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43 CFR Part 2090, et al.
Mining Claims Under the General Mining Laws; Surface Management; Final Rule

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

43 CFR Parts 2090, 2200, 2710, 2740, 3800 and 9260

[WO–300–1990–00]

RIN 1004–AD22

Mining Claims Under the General Mining Laws; Surface Management

AGENCY: Bureau of Land Management, Interior.

ACTION: Final rule.

SUMMARY: The Bureau of Land Management (BLM or ''we'') amends its regulations governing mining operations involving metallic and some other minerals on public lands. We are amending the regulations to improve their clarity and organization, address technical advances in mining, incorporate policies we developed after we issued the previous regulations twenty years ago, and better protect natural resources and our Nation's natural heritage lands from the adverse impacts of mining. We intend these regulations to prevent unnecessary or undue degradation of BLM-administered lands by mining operations authorized under the mining laws.

DATES: This rule is effective January 20, 2001.

FOR FURTHER INFORMATION CONTACT: Robert M. Anderson, 202/208–4201; or Michael Schwartz, 202/452–5198. Individuals who use a telecommunications device for the deaf (TDD) may contact us through the Federal Information Relay Service at 1–800/877–8339.

SUPPLEMENTARY INFORMATION:

I. What Is the Background of This Rulemaking?

Under the Constitution, Congress has the authority and responsibility to manage public land. See U.S. Const. art. IV, § 3, cl. 2. Through statute, Congress has delegated this authority to executive-branch agencies, including the Bureau of Land Management (BLM). The Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. 1701 *et seq.*, directs the Secretary of the Interior, by regulation or otherwise, to take any action necessary to prevent unnecessary or undue degradation of the public lands. See 43 U.S.C. 1732(b). FLPMA also directs the Secretary of the Interior, with respect to public lands, to promulgate rules and regulations to carry out the purposes of FLPMA and of other laws applicable to the public lands. See 43 U.S.C. 1740. ''Public lands'' are defined in FLPMA (in pertinent part) as ''any land and interest in land owned by the United States * * * and administered by the Secretary of the Interior through the Bureau of Land Management. * * *'' See 43 U.S.C. 1702. This final rule is also authorized by 30 U.S.C. 22, the portion of the mining laws that opens public lands to exploration and purchase ''under regulations prescribed by law.'' [1]

Under this statutory authority, BLM issued regulations in 1980 to protect public lands from unnecessary or undue degradation and to ensure that areas disturbed during the search for and extraction of mineral resources are reclaimed. See 45 FR 78902–78915, November 26, 1980. We call these regulations the ''surface management'' regulations. They are located in subpart 3809 of part 3800 of Title 43 of the Code of Federal Regulations. For this reason, they are also called the ''3809'' regulations.

We amended the 1980 regulations in 1997 to strengthen the bonding requirements, but the 1997 amendments were overturned. Thus, the 1980 regulations, unchanged for 20 years, remain in place. Please refer to the ''Background'' section of the proposed rule for a detailed description of our efforts to develop revised regulations (64 FR 6423–6425, February 9, 1999).

On February 9, 1999, we published in the **Federal Register** a proposed rule to amend the 3809 regulations. See 64 FR 6422–6468. The 120-day public comment period closed on May 10, 1999. We issued the notice of availability for the draft environmental impact statement (EIS) that analyzes the potential impacts of the proposed changes to the 3809 regulations on February 17, 1999 (64 FR 7905). The comment period on the draft EIS also closed on May 10, 1999.

In the 1998 Omnibus Consolidated and Emergency Supplemental Appropriations Act (Pub. L. 105–277, sec. 120(a)), Congress directed BLM to pay for a study by the National Research Council (NRC) Board on Earth Sciences and Resources. The study was to examine the environmental and reclamation requirements relating to mining of locatable minerals on Federal lands and the adequacy of those requirements to prevent unnecessary or undue degradation of Federal lands in each State in which such mining occurs. The law directed NRC to complete the study by July 31, 1999.

In the 1999 Emergency Supplemental Appropriations Act (Pub. L. 106–31, sec. 3002), Congress prohibited the Department of the Interior from completing its work on the February 9, 1999, proposed rule and issuing a final rule until we provide at least 120 days for public comment on the proposed rule after July 31, 1999. The NRC completed and published its report, entitled, *Hardrock Mining on Federal Lands* (hereafter the NRC Report), in late September 1999. Accordingly, we reopened the comment period on the proposed rule and the draft EIS for 120 days. See 64 FR 57613, October 26, 1999. We also supplemented the proposed rule with some of the recommendations from the NRC and asked for public comment on them.

In the fiscal year 2000 appropriations bill for the Department of the Interior (Pub. L. 106–113, sec. 357), Congress prohibited the Secretary from spending money to issue final 3809 rules, except that he may issue final rules ''which are not inconsistent with the recommendations contained in the [NRC Report] so long as these regulations are also not inconsistent with existing statutory authorities.'' Congress also added this provision to the Department's fiscal year 2001 appropriations bill (Pub. L. 106–291, section 156).

We received and considered a total of about 2,500 public comments during both 120-day comment periods. While many comments merely expressed support or opposition for the proposed rule, some comments offered useful and constructive suggestions for changes to the proposed rule. Where possible and advisable, we made changes to the proposed rule to incorporate the suggestions contained in these comments. Part II of this preamble describes the substantive changes to the proposed rule that we incorporated into this final rule.

Legal Basis for the Final Rule

This final rule is supported by FLPMA and the Mining Law of 1872, as amended (hereafter ''mining laws''). Section 302(b) of FLPMA, 43 U.S.C. 1732(b), directs the Secretary to manage

[1] Although BLM is responsible for administration of the mining laws for lands within the National Forest System, the Secretary of Agriculture has responsibility for promulgating rules and regulations applicable to surface management of lands within the National Forest System. For this reason, none of the regulatory changes we are adopting apply to the National Forests. See 36 CFR part 228 for regulations governing mining operations on National Forests.

development of the public lands. In addition, the final rule we are adopting today carries out the FLPMA directive that, ''[i]n managing the public lands, the Secretary shall, by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the public lands.'' See 43 U.S.C. 1732(b). The ''any action necessary'' language of this provision shows that Congress granted the Secretary broad latitude in the preventive actions that he could take. Congress did not define the term ''unnecessary or undue degradation,'' but it is clear from the use of the conjunction ''or'' that the Secretary has the authority to prevent ''degradation'' that is necessary to mining, but undue or excessive. This includes the authority to disapprove plans of operations that would cause undue or excessive harm to the public lands. Readers should note that the Secretary has delegated to BLM many of his management responsibilities under FLPMA and the mining laws.

The final rule we are adopting today is consistent with the FLPMA directive, as well as the general rulemaking authorities of FLPMA and the mining laws (43 U.S.C. 1740 and 30 U.S.C. 22 respectively). Other portions of this preamble contain discussions of legal authorities for this rule in the context of specific sections of the regulations.

As explained in more detail later in this preamble, we are continuing the 3-tiered classification of operations with the attendant increasing degree of BLM involvement in review or approval. As mining operations increase in size and complexity, BLM's up-front involvement should also increase. We are continuing, with necessary refinements, the set of outcome-based performance standards that operations must comply with to prevent unnecessary or undue degradation. We are adopting financial guarantee requirements for exploration and mining operations that go beyond ''casual use'' to prevent unnecessary or undue degradation caused by failure to fulfill the reclamation obligation. We are adopting reasonable and graduated enforcement procedures and penalties, which incorporate due process, as a deterrent to practices that would result in unnecessary or undue degradation. These and other provisions described later in this preamble are focused on preventing unnecessary or undue degradation while at the same time avoiding, to the extent possible and foreseeable, unintended adverse impacts on the ability of mining claimants and operators to explore for and develop mineral resources.

In addition to this preamble, the preamble to the February 9, 1999 proposed rule (64 FR 6422) and the comment responses in the final EIS (Volume 2) also contribute to the basis and purpose of this rule.

Consistency With the NRC Report Recommendations

In the fiscal year 2000 appropriations bill for the Department of the Interior (Pub. L. 106–113, sec. 357), Congress prohibited the Secretary from spending money to issue final 3809 rules other than those ''which are not inconsistent with the recommendations contained in the [NRC Report] so long as these regulations are also not inconsistent with existing statutory authorities.'' Comments we received during the second comment period indicate that there are divergent views on the consistency question. Some commenters appear to strongly believe that the ''not inconsistent with'' provision should be interpreted as setting strict limits on what we can include in this rulemaking. That is, we can promulgate only regulations that conform exactly to specific NRC Report recommendations, and no more.

We do not agree with these comments. The NRC Report, *Hardrock Mining on Federal Lands* (1999), was prepared in response to a Congressional directive in our fiscal year 1999 appropriations (Pub. L. 105–277, sec. 120(a)). Congress asked the NRC to assess the adequacy of the existing regulatory framework for hardrock mining on Federal lands. Congress did not ask the NRC to analyze our proposed rule, and the NRC Report did not do so. As a result, while portions of the NRC Report overlap the proposed rule, the study is not coterminous with the proposal, and a number of the issues addressed in the proposed rule are not covered by the NRC Report recommendations.

Congress was aware that the NRC Report and our proposed rule were not coterminous when Congress was considering the appropriations bill in the Fall of 1999. The proposed rule was published in February 1999. Congress was also aware of the regulatory recommendations made in the NRC Report, which was published on September 29, 1999. The appropriations bill did not pass Congress until November 19, 1999. (The President signed the bill on November 29, 1999.) Thus, six weeks elapsed between the issuance of the NRC Report and Congressional action on our appropriations bill. If Congress had intended for this rulemaking to be limited strictly to things recommended by the NRC Report, it could have said so, but did not. Congress used the ''not inconsistent with'' language, which is much less restrictive than other possible formulations, such as the rules must be ''limited to'' or ''restricted to'' or ''must not go beyond'' the recommendations of the NRC Report.

This interpretation of Congress's purpose in the fiscal year 2000 Interior appropriation is supported by recent Congressional action to twice expressly reject language (once in bill text and once in a conference report) that would have imposed a greater limitation on the Secretary's authority to amend subpart 3809 than the ''not inconsistent with'' language of the fiscal year 2000 appropriations rider (Pub. L. 106–113, section 357). By way of background, on December 8, 1999, the Interior Department Solicitor issued an opinion interpreting section 357. The opinion concluded that the ''not inconsistent with'' language of section 357 applied only to the numbered, bold-faced recommendations in the NRC Report. The Solicitor also concluded that final rules addressing subjects that lie outside the specific NRC Report recommendations would not be affected by section 357.

Subsequently, in the second session of the 106th Congress, legislative language was added to an agriculture appropriations bill that would have limited the final rules to ''only the regulatory gaps identified at pages 7 through 9 of the [NRC Report].'' See section 3105 of S. 2536, as contained in S. Rpt. 106–288. This language would have imposed additional limits on the Secretary's authority to amend subpart 3809. The amendment was dropped and replaced in the conference on the current year Interior appropriations bill by the more neutral ''not inconsistent with'' language of section 156 of Pub. L. 106–291.

Similarly, Conference Committee report language to accompany section 156 was proposed that would have expressed the committee's intent ''for [BLM] to adopt changes to its rules at 43 CFR part 3809 *only if those changes are called for* in the NRC report.'' (Reported in *Public Land News*, vol. 25, no. 19, Sept. 29, 2000. Emphasis added.) See also 146 Cong. Rec. S10239, statement of Sen. Durbin. This language was dropped from the final conference report. See H. Rpt. 106–914, p. 154. Although the Conference Report cautioned that re-enactment of the ''not inconsistent with'' language in the fiscal year 2000 Interior appropriations was not intended to constitute congressional ratification of the Solicitor's December 8, 1999 opinion, the Conference Report

does not explain how it interprets section 156 in any way different from how the Solicitor interpreted the identical language in section 357 of the previous year's appropriations.

Our view of the plain meaning of the ''not inconsistent with'' language in both the fiscal year 2000 and 2001 appropriations acts remains as the Solicitor described it in his December 8, 1999 opinion as follows: To the extent that an NRC Report recommendation and the proposed rule overlap, then the final rule must be entirely consistent with the recommendation. However, it is reasonable to interpret the ''not inconsistent with'' language as not applying to parts of this final rule related to subjects lying outside the recommendations of the NRC Report. In these cases, there can be no question of consistency with the NRC Report recommendations because those recommendations are silent on an issue or not dispositive of an issue.

As discussed in more detail later in this preamble, all the provisions of this final rule that overlap the recommendations of the NRC Report are not inconsistent with the report. Other provisions of this final rule, for which there is no corresponding NRC Report recommendation, are consistent with the Secretary's statutory authority to prevent unnecessary or undue degradation of the public lands and other legal authorities supporting the final rule. BLM wishes to emphasize that we carefully reviewed the entire NRC Report and gave appropriate weight to its entire contents. Even if the ''not inconsistent with'' language were construed to mean that these final rules could not be inconsistent with the entire NRC Report, BLM believes that this final rule would comply.

A commenter stated that even without the limits placed on BLM by the ''not inconsistent with'' language of section 357 of H.R. 3423 (the FY 2000 Interior Appropriations bill, which was enacted by reference in the Consolidated Appropriations Act, Pub. L. 106–113), neither FLPMA nor any other authority grants BLM the power to promulgate the regulations as proposed. The commenter stated that in addition to a general lack of authority to promulgate the 3809 proposal, Congress's specific and direct commands in section 357 further restricting BLM's authority to promulgate regulations related to subpart 3809 independently demonstrate that the proposed regulation is not authorized by law.

BLM disagrees with the comment. As discussed earlier in this preamble, BLM has the authority to issue these final regulations. The ''not inconsistent with'' language of section 357 of H.R. 3423 (and its successor, section 156 of Pub. L. 106–291) imposes a separate requirement. BLM's underlying statutory authority under FLPMA and the mining laws remains intact. Indeed, both section 357 of fiscal year 2000 Interior appropriations and section 156 of fiscal year 2001 Interior appropriations recognize that BLM's ''existing statutory authorities'' continue to apply to these rules. These rules have been reviewed, and changed as necessary, to address the requirements of sections 357 and 156. Thus, the final rules are not inconsistent with the recommendations contained in the NRC Report.

Record of Decision Under the National Environmental Policy Act

This preamble constitutes BLM's record of decision, as required under the Council on Environmental Quality regulations at 40 CFR 1505.2. The decision is based on the proposed action and alternatives presented in the Final Environmental Impact Statement, ''Surface Management Regulations for Locatable Mineral Operations.''

After considering all relevant issues, alternatives, potential impacts, and management constraints, BLM selects Alternative 3 of the Final EIS for implementation. Alternative 3 changes the existing 3809 regulations in several general areas: (1) it changes the definition of unnecessary or undue degradation to better protect significant resources from substantial irreparable harm, (2) it requires mineral operators to file a plan of operations for any mining activity beyond casual use regardless of disturbance size, (3) it requires operators to provide reclamation bonds for any disturbance greater than casual use, (4) it specifies outcome-based performance standards for conducting operations on public lands, (5) it provides an improved program from enforcement of the regulations in cases of noncompliance, and (6) it provides options for Federal-State coordination in implementing the regulations. A comprehensive description of Alternative 3 is presented in Chapter 2 of the Final EIS. The specific regulation language to carry out Alternative 3 follows the preamble discussion.

Alternatives Considered

BLM considered a full range of program alternatives for development of the 3809 regulations. See Chapter 2 of the final EIS for a description of how specific issues drove the formulation of the alternatives. BLM developed the five alternatives considered in the EIS in response to issues raised by the public during the EIS scoping period and comments we received on the draft EIS. The alternatives ranged from the required ''no action'' alternative, which would have retained the 1980 regulations, to Alternative 4, the ''maximum protection'' alternative. A fifth alternative, Alternative 5, was added to the final EIS in response to comments that BLM should only make changes to the 3809 regulations that were specifically recommended in the NRC Report. The following is a brief description of the alternatives and the rationale behind their formulation:

Alternative 1, No Action—This alternative would not have changed the regulations. Locatable mineral operations would continue to be managed under the regulations that BLM promulgated in 1980. This alternative served as the baseline for the EIS analysis. The No Action alternative encompasses the view expressed by many in industry and State governments that changes in the regulations are not needed, and that BLM should make non-regulatory changes to improve the way the program works prior to proposing any regulatory changes.

Alternative 2, State Management—The State Management alternative would have required rescinding the 1980 regulations and returning to the prior surface management program strategy, under which State or other Federal regulations governed locatable mineral operations on public land. Compliance with these other regulations would have been deemed adequate to prevent unnecessary or under degradation under Alternative 2. We developed this alternative in response to comments that BLM should evaluate ways to encourage mineral development through less regulation, and that a BLM regulatory role was not needed since the respective State regulatory programs were adequate to protect the environment. Consideration of Alternative 2 also served as a benchmark for considering the effectiveness of State programs absent a BLM regulatory role.

Alternative 3, Proposed Final Regulations—This alternative considered the implementation of the proposed regulations developed by the 3809 Task Force. Alternative 3 is the BLM's proposed action and the agency's ''preferred alternative.'' The alternative was changed between the draft and final EIS in order to incorporate conclusions and recommendations from the NRC Report and in response to public comments. This alternative represents the preferred regulatory approach of agency management and program specialists after considering the results

of public scoping, comments on the February and October 1999 proposed rules, results of the NRC Report, and the effects of other alternatives discussed in the EIS.

Alternative 4, Maximum Protection—The maximum protection alternative was developed presuming that the 3809 regulations could not change the basic mineral resource allocations made by the mining laws, and that the public lands are open to entry, location, and development of valuable mineral deposits unless segregated or withdrawn. While a total prohibition on mining activity would also achieve maximum environmental protection, it would be beyond the scope of the action, which is to manage activity authorized by the mining laws in a way that prevents unnecessary or undue degradation. A surface management program under Alternative 4 would allow BLM to give the highest priority to protecting resource values and impose design-based performance criteria. We developed this alternative in response to comments that stronger environmental requirements were needed, that BLM should have total discretion to deny certain mining operations, and that designed-based performance standards should be developed as a nationwide minimum best management practice.

Alternative 5, NRC Recommendations—Alternative 5, like Alternative 3, incorporates the recommendations made by the NRC Report. However, Alternative 5 limits changes in the regulations to those specifically recommended by the NRC. See the NRC Report, especially pages 7 to 9. We developed this alternative in response to public comments and a then-pending budget rider that would have restricted BLM to implementing only some of the recommendations of the NRC Report.

Environmentally Preferred Alternative

Although not selected for implementation, the environmentally preferred alternative is Alternative 4, the maximum protection alternative. While many of the environmental protection measures contained in Alternative 4 were included in the final regulations under Alternative 3, the BLM decided not to select Alternative 4 due to its adverse economic impact and administrative cost compared to the environmental benefit.

Decision Rationale

BLM has included all practical means to avoid or minimize environmental harm in the selected alternative. The following is a summary of the rationale for selection of the preferred alternative as compared to the other alternatives. A detailed rationale for the selection of each regulatory provision is discussed in this preamble.

Definition of ''Unnecessary or Undue Degradation''

The selected alternative satisfactorily addresses the overall program issue of improving BLM's ability to prevent unnecessary or undue degradation, as required by FLPMA. The regulations change the definition of ''unnecessary or undue degradation'' to clarify that operators must not cause substantial irreparable harm to significant resources that cannot be effectively mitigated. Clarifying that the definition specifically addresses situations of ''undue'' as well as ''unnecessary'' degradation will more completely and faithfully implement the statutory standard, by protecting significant resource values of the public lands without presuming that impacts necessary to mining must be allowed to occur.

In comparison, Alternatives 1 and 5 would not protect significant scientific, cultural, or environmental resource values of the public lands from substantial irreparable harm because they would not change the definition of ''unnecessary or undue degradation.'' Alternative 2 would remove the definition as a regulatory criteria, and BLM would not have a reasonable assurance that unnecessary or undue degradation would be prevented since BLM would have no role in the review of individual projects.

Although under Alternative 2 operators would have to comply with State regulations and other environmental laws, certain resources, such as wildlife not proposed or listed as threatened or endangered, cultural resources, and riparian areas would not necessarily be given appropriate consideration in planning and conducting mineral operations.

Alternative 4 would tie the definition of ''unnecessary or undue degradation'' to use of design-based standards and best available technology, which BLM does not believe are flexible enough for application to the wide variety of mining operations and environmental conditions on public lands, resulting in over- or under-regulation of some operations.

Performance Standards

The selected alternative provides performance standards that enumerate specific outcomes or conditions, yet do not mandate specific designs. This type of performance standard provides BLM with the level of detail needed to ensure that all environmental components are addressed, and at the same time preserves flexibility to consider site-specific conditions and allows for innovation in environmental protection technology. The performance standards developed under the selected alternative often require compliance with, or achievement of, the applicable State standard. This facilitates coordination with the States and reduces the potential for a single operation to be subject to conflicting standards. The final 3809 regulations also provide for monitoring programs to be adopted as part of individual project approvals to ensure compliance with the necessary mitigating measures. The final regulations specify the content requirements of these monitoring programs.

We did not select Alternatives 1 or 5 because they would retain the performance standards in the 1980 regulations, which are sometimes too vague and subjective, causing them to be applied inconsistently.

Under Alternative 2, operators would have to comply with the performance standards of the State in which their operations are located. While BLM has found the standards in many States generally adequate in the areas they cover, BLM believes that minimum Federal standards are needed for operations on public lands in order to prevent unnecessary or undue degradation. Relying on individual State standards which may vary widely, which may not address all resources of concern to BLM, or which are subject to change or varying application would not, in our judgment, allow BLM to prevent unnecessary or undue degradation. Therefore, Alternative 2 has not been selected for implementation.

The performance standards under Alternative 4 would be design-based and would not be flexible enough to account for the variety of mining operations and environmental conditions on public lands. The performance standards under Alternative 4 may be overly stringent for some operations or possibly not stringent enough in other cases. In addition, the NRC report recommended against the adopting of prescriptive design-based standards such as those in Alternative 4.

Notice/Plan of Operations Threshold

BLM's main mechanism for preventing unnecessary or undue degradation is review of notices and review and approval of plans of operations. The threshold for when to

file a plan, what it must contain, and how it is reviewed are part of this issue. After considering a variety of approaches for setting the notice/plan of operations threshold, including the NRC Report recommendations, BLM decided the threshold should generally be set between exploration and mining. In special category lands, BLM decided to set the threshold at any activity greater than ''casual use.'' By using these thresholds, the selected alternative will provide for the more detailed review and environmental analysis process conducted for a plan of operations to be targeted at the activity (mining) most likely to create significant environmental impacts. Exploration generally has not created major environmental impacts, or does not involve issues difficult to mitigate. Casual use generally results in no or negligible disturbance of the public lands. The requirement to file a notice for operations involving exploration activities, combined with the selected alternative's financial guarantee requirements and performance standards, will prevent unnecessary or undue degradation.

BLM has also included other changes to the regulations applicable to plans of operations in the selected alternative. We have developed a more comprehensive list of content requirements to ensure that critical items, such as plans for interim management and environmental baseline studies, are not overlooked. We have added a mandatory public notice and comment requirement to the process of reviewing proposed plans of operations to ensure the public has an opportunity to comment prior to approval of plan activity that may impact public resources.

We did not choose Alternative 1 because the 1980 regulations have not functioned well with the notice/plan of operations threshold generally set at 5 acres of disturbance. Some small mining operations disturbing less than 5 acres have created significant environmental impacts or compliance problems. These problems could have been avoided or reduced if the operator had submitted a plan of operations and had been subject to environmental review under NEPA and BLM approval.

Alternative 2 would not have addressed this issue satisfactorily. While generally all States have some permit review process, most do not have a comprehensive review process similar to NEPA. Others may have permits geared towards specific media like air or water, which may not address concerns such as cultural resources, or may not always include a public involvement process.

Conversely, Alternative 4 would require a plan of operations for any activity greater than casual use, including exploration. Use of agency resources to process plans of operations for exploration projects, which have a low environmental risk, would not be efficient and would result in unnecessary delay to the mineral operator. In addition, this requirement would not be consistent with the NRC Report, which recommended that plans of operations be required for mining and milling operations (but not exploration activities), even if the area disturbed is less than 5 acres.

While Alternative 5 has the same notice/plan of operations threshold as the selected alternative, it does not have the more specific plan of operations content or public notice and comment requirements. BLM believes these requirements are necessary for the identification and prevention, or mitigation, of environmental impacts associated with mining.

Financial Guarantees

The posting of a financial guarantee for performance of the required reclamation is a major component of the regulatory program under all the alternatives considered. The selected alternative requires that all notice-and plan-level operators post a financial guarantee adequate to cover the cost as if BLM were to contract with a third party to complete reclamation according to the reclamation plan, including construction and maintenance costs for any treatment facilities necessary to meet Federal and State environmental standards. BLM decided to require financial guarantees for all notices and plans of operations because of the inability or unwillingness of some operators to meet their reclamation obligations. At present, the potential taxpayer liability for reclamation of unbonded or underbonded disturbances conducted under the 3809 regulations is in the millions of dollars. BLM has decided that to protect and restore the environment and to limit taxpayer liability, financial guarantees for reclamation should be required at 100 percent of the estimated cost for BLM to have the reclamation work performed. This includes any costs that may be necessary for long-term water treatment or site care and maintenance.

The 1980 regulations (Alternative 1) do not contain financial guarantee requirements adequate to achieve this level of protection. Under the 1980 regulations, notice-level operators are not required to provide a financial guarantee for reclamation, and financial guarantees for plan-level operations are discretionary. A number of notice-level operations have been abandoned by operators, leaving the reclamation responsibilities to BLM. In addition, the existing regulations are silent on the need to provide bonding for any necessary water treatment or site maintenance. BLM believes it is necessary to specify this requirement to eliminate any argument about requiring such resource protection measures.

Alternative 2 would rely on State financial guarantee programs. While BLM intends to work with the States under the selected alternative to avoid double bonding, relying exclusively on State bonding may not provide adequate protection of the public resources. Not all states require a financial guarantee for all disturbance at 100 percent of the estimated reclamation cost.

Alternative 4 requires financial guarantees for reclamation of all disturbance at 100 percent of the estimated reclamation costs. Alternative 4 would also require bonding for undesirable events, accidents, failures, or spills. BLM believes it would be overly burdensome on the operator to require a financial guarantee for the remediation of events with a low probability of occurrence and has therefore not selected the Alternative 4 financial guarantee provisions. Such potential problems are best addressed by a thorough review of the operating plans and the development of contingency measures, which are part of the selected alternative.

Alternative 5 would impose financial guarantee requirements similar to the selected alternative. However, under Alternative 5, the procedural requirements for establishing the amount of a financial guarantee are more limited than those followed under the selected alternative. For example, there is no public notification before release of the financial guarantee, as there is in the selected alternative. BLM believes these procedures are of value in arriving at a final reclamation financial guarantee amount and has therefore not selected the Alternative 5 financial guarantee requirements.

Enforcement

The selected alternative contains a program for enforcement of the regulations through issuance of enforcement orders and use of civil and criminal penalties where appropriate. It has been developed in response to the cumbersome enforcement provisions of the existing regulations which often necessitate involvement of the U.S. Attorney to pursue noncompliance

actions. BLM believes the selected alternative's enforcement program will improve operator compliance while reducing the administrative burden on the government. This approach is also part of Alternative 5.

Relying exclusively on the States' enforcement programs under Alternative 2 may have limited utility in achieving Federal land management or reclamation objectives. Conversely, State enforcement in such delegated programs as air quality or water quality may be more effective than BLM enforcement action. The selected alternative provides for cooperation with the State in order to quickly resolve noncompliance in these delegated programs areas.

Alternative 4 contains a requirement for mandatory enforcement. This means when a violation is observed in the field, the BLM inspector must issue a noncompliance and must assess a penalty. Resolution of the problem in the field with the operator must be preceded by the notice of noncompliance. The problem with this approach is that there may be extenuating circumstances that an inspector should consider before taking an enforcement action, or it may be possible to resolve the violation in the field without issuing a notice of noncompliance. We have not selected this mandatory enforcement provision. BLM believes the regulatory approach to compliance in Alternative 4 may actually hinder the resolution of compliance problems by providing an incentive for their concealment.

Federal/State Coordination

Most of the mineral activity under the 3809 program occurs in the Western states. These States have regulatory programs applicable to mineral operations in the form of either specific regulations that apply to mining, overall environmental protection regulations for a specific resource such as water quality, or both. How the BLM surface management program is coordinated with the State programs is an issue that crosses all elements of the alternatives considered. After consultation with the States, consideration of BLM resource protection needs, and evaluation of the various alternatives, BLM has selected the Federal/State coordination approach in Alternative 3 for implementation.

Alternative 3 provides a combination of Federal/State agreements that can be used to coordinate efforts, reduce duplication, and improve resource protection while not overly burdening the operator. The selected alternative provides for two types of Federal/State agreements, those that provide for joint administration of the program, and those in which BLM defers part or all of the program to the State (with BLM retaining minimum involvement). BLM selected this alternative to provide flexibility for the BLM field offices to develop their own Federal/State program specific to their States' operating and regulatory environment. By also incorporating State performance standards into the BLM performance standards, as described above, this alternative facilitates coordination between BLM and the State regulatory agencies when it comes to development and implementation of Federal/State agreements.

While the 1980 regulations (Alternative 1) provide for Federal/State agreements, they do not provide for BLM to concur in the State's approval of each plan of operations or in the approval, release, or forfeiture of a financial guarantee. BLM believes that retaining at least a concurrence role in these actions is the minimum required to prevent unnecessary or undue degradation of the public lands.

Alternative 2 would leave review, approval, and enforcement for mineral operations to the respective State programs. Total reliance on State regulation may not be adequate to protect all the public land resources from unnecessary or undue degradation. BLM as a land manager has to meet a comprehensive requirement to protect all the resources on public lands from unnecessary or undue degradation. A State regulatory agency would not be able to provide the resource protection required for public lands without BLM involvement in the review, approval and compliance processes. In addition, this would be a burden on the State for which BLM would not be able to provide compensation. For these reasons, we didn't select Alternative 2.

BLM didn't select Alternative 4 because it would assert Federal control over operations without any effort to coordinate with State activities. Such an approach could lead to conflicting, or at least confusing, standards for operators, and duplication of effort. Independent BLM standards would be difficult to administer because of the intermingling of private and public land that occurs at many mining operations. Alternative 4 could result in situations where two different performance requirements apply within the same operating area depending upon the land status. Nor does Alternative 4 result in substantial environmental benefits. Where the States have developed performance standards for mineral operations, they are generally considered adequate for operations on public lands. Where there are regulatory gaps in State standards or programs, development of a specific BLM requirement is warranted.

Federal/State coordination under Alternative 5 would not differ greatly from the 1980 regulations. Alternative 5 would provide procedures for referral of enforcement actions to the State. However, it would not provide for retention of a minimal level of involvement by BLM in individual project approvals or financial guarantees. BLM believes this minimal level of participation is needed to meet its obligation to prevent unnecessary or undue degradation. For these reasons, BLM has not selected Alternative 5.

Consistency With the NRC Report

Since release of the NRC Report, ''Hardrock Mining on Federal Lands,'' the last two Congressional appropriations acts have contained a requirement that any final 3809 regulations must be ''not inconsistent with'' the recommendations in the NRC Report. The Department of the Interior Solicitor has interpreted the key phrase ''not inconsistent with'' to mean that so long as the final rule does not contradict the specific recommendations of the NRC Report, the rule can address whatever subject areas BLM determines are warranted to improve the regulations and meet the FLPMA mandate to prevent unnecessary or undue degradation of the public lands. This Congressional requirement places some management constraints on the selection of a final alternative for implementation. Of the five alternatives in the Final EIS, only Alternatives 3 and 5 would clearly not be inconsistent with the recommendations in the NRC Report.

The ''No Action'' Alternative would retain the 1980 regulations, but would clearly be inconsistent with the recommendations of the NRC Report. The NRC report identified specific gaps in the regulations and made six recommendations for regulatory changes. See the NRC Report, pages 7–9. BLM could not now decide that the existing regulations were adequate without being inconsistent with the NRC recommendations and violating the applicable Congressional mandate.

Selection of Alternative 2 would be inconsistent with most of the NRC recommendations. Alternative 2 does not provide reclamation bonding for all disturbance greater than casual use, does not provide for a plan of operations for all mining activity, does not provide for clear procedures for modifying plans of operations, and does not require interim management plans. The NRC report clearly recommends regulatory

changes that are inconsistent with the decreased BLM role inherent in Alternative 2.

Regulations developed under Alternative 4 would be more stringent than those suggested by the NRC and therefore inconsistent the NRC recommendations. The Alternative 4 requirement to file a plan of operations for all activity greater than casual use would be inconsistent with the NRC finding that exploration involving less than 5 acres of disturbance should be allowed under a notice. The use of design-based standards and mandatory pit backfilling under Alternative 4 would be inconsistent with the NRC recommendation that BLM use performance-based standards. It is also not in harmony with a discussion (which was not incorporated in a specific recommendation) of the NRC Report which suggested that pit backfilling should be determined on a case-by-case basis.

Neither Alternative 3 nor Alternative 5 would be inconsistent with the NRC recommendations. Both alternatives would incorporate the NRC recommendations into the 3809 regulations. The main difference between these two alternatives is that Alternative 5 limits the changes in the regulations to the specific NRC recommendations, while Alternative 3 includes both the changes recommended by NRC and additional regulatory changes to address issues identified by BLM. These additional changes reflect the Secretary's judgment as to what is required to prevent unnecessary or undue degradation of the public lands, and since they are not addressed in the NRC Report, are not inconsistent with it. Selection of Alternative 3 does not preclude BLM from pursuing the NRC recommendations for non-regulatory changes in the surface management program.

Additional discussion of the consideration of EIS alternatives and of how the NRC Report and Congressional budget rider affect the final rule adopted today can be found in other portions of the preamble and in the responses to comments in the Final EIS.

Summary of Rule Adopted

This part of the preamble describes in general terms some of the major features of the final rule. A reader who is interested in a quick overview of the final rule may find this part useful. However, if you are looking for a detailed description of the final rule, you should look at the section-by-section analysis which appears later in this preamble.

The final rule continues, with some modification, BLM's three-tier classification scheme for mining operations on Federal lands. For activities that ordinarily result in no or negligible disturbance of the public lands or resources (''casual use''), a person would not have to notify BLM or seek our approval. In certain situations, described later in this preamble, persons conducting activities on the public lands must contact BLM in advance so that we may determine that the proposed activities, both individually and cumulatively with other activities, will not result in more than negligible disturbance. For exploration operations disturbing less than 5 acres and some kinds of bulk sampling, the operator would have to notify BLM 15 calendar days in advance of initiating operations. For all mining operations and for exploration operations disturbing more than 5 acres, the operator would have to submit a plan of operations and receive BLM's approval.

The final rule continues BLM's authority to enter into agreements or memoranda of understanding with States for joint Federal/State programs. The final rule also provides for Federal/State agreements in which BLM would defer to State administration of some or all of the surface management regulations. These agreements enable BLM and the States to coordinate activities to the maximum extent possible and avoid duplication of effort. Federal/State agreements currently in effect would be reviewed for consistency with this final rule. Existing agreements could continue in effect during the review period. If the review results in a BLM finding of no inconsistency, existing agreements could continue.

In the final rule provisions applicable to notices, BLM continues its goal of reviewing notices in 15 calendar days. The final rule explicitly provides that BLM can require a prospective notice-level operator to modify a notice. Existing notices can continue under the current operator for two years, or longer, if the notice is extended. BLM is not requiring financial guarantees for existing notices until they are extended or modified. When a notice expires, all disturbed areas must be reclaimed.

For plans of operations, which are required for all mining, even if the disturbed area is less than 5 acres, the final rule expands the list of items that an operator must include in a plan. However, BLM will require less information about smaller and simpler mining operations. We are adding a 30-day public comment period on plans of operations. Existing and pending plans of operations may continue to be regulated under the plan content and performance standards of the previous surface management regulations. The list of performance standards applicable to plans of operations is expanded to explicitly include many items that were implicit in the previous performance standards. The final rule applies to modifications of existing plans of operations that add a new facility. Modifications to existing facilities would not necessarily come under the final rule if the operator demonstrates it is not practical to do so.

The final rule requires financial guarantees for all notices and plans of operations. Each existing plan of operations has 180 days from the effective date of the final rule to post the required financial guarantee if any existing financial guarantee doesn't satisfy this subpart. Acceptable forms of financial guarantee include bonds, marketable securities, and certain kinds of insurance. Corporate guarantees will no longer be accepted, although existing corporate guarantees are not affected by the final rule. At the time of final financial guarantee release, BLM will either post in the local BLM office or publish a notice in a local newspaper and accept comments from the public for 30 days.

The final rule sets forth BLM's goal of inspecting certain operations, including those using cyanide leaching technology, at least four times each year. In the procedures for ensuring compliance with the 3809 regulations, BLM can issue a variety of orders—from requiring an operator to take specified action within a specified time frame to requiring an immediate suspension of operations. The final rule provides for administrative civil penalties of up to $5,000 for each violation. Affected parties have the right to appeal a BLM decision under this subpart to the State Director and to the Interior Board of Land Appeals. The final rule also allows BLM to schedule public visits to mines on public lands if a visit is requested by a member of the public.

II. How did BLM Change the Proposal in Response to Comments?

In this preamble, we respond to the significant comments we received from the public and other interested parties on the February 9, 1999, and October 26, 1999, proposed rules (64 FR 6422 and 64 FR 57613, respectively). Interested readers should also refer to the final EIS for additional responses to comments.

General Comments

Many commenters questioned the need for changes to BLM's surface management regulations. ''If it ain't broke, don't fix it,'' was a common refrain. Other commenters asserted that BLM had failed to justify the proposed changes or to point out the exact problems the revisions are designed to solve. Other commenters argued that sufficient regulations governing mining activities on Federal lands are already in place, either at the State or Federal level. The NRC Report indicated that the overall structure of Federal and State laws and regulations is generally effective (p. 5). Many commenters perceived this general conclusion by the NRC to obviate any regulatory changes. Some commenters felt that the proposed regulatory changes were unnecessary because they would duplicate the provisions of existing State regulatory programs. Other commenters suggested BLM use other mechanisms, such as policy changes or better implementation of existing regulations, as the means to address problems. On the other hand, many commenters argued for strengthening the 3809 regulations to provide adequate protection for communities and the environment and to ensure that the mining industry does not burden taxpayers with the costs of cleaning up environmental degradation of the public lands.

Congress has expressly directed the Secretary, in managing the public lands, to prevent unnecessary or undue degradation of the public lands. This final rule represents the Secretary's judgment of the regulations required to prevent unnecessary or undue degradation.

Some of the regulations adopted today are designed to address real-world, on-the-ground environmental problems caused by exploration and mining operations on the public lands. For example, provisions that increase or amplify the information that an operator must include in a proposed plan of operations are intended to address unanticipated problems that occur after BLM has approved a plan of operations, such as dewatering of springs, acid seeps and drainages, failure or slumping of waste or tailings piles, and so on. Some of the regulations adopted today address the recommendations for filling regulatory gaps included in the NRC Report. For example, the final rule requires financial guarantees for all notice- and plan-level operations. See recommendation number 1 (p. 93). Some of the regulations adopted today are designed to clarify and streamline administrative processes. For example, we are adopting changes to the regulations governing review of notices to clarify the circumstances under which BLM will need longer than 15 days to review a notice. Some of the changes we are adopting today are designed to make information easier to find in the regulations, and once found, easier to understand. For example, we have broken up the regulations into more and shorter sections. This increases the amount of information that is printed in the table of contents of subpart 3809, making it easier to find specific information without having to read through non-relevant sections. In summary, all the changes we are adopting today are necessary for one or more reasons and are aimed at preventing unnecessary or undue degradation, either directly or indirectly.

Although BLM recognizes that many States have programs in place to regulate the operations covered by this rule, BLM has a non-delegable responsibility to manage the public lands in a way that prevents unnecessary or undue degradation. These rules are intended to establish a Federal floor for such regulation, but to do so in a manner that will not unnecessarily intrude where other regulatory schemes are working properly.

Sections 3809.1 to 3809.116 General Information

Section 3809.1 What Are the Purposes of This Subpart? and Section 3809.2 What Is the Scope of This Subpart?

The final rule at § 3809.1 describes the purposes of this subpart, which are to (1) prevent unnecessary or undue degradation of public lands by operations authorized by the mining laws and (2) provide for maximum possible coordination with appropriate State agencies to avoid duplication and to ensure that operators prevent unnecessary or undue degradation of public lands.

The final rule states at § 3809.2 that this subpart applies to all operations authorized by the mining laws on public lands where the mineral interest is reserved to the United States, including Stock Raising Homestead lands as provided in final § 3809.31(c). It also states that this subpart lists the lands to which the regulations do not apply and includes a reference to the patented mining claims in the California Desert Conservation Area that are subject to the regulation. Additionally it describes the mineral commodities subject to the regulation and those excluded from the operation of the mining laws by statute.

The preamble discussion of §§ 3809.1 and 3809.2 in the proposed rule consolidated several sections and covered a wide range of subjects on which we received comments during the scoping process. First, the discussion noted that the language of the proposed rule did not include previous language that expressed the Departmental policy to encourage development of Federal mineral resources and reclamation of disturbed lands, a deletion made in the interest of brevity.

The preamble to the proposed rule also briefly mentioned the November 7, 1997 Solicitor's Opinion [M–36988] regarding the proper acreage ratio for mining claims and mill sites and its implementation via the existing 3809 regulations. This final rule does not contain provisions expressly addressing that opinion. It should be noted, however, that approval of a plan of operations under this subpart constitutes BLM approval to occupy public lands in accordance with its provisions whether or not associated mining claims on millsites are determined invalid. Such authority is provided by section 302(b) of FLPMA. See also the preamble discussion of final § 3809.100, below.

The language in these sections and the accompanying preamble discussion prompted comments. We received comments on removal of some of the objectives language, implying that the exclusion of the language was not based on a search for brevity, but was in fact based on the desire to have BLM field personnel forget the Departmental policy when implementing the regulations. We received comments demanding reform or repeal of the mining law as well as comments supporting the mining law and demanding an end to BLM's administrative reform or repeal of the law. There were comments both pro and con regarding the continued utility of mining law, mineral patenting and payment of royalties. Other commenters expressed concern about the proposed rule's apparent extension of BLM's surface management jurisdiction to unclaimed lands. We received comments on royalties and taxes, patenting costs, liability and the moratorium on processing patent applications. Lastly we received comments on recent policy changes and the new regulations.

Changes to the Proposal

The language of this section is a slight revision of the original language contained in the 1980 regulations. We have added a sentence to final

§ 3809.2(a) to specify that when public lands are sold or exchanged under 43 U.S.C. 682(b) (the Small Tracts Act [2]), 43 U.S.C. 869 (the Recreation and Public Purposes Act), 43 U.S.C. 1713 (sales) or 43 U.S.C. 1716 (exchanges), minerals reserved to the United States continue to be segregated from the operation of the mining laws unless a subsequent land-use planning decision expressly restores the land to mineral entry, and BLM publishes a notice to inform the public. We added this sentence to clarify that this final rule does not restore land that has been removed from mineral entry under the mining laws because of disposal of the surface by sale or exchange (that is, non-Federal surface over Federal minerals). As proposed, subpart 3809 could have had this effect because section 209(a) of FLPMA, 43 U.S.C. 1719(a), and BLM's land resource management regulations (43 CFR §§ 2091.2–2(b), 2091.3–2(c), 2201.1–2(d), 2711.5–1, and 2741.7(d)) state that public lands with reserved minerals are closed, segregated, or removed from the operation of the mining laws until the Secretary issues regulations addressing such lands. If the 3809 proposed rule has been put in final as proposed, it could have been considered as the issuance of regulations referred to in the land resource management rules, and thus could have removed the regulatory barriers contained in those regulations.

We have added a second sentence of section 3809.2(a), however, to prevent the issuance of these rules from automatically restoring all such lands to mineral entry under the mining laws, and maintaining the status quo pending future BLM action. The lands will continue to remain removed from operation of the mining laws until subsequent land-use planning decisions expressly restore the land to mineral entry, and BLM publishes a notice to inform the public. Because the addition of this sentence in the final rule makes the references to future regulations in BLM's land resource management rules superfluous, we have removed those references in this rulemaking as technical conforming changes.

The reason for this change is as follows: Keeping lands with reserved minerals removed from mineral entry under the mining laws indefinitely pending the issuance of rules in the future (as was the status under the former land resource management rules) is not a reasoned approach to land-use planning. Conversely, promulgation of subpart 3809 rules is not an appropriate basis for generally restoring all such lands throughout the country to mineral entry. BLM believes strongly that site-specific conditions need to be factored into the determination whether to restore areas currently removed from mineral entry under the mining laws. Such considerations are best addressed in land-use decisions that will be subject to public participation. Thus, although these rules remove the regulatory bars in the former land resource management rules which prevented public lands with reserved minerals from being restored to mineral entry under the mining laws, they allow such restoration to occur on an area-specific basis only after subsequent land-use planning decisions occur, and BLM notifies the public.

As a conforming change, we deleted the references to the Small Tracts Act and the Recreation and Public Purposes Act from what was proposed as § 3809.2(b).

We have also added a sentence to final § 3809.2(d) to clarify that the final regulations do not apply to private land unless the lands were patented under the Stock Raising Homestead Act or are a post-FLPMA mineral patent in the California Desert Conservation Area. The same sentence states that BLM may collect information about private land that is near to, or may be affected by, operations authorized under this subpart for purposes of analysis under the National Environmental Policy Act of 1969.

Consistency With the NRC Report Recommendations

Final §§ 3809.1 and 3809.2 are not inconsistent with the NRC Report recommendations because those recommendations don't address the issues of the purposes and scope of subpart 3809.

Comments and Responses

Commenters asserted that as the 1872 Mining Law was written over 100 years ago it is ''out of date,'' ''anachronistic,'' ''antiquated,'' and a ''subsidy.'' Other comments pointed out that the law was written during a period favorable to resource development and that time had changed, thus the law needed to change. The general sentiments expressed by these commenters favored outright repeal/reform of the mining law.

Repeal or reform of the mining laws is not within the jurisdiction of the agency. While the Administration has and continues to support reform of the mining laws, that process must be undertaken by the Congress and not the Executive branch. Further, BLM agrees that some of the past practices carried out under the mining laws have had undesirable environmental results. That is the very reason that the regulations being published today were developed. BLM further notes that the flexibility demonstrated by the mining laws and laws like FLPMA allows BLM to incorporate a greater degree of environmental protection within its own regulations, in addition to any imposed by other agencies under the environmental protection laws.

Some commenters praised the 1872 Mining Law for more than 100 years' service as ''effective,'' ''fair,'' ''resilient'' and perhaps more efficient them most other Federal programs. Several comments accused the BLM and the Secretary of attempting to administratively effect a ''back-door'' reform or repeal of the mining laws, stating that it is not BLM's job to re-write the laws and that job belongs to the Congress. Other commenters noted the legal constraints on the mining laws, including the environmental protection laws, yet the law continued to effectively function.

BLM responds that it is not attempting to effect a ''back-door'' reform of the mining laws. BLM agrees with the comment that the reform of the mining laws is the job of the Congress and the Administration will continue working with the Congress to get common sense reforms. BLM also agrees with the commenter who noted the legal constraints that apply to operations conducted under the mining laws. In developing these regulations BLM has been careful to incorporate where appropriate references to the environmental protection statutes that apply to operations under the mining laws.

One commenter objected strenuously to the removal of language contained in previous § 3809.0–2. BLM consolidated several sections of the regulations in the interest of clarity and brevity. The commenter asserts this is an attempt to divert attention away from the rights granted to the miner under the mining laws during the application of the regulations.

BLM disagrees with the assertion that the change is intended to divert attention away from the miner's rights. BLM personnel are aware that miners may have property rights in their claims, but generally speaking, their rights may be regulated to prevent unnecessary or undue degradation.

Commenters objected to the proposed removal of previous § 3809.0–6, which recognized the declaration of policy in section 102 of FLPMA that the ''public

[2] Although the Small Tracts Act was repealed by FLPMA, and therefore new conveyances are not being made, tracts previously conveyed under that Act contain minerals that were reserved to the United States.

lands be managed in a manner which recognizes the Nation's need for domestic sources of minerals * * * from the public lands including implementation of the Mining and Mineral Policy Act of 1970 * * *'' 43 U.S.C. 1701(a)(12). One commenter characterized BLM's duty as ''to encourage development of Federal mineral resources.'' The commenters also stated that the proposed regulations conflict with the 1970 Mining and Mineral Policy Act and the 1980 National Materials Policy Research and Development Acts, because they would not only inhibit most small-scale operations, but also keep new people from wanting to get into prospecting and mining to begin with. Commenters asserted that BLM appears intent on reducing the level of mineral activity on the public lands through the creation of an unnecessary and redundant scheme, and that BLM is not in compliance with FLPMA unless it takes into account the impacts of cumulative regulations that apply to supplying the Nation's need for domestic sources of minerals. The commenters concluded that if BLM truly intends to fulfill its statutory obligation to encourage development of Federal mineral resources, then this language is an important part of the rules and should be retained.

BLM disagrees with the comments. Section 102(a) of FLPMA contains a number of diverse policies, including implementation of the Mining and Minerals Policy Act of 1970 (section 102(a)(12)) and protection of the environment and other resources on public lands (section 102(a)(8)). All of these policies, however, cannot be maximized on each parcel of public lands. BLM has made a reasoned effort to reconcile these policies and to meet its statutory responsibilities. The reference to the Mining and Minerals Policy Act has been removed from subpart 3809 because it is not necessary for regulatory purposes. This does not change any of the statutory requirements of FLPMA or the Mining and Minerals Policy Act. BLM is still subject to the requirements of these acts and of other acts such as the National Environmental Policy Act (NEPA) and the Endangered Species Act (ESA). It is neither necessary nor appropriate to present a complete listing of all applicable acts in the regulations, or all the policies set forth in the 13 paragraphs of section 102(a) of FLPMA.

BLM understands that the final regulations, which are based in part on the NRC Report recommendations that all mining operators obtain a BLM-approved plan of operations and submit financial guarantees, may have an impact on the small miner who works on an individual basis. We have found, however, that the small, notice-level mining operations create a disproportionate share of the abandonment and compliance problems. A 1999 survey of BLM field offices showed over 500 abandoned 3809 operations where BLM was left with the reclamation responsibility. Most of these were notice-level operations. BLM believes, as did the NRC, that these changes to the 3809 regulations are necessary to address this problem, prevent unnecessary or undue degradation, and to provide for environmentally responsible mineral operations.

Several commenters observed that royalties and taxes should be imposed on operations subject to these regulations. Other commenters observed that any royalty or tax must be enacted by Congress. While the Administration has and will continue to support a fair return to the taxpayer for the miner's use of Federal mineral resources, BLM agrees with the commenters that observed that the creation of such taxes and royalties is the sole province of the Congress.

A commenter observed that an agency cannot end the patenting process, which allows mining companies to obtain public land for a fraction of its value as that requires congressional action. Some commenters objected to the low purchase price paid by mining claimants for their mineral patents. One commenter suggested there had been a recent inversion in land prices for mineral lands (formerly high compared to non-mineral lands, but now low) versus non-mineral land (formerly low relative to mineral lands and but now high) seeming to imply the need for a change. Another commenter suggested that the price of a patent be indexed to account for inflation since 1872. Another commenter observed that patented land reduces liability to BLM, aids in protecting mining-related improvements, and should be ''restored,'' albeit at fair market prices. Other commenters raised national security concerns in supporting the patent provisions of the mining laws. Other commenters argued that the process to get a patent is neither quick nor cheap and costs significantly more than the purchase price. These same commenters objected to the amount of time required to complete the Secretarial review process.

BLM agrees with the commenters who note that congressional action is required to end the patenting process. BLM also agrees with the comments regarding the low prices for mineral patents and that the purchase price should be changed. The Administration will continue to support congressional action that will end patenting once and for all. BLM does not agree that the patent process is the only way to protect mining related improvements. For example, BLM's regulations at 43 CFR 3715 create a specific process to deal with trespass and damage to mining improvements. As to the amount of time and expense in pursuing the patent process, and in particular the amount of time required by the Secretarial review process, BLM agrees that the process is expensive and time consuming, but because the patent gives away what could be very valuable Federally owned resources for a nominal fee, care in reviewing patent applications is warranted. BLM notes also that a patent is not required to mine a valuable mineral deposit found in Federal lands.

Commenters observed that BLM already had authority to write policies that made the existing regulations more effective and cited several examples. These commenters asserted that the development of policy was the proper way to address and solve problems rather than to undertake wholesale modification of the existing regulations. One commenter supported incorporation of the cyanide and acid drainage policies into the new regulations. Several commenters pointed to BLM's development of the use and occupancy ''policy'' as having resolved a ''significant'' problem.

BLM's authority to develop policies that extend and improve implementation of regulations is limited by the Administrative Procedure Act (APA). When policies go beyond simply explaining or otherwise implementing an existing set of regulatory standards, the APA requires that they be published as rules. BLM's amended bonding rules set aside by the court in *Northwest Mining Association* v. *Babbitt* (No. 97–1013, D.D.C. May 13, 1998) incorporated parts of earlier bonding and cyanide policies. These final regulations incorporate elements of the bonding, cyanide, and acid drainage policies. The use and occupancy ''policies'' (43 CFR 3715) originated out of a commitment in 1990 to initiate a separate rulemaking to provide field managers with a set of tools to manage legal occupancy and terminate illegal mining claim occupancy. As such, they predated the initiation of this rulemaking in 1991 and did not flow from that review, as claimed by one commenter.

BLM is fully aware that approvals of plans of operations on unclaimed lands are not based on property rights under the mining laws, and that approval of a

plan of operations under subpart 3809 does not create property rights where none previously existed. The purpose of the regulations is to prevent unnecessary or undue degradation, not to adjudicate or convey rights under the mining laws.

One commenter stated that subpart 3809 does not properly incorporate FLPMA's requirement of suitability analysis, which is the multiple-use mandate that governs BLM activities on the public land and regulatory activities. The commenter stated that FLPMA requires the BLM to balance competing resources to determine what is in the best interests of the American people. To do this, BLM needs to determine the benefits of a proposed activity and balance that against the impacts on other competing activities, including water quality, recreation, wildlife habitat, and so forth. Also, FLPMA has an eye toward preserving public land resources for future generations. The commenter asserted that this mandate alone suggests that the BLM should do everything it can to protect public land values for future generations, such as requiring the most up-to-date technology to not minimize, but prevent, undue degradation of the public land. Given the concessions that BLM appears to be making to the mining industry, according to the commenter, the agency should require the most up-to-date, best available technology to control all threats to public land values. That approach is underlined by FLPMA's attention to preserving land value for future generations.

BLM does not accept the commenter's suggestion. BLM uses the land-use planning process under section 202 of FLPMA to determine the long-term management of lands, balance competing resource concerns, and decide if any areas should be withdrawn (determined unsuitable) from operation of the mining laws to protect other resources. Once an area is identified for withdrawal from the mining laws, a withdrawal is processed under section 204 of FLPMA. The 3809 regulations are applied where the area is open to operation of the mining laws, or if closed, where there are valid existing rights. The regulations are not intended to be a vehicle for suitability determinations. BLM has added a requirement in the final regulations to the definition of unnecessary or undue degradation that protects certain significant resources from substantial irreparable harm that cannot be mitigated if identified during review of a specific proposal. However, this does not replace the need for comprehensive land-use planning or mineral withdrawals to make broad-based ''multiple use'' determinations about how to manage the public lands.

BLM also disagrees that FLPMA's multiple use mandate requires mining operations to apply the ''best available technology.'' Once it has been determined that an area will be used for mining operations, a certain level of mining-related impacts is inevitable, and the land will not necessarily be available for all other uses.

Section 3809.3 What Rules Must I Follow if State Law Conflicts With This Subpart?

BLM has adopted § 3809.3 as proposed. Final § 3809.3 clarifies situations where State and Federal laws or regulations relating to the conduct of mining operations may conflict. The final rule provides that if State laws or regulations conflict with subpart 3809 regarding operations on public lands, the operator must follow the requirements of subpart 3809. The rule also states that there is no conflict if the State law or regulation requires a higher standard of protection for public lands than this subpart. The final rule incorporates the Supreme Court's ruling in the *Granite Rock* case (*California Coastal Commission et al.* vs. *Granite Rock Co.*, 480 U.S. 572, 581 (1987)) and the 1980 final rule preamble position regarding preemption into the regulations (45 FR 78908, Nov. 26, 1980).

There were many general comments on State conflicts and preemption. Most of the comments on this provision were concerned about the revisions from the previous rule and the negative impacts on Federal/State relationships. Most of the commenters that expressed concern over the proposed regulations urged that BLM not change the previous regulations. Although there were no specific comments that expressly and specifically supported the proposal, there were general comments that expressed concern that State laws are not strict enough to protect public lands and BLM should not abdicate its stewardship responsibilities by deferring to State regulations. Many commenters expressed concern that this section would create confusion, especially at sites with mixed public and private lands.

Other commenters expressed concern that the effect of this section will be to diminish the States' roles as co-regulators on Federal lands within their borders. Another commenter stated that ''this one-sided approach to the preemption issue would abdicate Congress's direction to BLM to ''encourage development of federal resources.'' State agencies expressed concern that this section would harm existing Federal/State relationships. Commenters noted that this provision and the provisions regarding Federal and State agreements would effectively cause the States to change State programs.

