FEDERAL REGISTER: 54 FR 18438 (April 28, 1989)

DEPARTMENT OF THE INTERIOR
AGENCY: Office of Surface Mining Reclamation and Enforcement (OSM).

30 CFR Parts 773 and 843
Surface Coal Mining and Reclamation Operations; Permanent Regulatory Program;
Requirements for Permits and Permit Processing; Federal Enforcement; Improvidently Issued Permits

ACTION: Final Rule.

SUMMARY: This rule adds to the existing regulations governing surface coal mining and reclamation permits and enforcement new procedures for improvidently issued Federal and State permits. It includes general procedures for determining whether a permit was improvidently issued, and for applying appropriate remedial measures. It also includes procedures for the suspension and rescission of improvidently issued permits, and for action by the Office of Surface Mining Reclamation and Enforcement (OSMRE) on improvidently issued State permits. The rule is needed to provide uniform procedures and remedial measures for dealing with improvidently issued permits.

This rule also revises the heading of an existing regulation to further differentiate that regulation from the new procedures for improvidently issued permits.

EFFECTIVE DATE: May 30, 1989.

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November 3, 1988.

SUPPLEMENTARY INFORMATION:

I. BACKGROUND

A. GENERAL PURPOSE OF THE RULE

Sections 201(c) and 510(c) of the Surface Mining Control and Reclamation Act of 1977 (the Act or SMCRA), *30 U.S.C. 1211*(c) and 1260(c), authorize a regulatory authority to withhold a surface coal mining and reclamation permit from any applicant who either directly, indirectly or through a relationship of ownership or control is in violation of the Act or certain other environmental laws and regulations.

The Office of Surface Mining Reclamation and Enforcement (OSMRE) has implemented these provisions of the Act by regulations at 30 CFR 773.5 and 773.15. Also, under section 503(a)(7) of the Act, *30 U.S.C. 1253*(a)(7), and regulations at 30 CFR 730.5 and 732.15, each State regulatory program is required to have regulations that are consistent with Sections 773.5 and 773.15. General procedures governing OSMRE enforcement of this State program requirement appear at 30 CFR Part 843.

Through administrative error, or otherwise, a regulatory authority in some cases may not make the connection between an applicant and an unabated violation or a delinquent penalty or fee in accordance with these provisions, and as a result may improvidently issue a permit. To provide corrective measures for bringing these permits into compliance, this rule adds to Part 773 general procedures governing improvidently issued permits and permit suspension and rescission, and to Part 843 procedures for OSMRE action on improvidently issued State permits.

This rule also revises the heading of existing Section 843.13 to further differentiate that section from the remainder of this rule.

B. HISTORY OF THE RULE

This rule initially was proposed by OSMRE on July 16, 1986 *(51 FR 25822),* along with other provisions in Part 773. The other provisions in Sections 773.15 (b)(1)(ii) and (b)(2) and a portion of Section 773.15(b)(3) were promulgated in the October 3, 1988 *(53 FR 38868)* OSMRE final rule on ownership and control (the ownership and control rule). The remainder of these other provisions will appear in a subsequent final rule.

On September 24, 1986 *(51 FR 33905),* the comment period for the proposed rule was extended to October 24, 1986. On August 4, 1988 *(53 FR 29343)* OSMRE reopened the comment period and published a supplement to the proposed rule. As alternatives to initial proposed Section 773.20, Permit rescission, and Section 843.21, Procedures on improperly or erroneously issued State permits, the supplement proposed new provisions in Section 773.20, Procedures on improvidently issued permits, Section 773.21, Permit suspension and rescission, and Section 843.21, Procedures for improvidently issued State permits. This final rule derives primarily from those later provisions.

C. ACRONYMS AND TERMS OF ART

For the sake of brevity this preamble and the rule use a number of acronyms and terms of art, which have the following meanings:

AVS -- the computerized Applicant/Violator System instituted by OSMRE to store and retrieve information on permit applicants, violators and violations of the Act, and persons related to them through ownership or control.

CO -- a cessation order.

IMPROVIDENTLY ISSUED PERMIT -- a surface coal mining and reclamation permit that meets the criteria of Section 773.20(b) of this rule or its State program equivalent.

INITIAL -- used to differentiate the initial, July I6, 1986, proposed rule from the later, August 4, 1988, proposed rule. Where a lack of differentiation would not cause confusion, the qualifying term is omitted.

LATER -- see initial.

NOV -- a notice of violation.

OWNERSHIP AND CONTROL RULE -- the October 3, 1988, OSMRE final rule which added to 30 CFR 773.5 a definition of the terms owned or controlled and owns or controls and amended the permit application review procedures at 30 CFR 773.15.

OSMRE – the Office of Surface Mining Reclamation and Enforcement.

PERSON RESPONSIBLE -- the person who is directly or indirectly responsible for an unabated violation or a delinquent penalty or fee, which may be either the permittee, another person to whom the permittee is linked by a relationship of ownership or control, or both the permittee and another such person.

RESCISSION -- equivalent to revocation, but used to differentiate between the rescission of an improvidently issued permit under Section 773.21 of this rule and the revocation of a permit for a pattern of violations under existing 30 CFR 843.2l.

RESPONSIBLE AGENCY -- equivalent to the statutory phrase, "regulatory authority, department, or agency which has jurisdiction over such violation," as set out in section 5l0(c) of the Act.

REVISED PARKER ORDER -- an order issued by the United States District Court for the District of Columbia in the case of Save our Cumberland Mountains, Inc. v. Clark, No. 81-2134 (D.D.C. January 31, 1985).

REVOCATION -- see rescission.

SMCRA or the Act -- the Surface Mining Control and Reclamation Act of l977, *30 U.S.C. 1201* et seq.

VIOLATION, PENALTY OR FEE -- a violation, penalty or fee covered by the violations review criteria of the applicable regulatory program. Violations review criteria -- those permitting provisions of a regulatory program under which the regulatory authority reviews the relationship of the applicant to outstanding violations and delinquent penalties and fees and determines whether a permit should be withheld. For the minimum violations review criteria each regulatory program should include, see the list of Applicable Violations Review Criteria under the subsequent heading, II.B.2.a. Section 773.20(b)(2).

D. PUBLIC COMMENTS

No request was received for a public hearing on the proposed rules, and none was held.

Commenters on the proposed rules included environmental groups, trade associations, Federal and State agencies, the coal industry, and individuals. Eighteen comment letters were received on the initial proposed rule, and three on the later proposed rule, some of which incorporated another of the letters by reference.

Comments were received both for and against the general regulatory scheme of the rule. The individual comments, along with OSMRE responses, are discussed in the following section of this preamble.

II. DISCUSSION OF THE RULE AND COMMENTS

A. GENERAL OVERVIEW

This rule adds to the existing OSMRE regulations in 30 CFR Title VII new procedures for dealing with improvidently issued surface coal mining and reclamation permits. It includes, in Section 773.20, general procedures for improvidently issued permits; in Section 773.21, procedures for rescinding an improvidently issued permit; and, in Section 843.21, procedures for OSMRE action on improvidently issued State permits.

In addition, to further differentiate existing Section 843.13, which governs the suspension and revocation of a permit for a pattern of violations, from new Section 773.20, this rule revises the heading of Section 843.13 to read: "Suspension or revocation of permits: Pattern of violations."

As noted in the preceding background section of this preamble, this rule derives primarily from the later proposed rule, published on August 4, 1988 *(53 FR 29343).* A number of changes were made in the final rule in response to public comments, as discussed below. Without changing its general effect, the rule also was reworded in an attempt to eliminate ambiguity, and thus make it easier to understand and apply.

Each section of the rule is discussed in detail under the following headings, along with the comments received on the corresponding sections of the initial and later proposed rules and the OSMRE responses. Several issues and related comments that apply to more than one section of the rule are discussed under the subsequent heading, F. Statutory Authority and General Comments, which covers the following topics: (1) the statutory authority for the rule; (2) its relationship to the OSMRE rule on ownership and control; and (3) the rule is not retroactive.

B. SECTION 773.20 - GENERAL PROCEDURES FOR IMPROVIDENTLY ISSUED PERMITS

1. OVERVIEW

Section 773.20 contains the general procedures a regulatory authority must employ to determine whether a surface coal mining and reclamation permit was improvidently issued and to implement remedial measures. Section 773.20(a) imposes general requirements; Section 773.20(b) lists the criteria a regulatory authority must apply in finding that a permit was improvidently issued; and Section 773.20(c) sets out four remedial measures, one or more of which a regulatory authority must apply to an improvidently issued permit.

Final Section 773.20 derives primarily from Section 773.20 of the later proposed rule. The requirement of initial proposed Section 773.20(b) for a notice of violation (NOV) was deleted as unnecessary because the remedial measures in final Section 773.20(c) provide sufficient and more direct mechanisms for achieving compliance. The permit rescission procedures of initial proposed Section 773.20(b) were relocated in revised form in final Section 773.21 to emphasize that permit rescission is only one of the four alternative measures a regulatory authority must choose between to remedy an improvidently issued permit.

2. SECTION 773.20(a) - PERMIT REVIEW

Section 773.20(a) contains general requirements for permit review and review-related compliance. Under this section a regulatory authority which has reason to believe that it improvidently issued a surface coal mining and reclamation permit must review the circumstances under which the permit was issued, using the criteria in Section 773.20(b). If the regulatory authority finds that the permit was improvidently issued, the regulatory authority must comply with Section 773.20(c).

This section derives from the introductory paragraph of proposed Section 773.20(a), which was revised to clarify and set out in a separate paragraph the procedural steps leading to a finding that a permit was improvidently issued. In this section, the term finds was substituted for the proposed term determines as more precise.

The "reason to believe" standard in Section 773.20(a) for prompting action by the regulatory authority is equivalent to the "discovers" standard set out in the preamble to the initial proposed rule, *51 FR 25826*. It was adopted to make the terminology of Section 773.20 parallel to that of proposed Section 843.21, which applies a similar standard to State permits.

Under this "reason to believe" standard the regulatory authority is not required to review all of the permits under its jurisdiction on a regular basis for improvident issuance, but only a particular permit it has some reason to believe was improvidently issued.

APPLICATION OF RULE TO PERMIT REVISIONS

One commenter said that while a regulatory authority might properly consider an operator's past history, in the absence of new information it should not use permit revision as a trigger to review whether a permit was improvidently issued.

OSMRE agrees. The rule requires a regulatory authority to review the underlying circumstances only when it has reason to believe that a permit was improvidently issued, not as a matter of routine for every permit revision. The OSMRE requirements for permit revision appear at 30 CFR 774.13.

CONDITIONALLY ISSUED PERMITS

Several commenters said that to facilitate prompt rescission if the permittee fails to comply with a conditionally issued permit, the rule should require the regulatory authority to periodically review and update the information which led to its conditional issuance.

OSMRE did not adopt the commenters' suggestion. As explained in the subsequent discussion of Section 773.20(b)(1), this rule does not apply to permits validly issued with conditions, but only to those issued contrary to the violations review criteria of the applicable regulatory program, or issued on the presumption that a notice of violation was in the process of being corrected to the satisfaction of the responsible agency, but a failure-to-abate cessation order (FTACO) subsequently was issued.

For a permit that was conditionally issued, the regulatory authority has the same duty to monitor compliance with its conditions as for compliance with any other requirement of the regulatory program, and has available the same enforcement measures.

For a permit issued on the presumption that a specifically identified violation was being corrected, the regulatory authority has a duty to determine whether abatement in fact occurs, and if not to issue an FTACO which would lead to application of the remedial measures of this rule.

This rule does not require either OSMRE or State regulatory authorities, however, to conduct general, ongoing, systematic reviews of permits under their jurisdiction for improvident issuance.

3. SECTION 773.20(b) - REVIEW CRITERIA

Section 773.20(b) requires a regulatory authority to find that a surface coal mining and reclamation permit was improvidently issued if the permit meets specified review criteria. These criteria, which derive primarily from the later proposed rule, were modified somewhat in this final rule in response to public comment.

Although not explicitly stated in the rule, OSMRE expects that the regulatory authority will make the required finding in writing as a basis for further action on an improvidently issued permit.

ADDITIONAL FACTORS

Several commenters said that later proposed Section 773.20 was a major departure from the initial proposal, as well as from the October 1, 1987, OSMRE Directive INE-34, "Guidelines for Responding to Improvidently Issued Permits." Under the later proposal, the commenter said, OSMRE sought to impose additional factors to be considered by the regulatory authority in what, heretofore, had been a straightforward exercise. The commenter concluded that neither the Act nor its legislative history contemplated those additional factors, and that OSMRE had not offered the necessary justification for its change in policy.

OSMRE disagrees that the initial and later proposed rules were in any way deficient to support this final rule, or that the rule in any way is contrary to the Act or its legislative history. This preamble clearly articulates the basis and purpose of, and the legal authority for, the criteria in Section 773.20(b), and thus fully supports any change in policy or legal interpretation the rule may embody. Following promulgation of this rule, OSMRE will consider the need to revise its internal directives to reflect any such change.

a. SECTION 773.20(b)(1). The first criterion, in Section 773.20(b)(1), is that under the violations review criteria of the regulatory program at the time the permit was issued, either (i) because of an unabated violation or a delinquent penalty or fee the regulatory authority should not have issued the permit; or (ii) the permit was issued on the presumption that a notice of violation was in the process of being corrected to the satisfaction of the agency with jurisdiction over the violation, but a failure-to-abate cessation order (FTACO) subsequently was issued. This section derives from initial and later proposed Section 773.20(a)(1).

Section 773.20(b)(1)(i) does not specify any particular unabated violation, delinquent penalty or fee, or ownership or control relationship as the basis for a finding that a permit was improvidently issued. Instead, the regulatory authority is to apply whatever violations review criteria were in force in the regulatory program at the time the permit was issued.

The rule does not require "a demonstrated pattern of willful violations," as specified in section 510(c) of the Act, for which separate procedures exist in 30 CFR 843.13.

Depending on the regulatory program under which a permit is reviewed, the applicable violations review criteria under Section 773.20(b)(1)(i) of this rule may include such Federal regulations as those at 30 CFR 741.21(b) and 786.17(c) (1979) for the 1979 permanent program, or at 30 CFR 773.15(b)(1) for the current permanent program, their State program equivalents, definitions of ownership or control relationships, the Revised Parker Order, internal agency directives, and the like.

In response to public comment, OSMRE has concluded that it is best to frame the rule in general terms, referencing the violations review criteria of the applicable regulatory program, and then have the regulatory authority apply its specific violations review criteria on a case-by-case basis. This approach will best account for any differences that may exist between regulatory programs, and give each State regulatory program the status intended by the Congress under primacy. It also will account for any changes that may occur over time in a particular regulatory program.

OSMRE expects that in applying this criterion of the rule, a regulatory authority will interpret its violations review criteria in the same way as they lawfully were, or should have been, interpreted at the time of permit issuance.

The presumption referred to in Section 773.20(b)(1)(ii) regarding a notice of violation (NOV) is authorized by Section 773.15(b)(1) of the October 3, 1988 *(53 FR 38868)* OSMRE final rule on ownership and control (the ownership and control rule), which this preamble incorporates by reference. Under this presumption,

"[i]n the absence of a failure-to-abate cessation order, the regulatory authority may presume that a notice of violation issued pursuant to Section 843.12 of [30 CFR Chapter VII] or under a Federal or State program has been or is being corrected to the satisfaction of the agency with jurisdiction over the violation, except where evidence to the contrary is set forth in the permit application, or where the notice of violation is issued for nonpayment of abandoned mine reclamation fees or civil penalties."

Id. at 38890. Where a permit is issued on this presumption, but an FTACO subsequently is issued, the procedures of this rule apply.

VIOLATIONS REVIEW CRITERIA

Because this rule is written in general terms, and the violations review criteria of each Federal or State regulatory program will govern the specific unabated violations, delinquent penalties and fees, and ownership and control relationships to which it will apply, it is appropriate to set out the violations review criteria each regulatory program should include.

The following list sets out these violations review criteria. It covers the types of unabated violations and delinquent penalties and fees for which a regulatory authority should have withheld a permit, as well as the applicable ownership and control relationships. Each item in the list is followed by the effective date after which a regulatory authority should have considered it in reviewing a permit application under its regulatory program. Notwithstanding this list, the violations review criteria of each Federal and State regulatory program at the time of permit issuance will govern the application of this rule.

For a violation, penalty, or fee, the effective date in the list relates to when a permit was issued, not when the violation became unabated or the penalty or fee became delinquent, either of which may have occurred at any time prior to permit issuance. The listed violations, penalties and fees apply regardless of the issuing regulatory authority. Unless otherwise noted, the same criteria apply equally to OSMRE and the States. Some State programs may include more stringent criteria.

APPLICABLE VIOLATIONS REVIEW CRITERIA

I. VIOLATIONS, PENALTIES AND FEES

A. ABANDONED MINE RECLAMATION FEES

Fees included: All delinquent reclamation fees.

Effective date: For Federal permits, from March 13, 1979.

For State permits, from July 5, 1984, the date when OSMRE published the final rule at 30 CFR 773.17(g) *(49 FR 27493)* making the payment of reclamation fees as required by 30 CFR Subchapter R a permit condition.

B. AIR AND WATER QUALITY ENVIRONMENTAL VIOLATIONS

Violations included: All unabated violations of Federal and State laws, rules and regulations pertaining to air or water environmental protection incurred in connection with any surface coal mining operation.

Effective date: From the outset of each permanent regulatory program.

C. BOND FORFEITURES

Forfeitures included: Any bond forfeiture at an interim or permanent program operation involving a violation that was unabated at the time the permit under review was issued. For OSMRE and most States, abatement of the violation negates the effect of a forfeiture under Section 773.20(b)(2) of this rule; some States may have more stringent requirements.

Effective date: From the outset of each permanent regulatory program.

D. CESSATION ORDERS

Orders included: All unabated initial and permanent program imminent harm and failure-to-abate cessation orders (FTACO's).

Effective date: From the outset of each permanent regulatory program.

E. CIVIL PENALTIES

Penalties included: All delinquent civil penalties imposed under section 518 of the Act, *30 U.S.C. 1268,* or the State regulatory program equivalent.

Effective date: For Federal permits, January 31, 1985, the date of the Revised Parker Order.

For State permits: For penalties other than Federal penalties under section 518(h) of the Act, the date when the State regulatory authority first considered nonpayment of Federal or State civil penalties following a final order to be a violation of the Act. For Federal penalties under section 518(h), January 31, 1985.

