

	U.S. DEPARTMENT OF THE INTERIOR OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT	Subject Number: <b>INE-35</b>
	<b>DIRECTIVES SYSTEM</b>	Transmittal Number: <b>996</b>
		Date: <b>MAY 03 2019</b>
Subject: Ten-Day Notices		
Approval: <i>Wanda St. Owens</i>		Title: Deputy Director Exercising the Authority of the Director

1. **Purpose.** This directive conveys procedures and guidance for the issuance of ten-day notices (TDNs) to State and Tribal regulatory authorities<sup>1</sup> (RAs), the evaluation of RA responses to those notices, and informal reviews of Field Office Director determinations with respect to those responses.

Section 521 of the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act) establishes an enforcement mechanism by which the Office of Surface Mining Reclamation and Enforcement (OSMRE) gives RAs notice about the possible violation of any requirement of the Act or any permit condition required by the Act, along with ten days “to take appropriate action to cause said violation to be corrected or to show good cause for such failure.” 30 U.S.C. 1271. OSMRE’s TDN regulations are set forth at 30 CFR 842.11 and 843.12. In general, absent an imminent danger or harm scenario, OSMRE will issue a TDN to an RA when OSMRE has reason to believe or determines a violation of SMCRA or the applicable State program exists. OSMRE will conduct a Federal inspection or re-inspection when, in response to a TDN, the RA fails to take appropriate action to cause the violation to be corrected or to show good cause for failure to do so. See 30 CFR 842.11(b)(1) and 843.12(a)(2).

On July 14, 1988 (53 FR 26728), OSMRE published amended Federal inspection and enforcement regulations that established a uniform standard for evaluation of RA responses to TDNs. Under that standard, OSMRE will accept an RA’s response to a TDN as an appropriate action for causing a violation to be corrected or as good cause for failure to do so, unless the RA has acted in a manner that is arbitrary, capricious, or an abuse of discretion under the approved regulatory program. See 30 CFR 842.11(b)(1)(ii)(B)(2). The rule also identifies measures that would constitute appropriate action [see 30 CFR 842.11(b)(1)(ii)(B)(3)] and circumstances under which the RA would have good cause for not taking appropriate action [see 30 CFR 842.11(b)(1)(ii)(B)(4)]. Finally, the rule establishes a process by which an RA may request informal review of a Field Office

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<sup>1</sup> While there are currently no tribes that have approved regulatory programs, there are tribes that are in the process of developing programs.

Director's determination that the RA failed to take appropriate action in response to a TDN or show good cause for failing to do so. See 30 CFR 842.11(b)(1)(iii).<sup>2</sup>

2. **Summary of Changes.** This is a revision of an existing Directive. Previous versions are rescinded. All references to INE-24 have been removed as that Directive is being rescinded.

3. **Definitions.**

a. **Appropriate action,** as provided under 30 CFR 842.11(b)(1)(ii)(B)(3), means enforcement or other action authorized under the approved regulatory program to cause a violation to be corrected.

b. **Arbitrary, capricious, or an abuse of discretion** generally means, with respect to an RA response to a TDN, that the RA has acted—

(1) Irrationally in that the RA's interpretation of its program is inconsistent with the terms of the approved program or any prior RA interpretation recognized by the Secretary of the Interior (Secretary);

(2) Without adhering to correct procedures (as specified in the RA's approved program);

(3) Inconsistent with applicable law; or

(4) Without a rational basis after proper evaluation of relevant criteria.

c. **Authorized representative,** in the context of this directive, means a person certified by the Director or the Director's designee to—

(1) Conduct Federal inspections of surface coal mining and reclamation operations, including associated facilities and records;

(2) Issue TDNs; and

(3) Take appropriate enforcement actions, including issuance of notices of violation and cessation orders.

d. **Director** means the Director of OSMRE.