Another commenter added that ''This provision coupled with the proposed provisions of the Federal/State relationship (§§ 3809.201 to 3809.204) and the proposed performance standards (§ 3809.420) will have a preemptive effect on State Laws. Preemption of State laws is not contemplated by FLPMA and will cause a host of problems.'' Commenters from the State agencies requested that BLM specifically indicate in the regulations and the draft EIS where there is conflict with specific state laws. Commenters also disagreed that the new provision is consistent with the decision in the *Granite Rock* case. One commenter indicated that any State provision ''that is so stringent that it effectively precludes mining or substantially interferes with mining on the public lands is preempted, because it would run afoul of the provisions of the Mining Law.''

One commenter asked whether BLM would enforce the newly enacted Montana constitutional amendment banning cyanide leach processes from new mining operations, noting that it far exceeds the BLM standards and the Alternative 4 in the draft EIS.

Commenters also asserted that the proposed rules' provisions regarding preemption and Federal/State conflict cannot be reconciled with the NRC Report recommendations and that the existing regulatory relationships work and need not be replaced by the BLM regulations. One commenter noted that the requirements of this section ''would take over administration of the programs previously handled by the states.''

Final § 3809.3 provides that no conflict exists if the State regulation requires a higher level of environmental protection. BLM disagrees that this final rule will significantly affect Federal/State relationships or diminish State roles as co-regulators. Under the final rule, States may apply their laws to operations on public lands. It is expected that conflicts will not be common occurrences. In most cases, satisfying the State requirements will also satisfy BLM's requirements. Satisfying the BLM requirements will also satisfy the State requirements. BLM intends to coordinate with the appropriate State agencies to avoid duplication of efforts. A conflict occurs only when it is impossible to comply

with both Federal and State law at the same time. If a conflict were to occur, the operator would have to follow the requirements of subpart 3809 on public lands. In this case, the State law or regulation is preempted only to the extent that it specifically conflicts with Federal law.

BLM expects to avoid conflicts in part through cooperation with States using the agreements under final §§ 3809.200 through 3809.204. In some situations, a State may choose to strengthen its regulations to be consistent or functionally equivalent to this subpart.

BLM disagrees with the comments that the preemptive effect of the rule violates FLPMA. One purpose of subpart 3809 is to establish a minimum level of protection for public lands. This is within the BLM's authority under FLPMA. States may continue to assert jurisdiction over mining operations on the public lands. As final § 3809.3 provides, it is only where a conflict with these rules exists that State law will be preempted. This is consistent with the U.S. Constitution and Federal law. As the United States Supreme Court stated:

''Absent consent or cession a State undoubtedly retains jurisdiction over federal lands within its territory, but Congress equally surely retains the power to enact legislation respecting those lands pursuant to the Property Clause [of the Constitution]. And when Congress so acts, the federal legislation necessarily overrides conflicting state laws under the Supremacy Clause [of the Constitution].'' We agree * * * that the Property Clause gives Congress plenary power to legislate the use of the federal land on which Granite Rock holds its unpatented mining claim. The question in this case, however, is whether Congress has enacted legislation respecting this federal land that would preempt any requirement that Granite Rock obtain a California Coastal Commission permit. To answer this question, we follow the pre-emption analysis by which the Court has been guided on numerous occasions: ''[S]tate law can be pre-empted in either of two general ways. If Congress evidences an intent to occupy a given field, any state law falling within that field is pre-empted. * * * If Congress has not entirely displaced state regulation over the matter in question, state law is still pre-empted to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law, * * *, or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.''

California Coastal Commission v. *Granite Rock Co.,* 480 U.S. 572, 580–581 (quoting other cases, and omitting citations). Final § 3809.3 and the other rules cited by the commenter implement the principle enunciated by the Supreme Court for situations, such as FLPMA, involving areas where Congress has not entirely displaced State regulation. A further analysis of the preemptive effect of these rules appears in the preamble to the February 9, 1999 proposed rule at 64 FR 6427.

Although most of subpart 3809 should not conflict with State laws or regulations, one possible specific case where the regulations may conflict with State requirements is final § 3809.415(d), which requires avoiding substantial irreparable harm to significant scientific, cultural, and environmental resource values that cannot be mitigated. For instance, this requirement could address an issue which is related to the Secretary's trust responsibility for impacts to adjoining or nearby Native American lands. Some States may not have similar requirements. Even such a conflict is expected to be rare as historically most resource conflicts have traditionally been mitigated on the public lands.

There are also certain situations where the State law or regulations may provide a higher standard of protection than subpart 3809, such as the restriction on cyanide leaching-based operations approved by voters in Montana. In this situation, the State law or regulation will operate on public lands. BLM believes that this is consistent with FLPMA, the mining laws, and the decision in the *Granite Rock* case.

Final § 3809.3 is not inconsistent with the recommendations of the NRC Report, none of which expressly addresses preemption of State law. The report recognized that the overall regulatory structure ''reflects the unique and overlapping Federal and state responsibilities'' (p. 90) and also addressed the mechanism for protecting valuable resources and sensitive areas (p. 68). BLM believes that this represents an acknowledgment of the Department of the Interior's responsibilities in regard to FLPMA where the States may not have analogous coverage.

Section 3809.5 How Does BLM Define Certain Terms Used in This Subpart?

In developing the final rule, BLM has streamlined and clarified language in final §§ 3809.5 (definitions) and 3809.420 (performance standards) to address concerns raised by commenters about circular definitions and clarity of regulatory language. Definitions of several terms have been modified based on public comment. The concept of appropriate technology has been retained in final § 3809.420, but the term ''most appropriate technology and practice'' has been dropped from final §§ 3809.5 and 3809.420 to reduce confusion. The BLM has made no attempt to define terms used in the National Research Council Report unless specifically related to terms in the 3809 regulations and pertinent to this regulatory effort.

FLPMA authorizes the Secretary of the Interior to ''prevent unnecessary or undue degradation of the public lands.'' BLM believes that this broad authority provides for performance standards and related definitions. Many definitions included in the final rule are derived directly from FLPMA, CEQ regulations, or long-standing and publicly available Bureau policy. As such, the BLM believes the definitions to be consistent with Federal law and regulation, and not inconsistent with the recommendations of the NRC Report.

There were numerous requests to define terms such as ''feasible,'' ''significant,'' ''necessary,'' and ''substantial.'' BLM has chosen to rely on established definitions of these words in order to ensure greatest understanding of the terms rather than to introduce a specific regulatory definition. In addition, changes have been made in the language of the performance standards and elsewhere in the regulations to make these terms more clearly understood in the regulatory context.

''Casual Use''

This final rule defines ''casual use'' as activities ordinarily resulting in no or negligible disturbance of the public lands or resources. In paragraph (1) of the final definition, we give examples of things that we generally consider to fall within the definition of ''casual use,'' and in paragraph (2), we give examples of things that we don't consider to be ''casual use.'' Changes to the proposed rule in response to comments include adding a number of examples of what is ''casual use'' and eliminating the terms ''hobby or recreational mining'' and ''portable suction dredges.'' We also made a clarifying change related to when the use of motorized vehicles is not ''casual use.'' These changes are discussed below.

A commenter felt that the BLM should focus more on mining operations of less than five acres in size instead of on numerous changes in the definition of ''casual use.'' One commenter indicated that BLM needs to revise the definition of ''casual use'' to be consistent with NRC Report Recommendations 1, 2, and 3. A few commenters said that BLM should assure that the definition of ''casual use'' is similar to the Forest Service definition.

Many commenters felt that BLM should develop a detailed list of what ''casual use'' is to ensure that there is no confusion in anyone's mind about when an activity is considered casual use and when it falls under a notice. Other commenters indicated the current definition needed to be strengthened to ensure protection of public lands and resources, particularly riparian areas. One suggested that the amount of area to be disturbed should be specifically defined.

Many commenters stated that the current definition of ''casual use'' had worked well for nearly 20 years and did not need to be changed. One commenter indicated that the NRC Report supported BLM retaining the definition of ''casual use.'' Other commenters stated that the existing definition of casual use provides adequately for prospecting and recreational mining according to BLM's own data. Some commenters objected to the expansion of items not be to considered ''casual use.''

The final rule definition of casual use is based on the existing definition. We have modified it to address situations that have arisen since the 1980 regulations were published. We have included examples of activities that are generally considered casual use, and examples of activities that are not considered casual use. For instance, the term ''occupancy,'' as defined in 43 CFR 3715.0–5, is not considered ''casual use.'' Similarly, the final rule clarifies that surface disturbance from operations in areas where the cumulative effects of the activities result in more than negligible disturbance is not casual use.

Some commenters stated the proposed definition was too restrictive and recommended that ''casual use'' should include not only hand tools, but also other equipment used by recreational miners. Several commenters felt that some mechanized equipment should be allowed under casual use. Several commenters stated that casual use has always included the use of mechanized equipment. Several commenters felt that the changes in the definition of casual use could be interpreted by some offices in a way that would result in elimination of prospecting and recreational mining on public lands. Others raised a concern that the revised definition of casual use will preclude geochemical sampling and will adversely affect mineral exploration.

Others expressed a general concern about the proposed provision that would have required hobby and recreational miners to file a notice, instead of operating under casual use, where the cumulative effect of their operations results in more than negligible disturbance. Some commenters expressed the view that active prospecting is virtually excluded without the ability to conduct these activities as casual use.

It is not the intention of the BLM to unduly restrict mineral prospecting and exploration on the public lands. Revisions in the final rule are intended in part to address concerns on the part of some members of the public about cumulative impacts to the environment resulting from multiple operations in a single area. The requirement for operations above the ''casual use'' level to file a notice or plan of operations and obtain a financial guarantee is intended to provide an increased measure of environmental protection for public land and resources. On the other hand, exploration techniques involving negligible surface disturbance will not require a notice or financial guarantee. See also the preamble discussion of final § 3809.31(a).

Based on the number and substance of comments about the description of activities that cause negligible surface disturbance, the definition of casual use was expanded in this final rule to include geology-based sampling and non-motorized prospecting activities.

The public comments on suction dredging and its impacts covered a broad range. One commenter stated that the proposed regulations are contrary to the NRC finding that States adequately regulate suction dredging under their own permitting. Another commenter stated that BLM does not acknowledge the NRC finding that BLM appropriately regulates small suction dredge operations under current regulations. The same commenter, as well as others, felt that BLM should allow at least some suction dredge activities under casual use. Other commenters stated that suction dredging should be regulated by State fish and game departments.

Some members of the public indicated that suction dredging should not be handled as a casual use because of associated environmental impacts. Some commenters did not view the damage caused by suction dredging to be a major environmental concern. Another commenter indicated that the major impacts (in California) from suction dredging were associated with abandoned junk, long-term camping, sewage and waste management, and interference with other public land users.

Several commenters felt that the BLM should give more credence to a U.S. Geological Survey study on the Forty Mile River in Alaska that found no adverse impacts to water quality from suction dredges with an intake diameter of 10 inches. Many commenters, from different states, indicated that 4″, 5″, and 6″ (intake diameter) on suction dredges have essentially the same impacts, and in the view of these commenters are not environmentally damaging.

In response to the comments, and to be consistent with the NRC Report discussion, the final definition of ''casual use'' allows small portable suction dredges to qualify on a case-by-case basis as ''casual use.'' BLM believes that this approach is also consistent with IBLA case law because the cases holding that suction dredging is not ''casual use'' were dependent upon the specific facts and circumstances at issue in those cases.

Some commenters feel the complete exclusion of chemicals from casual use operations is unrealistic and too far-reaching. They recommend that only ''hazardous'' chemicals to land or water be prohibited. Other commenters expressed the concern that the definition of casual use should not include small miners because they might not have the expertise to use chemicals properly.

BLM's intent in defining ''casual use'' as not including the use of chemicals does not apply to the use of small amounts of gasoline, oil, or similar products in connection with small operations, but is intended to address concerns about the use of cyanide and other leachates. We did not create an exception to this provision for small miners (some of whom the commenter alleged might not have the expertise to use chemicals properly) because the issue here is the impact of harmful chemicals on the environment, not the size of the operation or the sophistication of the operator.

Many commenters supported the use of truck-mounted drilling equipment under casual use when no new road construction or surface disturbance would be required.

BLM recognizes the desire of those conducting mineral exploration using truck-mounted drilling equipment to maximize their access to drill sites on public lands with minimum regulation. However, the BLM believes that drilling activities should be conducted under a notice or a plan to increase consideration of potential impacts to the environment, including, but not limited to riparian areas, cultural resource sites, and wildlife habitat. Therefore, BLM has not included truck mounted drilling activities under casual use.

Several members of the public commented that there is no provision in

the mining laws for recreational mining, and that it should not be regulated under subpart 3809. Others recommended that the term ''recreational mining,'' if used at all, should be defined in BLM's recreation management regulations (43 CFR 3840). Several commenters indicated that recreational prospecting is generally allowed in most States, and should not be constrained on BLM-administered lands.

Many commenters indicated that recreational or weekend miners will not be able to prospect and extract minerals if they are required to operate under the notice rather than the casual use provisions. Several suggested that they would not be able to afford the cost of filing a notice and obtaining a bond. Another view, expressed by one commenter, identified a concern that small miners might lack the expertise to properly use chemicals or afford a bond.

The public provided a range of perspectives relative to the impacts of ''hobby or recreational mining.'' Many commenters expressed concern about recreational mining being included in the category of casual use because it allowed for uncontrolled use of public lands with associated impacts.

Another commenter stated that if there are inappropriate impacts to the land by weekend recreational miners, stiffer fines are a more appropriate response than a broad-scale restriction of land use. One commenter prefers designations or constraints to be included in the regulations rather than in the land-use plans. Another felt that BLM should identify areas in land-use plans where hobby or recreational mining could occur. Some commenters felt that all recreation and hobby mining should be casual use.

The BLM recognizes that some weekend prospectors and recreational miners may now be required to obtain a notice rather than operate under the casual use provision. However, it is BLM's intent that all operations which cause more than negligible surface disturbance should be conducted under a notice or a plan to ensure appropriate review of environmental concerns and development of appropriate mitigation.

Numerous members of the public stated that the term, ''recreational mining,'' should be more clearly defined or deleted. Some commenters felt that the lack of definition of recreational mining will lead to inconsistent interpretation of what it includes.

Many commenters recommended changing the definition to include some version of the following: ''The term casual use should include the following activities: use of metal detectors, gold spears, and other battery-operated devices for sensing the presence of minerals, battery-operated and motorized high bankers, hand, battery operated, and motorized drywashers, and motorized gold concentrating wheels.''

One individual commented that the definition of ''casual use'' should be modified to state ''Nonprofit organizations or societies, hobbyists, and recreational miners are classified as casual use as long as they do not use motorized tools.'' Many commenters expressed concern that the new definition of casual use could eliminate rock hounding. Others made general statements that the definition is too restrictive. Numerous members of the public felt there should be a provision for collection of mineral specimens with hand tools, hand panning and motorized sluices. Others commented that the definition of casual use should include sampling of rocks and soils.

The BLM concurs with the recommendations made by the public to include various types of sampling, and various types of prospecting activities and equipment in the definition of casual use to clarify its intent that these types of activities are acceptable under the definition of casual use as long as they create no or negligible surface disturbance. The definition has been modified to address this concern. The BLM did not however, elect to include high bankers and other similar equipment in this definition in order to address concerns about the surface disturbing impacts of this type of equipment.

A proposed paragraph (2) of the ''casual use'' definition would have indicated that use of motorized vehicles in areas designated as closed to ''off-road vehicles'' (ORV), as defined in 43 CFR 8340.0–5 is not ''casual use.'' Under BLM's existing ORV regulations, ORV use may be completely prohibited (a ''closed area'') or restricted at certain times, in certain areas, or to certain vehicular use (a ''limited area''). We are concerned that the language of the proposal may be interpreted to mean that only motorized vehicle use in ''closed areas'' exceeds the ''casual use'' threshold. In reality, we intended the language to also mean that motorized-vehicle use that conflicts with the use restrictions in a ''limited area'' exceeds the ''casual use'' threshold. Therefore, we have made a clarifying change to the final rule to indicate that use of motorized vehicles in areas when designated as closed (either permanently or temporarily) is not ''casual use.''

''Exploration''

Although not explicitly requested by the public in comments, the BLM has added a new term, ''exploration,'' to the definitions. The final rule embraces the concept that exploration activities will be covered under a notice, unless they exceed five acres unreclaimed surface disturbance in a calendar year, and any mining activities will be covered by a plan of operations. The definition of ''exploration'' was included to help differentiate when an operator should file a notice and when an operator should file a plan of operations and is necessary to implement the NRC Report recommendations.

Military Lands

A few commenters said that BLM needs to define the term, ''military lands,'' and clarify to what extent subpart 3809 applies to minerals on military lands that are also under the jurisdiction of BLM.

Public Law 106–65 extended the withdrawals for Fort Greely, Alaska; the Yukon Range of Fort Wainwright, Alaska; Nellis Air Force range, Nevada; Naval Air Station Fallon Range, Nevada; McGregor Range of Fort Bliss, New Mexico; and Barry M. Goldwater Range, Arizona. The mining language in the prior Public Law 99–606 withdrawal for these ranges was carried forward into Public Law 106–65.

Public Law 99–606 provided for land-use planning on these military ranges. The BLM has completed land-use plans on all lands addressed by Public Law 99–606 except for Bravo-20 Range at the Naval Air Station at Fallon, Nevada. No lands were found suitable to open to entry under the mining or mineral leasing laws, except at McGregor Range, in New Mexico. Public Law 106–66 calls for the update of these land-use plans. No implementing regulations for these public laws have been promulgated to date. The responsibilities of the BLM would be outlined at such time as these regulations are developed.

''Minimize''

According to one commenter, the proposed definitions of ''minimize'' is fundamentally at odds with the NRC Report because NRC assumes mining will change the landscape. Other commenters thought this definition should be deleted because it is confusing and is defined differently than the commonly understood meaning of the word ''minimize.'' Several commenters stated that ''minimize'' is not synonymous with ''eliminate'' or ''avoid.'' The precise meaning of some

terms within the definition—''most'' and ''practical level''—were unclear to some commenters. Several commenters raised the concern that the second sentence in the proposed regulations has significantly reduced the BLM's flexibility from the current 3809 rules.

BLM is in agreement with the NRC that mining changes the landscape. However, it is the view of the BLM that the NRC Report recommendations do not preclude appropriate attempts to reduce or avoid impacts to public land and resources. BLM has modified the second sentence of the proposed definition of ''minimize'' to reduce confusion and increase flexibility of the authorized officer in evaluating proposed mining operations. Rather than stating that ''minimize'' ''means'' to avoid or eliminate, the final rule clarifies that in certain instances ''it is practical'' to avoid or eliminate particular impacts. In this context, ''practical'' is not based on what a particular company can afford, but rather on technologies and practices reasonably considered to be cost-effective.

By changing the final rule in this manner, BLM will still define the term ''minimize'' as it is used in a number of the performance standards in final § 3809.420 as reducing the adverse impact of an operation to the lowest practical level. During BLM's review of proposed operations, either notice or plan-level, BLM might determine that avoiding or eliminating specific impacts can be achieved practically. BLM would determine the lowest practical level of a particular impact on a case-by-case basis.

''Mining Claim''

The final definition is unchanged from the proposal. A commenter suggested that the definition of ''mining claimant'' should be included in this subpart, rather than including just a cross reference to existing 43 CFR 3833.0–5. The definition should include any citizen or entity in the United States. The definition should be similar to the current definition.

BLM has referenced the definition in 43 CFR 3833.0–5 to promote consistency in definition of terms across Title 43 of the Code of Federal Regulations. The definition provides for citizens of the United States to hold mining claims.

''Mitigation''

The final definition is unchanged from the proposal. A commenter asserted that the term should be deleted from the regulation unless BLM can show specific statutory authority for mitigation. In the commenter's opinion, BLM has no authority to require compensatory mitigation. Several commenters raised the question of when compensation is appropriate and whether BLM has the statutory authority to require it. Some commenters indicated that the definition of ''mitigation,'' which comes from the Council on Environmental Quality definition, should be eliminated because in that context it was used for analytical purposes rather than regulatory purposes, as in this case. Some commenters felt that the revised definition, included in the draft rule, gives the BLM too much latitude without a standard for comparison.

Section 302(b) and 303(a) of FLPMA, 43 U.S.C. 1732(b) and 1733(a), and the mining laws, 30 U.S.C. 22, provide BLM the authority for requiring mitigation. Mitigation measures fall squarely within the actions the Secretary can direct to prevent undue or unnecessary degradation of the public lands. An impact that can be mitigated, but is not, is unnecessary. Section 303(a) of FLPMA directs the Secretary to issue regulations with respect to the ''management, use, and protection of the public lands * * *'' In addition 30 U.S.C. 22, allows the location of mining claims subject to regulation. Taken together, these statutes clearly authorize the regulation of environmental impacts of mining through measures such as mitigation. The final rule does not require compensatory mitigation. However, many companies are currently voluntarily completing compensatory mitigation, and it is clearly an available form of mitigation.

BLM believes it is appropriate to retain the Council on Environmental Quality's government-wide definition of ''mitigation'' as it appears in 40 CFR 1508.20. An operator who must ''mitigate'' damage to wetlands or riparian areas under final § 3809.420(b)(3), or who must take appropriate mitigation measures for a pit or other disturbance, would have to take mitigation measures, which includes the measures listed in the definition. BLM will approach mitigation on a mandatory basis where it can be performed on site, and on a voluntary basis, where mitigation (including compensation) can be performed off site. For example, if, because of the location of the ore body, a riparian area must be disturbed, mitigation can be required on the public lands within the area of mining operations. If a suitable site for riparian mitigation can't be found on site, the operator, with BLM's concurrence, may voluntarily choose to mitigate the impacts to the riparian area off site.

''Most Appropriate Technology and Practices'' (MATP)

The final rule does not contain a definition of MATP. A commenter stated that the only statement in the proposed definition of MATP or in the explanation of the proposed rule regarding cost is that ''MATP would not necessarily require the use of the most expensive technology or practice.'' The commenter asserted that this statement not only fails to address how BLM would consider cost, but suggests that BLM could require the use of the most expensive technology or practice for a mine regardless of whether the mine meets performance standards by using a less expensive technology. The commenter asserted that if BLM claims authority to require use of a particular technology under such circumstances, the proposed rules would clearly violate FLPMA, the general mining laws, and the Mineral Development Act. The commenter stated that requiring the use of a costly technology that may make mining impossible or uneconomical in order to achieve minimal or no environmental benefits would ignore FLPMA's limit on BLM's authority only to prevent ''unnecessary'' and ''undue'' degradation of public lands, would impair the rights of locators and claims located under the general mining laws in violation of 43 U.S.C. 1732(b), and would contravene Congress' policy and intent for BLM to manage public lands in a manner that recognizes the Nation's need for domestic sources of minerals and to implement the Mining and Minerals Policy Act of 1970, as set forth in 43 U.S.C. 1701(a)(12). The commenter also stated that the proposed rules provide no explanation of how BLM will reconcile its proposed authority to impose technology-based requirements with its legal authority and obligations under FLPMA.

BLM disagrees that a statement included to assure operators they would not have to use the most expensive technology could be interpreted to mean they would be required to use the most expensive technology or practice regardless of whether the mine meets performance standards. The term ''MATP'' has been deleted from the final regulations because BLM concluded it was confusing and circular, and did not add to the protection provided by the performance standards. In its place, we added a requirement to the performance standards that requires operators to use equipment, devices and practices that will meet the performance standards. The purpose of this requirement is not

for BLM to specify that an operator use any particular technology, but instead to assure that the methods an operator proposes to employ are technically feasible for meeting the performance standards.

Some commenters stated that the NRC Report indicated that existing State and Federal laws are okay with respect to technology. Others indicated that there was no specific statutory authority for requiring most appropriate technology and practices. Still others felt the BLM should abandon the concept of MATP in favor of best available technology (BAT). There was considerable agreement from numerous commenters that the definition proposed in the draft regulations was unclear, confused, difficult to enforce, ambiguous, and circular. Even commenters who liked the concept of MATP over BAT were critical of the BLM's definition. A few commenters raised a concern about whether this definition would be in conflict with State law or technical standards.

BLM agrees with concerns raised about the term ''most appropriate technology and practices.'' The term has been deleted from the definitions in the final rule. Final § 3809.420(a)(1) incorporates the requirement to use equipment, devices, and practices that will meet the performance standards of subpart 3809.

''Operations''

Several members of the public stated that the definition of ''operations'' needs to clarify that FLPMA only gives the BLM authority to regulate activities on Federal public lands. Another commenter indicated that the definition needs to include any facility that is used for the beneficiation of ore. One commenter expressed a concern that including ''reclamation'' in the definition of ''operations'' might cause confusion. Another commenter asserted that the definition of ''operations'' should be defined to include geologic-based or hobby activities such as rock hounding, hobby mining, fossil collecting, caving, and other similar activities.

In the final rule, BLM did not modify the definition except to add a reference to exploration. The definition is intended to be broad in scope to address ''cradle to grave'' activities authorized under the mining laws on the public lands. Therefore, reclamation is included in the definition of operations. The definition clearly states that it applies to activities on public lands. The BLM may request information about activities on adjacent or near by private lands because a proposed operation may occur on mixed ownership, or environmental analysis requirements under the National Environmental Policy Act may require that BLM have a complete picture of the proposed operation. The definition adopted today covers all activities under the mining laws which occur on public lands as casual use or under a notice or a plan or operations, including the hobby activities mentioned by the commenter.

Several commenters opposed applying subpart 3809 to unclaimed land, asserting that the proposal improperly treats such lands as having valid claims and would codify the industry position. The commenters stated that a decision to allow mining on such lands is discretionary and not based on property rights and that BLM should make decisions regarding mining operations on unclaimed lands based on FLPMA's multiple-use mandate rather than treating operations on such lands as equivalent to operations on lands where operators have property rights under the mining laws. Thus, the commenters concluded that 43 CFR subpart 2920 should apply, not subpart 3809. Subpart 2920 does not authorize the exclusive and permanent use of public lands. Commenters stated that increased costs associated with subpart 2920 might result in lower grade ores not being mined. Commenters inquired whether BLM's interim directive would be extended when it expired in September 1999?

BLM has carefully considered the relationship between FLPMA and rights under the mining laws. In these regulations, BLM has decided that it will approve plans of operations on unclaimed land open under the mining laws if the requirements of subpart 3809 are satisfied, and the other considerations that attach to a Federal decision, such as Executive Order 13007 on Indian Sacred Sites, are also met. This continues the scheme that existed under the previous rules and recognizes that in certain situations acreage authorized under the mining laws may be insufficient to conduct large-scale operations.

Other commenters noted the inclusion of unclaimed land within the reach of regulation. They perceived this as a proposed expansion of the ambit of the mining laws and were opposed to any such expansion.

BLM disagrees with the commenters' interpretation of the mining laws. Lands are open to the right to prospecting and if successful, location of mining claims. The sequence of activity set out in the text of the law itself (exploration, then discovery, followed by claim location) presupposes that activities will be carried out on unclaimed land. The same goes for land that has been improperly claimed, for example, with millsites in excess of applicable limits. The inclusion of unclaimed land within an area of operations subject to these regulations is carried over from the original November 26, 1980 rulemaking. That rulemaking, at 45 FR 78903, addressed similar comments received on that rulemaking's definition of ''mining operations'' and noted, ''One does not need a mining claim to prospect for or even mine on unappropriated Federal lands.'' BLM is simply carrying forward the older definition with only minor modifications. Nothing about the law or the regulations has changed, and the right to use unappropriated Federal lands to engage in reasonably incident uses remains unaffected.

''Operator''

Several commenters stated that it was beyond BLM's authority to include in the definition of ''operator'' all persons who own a mining claim or otherwise have an interest in a claim. A commenter felt the definition of ''operator,'' when combined with the new provisions for joint and several liability are contrary to NRC Report Recommendation 7, which concerns promoting clean up of abandoned mine sites adjacent to new mine areas without causing mine operators to incur additional environmental liabilities. According to one commenter, the proposed definition of ''operator'' is similar to the approach taken under the Surface Mining Control and Reclamation Act (30 U.S.C. 1201 *et seq.*), but there is no authority for this approach in FLPMA.

We evaluated the proposed definition in the context of public comments but did not change it. The definition of ''operator'' adopted today incorporates a ''material participation'' test for determining whether a parent entity or an affiliate is an ''operator'' under this subpart. As discussed in the preamble to the proposed rule (64 FR 6428), this test is in accord with reasoning contained in the Supreme Court decision in the *Best Foods* case. See *U.S.* v. *Best Foods et al.,* 118 S. Ct. 1876. The authority for the definition derives from FLPMA, and BLM bases the definition on participation, not affiliation. BLM disagrees that the definition of ''operator'' is inconsistent with NRC Report Recommendation 7 because subpart 3809 applies to active operations, not to cleaning up previously abandoned mines.

''Project Area''

The final definition is unchanged from the proposal. Numerous commenters stated that there is no legal basis for the definition as proposed in the draft rule. According to many commenters, the proposed definition suggests that BLM is attempting to manage private land and State land. Others said that this term needs to be unambiguously defined to show how it will apply to all mineral ownerships. Commenters felt this to be especially important because they believe enforcement provisions say the mineral owner is financially liable for the actions taken by the operator. Several commenters said the definition should apply only to Federal public land. Clarification is needed, according to more than twenty commenters, on how BLM intends to deal with adjacent private lands.

Several commenters who had concerns about the intent of BLM with regard to private land within a project area tied their concerns to the relationship of joint and several liability to the project area and the definition of ''operator.''

At least one State has raised a concern about the relationship of a project area as defined by the BLM, for regulatory purposes, and an area defined by a state for similar purposes, but defined differently. Others raised concerns that mines should not be able to expand mine waste dumps by using surrounding public land.

In the final rule, BLM has clarified its intentions relative to the definition of ''project area'' in final § 3809.2(d). It is BLM's intent to regulate operations on public lands managed by the Secretary of the Interior through the BLM. However, BLM may collect and evaluate information from private lands for the purpose of analysis under the National Environmental Policy Act.

The ''project area'' concept is used to facilitate defining an area of operations for the purpose of analysis and decision-making. This will not preclude an individual State from using its own means of defining a project area. Differences between BLM and a State can be worked out through cooperative agreement or other means. Since the location and management of mine waste is part of the plan of operations and associated environmental analysis, these should be considered during the processing of the plan of operations or the notice and should be within the established project area for a given mine.

''Public Lands''

Many commenters indicated that the draft rule definition of ''public lands'' caused considerable confusion and consternation about BLM's intent with regard to private land and State land. Several commenters raised concerns about the applicability of the regulations to the Stock Raising Homestead Act lands where the surface is private and the mineral estate is Federal.

Others questioned BLM's authority to regulate activities on Stock Raising Homestead Act lands without the consent of the land owner. Others indicated that the 1993 amendments to the Stock Raising Homestead Act were not cited as an authority in the proposed regulations and that the proposed means of handling Stock Raising Homestead Act lands are not consistent with the 1993 amendments.

The definition of public lands included in the final rule replaces the definition of Federal lands in the existing 3809 regulations. This definition is taken from FLPMA and used throughout this subpart for the sake of consistency. Therefore the definition was not modified from the proposed to the final rule. ''Public land,'' as defined in FLPMA and in this regulation, means land or interest in land owned by the United States and administered through the Secretary of the Interior by the BLM. Public land does not mean State land or private land. See final § 3809.2(d) which addresses the scope of these regulations.

Under provisions of the Stock Raising Homestead Act of 1916 (43 U.S.C. 299), coal and other minerals were reserved to the United States. Individuals were allowed to enter on these private lands to locate and develop these mineral deposits so long as they did not injure, damage or destroy the permanent improvements of the entry man, and are required to compensate the entry man or patentee for all damage to crops caused by the prospecting or development activities. The inclusion of these Stock Raising Homestead Act lands under the revised 3809 rule does not change the statutory requirements established in 1916 or in the subsequent 1993 amendments which clarified requirements for minerals operations on these lands. It is the intent of the final rule and BLM's ongoing rulemaking on Stock Raising Homestead Act lands (43 CFR 3814) to provide specific requirements for mineral exploration and development of the Federal mineral estate to ensure consistency and equity for both those conducting prospecting and development operations on Federal minerals.

A commenter stated that when BLM restated the definition of ''public lands'' in FLPMA, the BLM failed to include the first paragraph of 43 U.S.C. 1702: ''Without altering in any way the meaning of the following terms as used in any other statute, whether or not such statute is referred to in, or amended by this Act, as used in this Act * * *''

We don't believe that repeating the lead-in statement is necessary. It simply says that if the same terms are used in other legislation, that these definitions do not alter their meaning in those other statutes. Since the 3809 regulations are promulgated under FLPMA, it is the FLPMA definition of public lands that applies.

''Reclamation''

The final definition of the term ''reclamation'' is unchanged from the proposal. Public comments on the definition addressed a variety of concerns. Several commenters felt that the definition of ''reclamation'' needed to retain the concept of ''reasonable reclamation'' from the existing regulations. Another commenter indicated the definition was too onerous because the terms used were problematic—terms like ''applicable performance standards'' and ''achieve conditions required by BLM.'' Several commenters sought clarification about the requirement for regrading and reshaping to conform to surrounding landscape. They felt this requirement to be open-ended. The requirement to provide for post-mining monitoring, maintenance or treatment raised the question in a few commenters' minds about whether this implied that backfilling would be required. Other commenters did not think an operation should be authorized or allowed if post-closure treatment was required. One commenter recommended removal of the words ''placement of a growth medium'' because this is a ''how'' standard, not a performance standard.

Another member of the public expressed the concern that ''reclamation'' should be defined as something that is ongoing, not just at the end of the project. The definition should state that the performance standards for reclamation will be deemed as met when requirements in the plan of operations or notice have been met. Another comment was that the reclamation definition references 43 CFR 3814 relative to reclamation requirements under the Stock Raising Homestead Act (SHRA), but these regulations have not been promulgated.

BLM has carefully considered the concerns expressed by the public about the proposed definition, but did not

change it in the final rule. Reclamation means measures required by BLM in this subpart to meet applicable performance standards and achieve conditions at the conclusion of surface-disturbing operations. These phrases are needed to make it clear that every performance standard doesn't apply to every operation and that each operation will be required to meet site-specific conditions, some of which will be specified in the closure plan. Concurrent reclamation is required in final § 3809.420(a)(5). Reclamation is deemed satisfactory on a plan or a notice when it meets the standards established in the accepted notice or the approved plan of operations.

The final rule does not retain the presumption of backfilling included in the draft rule. There is no intent or requirement in the final rule that regrading or reshaping means backfilling. Post-closure monitoring, maintenance and treatment will be addressed at least twice in the life cycle of a mining operation. To the extent possible at the time a notice or a plan of operations is filed, needs for post-closure activities should be identified and included in the initial plan or notice. In addition, at the time of mine closure, the requirements for subsequent management and maintenance of the site will be evaluated. The more information provided by operators at the beginning of the process, the less ''open-ended'' the process will be. The definition also provides a generic list of the components of reclamation. As explained above, the reference to the Stock Raising Homestead Act is part of another rulemaking that BLM is currently working on. The separate reference to the SHRA is necessary because that Act has its own definition of the term ''reclamation.''

''Riparian Area''

The definition of ''riparian area'' adopted today identifies riparian areas as a form of wetland transition between permanently saturated wetlands and upland areas that exhibit vegetation or characteristics reflective of permanent surface or subsurface water influence. The definition gives examples of riparian areas and excludes ephemeral streams or washes that do not exhibit the presence of vegetation depending upon free water in the soil. Final § 3809.420 requires an operator to avoid locating operations in riparian areas, where possible; minimize unavoidable impacts; and mitigate damage to riparian areas. It also requires an operator to return riparian areas to proper functioning condition, or at least the condition that pre-dated operations, and to take appropriate mitigation measures, if an operation causes loss of riparian areas or diminishment of their proper functioning condition. This definition is currently part of the BLM Manual (BLM Manual, Dec. 10, 1993).

Commenters felt the definition of ''riparian area'' should be deleted unless BLM can show specific statutory authority for riparian management on all lands. The NRC recommended that BLM issue guidance but leave the regulation (of wetlands) to the Environmental Protection Agency (EPA) or the Corps of Engineers. Further, commenters stated that BLM does not have authority over non-jurisdictional wetlands or non-wetlands habitat. The requirement to avoid, minimize, or provide compensatory mitigation was felt to have major effect on Alaska placer miners. Some commenters also requested that ''proper functioning condition'' be defined.

BLM's definition of riparian area has been in use since 1987. BLM's statutory authority for protection of riparian areas is derived from FLPMA. Section 302(b) and 303(a) of FLPMA, 43 U.S.C. 1732 (b) and 1733 (a), and the mining laws, 30 U.S.C. 22, provide BLM the authority for requiring protection of riparian areas. Protection of riparian areas falls squarely within the actions the Secretary can direct to prevent unnecessary or undue degradation of the public lands. An impact that can be mitigated, but is not, is unnecessary. Section 303(a) directs the Secretary to issue regulations with respect to the ''management use, and protection of the public lands * * *'' In addition, 30 U.S.C. 22 allows the location of mining claims subject to regulation. Taken together, these statutes clearly authorize the regulation of environmental impacts of mining through measures such as protection of riparian areas.

The final rule is not attempting to usurp jurisdiction of either the Corps of Engineers or the EPA relative to wetlands. The intent of this subpart is to provide appropriate environmental protection for one of the critical resources on public lands—riparian areas. The policy for protection of riparian areas has been in place in BLM internal guidance for more than 13 years. We believe that including this guidance as part of the rulemaking makes the policy more accessible to the public.

The final rule does not require compensatory mitigation. However, many companies are currently voluntarily completing compensatory mitigation, and it is clearly an available form of mitigation.

''Unnecessary or Undue Degradation''

The first three paragraphs of the final definition of ''unnecessary or undue degradation'' are substantially the same as the February 9, 1999 proposal. BLM added a fourth paragraph, discussed below, in response to comments and to a concern expressed in an NRC Report recommendation. More than seventy commenters from diverse publics felt the proposed definition to be unclear, vague, ambiguous, circular, inflexible, and/or duplicative of existing State and Federal laws. A similar number of commenters felt the current definition is working well and recommended retention of the current language and the current ''prudent operator'' concept.

Concern was expressed by some commenters about new terms that were introduced in the definition that were not defined. Many commenters felt that the proposed definition was moving the BLM from an unnecessary or undue degradation standard provided for in section 302(b) of FLPMA to a ''California Desert'' standard of no degradation taken from section 601(f) of FLPMA.

Some commenters noted significant additional costs the new definition would impose on industry. Others expressed belief that whether or not a mining company could afford appropriate environmental protection measures should not be the determining factor as to whether those measures are required.

Several commenters felt that there should be a specific list of actions or situations that would constitute unnecessary or undue degradation. One commenter said that BLM should take the dictionary definition of ''undue'' (inappropriate or unwarranted) and apply that definition to these regulations. Many commenters were frustrated by the lack of clear language giving BLM the authority to deny a plan of operations or reject a notice. One commenter stated that any operation resulting in permanent post-closure water treatment should be deemed unnecessary or undue degradation. A few commenters supported the inclusion of Best Available Technology and Practice into the concept of undue or unnecessary degradation. Many commenters felt the draft regulations fell far short of steps that should be taken to prevent undue or unnecessary degradation of the public lands. Some commenters felt that the draft regulations don't provide for accountability of BLM line managers. Concern was expressed by some commenters that the definition of ''unnecessary or undue degradation''

needs to reference the impacts of mining operations on other resources on and off of the mining property.

Several commenters preferred that BLM retain the ''prudent operator'' concept, currently incorporated into the undue or unnecessary degradation standard. Several commenters felt the provision of the prudent operator concept for comparison of similar operations to determine what is reasonable and prudent was beneficial and valuable. According to other commenters, use of the prudent operator standard allows the required flexibility for the BLM to make reasoned decisions based on experience and sound judgement. A few commenters stated that narrowing defining unnecessary degradation in terms of ''failure to do'' reduces needed flexibility in real-world regulatory situations. Some commenters felt the current prudent operator standard gives the BLM too much latitude and makes it difficult to hold the authorized officer accountable. Other commenters have combined the concept of the prudent operator, used in the current 3809 regulations, and the ''prudent man'' concept established by case law developed subsequent to passage of the 1872 Mining Law. Comments generally supported the retention of both concepts.

Commenters asserted that FLPMA grants BLM only limited license to regulate mining on public lands. The commenters stated that Congress realized that mining on public lands, which it sanctions expressly in the 1872 Mining Law, necessarily causes some impacts, and thus did not completely prohibit all such impacts or empower BLM to do so in its stead. Rather, it charged BLM with preventing ''unnecessary or undue degradation'' of public lands, which the commenters characterize as a decidedly limited mandate. The commenters stated that FLPMA does not grant BLM the authority to prevent all degradation of public lands, but only to prevent degradation beyond that which a prudent miner causing necessary or appropriate degradation would cause. The commenters concluded that many of the provisions in the proposal overstep this critical limitation.

BLM disagrees with the comments. BLM has not attempted to prevent all degradation as the commenters contend. Such an effort would not be practical in any reasonable regulatory scheme. However, since ''unnecessary or undue degradation'' was not defined in FLPMA, the agency has the discretion to define it through a regulatory program that considers mining technology, reclamation science, and site specific resource concerns. The ''prudent miner'' standard commenters advocate does not appear in FLPMA, is unnecessarily subjective, and need not be retained in the BLM rules. Also, contrary to the commenters' assertions, BLM derives authority for subpart 3809 from the mining laws and sections of FLPMA other than the one sentence referred to by the commenters.

A commenter asked why after stating that ''Despite the urging of certain commenters, BLM is not proposing additional regulations to implement the ''undue impairment'' standard of section 601(f) of FLPMA'' (64 FR 6427), BLM then included such regulations in the proposal.

Contrary to the commenter's assertion, BLM has not added regulations specifically to implement the ''undue impairment'' standard of section 601(f) of FLPMA, related exclusively to the California Desert Conservation Area (CDCA). What was done in the proposed and final rule is continue the previous rule's cross-reference to the section 601(f) standard in the definition of ''unnecessary or undue degradation.'' BLM will continue to apply the standard on a case-by-case basis, as is currently being done. The agency continues to believe that such an approach will provide the necessary level of protection for the enumerated resources in the CDCA.

BLM has changed the final definition of the term ''unnecessary or undue degradation'' in response to numerous comments, and in response to a discussion in the NRC Report that called for clarification of BLM's policy. The revised definition of ''unnecessary or undue degradation'' in the final rule eliminates the current reference to the prudent operator standard because the BLM believes it to be too subjective and vague. Instead the definition defines ''unnecessary or undue degradation'' in terms of failure to comply with the performance standards of final § 3809.420, the terms and conditions of an approved plan of operations, the operations described in a complete notice, and other Federal and State laws related to environmental protection and protection of cultural resources. ''Unnecessary or undue degradation'' would also mean activities that are not ''reasonably incident to prospecting, mining, or processing operations as defined in existing 43 CFR 3715.0–5.'' Based on public comments about the need for BLM to have explicit regulatory authority to deny a proposed mining operation because of the potential for irreparable harm to other resources, we have introduced an additional threshold for undue and unnecessary degradation. As described in the following discussion, we have also made it clear in the regulation that BLM can deny a proposed mining operation under certain conditions in order to provide protection of significant resources. We believe the definition included in the final rule is more comprehensive, straightforward, and easily measured than the prudent operator rule.

Commenters stated that the BLM's proposed unnecessary or undue degradation definition, by continuing to reject implementation of the ''undue degradation'' standard of FLPMA, may tie the agency's hands when occasions arise when a common-sense application of the statutory ''undue degradation'' standard would enable the BLM to avoid the immense damage to many valuable resources of the land which a gigantic, unreclaimed open pit mine would cause in a particular location.

BLM agrees with this comment and has modified the final rule accordingly. In the final regulations the definition of ''unnecessary or undue degradation'' has been modified with the addition of paragraph (4) to address when degradation is ''undue.'' The requirement is that operations not result in substantial irreparable harm to significant resource values that cannot be effectively mitigated. This provision must be applied on a site specific basis and would not necessarily preclude development of a large open pit mine.

With this clarifying change, these final rules will allow BLM to disapprove a proposed plan of operations to protect significant scientific, cultural, or environmental resource values on the public lands from substantial irreparable harm that cannot be mitigated and which would not otherwise be prevented by other laws. The rule accomplishes this by adding a paragraph (4) to the proposed definition of ''unnecessary or undue degradation'' to include conditions, practices or activities that (a) occur on mining claims or millsites located after October 21, 1976 (or on unclaimed lands) and (b) result in substantial irreparable harm to significant scientific, cultural, or environmental resource values of the public lands, which cannot be effectively mitigated. An accompanying change is being made in final § 3809.411(c)(3), which will require BLM, should it decide to disapprove a plan of operations based on paragraph (4) of the definition of ''unnecessary or undue degradation'' to include written findings supported by a record that clearly demonstrates each element of paragraph (4).

The revised regulation contains important limits to assure that BLM will

disapprove proposed plans of operations only where necessary to protect valuable resources that would not otherwise be protected. *First,* final paragraph (4) applies only to protect significant scientific, cultural, or environmental resource values of the public lands. These are the same values Congress intended to protect under FLPMA, as described in section 102(a)(8). See 43 U.S.C. 1701(a)(8). Thus, the subparagraph will not apply unless BLM determines that these public land resource values are significant at a particular location. *Second,* BLM must also determine that mining will cause substantial irreparable harm to the resources. A small amount of irreparable harm to a portion of the resource will not trigger the protection. The harm must be substantial. *Third,* the harm may not be susceptible of being effectively mitigated. If the harm can be mitigated, the paragraph will not apply. *Fourth,* BLM must document, in written findings based on the record, that all of the elements of the definition have clearly been met. These findings, and BLM's conclusion, will be reviewable upon appeal. In addition, subparagraph (4) will apply only to operations on mining claims or millsites located after the enactment of the undue degradation standard in FLPMA (or on unclaimed lands, if any, on which an operator proposes to conduct operations).

This revision was generated in part by a concern expressed in the NRC Report (p. 7). The NRC panel examined the adequacy of existing laws to protect lands from mining impacts, and observed that the variety of existing environmental protection laws governing mining operations

> may not adequately protect all the valuable environmental resources that might exist at a particular location proposed for mining development. Examples of resources that may not be adequately protected include springs, seeps, riparian habitat, ephemeral streams, and certain types of wildlife. In such cases, the BLM must rely on its general authority under FLPMA and the 3809 regulations to prevent ''unnecessary or undue degradation.'' Because the regulatory definition of ''unnecessary or undue'' at 3809.0–5(k) does not explicitly provide authority to protect such valuable resources, some of the BLM staff appear to be uncertain whether they can require such protection in plans of operation and permits. *Some resources need to be protected from all impacts, while other resources may withstand other impacts with associated mitigation. BLM should clarify for its staff the extent of its present authority to protect resources not protected by specific laws, such as the Endangered Species Act.*

NRC Report at p. 121 (emphasis added). Many commenters echoed the NRC concern and urged that the final rules unequivocally assert BLM's authority to disapprove plans of operation when mining would harm the public lands. Many specifically asserted that BLM should use the ''undue'' degradation portion of Section 302(b) of FLPMA as the basis for BLM's authority.

BLM agrees with the NRC that the extent of BLM's authority to protect valuable environmental resources which are not adequately protected by other specific laws needs to be clarified in the definition of ''unnecessary or undue degradation.'' In addition to following the NRC Report's suggestion to add protection for valuable ''environmental'' resources, the final rule will also include protection for ''scientific'' and ''cultural'' resource values on the public lands. Scientific and cultural resources are plainly within the ambit of the unnecessary or undue degradation standard. FLPMA itself recognizes protection of cultural and scientific resources as an important component of public land management. See, *e.g.* 43 U.S.C. 1702(a) and (c). BLM has concluded that the clarification should appropriately appear in regulatory text, in addition to guidance manuals as the NRC suggests, to better inform the regulated industry and the public.

FLPMA section 302(b) requires that the Secretary, by regulation or otherwise, take whatever action is necessary to prevent ''unnecessary or undue'' degradation of the public lands. The conjunction ''or'' between ''unnecessary'' and ''undue'' speaks of a Secretarial authority to address separate types of degradation—that which is ''unnecessary'' and that which is ''undue.'' That the statutory conjunction is ''or'' instead of ''and'' strongly suggests Congress was empowering the Secretary to prohibit activities or practices that the Secretary finds are unduly degrading, even though ''necessary'' to mining. Commentators agree that the ''undue degradation'' standard gives BLM the authority to impose restrictive standards in particularly sensitive areas, ''even if such standards were not achievable through the use of existing technology.'' Graf, *Application of Takings Law to the Regulation of Unpatented Mining Claims,* 24 Ecology L.Q. 57, 108 (1997); *see also* Mansfield, *On the Cusp of Property Rights: Lessons from Public Land Law,* 18 Ecology L.Q. 43, 83 (1991). Further support for that interpretation is found in the fact that, in the 105th Congress, a mining industry-supported bill introduced in the Senate would have, among other things, changed the ''or'' to ''and.'' S. 2237, 105th Cong. (1998); *see* 144 Cong. Rec. S10335–02, S10340 (September 15, 1998). *See also Utah* v. *Andrus,* 486 F. Supp. 995, 1005 n.13 (D. Utah 1979) (quoting brief of the American Mining Congress).

The definition of ''unnecessary or undue degradation'' in the previous regulations focused generally on those impacts which are *necessary* to mining, and allowed such impacts to occur (except for the incorporation of other legal standards in the definition). The previous regulations sought to prevent disturbance ''greater than what would normally result'' from a prudent operation. The Interior Board of Land Appeals (IBLA) has read the regulations this way. *See Bruce W. Crawford,* 86 IBLA 350, 397 (1985) (the previous regulatory definition ''clearly presumes the validity of the activity but asserts that [unnecessary or undue degradation] results in greater impacts than would be necessary if it were prudently accomplished''); *see also United States* v. *Peterson,* 125 IBLA 72 (1993); *Kendall's Concerned Area Residents,* 129 IBLA 130, 140 (1994). While BLM could have adopted (and indeed might have been obliged to adopt) more stringent rules in order to ensure prevention of ''undue degradation,'' it previously chose to circumscribe only harm outside the range of degradation caused by the customary and proficient operator utilizing reasonable mitigation measures.

As commenters pointed out, however, the focus on impacts that are *necessary* to mining does not adequately address the ''undue'' degradation Congress was concerned about in FLPMA section 302(b), and does not account for irreparable impacts on significant environmental and related resources of the public lands that cannot be effectively mitigated.

Thus, the BLM has concluded that degradation of, in the words of the NRC Report, those ''resources [that] need to be protected from all impacts,'' is appropriately considered ''undue'' degradation. Clarifying that the definition specifically addresses situations of ''undue'' as well as ''unnecessary'' degradation will more completely and faithfully implement the statutory standard, by protecting significant resource values of the public lands without presuming that impacts necessary to mining must be allowed to occur.

BLM recognizes that the ''unnecessary or undue degradation'' standard does not by itself give BLM authority to prohibit mining altogether on all public lands, because Congress clearly

contemplated that some mining could take place on some public lands. *See, e.g.*, 43 U.S.C. 1701(12) (policy statement that the public lands ''be managed in a manner which recognizes the Nation's need for domestic sources of minerals * * * including implementation of the Mining and Minerals Policy Act of 1970 * * * as it pertains to the public lands [3]); 43 U.S.C. 1702(c) (the multiple uses for which the public lands should be managed include ''minerals''). Therefore, ''undue degradation'' under section 302(b) must encompass something greater than a modicum of harmful impact from a use of public lands that Congress intended to allow. *See Sierra Club* v. *Clark*, 774 F.2d 1406, 1410 (9th Cir. 1985). The question is not whether a proposed operation causes any degradation or harmful impacts, but rather, how much and of what character in this specific location. The definition adopted today will allow BLM to address these concerns.

A number of commenters mentioned a recent legal opinion by the Interior Department Solicitor that addressed the standards for approving plans of operation in the California Desert Conservation Area (CDCA). Regulation of Hardrock Mining (December 27, 1999). That opinion focused on the ''undue impairment'' standard set forth in 43 U.S.C. 1781(f), which applies only in the CDCA. Under FLPMA section 601(f), BLM can prevent activities that cause undue impairment to the scenic, scientific, and environmental values or cause pollution of streams and waters of the CDCA, separate and apart from BLM's authority to prevent unnecessary or undue degradation. The IBLA has agreed that BLM's obligation to protect the three enumerated CDCA values from ''undue impairment'' supplements the unnecessary or undue degradation standard for CDCA lands. See *Eric L. Price, James C. Thomas*, 116 IBLA 210, 218–219 (1990). Thus, BLM decisions with respect to development proposals in the CDCA are governed by both the ''undue impairment'' standard of subsection 601(f) and the ''unnecessary or undue degradation'' standard of section 302(b), as implemented by the subpart 3809 regulations.

Although BLM's mandate to protect the ''scenic, scientific, and environmental values'' of lands within the CDCA from undue impairment is distinct from and stronger than the prudent operator standard applied by the previous subpart 3809 regulations on non-CDCA lands, application of the CDCA's undue impairment standard for proposed operations in the CDCA is likely to substantially overlap the undue degradation portion of the definition of ''unnecessary or undue degradation'' adopted today.

Section 3809.10—How Does BLM Classify Operations?

Final § 3809.10 classifies operations in three categories: casual use, notice-level, and plan-level. For casual use, an operator need not notify BLM before initiating operations. For notice-level, an operation must submit a notice to BLM before beginning operations, except for certain suction-dredging operations covered by final § 3809.31(b). For plan-level, an operator must submit a plan of operations and obtain BLM's approval before beginning operations.

The word ''generally'' was deleted in final § 3809.10(a) to reflect the fact that casual use on public lands does not require notification to BLM. We deleted the language in proposed § 3809.11(a) from the final rule and moved the requirement to perform reclamation for casual use disturbance to final § 3809.10(a) for clarity. See final § 3809.31(a) and (b) for certain specific situations requiring persons proposing certain activities to notify BLM in advance.

Two commenters pointed out that proposed § 3809.11(a) required casual use disturbance to be ''reclaimed,'' and wanted to know which reclamation standards apply. We changed the requirement in final § 3809.10(a) to include the word ''reclamation,'' which is defined under § 3809.5, rather than continue to use the phrase ''you must reclaim'' that appeared under proposed § 3809.11(a). The applicable standards depend on the nature of the disturbance and may be found in final § 3809.420. Wording was added to final § 3809.10(a) to clarify that if operations do not qualify as casual use, a notice or plan of operations is required, whichever is applicable. A commenter was concerned about a portion of proposed § 3809.11(a) that would have alerted the public to BLM's intent to monitor casual use activities. The commenter indicated that with no notification requirements, it is not clear how BLM would monitor casual use operations. While BLM intends to monitor casual use operations in the course of our normal duties, we agree with the comment and did not include it in the final rule.

Section 3809.11—When do I Have to Submit a Plan of Operations?

Final § 3809.11 lists instances when an operator would need to submit a plan of operations to BLM. We received several comments asking us to revise the table in proposed § 3809.11 to avoid duplicating or summarizing the definitions in 3809.5 and to eliminate ambiguity. Commenters also stated they found the table was difficult to follow. The table in proposed § 3809.11 has been eliminated from the final rule. The information formerly contained in that table has been reorganized and edited, and, now appears under final §§ 3809.11, 3809.21 and 3809.31.

As indicated under final § 3809.11(a), a plan of operations will be required for all operations greater than casual use, including mining and milling, except as described under final §§ 3809.21 and 3809.31

Consistency With NRC Report Recommendation 2

NRC Report Recommendation 2 provides: ''Plans of operation should be required for mining and milling operations, other than those classified as casual use or exploration activities, even if the area disturbed is less than 5 acres.'' NRC Report p. 95. The intent of Recommendation 2 is to require BLM plan approval for all mining and milling activities, while allowing exploration to occur under notices and allowing casual use to occur without notices or plans.

BLM has adopted the system the NRC Report recommends. Mining and processing require BLM plan approval; casual use can proceed without a notice or plan; generally exploration activities disturbing less than five acres may proceed under a notice, with certain exceptions. The exceptions include those contained in the previous 3809 rules, plus a few others. Previous exceptions included:

(1) Lands in the California Desert Conservation Area (CDCA) designated by the CDCA plan as ''controlled'' or ''limited'' use areas;

(2) Areas in the National Wild and Scenic Rivers System, and areas designated for potential addition to the system;

(3) Designated Areas of Critical Environmental Concern;

(4) Areas designated as part of the National Wilderness Preservation System and administered by BLM;

(5) Areas designated as ''closed'' to off-road vehicle use, as defined in § 8340.0–5 of this title;

(6) Lands in the King Range Conservation Area.

The final rule would add the following new exceptions:

[3] The Mining and Mineral Policy Act, 84 Stat. 1876, 30 U.S.C. 23a, expresses United States policy as encouraging the development of domestic minerals in an efficient, wise, and environmentally sound way.

(1) National Monuments and any other National Conservation Areas administered by BLM;

(2) Any lands or waters known to contain Federally proposed or listed threatened or endangered species or their proposed or designated critical habitat; and

(3) Bulk sampling over 1,000 tons.

A proposed exception not adopted would have been for activities in all areas segregated in anticipation of a mineral withdrawal and all withdrawn areas.

Commenters asserted that NRC Report Recommendation 2 does not provide for exceptions, and to be consistent with that recommendation, the final rule must provide that all exploration activities on less than 5 acres be allowed to proceed under notices.

BLM disagrees with the comment. BLM believes that NRC intended that exceptions for sensitive areas continue. The NRC was aware of the previous exceptions for sensitive areas,[4] and it did not question BLM's authority or wisdom in carving out certain areas to require plans even for exploration (more than casual use). It did not state the previous exceptions should be eliminated, and did not address whether BLM should include further exceptions to account for additional sensitive areas and resources.

