June 26, 2023

U.S. Department of the Interior
Office of Surface Mining Reclamation and Enforcement
1849 C Street NW, Mail Stop 4550, Room 4558,
Main Interior Building
Washington, DC 20240

Attention: Division of Regulatory Support, OSMRE
Submitted electronically via *www.regulations.gov*, RIN 1029–AC81

Re: Ten-Day Notices and Corrective Action
For State Regulatory Program Issues
88 *Federal Register* 24944 (April 25, 2023)

To Whom It May Concern:

These comments are submitted by numerous organizations representing thousands of individuals who live, work, and recreate near surface coal mining operations that are regulated under the Surface Mining Control and Reclamation Act of 1977 ("SMCRA"). Commenters include the Citizens Coal Council, Inc., Appalachian Voices, and the Sierra Club, who are Plaintiffs/Petitioners in the pending case of *Citizens Coal Council, et. al. v. Haaland,* Civil Action No. 1:21-cv-195 (D.D.C.), which challenged the November 24, 2020, promulgation by then-Secretary of Interior David L. Bernhardt of a final rule unlawfully modifying important provisions of the prior rules governing the ten-day notice ("TDN") process and issuance of ten-day notices (TDNs) to state regulatory authorities ("SRAs") regarding alleged violations of SMCRA, the Secretary's regulations, provisions of the approved state regulatory programs, or permits issued thereunder.[1]

[1] Citizens Coal Council ("CCC") is a nonprofit Pennsylvania corporation that is a nationwide association of grassroots individuals who reside in or visit America's coalfields, with a mission to protect resources, including the homes, farms, businesses, and water supplies of its individual members, through advocacy of full compliance with all environmental laws pertaining to coal mining, and in particular, through full and fair implementation of SMCRA. Appalachian Voices ("AV") is a regional nonprofit corporation incorporated in North Carolina with over 1,100 members nationwide, whose mission is to protect the air, land, waters and communities of Central

Commenters support many of the provisions of this proposed rulemaking, and appreciate the time and effort that has been expended to bring the Secretary's rules back into line with the plain language of SMCRA and the directives and expressed intent of Congress with respect to the pivotal role of citizens in the monitoring of performance of the regulated community *and* of state regulatory authorities through the inspection and enforcement process. Commenters believe the proposed rule better reflects and honors the intended balance struck by Congress between respecting the principles of federalism in crafting a potential role for state lead in implementation of the federal law, with the unalloyed goal of ending the historic failures of performance by the states in the regulation of the human and ecological impacts of surface coal mining operations.

Specific comments follow regarding aspects of the proposed rule, prefaced by an introduction to the language of the 1977 law and consideration of the expressed intent of Congress in enacting Public Law 95-87 relative to the TDN process. Commenters urge the agency to finalize the rulemaking with all due dispatch, revising it as suggested below to even better align the proposal with the letter and intent of the federal law and to address the practical

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and Southern Appalachia.

Sierra Club is a national nonprofit conservation organization incorporated in California, with more than 830,000 members and supporters nationwide, maintaining local chapters and members in each of the Appalachian states, including Kentucky, West Virginia, Virginia, Tennessee, and Pennsylvania; as well as in Alaska; the Illinois Basin; Colorado Plateau; Gulf Coast; Northern Rocky Mountains; and Great Plains, and dedicated to exploring, enjoying, and protecting the wild places of the Earth; practicing and promoting the responsible use of the Earth's resources and ecosystems; educating and enlisting humanity to protect and restore the quality of the natural and human environment; and to using all lawful means to carry out these objectives. The Sierra Club has long worked to prevent the harm caused by mining coal across the United States, particularly in Appalachia and the West.

Numerous individual CCC, AV, and Sierra Club members depend upon the TDN process to protect their interests – as residents of, or visitors to, America's coalfields – from damage as the result of violations of SMCRA caused by either the failure of the permittee to comply with the law, regulations, and the permit, or the failure of the state regulatory authorities to properly maintain, administer, and enforce the approved program.

and logistical issues associated with successful oversight of state regulatory programs.

The on-line *Merriam-Webster* dictionary contains two definitions of "oversight." The first is "regulatory supervision." The second is an "omission or error." Congress intended the Office of Surface Mining Reclamation and Enforcement ("OSMRE") to serve the first role with respect to state regulatory authorities' management of approved state programs. The 2020 TDN Rule reflected a departure from that rule into one of overlooking state omissions and errors rather than properly supervising the implementation by states of their approved regulatory programs. Commenters appreciate that this rule seeks to restore the regulatory supervision role intended by Congress both for OSMRE *and* for the public.

We begin, as always, with the text of the statute that both authorizes and mandates the issuance of "ten-day notices" ("TDNs") at 30 U.S.C. 1271(a)(1), which provides in pertinent part that:

> Whenever, on the basis of any information available to him, including receipt of information from any person, the Secretary has reason to believe that any person is in violation of any requirement of this Act or any permit condition required by this Act, the Secretary shall notify the State regulatory authority, if one exists, in the State in which such violation exists. If no such State authority exists or the State regulatory authority fails within ten days after notification to take appropriate action to cause said violation to be corrected or to show good cause for such failure and transmit notification to the Secretary, the Secretary shall immediately order Federal inspection of the surface coal mining operation at which the alleged violation is occurring unless the information available to the Secretary is a result of a previous Federal inspection of such surface coal mining operation.

30 U.S.C. 1271(a)(1) (Emphasis added).

Congress enacted this provision as part of "a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations," 30 U.S.C. § 1202(a). In enacting SMCRA, Congress intended, among other goals, to "assure that the rights of surface landowners and other persons with a legal interest in the land or appurtenances thereto are fully protected from such operations," and to "assure that surface coal mining operations are

so conducted as to protect the environment," 30 U.S.C. Sections 1202(b), (d).

Throughout the decade-long legislative process that resulted in the enactment of the SMCRA, and in the numerous debates on the earlier surface mining bills, Congress repeatedly voiced concern over the historic propensity of states to under-regulate and under-enforce environmental constraints on coal mining. In the House Committee Report on H.R. 11500, where the current language of 30 U.S.C. Section 1271(a)(1) originated, Congress clearly articulated the intent that OSMRE exercise oversight authority where the state regulatory authority was implementing an approved delegated program, to assure that the provisions of SMCRA were fully enforced. The Senate version of the bill, S. 425, contained no comparable provision for federal inspection and enforcement in non-imminent danger situations where the Secretary was acting in an oversight role, providing only that the Secretary notify the state regulatory authority, at which point the state was to proceed under the approved program. S. Rept. No. 93-402, 93rd Cong., 1st Sess. 17 (1973). The House provision, which prevailed in the Conference Committee, and which contained language identical in relevant part to current 30 U.S.C. Section 1271(a)(1), explained the justification for the TDN process and how it fit within the framework of Title V of SMCRA. In so doing, Congress provided the legislative context in which the role of the citizen must be understood and respect, and also defined the limits of deference to state prerogative:

> For a number of predictable reasons – including . . . the tendency of State agencies to be protective of local industry - State enforcement has in the past, often fallen short of the vigor necessary to assure adequate protection of the environment.
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> * * * * *
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> While it is confident that the delegation of primary regulatory authority to the States will result in fully adequate state enforcement, the Committee is also of the belief that a limited Federal enforcement role as well as increased opportunity for citizens to participate in the enforcement program are necessary to assure that the old patterns of minimal enforcement are not repeated.

> The mechanism fashioned by the Committee to meet the dual need of limited Federal enforcement oversight and citizen access is operative in both the interim period and after a State program has been approved. When the Secretary received information from any source that would give rise to a reasonable belief that the standards of the Act are being violated, the Secretary must respond by either ordering an inspection by Federal inspectors during the interim period, or, after the interim, notice to the States in the follow-up inspection that the State's response is inadequate.

H. R. Rept. No. 93-1072, at 111.

Congress intended that a federal inspection as a follow-up to the TDN would occur in all instances where the state had failed to take appropriate action, and that the state had a time-limited period in which to take action to cause the violation to be corrected (i.e. "appropriate" action). This is underscored later in the same Committee report:

> (2) Upon receiving such information [giving rise to a belief in the Secretary that a violation was occurring], the Secretary must notify the State o[f] such violations and within ten days the State must take action to have the violations corrected. If this does not occur, the Secretary *shall order Federal* inspection of the operation.

*Id.* at 143 (Emphasis added).

So too, the Senate Report on the 1977 law explained the limited nature of state latitude concerning enforcement of the Act and the backup enforcement role intended for the Secretary:

> If and when a State manifests a lack of desire or an inability to participate in or implement that program and to meet the requirements of the Act, the Federal Government is to exercise the full reach of Federal constitutional powers to insure the effectiveness of that program.

S. Rep. No. 95-128, 95th Congress 1st Session at 63.

Elsewhere, this role and the limits of deference is explained and bounded:

> The Federal enforcement system contained in this section, while predicated upon the States taking the lead with respect to program enforcement, at the same time provides sufficient Federal backup to reinforce and strengthen State regulation as necessary. Federal standards are to be enforced by the Secretary on a mine-by-mine basis for all or part of the State as necessary without a finding that the State regulatory program should be superseded by a Federal permit and enforcement program. Subsection (a) sets forth a number of specific characteristics for the Federal enforcement program.
> (1) The Secretary may receive information with respect to violations of provisions of this Act from any source, such as State inspection reports filed with the Secretary,

> or information from interested citizens. (2) Upon receiving such information, the Secretary must notify the State on such violations and within ten days the State must take action to have the violations corrected. If this does not occur, the Secretary shall order Federal inspection of the operation.

S. Rept. *supra* at 89.

The plain language and legislative history of Section 521 does not admit to a reading that allows the interposition of additional delay in taking federal inspection and enforcement action through the creation of new procedures as a prelude to or surrogate for the mandatory TDN process, such as where violations are more widespread due to systemic failures of the state regulatory authority to properly maintain, administer, and enforce SMCRA as it is obligated by law and regulation. Commenters appreciate the recognition in the proposed rule that such is the case.

**I. The 2020 TDN Rulemaking**

The 2020 TDN Rulemaking contained several provisions that were contrary to SMCRA. They are briefly reviewed here in order to frame the current rulemaking and to provide background for consideration of whether and how the agency proposes to resolve the problems created in that 2020 rule.

The first flaw was the creation and interposition of a new procedural step prior to issuance of a TDN after receipt of information by the Secretary giving rise to the belief that a violation exists. Contrary to the plain language of 30 U.S.C. Section 1271(a)(1), which mandates that the Secretary, *upon receipt of information* from any person or on the basis of information available to him, shall notify the state regulatory authority and provide ten (10) days for that state regulatory authority to "take appropriate action to cause the violation to be corrected or to show good cause for such failure," the 2020 TDN rule allowed OSMRE to delay issuance of a TDN in order to allow for a request to, and state provision and transmittal of, additional information that was by

definition *not* available to the Secretary as contemplated by SMCRA but which would subsequently be produced and *made* available, thus indefinitely postponing the commencement of the mandated TDN process and delaying the state regulatory authority obligation to take action or show good cause. The 2020 TDN Rule created this "pre-TDN" process that is inconsistent with both the Act and long-standing interpretation of Section 521 by the agency. It is also inconsistent with the plain language of 30 U.S.C. 1271 in attempting to interject the undefined concept of "readily" as a modifier to the term "available information" as a justification for delaying issuance of a TDN indefinitely so as to allow transmittal of information by the state regulatory authority.[2]

The second major flaw in the 2020 TDN Rule was the creation of an arbitrary and unlawful distinction - nowhere found in SMCRA - between violations that result from a site-specific failure *of a permittee* to comply with the conditions and obligations imposed by the state-issued permit, and those violations manifested "on the ground" that result from a site-specific (or programmatic) failure by a state regulatory authority to properly maintain, administer, and enforce the approved state program in the permitting process. That distinction was wholly without support in the Act, was counter to decades of agency interpretation and practice, and attempted by administrative fiat to allow actual federally-observed violations of the Act that result from a state's misadministration of the Act and of the approved state program to continue unabated for an indefinite period of time while the Secretary consults with the state regulatory authority under a newly crafted interim 30 C.F.R. 733 process regarding the problem.

[2] While the current rule describes the use of "readily available" as having been an effort to "place a temporal limitation on the data collection," 88 Fed. Reg. 24949, it was not such a limitation, since it strayed from the legislative intent that the decision on TDN issuance would rest on information already in the possession of OSMRE, such as that gleaned from state oversight inspections and citizen complaints. The 2020 rule defined "readily available" to include information that *could be made* available by subsequent submission from a state, thus greatly expanding rather than limiting what information could be considered prior to issuance of the TDN.