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<sup>2</sup> Under the procedures set forth at 30 CFR 842.15, certain persons may request informal review of a Field Office Director's decision not to inspect or take appropriate enforcement action with respect to any violation alleged by such a person in a request for a Federal inspection.

e. Federal inspection, in the context of this directive, means:

(1) An inspection conducted by an authorized representative of OSMRE under 30 CFR 842.11(b)(1) when an RA fails to take appropriate action, or to show good cause for such failure, in response to a TDN;

(2) An inspection conducted by an authorized representative of OSMRE under 30 CFR 842.11(b)(1) when a person provides adequate proof that an imminent danger or harm exists, and the RA has failed to take appropriate action; or

(3) Any other inspection conducted by OSMRE or jointly by OSMRE and an RA.

f. Field Office means a Field Office or any equivalent OSMRE organizational unit with responsibility for State or Tribal regulatory program oversight.

g. Field Office Director (or FOD) means the manager in charge of a Field Office or equivalent organizational unit with responsibility for State or Tribal regulatory program oversight.

h. Good cause. Under 30 CFR 842.11(b)(1)(ii)(B)(~~4~~), an RA has good cause for not taking enforcement or other action within ten days to cause a violation to be corrected if—

(1) The alleged violation does not exist under the approved regulatory program;

(2) The RA needs a reasonable, specific additional amount of time to determine whether a violation of the approved regulatory program exists (for example, the RA may need more than ten days to conduct a technical review or obtain laboratory analyses);

(3) Under the approved regulatory program, the RA lacks jurisdiction over either the alleged violation or the operation;

(4) An administrative review body or court of competent jurisdiction has issued an order legally precluding the RA from acting on the alleged violation, provided that the order is based either on the premise that the violation does not exist or a determination that the temporary relief standards of the approved regulatory program counterparts to section 525(c) or 526(c) of SMCRA have been met; or

(5) With regard to abandoned sites as defined in 30 CFR 840.11(g), the RA is diligently pursuing or has exhausted all appropriate enforcement provisions of the approved regulatory program.

i. Regional Director (or RD) means the senior executive with responsibility for OSMRE regional operations.

j. Ten-day notice or TDN means a form OSMRE uses to notify an RA under 30 CFR 842.11(b)(1)(ii)(B)(1) and 843.12(a)(2) whenever OSMRE has, on the basis of information available to it, including information from the RA or other sources, a reason to believe that a violation exists or when, on the basis of a Federal inspection, OSMRE determines that a violation exists and OSMRE has not issued a previous TDN for the same violation.

#### 4. Guidance.

a. Subject to the qualifications contained in section 4.j., below, an authorized representative of the Secretary will issue a TDN to the RA whenever the authorized representative has a reason to believe based upon information available to him or her that a violation of the Act, the Federal regulations, the approved regulatory program, or a permit condition (hereinafter violation) exists. This requirement applies to all requests for Federal inspections that OSMRE receives from citizens under 30 CFR 842.12, provided such requests give the authorized representative a reason to believe, based upon available information, that a violation exists. See section 6.a.(2), below, for procedures to follow when you receive a citizen complaint.

b. When evaluating whether you, the authorized representative, have a reason to believe that a violation, condition, or practice exists on the basis of available information, you must, as is set forth in 30 CFR 842.11(b)(2), consider whether the facts alleged by the informant would, if true, constitute a condition, practice, or violation. However, consistent with 30 CFR 842.11(b)(1)(i), the authorized representative should also consider other information that is known or that is easily and readily ascertainable when deciding whether there is a reason to believe, based upon available information, that a violation exists and that a TDN is warranted.

c. Consistent with the exclusive jurisdiction SMCRA confers on RAs and the oversight and enforcement authority reserved for OSMRE, OSMRE continues to believe that if citizens contact the RA initially, most problems will be resolved satisfactorily without the need for OSMRE's involvement. Accordingly, if the authorized representative is aware that the RA has investigated or is actively investigating the subject of the citizen complaint, the authorized representative will consider the RA's action before determining whether he or she has a reason to believe a violation exists. If the RA is still actively investigating and if otherwise appropriate, the authorized representative will afford the RA a reasonable amount of time to complete its investigation before deciding whether he or she has reason to believe a violation exists. The authorized representative should avoid duplication or redundancy of investigatory or enforcement activity with the RA. The Field Office will acknowledge the receipt of the complaint to the complainant. Citizen complaints will be processed in accordance with 30 CFR 842.12. When OSMRE sends a TDN to an RA as a result of a

citizen complaint, the authorized representative will also follow the procedures set forth in section 6.a.(2), below.

d. An authorized representative will issue a TDN to the RA whenever he or she determines, on the basis of a Federal inspection, that a violation exists, OSMRE has not issued a previous TDN for the same violation, and the RA has not taken appropriate action to cause the violation to be corrected.