F. NOTICES OF VIOLATION

1. Before Presumption on Abatement of NOV's Becomes Effective -- Violations included: Any unabated notice of violation (NOV) which information available to the regulatory authority at the time of permit issuance indicated was not being corrected to the satisfaction of the responsible agency; any unabated NOV for the nonpayment of abandoned mine reclamation fees; and any unabated NOV for which an FTACO was issued.

Effective date: From the outset of the regulatory program until a presumption corresponding to the one under Section 773.15(b)(1) of the October 3, 1988 *(53 FR 38868)* OSMRE final rule (the ownership and control rule) becomes effective in the regulatory program.

Note: Except where the regulatory authority had information to the contrary, an NOV for which an FTACO was not issued is not included prior to the effective date of the presumption because the lack of an FTACO constitutes sufficient historic evidence that the NOV was being corrected to the satisfaction of the responsible agency. Moreover, any subsequent review for improvident issuance should ensure that an FTACO is issued where appropriate.

2. After Presumption on Abatement of NOV's Becomes Effective -- Violations included: Any NOV to which the presumption did not apply, or for which an FTACO subsequently was issued.

Effective date: From the date the presumption becomes effective in the regulatory program.

II. OWNERSHIP AND CONTROL RELATIONSHIPS

A. BEFORE OWNERSHIP AND CONTROL RULE DEFINITION AND REVISED REVIEW CRITERIA BECOME EFFECTIVE

Relationships included: From a class of persons no less inclusive than specified in section 507(b)(4) of the Act, *30 U.S.C. 1257*(b)(4), those persons who in fact own or control the applicant.

Note: For a discussion of the relationship between section 507(b)(4) of the Act and the permit blocking requirements of section 510(c) of the Act and 30 CFR 773.15(b)(1), see the ownership and control rule at *53 FR 38874-38875*.

Effective date: From the outset of the regulatory program until the definition of owned or controlled and owns or controls at 30 CFR 773.5 and the review criteria at 30 CFR 773.15(b)(1) covering operations owned or controlled by either the applicant or by any person who owns or controls the applicant, as set out in the ownership and control rule, or the State program equivalent, become effective in the regulatory program.

B. AFTER OWNERSHIP AND CONTROL RULE DEFINITION AND REVISED REVIEW CRITERIA BECOME EFFECTIVE

Relationships included: Those covered by the definition and revised review criteria, or equivalent provisions.

Effective date: From the date the definition and revised review criteria, or equivalent provisions, become effective in the regulatory program.

SPECIFIC CRITERIA REMOVED

Later proposed Section 773.20 (a)(1) and (a)(4)(ii)(B) set out specific types of violations, penalties and fees to which the rule would apply. Several commenters said that the proposal unlawfully differentiated between and limited these types of violations, penalties and fees.

Other commenters said that the rule should not depend solely on information contained in the OSMRE Applicant/Violator System (AVS). Several commenters said that the preamble to the initial proposed rule was incorrect in suggesting that only a failure to abate a "serious" violation constituted a "failure to comply" under section 201(c)(1) of the Act, and that this qualification should be deleted.

The criteria to which the commenters objected were removed from the rule. Final Section 773.20(b)(l) does not specify any particular violation, penalty or fee as a basis for a finding that a permit was improvidently issued. Nor is it limited to the information contained in the AVS. Instead it requires a regulatory authority to apply the violations review criteria of the regulatory program at the time the permit was issued.

OSMRE has concluded that because of differences between regulatory programs, as well as in the interpretation of the Act as experience has been gained with its requirements, it is best to adopt general procedures which rely on the specific requirements of each regulatory program for their ultimate interpretation and application. The minimum types of unabated violations and delinquent penalties and fees which the violations review criteria of each regulatory program should cover are set out in the preceding list.

SECTION 518(f) - PENALTIES

Several commenters said that as the basis for permit rescission Section 773.20 should cover any penalty for which a final order was issued to an entity with a common control relationship to a permittee, including penalties assessed under section 518(f) of the Act, *30 U.S.C. 1268*(f), or the State program equivalent.

OSMRE agrees. As discussed previously, the rule will apply to all penalties for which a final order was issued under section 518 of the Act or a State program equivalent, including individual civil penalties under section 518(f) or its equivalent.

OTHER ENVIRONMENTAL LAWS

One commenter said that the initial proposed rule should apply not only to violations of the Act, but also of other environmental laws.

OSMRE agrees. Under the violations review criteria of the regulatory program at the time the permit was issued, the rule can apply to violations of any Federal or State law, rule or regulation pertaining to air or water quality environmental

protection in connection with any surface coal mining and reclamation operation.

OTHER COMPLIANCE

The same commenter said that the rule should require a permit applicant to demonstrate compliance by having appropriate permits, and subsequently to remain in compliance with them.

OSMRE did not adopt the commenter's suggestion. This rule provides remedial measures for permits that were improvidently issued as a result of an unabated violation or a delinquent penalty or fee of a related operation at the time of permit issuance. Except for the overall violation of operating under an improvidently issued permit, it does not apply to any environmental or other violation that may arise under the permit itself, or to any violation occurring at another operation after permit issuance.

FUTURE EVENTS

One commenter said that the Act only authorized a regulatory authority to decline to issue a permit based on existing compliance, but neither authorized nor required rescission based on future events.

OSMRE agrees in part. To the extent the "future event" referred to by the commenter concerns compliance with the regulatory program for operations under the permit in question, or to a violation at another operation after the issuance of the permit in question, the rescission procedures of the rule do not apply. A regulatory authority may not use the rule to rescind a permit for any violation, penalty or fee resulting from such operations.

To the extent the rule requires a regulatory authority to consider events following permit issuance it is a reasonable means to identify and remedy improvidently issued permits.

Where a regulatory authority has reason to believe that a permit was improvidently issued, it legitimately may make the finding under this rule and take appropriate remedial measures, regardless of when the information concerning the violation status of the permittee at the time of permit issuance became available. Any other interpretation of the Act potentially would reward a permittee for failing to bring compliance information to light at the time of permit issuance.

Where a permit was issued on the presumption that a notice of violation was in the process of being corrected, and a cessation order subsequently was issued, the lack of abatement following permit issuance is a condition subsequent of sufficient gravity to support rescission of the permit under the Act.

Thus, to the extent the "future event" concerns an ongoing lack of abatement of a past violation, or the delinquency of a penalty or fee for which a regulatory authority should have withheld a permit the rule is authorized by sections 201 (c)(l) and (c)(2) and 510(c) of the Act.

Section 201(c)(1) authorizes OSMRE to rescind a permit for a failure to comply with the Act and its implementing regulations. A failure of a permittee to comply with the permit withholding requirements of Act and its implementing regulations, or the State program equivalents, at the time of permit issuance because of an unabated violation or a delinquent penalty of fee is a failure to comply under section 201(c)(1).

Under section 201(c)(2) of the Act, OSMRE and State regulatory authorities have the authority to correct errors in the issuance of permits through permit rescission and other appropriate remedial measures as a means of carrying out the purposes of sections 201(c)(1) and 510(c).

Except for these limited circumstances, however, and the violation of operating under an improvidently issued permit, the rule does not concern any violation, penalty or fee arising under the permit itself, or arising after permit issuance under an ownership or control link to the permittee.

RELATIONSHIP TO REVISED PARKER ORDER

One commenter said that since the Revised Parker Order appeared to be the principal, if not the sole, reason for this rule, OSMRE should limit its application to the limited universe of Federal violations and civil penalties covered by the

order. OSMRE disagrees, and did not adopt the commenter's suggestion.

The Revised Parker Order, to which the commenter referred, was issued by the United States District Court for the District of Columbia in the case of Save Our Cumberland Mountains, Inc. v. Clark, No. 81-2134 (D.D.C. January 31, 1985), and among other things concerned the implementation and enforcement of section 510(c).

While this rule will facilitate compliance with the Revised Parker Order, it serves the broader purpose of bringing improvidently issued permits into compliance with the more encompassing requirements of the Act. Consistent with this broader purpose, the rule is not limited by the specific violations or penalties covered by the Revised Parker Order.

PRE-1985 FEDERAL VIOLATIONS

The same commenter said that the rule had the limited purpose of correcting pre-1985 Federal violations covered by the Revised Parker Order, so there was no basis for extending it beyond those violations. To the extent the rule applied to State violations, the commenter said, it was an intrusion into the exclusive domain of State permitting.

OSMRE disagrees. Neither section 510(c) of the Act nor 30 CFR 773.15(b)(1) differentiates between Federal and State violations for purposes of withholding a permit, and this rule is consistent with those requirements.

STATUTE OF LIMITATIONS

One commenter said that the five year statute of limitations for the collection of fines and penalties prohibits using the mechanism of permit rescission to force payment of civil penalties for which the statute has tolled.

OSMRE disagrees. While a statute of limitations may act as a defense in a lawsuit filed to collect civil penalties, it does not cancel the underlying debt, and the failure to pay remains an act of noncompliance that is relevant in determining whether a permit was improvidently issued and imposing an appropriate remedial measure under this rule.

OWNERSHIP AND CONTROL CRITERIA AT TIME OF PERMIT ISSUANCE

Later proposed Section 773.20(a)(4)(ii)(A) set out specific ownership and control relationships to which the rule would apply. Several commenters said the rule should cover operations that had an outstanding violation, penalty or fee and were in an ownership or control relationship with the permit applicant in a manner consistent with the Act and the regulations at the time of permit issuance. These commenters cited section 507(b)(4) of the Act and the Revised Parker Order to support their interpretation of which relationships were consistent with the Act.

OSMRE agrees with these commenters that the applicable criteria for determining ownership and control relationships under this rule are those in force at the time the permit was issued. As a result of these comments, all specific ownership and control criteria were deleted from the rule.

Instead, the rule requires the regulatory authority to base its finding that a permit was improvidently issued on the violations review criteria of the regulatory program at the time the permit was issued, including those criteria relating to ownership and control. The minimum ownership and control relationships which OSMRE believes the violations review criteria of a regulatory program should include are set out in the preceding list.

SECTION 507(b)(4) OF THE ACT

Several commenters said that until the ownership and control rule was promulgated and adopted by the States, it appeared that later proposed Section 773.20(a)(4)(ii)(A)(1) would, de facto, define ownership and control to include those entities listed in section 507(b)(4) of the Act. They said that this was consistent with the Revised Parker Order, which mandated the use of this standard. They disagreed with the proposed limitation of this standard to "appropriate circumstances."

These same commenters said that the proposed rule was unclear on when in the development of a regulatory program those entities listed in section 507(b)(4) would serve as the basis for an ownership and control determination by a State

regulatory authority, which the commenter said should begin with primacy. In addition, they said that under the rule the applicability of the term owns or controls in a regulatory program should begin with primacy.

The final rule no longer specifies the ownership and control relationships referred to by these commenters, but instead requires a regulatory authority to apply the ownership and control criteria of the regulatory program at the time the permit was issued. Nevertheless, because their reasoning also might apply to those criteria, it is necessary to explain why OSMRE disagrees with a number of the commenters' conclusions.

OSMRE agrees that the obligation of a State regulatory authority to withhold a permit in accordance with section 510(c) of the Act begins with primacy. OSMRE disagrees, however, with the commenters' interpretation of section 507(b)(4) of the Act and the Revised Parker Order.

For a discussion of the relationship between the requirements of sections 507(b)(4) and 510(c) of the Act in this context, as reflected in the Revised Parker Order, see the ownership and control rule at *53 FR 38874-38875.* As stated there, the Congress intended to give a regulatory authority discretion to determine whether any person named under section 507(b)(4) in fact owns or controls a permit applicant.

The Revised Parker Order, which in footnote No. l provides that OSMRE shall use no less inclusive a class of persons than is set out in section 507(b)(4) when establishing and implementing the Applicant/Violator System, merely requires OSMRE to consider whether those persons are owners or controllers, not to find inflexibly in all cases that they are.

CORPORATE SEPARATENESS

Several commenters objected to the proposed rule to the extent it broadly applied the concept of ownership and control under section 510(c) of the Act. One said that in doing so the rule ignored established legal concepts of corporate separateness. The commenter said that due to a lack of authority to direct the actions of an affiliated company a permittee who was linked to a violation, penalty or fee through ownership or control would not be able to abate the violation or enter into an abatement plan or payment schedule, as provided by initial proposed Section 773.20(b)(2).

OSMRE does not believe that this rule is the proper forum to reconsider the previously established scope of ownership or control relationships under section 510 (c) of the Act or a regulatory program. For the current OSMRE policy and procedures on this topic, see the October 3, 1988 *(53 FR 38868)* OSMRE final rule on ownership and control.

OSMRE agrees with the commenter that the initial proposed language, which appeared to require a permittee to abate a violation for which the permittee was not responsible, might have placed a permittee in an untenable position. Therefore, the later proposed and final rules were revised to provide that the necessary corrective action may be taken either by the permittee or by the "other person responsible."

PARENT-SUBSIDIARY RELATIONSHIPS

One commenter on initial proposed Section 773.20 said that ownership and control considerations should apply only down, and not up, the corporate ladder.

OSMRE disagrees. Where the violations review criteria of the regulatory program at the time of permit issuance trace ownership or control up the corporate ladder, they are a legitimate basis for applying this rule. For a discussion of how ownership and control links may be traced up and down a corporate ladder, see the ownership and control rule at *53 FR 38875.*

Another commenter objected to initial proposed Section 773.20(b)(1) for requiring the issuance of an NOV to a subsidiary permittee where the parent company was responsible for the underlying violation, penalty or fee. The commenter said that a subsidiary company has no authority to dictate what must be done by its parent, and that it was inconceivable that any good could come from penalizing a subsidiary for the actions of the parent.

OSMRE disagrees. While final Section 773.20 no longer provides for the issuance of an NOV, it includes other remedial measures which may be imposed on a subsidiary because of an ownership or control link to a parent company.

Where such a link exists, the authority of the subsidiary to dictate the actions of the parent is irrelevant. A parent company has a definite economic interest in the continuing viability of its subsidiaries, and the rule will provide a strong incentive for the parent to abate any outstanding violation or pay any delinquent penalty or fee so that a subsidiary can continue to operate.

COVERAGE OF OPERATORS

Other commenters said that OSMRE should revise initial proposed Section 773.20(a)(1) to specifically include the operator as having a control link to the permittee.

OSMRE did not adopt this suggestion. As previously discussed, the rule now incorporates the ownership and control criteria of the regulatory program at the time the permit was issued, including the operator in appropriate circumstances. For a discussion of how an ownership or control link may be traced through an operator, see the ownership and control rule at *53 FR 38873*.

ATTRIBUTION OF VIOLATIONS

One commenter said that the essence of this rule and the ownership and control rule was to attribute violations from one legal entity to another. The commenter said that it would be more expedient to seek a court order compelling abatement of the underlying violation than to adopt the passive approach of the rule. Another commenter said that the rule would impute to a permittee third party liability for a violation, penalty or fee.

OSMRE disagrees. As explained more fully in the October 3, 1988 *(53 FR 38868)* ownership and control rule, neither that rule nor this one makes one legal entity responsible for abating the violation or paying the penalty or fee of another.

As authorized by sections 201(c) and 510(c) of the Act, these rules instead deny persons who through ownership or control are linked to a person responsible for an unabated violation or a delinquent penalty or fee the privilege of obtaining or retaining a surface coal mining and reclamation permit.

FRAUD, MISREPRESENTATION AND LACK OF KNOWLEDGE

Several commenters on the later proposed rule said that the criteria of fraud, misrepresentation, lack of knowledge, and good faith on the part of the permittee or regulatory authority in later proposed Section 773.20(a)(4) were immaterial. These commenters said that the criteria improperly shifted the focus of the inquiry away from whether an applicant had an outstanding violation to whether the regulatory authority knew or should have known of the violation. The commenters said that use of these criteria would unfairly award abuse or incompetence.

The proposed criteria concerning fraud, misrepresentation and lack of knowledge, to which the commenters objected, were removed from final Section 773.20(b) of the rule. Instead, the regulatory authority is to apply the violations review criteria of the regulatory program at the time the permit was issued.

The criterion concerning good faith, to which the commenters also objected, does not concern permit issuance and was retained in Section 773.20(b)(2)(ii) of the rule as a reasonable measure of a permittee's justification for appealing an unabated violation or delinquent penalty or fee for which a regulatory authority should not have issued a permit.

Other commenters said that the later proposed rule defined the term known or should have known too narrowly, and that the rule should apply whenever pertinent information becomes known to the regulatory authority. They added that since a permit applicant has an independent responsibility to comply with the Act and its implementing regulations, regardless of any inaction on the part of the regulatory authority, the action taken by a regulatory authority to remedy its prior inaction on an improvidently issued permit would not penalize a permittee.

OSMRE disagrees. Although this explicit criterion was removed from the rule, a regulatory authority's lack of knowledge of an existing violation at the time of permit issuance is a relevant consideration in determining whether a permit was improvidently issued, and is inherent in the violations review criteria of each regulatory program.

Section 510(c) of the Act does not impose on an applicant an unlimited responsibility to submit violations information, as the commenters infer, but is limited to certain notices of violations incurred during a certain period of time preceding the application. And under section 510(c) and 30 CFR 773.15(b)(1) a violations review must be based on information "available to the regulatory authority."

The existence of an unabated violation or a delinquent penalty or fee at the time of permit issuance does not invalidate a determination by a regulatory authority that none existed unless information concerning the violation, penalty or fee was available to the regulatory authority, or should have been available if the permit application were complete and accurate, or if the regulatory authority had made reasonable inquiries. At a minimum, for permits issued after October 1, 1987 such reasonable inquiries would include querying the Applicant/Violator System.

The discovery of a pre-existing violation after permit issuance should not automatically lead to the conclusion that the permit was improvidently issued if the regulatory authority could not reasonably have been made aware of the violation at the time the permit was issued. Similarly, such a discovery does not necessarily mean that an operator's activities under the permit were conducted in violation of the regulatory program. This standard for violations review will not, as the commenters suggested, award abuse or incompetence because it covers not only actual knowledge, but also what the regulatory authority reasonably should have known.

Several commenters asked OSMRE to clarify that the rule will apply not only in situations where a regulatory authority had the information necessary to block a permit at the time it was issued, but also where the information was obtained after the permit was issued.

OSMRE agrees that this is the correct interpretation of the rule in situations where the permit applicant should have provided the information in the permit application, or where the regulatory authority could have obtained the information with reasonable inquiry.

