cause have been satisfied. A State regulatory authority's failure to respond within ten days does not prevent the authorized representative from making a determination, and will constitute a waiver of the State regulatory authority's right to request review under paragraph (b)(1)(iii) of this section.

Although there is no proposed change to the existing regulation at 30 CFR 842.11(b)(1)(ii)(B)(2), it is discussed here for context related to the proposed clarifications in 30 CFR 842.11(b)(1)(ii)(B)(3), which describes the term "appropriate action," and 30 CFR 842.11(b)(1)(ii)(B)(4), which describes the term "good cause." Consistent with § 842.11(b)(1)(ii)(B)(2), when OSMRE receives a State regulatory authority's response to a TDN, OSMRE determines whether or not the State regulatory authority's action or response constitutes appropriate action to cause any violation to be corrected or good cause for not taking action. The existing regulation requires OSMRE to determine that the State regulatory authority's action or response constitutes appropriate action or good cause if it is not arbitrary, capricious, or an abuse of discretion under the approved State regulatory program. In this context, the arbitrary and capricious standard is appropriately deferential to State regulatory authorities and is consistent with SMCRA's cooperative federalism model.

As it currently exists, 30 CFR 842.11(b)(1)(ii)(B)(3) explains that "[a]ppropriate action includes enforcement or other action authorized under the State program to cause the violation to

be corrected.” The proposed rule would add to this requirement a second sentence that reads, “[a]ppropriate action may include OSMRE and the State regulatory authority immediately and jointly initiating steps to implement corrective action to resolve any issue that the authorized representative and applicable Field Office Director identify as a State regulatory program issue, as defined in 30 CFR Part 733.” The proposed rule gives the responsibility for identification of State regulatory program issues to the applicable Field Office Director and authorized representative, as these officials possess unique knowledge of the specific requirements of and responsibilities under the applicable State regulatory program. Although OSMRE has historically allowed programmatic resolution of State regulatory program issues, such as implementation of remedies under 30 CFR Part 732, to constitute “appropriate action” in a given situation, the existing regulations do not specifically explain resolution of State regulatory program issues through corrective actions. This approach has created regulatory uncertainty. In order to avoid confusion for the regulated community, State regulatory authorities, and the public at large, the proposed rule would remove any ambiguity and definitively state that “appropriate action” may include corrective action to resolve State regulatory program issues. However, proposed § 733.12(a)(2) reaffirms that if OSMRE concludes that the State regulatory authority is not effectively implementing, administering, enforcing, or maintaining all or a portion of its State regulatory program, OSMRE may substitute Federal enforcement of the State regulatory program or withdraw approval. Additionally, in accordance with proposed § 733.12(d), OSMRE reserves the right to reinstitute oversight enforcement if, subsequent to a finding of appropriate action based upon a corrective action consistent with proposed 30 CFR Part 733, an on-the-ground violation occurs or may imminently occur.

As it currently exists, 30 CFR 842.11(b)(1)(ii)(B)(4) identifies circumstances that

constitute good cause for a State regulatory authority not to have corrected a violation. In general, pursuant to the existing regulations, good cause for a State regulatory authority's failure to take action includes: (1) a finding that the possible violation does not exist under the State regulatory program; (2) the State regulatory authority requires additional time to determine whether a violation exists; (3) the State regulatory authority lacks jurisdiction over the possible violation under the State regulatory program; (4) the State regulatory authority is precluded by an administrative or judicial order from acting on the possible violation; or (5) specific to abandoned mine sites, the State regulatory authority is diligently pursuing or has exhausted all appropriate enforcement provisions.

The proposed rule would make minor clarifications to the examples of what constitutes good cause. First, proposed § 842.11(b)(1)(ii)(B)(4)(i) would make a non-substantive change for readability and consistency that would simply add the word "regulatory" between "State" and "program" and switch the position of two phrases in the provision. The existing provision reads, "[u]nder the State program, the possible violation does not exist," and the revised provision would read, "[t]he possible violation does not exist under the State regulatory program." Second, the proposed rule would revise § 842.11(b)(1)(ii)(B)(4)(ii) to provide that good cause includes: "[t]he State regulatory authority has initiated an investigation into a possible violation and as a result has determined that it requires a reasonable, specified additional amount of time to determine whether a violation exists." The proposed revision would explain that the authorized representative would have discretion to determine how long the State regulatory authority should reasonably be given to complete its investigation of the possible violation. Also, the authorized representative would communicate to the State regulatory authority the date by which its investigation must be completed. This proposed revision would promote prompt identification

and resolution of possible violations. OSMRE cautions that investigations should not be open-ended, the State regulatory authority would be required to perform the investigations efficiently and effectively, and the State regulatory authority should focus the investigation on satisfying the objective of the TDN process—achieving compliance with the State regulatory program. A State regulatory authority must demonstrate that, when engaging in an investigation, its inquiry focuses on investigating a possible violation. In no circumstance should a State regulatory authority use an investigation to delay Federal oversight or enforcement or delay our evaluation of a State regulatory authority’s response to a TDN.

The proposed rule would make a minor revision to § 842.11(b)(1)(ii)(B)(4)(iii). This proposed change would also require that a State regulatory authority would need to demonstrate that it lacks jurisdiction over the possible violation to qualify for this good cause showing. The existing language reads, “[t]he State regulatory authority lacks jurisdiction under the State program over the possible violation or operation... .” The proposed language would read, “[t]he State regulatory authority demonstrates that it lacks jurisdiction over the possible violation under the State regulatory program... .”

Similarly, the proposed rule would make minor, non-substantive modifications to § 842.11(b)(1)(ii)(B)(4)(iv) for readability and to clarify that, in order to show good cause, the State regulatory authority would need to demonstrate that an order from an administrative review body or court of competent jurisdiction precludes it from taking action on the possible violation. The existing language reads, “[t]he State regulatory authority is precluded by an administrative or judicial order from an administrative body or court of competent jurisdiction from acting on the possible violation, where that order is based on the violation not existing or where the temporary relief standards of section 525(c) or 526(c) of the Act have been met... .” The

proposed language would read, “[t]he State regulatory authority demonstrates that it is precluded from taking action on the possible violation because an administrative review body or court of competent jurisdiction has issued an order concluding that the possible violation does not exist or that the temporary relief standards of the State regulatory program counterparts to section 525(c) or 526(c) of the Act have been satisfied... .”