e. The primary purpose of the TDN process is for OSMRE to communicate to the RA the potential existence of a violation and, if one exists, to cause it to be corrected or addressed. An RA has broad discretion in addressing violations under an approved program. The authorized representative will focus his or her inquiry on whether the violation was corrected and not on *how* the violation was corrected. Even if he or she does not agree with the method the RA has chosen, as long as the violation is corrected, the authorized representative will not issue a TDN because there is no reason to believe a violation exists.

f. The TDN process applies to all lands for which the RA has primary regulatory authority, including Federal lands for which a cooperative agreement under 30 CFR Part 745 is in effect.

g. The Field Office will consider the RA's response to a TDN to constitute appropriate action to cause a violation to be corrected, or good cause for failure to do so, unless the Field Office makes a written determination, in accordance with 30 CFR 842.11(b)(1)(ii)(B)(I), that the RA's response is arbitrary, capricious, or an abuse of discretion under the approved regulatory program. When the authorized representative is determining whether the action that the RA took is appropriate, he or she will focus on whether the action corrected the violation and will not second guess the RA's methodology for correcting the violation. The authorized representative will not view the RA's response as arbitrary, capricious, or an abuse of discretion simply because OSMRE would have acted differently than the RA in a particular situation. In general, OSMRE will make a finding of appropriate action or good cause if the RA presents a rational basis for its decision. In reviewing TDN responses, OSMRE will determine whether the RA's action or response is based upon a reasonable consideration of the relevant facts and is an exercise of reasoned discretion that does not deviate from the approved program in accordance with the definition of "arbitrary, capricious, or an abuse of discretion" above. If OSMRE determines that the RA's response to a TDN does not constitute appropriate action or good cause for inaction, the written determination will specify the programmatic, statutory, or regulatory basis for the conclusion that the RA's response is arbitrary, capricious, or an abuse of discretion.

h. Subject to the qualifications contained in section 4.j., below, the authorized representative will conduct a Federal inspection or re-inspection, as appropriate, and, if the alleged violation or violation in fact exists or continues to exist, take an appropriate enforcement action to cause abatement of the violation:

(1) If the authorized representative, with Field Office Director concurrence, determines that the RA, in response to a TDN, failed to take appropriate action or show good cause for failing to do so; and

(2) Either the time (five days) within which the RA may request informal review by the Regional Director has expired or the Regional Director affirms the authorized representative's written determination.

i. After evaluating the RA's response to the TDN, if the Field Office Director concludes that an approved regulatory program is inconsistent with the Act or Federal regulations to the extent that an alleged violation, or violation, is not explicitly addressed and is allowed under the approved program, the Field Office Director must elevate the issue to the Regional Director for possible action under 30 CFR Part 732 or Part 733, as provided in section j.(4), below.

j. A TDN will not be issued under the following circumstances:

(1) Imminent danger/harm.

(a) The authorized representative will issue a cessation order to the permittee under 30 CFR 843.11(a) if, on the basis of a Federal inspection, he or she finds any condition or practice, or any violation that creates an imminent danger to the health or safety of the public or is causing or can reasonably be expected to cause significant, imminent environmental harm.

(b) The authorized representative will immediately conduct a Federal inspection under 30 CFR 842.11(b)(1)(i) and (ii)(C) when a person provides adequate proof that:

i. An imminent danger or harm exists; and

ii. The RA has failed to take appropriate action.

(2) Joint oversight inspections with the RA. An authorized representative will not issue a TDN when he or she finds that the RA's inspector has already taken appropriate action, before the inspection is physically and administratively complete, concerning a violation or possible violation observed during the course of a joint OSMRE-RA oversight inspection. The time when an inspection will become physically and administratively complete may be agreed upon by the authorized representative and the RA's inspector while onsite and may be extended upon mutual agreement. Absent agreement, the Field Office Director will determine when an inspection is administratively and physically complete and

he or she will consider any pending State research, investigation, or enforcement procedures when making that determination.

(3) Previous issuance of a TDN that resulted in a Federal inspection. When an authorized representative, on the basis of a Federal inspection, determines that a violation exists, the authorized representative will not issue a TDN under 30 CFR 843.12(a)(2) if a TDN has previously been issued to the RA for the same violation under 30 CFR 842.11(b)(1)(ii)(B). In that instance, the authorized representative will proceed directly to an appropriate enforcement action.