The NRC Report did state ''mine development, extraction, and mineral processing require considerable engineering design and construction activities, whereas, apart from the design of roads to minimize erosion and *impact on sensitive areas*, exploration requires little, if any, engineering and construction (emphasis added).'' NRC Report, p. 95. The reference to ''impacts on sensitive areas,'' when discussing exploration, without a statement that BLM should drop previous exceptions for such areas, supports the inference that the NRC endorsed exceptions for sensitive areas.

Moreover, the NRC Report states that its objective, in urging the Forest Service to allow exploration on less than five acres under something like a notice rather than a plan (Recommendation 3), is ''to allow exploration activities to be conducted quickly *when minimal degradation is likely to occur*.'' NRC Report, p. 98 (emphasis added). Adding areas to the category that require plans is just modifying BLM's judgment as to when minimal degradation is likely to occur.

Thus, inclusion of the previous exceptions where exploration requires plans of operations, and the new exception for additional sensitive areas, including National Monuments, National Conservation Areas, and areas containing Federally listed or proposed threatened or endangered species or their proposed or designated critical habitat, are not inconsistent with the NRC Report Recommendation 2.

In particular, the addition of BLM-administered National Conservation Areas and National Monuments are logical extensions of the sensitive-area exceptions to the previous rules. The addition of National Conservation Areas administered by BLM is a logical extension of the exception for the King Range Conservation Area, which was the only conservation area BLM administered when the previous rules were adopted. Similarly, in 1981, BLM did not administer any National Monuments, but now we do, and their inclusion is also appropriate.

The bulk sampling exception in the final rule also is not inconsistent with the NRC Report Recommendation 2 because of the statement in the NRC Report discussion of Recommendation 2 that ''a plan of operations should generally be required for activities involving bulk sampling.'' NRC Report, p. 96.

The proposed exception that would have required plan approval in advance of exploration activities in segregated and withdrawn areas, without some kind of indication that such areas are sensitive, has not been adopted so as not to be inconsistent with NRC Report Recommendation 2.

Many commenters felt that, to be consistent with the NRC Report, any mining disturbance greater than casual use should require a plan of operations. As discussed above, these comments were adopted in the final rule.

Many other commenters wrote that the current casual use/notice/plan threshold is adequate and should be retained. They believe the threshold protects the environment and reduces costs of exploration for operators. These comments were not adopted. Retaining the above-described threshold would be inconsistent with NRC Report Recommendation 2.

A mining association commented that mining or milling operations, which will cause a significant impact, even if related to 5 acres or less, shouldn't be required to submit a plan of operations for approval. BLM would be inconsistent with the NRC Report recommendation if it were to adopt the alternative suggested in this comment. In light of this and the decision to adopt the NRC Report recommendation, the suggested change has not been made.

A commenter felt that the NRC did not evaluate the adverse impact that NRC Report Recommendation 2 would have on the vast majority of miners who have complied with existing regulations. Another commenter did not support the recommendation because it would automatically exclude some operations under a notice that would not have a significant impact on the environment. Several commenters felt that BLM should adopt the NRC Report recommendation that exploration be allowed under notices, while mining requires plan of operations, but should leave further details to agency guidance. They felt that the criteria for distinguishing between ''exploration'' and ''mining,'' may vary from state to state. One commenter suggested that BLM not require all mining operations to be conducted under plans of operations, retaining the notice level for placer and lode mines that do not use toxic chemicals or create acid-rock drainage. One mining industry commenter felt it unnecessary to require plans of operations for mining in light of the proposed financial assurance requirements for notices. Another commenter proposed that any activity requiring construction equipment or engineering design should need a plan of operations in light of the NRC Report. Mechanized drilling equipment, off-highway vehicles and bulldozers should also require a plan of operations. These comments were not accepted because they are inconsistent with NRC Report Recommendation 2 and because requiring BLM approval for all mining will help assure the prevention of unnecessary or undue degradation.

Several commenters asserted that the lowering of the threshold for notices or plans of operations seems to be in conflict with the 1970 Mining and Mineral Policy Act and the 1980 National Materials and Minerals Policy Research and Development Acts. BLM disagrees with the comment. We believe we have balanced the mandate of FLPMA to prevent unnecessary or undue degradation of the public lands with the above-mentioned mineral policy acts that promote

[4] The Sidebar 1–3 on p. 20 of the NRC Report describes the various categories of mining activities on BLM lands, including casual use, notice level operations, and plans of operation. Although the description of notice level operations does not mention special areas, the description of plans of operations specifically states that a plan of operations is required when an operator disturbs more than 5 acres a year ''or when an operator plans to work in an area of critical environmental concern or a wildneress area.'' Thus, although it did not enumerate each exception, the NRC expressly recognized the BLM although it did not enumerate each exception, the NRC expressly recognized the BLM system of requiring plan approval for operation in sensitive areas.

environmentally sound development of the nation's mineral resources.

Final § 3809.11(b) specifies that bulk samples of 1,000 tons or more require a plan of operation to be submitted for prior approval by BLM. The discussion following NRC Report Recommendation 2 indicated that bulk sampling could be considered as advanced exploration rather than mining: ''Because an exploration project must advance to a considerable degree before bulk sampling is done and because bulk sampling can require the excavation of considerable amounts of overburden and waste rock, the Committee believes a plan of operations should generally be required for activities involving bulk sampling.'' NRC Report p. 96.

A mining association agreed in their comments with the NRC Report findings that some bulk sampling efforts may cross the line from an exploration to a mining activity, although they indicate that this is not universally true. The commenter asserted that bulk sample activity to remove less than 100 tons of material cannot be compared to one that requires 10,000 tons for testing, which they assert is the known range in size of such activities. They believe that while a bulk sample proposal under a notice deserves scrutiny, the final determinations should be made on a case-by-case basis.

A commenter urged BLM to use caution in deciding whether to exclude bulk sampling from notice-level operations, suggesting that the NRC Report was referring to activity that involves the ''excavation of considerable amounts of overburden and waste rock'' to get to layers where the bulk samples will be taken. The commenter agreed that sampling of that nature gets to be so extensive as to require a plan of operations, but felt that other activities that might nominally qualify as bulk sampling, such as ones that do not first involve the removal of considerable amounts of overburden, can properly be treated as exploration activity subject to the notice-level program. The commenter indicated that such sampling involves far less disturbance than the activities identified by NRC, and, in any event, the land from which the bulk samples are taken must still be reclaimed. For these reasons, the commenter urged that, in case of bulk sampling, BLM should focus not on the amount of earth sampled, but rather the sampling method.

BLM recognizes that bulk sampling is not easy to define. Bulk samples vary in many ways, including size and weight, as acknowledged in the NRC Report. The Report discussion on sampling clearly indicates the NRC believes not all sampling programs would require a plan of operations, but that plans of operations would generally be required. In considering the NRC discussion, BLM does not believe that drilling should be considered as a bulk sampling method since NRC characterized bulk samples as excavations from shallow open pits or small underground openings. We have chosen a threshold at the upper limit of the NRC discussion on bulk sampling, that is, bulk samples of 1,000 tons or more will trigger the requirement for a plan of operations. (See final § 3809.11(b)). We believe this implements NRC Report Recommendation 2 in a way that does not unduly constrain exploration (see NRC Report Recommendation 3), yet provides a clear ''cutoff'' that can be verified by BLM field personnel.

Final § 3809.11(c) requires a plan of operations for surface disturbance greater than casual use (even if an operator will cause surface disturbance on 5 acres or less of public lands) in those special status areas listed under final § 3809.11(b) where § 3809.21 does not apply. The final rule incorporates changes in the language from proposed § 3809.11(j).

Final § 3809.11(c)(6) has been modified from proposed § 3809.11(j)(6). The proposed rule included areas specifically identified in BLM land-use or activity plans where BLM has determined that a plan of operations would be required to review effects on unique, irreplaceable, or outstanding historical, cultural, recreational, or natural resource values, such as threatened or endangered species or their critical habitat. Final § 3809.11(c)(6) now requires a plan of operations for surface disturbance greater than casual use on lands or waters known to contain Federally proposed or listed threatened or endangered species or their proposed or designated critical habitat unless BLM allows for other action under a formal land-use plan or threatened or endangered species recovery plan. We deleted all other requirements transferred to this section from proposed § 3809.11(j)(6).

This change was made for several reasons. First, we modified the definition of ''unnecessary or undue degradation'' in final § 3809.5 to include conditions, activities, or practices that result in substantial irreparable harm to significant scientific, cultural, or environmental resource values of the public lands that cannot be effectively mitigated. Second, we retained language specific to threatened or endangered species in recognition of the consultation requirements of the ESA. In the final rule, we clarified that the reference to ''threatened or endangered species or their critical habitat'' in the proposed rule means Federally proposed or listed threatened or endangered species or their proposed or designated critical habitat. The ESA requires BLM to enter into formal consultation with the Fish and Wildlife Service (FWS) or National Marine Fisheries Service (NMFS) on all actions that may affect a listed species or its habitat. Also, BLM must request a formal conference with FWS or NMFS on all actions that may affect a proposed species. Thus, it is BLM's longstanding policy to manage species proposed for listing and proposed critical habitat with the same level of protection provided for listed species and their designated critical habitat, except that formal consultations are not required. BLM Manual Chapter 6840.06(B), Rel. 6–116, Sept. 16, 1988.

BLM has concluded that the areas identified in final § 3809.11(c)(1) through (5), plus areas containing proposed or listed threatened or endangered species or their designated critical habitat, provides a necessary degree of specificity as to when BLM will require a plan of operations. The proposed language did not provide the degree of certainty that is needed for an operator to attempt to proceed with BLM approval.

The final rule also acknowledges that in some cases, under an endangered species recovery plan, notice-level operations may be allowed. The final rule doesn't affect those situations, and notice-level operations could be conducted in those areas if allowed under the land-use plan or recovery plan.

As discussed above, we deleted proposed § 3809.11(j)(8), regarding areas segregated or withdrawn from the final rule based on the requirement not to be inconsistent with the NRC Report.

Two commenters wanted BLM to revise language that now appears in final § 3809.11(c)(3) to state that an Area of Critical Environmental Concern (ACEC) triggers this provision only when the establishment of the ACEC considered and evaluated existing mineral rights and mineral potential. BLM disagrees with the comment. ACEC's are designated through BLM's land use planning process and are subject to public comment prior to designation. This provides the public the opportunity to provide comments on mineral rights and mineral potential. However, the impacts related to a specific mining proposal are better evaluated on a case-by-case basis at the time mining is proposed. Submittal of a

plan of operations to BLM for approval will assure that a proposed operation accounts for and minimizes adverse impact to the ACEC.

Two commenters were concerned about the language now appearing in final § 3809.11(c)(5). They indicate that most mining claims, held by small miners, are located either within areas closed to off-road vehicles or within areas proposed to be closed to off-road vehicles. As such, almost all small miners will be required to prepare a plan of operations for any level operation on their claims. The requirement is restricted to areas designated as ''closed'' to off-road vehicle use. It does not apply to proposed closures. This requirement remains unchanged from previous § 3809 regulations in effect since 1981.

We received numerous comments on proposed § 3809.11(j). One commenter urged BLM to include riparian areas under proposed 3809.11(j), as in the Northwest Forest Plan. Using the new performance standards, including the protection of riparian areas and wetlands found in final § 3809.420(b)(3), we believe that riparian areas will be adequately protected. The comment was not incorporated into the final rule.

Two mining industry commenters opposed the requirement for a plan of operations for operations affecting proposed threatened and endangered species or designated critical habitat, due to the uncertainty and delays to the permitting process that they would anticipate, as well as the additional work load it would cause. BLM appreciates the commenters' concern, but under the ESA, BLM must insure that any action authorized, funded, or carried out by the agency is not likely to jeopardize the continued existence of any threatened or endangered species or result in the destruction or adverse modification of habitat of such species, including any species proposed to be listed or result in the destruction or adverse modification of critical habitat proposed to be designated for such species.

Several commenters asked that we delete the phrase ''unique, irreplaceable, or outstanding historical, cultural, recreational, or natural resource values'' from proposed § 3809.11(j)(6), since this may be too subjective and any public lands could meet these criteria. Some commenters believed that the result of defining ''special status areas'' by those criteria would be to establish ad hoc designations of ACEC's as to mining without following the procedures of 43 CFR 1610.7–2. Other commenters wanted us to delete the term ''activity plans.'' The phrases referred to above have been deleted from the final rule for the reasons discussed above.

Several commenters consider the term ''special status areas,'' used in final § 3809.11(c) to be very broad, and would effectively remove many areas from exploration. Others felt it expanded BLM authority to create such areas. BLM disagrees with these comments. The term is intended to be a general description for the lands listed in that section that have special designations, and does not in and of itself impart any special status to these lands. Each area in the list is comprised of land designations created under separate laws that are already in existence. Operations on lands in this list would be subject to restrictions applicable to each designation.

One commenter indicated that proposed 3809.11(j)(6) is too narrow an approach under BLM's responsibility to prevent unnecessary or undue degradation, and BLM must retain authority to require plans of operations for exploration based on the need to protect affected resources. BLM has not accepted this comment. We believe that affected resources will be adequately protected from operations following the procedures of this rule, including the performance standards and the requirement to prevent unnecessary or undue degradation. Moreover, a general authority to require plans of operation for exploration could be construed to be inconsistent with NRC Report Recommendation 2.

A commenter stated that proposed § 3809.11(j)(6) should be stricken because it is tantamount to a bureaucratic withdrawal authority for which no legal authority currently exists, and is contrary to FLPMA. The commenter stated the Congressional intent to establish sensitive areas is set forth in section 103(a) of FLPMA (43 U.S.C. 1702(a)), defining ''areas of critical environmental concern'' (ACEC) as areas where ''special management attention is required * * * to protect and prevent irreparable damage to important historic, cultural, or scenic values, fish and wildlife resources, or other natural systems or processes, or to protect life and safety from natural hazards.'' The commenter stated that the ACEC definition is no different than what the BLM cites in proposed section 3809.11(j)(6) as the basis for ''areas specifically identified in BLM land-use or activity plans,'' and that BLM is usurping the authority to create ACEC for an unauthorized expansion of the power of its land-use plans. The commenter concluded that proposed section 3809.11(j)(3) captures ACEC as a proper basis for requiring a higher standard of review, consistent with the intent of Congress, and that no expansion of that authority is justified.

BLM disagrees in part with the comment. Proposed § 3809.011(j)(6) would not have withdrawn an area from operation of the mining laws; it would have served as a threshold for when a plan of operations must be filed instead of a notice. BLM agrees the paragraph contains substantial overlap with the ACEC areas which were listed in proposed § 3809.011(j)(3). In the final regulations, BLM has replaced proposed § 3809.011(j)(6) with a different threshold standard. Final § 3809.11(c)(6) requires a plan of operations in areas that contain Federally proposed or listed threatened or endangered species or their proposed or designated critical habitat.

A commenter objected to requiring BLM approval for operations in National Monuments because operations in National Monuments are under the provisions of the Mining in the Parks Act and already require approval by the National Park Service. BLM disagrees with the comment. BLM now has eight National Monuments under its administration. These monuments are not a part of the National Park System and, therefore, the Mining in the Parks Act does not apply.

BLM has determined that the language in proposed § 3809.11(f) is unnecessary for the final rule, in light of NRC Report Recommendation 2. That recommendation requires plans of operations for all mining and milling-related operations even if the area disturbed is less than 5 acres. See preamble discussion regarding final § 3809.11 and NRC Report recommendation above. Leaching or storage, addition, or use of chemicals in milling, processing, beneficiation, or concentrating activities that were identified in proposed § 3809.11(f) are now covered under final § 3809.11(a), requiring plans of operations. Therefore, we deleted the language in proposed § 3809.11(f) from the final rule.

We received numerous comments on proposed § 3809.11(f), mostly detailing concerns about eliminating flexibility when requiring plans of operations for uses described in that section. NRC Report Recommendation 2 and the resultant changes in the final regulations described above render these comments moot.

Proposed Section 3809.11 (''Forest Service'' Alternative)

BLM did not adopt in this final rule proposed § 3809.11 (''Forest Service'' Alternative) which would have based the notice/plan threshold on whether a

proposed operation would cause ''significant disturbance of surface resources.'' BLM believes that to effectively prevent unnecessary or undue degradation of the public lands, the agency should review and approve all proposed mining operations, including conducting reviews under the National Environmental Policy Act. In addition, a significant disturbance standard is subjective and open to varying degrees of interpretation. That is, what constitutes significant disturbance in the opinion of one BLM field office may not in the opinion of another. This subjectivity might unfairly result in an operation under the jurisdiction of one BLM field office needing only to file a notice while a similar operation under the jurisdiction of another office having to obtain approval for a plan of operations. In contrast, the notice/plan threshold BLM is adopting, which is based on the type of operation, that is, exploration versus mining, allows far less room for interpretation and variance, and presumably fewer inequitable outcomes.

A principal reason for not adopting the Forest Service alternative is to conform to the mandate of Congress. As described earlier in this preamble, Congress has directed BLM to issue final 3809 rules that are not inconsistent with the recommendations of the NRC Report. The Forest Service alternative significantly differs from the NRC Report recommendation that BLM require a plan of operations for all mining and for all exploration operations disturbing more than five acres. The NRC Report bases the notice/plan threshold on the type of operation, while the Forest Service alternative bases the threshold on a subjective judgment of the level of anticipated disturbance. Under the Forest Service alternative, a mining operation that, in the judgment of the BLM field manager, would not cause ''significant disturbance of surface resources'' could proceed under a notice. Since this result could not occur under the NRC-recommended threshold, the Forest Service alternative is not consistent with the NRC Report recommendation. We believe Congress has limited our discretion here.

Comments on the Forest Service alternative ran about four to one against its adoption. Some commenters who supported the Forest Service alternative did so because they believed it would provide a consistent approach to Federal agency administration of the mining laws. Other commenters asserted that the surface resources on the BLM public lands deserve the same level of protection as do the National Forest lands. One commenter felt that adoption of the Forest Service alternative would be less confusing in those mineralized areas that occur on both BLM lands and National Forests. One commenter compared the Forest Service alternative favorably to proposed § 3809.11 (Alternative 1) due to a perception that the Forest Service alternative would provide greater protection to non-special status areas, that is, those areas not listed in proposed § 3809.11(j). One commenter indicated we did not provide a meaningful basis for reasoned comment on this issue. Finally, a commenter perceived an advantage in the Forest Service alternative because it places the burden of deciding whether a notice or plan is needed on the government as opposed to the operator.

As discussed above, BLM believes that Congress has precluded the agency from adopting the Forest Service alternative. Nevertheless, while adopting the Forest Service alternative would provide a consistent approach on paper, as discussed above, there is no assurance of consistency in application. BLM lands and National Forest lands are managed under different authorities-FLPMA for BLM and the National Forest Management Act (16 U.S.C. 1600) for the National Forests. Thus, the level of protection afforded BLM lands may not be the same as that afforded National Forest lands. The final rule allows for an appropriate degree of variance in protection based on the specific resources in any given location. BLM agrees with the comment that having the same regulations as the Forest Service could, in certain circumstances, reduce confusion, but believe that this benefit may be offset by the potential harm inherent in uneven application of the significant disturbance standard. While BLM agrees that the Forest Service alternative, depending on how ''significant disturbance'' is interpreted, might provide a greater level of protection to non-special areas than Alternative 1, the final rule BLM is adopting is more protective than either alternative. Finally, the regulatory approach BLM is adopting in this final rule eliminates much of the uncertainty about whether an operation should submit a notice or obtain approval of a proposed plan of operations. Under the final rule, all mining operations and all exploration operations disturbing more than five acres must obtain approval of a proposed plan of operations.

Comments opposing the Forest Service alternative included those which considered the significant disturbance standard to be too vague, too open to varying interpretations, as creating uncertainty as to which operations it would apply, and as having significant potential for disagreement between the operator and BLM over whether a planned operation would create significant disturbance. Some commenters felt that the significant disturbance standard goes beyond FLPMA's statutory directive to prevent unnecessary or undue degradation. Several commenters who identified themselves as exploration geologists believed that adoption of the Forest Service alternative would result in elimination of the use of notices for small exploration operations. If so, the commenters felt that their business would be adversely affected. Another commenter felt that elimination of notices for placer mining in Alaska would create a hardship for small miners who would not be able to meet the requirements for filing a proposed plan of operations. Other commenters opposed the Forest Service alternative because they felt it would consume more of BLM's already thinly spread resources potentially causing administrative delays and increase costs due to NEPA compliance requirements.

Section 3809.21 When Do I Have To Submit a Notice?

Final § 3809.21 is a new section, which incorporates changes from proposed § 3809.11(b). Final § 3809.21(a) requires that an operator submit a complete notice at least 15 calendar days before commencing exploration disturbing the surface of 5 acres or less of public lands on which reclamation has not been completed.

The 5-acre threshold for notices has been retained for exploration operations in most instances. See final § 3809.21(a) and the preamble discussion under § 3809.11(a) for information on how we are implementing NRC Report Recommendation 2. We received many comments indicating that small operators count on the 5-acre exclusion for rapid yet responsible evaluation of a large number of projects to make its discovery. They point out that such operators may not have the finances for lengthy permit procedures and time delays, as does a major mining company. Without the 5 acre threshold, they feel that future exploration would be done almost exclusively by the largest of the mining companies.

Two comments were received asking us to define ''unreclaimed'' as used in proposed § 3809.11(b) and proposed § 3809.11(c). Other commenters indicated that BLM should not regard the notice threshold as ''unreclaimed surface disturbance of 5 acres or less.'' The term ''unreclaimed surface

disturbance of 5 acres or less'' has been changed in § 3809.21(a) in order to clarify the requirement. By specifying ''public lands on which reclamation has not been completed,'' we intend to incorporate the definition of the term ''reclamation'' in final § 3809.5. This means reclamation must meet applicable performance standards outlined in final § 3809.420, and such reclamation must be accepted by BLM before release of an applicable financial guarantee. Once reclamation has been completed to these standards, BLM believes such lands may be treated as if never disturbed when considered in determining acreage for submittal of a notice.

One commenter asked us to clarify under proposed § 3809.11(b) how an operator is responsible to reclaim previous disturbance by another operator. As with proposed § 3809.11(b) and (c), and the final rule, the operator is liable for prior reclamation obligations in a project area if conditions described under final § 3809.116 are met. If an operator believes that BLM should not hold it responsible for past reclamation obligations, he/she should contact BLM before causing additional surface disturbance to determine if BLM is taking any action against previous operators or mining claimants at the disturbed site.

Many commenters urged BLM to revise proposed § 3809.11(b) to retain the existing requirement for BLM to act within 15 calendar days. They pointed out that extending the review period to 15 business days would delay exploration activities. They felt that operators need flexibility and speed for notice-level exploration projects, and that timing of exploration activities is often critical. They wanted us to streamline the processing of notices as much as possible and avoid delays. They felt streamlining the process would be consistent with the NRC Report. Other commenters asked us to clarify what is meant by ''business days'' since government business days do not coincide with industry business days. Two commenters felt the 15-business-day review period in proposed rule given the BLM to review notices is too short to ensure adequate investigation by the agency. Thirty days was suggested. We changed the final rule to use calendar days rather than business days. We did this in light of the NRC Report recommendations, in order to minimize impacts on exploration activities and small operators, and public comments.

Section 3809.31 Are There Any Special Situations That Affect What Submittals I Must Make Before I Conduct Operations?

Final § 3809.31 is derived from proposed § 3809.11 (Alternative 1). Final § 3809.31(a) is based on proposed § 3809.11(e), which would have required the representative of any group, such as a mining club, that is involved in any recreational mining activities to contact BLM at least 15 days before initiating any activities. The purpose of the contact would have been to allow BLM to determine whether to require the group to file a notice or a plan of operations.

The language in proposed § 3809.11(e) has been deleted from the final rule. We received many comments from rock collectors and clubs indicating the proposed rule was vague regarding when a notice or plan of operations would be required for recreational mining activities by a group. Other commenters strongly felt that recreational- and mineral collecting groups should not be singled out and have to submit a notice or a plan of operations. They indicated that it is an unreasonable requirement and, in some cases, mineral-collecting groups could not afford the financial guarantees, which they felt are unnecessary for those who use hand tools.

Final § 3809.31(a) differs from the proposal in response to comments. Under the final rule, the BLM State Director may establish specific areas where the cumulative effects of casual use by individuals or groups have resulted in, or are reasonably expected to result in, more than negligible disturbance. In these areas, any individual or group intending to conduct activities under the mining laws must contact BLM 15 calendar days before beginning activities. BLM would use the 15-day period to determine whether the individual or group must submit a notice or plan of operations. BLM will notify the public of the boundaries of these specific areas through **Federal Register** notices and postings in local BLM offices.

As discussed earlier in the preamble discussion of the definition of ''casual use,'' BLM received many comments on whether, and if so, how to regulate recreational mining activities; whether recreational mining should be considered casual use; how to handle casual use activities that cumulatively cause adverse impacts; and what activities are encompassed by the term ''recreational mining activities.'' After carefully considering the public comments and the interrelationships of the various issues raised by the commenters in response to proposed § 3809.11(e), BLM has decided that our regulatory framework will ultimately be more effective in preventing unnecessary or undue degradation if we focus not on the purpose of the activities occurring on public lands, the types of groups involved, and the definitions of ''casual use'' and ''recreational mining,'' but rather on the impacts associated with the activities carried out under the mining laws on public lands.

To that end, we are adopting a regulation that avoids trying to discern the motivations of people who go upon the public lands (that is, commercial motive versus recreational motive), treats all individuals and groups in a similar manner (imposes no special requirements solely on mining clubs), and allows weekend miners and others who cause no or negligible disturbance to continue their customary activities, while at the same time giving BLM a way to regulate the cumulative effects of ''casual use'' activities. BLM field managers know which areas under their jurisdiction are popular with the general public for small-scale panning, washing, prospecting, rock collecting, and other mining-related activities. In some cases, such as when dozens or hundreds of ''rock hounds'' gather for a weekend outing, activities that if carried out individually would be ''casual use'' can cause a much greater level of disturbance. The final rule gives the BLM manager a way to sensibly regulate activities based on existing or anticipated impacts to the public lands.

Final § 3809.31(b) incorporates changes to the language appearing under proposed § 3809.11(h) addressing the use of suction dredges. The reference in proposed § 3809.11(h) to an ''intake diameter of 4 inches or less'' was deleted from the rule. We retained language that relies on State regulation. When the State requires an authorization for the use of suction dredges and the BLM and the State have an agreement under final § 3809.200 addressing suction dredging, we will not require a notice or plan of operations unless otherwise required by this section. In addition, clarifying language and cross-references were added under final § 3809.31(b)(1) and (2). See also the preamble discussion of § 3809.201(b).

Due to public comment and the recommendations in the NRC Report, the proposed rule was modified to remove the four inch or less diameter intake on suction dredges and to allow some small portable suction dredges to qualify on a case-by-case basis as

''casual use.'' This is consistent with the discussion in the NRC Report. With the removal of the reference to the four inch diameter, final § 3809.31(b)(1) reads, ''If your operations involve the use of a suction dredge, the State requires an authorization for its use, and BLM and the State have an agreement under § 3809.200 addressing suction dredging, then you need not submit to BLM a notice or plan of operations, unless otherwise provided in the agreement between BLM and the State.'' It will take some time for BLM and individual States to create new agreements that address suction dredging. In the period between the effective date of this final rule and a Federal/State agreement addressing suction dredging, those persons wishing to conduct operations involving suction dredging must contact BLM first, as provided in final § 3809.31(b)(2), outlined below.

BLM has considered technical information, such as studies about its impact on water quality in evaluating impacts of suction dredging. Suction dredge operations may affect benthic (bottom dwelling) invertebrates; fish; fish eggs and fry; other aquatic plant and animal species; channel morphology, which includes the bed, bank, channel and flow of rivers; water quality and quantity; and riparian habitat adjacent to streams and rivers. Because of the potential for impacts to these resources, final § 3809.31(b)(2) requires the public, before using a suction dredge, to contact BLM to determine whether the proposed user must submit to BLM a notice pursuant to final § 3809.21 or a plan of operations pursuant to final §§ 3809.400 through 3809.434, or whether their activities are considered ''casual use.''.

Final § 3809.31(b) reflects commenters' concerns over the size of intake diameter as well as requests to use State standards. It will be advantageous to State agencies, BLM and suction dredge operators for an agreement addressing suction dredges to be reached between the State and BLM where the State already regulates suction dredging. This will avoid duplication of permit requirements and streamline permit processing while protecting the environment.

We received many comments regarding the 4-inch intake diameter for suction dredges that appeared in proposed § 3809.11(h). Many commenters felt that suction dredges with an intake diameter of 4″ or less (in some comment letters, 5-to-8 inches or less) should be considered casual use and not require a notice or a plan of operations. Other commenters stated that it was not clear how the 4″ intake threshold was determined by BLM. Many commenters felt that BLM should adopt State requirements, including intake size, and not be more stringent than the State. One commenter believed the proposed rule required a notice or plan of operations for any dredging activity, regardless of how insignificant. Another commenter suggested replacing the 4″ nozzle threshold with language that identifies surface-disturbing activities as the threshold for notice level use. Two commenters believed that high value fish and wildlife habitats could be adversely impacted with a 4″ suction dredge intake. One commenter recommended that standards be required for suction dredging concerning cumulative impacts and stream status. A commenter stated that BLM should consider a broader range of values that could be impacted when assessing whether to regulate portable suction dredges under 4 inches in diameter. The commenter felt that suction dredge operators should, at a minimum, be required to obtain an individual National Pollution Discharge Elimination System (NPDES) permit. Another commenter wanted to avoid the contradiction that small suction dredges are not considered casual use yet do not follow requirements for notices or plans of operations. The commenter felt that BLM should define small dredges as recreational or casual use and not require bonding or notices unless the operators have a record of causing problems or non-compliance.

A mining association commented that it didn't believe the NRC wanted small-scale dredging operations, those that use a nozzle size of 8 inches or less, to be categorized as a mining operation. In addition, the commenter felt that very small industrial mineral mines or placer operations (other than the small dredges discussed above) that use only simple sorting methods should not automatically be required to submit a plan of operations. Such determinations, they believe, should be made on a case-by-case basis.

In the final rule, BLM has provided case-by-case flexibility for small portable suction dredges to qualify as casual use, and has removed the size reference that was in the proposal. BLM has not adopted the commenter's suggestion that small industrial minerals mines or placer operations should not have to submit plans of operations. As discussed earlier in this preamble, all mining operations will have to submit plans of operations.

Several commenters concluded that the language now in final § 3809.31(b) would conflict with the NRC Report discussion under Recommendation 2. One commenter stated that such activities are properly managed under state or local authority. Another commenter felt that if the proposed rule is finalized, the proposed alternative that would ''allow an operator to use any suction dredge if it was regulated by the State and the State and BLM have an agreement to that effect'' should be adopted as the least burdensome alternative.

The NRC Report stated that ''BLM and the Forest Service are appropriately regulating these small suction dredging operations under current regulations as casual use or as causing no significant impact, respectively.'' Although the IBLA has ruled on this issue on a number of occasions (See Pierre J. Ott, 125 IBLA 250, and Lloyd L. Jones, 125 IBLA 94.), BLM concludes it is justified in allowing some small portable suction dredges to qualify as casual use, depending on the level of impacts.[5] Given the discussion in the NRC Report that endorses the way BLM currently regulates suction dredging, we believe that the NRC did not intend in its Recommendation 2 to require plans of operations for suction dredging operations.

The final rule will allow most suction-dredging operations to be regulated by State regulatory agencies so long as they have a permitting program that is the subject of an agreement with BLM under final § 3809.200. In the absence of State agreements, BLM will evaluate the expected impacts from suction dredges on a case-by-case basis. If such impacts will be negligible, the proposed suction dredging operations would qualify as casual use. We find that final § 3809.31(b) is not inconsistent with Recommendation 2 of the NRC Report.

A commenter stated that since suction dredging takes place in rivers and streams, and not on the land, it should be under State authority and regulation, not BLM regulation. A few other commenters also raised the question of BLM's jurisdiction over mining activities in navigable rivers and

[5] The final rule is not intended to overrule either the *Ott* or *Jones* IBLA case, which were based upon the facts therein at issue, particularly the *Jones* case which analyzes the level of potential impacts from the operation. See *Jones* at 125 IBLA 96–97. It does depart from the position taken in the *Ott* and *Jones* IBLA cases insofar as the final rule allows certain small suction dredges to constitute casual use even though suction dredging operations involve the use of mechanized earth-moving operations. Under the final rule, the test for whether a small suction dredge operation can be classified as casual use focuses on the level of impacts, that is, whether the activity will result in greater than negligible disturbance instead of focusing only on whether mechanized earth-moving equipment is used, as these cases do.

streams. We generally agree that it is appropriate for States to regulate activities within navigable waters on BLM land. Even in such cases, BLM believes it has the authority to protect the public lands above high-water mark from such operations. Moreover, BLM generally retains authority to regulate activities on non-navigable waters on public lands. BLM intends to regulate activities in streams on the public lands based on the use of the public lands to enter the streams and because, for the most part, such streams have not been determined to constitute ''navigable waters.'' In most cases, there has been no determination of whether waters on public lands are navigable or non-navigable. We believe we have provided for appropriate State regulation of suction-dredging activities in final § 3809.31(b).

BLM concurs with comments that recreational mining and hobby mining are not classifications provided for in the mining laws. Accordingly, the term ''hobby or recreational mining'' is removed from the definition of casual use. It is BLM's intent that the casual use definition will continue to include exploration and prospecting that cause no or negligible disturbance. The final rule may require a notice be filed with the BLM if exploration or prospecting would cause more than negligible disturbance. BLM intends for the States to assume jurisdiction over suction dredging through State-specific agreements with BLM. Such agreements providing for State regulation in lieu of BLM involvement should reduce the number of jurisdictional questions.

Final § 3809.31(d) incorporates the language from proposed § 3809.11(i) regarding operations on lands patented under the Stock Raising Homestead Act. We received no comments on the proposal and are adopting it without substantive change in this final rule.

We added final § 3809.31(e) to account for situations involving public lands where the surface has been conveyed by the United States with minerals both reserved to the United States and open under the mining laws. The final rule provides that where a proposed operation would be located on lands conveyed by the United States which contain minerals reserved to the United States, the operator must submit a plan of operations under final § 3809.11 and obtain BLM's approval or a notice under final § 3809.21. This provision clarifies how this subpart applies in circumstances involving minerals reserved to the United States where the surface is not Federally owned. The reason for requiring a plan of operations for all mining in this situation is to ensure that the impacts of the proposed operation on all potentially affected resources are fully considered, particularly where Federally listed or proposed threatened or endangered species or their designated critical habitat are present. In reviewing a plan of operations, BLM intends to accommodate any agreement between the operator and the surface owner as long as the agreement does not cause unnecessary or undue degradation of public lands resources and is not likely to jeopardize proposed or listed threatened or endangered species or their designated critical habitat.

Section 3809.100 What Special Provisions Apply to Operations on Segregated or Withdrawn Lands?

This section governs the circumstances under which operations may be conducted on segregated or withdrawn lands. The subject of operations on segregated or withdrawn lands is not addressed by the NRC Report recommendations, and this section is therefore not inconsistent with those recommendations.

Final § 3809.100(a) requires a mineral examination report before BLM will approve a plan of operations or allow notice-level operations to proceed on an area withdrawn from the operation of the mining laws. It also allows BLM the discretion to require a mineral examination report before approving a plan of operations or allowing notice-level operations to proceed in an area that has been segregated under section 204 of FLPMA (43 U.S.C. 1714) for consideration of a withdrawal. Final § 3809.100(b) allows BLM to approve a plan of operations before a mineral examination report for a claim has been prepared in certain limited circumstances, including taking samples or performing assessment work. It also allows a person to conduct exploration under a notice only if it is limited to taking samples to confirm or corroborate mineral exposures that are physically disclosed and existing on the mining claim before the segregation or withdrawal date, whichever is earlier.

These two paragraphs differ from the proposed rule, which only addressed plans of operations in withdrawn or segregated areas. The final rule allows operators to conduct exploration in segregated or withdrawn areas under notices, which would not have been allowed under proposed § 3809.11(j)(8). See earlier discussion of final § 3809.11. Final § 3809.100(a) and (b) have been modified from the proposal to include notices, as well as plans of operations. The final rule recognizes that operations are allowable in areas segregated or withdrawn from the mining laws only to the extent that a person has valid existing rights to proceed, regardless of whether a person intends to proceed under a plan or a notice. Thus, the final rule allows BLM to protect genuine valid existing rights (by requiring a determination that such rights exist) while at the same time protecting areas that have been withdrawn or are being proposed to be withdrawn from operation of the mining laws. Limited activities are allowed before completion of a mineral exam, including taking samples to confirm or corroborate mineral exposures that are physically disclosed and existing on the mining claim before the segregation or withdrawal date, whichever is earlier; and performing any minimum necessary annual assessment work under 43 CFR 3851.1.

Final § 3809.100(c) allows BLM to suspend the time limit for responding to a notice or acting on a plan of operations when we are preparing a mineral examination report under final paragraph (a) of this section. The proposed rule would have allowed BLM to suspend the time limit for responding to a notice only for operations in Alaska. We deleted this provision because we decided not to adopt proposed § 3809.11(j)(8) for lack of consistency with the NRC Report. See the discussion under § 3809.11 earlier in this preamble.

Final § 3809.100(d) requires an operator to cease all operations, except required reclamation, if a final departmental decision declares a mining claim to be null and void. We received a number of comments on this section, and we discuss them below.

One commenter stated that when BLM conducts an examination in a withdrawn or segregated area to assess valid existing rights (VER), BLM does not impose time periods on itself in making recommendations on the validity of the claims. BLM will make a diligent effort to schedule VER examinations as soon as possible. The examination process will be greatly expedited if mining claimants promptly make their pre-withdrawal or pre-segregation discovery data available for the BLM examiner.

One commenter recommended that if BLM cannot complete a VER determination in a withdrawn or segregated area within 30 business days, the plan of operations should be automatically approved. BLM disagrees with the comment. VER determinations may, as discussed further below, be complex. The test for discovery of a valuable mineral deposit, for example, is very fact-based. BLM will act as

expeditiously as possible, but an arbitrary time limit is not practical.

One commenter was concerned that BLM is intending to unlawfully apply a ''comparative disturbance test'' to determine the validity of mining claims—similar to the ''comparative value test'' that has recently been in dispute in the *United Mining Case*. See ''Decision Upon Review of *U.S.* v. *United Mining Corp.,* 142 IBLA 339'' (Secretarial decision dated May 15, 2000). BLM disagrees with the comment. There are no provisions in subpart 3809 for a ''comparative disturbance test.'' BLM is not addressing the standards for determining the validity of mining claims in this rulemaking.

One commenter asked, concerning VER examinations, how can anyone but the miner decide if a deposit is economically feasible? The law has long been well-established that determinations of VER, including whether a valuable mineral deposit has been discovered are not subjective decisions to be made by the miner. BLM mineral examiners are geologists and mining engineers who are trained in sampling, interpreting, and evaluating mineral deposits to determine whether or not, in their professional opinion, a discovery of a valuable mineral has been made. If that assessment is yes and the other requirements for valid claims are met, the plan of operations will be approved if all other requirements of the 3809 regulations are met. If the answer is no, then BLM will initiate a contest proceeding alleging that no discovery has been made. The contest proceeding affords the claimant full due process and opportunity to be heard and make his or her case. The mining claimant and BLM will appear before an administrative law judge who will decide for the mining claimant or BLM. The mining claimant may appeal an adverse decision to the Interior Board of Land Appeals and then to Federal courts.

A valuable mineral deposit has been discovered where minerals have been found in such quantity and quality as to justify a person of ordinary prudence in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable miner. *Chrisman* v. *Miller*, 197 U.S. 313 (1905). This so-called ''prudent person'' test has been augmented by the ''marketability test'', which requires a showing that the mineral may be extracted, removed, and marketed at a profit. *United States* v. *Coleman*, 390 U.S. 599 (1968). In addition, where land is closed to location and entry under the mining laws, subsequent to the location of a mining claim, the claimant must establish the discovery of a valuable mineral deposit at the time of the withdrawal, as well as the date of the hearing. *Cameron* v. *United States*, 252 U.S. 450 (1920); *Clear Gravel Enterprises* v. *Keil*, 505 F.2d 180 (9th Cir. 1974).

A commenter asked why it is necessary to put the VER for withdrawal or segregation in this regulation. Both the Forest Service and BLM already generally do, as a matter of policy, require VER examinations when operations are proposed on lands that have been withdrawn or segregated. In response, BLM believes that this policy should be embodied in regulations so that all affected interests are fully aware of it, and to assure that mining operations don't proceed in segregated or withdrawn areas unless valid existing rights are present.

One commenter suggested that validity determinations should be required on all lands; including lands no withdrawn or segregated, before plans are approved. BLM disagrees with the comment. We are responsible for closely reviewing data submitted in a plan of operation to ensure that plans for extraction of the mineral deposit make sense. For example, we would not approve a plan of operations for an open-pit gold mine if no data were submitted outlining where the gold mineralization lies. However, if a plan of operations appears to be of marginal or questionable profitability, the BLM manager has the prerogative to request a validity exam before that plan is approved. Generally speaking, however, BLM will not require validity examinations when plans of operations are submitted on lands open to location under the mining laws. On segregated lands, BLM will examine the purpose of the segregation to determine whether a validity exam is necessary to protect the lands.

A commenter asserted that miners cannot afford the cost of validity examinations. BLM's response is that when we initiate VER determinations on lands that have been withdrawn or segregated, the BLM absorbs the cost of this examination under current policy. However, the mining claimant will have some associated costs, especially if the mining claimant must defend his/her asserted discovery in a contest proceeding. Although not part of this rulemaking, BLM is considering regulations that would enable the agency to recover the costs of conducting validity examinations.

One commenter suggested that segregation ought not be enough to trigger disapproval of a plan of operations. Lands should be available until the formal FLPMA withdrawal process has been completed. BLM disagrees with this comment. The final rule gives the BLM manager discretion to approve plans of operations on land under the ''segregated'' category or first to require a validity examination. That decision will be made based on the magnitude of disturbance under the proposed activities, measured against the purpose of the segregation.

Another commenter asserted that the Secretary of the Interior does not have the right to deny access and locations for lands that are merely segregated. BLM disagrees with the comment. Segregated lands are closed to the operation of the mining laws, if so stated in the segregation notice. From this standpoint, there is no difference between ''segregated'' lands and ''withdrawn'' lands during the period of the segregation (ordinarily two years under FLPMA section 402). Both are closed to the operation of the mining laws. That is, no valid claim or discovery can be made after the effective date of either the withdrawal or the segregation.

One commenter observed that it appears that a VER determination on lands withdrawn or segregated is discretionary and recommended that it be mandatory. BLM disagrees in part with the comment. The VER determination is mandatory for lands that are withdrawn. However, for lands segregated, BLM has discretion to approve the plan of operations as long as the proposal is not inconsistent with the purposes of the segregation. See the discussion earlier in this preamble.

One commenter stated, ''When an applicant proposes uses on lands that do not contain valid claims, the BLM may not approve a use of the public land where such use is adverse to the public interest or where such use would effectively result in the exclusive use of that land by the holder of the permit.'' In response, BLM believes that section 302(b) of FLPMA, 43 U.S.C. 1732(b), authorizes BLM, in its discretion, to approve mineral exploration and development regardless of whether there is a valid mining claim or millsite in the area. For example, BLM may approve an exploration activity on a mining claim even when it is not valid; that is, there is not yet a discovery of a valuable mineral. The purpose of the exploration is, of course, to try to make a discovery. If the lands have already been withdrawn, however, it is too late to make a discovery and the activity would be denied.

Section 3809.101 What Special Provisions Apply to Minerals That May Be Common Variety Minerals, Such as Sand Gravel, and Building Stone?

This section is unchanged from the proposed rule and requires a mineral examination report before anyone begins operations for minerals that may be ''common variety'' minerals. There is an exception to the report requirement under which BLM will allow operations to remove possible common variety minerals if the operator establishes an escrow account for the appraised value of the minerals removed.

In the proposed rule preamble (64 FR 6430, Feb. 9, 1999), we indicated we would make a conforming change to 43 CFR 3601.1–1 to reflect BLM's authority to allow disposal of common variety materials from unpatented mining claims with a written waiver from the mining claimant. This final rule does not include that conforming change because we have separately proposed changes to our minerals materials regulations. See proposed § 3601.14, which corresponds to 43 CFR 3601.1–1 (65 FR 55863–55880, Sept. 14, 2000).

The topics covered by this section are not addressed by the NRC Report recommendations, and thus are not inconsistent with those recommendations. We received a number of comments on this section, and we discuss them below.

A commenter observed that when BLM examines a mining claim to determine the locatability of what may be a common variety, it not only has to check for its ''special and unique'' characteristics, but it must also ensure that the mineral deposit is of sufficient quantity and quality to satisfy the ''prudent man'' test. BLM agrees with the comment. We must ensure that the mineral deposit of non-metallic minerals is locatable under the mining laws rather than salable under the Materials Act of 1947, 30 U.S.C. 601 *et seq.* In accordance with the Surface Resources Act of 1955, 30 U.S.C. 612, only uncommon varieties of sand, stone, gravel, pumice, pumicite, or cinders are locatable. Please refer to 43 CFR 3711.1 for a more detailed explanation of the common variety requirements. Court cases have further refined this test. See, for example, *McClarty* v. *Secretary of the Interior*, 408 F2d 907 (9th Cir 1969). Once BLM determines that a mineral deposit consists of a locatable mineral, we will evaluate whether a discovery exists and whether other requirements for a valid claim are satisfied.

In one commenter's opinion, the limited activities permitted in proposed § 3809.101(b) may not be sufficient to allow a mineral report to reach a conclusion whether the deposit is one of an uncommon variety. In response, BLM will allow sampling and testing sufficient to determine whether the mineral is special and unique. Tests may also be done for comparative purposes on other similar mineral deposits that may be used for the same purpose. These tests and the requirements of *McClarty* will be documented in the mineral examination report.

One commenter favored a mineral examination if there is any doubt as to the common versus uncommon nature of the mineral. BLM generally agrees that the locatability of a specific deposit must be determined based on the individual circumstances involved.

A commenter said that although the draft EIS states that the ''present policy is to process the 3809 action and collect potential royalties in escrow while a determination is made on the locatable versus salable nature of the material,'' the proposed rule did not specifically acknowledge this. BLM agrees in part with the comment. Before subpart 3809 was revised, BLM's policy was to encourage an escrow account when the common vs. uncommon nature of the mineral was questionable. However, in the event the operator did not cooperate, subpart 3809 did not expressly address whether BLM may delay approval of a plan of operations while an examination was under way. This final rule gives BLM the express authority to delay approval until escrow is agreed to, or an examination is made.

A commenter recommended that the proposed rule should delete the entire section dealing with special provisions for common variety minerals. BLM disagrees with the comment. It is not in the public interest to delete this requirement. We must ensure that the mineral deposit of non-metallic minerals is locatable under the mining laws rather than salable under the Material Act of 1947 before approving a plan of operations under subpart 3809. In accordance with Public Law 167 (the Surface Resources Act of 1955), only uncommon materials of sand, stone, gravel, pumice, pumicite, or ciders are locatable. As stated in an earlier comment and answer, the test for that determination is outlined in *McClarty* v. *Secretary of the Interior*. In the event the material is asserted to be an exceptional clay, BLM will refer to, among others, the *U.S.* v. *Peck*, 29 IBLA 357, 84 ID 137 (1977).

One commenter asked BLM to clarify that an operator could use common variety road-building material for his operation or common variety reclamation material to fulfill the unnecessary or undue degradation standards. BLM agrees that if use of the common variety mineral material is reasonably incident to an operation authorized under subpart 3809, the operator may use that material on the mining claim at no charge, if that removal is a part of the plan of operations that is approved by BLM.

A commenter was concerned that under proposed § 3809.101(d), BLM would have authority to sell common material from an unpatented mining claim like the Forest Service is doing now. This could result in placing gold-bearing gravels on roads, thus wasting a resource. BLM responds that under the final rule, removal of common material from an unpatented mining claim by a BLM contractor or permittee would only occur after a review of the common material to be sold, to ensure the removal would not interfere with a mining claimant's operation or his or her mineral resource. Obtaining a waiver from the mining claimant would assure that such interference would not occur. A recent Solicitor's Opinion discussed this issue. See *Disposal of Mineral Materials from Unpatented Mining Claims* (M–36998, June 9, 1999).

One commenter asked what is a mineral report, how is it initiated, what are the qualifications for doing a mineral examination and associated report and who reviews the report? In response, there are formal procedures and strict guidelines for the mineral examination, and BLM requires certification by BLM of mineral examiners and reviewers. These are found in BLM Manual 3895 and the Handbook for Mineral Examiners (1989 edition) and can be reviewed in the local BLM office.

In one commenter's opinion, the discussion related to common variety minerals is confusing since common variety minerals are not ''locatable'' under 3809. BLM agrees that common variety minerals are not locatable. However, there are mining claimants who still attempt to remove common varieties under the auspices of the mining laws and associated 3809 regulations. This final rule addresses this practice. By law, common variety minerals are sold under contract by BLM, and the agency must receive market value upon sale.

One commenter asserted that BLM should be liable for any economic losses resulting from a review of whether minerals are common variety, if the minerals are subsequently found to be locatable. BLM disagrees with the comment. If the mining claimant ultimately prevails, any money put in

escrow would be returned to the mining claimant together with any accrued interest.

In one commenter's opinion, the right to ''occupy'' public land in the pursuit and development of mineral deposits exists separate and apart from the claim location and patenting provisions of the mining laws. Therefore, BLM may not promulgate a regulation that limits operations under the 3809 regulations to valid claims. BLM agrees. The 3809 regulations cover operations whether or not valid claims exist. If an operator files a plan of operations on lands withdrawn or segregated, but not encumbered with a mining claim, BLM will reject that plan of operations. Mining claims cannot be located and operations conducted on lands withdrawn or segregated from operation of the mining laws, except for valid existing rights.

Section 3809.116 As a Mining Claimant or Operator, What Are My Responsibilities Under This Subpart for My Project Area?

Final § 3809.116 is adopted with a number of changes from the proposal to clarify BLM's intent, and to respond to comments. A number of commenters asserted that the proposed rule exceeded BLM's authority, and that liability should be proportional. In the final rule BLM has more carefully delineated who is responsible for obligations created by operations, and has included examples in an effort to reduce ambiguity. This is not an area addressed by the NRC Report recommendations, and thus, is not inconsistent with those recommendations.

The final rule separates proposed § 3809.116(a) into two subparagraphs. Final § 3809.116(a)(1) specifies that mining claimants and operators (if other than the mining claimant) are jointly and severally liable for obligations under subpart 3809 that accrue while they hold their interests. This would, for instance, include claimants who lease their claims to operators while keeping an overriding royalty or other purely monetary interest. Maintaining joint and several liability better protects the public lands in cases where one of multiple involved entities refuses to or cannot satisfy its obligations, for example, as a result of bankruptcy.

The final rule is more specific than the proposal and states that joint and several liability, in the context of subpart 3809, means that the mining claimants and operators are responsible together and individually for obligations, such as reclamation, resulting from activities or conditions in the areas in which the mining claimants hold mining claims or mill sites or the operators have operational responsibilities. The italicized text is new and clarifies BLM's intent regarding limitations on responsibilities. To illustrate further, the final rule includes the following three examples:

Example 1. Mining claimant A holds mining claims totaling 100 acres. Mining claimant B holds adjoining mining claims totaling 100 acres and mill sites totaling 25 acres. Operator C conducts mining operations on a project area that includes both claimant A's mining claims and claimant B's mining claims and millsites. Mining claimant A and operator C are each 100 percent responsible for obligations arising from activities on mining claimant A's mining claims. Mining claimant B has no responsibility for such obligations. Mining claimant B and operator C are each 100 percent responsible for obligations arising from activities on mining claimant B's mining claims and millsites. Mining claimant A has no responsibility for such obligations.

The first example illustrates that each mining claimant is 100 percent responsible for obligations resulting from activities occurring on his or her mining claims, but has no responsibilities for activities on someone else's mining claims. The operator is 100 percent responsible for all operations in the areas where it conducts operations.

Example 2. Mining claimant L holds mining claims totaling 100 acres on which operators M and N conduct activities. Operator M conducts operations on 50 acres. Operator N conducts operations on the other 50 acres. Operators M and N are independent of each other and their operations do not overlap. Mining claimant L and operator M are each 100 percent responsible for obligations arising from activities on the 50 acres on which operator M conducts activities. Mining claimant L and operator N are each 100 percent responsible for obligations arising from activities on the 50 acres on which operator N conducts activities. Operator M has no responsibility for the obligations arising from operator N's activities.

The second example illustrates that an operator is jointly and severally responsible with the mining claimant for obligations arising from areas in which it conducts operations, and not for obligations arising from areas in which it has no involvement.

Example 3. Mining claimant X holds mining claims totaling 100 acres on which operators Y and Z conduct activities. Operators Y and Z each engage in activities on the entire 100 acres. Mining claimant X, operator Y, and operator Z are each 100 percent responsible for obligations arising from all operations on the entire 100 acres.

The third example illustrates that the mining claimant and all operators are jointly and severally responsible for obligations arising from all operations on areas where they either hold claims or conduct activities. It should be noted that mining claimant obligations include off-claim reclamation or repair stemming from activities on the claims. Similarly, operator responsibility extends to off-site reclamation or repairs resulting from activities or conditions in the areas where the operator is conducting activities.

Final § 3809.116(a)(2) provides that in the event obligations are not met, BLM may take any action authorized under subpart 3809 against either the mining claimants or the operators, or both.

Final § 3809.116(b) specifies that relinquishment, forfeiture or abandonment does not relieve a mining claimant's or operator's responsibility under subpart 3809 for obligations that accrued or conditions that were created while the mining claimant or operator was responsible for operations conducted on that mining claim or in the project area. In other words, an entity cannot just walk away from unsatisfied obligations under subpart 3809. Final § 3809.116(c) provides that transfer of a mining claim or operation does not relieve a mining claimant's or operator's responsibility under this subpart for obligations that accrued or conditions that were created while the mining claimant or operator was responsible for operations conducted on that mining claim or in the project area until BLM receives documentation that a transferee accepts responsibility for the previously accrued obligations, and BLM accepts a replacement financial guarantee that is adequate to cover both previously accrued and new obligations. In other words, a mining claimant or operator can transfer responsibility to an transferee or assignee upon acceptance by the transferee or assignee and the posting of an adequate financial guarantee.

Editorial changes were made from the proposal in paragraphs (b) and (c). These include adding the words ''that accrued'' after the word ''obligations'' in both paragraphs, and making clear that the transferee must agree to accepting previously accrued obligations before the transferor is no longer responsible. These changes are consistent with the intended meaning in the proposal.

Final § 3809.116(a)(1) is consistent with and a restatement of BLM's previous position which has been in the BLM Manual since 1985. See BLM Manual Chapter 3809—Surface Management, Release 3–118, July 26, 1985. It is supported by both FLPMA and the mining laws. Mining claimants

are the ones who hold rights under the mining laws to develop and produce Federal minerals on public lands. Such rights, however, are limited by the responsibility under FLPMA to prevent unnecessary or undue degradation of the public lands, and their liability reflects that continuing responsibility. Mining claimants cannot divest themselves of the statutory responsibilities associated with holding mining claims or millsites by entering into contractual arrangements with operators to develop and produce minerals from their mining claims. Operators on mining claims and mill sites on the public lands derive their development and production rights from mining claimants, and for this purpose are the agents of the mining claimants.

Operators are also independently responsible for their own activities on public lands, regardless of their ties to mining claimants. Approval of a plan of operations (and activities under a notice) allows surface disturbance of the public lands, conditioned upon compliance with statutory and regulatory requirements, including the requirement to prevent unnecessary or undue degradation. If a person's activities disturb the public lands, that disturbance is his or her responsibility. Entities that reap the benefits from mineral development and production should certainly bear the associated costs. As discussed earlier in this preamble, the term ''operator'' includes any person who manages, directs or conducts operations at a project area, including a parent entity or an affiliate who materially participates in such management, direction, or conduct. Thus all persons directly involved with operations and who benefit directly from those operations, are responsible for those operations.

Commenters asserted that the financial guarantee posted with a plan of operations is sufficient to assure satisfaction of claim obligations and thus there is no need for joint and several liability. BLM agrees that the financial guarantee should be adequate to assure satisfaction of claim obligations. There is no guarantee however, that this will always be the case in every situation, even when the financial guarantee is calculated in advance to be sufficient to cover all reclamation costs. A statement of responsibility is necessary to make it clear who will be responsible in the event that obligations remain following forfeiture of a financial guarantee.

Commenters stated that liability among operators should be proportional. BLM agrees in part. The final rule specifies that liability of an entity should be limited to obligations that accrue or conditions, to the extent it can be reasonably ascertained, that result from activities carried out during those periods of time when that entity (mining claimant or operator) has an interest in the claims or operations. Also, under the final rule, obligations of mining claimants are limited to those obligations that result from activities within their mining claims or mill sites, because the exercise of their rights over mining is limited to activities within their claim boundaries. Also, the final rule provides that operator obligations derive only from activities or conditions on areas for which they materially participated in the management, direction, or conduct of operations. As mentioned above, obligations include off-site reclamation resulting from activities on claims or in the project area.

BLM disagrees, however, that responsibility within a specific area should be split proportionately among the persons responsible for that area. Although operators and claimants can, among themselves, divide their responsibilities, they should all be jointly and severally responsible to BLM for the satisfaction of obligations associated with the operations on public lands.