That process and the decision not to direct or to take enforcement action for violations caused by the failure of a state to maintain, administer, and enforce the Act and approved state program, was inconsistent with the mandate of Congress that all observed violations of the Act, the federal regulations, the approved state program, and the permit, are required to be immediately subject to enforcement action upon detection. Congress, in 30 U.S.C. § 1271(a), directed OSMRE to take action to address violations caused by "any person," and the Secretary lacked authority to define "any person" in a manner that exempted state regulators from the definition. The 2020 TDN Rule mistakenly assumed that in the face of an on-the-ground violation caused by the failure of the State to maintain, interpret, and implement an approved state program, the Secretary could *elect* to take direct enforcement under 30 U.S.C. 1271(a) in the absence of state action or could ignore the mandate in 30 U.S.C. 1271(a) that each violation must be subject to federal inspection and enforcement where the state has failed to take "appropriate action" to cause the violation to be corrected or to show "good cause" for failure to do so, and instead utilize the 30 U.S.C. Section 1271(b) process to address the state failure while allowing the ongoing violation to cause harm unabated and unaddressed. As discussed below, programmatic action under 30 C.F.R. Part 733 is never a surrogate for inspection and enforcement action against a detected violation of the Act, Secretary's regulations, or approved state program.

In furtherance of the impermissible exemption of programmatic violations from the TDN process , OSMRE created out of whole cloth an "enhancement to the existing 30 C.F.R. Part 733 process" that allows the Secretary and state regulatory authority to sidestep the statutory requirements of 30 U.S.C. Section 1271(b) in favor of "addressing state regulatory program issues early and promptly resolving the issues" prior to or in lieu of initiation of the current 30 C.F.R. 733 process mandated by SMCRA. The interposing of new procedures prior to federal

action pursuant to 30 U.S.C. Section 1271(b) is contrary to law, and the process mandated by Congress does not admit of the creation by the Secretary of a new intermediate process for resolving a ‘‘State regulatory program issue’’ short of notification of intent to commence proceedings to withdraw all or part of a State regulatory program under 30 U.S.C. Section 1271(b).

Another issue was the removal of the phrase “if true” in the context of the agency’s obligation to act when receiving information from a citizen’s complaint that *if true* would constitute a violation. The agency failed to provide a sufficient and reasoned basis for rejection of the contemporaneous interpretation of the statutory requirement.

Another concern was the promulgation of the definitions of “action plan” and “state regulatory program issue,” which supported implementation of a new intermediate step prior to 30 U.S.C. 1271(b) that is inconsistent with SMCRA.

The final concern was the interpretation in the 2020 rule of what constitutes “appropriate action.” The 2020 rule posited that “appropriate action to cause the violation to be corrected” could include actions *other than* issuance of a notice of violation by either the state regulatory authority or OSMRE. Such an interpretation is inconsistent with law and with OSMRE’s long-standing interpretation of the Act and its obligations thereunder.

In sum, the 2020 rulemaking effected significant substantive changes in the language and scope of the current regulations under the guise of “clarifications” to the previous regulation, and in doing so violated the plain language and intent of SMCRA, and upended decades of consistent agency interpretation and application of the requirements of Section 521 of SMCRA. It redefined the relationship between State Regulatory Authorities and the federal Office of Surface Mining Reclamation and Enforcement in a manner that undercut accountability of state regulatory authorities in the day-to-day administration and enforcement of the Act and the approved state

programs. The result was to significantly impair the ability of the communities who bear the brunt of coal mining's negative impacts to seek enforcement of SMCRA's provisions in cases where the state regulatory authority is - through design or inadvertence - failing to maintain, implement, administer, and enforce the Act and the approved state program on a case-specific basis. The 2020 TDN Rule made several changes repugnant to the federal Act, legislative history, and long-standing agency interpretation and policy, and commenters appreciate the recognition of that in the current proposed rule and the effort to return to interpretations of key statutory provisions such as the meaning of "any person" in 30 U.S.C. 1271(a)(1) that the agency has "held throughout most of OSMRE's history[.]" 88 Fed. Reg. 24949.

## II. The 2023 Proposed Rule

The proposed rule, in many respects, repairs the damage caused by the 2020 Rule's departure from the text and intent of the 1977 law and from long-standing agency interpretation and policy. Commenters conceptually support, as being more aligned with and consistent with the federal Act and intent of Congress, **many** of these changes, including the proposals to:

- Define "ten-day notice;"
- Define "citizen complaint;"
- Treat all citizen complaints as requests for Federal inspection even where "a citizen complaint does not specifically request an inspection[;]" 88 Fed. Reg. 24945*;*
- Remove the requirement in 30 C.F.R. 842.12(a) that a citizen notify the State regulatory authority when requesting a Federal inspection;
- Remove the requirement at 30 C.F.R. 842.12(a) that the citizen requesting a federal inspection set forth "the basis for the person's assertion that the State regulatory authority has not taken action with respect to the possible violation;"
- Further clarify and impose limits on what information other than that provided by a citizen complaint would be considered when determining whether OSMRE has reason to believe that a violation exists, by limiting the "readily available information" to that contained in the agency files at the time of notification, the information from the citizen, and "any public available electronic information;" 88 Fed. Reg. 24946 cols. 2-3*;*

- Restore the obligation to require issuance of a TDN when OSMRE has reason to believe that the violation is a so-called "permit defect," *i.e.* a deficiency in a permit-related action taken by a State regulatory authority; and

- Provide that a corrective action plan does not constitute "appropriate action" in response to a TDN because such a plan does not itself remedy the violation.

Commenters concur that the proposed rule hews closer than the previous rule changes, to the overarching goals of the Act and to Congressional intent to "assure that appropriate procedures are provided for the public participation in the development, revision, and enforcement of regulations, standards, reclamation plans, or programs established by the Secretary or any State under [the Act]." 30 U.S.C. Section 1202(i). There remain, however, several areas in which further clarification is needed from the agency, and a few where the proposed rule remains at variance with the requirements of the federal Act and Congressional intent.

Specific comments follow, referenced by applicable regulation or by issue.

**A. Simplifying The Complaint Process**

OSMRE proposes to simplify the citizen complaint process to "increase efficiency and make it easier for citizens to report possible violations[.]" 88 Fed. Reg. 24948. The proposed rule would amend 30 C.F.R. 842.11(b)(2) and 842.12(a) to treat all citizen complaints as requests for Federal inspection, and to remove two provisions found based on agency experience under the 2020 TDN Rule to be burdensome and unnecessary – first, the express requirement that a person requesting a federal inspection first notify the state regulatory authority of the possible violation, and second, that the person requesting the federal inspection state the basis for their assertion that the state had not taken action with respect to the possible violation.

Commenters support both changes, both for the reasons stated by the agency, and because *neither* obligation was based on the statute, which in no fashion requires that the citizen alert the state prior to requesting a federal inspection, nor that it explain to OSMRE why *he or she*

believes the state has not acted properly, when that determination is one for the agency to make. Congress was fully capable of determining what degree of deference would be accorded to a state regulatory authority with respect to a potential violation of the Act, Secretary's regulations, or the approved state program – the state would be given ten days after a complaint was received by the federal agency and promptly conveyed to the SRA, after which federal action would occur (and excepting imminent harm situations in which case no delay was provided). *Had* Congress intended that the citizen be required to first direct the concern to the state regulatory authority *prior* to requesting a federal inspection, it would have so provided. For example, the inclusion of a requirement to provide 60-days of notice to the state regulatory authority as a precondition of maintenance of a citizen suit under 30 U.S.C. Section 1270(b)[3] reflects graphically that where Congress intended a citizen to have to notify the state regulatory authority as a prerequisite to enforcement of the law, it was quite capable of so providing. The imposition of procedural obstacles to a citizen's ability to access the administrative process or to invoke federal authority, as was occasioned by the requirements that OSMRE now proposes to remove, was inconsistent with the intent of Congress as reflected in the legislative history to the 1977 law.

**B. Defining "Citizen Complaint" and "Ten-Day Notice"**

The proposed rule would, for the first time in the 46-year history of SMCRA, define "citizen complaint." Commenters support the proposed definition, which is consonant with the Congressional goal of providing "increased opportunity for citizens to participate in the enforcement program" to "assure that the old patterns of minimal enforcement are not repeated." H.R. Rept. No. 95-218 at 129; S. Rept. No. 95-128 at 90. Commenters would suggest a slight

[3] "(b) No action may be commenced— (1) under subsection (a)(1) of this section— (A) prior to sixty days after the plaintiff has given notice in writing of the violation (i) to the Secretary, (ii) to the State in which the violation occurs, and (iii) to any alleged violator; or…." 30 U.S.C. 1270(b).

revision to the proposed definition, however, to bring it in line with the intent of Congress. Rather than defining "citizen complaint" to mean "any information received from any person notifying the Office of Surface Mining Reclamation and Enforcement (OSMRE) of a possible violation of the Act…," commenters suggest the "any information received from any person *by* the Office of Surface Mining Reclamation and Enforcement (OSMRE) of a *condition or practice that might be a* possible violation of the Act….

The citizen complainant may not be aware of the technical or legal details of the Act and the applicable regulations so as to know whether the situation is or is not a violation. It is for the agency official, trained in the nuances of the Act and regulations, to determine from the information provided whether a possible violation exists and to "notify" the agency that the practice or condition observed is a violation. The House Report described the interaction as one where "the Secretary receives, (sic) information giving him reason to believe that violations of the act or permit have occurred." H.R. Rept. No. 95-218 at 129. Congress did not intend that the complainant use any "magic words;" instead observing that "'reasonable belief' could be established by a snapshot of an operation in violation or other simple and effective documentation of a violation." *Id.* The agency has recognized that principle elsewhere in this proposed rule, where it states that OSMRE will interpret citizen complaints as including a request for federal inspection even where none is explicitly requested.

Commenters support the proposed definition of "ten-day notice," and the recognition that the TDN is a communications mechanism and not a judgment or determination on the performance of the permittee, operator, or SRA. The creation of extra-TDN steps, notifications, and communications between state and federal regulatory officials in the 2020 TDN Rule grew out of a mistaken assumption that issuance of or receipt of a TDN represented a determination of a failure on the part of either the SRA or the regulated party. Rather, it is a mechanism for

communicating the *possibility of* a condition or practice that may constitute a violation of the applicable body of law or the embodiment of the permittee's regulatory obligations in the form of a permit or approval, as the agency notes in the preamble to the proposed rule:

> A TDN that results from a citizen complaint is not a direct enforcement action, a finding that any form of violation exists, or a determination that the State has acted improperly. Rather, as SMCRA envisioned, a TDN is a communication mechanism between OSMRE and the applicable State regulatory authority indicating that *a possible* violation exists.

88 Fed. Reg. 24947.

Commenters concur with the agency characterization of the TDN, and hope that this recognition of the TDN mechanism as a communications tool intended by Congress to involve the public in partnership with state and federal officials in full and fair implementation of the law, will avoid future efforts to sidestep or avoid the use of the TDN process.

**C. "Reason To Believe" and "Publicly Available Electronic Information"**

Commenters support the effort of OSMRE to address the problems caused by the interposition of the "readily available information" provision in the 2020 TDN Rule. Commenters are extremely concerned, however, that by requiring OSMRE to consult "publicly available electronic information" in all cases prior to issuance of a TDN, the rule still allows for (while not intending) indefinite delay in OSMRE's determination whether there is "reason to believe" a violation exists, and discounts citizen-provided information in favor of agency electronic records searches beyond information contain in OSMRE files. We are concerned that doing so defeats the intent of Congress that TDN issuance be immediate on receipt of information giving rise to the possibility of a violation, that the threshold for issuance of a TDN be intentionally low, and that the process be expeditious (hence the use of ten days rather than a "reasonable time" or other discretionary time frame).

A review of the applicable legislative history reflects that *any* delay occasioned by agency

investigation into online sources beyond the agency's own files and the information provided by a citizen complainant, is inconsistent with Congressional design.

Congress enacted SMCRA to, among other things:

> (a) establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations;…
> (i) assure that appropriate procedures are provided for public participation in the development and **enforcement** of regulations and programs established by the Secretary of the Interior or any State under the Act; and…
> (m) wherever necessary, exercise the full reach of Federal constitutional powers to ensure the protection of the public interest through effective control of surface mining operations. *Id*.