(4) Programmatic Issues. OSMRE will not issue a TDN where a citizen has not alleged any site-specific violations and OSMRE determines that the issue raised by the citizen is programmatic in nature and more appropriately addressed through the 30 CFR Part 732 or 30 CFR Part 733 procedures. The following types of issues have been determined to be programmatic:

- (a) There is or may be a systemic implementation of an aspect of an approved program that OSMRE believes is inconsistent with the approved program;  
or
- (b) The approved State program lacks a counterpart to a requirement of the Act or Federal regulations resulting in the RA's inability to take enforcement action against certain types of violations or to perform certain regulatory functions.

(5) Notices of Intent to Sue. Unless a notice of intent to sue also meets the requirements of 30 CFR 842.12(a), and gives the authorized representative an independent reason to believe that a violation exists, based upon information available to him or her, OSMRE will not issue a TDN based solely upon a notice of intent to sue under section 520 of SMCRA. A notice of intent to sue initiates a process under section 520 of SMCRA that is separate from, and independent of, OSMRE's authority with respect to TDNs under section 521.

k. The computation of time under all provisions of this directive will conform to the requirements set forth in 30 CFR 700.15.

## 5. Responsibilities.

The following persons will carry out the listed responsibilities in accordance with the policies and procedures contained in this directive:

a. Authorized Representative:

(1) Determines whether a citizen's request for a Federal inspection under 30 CFR 842.12 provides him or her with a reason to believe, on the basis of information available, that a violation exists under 30 CFR 842.11(b)(2).

(2) Determines whether a citizen has provided adequate proof that an imminent danger or harm exists, and whether the RA has failed to take appropriate action, justifying an immediate Federal inspection in lieu of the TDN process. When the authorized representative is determining whether the action that the RA took is appropriate, he or she will focus on whether the action corrected any imminent danger or harm and will not second guess the RA's methodology.

(3) Issues TDNs when, on the basis of available information, including information from the RA and other sources, he or she has reason to believe a violation currently exists (e.g., the RA has not already taken appropriate action to cause the violation to be corrected), and OSMRE has not issued a previous TDN for the same violation.

(4) Issues TDNs when, on the basis of a Federal inspection, OSMRE determines that a violation currently exists (e.g., the RA has not already taken appropriate action to cause the violation to be corrected) and OSMRE has not issued a previous TDN for the same violation.

(5) Establishes a separate case file for each TDN. The file must contain, in chronological order, all documents and correspondence, including e-mails, associated with the TDN.

(6) When appropriate, grants extensions of time up to 45 days for the RA to respond to a TDN and tracks the RA's progress in completing all promised actions.

(7) Determines in writing, through consultation with program specialists, as necessary, and with the concurrence of the Field Office Director, whether an RA's response to a TDN meets or does not meet the standards for appropriate action or good cause, and transmits the written evaluation (TDN determination) to the RA and the permittee. If the TDN was a result of a citizen complaint, the determination must also be transmitted to the citizen.

(8) Monitors the RA's implementation of the actions that formed the basis for a Field Office's determination that the RA has taken appropriate action or shown good cause. As appropriate, notifies an RA of the OSMRE determination that the RA did not take appropriate action or show good cause for such failure when an RA does not implement an action that formed the basis for a prior determination that the RA had met the standards for appropriate action or good cause.



(9) Visits the mine site, as appropriate, to determine the adequacy of an RA's response to a TDN.

(10) Conducts the Federal inspections and re-inspections described in this directive, and, when required, provides prior notification of an inspection to the RA and citizen, if applicable.

(11) Takes appropriate enforcement actions.

b. Field Office Director (FOD):

(1) Determines when a joint OSMRE-RA oversight inspection is physically and administratively complete in accordance with section 4.j.(2), above.

(2) When appropriate, grants extensions of time of more than 45 days for the RA to respond to a TDN and ensures that the Field Office tracks the RA's progress in completing all promised actions.

(3) Reviews and approves the authorized representative's written determination that an RA's response to a TDN does or does not meet the standards for appropriate action or good cause before that determination is transmitted to the RA, permittee, or citizen. When the FOD anticipates that he or she will decide that the RA's response is arbitrary, capricious, or an abuse of discretion, the FOD is encouraged to communicate with the RA before issuing a final written determination to give the RA a final chance to take enforcement action or to provide any final views. The FOD will ensure that this process will not delay the time it takes OSMRE to complete its evaluation of the RA's response. The FOD will notify the RA about the issuance of a TDN determination before releasing this information to any outside source. The FOD will ensure that the authorized representative conducts a Federal inspection or re-inspection and takes enforcement action, as appropriate.