BLM emphasizes that final § 3809.116 applies to and explains obligations under FLPMA and the mining laws. It is not intended in any way to affect obligations or responsibilities under any other statutes, such as the Clean Water Act, the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), or the Resource Conservation and Recovery Act (RCRA).

A commenter asserted that establishing joint and several liability for ''parent entities and affiliates'' would seriously chill mining on Federal lands administered by BLM. The commenter stated that investors in mining operations rely upon existing principles of corporate law and liability in evaluating their investments. The proposed liability rules would seriously affect the risk that investors, such as joint ventures, would undertake by participating in a mining project.

BLM disagrees with both the characterization of the rule and the alleged impact. The final rule does not make ''parent entities and affiliates'' responsible because of those relationships. Parent and affiliate entities are responsible if they materially participate in the management, direction, or conduct of the operations. The responsibility derives from their own actions, not through the structure of the relationship. Parent entities or affiliates that do not materially participate are not responsible under this rule. Such responsibility is not new and should not discourage future investment.

A commenter asserted that imposing liability upon mining claimants would expose small mining claimants to full liability for the actions of operators, seriously chilling the willingness of claimants to option or lease claims to operators for mineral development. The commenter stated that some industry members have estimated that this provision in the proposed rules by itself could reduce mining claim activity by fifty percent. If so, the commenter continued, then BLM's estimate of the impacts of the proposed rules is seriously underestimated because it fails to account for the impact of this proposed rule change. BLM disagrees with the comment. Mining claimant liability is not a new concept. Such liability has always existed under the mining laws, and this has been expressly set forth in the BLM Manual since 1985.

A commenter stated that BLM has no authority to create a joint and several liability scheme. BLM disagrees with the comment. As explained above, BLM has authority under the mining laws and FLPMA. Moreover, this rule is not a new concept, but merely a clarification of already existing responsibilities.

A commenter stated that as a practical matter, the proposal disregarded the fact that many mining operations involve many different mining claimants, and that if each owner has to obtain assurances sufficient to protect against the unlikely imposition of joint and several liability, it is unlikely that most operations could obtain adequate bonding.

BLM has revised the final rule to clarify the extent of mining claimant responsibilities. BLM recognizes that liability may be complex in situations involving multiple claimants, but expects that in most instances operators and claimants will agree among themselves as to who will have the initial responsibility for performing reclamation and satisfying reclamation obligations. BLM also disagrees that this provision will make it more difficult to obtain adequate financial guarantees. Final § 3809.116 does not increase the obligations to be covered by the financial guarantee. Instead it explains who will be responsible if the financial guarantee is not sufficient.

Sections 3809.200 to 3809.204 Federal/State Agreements

Final §§ 3809.200 to 3809.204 address Federal/State agreements, including the kinds of agreements that BLM and the State may make (§ 3809.200); the content of the agreements (§ 3809.201); the conditions necessary for BLM to defer part or all of this subpart to a State (sections 3809.202 and 3809.203); how existing agreements relate to this subpart; and which regulations apply during the review of existing agreements (§ 3809.204).

FLPMA section 303(d), 43 U.S.C. 1733(d), provides that the Secretary of the Interior is authorized to cooperate with State regulatory officials in connection with the administration and regulation of the use and occupancy of the public lands. These regulations provide for agreements or memoranda of understanding to implement this statutory provision and meet the intended purposes of FLPMA. Cooperation with the States and the avoidance of duplication are important purposes of these regulations, and are necessary for BLM to carry out its responsibilities, especially for operations which are on both private and public lands. Such cooperation is good management and common sense.

Section 3809.200 What Kinds of Agreements May BLM and a State Make Under This Subpart?

BLM has renumbered proposed § 3809.201 as final § 3809.200. We made no changes to the text. We made this change in section numbers in response to a comment that some sections of the proposed regulations lacked ''logical organization.''

Final § 3809.200 specifies that to prevent unnecessary administrative delay and to avoid duplication of administration and enforcement, BLM and a State may make two kinds of agreements: One that provides for a joint Federal/State program; and another that provides that, in place of BLM administration, BLM may defer to State administration of some or all of the requirements of subpart 3809, subject to the limitations in § 3809.203.

Under the first type of agreement, provided for at § 3809.200(a), BLM and States may coordinate actions to avoid duplication, but each agency retains its own authorities and regulations. The previous regulations at § 3809.3–1 authorized this type of agreement, and BLM has been implementing these agreements for many years. BLM believes that cooperation fostered by this type of agreement greatly aids in the management of the public lands. Final § 3809.200(a) will continue to allow most of the joint agreements and memoranda of understanding that BLM and the States have been utilizing primarily to avoid duplication.

Under the second type of agreement, provided for at final § 3809.200(b), BLM may, in lieu of BLM administration, defer to the States part or all of the regulation of mining operations under State laws, regulations, policy and practices. Under this kind of agreement, BLM retains certain responsibilities that are inherent in Federal public land management under FLPMA, and may not be delegated. These include concurrence on the approval of each plan of operations and responsibility for other Federal laws, such as the National Environmental Policy Act and the Endangered Species Act. The effect is to allow State management of the programs with the minimum oversight necessary to carry out Federal law.

Under the final rule, a State could enter into one or both types of agreements. For example, a State could request that BLM defer to State administration of a part of the program, such as bonding, while the other parts of the program would be cooperatively administered by BLM and the State. Final § 3890.200 allows a State and BLM to tailor a State program to the particular strengths of that State. The minimum national requirements established by subpart 3809 give assurance to operators and the public that a basic consistency and fairness will exist under either kind of State/Federal agreement.

Final § 3809.200(b) references section 3809.202 and 3809.203, which contain the conditions and limitations for those situations where a State may request to have part or all of a program in this subpart deferred to State administration.

Some commenters asked that section 3809.200(b) not be adopted. BLM did not accept those comments. BLM believes that deferral to State regulatory programs can be an effective way to minimize duplication and promote cooperation among regulators, so long as FLPMA's purpose of avoiding unnecessary or undue degradation is also achieved. Deferral may sometimes not be appropriate, but BLM believes it is an option that should be available when circumstances warrant. We believe the final rule contains sufficient checks and balances on the deferral process, including public comment, to avoid deferral to State whose regulatory programs are not consistent with the 3809 subpart.

Section 3809.201 What Should These Agreements Address?

BLM included final § 3809.201 in this rule in response to comments requesting BLM to clarify what Federal/State agreements should include. Final § 3809.201(a) recommends that Federal/State agreements provide for maximum possible coordination to avoid duplication and to ensure that operators prevent unnecessary or undue degradation of public lands. It also recommends that agreements consider, at a minimum, common approaches to the review of plans of operations, including effective cooperation regarding NEPA; performance standards; interim management of temporary closure; financial guarantees, inspections; and enforcement actions, including referrals to enforcement authorities.

In part, these additions address the NRC Report recommendations. NRC Report Recommendation 6 urges clear procedures for referring activities to other Federal and State agencies for enforcement. NRC Report Recommendation 10 urges effective cooperation by agencies involved in the NEPA process. These recommendations may be satisfied through Federal/State agreements.

Final § 3809.201(a) also contains a general requirement for regular review or audit of Federal/State agreements. Commenters suggested that such audits be included. A regular review, established cooperatively by BLM and a State and included in the agreement, would assist in ensuring that such agreements will be kept up-to-date. The section provides BLM and the State the flexibility to develop such provisions tailored to each agreement's situation.

Final § 3809.201(b) addresses agreements that allow States to regulate suction dredging in lieu of BLM, as provided in final § 3809.31(b). It responds to a concern expressed by a commenter that allowing States, instead of BLM, to regulate suction dredging, eliminates the Federal action that would otherwise trigger the requirements of section 7 of the Endangered Species Act (ESA). The concern was that without a Federal action, sufficient assurances will not exist to protect Federally listed or proposed threatened or endangered species or their proposed or designated critical habitat.

Accordingly, to assure that such protection does exist, final § 3809.201(b) provides that if an agreement between BLM and a State is intended to satisfy the requirements of § 3809.31(b) regarding suction dredge activities (so that the State may regulate suction

dredges in place of BLM), the agreement must require a State to notify BLM of each application to conduct suction dredge activities within 15 calendar days of receipt of the application by the State. The agreement must also specify that BLM will inform the State whether Federally proposed or listed threatened or endangered species or their proposed or designated critical habitat may be affected by the proposed activities and any necessary mitigating measures. Under final § 3809.201(b), BLM does not have to approve each suction dredge application. Rather, BLM must conduct any necessary consultation or conferencing with the appropriate agency (either the U.S. Fish and Wildlife Service (FWS) or the National Marine Fisheries Service (NMFS)) and provide the necessary information to the State. To the extent that a State receives multiple suction dredge applications for a particular river or stream, BLM may work with the State (and the FWS or NMFS) to develop programmatic measures that would cover all or some operations in that body of water. We also added a sentence to the end of paragraph (b) to make it clear that operations may not begin until BLM has completed any necessary consultation or conferencing under the ESA.

Section 3809.202 Under What Conditions Will BLM Defer to State Regulation of Operations?

BLM is adopting final § 3809.202 substantially as proposed. It establishes the procedures that BLM will use to review and approve a request to defer to State regulations of operations. The procedures of final § 3809.202 assure that agreements that authorize the deferral of the regulation of mining operations to the States will result in the prevention of unnecessary or undue degradation of the public lands.

To have part or all of the program deferred, a State must show that its provisions are consistent with the subpart 3809 requirements. The final rules explain how BLM will determine consistency with subpart 3809 requirements. BLM will compare State standards with subpart 3809 on a provision-by-provision basis. The final rules provide that non-numerical standards need to be functionally equivalent to BLM counterparts; numerical State standards need to be the same as any numerical BLM standard; and BLM will construe State environmental protection standards that exceed the corresponding Federal standard to be consistent with the Federal standard.

This section does not provide for a delegation of the Secretary's authority under FLPMA. States will act under State laws and regulations which are consistent with the requirements of subpart 3809. The process of determining whether State laws and regulations are consistent with subpart 3809 includes an opportunity for public comment and an opportunity to seek review of the State Director's decision. Because of the decision's policy implications, a State Director's decision may be appealed to the Assistant Secretary for Land and Minerals Management, and not the Department's Office of Hearings and Appeals because of the sensitive policy implications of the decision.

There were many comments on specific requirements of the conditions and limitations regarding deferral. Commenters suggested clarifying many of the specific definitions, conditions and limitations in proposed §§ 3809.202 and 3809.203. Several questioned the meaning and clarity of the terms ''functionally equivalent'' and ''consistency'' in the proposal. One commenter questioned if any State could comply with the term ''functionally equivalent.''

BLM reviewed the comments on the need for making specific changes, such as providing further guidance on consistency and defining ''functionally equivalent.'' The rules already explain how consistency will be determined. BLM will determine functional equivalency on a provision-by-provision basis, as compared to the corresponding BLM provision.

Commenters stated that this provision would require substantial changes to existing State programs. BLM disagrees with the comment. First, nothing in this rule requires a State to do anything. The sufficiency of the State program comes under review only if a State requests BLM to defer administration of portions of its mining program, States programs may remain in place. When BLM receives a deferral request, BLM will determine whether State provisions are functionally equivalent to the corresponding BLM rule. BLM's analysis of State laws and regulations and its review of the comments indicate that many States have statutory, regulatory, and policy requirements that are functionally equivalent to parts or much of the subpart 3809 regulations. Although some State provisions may require upgrading, BLM does not anticipate wholesale deficiencies.

One commenter stated that time frames for State review should be no longer than those required for BLM. Another asked if ''days'' meant business days or calendar days. BLM declines to adopt the commenter's suggestion with regard to State time frames. In most instances, operators are already functioning under State time frames, which have been adopted to accommodate State resources. BLM does not intend to interfere with such time frames in its rules. With regard to time frames in subpart 3809, BLM made the ''days'' requirement consistent throughout the regulations to mean calendar days.

Commenters suggested that BLM consider adding to subpart 3809 provisions for conditional State program approval. These provisions would be analogous to those that apply to conditional approval of State programs under the Surface Mining Control and Reclamation Act (30 U.S.C. 1201 *et seq.*). See 30 CFR 732.13(j). BLM agrees that this comment has merit. The rules do not preclude conditional approval as a possible decision under section 3809.202. As BLM reviews of State programs occur, BLM will determine whether agreements containing conditional deferrals are warranted.

BLM has edited final § 3809.202(b)(2)(ii) to remove unnecessary text without changing the meaning or intent of the proposed regulations.

Commenters urged BLM to conserve its resources by deferring to the States all or portions of the proposed regulations. One commenter stated that the proposal has the potential to provide for less costly, more effective permitting and enforcement. Commenters urged BLM to delegate the entire program to the State without retaining ultimate approval authority. A commenter stated that BLM can best minimize or avoid duplication with deferrals and agreements with State programs. Another commenter asserted that the proposed regulations should adopt a presumption that State requirements are adequate.

BLM disagrees with the comment that it defer to the States and not finalize portions of subpart 3809. The BLM has a nondelegable responsibility under FLPMA to assure that the public lands are managed properly and that unnecessary or undue degradation not occur. BLM would not satisfy its responsibilities by a general deferral to State regulation without determining the adequacy on a State-specific basis, and without retaining the specific regulatory responsibilities set forth in section 3809.203. BLM agrees that Federal/State agreements and MOUs can minimize duplication. BLM disagrees, however, that it has a basis for a general presumption that State regulations are adequate. The basis for the State regulations may or may not be similar

to the prevention of ''unnecessary or undue degradation'' standard that governs this rulemaking.

Several commenters said the proposal was illegal as there are no statutes that allow for State assumption of administration or primacy for hard rock mining on public lands. BLM does agree that the Secretary has no authority to adopt this approach. FLPMA section 303(d), 43 U.S.C. 1733(d), allows States to ''assist in the administration and regulation of use and occupancy of the public lands.'' This rule is not a delegation of Federal authority. It is a recognition by BLM that in certain cases the Federal regulatory role may be exercised more efficiently while still satisfying FLPMA's mandate to prevent unnecessary or undue degradation of the public lands.

Commenters stated BLM did not have the expertise to make decisions as to how much to defer to States. BLM disagrees with the comment. Its professionals will be able to make the judgments necessary to decide whether deferrals are allowable. This will be an open process, with the opportunity for all segments of the public to submit comments and information and appeal State Director decisions on such matters.

One commenter suggested that deferral to the States would result in BLM being ''subservient to the political maneuvering of State government officials that might not have the best interests of the land in question. This should not happen.'' Several commenters stated that the provisions for deferral should be deleted. BLM disagrees with the comments. The comments appear to reflect a complete distrust of the State regulatory processes that BLM does not share. In any event, BLM will need to concur on each approved plan of operations.

Commenters noted that the States have no trust obligation to Native Americans and that deferral of authority to the States would be a dereliction of BLM's trust obligation. BLM disagrees with the comment. BLM concurrence is required on each approval of a plan of operations. Such concurrence will allow for the consideration of trust responsibilities to Native Americans in appropriate circumstances.

One commenter asserted that the proposed provision is a ''passing the buck'' strategy that increases the States' exposure to risk and protects the BLM from accusations of mismanagement and violation of the public's trust. BLM disagrees with the comment. BLM and the States will each maintain a level of responsibility for decisions under its jurisdiction. BLM understands it remains ultimately responsible for protecting the public lands from unnecessary or undue degradation under the final rule.

Commenters asserted that the deferral of programs to the State constitutes an unfunded mandate to the States without any provision of resources to carry out the programs. One commenter noted that there is no Federal money available to the States to implement the program. One commenter suggested that the provision in proposed § 3809.201 be revised to indicate how BLM will reimburse a State for assuming BLM work under an agreement.

BLM disagrees that the rules impose unfunded mandates. There is no legal requirement in this final rule or anywhere else that the States assume some of BLM's responsibilities under subpart 3809. Although Section 303(d) of FLPMA authorizes the Secretary to reimburse States for expenditures incurred in assisting in the administration and regulation of use and occupancy of the public lands, no reimbursements may occur without Congressional appropriation. Congress has appropriated no funds for this purpose.

Section 3809.203 What Are the Limitations on BLM Deferral to State Regulation of Operations?

BLM is also adopting final § 3809.203 as proposed. It sets forth the limitations on any agreement deferring to State regulation of some or all operations on public lands. The limitations are an important way to assure that operators comply with subpart 3809 and that unnecessary or undue degradation of the public lands does not occur.

Final § 3809.203(a) requires BLM to concur with each State decision approving a plan of operations. The existence of a Federal action on the approval of each plan of operations triggers the applicability of NEPA (which is particularly important in those States that don't have an equivalent environmental impact assessment process) and those other Federal responsibilities that attach to Federal actions, such as the National Historic Preservation Act and the Executive Order protecting sacred sites. Although BLM understands that some commenters question the need for BLM to retain the concurrence role, BLM views this as important to carrying out its mandate to protect the public lands from unnecessary or undue degradation. The concurrence responsibility will also apply to plan modifications which are subject to the same procedures as plans.

Some commenters stated that BLM should consider programmatic concurrence and basically provide for blanket approvals. BLM did not change the provision regarding concurrence on plans of operation because such concurrence is important in providing the appropriate degree of assurance under FLPMA that unnecessary or undue degradation will be prevented. These are Federal lands and it is a mandate of Federal law that the Secretary of the Interior must prevent such unnecessary or undue degradation. Although concurrence is required for each plan of operations, the final rule allows the State and BLM some flexibility in determining, as part of an agreement, how to provide this concurrence while still eliminating as much duplication as possible.

Several commenters addressed the issue of the National Environmental Policy Act and its relationship to final §§ 3809.200 through 3809.204. One commenter noted that a State should have a State NEPA-like program in place before BLM considers deferring part of a program. One comment proposed revising § 3809.203 to provide that States prepare the NEPA compliance. One commenter stated BLM should ensure that any State-written findings are included in the NEPA document. The Federal EPA strongly recommended that where a State takes the lead on the surface management program, the Federal/State agreement require that a State be a cooperating agency on the NEPA document. EPA did support BLM deferral of programs to States with laws similar to the Federal NEPA. In addition, NRC Report Recommendation 10 addresses Federal/State cooperation in the NEPA process. Recommendation 10 states that ''all agencies with jurisdiction over mining operations should be required to cooperate effectively in the scoping, preparation, and review of environmental impact assessments for new mines. Tribes and non-governmental organizations should be encouraged to participate and should participate from the earliest stages.''

BLM believes its final rule properly allocates the NEPA responsibility. Under it, BLM retains responsibility for NEPA compliance in any deferral and the State and BLM may decide who will be the lead in any plan review process. Complying with NEPA remains a Federal responsibility although the Council on Environmental Quality may allow BLM and a State to coordinate the NEPA process. See 40 CFR 1501.5 and 1506.2. After review of the comments, BLM did not change the requirements in final § 3809.203. BLM agrees that any State findings need to be considered in the NEPA process. After review of the NRC Report recommendation, BLM

revised final § 3809.201 to recommend that Federal and State agreements should address NEPA to provide for effective cooperation in scoping, preparation, and review.

Final § 3809.203(b) clarifies that BLM will remain responsible for all land-use planning and for implementing other Federal laws relating to the public lands for which BLM is responsible.

Commenters stated that land-use planning on public lands could not be restricted by a State. Commenters also stated that BLM should not relinquish its obligations to balance the uses of the public lands and to determine if mining is an appropriate use of the land. BLM has not changed the final rule in response to these comments. The final rule involves no relinquishment by BLM of its land-use planning responsibilities.

Final § 3809.203(c) makes it clear that BLM may enforce the requirements of subpart 3809 or any term, condition, or limitation of a notice or an approved plan of operations, regardless of the nature of its agreement with a State, or actions taken by a State. The retention of such authority is made express to eliminate any question about whether BLM maintains enforcement jurisdiction where needed. BLM believes that by working cooperatively with States, however, enforcement protocols can be established under which many problems can be resolved through State or other Federal agency action, without the need for BLM enforcement.

A commenter stated that because State decisions also require BLM approval and that BLM may initiate independent enforcement, this provision allowing deferrals to States was largely meaningless. BLM disagrees with the comment. BLM concurrence on each plan and BLM enforcement authority does not make State deferrals meaningless. States may take the lead on the information gathering and analysis associated with each plan of operations and, as long as the State has a sound basis for determining that the requirements of this subpart have been met, BLM is not required to duplicate State efforts before concurring. Similarly, States may take the lead enforcement role for violations on public land and a State's effort may be sufficient to achieve compliance with this subpart without BLM having to exercise its enforcement authority.

Final § 3809.203(d) sets forth limits related to financial guarantees. BLM revised the proposal to include a requirement for BLM to concur with forfeiture of a financial guarantee. The proposed regulations addressed BLM concurrence only for approval and release. BLM concurrence for bond forfeiture was added because of our experience with recent forfeitures where there were bankruptcies, to ensure that BLM and the State maintain close coordination where such situations occur on the public lands. BLM believes the decision whether to declare a bond forfeiture on Federal land is a responsibility it should not delegate under FLPMA.

Final §§ 3809.203(e) and (f) relate to BLM oversight of Federal/State agreements and termination of such agreements. They are unchanged from the proposal.

Section 3809.204 Does This Subpart Cancel an Existing Agreement Between BLM and a State?

Final § 3809.204 describes the effect of the revised subpart 3809 on existing Federal/State agreements. It clarifies that promulgation of subpart 3809 does not cancel Federal/State agreements or memoranda of understanding (MOAS) in effect on the effective date of these rules. (An existing agreement may, however, be terminated at any time under its own terms—this rule does not preclude such action.) As was proposed, BLM and States will review existing agreements and MOAS to determine whether revisions will be required to comply with subpart 3809. The period for the review and any necessary revisions will be one year from the effective date of these rules. BLM and a State could use the review time to determine if the basic relationships in that State should remain or should be changed.

In the proposed rule preamble, BLM requested comments on whether one year would be sufficient time to review and revise existing agreements and MOAS. BLM received comments advocating several different options; this issue was also discussed with State representatives at a meeting BLM held with the States. Several comments indicated that one year was too short a period to review existing agreements and revise them if necessary.

BLM expects that most existing agreements will be successfully reviewed within the one-year time frame. BLM agrees, however, that in some instances a one-year review period may be too short. The final rule adds § 3809.204(b) to provide that the BLM State Director may extend the review period one year at a time for a second or third year if each extension is specifically requested by the State Governor or his or her delegate. At the end of the review period (and any extensions of that period), BLM will terminate existing agreements and MOAS if the review and any necessary revisions have not occurred.

In general, the new regulations will apply during the review period, except as specified in final § 3809.204(c). Final § 3809.204(c) was added to clarify how subpart 3809 applies during the review period in specific (and rare) situations where an existing agreement allows a State to administer portions of the program in a manner inconsistent with the new regulations. In most States, existing agreements provide for close coordination and avoidance of duplication with BLM, without any deferral by BLM. In those few situations where a State currently administers part of the previous rules, such as in Montana for bonding and in Colorado for notices, those specific parts of the program will be administered under the applicable section of the previous rules until the review is completed or the agreement is terminated. State administration refers to those situations where BLM has deferred its authority to the State and allows the State to be responsible for administering a specific part of the program, such as bonding on Federal lands.

Final § 3809.204(c) does not allow those portions which are currently administered by a State to continue past the deadlines in final § 3809.204(a) and (b); those specific parts must comply with subpart 3809 or be terminated. If a State wishes to continue to have BLM defer to State administration of portions of the program, the State must follow the procedures of final § 3809.202.

One commenter stated that there should be public review of existing Federal/State agreements; another commenter suggested that public review should be by State invitation only. These final rules do not provide for public review of existing agreements. If BLM and a State enter into a process to provide for BLM to defer to State administration of a portion of the regulations, then the procedures of section 3809.202 will be followed, including the opportunity for public participation.

Consistency With the NRC Report Recommendations

The regulations related to Federal/State agreements are not inconsistent with the NRC Report recommendations. The NRC Report provided recommendations on actions needed to coordinate Federal and State requirements and programs. The Report noted that memoranda of understanding are the links between the Federal and State agencies, but did not make any specific recommendations regarding the

content or requirements of such agreements.

The NRC Committee on Hardrock Mining on Federal Lands, which prepared the report, noted that strong Federal and State coordination is needed and such coordination can be used to supplement and complement the respective agency programs. Close Federal and State cooperation remains a major purpose of these final regulations. The regulations more clearly identify the roles and authorities of the BLM with respect to State agencies. Final §§ 3809.202 and 3809.203 provide the framework for a State to assume administration of part or all of the BLM program on public lands, consistent with FLPMA. Close Federal and State cooperation remains a major purpose of these regulations. The regulations also provide the opportunity to tailor agreements or memoranda of understanding to address various statewide conditions, and allow the BLM and the State to determine what will work best regarding site conditions in that State.

Although no one recommendation of the NRC Report addressed the contents of Federal/State agreements, the regulations do address the concerns identified in the NRC Report related to Federal/State coordination. BLM added a provision in section 3809.201(a) for BLM and the State to address effective NEPA coordination in any Federal and State agreement, in support of NRC Report Recommendation 10. Also, maintaining a Federal concurrence on each plan of operation is consistent with NRC Report Recommendation 9 because it will assure that NEPA will be used to evaluate each permitting decision. In addition, under the added language of section 3809.201(a), BLM expects that Federal/State agreements will address enforcement referrals, as suggested by NRC Report Recommendation 6.

General Comments Related to Federal and State Coordination

BLM received many comments on Federal and State coordination and agreements. Many of the same comments that were directed to Federal and State coordination and agreements were also applied to other sections of the regulations, such as performance standards and bonding.

General comments ranged widely, from recommending deleting these sections on Federal/State agreements to leaving the previous sections in place. Several commenters asserted that State laws are not strict enough to protect public lands; that BLM should maintain a baseline national program that applies to all States and that BLM should not abdicate its stewardship responsibilities by deferring programs to the States. On the other hand, many commenters asserted that State laws are effective in protecting the environment; Federal and State coordination is excellent and there is no need to change existing agreements. Several commenters asserted that the proposed regulations would create new conflicts with Federal and State relationships. State agencies and the Western Governor's Association questioned the need for new BLM regulations and changes to the existing Federal/State agreements.

General comments on the NRC Report, ''Hardrock Mining on Federal Lands'' also ranged widely. Commenters stated that the Report concluded that the existing Federal/State relationships work and need not be replaced by new BLM regulations. One commenter stated, ''The NRC Report also confirms that BLM should not tinker with the existing and successful Federal/State partnerships that govern hardrock mining on the public lands.'' Other commenters noted that many states already have requirements in place to address many of the regulatory gaps identified by the NRC Report. On the other hand, commenters stated that the study is ''unreasonable'' and contrary to Congressional direction.

BLM has considered these comments and, on balance, decided to continue the basis approach of the proposed rules. BLM is not abdicating its responsibilities under FLPMA. If a State wishes BLM to defer administration of certain portions of subpart 3809, the rules are designed to allow States to use State counterpart provisions which are functionally equivalent to the subpart 3809 rules. Where no deferral exists, the general nature of the Federal performance standards, including the absence of numeric standards in the Federal rules, will make it possible for both the Federal and State provisions to apply without major difficulty and for Federal and State partnerships to continue successfully.

BLM believes that its rules should contain comprehensive performance standards, as suggested in NRC Report Recommendation 9, and that the existence of particular provisions in State laws and regulations does not substitute for needed Federal regulatory provisions. Although the final rules contain a comprehensive set of performance standards to serve as a baseline for environmental protection, they are intended to be outcome based and general so that they will mesh easily with existing State standards which address the same topics. This will reduce the likelihood of conflicting standards, will foster Federal/State cooperation, and will allow continuation of existing Federal/State agreements and MOUs.

Whether or not the NRC Report met Congressional requirements is up to Congress to determine. We note, however, that the Congress has directed these final rules not be inconsistent with the NRC Report recommendations. BLM has reviewed the NRC Report, has included it in the administrative record, and has considered its contents carefully in preparing this final rule.

BLM received numerous comments related to adequacy of State programs and to duplication of effort between State programs and these regulations. Many comments addressed Federal and State programs and other parts of the regulations such as performance standards together.

Many commenters asserted that particular State programs were effective in protecting the environment and these programs prevented duplication of efforts. One commenter noted, ''all of the western states have detailed regulatory programs, covering environmental impacts and reclamation requirements. The Western states are on record in the context of the 3809 rule-making process that the existing regulatory system is working well.'' Most of the Western States' regulatory agencies and the Western Governor's Association provided extensive comments on these themes. There were several comments from State legislative and county commissioners and committees; one comment from the Nevada Legislature's committee on public lands supported the position of the Western Governor's Association that ''the current 3809 regulations are working well on the ground.'' In regard to the coordination between the State programs and BLM, most comments noted that relationships were good. One commenter in reference to BLM and the State mining regulatory agency said, ''Both agencies worked well together, developing a plan to protect and mitigate against environmental degradation by employing existing state and federal regulations.'' Another commenter noted that the proposed regulations would increase the overlap of jurisdiction and level of duplication. Several commenters recommended maximizing the States' roles. Many commenters questioned the need for changing the regulations and one commenter added ''where if it's not broke, don't fix it.''

There were also commenters who asserted that State surface mining laws are not strict enough to protect public lands and that strong Federal standards

are needed. A commenter noted that, ''the bulk of Western states have negligible environmental standards.'' One comment from the California legislative Senate Committee on Environmental Quality urged strengthening the existing 3809 regulations, rather than allow State governments to regulate mining activities on Federal lands. Several commenters pointed out deficiencies or shortcomings in certain State programs which were included in the proposed regulations. One commenter noted that States do not address Native American issues. Another commenter noted that their State mining regulatory law was very weak and every year the legislative attempts to reduce its funding. One commenter noted that several States do not have provisions for bonding of small exploration or mining operations of less than five acres. One commenter noted that certain States refrain from vigorously enforcing their own regulations.

The NRC Report identified specific national regulatory ''gaps,'' such as financial assurance for mining activities less than five acres and long-term post-closure management of mine sites on Federal lands. Not all States have such requirements and a consistent national baseline of requirements for public lands is needed by BLM, which manages hardrock mining on public lands from Alaska to Arizona.

This final rule is intended to modernize the 3809 regulations and correct their shortcomings, such as lack of bonding of all operations on the public lands. The need for the regulations has been established in many studies, reports, public meetings, and discussions since the rules were first adopted in 1980. One of the main goals of this effort is to ensure that FLPMA's purpose of preventing unnecessary or undue degradation is achieved, while minimizing duplication and promoting cooperation among regulatory agencies. BLM believes this final rule meets these objectives. These regulations provide a national baseline or floor of regulatory requirements, which in cooperation with the State programs should provide a sound and consistent foundation to assure the public that exploration and mining on the public lands are being properly managed to prevent unnecessary or undue degradation as required by Federal law. Additionally, these regulations also address the specific regulatory gaps identified by the NRC Report. Although many States have excellent mining regulatory programs, BLM must manage the public lands in a manner that satisfies the Federal responsibilities set forth in FLPMA.

Several commenters noted that the previous regulations provided that the BLM shall conduct a review of State laws and regulations related to unnecessary or undue degradation of lands disturbed by exploration or mining. The preamble to the previous regulations indicated that this review would occur in three years. Several commenters asserted that until the BLM completes this review and analyzes the State programs in the EIS and parts of the regulations the ''ability to rationally revise the 3809 regulations is fundamentally and fatally flawed.'' Several commenters also asserted that BLM did not provide for cooperation with State regulatory programs and did not consult with the States.

BLM acknowledges that a comprehensive, systematic review of all State laws did not take place prior to the start of the events leading to this rulemaking process. BLM has, however, coordinated extensively with State agencies and organizations, such as the Western Governor's Association, and has since reviewed each of the State programs for the States involved.

BLM disagrees with the comment that it was obligated to conduct a comprehensive, systematic review of all State laws before it could undertake this rulemaking. BLM has a lengthy and comprehensive administrative record that fully demonstrates a sufficient basis and purpose for the revisions. For example, in 1989, a BLM Mining Law Administration Program task force addressed significant issues in the Mining Law Program, including adequacy of standards, the 5-acre threshold and the State relationships regarding bonding. In 1991, BLM published an advance notice of proposed rulemaking for possible amendments to the 3809 regulations. Public discussions regarding the regulations and need for changes were held in several States. This initiative was put on hold by BLM because Congress was considering reform of the mining laws. Then on January 6, 1997, Secretary Babbitt directed BLM to restart this rulemaking and directed that, among other things, ''[c]oordination with State regulatory programs should be carefully addressed.'' During the rulemaking process, BLM held 19 public scoping meetings in 12 cities. BLM also met with State agencies and the Western Governor's Association many times, as well as with various State, county and local committees and commissions. Public hearings on the proposed regulations were held in thirteen States and the District of Columbia. The draft EIS also addressed the affected environments and programs of the States. Alternative 2 of the draft EIS analyzed deferral of exploration and mining on public lands to the States. BLM believes that it has adequate information regarding state laws and programs and that it has conducted an extensive coordination and outreach effort regarding the rulemaking.

Sections 3908.300 to 3809.336 Operations Conducted Under Notices

This portion of the final rule (§§ 3809.300 through 3809.336) governs operations conducted under notices. It is based primarily on previous § 3809.1–3. We use two tables: One covers applicability of this subpart to existing notice-level operations (See final § 3809.300.). This is a transition section to address notices in existence when this final rule becomes effective. The other table governs when an operator may begin operations after submitting a notice (See final § 3809.313.). For the sake of simplicity, we have not used a separate set of performance standards applicable only to notices. Instead, final § 3809.320 simply references the plan-level performance standards of final § 3809.420, where applicable. In many cases, some of the performance standards will not be applicable to notice-level operations. See the discussion of the performance standards of final § 3809.420 later in this preamble. Notices have two-year expiration dates, unless extended. This will significantly reduce the number of outstanding notices where operations have either never occurred or where reclamation has been completed to BLM's satisfaction, but the notice has not been formally closed by BLM.

Section 3809.300 Does This Subpart Apply to My Existing Notice-Level Operations?

Final § 3809.300 is in the form of a table that clarifies how this final rule applies to existing notice-level operations. We use tables here and elsewhere in this subpart to reduce complexity and to make it easier for the reader to understand the requirements of subpart 3809. This section allows operators identified in an existing notice already on file with BLM on the effective date of this final rule to continue operations for two years. After 2 years, the notice can be extended under final § 3809.333. New operators will have to conduct operations under subpart 3809. If a notice has expired, the operator will have to immediately reclaim the project area or promptly submit a new notice or plan of

operations under this subpart. Final § 3809.300(a) adds a statement that BLM may require a modification of an existing notice under § 3809.331(a)(1).

Final § 3809.300(c) contains new language about situations where an operator modifies an existing notice after the effective date of the final rule. Final § 3809.300(c)(1) specifies that if an operator modifies an existing notice after the effective date of the final rule, and the modified operations remain within the outline of the original acreage described in the notice, then operations may continue for 2 years after the effective date of the rule, or longer if the operator extends the notice under § 3809.333. The rule also explains that BLM may require an operator to modify the notice under § 3809.331(a)(1). The operator under a modified notice must also comply with the financial guarantee requirements of § 3809.503.

Final § 3809.300(c)(2) requires that operations on any additional acreage described in a modification to an existing notice be subject to the provisions of subpart 3809, including § 3809.11 and § 3809.21, and provides that BLM may require approval of a plan of operations before the additional surface disturbance may begin. For example, a plan of operations may be required if the additional acreage to be disturbed results in cumulative surface disturbance of greater than 5 acres under an exploration project.

Final § 3809.300(d) replaces proposed § 3809.300(c). The language has been modified to clarify that an operator with an expired notice must either submit a new notice under § 3809.301, submit a plan of operations under § 3809.401, whichever is applicable, or immediately commence reclamation of the project area.

One commenter suggested we clarify in § 3809.300(a) that all notices will expire after 2 years, and then the final rules will apply. We have modified final § 3809.300(a) to clarify that the intent of the section is to have all existing notices expire two years from the effective date of this final rule. The operator under an existing notice may extend the notice beyond two years, and this final rule may not necessarily apply to an existing notice that is extended. That is, under final §§ 3809.300(c), 3809.331(a), and 3809.333, an operator may extend an existing notice in two-year increments subject to the terms of the existing notice and the previous regulations if the operator doesn't make ''material changes'' to the operation. The term ''material changes'' is defined in final § 3809.331(a)(2).

Other commenters wanted BLM to delete both the two-year limitation in proposed § 3809.300(a) and all of proposed § 3809.300(b). In addition, some commenters felt the two-year term for notices was too short and wanted to have a five-year term for notices. These commenters asserted that a two-year term would require too frequent re-application for approval of notices and would be inconsistent with the NRC Report recommendations. We should point out that BLM reviews, but doesn't ''approve,'' notices. We disagree with the commenters' suggested deletions and assertion. The two-year term for notices in this final rule will bring notice-level operations that extend beyond the acreage covered by the original notice under the performance standards of this final rule (§ 3809.320) within a reasonable time frame. The NRC Report recommendation does not address the transition for existing notices. Under this final rule, it is being applied to all new mining and exploration.

Section 3809.301 Where Do I File My Notice and What Information Must I Include in It?

Final § 3809.301 lists notice-filing and content requirements. Two commenters suggested we use a tax identification number instead of a Social Security number in the operator information required under proposed § 3809.301(b)(1). We agree and have made that change in the final rule, as well as under final § 3809.401(b)(1). One commenter pointed out that notice-content requirements should not include the dates that operations will begin and when reclamation will be completed, since these are never exactly known. We agree and have changed final § 3809.301(b)(2)(iv) accordingly by asking for the expected dates that operations will commence and reclamation will be completed. We have also specified ''calendar'' days under final § 3809.301(d) for clarity.

A few commenters said they are not opposed to requiring bonding, a reclamation plan and reclamation cost estimate for notice-level operations as required in final § 3809.301(b)(3) and (b)(4). They believed that these safeguards are more than sufficient to prevent unnecessary or undue degradation to public lands.

Several commenters suggested adding a requirement [to proposed §§ 3809.301(b), 3809.312, and 3809.313] for an operator to advertise planned operations in a local newspaper, not commencing operations until 30 days after publication. This would allow the public to file written objections. A commenter suggested adding language to proposed § 3809.311 which would allow any person with an adversely affected interest to file written objections to a notice within 30 days of advertising planned operations. We did not adopt these comments since we believe they would not be consistent with NRC Report Recommendation 3 dealing with expeditious handling of exploration activities.

A few commenters said they should not have to provide a reclamation cost estimate under proposed § 3809.301(b)(4), since BLM would review and modify a reclamation plan in most cases. We do not agree with these comments and we have included the requirement in this final rule. The burden should be on the operator, who is the proponent of the activities requiring reclamation, to provide his or her best estimate of reclamation costs.

Section 3809.311 What Action Does BLM Take When It Receives My Notice?

Final § 3809.311 outlines actions BLM takes when it receives a notice. Based on numerous comments discussed in this preamble under final § 3809.21, we changed final § 3809.311(a) from 15 ''business'' days as proposed to ''calendar'' days from the time that we receive a notice to review it. Final § 3809.311(c) was changed to use 15 calendar days as well. If BLM determines that a submitted notice is incomplete, we will inform the operator of what additional information would be needed to comply with final § 3809.301. The 15-calendar-day review period commences upon BLM's receipt of each submittal (or re-submittal) of a notice. Where feasible, BLM will try to perform its review of the revised notice in a shorter time frame. We received final § 3809.311(c) to clarify that BLM's review of any additional information submitted by a prospective notice-level operator will continue until either the notice is complete or we determine that an operator may not proceed due to the inability to prevent unnecessary or undue degradation.

Several commenters wanted BLM to review notices for completeness in time frames ranging from 5 calendar days to 20 business days. We have not accepted this comment since we believe the 15-day calendar review period should include completeness review. If BLM staff determines that a notice is incomplete in less time, we will notify the operator as soon as possible. Another commenter asked us to clarify the standards BLM will use to see if a notice is complete under 3809.311(a). The standards for completeness are

listed in final § 3809.301, as stated in the final rule.

One State Game and Fish department commented that they would like to review proposals, regardless of acreage, where there is concern about fish and wildlife resources, or limited, high-value wildlife habitats such as riparian zones and wetland habitats. During the notice-review process, BLM will make every effort to coordinate with State regulators. Federal/State agreements described under final § 3809.200 could be used to create a mechanism for such coordination.

Section 3809.312 When May I Begin Operations After Filing a Complete Notice?

Consistent with the changes in the review period in other sections as compared to the proposed rule, and based on public comment, final § 3809.312 specifies that an operator will be able to commence operations 15 calendar days after BLM receives a complete notice from that operator and after the operator provides a financial guarantee that meets the requirements of subpart 3809. The operator may commence sooner if BLM informs the operator that it has completed its review and the financial guarantee requirements are met. This section also alerts the operator that operations may be subject to approval under 43 CFR part 3710, subpart 3715, which governs occupancy of public lands.

Several commenters indicated that BLM should be required to inform the operator when a notice is complete and operations can commence. Other commenters said that the final rule should require that BLM notify an operator that it has completed its notice review. These comments have not been incorporated in the final rule. The notice system is designed to allow an operator to commence operations unless BLM notifies the operator of BLM's concerns regarding compliance with this rule. A commenter suggested that new § 3809.312(e) be added that would notify operators that they may be subject to additional requirements imposed by State regulation, and that operators must be in compliance with such requirements before commencing operations. The comment was not adopted. This requirement is already covered under the definition of ''unnecessary or undue degradation'' in final § 3809.5. See also final § 3809.3. In addition, State law applies by its own terms. One commenter felt that the 15-business-day time frame proposed for notice review would not be realistic since an operator would be required to provide a financial guarantee before commencing operations. In practice, an operator must have a financial guarantee in place at least 15 days before, or soon after, filing a notice in order to commence operations 15 days after filing a notice.

One commenter believed that notice-level operations should not be required to furnish a financial guarantee, as required under proposed § 3809.312(c), if no cyanide or leaching is proposed. This comment has not been incorporated into the final rule. We believe it would be inconsistent with NRC Report Recommendation 1, and that financial guarantees are needed to assure the reclamation of any greater-than-negligible surface disturbance.

Section 3809.313 Under What Circumstances May I Not Begin Operations 15 Calendar Days After Filing My Notice?

Final § 3809.313 outlines, in table format, cases in which BLM may extend the time to process a notice. Consistent with the changes in the review period in other sections as compared to the proposed rule, final § 3809.313 specifies 15 calendar days rather than business days. We have added a statement to final § 3809.313(d) that BLM will notify the operator if the agency will not conduct an on-site visit within 15 calendar days of determining that a visit is necessary, including the reasons for the delay.

Several commenters believed that BLM would be able to extend the 15-business-day review period for a notice indefinitely under proposed § 3809.313 due to the ambiguous proposed language of that section. We have limited the amount of time BLM can extend its review under final § 3809.313(a) to an additional 15 calendar days. We believe this limitation, combined with use of calendar days instead of business days as in the proposed rule, will serve to expedite BLM's review. BLM acknowledges that the review period could be extended beyond 30 days under final § 3809.313(b), (c), and (d) until BLM concerns are satisfied.

Section 3809.320 Which Performance Standards Apply to My Notice-Level Operations?

Final § 3809.320 requires that notice-level operations meet all applicable performance standards listed in proposed § 3809.420. BLM is adopting this section as proposed. See the discussion of performance standards later in this preamble under § 3809.420.

Section 3809.330 May I Modify My Notice?

Final § 3809.330 clarifies that an operator may modify an existing notice to reflect proposed changes in operations. BLM is adopting this section as proposed. BLM will review the modification under the same time frames proposed in § 3809.311 and § 3809.313. This provision addresses confusion over whether a notice may be modified. The previous regulations were silent on this topic.

Two commenters stated that proposed § 3809.330 does not define how an incomplete notice modification impacts the existing notice. Final § 3809.330(b) specifies that modified notices will be handled under the procedures of final § 3809.311, which addresses incomplete notices.

Section 3809.331 Under What Conditions Must I Modify My Notice?

As proposed, final § 3809.331 requires an operator to modify a notice if BLM requires such modification to prevent unnecessary or undue degradation, or if the operator plans to make ''material changes'' in the operations. Where an operator plans to make material changes, the operator would have to submit the modification 15 calendar days before making the changes. While BLM is reviewing the modification, the operator could halt operations or continue operating under the existing (unmodified) notice. However, BLM could require an operator to proceed with modified operations before the 15-day period has elapsed to prevent unnecessary or undue degradation.

The proposal would have defined ''material changes'' as ''the addition of planned surface disturbance up to the threshold described in § 3809.11, undertaking new drilling or trenching activities, or changing reclamation.'' In response to a comment that this language was not clear, we changed the language in the final rule. Under final § 3809.331(a)(2), ''material changes'' are ''changes that disturb areas not described in the existing notice; change your reclamation plan; or result in impacts of a different kind, degree, or extent than those described in the existing notice.''

We received two comments stating that it was unclear how proposed § 3809.331(a)(1) would apply to private lands. Although BLM doesn't directly regulate activities on private lands, BLM is under a duty in FLPMA to manage the public lands to protect them from unnecessary or undue degradation, and in some cases this may require taking steps to protect the public lands from

impacts caused by activities on private lands.

Two commenters indicated that it was unclear how much time BLM would give an operator to comply with § 3809.331(a)(1) if BLM requires modification of a notice. The length of time that BLM requires to modify a notice will depend on site-specific conditions. The time requirements and the reasons for the modifications will be spelled out in an appealable decision letter sent to the operator from the BLM. A commenter indicated we should revise proposed § 3809.331(a)(1) to require documentation of unnecessary or undue degradation that BLM had found. Normal case processing in BLM includes documentation in case files of our findings. This ensures a good written record upon which the local BLM manager can base decisions and findings. The comment has not been incorporated into the final rule.

Section 3809.332 How Long Does My Notice Remain in Effect?

Final § 3809.332 provides for an effective period of 2 years for a notice, unless extended under § 3809.333 or unless the operator were to complete reclamation beforehand to the satisfaction of BLM, in which case BLM would notify an operator that the notice is terminated. An operator's obligation to meet all applicable performance standards, including reclamation, would not terminate until the operator has in fact satisfied the obligation. The word ''complete'' was added before ''notice'' in final § 3809.332 to ensure that only complete notices are ''grandfathered'' under subpart 3809.

Several commenters indicated that two years is a reasonable period for a notice to be effective, however, the responsibility for an operator to reclaim operations should be independent of the validity of the affected mining claim(s). We agree that reclamation responsibilities remain until reclamation is completed, regardless of the validity of mining claims within the project area. No change has been made in the final rule to reflect these comments.

We received several comments asserting that notices should expire in 4 to 5 years. BLM believes such changes are unwarranted. An operator may file an extension under final § 3809.333 to keep records current. Additional extensions are allowed. See preamble discussion under § 3809.333 below.

Several commenters stated that BLM has not demonstrated that an inability to clear expired notice records has resulted in unnecessary or undue degradation and that it would be inappropriate to clear records since reclamation may not be completed for a considerable time in the future at a project area. This provision remains in the final rule as it will help BLM clear its records of notices for which no activity has ever occurred on the ground. Reclamation obligations will continue for the operator until reclamation is completed as required, regardless of the disposition of the notice.

Section 3809.333 May I Extend My Notice, and, if So, How?

Final § 3809.333 contains a provision to allow notices to be extended beyond the 2-year effective period specified in final § 3809.332. This provision would accommodate notice-level operations that cannot be completed within 2 years. We received one comment asking that we clarify that notices would be extended only if there is an acceptable financial guarantee as provided under § 3809.503. We have incorporated a reference to § 3809.503 in this subsection of the final rule.

We received several comments regarding whether the 2-year time period is adequate for extension of notices. The comments ranged from agreeing that the 2-year time frame is adequate, to comments that it is too short. Others stated that notice renewals should not be required if operations do not change. We believe the 2-year period for notice extensions will be adequate since notices may be extended more than once with minimal additional paperwork.

One commenter wished us to indicate that the only reason a notice extension might not ensue is in the instance of noncompliance, and in that case, the operator would be notified by BLM. BLM declines to adopt the suggestion. Although BLM will notify operators in noncompliance of the reasons for the noncompliance and steps needed to correct it, the existence of the noncompliance will not automatically preclude extension of the notice.

One commenter suggested that language be added to § 3809.330(a) and to § 3809.333 that would require public notification for notice modifications and extensions respectively. We have not incorporated this comment in the final rule. We believe adding such public notification requirements would be inconsistent with NRC Report Recommendation 3 concerning the expeditious handling of notices.

Section 3809.334 What if I Temporarily Stop Conducting Operations Under a Notice?

Final § 3809.334 clarifies that during periods of temporary cessation, the operator must take all steps necessary to prevent unnecessary or undue degradation as well as maintain an adequate financial guarantee. BLM is adopting this section as proposed. BLM will require in writing that the operator take such steps if the agency determines that unnecessary or undue degradation would be likely to occur.

A State regulator commented and agreed with the need for interim site stabilization during temporary cessations of operations under proposed § 3809.334. Several commenters were concerned that BLM provide written documentation of any finding under proposed § 3809.334(b) that temporary cessation of operations will likely cause unnecessary or undue degradation. BLM's findings, on a case-by-case basis, will be spelled out in an appealable decision letter sent to the operator from the BLM.

One commenter asserted that proposed § 3809.334 would inadequately address unnecessary or undue degradation caused by improper storage and containment of hazardous materials and remediation of contaminated soils. BLM disagrees with the comment. The performance standards applicable under § 3809.320 as well as the continued requirement to prevent unnecessary or undue degradation adequately address these concerns.

Several commenters asked that the final rule define ''period of time'' as used in proposed § 3809.334(a) and ''extended period of non-operation'' as used in proposed § 3809.334(b)(2). We did not incorporate these comments into the final rule. Regardless of the ''period of time'' that passes, at all times, an operator must meet the requirements of final § 3809.334(a). BLM will take actions necessary to ensure the prevention of unnecessary or undue degradation. The term of an ''extended period of non-operation'' will be determined by BLM on a case-by-case basis, after considering the sensitivity of the resource values in the project area.

Section 3809.335 What Happens When My Notice Expires?

Final § 3809.335 describes what must occur when a notice expires and is not extended. BLM is adopting this section as proposed. The operator must cease operations, except reclamation, and promptly complete reclamation as described in the notice. The operator's responsibility to complete reclamation continues beyond notice expiration, until such responsibilities are satisfied. This provision helps address the problem of abandoned operations by

clearly establishing the operator's responsibilities.

One commenter suggested that a third option be added to proposed § 3809.335(a) which would allow an operator to provide written notice to BLM of the intent to extend the notice per § 3809.333. The commenter reasoned that if an operator misses the extension deadline, but intends to operate, he/she should not be forced to reclaim. Operators who face this situation would not be in compliance with § 3809.333, which requires they notify BLM in writing *on or before* the expiration date of their desire to conduct operations for 2 additional years. We wrote § 3809.333 in this way in order to avoid long periods of time after a notice expires for reclamation to be completed, and to prevent unnecessary or undue degradation from occurring. If a notice expires, § 3809.335(a) ensures that reclamation is promptly completed. If an operator inadvertently misses a notice-extension deadline, he/she must immediately submit a new notice and provide adequate financial guarantee as required under § 3809.301, then follow § 3809.312. Quick submittal of a new notice will ensure the prevention of unnecessary or undue degradation and continuity of operations. A complete, new notice must be submitted before BLM initiates forfeiture of the operator's existing financial guarantee.

Section 3809.336 What if I Abandon My Notice-Level Operations?

Final § 3809.336(a) describes what characteristics BLM uses to determine if it considers an operation to be abandoned. Final § 3809.336(b) specifies that BLM may, upon a determination that operations have been abandoned, initiate forfeiture of an operator's financial guarantee. BLM is adopting this section as proposed. BLM may complete reclamation if the financial guarantee is found to be inadequate, with the operator and all other responsible persons liable for the cost of reclamation.

Several commenters pointed out that since exploration is typically intermittent, notice-level operations may appear to be ''abandoned'' at some time during the two-year notice term. We have included criteria in final § 3809.336 that is designed to inform the public of indicators of abandonment. BLM will strive to contact operators in cases where it is not clear whether operations have been abandoned. Our major concerns are that unnecessary or undue degradation be prevented and that operators maintain public lands within the project area, including structures, in a safe and clean condition.

Other commenters suggested that we revise proposed § 3809.336(a) to require BLM to provide an appealable determination that the project area has been abandoned. Any written decision that BLM sends to an operator may be appealed as specified under final § 3809.800.

Sections 3809.400 through 3809.424 Operations Conducted Under Plans of Operations

Section 3809.400 Does This Subpart Apply to My Existing or Pending Plan of Operations?

Proposed § 3809.400 described how the new regulations would apply to existing and pending plans of operations. If an operator had an existing approved plan of operation before the effective date of the regulations, then the operations would not be subject to the new performance standards. If the plan of operations was pending (not yet approved) then BLM proposed a distinction on how the new regulations would be applied based upon how much NEPA documentation had been completed. If an environmental assessment (EA) or EIS had been released, the plan content and performance standards did not apply. If an EA or draft EIS had not yet been released, then all portions of the final regulations would have applied to the plan of operations.

BLM received considerable comments expressing concern that release of the EA or draft EIS was not an appropriate threshold. The concern was that by the time of document release the operator had invested considerable time and resources in the development of a plan of operations. There was also concern that plans of operations just days away from release of the NEPA documents to the public would be caught with having to go back and redesign plans to meet the new performance standard and supply additional information to meet the content requirements. Furthermore, the operator had no control over when BLM would release the NEPA document and should not be punished for actions beyond its control. It was suggested that instead BLM chose a simpler cutoff for existing and pending plans of operations. It was suggested that if the plan of operations had been submitted to BLM before the effective date of the regulations, it would fall under the existing 3809 regulations for plan content and performance standards.

BLM was persuaded by these comments and has changed final § 3809.400 to provide that any plan of operations submitted prior to the effective date of the final regulations would be able to use the plan content requirements and performance standards in the previous regulations. All other provisions of the final regulations, such as the posting of financial assurances and penalties for noncompliance would still apply. BLM believes this is appropriate as it protects the investment operators have made in preparing their plans of operations and supporting NEPA documents, yet provides BLM with the financial assurance that reclamation will be completed and that enforcement actions can be taken to remedy any future noncompliance, should it occur. The revised text in § 3809.400 of the final regulations has been rewritten to reflect these changes in three paragraphs. The proposed table in this section has been deleted. Parallel changes have also been made in final § 3809.434 regarding pending modifications to plans of operations for new or existing mine facilities.

This section of the regulations dealing with existing and pending plans of operations is not inconsistent with the NRC Report recommendations. The NRC Report recommendations did not specifically address how existing operations should transition into any change in the regulations, but they did recommend that all operations on public lands provided adequate financial assurance and were subject to BLM enforcement authority. This section of the regulations meets those NRC Report objectives.

Section 3809.401 Where Do I File My Plan of Operations and What Information Must I Include With It?

Final § 3809.401 describes where a plan of operations has to be filed and what information it must contain. Final § 3809.401(a) states that the plan of operations must be filed in the local BLM office with jurisdiction over the land involved. This is an intentional change from the previous regulations which required the plan of operations to be filed in the BLM District Office with jurisdiction over the lands involved. BLM has reorganized, and in some areas there are no longer three tiers of administration with a District Office. The intent of the regulations is to now make sure the plan of operations is filed in the local BLM field office responsible for day-to-day management of the lands involved.

No detailed comments were received on this paragraph of the regulations. Part of the following paragraph (proposed § 3809.401(b)) has been

moved into final paragraph (a) for purposes of clarity as explained below.

Final § 3809.401(a) is not inconsistent with the recommendations of the NRC Report. The NRC Report did not address where a plan of operations should be filed. The NRC Report did recommend that a more timely permitting process be developed. By not requiring the plan of operations to be on a particular form, BLM saves operators time and resources by allowing them to provide copies of information they may already have assembled to meet other agencies' filing requirements.

Section 3809.401(b)

This section of the regulations lists all the content requirements for a complete plan of operations. The section is broken into five major paragraphs covering: operator information, description of operations, reclamation plan, monitoring plan, and the interim management plan.

A plan of operations is not considered complete until the information required under final § 3809.401(b) has been provided in enough detail for BLM to determine that the plan of operations would prevent unnecessary or undue degradation. The language on the demonstration in proposed paragraph (b) has been moved to final paragraph (a) because it is not a content requirement but rather defines the end result of the plan review process.

There were many general comments on this section that said the content requirements were too detailed or were too open ended, and did not specify why BLM needed this level of detail. In response, BLM has revised the regulations to specify that the level of detail must be sufficient for BLM to determine that the plan of operations would prevent unnecessary or undue degradation. BLM has also deleted the word ''fully'' from the proposed paragraph and instead will have the level of detail be driven by the needs of the individual review process.

This approach is not inconsistent with the NRC Report or its recommendations which emphasized the variety of mining operations and environmental settings and contained a general caution against one-size-fits-all requirements.

Operator Information

The proposed regulations would have required the operator to supply basic identification information including, name, address, phone number, Social Security Number or corporate identification number, and the serial number of unpatented mining claims involved. The proposed regulations would also have required the operator, if a corporation, to designate a corporate point of contact, and to notify BLM within 30 days of any change in operator. BLM has adopted the proposed language with the changes described below.

Comments received on this paragraph questioned the legality and purpose in requiring the operator to supply a Social Security number. The purpose of the requirement is for the BLM to be able to definitively identify the operator responsible for the operation and reclamation of the site. The final provision has been changed to require a taxpayer identification number, as suggested by some commenters. A notice or plan of operations would not be considered complete without information sufficient to identify the responsible operator.