30 U.S.C. Sections 1202(a)(g)(i) and (m) (emphasis added).

SMCRA's lengthy legislative history culminated in reports issued by the House and Senate Committees charged with drafting the statute. A Conference Committee report explained the final resolution of differences between the House and Senate bills. Ultimately, Congress enacted the House bill, as amended in conference. The House and Senate Committee Reports on Public Law 95-87 explained Congress' intention in crafting SMCRA's overlapping federal and state enforcement procedures. Congress intended to address pervasive historical problems in State nonenforcement of then-existing state surface coal mining laws at the time of SMCRA's enactment. Each report states:

> Efficient enforcement is central to the success for the surface mining control program contemplated by [the bill then under consideration]. For a number of predictable reasons – including insufficient funding and the tendency for State agencies to be protective of local industry – State enforcement has in the past often fallen short of the vigor necessary to assure adequate protection of the environment. The Committee believes, however, that the implementation of minimal Federal standards, the availability of Federal funds, and the assistance of the experts in the Office of Surface Mining Reclamation and Enforcement in the Department of Interior, will combine to greatly increase the effectiveness of State enforcement programs operating under the Act. While it is confident that the delegation of primary regulatory authority to the States will result in adequate State enforcement, the Committee is also of the belief that a limited Federal oversight role as well as *increased opportunity for citizens to participate in the enforcement program are necessary to assure that the old patterns of minimal enforcement are not repeated.*

H.R. Rept. No. 95-218 at 129; S. Rept. No. 95-128 at 90 (emphasis added).

The House Report goes on to point out that:

> Once State programs or Federal programs replace the interim regulatory procedure, section 517 requires that Federal inspections must be made for purposes of developing, administering, or enforcing any Federal program, and *assisting* or evaluating the development, administration, or *enforcement of any State program.*
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> . . . .
>
> In addition to normally programed inspections, section 521(a)(1) of the bill also provides for *special inspections when the Secretary receives, information giving him reason to believe that violations of the act or permit have occurred.* It is anticipated that "reasonable belief" could be established by a snapshot of an operation in violation or other *simple and effective documentation of a violation.*

H.R. Rept. No. 95-218 at 129 (emphasis added). The Senate Report emphasizes the Secretary's mandatory duty to issue an order for a federal inspection as a consequence of SMCRA's Section 521 (a)(1)'s explicit "Ten Day Notice" procedure:

> The Secretary may receive information with respect to violations of provision[s] of this Act from any source, such as State inspection reports filed with the Secretary, or information from interested citizens.
>
> *Upon receiving* such information, the Secretary *must* notify the State on such violations and within ten days the State must take action to have the violations corrected. If this does not occur, the Secretary *shall* order Federal inspection of the operation.

S. Rept. No. 95-128 at 89-90 (emphasis added).

There is nothing in the Congressional history that indicates that the Secretary, upon receipt of information from "interested citizens," could delay in any manner the notification to the state regulatory authority through the ten-day notice, after receipt of the information.[4]

[4] That is not to say that such information may never be considered. The SRA may provide any such relevant information in response to a TDN and may thereby, if the information conclusively demonstrates the absence of any violation, avoid a federal inspection. *See infra* at 22 (discussing *WVHC 1*, 152 IBLA 158 at 186-87 (2000) and its recognition of the principle that "factual investigation of a citizen's complaint follows, rather than precedes, issuance of the ten-day notice to state regulators").

Commenters appreciate that OSMRE recognizes the sometimes months-long delay occasioned by the open-ended nature of the 2020 TDN Rule, which created an opportunity for the agency to contact the state regulatory authority *after* receiving information from citizens and in advance of issuance of a TDN and to "consider the State regulatory authority's action **before** determining if there is reason to believe a violation exists." 85 Fed. Reg. 28904, 28907. OSMRE at the time justified the extra process as being permissible under the Act because "neither SMCRA nor the regulations clearly define the phrase 'reason to believe,' and both are ambiguous as to what information OSMRE may consider when determining whether OSMRE has 'reason to believe' that a permittee is in violation of applicable requirements." *Id*. at 28906. That purported ambiguity or lack of clarity in Congressional directive was entirely fictional since, as noted above, Congress was clear in instructing how the phrase "reason to believe" should be construed *and* provided examples. Until 2020, the Secretary had had no problem understanding or implementing the standard. OSMRE had consistently interpreted 30 U.S.C. Section 1271(a)(1) for more than four decades without claiming the provision is ambiguous.

Nor was the legislative intent in any fashion murky or unclear. The House Report accompanying H.R. 2 explained clearly that:

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

H.R. Rept. No. 95-218 at 129. (Italics added).

The threshold set by Congress is "simple and effective documentation" or a "snapshot" of the operation in violation. For decades the agency had not articulated any problem in understanding and applying that Section 521(a)(1) standard.

Commenters appreciate that OSMRE now acknowledges that providing an additional step

of substantiating the citizen complaint through contacts with the state regulatory authority *subsequent* to receipt of that complaint and *prior* to issuance of the TDN, results in delay. It is also flatly inconsistent with the Act and expressed Congressional intent. Commenters appreciate also the proposal for a "clear limitation so that the information that OSMRE will consider is contained in our files at the time that we are notified of a possible violation or receive a request for a Federal inspection." That limit is entirely consonant with the legislative intent that the Secretary act "upon receipt" of the information, and without delay.

Commenters are very concerned, however, with two aspects of the proposed rule that we believe are inconsistent with the Act and which could result in continued possibility for delay that might be occasioned by OSMRE conducting any additional information gathering outside of its own files *after* receiving information from a citizen complaint and *prior* to initiating the TDN process, even where the information gathering is cabined by limiting it to "publicly available electronic information." The language of Section 521(a)(1) requires the Secretary to act "on the basis of any information available to him, including receipt of information from any person[.]" Senate Report No. 95-218, describing what became Section 521(a)(1), noted that the section set forth "a number of specific characteristics for the Federal enforcement program," those being that the Secretary "may receive information with respect to violations of provisions of this Act from any source, such as State inspection reports filed with the Secretary, or information from interested citizens" and "*upon receiving such information,"* the Secretary "must notify the State of such violations and within ten days the State must take action. " S. Rept. No 95-218, *supra,* at 88-89 (emphasis added).

Nothing in the legislative history or in the language of Section 521(a)(1) suggests that the Secretary may interpose an additional step of affirmatively searching out "information not already in our files when determining whether we have reason to believe a violation exists[.]" 88

Fed. Reg. 24949. Any delay between the Secretary's receipt of information giving "reason to believe" and notification via a TDN to the state regulatory authority, in order to allow OSMRE to conduct an internet search for additional information that is by definition *not* in its' possession at the time of the citizen complaint, is inconsistent with the plain language of Section 521 of the Act and the legislative history and will result in an open-ended opportunity for delay until the electronic search is completed.

The proposed language in 30 C.F.R. 842.11(b)(1)(i) is of concern for a second reason, which is that it requires, by use of the word "and," that in all cases, OSMRE consult their files **and** search out publicly available electronic information," in addition to considering information "received from a citizen complainant" before issuing a TDN. This is wholly inconsistent with the plain language of the Act and with legislative history, since it raises an intentionally low threshold for information needed to trigger the notification process by requiring additional inquiry beyond the information already in agency possession and that supplied by the complainant.

The proposal to require additional electronic record searches by OSMRE prior to issuance of a TDN after receiving information from a citizen complainant, also sharply deviates from the agency's historic interpretation and application of the "reason to believe" standard.

For example, OSMRE's Interim Program regulations rejected several commenters' suggestions that a reasonable basis to believe should be considered to be established only when the facts, if **proven** to be true, would show a violation. 42 Fed. Reg. 62665 (December 13, 1977). OSMRE interpreted Section 521(a) as antithetical to rigid rules regarding the necessity of documentary proof in every case and concluded that such a requirement was contrary to Congressional intent. Rather, the agency concluded the standard would be met *when facts alleged* by a complainant, *if* true, constitute a violation. 44 Fed. Reg. 15457 (March 13, 1979). OSMRE

further emphasized that it is the Office's duty to respond to any information, furnished by any person, which gives rise to a reasonable belief. 42 Fed. Reg. 62665 (December 13, 1977). The agency found a high standard of proof inconsistent with the public participation goal of SMCRA.44 Fed. Reg. 15299 (March 13, 1979). Similarly, in the preamble to a 1982 rulemaking, OSMRE discussed commenters' suggested replacement of the word "alleged" for "possible" in 30 C.F.R. 842.11(b)(1)(ii)(B). OSMRE disagreed. The agency emphasized that Section 521(a) imposed a mandatory duty requiring it to conduct an inspection when it has "reason to believe" a violation exists. 47 Fed. Reg. 35627 (August 16, 1982). The basis for such a belief may or may not involve an affirmative allegation. *Id.* "It does not matter if the word 'possible' is speculative in nature because OMSRE inspections are in fact speculative --- until it determines whether a violation exists." *Id.* Another commenter on the 1982 rulemaking suggested something similar to a 1977 comment that OSMRE must have "probable cause" to believe a complainant's statements are true before acting under 30 C.F.R. 842.11(b).[17] Again, OSMRE disagreed, stressing that section 521(a)(1) of the Act does not require OSMRE to conduct an inquiry into the veracity of the complaint. 47 Fed. Reg. 35628 (August 16, 1982). Also, in the 1982 rulemaking, OSMRE emphasized that the language of the original regulation reflected the intent of the Act, because it required a person need only provide information giving rise to a "reason to believe" rather than requiring a complainant be certain that a violation exists.

Delaying issuance of a TDN on the basis of a records search for all electronic databases and other information *not* in the agency's possession when the complaint is received, and *even where* the complaint provides information that *if true* would constitute a violation, impermissibly raises the bar on federal action, and impermissibly delays notification to the states through the TDN process. Over the ensuing four decades after the adoption of the permanent program regulations and prior to the 2020 TDN Rule, OSMRE has interpreted Section 521(a)(1) to require

that information received from any source may establish "reason to believe" a SMCRA violation exists if a complainant's information would, if true, constitute a condition, practice, or violation of SMCRA or its applicable regulatory program. *See* 30 C.F.R. Sections 721.13 (a)(1) (interim program) and 842.11(b)(2) (permanent program). The latter rule practicably implements Congress's intent that "simple and effective documentation of a violation" suffices to establish "reason to believe" a violation has occurred so as to trigger the State's opportunity to investigate and respond within ten days without further federal intervention. H.R. Rept. No. 95-218 at 129.

Adding a records inquiry process, even one limited to searching electronic records, as a prerequisite to initiation of the mandatory Section 521(a)(1) TDN process is not an option that the plain language of the Act will countenance and is inconsistent with the mandatory compliance processes crafted by Congress. It raises the bar for federal action and interposes an additional step of finding information rather than acting based on available information and information received. The procedure Congress prescribed when OSMRE receives information that a coal company is violating SMCRA requires the agency to quickly evaluate whether the information, standing alone, describes a potential violation of SMCRA or a permit. S. Rept. No. 95-128 at 89-90. The immediacy inherent in the short statutorily mandated TDN time frame leaves no room for OSMRE to graft additional investigation steps between its receipt of a report of a possible violation and the issuance of a TDN to state regulators.

OSMRE affirmed its initial interpretation of SMCRA's plain meaning during the agency's 1982 rulemaking review of its 1979 permanent program regulations. OSMRE made clear that the statutory "reason to believe" standard for TDN issuance "does not require OSM to conduct an inquiry into the veracity of the complainant." 47 Fed. Reg. 35627 (August 16, 1982). Emphasizing SMCRA's demand for prompt action in response to information asserting a possible violation, OSMRE explained:

> [i]f a Federal inspection is required in a particular instance, **there need not be any delay** caused by requiring the person to notify the State, because such notification can be made at the same time the person requests the Federal inspection.
>
> . . .
>
> Furthermore, the Act does not require that a person be certain that a violation exists, but only that he have "reason to believe" that one exists. The existing language [of 30 C.F.R. § 842.11(b)(2)], thus, reflects **the intent of the Act. *i.e.*, that the Secretary inspect** where the **possibility** of violations exists . . . .

*Id*. at 35628 (emphasis added).

The proposed additional records search process is flatly inconsistent with the plain language of and Congressional intent behind Section 521(a)(1).