(4) Evaluates the RA's response to the TDN, and if the conclusion is that an approved regulatory program is inconsistent with the Act or Federal regulations to the extent that an alleged violation or violation is not explicitly addressed and is allowed under the approved program, elevates the issue to the Regional Director for possible action under 30 CFR Part 732.

(5) In response to a TDN, when an RA fails to take appropriate action or show good cause for such failure, elevates the issue, when warranted, to the Regional Director for possible action under 30 CFR Part 733, in addition to following all other applicable procedures and guidance in this directive.

(6) Records the date of receipt of an RA's request for informal review of a TDN determination, when the RA sends such a request to the Field Office rather than to the Regional Director, and transmits the request to the Regional Director.

(7) Prepares and forwards to the Regional Director and RA all required documentation concerning an RA's informal review request, as provided in Procedures 6.c.(2), below.

(8) When notified of a citizen's request for informal review of a decision not to inspect or take enforcement action, promptly transmits to the Regional Director all relevant documents, records, information, and files, along with a statement of the Field Office's rationale for deciding not to inspect or take enforcement action.

(9) Resolves or elevates to the Regional Director, as appropriate, through the programmatic actions described in OSMRE Directive REG-23, "Corrective Actions for Regulatory Program Problems and Action Plans," any failures of the RA to perform an obligation of the permitting process.

(10) Conducts consistency reviews with other Field and Regional Offices to ensure consistent treatment of similar violations.

c. Regional Director:

(1) Elevates the issue to the Director, as appropriate, for possible 30 CFR Part 733 action when an RA fails to take appropriate action or show good cause for such failure with respect to an alleged violation or violation.

(2) Considers possible 30 CFR Part 732 action when a Field Office evaluation of an RA's response to the TDN concludes that an approved regulatory program is inconsistent with the Act or Federal regulations to the extent that an alleged violation or violation is not explicitly addressed and is allowed under the approved program.

(3) Immediately notifies the FOD of any RA request for informal review of a TDN determination, and provides the Field Office with an opportunity to review and comment on any new information contained in the request.

(4) With respect to an RA's request for informal review, issues a written decision affirming, modifying, or reversing the Field Office's TDN determination and provides a copy of the decision to the RA, the permittee, Field Office, and citizen (if applicable).

(5) Upon finding that the RA failed to take appropriate action or show good cause in response to a TDN, orders a Federal inspection or re-inspection.

(6) Maintains a tracking system pertaining to requests for informal review of TDN determinations.

(7) Promptly notifies the FOD when a citizen requests informal review of a decision not to inspect or take enforcement action, and requests the FOD to transmit all relevant documentation.

(8) With respect to a citizen's request for informal review, conducts the review and issues a written determination to the citizen and provides a copy of the determination to the Field Office and the person alleged to be in violation, being mindful of the confidentiality considerations discussed in Procedures 6.d.(1)(a)iv., below.

(9) Conducts consistency reviews to determine how other Regions have treated similar violations.

d. Director:

(1) Considers, based upon a Regional Director's recommendation, whether the RA's failure to take appropriate action or show good cause with respect to an alleged violation or violation warrants initiation of the 30 CFR Part 733 process.

(2) Informs the Regional Director when to initiate the procedures of 30 CFR 733.12(b)-(g), as appropriate.

6. Procedures.

a. Issuance of TDNs.

(1) When must you issue a TDN?

Subject to the qualifications contained in section 4.j., above, the authorized representative will issue a TDN whenever he or she has reason to believe on the basis of information available to him or her that a violation exists, or when, on the basis of a Federal inspection, the authorized representative determines that a violation exists and OSMRE has not issued a previous TDN for the same violation. Consistent with 30 CFR 842.11(b)(1)(i), information that is known to the authorized representative, or that is easily and readily ascertainable, should be considered when determining whether there is a reason to believe, based upon information available, that there exists a violation and that a TDN is warranted.

(2) What should you do when you receive a citizen complaint that alleges the existence of a violation?