ERRONEOUS AVS INFORMATION

One commenter asked how erroneous information in the OSMRE Applicant/Violator System (AVS) would affect the responsibility of a regulatory authority under initial proposed Section 773.20(a)(4)(ii) for knowing about outstanding violations, penalties or fees.

Although the rule no longer explicitly includes the criterion to which the comment applies, the question remains relevant. Subject to the review standard set out in the preceding discussion, a regulatory authority may rely on the information in the AVS as up-to-date and accurate.

As explained previously, under section 510(c) of the Act and 30 CFR 773.15(b)(1) a violations review reasonably must cover the information "available to the regulatory authority." Due to its voluminous extent, OSMRE has found it necessary to establish the computer-based AVS as a means to provide access to this information.

Under this rule a proper query of the AVS will constitute a reasonable inquiry of the information available to the regulatory authority, and absent some defect in the violations information provided in the permit application, or inadequate use of other information that actually was known to the regulatory authority, an error in or omission from the information in the AVS will not provide the basis for a finding that a permit was improvidently issued.

b. SECTION 773.20(b)(2). The second criterion, in Section 773.20(b)(2), is that the violation, penalty or fee for which the regulatory authority should have withheld the permit remains unabated or delinquent, and is not the subject of a good faith appeal, or of an abatement plan or payment schedule with which the permittee or other person responsible is complying to the satisfaction of the responsible agency.

This criterion is essentially the same as proposed. It is included in the rule because from the standpoint of administrative efficiency it makes little sense to rescind a permit where the underlying violation, penalty or fee would not currently bar the issuance of a new permit. Where the defect in the permit either has been or is in the process of being corrected, this criterion will obviate the unproductive rescission of, reapplication for, and reissuance of what ultimately would amount to the same permit.

As a result of this criterion, abatement of the underlying violation or payment of the delinquent penalty or fee to the satisfaction of the responsible agency subsequent to permit issuance will preclude a finding that a permit was improvidently issued. In addition, if the violation, penalty or fee is the subject of a good faith appeal or payment schedule at the time of permit review under this section, the regulatory authority will not find that the permit was improvidently issued.

If the permittee or other person responsible loses the appeal, however, or fails to comply with the abatement plan or payment schedule, and the regulatory authority did not consider the appeal, abatement plan, or payment schedule and conditionally issue the permit, the procedures of this rule will apply. Where the permit was conditionally issued, the provisions of the regulatory program governing noncompliance with a permit condition, and not this rule, will apply.

c. SECTION 773.20(b)(3). The third criterion, in Section 773.20(b)(3), is that where the permittee was linked to the violation, penalty or fee through ownership or control, under the violations review criteria of the regulatory program at the time the permit was issued an ownership or control link still exists between the permittee and the person responsible for the violation, penalty or fee, or where the link was severed the permittee continues to be responsible for the violation, penalty or fee.

This criterion is similar to later proposed Section 773.20(a)(3). It was expanded in response to public comment to require a finding of improvident issuance where a permittee continues to be responsible for an unabated violation or a delinquent penalty or fee, notwithstanding the severing of a previous ownership or control link.

Like previously discussed Section 773.20(b)(2), this provision is included in the rule for reasons of administrative efficiency. Where no ownership or control link currently exists between the permittee and the person responsible for the underlying violation, penalty or fee, and the permittee has no continuing responsibility for the violation, penalty or fee, and thus the existence of the violation, penalty or fee would not currently bar the issuance of a new permit, it makes little sense to rescind the permit and, inevitably, issue a new one.

If an ownership or control link between a permittee and the person responsible for a violation, penalty or fee is severed after permit issuance, but later reestablished, this section would not preclude a subsequent finding that the permit was improvidently issued.

The requirement of this rule for a current ownership or control link between the permittee and the person responsible, or continuing responsibility on the part of the permittee, recognizes that there is little to be gained by applying the remedial measures of this rule to an existing permit if that critical link or responsibility no longer exists.

A fundamental purpose of section 510(c) of the Act is to ensure that unabated violations and delinquent penalties and fees associated with previous permits are abated or paid before another permit is issued. Where a permittee no longer bears any responsibility for, or has the requisite control to cause the abatement or payment of a previous violation, penalty or fee, however, it is consistent with section 510(c) for the regulatory authority to refrain from taking remedial action against the permit.

Since under section 510(c) a permit applicant legitimately may sever his or her ownership or control link with the person responsible for a violation, penalty or fee, and thus receive a permit, it is reasonable to afford a permittee a similar opportunity once a permit is issued.

Like Section 773.20(b)(1) of this rule, Section 773.20(b)(3) bases the continuing existence of an ownership or control link, and of the responsibility of the permittee for a violation, penalty or fee, on the criteria of the regulatory program at the time the permit was issued. OSMRE considered but rejected the alternative of applying the violations review criteria in force at the time a permit is reviewed under this section because it would have subjected the permittee to a standard that might be subject to change or reinterpretation.

RELATIONSHIP BETWEEN PERMITTEE AND VIOLATION, PENALTY OR FEE

To facilitate the interpretation of this rule, it is useful to differentiate three ways in which a permittee can be related to an unabated violation or a delinquent penalty or fee for purposes of section 510(c) of the Act and its implementing

violations review criteria. The permittee can be (1) directly responsible for the violation, penalty or fee; (2) indirectly responsible; or (3) linked to the violation, penalty or fee through ownership or control.

Direct responsibility arises where the permittee is cited on the violation notice or penalty assessment, or specifically is identified in a requirement to pay a fee.

Indirect responsibility may arise through an ownership or control link under certain circumstances where the permittee owns or controls the person who is directly responsible. Indirect responsibility generally will not arise through an ownership or control link where the permittee is owned or controlled by the person responsible.

A link through ownership or control arises where, under the violations review criteria of the applicable regulatory program, the permittee either owns or controls, or is owned or controlled by, the person directly responsible for a violation, penalty or fee.

The use of these three categories to differentiate these possible relationships between a permittee and a violation, penalty or fee is consistent with the relevant provisions of section 510(c) of the Act and its implementing violations review criteria, which preclude the issuance of a permit only where a permit applicant is either directly or indirectly is responsible for, or through an ownership or control relationship is linked to, an unabated violation or a delinquent penalty or fee.

CORRECTING DEFECT IN PERMIT

Where a permittee is either directly or indirectly responsible for an unabated violation or a delinquent penalty or fee, he or she cannot avoid this responsibility by severing his or her link with any other person. The only way to satisfy this responsibility is to prevail in an appeal, abate the violation, or pay the penalty or fee. If the permittee or other person responsible does so, this rule will allow the permit to remain in force. (For additional discussion of the circumstances under which a permittee continues to be indirectly responsible for the violation, penalty or fee of a former subsidiary, see the ownership and control rule at *53 FR 38876.)*

Where a permittee is linked to a violation, penalty or fee only through ownership or control, and has no direct or indirect responsibility for the violation, penalty or fee, the permittee may correct the defect in the permit and forestall the remedial measures of this rule by severing the ownership or control link. This is because under such circumstances the purpose of this rule is not to compel abatement or payment by the permittee, but to compel abatement or payment by the person responsible.

Where an ownership or control link continues to exist, the purpose of this rule is to prevent the person responsible from evading the prohibition of section 510(c) of the Act by using an intermediary, to which he or she is linked by ownership or control, to obtain and retain a permit which he or she otherwise could not have obtained or retained. Where the link is broken, however, the person responsible no longer has an interest in the permit that would serve to compel abatement or payment.

CURRENT OWNERSHIP OR CONTROL LINK

Several commenters favored the later proposed requirement for a current ownership or control link as a basis for a finding that a permit was improvidently issued. They said that a current link between the permittee and violator would have to exist if this rule were to achieve its stated objective of compelling the abatement of existing violations. One commenter said that in the absence of such a link the rule would place the permittee in a position where compliance would be impossible, and would make the rule more difficult to defend with respect to retroactive application.

OSMRE agrees with the commenter that where a permittee has no direct or indirect responsibility for an unabated violation or a delinquent penalty or fee, a current ownership or control link is a necessary measure of the ability of the regulatory authority to compel compliance, and thus to remedy the defect in the permit. As explained under the subsequent heading, II.F.3. The Rule is not retroactive, however, OSMRE disagrees that the rule in any way is retroactive.

Several commenters on the later proposed rule said that it was contrary to the Act to require a current ownership or control link as a criterion that a permit was improvidently issued. They said that this would provide an untimely incentive for permittees to sever links to avoid liability for operations under common ownership or control at the time of permit issuance.

OSMRE disagrees. As explained in the preceding discussion of Section 773.20(b)(3), in the absence of any direct or indirect responsibility on the part of the permittee for an unabated violation or a delinquent penalty or fee, the rule requires a current ownership or control link for reasons of administrative efficiency and because there is nothing to be gained by rescinding a permit where the permittee is not responsible for and will not be able to bring about abatement or payment.

Section 510(c) of the Act does not require a regulatory authority to withhold a permit from an applicant who at any time in the past was linked to a violator through ownership or control. Thus, prior to applying for a permit, an applicant may sever his or her link to the person responsible for an unabated violation or a delinquent penalty or fee and legitimately receive a permit.

In the same manner, it is reasonable for this rule to give a permittee an opportunity to sever an ownership or control link to the person responsible, and thereby forestall a finding that the permit was improvidently issued. As long as the link legitimately is severed, and the permittee does not continue to be directly or indirectly responsible for the violation, penalty or fee, the purposes of the Act are fully served.

Several commenters on the later proposed rule said that the withholding of a permit under section 510(c) and the rescission of a permit under this rule had two purposes: (1) To provide an incentive for a coal operator to correct past violations if he or she wished to continue mining coal; and (2) to prevent an operator who failed to comply with the law from mining coal.

The commenters said that regardless of a current link between the permittee and the violator, permit rescission would provide a strong incentive to correct unabated violations and pay delinquent penalties. The commenters said that the rule overlooked the second purpose, and concluded that a current ownership or control link should not be required.

OSMRE agrees with the commenters on the dual purposes of withholding a permit under section 510(c), and for applying the remedial measures of this rule. In response to this comment, Section 773.20(b)(3) was revised to require a finding of improvident issuance where a permittee continues to be responsible for an unabated violation or a delinquent penalty or fee, notwithstanding the severing of a previous ownership or control link. This revision will enhance the capacity of the rule to serve the second purpose of section 510(c) by subjecting a permittee who continues to be responsible for an unabated violation or a delinquent penalty or fee to its remedial measures.

OSMRE disagrees with the commenters, however, that requiring a current ownership or control link where a permittee does not continue to be responsible for a violation, penalty or fee is inconsistent with the purposes of section 510(c). As the commenters pointed out, the remedial measures of this rule will provide a strong incentive for a permittee to abate a violation or pay a delinquent penalty or fee for which he or she continues to be responsible and for which the regulatory authority should have withheld a permit.

Where the permittee has no direct or indirect responsibility for the violation, penalty or fee, however, this incentive can arise only where there is a current link between the permittee and the person responsible. Where the link is broken, the permittee is unlikely to have any relationship with the violator that might serve to bring about compliance, and the rule cannot provide the desired compliance incentive.

Notwithstanding its requirement for a current ownership or control link, this rule will effectively serve the second purpose noted by the commenters. It will enable regulatory authorities to prevent non-complying persons from retaining or otherwise continuing to operate under permits they should not have received. And it will give persons responsible an additional incentive to abate violations and pay delinquent penalties and fees because not doing so will prevent them from forming or maintaining viable ownership or control relationships with other prospective permittees.

Where the relevant ownership or control relationship continues to exist, so the violation, penalty or fee legitimately can be linked to the permittee, the rule requires the regulatory authority to take appropriate remedial action. But where

the ownership or control link with the person responsible is severed, and the permittee has no direct or indirect responsibility for the violation, penalty or fee, the permittee cannot be considered to have a bad mining record requiring remedial action under this rule.

SEVERING OWNERSHIP OR CONTROL LINK

Several commenters on the later proposed rule were concerned that the requirement for a current ownership or control link unlawfully would enable a permittee to break his or her connection with a non-complying mining operation and thus retain his or her permit. As examples of how this might be done, the commenters said that a partnership might be dissolved; a mining contract might expire or be terminated; a corporation might be dissolved, or liquidated in bankruptcy; or an operator might convey his or her interest in the operation to another party.

In response to this and a comment discussed under the preceding heading, Section 773.20(b)(3) was revised to require a finding of improvident issuance where a permittee continues to be responsible for an unabated violation or a delinquent penalty or fee, notwithstanding any severing of the ownership or control link under which that responsibility arose.

This revision will prevent a permittee who severs such a link from avoiding the responsibility he or she may continue to have for an unabated violation or delinquent penalty or fee. For the reasons discussed under the preceding heading, however, OSMRE disagrees that the requirement of Section 773.20(b)(3) for a current ownership or control link in the absence of such continuing responsibility provides any reason for the commenters' concern.

Depending on the review criteria of the applicable regulatory program, an ownership or control link between a permittee and a person responsible for an unabated violation or a delinquent penalty or fee may arise and be severed in a variety of ways. To use the examples cited by the commenters:

The dissolution of a partnership will not relieve the partners of any previously-held responsibility for an unabated violation, or for a delinquent penalty or fee as owners or controllers of the partnership. Nor will the expiration or termination of a mining contract necessarily relieve the parties to the contract of any previously-held responsibility. The dissolution or liquidation of a corporation in bankruptcy will not relieve any officer, director or other owner or controller of the corporation of his or her previous responsibility for operations conducted by, or under the ownership or control of, the corporation.

However, where a permittee has no personal responsibility for a violation, penalty or fee, and effectively severs his or her link with the person responsible, there no longer exists any reason to consider permit rescission or other remedial action under this rule. At that point the slate is as clean as it should have been on the date the permit was issued, and it not only is reasonable, but also fully in compliance with the Act and its implementing regulations, to allow the permittee to retain the permit and continue to operate without interruption.

INCONSISTENT TERMINOLOGY

One commenter said that while initial proposed Section 773.20(a) referred to any surface coal mining operation owned or controlled by either the permittee or by any person who owns or controls the permittee, this terminology was not consistently carried through the remainder of that section.

OSMRE agrees with the commenter that these same ownership and control relationships should have been included throughout initial proposed Section 773.20, as they were in later proposed Section 773.20. Rather than explicitly setting out the applicable ownership and control relationships, however, final Section 773.20(b)(1) and (b)(3) now refer generally to "the violations review criteria of the regulatory program," which covers any applicable ownership or control relationship.

In addition, Section 773.20(b)(2)(ii), (b)(3), (c)(1) and (c)(2), refer to the "person responsible," as do Sections 773.21 and 843.2l of this rule, which covers any person related to the permittee through ownership or control who is responsible for an unabated violation or a delinquent penalty or fee.

4. SECTION 773.20(c) - REMEDIAL MEASURES

Where a regulatory authority finds, under Section 773.20(b) of this rule, that a surface coal mining and reclamation permit was improvidently issued, Section 773.20(c) requires it to use one or more of four specified remedial measures: To (1) implement an abatement plan or payment schedule; (2) impose a permit condition; (3) suspend the permit; or (4) rescind the permit. In combination with one or more of these remedial measures, a regulatory authority also may use any other measure available under its regulatory program.

This section derives from later proposed Section 773.20(b). It includes four alternative remedial measures because of the diversity of circumstances under which a regulatory authority might find that a permit was improvidently issued, and the resulting need to apply a remedy that not only is administratively appropriate, but also is fair and equitable to the permittee.

Again, from the standpoint of administrative efficiency it is consistent with section 510(c) of the Act to adopt alternative remedial measures through which a regulatory authority can afford a permittee a reasonable period of time to correct the defect in the permit and achieve a state of compliance that neither would have caused the regulatory authority to withhold the permit initially or have led to a finding of improvident issuance under this rule.

While mandatory rescission might in some instances prompt a permittee to achieve compliance more rapidly, in other instances it might, through loss of income or default on contractual or other legal or financial obligations, effectively thwart a permittee's ability to do so.

Moreover, mandatory rescission could produce grossly inequitable results where a permit was improvidently issued through oversight or error on the part of the regulatory authority, and notwithstanding a relatively minor past violation the permittee or its employees would suffer considerable hardship if mining under the permit abruptly were terminated.

In view of the administrative and equitable considerations involved, this rule is intended to strike the reasonable balance sought by section 202(f) of the Act.

NEED FOR REMEDIES OTHER THAN RESCISSION

Several commenters on the initial proposed rule objected to permit rescission as the sole remedy for an improvidently issued permit. One commenter said that in circumstances involving a nominal penalty it was inconceivable that the only remedy available to the regulatory authority to accomplish the desired result was to rescind the permit and require reclamation of the operation. The commenter said that rescission would be particularly burdensome to large operators in the west, and recommended revision of the rule to include alternative remedies.

Another commenter said that while permit rescission may at times be warranted and appropriate, the rule should include discretion for permit suspension, both as an independent remedy and as the first step in the rescission process, to give all parties an opportunity to ensure that no errors had been made.

Another commenter said that suspension, rather than rescission, was the more appropriate sanction in most circumstances addressed by initial proposed Section 773.20(c). This commenter said that in cases of fraud or misrepresentation rescission was the appropriate sanction, but where a permit was issued through human error or a lack of current information rescission would be unnecessarily harsh. The commenter said that both suspension and rescission would have the desired effect, but only suspension would facilitate the timely resumption of operations.

Another commenter said that the rule should include provision for suspending a permit as provided by section 521(b) of the Act, *30 U.S.C. 1271*(b). This commenter said that because of delays in the repermitting process, permit rescission would delay mining at a site for a period of at least six months to two years. The commenter said that this would increase the burden on regulatory authorities because many of the affected operators would become insolvent, and thus default on penalties and fees, as well as forfeit their performance bonds.

A much better solution, the commenter said, was to suspend a permit until the defect in the permit was corrected. This not only would give a permittee a strong financial incentive to correct the defect, the commenter said, but also would increase the likelihood that the regulatory authority would collect the penalties and fees that were owed.

Another commenter said that the additional remedial measures in later proposed Section 773.20(b) provided the flexibility necessary to resolve the problem through the most effective means available under each regulatory program.

OSMRE agrees that because of differences in the circumstances involving each improvidently issued permit, alternatives to permit rescission are needed, and has revised the later proposed and final rules accordingly.