Congress *could have* written the statute to allow OSMRE to gather information pertinent to an alleged SMCRA violation for as long as OSMRE deemed necessary, without temporal limit. It did not. Congress *could have* authorized federal inspections only if OSMRE deemed an on-the-ground review warranted, in its discretion, and only after checking all available electronic files even where the citizen complaint clearly provided facts that if true would constitute a violation. It did not. Congress *could have* limited federal enforcement in oversight to issuance of imminent harm cessation orders. It did not. On the contrary, Congress's used the mandatory exhortation "shall" and imposed a precise ten-day state response deadline triggered by receipt of information giving OSMRE "reason to believe" a violation exists.

The current proposal also appears to be at variance with *West Virginia Highlands Conservancy* (*WVHC 1*), in which the Interior Board of Land Appeals (IBLA) held that:

> the pendency of a request for programmatic relief does not excuse OSM from acting independently on inspection requests submitted pursuant to the procedures of 30 C.F.R. §§ 842.11 and 842.12, which require OSM to issue TDN's -- or at least to decide whether to do so based on the regulatory factor of whether there was "reason to believe" a possible violation might exist. *See generally Donald St. Clair*, 77 IBLA at 293-95, 90 I.D. at 501-502. Although appellants initially suggested that action on the specific complaints could be delayed if OSM would pursue their complaints in accordance with an agreed schedule, OSM declined this offer. At that point, OSM had no choice but to follow its regulations with respect to the inspection requests.

. . . .

> The citizen's complaint response requirements do not call for "policy review" by OSM, and they do not invite action by joint industry/government task forces before OSM decides whether to act. And we agree with appellants that the regulations do not envision "fact-finding" to determine if a violation exists before deciding whether a "possible" violation may exist. Rather, the preamble language to the 1982 rule makes clear that the possibility of a violation triggers the regulatory requirements to notify the State.
>
> Once a citizen's complaint gives OSM reason to believe that a violation of SMCRA has occurred, OSM is required to notify the State regulatory authority. *Plum Creek Mining Co.*, 142 IBLA 323, 328 (1998); *Patricia A. Mehlhorn*, 140 IBLA 156, 159 (1997); *Robert L. Clewell*, 123 IBLA 253, 259, 99 I.D. 100, 104 (1992). Neither the statute nor an implementing regulation gives OSM discretionary authority to do otherwise; the issuance of a TDN should be automatic in that case.
>
> . . . .
>
> We agree with appellants' assertion that, pursuant to 30 C.F.R. § 842.12, **the "factual investigation of a citizen's complaint follows, rather than precedes, issuance of the ten-day notice** to state regulators."

*WVHC 1*, 152 IBLA 158, at 186-87 (2000), (emphasis added) (certain internal quotations, quotation marks, and citations omitted).

In five cases decided over the intervening twenty years, the Board has cited *WVHC I* with approval for one or more of the above-quoted principles. *Cf. West Virginia Highlands Conservancy* (*WVHC II*), 165 IBLA 395, 401 (2005), *rev'd and remanded on other grounds*, *West Virginia Highlands Conservancy v. Kempthorne*, 569 F.3d 147 (4th Cir. 2009); *West Virginia Highlands Conservancy* (*WVHC III*), 166 IBLA 39, 47 n.10 (2005); *Mystic Brooke Development, Inc.*, 175 IBLA 209, 211 (2008); *Robert Gadinski*, 177 IBLA 373, 393 (2009); *Southern Appalachian Mountain Stewards v. Office of Surface Mining Reclamation & Enforcement*, 188 IBLA 310, 316 n.26 (2016), *rev'd on other grounds*, *Southern Appalachian Mountain Stewards v. Zinke*, 279 F.Supp.3d 722 (W.D. Va. 2017); *Jessica Bier*, 193 IBLA 109, 112 n.8 (2018). Requiring that issuance of a TDN be delayed to allow for a records search by OSMRE, even where it is bounded by "electronic information" that is "publicly available" yet not in the agency's possession at the time a complaint is received, is inconsistent with the

agency's long-standing interpretation, practice, and the law.

**D. Informal Review**

Commenters believe that the allowance of informal review by a state regulatory authority under 30 C.F.R. 842.11(b)(1)(iii) cannot lawfully be allowed to interfere with the obligation of OSMRE to initiate federal inspection and appropriate enforcement action. There is nothing in the text or legislative history of SMCRA that authorizes the interposition of a procedural step of state agency-initiated "informal review" after receipt of a TDN and a determination by OSMRE that the State regulatory authority has failed to take appropriate action or to show good cause for failing to do so. Imposition of an opportunity for the State regulatory authority to seek informal review, and completion of that review, as a prerequisite to conducting a federal inspection or issuing a federal notice of violation following issuance of a TDN and a determination by OSMRE that the state did not take appropriate action (or show good cause for such failure) is nowhere provided for in SMCRA, and has the effect of allowing extant violations to continue unabated, possibly ripening into avoidable imminent harm situations.

Existing 30 C.F.R. 842.11(b)(1)(iii)(B) should be rewritten to provide that a request for informal review by a State regulatory authority of OSMRE's determination that the state regulatory authority has failed to take appropriate action or to show good cause for such failure, shall **not** delay or prevent either a federal inspection or issuance of an enforcement order for the violation.

The delaying of federal inspection (and appropriate enforcement action for detected violations during that inspection) is wholly inconsistent with Section 521(a), which directs that the state has ten-days after notification in order to take appropriate action, *i.e.* enforcement action by the inspector to cause the violation to be abated. "If no such State authority exists or the State regulatory authority fails within ten days after notification to take appropriate action to

cause said violation to be corrected or to show good cause for such failure and transmit notification of its action to the Secretary, *the Secretary shall immediately order Federal inspection of the surface coal mining operation* at which the alleged violation is occurring unless the information available to the Secretary is a result of a previous Federal inspection of such surface coal mining operation[.]" 30 U.S.C. Section 1271(a)(1).

Had Congress intended that the State regulatory authority could dispute the determination that the State regulatory authority had failed "within ten days after notification to take appropriate action to cause the violation to be corrected or to show good cause for failure[,]" and in so disputing, delay federal inspection and enforcement action, Congress would have so provided. For where it *did* intend to provide a right to informal review, Section 517(h)(1) reflects that Congress knew how to express its intention in unmistakable language: "The Secretary shall, by regulation, establish procedures for informal review of any refusal by a representative of the Secretary to issue a citation with respect to any such alleged violation." 30 U.S.C. 1267(h)(1).

The late Justice Scalia remarked in *Whitman v. Am. Trucking Ass'n, Inc.*, 531 U.S. 457, 468 (2001) that "Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions — it does not, one might say, hide elephants in mouseholes." Nor can it be assumed that where Congress directed that OSMRE "shall immediately order" federal inspection and attendant enforcement action when it has determined that a State regulatory authority failed within the ten-day timeframe to take action or to show good cause for failure, it intended to grant OSMRE the authority to alter the regulatory scheme by creating out of whole cloth a new and wholly unauthorized informal appeal process for the State regulatory authority, delaying the federal inspection that was to occur "immediately" until the end of that process. It is time to revisit and eliminate the delaying of federal inspection and

enforcement action based on the invocation of "informal review" by a State regulatory authority.

**E. The Proposed Rule Appropriately Includes Violations Resulting From Actions Of State Regulatory Authorities Within the Section 5321(a)(1) Ten-Day Notice Process, In Accordance with the Plain Language of SMCRA and Decades of Prior OSMRE Interpretations and Policy**

Commenters appreciate the recognition of the agency that the 2020 TDN Rule departed abruptly from its long-standing interpretation of the phrase "any person" as used in 30 U.S.C. 1271(a)(1) as including the State regulatory authority. 88 Fed. Reg. 24949. We agree that "[t]reating all types of possible violations the same would be more consistent with 30 U.S.C 1271(a)(1) and that:

> [t]he better reading of that statutory provision is one we have held throughout most of OSMRE's history: that we must issue a TDN when we have reason to believe that *any person*, including a State regulatory authority, is in *violation of any requirement of SMCRA.* If a State has issued a permit that would allow coal mining to occur in a manner that is inconsistent with SMCRA or the applicable State regulatory program, or a permit that does not comply with all requirements to obtain a permit, it makes little sense for us to wait for the permittee or operator to act in accordance with that defective permit before we can issue a TDN.

88 Fed. Reg. 24949 (emphasis original).

The proposed rule appropriately restores and formalizes OSMRE's long-standing interpretation, prior to the abrupt departure in the 2020 rulemaking, that the TDN process applies to violations arising from actions of the state regulatory authority that are inconsistent with SMCRA, including so-called "permit defect" violations. *See* 88 Fed. Reg. 24944 at 24949-24952. The Federal Register notice for the proposed rule provides that:

> We further propose to amend the regulations to return to our longstanding practice of requiring the issuance of a TDN, in the first instance, when we have reason to believe a violation exists in the form of a so-called "permit defect." . . . We generally consider a permit defect to be a deficiency in a permit-related action taken by a State regulatory authority, such as when a State regulatory authority has issued a permit with a provision that is contrary to the approved State program.

88 Fed. Reg. at 24946.

The proposed rule corrects the misguided and unsupported interpretation put forward by OSMRE in the preamble to the 2020 Rule, where OSMRE had narrowed its interpretation of the term "any person" as used in section 521(a) of SMCRA, stating that "any person" "does not include a State regulatory authority, unless it is acting as a permit holder." 85 Fed. Reg. at 75176. (Notably, the 2020 Rule did not amend the actual regulation, but merely addressed the issue in the Federal Register preamble, raising significant Administrative Procedure Act compliance issues.)

Commenters concur with OSMRE's determination to "treat all types of possible violations the same" and would go one step further and suggest that it is not only "the better reading of that statutory provision" but is the only reading that is consistent with 30 U.S.C. Section 1271(a)(1), congressional intent, and consistent past OSMRE practice. By providing for federal oversight of site-specific violations occasioned because of actions or inactions of the state regulatory authority through the ten-day notice process, the proposed rule ensures proper and complete implementation of the environmental protection provisions of SMCRA, consistent with SMCRA's intent with respect both to the allocation of authority between state and federal regulators, and to the primary purpose of the federal law – i.e. "to protect society and the environment from the adverse effects of surface coal mining operations[.]" 30 U.S.C. Section 1201(a).

Commenters request further clarification by OSMRE that the restoration of the definition of "any person" for purposes of 30 U.S.C. Section 1271(a)(1) as encompassing the state regulatory authority include the *full range* of instances in which the state regulator's actions or decisions have caused on-the-ground violations of SMCRA. Several examples, drawn from experiences with SRA implementation of approved state programs over the past 43 years, are provided and the agency is requested to respond in each case as to whether the violation would be subject to the TDN process and, failing state enforcement action to cause the violation to be corrected, federal enforcement:

1. A state regulatory authority issues a permit based on a mining permit application that fails to include one or more provisions that are required under the regulations of the SRA applicable to such operations – for example, the permittee has failed to provide pre-blast surveys to residents within ½ mile of the proposed mining operation. In this instance, where the state regulatory program statute and regulations are not the issue but the *application* of those regulations by the SRA in this *individual case* is at variance with those regulations, would OSMRE issue a TDN followed by federal inspection and enforcement action to require permittee compliance with the SRA's regulations if the state failed to do so after notice?
2. A state regulatory authority issues a permit allowing construction of a high-hazard sediment impoundment within 100 feet of an occupied dwelling, based on a 300-foot waiver executed by the ex-husband of the owner-occupant. The ex-husband by court decree has no right to occupancy of the jointly-owned dwelling. The SRA response to the citizen is that it has "a waiver" from "an owner" of the occupied dwelling, and that it will not look behind that waiver because to do so would be to determine property rights. In this example, the state regulation is consistent with the federal counterpart, and it is the agency *interpretation* of the provision (i.e. the 300-foot waiver) that is the issue. That interpretation is not limited to this one instance, but represents an agency interpretation that it would apply in all similar cases. Would OSMRE issue a TDN in this instance, followed by federal inspection and enforcement action to require permittee compliance with the SRA's regulations if the state failed to do so after notice?[5]

[5] This is the case of Muriel Smith, a retired educator in Perry County, Kentucky. After the Commonwealth of Kentucky issued a permit to a coal company allowing construction of a high-hazard embankment sediment pond 100 feet above her home, she objected to the state regulatory authority that she had not signed a waiver as is required for any mining activities within 300 feet of an occupied dwelling. As the joint owner of the home and the individual with the sole legal right of occupancy after a divorce was finalized, she believed that she, and not her ex-husband who no longer lived in the premises at the time that he signed the waiver, should be the one who determines whether to waive the 300-foot buffer zone protection of Section 522 of SMCRA. The state agency dismissed her claims as a "property rights dispute," and refused to accord her an

Commenters believe that whether the violation is an isolated "one-off" failure of a permit reviewer, or a more systemic failure, such as the programmatic misinterpretation by a state of the stream buffer zone rule as being inapplicable only below an in-stream, sediment control structure; both categories of violations arising from SRA actions (or inactions) are subject to the TDN process and site-specific enforcement. Regardless of the root cause of the violation occasioned due to the actions or inactions of the state regulatory authority, and regardless of the root cause of the "permit defect," all violations of the Act, Secretary's regulations, or the approved program must be actionable through the TDN process.