When OSMRE receives information from a citizen that does not provide adequate proof of an imminent danger or harm:

- (a) The authorized representative should avoid duplication or redundancy of investigatory or enforcement activity with the RA. Accordingly, if the authorized representative is aware that the RA has investigated or is actively investigating the subject of the citizen complaint, the authorized representative will consider the RA's action before determining whether he or she has a reason to believe a violation exists. If the RA is still actively investigating and if otherwise appropriate, the authorized representative will afford the RA a reasonable amount of time to complete its investigation before deciding whether he or she has reason to believe a violation exists.
- (b) The Field Office will acknowledge the receipt of the complaint to the complainant and process it in accordance with 30 CFR 842.12.
- (c) For each citizen complaint, the authorized representative will establish a separate case file that contains all documents, information, and correspondence, including e-mails, associated with the case and that is organized chronologically.
- (d) If the information in a citizen complaint is not sufficient to form a reason to believe that a person is in violation, the authorized representative will send a letter explaining his or her rationale to the RA and the citizen.
- (e) Upon the Field Office's completion of their review of the complainant's allegations, provide a written explanation of all enforcement actions taken if any, and the complainant's right to informal review in accordance with 30 CFR 842.15.

(3) What should you do when a violation or possible violation is discovered during a joint inspection with the RA?

An authorized representative will not issue a TDN when the RA's inspector takes appropriate action concerning a violation or possible violation observed during the course of a joint OSMRE-RA oversight inspection before the inspection is physically and administratively complete. The time when an inspection will become physically and administratively complete may be agreed upon by the authorized representative and the RA's inspector while on-site, and may be extended upon mutual agreement. Absent agreement, the FOD will determine when an inspection is administratively and physically complete, and he or she will consider any pending State research, investigation, or enforcement procedures when making that determination.

(4) What should you do when you find out that the RA did not follow through with an action agreed to at the time of an OSMRE-RA oversight inspection in which a violation was identified?

When an authorized representative discovers that the RA has not implemented a promised action that formed the basis for not issuing a TDN for a violation identified during the course of an OSMRE-RA inspection, the authorized representative will immediately issue a TDN, consistent with 30 CFR 842.11(b)(1)(ii)(B)(1) or 843.12(a)(2), as appropriate.

(5) How do you deliver a TDN to the RA?

The Field Office will deliver each TDN and copies of all information constituting a reason to believe a condition, practice, or violation exists by hand or certified mail to the appropriate official at the office of the RA with jurisdiction over the operation. With the written consent of the RA, the TDN may be delivered instead by e-mail or fax. Concurrently, the Field Office will provide a copy of each TDN to the permittee in accordance with Directive INE-3, "Furnishing Permittees with Copies of Inspection Reports and Ten-Day Notices" and the citizen complainant, if any.

(6) What records will OSMRE keep?

OSMRE Field Offices will establish a separate case file for each TDN and a system to effectively monitor the expiration of the time for responding to TDNs. The case file will contain, in chronological order, all documents, information, and correspondence, including e-mails, associated with the TDN. If the TDN originated from a citizen complaint, the office should combine the case file described in section 6.a.(2)(c), above, with the TDN case file.

b. RA responses to TDNs.

(1) How do you calculate the time frame for the RA to respond to the TDN?

The ten days during which the RA must respond to a TDN will begin on the day following the RA's receipt of the notice and expire ten calendar days later in accordance with the time computation provisions of 30 CFR 700.15. Responses postmarked, e-mailed, or faxed on the last day of the period will be considered timely.

(2) May OSMRE grant an RA an extension of time to respond to a TDN?

Yes. OSMRE will accept as good cause under 30 CFR 842.11(b)(1)(ii)(B)(4)(ii) an RA response that requests a reasonable and specified extension of time to decide whether a violation of the approved regulatory program exists and provides an adequate justification for the extension, including the status of the RA's investigation to date and the steps to be taken to determine whether the violation exists. The RA's justification for an extension should be fully documented and not be arbitrary, capricious, or an abuse of discretion. An authorized representative may grant an extension up to an additional 45 days; extensions beyond the

additional 45 days may be granted only by the Field Office Director. The Field Office must track the RA's progress in completing all promised actions.

(3) What if the RA does not respond in ten days?

If the Field Office has received no response, and it is near the end of the ten-day period, the Field Office should contact the RA to determine the status of the response. The RA's failure to respond within ten days will not prevent the authorized representative from making a determination, with Field Office Director concurrence, as to whether the RA has met or not met the standards for taking appropriate action or showing good cause for not doing so, and the failure to respond within ten days will constitute a waiver of the RA's right to request informal review under 30 CFR 842.11(b)(1)(iii).