Finally, the proposed rule would make minor, non-substantive modifications to § 841.11(b)(1)(ii)(B)(4)(v) to enhance readability and clarity. The existing language reads,

[w]ith regard to abandoned sites as defined in § 840.11(g) of this chapter, the State regulatory authority is diligently pursuing or has exhausted all appropriate enforcement provisions of the State program.

The proposed rule would read,

[r]egarding abandoned sites, as defined in 30 CFR 840.11(g), the State regulatory authority is diligently pursuing or has exhausted all appropriate enforcement provisions of the State regulatory program.

In addition to the specific clarifications of the terms “appropriate action” and “good cause” noted above, the proposed rule would reaffirm the process OSMRE currently employs in relationship to conclusions about State regulatory authority TDN responses. Pursuant to existing § 842.11(b)(1)(B)(2), the authorized representative may make a finding that the State regulatory authority has taken an appropriate action or has good cause for not taking action, as long as the State regulatory authority has presented a rational basis for its decision, action, or inaction. Additionally, the State regulatory authority’s response must not be arbitrary, capricious, or an abuse of discretion under the State regulatory program. When an authorized representative assesses whether a State regulatory authority has taken appropriate action or has good cause for not taking action, the authorized representative focuses on whether the action corrected the violation and not merely the methodology that the State regulatory authority employed to correct

the violation. Additionally, OSMRE assesses and determines if the State regulatory authority based its action or response on a reasonable consideration of the relevant facts and if the action or response is an exercise of reasoned discretion that complies with the State regulatory program.

*E. Proposed 30 CFR 842.11(b)(2)*

As it currently exists, § 842.11(b)(2) offers an interpretation of the phrase “reason to believe” that has not been revisited in this section since a 1982 rulemaking. The existing regulation at § 842.11(b)(2) essentially requires an authorized representative to accept the facts in a citizen complaint as true when determining whether he or she has reason to believe that a violation exists. The existing provision reads, “[a]n authorized representative shall have reason to believe that a violation, condition or practice exists if the facts alleged by the informant would, if true, constitute a condition, practice or violation referred to in paragraph (b)(1)(i) of this section.”

The proposed revision reads,

[a]n authorized representative will have reason to believe that a violation, condition, or practice referred to in paragraph (b)(1)(i) of this section exists if the facts that a complainant alleges, or facts that are otherwise known to the authorized representative, constitute simple and effective documentation of the alleged violation, condition, or practice. In making this determination, the authorized representative will consider any information readily available to him or her, including any information a citizen complainant or the relevant regulatory authority submits to the authorized representative.

Some might have interpreted the existing regulatory provisions to mean that all OSMRE has to do is determine if the alleged facts would constitute a violation before issuing a TDN. However, the existing regulations at § 842.11(b)(1)(i) provide that the authorized representative can consider “information available” when determining whether he or she has reason to believe a violation exists, rather than automatically and only accepting the facts alleged in a citizen complaint as true. Because of its importance to an understanding of the statutory scheme,

clarifying the meaning of the phrase “reason to believe,” as discussed above in the explanation of proposed 30 CFR 842.11(b)(1), is paramount.

Consistent with this approach, the proposed rule would modify § 842.11(b)(2) to clarify that OSMRE would consider any information readily available and not only the facts alleged in a citizen complaint when determining whether it has reason to believe a violation exists. Nothing in SMCRA requires OSMRE to accept alleged facts as true in a vacuum. Rather, information that a citizen provides is usually only a portion of the readily available information that OSMRE would consider when deciding whether to initiate the TDN process. Moreover, the inclusion of the phrase “reason to believe” in section 521(a)(1) of SMCRA indicates that Congress intended for OSMRE to use discretion in determining whether to issue a TDN to a State regulatory authority. With the proposed changes, after OSMRE receives an allegation of a violation and assess all readily available information, OSMRE would apply independent, professional judgment to determine whether OSMRE has reason to believe a violation exists. Congress created OSMRE to be the expert agency that administers SMCRA. Therefore, OSMRE should never be acting as a mere conduit for transmitting a citizen complaint to a State regulatory authority in the form of a TDN.

Proposed § 842.11(b)(2) would complement the provisions of proposed § 842.11(b)(1)(i), discussed above, and, together, the provisions would provide clarification for how an authorized representative would arrive at reason to believe that a violation exists in the context of the TDN process. In short, the clarified provisions propose to adopt language that Congress offered when it was drafting SMCRA. Specifically, Congress anticipated that ““reasonable belief” could be established by a snapshot of an operation in violation or other simple and effective documentation of a violation.” H. Rept. No. 95-218 at 129 (1977). As explained above, under the

discussion of proposed § 842.11(b)(1), OSMRE would apply the principle of considering “other simple and effective documentation of a violation” to all information readily available to it, no matter the source. Specifically, the reference to “any information available” in section 521(a)(1), 30 U.S.C. 1271(a)(1), would include not only information OSMRE receives from a citizen complainant and information of which it is already aware, but also any information OSMRE receives from the applicable State regulatory authority. The discussion of proposed § 842.11(b)(1)(i), above, discusses in more detail OSMRE’s multi-faceted rationale for clarifying the meaning of the phrase “reason to believe.” One key point that the proposed rule would be clarifying is that, if the authorized representative, while using his or her best professional judgment, is aware that the State regulatory authority has investigated or is actively investigating the possible violation, the authorized representative would consider the State regulatory authority’s action before determining if there is reason to believe a violation exists.

However, OSMRE remains mindful of the important role that citizens play in effective implementation and enforcement of SMCRA. Therefore, OSMRE would continue to take allegations in a citizen complaint very seriously, and OSMRE encourages citizens to provide as much detail and simple and effective documentation about the alleged violation in their complaints as possible.