So too, whether the on-the-ground violation is the result of a permittee's disregard of regulatory obligations as contained in the state-issued permit or authorization, or of a permit issued erroneously due to an isolated regulatory failure to properly review the permit or a more systemic state program failure to properly interpret and apply its regulations, it is necessary and appropriate to hold the permittee accountable for the violation through the TDN process and enforcement action. To do otherwise would allow the violation and extant harm to continue. In such a case, OSMRE must exercise its ten-day notice oversight authority to hold the SRA accountable to its obligations to manage the approved program in accordance with the Act, particularly since in some

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administrative hearing. Rebuffed by the state regulatory authority, she pleaded with OSM to review the matter, resulting in issuance of a TDN, followed by a federal NOV and removal of the pond.

She also appealed the state's decision not to take action in response to her complaint. Four years later, the Kentucky Court of Appeals ruled on behalf of Ms. Smith, finding that the state agency's handling of the matter was "seriously flawed. Its 'hand off' policy of noninvolvement is in direct conflict with the spirit of Chapter 350[.] . . . We agree with the appellant that to hold otherwise would 'gut the protection of KRS 350.085(3).'" *Smith v. Natural Resources and Environmental Protection Cabinet*, Ky. App. 712 S.W.2d 951 (1986). But for OSMRE having issued a TDN and taken enforcement action that was needed due to the improper interpretation and application by the SRA of the 300-foot occupied dwelling waiver, Ms. Smith would have been forced to endure for four years the burden and risks associated with living directly below a high-hazard embankment sediment structure illegally located immediately uphill from her home, with the attendant risk of wash out or catastrophic failure of the structure, and the impairment of value and use of her land.

cases, the nature of the violation may not be apparent until after mining begins, long after the close of any opportunity for the public to have challenged the underlying permitting action and detected the failure.

**1. OSMRE's proposed recognition that state regulator violations are appropriately addressed via the ten-day notice process is consistent with the intent of SMCRA and OSMRE's existing regulations.**

The proposed rule would rewrite the SMCRA regulations to provide that "State regulatory program issues will be considered as possible violations and will initially proceed, and may be resolved, under part 842 of this chapter." 88 Fed. Reg. 24944 at 24957. This regulatory amendment is consistent with the intent of SMCRA and OSMRE's regulations. The proposed rule is necessary to give full effect to the requirements of SMCRA and should be finalized.

Section 521(a) of SMCRA states that if "the Secretary has reason to believe that <u>any person</u> is in violation of any requirement of this chapter," then enforcement will be taken according to its further provisions. 30 U.S.C. Section 1271(a) (Emphasis added.) While courts ordinarily apply "the longstanding interpretive presumption that 'person' does not include the sovereign"—which may include state regulatory authorities—that presumption is to be disregarded "upon some affirmative showing of statutory intent to the contrary." *Vermont Agency of Nat. Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 780–81 (2000) (discussing applicability of the Dictionary Act, 1 U.S.C. § 1, to the False Claims Act, 31 U.S.C. §§ 3721–3733 and determining whether "any person" included a state agency); *see also Return Mail, Inc. v. United States Postal Serv.*, 139 S. Ct. 1853, 1863 (2019). As discussed below, the legislative history shows that Congress intended for § 521(a) of SMCRA to apply to state regulators.

Congress' choice to use the phrase "any person" must be interpreted in context, since the meaning of words "may only become evident when placed in context." *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000). "It is a 'fundamental canon of

statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.' A court must therefore interpret the statute 'as a symmetrical and coherent regulatory scheme,' and 'fit, if possible, all parts into the harmonious whole.'" *Id.* at 133 (first quoting *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989); then quoting *Gustafson v. Alloyd Co.*, 513 U.S. 561, 569 (1995); then quoting *FTC v. Mandel Bros., Inc.*, 359 U.S. 385, 389 (1959)).

First, the context of § 521(a)(1) shows a clear intent that the term "person" take on the ordinary and plain meaning of the word to mean any "**entity**" violating SMCRA. The use of the term "any" as a modifier to both "person" and "requirement" shows statutory intent to broadly cover those that may violate SMCRA and elicit a TDN. Section 521(a) contemplates "all" or "every" entity and "all" or "every" possible violation of SMCRA. *See SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1353 (2018) ("In this context, as in so many others, 'any' means 'every.'"); *United States v. Caniff*, 955 F.3d 1183, 1190 (11th Cir. 2020) ("As we have often had occasion to say, when interpreting a statute, 'any' means 'all.'" (quoting *Merritt v. Dillard Paper Co.*, 120 F.3d 1181, 1186 (11th Cir. 1997))); *see also* David S. Elder, *"Any and All": To Use or Not to Use?*, 70 Mich. Bar J. 1070, 1070 (1991), available at https://www.michbar.org/file/generalinfo/plainenglish/pdfs/91_oct.pdf (discussing interchangeability of terms "any" and "all"). Such broad language was meant to encompass any possible violation of SMCRA, including those violations occasioned by acts and omissions of state regulators.

Additionally, the preceding provision Section 520, which discusses citizen suits under SMCRA, 30 U.S.C. Section 1270, sheds light on the context of Section 521(a). The citizen suits provision provides that "any person having an interest which is or may be adversely affected may commence a civil action on his own behalf to compel compliance with this chapter . . . against the

United States or **any other governmental instrumentality or agency** to the extent permitted by the Eleventh Amendment to the Constitution . . . ." *Id.* Section 1270(a)(1) (emphasis added). Section 520(a) clearly contemplates that state regulators could be violators liable to civil suit. When looking at the TDN provision with this concept in mind, it is apparent that Congress intended to include state regulators as those capable of violating SMCRA under Section 521(a).

The exclusion of the state regulatory authority as a "person" in the application of 30 U.S.C. 1271(a)91) by the agency would alco conflict with OSMRE's own regulations expressly providing that "any person" includes state regulatory authorities. 30 C.F.R. Section 700.5 defines "person" as including "any agency, unit or instrumentality of Federal, State or local government," thereby expressly including state regulators in the definition of "person." This is a straightforward interpretation by the agency. *See Kisor v. Wilkie*, 139 S. Ct. 2400, 2414–15 (2019) (explaining that "the 'traditional tools' of construction" apply to regulatory interpretation); *Safe Air for Everyone v. United States E.P.A.*, 488 F.3d 1088, 1097 (9th Cir. 2007) (noting that "the plain meaning of a regulation governs," and "[o]ther interpretive materials, such as the agency's own interpretation of the regulation, should not be considered when the regulation has a plain meaning" (quoting *Wards Cove Packing Corp. v. Nat'l Marine Fisheries Serv.*, 307 F.3d 1214, 1219 (9th Cir. 2002))). Because 30 C.F.R. 700.5 was promulgated under the statutory authority given to the Secretary and is consistent with the statute, it necessarily follows that state regulatory authorities fall within the scope of Section 521(a). *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001) ("We hold that administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying out the force of law, and that the agency interpretation claiming deference was promulgated in exercise of that authority.").

OSMRE was delegated authority to "publish and promulgate such rules and regulations as may be necessary to carry out the purposes and provisions of [SMCRA]." 30 U.S.C. § 1211(c)(2). Such delegation allowed OSMRE the discretion to determine what was necessary to implement SMCRA and, exercising such discretion, OSMRE promulgated a definition of "person" that includes state regulators. 30 C.F.R. Section 700.5. This definition is neither "procedurally defective, arbitrary or capricious, [n]or manifestly contrary to the statute." *Mead Corp.,* 533 U.S. at 227. As such, it is binding and therefore brings state regulators within the scope of Section 521(a). OSMRE's position in the proposed rule that state regulators fall within the definition of "any person" is entirely consistent with the agency's prior interpretation, including as expressed in 30 C.F.R. 700.5 and, prior to the 2020 TDN Rule, over a period spanning more than 40 years.

For these reasons, OSMRE's proposed inclusion of SRA's as "persons" under Section 521(a)(1) and of violations occasioned by acts or omissions of state regulatory authorities as violations subject to the TDN provisions of SMCRA is fully consistent with—and in fact mandated by—the statute and OSMRE's own definitional regulations. Accordingly, the proposed rule should be finalized as proposed, and "any person" should be construed for purposes of 30 U.S.C. Section 1271(a)(1) to include State regulatory authorities in their regulatory capacities of the entities responsible for maintaining, administering, and implementing the delegated programs in a manner consistent with the Act, and the Secretary's regulations.

**2. Congress intended for OSMRE to use ten-day notice oversight to address site-specific violations resulting from acts or omissions by state regulatory authorities**

In enacting SMCRA in 1977, Congress made clear its intent that OSMRE had an ongoing and active role in assuring compliance with SMCRA once primary responsibility for implementation and enforcement had been assumed by individual states. This mandate to OSMRE did not distinguish between OSMRE's oversight of violations created by permittees and those

violations created through acts or omissions of state regulators. Congress made very clear that broad ongoing federal oversight of all aspects of SMCRA implementation was critical to ensuring that federal standards would be met at all times:

> The Federal enforcement system contained in this section, while predicated upon the States taking the lead with respect to program enforcement, at the same time provides sufficient Federal backup to reinforce and strengthen State regulation as necessary. *Federal standards are to be enforced by the Secretary on a mine-by-mine basis for all or part of the State as necessary without a finding that the State regulatory program should be superseded by a Federal permit and enforcement program.*

S. Rept. No. 95-128, 95th Cong., 1st Sess. 88 (1977) (emphasis added).

This legislative history makes clear in two ways that OSMRE's proposed express inclusion of oversight of state regulator violations under the ten-day notice provisions is consistent with the intent of Congress. First, the statement of Congressional intent makes clear that the only limitation on use of the ten-day notice provisions is that the alleged violation must be manifest at a particular mine, where it notes that "Federal standards are to be enforced by the Secretary on *a mine-by-mine basis*." The preamble to the proposed rule continues to recognize and respect this limitation by determining that the ten-day notice process is the appropriate means to address 'permit defect' issues because in such an instance the state regulator will have "issued a permit that is not in compliance with the approved State program or that would allow a permittee to mine in a manner that is not authorized by the State regulatory program." 88 Fed. Reg. at 24957. In such a circumstance, OSMRE "would issue a TDN for possible on-the-ground violations as well as other [permit-specific] possible violations of the approved State program, such as noncompliance with the State analogues to the permit application requirements at 30 CFR part 778." *Id.*

Second, Congress made clear that invocation of the Part 733 process for revoking delegation of authority to a state and substituting a federal program was never designed as a surrogate for individual enforcement action to resolve mine-specific violations, stating that

OSMRE should enforce federal standards on a mine-by-mine basis "as necessary without a finding that the State regulatory program should be superseded by a Federal permit and enforcement program." OSMRE's current proposal restores this essential distinction by allowing OSMRE to address immediate, mine-specific violations arising from state program implementation failures (i.e. 'permit defects') initially via the ten-day notice process followed by federal enforcement in the absence of effective state action, while also recognizing that underlying programmatic issues may then be further addressed through the Part 733 process. The proposed rule properly recognizes that although **programmatic** violations of obligations by state regulators are properly addressed through the Part 733 process, Congress intended that **mine specific** violations by state regulators—including, but not limited to, issuance of defective permits—be addressed through the ten-day notice process.

### 3. OSMRE's proposed inclusion of state regulator violations within the ten-day notice process is consistent with decades of OSMRE's past practice.

The inclusion within the TDN process of violations arising from permit defects or other acts or omissions by state regulators, is fully consistent with decades of agency practice with respect to such violations. The Office is correct in noting that this "better reading" of 30 U.S.C. 1271(a)(1) is one that the agency has "held throughout most of OSMRE's history: that we must issue a TDN when we have reason to believe that *any person,* including a State regulatory authority, is in *violation of any requirement of SMCRA."* 88 Fed. Reg. 24949. A review of IBLA decisions reveals that over the decades since SMCRA was enacted in 1977 OSMRE regularly exercised ten-day notice oversight of violations by state regulators. Although in some of those cases OSMRE ultimately declined to find a violation, and in some cases the IBLA reversed a determination by OSMRE, in *none* of the cases did OSMRE or the IBLA question the validity or propriety of

OSMRE's use of the ten-day notice provisions to investigate and address alleged mine-specific violations arising from actions or omissions of a state regulatory authority.