(4) How long does OSMRE have to evaluate an RA's response to a TDN, and what must it do upon completion of its evaluation?

The authorized representative should generally complete his or her TDN determination within ten days unless there is a need for special expertise (e.g., legal assistance or technical reviews). The TDN determination will clearly identify the aspects of the RA's response that the authorized representative reviewed and state in writing the basis for his or her conclusion about whether the standards for appropriate action or good cause for such failure have been met. When the TDN determination is complete, the authorized representative will, with FOD concurrence, immediately transmit the TDN determination to the RA, the permittee, and the citizen (if the TDN was the result of a citizen complaint) by e-mail, fax, or certified mail.

(5) When may you conduct a Federal inspection or re-inspection based upon an RA's response or non-response to a TDN?

The authorized representative will conduct a Federal inspection or re-inspection and take enforcement action, as appropriate, if OSMRE determines that the RA has neither taken appropriate action nor shown good cause for failing to do so *and* either the RA has not requested informal review by the Regional Director and the time (five days) for requesting review has expired or, upon a request for informal review, the Regional Director has affirmed the Field Office's determination. If the RA does not respond to the TDN within ten days, the authorized representative will immediately conduct the inspection or re-inspection and take enforcement action, as appropriate.

(6) May the authorized representative follow up on the RA's response to a previously issued TDN?

The authorized representative should monitor the RA's implementation of the actions that formed the basis for the determination that the RA had taken appropriate action or shown good cause. If the RA does not implement an action indicated in its TDN response within a

reasonable time, the authorized representative, with FOD concurrence, will inform the RA in writing, in accordance with 30 CFR 842.11(b)(1)(ii)(B)(1), that the RA has not met the standard for appropriate action or shown good cause. In that case, the authorized representative will conduct a federal inspection or re-inspection and take enforcement action, as appropriate.

(7) May an authorized representative visit the mine site, and examine relevant records and files, to determine the adequacy of the RA's response to a TDN?

Yes. The authorized representative may visit the mine site, and examine relevant records and files, to determine the adequacy of the RA's response to the TDN. The authorized representative will notify the RA in advance of a planned mine site visit.

c. RA requests for informal review of Field Office TDN determinations.

(1) How does an RA request informal review of a Field Office's TDN determination on an RA's response to a TDN?

Under 30 CFR 842.11(b)(1)(iii)(A), the RA may request that the Deputy Director conduct informal review of a Field Office's determination that the RA has neither taken appropriate action in response to a TDN nor shown good cause for not doing so. However, if the RA fails to respond to the TDN within ten days, the RA has waived its right to request informal review under 30 CFR 842.11(b)(1)(iii). As indicated in Directive OPM-5, "Delegations of Authority," the authority to conduct an informal review and render a final decision has been delegated to the RD. The RA must submit the request and any accompanying explanation to the appropriate Field Office or Regional Office within five days after the RA receives the Field Office's TDN determination. As provided by 30 CFR 700.15, the five days will begin with the day following the RA's receipt of the Field Office's determination and will expire five calendar days later, excluding Saturdays, Sundays, and holidays. Responses postmarked, e-mailed, or faxed on the last day of the period are considered timely.

(2) What procedures should the FOD follow with respect to an RA's request for informal review?

In connection with an RA's request for informal review, the FOD will follow the procedures below, as applicable—

(a) Record the date of receipt on the request for informal review.

(b) Fax or e-mail a copy of the request for informal review to the Regional Director within one working day after receipt.

(c) Prepare and forward the following items via overnight mail or carrier (or by e-mail or other electronic means when feasible) to the appropriate contact at the Regional Office within three working days after receipt of the request for informal review (or within three working days after receipt of notification from the Regional Office that the RA has submitted a request for informal review):

i. The original request for informal review, together with any accompanying explanation (when the request is filed with the Field Office);

ii. A copy of the complete TDN case file, in chronological order, including the citizen complaint (if any), the TDN, the RA's response to the TDN, the TDN determination, relevant maps, and photographs;

iii. Copies of the relevant portions of permits and State or Tribal laws and regulations upon which the TDN was based;

iv. A synopsis of the case, including a discussion of the rationale for the Field Office TDN determination.

(d) Simultaneously send the RA copies of the documents in (c)(i) through (iii), above, if those documents are not otherwise available to the RA.