This requirement is not inconsistent with the NRC Report recommendations. While NRC did not specifically address operator identification, it did recommend that operators be held accountable for meeting the requirements of the regulations through improved enforcement provisions. The requirement that operators responsible for compliance be identifiable is not inconsistent with this recommendation.

Description of Operations and Reclamation

Final § 3809.401(b)(2) and (3) require the operator in a plan of operations to describe its proposed operating plans and associated reclamation plans. These sections of the regulations specify much of the information that many operators are providing today under the existing regulations. Items required include, where applicable; a description of the equipment, devices or practices that will be used; maps showing the location of mine facilities and activities; preliminary or conceptual designs and operating plans for processing facilities and waste containment facilities; water management plans, rock characterization and handling plans; quality assurance plans; spill contingency plans; a general schedule of operations from start through closure; plans for access roads and support services; drill-hole plugging plans; regrading and reshaping plans; mine reclamation plans including information on the practicality of mine pit backfilling; riparian and wildlife mitigation; topsoil handling and revegetation plans; plans for the isolation and control of toxic, acid-forming or other deleterious materials; plans for removal of support facilities; and plans for post-closure management. Again, this information is only required to the extent it is applicable to the operation. For example, a plan of operations for exploration drilling would not be required to provide information on mine pit reclamation since it would not involve the excavation of a pit.

Many commenters were concerned that the information required was too detailed and was not needed by BLM to meet its mission of preventing unnecessary or undue degradation—that operators would waste time and resources redesigning plans after the approval decision had been made. Other commenters were concerned that BLM was requiring the operator to provide a final plan of operations before the review process had even begun, and suggested that BLM should let the NEPA process decide what information was needed in the plan of operations. Several commenters stated that BLM should be able to require any information needed to evaluate the plan of operations. One commenter was concerned that BLM's use of ''preliminary designs'' indicated BLM would approve plans that were not final.

BLM has carefully considered these comments. BLM believes that the content requirements for plans of operations essentially put into regulation the process that is currently being implemented by most BLM field offices. By describing these in the regulations themselves, BLM intends to improve consistency among field offices and provide operators more precise information on what is expected in a plan of operations. The purpose of the information requirements is to obtain a plan of operations that describes what the operator proposes to do in enough detail for BLM to evaluate impacts and determine if it will prevent unnecessary or undue degradation. The required level of detail will vary greatly by both type of activity proposed and environmental resources in the project area. On large EIS-level projects scoping may actually start before a plan of operations is submitted, through discussion with BLM staff on the anticipated issues and level of details expected. A certain level of detail is needed to begin public scoping. In the initial plan submission it is up to the operator to determine what level of detail to include in the plan. BLM will then advise the operator if more detail is required, concurrent with conducting the scoping under NEPA. By conducting the NEPA issue identification process (scoping) concurrent with the plan completeness review, both BLM and the operator can identify the appropriate level of detail for the plan of operations

that addresses agency and public concerns.

In response to the comment on use of preliminary designs in plan review, it should be noted that many plans of operations are expected to present preliminary or conceptual designs for mine facilities that must eventually be highly engineered prior to construction. During plan review, BLM typically requests information about such facilities in order to ascertain location, size, general construction, operation, environmental safeguards, and reclamation. The level of detailed required is highly variable and site specific, but must be enough that the agency can evaluate whether the facility is not going to result in unnecessary or undue degradation of the public lands. An approved plan of operations allows for the mine facility to be constructed within the parameters outlined in such preliminary designs. Since the operator does not know what BLM's decision will be regarding plan approval, or conditions of approval, it may wait until the approval decision is issued before committing the often significant amount of resources necessary to prepare final detailed construction engineering drawings and specifications. For example, an operator may propose a tailings impoundment of a certain size and location, but the environmental analysis may evaluate several alternative locations or disposal methods. In this case, it may not be advisable for the operator to prepare final designs for an impoundment that may never be constructed. Once the preferred alternative is selected, the plan of operations approval decision could then require the operator to submit final approved engineering designs (and later ''as-built'' reports) in order to verify that the plan of operations, as approved, would be followed. Final § 3809.411(d)(2) had been added to clarify this process.

BLM has revised the final regulations to eliminate the word ''detailed'' from the proposed descriptions of operations and reclamation in order to let the issues of a specific plan of operations determine the appropriate level of detail. This does not mean the operator may not eventually be required to provide detailed information, just that it may not be immediately necessary to have such a level of detail in the initial plan of operations submitted for BLM review. Likewise, the term ''conceptual'' has been added to final § 3809.401(b)(2)(ii) to clarify that detailed final engineering designs are not required at the initial step in the review process. Under final § 3809.401(b)(3)(iii), an information requirement has been added on mine pit backfilling. This is in response to a discussion in the NRC Report suggesting that the advisability of requiring pit backfilling ought to be considered on a case-by-case basis. This information will allow BLM to consider pit backfilling on an individual basis, without being subject to a presumption that backfilling should occur.

Final § 3809.401(b)(3)(viii) has been edited to clarify that acid materials, as referred to in the proposed regulations, means acid-forming materials. Several commenters also questioned what was meant by ''deleterious materials.'' ''Deleterious material'' is material with the potential to cause deleterious effects if not handled properly. This could include material which generates contaminated leachate, is toxic to vegetation, and/or poses a threat to human health or wildlife. The term is broader and more inclusive than material with the potential to produce acid drainage.

Final § 3809.401(b)(3)(ix) has been edited to clarify that stabilization in place, rather than removal, may be appropriate for some facilities at reclamation. This is consistent with the definition of ''reclamation'' at final § 3809.5.

The plan of operations content requirements related to the operating and reclamation phases of an operation are not inconsistent with NRC Report recommendations. NRC Report Recommendation 9 encourages BLM to continue to base permitting decisions on the site-specific evaluation process provided by NEPA. The process set out in the final rule does just that. Also, the NRC Report recommendation for a more timely permitting process would be facilitated by providing prospective operators with a comprehensive list of requirements that may be applicable to their operations. While many of these requirements are not new, they have not been clearly articulated under the existing regulations. The final regulations would help operators put together a plan of operations that would allow BLM to initiate a substantive evaluation earlier than is presently occurring.

Monitoring Plan

Final § 3809.401(b)(4) requires operators to provide monitoring plans as part of the plan of operations. Monitoring plans must meet the following objectives: demonstrate compliance with the approved plan of operations and other Federal or State environmental laws and regulations, provide early detection of potential problems, and supply information that will assist in directing corrective actions should they become necessary. Where applicable, the operator must include in monitoring plans details on type and location of monitoring devices, sampling parameters and frequency, analytical methods, reporting procedures, and procedures to respond to adverse monitoring results.

Many commenters were concerned that monitoring plans could not be developed until after the plan of operations was approved and facility locations and outfalls were known. Other commenters felt that monitoring plans would duplicate or conflict with similar State or other Federal monitoring requirements.

In response, BLM anticipates that certain portions of the plan of operations may change as a result of the NEPA review process, including monitoring programs. However, BLM requires information on all aspects of the plan of operations, including monitoring programs, to determine whether they will prevent unnecessary or undue degradation. This means basic information is required up front on what resources will be monitored where and how, and what corrective measures would be triggered by what monitoring results. The purpose of the NEPA process is to identify shortcomings in such plans and develop corrective measures (mitigation) in those plans. BLM does not agree that development of monitoring programs should be deferred until after the plan of operations has been through NEPA analysis. A monitoring program, tied to corrective action triggers, can serve to mitigate many environmental impact concerns and should be developed simultaneously with the plan of operations. BLM acknowledges that many existing State or Federal monitoring programs, where present, would satisfy most monitoring needs. The final regulation text has been revised to make it clear that monitoring plans should incorporate existing State or other Federal monitoring requirements to avoid duplication.

Other commenters were concerned that by requiring monitoring the BLM was attempting to regulate resources such as water quality and air quality that have not been delegated to BLM. States or other Federal agencies regulate water quality and air quality by establishing discharge limits and monitoring them to determine compliance with set numeric levels. BLM is not attempting to duplicate these regulatory programs under this subpart, but BLM is required to regulate mining activity under FLPMA to prevent unnecessary or undue

degradation of all resources of the public lands, including those protected by other authorities. In order to evaluate the impact of mining operations, and the effectiveness of mitigation in preventing unnecessary or undue degradation, it is important to have the information that monitoring provides. Requiring monitoring plans under this subpart does not give BLM any additional authority beyond what it already has under FLPMA to prevent unnecessary or undue degradation, but rather allows BLM to ensure operations are following the approved plan and to identify the need for any modifications should problems develop.

Finally, independent of the provisions of this subpart, BLM must ensure that its actions (both direct activities and activities it authorizes) comply with all applicable Federal, State, tribal and local air quality laws, statutes, regulations, standards, and implementation plans. See the pertinent portions of FLPMA, 43 U.S.C. 1712(c)(8), 1732(c), and 1765(a)(iii), and the Clean Air Act, 42 U.S.C. 7418(a) and 7506(c). Therefore, BLM may conduct, or require authorized users to conduct, appropriate air quality monitoring to demonstrate such compliance.

The monitoring requirements in the final regulations are not inconsistent with the NRC Report recommendations. NRC did not make any recommendations to limit monitoring, and in fact acknowledged that continued monitoring after mine closure would be necessary and may need to include monitoring of surface and groundwater.

Interim Management Plans

New § 3809.401(b)(5) has been added to the final regulations. We added this section in response to NRC Report Recommendation 5, which says that BLM should require interim management plans for periods of temporary closure. This provision of the final regulations is not inconsistent with other NRC Report recommendations. This paragraph requires operators to provide plans for the interim management of the project area during periods of temporary closure. The new text requires that interim management plans include, where applicable: measures to stabilize excavations and workings; measures to isolate or control toxic or deleterious materials; provisions for the storage or removal of equipment, supplies and structures; measures to maintain the project area in a safe and clean condition; plans for monitoring site conditions during periods of non-operation; and a schedule of anticipated periods of temporary closure during which the operator would implement the interim management plan, including provisions for notifying BLM of unplanned or extended temporary closures.

Some commenters did not see the need for an interim management plan in each plan of operations because it would be a significant burden on the operator, and it was only speculative that an operation may be suspended. It was also commented that an interim management plan prepared as part of the plan of operations probably wouldn't be adequate to address the environmental concerns at some future temporary closure.

BLM believes that interim management plans do not pose a significant burden to operators if prepared as part of the plan of operations. An operator, in planning to mine, should also be able to plan under what conditions they might temporarily not mine, and how they would manage the site to prevent unnecessary or undue degradation during the temporary closure. If conditions change at temporary closure, the interim management plan can be modified to address the new conditions or circumstances.

BLM considered requiring interim management plans to be submitted only upon temporary closure, but concluded that preparing and processing an interim management plan as a modification under § 3809.431 would impose a greater burden than if it was done as part of the initial plan of operations. In addition, deferring preparation of interim management plans until a temporary closure was imminent would not provide the up front planning needed to consider the issues associated with temporary or seasonal closures. Final § 3809.424(a) has also been revised to require operators to follow the interim management plan if they stop conducting operations and to modify the interim management plan if it does not cover the circumstances of the temporary closure.

Section 3809.401(c)

Final § 3809.401(c) says that BLM may require the operator to provide operational or baseline environmental information needed by BLM to conduct the environmental analysis as required by NEPA. This is a separate requirement from the information needed under final § 3809.401(b) to have a complete plan of operations. Presently, many operators are already providing information needed to support the NEPA analysis, and this regulation would formalize that arrangement. For other operators, especially those who could file a notice under the previous regulations, this would represent a significant burden, but BLM believes it is appropriate for the operator to be responsible for providing this information to have their proposed plan of operations be favorably acted upon.

Many commenters were concerned with one aspect of this provision, that the information provided could include that applicable to private as well as public lands. Some commented that the requirement suggests BLM intends to regulate non-public lands. Others were concerned BLM was using NEPA authority to regulate mining when it should be used as an analysis and disclosure process.

Final § 3809.2(d), discussed earlier in this preamble, has been added to make clear that BLM is not intending to exercise regulatory authority over private lands. However, NEPA requires that any environmental analysis conducted under that statute describe the environmental effects on all lands, regardless of ownership, that would result from the BLM approval action for the public lands portion of a project. BLM agrees that NEPA is a procedural statute that does not set substantive requirements operators must achieve. However, the NEPA regulations do require BLM to describe impacts to all resources, including those over which BLM may not have regulatory authority, or for which BLM shares regulatory authority with other agencies and to address mitigating measures for those impacts.

Several commenters were concerned about the substantial additional burden that the information requirements would pose for many mine operators, but then stated that the information was being collected anyway to meet State or other Federal requirements and was duplicative. BLM agrees with the comments that much of the information is already being collected by the operator; therefore we don't agree that it constitutes a substantial additional burden for the operators of large mines.

Another commenter suggested that the quality and quantity of baseline studies should be determined in the NEPA scoping process, and that as written, this requirement to supply information is an open-ended invitation for uneven or arbitrary and capricious action by BLM to request data that it thinks would be ''nice to have,'' and that BLM should not pass on the cost of ''basic inventory'' or ''nice to have'' data to an owner/operator unless the owner/operator is given financial credit equal to the cost of the data collection.

BLM does not believe that final § 3809.401(c) provides an open-ended request for ''nice to have data.'' The provision specifically links baseline data needs to the NEPA process. Scoping, as part of the NEPA process, would be used to identify issues associated with the operator's proposal and to determine the baseline data needs. This would serve to keep the data requirements tied to the issues identified for the individual plan of operations under consideration. That is also the reason BLM has not required set minimum amounts or durations of data collection as suggested by some commenters.

Requiring baseline operational and resource information under final § 3809 401(c) is not inconsistent with NRC Report recommendations. To the contrary, we believe it may facilitate the implementation of NRC Report Recommendation 9 regarding use of the NEPA evaluation process, NRC Report Recommendation 10 regarding early interagency NEPA coordination, NRC Report Recommendation 14 regarding long-term post-closure site management, and NRC Report Recommendation 16 regarding a more timely permitting process. Early communication with the operator on information collection needs will result in a more efficient permitting process.

Section 3809.401(d)

Final § 3809.401(d) says that at a time specified by BLM, the operator must submit an estimate of the cost to fully reclaim the operations as required by § 3809.552. This section was made separate from the completeness requirements for a plan of operations because it does not make sense for the operator to provide this information until the final reclamation plan is known with some certainty.

BLM received several comments on this section that stated BLM should be required to set a specific time limit on how long BLM will have to review the reclamation cost estimate and a time line for the operator so he knows when the cost estimate is due.

In response, we have added language to final § 3809.401(d) to the effect that BLM will review the cost estimate and notify the operator either of any deficiencies or additional information needed or that we have determined the final amount on which the financial assurance is based. We did not set a specific time limit on how long we have to review the information because of the variability of the plan approval process. For example, some of the reclamation costs are based on mitigation measures developed through the NEPA process, which may be far from complete when the operator submits the estimate.

A reclamation cost estimate can represent a significant amount of time and engineering resources. BLM believes operators should prepare the cost estimate when the plan of operations review process is nearly finished, not at the time the operator submits the initial proposed plan of operations. This way changes to the reclamation plan resulting from the NEPA analysis can be incorporated into the cost estimate, saving the operator resources.

This section of the regulations is not inconsistent with NRC Report recommendations. The first recommendation in the NRC Report was to require financial assurance for all disturbance greater than casual use. The NRC went on to suggest the establishment of standard bond amounts for certain types of activities in certain terrain. The BLM agrees with the use of standard bond amounts for certain activities, but does not believe they should be included in the regulations. As long as the regulations require that bond amounts be adequate to cover all the reclamation costs, standardized bond calculation approaches that meet this objective can be developed in local policy and guidance documents where regional cost structures can be taken into account. Reclamation cost estimates can rely on BLM guidance documents, but may need to be modified to account for site-specific circumstances.

Section 3809.411 What Action Will BLM Take When It Receives My Plan of Operations?

Final § 3809.411 contains the review process BLM will follow when it receives a plan of operations. In general, the process involves reviewing the plan for completeness; conducting the necessary environmental analysis, interagency consultation and public review; making a determination on whether the plan would prevent unnecessary or undue degradation; identifying any changes in the plan that must be made to prevent unnecessary or undue degradation; and issuing a decision to either approve, approve as modified or not approve the plan of operations.

Comments on this section expressed concern with the time it would take to process a plan of operations. Commenters also expressed concern over the purpose and utility of a public review process specific to the financial guarantee amount, although some commenters endorsed the public review process for reclamation bonding. Other comments were concerned with the situations where the regulation states that BLM ''must disapprove'' a plan of operations, which, when coupled with the completeness requirements, they argued would create endless appeals. Comments were made regarding the difficulty of bonding for perpetual water treatment and that plans involving perpetual water treatment should be denied. Other commenters questioned what was meant by a complete plan of operations and by adequate baseline information. Specific comments follow:

A comment specifically asked on proposed § 3809.411(a), what BLM meant by the term ''complete.'' In response, a ''complete'' plan of operations is one that contains a complete description of the plan, using the applicable information content listed in § 3809.401(b), in enough detail that BLM can conduct a NEPA analysis on the plan and make a determination as to whether it would cause unnecessary or undue degradation.

One comment expressed serious concerns regarding delays in agency actions. The commenter stated that BLM's proposal would essentially eliminate the limited time deadlines which now exist in the current 3809 rules. After 18 years of experience, the commenter asserted, BLM should need less time to review plans, not more because, this commenter felt, delay in the permitting process is one of the most significant impediments to continued domestic mining investment and recent experiences with BLM approvals for plans of operations have shown increasingly longer periods of time to obtain approval of the plans. The commenter suggested that meaningful regulatory time frames for plan review should be specified, such as 90 days where only an environmental assessment is required, and 18 months where an environmental impact statement is prepared.

In response, BLM notes that even under the existing regulations it may not be possible to complete review of a non-EIS-level plan of operations within the suggested 90 days. Many of the time frames BLM must follow, and the delays sometimes encountered, are related to coordination with other agencies or with completing mandatory consultation processes which cannot be placed under preset time restrictions. While BLM has gained much experience in processing plans that has facilitated plan processing, to a considerable extent the efficiencies created by this experience has been offset by the fact that more technically complex issues, such as acid drainage, often require careful and comprehensive review, and by the additional coordination efforts

needed to interact with other agencies. BLM believes that under these circumstances the best way to expedite the process is for the final regulations to identify the information requirements for the operator, require BLM to provide the operator with a list of any deficiencies within 30 days, provide for interagency agreements with the States to reduce overlap, and to consult with operators early in the mine planning process on the required information and level of detail that would be needed to meet the requirements of the regulations.

Several commenters were concerned with proposed § 3809.411(c) which requires that ''BLM must disapprove, or withhold approval of, a plan of operations if it (1) does not meet the content requirements of 3809.401.'' They commented that there is no conceivable legal or policy reason why BLM would want its regulations to require that it ''must disapprove'' a plan. That language can only constrain the agency's discretion, and on appeal, IBLA's. One commenter stated that this proposed language, combined with the detailed plan content requirements, creates fertile ground for appeals by opponents to mining projects. On appeal, BLM may be required to defend not only the substance of its decision, but its decision on the completeness of every aspect of the plan of operations, including the level of detail of the project description and design, and the long list of plans required by proposed § 3809.401.

BLM has reworded the particular sentence of concern under final § 3809.411 to remove the ''must disapprove'' phrase, although it remains clear that BLM may still disapprove a plan of operations because it is incomplete. It should also be noted that a decision by BLM that a plan of operations is ''complete'' does not mean BLM has determined it is adequate to prevent unnecessary or undue degradation. A ''complete'' plan is only one where the operator has merely described their proposal in enough detail that BLM is able to analyze the plan to determine whether it would prevent unnecessary or undue degradation. It is only after the complete plan has been analyzed, and any additional mitigation developed that might be needed to prevent unnecessary or undue degradation, that BLM may issue an approval decision on the adequacy of the plan to prevent unnecessary or undue degradation. Upon appeal, the decision under review would be whether the plan of operations ''as approved'' will prevent unnecessary or undue degradation. BLM does not intend that its determination that a proposed plan of operations is complete is appealable to the Interior Board of Land Appeals. Only final decisions on whether plans are adequate to prevent unnecessary or undue degradation are appealable.

Another comment was that proposed § 3809.411 seemed to require compliance with all of the information requirements of proposed § 3809.401 before the plan is ''complete,'' and before the BLM can initiate the substantive review process, including NEPA review. The commenter questioned whether this was BLM's intent, for it requires the operator to submit documentation in a needless level of detail and requires BLM's employees to review plans and information that can be no more than hypothetical.

BLM wants operators to understand that it is their responsibility to provide a sufficient level of detail up-front to BLM on their proposed plan of operations so that the potential for unnecessary or undue degradation can be evaluated. The review process is ongoing and begins when the operator initially submits a plan of operations. However, lack of information on what the operator is proposing will only delay the review and approval process. BLM has added a mechanism in final § 3809.411(d)(2) which allows for the incorporation of additional levels of implementation detail that may result from review of the plan by BLM or by other agencies.

A comment was made on proposed § 3809.411(c)(2) which may require BLM to disapprove operations that are in an area segregated or withdrawn from the operation of the mining laws. The commenter felt that segregation is not enough to trigger disapproval of a plan of operations, that lands should be accessible under the mining laws until the formal FLPMA withdrawal process has been followed. And that to do anything different would violate FLPMA's congressional mandate.

BLM disagrees with this comment. FLPMA is clear that areas segregated from operation of the mining laws, in anticipation of a withdrawal, are legally not available for locatable mineral entry. The only mining activity that can be allowed in these areas are those associated with mineral discoveries made on valid mining claims prior to the segregation order and which therefore have prior existing rights. The final regulations at § 3809.411(d)(3)(ii) reference § 3809.100 which provides for a determination that the operator holds prior existing rights to mineral development over the segregation or withdrawal.

EPA commented that the proposed regulations should be changed to fully integrate the input from EPA and State environmental agencies prior to plan of operations approval. EPA stated that under current procedures, after a final EIS is issued, the mining company submits its draft operating plan to BLM for approval. There is no formal requirement that BLM secure certification from State environmental agencies or the EPA that all applicable environmental permits have been secured prior to plan approval. Such a process would assure that the mining companies have met with and secured the entire range of permits needed to comply with environmental regulations.

The EPA comment does not accurately reflect the current process. A proposed plan of operations is submitted prior to preparation of the EIS. It is this proposed plan that constitutes the proposed action of the NEPA document. As a result of NEPA review, the plan may be modified by conditions of approval needed to prevent unnecessary or undue degradation. We hope and expect that interagency agreements developed with the States under § 3809.201 would address coordination of State environmental permits with the plan of operations approval. Final § 3809.411(a)(3) has an added requirement that BLM consult with the States to ensure operations are consistent with State water quality standards. Final § 3809.411(d)(2) has been added to provide for the incorporation of other agency permits into the final plan of operations.

Commenters raised the issue that the BLM's approval of a plan of operations is a ''federal licence or permit'' and requires a Clean Water Act section 401 certification (or waiver of certification) from the State to be valid as long as a discharge is anticipated by the plan of operations.

BLM agrees with the comment, but does not need to amend subpart 3809 to comply with section 401 of the Clean Water Act. BLM will not approve a plan of operations under subpart 3809 until any necessary certification has been obtained by the operator or waived under section 401 of the Clean Water Act. A section 401 certification is required for any plan of operations where discharges into navigable waters are anticipated. BLM does not consider this a new requirement because 43 CFR 3715 already makes uses and occupancies under the mining laws subject to all necessary advance authorizations under the Clean Water

Act. See 43 CFR 3715.3–1(b) and 3715.5(b) and (c). If the State, interstate agency, or EPA, as the case may be, fails or refuses to act on a request for certification within six months after receipt of such request, the certification requirements will be considered waived. In such circumstances, BLM will follow EPA rules at 40 CFR 121.6(b) and notify the appropriate EPA Regional Administrator that there has been a failure of the State to act on the request for certification within a reasonable period of time after receipt of the request.

Several commenters asked how proposed § 3809.411(d), which requires BLM to accept public comment on the amount of financial guarantee and proposed § 3809.411(a)(4)(vi), which states BLM may not approve a plan of operations until it completes a review of such comments, would work. If the intent of this section is that BLM will respond to these comments as well, according to this comment, this should be stated in the regulations, but the commenters also noted that these requirements will add extensive time to the BLM review process and increase BLM's workload without increasing the effectiveness of BLM's surface management regulations. According to this comment, BLM and the States have expertise in setting financial assurance, and the public does not have the necessary knowledge or training to comment on financial guarantees prior to plan approval and is not likely able to add anything to that process. It was suggested that if public comments are believed to be appropriate, they should be solicited in the same manner and according to the same time frame applicable to other issues in the NEPA process.

In response, BLM has changed the proposed regulations to eliminate the specific public comment period on the financial guarantee amount. BLM believes soliciting comments on the merits of the operating and reclamation plans is more useful than obtaining comments strictly on the reclamation cost calculations, and is therefore requiring a mandatory 30-day minimum public comment period for all plans of operations. This comment period could, and typically would, be conducted as part of the NEPA process. Comments could also be provided at this time on the financial guarantee amounts, to the extent cost estimates are available during the comment period. In any event, financial guarantee information would still be available to the public so that they can comment on what BLM may require in the way of financial guarantees to ensure the public doesn't bear the cost of required reclamation. For example, the public may suggest mitigation measures that, if incorporated into the reclamation plan, would affect the financial guarantee amount. BLM will respond to comments made on the reclamation cost estimate at the same time and manner as they respond to comments made on the NEPA analysis of the plan of operations.

Commenters on proposed § 3809.411(c) were concerned that the section does not identify what options an applicant has if the plan of operation is denied or disapproved.

In response, this section has been modified and moved to final § 3809.411(d)(3). The BLM decision on the plan of operations would advise the operator of corrective actions that must be taken in order for the plan to be approved, or of the specific rationale behind a decision that the plan of operations could not be approved because it would cause unnecessary or undue degradation of the public lands, including substantial irreparable harm to significant resources that could not be mitigated. The BLM decision would also advise the operator of the appeals process if it disagreed with the decision and wanted to appeal it to the State Director or IBLA.

One commenter said that BLM has the authority to, and should, prevent all offsite impacts due to mining whether these impacts be caused by actual surface disturbance, wind blown pollution, mine dewatering, acid drainage, or anything else. Mining proponents should not be allowed to externalize their costs over hundreds of square miles of surrounding public lands (as occurs in northern Nevada due to dewatering drawdown). Onsite impacts should be limited to surface excavation and be totally reclaimed.

In response, BLM's authority is to take any action necessary to prevent unnecessary or undue degradation to public lands. This includes lands within and outside of the project area. However, it should be noted that impacts from mining operations and many other activities on public lands cannot be confined exclusively to the area of direct surface disturbance. Impacts to many resources transcend the direct disturbance boundary due to the nature of the effect. Visual impacts can often be seen for miles. Noise from operations can be heard a good distance from the project area. Wildlife may be displaced. Impacts to such resources as water and air will extend beyond the immediate disturbance due to the establishment of compliance points and mixing zones by other regulatory agencies. Due to the nature of mining, these situations will occur even with model operations that are in compliance with all applicable laws and regulations. The decision BLM must make upon plan review is to determine if the impacts would constitute unnecessary or undue degradation, and if so, decide what measures must be employed to prevent it from occurring.

Some comments expressed concern that BLM would be duplicating existing State and Federal programs and that this would have the effect of extending the time required for approval of plans of operations and permitting.

BLM is not trying to duplicate other Federal or State programs, but to incorporate their requirements into the review process to make it more comprehensive. This is not a substantial change from the current practice of working with the States or other Federal agencies on joint reviews. MOUs developed under the regulations that provide for the State to have the lead role may actually expedite the permitting process.

Several comments were concerned that proposed § 3809.411 takes away the 30-day response time the BLM has to reply to a miner's plan of operations. This could allow the BLM to delay action on a proposed plan and possibly cost the miner a whole season. The commenter stated that by removing the 30-day response time, the BLM has a new tool for stopping a proposed operation without the actual denial of a plan of operations. Comments were made that the present time frames by which BLM had to approve a non-EIS level plan of operations should be retained.

BLM does not believe mandatory time frames for the plan review and NEPA analysis can be realistically set due to the uncertainty associated with many mining technical issues and the need for interagency coordination and consultation. BLM has committed in final § 3809.411(a) to respond within 30 calendar days to an operator's proposed plan of operations as to the completeness of the plan. After a complete plan of operations is received and the environmental analysis prepared, there is a 30-day public comment period. BLM acknowledges it could take several months to review and approve even a mine plan where there do not appear to be any substantial resource conflicts. The operator should anticipate this review time and submit its proposed plan enough in advance that activity can begin when scheduled. It should also be noted that for seasonal activity, a plan of operations does not necessarily have to be filed with BLM every year. A single plan of operations

that describes the seasonal nature of the activity and the overall duration of the plan would be sufficient. For example, a plan could state that mining would occur from May 1st through September 1st every year for the next 5 years. Final § 3809.401(b)(5) has been added to the regulations to assist operators with development of interim management plans for plans of operations that involve seasonal activity.

EPA commented that it was concerned with the perpetuation of current procedures that do not promote cross-referencing between the final EIS and the operations plan. Past experience has shown that mining companies often change key design and operating features in the operations plan that were not noted (or were given little analysis) in the final EIS. Not linking the EIS process with the operations plan process allows the introduction of features that were not adequately evaluated or publicly disclosed and which could potentially increase environmentally risks at the site. EPA believes that the proposed regulations should include a process to ensure that major mine design features noted in the operations plan are fully evaluated in the final EIS. If there are significant changes in the mine plan after the final EIS is complete, a supplemental NEPA document should be prepared. Also, EPA suggests that the recommendations noted in the final EIS regarding mitigation measures be cross checked in the operations plan to assure that mitigation approaches committed to by BLM in the EIS process are included in the operations plan.

BLM believes the final regulations address the problems perceived by EPA. First, under the existing regulations, operators are required to follow their approved plans of operations. If an operator doesn't follow the approved plan of operations, it is a compliance problem, not a NEPA problem, and is best addressed through improved enforcement. The proposed regulations specifically provide that failure to follow the approved plan of operations constitutes unnecessary or undue degradation. Final § 3809.601(b) provides that BLM may order a suspension of operations for failure to comply with any provision of the plan of operations. Mitigating measures needed to prevent unnecessary or undue degradation, developed during the NEPA process, are required as conditions of approval. The final regulations at § 3809.411(d)(2) provide a mechanism to require the operator to incorporate these mitigating measures into the plan of operations. If operators want to change their operations they have to file a modification under final § 3809.431(a) and undergo a review and approval process similar to the initial plan of operations approval, including any necessary NEPA compliance.

One commenter repeatedly commented on various aspects of the proposed regulations that BLM needs to assure that the final regulations are consistently used in the same way by both BLM and the Forest Service.

The Forest Service has responsibility for surface management impacts of mining activities on National Forest Lands. BLM has developed the final regulations it believes best meet BLM management needs and are not inconsistent with the recommendations in the NRC Report.

One commenter was specifically concerned with the problems and inherent risks in estimating a bond for perpetual water treatment. The commenter stated that if the bond is insufficient to meet the costs of operating and maintaining the treatment facility, it will almost certainly be the public that is obligated to meet the deficit, or to bear the cost of degraded water quality if treatment is discontinued or degraded. There is also a potential burden on the mine operator in that if the amount bonded is overestimated, the profitability of the mine can be negatively affected. When bonds are established, an agency makes assumptions not only about the long-term replacement and operating costs of a treatment plant, but also about the average inflation over the period of time covered by the bond and the average return-on-investment the bond amount will generate over its lifetime. According to the commenter, as anyone who follows the financial markets knows too well, there is a considerable amount of instability and risk in both of these assumptions Typically, changing either the inflation rate or the rate for return-on-investment by a single percentage point will cause a huge change on the required bond amount. With a bond for perpetual treatment, ultimately the public bears the risk of these assumptions. In addition, predicting what costs might be, what other problems might arise, and whether the vehicle chosen to provide financial assurance all involved a considerable amount of uncertainty. Second, there is a risk that the financial vehicle used for the bond may not be available or viable when it is required for treatment. Financial institutions, and even government institutions, have a finite life. If these institutions change significantly, or fail, the potential for damage from water pollution is still there.

In response, BLM acknowledges the difficulty in calculating an adequate financial guarantee for long-term, continual, or perpetual water treatment. A sufficient margin of safety for the public and the environment must be built into the cost assumptions, even though that may increase the financial guarantee amount and add to the operator's cost. That is a problem inherent in proposing an operation in an area that requires perpetual water treatment to prevent unnecessary or undue degradation. It would then be up to the operator to decide whether to proceed with the project in view of the significant financial guarantee that would have to be provided. In BLM's view, the alternative of not acknowledging that long-term water treatment is a possibility, and bonding accordingly, presents even greater public risks given the low reliability of present predictive modeling techniques.

Additional comments on long-term water treatment urged that the best policy is to deny any application for a mine that includes a requirement for long-term water treatment. The commenters asserted that the long-term risk to the public, who is the ultimate guarantor for any long-term cleanup, is too great, and that by doing so, BLM would be best able to ''assure long-term post-closure management of mines sites on federal lands'' as stated by NRC Report Recommendation 14. This commenter also asserted that it is possible to design most mines to preclude conditions that will require long-term water treatment by using operating and reclamation procedures to minimize the contamination of water. Commenters also asserted that if it is not possible to design preventative measures into the mine, then the mine should not be permitted to open.

BLM did consider an alternative that would not approve plans of operations that involved long-term or perpetual water treatment. BLM decided that it is difficult at best to accurately assess the post-closure treatment needs of a mine up front, which could be decades before actual closure would take place. BLM was concerned that adopting such a restriction might, paradoxically, result in less analysis and disclosure by the proposed operator of information relevant to potential water quality impacts, and lead operators to be over optimistic about, and place greater reliance than may be warranted by the facts on, source control measures. BLM agrees that mine design and operation should focus on pollution prevention measures, and the regulations are written to stress this preference. Similarly, the use of some treatment

systems is desirable even in cases where pollution prevention measures have reduced contaminant loads significantly. BLM did not want to rule out the use of combined pollution prevention techniques such as source control with treatment programs. This is a difficult issue and is, in our judgment, a close call, but ultimately BLM believes that site-specific factors should drive the decision on the acceptability of perpetual treatment both in terms of its ability to prevent unnecessary or undue degradation under the new definition which considers significant irreparable harm, and its potential cost to the operator in terms of the financial assurance that will be required to operate these systems in perpetuity.

Several comments were received on the regulations regarding how the recent Solicitor's Opinion on millsite acreage limits may impact plan of operations approval. Some commenters objected that the 3809 regulations might be used where there was mine waste placement in excess of the millsite acreage limits in the mining laws as explained in that opinion. Other commenters endorsed the relationship presented in the proposed regulations, stating that the millsite ratio was immaterial to the review and approval of a plan of operations. These commenters also argued that if BLM intends a change in these principles from the proposed regulations, it cannot make such changes in a final 3809 rule without having to re-propose its 3809 proposal, because no alternative to the existing system for establishing one's land and claim position is studied in the EIS or noticed for comment, nor is even the idea of such a change in the regime for operating a hardrock mine on BLM lands noticed for comment.

The final rules are consistent with the February 9, 1999, proposed rule. Under these final rules, BLM will not disapprove plans of operations based on the ratio of mill site acres to the number of mining claims. The 3809 regulations govern the surface management of operations conducted under the mining laws, and are intended to assure that operations do not result in unnecessary or undue degradation. Under the mining laws, operations may be conducted on lands without valid mining claims or mill sites, as long as such lands are open under the mining laws. It must be clearly understood, however, that persons who conduct operations on lands without valid claims or mill sites do not have the same rights associated with valid claims or sites. This means that BLM's decision whether to approve such activities under section 302(b) of FLPMA, 43 U.S.C. 1732(b) is not constrained or limited by whatever rights a mining claimant or mill site locator may have, and thus is of a somewhat different and more discretionary character than its decision where properly located and maintained mining claims are involved. For example, an operator doesn't have a properly located or perfected mill site would not be able to rely upon a property right under the mining laws to place a tailings pile on unclaimed land. Such situations will be evaluated on a case-by-case basis in accordance with BLM policy.

Some commenters stated that the issue of land manager discretion must be made clear in order to meet FLPMA standards and that BLM needs the authority to consider other competing resource values and also the history of mining companies. Bad environmental records should lead to denial of permits to some companies. To protect public lands, land managers should have the right and be expected to weigh other uses and be able to deny mining proposals, including operations that would cause unnecessary or undue degradation. The commenters suggested that the final regulations need to provide land managers with discretion to deny mining permits for these reasons. Commenters also stated that small mines must not be exempt from FLPMA standards.

Final § 3809.411(d)(3) provides that BLM may deny a plan of operations that would result in unnecessary or undue degradation, or revoke a plan of operations under final § 3809.602 for failure to comply with an enforcement order or where there is a pattern of violations. The regulations can't provide total discretion to land managers in making decisions on proposed operations involving properly located and maintained mining claims because of the rights these claimants may have under the mining laws. The regulations do provide for denial of a plan of operations if BLM determines the plan of operations would cause unnecessary or undue degradation. This includes creating substantial irreparable harm to significant resources that cannot be effectively mitigated. Small operators have never been exempt from the FLPMA standard to prevent unnecessary or undue degradation.

Changes have been made in final § 3809.411 for organizational purposes, editorial purposes, and to change procedural requirements for plan review and approval.

Final § 3809.411(a) has been changed to 30 calendar days from business days for the initial plan of operations review. Proposed § 3809.411(a)(3) has been deleted because BLM will not be able to approve a plan within 30 days due to the addition of a minimum 30-day public comment period for each plan of operations prior to approval.

In final § 3809.411(a)(3)(iii), we have added a reference to the Magnuson-Stevens Fishery Conservation and Management Act, under which BLM may also have to conduct consultation. On October 11, 1996, the Sustainable Fisheries Act (Pub. L. 104–297, 16 U.S.C. 1801 *et seq.*) became law which, among other things, amended the habitat provisions of the Magnuson Act. The re-named Magnuson-Stevens Act calls for direct action to stop or reverse the continued loss of fish habitat. Toward this end, Congress mandated the identification of habitat essential to managed species and measures to conserve and enhance this habitat. The Act requires Federal agencies to consult with the Secretary of Commerce regarding any activity, or proposed activity, authorized, funded, or undertaken by the agency that may adversely affect essential fish habitat. The National Marine Fisheries Service has promulgated regulations to carry out the Magnuson-Stevens Act. The regulations governing Federal agency consultation are found in 50 CFR 600.920. This change makes it clear that these pre-existing statutory and regulatory requirements apply to operations on Federal lands under the mining laws.

On BLM managed public lands, ''essential fish habitat'' refers to those waters and substrate necessary to salmon for spawning, breeding, feeding, or growth to maturity. For the purpose of interpreting the definition of ''essential fish habitat'': ''waters'' includes aquatic areas and their associated physical, chemical, and biological properties that are used by salmon and may include aquatic areas historically used by salmon where appropriate; ''substrate'' includes sediment, hard bottom, structures underlying the waters, and associated biological communities; ''necessary'' means the habitat required to support a sustainable fishery and the managed species' contribution to a healthy ecosystem; and ''spawning, breeding, feeding, or growth to maturity'' covers a species' full life cycle. See 62 FR 66531, Dec. 19, 1997.

Final § 3809.411(a)(3)(vi) replaces the BLM review of public comments on the amount of the financial guarantee with a review of public comments on the plan of operations itself consistent with final § 3809.411(d).

BLM has added final § 3809.411(a)(3)(ix) to the final

regulations. This provision provides for BLM to complete consultation with the State when needed to make sure that the plan of operations approved by BLM will be consistent with State water quality standards. This allows for measures need to meet applicable water quality standards to be incorporated into the plan of operations, limiting the need for later modification to the plan of operations.

BLM has replaced proposed § 3809.411(d) with final § 3809.411(c). This paragraph replaces the requirement for public review on the amount of the financial assurance with a 30-day minimum public review period on the plan of operations. BLM believes soliciting comments on the merits of the operating and reclamation plans are more useful than obtaining comments strictly on the reclamation cost calculations themselves. BLM intends that the comment period can be conducted as the public comment period on the NEPA document, either the EA or draft EIS, prepared for a specific plan of operations. Reclamation cost estimates, to the extent they are available, would be included in the NEPA documents, but would not be the focus of public review and would not be reviewed using a separate comment period. All reclamation cost calculations would still be available for public inspection. All comments received would be handled under the NEPA process.

Final § 3809.411(d) has been added to clarify the decisions BLM may make with regard to a plan of operations. BLM may approve the plan as submitted, approve it subject to modification to prevent unnecessary or undue degradation, or not approve it for the reasons listed in final § 3809.411(d)(3).

Aside from the organizational changes for purposes of clarity, two changes in this paragraph are substantial. The second sentence in final § 3809.411(d)(2) has been added which states: BLM may require an operator to incorporate into the plan of operations other agency permits, final approved engineering designs and plans, or other conditions of approval from the review of the plan of operations filed under § 3809.401(b). This additional sentence is to acknowledge that plans may be approved subject to the satisfactory completion of final design work, obtaining other necessary permits, or completion of specific mitigation plans or studies. The benefit of this provision for the operator is that it lets the operator preserve engineering and technical resources until the operating parameters have been set by the plan approval. The benefit to BLM and other agencies is that it requires the plan of operations to be updated upon completion of the review to incorporate all relevant agencies' requirements in a single comprehensive document.

The other substantial change is in final § 3809.411(d)(3)(iii) where it provides for BLM to disapprove a plan of operations that would result in unnecessary or undue degradation. We have added language to describe how BLM would document disapproval of a plan of operations that would cause unnecessary or undue degradation under paragraph (4) of the final definition of ''unnecessary or undue degradation'' in § 3809.5. The added text states that, ''If BLM disapproves your plan of operations based on paragraph (4) of the definition of 'unnecessary or undue degradation' in § 3809.5, BLM must include written findings supported by a record clearly demonstrating each element of paragraph (4) including that approval of the plan of operations would create irreparable harm; how the irreparable harm is substantial in extent or duration; that the resources substantially irreparably harmed constitute significant scientific, cultural, or environmental resources; and how mitigation would not be effective in reducing the level of harm below the substantial or irreparable threshold.'' Paragraph (4) of the definition of ''unnecessary or undue degradation'' states, in part, ''* * * conditions, activities, or practices that * * * result in substantial irreparable harm to significant scientific, cultural, or environmental resource values of the public lands that cannot be effectively mitigated.'' Any decision to deny the plan of operations must be supported by documentation showing how all four criteria have been met. It is BLM's intent that a plan of operations would be denied on this basis only in exceptional circumstances.

The final regulations in section 3809.411 are not inconsistent with the NRC conclusions and recommendations. We discussed earlier in this preamble how the paragraph (4) provision responds to the NRC Report recommendation that BLM clarify its authority to protect valuable resources that may not be protected by other laws. See the preamble to the definition of ''unnecessary or undue degradation.'' The NRC Report recommended that BLM plan for, and implement, a more timely permitting process, while still protecting the environment; and that BLM involve all agencies, Tribes, and non-governmental organizations in the earliest stages of the NEPA process. The requirements of final § 3809.411 and information description in final § 3809.401(b) establish a process where the operator is advised early as to the needed contents in the plan of operations, and the information required to support the NEPA analysis. This should facilitate plan review. The process will also provide for public comment on all plans of operations, and for consultation with the other State and Federal regulatory agencies, surface managing agencies, and Tribes. This early involvement by other parties, should they chose to participate, would reduce the potential for last minute surprises or delays in the approval process.

The NRC Report also recommended that BLM develop procedures that will enable the agency to identify during the plan of operations review process, the kinds of post-mining requirements that are likely to arise, and to incorporate these into the approved plan of operations. BLM has accomplished this in the final regulations by requiring: (1) In § 3809.401(b)(3) that plans of operations address post-closure management; (2) in § 3809.411(d)(2) the incorporation of other agency plans and permit requirements (including closure requirements), into the approved plan of operations; (3) in § 3809.420(a)(3) that operations comply with applicable land use plans; and (4) in § 3809.431(c) that plan modifications be submitted prior to mine closure to address unanticipated events, conditions or information.

Section 3809.412 When May I Operate Under a Plan of Operations?

Final § 3809.412 describes when an operator may conduct operations under a plan of operations. It lists two criteria: (1) BLM must have approved the plan of operations; and (2) the operator must have provided the required financial guarantee.

BLM has edited this section for clarity to remove the reference to the financial guarantee required under proposed § 3809.411(d) since that section merely requires an estimate of the guarantee amount. The reference has been replaced with one to final § 3809.551, which provides options for the financial guarantee instrument and associated requirements.

BLM received several comments on proposed § 3809.412 suggesting that BLM should notify the operator when the operator may begin operations.

When BLM issues a decision to the operator under final § 3809.411(d), notifying them of the approval of their plan of operations, BLM would also state in that decision when operations may begin. This notification would list any deficiencies that must be satisfied

prior to initiating operations. The purpose of final § 3809.412 is to advise the operator that under no circumstances may operations begin until the plan of operations has been approved and the financial guarantee provided. This section of the regulations explicitly precludes operators from conducting operations under a plan of operations without BLM approval and an adequate reclamation bond. This is not inconsistent with NRC Report Recommendation 1 that financial assurance should be required for the reclamation of all disturbances greater than casual use.

Section 3809.415 How Do I Prevent Unnecessary or Undue Degradation While Conducting Operations on Public Lands?

Final § 3809.415 lists the items operators must do to prevent unnecessary or undue degradation on public lands while conducting operations. It parallels the elements in the definition of ''unnecessary or undue degradation'' at final § 3809.5.

BLM received several comments on this section. One comment was that tying prevention of unnecessary or undue degradation in proposed § 3809.415(a) to complying with the terms and conditions of your approved plan of operations would open the door for BLM to prescribe any terms and conditions without being limited to the objective of preventing unnecessary or undue degradation. Another was that the rules should be crafted so that compliance with an approved plan of operations is sufficient to demonstrate compliance with any performance standards.

In response, as final § 3809.411(d) states, any terms or conditions BLM places on a plan of operations approval would be those needed to meet the performance standards in § 3809.420. Compliance with the performance standards is part of preventing unnecessary or undue degradation. However, while BLM intends that compliance with an approved plan of operations would be adequate to meet the performance standards, this may not always be the case. Conditions or circumstances that were not anticipated during initial plan approval may eventually occur, requiring that operations be modified in order to meet the performance standards and prevent unnecessary or undue degradation.

One comment asked BLM to (1) clarify what level of incremental activity they want to judge for unnecessary or undue degradation under proposed § 3809.415(b) and (2) change ''reasonably incident'' to ''logically incident''.

The requirement to prevent unnecessary or undue degradation applies to all levels of locatable mineral activity on public lands, casual use activities, notice-level activities and to plans of operations. All activities conducted under casual use, notices or plans must be reasonably incident to prospecting, mining, or processing operations. Activities that are not reasonably incident to these operations must be authorized under agency authorities other than the 3809 regulations. The term ''reasonably incident'' comes from Public Law 167, codified at 30 U.S.C. 612, and from the regulations at 43 CFR 3715. BLM needs to retain this term to maintain consistency with the applicable legal standards.

One comment expressed concern that proposed § 3809.415(c) did not include the White Mountains National Recreation Area. The commenter asserted that this is an example of the flawed character of the proposed regulations and illustrated a lack of consideration given to the special environmental conditions that apply in Alaska, the State with the largest amount of public and other Federal lands.

BLM provided the list in proposed § 3809.415(c) to present examples of areas where certain levels of protection are required by specific law or statute above the requirements in the 3809 regulations. It was not intended to be an exhaustive list of all areas where such requirements exist. The local BLM Field Offices are responsible for identifying such areas under their management when they administer the 3809 regulations. Operators are responsible for knowing if they are operating or proposing to operate in such areas.

The final regulations add § 3809.415(d) which says, ''You prevent unnecessary or undue degradation while conducting operations on public lands by * * * (d) Avoiding substantial irreparable harm to significant scientific, cultural, or environmental resource values of the public lands that cannot be effectively mitigated.'' This addition was made to parallel the change made in the definition of ''unnecessary or undue degradation'' with the addition of paragraph (4) in the final regulations at § 3809.5.

Final § 3809.415 is not inconsistent with the NRC Report recommendations. The report noted that the current regulatory definition of ''unnecessary or undue degradation'' does not explicitly provide authority to protect valuable or sensitive resources that are not protected by other laws, and the NRC recommended that BLM ''communicate the agency's authority to protect valuable resources that may not be protected by other laws.'' See the NRC Report at pp. 120–22; see also at p. 69. The NRC recommended that this be done through ''guidance materials'' and ''staff training,'' but we have decided it is more fair to the public and the regulated industry, and overall more effective, to communicate this through these regulations. The explicit listing of requirements that must be taken to prevent unnecessary or undue degradation in the final regulations will address the NRC concern with the previous definition.

Section 3809.420 What Performance Standards Apply to My Notice or Plan of Operations?

Final § 3809.420 explains which performance standards apply to a notice or plan of operations. The previous regulations at § 3809.2–2 provided general performance standards in areas such as performing reclamation and complying with all applicable State and Federal environmental requirements. Due to confusion in implementing this portion of the previous regulations in the field, BLM determined that additional performance standards (which are incorporating some policies that BLM had already put into effect without amending the earlier regulations) and a clearer explanation of the standards, would assist both operators and BLM in defining and preventing unnecessary or undue degradation.

BLM considered developing performance standards that would specify the design and operating requirements for exploration, mining and reclamation components. These requirements would serve as minimum national standards that would specify how all operations had to be designed, constructed, and operated. We decided this approach is impractical and inflexible given the range of environmental conditions on the public lands and the wide variety of exploration and mining activities and for inconsistency with the NRC Report.

The approach selected for final § 3809.420 is to focus on the outcome of accomplishments that the operator must achieve. These ''outcome-based'' performance standards put minimal emphasis on how the operator conducts the activity, so long as the desired outcome is met. This approach allows the operator maximum flexibility, encourages innovation, and fosters the development of low-cost solutions. In implementing final § 3809.420 BLM will

review each notice or proposed plan of operations to determine if it is reasonably likely to meet each outcome-based performance standard, but BLM won't require any specific design to be used. The approach we have selected is consistent with a recommendation in the NRC Report that BLM continue to use comprehensive performance-based standards rather than using rigid, technical prescriptive standards.

The NRC Report also suggested that some changes to the previous rules are warranted. The NRC emphasized that BLM as a land manager on the public's behalf stands in a different relationship to the land and its resources from other landowners and from regulators who focus on specific environmental media. The Federal land managers have a mandate to ensure long-term productivity of the land, protection of an array of uses and potential future uses, and management of the Federal estate for diverse objectives. This relationship means that the term ''regulator does not fully describe BLM and Forest Service responsibilities when dealing with mining activities on Federal lands. It also means that these agencies are not merely landholders. They are both landholders and regulators, with set statutory management standards. Further they must serve a constituency almost always described in national terms—''the nation's need,'' ''all Americans,'' ''future generations.'' NRC Report at p. 40. The NRC Report also noted that, in general, the presence of multiple regulatory programs helps to assure that large-scale mining on Federal lands is subject to substantial scrutiny.

The performance standards are divided into three groups: General Performance Standards, Environmental Performance Standards and Operational Performance Standards. This was done to distinguish the broad performance standards—such as concurrent reclamation and conformance to the applicable land use plan—from the environmental performance standards that are specific to certain media such as air and water; as well as from the operational performance standards which describe what operational components a project must achieve.

Proposed § 3809.420 was modified in response to comments; primarily to provide added flexibility to operators. Requirements to ''prevent'' the introduction of noxious weeds, and ''prevent'' erosion, siltation and air pollution were replaced with requirements to ''minimize'' these things. This was done in response to public comments that pointed out an operator cannot always prevent impacts from occurring. ''Minimize'' means to reduce the impact to the lowest practical level. During its review of plans of operations, BLM may determine that it is practical to avoid or eliminate particular impacts altogether.

BLM added the phrase ''where economically and technically feasible'' or the phrase ''where technically feasible'' to make it clear to BLM and operators when economic and/or technical feasibility would be considered in achieving certain performance standards. See, for example, final §§ 3809.420(b)(3)(ii) and 3809.420(b)(4)(ii).

To acknowledge the fact that some States delegate certain environmental requirements to local governments, we added language to say that where delegated by the States, operators must comply with local governments laws and requirements. We dropped the concept of Most Appropriate Technology and Practices from proposed §§ 3809.5 and 3809.420. Instead, in final § 3809.420(a)(1), we clarified that operators must utilize equipment, devices and practices that will meet the performance standards. We also added language ''to minimize impacts and facilitate reclamation'' to final § 3809.420(a)(2) to clarify the purpose of this requirement.

In our continued effort to clarify that BLM is not usurping the States authority to regulate water resources, BLM dropped the requirement from proposed § 3809.420(b)(2)(i)(B) Surface water to handle earth materials and water in a manner that minimizes the formation of acidic, toxic, or other deleterious pollutants of surface water systems'' and removed the same language from proposed § 3809.420(b)(2)(ii)(B) Groundwater. In addition, at both proposed § 3809.420(b)(2)(C), now final § 3809.420(b)(2)(B), and § 3809.420(b)(2)(ii)(B) Groundwater, we eliminated the words ''Manage excavations and other disturbances'' and inserted the words ''conduct operations'' in their place to clarify that all aspects of operations have to comply with these requirements.

A commenter asserted that BLM's regulatory authority under FLPMA does not extend to water quality or water quantity issues. The commenter reasoned as follows: FLPMA grants BLM the authority to prevent ''unnecessary or undue degradation of the public lands.'' Public lands under FLPMA must be owned by the United States and administered by BLM. The United States does not hold title to navigable waters, and thus, navigable waters generally are not included within the definition of public lands. Consequently, because the United States does not own the navigable waters lying within the States, BLM lacks the statutory authority to promulgate regulations under FLPMA managing the quality of such waters. The commenter stated that BLM's previous regulations correctly deferred water quality regulation to applicable environmental protection statutes and regulations. With regard to water quantity, the commenter stated that BLM has long recognized that it must defer to and comply with state water right laws with respect to matters of water use and allocation.

BLM disagrees in part with the comment. The final rules do not establish water quality standards. BLM does have the authority, however, to regulate operations conducted on public land to prevent unnecessary or undue degradation, and may appropriately give consideration given to the effects an operation may have on water quality and quantity. FLPMA, at section 102(a)(8), states in part that, ''the public lands be managed in a manner that will protect the quality of * * * water resource * * * values * * *'' 43 U.S.C. 1701(a)(8). In general, BLM relies on operator compliance with State or Federal water quality standards to meet this objective. BLM can also require operators to incorporate protective measures for water resources into their operating and reclamation plans.

BLM agrees that the 3809 regulations do not apply to operations on State land, such as on certain beds of waters that were navigable at statehood. But the legal rules for determining ownership of the beds of waterbodies are complex, and in many situations throughout the public lands, it has never been determined who owns the beds of particular waterbodies. For one thing, whether particular watercourses were in fact navigable at statehood has never been adjudicated. Furthermore, the U.S. not only generally owns the beds of waterbodies that were not navigable at statehood, but also owns the beds of waterbodies that were navigable at statehood, if the U.S. had reserved the lands for Federal purposes prior to statehood. See, for example, *United States* v. *Alaska* (521 U.S. 1, 117 S. Ct. 1888 (1997)). Finally, even where States do own the beds of navigable waters on public lands, operators usually must use public land above and adjacent to the high water mark as part of their operations. Such use is subject to the 3809 regulation and requires plan approval, which may be withheld unless the plan of operations includes measures necessary to protect the public lands from any activities conducted by

the operator. As to matters of water use and allocation, this final rule respects established systems of State law that allocate water rights.

A commenter stated that by focusing on ''degradation * * * of the public lands,'' Congress consciously tasked BLM with managing the surface impacts of mining and that Congress did not authorize BLM to regulate or limit the effects of mining on ground water, surface water, or other environmental media. The commenter asserted that Congress did not ignore the need for environmental protections on the public lands, but it empowered BLM to incorporate State and other Federal environmental laws into its regulatory program, which the commenter asserted is what BLM has done in the 20 years that the 3809 regulations have been on the books. The commenter concluded that in the proposed rule BLM is seeking to tread heavily in environmental areas Congress said were off limits.

BLM disagrees with the comment that unnecessary or undue degradation does not consider the effects of mining on ground water, surface water, or other environmental media. FLPMA section 102(a)(8) states in part that, ''the public lands be managed in a manner that will protect the quality of * * * ecological, * * * environmental, air, * * * [and] water resource * * * values * * *'' The FLPMA mandate to prevent unnecessary or undue degradation includes degradation of water resources or of any other resource located upon the public lands. BLM has the authority to regulate operations conducted on public land with consideration given to the effects an operation may have on any of these resources. In part, BLM relies on operator compliance with State or Federal media-specific standards and programs to meet this objective. However, BLM can also require operators to incorporate protective measures for environmental media into their operating and reclamation plans. Federal law requires BLM to ensure that its actions (both direct activities and authorized activities) comply with all applicable local, State, tribal and Federal air and water quality laws, regulations, standards and implementation plans. See FLPMA sections 202(c)(8), 302(c), and 505(a)(iii), Clean Air Act sections 118(a) and 176(c) and Clean Water Act section 313(a). Therefore, BLM may require operators to conduct operations to avoid or limit impacts to air and water resources or require them to conduct appropriate air and water quality monitoring to demonstrate compliance.