In summary, the proposed revision to § 842.11(b)(2) dovetails with existing § 842.11(b)(1)(i), as well as the proposed clarification of that section, discussed above, which would allow OSMRE to consider “any information readily available” when making a “reason to believe” determination. Being able to read these two provisions in harmony should reduce or eliminate any conflict or confusion that the existing provisions created.

*F. Proposed 30 CFR 842.12(a)*

As it currently exists, 30 CFR 842.12(a) identifies the process to request a Federal inspection. This existing regulatory provision states that a person may request a Federal inspection by submitting a signed, written statement giving the authorized representative reason to believe that a violation, condition or practice referred to in § 842.11(b)(1)(i) exists and that the State regulatory authority has been notified in writing about the violation. The provision also requires the submitter to include a phone number and address where the person can be contacted. The authorized representative then assesses if he or she has reason to believe that a violation, condition, or practice referred to in § 842.11(b)(1)(i) exists.

The proposed modifications to 30 CFR 842.12(a) complement the proposed clarifications outlined above in the discussion of proposed § 842.11(b)(1)'s "reason to believe" standard. Specifically, the proposed rule would modify the existing language in § 842.12(a) to clarify that, when a person requests a Federal inspection, the person's request must include, "information that, along with any other readily available information, may give the authorized representative reason to believe that a violation, condition, or practice referred to in § 842.11(b)(1)(i) exists." The proposed rule would also make minor, non-substantive modifications to the provision at existing § 842.12(a) so that the revised provision would reaffirm that when any person requests a Federal inspection, the person's written statement "must also set forth the fact that the person has notified the State regulatory authority, if any, in writing, of the existence of the possible violation, condition, or practice. . . ." Under the proposed rule, the person's statement must also include "the basis for the person's assertion that the regulatory authority has not taken action with respect to the possible violation." The latter provision reflects the fact that, most often, a State regulatory authority will address a potential violation when the State regulatory authority is made aware of the situation.

Under this section of the proposed rule, OSMRE would verify whether the individual requesting the Federal inspection notified the State regulatory authority. As with the “reason to believe” standard in § 842.11(b)(1), OSMRE would consider any readily available information, including any information that the citizen or the State regulatory authority provides, in our “reason to believe” determination. OSMRE may verify the person’s compliance with this section, and the State regulatory authority’s action or inaction relative to the alleged violation, using a variety of methods, not limited to the examples that follow. OSMRE may directly communicate with the State regulatory authority to obtain any readily available information, or rely on other readily available information, such as information in permit files, public records, or documentation that the person provides in connection with the request for a Federal inspection. OSMRE may also obtain the status of the situation if the State regulatory authority acknowledges in writing that the requester previously notified the State regulatory authority of the possible violation, and the State regulatory authority sets forth whether it has acted or not with respect to the possible violation. Again, OSMRE does not deem this list of examples to be exhaustive, and OSMRE may select other mechanisms to verify that the requester properly notified the State regulatory authority of the existence of a possible violation, and to ascertain the status of the State regulatory authority’s response to the possible violation.

Finally, in order to conform and update the regulations to modern, generally accepted, and efficient mechanisms of communication, the proposed rule would provide that, in addition to providing a phone number and physical address, any person who requests a Federal inspection should include an email address, if one is available, so that OSMRE may contact the requester.

In § 842.12(a), the proposed rule would replace the term “a person” with the term “any person” to mirror the language of section 521(a) of SMCRA.

Please note that, under the proposed rule change in § 842.12(a), when OSMRE determines whether a violation exists for purposes of issuing a TDN or determining whether to conduct a Federal inspection, a State regulatory program issue would not qualify as a possible violation. Similarly, OSMRE would not consider a State regulatory authority's failure to enforce its State regulatory program as a violation that warrants a TDN or Federal inspection. The TDN and Federal inspection process in section 521(a) applies to oversight enforcement about violations at individual operations. Congress differentiated this type of individual operation oversight from the State regulatory program enforcement provisions of section 521(b). Based on this distinction, the existing 30 CFR Part 733 addresses State regulatory program issue enforcement identified in section 521(b). As discussed in the next section of the preamble, the proposed rule would add new provisions to 30 CFR Part 733, so that OSMRE may also address potential problems for individual permits under the Part 733 regulations. As proposed, the changes to 30 CFR Part 733 discussed below would not address the types of issues that qualify as violations under the TDN and Federal inspection process in section 521(a). However, OSMRE could still take appropriate oversight enforcement actions in the event that there is an on-the-ground violation, or such a violation could be imminent. The proposed modifications to 30 CFR Part 733 are discussed below.

#### *G. 30 CFR Part 733*

As it currently exists, this part establishes requirements for the maintenance of State regulatory programs, and procedures for substituting Federal enforcement of State regulatory programs or OSMRE withdrawal of approval of State regulatory programs.

Throughout OSMRE's 42 years of implementing and overseeing SMCRA and State regulatory programs, OSMRE has observed that early identification of and corrective action to

address problems is critical to strong enforcement of SMCRA. If problems remain unaddressed, they may result in a State regulatory authority's ineffective implementation, administration, enforcement, or maintenance of its State regulatory program. To prevent this from occurring and to encourage a more complete and efficient implementation of SMCRA, the proposed rule would enhance the provisions of 30 CFR Part 733. Proposed § 733.5 would define the terms "action plan" and "State regulatory program issue." Proposed § 733.12 would address how early identification of and corrective action for State regulatory program issues can be achieved. OSMRE considers these additions to the regulations beneficial for early identification, evaluation, and resolution of potential problems that may impact a State regulatory authority's ability to effectively implement, administer, enforce, or maintain its State regulatory program. Further, these proposed mechanisms would avoid unnecessary substitution of Federal enforcement and minimize the number of on-the-ground violations.

Additionally, in the sections that would be added or revised throughout 30 CFR Part 733, the proposed rule would add the term "regulatory" between the terms "State" and "program." Specific wording is discussed in each proposed section, below. OSMRE finds these to be nonsubstantive changes made for the purpose of clarity; if incorporated into a final rule, these changes would clearly differentiate between a regulatory program administered by OSMRE and a State regulatory program that is administered by a State that has achieved primacy after approval by OSMRE.