(3) What procedures should the Regional Director follow with respect to an RA's request for informal review?

In connection with an RA's request for informal review, the Regional Director will follow the procedures below—

(a) Immediately notify the appropriate Field Office Director when an RA submits a request for informal review of a TDN determination to the Regional Office.

(b) Provide a copy of that request and any accompanying information to the Field Office.

(c) Affirm, reverse, or modify the TDN determination after receipt of any request for informal review. In general, the Regional Director must base the informal review decision upon the same documentary/evidentiary record that was before the Field Office, together with the RA's written request for informal review. If the RA's request for informal review contains supplemental information, the Regional Director should provide the Field Office with an opportunity to review and comment on any new information that was not available when the TDN determination was made. The RA should be given the opportunity to review and respond to any additional information the Field Office Director provides to the Regional Director, except that the RA should not be given any information that is privileged



or otherwise protected. The Regional Director should not provide the Field Office with an opportunity to review his or her decision before issuance.

(d) Order a Federal inspection or re-inspection when the Regional Director decides that the RA has failed, in response to a TDN, to take appropriate action or show good cause for not doing so.

(e) Provide the RA, the permittee, and the Field Office with a written explanation of the decision. If the TDN resulted from a request for a Federal inspection under 30 CFR 842.12, the Regional Director also must provide a copy of the decision to the person who made the request.

(f) Maintain tracking systems capable of readily providing summary statistical reports concerning the number, origination, outcome, and processing times of all requests for informal reviews.

d. Citizen requests for informal review of a TDN determination resulting in a decision not to inspect or take enforcement action.

(1) What procedures should the Regional Director follow in connection with a citizen's request for informal review of a decision not to inspect or take enforcement action with respect to any violation alleged by that person in a request for a Federal inspection under 30 CFR 842.12?

(a) Upon receipt of a citizen's written request for informal review under 30 CFR 842.15 of a decision not to inspect or take enforcement action, which request must include a statement of how the person is or may be adversely affected by a coal exploration or surface coal mining and reclamation operation and why the underlying decision merits review, the Regional Director will follow the procedures below—

i. Promptly notify the Field Office Director of the request for informal review.

ii. Request the Field Office Director's prompt transmittal of all relevant documents, records, and files, along with a statement of the Field Office's rationale for deciding not to inspect or take enforcement action.

iii. Conduct an informal review of the decision, and issue a written determination to the citizen.

iv. Provide a copy of the determination to the person alleged to be in violation, except that the identity of the person who requested informal review must not be

disclosed unless confidentiality has been waived or disclosure is required under the Freedom of Information Act or other Federal law.

(b) The Regional Director's determination constitutes a decision of OSMRE within the meaning of 43 CFR 4.1281 and must contain a statement of the citizen's right of appeal to the Office of Hearings and Appeals in accordance with 43 CFR Part 4.

e. Federal inspections.

Before conducting a Federal inspection or re-inspection, either as a result of a determination that the RA failed to take appropriate action in response to a TDN or show good cause for not doing so, or when a person provides adequate proof of an imminent danger or harm, OSMRE will notify the RA (and must notify the citizen, if applicable) that a Federal inspection is scheduled and provide the RA (and the citizen, if applicable) with the opportunity to accompany the authorized representative. If the inspection or re-inspection reveals that a violation exists, the authorized representative will issue an appropriate enforcement action unless the RA's inspector takes an appropriate enforcement action during the inspection.

7. Reporting Requirements. None.

8. Effect on Other Documents. None.

9. References.

- a. 30 CFR 700.15.
- b. 30 CFR Part 732.
- c. 30 CFR Part 733.
- d. 30 CFR Part 745.
- e. 30 CFR 840.11.
- f. 30 CFR 842.11.
- g. 30 CFR 842.12.
- h. 30 CFR 842.15.
- i. 30 CFR 843.11.
- j. 30 CFR 843.12.

k. 43 CFR Part 4.

l. OSMRE Directive INE-3, "Furnishing Permittees with Copies of Inspection Reports and Ten-Day Notices."

m. OSMRE Directive OPM-5, "Delegations of Authority."

n. OSMRE Directive REG-23, "Corrective Actions for Regulatory Program Problems and Action Plans."

10. **Effective Date.** Upon issuance.

11. **Distribution.** Electronically

12. **Appendices.** None.

**Contact:** Chief, Division of Regulatory Support, (202) 208-4479.