The final rules contain a revegetation performance standard, § 3809.420(b)(5), which required operators to use native species for revegetation when they are available and to the extent technically feasible. We added the ''when available'' language in recognition of the fact that at the present time, sources for seeds of native species cannot keep up with demand. When we use the term ''native species'' in this final rule, we mean to give the term the same definition of ''native species'' found in Executive Order 13112, entitled ''Invasive Species,'' dated February 3, 1999. Under the Executive Order and this final rule, ''native species'' means, with respect to a particular ecosystem, a species that, other than as a result of an introduction, historically occurred or currently occurs in that ecosystem.

There are occasions when non-native plant material may need to be used in revegetation of an area, but we also added language to the final rule to specify that in a situation where an operator uses non-native species, the non-native species should not be invasive, nor inhibit re-establishment of native species. For example, operators often use a seed mixture of non-native annual and native plant material for revegetation because the non-native seed will germinate quickly to hold the soil in place and keep invasive species from encroaching into the disturbed site. (Native species usually take longer to germinate and become established.) This would be allowable under the final rule if the non-native species would gradually give way as the native species become established on the site. Another example is when a seed bank of native species exists in the soil of a site being revegetated. Under the final rule, an operator could plant short-lived, non-native species to hold the soil in place until the native species reestablish themselves from the on-site seed bank.

In the final rule, we changed the heading of the proposed fish and wildlife performance standard, § 3809.420(b)(6) to read, ''Fish, wildlife, and plants'' to clarify that it also covers plants. In final § 3809.420(b)(6)(ii), we clarified that the reference to ''threatened or endangered species and their habitat'' in the proposed rule means Federally proposed or listed threatened or endangered species or their proposed or designated critical habitat. The ESA requires BLM to enter into formal consultation with the FWS or the NMFS on all actions that may affect a listed species or its habitat. BLM must request a formal conference with FWS or NMFS on all actions that may affect a proposed species. Thus, it is BLM's longstanding policy to manage species proposed for listing and proposed critical habitat with the same level of protection provided for listed species and their designated critical habitat, except that formal consultations are not required. BLM Manual Chapter 6840.06(B), Rel. 6–116, Sept. 16, 1988. Also, to maintain consistency with final § 3809.420(b)(6)(iii) and to clarify that any actions to prevent impacts to threatened or endangered species are required, BLM added the word ''any'' so the final reads, ''You must take any necessary measures to protect Federally proposed or listed threatened or endangered species, both plants and animals, and their proposed or designated critical habitat as required by the Endangered Species Act.''

BLM lengthened the time requirement of 20 business days in proposed § 3809.420(b)(7)(ii) to 30 calendar days in final § 3809.420(b)(7)(ii) to give time required to ''evaluate the discovery and take action to protect, remove, or preserve the resource.''

At final § 3809.420(c)(3)(ii) and (iii), which is the performance standard for acid-forming, toxic, or other deleterious materials, BLM added migration control so final § 3809.420(c)(3)(ii) now reads, ''If you cannot prevent the formation of acid, toxic, or other deleterious drainage, you must minimize uncontrolled migration of leachate (migration control).'' Final § 3809.420(c)(3)(iii) reads, ''You must capture and treat acid drainage, or other undesirable effluent, to the applicable standard if source controls and migration controls do not prove effective. You are responsible for any costs associated with water treatment or facility maintenance after project closure. Long-term, or post-mining effluent capture and treatment are not acceptable substitutes for source and migration control, and you may rely on them only after all reasonable source and migration control measures have been employed.''

At final § 3809.420(c)(7), concerning pit reclamation, BLM removed the presumption for pit backfilling, in response to public comments and the discussion in the NRC Report. Final § 3809.420(c)(7)(i) now reads, ''Based on the site-specific review required in § 3809.401and the environmental analysis of the plan of operations, BLM may determine the amount of pit backfilling required, taking into consideration economic, environmental, and safety concerns.'' Final § 3809.420(c)(7)(ii) was modified from the proposed rule for clarity to read, ''You must apply mitigation measures to minimize the impacts created by any pits or disturbances that are not completely backfilled.'' These changes regarding pit backfilling are consistent

with current BLM management practices.

A commenter asserted that BLM does not have the authority to impose regulations that will eliminate environmental impacts if those regulations also limit the opportunity to develop mining claims on public lands. The commenter stated that this issue was addressed in the final EIS for the previous 3809 regulations, where the Department of the Interior explained why it was not adopting an alternative that would have imposed stricter environmental standards. The commenter asserted that, while BLM has the authority to take ''any action necessary to prevent unnecessary or undue degradation of the public lands,'' the word ''necessary'' places a limit on BLM's authority. The commenter stated that the proposed rule would expand the BLM's regulatory role beyond that authorized by FLPMA, and would fundamentally change BLM from a land management agency with jurisdiction shared with the States into an EPA-like agency, setting Federal environmental standards that in turn drive standards on Federal, State and private lands. The commenter asserted that this is far beyond what Congress had in mind when it directed the BLM in FLPMA to prevent unnecessary or undue degradation.

BLM disagrees with the comment. The mining laws do not establish an unfettered right to develop mining claims free from environmental constraints. The Mining Law of 1872 itself refers to ''regulations prescribed by law,'' 30 U.S.C. 22, and FLPMA mandates regulation to prevent ''unnecessary or undue degradation.'' That is, section 302(b) of FLPMA expressly amended the mining laws by making rights under the mining laws subject to the Secretary's responsibility, by regulation or otherwise, to take any action necessary to prevent unnecessary or undue degradation of the public lands. Because FLPMA did not define ''unnecessary or undue degradation,'' the Secretary may do so in these rules. BLM believes that the regulation changes are necessary to prevent unnecessary or undue degradation. BLM has identified numerous regulatory issues that need to be addressed. The NRC Report has also identified issues and recommended regulatory changes. The commenter is also wrong in asserting that proper land management does not include setting appropriate environmental standards for activities that occur on the public lands, particularly in light of the Congressional policy set forth in section 102(a)(8) of FLPMA.

A commenter disagreed with a statement in the draft EIS that the BLM lacks ''clear, consistent standards for environmental protection'' (p. 12, Draft EIS). The commenter stated that there are over 20 State and Federal environmental regulations that control mining industry impacts on the environment, and that Congress delegated authority for implementation of environmental regulation to specific Federal and state agencies in order to avoid overlapping authority and redundancy. The commenter asserted that Congress limited the authority of the BLM to regulate locatable mineral exploration and development in accordance with FLPMA and has not significantly modified this authority since 1976. Thus, BLM must ensure that its regulatory actions are consistent with the intent of Congress as reflected in the existing environmental statutes.

BLM disagrees that its rules exceed its statutory authority under FLPMA and the mining laws. Although other Federal and State agencies regulate various aspects of mining under other statutes, BLM has its own responsibilities under FLPMA and the mining laws to protect the resources and values of the public lands from unnecessary or undue degradation. The statement from the draft EIS reflects the difficulty BLM often encounters in determining what constitutes unnecessary or undue degradation. The NRC Report noted this difficulty in its Recommendation 15. See NRC Report, pp. 120–22; see also id. pp. 68–71.

Numerous commenters were concerned that BLM's requiring compliance with State or Federal environmental requirements duplicates existing State and Federal programs and permitting requirements, especially regarding water quality. BLM made modifications to the proposed rule to clarify that BLM is not duplicating State or Federal requirements but instead is making it clear to operators, the public and BLM field managers that operators must comply with State and or Federal environmental requirements. BLM as the land manager of public land is ultimately responsible for ensuring that operations on land under its jurisdiction are in compliance with various Federal, State, tribal or, where delegated by the State, local government environmental requirements. If operators are cited for violations of these environmental requirements by appropriate authorities, BLM will notify operators they are in non-compliance with their plan of operations and act accordingly. The NRC Report observed that, ''In general, the existence of multiple regulatory programs helps to assure that at least large-scale mining on Federal lands is subject to substantial scrutiny.'' See p. 54.

Commenters expressed concern over mitigation. BLM has adopted a three-tiered approach to mitigation. First, we encourage avoiding the impact altogether by not taking the action or certain parts of an action. Secondly, we encourage the operator to minimize the impact by (a) limiting the degree or magnitude of the action and its implementation; (b) rectifying or eliminating the impact by repairing, rehabilitating, or restoring the affected environment; and (c) reducing or eliminating the impact over time by taking appropriate steps during the life of the action. Thirdly, an operator may, if the impacts are unavoidable, compensate for the impact by replacing or providing substitute resources or environments. Mitigation would only occur on a limited case-by-case basis if this strategy is followed.

Some commenters questioned BLM's authority to require mitigation of unavoidable impacts. We believe, however, that sections 302(b) and 303(a) of FLPMA, 43 U.S.C. 1732(b) and 1733(a), and the mining laws, 30 U.S.C. 22, provide the BLM with the authority to require mitigation. Mitigation measures fall squarely within the actions the Secretary can direct to prevent unnecessary or undue degradation of the public lands. An impact that can be mitigated, but is not, is clearly unnecessary. Section 303(a) of FLPMA directs the Secretary to issue regulations with respect to the ''management, use and protection of the public lands * * *'' In addition, 30 U.S.C. 22, allows the location of mining claims subject to ''regulations prescribed by law.'' Taken together these statutes clearly authorize the regulation of environmental impacts of mining through measures such as mitigation. BLM may mandate particular steps to mitigate where mitigation can be performed onsite. For example, if due to the location of the ore body a riparian area must be impacted, mitigation can be required on the public land within the area of mining operations. If a suitable site for riparian mitigation cannot be found on site, the operator may voluntarily choose, with BLM's concurrence, to mitigate the impact to the riparian area off site.

Some commenters were concerned that BLM did not have the authority to, or should not require, operators to follow a ''reasonable and customary mineral, exploration, development, mining and reclamation sequence.'' In BLM's experience, there have been instances in the past where operators

have created unnecessary impacts by not following a reasonable and customary mineral development sequence. Therefore we believe regulating sequencing may be necessary to prevent unnecessary or undue degradation. BLM will review sequencing on a large scale and will not regulate the sequencing of small portions of an operation.

Numerous commenters wanted BLM to establish explicit provisions for groundwater protection as well as general and operational performance standards. BLM considered establishing numeric standards for groundwater affected by operations. Currently, there are no Federal groundwater standards, and several States where mining activities subject to these regulations occur do not have their own groundwater standards. BLM decided not to propose numeric standards because of the difficulty of designing nationwide numeric standards relevant to the range of conditions. BLM believes the States are better equipped to develop groundwater standards applicable within their borders. Instead, the regulations adopt a pollution minimization requirement, in preference to treatment or remediation, and rely upon applicable State standards for groundwater where they are present.

Some commenters were concerned that BLM's requirement to return disturbed wetlands and riparian areas to proper functioning condition, where economically and technically feasible, would infringe upon the U.S. Army Corps of Engineers (COE) and EPA's responsibility to manage wetlands under their jurisdiction (so-called ''jurisdictional wetlands'') under § 404 of the Clean Water Act. BLM is not proposing to duplicate the regulation of jurisdictional wetlands. Not all wetlands meet the definition of jurisdictional wetlands. BLM has responsibility for wetland and riparian areas found on public lands under its jurisdiction that do not fall under the COE jurisdiction, and the final rules require that impacts to them either be avoided or mitigated.

Commenters were concerned that waste dumps should not be located on millsites (non-mining claims). Final § 3809.420 does not address whether waste dumps can be located on particular mining claims. The issue raised, in part, relates to whether locating waste dumps on mining claims rather than millsites affects the validity of those mining claims under the mining laws. This is an issue the Department is currently examining, but is not implicated in this rulemaking.

Some commenters supported BLM requiring the use of Best Available Technology and Practices (BATP) and opposed the use of Most Appropriate Technology and Practices. Since BATP doesn't lead to innovation and development of new technology, BLM chose not to require the use of BATP, preferring instead to use outcome-based performance standards, as discussed earlier in this preamble. The definition of MATP also served to confuse and not add any value to the regulations and was therefore dropped from the final rule. BLM has sought, in the development of performance standards, to focus on the outcome or accomplishment the operator must achieve.

Some commenters thought that the requirement to ''minimize changes in water quality in preference to water supply replacement'' was an improper infringement upon State water laws. We believe, however, that sections 302(b) and 303(a) of FLPMA, 42 U.S.C. 1732(b) and 1733(a), and the mining laws, 30 U.S.C. 22, authorize, if not mandate, that BLM require mining operators to minimize water pollution (source control) in preference to water treatment, and it is appropriate for BLM to make these decisions in reviewing and deciding whether to approve mining plans. This review falls squarely within the actions the Secretary can direct to prevent unnecessary or undue degradation of the public lands. While allocation and permitting of water use is primarily the responsibility of the States, the ''prevention of unnecessary or undue degradation'' mandate makes it BLM's responsibility to address impacts to water resources on the lands under its jurisdiction, in deciding whether to approve plans of operations under these regulations.

There were comments that BLM should not require operators at closure to detoxify leaching solutions and heaps. Final § 3809.420(c)(4) lists acceptable practices for detoxification of leaching solutions and heaps and adds that other methods that achieve the desired success are acceptable. However, all materials and discharges must meet applicable standards. Partial detoxification is not acceptable if upon completion, all materials and discharges don't meet applicable standards.

Some commenters expressed concern that the performance standards would not require compliance with BLM's standards and guidelines for grazing administration (43 CFR part 4100, Subpart 4180). The rangeland health standards are expressions of physical and biological conditions or degree of function required of healthy sustainable lands. Operations under this subpart would have to comply with the performance standards of final § 3809.420. These performance standards will ensure that the rangeland health standards can be met. To the extent that the standards for rangeland or public land health are incorporated in BLM's land use plans, they will be reflected in the plans of operations that BLM approves under this subpart.

Section 3809.423 How Long Does My Plan of Operations Remain in Effect?

Final § 3809.423, which was not changed from what was proposed, states that the plan of operations is in effect as long as operations are being conducted, unless BLM suspends or revokes the plan of operations for failure to comply with this subpart.

BLM received several comments on this section of the proposed regulations. One comment suggested that BLM should establish a term or duration after which a plan of operations would have to be renewed. A term of 5 years was suggested for active plans of operations and a term of 1 year for inactive operations.

BLM considered issuing plan of operations approvals with limited periods of effectiveness or terms, but could not decide upon a standard term or duration due to the variability in mining operation sizes and types. BLM believes it is more appropriate to have the operator propose an overall schedule for operations. During the plan review and approval process, BLM would then approve the operations schedule for the individual mining plan under review. Changes or extensions in the schedule could be provided through plan modifications under § 3809.431(a), if needed.

Other comments were concerned with the revocation clause in this section of the regulations. One commenter suggested removing the revocation provision from the regulations. Another asked how long BLM would give the operator before revoking the operating plan.

Final § 3809.423 provides that the plan of operations approval is good for the life of the project as described in the plan. In the event the operator fails to comply with an enforcement order, however, the plan approval can be revoked under § 3809.602. BLM believes this is appropriate where the operator is failing to take corrective actions specified in an enforcement order. Final § 3809.602(a)(1) provides that a plan may be revoked after the time frames provided in the enforcement order have been exceeded, and it provides the operator with due process to appeal

such a determination. The enforcement order's time frame will vary from case to case depending upon the specific cause of the violation and the urgency with which it must be abated to prevent unnecessary or undue degradation.

Final § 3809.423 is not inconsistent with the recommendations of the NRC Report. The NRC Report did discuss the issue, as follows:

> The Committee did not determine if plans of operations should be reviewed or reopened at predetermined intervals. The evolutionary nature of mining at individual sites—particularly at mines using newer technologies and dealing with disseminated mineral deposits—requires changes in the limitations on plan modifications in the original BLM and Forest Service regulations. Updating of financial assurance instruments should also take place as conditions change that might affect the levels of bonding or other forms of financial assurance. Practices now vary among the states and federal agencies.

Report, p. 101. The issues of plan modification and changes in levels of financial assurance are discussed further below.

Section 3809.424 What Are My Obligations if I Stop Conducting Operations?

Final § 3809.424 addresses the obligations of operators should they stop conducting operations. This section of the regulations provides in table format a list of conditions operators must follow during periods of non-operation. It also describes what BLM will do if non-operation is likely to cause unnecessary or undue degradation; or if BLM determines the operation has been abandoned.

The final regulations at § 3809.424 carry out Recommendation 5 of the NRC Report, which was that BLM require interim management plans, define conditions of temporary closure, and define conditions under which temporary closure becomes permanent and all reclamation and closure requirements must be completed.

Final § 3809.424 requires that if an operator stops conducting operations for any period of time, the operator must follow the approved interim management plan for its plan of operations, take all necessary action to prevent unnecessary or undue degradation, and maintain an adequate financial guarantee. If the interim management plan does not address the particular circumstances of the temporary closure, the operator must submit a modification of the interim management plan to BLM within 30 days. The regulations also provide that BLM will require the operator to take all necessary actions during the period of non-operation to assure that unnecessary or undue degradation does not occur. This includes requiring the removal of structures, equipment and other facilities, and reclamation of the project area. After 5 consecutive years of inactivity BLM will review the operation to determine whether the operation is abandoned and whether BLM should direct final reclamation and closure. If BLM determines the operation has been abandoned, it may initiate bond forfeiture and conduct the reclamation. If the bond is not adequate to pay for the reclamation, BLM may complete the reclamation and hold the operator liable for the reclamation costs.

Comments received on proposed § 3809.424 included suggestions for incorporating the NRC Report recommendation on temporary and abandoned operations; concern that BLM would terminate plans, thus causing a decrease in the value for the operator; suggestions for putting limits on how long an operation can wait for improvement in commodity prices; and objections that operators would be held responsible for reclamation costs that exceed the amount of the financial assurance should BLM terminate a plan and implement reclamation. Specific comments and responses to proposed § 3809.424 follow.

Numerous commenters were concerned that proposed § 3809.424(a)(3) and (4) be revised to incorporate NRC Report recommendations and describe the conditions that will cause BLM to unilaterally terminate a plan of operations. They noted that an approved plan of operations has financial value to the owner/operator and can be transferred to another owner or operator as part of a total mining package. The commenters asserted that BLM should not have the ability to unilaterally terminate a financially valuable part of a mining operation. The proposed 5-year threshold for terminating an approved plan of operations failed to properly consider the economic consequences of unilateral cancellation when the suspended mining operation is not causing unnecessary or undue degradation and BLM has certified that the financial guarantees are adequate. Other commenters suggested amounts of time, ranging from 3 years to 10 years, that operations should be allowed to remain inactive before terminating the plan of operations. One comment suggested that the temporary closure be considered permanent only when the operator advises BLM it is permanent. Others suggested that five years is just the right length of time. A comment was made that the rule should not just direct BLM to review to see if termination is warranted, but should instead require BLM to initiate termination.

In response to comments, BLM has incorporated the NRC Report recommendation regarding interim management plans into final §§ 3809.401 and 3809.424. Because of the recognized value an approved plan of operations may have, and the potential for changing market conditions, the rule allows up to 5 years to pass before BLM conducts a review to see if the plan should be terminated. The final regulations do not require the plan to be terminated after five years, only that a review be conducted to determine if it should be terminated. If there is adequate bonding in place, no unnecessary or undue degradation occurring, and persuasive reasons exist to maintain an inactive status, there may be no reason for BLM to terminate the plan and direct final closure. However, a plan of operations cannot be allowed to remain inactive and unreclaimed indefinitely. BLM believes that 5 years is a reasonable amount of time to allow most operators to maintain standby conditions. After 5 years of inactivity, it will be increasingly difficult to remove equipment, maintain suitable access for reclamation purposes, control weed infestations, preserve topsoil stockpiles, and ensure public safety. At some point, BLM should direct reclamation and closure.

One commenter proposed an alternative approach for interim management plans, as follows: (1) BLM should require an operator to notify BLM and the State of intent to temporarily cease operation. (2) An interim management plan should be adopted within 90 days of a decision by the mining company to cease operations due to market conditions or other factors. (This approach is taken in some state programs, such as section 273(h) of California's Surface Mining and Reclamation Act.) (3) BLM should annually review the operation to determine whether the site is viable to restart, and assess the intent of the operator to continue operations. (4) If, after two consecutive years, the operator has not indicated an intent to restart mining, the BLM should require the operator to begin reclamation. (5) If the ''temporary'' closure extends to 5 years, the operator must demonstrate that the site will be re-opened. Otherwise, the operator must begin reclamation.

Another comment suggested that the operator should be required to obtain approval of an interim management plan that describes what measures will

be taken to comply with proposed § 3809.424(a)(1)(i-iii).

BLM prefers to require that the operator propose an interim management plan for periods of non-operation as part of the initial plan of operations. This approach should reduce the workload on both the operator and BLM, plus provide for up-front planning on how to manage periods of non-operation. If the period of non-operation is not adequately covered by the interim management plan, BLM would require the operator to submit a modification within 30 days, while at the same time assure that unnecessary or undue degradation does not occur. We believe final § 3809.424(a)(3) would accomplish the objective of this commenter. If the operator could not demonstrate the site would reasonably be expected to reopen, BLM may consider it abandoned and order reclamation.

Several comments wanted proposed § 3809.424(a)(3) revised to unambiguously explain the difference between inactive and abandoned mining operations and to be consistent with the NRC Report recommendations. One commenter wanted assurance that BLM and FS are using and applying the definitions for inactive and abandoned operations in a uniform manner.

Under the final regulations at § 3809.424(a), an operation is considered inactive if it is not operating (mining, exploring or reclaiming), but is following its interim management plan. An operation may be considered abandoned for a variety of reasons, including failure to follow or amend the interim management plan, or after 5 consecutive years of inactivity. Other reasons for considering an operation abandoned may include inability to locate the operator, or if the operator is deceased. This is consistent with NRC Report recommendations regarding inactive and abandoned operations. BLM is unable to assure the Forest Service would adopt similar regulations for defining inactive or abandoned operations.

EPA expressed concerns about the potential for interminable delays that may occur between mine closure and reclamation. The time when mining is terminated and the interval between cessation of mining and restoration needs to be carefully addressed in the plan of operations. It is sometimes difficult to determine when an operator is finished mining the site. Most mining activities are sensitive to world fluctuations of commodity prices, and may have to be discontinued when prices are not high enough to make the operation profitable. The occurrence or length of these ''down times'' caused by low commodity prices cannot be determined in advance. Nonetheless, EPA asserted, there needs to be some criteria, within the plan of operations, to determine when extractable resources have been exhausted, and when reclamation should commence. EPA recommended that criteria be included that define mining activity end-points that are consistent with the financial objectives of the applicant, and at the same time identify a time line for the initiation of reclamation activities.

BLM believes that the final regulations generally address EPA's concerns. Final § 3809.401 requires operators to provide a general schedule of activities from start through closure and an interim management plan for periods of non-operation. The general performance standard in § 3809.420 requires the operator to perform concurrent reclamation on areas that will not be disturbed further under the plan of operations. Final § 3809.424 puts limits on the amount of time an operation can remain temporarily closed without undergoing review to determine if it is abandoned. This combination of requirements means individual plans of operations will have to set out an extraction and reclamation schedule for agency review and approval that describes when mine facilities would be open and when they would be reclaimed, and that reclamation would have to occur at the earliest practical time. In addition, temporarily inactive operations would receive greater scrutiny with defined time limits for periods of inactivity. BLM believes these combined requirements will promote timely reclamation within a defined period after operations cease, yet be flexible enough to take into account ordinary fluctuations in world commodity markets.

Several commenters requested that proposed § 3809.424(b) be revised to make it clear that the obligations of the owner/operator are only those contained in the approved plan of operations and associated financial instruments, such as bonds. Some commenters characterized the plan of operations and associated requirements as in the nature of a ''contract'' between the BLM and the operator, and asserted that an operator may use ''reasonable and customary methods'' to comply with the contract. They would have the regulations deny BLM unilateral authority to change that ''contract'' and make the operator liable beyond this. They assert that operators should not be required to monitor a site in perpetuity, and that, without well-defined closure or success criteria, operators will have a difficult, if not impossible, time securing reclamation bonds.

BLM disagrees with the comment. The operator's liability is not limited to the amount of the reclamation bond or other financial instrument. The operator is responsible for preventing unnecessary or undue degradation. This includes complying with applicable environmental standards such as water quality and air quality standards, and to reclaim the site to the performance standards in § 3809.420. The financial instrument is an enforcement tool to back up the operator's obligations, if it is unable or unwilling to meet these regulatory requirements. It does not represent the limits of the operator's responsibility, but merely provides the BLM some level of assurance that the work will be performed. If a reclamation bond is not adequate to perform the reclamation work, the operator is liable for the unfunded portion needed to meet the minimum regulatory requirements.

BLM also disagrees with the commenter's characterization of its obligations as being contractual in nature. The operator's obligation to reclaim and prevent unnecessary or undue degradation is based on Federal statute and regulations. The test for compliance is not whether the operator uses ''reasonable and customary practices,'' but whether the operator achieves success in meeting the performance standards. Site-specific success criteria and post-closure monitoring requirements should be established as a result of the individual plan of operations review process. Once a closure plan has been successfully implemented, no additional work or monitoring may be necessary by the operator. However, operator remains responsible for future problems that might develop on that site deriving from the operator's activities.

One commenter recommended that BLM should not be mandated to forfeit the bond within 30 days of the determination that the operation was abandoned. The commenter recommended instead a statement indicating that the BLM may initiate forfeiture under this section. In this way, the BLM would have an opportunity to take enforcement action prior to forfeiture.

BLM agrees with the comment and final § 3809.424(a)(4) provides that BLM may initiate forfeiture under § 3809.595. Final § 3809.595 has been revised to substitute ''may'' for ''will'' on conditions which would cause BLM to initiate forfeiture.

One comment was made that ''inactive'' status under the mining laws

may constitute ''abandonment'' under CERCLA (Superfund) where a release or threat of a release exists because of inadequate controls for public safety, health and the environment.

These rules do not reflect any judgment that ''inactivity'' here equates with ''abandonment'' under CERCLA. CERCLA liability is determined by that statute. We believe, however, that a release or threat of release under CERCLA from a mining operation subject to these rules could also constitute unnecessary or undue degradation. The interim management plan required under final § 3809.401(b)(5) must address management of toxic or deleterious materials during periods of temporary closure. This includes measures needed to prevent a release or the threat of a release. Operations which have a release, or threaten release, may be considered abandoned by BLM and subject to immediate forfeiture of that portion of the financial guarantee needed to stabilize the area or to prevent or correct the release conditions.

One comment was not opposed to procedures regarding abandonment, temporary cessation of operations, or a specified time frame for expiration of a notice, as the NRC Report recommends, but urged that BLM work with States to determine how best to plan and define those circumstances when temporary closure becomes permanent. States already have extensive experience in this area. No new Federal program is necessary and would only duplicate these existing State programs and authorities.

BLM agrees that temporary closure is one of the items that must be coordinated with the respective States. This has been specified in final § 3809.201 as one of the items that should be covered under Federal/State agreements. However, BLM believes that, as recommended by the NRC Report, it must have its own procedures in place to address ongoing problems with inactive and abandoned operations.

One commenter objected to the requirement for preparation of interim management plans, asserting that it was a significant burden on operators and not needed where unnecessary or undue degradation has not occurred or is not expected. For example, the commenter stated, it is inappropriate to require an interim management plan in all plans of operations because of speculation that the mining operation may be suspended in the future. Further, the commenter suggested any interim management plan prepared as part of the plan of operations application would become out of date in the future.

BLM believes that interim management plans do not pose a significant burden on operators if prepared as part of the plan of operations. The operator, in planning to mine, should also be able to plan under what conditions they might temporarily not mine, and how they would manage the site to prevent unnecessary or undue degradation during the temporary closure. If conditions change at temporary closure, the interim management plan could be easily modified to address the new conditions or circumstances. More importantly, by giving consideration to possible interim management needs during the project planning phase, the operator is better prepared to address temporary closure should it become necessary. Finally, there is some efficiency in using a single NEPA document and a single review process to process the entire plan of operations, instead of treating the interim management plan as a plan modification later, with its own review periods and NEPA documentation requirements.

One comment objected to what it called the ''implied'' requirement of an interim management plan to remove equipment and/or facilities. The comment asserted that this issue should be considered in the BLM plan of operations decision for final reclamation, and at least BLM should describe factors under which it might consider equipment or facility removal during temporary suspension of operations.

BLM does not know in advance all situations where removal of equipment might be required. However, under the interim management plans that would be submitted as part of the plan of operations, it is the operator who will propose the provisions for storage or removal of equipment, supplies, and structures during periods of temporary closures. BLM will review the proposed interim management plan and decide if the plan would prevent unnecessary or undue degradation. Obviously, the need to remove equipment at the end of mine life is greater than it would be for relatively short periods of non-operation.

Some commenters did not agree that BLM needed to require interim management plans or to specifically define the conditions under which temporary closure becomes permanent, triggering the requirement for final reclamation, although they did acknowledge that the NRC Report recommended (Recommendation 5) that BLM define such conditions.

BLM believes the NRC was correct and that it is appropriate to have interim management plans prepared for both planned and unplanned temporary closures as part of the overall plan of operations. BLM has defined 5 years as the maximum time period an operation can maintain temporary closure without a review to evaluate whether final closure should be directed. This gives operators a reasonable amount of time to await changes in financial conditions yet provides flexibility in that closure is not necessarily mandated after the 5-year period.

Other commenters were concerned that BLM be consistent with NRC Report Recommendation 5. They pointed out that following the recommendation would add clarity and provide useful guidelines. In addition, that BLM should allow for extended periods of temporary closure.

In the final regulations, BLM has added the requirement under § 3809.401(b) that plans of operations include interim management plans as recommended by the NRC Report; and to final § 3809.424 that operators follow their approved interim management plans during periods of non-operation. BLM believes these requirements are consistent with NRC Report Recommendation 5 and provide useful guidelines for temporary, seasonal, and abandonment determinations. Operators may propose to extend periods of temporary closure by submitting a modification to their interim management plans while maintaining an adequate financial assurance during the closure period.

Changes made to final § 3809.424 have been made under the ''Then'' column of § 3809.424(a)(1). Several sentences have been inserted in the final regulations to the effect that if an operator stops conducting operations for any period of time, the operator must follow the approved interim management plan submitted under § 3809.401(b)(5), and must submit a modification under § 3809.431(a) to the interim management plan within 30 days if it does not cover the circumstances of the temporary closure.

Other changes made to final § 3809.424(a)(1) are the deletion of the phrase, ''maintain the project area, including structures, in a safe and clean condition;'' and deletion of the phrase, ''* * * including those specified at 3809.420.(c)(4)(vii).'' These phrases have been added to § 3809.401(b)(5) as part of the content requirements for all interim management plans. With the addition to final § 3809.424(a)(1) that interim management plans must be

followed, these phrases became redundant and have been deleted.

Final § 3809.424 is not inconsistent with the conclusions or recommendations of the NRC Report. NRC Report Recommendation 5 stated that BLM should adopt consistent regulations that (a) define conditions under which mines will be considered to be temporarily closed; (b) require that interim management plans be submitted for such periods; and (c) define the conditions under which temporary closure becomes permanent and all reclamation and closure requirements must be completed.

The final regulations implement the NRC Report recommendation. Interim management plans that define the anticipated conditions of temporary closure are required to be approved as part of all plans of operations. The interim management plans must be implemented during periods of non-operation, and modifications must be submitted within 30 days if circumstances of the closure change from that anticipated in the interim management plan. Final § 3809.424 provides that after 5 consecutive years of inactivity, BLM will review the operations and may determine that the closure is permanent and direct final reclamation and closure be completed. BLM may also determine at any time that the operation has been abandoned, and direct final reclamation, if the interim management plan is not being implemented and the indicators of abandonment in final § 3809.336(a) exist.

Sections 3809.430 Through 3809.434 Modifications of Plans of Operations

Section 3809.430 May I Modify My Plan of Operations?

Final § 3809.430 says that the operator may request a modification of the plan of operations at any time when operating under an approved plan of operations. No substantive comments were received on this section of the proposed rule, and no changes have been made to the final regulations. Providing for operator-requested modifications is not addressed by any recommendation of the NRC Report, and therefore this section is not inconsistent with any recommendation of the NRC Report.

Section 3809.431 When Must I Modify My Plan of Operations?

Final § 3809.431 describes the three circumstances under which operators must modify their plans of operations: (1) Before making any changes to the operations described in the approved plan of operations; (2) when required by BLM to prevent unnecessary or undue degradation; and (3) before final closure to address impacts from unanticipated events or conditions or newly discovered circumstances or information. The final regulations then provide examples of what might constitute unanticipated events or conditions or newly discovered circumstances or information that would warrant a plan modification before final reclamation and closure. These include: the development of acid or toxic drainage, the loss of surface springs or water supplies, the need for long-term water treatment and site maintenance, providing for the repair of potential reclamation failures, assuring the adequacy of containment structures and the integrity of closed waste units, provisions for post-closure management, and eliminating hazards to public safety.

A new paragraph has been added under final § 3809.431(c) to address NRC Report Recommendation 14 that BLM plan for and assure the long-term post-closure management of mine sites. BLM believes that the best way to do this, aside from comprehensive planning in the initial plan of operations, is to provide a mechanism where plans of operations may be modified before closure to address specific closure needs due to unanticipated events or conditions, or newly discovered circumstances or information.

Experience has shown that, especially with large mining projects spanning ten or more years, it is often useful to reevaluate reclamation plans prior to final closure. This allows for the incorporation into the reclamation plan of environmental information gained throughout the mine life, consideration of ''as built'' mine conditions, and the ability to apply the most recent developments in reclamation or remediation technology. This does not mean that all plans of operations would require modification prior to reclamation and closure. The requirement to modify the plan of operations would have to be triggered by a significant change that makes reclamation and closure plans approved as part of the initial plan of operations no longer adequate or appropriate.

BLM received comments expressing concern about when BLM would require an operator to modify a plan of operations. Some commenters were concerned that a modification not be directed just because BLM suddenly changed its mind regarding acceptable impacts. Others were concerned that BLM could use the new definition of unnecessary or undue degradation with the modification requirements to retroactively apply the new performance standards to existing operations. Some commenters recommended periodic reviews for all plans of operations while others were against periodic reviews. Some operators were concerned with the amount of operational change that would warrant a modification requiring BLM review and approval.

In response, BLM believes we must have the authority to require a plan modification in a timely manner to prevent unnecessary or undue degradation. In this regard, the NRC Report had some relevant observations:

> Where * * * modifications are needed to prevent unnecessary undue degradation, such review should be expeditious and tied to the NEPA document approving the initial plan of operations. In addition, revised agency procedures should contain safeguards to assure that modifications are imposed only after serious consideration and following a procedure that protects the interests of the mining company in continuing to conduct operations, consistent with the avoidance of unnecessary or undue degradation.

NRC Report, p. 101. BLM would not use the modification requirement to place existing operations under the new performance standards. Final § 3809.400 makes it clear that an existing operation can continue to implement the existing plan of operations under the performance standards in the existing regulations. Furthermore, the final regulations do not require reviews of plans of operations at predetermined intervals, or modifications of already approved plans of operations for non-substantive changes in circumstances.

Two commenters asked if proposed § 3809.431(b) was ''retroactive'' onto private lands. As discussed earlier in this preamble, the 3809 regulations apply only to operations located on lands managed by the BLM. Final § 3809.2(d) has been added to the regulations to make this more clear.

One comment objected to statements in the proposed rule preamble that the proposed rule would eliminate the procedures relating to required modifications because the ''procedures are unnecessarily detailed and cumbersome'' and the ''proposal would allow BLM field staff flexibility to streamline the modification review process.'' The commenter asserted that the provisions in the existing regulations provide justifiable and substantive protections to operators that have expended enormous sums designing and constructing facilities in accordance with BLM-approved plans, and that BLM shouldn't be allowed to wipe the slate clean merely because it

changes its mind in a situation where all impacts were foreseen from the start. The commenter asserted that the existing provisions have worked well over time to allow BLM to protect the public lands from unforeseen events without disturbing the legitimate expectations operators gain through approval of their plans and their resulting investment of significant sums in mining operations.

BLM has developed the modification procedures in the final regulations in response to NRC Report Recommendation 4 that BLM revise its modification requirements to provide more effective criteria for modifications to plans of operations. The NRC Report concluded that the current procedures are not straightforward enough to allow BLM to require a modification even where needed to prevent unnecessary or undue degradation, and should not depend upon ''looking backward'' at what should have happened in the initial plan of operations approval. See the NRC Report, pp. 99–101. The new modification procedures are designed to be consistent with the discussion in the NRC Report.

One comment specifically requested that BLM require a closure plan that includes all actions to both reclaim and remediate any outstanding environmental issues. BLM has added final § 3809.431(c) to the final regulations to require a modification prior to final mine closure if needed to address unanticipated events or conditions, or newly discovered circumstances or information that must be taken into account by final reclamation activities. This would include requiring, as part of the modified final reclamation plan, plans for remediation of any outstanding environmental problems that were not adequately covered in the approved plan of operations.

Several commenters were concerned that the agency's authority to direct an operator to modify its approved plan be subject to some constraint. They asserted that operators are entitled to due process, including some written specification on how and why the agency has determined that operations it previously approved as not constituting unnecessary or undue degradation of BLM-managed land has suddenly become unnecessary or undue degradation. They urge that the rule require the agency to state in writing, in any such directive to modify a plan, how and why the modification is being directed.

Any order issued under final § 3809.431(b) requiring an operator to submit a plan modification would contain a detailed description on why BLM had determined that the modification is necessary. Procedural protections for the operator are preserved in final § 3809.800. An operator may challenge an order of the BLM field manager by appealing it to the BLM State Director and eventually to the Interior Board of Land Appeals. This approach is consistent with discussions in the NRC Report on revising the criteria for requiring plan modifications, and on preserving due process for operators.

One comment said that proposed § 3809.431 would create a separate and inconsistent standard for modifications to plans of operations by allowing BLM to require a modification to ''minimize environmental impacts, or to enhance resource protection.'' The commenter asserted that BLM should only be able to require a modification to prevent unnecessary or undue degradation. Final § 3809.431 doesn't use the terms suggested in the comment, but requires modifications to prevent unnecessary or undue degradation and to account for unanticipated events or conditions, or newly discovered circumstances or information.

Several commenters were concerned that existing operations would be affected by the rule changes. In their view, proposed § 3809.431(b) would essentially create a ''Catch-22'' situation by providing that a plan of operations must be modified if BLM concludes it does not prevent unnecessary or undue degradation, because the rule will also modify the definition of ''unnecessary or undue degradation'' and the related performance standards. This gives BLM the authority to require modification at any time to require compliance with the new performance standards. The commenter asked that the rule be clarified with respect to BLM's ability to impose the new performance standards on existing operations through a modification order.

In response, BLM has revised final § 3809.400(a) to make it clear that operations existing on the effective date of this final rule are exempt from the new performance standards. A modification required under 3809.431(b) for operations covered by a plan of operations approved or pending as of the effective date of the final regulations would be tied to the previous definition of ''unnecessary or undue degradation'' and the previous performance standards. Existing operations would remain subject to modification orders under final § 3809.431, but the modification requirements themselves would be based on the previous performance standards and definition of unnecessary or undue degradation.

One commenter suggested that the regulations clarify when changing conditions warrant a change or modification in operations. For example, a single mine in a basin doesn't have the same impact as several; therefore changes should be required throughout the basin rather than to put all of the mitigation requirements on the last mine permitted.

Final § 3809.431(c) has been added to provide some examples of when a change in conditions or circumstances would require a plan modification. The allocation of mitigation measures among different mine operators contributing to cumulative impacts may be factually complex and may also raise legal issues. BLM believes such situations must be dealt with on a case-by-case basis.

Several comments noted that most operations at some time make changes in their plans of operations, such as to expand the scale of operations, or to extend mine life, or to convert from open pit to underground operations. Eventually, according to these comments, most existing mining operations will likely be impacted by these new regulations.

BLM agrees that most existing operations are likely to undergo a modification in the future. We have written final § 3809.433 specifically to address how the final regulations would apply to new modifications of existing plans of operations and to provide a transition approach that BLM believes would not significantly affect existing operations.

Some commenters recommended no periodic reviews. Commenters also asserted that, as a practical matter, mining plans of operations are amended relatively frequently to reflect changing economic and geologic conditions, that mandatory periodic review creates undue burden on the entire industry and on the BLM, and that changing environmental conditions or standards can be considered in evaluation of plan amendments submitted by the operator. Others felt that if BLM imposes this periodic review of plans, reviews should be no more frequent than every five years. One commenter believed that the regulations should require BLM to conduct an annual review on all plans of operations. According to this commenter, an annual review would be a good time for BLM to review the bond amount and specifically address the adequacy of the approved plan of operations in the light of actual on-the-ground performance. BLM could also determine at this time if a modification

was needed to prevent unnecessary or undue degradation.

The NRC Report did not take a position on whether plans should be ''reviewed or reopened at predetermined intervals,'' (p. 101), although it did say that ''[p]rovisions for periodic review of plans of operations, and the ability to require modifications, are important to deal with adverse effects on public lands.'' *Ibid.* It also said that ''[s]taff comments and documents reviewed by the Committee suggest that the regulations should be modified to improve criteria for modifications, require periodic reviews, and/or specify expiration dates for approved plans of operations to assure the opportunity to adjust practices where needed.'' (p. 100.)

BLM has decided not to require annual or other mandatory reviews of plans of operations at predetermined intervals. Final § 3809.431 provides for the BLM to require modifications to existing plans of operations to prevent unnecessary or undue degradation on an as-needed basis when unanticipated conditions or situations arise. This provision, coupled with inspection and monitoring requirements, provides adequate protection of public lands without burdening either the operator or the agency with periodic reviews on a fixed schedule to determine if modifications are needed. BLM can review a plan of operations at any time to determine whether modifications are needed to prevent unnecessary or undue degradation, and can conduct a review at any time to verify that the financial guarantee is adequate to cover the reclamation liability. Due to the site-specific nature of the various mining operations on public land, BLM decided not to specify a set time interval for review of plans of operations.

There were several comments about the discussion in the NRC Report under its Recommendation 4, which says that BLM and Forest Service regulations ''should not require the agencies to make retrospective findings on 'foreseeability' or whether 'all reasonable measures' were applied in approving the existing plan. Modifications should be based on the results of monitoring or other data that demonstrate the occurrence or likely occurrence of unnecessary or undue degradation if the plan is not modified.'' (P. 101) These commenters assert that the revised definition of ''unnecessary or undue degradation'' proposed by BLM in this rulemaking would be impossible to administer. The commenters believe that because the proposed definition of ''unnecessary or undue degradation'' is essentially circular (*i.e.,* unnecessary or undue degradation is whatever BLM says it is), and therefore proposed § 3809.431 is unworkable and inconsistent with the NRC Report recommendation for more effective modification criteria.

BLM does not agree that the modification language is unworkable with the new definition of ''unnecessary or undue degradation.'' We believe the final definition of ''unnecessary or undue degradation'' provides a more direct basis for evaluating whether a modification is needed by being tied directly to the performance standards in final § 3809.420, as well as to compliance with other Federal and State laws. Further, the plan modification procedures in the final regulations remove the State Director determinations regarding initial plan approval that were of concern to the NRC.

One commenter questioned whether the application of the millsite acreage limits would affect BLM's review if an operator proposed a modification. They noted that currently there are no serious consequences to an operator if a change in the plan of operations is labeled a modification. They expressed concern whether a ''modification'' of a plan would lead BLM to examine whether the millsite acreages in the operation exceed the acreage limits in the Mining Law, as interpreted in the Solicitor's Opinion on millsites. The commenter was concerned that an operator might forego improvements in efficiency to its operation, including reductions in environmental impacts or improvements in efficiency (reducing the volume or distance of waste rock or ore hauls), if proposing a ''modification'' to its existing plan would force BLM to get into claim position reviews never before undertaken, and never before deemed relevant under the 3809's in the siting and environmental clearance of existing and planned facilities.

In the final regulations, BLM did not include a specific review requirement regarding millsite acreage limits. Any modification filed for a plan of operations will be reviewed in the context of the need to prevent unnecessary or undue degradation. Whether an operation is in compliance with the acreage limits on mill sites or any other requirement of the Mining Law concerning claim location and maintenance is generally outside the purview of these regulations. Such matters can be raised by BLM at any time, regardless of the status of operations.

One commenter asserted that any requirement to modify a plan of operations must be coordinated with State permitting requirements so as to avoid unnecessary duplication of effort and to minimize industry and agency time devoted to evaluating minor changes. In Nevada, for example, key permits for mining and exploration projects must be renewed or updated on a regular basis. (A Water Pollution Control Permit must be renewed every five years; a Reclamation Permit must be updated every three years). The commenter requested that BLM's plan modification process should be coordinated with these State requirements to minimize duplication.

BLM agrees with the comment that where States or other regulatory agencies conduct periodic reviews of operations, operators should provide BLM with updates on operations activities that have occurred within the scope of the approved plan of operations. For operational changes that would exceed the scope of the approval, the operator should contact BLM and the appropriate State agency well in advance to determine what modification requirements need to be followed.

One commenter asserted that the proposed rule is vague in defining the circumstances under which BLM would require a plan modification. While the creation of a new facility (waste rock dump, heap leach pad, etc.) or expansion of an existing facility would require a plan modification, as provided for in proposed § 3809.433, the commenter believes the following activities should also trigger plan modifications: boundary adjustments, changes in a financial assurance, and temporary closure (which would trigger a modification for ''interim'' operations).

BLM does not intend that administrative actions, which do not approve or create any on-the-ground impacts, will trigger a plan of operations modification, such that the NEPA analysis would need to be supplemented or the public comment period would need to be reopened. Examples of such administrative actions include a change in operator, property boundary changes, or enforcement actions. These actions are clearly within the scope of implementing the approved plan of operations. A modification would be triggered by a material change in operations outside the scope of the existing approved plan of operations, or by events or conditions which create the possibility of unnecessary or undue degradation as described in the preamble discussion of final § 3809.431(c). A change in revegetation plans, an increase in mining rate, or a greater disturbance footprint beyond

that described in the approved plan of operations are all examples of material changes that would require a plan of operations modification prior to implementing.

Final § 3809.431(c) requires a plan modification prior to final closure to address unanticipated events or conditions or newly discovered information. Final § 3809.431 has also been revised and reformatted to present the possible circumstances that would require plan modification in a sequential fashion.

Final § 3809.431 is consistent with the recommendations of the NRC Report. NRC Report Recommendation 14 is that BLM plan for and assure the long-term post-closure management of mine sites. The final regulations provide not only for up-front post-closure management plans under § 3809.401(b), but also provide a mechanism under § 3809.431(c) where plans of operations can be modified prior to closure to address specific closure and post-closure needs due to unanticipated events or conditions or newly discovered circumstances or information.

Recommendation 4 of the NRC Report was for BLM to revise its modification requirements to provide more effective criteria for modifications to plans of operations. The NRC stated that the current procedures are not straightforward enough to require a modification even when ''the results of monitoring or other data * * * demonstrate the occurrence or likely occurrence of unnecessary or undue degradation if the plan is not modified.'' (p. 101) BLM has developed the procedures for when it can require a modification in final § 3809.431 and removed the complex State Director evaluation process which was of concern to the NRC. The final regulations now provide that BLM may require a modification to a plan of operations when needed to prevent unnecessary or undue degradation. The final regulations also preserve procedural protection for operators by allowing for appeals of a BLM-required modification decision.

Section 3809.432 What Process Will BLM Follow in Reviewing a Modification of My Plan of Operations?

Final § 3809.432(a) describes the review and approval process that BLM will use for modifications to plans of operations. BLM will review and approve a modification in the same manner as it reviewed and approved the initial plan of operations. This is not a change from the previous regulations at § 3809.1–7(b). BLM follows these procedures for modifications involving changes in the plan of operations that exceed the scope of the initial review and approval. For example, modifications to add new mine facilities, extend mine life, or change the operating and reclamation plans are reviewed and approved following the same procedural steps as used for the initial plans. In appropriate cases, BLM may supplement or tier off of the previously prepared NEPA documents (EA or EIS), as allowed under the CEQ regulations, in order to expedite the modification review process.

Final § 3809.432(b) describes how BLM will process minor modifications that do not constitute a substantive change in the plan of operations and do not require additional environmental analysis under NEPA. The final regulations provide that BLM will accept such modifications after review for consistency with the approved plan of operations and consistency with NEPA analysis previously done on the operation. Examples of such modifications include a change in mining rate, adjustment of monitoring plans, substitution of revegetation species, implementation of engineering practices, minor realignment of roads or disturbance areas within the approved project footprint, or administrative changes such as a change in operator or mining claim information.

Several commenters suggested that under proposed § 3809.432(b), BLM should provide an operator with an approval or disapproval to a requested plan modification. The degree of administrative review would vary depending on the magnitude of the requested plan modification, but the operator should be informed that a requested plan modification has been either approved or disapproved. Otherwise, the operator may be unknowingly in violation of approved permits.

BLM agrees that the operator needs to be advised as to the outcome of our review of a modification request. Under final § 3809.432(b), BLM will notify the operator of the acceptability of proposed changes in the plan of operations as minor modifications. BLM does not intend to issue approvals or denials of minor changes, but to merely screen them for conformance with the existing approved plan requirements and consistency with previous NEPA documentation, and advise the operator if they are acceptable without undergoing the formal review and approval process in final § 3809.432(a).

One commenter wanted to know how much of the information listed in proposed § 3809.401 would be required for a plan modification. BLM will require all of the information listed in § 3809.401 that is applicable to support the review and approval of the plan modification. The amount of information depends on the type and magnitude of the proposed modification. Minor changes could be sufficiently addressed on a single page while major modifications may require much more information.

One commenter was concerned with the situation where modifications are being processed when a plan of operations is under appeal. The commenter recommended that BLM add a provision that we would deny any substantial amendments until appeals are settled. BLM notes that under current procedures, when a BLM decision is under appeal before IBLA, BLM does not take any additional action on matters covered by the pending appeal, unless agreed to by the IBLA. During the pendency of the appeal, the IBLA has jurisdiction over the matter covered by the appeal. For example, if a modification approval for a mine expansion is under appeal before IBLA, BLM won't approve a second modification while the appeal on the first one is pending.

Several commenters want BLM to define ''minimally'' as used in proposed § 3809.432(a) regarding not soliciting public comments if the financial guarantee amount would only be changed ''minimally.'' It was suggested that since the word ''minimally'' is open to differing interpretations, it would be helpful if BLM would pick a certain percentage change in the guarantee amount (20% or 80% were suggested) before triggering public comment. Or that BLM should use the NEPA compliance process to determine whether the proposed modification is ''minimal.'' If a supplement to the EIS is required, it would not be ''minimal;'' whereas if only an EA/FONSI is required it would be ''minimal.''

As discussed earlier in response to comments on proposed § 3809.411(d), BLM has removed the requirement for public review on the amount of the financial guarantee. BLM has also deleted reference to public review from the last half of § 3809.432(a) which included the term ''minimally.'' Therefore, comments on defining this term are no longer relevant. Plan modifications processed under final § 3809.432(a) would still have public comment periods on the modification. Comments on the financial guarantee could still be provided during the 30-day comment period on the plan modification, but the comment period is

not contingent upon any change in the financial guarantee.

Other commenters requested that BLM define ''substantive'' as used in proposed § 3809.432(b). They stated that since virtually everything in a plan of operations is substantive; the regulations need a qualitative adjective to distinguish matters of minor substance from those of significance. They suggested including in the definition in § 3809.5 that any change proposed would not be substantive when BLM uses an EA/FONSI for NEPA compliance.

In response, BLM believes a substantive change takes place at a lower threshold than suggested by the commenter, and occurs when the activity would exceed the scope of the approved plan of operations. A substantive change may require either the EA or the EIS analysis to be supplemented. Even if the impact is not significant (able to be approved using an EA) the change itself could be substantive compared to the initial approved plan of operations. For example, expanding a 25-acre waste rock dump by ten acres may be a substantial change, but it may not trigger the significant impact threshold of NEPA, and might be processed using an EA instead of an EIS. Placing an extra lift of ore on a leach pad involves no additional surface disturbance, but could still present potentially significant impacts through changes in mass stability or leaching solution inventory, and might trigger preparation of an EIS or supplement. For these reasons BLM does not believe it is appropriate to tie the substantive change criteria for minor modifications to either the level of NEPA review required or to the amount of surface disturbance involved.

One commenter was concerned that the modifier ''substantive'' will not work because virtually everything in a plan of operations is substantive. The commenter asserted that the regulations need a qualitative adjective to distinguish matters of minor substance from those of significance, and only the latter should be required to be reported. The provision must be modified to clearly indicate that only ''significant'' changes require a modification of a plan of operations.

In response, BLM points out that the test for how a modification submitted under the final regulations at 3809.431(a) is processed does not rely on whether the project component being modified is ''substantive,'' but on whether the ''change'' itself would be substantive from that already approved. BLM anticipates that there are three levels of changes or modifications which an operator could make to a plan of operations. The first are changes within the confines of the approved plan of operations, such as a change in equipment size or type that is within the range already described in the plan. These do not require any notification to BLM as they are within the scope of the existing plan approval. The second are changes which, while not substantive enough to require supplemental NEPA analysis, must be reviewed by BLM for consistency with the approved plan of operation to ensure unnecessary or undue degradation would not result. These would include such things as a revision to monitoring parameters or frequency, a seed-mix substitution, or a minor road re-alignment. The third types of modification are those that involve a material change in operations, either in extent, intensity, duration or type of activity such that they are not within the scope of the existing approved plan of operations and require formal review and approval. Examples of this type of modification include construction of new or expanded mine facilities; changes in mineral processing that change the potential impacts or increase their intensity; or changes needed to address unanticipated events or conditions, such as subsidence or development of acid drainage. This is not much different from the existing regulations. Operators are already required to contact BLM before making changes that exceed the scope of their existing approvals. The threshold for each of these levels is site-specific, and operators should contact the local BLM office if they have any question on the change in operations they would like to make.

Several commenters were concerned that by requiring such detailed plans to be submitted, BLM increases the likelihood that when circumstances are encountered that are different from those projected by the exploration work, the details of the plan will require changes. Under the draft rules, any ''substantive change'' may require reinitiating the same process required for initial plan of operations approval under § 3809.432. In the view of these commenters, this process can be extraordinarily expensive and time-consuming. The commenters suggest that the draft rules should either reduce the level of detail required in plans of operation, or ease the procedural requirements for plan modifications.

BLM notes that while a substantive change may require review and approval similar to the process followed for the initial plan of operations, only the information pertinent to the modification need be submitted under § 3809.401(b). Furthermore, the NEPA analysis for the modification may use or supplement existing documents, serving to facilitate the modification review. BLM does not believe the information requirements in final § 3809.401 are overly detailed. Plans of operations may be proposed in such a manner that preserve operators' flexibility to make minor adjustments without exceeding the scope of the plan approval.

Several commenters question how a ''substantive change'' under proposed § 3809.432(b) was the same as a ''significant modification'' under the previous regulations at 43 CFR 3809.1–7. They were concerned that the term ''substantive'' could mean any change that is not strictly ''procedural,'' and thus, an operator might have to go through a formal BLM approval process for something as minor as a proposal to add 10 square feet to a storage shed.

In response, a substantive change or modification is one that is outside the scope of the approved plan of operations. It is very similar to the ''significant modification'' under the existing regulation, but BLM decided to use ''substantive'' instead of ''significant'' to avoid confusion over whether ''significant'' in this context was the same as ''significant impacts'' as used in NEPA to trigger preparation of an EIS. It has never been BLM's policy or practice under the previous regulations that a change had to exceed the EIS significance trigger before a modification was required, and using the term ''substantive'' makes the regulation better conform to BLM's practice. Regarding the example, BLM believes that in most situations a 10-square-foot increase in the size of a storage shed would be considered minor and not require further NEPA analysis or require BLM approval. However, if for some reason the size of the storage shed had been an issue during the initial plan approval and the storage shed size had been specifically limited to meet the performance standards, then an increase in its size would require a modification under final § 3809.432(a).

Another comment was that proposed § 3809.432 should include time frames for BLM's review of modifications and that BLM needs to return to the current language which recognizes the reality of ongoing mining operations, where minor operating changes are made constantly as a matter of course. The commenters recommended that the new regulations not create a system which even implicitly requires the operator to constantly barrage the local BLM office with non-significant changes.

BLM recognizes that day-to-day operations often include minor changes. However, anytime the operator makes a change in operations that goes outside what was provided for in the approved plan of operations, it is substantive and the operator must contact BLM. For a substantive modification, BLM would follow the time frames for review found in final § 3809.411. If the substantive change requires additional analysis under NEPA, then we will process it in the same manner as the initial plan of operations. If the change is a minor modification consistent with the approved plan of operations, it can be handled expeditiously as a compliance matter between the operator and BLM.

One commenter felt that the NRC Report was inaccurate in its depiction of how small miners were allowed to make modifications. In the commenter's opinion, BLM does not permit small miners to make minor modifications to approved plans of operations without requiring extensive re-processing. The commenter asserted that the NRC has reported something other than what actually does occur for all small miners, has failed to comply with the law mandating the study, is unreasonable, and should not be followed.

In response, the final regulations apply to all plans of operations, including both small and large mines. The final regulations provide flexibility for plan modifications to be judged on an individual basis as to the need for additional environmental review. Whether or not the NRC Report has accurately portrayed the process for small miners, Congress has required that BLM rules not be inconsistent with the NRC Report recommendations.

Changes made to final § 3809.432 include deleting the last clause from proposed § 3809.432(a) with respect to a specific public comment period on the amount of the financial guarantee. The paragraph now reads, ''BLM will review and approve a modification to your plan of operations in the same manner as it reviewed and approved your initial plan under §§ 3809.401 through 3809.420.''