In the 1987 *Mullinax* decision, IBLA considered a citizen's appeal of OSMRE's ten-day notice decision regarding the citizen complaint that Alabama's mine regulator had issued defective permits. *Mullinax*, 96 IBLA 52 (Feb. 27, 1987). The citizen complaint alleged that he had alerted the Alabama Surface Mining Commission ("ASMC") that he claimed ownership of property covered by a permit, and that he had not granted permission for mining of that property. *Id.* at 53. OSMRE responded by issuing a ten-day notice to ASMC that described the violation as "issuance of permit where company did not have legal right to mine/ failure to notify surface/ mineral ownership of issuance of permit." *Id.* at 54. Thus, the ten-day notice was premised squarely and entirely on the allegation that the state regulator had violated SMCRA in issuing the permit. Ultimately, OSMRE upheld ASMC's permitting decision. In reviewing OSMRE's determination, the IBLA noted that the ten-day notice provisions are "primarily designed to address violations of performance standards or permit conditions that would be ascertainable by inspection of the surface coal mining operation" (*Id.* at 58), but nevertheless held that "OSM acted properly in referring the complaint to the state" (*Id.* at 59). IBLA thus expressly affirmed the propriety of OSMRE's use of Section 521's ten-day notice provisions to review a state's permitting action.

In IBLA's 1990 *W.E. Carter* decision, the Board considered OSMRE's actions in issuing a ten-day notice to the Kentucky mine regulator in response to a citizen complaint alleging that a mining road "had been permitted in violation of [SMCRA]." 116 IBLA 262, 263 (October 18, 1990). The citizen complaint specifically alleged that the road had been permitted in violation of SMCRA's prohibition against mining operations within 300 feet of occupied dwellings. *Id.* After initially sending the ten-day notice, OSMRE had declined to take further action after it learned that the permit issue had been appealed to an administrative hearing officer, and that the head of the

Kentucky regulator had declined to reverse approval of the permit. *Id*. at 265. The IBLA reversed OSMRE's decision, finding that "[a]ctive litigation, in and of itself, does not sustain a finding that the State regulatory agency acted appropriately," that "OSMRE was bound to oversee enforcement of the State permanent program regulation," and that "an inspection was required to be made in furtherance of Federal oversight required by SMCRA." *Id*. at 268. Accordingly, IBLA affirmatively held that OSMRE has **a duty** under SMCRA to investigate and take enforcement action against alleged violations by state regulators based on permit defects.

IBLA again held, in the 1991 *Kuhn* decision, that OSMRE has an affirmative duty under Section 521's ten-day notice provision to issue the TDN and then to conduct a federal inspection where the state regulator has allegedly issued a defective permit. 120 IBLA 1 (July 3, 1991). In that case, a citizen had filed a complaint with OSMRE alleging that Ohio had issued a permit where the permittee had not secured a legal right to enter and mine. *Id*. at 6. In response to the citizen complaint, OSMRE issued a ten-day notice to the Ohio regulator. *Id*. IBLA interpreted the citizen appeal as seeking federal oversight over *two affirmative duties* on the part of the state regulator: "(1) the duty to ensure accurate permit boundaries prior to permit issuance and to prevent trespass; and (2) the duty to suspend permission to mine where permit boundaries are called into question." *Id*. at 18. IBLA recognized that the case presented somewhat unique facts, noting that "few cases have addressed allegations that the regulatory authority has issued a permit which erroneously expands upon the legal right to mine; that is, that the boundaries described in the permit encompass more land than the operator has legal authority to mine." *Id*. at 19. In that instance, "the regulatory agency has bestowed authority to mine upon the operator, but it allegedly lacks the legal right to do so." *Id*. IBLA then reviewed its prior decisions, including the *Mullinax* and *W.E. Carter* decisions discussed above, noting that "this Board noted that the legislative history of SMCRA indicates an intent by Congress to place primary control of permit issuance within state jurisdiction, even during

interim Federal enforcement. Even so, *where it is evident that a permit has been issued in violation of state regulatory requirements,* this Board has declared such action inappropriate, and has ordered Federal enforcement." *See W. E. Carter*, *supra*, *Id*. at 20 (emphasis added). Ultimately, IBLA held that OSMRE had failed to take appropriate action to correct the state's violation, finding that "[s]o long as the operator retained full authority to mine the disputed area under a validly issued permit, the intent and purpose of the Act stated in section 102(b) (30 U.S.C. § 1202(b) (1988)) to 'assure that the rights of surface landowners and other persons with a legal interest in the land or appurtenances thereto are fully protected from such operations' was jeopardized." *Id*. at 27. As noted in the *Kuhn* fact pattern, where actions by a state regulatory authority are contrary to the intent and language of SMCRA, OSMRE has a duty to act, including exercising the enforcement authority that attends Section 521's ten-day notice process.

Finally, in the 1995 *Molinary* case, the IBLA reviewed OSMRE's ten-day notice response to a citizen complaint alleging, among other things, that the Virginia surface mining regulator had erred in issuing a permit that approved using spoil to construct a roadway at the expense of returning that spoil for highwall elimination. 134 IBLA 244, 261 (Nov. 30, 1995). After issuing a ten-day notice request and reviewing the state's response, OSMRE determined that Virginia's permitting decision was not arbitrary, capricious, or an abuse of discretion. *Id*. at 263. IBLA disagreed, holding that to the extent the Virginia regulatory agency ("DMLR") permitted a road to be constructed to standards beyond those necessary to accomplish the purpose for which the road was intended, the State's approval of the road conflicted with the state regulation and the terms of the permit, which require that "[a]ll available material * * * [be used] to backfill the existing wall to the extent possible." As such, DMLR's approval of the improved roadway was deemed by IBLA an arbitrary and capricious action, and, before its approval of site reclamation, DMLR should have required Powell to regrade the road, and to use the excess spoil placed on the roadway to backfill

the highwall. *Id*. at 264. Once again, IBLA found no problem in OSMRE's employment of the ten-day notice provision to assure oversight and remedy of a state regulator's defective permitting decisions.

IBLA has repeatedly held that SMCRA not only allows, but affirmatively requires, OSMRE to conduct ten-day notice inspections in response to citizen complaints alleging mine-specific violations by the state regulator. The proposed rule is in full accord with these IBLA decisions.

**4. OSMRE and the IBLA have successfully distinguished between mine-specific violations by state regulators where ten-day notice oversight is required, and programmatic violations better addressed under the Part 733 Process**

In at least two decisions, the IBLA has clarified the factors that determine whether OSMRE should address a violation alleged in a citizen complaint via the ten-day notice process or solely via the Part 733 process. Consistent with OSMRE's approach in the proposed rule, this distinction does not rest on whether the alleged violator is a permittee or a state regulator, but whether the alleged violation is permit-specific or is of a general nature. Where there is a citizen complaint of an alleged violation arising from actions or omissions of a state regulator that is permit- or mine-specific, OSMRE must issue a ten-day notice to assure that such violation is remedied. But where the violation is more general or programmatic, and there is no citizen complaint regarding a specific manifestation of that programmatic violation, the use of the Part 733 process is appropriate.

In the 2000 *West Virginia Highlands Conservancy, et al.*, decision, the IBLA addressed an appeal of OSMRE's failure to issue ten-day notices in response to a citizen complaint that the West Virginia regulatory authority had repeatedly failed at multiple mines to conduct inspections of all discharge outfalls as part of the complete inspections required by SMCRA. 152 IBLA 158, 200 (April 25, 2000). In affirming OSMRE's decision not to issue TDNs, the IBLA drew a clear distinction between permit-specific violations where a ten-day notice would be required, and more

programmatic violations where the 733 process should be invoked. IBLA held that if a complainant alleges that the effluent (i.e. wastewater discharge) from a particular outfall is a violation, then the proper remedy is for OSMRE to issue a TDN, and to conduct a Federal inspection if the State fails to inspect that outfall and take appropriate action or to provide good cause for failing to do so. On the other hand, if the gravamen of the complaint is that the State as a general matter is programmatically failing to carry out the complete inspection requirements of its program by failing to inspect every outfall, that particular grievance would be cognizable under the Federal takeover provisions of 30 C.F.R. § 733.12(a)(2) and would thus be beyond IBLA's jurisdiction. *Id*. at 200-201. Because the citizen complaint in that case had alleged a "general" failure by the state regulator, as opposed to a "particular" violation, OSMRE was justified in declining to issue the ten-day notice.

IBLA reaffirmed this distinction five years later in a second *West Virginia Highlands Conservancy* decision. 166 IBLA 39 (June 9, 2005). IBLA noted that the citizen complaint "did not present OSM with any site-specific evidence of violations," but instead raised "certain programmatic enforcement issues over which WVHC disagrees with OSM." *Id*. at 46-47. Again, IBLA emphasized the critical distinction between "site-specific" violations, and "programmatic" issues. *Id*. After characterizing the citizen complaint as involving only programmatic issues, IBLA affirmed OSMRE's decision to not issue a ten-day notice.

OSMRE's proposed rule reflects this straightforward distinction recognized by the IBLA between "site-specific" violations (to which the ten-day notice provisions apply, whether or not the violation is caused by the acts or omissions of an SRA), and "programmatic" issues (which should be primarily addressed via the Part 733 process). Specifically, OSMRE's proposed rule recognizes the continuing importance of addressing programmatic problems with SMCRA implementation by the state regulator through the Part 733 process, while simultaneously ensuring that OSMRE

address permit-related site-specific violations in a much more direct and timely manner through the ten-day notice process. Neither the coalfield public nor the environment downhill and downstream of a mining operation in violation of a permit, the approved state program, or the Act and Secretary's regulations, should be required to bear the burdens and suffer the consequences of violations simply because those violations result from acts or omissions of the SRA at variance with the Act or that approved program.

The 2020 TDN Rule deferring violations caused by acts or omissions of the SRA, was in direct contravention of Congressional intent, expressed in the Senate Report, that "federal standards are to be enforced by the Secretary **on a mine-by-mine basis"** to "reinforce and strengthen State regulation" as necessary, **without** resort to the Part 733 process by which a federal permit and enforcement program would be installed. S. Rept. No. 95-128, *supra*, at 88 (emphasis added). Addressing through the TDN process and federal enforcement action those violations occurring under an approved state program at a particular mining operation that arise due to state failure to properly maintain, implement, and administer the state program, in furtherance of the intent of the Senate Committee that the Act and approved state program be enforced "on a mine-by-mine basis," is consistent with the broad remedial goal of the law:

> [T]he purpose of Congress in passing this Act is to establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations as well as the surface impacts of underground coal mining operations.
>
> * * *
>
> If and when a State manifests a **lack of desire or an inability to participate in or implement that program** and to meet the requirements of the Act, the Federal Government is to exercise the full reach of Federal constitutional powers to insure the effectiveness of that program.

S. Rept. No. 95-128, at 63.

### 5. OSMRE has previously and repeatedly adopted official interpretations of the ten-day notice provisions that include violations arising from actions and omissions of state regulators

For most of the years that SMCRA has been in effect, it has been the official policy of OSMRE that the ten-day notice provisions should be used to address violations that are traceable to actions or omissions by state regulators, including the issuance of defective permits. That policy has been clearly articulated in a series of agency INE-35 directives. The proposed rule appropriately codifies this long-standing interpretation and avoids the confusion that has stemmed from the agency's prior informal changes of policy through the issuance of conflicting directives.

At least by 1989, OSMRE's official policy—as expressed in INE-35 Directive 534 issued by OSMRE's Director—was that a ten-day notice "should be issued" where permit "omissions or defects" are identified as a result of individual field inspections. A permit omission or defect can only be the product of a state regulator's action, so this Directive required OSMRE to use the ten-day notice provision to correct a violation by a state regulator.