#### *Proposed § 733.5 – Definitions*

The proposed rule would add a definition section to 30 CFR Part 733. The proposed rule would define the terms "action plan" and "State regulatory program issue." In short, under the proposed definition, the term "action plan" would mean "a detailed schedule OSMRE prepares to

identify specific requirements a State regulatory authority must achieve in a timely manner to resolve State regulatory program issues identified during oversight of State regulatory programs.” Historically, OSMRE and State regulatory authorities have used action plans as a compliance strategy and documented their use in the Annual Evaluation Reports that OSMRE compiles to discuss, among other things, the status of State regulatory programs. Therefore, the proposed inclusion of a definition for the term “action plan” in the regulations would not place a new burden on State regulatory authorities, but would merely create regulatory certainty and promote uniform application.

Similarly, the proposed rule would define the term “State regulatory program issue” to mean:

an issue we identified during our oversight of a State or Tribal regulatory program that could result in a State regulatory authority not effectively implementing, administering, enforcing, or maintaining all or any portion of its State regulatory program, including instances when a State regulatory authority has not adopted and implemented program amendments that are required under 30 CFR 732.17 and 30 CFR Subchapter T, and issues related to the requirement in section 510(b) of the Act that a regulatory authority must not approve a permit or revision to a permit unless the regulatory authority finds that the application is accurate and complete and that the application is in compliance with all requirements of the Act and the State regulatory program.

Generally, OSMRE identifies State regulatory program issues during oversight of a State regulatory program. In short, State regulatory program issues are those that may result in a State regulatory authority not adhering to its approved, State regulatory program. Other examples of a State regulatory program issue include when a State regulatory authority does not adopt and implement program amendments that are required under 30 CFR 732.17 and 30 CFR Subchapter T. The proposed definition would also include issues related to the requirement in SMCRA section 510(b), 30 U.S.C. 1260(b), that a regulatory authority must not approve a permit or permit revision, unless the regulatory authority finds that the application is accurate and

complete and is in compliance with all of SMCRA's requirements and those of the approved program.

As discussed above in relation to the proposed changes to 30 CFR Part 842, the TDN and Federal inspection process in section 521(a) of SMCRA and the State regulatory program enforcement provisions in section 521(b) of SMCRA, along with the existing implementing regulations, differentiate between issues related to a State regulatory authority's failure to implement, administer, maintain, and enforce all or a part of a State regulatory program and possible violations that could lead to a TDN or Federal inspection. Most notably, the State regulatory program enforcement provisions of section 521(b) of SMCRA generally address systemic programmatic problems with a State regulatory program, not specific violations exclusive to an individual operation or permit as detailed in section 521(a) of SMCRA. However, citizens sometimes identify State regulatory program issues in citizen complaints under section 521(a) of SMCRA and 30 CFR Part 842. OSMRE may also become aware of a State regulatory program issue while overseeing enforcement of specific operations or permits. As discussed above in connection with proposed § 842.11(b)(1)(ii)(B)(3), the proposed rule would modify the definition of "appropriate action" to further clarify the differences between possible violations, which may warrant issuance of a TDN or a Federal inspection on specific permits, and systemic, programmatic issues, which are not appropriately addressed through the TDN or Federal inspection process. SMCRA and the existing regulations provide a remedy for systemic, programmatic issues at 30 CFR Part 733 by identifying procedures for substituting Federal enforcement of State regulatory programs or withdrawing approval of State regulatory programs. The proposed addition of early identification and corrective action to address State regulatory program issues would enhance our ability to ensure prompt resolution of issues, which, if

unattended, may result in OSMRE exercising the rare remedy of substituting Federal enforcement. Specifically, if the proposed inclusion of an “action plan,” as proposed in § 733.5(a), is finally adopted, an “appropriate action” that a State might take, as explained in proposed § 842.11(b)(1)(ii)(B)(3), could include OSMRE and the State regulatory authority immediately and jointly initiating steps to implement corrective action to resolve any issue that the authorized representative and applicable Field Office Director identify as a State regulatory program issue. The proposed modification to 30 CFR 842.11(b)(1)(ii)(B)(3), coupled with the proposed definition of “State regulatory program issue,” is designed to further clarify the differences between the types of violations or issues that would be addressed by the TDN and Federal inspection process in section 521(a) and the State regulatory program enforcement provisions in section 521(b) of SMCRA, respectively.

While OSMRE may sometimes identify State regulatory program issues during the TDN process, as discussed in the preceding paragraph, at other times, as referenced earlier in this preamble, OSMRE may identify and address State regulatory program issues before, and instead of, initiating the TDN process. For example, over the years, various groups, including citizens, State regulatory authorities, and industry, have raised the issue of how OSMRE deals with alleged problems in a permit that a State regulatory authority has issued to a permittee. This proposed rule would address these types of issues in the proposed additions to the regulations at 30 CFR Part 733. As discussed above, SMCRA provides textual support for this approach. However, as previously discussed earlier in this preamble, even when a State regulatory authority and OSMRE are engaged in the proposed Part 733 process, the State regulatory authority could still take direct enforcement action under its State regulatory program. Additionally, OSMRE could still take appropriate oversight enforcement actions, in the event

that there is or may be an imminent on-the-ground violation. It should be noted that an imminent on-the-ground violation is different from “[i]mminent danger to the health and safety of the public,” as defined at 30 CFR 701.5. Like other changes proposed in this rulemaking, the proposed additions to 30 CFR Part 733 should provide greater regulatory stability and certainty in relationship to State regulatory program issues and how these issues will be addressed to all interested parties, including citizens, State regulatory authorities, and permittees. OSMRE has addressed mechanisms for handling State regulatory program issues in various ways outside the context of rulemaking, but uncertainty among the regulated community and State regulatory authorities remain. The proposed rule would resolve the issue in the context of this rulemaking initiative by clearly differentiating between the types of violations or issues that would be addressed by the TDN and Federal inspection process outlined in section 521(a) and the State regulatory program enforcement provisions in section 521(b) of SMCRA.