SUSPENSION AND RESCISSION AS SOLE REMEDY

Several commenters disagreed with the alternative remedial measures in later proposed Section 773.20(b), and said that regardless of what definitions were applied or distinctions were drawn, once it was determined that a permit was issued in violation of section 510(c) of the Act the remedy mandated by law was permit suspension or revocation. These commenters characterized section 201(c)(1) of the Act, *30 U.S.C. 1211*(c)(1), as unmistakably mandatory in nature, requiring that the regulatory authority shall order the suspension or revocation of the permit.

Likewise, the commenters said, section 510(b)(1) of the Act demands that a permit application be accurate and complete and that all of the requirements of the Act and the regulatory program be complied with before the application is approved. Moreover, they said, the requirements of section 510(c) that a permit applicant list any and all notices of violations, and that the regulatory authority not issue a permit under certain circumstances, are equally demanding.

Citing the legislative history of the Act for support, the commenters said that under section 510(b), (b)(1) and (c) of the Act an applicant has a duty to provide information to the regulatory authority on any and all violations of environmental laws, and that absent an affirmative demonstration by the applicant that he or she has met all of the requirements of the Act no permit can lawfully be issued. Based on these provisions of the Act, the commenters concluded that the suspension and revocation of an improvidently issued permit was required regardless of any mitigating circumstances involved in its issuance.

OSMRE disagrees. For the reason why OSMRE prefers to use the term rescission in the context of an improvidently issued permit, as opposed to the commenters' term revocation, see the discussion of Permit Rescission vs. Revocation under the subsequent heading, II.F.1. Statutory Authority.

Contrary to the commenters' allegations, section 510(c) of the Act does not require an applicant to list all violations, but is limited to certain notices of violations incurred during a certain period of time prior to the date of the application.

Moreover, the commenters' excessively strict reading of section 201(c)(1) of the Act would necessitate permit suspension and rescission for any violation of the Act, which could result in economic hardship and disruption the Congress clearly did not intend to cause despite any mitigating circumstances.

OSMRE concludes that it has sufficient discretion under the Act to adopt procedures which reasonably account for the circumstances under which a permit was improvidently issued, and which include alternative remedial measures that will enable the regulatory authority to consider those circumstances in taking appropriate remedial action against the permit.

Contrary to several commenters' allegations, the term improvidently issued is not intended as a euphemism. Rather, OSMRE believes that the term reflects the severity of the problem involved when a regulatory authority should not have issued a permit, while at the same time not foreclosing reasonable flexibility in the adoption of appropriate remedial measures. In a process as complex as the filing and review of a permit application it is unavoidable that some errors may be made, either by the applicant or by the regulatory authority, which will require correction or modification of the permit once it is issued.

The all-or-nothing interpretation of the Act espoused by the commenters would lock this process into a state of rigidity that is contrary to the purposes of the Act and is inconsistent with the efficient and effective administration of its requirements and sound environmental policy. Thus, OSMRE declines to interpret the Act as inflexibly requiring permit suspension and rescission regardless of the circumstances under which a permit was improvidently issued.

VOID VS. VOIDABLE PERMITS

One commenter said that in view of the elaborate and detailed permit review process provided by the Congress, a presumption of validity accompanies a regulatory authority's decision to issue a permit. OSMRE agrees.

Several commenters on the later proposed rule said that sections 510 (b) and (c) of the Act are mandatory provisions, and any failure on the part of a permit applicant to divulge relevant violations renders the permit in violation of the law and subject to mandatory suspension or revocation under section 201(c)(1) of the Act. The commenters said that there is no room for failing to take action to rescind or suspend a permit based on regulatory authority or applicant inadvertence. Citing several court decisions to support this allegation, the commenters said that the issuance of a permit in contravention of the mandatory prerequisites for valid issuance renders the permit void ab initio and a legal nullity.

OSMRE disagrees with the commenters that suspension and rescission are the only lawful remedies for an improvidently issued permit. The Congress did not intend the extreme measures in section 201(c)(1) as exclusive remedies. Section 201(c)(2) of the Act provides authority for less extreme measures sufficient to carry out the purposes and provisions of the Act.

Because determining the validity of a particular permit under section 510(c) is not always as clear-cut as the commenters allege, OSMRE is reluctant to require permit suspension or rescission in every instance. The case law cited by the commenters to support their allegation concerned Federal agency regulations, not permits, and thus is relevant in this context only by the broadest analogy, upon which OSMRE is reluctant to rely in promulgating a national rule.

This rule need not and cannot conclusively resolve the issue of whether a particular permit is either void or voidable. Through the alternative remedial measures in Section 773.20(c), which range from the implementation of an abatement plan or payment schedule to permit rescission, the rule affords the regulatory authority reasonable discretion to consider the circumstances involving a particular improvidently issued permit and to fashion an appropriate remedy.

Rather than specifying in legalistic detail the circumstances under which a regulatory authority must consider a permit void, and thus subject to rescission, this rule reasonably leaves the question to the informed discretion of the regulatory authority for determination on a case-by-case basis.

Although the rule does not require a regulatory authority to use any particular one of the four remedial measures, OSMRE intends that the measure or measures used will be commensurate with the circumstances under which a permit was improvidently issued.

Where a permit was issued through willful fraud or collusion on the part of the permittee, rescission must be given serious consideration as the only appropriate remedy. Where a permit was issued because the regulatory authority itself did not fully implement the violations review criteria of the regulatory program, a remedy other than rescission may be more appropriate.

Where a remedial measure other than rescission is used, and the permittee fails to comply with the measure, the regulatory authority should reconsider its finding, and where appropriate rescind the permit.

This interpretation of the requirements of the Act for permit rescission under section 510(c) is consistent with the analogous requirements of section 521(b) of the Act, which provides that

“in the case of a State permittee who has met his obligations under such permit and who did not willfully secure the issuance of such permit through fraud or collusion, the Secretary shall give the permittee a reasonable time to conform ongoing surface mining and reclamation to the requirements of this Act before suspending or revoking the State permit.”

This provision in section 521(b) authorizes OSMRE to use remedial measures other than suspension or revocation when enforcing a defective State permit, as a means of bringing the permit into conformance with the regulatory program. Thus, it is reasonable to conclude that this rule, which includes alternatives to permit suspension and rescission, conforms with the intent of the Congress on how regulatory authorities should deal with improvidently issued permits.

TWO-ACRE VIOLATIONS

The same commenters cited the experience of a State regulatory authority under " 'two-acre' permits" as evidence of how a lack of suspension or rescission would pose undesirable risks to the public and the environment. Where notices of violation rather than cessation orders were issued for two-acre violations, the commenter said, the lack of a requirement to immediately cease operations resulted in additional disturbance and subsequent abandonment of the affected sites.

OSMRE disagrees that the context of this rule is analogous to the two-acre situation described by the commenters. In the case of an improvidently issued permit, the underlying violation, penalty or fee did not arise from the mining operation under the permit, but from another operation.

Suspension or rescission of the permit would not necessarily bring about compliance at the other operation any more effectively than the other remedial measures of this rule. Moreover, any violation stemming from operations under an improvidently issued permit itself is subject to enforcement under the applicable regulatory program, including the issuance of a cessation order where appropriate.

SUGGESTED ALTERNATIVES TO RULE

One commenter on the initial proposed rule said that permit rescission should be made an optional enforcement mechanism. OSMRE has adopted this suggestion by including in Section 773.20(c) remedial measures other than permit rescission, one or more of which a regulatory authority must use where it finds that a permit was improvidently issued.

One initial commenter suggested specific alternative procedures for a permit suspension process initiated by an order to the permittee to show cause. Under the alternative, where the permittee failed either to show that the regulatory authority's findings were in error, or to correct the defect in the permit, the permit temporarily would be suspended and the permittee would be required to commence reclamation. If the defect subsequently were corrected, the regulatory authority would reinstate the permit. The commenter concluded that this alternative more closely conformed with the provisions of section 521(a)(4) of the Act, *30 U.S.C. 1271*(a)(4), concerning the suspension of permits.

OSMRE disagrees that the suspension procedures suggested by the commenter are preferable to those of this rule. The referenced section 521(a)(4) of the Act applies only to suspension or revocation of a permit for a pattern of violations under that permit, not to the improvident issuance of a permit because of an unabated violation or a delinquent penalty or fee at another operation. Moreover, the commenter's alternative fails to provide for permit rescission, a necessary remedial measure under appropriate circumstances.

Several commenters said that the rule was unnecessary in view of the enforcement measures already available to OSMRE and State regulatory authorities for dealing with improvidently issued permits. One said that the rule would put numerous contract miners out of work because a large company could not take the risk that a contractor might have failed to abate a violation or pay a penalty or fee in connection with another operation. This, the commenter said, could result in the closing of a large company's mines and the forcing of contract miners out of business.

Another commenter said that the rule created unnecessary obligations, and that a more focused approach to the problem would be a more prudent course. Another said that instead of issuing a new rule, OSMRE should develop a uniform and consistent policy or procedure for progressive enforcement actions against failures to abate violations and the nonpayment of civil penalties or reclamation fees.

The commenter said that instead of permit rescission, the regulatory authority should use existing procedures, such as better enforcement and the issuance of a notice of violation followed by a failure-to-abate cessation order. If compliance, or satisfactory progress toward compliance, were not achieved within ninety days, the earlier permit would be suspended. Failure to reclaim or to comply ultimately would result in bond forfeiture and revocation of the earlier permit.

OSMRE disagrees. This rule is needed to give regulatory authorities specific procedures which the existing regulatory scheme does not provide for dealing with improvidently issued permits. As such, it will provide not only the "focused approach" sought by the one commenter, but also the "uniform and consistent" procedures sought by the other. It will not put any law abiding permittees, operators or contract miners out of business, but will give any permittee whose

permit was improvidently issued a reasonable opportunity to bring about the correction of the defect in the permit and thus continue mining.

The threat of alternative enforcement at a previous site with an unabated violation or a delinquent penalty or fee would not have an effect on operations under an improvidently issued permit. The potential rescission of an improvidently issued permit under this rule will give a permittee an incentive in addition to a cessation order or other enforcement action at a previous operation to bring about the abatement of a violation or the payment of a penalty or fee resulting from that operation.

One commenter said that the Congress provided an elaborate and detailed review process by which any objection to a permit decision must be raised. Therefore, the commenter concluded, a presumption of validity accompanies a regulatory authority's decision to issue a permit, and the only remedy for an improvidently issued permit is an appeal under sections 514 and 526 of the Act, *30 U.S.C. 1264* and 1276, and their State program counter-parts.

OSMRE disagrees that an appeal is the only lawful remedy. Section 514 of the Act, which gives certain persons a right to appeal a permit decision, neither limits the authority of OSMRE to adopt this rule nor the power of State regulatory authorities over improvidently issued permits. Nor does section 526 of the Act, which applies to judicial review of OSMRE and State regulatory authority actions, place any limitation on the authority of OSMRE or a State to adopt or implement the oversight and enforcement procedures of this rule.

a. Section 773.20(c)(1). Section 773.20(c)(1) gives a regulatory authority the alternative of implementing, with the cooperation of the permittee or other person responsible, and of the responsible agency, a plan for abatement of the violation or a schedule for payment of the penalty or fee on which the finding of improvident issuance was based. This section derives from later proposed Section 773.20(b)(1).

The cooperation of the permittee or other person responsible, and of the responsible agency, is necessary to insure the initial feasibility of and ultimate compliance with any resulting plan or schedule. If the permittee or other person responsible is unwilling to cooperate in implementing an abatement plan or payment schedule, the regulatory authority should use one of the other remedial measures.

Any unwillingness on the part of the person responsible to cooperate with the regulatory authority in this process should not be construed as a lack of ownership or control on the part of the permittee. Otherwise, persons responsible might be induced to withhold cooperation as a means of demonstrating the lack of an ownership or control link.

COOPERATION OF RESPONSIBLE AGENCY

One commenter said that the lack of a reference to the responsible agency in the provision of the later proposed rule corresponding to final Section 773.20(c)(1) was inconsistent with later proposed Section 773.21(a)(3), which required compliance with an abatement plan or payment schedule to the satisfaction of the responsible agency. The commenter asked whether this lack had any significance.

The lack of an explicit reference to the responsible agency in later proposed Section 773.20(b)(1) was an oversight that was corrected in final Section 773.20(c)(l). Where an agency other than the regulatory authority has jurisdiction over the unabated violation or delinquent penalty or fee, it is appropriate that the regulatory authority implement any abatement plan or payment schedule with the cooperation of that agency.

b. Section 773.20(c)(2). Section 773.20(c)(2) gives a regulatory authority the alternative of imposing on an improvidently issued permit a condition requiring that in a reasonable period of time the permittee or other person responsible abate the violation or pay the penalty or fee on which the finding of improvident issuance was based. This section derives from later proposed Section 773.20(b)(2).

The final rule was revised to provide explicitly for a reasonable period of time for abatement or payment. This was done because the permittee otherwise would be in violation of the condition immediately after it was imposed. After this reasonable period of time, lack of compliance would subject the permittee to the enforcement measures of the regulatory program for the violation of a permit condition.

c. Section 773.20(c)(3). Section 773.20(c)(3) gives a regulatory authority the alternative of suspending an improvidently issued permit until the underlying violation is abated or the delinquent penalty or fee is paid. This section derives from later proposed Section 773.20(b)(3).

A suspension under Section 773.20(c)(3) will enable a regulatory authority to terminate mining operations under a permit for an indefinite period of time without subjecting the permittee to the possible financial, legal or other consequences that permit rescission might entail, such as default on financial or contractual agreements.

Unlike Section 773.21 of this rule, Section 773.20(c)(3) does not set out specific suspension procedures. A regulatory authority which elects to suspend a permit under this section may use any appropriate procedures that are consistent with the regulatory program. Unless sound reasons exist to the contrary, however, OSMRE anticipates that a suspension under this section would at a minimum include a requirement that reclamation of the site continue in a manner consistent with the anticipated duration of the suspension, and provide for administrative appeal.

PERMIT SUSPENSION PROCEDURES

One commenter said that OSMRE should modify later proposed Section 773.20(b)(3) to allow the regulatory authority an appropriate period of time before initiating permit suspension. The commenter said that permit suspension could be more onerous than rescission if it occurred immediately, without an opportunity for the permittee to correct the defect in the permit.

OSMRE did not expressly adopt the commenter's suggestion. Section 773.20(c)(3) does not set out specific suspension procedures, but allows the regulatory authority to use any appropriate procedures that are consistent with the regulatory program, including a reasonable period of time between notifying a permittee of a suspension and when the suspension becomes effective.

The same commenter said that it was unclear whether the permit rescission procedures of Section 773.21 applied both to suspension under later proposed Section 773.20(b)(3), and to suspension and rescission under later proposed Section 773.20(b)(4). The commenter concluded that Section 773.21 applied only to rescission under Section 773.20(b)(4).

The commenter is correct. As was proposed, final Section 773.21 applies only to permit suspension and rescission under Section 773.20(c)(4) of this rule. The suspension provision in Section 773.20(c)(3) was included in the rule to give a regulatory authority discretion to tailor a suspension to the unique circumstances involving a particular permit, and thus prevent in appropriate cases such potentially onerous consequences as those to which the commenter referred.

To further clarify that Section 773.21 applies only to permit suspension as a preliminary step in the permit rescission process, and not to suspension under Section 773.20(c)(3), the word suspension was deleted from the heading of Section 773.21.

d. Section 773.20(c)(4). Section 773.20(c)(4) gives a regulatory authority the alternative of rescinding an improvidently issued permit under Section 773.21 of this rule.

This section derives from later proposed Section 773.20(b)(4). For more on this remedial measure, see the immediately following discussion of Section 773.21.

C. SECTION 773.21 -- IMPROVIDENTLY ISSUED PERMITS: RESCISSION PROCEDURES

1. OVERVIEW

Section 773.21 of this rule sets out the procedures a regulatory authority must use when it elects to rescind an improvidently issued permit. It requires the regulatory authority to serve on the permittee a notice of proposed suspension and rescission which includes the reasons of the regulatory authority for its finding under Section 773.20(b) of this rule. In addition, the notice must state (1) when the proposed suspension and rescission will take effect; (2) what proof the permittee must submit to forestall the suspension and rescission; (3) the effect of the suspension and rescission; and (4) the applicable appeal procedures.

This section derives from later proposed Section 773.21. To insure that the permittee receiving a notice of proposed suspension and rescission is fully aware of its effect, this rule incorporates all of the requirements of later proposed Section 773.21 into the notice itself.

An explicit requirement for the regulatory authority to include in the notice the reasons for its finding under Section 773.20(b) of this rule, which was implicit in later proposed Section 773.21(a)(1), was added to this section to insure that the permittee is informed of the basis for the finding. In serving a notice of proposed suspension and rescission on a permittee, OSMRE intends that the regulatory authority will follow the procedures of 30 CFR 843.14, or the State program equivalent, for the service of notices of violation, cessation orders, and show cause orders.

2. SECTION 773.21(a) AUTOMATIC SUSPENSION AND RESCISSION

Section 773.21(a) requires a regulatory authority to state in a notice of proposed suspension and rescission that after a specified period of time not to exceed ninety days the permit automatically will be suspended, and not to exceed ninety days thereafter will be rescinded, unless within those periods the permittee demonstrates to the regulatory authority that the finding on which the notice was based was erroneous at the time it was made, or that he or she subsequently has brought about the necessary corrective action.

The maximum ninety-day notice periods prior to the effect of suspension and rescission derive from later proposed Section 773.20(a). Periods shorter than ninety days may be set at the discretion of the regulatory authority as circumstances warrant, and the periods for suspension and rescission may have different durations.

The notice period for permit rescission begins to run on the date a suspension becomes effective, so that under the rule the maximum notice period is one hundred and eighty days. The specified periods include Saturdays, Sundays and holidays.

These notice periods were adopted for several reasons. They will give the permittee adequate time in appropriate cases to take corrective action or to gather and submit the proof required to forestall the proposed suspension and rescission. Such proof may not be readily available to the permittee if the person responsible for the violation, penalty or fee is linked to the permittee through a complex chain of ownership or control.

In view of the potentially severe consequences which permit suspension or rescission may have on the financial and contractual obligations, reputation, and employees of a permittee, and the diversity of circumstances under which a permit may be suspended or rescinded under this rule, it is reasonable to give the regulatory authority discretion to set appropriate periods before the notice takes effect. The notice periods also will enable the permittee to file an appeal as provided for by Section 773.21(c) of this rule.