BLM has also edited final § 3809.432(b) to clarify that it applies to minor modifications that are consistent with the approved plan of operations, and do not require additional NEPA analysis. The final paragraph now reads: ''BLM will accept a minor modification without formal approval if it is consistent with the approved plan of operations and does not constitute a substantive change that requires additional analysis under the National Environmental Policy Act.'' This change is needed to allow for the expeditious consideration of minor modifications which, may be a substantive change, yet are still consistent with the approved plan such that additional NEPA analysis is not warranted.

The final regulations are not inconsistent with the recommendations in the NRC Report. Final § 3809.432(a) maintains a public review and approval process, consistent with NRC Report Recommendation 10, for modifications that are clearly outside the scope of the approved plan of operations. Consistent with the NRC Report discussions following Recommendation 4, final § 3809.432(b) recognizes that operational changes are often necessary, and an expeditious process is needed where minor modifications can be reviewed under the existing NEPA documents used to approve the original plan of operations.

Section 3809.433 Does This Subpart Apply to a New Modification of My Plan of Operations?

Final § 3809.433 addresses the situation where an operator may propose to modify an existing plan of operations after the effective date of the final regulations. The regulations consider two types of modifications that might occur. One is a modification to add a new and distinct mine facility, such as a new waste rock repository, leach pad, drill site, or road. The second is a modification that changes an existing mine facility, such as by enlarging a leach pad, waste rock repository, or mine pit.

Where the operator adds a new mine facility, the final regulations require the new facility to follow the plan content requirements of final § 3809.401 and meet the performance standards of final § 3809.420. The other portions of the operation can continue under the terms and conditions of the existing plan of operations.

Where the operator changes an existing mine facility, the final regulations require compliance with the plan content requirements of final § 809.401 and the performance standards of final § 3809.420, except that if the operator can demonstrate to BLM's satisfaction that it is not practical to apply the new requirements for economic, environmental, safety or technical reasons, then the modified facility may operate under the plan content requirements and performance standards of the previous regulations. This is because BLM recognizes it may not be practical or desirable to retrofit an existing mine facility with new requirements.

One commenter stated that if an existing facility is modified after the effective date of the final rule, the entire modified facility (not just the modified portion of it) must generally be retrofitted to comply with the new performance standards unless this is not ''feasible.'' For instance, if more environmentally protective processes become available in the future, an operator might be hesitant to incorporate them into an existing facility, for fear of having to retrofit the entire facility in all respects. Or, the commenter asserted, if an operator wants to expand operations, rather than modify (and thereby retrofit) an existing facility, it may decide instead to build an entirely new facility—thereby resulting in more environmental impacts than a modified, but not retrofitted, facility.

As part of the modification review process to determine whether unnecessary or undue degradation would occur, BLM would consider the environmental trade-offs should the operator propose building a new facility versus expanding and retrofitting an existing facility. The provision in § 3809.433(b), allowing for a demonstration that applying the final regulations the entire facility is not practical, should mitigate the impact on most operators while identifying the environmentally preferred approach for mine expansion.

A couple of comments were concerned with how final § 3809.433(b) would apply if the mine pit layback is on patented ground and how much road widening is allowed. There was a question on the amount of deviation allowed on a day-to-day basis to grade roads, and when it would be considered road widening.

The 3809 regulations do not apply where private lands overlie private minerals, even if those lands are within the project area. Therefore, a modification approved by BLM would not be required for a pit layback totally on private lands. However, it should be noted that if the layback on private lands causes some change in activity on BLM-managed lands, such as increased waste rock disposal or expanded leach pad areas, then a plan modification would be needed for those activities. Regarding roads and grading, provisions for day-to-day maintenance needs should be written into the plan of operations, and the overall specified road width should take such activities into account. If the plan of operations calls for a road with a certain maximum width, and the operator wants to grade it to exceed that width, then we would consider it widening of the road and would require an approved modification.

A commenter stated that, under proposed § 3809.433(b), economic reasons alone would not prevent the application of the new performance standards to new or expanded facilities within an existing operation. The commenter suggested that operating plans and the economics of established operations are based upon requirements and laws at the time those plans and operations were developed, therefore these requirements should be modified so that the regulations would not apply to any activities within an ''integral operating area'' covered by an approved plan or by a plan submitted to the BLM at least 18 months prior to the effective date of the regulations.

BLM understands that the economics of a specific operation were determined by the regulations in place at the time the project was first approved. That is why BLM believes it is appropriate that parts of the regulations be applied prospectively to new plans of operations or expanded activities that require modification of already approved or pending plans of operations. BLM believes that final § 3809.433(b) provides a reasonable transition approach allowing the operator and the BLM to consider whether a certain measure can be applied to satisfy the purpose of the statute and these regulations to prevent unnecessary or undue degradation while respecting the investments operators have made. In response to the commenter's concern, we have revised the provision to replace ''feasible'' with ''practical'' to account for the economic factors that must be considered, and we have added the word ''economic.'' BLM does not believe it is necessary to introduce the term ''integral operating area'' into the regulations.

Several commenters were concerned that proposed § 3809.433 would be creating too much confusion by setting up a situation where one set of regulations governs part of an operation and another set governs another part, especially when it is not simply parts of ''an operation'' that may be under different standards, but parts of the same, integrated ''facility''—an individual milling unit, an individual pit, a leach pad, or a waste rock repository. The commenters proposed that the regulations in effect when a plan of operations is submitted would govern the plan and all subsequent modification to avoid confusion. Another commenter suggested letting the operator decide where and how they wanted the new regulations to apply on future modifications.

BLM does not believe that allowing operations to continue to expand or modify indefinitely under the old regulations is a reasonable transition approach. Given the incremental nature of mining, and the need to achieve economies of scale, it is not uncommon for a modification to be larger in size and scope than the initial approved plan of operations. Final § 3809.433(b) provides a reasonable test of practicality in applying the new requirements to future modifications of existing mine facilities. BLM believes that as long as the overall facility design and operating parameters are clearly laid out in the approved plan of operations, the BLM inspector should be able to discern the appropriate requirements.

One commenter was concerned that a literal reading of the proposal required an operator who wished to modify a facility to incorporate new environmentally protective technology could do so only if first retrofitting the entire facility to comply with all of the proposed performance standards or established to BLM's satisfaction that retrofitting was not ''feasible.'' The commenter stated that in such circumstances, the operator would likely not install the new environmentally protective technology. For these reasons, the commenter suggested that the new rules should at most apply only to the modified portions of an existing facility.

BLM agrees with the comment and notes that the intent of final § 3809.433 is not to apply the new regulations to the entire mine facility, but only to the portion that is being modified, and only if the application of the new regulations is practical. The final regulations have been revised to clarify that the requirement applies to the modified portion of the mine facility.

Another person commented that under proposed § 3809.433(b), the term ''feasible'' can be interpreted to mean that it is simply not possible. This in turn could mean that absent bankrupting the company, an operator could be required to expend enormous sums to retrofit an existing facility merely because it came to BLM proposing to make only a minor change to the facility.

For clarity, BLM has, throughout the final regulations, modified the term ''feasible'' by ''technically'' and ''economically'' as appropriate to make it clear when we intend ''feasible'' to include economic considerations. In final § 3809.433(b), we have replaced ''feasible'' with ''practical'' to acknowledge that economics (cost) is one of the factors that will be considered in deciding to exempt a modification of an existing mine facility from the new performance standards.

One commenter asked that the regulations be clarified regarding whether, when a modification is filed, it opens the entire plan of operations to the new 3809 regulations.

The final rule makes it clear that the review and approval are for the modification being proposed, so that a proposed modification does not open the entire plan of operations to re-approval. However, it should be noted that while the modification is what would be review and approved, the scope of any NEPA analysis that might be required would have to consider the cumulative impacts of all the past actions.

Another commenter asserted that the last sentence of proposed § 433(b) (in the ''Then'' column of the table) contained a minor and a major defect. The minor one is that ''areas'' do not ''operate.'' Rather, ''operators use areas.'' The major one is that, as written, it only expressly provides for the operator to continue to operate facilities, or in areas, NOT subject to the modification. The negative implication is that all use of facilities or areas in the modification area must cease (leaching must cease in the pad to be enlarged; excavation must cease in the pit to be laid back). The commenter questioned whether this was intended and sought to have the regulations make clear that operations may continue, under the existing terms of approval, in the area of facility subject to the modification. The comment suggested that the sentence should read, ''You may continue to operate under your existing plan of operations, including at those facilities and in those areas that are the subject to the modification.''

In response, BLM intended that all operations not part of the modification, including portions of the facility to be modified, would not be subject to the new regulations and could continue to operate as approved under the existing plan of operations. In addition, an operator may continue to conduct activities at the facility proposed to be modified under the approved plan of operations until BLM acts on the proposed modification. The sentence is unnecessary, and BLM has deleted it to avoid confusion.

One commenter was concerned that BLM could simply undo decisions made and compromises wrought in the initial plan approval process regarding facility siting and operation, after the operator has invested in opening the mine under the terms of the original approval, by simply issuing a directive to modify the plan.

BLM notes that existing approved facilities, while subject to modification

under the existing regulations as needed to prevent unnecessary or undue degradation, would not be required to change from the old performance standard to the new standards. The modification language under final § 3809.433(b) applies the new performance standards only to that portion of the new facility being modified, and does not mean the entire facility would be subject to new requirements.

Another comment on proposed § 3809.433 concerned how to apply the performance standards of the new regulations to the expansion of an existing facility, in areas of mixed ownership. The commenter cited an example where an open pit mine on private land would require a small area of BLM land for expansion of the mine pit slope. The commenter was concerned that under final § 3809.420(c)(7), BLM would be able to require backfilling of the part of the pit that expanded onto BLM land, which would effectively require backfilling the entire pit, even on the private land part of the mine, and even though a minuscule area of BLM land may be involved. The commenter cited this example as a reason for exempting all modifications of existing operations from application of the final regulations.

The backfilling situation described above, with a large amount of private land, is a good example of where BLM would allow an exclusion from the new regulations as specified in final § 3809.433(b) based upon practicality, or a determination made under final § 3809.420(c)(7) that backfilling was not necessary. Other mine design and operation aspects, such as leach pad containment design, would be reviewed in a similar fashion and a determination made regarding the practicality of applying the new regulations to the modification.

Changes made in the final regulations to § 3809.433 occur in paragraph (b) of the table. BLM has deleted the last sentence in the ''Then'' column to avoid confusion regarding continued operations. We have edited the text to specify that the paragraph applies to the modified portion of facility. We have replaced the term ''feasible'' with ''practical,'' added the word ''economic,'' and provided a citation to the 3809 regulations that were in effect prior to these final regulations.

Final § 3809.433 is not inconsistent with the NRC Report. While NRC did not specifically address how to transition existing operations into any new regulations, it did discuss the need for regulations to have ''safeguards to assure that modifications are imposed only after serious consideration and following a procedure that protects the interests of the mining company in continuing to conduct operations, consistent with the avoidance of unnecessary or undue degradation.'' (p. 101) Under final § 3809.433, operators proposing a modification do not have to retrofit existing mine facilities. In addition, operators may be given an exemption from the content and performance standards of the new regulations by showing it is not practical to apply them to the modification of an existing mine facility. This approach is not inconsistent with the discussions contained in the NRC Report regarding plan modifications.

Section 3809.434 How Does This Subpart Apply to Pending Modifications for New or Existing Facilities?

We have combined proposed §§ 3809.434 and 3809.435 into final § 3809.434. This section describes how the regulations will apply to modifications of plans of operations for new or existing mine facilities that are pending before BLM when the final regulations go into effect. We have rewritten both proposed sections, deleted the tables, and simplified the concepts.

The final regulations provide that modifications pending on the effective date of the final regulations will be subject to the new regulations, except for the plan of operations content requirements (final § 3809.401) and performance standard requirements (final §§ 3809.415 and 3809.420). The existing plan of operations content requirements and performance standards that were in effect when the modification was submitted would continue to apply to the modification.

Several commenters said that BLM was making these subsections too complicated, burdensome, and cumbersome. The commenters suggested that if the new facility or modification can be done under an EA/FONSI then the standards in effect at the time of plan approval should apply. If the modification or new facility requires amendment to the EIS prepared for the original decision by BLM, then the Supplemental EIS should determine the extent, if any, new regulations apply.

BLM did consider using a NEPA criteria such as EA/Supplemental EIS for when to apply the new regulations to a pending modification, but did not adopt it because of potential problems with consistency and fairness. Instead, BLM has simplified these sections. We have combined proposed § 3809.435 with proposed § 3809.434. The cutoff for application of the new regulations to pending modifications has been relaxed from the NEPA document publication date in the proposed regulations, to the effective date of the final regulations. If an operator's modification was filed before the effective date of the new regulations it remains under the previous plan content and performance standard requirements.

Other comments were concerned that proposed § 3809.434 would create too much confusion by setting up a situation where one set of regulations governs a part of an operation and another set governs another part. The commenters felt that it is even more inappropriate to apply new standards to existing facilities than it is to apply them to a wholly new plan of operations submitted prior to adoption of new standards. This is because the operator relies on the terms and conditions of the initial approval in deciding whether to expand operations. A new facility at an existing mine is proposed because it fits, economically, logistically, and operationally into an existing operation. It can only be designed and located in ways dependent on the design and operation of the existing mine. The commenters were concerned that new facilities would be prohibited by standards that would not have allowed the initial facilities to be located where they are, or to be operated as they are, and felt that the same standards that governed approval of the initial facility location and mode of operations must govern the new facility.

BLM understands the concern that modifications may not be able to occur if held to a higher standard than the initial plan of operations. However, BLM believes the performance standards in final § 3809.420 will generally be compatible with existing operations when applied on a site-specific basis. Modifications under the existing regulations happen frequently, yet evolving changes in reclamation technology and regulatory approaches get incorporated successfully, even when it may be years between the initial facility approval and the modification. It won't be that different with a change in regulations. As long as the approved plan of operations clearly identifies how the overall facility is to be constructed, operated, and reclaimed, there should not be any more confusion over expected performance than occurs today with modifications processed under the existing regulations. Nor does BLM expect facilities be prohibited from expansion due to the changes in performance standards in final § 3809.420.

One comment suggested that we use completion of the public scoping process, instead of the publication date for the NEPA document, as the cutoff for applying this final rule to pending modifications. BLM does not agree with the comment, but we have revised final § 3809.434 to provide that a project modification submitted prior to the effective date of the final regulations may continue under the existing 3809 regulations. Using the cutoff date for the scoping process, as suggested by the comment, would have generated the same confusion as the proposal.

Changes have been made in the final regulations to proposed §§ 3809.434 and 3809.435. All of proposed § 3809.435 has been deleted. Final § 3809.434 has been rewritten to address pending modifications for an existing mine facility that were covered in proposed § 3809.435, as well as pending modifications for new mine facilities. The title of final § 3809.434 has been changed to: How does this subpart apply to pending modifications for new or existing facilities? The table has been deleted and the text presented in four paragraphs.

Final § 3809.434(a) says that this section applies to modifications pending before BLM on the effective date of the final rule to construct a new facility, such as a waste rock repository, leach pad, drill site, or access road; or to modify an existing mine facility such as expansion of a waste rock repository or leach pad.

Final § 3809.434(b) states that all provisions of this subpart, except plan content and performance standards (§§ 3809.401 and 3809.420, respectively) apply to any modification of a plan of operations that was pending on the effective date of final rule. It also cross references § 3809.505 on the applicability of financial guarantee requirements.

Final § 3809.434(c) provides a reference to the plan content requirements (§ 3809.1–5) and the performance standards (§§ 3809.1–3(d) and 3809.2–2) that were in effect immediately before the final rule which apply to a pending modification of a plan of operations.

Final § 3809.434(d) provides that operators could choose to have the new rules apply to their pending modification of a plan of operations, where not otherwise required.

The cutoff date for applicability of the final regulations to pending modifications has been changed from when the NEPA document has been published, to whether the proposed modification has been submitted to BLM prior to the effective date of the final regulations. The reason for this change is that BLM was persuaded by comments concerning the amount of effort that goes into preparing a plan of operations and associated NEPA documents which might have to be partially redone or supplemented, and by the fact that the operator has very little control over when the NEPA document is actually published. BLM believes that using the effective date of the final regulations to determine ''grandfathered'' plans of operations, or modifications, would be simpler to administer and more fair to the operators. However, BLM does expect that in order for pending plans or modifications to be grandfathered, they will have to be substantially complete in addressing the content requirements of the existing regulations before the effective date of the new regulations.

Final § 3809.434 is not inconsistent with the NRC Report. While NRC did not specifically address how to transition pending modifications into any new regulations, they did express concern for the protection of an operator's investment and that the regulations in general contain procedural protections. Under final § 3809.434 operators with a pending modification do not have to redo designs or reopen NEPA analysis that was underway. This approach is not inconsistent with the discussions contained in the NRC Report regarding plan modifications

Sections 3809.500 Through 3809.551 Financial Guarantee Requirements—General

Today's rule establishes mandatory provisions for financial guarantees for all activities greater than casual use, expands the types of financial guarantees available, and establishes the circumstances and procedures under which BLM will pursue forfeiture of a guarantee. It also requires that financial guarantees be redeemable by the Secretary while allowing BLM to accept financial guarantees posted with the State in which operations take place if the level of protection is compatible with this subpart. The rule authorizes the establishment of a trust fund in those circumstances where long-term, post-mining operations and water treatment will be necessary.

This final rule is different from the proposed rule in several significant ways. First, we are not adopting part of the proposal contained in the supplemental rule published on October 26, 1999. See 64 FR 57613, proposed § 3809.552(d). That proposal would have required an operator, when BLM identifies a need for it, to put portion of the financial guarantee in an immediately redeemable funding mechanism that would enable BLM to quickly obtain use of the funds for site stabilization during forfeiture proceedings.

Second, we will no longer accept corporate guarantees for plans approved after the effective date of this regulation. BLM will continue to allow corporate guarantees which are in effect on the effective date of the regulation. However, if a plan modification results in an increase in the estimated costs of reclamation we will require a financial guarantee in a form other than a corporate guarantee for the area covered by the modification.

A third change will provide BLM discretion in determining whether to seek forfeiture of a financial guarantee.

Also, BLM will not require a 30-day period for public comment prior to releasing financial guarantees associated with notice-level activities but will have a 30-day comment period for plans of operation. The comment period will be posted in the BLM field office having jurisdiction, published in a local newspaper, or both.

General Comments on Financial Guarantees

BLM received numerous comments addressing the proposed rules related to financial guarantees. Commenters generally supported the concept that BLM require financial guarantees for all operations beyond casual use. However commenters diverged widely on specific contents of the rule.

General Comments Supporting the Proposal

Numerous commenters supported the notion that adequate bonding is necessary to protect the public from bearing the financial burdens of cleanup should an operator declare bankruptcy and abandon a mine site. In particular, this included industry support for bonding of notice-level operations. BLM received comments in favor of the wide range of financial instruments we proposed to accept and the continued use of State bond pools. Industry expressed satisfaction that BLM proposed to continue to allow corporate guarantees. The environmental community generally supported the provisions proposing a trust fund to cover the cost of post-mining operations and water treatment, although some commenters suggested this did not go far enough. Non-industry commenters supported the provisions allowing a time period for public participation both before plan approval [proposed § 3809.411(d)] and prior to final

financial guarantee release [proposed § 3809.590(c)]. One commenter asked that BLM amend the rule to clarify how we will implement it for a variety of conditions covered in the individual sections of the rule.

General Comments Opposing the Proposal

Some small miners expressed opposition to bonding for notice-level activities because, they felt, this would establish a hardship. There were numerous comments opposing BLM's proposal to accept corporate guarantees and State financial guarantees. Regarding the former, commenters saw this as a risk because if commodity prices decline, corporate assets would also drop. Some commenters expressed that accepting State financial guarantees is risky because of the possibility that a State could call a financial guarantee, leaving the Federal government holding a financial guarantee which would not cover the full cost of reclamation. There was also opposition to the public participation proposal on the part of industry which sees this as creating an unnecessary delay. They see the NEPA process as already affording the public an opportunity to comment on financial guarantee amounts. Industry strongly opposed the provisions calling for a trust fund and the posting of a financial guarantee to cover unforeseen contingencies. With respect to the trust fund, commenters felt that once a financial guarantee is released that is a recognition that reclamation is complete. With respect to contingency bonding, many commenters expressed the belief that it is not workable to provide such an instrument.

Consistency With the National Resource Council Report

Recommendation 1 of the NRC Report stated; ''Financial assurance should be required for reclamation of disturbances to the environment caused by all mining activities beyond those classified as casual use, even if the area disturbed is less than 5 acres.'' The report justifies the recommendation by pointing out it observed unreclaimed exploration and mining sites that operated under a notice. The NRC expressed the belief that disturbances beyond casual use are significant and that financial guarantees would protect the taxpayer by allowing agencies to reclaim lands but not at taxpayer expense. The NRC also thought that a financial guarantee could provide an incentive ''for operators to reclaim land in a timely manner.'' The proposed rule and the final rule carry out this recommendation.

The NRC goes on to describe how it believes BLM could implement a bonding program and suggests BLM should establish standard financial guarantee amounts for ''typical activities'' which it describes as limited activities of under 5 acres. This would preclude the need to calculate a financial guarantee for each activity. The NRC suggests that if BLM were to do this, the amount of bonding must be adequate. Language in both the proposed and final rule is broad enough to allow BLM field managers to establish and accept standard financial guarantee amounts. However, regardless of the standard, and consistent with the NRC Report, if the ''standard'' would result in the filing of an insufficient guarantee, the BLM field manager must require the posting of a greater guarantee, even if this requires a calculation. Likewise, there may be instances when the ''standard'' amount exceeds the likely cost of reclamation. In those cases, BLM would permit the operator to demonstrate this and the field manager could accept a guarantee in an amount less than the ''standard.''

The NRC Report (p. 95) also encourages the use of bond pools. Today's action permits operators to use bond pools provided the pool is adequate to protect the public in case of default.

Except for the items discussed above, the NRC Report provides no guidance on how to operate a bonding program. But it is difficult to imagine a rule which addresses financial guarantees in such a limited manner that BLM and the public would not know the conditions of surety release, forfeiture, or how the States and BLM will work together. Therefore today's action includes provisions necessary to implement the recommendations of the Report.

Section 3809.500 In General, What Are BLM's Financial Guarantee Requirements?

This section requires operators to provide financial guarantees for all activities other than casual use. It mirrors exactly Recommendation 1 of the NRC Report. The only difference from the proposed rule is language we added to state explicitly that if a notice is on file with BLM as of the effective date of the regulation, the operator doesn't need to post a financial guarantee. However, if an operator modifies or extends a notice, the operator will have to post a financial guarantee. (See final § 3809.503)

We received numerous comments in support of requiring financial guarantees for notice-level activities. The majority of the commenters expressed the feeling that financial guarantees should protect the public from having to bear the financial burdens of cleanup should an operator declare bankruptcy and abandon a mine.

Comments opposing this section generally complained that requiring all notice-level operators to post a financial guarantee will create hardships that small operators might not be able to overcome and therefore would be unable to continue in the business. Several Alaska miners thought that the rules would be especially difficult for them and would make it difficult to use the Alaska bond pool. One commenter suggested that BLM be flexible so as to not overly burden small businesses. Hardships were described both as financial, *i.e.*, the cost of the financial guarantee and procedural, *i.e.*, small miners find it difficult to obtain a bond (the most common form of financial guarantee). One commenter suggested that BLM has not demonstrated that the requirement will provide additional environmental protection given that so few notice-level operations actually result in unnecessary or undue degradation.

Commenters suggested that exploration activities not be subject to environmental review or bonding if the operations don't use chemicals. Under these circumstances, some saw bonding as unnecessary given the low level of environmental degradation. Others believe that requiring a financial guarantee would adversely impact the recreational mining community. In a similar vein, commenters suggested that it would cost BLM more to administer a financial guarantee program for notice-level operations than it would cost to simply reclaim the few operations where an individual or company has left their obligations. Several commenters expressed the belief that notice-level bonding is appropriate, but asked that it be done as a separate rulemaking. They believe this would ensure consistency with State laws. One commenter asks how BLM will protect the miner from trespassers who cause degradation that results in the legal miner forfeiting a financial guarantee.

Commenters expressed a concern and requested clarification concerning the possibility that a mine could be double bonded for some parts of an operation because of the requirements for calculating reclamation costs.

One State suggested that BLM distinguish between mining and exploration and not require a financial guarantee for certain exploration projects of less than 5 acres. Recreational miners and hobbyists

expressed concern that the financial guarantee requirements would prevent them from continuing to pursue mining.

BLM believes, along with the NRC, that the posting of a financial guarantee protects the public, and its very existence might encourage an operator to promptly reclaim once the activities have ended. In fact, the NRC was quite specific that operators undertaking exploration activities should post a financial guarantee. With respect to recreational miners and hobbyists, they must follow the requirements of § 3809.11 to determine if their activities go beyond casual use. If so, we must require a financial guarantee because of the potential cumulative impacts and the need to assure reclamation activities are carried out. With respect to the possibility of double bonding, BLM wrote these rules in such a manner that through State-BLM cooperation, double bonding should normally not occur. The only time double bonding might occur is when BLM and State interests diverge, and the parties can't agree on bonding requirements.

If BLM were not to adopt this requirement, we would be inconsistent with a specific NRC Report recommendation. While we can be sympathetic toward those who may face a hardship in securing a financial guarantee, this potential hardship cannot override the Secretary's responsibility under FLPMA section 302(b) to ''prevent unnecessary or undue degradation.'' The NRC said posting a financial guarantee may provide an incentive to reclaim land and also protects the taxpayer from having to pay for the failure of an operator to do so. We agree. This is why we include the requirement in today's action.

A commenter stated that at the time the previous rules were adopted, BLM decided not to burden the small miner with ''confiscatory'' bonding or undue impairment to the point that mining was no longer feasible. The commenter asserted that BLM previously concluded that requiring notice-level operations to obtain bonds was unreasonable enforcement and the taking of capital to mine through bonding, a hardship that took the operating capital from a small-entity operation.

BLM disagrees as to the relevance of its decision in 1980 not to require that notice-level operations be bonded. BLM has documented over 500 cases since 1980 where the operators, most of them at the notice level, have abandoned their operation without performing the required reclamation. BLM now believes that bonding is necessary to ensure performance of reclamation. The bonding provisions have been structured so that the amount of the financial assurance can be incrementally posted and released to correspond with the on-the-ground disturbance or the performance of reclamation. This should keep the impact to operating capital at a minimum while promoting performance of reclamation.

Today's action does not intend to limit the use of State bond pools, including the Alaska bond pool, provided the BLM State Director is satisfied that the bond pool will actually provide the funds BLM might need to carry out reclamation in the event operators fail to carry out their obligations.

The rule attempts to eliminate hardships by requiring bonding for the actual cost of reclamation rather than requiring a minimum financial guarantee as we did in the remanded 1997 rule. In response to those who believe this would cause hardship, BLM contacted the Small Business Administration (SBA) to see how its Surety Bond Guarantee Program might be applied to small mining businesses. The SBA concluded that it is unable to accommodate our request at this time.

Section 3809.503 When Must I Provide a Financial Guarantee for My Notice Level Operations?

This section of the final rule requires an operator to provide a financial guarantee before beginning operations, if the operator files a notice on or after the effective date of the rule. Operators must provide a financial guarantee for operations that existed before today's rule becomes effective only if they modify their operation or extend it beyond two years.

Today's action differs from the proposal in that we modified paragraph (b) to make clear that if an operator modifies a notice that the operator submitted prior to the effective date of the rule, the operator must post a financial guarantee to ensure reclamation for the entire area covered by the notice. We believe that this language, coupled with final § 3809.300 clearly answers any questions regarding the posting of financial guarantees for notices. This change is in response to comments that the proposal was unclear as to whether an operator has to post a financial guarantee if the operator modifies a notice that existed before the effective date of this rule.

We also received a comment asking BLM to clarify that the operator is only responsible for the disturbances created by that operation. The commenter feared that BLM would hold operators responsible for disturbance created by previous operations. One commenter asked BLM to clarify whether if the operator modifies a notice, a financial guarantee is required for the entire notice or just the modified part of the notice. One commenter suggested that we add words to clarify that the State might have requirements for a financial guarantee beyond what BLM requires.

The intent of this section is to state that financial guarantees are posted for current notice-level operations. However, if the operations are continuing under a notice which has been transferred, the joint and several liability provisions of final § 3809.116 would apply. If an operator begins a new operation on lands disturbed by an earlier operation, and if the new operation is not a continuation of the earlier operation, the new operator is responsible for the earlier disturbances only to the extent the new operator redisturbs the area. If an operator modifies a notice, BLM will consider the notice as a new notice, and we will regulate the modified notice under the rules we are issuing today. Therefore, as stated above, we added language to this section to clarify that the operator will have to post a financial guarantee for the entire notice.

We do not think it is necessary to address State requirements for a financial guarantee. Operators know that in addition to the requirements of this subpart, they must comply with all local, State, and Federal requirements. We have made clear that the plan of operations must comply with State, local, Tribal, and other Federal requirements. Where those requirements include the posting of a financial guarantee beyond the BLM requirements, the operator is responsible for doing so.

Section 3809.505 How Do the Financial Guarantee Requirements of This Subpart Apply to My Existing Plan of Operations?

This section allows those operating under an existing plan of operations 180 days from the effective date of today's action to comply with the financial guarantee requirements of this rule. There are no substantive changes from the proposed rule; however we did add a sentence to clarify that if an existing financial guarantee complies with the requirements of this subpart, the operator need not file a new financial guarantee.

We received some comments asking that we lengthen the time period for operators to comply to one year. Some holders asked that BLM extend the requirements from 180 days to one year

to cover seasonal situations and to give the operator additional time to decide whether to continue the notice. We received a comment from a Federal agency asking that we shorten the period to 60 days. We also received a few comments suggesting that we clarify that notice level operators are not subject to the requirements of this section. Several commenters asked that we clarify proposed § 3809.505 to state that the obligation to provide a financial guarantee meeting the requirements of this subpart will not restrict the ability of an operator to continue to operations under an approved plan of operations. One commenter said that the existing financial guarantee should remain in place unless the operator modifies the approved plan of operations.

There were comments that the provisions of the rule for existing plans require clarification. One commenter suggested that proposed §§ 3809.430–434 appear to have requirements that conflict with proposed § 3809.505. Final §§ 3809.430–434 apply to modifications of existing plans of operations whereas this section states that an operator has 180 days to post a financial guarantee meeting the requirements of this subpart. The financial guarantee requirements are independent of modifications. Any modification of an approved plan of operations would require the operator to adjust the financial guarantee before beginning to operate under the modifications. One commenter asked that we modify this section to state explicitly, ''This obligation does not affect your right to continue to operate under the approved plan of operations both before and after complying with the obligation in this section.'' As stated above, we adopted language to make clear that operations may continue during the 180-day period we grant in final § 3809.50.

BLM decided to leave the 180-day transition period in place as this provides ample time to come into compliance. The 180-day period applies to plans of operations, not notices. As most currently operating under a plan will already be complying with these provisions, we believe few, if any, operations will be impacted. But if an existing plan of operations does not have a financial guarantee meeting the requirements of this subpart, there is a need to upgrade the guarantee. Plans of operations frequently result in significant on-the-ground disturbance and other impacts. However, shortening the time period to 60 days has the potential to unnecessarily cause hardship in some instances due to the fact that some work is seasonal and that requiring a financial guarantee could take more than 60 days. If the operator cannot secure an adequate financial guarantee in 180 days, the operator will be in noncompliance. We believe that BLM can justifiably say the operations pose a potential threat and take appropriate enforcement action.

Section 3809.551 What Are My Choices for Providing BLM With a Financial Guarantee?

These rules allow an operator to provide:

- An individual financial guarantee for a single notice or plan of operations,
- A blanket financial guarantee for State-wide or nation-wide operations or,
- Evidence of an existing financial guarantee under State law or regulations.

These choices are identical to those contained in the proposed rule.

Several members of the mining industry commented that companies with several notice- or plan-level operations would be better served with one large financial guarantee, rather than having several different financial guarantees. Conversely, a large financial guarantee is seen by some commenters as a way that industry can skimp on bonding and have all of their operations covered. In addition, the same commenters believe having one financial guarantee for several plans of operations would make defaulting on a financial guarantee more of a possibility.

Commenters suggested that the blanket financial guarantee provision is unclear as to whether the sum of the financial guarantees will equal the sum of financial guarantees required for individual operations. Others objected to blanket guarantees because of the administrative difficulties they could cause BLM.

BLM allows nationwide blanket guarantees in other mineral programs, and we believe we can administer the program soundly. Final § 3809.560(b) states that BLM will accept the blanket financial guarantee if we determine that its terms and conditions are sufficient to comply with this subpart. As the operator must post a sufficient financial guarantee to cover the cost of reclamation for each individual project, we believe that the amount of the financial guarantee must equal the sum of the reclamation estimates for each project.

Sections 3809.552 Through 3809.556 Individual Financial Guarantee

Section 3809.552 What Must My Individual Financial Guarantee Cover?

This final rule requires an individual financial guarantee to cover reclamation costs as if BLM were to contract for reclamation with a third party. The rule also requires financial guarantees to cover all reclamation obligations arising from an operation, regardless of the areal extent or depth of activities the operator describes in the notice or the approved plan of operations. Paragraph (b) BLM establishes the goal of periodic BLM review of the adequacy of the estimated reclamation cost. Paragraph (c) authorizes BLM to require the operator to establish a trust fund or other funding mechanism to ensure the continuation of long-term water treatment to achieve water quality standards or other long-term, post-mining maintenance requirements.

The final rule omits a portion of the proposal contained in the supplemental proposed rule published on October 26, 1999 (64 FR 57613). See proposed § 3809.552(d). That portion of the proposal would have required an operator, when BLM identifies a need for it, to establish a portion of the financial guarantee used to conduct site stabilization and maintenance in a funding mechanism that would be immediately redeemable by BLM. BLM would then use the funds to maintain the area of operations in a safe and stable condition during the period needed for bond forfeiture and reclamation contracting procedures.

Some commenters feared that it would require operators to put up front substantial sums of capital for reclamation which could be used at BLM's whim. Some saw it as potentially giving a competitive advantage to larger companies. Others, silent on how BLM would use the money, felt the provision would tie up large sums of capital. Another comment suggested that all guarantees should be immediately redeemable. We also received several comments suggesting that the supplemental proposed rule did not follow the requirements of the Small Business Regulatory Enforcement and Fairness Act, 5 U.S.C. 601–612, because the regulatory flexibility document did not consider the impact of this proposed change.

We decided to omit this provision from the final rule for some of the reasons expressed in the comments. Requiring a separate interim funding mechanism, while useful, could be complicated, and the complications of creating and maintaining such a fund in every case could outweigh the advantage of having the fund available in the relatively fewer occasions when it would be helpful. We believe the regulatory flexibility document meets the requirements of the Act, even though the economic analysis dated

December 18, 1998, did not specifically address the potential for increased cost of a financial guarantee that would be immediately available to BLM, and the impact of this proposal would have been minimal.

We are adopting the part of the October proposal that requires the financial guarantee to cover any interim stabilization and infrastructure maintenance costs necessary to maintain the area of operation while third-party contracts were being developed and executed. See the last sentence of final § 3809.552(a), which clarifies the February 9, 1999, proposed rule.

One commenter suggested that we amend proposed § 3809.552(b) to require BLM to annually send each operator a written report on the adequacy of the financial guarantee. The same comment asked that we amend paragraph (c) of that section to include a provision to require BLM to show that the trust fund does not duplicate any other authority.

When we published the proposed rule we specifically asked for comments on whether additional financial assurances should be required to satisfy operational or environmental contingencies. We received a number of comments objecting to bonding for contingencies or worst-case scenarios. Numerous commenters suggested that operators have liability insurance to protect against the financial consequences of unforeseen activities. Operators would presumably use the proceeds of this insurance to fund corrective actions that a contingency requires. Other comments see contingency bonding as inconsistent with reclamation and also see the long-term trust fund as something that State and Federal water quality laws address. The potential cost led one commenter to conclude this ''would be a potential violation of the right to mine.''

A national industry association questioned the concept of contingency bonding, stating that this runs counter to the notion of bonding for ''specific and calculable reclamation requirements established in the approved plan of operations.'' These comments describe this requirement as ''phantom bonding'' and suggest that operators liability insurance would provide protection if an unforseen accident occurred. They asserted it would be difficult to obtain a financial guarantee under these circumstances.

One industry comment suggested that requiring contingency bonding is difficult to implement because all mine models are uncertain. This commenter suggested that BLM should consider the worst case and the probability that this would occur. Another commenter pointed out that the expense of such bonding and the infrequency of worst-case occurrences that were beyond the ability of the operators to redress with their funds.

Others believe that bonding for unforeseen contingencies in the reclamation process is an unreasonable requirement. They contend this would give BLM too much discretion in determining the amount of the financial guarantee for an unplanned events. Another commenter suggested this is possible to do through using modeling and determining the probability of an impact occurring.

There were also numerous comments asking BLM to incorporate contingency bonding into these rules because the impact of mining is often not known for many years after it is concluded. One comment suggested we hold a portion of the financial guarantee beyond the time of surface reclamation to assure that off-site impacts will not occur. One Interior Department agency noted that long-term financial support is an important tool for environmental protection.

BLM has decided not to require bonding for contingencies because of the uncertainties involved in calculating the amount. The rules do require that the financial guarantee be sufficient to cover the costs of reclamation described in the plan of operations or notice. If a contingency occurs and creates a new reclamation obligation, the operator must adjust the financial guarantee upward accordingly to cover the new obligation.

Some commenters objected to proposed § 3809.552(c) on the basis that a financial guarantee to establish long-term water treatment or water quality standards should be left to EPA or State regulators. A Federal agency noted the proposal didn't define the criteria BLM would use to base the ''need'' for a long-term trust fund. One commenter asked that we clarify that the State may require financial assurances for water quality requirements that go beyond the requirements of this subpart.

In some circumstances, an important or perhaps the only way an operator may protect water quality from unnecessary or undue degradation is to provide for long-term water treatment. The trust fund or other funding mechanism is appropriate to assure that long-term treatment and other maintenance will continue. The final rule does not preclude States from establishing additional financial guarantee requirements.

Some commenters said that paragraph (c) should be deleted because BLM should not approve any plan of operation that would create the need for long-term water treatment because that constitutes unnecessary or undue degradation. This suggestion is not incorporated into the final rule. BLM defines ''unnecessary or undue degradation'' in such a way that long-term water treatment by itself is not an indicator of unnecessary or undue degradation.

One commenter asked that we revise proposed § 3809.552(a) to specify that BLM administrative costs associated with a default be limited to direct costs of BLM staff directly responsible for implementing the approved reclamation plan. One commenter suggested that instead of financial guarantees BLM (and the Forest Service) should have the funding authority to spend Federal dollars on the ''few, if any'' operations causing unnecessary or undue degradation.

In the final rule we are not limiting the administrative costs to direct BLM costs. Such an action could result in BLM having to use taxpayer funding to properly monitor reclamation contracts. Likewise we did not impose a requirement to send an annual status letter to the claimant/operator or to impose a specific time period for BLM to review the adequacy of a financial guarantee. Both proposals would impose an unnecessary administrative burden on BLM because the normal claim/plan management process affords us the opportunity to review the adequacy of financial guarantees when it is necessary. This final rule also declines to adopt the rules of any one State. We intend this rule to be flexible, avoiding a one size fits all approach. Adopting a rule which mirrors that in one State could inadvertently negatively affect other States. We also decided not to accept the suggestion that BLM seek authority to spend tax dollars to reclaim lands because BLM already has the authority, and it is the objective of these rules to *prevent* unnecessary or undue degradation, not simply to make arrangements for cleaning up problems after they occur at the expense of taxpayers.

BLM has explained on many occasions that these rules do not establish water quality standards. States establish the standards for ground water, and EPA establishes the standards for surface water unless EPA has delegated this function to the State. Final § 3809.420 describes what constitutes an acceptable plan of operations. In this section (final § 3809.552) we are requiring the posting of a financial guarantee to assure that State water quality standards will be

maintained on public lands as a result of mining operations.

BLM did not attempt to define ''need'' because this will differ on a case-by-case basis. BLM believes that allowing the local field manager to work with the operator to determine need is preferable to trying to force a one-size-fits-all set of criteria.

One comment asked that paragraph (b) of this section require BLM to prepare an annual report on the adequacy of the financial guarantee. An association asked BLM to consider incorporating the financial assurance requirement used under California laws, including an annual review. Another commenter recommended that we amend paragraph (b) to require BLM to review the adequacy of financial guarantees at least once every three years.

We are not requiring review of the amounts of financial guarantees at predetermined periods. If a financial guarantee is linked to market fluctuations, the operator must certify annually to BLM that the market value of the instrument is sufficient to cover the cost of reclamation. See final § 3809.556(b). In other cases, the BLM will monitor the adequacy of financial guarantee amounts through our inspection program.

Section 3809.553 May I Post a Financial Guarantee for a Part of My Operations?

This final rule permits operators to provide financial guarantees on an incremental basis to cover only those areas being disturbed. Paragraph (b) establishes BLM's goal of reviewing the financial guarantee for each increment of an operation at least annually. The final rule is unchanged from the proposed rule.

We received one comment on this section which supported incremental bonding as a ''welcome regulatory innovation.''

Section 3809.554 How Do I Estimate the Cost To Reclaim My Operations?

This section requires that an operator estimate the reclamation cost as if BLM were to hire a third-party contractor to perform reclamation of the operation after the operator has vacated the project area. It is unchanged from the proposed rule.

There were numerous comments opposing this provision. Some expressed the belief that the rule should limit financial guarantees to 100% of reclamation costs so that BLM administrative costs would not be part of the calculation. This was seen as an incentive to achieve reclamation. Another comment wanted to limit BLM administrative costs to the direct costs of individuals implementing the approved reclamation plan. Other comments aimed at cost reduction objected to third-party reclamation cost calculations as requiring contractors to pay Davis-Bacon wages.

Others believed that calculating the amount of each financial guarantee was too labor intensive and suggested alternatives such as:

- Establishing thresholds, for example, under $100,000, under $500,000 and over $500,000, for determining the amount of the financial guarantee;
- For notices, establishing a fixed amount;
- Giving notice-level operators the option of using either a dollar per acre figure or a site-specific amount that the operator calculates; or
- Establishing Statewide amounts.

We received a series of comments suggesting that BLM incorporate State models and guidelines to calculate the costs of reclamation. Some see this as a way of avoiding double bonding.

The NRC Report discussion of bonding notes that ''standard bond amounts for certain types of activities on specific kinds of terrain should be established by the regulatory agencies. * * * in lieu of detailed calculations of bond amounts based on the engineering design of a mine or mill.'' Numerous commenters, while expressing general support for the NRC discussion, noted that it would also be reasonable to calculate the amount for individual operations as necessary. One mining association thought BLM ought to allow operators to choose between a per-acre amount and an actual-cost-to-reclaim amount. Another industry group wrote that a one-size-fits-all standard financial guarantee amount would be counter to the heart of the NRC Report which emphasizes the need for site-specific flexibility. One mining company expressed specific support for the cost-estimating approach BLM used in the proposed rule. However, other mining groups suggested that an amount could be set at the State level if BLM and the State worked cooperatively.

Alaskan miners argued that BLM should establish standard amounts and that it is inappropriate to base financial guarantee amounts on the basis of third-party contractor rates.

There were comments that asked BLM to incorporate the NRC proposal to establish fixed amounts for financial guarantees as a means of streamlining the process, while also giving operators a way of knowing ahead of time what their financial guarantee requirements will be.

One commenter asked that we explain what constitutes an ''acceptable'' reclamation cost estimate. We chose not to define ''acceptable'' because the decision as to what constitutes ''acceptable'' must be made at the local level by the field manager for each project.

There were comments asking that BLM reinstate the remanded regulations requiring a third-party professional engineer to certify the reclamation estimate, even suggesting that BLM foot the bill if this would be overly burdensome to small miners. The argument presented was that a company would ''lowball'' the estimate to lower its costs.

This final rule requires that financial guarantees cover actual costs. We believe this is consistent with the NRC Report, which recommends that operators post financial guarantees adequate to cover reclamation costs. The rule is flexible enough to permit the BLM field manager to establish fixed amounts for activities under his or her jurisdiction, but also allows the field manager to require a financial guarantee in an amount over or under the fixed amount if the cost of reclamation of a specific operation deviates from the fixed amount.

As we stated in the preamble of the proposed rule (64 FR 6442, Feb. 9, 1999), the purpose of this section is to ensure that the estimated cost of reclamation, on which the financial guarantee amount is based, is sufficient to pay for successful reclamation if the operator does not complete reclamation. We explained that if funding were not available in the financial guarantee to pay the administrative costs, the costs would have to come out of the funds available for the on-the-ground reclamation. This could result in incomplete or substandard reclamation. This final rule reconfirms BLM's desire to assure complete reclamation without the use of taxpayer funds.

The comments that advocate excluding BLM's administrative costs from the amount of the financial guarantee would not achieve the goal of avoiding the taxpayer bearing the cost of reclamation. Arguments that BLM administrative costs should be limited to direct costs were not accepted because BLM's general policy regarding cost recovery is to include all charges, direct and indirect. We found no reason for making an exception where reclamation financial guarantees are calculated. Similarly, inclusion of Davis-Bacon wages for third-party contracts in the calculation is something

BLM, as well as all other Federal agencies, are required to do as a matter of law.

We decided not to accept suggestions that we establish financial guarantee thresholds, establish fixed amounts, or have different processes for notice operations. Again, the purpose of these provisions is to assure the availability of funding to complete reclamation. Especially in the case of operations beyond the notice level, reclamation costs vary widely depending on size, location, and the mineral being developed. Using a threshold amount would leave BLM vulnerable to having an insufficient guarantee, especially in the case of larger mines.

Notice-level operations pose a different set of problems. While estimated reclamation costs might vary, the range of costs will not be as great. The rule will permit local BLM field managers to establish fixed amounts for reclamation of notice-level activities and work with the operator to adjust the amount of financial guarantee in specific cases. This could work on a district-wide basis. Establishing Statewide amounts is more problematic. For example, within a single State such as California, climate, soil conditions, water quantity may differ widely with an accompanying difference in reclamation costs. The approach we are taking is not inconsistent with the NRC Report, which recognized that different on-the-ground conditions require different levels of financial guarantees.

This final rule does not incorporate State models and guidelines for calculating the cost of reclamation. It would be very difficult to issue a national regulation incorporating the guidelines of the individual States. However, there is nothing to prevent individual States from working with BLM to incorporate all or part of their guidelines into BLM-State MOUs. This approach has advantages over a regulatory solution in that the site-specific needs can be addressed by those most familiar, and, as conditions or knowledge change, it is easier to make adjustments if parties are not locked into a methodology prescribed by regulation.

When we proposed the financial guarantee portion of today's rulemaking, BLM chose not to incorporate a provision of the rules we previously published on this subject that were remanded by a district court, which would have required a third party to certify the estimated cost of reclamation bonding. The experience under the remanded rules was that requiring a third party to certify the estimated cost of reclamation was a burden, particularly on small miners, and on BLM because the BLM field manager must still had to pass on the adequacy of the estimate to make sure the amount of the guarantee was adequate, regardless of who made the estimate. The benefits of the process did not outweigh these burdens. The final reinforces BLM field managers' responsibility to have an adequate financial guarantee in place before operations begin.

Section 3809.555 What Forms of Individual Financial Guarantee Are Acceptable to BLM?

The final rule expands the kinds of financial instruments that are acceptable. In addition to surety bonds, cash, and negotiable securities, which were acceptable under the previous rule, this expanded list of acceptable instruments includes letters of credit, certificates of deposit, State and municipal bonds, investment-grade rated securities, and insurance.

The final rule differs from the proposed rule in that we have decided to include insurance as an acceptable form of financial guarantee as paragraph (f) of this section. The form and function of the insurance must be to guarantee the performance of regulatory obligations in the event of operator default. In adding insurance, we determined that the company must have an A.M. Best rating of AA. This rating limits the risk to the government that the company will be unable to pay should the operator fail to reclaim land after completing operations. Several commenters suggested that we add insurance because it provides BLM as much protection as the other instruments and operators are often able to obtain insurance at a reasonable cost.

We also added language to reference Treasury Circular 570 and removed the word ''Non-cancellable.'' We added the reference to Treasury Circular 570 in response to suggestions that we clarify that BLM will not accept any surety. BLM will only accept bonds of sureties that Treasury Circular 570 authorizes to write Federal bonds.

We took out the word ''non-cancellable'' after considering comments which emphasized the difficulty of obtaining a surety if it could never be canceled. BLM decided these concerns had merit and that an operator's liability would not change and BLM's protection would not be appreciably diminished so long as the liability period of the surety would cover any situation where BLM would make a demand on the surety. If a surety intends to cancel a bond, the operator must have a replacement financial guarantee in place at the time of cancellation to avoid a gap in coverage.

Several commenters asked BLM to consider operators' liability insurance as an additional funding mechanism. Another comment asked us to include language which would, in essence, allow BLM to take any form of guarantee if it would achieve the objectives and purposes of the bonding program. The intent of this suggestion was to provide the greatest possible flexibility for both operators and BLM.

Another comment suggested that BLM require operators to replace an expiring letter of credit 30 days before it expires, because after its expiration there would be no guarantee to collect. The same commenter said BLM should redeem the letter of credit 30 days before it expires if the operator has not replaced it. One comment objected to our proposal to accept investment-grade securities because the commenter views them as close to accepting corporate guarantees. One comment suggested that BLM explore with the States creative forms of guarantees including liens on property. This suggestion was proffered to ease the burden on small business. One comment asked BLM to require the custodian of the security to submit monthly statements to BLM attesting to the market value.

BLM chose not to incorporate any of the above suggestions. We did not include operators' liability insurance because we consider liability insurance to be more appropriate for work-related liability, such as worker injury as opposed to liability for completing reclamation. Companies routinely acquire this type of insurance and while it would normally cover unintended events during mining, such insurance would not cover post-mining liabilities.

BLM chose not to add language regarding expiring letters of credit because in most cases the letter of credit will be for a significant time period. As BLM will be reviewing the adequacy of financial guarantees on a periodic basis, the field manager will be aware of any letter of credit which is about to expire and take appropriate action if the operator is not moving to replace it in a timely manner. Redeeming a letter of credit solely because it is about to expire would not be consistent with the objective of the rule. We would only redeem the letter of credit if the operator were unwilling or unable to complete reclamation.

BLM can explore creative forms of guarantees with the States, but our experience is that the rules should not provide open-ended discretion in this area. If we determine a ''creative'' method is worth including in the list of

acceptable instruments we can incorporate that in a separate rulemaking.

The notions that BLM should not accept investment-grade securities or, if we do, require the custodian to submit monthly statements attesting to their market value, are overly burdensome. In the first instance, an investment-grade security is not equivalent to a corporate guarantee because the value can be determined daily in the marketplace without having to consider intangible corporate assets. Final § 3809.556 provides BLM adequate protection from any declines in the value of the security. The suggestion that the custodian provide a monthly statement would place an unnecessary burden on the custodian without substantially increasing BLM's protection. It would also place a burden on BLM to review and file monthly reports. We believe requiring annual review of these types of financial guarantee instruments will be adequate.

Section 3809.556 What Special Requirements Apply to Financial Guarantees Described in § 3809.555(e)?

This section of the rule requires operators to provide BLM an annual statement describing the market value of a financial guarantee which is in the form of traded securities. Paragraph (b) requires the operator to post an additional financial guarantee if the values decline by more than 10 percent or if BLM determines that a greater financial guarantee is necessary. Paragraph (c) allows the operator to ask BLM to release that portion of an account exceeding 110 percent of the required financial guarantee. BLM will allow the release if the operator is in compliance with the terms and conditions of the operator's notice or approved plan of operations. It is unchanged from the proposed rule.

One commenter suggested deleting this paragraph because § 3809.552(b) contains the same general requirement for an annual review.

We chose not to delete paragraph (b) because it provides the specific requirements for certain types of financial guarantees. As the instruments vary in value, it is important that BLM annually review the value to assure their adequacy. In contrast, final § 3809.552 establishes the framework for all financial guarantees. Part of that framework is paragraph (b) which tells operators that BLM will periodically review financial guarantees without establishing any specific time period for the review. Unlike this section, § 3809.552(b) does not require the operator to submit anything to BLM unless specifically requested by BLM.

Commenters asked why BLM is requiring assets to be 110 percent of estimated reclamation costs before BLM will authorize releasing that portion of the guarantee that exceeds 110 percent. The comment suggests that a guarantee covering 100 percent of the reclamation cost is sufficient. The purpose of requiring 110 percent is to provide assurance that an adequate financial guarantee remains in place regardless of market fluctuations. If we were to use 100 percent it would be logical for us to ask for an increase in the guarantee if the level drops to 95 percent. This would impose a burden on industry and BLM to constantly adjust the level of the guarantee while not providing any real increase in protection.

Section 3809.560 Under What Circumstances May I Provide a Blanket Financial Guarantee?

This section allows operators to provide a blanket guarantee covering State-wide or nation-wide operations. The amount of any blanket financial guarantee would have to be sufficient to cover all of an operator's reclamation obligations. This final rule is unchanged from the proposed rule.

We received a comment asking whether the purpose of this section was to provide administrative convenience or something else. Other comments expressed the fear that blanket guarantees make it easier for companies to post insufficient financial guarantees, declare bankruptcy and walk away. Others see blanket guarantees as a way of avoiding detailed calculations of financial guarantee amounts based on the engineering design of a mine or mill. Others expressed the concern that the blanket guarantees will not equal the sum of guarantees needed for all individual projects.

BLM decided to maintain the option allowing blanket guarantees. The system has been in place for many years and provides administrative convenience to both the operator and BLM. It is a system which is used successfully in other BLM programs. In our experience, a blanket guarantee does not increase BLM's risk of having to use taxpayer funds to reclaim operations. BLM must work with its field managers to review the blanket guarantees to be certain that sufficient funds are available for each project covered in the event the operator does not complete reclamation for whatever reason.

Sections 3809.570 Through 3809.574 State-Approved Financial Guarantee

Section 3809.570 Under What Circumstances May I Provide a State-Approved Financial Guarantee?

This section permits BLM to accept a State-approved financial guarantee that is redeemable by the Secretary, is held or approved by a State agency for the same operations covered by a notice or plan of operations, and provides at least the same amount of financial guarantee as required by this subpart. We are requiring that any State-approved financial guarantee be redeemable by the Secretary so that, in case of failure to reclaim, we have independent authority to initiate forfeiture of the financial guarantee to ensure reclamation of public lands. The redeemability requirement would not apply to State bond pools. The final rule is unchanged from the proposed rule.

We received one comment asking that BLM amend proposed paragraph (c) to provide that the State guarantee need not include funds to cover BLM costs for issuing a third-party contract when the State agreement provides for the State to implement a jointly approved reclamation plan that is in default.

There were comments that the proposal would end joint bonding because a surety would not issue an instrument redeemable by both the State and the Secretary of the Interior. One State asked that we amend the section so that the Secretary of the Interior would not have to sign the guarantee, citing the MOU as providing a means to protect both the State and BLM. Another State pointed out that its law does not provide for jointly held financial guarantees and suggested that to make an MOU workable with respect to financial guarantees could require the State legislature to act. One State expressed concern that BLM should allow that State to hold the financial guarantee instrument because a joint instrument would be difficult to administer.

In the context of State bonding, there were many comments about using State bond pools. One comment stated, ''We are pleased that the State bond pool may continue to work as a means of allowing placer miners and others to easily comply with proposed regulations. In Alaska, all operations disturbing 5 acres or more are required to be bonded for reclamation, and reclamation is required for all operations of any size. The State of Alaska bond pool has been used successfully for many years, and has been approved by the BLM for many operations.''

Another comment said that BLM shouldn't be able to recoup administrative costs from the State bond pool because utilizing the pool saves BLM money. The same commenter noted that States ''have the ability to audit all reclamation costs claimed under a default situation, when monies are drawn from the existing State bond pool.'' Finally, the commenter suggested that BLM proceed with legal action against any and all liable parties before using State bond pool money to remedy the reclamation obligation.

There were comments asserting BLM should not accept financial guarantees that are part of State bond pools. These commenters see such pools as not always solvent and note that one large cost recovery may exceed the value of the pool.

Other commenters asked why BLM would not adopt State rules. Commenters also questioned whether operators would be able to obtain an instrument from a surety that named two different entities with the ability to redeem a guarantee.

BLM did not accept the suggestion that a third-party contract not be included. Even when a State agreement exists, the responsibility for protecting Federal lands remains with BLM. BLM must still administer any third party contracts needed to reclaim land after operations, and this is a legitimate expense. Estimates of the amount of the financial assurances are expected to consider the administration of contracts, so it is not unreasonable to have proceeds from a State bond pool pay this expense. BLM believes it must include its direct and indirect administrative costs in calculating the estimated reclamation costs. These costs should apply to State bond pools as well. In the event of a disagreement with the State, BLM should be certain to have sufficient funds to pay for reclamation. See also the response to comments about the calculation of the estimate in final § 3809.554.

We believe that making a financial guarantee redeemable by the Secretary is a fundamental principle of the financial guarantee program. In final § 3809.203, we state clearly that if the financial guarantee is a single instrument, it must be redeemable by both the Secretary and the State, and this section is consistent with that requirement. We believe that surety companies will cooperate and accept the notion, and that joint State-BLM bonding may proceed. We recognize that sometimes State and Federal interests are not the same. Under FLPMA, the Secretary of the Interior is ultimately responsible for assuring that operators not cause unnecessary or undue degradation, and this appropriately includes a requirement that they assure reclamation of Federal land after mining.