In sum, these proposed changes would ensure a more complete enforcement of SMCRA, and provide guidance on early detection of potential problems that may, if left unaddressed, escalate to the point that OSMRE considers substituting Federal enforcement procedures as outlined in existing 30 CFR 733.12 through 733.13.

*Proposed 733.12 – Early identification and corrective action to address State regulatory program issues.*

The proposed rule would redesignate certain sections of existing 30 CFR Part 733 to accommodate both the proposed new definition section at 30 CFR 733.5, discussed above, and a new proposed § 733.12 entitled, “Early identification and corrective action to address State regulatory program issues.” Because this rulemaking proposes to number the new, proposed section as 733.12, the proposed rule would re-designate existing § 733.12 as 733.13 and existing

§ 733.13 as 733.14. Additionally, the proposed rule would replace references to § 733.12 in the existing regulations with references to § 733.13 in the proposed rule, in accordance with the new section numbering to accommodate the addition of proposed new § 733.12. In particular, in existing § 733.10, the proposed rule would replace the reference to 30 CFR 733.12(a)(2) with a reference to 30 CFR 733.13(a)(2). Similarly, in existing § 736.11(a)(2), the proposed rule would replace the reference to “§ 733.12” with a reference to “§ 733.13.” Also, in existing § 733.10, the proposed rule would change a reference from “OSM” to “OSMRE” for consistency.

Proposed § 733.12 would contain the substantive mechanisms and compliance strategies that OSMRE would use to resolve a State regulatory program issue (as defined in proposed 30 CFR 733.5) that OSMRE becomes aware of during oversight of a State regulatory program or from information OSMRE receives from any person. Although OSMRE has historically worked closely with the State regulatory authorities and used similar approaches, incorporating these approaches into the regulations would provide a clear mechanism for early identification and resolution of issues that would enable OSMRE to achieve regulatory certainty and uniform implementation of the procedures among State regulatory authorities. This proposed addition to the regulations would include procedures for developing an action plan (as defined in proposed 30 CFR 733.5) so that OSMRE can ensure that State regulatory program issues are timely resolved.

When OSMRE identifies a State regulatory program issue, proposed § 733.12(a) would provide that the Director should take action to make sure that the issue does not escalate to the point that might give the Director reason to believe that the State regulatory authority is not effectively implementing, administering, enforcing, or maintaining all or a part of its State regulatory program, which could otherwise lead to substituting Federal enforcement of a State

regulatory program or withdrawing approval of a State regulatory program as provided in 30 CFR Part 733. OSMRE would use the proposed procedures in proposed § 733.12 to attempt to achieve resolution of the issue in a timely and effective manner. It is emphasized that proposed § 733.12 would not, in any manner, diminish the requirements of existing 30 CFR 733.12 (that would be re-designated as 30 CFR 733.13 under this proposed rule) or our responsibilities associated with substituting Federal enforcement of State regulatory programs or withdrawing approval of State regulatory programs under the appropriate circumstances. Instead, this proposed procedure supplements the existing process in order to identify problems before State regulatory program issues rise to the level of warranting the rare remedy of substituting Federal enforcement. In the event OSMRE has reason to believe that the State regulatory authority is not effectively implementing, administering, enforcing, or maintaining its State regulatory program, OSMRE would use existing 30 CFR 733.12 (that would be redesignated as § 733.13) and all other applicable provisions to respond appropriately. In contrast, if the State regulatory program issue does not rise to the level of requiring OSMRE to substitute Federal enforcement, OSMRE may initiate the proposed process for early identification and corrective action found in proposed § 733.12(b). Inherent in the previous statement is the supposition that the State regulatory program issue is a programmatic problem, not a possible violation warranting a TDN or Federal inspection, as contemplated in section 521(a)(1) of SMCRA; if it is a possible violation, OSMRE would use the TDN procedures if OSMRE has reason to believe that a violation exists.

In general, proposed § 733.12(b) would allow the OSMRE Director, or his or her delegate, as set forth in OSMRE's guidance, to "employ any number of compliance strategies to ensure that the State regulatory authority corrects State regulatory program issues in a timely and effective manner." OSMRE suggests that possible compliance strategies might include, but are

not limited to:

- OSMRE engaging in informal discussions with the State regulatory authority regarding possible resolutions of the issue;
- OSMRE and the State regulatory authority participating in the program amendment process as outlined in 30 CFR 732.17;
- OSMRE suggesting changes in the State regulatory authority's procedures, use of resources, or training of staff;
- OSMRE providing technical assistance or initiating targeted special studies that our technical experts would conduct;
- OSMRE increasing our number of oversight inspections beyond the statutory minimum or providing more OSMRE inspection teams to supplement the State regulatory authority's inspection resources;
- OSMRE conducting a formal audit of the State regulatory authority's permitting and compliance activities;
- OSMRE conducting public fact-finding hearings related to the State regulatory program issue; or
- OSMRE devising enhanced tracking procedures to determine if the State regulatory program issue represents a systemic problem.

Although the above list reflects examples of potential corrective actions that a State regulatory authority and OSMRE might jointly employ, the list is not exhaustive. In fact, OSMRE recommends a case-by-case analysis of the State regulatory program issue. This would allow the State regulatory authority and OSMRE to develop a specifically tailored, innovative solution to the State regulatory program issue that is designed to achieve timely resolution.

Generally, OSMRE does not anticipate that resolution of a State regulatory program issue should exceed 180 days. However, the proposed rule at § 733.12(b) would provide that if the OSMRE Director or delegate “does not expect that the State regulatory authority will resolve the State regulatory program issue within 180 days after identification or that it is likely to result in an on-the-ground violation, then the Director or delegate will develop and institute an action plan [as defined in proposed § 733.5].” In proposed § 733.12(b)(1), OSMRE would prepare a written action plan with sufficient “specificity to identify the State regulatory program issue and an effective mechanism for timely correction.” When OSMRE is preparing the action plan, OSMRE would consider any input it receives from the State regulatory authority. When selecting corrective measures to integrate into the action plan, OSMRE may consider any established or innovative solutions, including the compliance strategies referenced above. Additionally, proposed § 733.12(b)(2) states that “[a]ction plans will identify any necessary technical or other assistance that the Director or his or her delegate can provide and remedial measures that a State regulatory authority must take immediately.” It is important for OSMRE to assist the State regulatory authorities in any way to ensure successful implementation of their respective State regulatory programs. This provision also recognizes that OSMRE might identify a State regulatory program issue that requires immediate remedial measures, and the action plan would reflect that fact.