The proof which the permittee must submit to forestall the suspension and rescission of the permit is either that (1) the finding of the regulatory authority under Section 773.20(b) of this rule was erroneous; (2) the permittee or other person responsible has abated the violation on which the finding was based, or paid the delinquent penalty or fee, to the satisfaction of the responsible agency; (3) the unabated violation or delinquent penalty or fee is the subject of a good faith appeal, or of an abatement plan or payment schedule with which the permittee or other person responsible is complying to the satisfaction of the responsible agency; or (4) since the finding was made the permittee has severed any ownership or control link with the person responsible for, and does not continue to be responsible for, the violation, penalty or fee.

Under Section 773.21(a)(1) a permittee may submit proof concerning the status of the violation, penalty or fee at the time the finding was made, including any abatement, payment, appeal or abatement plan or payment schedule overlooked by the regulatory authority. Under Section 773.21(a) (2) and (3), the permittee may submit proof concerning any abatement, payment, appeal or abatement plan or payment schedule that arose after the finding was made and the notice was issued.

Likewise, under Section 773.21(a)(4) the permittee may submit proof that the applicable ownership or control link was severed after the notice of proposed suspension and rescission was issued, and that the permittee does not continue to be responsible for the violation, penalty or fee. This provision was added to make final Section 773.21(a) consistent with Section 773.20(b)(3), which precludes a finding of improvident issuance under similar circumstances.

Thus, a permittee generally may forestall suspension or rescission under a notice of proposed suspension and rescission by using the waiting period set by the regulatory authority to prove that the finding was erroneous or to remedy the defect in the permit. Again, from the standpoint of administrative efficiency it is consistent with section 510(c) of the Act to afford the permittee a reasonable period of time to submit this proof or correct the defect in the permit, and thereby achieve a state of compliance that neither would have blocked the permit initially or have led to a finding of improvident issuance under this rule.

NINETY-DAY NOTICE PERIODS

Several commenters said that the proposed ninety-day notice periods prior to suspension and rescission under the rule were unjustified.

OSMRE disagrees. Contrary to the commenters' interpretation, these periods may not exceed ninety days, but can be shorter, as circumstances warrant. As explained in the preceding discussion of Section 773.21(a), these notice periods were adopted to give the permittee adequate time in appropriate cases to gather and submit the proof required to forestall the proposed suspension and rescission or take necessary corrective action, to account for the diversity of circumstances under which a permit may be suspended or rescinded under this rule, and to enable the permittee to file an appeal as provided for by Section 773.21(c) of this rule.

Several commenters said that the rescission procedures of the initial proposed rule were onerous and uneven, and provided preferential treatment to a permittee who consciously violated section 510(c) of the Act, as compared to one who in good faith provided all information on existing violations. Because the risk of agency error was small compared to the high degree of risk to the public and the environment, these commenters said, the rule should not give a permittee any time to enter into an abatement plan or payment schedule before a permit was rescinded, and that to do so would undercut compliance with section 510(c), encourage and reward fraud in permit application preparation, and place the public and the environment at risk.

OSMRE disagrees. As explained in detail elsewhere in this preamble, from the standpoint of administrative efficiency, and considering the multiple purposes of the Act, it is reasonable and appropriate to give a permittee a realistic period of time to bring his or her permit into compliance before permit suspension and rescission ultimately take effect.

The tiered approach of permit suspension followed by rescission was adopted to give the regulatory authority sufficient discretion to apply this remedial measure in a way that not only will fully protect the public and the environment, but also will reflect the underlying circumstances and the potential impact of these actions on the affected permittee.

PROOF REQUIRED TO NEGATE NOTICE

One commenter asked for examples of what would constitute satisfactory proof that the finding of the regulatory authority was erroneous, or that the permittee or other person responsible had abated the violation or paid the delinquent penalty or fee, or had entered into an abatement plan or payment schedule.

Because of the diversity of circumstances under which the rule will apply, it is not possible or appropriate to place strict limitations on what might constitute sufficient proof under Section 773.20(a). OSMRE intends that the regulatory authority will evaluate the sufficiency of the proof submitted by a permittee on a case-by-case basis.

Generally, the proof should include a copy of some official written document which confirms that the defect in the permit has been or is in the process of being corrected. It may include, for example, a termination notice issued by a regulatory authority, indicating that the underlying violation had been corrected; a cancelled check indicating payment of money owed; or a copy of a suitable abatement plan or payment schedule with accompanying evidence of compliance.

3. SECTION 773.21(b) - CESSATION OF OPERATIONS

Section 773.21(b) requires a regulatory authority to state in a notice of proposed suspension and rescission that after permit suspension or rescission the permittee shall cease all surface coal mining and reclamation operations under the

permit, except for violation abatement and for reclamation and other environmental protection measures as required by the regulatory authority. This section derives from later proposed Section 773.21 (b).

The phrase "as required by the regulatory authority" in this section refers only to reclamation and other environmental protection measures, and not violation abatement, which is required in any case. This phrase was substituted for the proposed phrase, "required reclamation," to make it clearer that the regulatory authority has discretion to make the reclamation requirement consistent with any substantial likelihood that mining under the permit will resume, and thus relieve the permittee, under appropriate circumstances, from performing unproductive reclamation activities.

The phrase, "and other environmental protection measures," was added to the final rule to enable a regulatory authority to account for environmental effects which may arise where mining has ceased, but complete reclamation has not yet begun. Under such circumstances, the use of other protection measures may be needed to reduce or prevent environmental impacts caused by the cessation of mining or deferral of complete reclamation. The addition of this phrase is consistent with the requirement of later proposed Section 773.21(b) that the permittee perform "required reclamation" because the discretion of the regulatory authority to defer complete reclamation necessarily includes discretion to impose measures needed to ensure that the exercise of this discretion does not lead to additional environmental harm.

The regulatory authority may specify in the notice itself any reclamation that the permittee is required to perform, or subsequently may inform the permittee regarding the reclamation requirement. This discretion is not intended to eliminate a reclamation requirement, but to allow temporary deferral of certain reclamation activities under circumstances where the resumption of mining appears probable.

RECLAMATION RESPONSIBILITY AFTER PERMIT RESCISSION

Several commenters said that since a permit is issued to conduct not only surface coal mining operations, but also reclamation, permit rescission terminates not only the right to mine, but also the right to reclaim. Thus, the commenters said, the requirement of the rule for a permittee to reclaim the site following permit rescission was unfounded.

OSMRE disagrees. As set out in section 102(e) of the Act, *30 U.S.C. 1202*(e), it is a purpose of the Act to "assure that adequate procedures are undertaken to reclaim surface areas as contemporaneously as possible with * * * surface coal mining operations." In view of this purpose, OSMRE has a duty to interpret the remainder of the Act in a manner that will bring about the satisfactory completion of reclamation in situations where a permit is rescinded.

Following their inclusion in a regulatory program, the environmental protection performance standards in section 515(b) of the Act, *30 U.S.C. 1265*(b), including those for reclamation, apply to "all surface coal mining and reclamation operations." (Emphasis added.) Thus, the reclamation requirements apply whether an operation is permitted or not.

A permittee who disturbs a site as a result of operating under an improvidently issued permit incurs a reclamation obligation under the applicable regulatory program, which terminates only upon satisfactory completion of reclamation. The rescinding of a permit does nothing to terminate or otherwise affect this obligation to reclaim.

Moreover, although section 506(a) of the Act, *30 U.S.C. 1256*(a), requires that "no person shall engage in * * * any surface coal mining operations unless such person has first obtained a permit," this requirement for a permit is limited to surface coal mining operations, and does not extend to reclamation operations. (See *Alabama By-Products Corp. and Drummond Coal Co., Inc. v. OSMRE, 103 IBLA 264, 271 72 (1988),* and *Citizens for the Preservation of Knox County, 81 IBLA 209, 218-219 (1984),* which conclude that a permanent program permit is not needed to reclaim a site that was mined under an interim program permit; and the OSMRE proposed rule at *53 FR 36404* (September 19, 1988) concerning the removal of requirements that an operator obtain or renew a permit when only reclamation activities must be performed.)

Thus, it is consistent with the purpose set out in section 102(e) of the Act and the general authority provided by section 201(c)(2) of the Act for OSMRE to establish procedures requiring reclamation in conformance with the Act following permit rescission.

POSTPONING RECLAMATION REQUIREMENT

One commenter on the initial proposed rule said that where a permit is rescinded the operator should be given time to cure the defect in the permit before reclamation of all areas is required.

OSMRE agrees with the commenter that after receiving a notice of proposed suspension and rescission an operator should have a reasonable amount of time to cure the defect in the permit before complete reclamation of all areas for which a reclamation obligation exists is required. Thus, final Section 773.21 gives a permittee up to ninety days before a permit is suspended, and up to ninety days more until it is rescinded, in which to cure the defect in the permit.

Following permit suspension or rescission, Section 773.21(b) requires the permittee to undertake reclamation and other environmental protection measures as required by the regulatory authority. Depending on what the permittee is doing to correct the defect in a suspended permit, this would enable the regulatory authority under appropriate circumstances to make reasonable adjustments in the required reclamation schedule. Following permit rescission, however, any delay in the commencement or continuation of complete reclamation would not be appropriate.

FULL RANGE OF ENFORCEMENT MEASURES

Initial proposed Section 773.20(b) provided for the issuance of a notice of violation (NOV) to a permittee as an initial step in the permit rescission process. Provision for this NOV was removed from the later proposed rule, and was not included in the permit rescission procedures of final Section 773.21.

One commenter asked whether the full range of enforcement measures would be taken against a permittee issued an NOV under initial proposed Section 773.20(b) if an outstanding violation at another site remained unabated. The commenter suggested that it would be inappropriate to do so since the underlying violation requiring rescission of the permit was the result of a failure to abate at a different operation, and presumably had been previously subjected to the full range of alternative enforcement measures.

OSMRE agrees in part, which is one reason why the procedures of the initial proposed rule were changed in the later proposed and final rules.

The commenter is correct that a notice of proposed suspension and rescission, and any subsequent enforcement, would not directly apply to the reclamation of another site. For a violation at another site, alternative enforcement measures are governed by 30 CFR 723.15(b)(2) and 845.15(b)(2), not Section 773.21.

Once permit rescission becomes effective, however, the permittee no longer will have the privilege of mining at the site for which the permit was rescinded. If the permittee of the rescinded permit does not comply with the requirement of Section 773.21(b) for the cessation of mining operations and for reclamation and other environmental protection measures at the site of the rescinded permit, then the full range of enforcement measures, including the issuance of a cessation order and the assessment of civil penalties, may be taken against the permittee for mining without a valid permit.

4. SECTION 773.21(c) - RIGHT TO APPEAL

Section 773.21(c) requires a regulatory authority to state in a notice of proposed suspension and rescission the procedures by which the recipient may file an appeal from the notice. This section derives from later proposed Section 773.21(c).

Under this section, an appeal from a notice of proposed suspension and rescission may be filed by a permittee under 43 CFR 4.1280-4.l286, or the State program equivalent. The referenced Sections 4.1280-4.1286 generally apply to appeals from those decisions of the Director of OSMRE for which the Act does not require formal adjudication under *5 U.S.C. 554.*

Under Section 773.21(c) the notice also must state that where OSMRE is the regulatory authority the procedures of 43 CFR 4.21(a) shall not apply to suspend the effect of the notice. This precludes a suspension of the notice both during the time when an appeal of the notice may be filed and while an appeal is pending.

The alternative of allowing the filing of an appeal to stay the effect of the notice pending a decision could defeat the purpose of the notice by enabling mining to proceed to completion. This provision makes the notice effective immediately when issued, and the maximum ninety-day periods before an automatic suspension or rescission are not affected by the filing of an appeal. Nothing in the rule will prevent the recipient of a notice of proposed suspension and rescission from seeking a temporary stay as part of the normal administrative review process.

In an appeal under Section 773.21(c), the review authority may allow any person responsible for the underlying violation, penalty or fee through a relationship of ownership or control to intervene. If the permittee does not appeal, but instead chooses another way to forestall suspension and rescission, such as severing the link to the responsible person, any other person may contest in the appropriate forum his or her responsibility for the violation, penalty or fee if that opportunity was not previously provided.

As discussed in the ownership and control rule at *53 FR 38879*, questions involving a Federal violation, penalty or fee must be resolved in a Federal forum, and both individuals and organizations may seek to amend incorrect information in the Applicant/ Violator System.

SCOPE OF APPEAL

Several commenters on the initial proposed rule said that an appeal of permit rescission should only concern whether the permittee or other person responsible in fact had been cited for the violation on which rescission was based, and not whether the citation itself was lawful, which should have been contested in a separate and timely appeal proceeding following issuance of the violation notice.

OSMRE agrees that an appeal from a notice of proposed suspension and rescission is not the proper forum for direct appeal of the underlying violation, penalty or fee when an earlier opportunity was provided. Generally, however, a permittee should be allowed to contest the basis for the notice. Whether any particular issue can be relitigated in a particular case will depend on the accepted legal principles of res judicata and collateral estoppel.

CESSATION OF OPERATIONS PENDING APPEAL

One commenter objected to later proposed Section 773.21 (b) and (c) to the extent they required a permittee to cease operations pending an appeal of a notice of proposed suspension and rescission. The commenter said that since the violation would not have occurred under the permit that was subject to suspension or rescission, operations under that permit should not have to cease, and that when the Congress addressed permit suspension for a pattern of violations in section 521(a)(4) of the Act it provided for a hearing prior to the suspension.

Likewise, the commenter said, under section 521(a)(5) of the Act a cessation order expires if a hearing is not held within thirty days of actual notice to the operator. By not affording a hearing prior to suspension or rescission, the commenter concluded, the rule was contrary to the explicit provisions of the Act, as well as the guarantee of due process under the Fifth Amendment to the Constitution.

OSMRE disagrees. The commenter's objection concerns the provision in later proposed and final Section 773.21(b) that requires the permittee to cease operations after permit suspension or rescission becomes effective, and the provision in later proposed and final Section 773.21(c) that makes 43 CFR 4.21(a) inapplicable to a notice of proposed suspension and rescission. Absent that later provision, under Section 4.21(a) the notice would not be effective during the time in which a person adversely affected might file an appeal, and the filing of an appeal would suspend the effect of the notice pending the decision on appeal, so the permittee could continue mining.

Contrary to the commenter's assertion, a notice of proposed suspension and rescission under Section 773.21 is based not only on a previous violation, penalty or fee, but also on a violation associated with the permit in question -- namely, operating under an improvidently issued permit. And Section 4.21(a) expressly provides for exceptions to its provisions through other regulations such as this rule.

Since operations under an improvidently issued permit should not have commenced in the first place, it is appropriate to impose reasonable restrictions on how long they may continue after a notice of proposed suspension and rescission is

issued. If Section 4.21(a) applied, a permittee who appealed a notice could continue to mine until the appeal was decided, regardless of the consequences to the public and the environment.

Rather than risk the potentially harmful results that could ensue under an automatic stay under Section 4.21(a), the rule gives the regulatory authority discretion to adopt, on a case-by-case basis, notice periods as long as ninety days before suspension and rescission take effect, or an overall maximum of one hundred and eighty days. This will enable the regulatory authority to reasonably balance the rights of the permittee against the need to protect society and the environment from potential adverse consequences. Moreover, it will add to the incentive provided by the rule for the permittee to bring about abatement or payment of the violation, penalty or fee on which the notice is based.

As the commenter pointed out, section 521(a)(4) of the Act and the implementing regulations at 30 CFR 843.13 allow a permittee to request a public hearing before a suspension under their provisions becomes effective. Corresponding provisions in section 521(b) of the Act, however, only require the Secretary to give the permittee a reasonable time to conform ongoing operations to the requirements of the Act before suspending or revoking a State permit.

Thus, the Congress did not intend that the procedures in section 521(a)(4) pertaining to a pattern of violations would apply in all circumstances, and this rule legitimately may employ other appropriate procedures. The procedures governing cessation orders in section 521(a)(5) of the Act are limited to that specific context and do not apply to this rule.

Subject only to the limitation that the procedures of 43 CFR 4.21(a) do not apply where OSMRE is the regulatory authority, the rule affords a permittee a reasonable right to file an appeal for administrative review of a notice of proposed suspension and rescission, and does not preclude the granting of a temporary stay of the notice. This is fully consistent with the guarantee of due process under the Fifth Amendment to the Constitution.

D. SECTION 843.13 - SUSPENSION OR REVOCATION OF PERMITS: PATTERN OF VIOLATIONS

This rule revises the heading of existing Section 843.13, which governs the suspension and revocation of a surface coal mining and reclamation permit for a pattern of violations occurring under that permit. The revision adds at the end of the heading the phrase, "Pattern of violations."

The expanded heading will help to differentiate Section 843.13 from new Section 773.21, which governs permits that were improvidently issued as a result of an unabated violation or a delinquent penalty or fee at another operation prior to the time of permit issuance.

No comments were received on this revision, which is adopted as proposed.

E. SECTION 843.21 - PROCEDURES FOR IMPROVIDENTLY ISSUED STATE PERMITS

1. OVERVIEW

A State regulatory authority in some instances may not take the action required by Section 773.20 of this rule, or the State program equivalent, with respect to an improvidently issued permit. This may result from a lack of equivalent regulations in the State program, or from other causes.

OSMRE is adding to the existing Federal enforcement procedures in 30 CFR Part 843 a new Section 843.21 to provide a mechanism for Federal enforcement in these situations. Unless otherwise noted, the provisions of Section 843.21 derive from the correspondingly numbered paragraphs of later proposed Section 843.21.

If OSMRE has reason to believe that a State surface coal mining and reclamation permit meets the criteria of this rule, or the State program equivalent, for an improvidently issued permit, Section 843.21 requires OSMRE to issue to the State an initial notice of that belief, requires the State to respond within a specified period of time, and where the State response is inadequate requires OSMRE to issue to the State a ten-day notice.

If the State does not take appropriate action under the ten-day notice, or show good cause for not doing so, the rule requires OSMRE to take appropriate remedial action, which may include the issuance of a notice of violation (NOV). Where an NOV is issued, the rule allows any person to submit information which may lead OSMRE to either vacate or terminate the NOV. Finally, the rule prohibits OSMRE from assessing a civil penalty for such an NOV.

JURISDICTIONAL CONSIDERATIONS

One commenter said that the initial proposed rule gave the clear implication that it would be used to make the operator the pawn in a chess match between OSMRE and any State which failed to enforce its regulatory program. The commenter was concerned that the rule would enable OSMRE to impose on an operator requirements a State was unwilling to impose, which might result in a domino effect leading to the rescission of permits for other operations owned or controlled by that operator.