OSMRE expanded on this policy in Directive 640 (1990). That directive includes an entire section on "Addressing Permit Defects." That section imposes a mandatory duty on OSMRE to address violations by state regulators, requiring that "[w]here alleged defects are identified in permits issued by the regulatory authority during oversight inspections or during the course of administering permit reviews, the Field Office shall notify the regulatory authority of the alleged defect by ten-day letter." *Id.* (emphasis added). OSMRE subsequently issued two clarifying directives in 1991, 681 and 700, that amended portions of Directive 640—including the use of "ten-day letters" as an alternative to "ten-day notices"—but left intact the mandate that OSMRE address violations by state regulators through the Section 521 process.

OSMRE maintained this interpretation and policy until October 2006, when the then-Acting Director rescinded Directive 640 in Directive 922, which consisted of just two short paragraphs.

In January 2011, OSMRE Director Pizarchik issued a new INE-35 directive—Directive 968—once again making clear that the ten-day notice provision is proper to address state regulatory authority violations, including issuance of defective permits. Directive 968 defined "permit defect" as "a type of violation consisting of any procedural or substantive deficiency in a permit-related action taken by the RA (including permit issuance, permit revision, permit renewal, or transfer, assignment, or sale of permit rights)." The Directive clarified that OSMRE should wait for the state regulator to finalize its permitting action before issuing a ten-day notice, so as to not interfere with a pending permitting decision. The Directive made clear that in conducting its ten-day notice oversight, "permit defects are handled like any other type of violation." Directive 968 also again emphasized that the issuance of a ten-day notice to address a violation by a state regulator is **mandatory,** stating that "an authorized representative must issue a TDN when: (a) the authorized representative has reason to believe a permit defect exists (whether based on an oversight inspection, an administrative permit review, a citizen's complaint, or any other information available to the authorized representative); or (b) on the basis of a Federal inspection, the authorized representative determines that a permit defect exists and OSM has not issued a previous TDN for the same violation." Further, emphasizing that OSMRE must treat violations by state regulators in the same way as violations by permittees, the Directive plainly stated that state responses to ten-day notices "based upon permit defects" are not evaluated differently from responses based on other types of violations, because "[a]ll RA responses to TDNs are evaluated under the same 'appropriate action' and 'good cause' standards set forth at 30 C.F.R. 842.11(b)(1)(ii)(B)."

Director Pizarchik's Directive 968 was rescinded by Deputy Director Glenda Owens on May 3, 2019, and replaced with Directive 996, which remains current OSMRE policy. The Owens directive makes no reference to permit defects or other alleged violations by the state regulator

itself—it neither expressly provides that such violations may not be addressed via the ten-day notice process, nor does it require OSMRE to issue a ten-day notice when a citizen alleges a violation by a state regulator. Directive 996 does expressly provide that "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." *Id.* at 7. Thus, Directive 996 conforms with prior OSMRE practice and IBLA decisions in distinguishing use of the ten-day notice provisions to address site-specific violations, and not excluding those violations caused by a state regulatory act or omission.[6]

**6. OSMRE's proposed approach of addressing permit defect violations initially through the ten-day notice process, with the potential for additional action under the Part 733 process, could with modification strike an appropriate balance between addressing permit-specific on-the-ground violations quickly while also initiating a longer-term process with the state regarding underlying programmatic issues.**

In the proposed rule, OSMRE provides for the use of both the ten-day notice and Part 733 processes to address permit defect violations created by acts or omissions of the state regulatory authority. Under the proposed rule, state regulatory authority violations such as permit defects "will

[6] Prior to the discussion in the preamble to the 2020 rule, the only articulation of the idea that Congress intended to exclude state regulatory violations from the ten-day notice process was a 2005 letter by Rebecca Watson, then-Acting Secretary, Land and Minerals Management, responding to a citizen complaint of a site-specific violation at the Mettiki mine in West Virginia ("the Mettiki Letter"). In the Mettiki Letter, Acting Secretary Watson asserted that the issuance of a defective permit by a state regulator is not a violation that may be addressed via the ten-day notice process. The Mettiki Letter was expressly cited in directive 922 as the basis for the rescinding of earlier INE-35 directives that had included permit defects and other state regulator violations within the ten-day notice process. The Mettiki Letter contained a flawed analysis and ignores the decades of preceding interpretations and policy by OSMRE applying the ten-day notice process to state regulator violations, as well as the many IBLA decisions upholding the same. The Mettiki Letter did not engage with the plain language of section 521 of SMCRA which requires federal oversight of violation by "any person" of "any requirement of this chapter or any permit condition required by this chapter." 30 U.S.C. § 1271(a). Instead, it was premised on an inappropriately narrow view of OSMRE's ongoing authority. The Mettiki Letter was repudiated by adoption of INE-35 Directive 968 in January 2011. Then-Director Pizarchik was aware of the Farrell-Cooper Mining Co. matter, in which the permittee and the Oklahoma state regulator challenged OSMRE's use of the ten-day notice provisions to address the Oklahoma state regulator's issuance of defective permits. The Oklahoma state regulator had attempted to shield itself and the permittee from enforcement action by citing the Mettiki letter. Director Pizarchik's INE-35 Directive 968 reversed course from the Mettiki letter and Directive 922, and once again provided guidance to OSMRE clarifying the agency's obligation to issue ten-day notices to state regulators who took actions in violation of SMCRA.

initially proceed, and may be resolved, under" the ten-day notice process. 88 Fed. Reg. at 24960. But "the proposed regulations would still allow OSMRE and the State regulatory authority to develop an action plan under 30 CFR part 733 to address a State regulatory program issue." 88 Fed. Reg. at 24948. This approach appears to contemplate use of the ten-day notice process to address permit specific violations that are extant, and in so doing to avoid the significant flaws of the 2020 Rule's decision to move all permit defect violations into the Part 733 process without addressing and requiring timely abatement of site-specific violations on the ground. Further clarification is needed, however, in one aspect of the proposed rule.

Commenters appreciate the recognition by OSMRE that the Part 733 process is an inadequate and poor substitute for the ten-day notice process when dealing with mine-specific instances of state regulatory violations, for two primary reasons. First, the lengthy and ultimately indeterminate timelines inherent in the Part 733 procedural process do not render that process able to respond to violations requiring prompt action, such as the situations described above where a permittee intends imminently to begin mining on a piece of property its rights to which are contested. This is true even with the amendments to the Part 733 process in the proposed rule, because the proposed deadlines would not allow OSMRE to use the Part 733 process to address on-the-ground violations in sufficient time to avoid permanent impacts or worse yet, the ripening of such violations into imminent harm situations. Second, because invocation of the Part 733 procedures requires that a state fail to effectively implement, administer, maintain, or enforce an entire "part" of the state program, it is not designed to nor is it effective at addressing in real time those cases where the state regulatory authority fails to properly administer its program with regard to one particular mine or permittee, but where the failure does not rise to the level of misadministration of all or part of its program.

The Part 733 process is not an adequate surrogate for the ten-day notice process in promptly remedying permit-specific failures of state regulatory agencies that may not rise to the level of "serious breakdowns in administration" of all or part of a regulatory program. The 2020 TDN Rule was an effort to "monkeywrench" the enforcement process in order to prevent timely issuance of NOVs by forcing OSMRE to serve notice and hold a hearing under Section 521(b) for any single violation found in an oversight inspection or based on a citizen complaint if the violation is caused or worsened by a failure of the state RA to properly apply the law. The reality is that, given the thousands of oversight inspections conducted in states with approved programs, the number of federal enforcement orders issued has been sparing, but the selective use of the enforcement tool where needed serves both as a deterrent and also provides a mechanism for assuring that the public and the environment will not be injured during the pendency of resolution of state and federal conflicts concerning appropriate implementation of the protections of the 1977 Act.

Individual Federal actions under Section 521(a)(1) are also needed to address those instances where states decline to act based on limited investigation, or simply fail as a matter of fact or technical inexpertise, to detect and act upon a violation of the approved state program. Finally, in situations where the state has been prevented by a court of law from properly enforcing the Act through the state program, federal inspection and enforcement action is needed to assure that Congress' purpose is not thwarted. FitzGerald v. OSM, IBLA 84-692 (1985).

The 2020 TDN Rule would have required OSMRE personnel to ignore a violation that is not being abated due to a failure of the state regulatory authority to properly interpret and apply the approved state program. That is in direct conflict with the obligations of those inspectors under 30 U.S.C. Section 1267(e), which requires that "[e]ach inspector, upon detection of each violation of any requirement of any State or Federal program or this Chapter, shall forthwith inform the operator in writing, and shall report in writing any such violation to the regulatory authority"

(emphasis added). This provision, mandatory on its face, applies by its terms to inspectors under approved state programs. 30 U.S.C. Sections 1267(b), 1291(22). Nothing in the Act or legislative history authorizes less than unqualified issuance of a notice of violation by OSMRE immediately upon detection of a violation, for each violation, in all cases, if the state fails to do so. OSMRE cannot, by regulation, abridge the mandatory nature of the enforcement provisions of 30 U.S.C. Sections 1267 and 1271, *Dixon v. U.S.* 381 U.S. 68 (l965); nor create out of whole cloth exemptions to mandatory enforcement against each observed violation which are not authorized in law and which are repugnant to the expressed intent of Congress. *Northeast Marine Terminal Co. v Caputo, 432 U.S. 249, 278-9 (l98l).* There can be no doubt that Congress intended to make mandatory the immediate issuance of enforcement orders upon detection of a violation, H.R. Rept. No. 95-218, 95th Cong. 1st. Sess. at 128-130 (l977), S. Rep. No. 95-128, 95th Cong. 1st Sess. 57-8 (l977); and that the mandatory obligation applies with equal force to federal and state inspections under approved state regulatory programs. H.R. Rept. No. 95-218, supra at 128-129.

The proposed combined approach in this rulemaking of initially addressing state regulator violations through the ten-day notice process, with the potential for additional longer-term action through the Part 733 process, is a step towards addresses these concerns and striking an appropriate balance. One important clarification is necessary however.

In the proposed rule, at 88 Fed. Reg. 24957, OSMRE revisits the "permit defect" issue and notes that:

> Upon reexamination, we believe a TDN is appropriate in these circumstances not because the State regulatory authority is in violation of SMCRA or its approved State program, but because it has issued a permit that is not in compliance with the approved State program or that would allow a permittee to mine in a manner that is not authorized by the State regulatory program. We would issue a TDN for possible on-the-ground violations as well as other possible violations of the approved State program, such as noncompliance with the State analogues to the permit application requirements at 30 CFR part 778. In this regard, we would issue TDNs in the appropriate circumstances even if mining under the permit has

> not started. Our proposed treatment of permit defects would restore our historical practice that was in place before the 2020 TDN Rule.

So far as this explanation goes, commenters have no objection or concern. Issuance of permits that do not comply with the requirements of the approved state program are subject to the same TDN process as any other violation, such as a permittee failure to comply *with* that state-issued permit. As noted above, and as has been the "historical practice" of the agency, mine-specific TDNs and enforcement action must be taken where the violation arises from a more programmatic failure of the State regulatory authority to maintain, administer, and enforce the approved state program in a manner consistent with its obligations under the Act. In this instance, it may be a state misinterpretation of a state program provision that *is* equivalent to the federal counterpart, or it may be a state program provision that has proven, because of the existence of the violation, to have been *less effective* than the federal counterpart. Whatever the reason, if a violation of the *Act, Secretary's regulations, or approved state program* exists, it must be subject to enforcement action. Section 517 and 521 of the Act require no less and are without exception. There can never be "good cause" under the Act to allow a violation to go unwritten and unabated.

Commenters concern arises from the discussion that follows the above-referenced section, where OSMRE explains that "[i]n the majority of cases, implementing the proposed rule will not result in issuance of a Federal notice of violation to, or any other Federal enforcement action against, a permittee resulting from a State regulatory authority's misapplication of its State regulatory program. State regulatory program issues would be addressed, in the first instance, between us and the relevant State regulatory authority." 88 Fed. Reg. 24957.

As noted in the next section of these comments, to the extent that OSMRE is suggesting that where there is a violation caused by a "State regulatory authority's misapplication of its State regulatory program" the violation would not be subject to federal inspection and enforcement

action immediately following the ten-day notice period and a state declining to act without good cause, OSMRE is perpetuating an unlawful reading and application of the law. While OSMRE and the state hash out disagreements concerning the proper maintenance and administration of the approved state program, they may not do so on the backs of coalfield citizens or at the expense of the land and water resources of the coalfields. Every violation of the Act, the Secretary's regulations, and the approved state program, and of any permit condition, is subject to mandatory enforcement, and there is no exception that would allow such a violation to go unabated because it was the result of a systemic rather than individual failure of a State regulatory authority. OSMRE is requested to clarify that the revised action plan process will not be used as a justification for failure of OSMRE, to take immediate inspection and enforcement action to correct any on-the-ground violations resulting from programmatic failures of a SRA to properly implement an approved state program.