The balance of this proposed section, at § 733.12(b)(3), describes the contents of action plans. To ensure that OSMRE can adequately track actions plans and that the underlying State regulatory program issue is resolved, under the proposed rule each action plan would be required to include: a specific “action plan identification number”; “a concise title and description of the State regulatory program issue”; “explicit criteria for establishing when complete resolution will

be achieved”; “explicit and orderly sequence of actions the State regulatory authority must take to remedy the problem”; “a schedule for completion of each action in the sequence”; and “a clear explanation that if the action plan, upon completion, does not result in the correction of the State regulatory program issue, the provisions of 30 CFR 733.13 [existing § 733.12] may be triggered.”

Proposed § 733.12(c) reiterates that OSMRE will track all identified State regulatory program issues. As part of OSMRE oversight responsibilities, each year OSMRE develops a performance agreement and evaluation plan to guide oversight activities within each primacy State. That process includes solicitation and consideration of public input and involves collaboration with the respective State. At the end of the evaluation period, OSMRE prepares an Annual Evaluation report. As proposed, this section would also require OSMRE to report the issues in the applicable State regulatory authority’s Annual Evaluation report.

Finally, proposed § 733.12(d) would emphasize that nothing in the proposed new section “prevents a State regulatory authority from taking direct enforcement action in accordance with its State regulatory program, or [us] from taking appropriate oversight enforcement action, in the event that a previously identified State regulatory program issue results in or may imminently result in an on-the-ground violation.” In context, “imminence” may vary, and OSMRE will rely on our authorized representative to use his or her professional judgment to determine whether an on-the-ground violation is imminent in a given situation.

#### **IV. Procedural Matters**

*Executive Order 12630—Governmental Actions and Interference with Constitutionally Protected Property Rights*

This proposed rule would not affect a taking of private property or otherwise have takings implications under Executive Order 12630. The proposed rule primarily concerns Federal

oversight of State regulatory programs and enforcement when permittees and operators are not complying with the law. Therefore, the proposed rule would not result in private property being taken for public use without just compensation. A takings implication assessment is not required.

*Executive Order 12866—Regulatory Planning and Review and Executive Order 13563—Improving Regulation and Regulatory Review*

Executive Order 12866 provides that the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget will review all significant rules. OIRA has not deemed this proposed rule significant because it would not have a \$100 million annual impact on the economy, raise novel legal issues, or create significant impacts. The proposed rule would primarily clarify the existing regulations to reduce the burden upon the regulated community and preserve resources by allowing for greater cooperation between the Federal Government and the States.

Executive Order 13563 reaffirms the principles of Executive Order 12866 while calling for improvements in the nation's regulatory system to promote predictability, reduce uncertainty, and use the best, most innovative, and least burdensome tools for achieving regulatory ends. The Executive Order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. Executive Order 13563 emphasizes further that agencies must base regulations on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. This proposed rule has been developed in a manner consistent with these requirements.

*Executive Order 13771—Reducing Regulation and Controlling Regulatory Costs*

This proposed rule describes a proposed deregulatory action. Consistent with Executive Order 13771 and the April 5, 2017, Guidance Implementing Executive Order 13771, the

proposed rule, if finalized, will have total costs less than zero.

*Executive Order 12988—Civil Justice Reform*

This proposed rule complies with the requirements of Executive Order 12988. Among other things, this rule:

- (a) satisfies the criteria of Section 3(a) requiring that all regulations be reviewed to eliminate drafting errors and ambiguity; be written to minimize litigation; and provide clear legal standards for affected conduct; and
- (b) satisfies the criteria of Section 3(b) requiring that all regulations be written in clear language and contain clear legal standards.

*Executive Order 13132—Federalism*

Under the criteria in Section 1 of Executive Order 13132, this proposed rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement. While clarification of the existing regulations would have a direct effect on the States and the Federal Government's relationship with the States, this effect is not significant as it neither imposes substantial unreimbursed compliance costs on States nor preempts State law. Furthermore, this proposed rule would not have a significant effect on the distribution of power and responsibilities among the various levels of government. The proposed rule would reduce burdens on State regulatory authorities and more closely align the regulations to SMCRA. A federalism summary impact statement is not required.

*Executive Order 13175—Consultation and Coordination with Indian Tribal Governments*

The Department of the Interior strives to strengthen its government-to-government relationship with Tribes through a commitment to consultation with Tribes and recognition of their right to self-governance and tribal sovereignty. OSMRE has evaluated this proposed rule

under the Department's consultation policy and under the criteria in Executive Order 13175 and have determined that it would not have substantial direct effects on federally recognized Tribes and that consultation under the Department's tribal consultation policy is not required. Currently, no Tribes have achieved primacy; therefore, OSMRE regulates all surface coal mining and reclamation operations on Indian lands with tribal input and assistance. Currently, OSMRE works in conjunction with the Crow, Hopi, and Navajo regarding enforcement of surface coal mining and reclamation operations. This proposed rulemaking would not directly impact the Tribes. However, because they have expressed interest in perhaps having their own regulatory programs in the future, OSMRE has coordinated with the Crow, Hopi, and Navajo to inform them of, and to provide updates on the progress of, our proposed rulemaking.

*Executive Order 13211 – Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use*

Executive Order 13211 requires agencies to prepare a Statement of Energy Effects for a rule that is: (1) considered significant under Executive Order 12866, and (2) likely to have a significant adverse effect on the supply, distribution, or use of energy; or is designated as a significant energy action by the Office of Management and Budget. Because this proposed rule is not deemed significant under Executive Order 12866 and is not expected to have a significant adverse effect on the supply, distribution, or use of energy, a Statement of Energy Effects is not required.