OSMRE disagrees that the rule involves any considerations other than legitimate oversight and enforcement of State regulatory programs under the Act.

Section 510(c) of the Act. imposes on an applicant an affirmative obligation to list all notices of violations of the Act and other specified environmental laws and regulations, and requires a regulatory authority to withhold a permit in appropriate circumstances. As revised on October 3, 1988 *(53 FR 37165), 30* CFR 773.15(b)(1) requires a regulatory authority to withhold a permit if any operation owned or controlled by either the applicant or by any person who owns or controls the applicant currently is subject to certain unabated violations or delinquent penalties or fees.

This rule requires no more than does section 510(c) and 30 CFR 773.15. A permittee who obtains a permit in contravention of these requirements has no cause to complain that rescission of the permit makes it a pawn in any disagreement that may lie between OSMRE and the issuing State. Where the State should not have issued the permit in the first place, the remedial measures of this rule merely seek to place the permittee in its lawful status.

One commenter, who suggested a previously discussed alternative to Sections 773.20 and 773.21 of this rule based on an order to show cause, said that under the alternative no need would exist for proposed Section 843.21 because adequate remedies existed under the Act for OSMRE to contest individual permits or to supersede the State permitting process. The commenter specifically referenced sections 513(b), 514(c), 521(b) and 526(e) of the Act, *30 U.S.C. 1263*(b), 1264(c), 1271(b) and 1276(e).

OSMRE disagrees. This rule does not supersede the State permitting process. Neither the suggested alternative nor the cited provisions of the Act minimize the need for this rule, which will provide OSMRE and the States with specific procedures for dealing with improvidently issued permits. The Congress in enacting section 201(c)(2) of the Act recognized the need for OSMRE to "publish and promulgate such rules and regulations as may be necessary to carry out [its] purposes and provisions," and this rule is a necessary and legitimate exercise of that rulemaking authority.

AVS MEMORANDUM OF UNDERSTANDING

One commenter said that initial proposed Section 843.21 conflicted with a memorandum of understanding (MOU) between State regulatory authorities and OSMRE concerning the implementation of the Applicant/Violator System. The commenter said that under the MOU, until all necessary State and Federal rule changes have taken place a State is required only to enforce its existing statutes and regulations. If State law prohibited permit rescission, the commenter concluded, it was not appropriate for OSMRE to rescind a State permit.

OSMRE disagrees that this rule conflicts with the MOU. Section 773.20 of the rule applies to the violations review criteria of the regulatory program in force at the time a permit was issued. Section 843.21, which references Section 773.20, also applies to the criteria in force at the time of permit issuance. Neither section requires a regulatory authority to take any action that is inconsistent with its existing regulatory program.

While each primacy State, in due course, must adopt regulations consistent with this rule, the MOU was not intended to preclude the amendment of State programs. Prior to the adoption of consistent regulations by a State, the rule will give OSMRE necessary enforcement power to take appropriate remedial action on an improvidently issued State permit. Such remedial action does not include suspension or rescission of a State permit.

EXTENSIONS OF TIME

One commenter asked if the maximum ninety-day extension of time afforded by initial proposed Section 773.20(b)(2) and (b)(3) also applied to the procedures under Section 843.21.

As neither final Section 773.20 nor Section 773.21 any longer provide for an extension of time, this comment is moot. Where an NOV is issued under Section 843.21, the deadlines normally associated with an NOV will apply.

OWNERSHIP AND CONTROL RELATIONSHIPS COVERED

One commenter said that initial proposed Section 843.21 failed to fully account for relationships of ownership or control, and that Section 843.21(c), (c)(2) and (c)(3) should be revised to cover any person responsible for an unabated violation or a delinquent penalty or fee.

OSMRE agrees and has added the phrase, "other person responsible," to this and the later proposed rules where appropriate to cover a relationship of ownership or control.

REVIEW OF STATE SECTION 510(c) - FINDINGS

One commenter asked if OSMRE intended to review all State section 510(c) findings on a day-to-day basis.

OSMRE does not intend to review all section 510(c) findings made by State regulatory authorities, but may sample them in a random manner as part of its oversight role.

2. SECTION 843.21(a) - INITIAL NOTICE

As the first step in the Federal enforcement of an improvidently issued State permit, Section 843.21(a) requires OSMRE to issue to the State an initial notice. The notice must state in writing the reasons why OSMRE has reason to believe that a State surface coal mining and reclamation permit meets the criteria for an improvidently issued permit in Section 773.20(b) of this rule, or the State program equivalent, and that the State must take appropriate action on the permit under State program equivalents of Sections 773.20 and 773.21 of this rule.

Although Section 843.21(a) refers to the State program equivalents of both Sections 773.20 and 773.21, as do the subsequent provisions of Section 843.21, action by a State under the equivalent to Section 773.21 is discretionary. Reference to both sections is included for completeness because under Section 773.20(c)(4) one of the appropriate actions a State may take against an improvidently issued permit is rescission, which if elected must occur under the State program equivalent to Section 773.21.

This notice is called an "initial notice" to differentiate it from a ten-day notice issued under subsequently discussed Section 843.21(c) of this rule. The rule also encourages, but does not require, OSMRE to provide to the permittee a copy of the notice. This discretion was included in the rule to forestall the possibility of invalidating any subsequent enforcement steps taken under this section due to an inadvertent lack of initial notice to the permittee.

Since the initial notice primarily is concerned with State compliance, and since the vacation and termination procedures in subsequently discussed Section 843.2l(e) provide ample relief to a permittee in the event of an error, a permittee who fails to receive the initial notice should not suffer any significant hardship. OSMRE will mail, or otherwise deliver, a copy of the initial notice to the permittee at his or her last known address.

MANDATORY TEN-DAY NOTICE

Several commenters on the later proposed rule said, without further explanation, that OSMRE was obligated to take enforcement action within ten days after notifying a State that a permit was improvidently issued, and nothing would constitute "good cause" for the State not taking action to suspend the permit. Several commenters said that the initial proposed rule illegally converted the ten day notice under section 521 of the Act into a forty-plus day notice. These commenters said that there was no legal or practical justification for extending the period for State response beyond ten days.

OSMRE disagrees. Section 521(a)(1) of the Act, *30 U.S.C. 1271*(a)(1), which applies to "any * * * violation of any requirement of [the] Act or any permit condition required by the Act," does require OSMRE to issue a notice to the applicable State regulatory authority, for which the State has ten days to respond. (For the OSMRE interpretation of the requirements of section 521(a), see the July 14, 1988 OSMRE final rule at *53 FR 26742,* which this preamble incorporates by reference.) Section 521(b) of the Act, however, which applies to a deficiency in State enforcement of all or any part of an approved State program, requires OSMRE to give a State thirty days' notice before holding a public hearing.

Since a State's lack of appropriate action on an improvidently issued permit may involve both a potential deficiency in State enforcement of its regulatory program, as well as an individual violation of the Act, it is reasonable for this rule to employ a tiered notice approach which reflects the goals and timing of both sections 521(a)(1) and 521(b). The authority for this regulatory approach, which is consistent with paragraph No. 3 of the Revised Parker Order, is set out under the subsequent heading, II.F.1. Statutory Authority.

3. SECTION 843.21(b) - STATE RESPONSE

Section 843.21(b) gives a State thirty days to respond to an initial notice issued under Section 843.21(a) of this rule concerning a potential improvidently issued permit. To forestall further proceedings under this section, the State must demonstrate to OSMRE in writing either that (1) the permit does not meet the criteria of Section 773.20(b) of this rule, or the State program equivalent, for an improvidently issued permit; or (2) that the State is in compliance with the State program equivalents of Sections 773.20 and 773.21 of this rule.

As is explicitly provided in subsequently discussed Section 843.21(d), a State cannot meet this requirement by demonstrating that the State program lacks equivalents to Sections 773.20 and 773.21.

4. SECTION 843.21(c) - TEN-DAY NOTICE

If OSMRE finds that a State has not made the demonstration required by Section 843.21(b) of this rule, Section 843.21(c) requires OSMRE to issue to the State a ten-day notice stating in writing the reasons for that finding and requesting that within ten days the State take appropriate action under the State program equivalents of Sections 773.20 and 773.21 of this rule.

This section does not impose any time limit on when OSMRE may make the required finding. OSMRE may make this finding prior to expiration of the thirty-day response period of Section 843.21(b) where the State inadequately has attempted to make the required demonstration. If a State does not respond, however, OSMRE will not issue a ten-day notice until after the thirty-day response period of Section 843.21(b) has expired.

5. SECTION 843.21(d) - FEDERAL ENFORCEMENT

Section 843.21(d) requires OSMRE to take appropriate remedial action if after ten days a State which is issued a ten-day notice does not take appropriate action under the State program equivalents of Sections 773.20 and 773.21 of this rule, or show good cause for its inaction. Under this section, good cause does not include the lack of State program equivalents of Sections 773.20 and 773.21.

For OSMRE to find that a State is taking appropriate remedial action under this section, the State need not have completed the processing of an improvidently issued permit under the State program equivalents of Sections 773.20 and 773.21. As long as the State has begun a process as effective as that of Section 773.20, and is making reasonable progress toward imposing and enforcing any appropriate remedial measures, the State is taking appropriate action.

Appropriate remedial action by OSMRE under Section 843.21(d) may include, but is not limited to, the issuance of a notice of violation (NOV) requiring that by a specified date all mining operations shall cease and reclamation of all areas for which a reclamation obligation exists shall commence or continue unless, to the satisfaction of the responsible agency, any violation, penalty or fee on which the notice of violation was based is abated or paid, or an abatement plan or payment schedule is entered into, or any ownership or control link with the person responsible is severed and the permittee does not continue to be responsible for the violation, penalty or fee.

Provision for allowing the permittee to sever his or her link with the person responsible as a way to forestall an NOV if the permittee does not continue to be responsible for the violation, penalty or fee, was added to make Section 843.21(d) consistent with Section 773.20(b)(3), which precludes a finding of improvident issuance under similar circumstances. As previously discussed, for purposes of section 510(c) of the Act severing the link to the person responsible should have the same effect regardless of when it occurs.

RECLAMATION REQUIREMENT

One commenter objected to the requirement of initial proposed Section 843.21(b)(2) for the commencement or continuation of reclamation for all areas for which a reclamation obligation existed. The commenter said that the mere interruption of mining would be sufficient to induce compliance, and that it was unnecessarily harsh to require termination of the operation when interruption would achieve the desired result.

Where a notice of violation was issued under Section 843.21, the commenter concluded, the permittee only should be required to meet contemporaneous reclamation requirements, but complete reclamation, such as backfilling the pit, removal or roads and sedimentation ponds, and dismantling of buildings and other structures, should not be required.

OSMRE disagrees in part. To the extent the commenter's concern is based on the requirement of initial proposed Section 843.21(b) for the immediate cessation of mining and the commencement or continuation of reclamation upon issuance of a notice of violation (NOV) under that section, later proposed and final Section 843.21(d) were revised to temper this excessively stringent requirement. Section 843.21(d) now allows OSMRE to postpone this requirement for "a specified time" following issuance of the NOV in order to give the permittee time to abate the violation.

While a notice of violation issued under Section 843.21(d) must include a requirement that complete reclamation commence or continue after a specified date, prior to that date the permittee may continue mining. Thus, the permittee will have notice of, and an opportunity to correct, the defect in the permit before mining is either interrupted or terminated. Only after this reasonable period for abatement expires must mining cease and reclamation commence or continue.

If a substantial likelihood arises that the permittee will be able to correct the defect in the permit after the specified date, although mining must cease OSMRE may amend the reclamation requirement in the NOV to reflect this development. After the permittee has demonstrated an unwillingness or an inability to correct the defect in the permit, however, complete reclamation is in order.

Where an NOV is issued under Section 843.21(d) and the permittee or other person responsible has failed to remedy the defect in the permit, a mere interruption of the mining operation would be insufficient to compel compliance. Thus, a requirement to commence reclamation is appropriate.

CESSATION OF MINING

One commenter said that OSMRE lacks authority to require the immediate cessation of mining, as required by initial proposed Section 843.21, in the absence of an inspection which results in a finding of a violation causing "an imminent danger to the health and safety of the environment" or actual or potential "significant, imminent environmental harm to land, air, or water resources."

OSMRE disagrees. The circumstances quoted by the commenter, which are set out in section 521(a)(2) of the Act, *30 U.S.C. 1271*(a)(2), govern the issuance of an imminent harm cessation order (CO). Under 30 CFR 843.11(a)(2) operating "without a valid surface coal mining permit constitutes a condition or practice which can reasonably be expected to cause significant, imminent environmental harm to land, air or water resources * * *." Thus, OSMRE has the authority to issue an imminent harm CO to a permittee operating under such circumstances.

Nevertheless, initial proposed Section 843.21 did not require, and this rule does not provide for the issuance of an imminent harm CO, but instead an NOV requiring the cessation of mining. And rather than requiring the cessation of mining immediately upon issuance of the NOV, as would have been required by the initial proposed rule, final Section 843.21 requires the cessation of mining if by a specified date after the issuance of an NOV the underlying violation,

penalty or fee is not abated or paid to the satisfaction of the responsible agency. Thus, a reasonable abatement period is provided.

Although an imminent harm CO and an NOV requiring the cessation of mining are similar in that both would require the cessation of mining, they differ in that they are based on different authority in the Act and are subject to different procedures with different consequences. For example, under section 518(a) of the Act and 30 CFR 845.12 a penalty for a CO is mandatory, but for an NOV may be discretionary. As provided in Section 843.21(f) of this rule, no civil penalty will be assessed for an NOV issued under Section 843.21.

Under section 521(a)(3) of the Act an NOV must require the permittee to abate the violation on which it is based. For the violation of operating under an improvidently issued permit, abatement may consist of either correcting the deficiency in the permit or ceasing operations.

To account for the alternative of abatement through correction of the deficiency in the permit, Section 843.21 of this rule requires the cessation of mining only if the permittee does not correct the deficiency within a specified time. If the permittee does not cease mining as required under the NOV, OSMRE will issue a failure-to-abate cessation order with all of the associated consequences.

OSMRE DISCRETION

Several commenters said the discretion afforded to OSMRE by later proposed Section 843.21(d) for the issuance of an NOV was inconsistent with enforcement actions under the regulatory program.

OSMRE disagrees. As explained in detail elsewhere in this preamble, the potential of this rule for causing economic disruption and hardship as a result of OSMRE action on an improvidently issued permit, as well as administrative considerations involved in the oversight and enforcement of a State permit, necessitate that OSMRE have reasonable discretion in imposing an appropriate remedy. As long as the purposes of the regulatory program are not compromised, it is reasonable for OSMRE to retain sufficient discretion to account for the overall effect of its action.

MEANING OF "GOOD CAUSE"

One commenter on the initial proposed rule asked what OSMRE would consider good cause for a lack of State action under Section 843.21(d).

Under the rule, good cause may consist of any reasonable factual or legal impediment to taking action under State program equivalents of Sections 773.20 and 773.21. As previously noted, however, good cause under Section 843.21 does not include the lack of State program equivalents to Sections 773.20 and 773.21. For additional discussion of the types of circumstances which may constitute good cause under this rule, see the July 14, 1988, OSMRE final rule at *53 FR 26728.*

Another commenter said that later proposed Section 843.21(d) was inherently inconsistent in requiring OSMRE to determine whether a State had taken appropriate action under the State program equivalent of Section 773.20, or had shown good cause for not doing so, while also providing that good cause does not include the lack of a State program equivalent to Section 773.20. The commenter asked how a State could be considered as not showing good cause when it was not authorized to take such action.

Good cause does not include the lack of State program equivalents to Sections 773.20 and 773.21 because even without such specific procedures each primacy State has the power to correct errors and take remedial action on an improvidently issued State permit. Any other approach might give a State an incentive to delay the adoption of equivalent procedures, and thus decrease the effectiveness of this rule.

MODIFICATION OF REVISED PARKER ORDER PROCEDURES

Several commenters said that under the Revised Parker Order if a State does not initiate permit rescission proceedings OSMRE must issue an NOV to cause the operation to cease until all violations are abated or penalties paid. Later proposed Section 843.21, the commenters said, would amend the clear action required by the Revised Parker Order, and

allow the State to take "appropriate action" or show good cause why it did not do so. Referencing previous comments on the ten day notice rule and related litigation, the commenters concluded that the proposal was illegal.

OSMRE disagrees. Like Sections 773.20 and 773.21 of this rule, Section 843.21 will facilitate compliance with the Act in a manner which is not unduly restrictive and which recognizes that different circumstances may necessitate different remedies. While this rule to a certain extent modifies the procedures of the Revised Parker Order, in many instances it will not interfere with the action specified by paragraph no. 3 of the order.

To the extent the rule modifies the procedures set out in paragraph no. 3 of the Revised Parker Order, it is authorized by paragraph no. 31 of the order, which provides that

"[n]othing in this Order shall in any fashion limit or otherwise interfere with the authority of the Secretary of the Interior to * * * revise, amend, or promulgate new regulations under the * * * Act. Once effective, such regulations shall apply to this Order."

6. SECTION 843.21(e) - REMEDIES TO NOTICE OF VIOLATION

Upon receipt from any person of information concerning the issuance of a notice of violation (NOV) under Section 843.21(d) of this rule, Section 843.21(e) requires OSMRE to review the information and either vacate or terminate the NOV in appropriate circumstances.

Vacation of an NOV issued under Section 843.21(d) is required if the NOV resulted from an erroneous conclusion regarding the issuance of the permit.

Termination of an NOV issued under Section 843.21(d) is required if (i) the permittee or other person responsible subsequently has, to the satisfaction of the responsible agency, abated any violation or paid any penalty or fee on which the notice of violation was based; (ii) the permittee or other person responsible has filed and is pursuing a good faith appeal of the underlying violation, penalty or fee, or has entered into and is complying with an abatement plan or payment schedule to the satisfaction of the responsible agency; or (iii) subsequent to issuance of the NOV the permittee severs any ownership or control link with the person responsible for, and does not continue to be responsible for, the underlying violation, penalty or fee.

Provision for allowing any person to demonstrate that the permittee has severed his or her link with the person responsible for the violation, penalty or fee as a way to terminate an NOV issued under this rule where the permittee does not continue to be responsible for the violation, penalty or fee was added to make Section 843.21(e)(2) consistent with Section 773.20(b)(3), which precludes a finding of improvident issuance under similar circumstances. As previously discussed, for purposes of section 510(c) of the Act severing the link to the person responsible should have the same effect regardless of when it occurs.