**7. The proposed rule appropriately recognizes that Part 733 action plans cannot constitute "appropriate action" under Section 521 of the Act**

The proposed rule corrects a change made to the ten-day notice provisions under the 2020 rule, by removing the statement that "appropriate action" in response to a ten-day notice could include "OSMRE and the State regulatory authority immediately and jointly initiating steps to implement corrective action to resolve any issue that [OSMRE] identif[ied] as a State regulatory program issue, as defined in 30 CFR part 733." 30 C.F.R. § 842.11(b)(1)(ii)(B)(3). This is an appropriate revision because the former approach allowed OSMRE and state regulators to avoid immediately addressing permit defect issues through the ten-day notice process. Although under the proposed regulatory changes OSMRE may still work with state regulators to prepare action plans, OSMRE must first address mine-specific permit defects through the ten-day notice process.

It is clear from the plain language of the Act and the legislative history that the *only* "appropriate action" that can be taken by a State regulatory authority in response to a violation is enforcement action that causes the violation to be corrected, and that failing that, such an enforcement response is required of OSMRE. The provisions of Section 517(e) and 521 (a)(1) and (3) of the Act interact to establish the standard for what constitutes "appropriate action." From the plain language of Section 521(a)(1), it is clear that "appropriate action" is that action on the part of the state "to cause said violation to be corrected." The question to whether a state could decline enforcement against an acknowledged violation and instead take "other action" such as entering into an action plan or agreement that would ostensibly and eventually cause the violation to be corrected, or whether the state's response must be an enforcement action, is found in the provisions of Section 517(e) and 521(a)(3) which establish a mandatory obligation to take enforcement action in responsible to each detected violation. Section 517(e) allows but <u>one</u> response to the identification of a violation, and that is the issuance of an enforcement notice:

> Each inspector, upon detection of each violation of any requirement of any State or Federal program or of this Act, <u>shall forthwith</u> inform the operator in writing, and shall report in writing any such violation to the regulatory authority. (Emphasis added).

Section 517(e) plainly mandates that a field inspector for a state or federal program must, on detecting a violation, take <u>enforcement</u> action through issuance of a notice of violation (or cessation order under certain circumstances). The inspector is without authority to allow the violation to continue without issuance of such a notice or order.

Section 521(a)(3), made applicable to state programs under Section 521(d), likewise mandates that where a violation is detected, a notice of violation setting a time certain for correction must be issued. The mandatory nature of the enforcement response by the state is borne out by the Secretary's own previous interpretation of the term. In revising the inspection and

enforcement regulations in l982, the Secretary declined to specifically define in greater detail the term "appropriate action," stating that "[t]he crucial response of a State is to take whatever enforcement action is necessary to secure abatement of the violation." 47 Fed. Reg. 35627-8 (Aug. l6, l982). It is apparent that the Secretary interpreted the provisions of Section 521(a)(1) to require the state response, in order to be considered "appropriate," to be an *enforcement* response that would cause the violation to be corrected. 53 F.R. 26733.

The legislative history further indicates that state action is "appropriate" only where it will "have the violations corrected." S.Rep. No. 95-128, supra at 88-9. The House Committee described the enforcement obligation in this manner:

> Where the Secretary is the regulatory authority . . . and a Federal inspector determines that a permittee is violating the act or his permit but that the violation is not causing imminent danger to the health or safety of the public or significant, imminent environmental harm, then the inspector must issue a notice to the permittee setting a time within which to correct the violation. The inspector can extend this initial period for up to 90 days. If the violation has not been corrected within the established time, the inspector must immediately order a cessation of the mining operation relevant to the violation.

House Rept. *supra*, at 130. (Emphasis added).

Where a violation of the Act, federal regulations, state program or permit exists, failure to immediately issue a notice of violation is not under any circumstances "appropriate action," since failure to cite the violation violates 30 U.S.C. 1267(e). It is apparent that the only "appropriate" response to cause the violation to be abated is an enforcement response consistent with 30 U.S.C. 1267(e) and 30 U.S.C. 1271(a)(1). See also: FitzGerald v. OSM, IBLA 84-692 (Petition for Reconsideration Denied, Oct. 28, l985) ("Therefore, we conclude that a state regulatory authority has failed to take appropriate action under section 521(a)(1) of SMCRA . . . where it fails to initiate an enforcement action [.] ")

Against this backdrop, the 2020 TDN Rule departed from both the plain mandate of the Act

and prior agency interpretations, to allow an action plan to constitute a sufficient response. Commenters appreciate the recognition in this proposed rule that because entry into an action plan would not cause a violation to be corrected, it cannot constitute "appropriate action." There is a mandatory and unconditional obligation of the state inspector under 30 U.S.C. 1267(e) to issue an enforcement response to any detected violation. The Supreme Court has recognized that the use of the word "shall" in the enforcement provisions of SMCRA imposes mandatory obligations on the Secretary, and by extension, upon the state regulatory authorities. Hodel v. Virginia Surface Mining and Reclamation Association, 452 U.S. 264, 298 n. 41 (l98l). OSMRE cannot, by regulation, abridge the mandatory nature of the enforcement provisions of 30 U.S.C. 1267 and 1271, Dixon v. U.S. 381 U.S. 68 (l965); nor create exemptions to mandatory enforcement against each observed violation which are not authorized in law and which are inconsistent with the expressed intent of Congress. There can be no doubt that Congress intended to make mandatory the immediate issuance of enforcement orders upon detection of a violation, H.R. Rept. No. 95-218, 95th Cong. 1st. Sess. at 128-130 (l977), S. Rep. No. 95-128, 95th Cong. 1st Sess. 57-8 (l977); and that the mandatory obligation applies with equal force to state inspections under approved state regulatory programs. H.R. Rept. No. 95-218, supra at 128-129.[7]

For the same reason that entering into an action plan does not of itself constitute appropriate action, such a plan cannot constitute "good cause" for the failure of a State regulatory authority to take such action. While development of orderly plans to bring deficient state regulatory programs into alignment with the Act and Secretary's regulations are appropriate steps in addressing systematic problems under Part 733, such plans and schedules are no surrogate for immediate

[7] The mandatory nature of the enforcement process was intentional on the part of Congress:
"H.R. 2 contains comprehensive provisions for inspections, enforcement notices and orders, administrative and judicial review, and penalties. These requirements are of equal importance to the provisions of the bill regarding mining and reclamation performance standards since experience with State surface mining reclamation laws has amply demonstrated that the most effective reclamation occurs when sound performance standards go hand in hand with strong equitable enforcement mechanisms." House Rep. No. 95-218, 95th Cong., 1st Sess. l28-9 (l977).

enforcement action where violation of any provenance (permittee error or permit defect) become manifest on the ground.

**8. OSMRE's proposed rule would improve the Part 733 process by shortening the timeframe for identifying and resolving State regulatory program issues.**

Even though, for the reasons described above, the Part 733 process is not well suited to be the *sole* means by which permit defects and other state regulatory program issues may be addressed, it is still an important tool for OSMRE to use in carrying out its oversight obligations under SMCRA. The proposed regulatory revisions would significantly improve the Part 733 process by setting appropriate deadlines and accelerating the timeframe between initial identification of state program issues and resolution of those issues. An appropriate action plan, not as a surrogate for interim enforcement against site-specific violations, but as a process with defined milestones and interim measures, could expedite resolution of programmatic issues.

The preamble to the proposed rule appropriately recognizes that "a possible violation, if addressed under existing 30 C.F.R. part 733 as a State regulatory program issue, could exist for a long period of time before resolution." 88 Fed. Reg. 24950. The proposed rule attempts to address this issue by setting deadlines for both OSMRE and state regulators to act under the Part 733 process. First, the proposed rule requires OSMRE and the state regulatory authority to "develop and approve an action plan within 60 days of identification of a State regulatory program issue." 88 Fed. Reg. at 24961 (proposed 30 C.F.R. § 733.12(b)). The proposed rule also authorizes OSMRE and the state to "identify interim remedial measures that may abate the existing condition or issue" within "10 business days of OSMRE's determination that a State regulatory program issue exists." *Id*. Finally, the proposed rule would require that "[t]he State regulatory authority must complete all identified actions contained within an action plan within 365 days from when OSMRE sends the action plan to the relevant State regulatory authority." *Id*.

The proposed rule therefore takes steps to make the Part 733 process both more timely and responsive. Combined with the regulatory change requiring OSMRE to address permit defects initially through the ten-day notice process, and with the affirmation in the final rule that no delay will be allowed in citation of violations arising from programmatic deficiencies or issues, these changes to the Part 733 provisions should result in more rapid resolution of state regulatory program issues.

**Conclusion**

The 2020 Rule set the stage for a dramatic lessening of state program accountability by painting a distorted view of the history and purposes of SMCRA, couching the Section 521(a) process as an "exception" to state "primacy." A reading of the Act and the extensive legislative history reflected Congress' belief that ongoing federal oversight was an integral component of the federal-state relationship – and that the ten-day notice process was intentionally crafted by a Congress that understood well how the states had been unable or unwilling to effectively control the impacts of surface coal mining on the land and people.[8] Congress believed that continued federal oversight of approved state programs through Sections 521(a) and 504 of the Act, as well as enhanced public participation in administrative and judicial processes were essential to assure that the historic patterns of state non-enforcement did not continue. [9]

Commenters appreciate the efforts of the agency to reverse the major flaws in the 2020 TDN Rule and to repair the damage caused by that rulemaking. Commenters urge the agency to

[8] "For a number of predictable reasons - including insufficient funding and the tendency of State agencies to be protective of local industry - State enforcement has in the past, often fallen short of the vigor necessary to assure adequate protection of the environment." H. Rept. 95-218, *supra*, at 129, S. Rept. No. 95-128, at 90 (l977).

[9] "While it is confident that the delegation of primary regulatory authority to the States will result in adequate State enforcement, the committee is also of the belief that a limited Federal oversight role as well as increased opportunity for citizens to participate in the enforcement program are necessary to assure that the old patterns of minimal enforcement are not repeated." *Id.*

finalize the rulemaking with all due dispatch, making those revisions suggested herein in order to more fully keep faith with the intent of Congress in enacting the 1977 Act, to "protect society and the environment from the adverse effects of surface coal mining operations;" to "assure that the rights of surface landowners and other persons with a legal interest in the land or appurtenances thereto are fully protected from such operations," and to "exercise the full reach of Federal constitutional powers to insure the protection of the public interest through effective control of surface coal mining operations." 30 U.S.C. Section 1202.[10]

These comments were prepared on behalf of the commenters listed in the attached addendum, by:

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Joe Pizarchik, former Director, Office of Surface Mining Reclamation and Enforcement
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Erin Savage, Appalachian Voices
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Tom FitzGerald, *of counsel*, Kentucky Resources Council, Inc.

[10] The intent of Congress regarding the role of the states and Secretary was never one of granting "exclusive" jurisdiction to the states. The role of the states with delegated "state programs" is strictly circumscribed under the Act, Section 503(a); and the state has a continuing obligation to conform the administration of the state program to the Secretary's regulations and the Act, as well as the terms of the approved state program. 30 C.F.R. 733.11. The premise of the Act is not "exclusive" delegation to the states, or the preeminence or "primacy" of state programs over the Secretary's authority, but rather is a regulatory structure "in which the federal government shares administrative responsibility with the states [which are] afforded an opportunity to propose regulatory programs of their own, conforming to the requirements of the Act and to regulations promulgated by the Secretary." In re: Permanent Surface Mining Regulation Litigation, 653 F.2d 514, 518 (D.C.Cir.)(en banc); cert. denied, 454 U.S. 822 (l981). The state program cannot be approved absent detailed demonstration that the state laws and regulations comprising the state program "provides for the State to carry out the provisions and meet the purposes of the Act and this Chapter within the State and that the State's laws and regulations are in accordance with the provisions of the Act and consistent with the requirements of this Chapter." 30 C.F.R. 732.15(a). A state with an approved state program must not merely conform to the federal requirements and demonstrate that the program will "carry out the provisions and meet the purposes of the Act" and Secretary's regulations; it is by law prohibited from making any changes in state laws or regulations comprising the program, or changes in any of "the provisions, scope or objectives of the State program" absent prior federal approval. 30 C.F.R. 732.17(b), (g).

**Addendum 1 Ten-Day Notice Comments - Organizational Sign-ons**

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