*Executive Order 13045—Protection of Children from Environmental Health Risks and Safety Risks*

This proposed rule is not subject to Executive Order 13045 because this is not an economically significant regulatory action as defined by Executive Order 12866; and this action would not concern environmental health or safety risks disproportionately affecting children.

### *National Technology Transfer and Advancement Act*

Section 12(d) of the National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 3701 note *et seq.*) directs Federal agencies to use voluntary consensus standards when implementing regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. This proposed rule would not be subject to the requirements of section 12(d) of the NTTAA because application of those requirements would be inconsistent with SMCRA, and the requirements would not be applicable to this proposed rulemaking.

### *National Environmental Policy Act*

OSMRE has made a preliminary determination that the changes to the existing regulations that would be made under this proposed rule are categorically excluded from environmental review under the National Environmental Policy Act (NEPA). 42 U.S.C. 4321 *et seq.* Specifically, OSMRE has determined that the proposed rule is administrative or procedural in nature in accordance with the Department of the Interior's NEPA regulations at 43 CFR 46.210(i). The regulation provides a categorical exclusion for, “[p]olicies, directives, regulations, and guidelines: that are of an administrative, financial, legal, technical, or procedural nature; or whose environmental effects are too broad, speculative, or conjectural to lend themselves to meaningful analysis... .” The proposed rule primarily seeks to clarify how OSMRE formulates reason to believe in the TDN context and the information OSMRE considers in this analysis. As such, the proposed rule would merely clarify OSMRE's process. Therefore, OSMRE deems the proposed changes to the regulations to be administrative and procedural in nature, as these proposed changes ensure regulatory certainty. These clarifications would result in efficiency and enhanced collaboration among State regulatory authorities and OSMRE. OSMRE has also determined that the proposed rule does not involve any of the extraordinary circumstances listed

in 43 CFR 46.215 that would require further analysis under NEPA. OSMRE will continue to review these factors as the proposed rule is evaluated.

*Paperwork Reduction Act*

This proposed rule would not impose a collection of information burden, as defined by 44 U.S.C. 3502, upon any entity defined in the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*).

*Regulatory Flexibility Act*

Based on OSMRE's collaboration with State regulatory authorities and years of experience, OSMRE certifies that this proposed rule would not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). The Regulatory Flexibility Act generally requires Federal agencies to prepare a regulatory flexibility analysis for rules that are subject to the notice-and-comment rulemaking requirements under the Administrative Procedure Act (5 U.S.C. 553), if the rule would have a significant economic impact on a substantial number of small entities. *See* 5 U.S.C. 601-612.

*Small Business Regulatory Enforcement Fairness Act*

This proposed rule is not a major rule under the Small Business Regulatory Enforcement Fairness Act. 5 U.S.C. 804(2). Specifically, the proposed rule: (a) would not have an annual effect on the economy of \$100 million or more; (b) would not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; and (c) would not have significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United-States based enterprises to compete with foreign-based enterprises in domestic and export markets.

*Unfunded Mandates Reform Act*

This proposed rule would not impose an unfunded mandate on State, local, or Tribal governments, or the private sector, of \$100 million or more in any given year. The proposed rule would not have a significant or unique effect on State, local, or Tribal governments, or the private sector. A statement containing the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1531 *et seq.*) is not required.

**List of Subjects**

**30 CFR Part 733**

Intergovernmental relations, Surface mining, Underground mining.

**30 CFR Part 736**

Coal mining, Intergovernmental relations, Surface mining, Underground mining.

**30 CFR Part 842**

Law enforcement, Surface mining, Underground mining.

**Casey Hammond,**

*Principal Deputy Assistant Secretary,  
Exercising the authority of the Assistant Secretary,  
Land and Minerals Management*

For the reasons set out in the preamble, the Department of the Interior, acting through OSMRE, proposes to amend 30 CFR parts 733, 736 and 842 as follows:

**PART 733—EARLY IDENTIFICATION OF CORRECTIVE ACTION, MAINTENANCE OF STATE PROGRAMS, PROCEDURES FOR SUBSTITUTING FEDERAL ENFORCEMENT OF STATE PROGRAMS, AND WITHDRAWING APPROVAL OF STATE PROGRAMS**

1. The authority citation for part 733 is revised to read as follows:

**Authority:** 30 U.S.C. 1201 *et seq.*

2. The heading of part 733 is revised as set forth above.
3. Add § 733.5 to read as follows:

**§ 733.5 Definitions.**

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

*Action plan* means a detailed schedule OSMRE prepares to identify specific requirements a regulatory authority must achieve in a timely manner to resolve State regulatory program issues identified during oversight of State regulatory programs.

*State regulatory program issue* means an issue OSMRE identifies during oversight of a State or Tribal regulatory program that could result in a State regulatory authority not effectively implementing, administering, enforcing, or maintaining all or any portion of its State regulatory program, including instances when a State regulatory authority has not adopted and

implemented program amendments that are required under 30 CFR 732.17 and 30 CFR Subchapter T, and issues related to the requirement in section 510(b) of the Act that a State regulatory authority must not approve a permit or revision to a permit unless the State regulatory authority finds that the application is accurate and complete and that the application is in compliance with all requirements of the Act and the State regulatory program.

4. Revise § 733.10 to read as follows:

**§ 733.10 Information collection.**

The information collection requirement contained in 30 CFR 733.13(a)(2) has been approved by the Office of Management and Budget under 44 U.S.C. 3507 and assigned clearance number 1029-0025. The information required is needed by OSMRE to verify the allegations in a citizen request to evaluate a State program and to determine whether an evaluation should be undertaken.

5. Redesignate §§ 733.12 and 733.13 as §§ 733.13 and 733.14 respectively.

6. Add a new § 733.12 to read as follows:

**§ 733.12 Early identification and corrective action to address State regulatory program issues.**

(a) When the Director identifies a State regulatory program issue, he or she should take action to make sure the identified State regulatory program issue is corrected as soon as possible in order to ensure that it does not escalate into an issue that would give the Director reason to believe that the State regulatory authority is not effectively implementing, administering, enforcing, or maintaining all or a portion of its State regulatory program.