INCORRECT TERMINOLOGY

One commenter said that the preamble to the initial proposed rule *(51 FR 25827)* incorrectly stated that OSMRE "could" vacate or terminate a notice of violation issued under Section 843.21(c)(1)-(3) for specified reasons, when it should have said "shall," since vacation or termination was mandatory.

OSMRE agrees, and that is the correct interpretation of the word shall in final Section 843.21(e).

7. SECTION 843.21(f) - NO CIVIL PENALTY

Section 843.21(f) bars OSMRE from assessing a civil penalty for an NOV issued under Section 843.21(d). If the permittee does not cease mining or otherwise comply by the specified date, however, OSMRE will issue a failure-to-abate cessation order (FTACO) with all of the associated consequences, including any appropriate penalty, and may use other alternative enforcement measures available under the Act.

OSMRE has adopted this provision because as a matter of policy it concludes that any penalty should derive directly from the underlying violation, penalty or fee, and not indirectly through an NOV issued to remedy an improvidently

issued permit. This is consistent with section 518(a) of the Act, which does not require a penalty for every NOV, because a penalty would have been assessed where appropriate on the underlying violation.

If an FTACO is issued, however, OSMRE concludes that the failure of the permittee to comply with the NOV constitutes independent justification for any resulting penalty.

COMMENTER SUPPORT FOR SIMILAR PROVISION

One commenter on initial proposed Section 773.20 said that since permit rescission was not necessarily the permittee's fault, a penalty should not be assessed for an NOV under that section. Another commenter said that an order for the cessation of operations and reclamation following permit rescission should not lead to additional penalties if complied with by the permittee.

While Section 773.20 of this rule no longer provides for an NOV, the issues raised by these commenters also apply to the prohibition of a penalty under Section 843.21(f). OSMRE agrees with these commenters, and has revised the later proposed and final rules accordingly.

F. STATUTORY AUTHORITY AND GENERAL COMMENTS

1. STATUTORY AUTHORITY

A number of commenters on the proposed rule said that the Act did not authorize the rescission of an improvidently issued permit or the promulgation of regulations for that purpose. Other commenters said that the Act provided such authority.

OSMRE concludes that it has the necessary statutory authority to suspend or rescind an improvidently issued permit where it is the regulatory authority, to take oversight and enforcement action on an improvidently State permit, and for this rule in general.

As noted in the preamble to the initial proposed rule *(52 FR 25823)*, sections 201(c)(2) and 412(a) of the Act, *30 U.S.C. 1211*(c)(2) and 1242(a), confer upon OSMRE broad rulemaking authority. Moreover, section 201(c)(1) of the Act, *30 U.S.C. 1211*(c)(1), authorizes OSMRE to "order the suspension, revocation, or withholding of any permit for failure to comply with any of the provisions of this Act or any rules and regulations adopted pursuant thereto." (Emphasis added.)

Sections 201(c) and 510(c) of the Act, *30 U.S.C. 1211*(c) and 1260(c), authorize a regulatory authority to withhold a permit from any applicant who either directly, indirectly or through a relationship of ownership or control is in violation of the Act or certain other environmental laws. The Congress could not have intended that OSMRE and State regulatory authorities would withhold a permit in accordance with these provisions from an applicant responsible for or linked to an unabated violation or delinquent penalty or fee, but do nothing to remedy a permit that was improvidently issued.

Since section 201(c)(1) covers a failure to comply with any of the provisions of the Act or its implementing regulations, it authorizes the suspension, rescission or taking of other remedial measures against a permit for a failure to comply with the permit withholding requirements of 30 CFR 773.15, or the State program equivalent. Moreover, the underlying failure to abate a violation or to pay a civil penalty or reclamation fee when due also is a "failure to comply" within the purview of this section of the Act.

As stated by the Act in section 102(a), *30 U.S.C. 1202*(a), the Act was passed "to protect society and the environment from the adverse effects of surface coal mining operations." As one means to achieve this protection, the Act denies certain persons the privilege of mining. Where through fraud, mistake or otherwise, such a person improvidently is issued a permit, the regulatory authority is required by the Act to protect society and the environment by taking appropriate measures to bring the permittee into compliance. The remedial measures of this rule, with the ultimate sanctions of permit suspension and rescission, will provide an incentive for the permittee or other person responsible to abate any violation or pay any delinquent penalty or fee which should have caused the regulatory authority to withhold the permit.

Authority for this rule also is provided by sections 101, 412(a), 501(b), 504, 506, 507, 511, 518 and 701 of the Act, *30 U.S.C. 1201*, 1242(a), 1251(b), 1254, 1256, 1257, 1261, 1268 and 1291.

GENERAL AUTHORITY

One commenter said that section 201(c)(1) of the Act does not provide general authority for permit suspension and revocation, but only under the circumstances set out in the specific implementing provisions of the Act. For each delegation of authority in section 201(c), the commenter said, the Act included a specific provision governing the circumstances and manner under which OSMRE may exercise that authority. Thus, the commenter concluded, the authority to order the suspension or revocation of a permit under section 201(c)(1) applied only to suspension or revocation under section 521(a)(4) of the Act for a pattern of violations.

OSMRE disagrees. There is nothing in the Act or its legislative history to support the commenter's constrained reading of section 201(c)(1).

If the Congress had intended to give section 201(c)(1) the limited scope suggested by the commenter, it would not have drafted that section as it did in far broader terms than section 521(a)(4). Section 201(c)(1) authorizes the revocation of a permit generally for a "failure to comply with any of the provisions of this Act or any rules and regulations adopted pursuant thereto." Section 521(a)(4) addresses only the limited circumstances where there exists a pattern of violations caused by the permittee, either willfully or by an unwarranted failure to comply with the Act. Since the Congress used broader language in section 201(c)(1) than it did in section 521(a)(4), OSMRE concludes that the Congress intended to give section 201(c)(1) broader scope.

Contrary to the commenter's analysis, section 201(c) is not a mere summary of the subsequent detailed provisions of the Act, but an independent mandate for OSMRE to take the specified actions in appropriate circumstances. Section 201(c)(1), like the general authority for promulgating regulations in section 201(c)(2), is prefaced by the statement, "The Secretary, acting through [OSMRE], shall * * * ." (Emphasis added.) This use of the word shall gives section 201 independent force and effect which is not subservient to any other provision of the Act.

If the Congress had intended section 201(c) as a summary of other specific provisions, it would have introduced section 201(c) with descriptive language more like that used to set out the purposes of the Act in section 102. Since the Congress did not do so, however, but instead chose to use the term shall, OSMRE concludes that the Congress intended section 201(c)(1) as general authority for permit suspension and rescission for a failure to comply with the Act or its implementing regulations.

This conclusion regarding the scope of section 201(c)(1) is consistent with the decision of the U.S. Court of Appeals for the District of Columbia Circuit in In re: Permanent Surface Mining Regulation Litigation (*In re: Permanent), 653 F.2d 514 (D.C. Cir. 1981),* cert. denied, *454 U.S. 822 (1981).* There the court examined the authority of the Secretary of the Interior to require a permit applicant to submit information not specifically identified in section 507(b) of the Act, *30 U.S.C. 1257*(b). In analyzing the authority provided to the Secretary by section 201(c)(2) of the Act, the court said:

"Appellant urges as a proposition of administrative law that the existence of specific grants must eviscerate a general grant of rulemaking power. That proposition cannot be squared with recent Supreme Court decisions relying on general rulemaking grants to uphold rulemaking authority despite the presence of specific grants in the statutes scrutinized."

Id. at 523 (citations omitted). In view of the general rulemaking authority provided by section 201(c)(2), the court held that

"The Act's explicit listings of information required of permit applicants are not exhaustive, and do not preclude the Secretary from requiring the states to secure additional information needed to insure compliance with the Act."

Id. at 527. Thus, OSMRE may rely on section 201(c)(1) and the broad rulemaking authority provided by section 201(c)(2) to provide for the rescission of an improvidently issued permit under circumstances not specifically set out in the Act.

NOTICE OF VIOLATION

Initial proposed Sections 773.20 and 843.21 included a notice of violation (NOV) as a preliminary step in the permit rescission process. In this final rule, as in the later proposed rule, an NOV is included only in Section 843.2l, which authorizes OSMRE to issue a Federal NOV to a State permittee if the State does not take appropriate action on an improvidently issued permit or show good cause for its lack of action.

Provision for the issuance of an NOV was deleted from Section 773.20 because it is not needed where the regulatory authority can directly impose on a permittee the alternative remedial measures of Section 773.20(c). Where OSMRE is enforcing an improvidently issued State permit under Section 843.21, however, it cannot directly impose these remedial measures and an NOV is needed if the State does not take appropriate action or show good cause for not doing so. Since OSMRE will not have issued the State permit, and thus cannot rescind it or impose the other remedial measures of Section 773.20, a Federal NOV may be needed to bring the permittee into compliance with the applicable regulatory program.

A number of commenters said that the issuance of an NOV for an improvidently issued permit was not authorized by the Act. Some said that OSMRE was not authorized to issue an NOV in a primacy State, that the proposed rule was an unauthorized intrusion into State authority vested by the Act over permitting issues and decisions, and that the rule conflicted with OSMRE regulations recognizing the exclusive jurisdiction of primacy States as regulatory authorities under the Act.

Another commenter said there can be only one regulatory authority at a time in a primacy State, and before OSMRE can issue an NOV it must divest the State of primacy. The commenter said that the rule would require a permittee to meet two different requirements because OSMRE and the State were unable to agree on a single interpretation of the Act.

OSMRE disagrees. To begin with, the violation on which an NOV under Section 843.21 is based is not the improvident issuance of the permit, but the permittee's continuing to operate under a permit that is not authorized by the regulatory program. Because the permittee can abate this violation by ceasing to operate or by securing abatement of the violation or payment of the delinquent penalty or fee which should have prevented the issuance of the permit, in the absence of permit rescission or another appropriate remedial measure the issuance of an NOV is a valid enforcement mechanism.

Federal authority for State program oversight and enforcement, including the issuance of a Federal NOV, is well-established. For an OSMRE statement of policy on this general issue, see *48 FR 9199* (March 3, 1983). For detailed analyses of this issue, see the OSMRE "Notice of availability of petition to initiate rulemaking and request for comment," *51 FR 27197* (July 30, 1986); the "Notice of decision on petition for rulemaking," *52 FR 21598* (June 8, 1987) (The denial of this petition with respect to Federal NOV's in primacy States is under appeal in the case of N.C.A. v Gentile, No. 87-2076 (D.D.C. 1987)); and the final rule on the evaluation of State responses to ten-day notices (Ten Day Notice Rule), *53 FR 26728* (July 14, 1988). OSMRE incorporates these documents by reference into this preamble.

Thus, OSMRE has the authority to issue a Federal NOV in a State where operations are conducted unlawfully under an improvidently issued State permit.

Another commenter said that OSMRE has no direct authority to interject itself into the State permitting process or to require State action, except through the substitution of Federal enforcement of the State program under section 521(b) of the Act.

OSMRE disagrees that Federal oversight and enforcement of a State program is limited to the specific process set out in section 521(b) of the Act. As discussed in detail in the previously cited references, sections 201 and 521(b) and other provisions of the Act authorize OSMRE to take the individual oversight and enforcement actions provided for in this rule.

OVERSIGHT OF STATE PERMITTING DECISIONS

One commenter said that even assuming that OSMRE retained authority to issue a Federal NOV in a primacy State, that authority did not extend to enforcement action resulting from OSMRE reevaluation of a State permitting decision. Where a State does not take appropriate action on an improvidently issued permit, the commenter said, OSMRE must either appeal the State decision to issue the permit or initiate Federal enforcement under section 521(b) of the Act.

The commenter said that to read section 521 of the Act as authorizing Federal oversight of individual State permitting decisions disregarded the Federalist scheme of the Act which granted primacy States exclusive jurisdiction to administer and enforce their programs. Citing case law and statutory authority which authorized another agency to veto individual permits, the commenter concluded that OSMRE did not have similar authority, and that primacy States retained complete independence in individual permitting decisions.

OSMRE disagrees. The enforcement provisions of Section 843.21 of this rule are in accordance with section 521 of the Act, which provides for Federal enforcement where a State does not take appropriate enforcement action, and section 201(c)(1) of the Act, which gives to the Secretary of the Interior acting through OSMRE broad powers to suspend, revoke or withhold any permit for noncompliance with the provisions of the Act or its implementing regulations. The noncompliance in this instance is both the act of operating under an improvidently issued permit and the underlying noncompliance by the permittee or those owning or controlling the permittee.

Another commenter cited the case of *Haydo v. Amerikol Mining, Inc., 830 F.2d 494 (3rd Cir. 1987),* to support its contention that the rule was an unauthorized intrusion into the State permitting process. The portion of Haydo relied on by the commenter states that

"In the SMCRA, the state is expressly offered "exclusive" jurisdiction to enforce its regulatory program. We have encountered nothing in the statute or the legislative history which leads us to believe that anything other than the ordinary meaning of "exclusive" was intended by the enactors of the SMCRA."

Id. at 497. Citing In re: *Permanent, 653 F.2d at 519,* the commenter said that the decision in Haydo followed the views of the U.S. District Court for the District of Columbia that "permit decisions are matters of state jurisdiction in which the Secretary plays no role."

OSMRE disagrees, both with the commenter's characterization of the rule as an intrusion into the State permitting process, and that these out-of-context quotations, or the decisions themselves, diminish the legal authority for this rule.

This rule does not improperly intrude into or displace State permitting responsibilities, nor does it in any way modify the permit issuance process. In primacy States, the States themselves will continue to issue and revise permits. Section 773.20 of the rule establishes minimum national standards for State regulatory authorities to implement for dealing with an improvidently issued State permit. State regulatory authorities will suspend, revoke or take the other remedial measures of this rule against an improvidently issued State permit following corresponding State program amendments.

This rule does not authorize OSMRE to take any action that would interfere with State permitting activities. Section 843.21 requires OSMRE to request that the State regulatory authority take the lead role in curing a defective permit. Only where a State does not demonstrate that it has acted appropriately, or show good cause for not doing so, will OSMRE take action.

OSMRE oversight action in such circumstances will not include suspension or rescission of the State permit, a "permitting" action, but instead may include the issuance of a notice of violation, an enforcement action. This limited Federal role is intended to respect the lead role assumed by the States in administering State programs.

With respect to the court decisions cited by the commenter, neither addresses the scope of section 201(c)(1) of the Act, which provides authority for this rule. The sentence from In re: Permanent, which the commenter quoted only in part, begins with the qualifying phrase, "Administrative and judicial appeals * * *," which significantly limits its scope. *Id. at 519.* This is consistent with the prior statement of the court in the same decision that

"[o]ur inquiry is narrow. We are called upon to determine only whether the Secretary has rulemaking authority to require that permit applicants submit any items of information beyond those enumerated in the Act."

Id. at 517 (latter emphasis in original, footnote omitted). As noted previously, the court held that section 201(c)(2) of the Act provided authority for requesting information not specifically enumerated in Title V of the Act.

And contrary to the commenter's broad reading, Haydo involved the limited procedural

"Question of whether there is subject matter jurisdiction in the federal district court to hear a claim for damages arising from an alleged violation [of the Act] by an operator * * * where a state has submitted and the Secretary of the Interior has approved a program for state regulation as contemplated by the Act."

Haydo, 830 F.2d at 495.

Because Haydo concerns a citizen's suit brought under section 520 of the Act, it does not address the Secretary's enforcement responsibilities under section 521 of the Act. The word "exclusive," which the court in Haydo quotes, appears in section 503 of the Act, which contains an exception for OSMRE actions under section 521. This exception was not relevant in Haydo, but is relevant to and supports this rule.

In view of their limited applicability, neither of these court decisions cited by the commenter supports any limitation on OSMRE authority for adopting this rule.

GOOD FAITH RELIANCE

One commenter said that the Act did not authorize permit rescission or other enforcement action for a mistake made by a regulatory authority where the permittee was operating in good faith reliance on the regulatory authority's own findings. Another commenter said that where a permit was improvidently issued any responsibility for that occurrence rested with the State regulatory authority and not the permittee.

OSMRE disagrees. Since section 201(c)(1) of the Act uses the term "a failure" generally, without regard to cause, it authorizes the revocation of a permit regardless of whether ultimate responsibility for noncompliance with section 510(c) of the Act in issuing a permit lies with the permittee, the regulatory authority, or some third party, and regardless of any subsequent good-faith reliance on the part of the permittee.

As noted in the preceding discussions of Sections 773.20 and 773.21, however, OSMRE recognizes that under this rule a potential exists for adversely affecting permittees who otherwise are complying with the regulatory program. To limit that potential, while at the same time ensuring that serious violations are abated and delinquent penalties and fees are paid, Section 773.20(b) includes carefully selected criteria governing the circumstances under which a regulatory authority may find that a permit was improvidently issued; Section 773.20(c) includes alternative remedial measures which will enable a regulatory authority to respond in a manner consistent with those circumstances; and Section 773.21 includes a number of safeguards to protect the legitimate interests of the permittee in the rescission process.

Given these features, this rule strikes a reasonable balance between the rights of permittees and the benefits to be derived from abating violations and collecting delinquent penalties and fees associated with improvidently issued permits.

PERMIT RESCISSION VS. REVOCATION

Several commenters said that the Act did not authorize rescission of a permit, only revocation.

OSMRE disagrees. Although section 201(c)(1) of the Act uses the term revocation and not rescission, these two terms are equivalent.

To differentiate between the revocation of a permit for reasons that existed at the time of permit issuance, and revocation for reasons that subsequently arose, OSMRE applies the term rescind to the former and revoke to the latter. In either case the ultimate effect of rescission or revocation is identical -- the loss of the permit -- and the choice of different terms for each is simply a matter of administrative convenience.

REVISION OF FEDERAL AND STATE PROGRAMS

One commenter said that the proposed rule would revise existing State and Federal programs, a result which was not authorized by the sections of the Act cited in the preamble to the initial proposed rule. Another commenter said that until a State amended its regulatory program or OSMRE amended the Federal program for a State, OSMRE had no authority to implement in a particular State the permit rescission process set out in initial proposed Sections 773.20 and 843.21.

As one commenter correctly pointed out, however, section 504 of the Act, *30 U.S.C. 1254*, provides specific authority for the promulgation of a Federal program. Likewise, section 504 authorizes OSMRE to revise a Federal program. Thus, to the extent this rule revises Federal programs it is authorized by section 504 of the Act.

As stated in the preamble to the initial proposed rule *(51 FR 25827)* and in this preamble under the subsequent headings, III. Procedural Matters, Effect in Federal Program States and on Indian Lands, this rule will apply through cross-referencing to the Federal program States. Thus, no further action is needed to incorporate its requirements into Federal programs.

Contrary to the commenters' assertions, this rule does not revise any State program. While Section 843.21 refers to "the State program equivalents of Sections 773.20 and 773.21," this rule does not establish any such equivalents, which must be done, where appropriate, in accordance with the procedures set out at 30 CFR 732.17.

Nor does Section 843.21 implement in any State program a permit rescission process. While initial proposed Section 843.21 was predicated on a State not taking appropriate action under proposed Section 772.20(b), and thus appeared to require State compliance with that section, later proposed and final Section 843.21 require a State to take appropriate action under the State program equivalents of Sections 773.20 and 773.21.

Finally, Section 843.21 does not include procedures for permit suspension or rescission, either at the State or Federal level. Section 843.21 only authorizes OSMRE to impose appropriate remedial measures, including the issuance of an NOV, if a State does not have and does not take appropriate action under State program equivalents of Sections 773.20 and 773.21. Under this rule, only a State may suspend or rescind an improvidently issued State permit.

NEED FOR INSPECTION

One commenter said that OSMRE authority to issue an NOV generally is predicated on the outcome of a Federal inspection. Thus, for example, the ten-day notice procedures of existing Section 843.12(a)(2) came into play "on the basis of any Federal inspection other than one described in paragraph (a)(1) of this section."

OSMRE disagrees. The basis for an NOV is a determination by the regulatory authority that a violation exists, which need not come about as a result of an actual on-site review.

APPLICANT INFORMATION

One commenter said that to the extent initial proposed Section 773.20(a)(1) requested information on parties who own or control the applicant it exceeded the authority provided by section 510(c) of the Act.

Neither initial proposed Section 773.20(a)(1) nor its final counterpart directly require a permittee to provide any information. The requirements of Section 773.20 apply where a regulatory authority has information which gives it reason to believe that it improvidently issued a surface coal mining and reclamation permit. Section 773.20 does not, however, require the permittee to submit any additional information.

2. RELATIONSHIP TO OSMRE RULE ON OWNERSHIP AND CONTROL

Several commenters said that it was not appropriate to propose this rule until after OSMRE published the final ownership and control rule. Some said it was not possible to comment adequately on the proposed rule in the absence of that final rule. Some suggested that OSMRE extend the comment period on the rule until ninety days after the ownership and control rule was promulgated.

OSMRE disagrees, and declined to adopt the commenters' suggestion. Although this rule relates to the concurrently proposed ownership and control rule, for which the final rule was published by OSMRE on October 3, 1988 *(53 FR 38868)*, it does not depend on the specific wording of that rule.

Moreover, the commenters on the August 4, 1988, later proposed rule had the benefit of the last proposal for the ownership and control rule, published on October 5, 1987 *(52 FR 37164)*. Based on the comments received, it is evident that even without the final ownership and control rule interested persons were able to submit focused and meaningful comments on this rule.

One commenter, who had read the preamble to the initial proposed rule as indicating that OSMRE intended to apply the definitions in the final ownership and control rule retroactively, said that the later proposed rule appeared to address this objection, but fell short of resolving the problem completely. The commenter said that the ownership and control criteria set out in the rule did not reflect the date when the underlying violations review criteria became effective in a particular regulatory program.

Citing *United States v. Shelton Coal Corp., 829 F.2d 1336, 1339-40 (4th Cir. 1987)*, the commenter said that operators reasonably relied on the rules in force at the time of permit issuance, and applying a different standard would be unfair and unconscionable. Thus, the commenter concluded, the rule should apply a particular violations review criterion only after it was included in the regulatory program.

OSMRE appreciates the commenter's concern, which is one reason why it published the later proposed rule. As stated in the preceding discussion of Section 773.20, this rule applies only to those ownership and control links covered by the applicable regulatory program at the time the permit was issued.

To the extent the commenter may have cited the decision in Shelton as precedent for the position that OSMRE lacks authority to adopt a rule requiring the suspension or rescission of permits issued prior to its effective date, OSMRE disagrees that the decision has any bearing on this issue. In Shelton, which concerned the liability of an operator under the approved Virginia State program for the payment of reclamation fees, the court said

"[t]here was a basis for * * * reasonable reliance, upon Virginia's exemption, and Virginia's interpretation of the statute was a rational one. There was no indication that the interpretation contravened any federal rule."

Id. at 1339. In the case of an improvidently issued permit, however, there is no corresponding basis for a permittee's reliance on noncompliance with the requirements of section 510(c) of the Act, which directly contravenes the related Federal and State procedures.

3. THE RULE IS NOT RETROACTIVE

Several commenters on the initial proposed rule were opposed to its alleged retroactive application. The commenters said that while some operators temporarily would escape action as a result of not applying the rule to existing permits, this would avoid a tendency of the regulatory authority to reexamine every previously issued permit application, which would cause chaos in the regulated community.

The commenters, concerns are not well-founded. This rule is targeted only at improvidently issued permits, and is not intended to disrupt any permittee operating under a permit that was validly issued.

In response to commenter concern over retroactive application of the initial proposed rule, the later proposed rule included several alternatives. One commenter said that these alternatives should not be considered because they would provide for the rescission of permits properly issued under the regulatory program.

OSMRE is sensitive to such concerns over changes in regulatory program standards after permit issuance. This rule requires no remedial action against a permit that was properly issued in accordance with the regulatory program in effect at the time the permit was issued.

The same commenter said that permit rescission should apply only to permits issued after the effective date of the rule or any corresponding State program amendments. The commenter said that numerous permanent program permits have been issued for ongoing operations, and it would not be fair to subject them to rescission through retroactive application of the rule.

OSMRE disagrees that the rule as adopted is retroactive. This rule does not change any permitting standard, either retroactively or prospectively, but requires the regulatory authority to apply the violations review criteria of the regulatory program at the time of permit issuance in determining the current violations review status of a permit. It will not affect any permit for which a previous violations review defect has been corrected or otherwise has ceased to exist.

The rule will apply prospectively to existing Federal permits, and to State permits whenever consistent regulations are approved as amendments to State regulatory programs. The rule will operate only with respect to violations, penalties and fees that remain outstanding. Violations may be abated at any time, and once abated their past existence will not result in any proceedings under this rule. Thus, the rule recognizes the commenter's concern and enables the permittee to legitimize activities under an improvidently issued permit through abatement of the underlying violation or payment of the delinquent penalty or fee.

III. PROCEDURAL MATTERS

Effect in Federal Program States and on Indian Lands

Sections 773.20 and 773.21 of this rule will apply, through cross-referencing, to the following Federal program States: California, Georgia, Idaho, Massachusetts, Michigan, North Carolina, Oregon, Rhode Island, South Dakota, Tennessee and Washington. The Federal programs for these States appear at 30 CFR Parts 905, 910, 912, 921, 922, 933, 937, 939, 941, 942 and 947, respectively. No comments were received concerning unique conditions in any of these States which would require changes to the national rules or to any of the Federal programs.

The same sections of this rule also will apply, through cross-referencing at 30 CFR Part 750, to surface coal mining and reclamation operations on Indian lands.

By its own terms, Section 843.21 of this rule does not apply to Federal program States or on Indian lands, but only to those States with State programs.

Federal Paperwork Reduction Act

This rule contains no information collection requirements, and thus does not require Office of Management and Budget approval under *44 U.S.C. 3501* et seq.

Executive Order 12291

The Department of the Interior has examined this rule according to the criteria of Executive Order 12291 (February 17, 198l) and has determined that it is not major and does not require a regulatory impact analysis.

This rule will impose only minor costs on the coal industry and coal consumers. It will not impose any significant new regulatory burden on operators because it does not change the existing permitting obligations of OSMRE, State regulatory authorities, permit applicants, and operators, but provides regulatory authorities with supplemental procedures for ensuring that operators are in full compliance with existing regulations.

Thus, this rule should not add appreciably to the cost of operating a mine in compliance with an approved regulatory program.

Regulatory Flexibility Act

For the reasons discussed in the previous paragraph, the Department of the Interior also has determined, pursuant to the Regulatory Flexibility Act, *5 U.S.C. 601* et seq., that this rule will not have a significant economic impact on a substantial number of small entities.

Some initial commenters said that OSMRE did not comply with the Regulatory Flexibility Act in proposing this rule. Others said that OSMRE did not comply with Executive Order 12291. They said that the proposed rule would make it more difficult for United States-based industry to meet foreign competition, and would impose major new costs on the

coal industry and on consumers. Another commenter said that the rule would reduce the number of jobs in the surface coal mining industry.

OSMRE disagrees. Executive Order 12291 and the Regulatory Flexibility Act were complied with in promulgating the rule. This rule imposes no new regulatory burden on operators, and will not affect the ability of United States-based industry to compete with foreign operators, nor will it add to the costs of industry or of consumers. OSMRE analyzed the effect of this rule on jobs, small entities, and on other economic factors, and found that it will have only minimal effect, if any.

OSMRE also considered possible significant economic effects on small entities -- those operators whose surface and underground coal production does not exceed 100,000 tons annually. Because this rule imposes no direct regulatory burden on operators, the effect of the rule will not be major, and it should have little or no economic effect on small entities who otherwise are in compliance with the Act.

Executive Order 12612

In accordance with section 6(b) of Executive Order 12612, OSMRE has determined that this rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

One commenter said that the later proposed rule conflicted with OSMRE regulations recognizing the exclusive jurisdiction of primacy States as regulatory authorities, and failed to satisfy the agency's obligations under Executive Order 12612 regarding federalism principles.

OSMRE disagrees. The rule fully recognizes and is consistent with the primary role of State regulatory authorities in administering and enforcing State regulatory programs. The rule does nothing to alter any State program requirement in force at the time of permit issuance. In keeping with the Federalism principles embodied in the Act, the rule gives a State a reasonable opportunity to take appropriate action on an improvidently issued permit.

As discussed elsewhere in this preamble, this rule does not unnecessarily intrude into activities delegated to States, but facilitates the Secretary's mandatory role in the oversight of State regulatory programs as required by the Act.

National Environmental Policy Act

OSMRE has prepared an environmental assessment (EA) and has made a finding (FONSI) that this rule will not significantly affect the quality of the human environment under section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), *42 U.S.C. 4332*(2)(C). The rule should result in better compliance with the environmental standards of the Act, and therefore result in enhanced protection of the environment.

The EA and FONSI are on file in the OSMRE Administrative Record at the address specified previously (see "ADDRESSES").

Author

The author of this rule is Albert A. Kashinski, Division of Surface Mining, Office of the Solicitor, U.S. Department of the Interior, Washington, DC 20240.

LIST OF SUBJECTS

30 CFR Part 773

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

30 CFR Part 843

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

Accordingly, 30 CFR Parts 773 and 843 are amended as follows:

Date: November 7, 1988.
James E. Cason, Acting Assistant Secretary -- Land and Minerals Management.

PART 773 -- REQUIREMENTS FOR PERMITS AND PERMIT PROCESSING

1. The authority citation for Part 773 continues to read as follows:

Authority: *30 U.S.C. 1201* et seq., *16 U.S.C. 470* et seq., *16 U.S.C. 1531* et seq., *16 U.S.C. 661* et seq., *16 U.S.C. 703* et seq., *16 U.S.C. 668a* et seq., *16 U.S.C. 469* et seq., *16 U.S.C. 470aa* et seq., and Pub L. 100-34.

2. Section 773.20 is added to read as follows:

SECTION 773.20 - IMPROVIDENTLY ISSUED PERMITS: GENERAL PROCEDURES.

(a) Permit review. A regulatory authority which has reason to believe that it improvidently issued a surface coal mining and reclamation permit shall review the circumstances under which the permit was issued, using the criteria in paragraph (b) of this section. Where the regulatory authority finds that the permit was improvidently issued, it shall comply with paragraph (c) of this section.

(b) Review criteria. A regulatory authority shall find that a surface coal mining and reclamation permit was improvidently issued if:

(1) Under the violations review criteria of the regulatory program at the time the permit was issued:

(i) The regulatory authority should not have issued the permit because of an unabated violation or a delinquent penalty or fee; or

(ii) The permit was issued on the presumption that a notice of violation was in the process of being corrected to the satisfaction of the agency with jurisdiction over the violation, but a cessation order subsequently was issued; and

(2) The violation, penalty or fee:

(i) Remains unabated or delinquent; and

(ii) Is not the subject of a good faith appeal, or of an abatement plan or payment schedule with which the permittee or other person responsible is complying to the satisfaction of the responsible agency; and

(3) Where the permittee was linked to the violation, penalty or fee through ownership or control, under the violations review criteria of the regulatory program at the time the permit was issued an ownership or control link between the permittee and the person responsible for the violation, penalty or fee still exists, or where the link was severed the permittee continues to be responsible for the violation, penalty or fee.

(c) Remedial measures. A regulatory authority which, under paragraph (b) of this section, finds that because of an unabated violation or a delinquent penalty or fee a permit was improvidently issued shall use one or more of the following remedial measures:

(1) Implement, with the cooperation of the permittee or other person responsible, and of the responsible agency, a plan for abatement of the violation or a schedule for payment of the penalty or fee;

(2) Impose on the permit a condition requiring that in a reasonable period of time the permittee or other person responsible abate the violation or pay the penalty or fee;

(3) Suspend the permit until the violation is abated or the penalty or fee is paid; or

(4) Rescind the permit under Section 773.21 of this part.

3. Section 773.21 is added to read as follows:

SECTION 773.21 - IMPROVIDENTLY ISSUED PERMITS: RESCISSION PROCEDURES.

A regulatory authority which, under Section 773.20(c)(4) of this part, elects to rescind an improvidently issued permit shall serve on the permittee a notice of proposed suspension and rescission which includes the reasons for the finding of the regulatory authority under Section 773.20(b) of this part and states that:

(a) Automatic suspension and rescission. After a specified period of time not to exceed 90 days the permit automatically will become suspended, and not to exceed 90 days thereafter rescinded, unless within those periods the permittee submits proof, and the regulatory authority finds, that:

(1) The finding of the regulatory authority under Section 773.20(b) of this part was erroneous;

(2) The permittee or other person responsible has abated the violation on which the finding was based, or paid the penalty or fee, to the satisfaction of the responsible agency;

(3) The violation, penalty or fee is the subject of a good faith appeal, or of an abatement plan or payment schedule with which the permittee or other person responsible is complying to the satisfaction of the responsible agency; or

(4) Since the finding was made, the permittee has severed any ownership or control link with the person responsible for, and does not continue to be responsible for, the violation, penalty or fee;

(b) Cessation of operations. After permit suspension or rescission, the permittee shall cease all surface coal mining and reclamation operations under the permit, except for violation abatement and for reclamation and other environmental protection measures as required by the regulatory authority; and

(c) Right to appeal. The permittee may file an appeal for administrative review of the notice under 43 CFR 4.1280-4.1286, or the State program equivalent, but where OSMRE is the regulatory authority the procedures of 43 CFR 4.21(a) shall not apply to suspend the effect of the notice.

PART 843 -- FEDERAL ENFORCEMENT

4. The authority citation for Part 843 continues to read as follows:

Authority: Pub. L. 95-87, *30 U.S.C. 1201* et seq., and Pub. L. l00-34.

5. Section 843.13 is amended by revising the heading to read as follows:

SECTION 843.13 - SUSPENSION OR REVOCATION OF PERMITS: PATTERN OF VIOLATIONS.

6. Section 843.21 is added to read as follows:

SECTION 843.21 - PROCEDURES FOR IMPROVIDENTLY ISSUED STATE PERMITS.

(a) Initial notice. If OSMRE has reason to believe that a State surface coal mining and reclamation permit meets the criteria for an improvidently issued permit in Section 773.20(b) of this chapter, or the State program equivalent, and the State has failed to take appropriate action on the permit under State program equivalents of Sections 773.20 and 773.21 of this chapter, OSMRE shall issue to the State, and should provide to the permittee, an initial notice stating in writing the reasons for that belief.

(b) State response. Within thirty days of the date on which an initial notice is issued under paragraph (a) of this section, the State shall demonstrate to OSMRE in writing either that:

(1) The permit does not meet the criteria of Section 773.20(b) of this chapter, or the State program equivalent; or

(2) The State is in compliance with the State program equivalents of Sections 773.20 and 773.21 of this chapter.

(c) Ten-day notice. If OSMRE finds that the State has failed to make the demonstration required by paragraph (b) of this section, OSMRE shall issue to the State a ten-day notice stating in writing the reasons for that finding and requesting that within ten days the State take appropriate action under the State program equivalents of Sections 773.20 and 773.21 of this chapter;

(d) Federal enforcement. After ten days from the date on which a ten-day notice is issued under paragraph (c) of this section, if OSMRE finds that the State has failed to take appropriate action under the State program equivalents of Sections 773.20 and 773.21 of this chapter, or to show good cause for such failure, OSMRE shall take appropriate remedial action. Such remedial action may include the issuance to the permittee of a notice of violation requiring that by a specified date all mining operations shall cease and reclamation of all areas for which a reclamation obligation exists shall commence or continue unless, to the satisfaction of the responsible agency, any violation, penalty or fee on which the notice of violation was based is abated or paid, an abatement plan or payment schedule is entered into, or any ownership or control link with the person responsible for the violation, penalty or fee is severed and the permittee does not continue to be responsible for the violation, penalty or fee. Under this paragraph, good cause shall not include the lack of State program equivalents of Sections 773.20 and 773.21 of this chapter.

(e) Remedies to notice of violation. Upon receipt from any person of information concerning the issuance of a notice of violation under paragraph (d) of this section, OSMRE shall review the information and:

(1) Vacate the notice of violation if it resulted from an erroneous conclusion under this section; or

(2) Terminate the notice of violation if:

(i) The permittee or other person responsible has, to the satisfaction of the responsible agency, abated any violation or paid any penalty or fee on which the notice of violation was based;

(ii) The permittee or other person responsible has filed and is pursuing a good faith appeal of the violation, penalty or fee, or has entered into and is complying with an abatement plan or payment schedule to the satisfaction of the responsible agency; or

(iii) Since the notice of violation was issued, the permittee has severed any ownership or control link with the person responsible for, and does not continue to be responsible for, the violation, penalty or fee;

(f) No civil penalty. OSMRE shall not assess a civil penalty for a notice of violation issued under this section.

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