(1) The Director may become aware of State regulatory program issues through oversight of State regulatory programs or as a result of information received from any person.

(2) If the Director concludes that the State regulatory authority is not effectively implementing, administering, enforcing, or maintaining all or a portion of its State regulatory program, the Director may substitute Federal enforcement of a State regulatory program or withdraw approval of a State regulatory program as provided in part 733.

(b) The Director or his or her delegate may employ any number of compliance strategies to ensure that the State regulatory authority corrects State regulatory program issues in a timely and effective manner. However, if the Director or delegate does not expect that the State regulatory authority will resolve the State regulatory program issue within 180 days after identification or that it is likely to result in an on-the-ground violation, then the Director or delegate will develop and institute an action plan.

(1) Action plans will be written with specificity to identify the State regulatory program issue and an effective mechanism for timely correction.

(2) Action plans will identify any necessary technical or other assistance that the Director or his or her delegate can provide and remedial measures that a State regulatory authority must take immediately.

(3) Action plans must also include:

- (i) An action plan identification number;
- (ii) A concise title and description of the State regulatory program issue;
- (iii) Explicit criteria for establishing when complete resolution will be achieved;
- (iv) Explicit and orderly sequence of actions the State regulatory authority must take to remedy the problem;
- (v) A schedule for completion of each action in the sequence; and
- (vi) A clear explanation that if the action plan, upon completion, does not result in

correction of the State regulatory program issue, the provisions of 30 CFR 733.13 may be triggered.

(c) All identified State regulatory program issues must be tracked and reported in the applicable State regulatory authority's Annual Evaluation report. Within each report, benchmarks identifying progress related to resolution of the State regulatory program issue must be documented.

(d) Nothing in this section prevents a State regulatory authority from taking direct enforcement action in accordance with its State regulatory program, or OSMRE from taking appropriate oversight enforcement action, in the event that a previously identified State regulatory program issue results in or may imminently result in an on-the-ground violation.

#### **PART 736—FEDERAL PROGRAM FOR A STATE**

7. The authority citation for part 736 continues to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*, as amended; and Pub. L. 100-34.

8. Revise § 736.11(a)(2) to read as follows:

#### **§ 736.11 General procedural requirements.**

(a) \* \* \*

(2) The Director shall promulgate a complete Federal program for a State upon the withdrawal of approval of an entire State program under § 733.13.

\* \* \* \* \*

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

9. The authority citation for part 842 continues to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*

10. Amend § 842.11 by revising paragraphs (b)(1) introductory text, (b)(1)(i),

(b)(1)(ii)(A), (b)(1)(ii)(B)(I), (3) and (4), and (b)(2) to read as follows:

**§842.11 Federal inspections and monitoring.**

\* \* \* \* \*

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

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

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

(B)(I) The authorized representative has notified the State regulatory authority of the possible violation and more than ten days have passed since notification, and the State regulatory authority has not taken appropriate action to cause the violation to be corrected or to show good cause for not doing so, or the State regulatory authority has not provided the authorized representative with a response. After receiving a response from the State regulatory authority, but before a Federal inspection, the authorized representative will determine in writing whether the standards for appropriate action or good cause have been satisfied. A State regulatory authority's failure to respond within ten days does not prevent the authorized representative from making a determination, and will constitute a waiver of the State regulatory authority's right to

request review under paragraph (b)(1)(iii) of this section.

\* \* \*

(3) Appropriate action includes enforcement or other action authorized under the approved State program to cause the violation to be corrected. Appropriate action may include OSMRE and the State regulatory authority immediately and jointly initiating steps to implement corrective action to resolve any issue that the authorized representative and applicable Field Office Director identify as a State regulatory program issue, as defined in 30 CFR part 733.

(4) Good cause includes:

(i) The possible violation does not exist under the State regulatory program;

(ii) The State regulatory authority has initiated an investigation into a possible violation and as a result has determined that it requires a reasonable, specified additional amount of time to determine whether a violation exists. When analyzing the State regulatory authority's response for good cause, the authorized representative has discretion to determine how long the State regulatory authority should reasonably be given to complete its investigation of the possible violation and will communicate to the State regulatory authority the date by which the investigation must be completed. At the conclusion of the specified additional time, the authorized representative will re-evaluate the State regulatory authority's response including any additional information provided;

(iii) The State regulatory authority demonstrates that it lacks jurisdiction over the possible violation under the State regulatory program;

(iv) The State regulatory authority demonstrates that it is precluded from taking action on the possible violation because an administrative review body or court of competent jurisdiction has issued an order concluding that the possible violation does not exist or that the temporary

relief standards of the State regulatory program counterparts to section 525(c) or 526(c) of the Act have been satisfied; or

(v) Regarding abandoned sites, as defined in 30 CFR 840.11(g), the State regulatory authority is diligently pursuing or has exhausted all appropriate enforcement provisions of the State regulatory program.

\* \* \* \* \*

(2) An authorized representative will have reason to believe that a violation, condition, or practice referred to in paragraph (b)(1)(i) of this section exists if the facts that a complainant alleges, or facts that are otherwise known to the authorized representative, constitute simple and effective documentation of the alleged violation, condition, or practice. In making this determination, the authorized representative will consider any information readily available to him or her, including any information a citizen complainant or the relevant State regulatory authority submits to the authorized representative.

\* \* \* \* \*

11. Revise § 842.12(a) to read as follows:

**§ 842.12 Requests for Federal inspections.**

(a) Any person may request a Federal inspection under § 842.11(b) by providing to an authorized representative a signed, written statement (or an oral report followed by a signed written statement) setting forth information that, along with any other readily available information, may give the authorized representative reason to believe that a violation, condition, or practice referred to in § 842.11(b)(1)(i) exists. The statement must also set forth the fact that the person has notified the State regulatory authority, if any, in writing, of the existence of the possible violation, condition, or practice, and the basis for the person's assertion that the State

regulatory authority has not taken action with respect to the possible violation. The statement must set forth a phone number, address, and, if available, an e-mail address where the person can be contacted.

\* \* \* \* \*

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