We believe that continuing to use State bond pools is appropriate, especially to assist small miners who might otherwise have difficulty obtaining a financial guarantee from other sources, so long as the conditions of the next section are met. The BLM State Director will have to determine whether the pool is sound (see final § 3809.571) before an operator would be able to post a financial guarantee through the pool. If one large claim would make the pool insolvent, the State would need to find a means to supply the financial guarantees necessary to comply with the requirements of subpart 3809.

We also received a comment asking BLM to add language that would clarify that BLM may still require its own financial guarantee even if there is an existing State-approved financial guarantee. We did not accept this suggestion because we believe the language in final § 3809.570 makes clear that BLM will review State-held financial guarantees and make an independent decision on whether to accept them.

Finally, BLM disagrees that it should have to bring legal action against liable parties before using a bond pool. One principal purpose of financial guarantees is to avoid the necessity of lawsuits to accomplish reclamation.

Section 3809.571 What Forms of State-Approved Financial Guarantee Are Acceptable to BLM?

This section allows an operator to provide a State-approved financial guarantee subject to the conditions in final § 3809.570, in the following forms:

- The kinds of individual financial guarantees specified under § 3809.555;
- Participation in a State bond pool, if the State agrees it will draw on the pool where necessary to meet obligations on public lands, and the BLM State Director determines that State bond pool provides equivalent level of protection as required by this subpart; or
- A corporate guarantee existing on the effective date of this final rule.

The final rule differs from the proposed rule regarding whether BLM will accept a corporate guarantee as a financial guarantee. BLM proposed to continue its policy of accepting corporate guarantees under certain circumstances if the State in which the operations are occurring did so and if the BLM State Director determined that the corporate guarantee would provide an appropriate level of protection. We asked for public comment on whether to continue this policy. A new section, final § 3809.574, explains that BLM will no longer accept corporate guarantees, but will allow those in place to continue for that portion of the operation covered by a corporate guarantee existing on the effective date of this rule.

Numerous commenters argued against permitting corporate guarantees, stating that financial guarantees should be held by an independent third party. Commenters noted that if BLM allows corporate bonding, the value of the ore should not be considered an asset as it fluctuates over time and loses value as it is mined. Thus, the soundness of the guarantee might be most questionable at the time it is most needed. We also received a comment suggesting that allowing corporate guarantees could be inconsistent with the first recommendation in the NRC Report because they may not provide assurance that reclamation will be completed.

Other commenters supported allowing corporate guarantees and suggested approaches the commenters considered workable. One commenter suggested that if BLM decides to permit corporate bonds, we should use a system similar to the system that the Office of Surface Mining (OSM) uses. This is an elaborate system which limits the percentage of corporate bonding based on the assets of a corporation. Other commenters suggested that BLM look at State models (specifically Nevada and California) for determining the levels of corporate guarantees. One comment described and supported the Nevada reclamation regulations pertaining to corporate guarantees, which allow them under certain conditions of corporate financial soundness, but only for 75 per cent of the estimated cost of reclamation. Another comment urged BLM to consider, for small entities, the salvage value of equipment and other property at the mine site. Numerous comments asked that we amend the rule to state that guarantees under the California program are automatically acceptable.

One commenter suggested that BLM use the OCS system which measures assets over liabilities on an annual basis. One commenter suggested that BLM consider using as a model the regulations adopted under Subtitle C of the Resource Conservation and Recovery Act (''RCRA'') with respect to the financial assurance of closure and abandonment costs.

During a January 11, 2000 meeting with the Western Governors' Association, some State representatives

expressed concern about continuing to accept corporate guarantees, for reasons similar to those in the comments we received from others opposing corporate guarantees. However, some State laws specifically allow corporate guarantees. We recognize that the final rule will, in some cases, require a reworking of MOUs with the States.

We found the arguments opposing corporate guarantees persuasive. We agree that a corporate guarantee is less secure than other forms of financial guarantees, especially in light of fluctuating commodity prices. Recent bankruptcies added to the concern that corporate guarantees don't provide adequate protection. We believe the number of new mines that might have wanted to rely on corporate guarantees is relatively small, and we also believe, given the economics of the industry, that companies that would have been eligible to hold a corporate guarantee should not have a significant problem finding a third-party surety, or posting the requisite assets.

BLM currently accepts a corporate guarantee only if there is an MOU with the State and the State accepts corporate guarantees. The proposed rules would have required BLM to evaluate the assets of individual companies before allowing corporate guarantees. Specific models cited in the comments all have requirements to evaluate assets, liabilities, and net worth. Some require judgments as to the amount of a company's net worth in the United States. Annual reviews would be necessary. BLM does not currently have the expertise to perform these reviews on a periodic basis, and even if we did, a risk of default would remain. This contributed to our decision not to allow additional corporate guarantees.

BLM and the State of Nevada currently hold a significant number of corporate guarantees. Some other States also allow corporate guarantees. We have decided not to invalidate existing guarantees, so as not to require these operators to secure an alternative financial guarantee instrument, so long as they are operating under already approved plans. While we have decided not to require operators who currently hold State-approved corporate guarantees to post an alternative guarantee, the final rule seeks to reduce the associated risk by explicitly requiring periodic review of financial guarantees, and directing that appropriate steps be taken if they are determined to be no longer adequate.

Section 3809.572 What Happens if BLM Rejects a Financial Instrument in My State-Approved Financial Guarantee?

This section states that BLM will notify the operator and the State in writing if it rejects a financial instrument in an existing State-approved financial guarantee. BLM will notify the operator within 30 days and explain why it is taking such action. This section requires an operator to provide BLM with a financial guarantee acceptable under this subpart at least equal to the amount of the rejected financial instrument before mining may continue.

The final rule is slightly different from the proposal. In response to comments, we have added language which directs BLM to notify the State if we do not accept a State-approved financial guarantee. We are making this change to assure that lines of communication between BLM and State governments are adequately maintained.

Some commenters stated that BLM should defer to the States on financial guarantees. Many comments questioned the criteria under which BLM would not accept a State bond, saying ''if a state accepts a bond, BLM should accept it.'' To do otherwise, these commenters suggest, might result in duplicate bonding. One commenter asked for a list of criteria under which BLM would not accept a financial guarantee which the State accepts. Other commenters noted that in the event BLM does not accept a State financial guarantee, there is no mechanism or time frame for BLM and the State to resolve what is an acceptable financial guarantee. Another commenter suggests establishing a time frame for the operator to remedy the situation. The same commenter asked BLM to establish an appeals procedure under which BLM would accept the State guarantee while the appeal is pending. Final §§ 3809.800–3809.809 establishes an appeals procedure.

There were some comments in opposition to BLM accepting State financial guarantees on the grounds that the interests of the State and Federal government can diverge.

The process we establish in this section assures that a strong financial guarantee will protect the Secretary if an operator is unable or chooses not to complete reclamation, or if a State establishes a requirement that does not provide adequate protection. If BLM does not accept a State-approved financial guarantee, the operator may not begin mining activities. For this reason, we have declined to accept the recommendation to add a time frame.

Although the appeals procedures in final §§ 3809.800 through 3809.809 apply to all BLM decisions, including whether to approve a financial guarantee, a rejected financial guarantee will not satisfy the regulatory requirement during the pendency of the appeal, because a sufficient guarantee must be in force at all times.

Section 3809.573 What Happens if the State Makes a Demand Against My Financial Guarantee?

Final § 3809.573 requires an operator to replace or augment a financial guarantee within 30 days when the State makes a demand against the financial guarantee and the available balance is insufficient to cover the remaining reclamation cost. This differs from the proposed rule by the addition of a 30-day time frame for augmenting or replacing a financial guarantee. This action conforms to the NRC Report's first recommendation that ''[f]inancial assurance should be required for reclamation of disturbances to the environment caused by all mining activities beyond those classified as casual use.'' It also responds to a comment from a Federal agency asking how BLM and a State would handle a situation where a financial guarantee is inadequate to cover demands made by both entities, and another comment that suggested BLM should add language specifying that the operator must inform BLM within 15 days of the demand's occurrence and require a replacement or augmented guarantee within 15 days. We decided 15 days was too short, and stretching the process beyond 30 days would leave a troubled operation operating too long without a sufficient financial guarantee. Such situations should be avoided if possible by taking care to establish a proper financial guarantee amount to cover both Federal and State obligations.

Section 3809.574 What Happens if I Have an Existing Corporate Guarantee?

As stated earlier, the final rule continues to allow corporate guarantees for existing operations to satisfy financial guarantee requirements, if they were accepted before the effective date of this rule. BLM will not allow an operator to transfer a corporate guarantee to another entity or operator.

Paragraph (b) specifies that if the State changes its corporate guarantee criteria or requirements, the BLM State Director will review any outstanding guarantees to ensure they still afford adequate protection. If the State Director determines they won't provide adequate protection, the State Director may terminate the existing corporate

guarantee and require the operator to post an alternative guarantee.

Sections 3809.580 Through 3809.582 Modification or Replacement of a Financial Guarantee

Section 3809.580 What Happens if I Modify My Notice or Approved Plan of Operations?

This section requires an operator to adjust the financial guarantee if the operator modifies a plan of operations or a notice and the estimated reclamation cost increases. The final rule clarifies the regulatory text by also explaining that if the estimated reclamation cost decreases, the operator may request BLM reduce the amount of the required financial guarantee. This change in the final rule was suggested by numerous commenters who noted that the language in the proposed rule did not allow BLM to approve a decrease in the amount of a financial guarantee even if a modification resulted in a lower estimated reclamation cost.

One comment asked us to clarify that an operator may request BLM to lower the amount of the financial guarantee. As noted in the preamble to the proposed rule (see 64 FR 6443, Feb. 9, 1999), this section makes clear that the proposed section does not preclude an operator from requesting BLM's approval to decrease the financial guarantee if the estimated reclamation cost decreases.

Section 3809.581 Will BLM Accept a Replacement Financial Instrument?

Final § 3809.581(a), unchanged from the proposed rule, authorizes BLM to approve an operator's request to replace a financial instrument. BLM will review and act on the request within 30 calendar days. We received no comments specific to this section.

BLM has added final § 3809.581(b) to clarify a surety's obligations, if for some reason a surety bond is no longer in effect. See, for example, the standard BLM surety bond form entitled, *Surface Management Bond Form* (February 1993), Bond Condition No. 8. See also *U.S. and Nevada* v. *SAFECO Insurance Co. of America,* CV–N–99–00361–DWH(PHA), Order dated Aug. 12, 1999. The final rule makes it clear that a surety is not released from an obligation that accrued while the surety bond was in effect, unless the replacement financial guarantee covers such obligations to BLM's satisfaction. This is not a new policy, but BLM believes it should be stated expressly so that if a surety bond is canceled or terminated, all parties understand that the surety cannot unilaterally terminate liability for obligations that have accrued while the bond was in effect. If the operator submits, and BLM accepts, an adequate replacement financial guarantee that covers the obligations covered by the previous surety bond. Then the earlier surety may be released from its obligations.

Section 3809.582 How Long Must I Maintain My Financial Guarantee?

This section requires an operator to maintain the financial guarantee until the operator, or a new operator, replaces it, or until BLM releases the requirement to maintain the financial guarantee after the operator completes reclamation. With minor editing, it is unchanged from the proposed rule.

One comment suggested that the rule contain criteria for release of a financial guarantee. BLM will not release the financial guarantee until we determine reclamation is complete. The standard is the reclamation plan in the notice or approved plan of operations . The sole criterion for judging whether the standard is met is the successful completion of reclamation. The regulation is clear and therefore we did not change it.

Sections 3809.590 Through 3809.594 Release of Financial Guarantee

Section 3809.590 When Will BLM Release or Reduce the Financial Guarantee for My Notice or Plan of Operations?

The final rule authorizes an operator to notify BLM that reclamation is complete on all or part of notice or approved plan of operations and to request a reduction in the financial guarantee upon BLM's approval of the adequacy of the reclamation. BLM must promptly inspect the area, and we encourage the operator to accompany the BLM inspector. If the reclamation is acceptable to BLM, the operator may reduce the financial guarantee as allowed in final § 3809.591. Paragraph (c) of this section requires BLM to post the proposed final release of the financial guarantee in the field office having jurisdiction, or to publish notice of the proposed final release in a local newspaper of general circulation and accept public comments for 30 calendar days.

We received several comments asking that notice-level activities not be included in the release procedures of paragraph (c). Because notice level activities entail less than 5 acres of surface disturbance, commenters suggested that there is no added value to allowing the public 30 calendar days to review a financial guarantee release.

The final rule differs from the proposed rule by excluding notice-level activities from the public notice and comment provisions of paragraph (c). Release of financial guarantees for notice-level operations do not need to undergo the same level scrutiny as the release of financial guarantees for plans of operations. Notice-level operations are much less likely to involve significant disturbance and in most cases generate little or no public interest. Additionally, the timing of the release of the financial guarantee is important to many notice-level operators as they need the release of one guarantee to post a guarantee on a new notice. Because the final rule limits notices to exploration, this change benefits small business without posing a significant threat to the environment.

A second change from the proposed rule is that the final rule includes language that will give the BLM field manager the discretion to post the proposed release of the financial guarantee in the BLM office or publish it in a local newspaper of general circulation, or both. The proposed rule would have required BLM to publish the proposed release of all financial guarantees in the newspaper. We chose this approach because today's rule limits notices to exploration, which generally has limited impact and limited interest. A newspaper notice for these actions is probably unnecessary. Moreover, BLM already posts many proposed actions in its office for public review; for example, Congress mandated that BLM post all oil and gas applications for permit to drill (APD) in the office as a way of promoting public involvement in decision making. In many cases, the (APD) results in more surface disturbance than small mining operations.

Several commenters believe that BLM should amend paragraph (b) by including a specific number of days within which we will inspect the operation. These commenters consider the term ''promptly inspect'' to be too vague. Other comments suggested we continue the current requirement that the inspection include the owner and/or operator unless they notify BLM in writing that the joint inspection is waived. Another commenter says that BLM should publish the date of inspection so that interested persons can attend.

The opportunity for public participation is controversial. Many respondents stated BLM should give the public an opportunity to be involved in all phases of planning, assessment, and

bond setting, noting that mining may affect local residents for a long period of time. Many others assert the public already has input into this process during the EIS stage, and their further involvement will slow down the process due to the 30-day period for public comment. These commenters feel that financial guarantee release is largely a mathematical exercise where a body of literature provides guidance on how to do the calculations. Other comments stated the general public is not educated in calculating and setting financial guarantees, and the BLM professionals should continue to set these requirements. We also received comments criticizing BLM for not discussing the value of public comment and explaining how differences would be resolved. There were several comments suggesting that the final rules should allow 30 days for BLM to inspect an operation and release financial guarantee, and to require BLM to pay interest if we take longer than 30 days to release the financial guarantee.

Other commenters pointed out that the impact of mining is not always known immediately at the time BLM approves reclamation, and therefore BLM should establish a mechanism to hold bonds after reclamation approval.

We changed the current rule which requires written waivers of joint inspections, and decided not to establish a time frame for when a joint inspection can occur. It is our intent to promptly inspect the reclaimed area, usually within 30 days. However, the time when we do it depends not only on our workload, but the availability of the operator and weather conditions. To state a time frame in the rule would be too inflexible. Requiring the release within a finite number of days could lead to the inappropriate release of some guarantees, or time-consuming appeals when we have legitimate reasons for delaying the release.

One overall purpose of these final rules is to permit an increase in public review of mining. The release of the financial guarantee is an important step in the mine closure process. Allowing the public an opportunity to comment on it should add value to the BLM review. The logistics of including the public on inspections could result in many of the same problems that we identified in deciding not to incorporate the proposal for ''citizen inspections'' (See the discussion of proposed § 3809.600(b) below.). Therefore, we did not add this as a step in the release of financial guarantees.

We view the opportunity for outside parties to comment as a positive. The public that is likely to comment tends to be well-versed in many aspects of mining or be familiar with the on-the-ground condition of the area for which the operator seeks release. BLM will review public comments as promptly as possible to see if they should affect the release of the guarantee. Then we will either release the guarantee or require additional work to meet the requirements of the performance standards and the approved plan of operations. Given the differences in the size and complexity of mines and the number of comments BLM might receive, the time it will take to analyze comments will vary greatly. Therefore, we choose not to place a time limit on the time to analyze comments.

We also chose not to hold financial guarantees after release. The performance bond guarantees reclamation. BLM will release it when it determines that the operator has successfully accomplished reclamation. While we know that the impacts of mining are not always readily apparent, and mining-related problems can subsequently occur, under final § 3809.592, the operator and mining claimant remain responsible for such problems. However, BLM does not think it necessary to hold a financial guarantee longer than the periods specified in final § 3809.591.

Section 3809.591 What Are the Limitations on the Amount by Which BLM May Reduce My Financial Guarantee?

This section governs incremental financial guarantee release. Paragraph (a) provides that this section does not apply to any long-term funding mechanism that an operator establishes under final § 3809.552(c). Paragraph (b) states that BLM will release up to 60 percent of a financial guarantee for a portion of a project area when BLM determines the operator has successfully reclaimed that portion of the project area. Paragraph (c) states that BLM will release the remainder of the financial guarantee when we determine the operator has successfully completed reclamation, if the area meets water quality standards for one year without needing additional treatment or if the operator has established a long-term funding mechanism under § 3809.552(c). These are unchanged from the proposed rule.

Several commenters suggested that the release of financial guarantee should be on a dollar by dollar basis as the reclamation work is completed, rather than, as proposed, holding of a financial guarantee for ''contingency or other unquantified purpose. Some commenters asserted that by the time an operator completes regrading he has spent more than 60 per cent of the total cost of reclamation. These commenters state that even if there were to be a default on the remainder of the financial guarantee, there would be more than adequate funds remaining to cover actual costs and BLM administrative costs. Some suggest we should release 80 percent of the financial guarantee, as once revegetation is completed, there is little left to reclaim. Conversely, other comments asked that we reduce the amount BLM releases to 40 per cent to assure that funds are available for use if necessary. These comments also suggested setting a ten-year period for full release, because problems are often undetected in the first year after mining.

One commenter suggested that we add language requiring the NEPA document to identify the amount of financial obligation BLM should release as each discrete phase of reclamation is completed.

Releasing financial guarantee on a dollar-for-dollar basis would create a somewhat more cumbersome process than relying on a fixed percentage. In addition, it would create a greater risk that toward the end of the reclamation process, the financial guarantee would prove inadequate to cover the cost of the remaining reclamation. Whether to release 40, 60, or 80 percent of a financial guarantee is admittedly a judgment call. In the proposed rule we chose 60 percent to assure that funds would be available at the end of the reclamation process. The comments on both sides of the issue suggest that our proposal took a reasonable middle ground. Therefore, we decided not to change the percentage of the financial guarantee we will release.

The final rule provides that once an operator completes reclamation, including revegetation of the disturbed area, the financial guarantee should be released when the water quality standards are achieved for one year. We believe this will provide a reasonable degree of confidence that reclamation is truly complete. In arid areas of the West, a determination that an area has been successfully revegetated may require the passage of several growing seasons. Until BLM makes that determination, we will not fully release the financial guarantee.

BLM decided not to accept the suggestion to use the NEPA document to identify financial release amounts at discrete phases of reclamation. This would overly complicate the NEPA document and would have the same problems associated with releasing the financial guarantee on a dollar-for-basis as discussed above. Also, because most

plans undergo numerous modifications, BLM and the operator would have to review the financial guarantee release points as we review each modification. Such a process would be overly burdensome.

Section 3809.592 Does Release of My Financial Guarantee Relieve Me of All Responsibility for My Project Area?

The final rule states that an operator's liability does not terminate when BLM releases the financial guarantee. We have included this provision to cover situations where latent defects exist, such as, for example, where a regraded and revegetated slope begins to slump or fail. Paragraph (b) of the final rule provides that release of a financial guarantee does not release or waive claims by BLM or other persons under the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended, 42 U.S.C. 9601 *et seq.*, (CERCLA) or under any other applicable statutes or regulations. This is unchanged from the proposed rule.

We received a number of comments opposing the concept of continued liability. Their primary arguments are: (1) because release of the financial guarantee means BLM determined the operator has successfully met the reclamation terms of the approved notice, it is not reasonable for BLM to later say that reclamation is no longer considered successful; and (2) once the reclamation is complete and the land opened up to other uses, someone other than the operator may be responsible for any degradation occurring.

Other commenters found continued liability objectionable because it could last into perpetuity, with the operator never knowing when BLM might require additional mitigation. Some commenters compared FLPMA to CERCLA and stated that FLPMA does not permit BLM to hold operators perpetually liable. Some commenters pointed out that financial guarantee release and release from environmental liability are different issues. One commenter suggested that we add a section addressing the release of a long-term funding mechanism if the anticipated problem never occurs, or is eliminated prior to reclamation.

Other commenters see this section as meaning financial guarantees will either never be returned, or it will be difficult or impossible to obtain financial guarantees because surety underwriters will see this provision as exposing themselves to an unacceptable risk. Another commenter stated that the standards for the release of the financial guarantee are part of the approved plan of operations and thus when they are met, the guarantee should be released. A few commenters suggested that we address definitive termination of liability for notice-level activities and add it as a new section under notices.

On the other side of the issue, some commenters expressed the opinion financial guarantees should address perpetual treatment scenarios, and objected that one year of satisfactory water quality is not sufficient for release of the financial guarantee, because contaminants may not be observed for years after closure. This commenter suggested releasing the financial guarantee after increasing by 50 per cent the time predicted in the mine model estimate.

In the preamble to the proposed rule (64 FR 6444), BLM anticipated these types of objections to paragraph (a). We pointed out that the issue of residual responsibility for a project area after release of the financial guarantee has come up many times since 1980 and the current rules do not address this. We continue to believe that this provision is necessary to cover situations where, for example, a totally regraded and revegetated slope begins to slump or fail. As we pointed out in the preamble to the proposed rule: ''If BLM could not require the operator or mining claimant to come back and fix the problem, unnecessary or undue degradation of public lands caused by the operator's activities would be a likely result.'' We do not anticipate a large number of cases where we would have to direct an operator to come back after release and fix problems, but we believe the final rule will help prevent unnecessary or undue degradation.

Regarding the concerns expressed about perpetual liability, and about possible difficulties in establishing a causal link between mining and subsequently occurring degradation, for liability to be imposed, there must be evidence that ties the on-the-ground problem to the operator's activities. As time passes, it may be increasingly difficult to demonstrate that a particular environmental problem was caused by an operator's mining activities, and not by independent causes.

As we explained in the preamble to the proposed rule, paragraph (b) clarifies the relationship between this subpart and other regulations, by providing that the release of a financial guarantee held to satisfy the requirements of this subpart doesn't affect any responsibility an operator may have under other laws.

We believe it is not necessary to include language here addressing the release of a long-term funding mechanism (trust fund) established under § 3809.552 in the event that the anticipated problem never occurs, or is eliminated prior to reclamation. If the problem does not occur or is eliminated, it is clear that the BLM field manager may release these funds as part of the reclamation release process.

Section 3809.593 What Happens to My Financial Guarantee if I Transfer My Operations?

This section states that a new operator must satisfy the financial guarantee requirements of this subpart. It also states that the previous operator remains responsible for obligations or conditions created while that operator conducted operations unless the new operator accepts responsibility. This means that a financial obligation must remain in effect until BLM determines that the operator is no longer responsible for all or part of the operations. BLM has added the word ''must'' to clarify the intent of the proposal.

We received comments that the rule does not make clear that BLM will promptly release the guarantee once the new operator provides a satisfactory guarantee and assumes the obligations of the former operator. We believe the rule is clear that once, in the language of the rule, ''BLM determines that you are no longer responsible for all or part of the operation,'' BLM will promptly release the financial guarantee. Therefore, we did not adopt the suggestion.

Section 3809.594 What Happens to My Financial Guarantee When My Mining Claim or Mill Site Is Patented?

This section states BLM will release the portion of a financial guarantee that applies to operations within the boundaries of the patented land. The final rules added the term ''mill site'' to make clear that BLM will also release any financial guarantee associated with a patented mill site.

We received one comment asking to delete paragraph (c) from the proposed rule because it addressed only access and therefore does not belong in this rule. We agree and have deleted it in the final rule.

We received one comment asking that BLM assign the financial guarantee on newly patented land to the State to assure that the private surface is reclaimed according to State law. Similarly, the EPA commented that if a cleanup became necessary on patented land, the government would likely have to spend money, thereby suggesting that we maintain the financial guarantee on newly patented land.

Once land is patented, BLM is no longer a party in interest with regard to

the reclamation of the patented land. BLM will, however, retain portions of a financial guarantee whose purpose is to guarantee reclamation of the public lands. BLM will work with States to see if portions of the financial guarantee can be transferred to States to meet State bonding requirements. Because this is likely to vary from State to State, we did not incorporate these suggestions into this final rule.

Sections 3809.595 Through 3809.599 Forfeiture of Financial Guarantee

Section 3809.595 When May BLM Initiate Forfeiture of My Financial Guarantee?

This section states BLM may initiate forfeiture procedures for all or part of a financial guarantee if the operator refuses or is unable to complete reclamation as provided in the notice or the approved plan of operations, if the operator fails to meet the terms of the notice or decision approving the plan of operations, or if the operator defaults on any condition under which the operator obtained the financial guarantee.

The final rule changes the word ''will'' in the proposed rule to ''may,'' to clarify that BLM has discretion in deciding under what circumstances to initiate forfeiture. Many commenters suggested that the term ''will'' would require BLM to initiate forfeiture procedures even for minor violations, and that this was not a reasonable approach, because it would be burdensome on BLM and would not give the operator an opportunity to correct the violation. We agree and made the change to indicate that BLM may, but does not have to, initiate forfeiture for every violation. Final § 3809.596(d) describes how an operator may avoid forfeiture after BLM issues a decision to require forfeiture.

An industry association suggested that we consider using California statutory language for clarity. We have generally avoided using State-specific language to ensure the rule is flexible enough to meet conditions in all States.

Section 3809.596 How Does BLM Initiate Forfeiture of My Financial Guarantee?

Except for minor editing, this section is unchanged from the proposed rule. It describes the process BLM will follow to initiate forfeiture of a financial guarantee. The section also describes the actions an operator can take to avoid forfeiture by demonstrating that the operator or another person will complete reclamation.

A State agency and others commented that Federal procedures are more protracted than State-level procedures and that State procedures can actually resolve the on-the-ground problem quicker. In response, we hope we will only rarely have to initiate forfeiture procedures, and that BLM and the State will be able as necessary to work together to resolve the issues before initiating forfeiture. Of course, if the operator, State, and BLM cannot agree on a course of action, BLM must take the steps necessary to prevent unnecessary or undue degradation. Although the procedures may appear detailed, BLM doesn't view them as protracted. Therefore, we decided to keep the proposed language in the final rule.

Section 3809.597 What if I Do Not Comply With BLM's Forfeiture Decision?

This section describes the next steps in the forfeiture process—how BLM will collect the forfeited amount, and how BLM will use the funds to implement the reclamation plan. This final rule differs from the proposed rule in that we changed the term ''forfeiture notice'' to ''forfeiture decision.'' We believe this is a more accurate description and is consistent with final § 3809.596 which discusses ''BLM's decision to require the forfeiture.'' BLM begins forfeiture by issuing a formal decision.

One comment said the State, not BLM, should be the collection agency and that this should be established in an MOU. Another commenter asked us to add language allowing BLM to use the funds to continue interim reclamation operations as permitted in proposed § 3809.552.

As BLM has the ultimate responsibility to protect Federal lands from unnecessary or undue degradation, BLM and a State may use a general or site-specific MOU to address procedures and responsibilities to assure that monies are collected and used to perform needed reclamation.

The final rule does not include language contained in proposed § 3809.552 that would have allowed BLM to continue interim reclamation, and does not incorporate the suggestion regarding interim reclamation in this section.

Section 3809.598 What if the Amount Forfeited Will Not Cover the Cost of Reclamation?

This section makes clear that if the amount of the financial guarantee forfeited by an operator is insufficient to pay the full cost of reclamation, the operator(s) and mining claimants(s) are jointly and severally liable for the remaining costs. It is unchanged from the proposed rule.

One commenter suggested BLM amend the rule to limit recovery to ''reasonable'' costs of reclamation. Another commenter said that the joint and several liability provisions should be eliminated because BLM does not have the authority to propose such a requirement.

The ''reasonable cost'' of reclamation is what it takes to reclaim the land and associated resources in accordance with these regulations. The primary purpose of posting a financial guarantee is to ensure that the taxpayer does not have to pay for the failure of an operator to reclaim land after completing operations. We have not incorporated the suggestion to limit recovery to the ''reasonable'' costs of reclamation, which are in the eye of the beholder.

Regarding BLM's authority to impose joint and several liability, see the discussion earlier in this preamble of the provisions of final § 3809.116.

Section 3809.599 What if the Amount Forfeited Exceeds the Cost of Reclamation?

This section states that BLM will return the unused portion of a forfeited guarantee to the party from whom we collect it. It is unchanged from the proposed rule. We did not receive any comments on this section.

Sections 3809.600 Through 3809.605 Inspection and Enforcement

This portion of the final rule (§§ 3809.600 through 3809.605) sets forth BLM's policies applicable to inspection of operations under subpart 3809. The final rules follow the proposed rules, with one exception related to allowing members of the public to accompany BLM inspectors to the site of a mining operation. The final rules also set forth the procedures BLM will use to enforce the subpart, including identifying several types of enforcement orders, specifying how they will be served, outlining the consequences of noncompliance, and specifying certain prohibited acts. The inspection and enforcement rules apply to all operations on the effective date of the final rule.

Section 3809.600 With What Frequency Will BLM Inspect My Operations?

Final § 3809.600 clarifies BLM's authority, as the manager of the public lands under FLPMA and the entity that administers the mining laws, to conduct inspections of mining operations. BLM's authority to inspect operations on the public lands derives from 43 U.S.C. sections 1732, 1733, and 1740 and 30 U.S.C. 22 (RS 2319). This section

incorporates previous §§ 3809.1–3(e) and 3809.3–6.

Final § 3809.600(a) provides that at any time, BLM may inspect all operations, including all structures, equipment, workings, and uses located on the public lands, and that the inspection may include verification that the operations comply with subpart 3809. Final § 3809.600(b), which was proposed as paragraph (c), provides that at least 4 times each year, BLM will inspect operations using cyanide or other leachate or where there is significant potential for acid drainage. This paragraph codifies existing BLM policy with regard to inspection of those operations at which this hazard exists. See Cyanide Management Policy, Instruction Memorandum 90–566, August 6, 1990, amended November 1, 1990. As was stated in the proposed rule, BLM believes that cyanide and acid-generating operations have the potential for greater adverse impacts to the public lands than other types of operations and should receive a greater quantity of BLM's inspection resources.

Proposed paragraph (b) is not adopted as proposed, but has been replaced by a more moderate provision allowing once-a-year public visits to mines, codified as § 3809.900, discussed below.

The recommendations of the NRC Report did not address BLM's inspection program. Therefore, the inspection provisions of the final rules are not inconsistent with the NRC Report.

Comments Related to Inspection

BLM received numerous comments addressing the proposed rules related to inspection and enforcement, both for and against the proposal. A number of the comments addressed inspection and enforcement together, and are discussed together for convenience.

General Comments Supporting the Proposal

Many commenters urged that inspection and enforcement must be improved, asserting that inspection and enforcement of mining regulations is a critical element of the regulatory process. Without it, they asserted, improved rules will be meaningless. These commenters asserted that inspection and enforcement activities also need to be strengthened to assure that environmental damage is as limited as possible and, in particular, to protect people, livestock, water, wildlife, and all other resources, from the modern realities of mining activity. One commenter stated that although many miners now operate and clean up in a responsible manner, unfortunately, based on observations ''for many years, both near home and also throughout the region,'' many others fail miserably. The commenter urged that land managers need enough teeth in the regulations to insure the compliance of all. Other commenters asserted that the proposed inspection and enforcement rules do not go far enough and supported the stronger inspection and enforcement measures set forth in Alternative 4 of the draft EIS .

BLM generally agrees with the commenters who urged strengthening of the BLM inspection and enforcement rules.

General Comments Against the Proposal

Some commenters opposed the proposed inspection and enforcement rules, asserting that this section is overly broad and will be administratively infeasible. Commenters stated that the industry's record with notice level compliance, although not spotless, is generally very good. Instead of revising the regulations, they urged, BLM should allocate more resources and get more inspection personnel in the field. BLM disagrees with the comment, and believes that the rules, are not too broad and will be workable.

Budget

The adequacy of BLM resources was a recurring theme. Commenters asserted that BLM must evaluate the personnel and funding it will take to implement the proposed inspection and enforcement provisions since BLM's current resources will be inadequate and no funding increases have been requested. For example, a commenter asserted, it is questionable whether BLM has the necessary resources to conduct inspections ''at least four times a year * * * if you use cyanide or where there is significant potential for acid drainage.'' Rather than cut back on the proposal, some commenters suggested a cost-recovery program, under which miners pay fees to cover inspection and enforcement. These commenters stated that it is sad if fees and reclamation requirements put mining companies out of business, but the reality is that our nation's history has brought many changes since 1872 that alter how we look at and value safety and environmental integrity along with the importance of mineral wealth. If operators cannot afford to mine responsibly, then they should not be mining at all. Other commenters stated that the agency needs to build in budget line items for inspection and enforcement.

BLM is cognizant of budgetary issues related to implementation of these rules. These final rules reflect policy choices that BLM believes appropriate. BLM will determine whether budget and resources are sufficient for implementation and, if they are not, seek additional resources consistent with fiscal constraints and Administration priorities.

Specific inspection issues raised by commenters follow:

Inspection Frequency

A number of commenters addressed the issue of inspection frequency. On one side, commenters urged that inspection and enforcement of the regulations need to be more frequent and rigorous, and include unannounced inspection of mining operations, and more frequent inspections of high-risk operations. These commenters asserted that mining companies have shown through the years that they will not conduct environmentally responsible operations unless forced to by law. Therefore, it is extremely important that enforcement include frequent unannounced inspections. A commenter requested that the final rule address whether inspections would be scheduled in advance or unannounced.

Some commenters suggested mandated inspection schedules for all operations, suggesting quarterly for example. For others, quarterly inspection is not sufficient, urging that every mine needs to be inspected at least monthly, and a sophisticated BLM lab needs to be big enough to process samples of air, water, tailings, dumps, etc. on a monthly basis, including chemical analysis of ground water, tailings, air, etc. Others suggested that the number and frequency of BLM inspections should be directly linked to documented risk evaluated in the NEPA compliance documents and incorporated in the approved plan of operations.

Several commenters opposed incorporating into the rules the current BLM policy of inspecting cyanide operations four times a year. There were suggestions that the number is arbitrary and does not reflect any documented problem with a lack of BLM inspections nor does it recognize that many operations in some areas like Alaska are seasonal. Some complained that the requirement for a minimum frequency of inspections appears to be based, at least in part, on an incomplete assessment of other State and Federal regulatory programs, and that BLM failed to properly account for the number of inspections which are required by States (*e.g.*, pursuant to the air, water, waste and cyanide processing programs) and by EPA.

BLM agrees that inspections are an important part of any regulatory program, but one limited by available resources. BLM has decided to inspect the more hazardous operations at least four times a year, and not to mandate an inspection frequency for other operations. When necessary, the inspections will be unannounced.

The U.S. Environmental Protection Agency suggested that to assure effective environmental compliance at mine sites, inspection efforts must occur from the start of operations and be ongoing. It suggested that the regulations be amended to require that BLM coordinate with the applicable State and Federal environmental agencies to conduct a complete multi-media inspection of mines within five years after beginning full-scale operations. The regulations should send a strong message that a coordinated Federal and State effort will occur at the beginning of the mine life to check environmental compliance. EPA suggested that these types of coordinated compliance inspections should also occur every five years throughout the mine life.

Other commenters asserted that proposed § 3809.600, which would establish new provisions related to the nature and frequency of BLM's inspections of mining operations, are generally unnecessary and inappropriate and reflect BLM's failure to consider the substantial implications of its proposal. Some commenters disagreed with BLM's statement that establishing a specific number of inspections is needed to prevent adverse environmental impacts, although certain large operators did not object to more frequent BLM inspections or visits to the mine sites. These operators stated that contact between BLM and the operator keeps the operator informed of BLM's concerns and educates BLM about the mine operations, concluding that this is desirable and can prevent misunderstandings or compliance problems.

One operator expressed two concerns with the proposed rule. First, it is not clear that a mandatory inspection schedule is the most efficient use of BLM's limited resources. Second, BLM has considered its own inspection program in isolation from other State and Federal regulatory authorities. The operator asserted that a mandatory inspection frequency is inappropriate if it has no relationship to the risk or compliance problems associated with the site to be inspected. The operator pointed to an Office of Surface Mining rule that eliminated a mandatory inspection frequency for certain categories of coal mines ''to free resources that can focus on existing or potential problems at high risk sites.'' 59 FR 60876 (Nov. 18, 1994) (OSM rule reducing frequency of inspections for abandoned, but not completely reclaimed, coal mines). The operator concluded that the goal of quarterly inspections is a useful goal, but should not be written into the regulations as a mandatory requirement. The operator suggested as an alternative, BLM should consider regulatory language that directed the BLM field officers to target their inspection and compliance resources at ''high risk'' sites or at sites during critical periods (such as placement of liners or during construction periods). The operator also proposed that the regulations include a provision that would require a follow-up inspection when a major notice of noncompliance has been issued. These provisions would give the agency more flexibility and would be more effective in preventing unnecessary or undue degradation than a formulaic approach to compliance inspections.

BLM fully intends to cooperate with other agencies with regulatory jurisdiction over mining operations. BLM agrees that it should coordinate both its inspection and enforcement activities with State agencies and with other Federal agencies. Such coordination can become formalized through memoranda of understanding of agreements, as suggested by the NRC Report, to prevent duplications of effort and to promote efficiency. See NRC Report at p. 104. Nevertheless BLM believes it important to codify its existing policy of four inspections a year for operations using cyanide or other leachate or which have a significant acid-generating potential. This policy has been effective so far, in BLM's judgment. The reference to the OSM rule is not on point because that rule dealt with situations involving abandoned coal mines where continued quarterly inspections serve no purpose.

On a technical level, one commenter asked that BLM define the term ''significant potential for acid drainage,'' asserting that there is a wide range of confusing and ambiguous applications of the concept of a mining operation that may or may not produce significant acid drainage. These can range from standard core drilling a high sulfide mineral deposit, to open trenching, to underground mining, to open pit mining to road or airport construction that will expose sulfide bearing country rock. Even where there may be high acid drainage potential, a small scale mining operation may not be threatening. Conversely, a large-scale operation in an area with low acid drainage potential might be significant concern. The commenter suggested that a table such as BLM has used in other parts of the proposed 3809 regulations would help sharpen BLM intentions and provide for uniform application between Resource Area, Districts, and States.

BLM appreciates the comment, but does not believe it requires providing a definition of the concept of ''significant potential for acid drainage,'' but rather calls for common sense in administering this section of the rules.

Requests for Inspection

Some commenters wanted BLM to provide opportunities for citizens to request inspections of mines. BLM does not view it necessary for its rules to provide citizens with the opportunity to request inspections. Anyone may inform BLM of the existence of problems and request inspections. BLM is not aware of a lack of responsiveness of its personnel that needs to be addressed in its rules.

Inspection—How?

Commenters addressed the nature of inspections and the measurement of compliance. One commenter asserted that the practical realities of judging compliance with unachievable performance standards to eliminate impacts will create substantial problems for both the BLM and the mining industry. For instance, how will BLM inspectors determine when erosion control and acid generation management measures comply with the ''minimize'' performance standard? Will each mine or mineral exploration site be judged on a case-by-case basis, subject to the individual inspectors' discretionary interpretation of what constitutes minimize? BLM disagrees that substantial problems will result. Trained, professional BLM inspectors will use their best judgment in determining whether operators comply with their approved plan of operations. Although the rules contain standards such as ''minimize'' rather than numeric standards, the plans will specify the activities that are allowable, and where appropriate, the acceptable parameters at a particular location.

Scope and Timing of Inspections

Some commenters objected to the scope and timing of inspections, asserting the BLM inspector cannot inspect ''at any time'' as provided by proposed § 3809.600(a). Some mining companies did not object to BLM's proposal for BLM employees to inspect mining operations on public lands, as long as such inspections are made at reasonable times—during normal

business hours. These commenters asserted that without a specific grant of authority from Congress, inspections must be conducted at reasonable times. Some commenters asserted that inspectors must notify the operator of their presence, and must permit representatives of the operator to accompany them during any such inspections. In addition, allowing inspectors unrestricted access to ''all structures, equipment, workings and uses located on public lands'' is too sweeping in its effect and creates significant safety concerns. Inspectors' access should be limited to property (both real and personal) having a reasonable relationship to BLM's role of ensuring compliance with the proposed revisions. Such limited access is especially appropriate in light of applicable Federal and State health and safety mandates.

To perform its inspections properly, BLM needs to be able to inspect whenever, wherever, or whatever is required to assure compliance with its regulations on the public lands. Many mining operations are conducted around the clock, and problems can arise anytime and anywhere on a mine site. When appropriate, BLM inspectors may allow operator representatives to accompany them, but not to the extent of interfering with their inspections. BLM expects that its inspectors will ordinarily inform operators of their presence. BLM inspectors will conform to applicable health and safety mandates.

Who Should Inspect?

A number of commenters asserted that those who enforce the regulations should not be the same as those who approve mine permits, if possible, and that the enforcement and regulatory processes should be otherwise kept apart. Such commenters were concerned about the independence of the inspectors. They suggested that BLM should consider dividing the agency into those who approve the mines and those who enforce environmental protection.

Although BLM understands the commenters' concern, the final rules do not address who can or cannot perform inspections. BLM agrees that inspectors need to be impartial in enforcing the rules, but persons who are involved in making decisions on plans of operations should not necessarily be precluded from determining whether operators have complied with the plans. Such persons will be more familiar with what is allowable under a plan of operations than a person who has had no earlier involvement.

Inspection of Residential Structures

A commenter asked that BLM revise proposed § 3809.600(a) to indicate the extent and authority of BLM to inspect the inside of private residential structures owned by workers at the mine site. The commenter asked that BLM define residential structures for the purposes of this subpart because the referenced 43 CFR 3715.7 focuses on a wide variety of uses that are exclusive of mining. For example, the commenter asked, does this include unlimited BLM inspection of living accommodations for the work force at a medium-sized remote mine in Alaska with workers living in trailers/campers. The commenter requested that BLM define how this provision applies to large and small size mines where there are no alternative living provisions.

As referenced in the rule for the convenience of readers, inspection of residences located on the public lands is covered by 43 CFR 3715.7. Section 3715.7(b) provides that BLM will not inspect the inside of structures used solely for residential purposes, unless an occupant or court of competent jurisdiction gives permission. For additional information concerning BLM's occupancy rules, the reader is directed to the July 16, 1996 **Federal Register** preamble at 61 FR 37125.

Self-Monitoring

Commenters opposed self-monitoring by operators. The commenters asserted that mine operators have a huge vested interest in ensuring that the results of such testing do not adversely affect operations at the mine. They questioned the reliability of asking someone in such a position to produce accurate and honest results. Also, commenters asserted that there are some mine operators who may be honest but unskilled in doing accurate scientific measurements.

Although BLM will perform inspections, the rules also require monitoring plans under which operators perform monitoring. Despite the concerns expressed by commenters, operator monitoring can be an effective way to keep track of activities at an operation. Records have to be maintained, and falsification or misrepresentation is a violation of Federal law.

Proposed § 3809.600(b) Citizen Participation in Inspection

One of the most controversial issues in the proposed rule, generating many comments, was the BLM proposal to allow members of the public to accompany BLM inspectors on mine inspections. Under the proposal, BLM would have been able to authorize members of the public to accompany a BLM inspector onto mining sites, as long as the presence of the public would not materially interfere with mining operations or with BLM's activities, or create safety problems. Under the proposal, when BLM authorized a member of the public to accompany the inspector, the operator would have been required to provide access to operations.

Opposition to BLM Proposal

Many commenters opposed public involvement in the inspection process. Specific objections included:

Undue influence—The only members of the public likely to accompany a BLM inspector onto a mine site are apt to be political opponents of the mine or other individuals with anti-mining agendas looking for a means to harass the mine operators. To allow ''biased environmentalists'' along will create unnecessary and undue influence.

Safety considerations—Allowing the public on mine sites with BLM inspectors poses an unacceptably high risk. There is no guarantee or assurance of personal safety of the visitor. MSHA requires that the BLM inspectors have specific MSHA training in order to enter certain hazardous areas of the mine such as the pits and mill. Citizens do not have that level of training and would not be allowed in most areas of a mine. Untrained people could cause a serious accident, if not a fatality.

Liability—BLM and mine operators could incur liability for injury or death of public or BLM personnel resulting from untrained people being allowed on mining sites. There could be BLM liability for public claims of exposure to toxic chemicals while at mine or mill sites. Increased risk to BLM personnel could also occur because of such personnel being responsible for untrained accompanying public. One commenter asserted that ''[i]t is unreasonable to require the company to carry liability insurance for the public at large on-site. It is also unfair to the BLM employee. There is no place for the public on a mine site unless the company provides the tour and is able to set access limits. It is unreasonable for the federal government to establish regulations that create unnecessary risk to the industry and the public, unless the government is willing to assume all liability created by this action.''

Authority—Commenters asserted the ''BLM does not have the authority to allow citizen inspections and therefore, the citizen inspection provision should be deleted. FLPMA is silent on this issue and cannot be cited as providing

such authority. * * * . In fact, FLPMA prohibits such citizen inspections. * * * Citizens cannot be permitted to accompany BLM inspectors without the specific consent of the mine operator.'' A commenter asserted that allowing members of the public to accompany BLM officials when they make inspections would be a Government authorization of trespass.

Confidentiality—Allowing a member of the public to accompany BLM officials during a site inspection raises serious issues of confidentiality. ''There is nothing in the proposal to constrain citizens from disseminating and disclosing information about the confidential business materials and processes they may encounter during an inspection. Nothing could stop a potential competitor from accompanying BLM as a ruse to obtain such information, and due to the difficulty in proving disclosure of confidential information, it would be hard to rewrite this provision in a manner that would allow meaningful policing of a nondisclosure agreement.'' A company whose shares are traded on any stock exchange cannot allow member(s) of the public to gain insider information that would affect the trading of the company's stock. This issue is of critical importance during the initial exploration stages when a mineral discovery is being made.

Vandalism and Theft—Small miners have a lot of supplies and small equipment at their remote mining camps. If non-BLM people visit the claims, it may result in loss of equipment, vandalism, or both. Citizens entering a mining operation could learn where each piece of equipment is located and what is vulnerable to acts of destruction.

Workload—Public participation in field inspections could be a cumbersome task if multiple people show up at some remote site and need to be transported. ''BLM should also consider how the presence of the public may affect the conduct of an inspection. Certainly, a trained inspector who is familiar with a mine site will be considerably slowed by the presence of untrained members of the public. Longer inspections will require more inspectors or fewer inspections will be completed.''

Comments also questioned how citizen involvement in inspections would work. For instance, if the BLM visits the site, is this the point when the proposed citizen inspector accompanies the BLM inspector? Will the operator be told that citizen inspectors are coming, and under what circumstances will the inspection be done?

Support for Public Participation in Inspections

Some commenters supported public participation in inspection and monitoring. They noted that citizens should have access to public lands and that the BLM should allow citizens to accompany BLM employees on mine inspections to ensure that no violations of regulations occurs. One commenter asserted that public involvement in the inspections of mines is merely an extension of open government and should be part of the privilege of operating on the public lands. ''The land the mining companies use are public lands, which the public should be allowed to visit, especially during these inspections, because the mining company is present during these inspections. * * * to balance that 'undue influence' on the inspectors from the mining companies, the public should have their own people present too. This would create a balance among the miners, the public, and the government caught in between.'' A commenter supporting the BLM proposal agreed that public involvement in mine inspections must depend upon the caveat that there are no significant safety concerns.

A commenter agreed that the public should be kept away from any potentially dangerous situations such as underground mines, but asserted there are safe opportunities for the public to view what is going on. Allowing inspections may have to be considered on a case-by-case basis rather than opening everything up to inspections as was proposed. The commenter asserted that the public should be allowed to see what's happening, with some restrictions, and the mining industry should be willing to go along with that, especially since they are always complaining about the public not understanding the industry.

BLM Conclusion

BLM has carefully considered all of the comments concerning members of the public accompanying BLM inspectors on inspections, as well as its own experience on those few occasions when members of the public did accompany BLM inspectors. BLM has decided not to finalize the provision as proposed. Many of the objections and risks pointed out by the commenters have merit. In addition, BLM's experience with allowing members of the public to accompany inspectors is that the site visits typically become more of a tour than an actual inspection, and that the inspector has to reinspect the operation to perform his or her job properly. Thus, BLM has concluded that the provision as proposed would not be workable.

Section 3809.900 Public Visits to Mines

On the other hand, BLM firmly believes that the public should be able to observe activities on the public land, including mining operations. BLM has thus adopted a provision, to be codified as § 3809.900, designed to allow public *visits* to mines once each year, but not in such a way to interfere with BLM or operator activities or to compromise safety or confidentiality. This provision is intended to respond to many of the objections raised by commenters. A visit will effectively be a mine tour, not an inspection, and operators can specify areas that will not be available, and limit the nature of the visit.

Specifically, final § 3809.900 provides that if requested by a member of the public, BLM may sponsor and schedule a public visit to a mine on public land once each year. The purpose of the visit is to give the public an opportunity to view the mine site and associated facilities. Visits will be limited to surface areas and surface facilities ordinarily made available to visitors on public tours. BLM will schedule visits during normal BLM business hours at the convenience of the operator to avoid disruption of operations. Under the final provision, operators must allow the visit and must not exclude persons whose participation BLM authorizes. BLM may limit the size of a group for safety reasons. An operator's representative must accompany the group on the visit. Operators must make available any necessary safety training that they provide to other visitors. BLM will provide the necessary safety equipment if the operator is unable to do so. Members of the public must provide their own transportation to the mine site, unless provided by BLM. Operators don't have to provide transportation within the project area, but if they don't, they must provide access for BLM-sponsored transportation.

BLM believes that a once a year visit sponsored by BLM will not impose unreasonable burdens on operators, who typically already provide limited mine tours, or interfere with operators' rights to develop minerals under the mining laws. The provision is authorized by FLPMA sections 302(b), 303(a), and 310 (43 U.S.C. 1732, 1733, and 1740), as well as by the mining laws, 30 U.S.C. 22 (R.S. 2319).

Enforcement

BLM is adopting its enforcement provisions generally as proposed. Each

section of the final rule is discussed below, together with comments received relating to the specific sections. First, however, BLM discusses the general enforcement comments and issues raised by commenters.

General Comments Received

Commenters supporting the proposal stated that strengthening BLM's administrative enforcement mechanisms and penalties for enforcing its surface mining regulations will help to prevent unnecessary or undue degradation of public land resources by mining operations, and wanted particularly to endorse the enforcement and penalty provisions in §§ 3809.600 and 3809.700. If BLM does not strengthen its administrative sanctions, the commenters asserted, it sends a message that BLM does not care about the health and welfare of the citizens and of the environment . Commenters stated that all of BLM's proposed changes are for naught if enforcement is not strengthened, and that stiff fines and the real threat of losing the right to mine are necessary to prevent harm to the taxpayer, environment, and local community. Commenters stated that if mining companies can't meet these standards they shouldn't be permitted to mine. Some commenters stated that mining companies have shown through the years that they will not conduct environmentally responsible operations unless forced to by law. Therefore, it is extremely important that enforcement be strong.

BLM agrees that it is important that BLM have strong enforcement remedies available to assist in preventing unnecessary or undue degradation of the public lands. BLM recognizes that many operators conduct operations in a responsible manner in compliance with regulatory standards. These final rules will not impede such operators in continuing their lawful conduct. On the other hand, violations do occur, and BLM must be able to deal with those in a firm, but fair manner. The rules provide the flexibility for BLM to take enforcement action when warranted, or to defer such action if violations will otherwise be timely corrected.

Commenters opposing the proposal asserted that BLM misled the public in the draft EIS by stating, as a ''gap'' not adequately covered in the existing 3809 regulations, that ''BLM lacks provisions for suspending or nullifying operations that disregard enforcement actions or pose an imminent danger to human safety or the environment.'' In support of its assertion, the commenter stated that previous 3809 regulations adequately addressed the issue of enforcement, and referred to previous § 3809 .3–2 ''Noncompliance,'' which provided that mining operations that were issued a notice of noncompliance pursuant to the regulations may be enjoined by a court order from continuing such operations, and may be liable for damages for unlawful acts. Other commenters pointed out that earlier BLM changes to its ''use and occupancy'' rules in 43 CFR part 3710 addressed the only enforcement needs BLM identified in 1992. Commenters also asserted that the BLM also fails to consider authority under RCRA, or authority delegated from the President of the United States to use the tools of CERCLA to address noncompliance and ''imminent dangers.''

BLM disagrees with the comments. BLM's previous rules did not provide adequate enforcement authority. Notices of non-compliance were not self-enforcing, and BLM was unable to compel compliance without seeking to invoke the aid of the Federal courts, in what could be a lengthy and uncertain process, which usually did not mean immediate compliance. The NRC Report discussed this problem at some length and made a specific recommendation for strengthening BLM policy on the subject. See the NRC Report at pp. 102–04. These final rules will increase the incentives for operators to correct violations in a timely manner.

Although BLM's ''use and occupancy'' rules adopted in 1996 (43 CFR subpart 3715) addressed certain abuses occurring on the public lands, those rules were somewhat limited in as to the types of activities regulated, focusing in large part on whether activities are ''reasonably incident'' to mining. The enforcement rules adopted today are broader than the 1996 rules and cover all activities the operator engages in, and in particular whether unnecessary or undue degradation occurs.

BLM acknowledges that RCRA and CERCLA provide a basis for enforcement of certain activities, and will work with EPA, as appropriate, so as not to duplicate enforcement actions, but BLM needs its own enforcement provisions as the land manager of the public lands.

Some commenters asserted that other enforcement mechanisms exist. For instance, operations that pose an imminent danger to human safety on public lands, are under the Federal jurisdiction of the U.S. Department of Labor, Mine Safety and Health Administration, whose regulations at 30 CFR 57.1800 ''Safety Program,'' require operators to inspect each working place at least once each shift for conditions that may adversely affect safety or health, and promptly initiate appropriate action to correct such conditions. In addition, conditions that may present an imminent danger, require the operator to withdraw all persons from the area affected until the danger is abated. These inspections are required to be recorded, and are available to the Secretary of Labor, or his authorized representative. Others asserted that State regulatory inspection and enforcement are sufficient.

BLM recognizes that other Federal and State enforcement agencies share the responsibility for regulating mining operations on the public lands, and that with respect to certain matters, other agencies will have the lead responsibility. BLM will work with the other agencies so as not to duplicate enforcement, and will refer violations to other agencies in appropriate cases. Notwithstanding this coordination, BLM believes it important to have its own enforcement actions available to use to assure the prevention of unnecessary or undue degradation of the public lands.

Other commenters urged a program based on cooperation: Cooperate with the obviously good operators, enlist their support and help, create a feeling of trust, and follow through with a positive program. Some felt that current rules were not adequately enforced until recent years and that there was little effort to take serious violators to task. Some commenters thought that it is inappropriate to dwell on the one or two ''bad apples'' of mining, such as the Summitville situation in Colorado and the Zortman-Landusky situation in Montana. The commenter asserted that both of these were in States that have very stringent environmental laws and that if these laws had been enforced and monitored, the environmental problems probably would not have occurred.

BLM agrees that it is important for BLM to cooperate with the industry, and vice versa. BLM intends to work with the industry to assure compliance with its rules, but is adopting the new rules to provide more effective, and a wider array, of remedies for use where needed. Although the high-visibility problems mentioned by the commenters perhaps could have been limited through better enforcement of existing authorities, these problems, as well as the recent overflow of a tailings dam at a gold mine in Romania, do show that mining operations sometimes carry a risk of serious environmental harm that is very expensive, or even impossible to repair. Stronger enforcement tools will allow more effective BLM intervention if other agencies need BLM assistance.

A commenter stated that if BLM proceeds with this final rulemaking, BLM will indeed change the way the surface management regulations are working on the public lands. It will change the regulatory system from one which encourages cooperation between mine operators and regulatory agencies into one which relies upon confrontational enforcement authorities.

BLM disagrees with the comment. BLM will continue to encourage cooperation between the regulated community and the regulators. Cooperation and seeking voluntary compliance will remain the top priority, but BLM must have, as the NRC Report has underscored, better access to an array of enforcement tools, for use when cooperation and voluntary compliance don't work.

A commenter concluded that the information provided to the public in the draft EIS and preamble was misleading, self-serving, and violates the conditions of several court rulings, NEPA, Department of Interior policy and regulations, and the Administrative Procedure Act.

BLM disagrees with this comment. BLM perceived a need to strengthen its enforcement remedies and so informed the public in the draft EIS and the proposed rule. The NRC Report also recognized the need for better enforcement mechanisms.

Some commenters stated that BLM could make better use of the enforcement tools it currently possesses through improved implementation and training. BLM agrees that improved implementation and training are useful, but that does not negate the need for better enforcement tools.

For consistency in enforcement, one commenter thought the same definitions and standards should be applied for all Federal lands, regardless of which agency managed the lands (for example, BLM, Forest Service), referring as an example, the 5-acre limitation on disturbance. A number of commenters repeated the theme that the BLM and the Forest Service should have comparable provisions and definitions.

The goal of having BLM and the Forest Service use the same definitions and standards is laudable. However, it must be recognized that the two agencies operate under different organic statutes and have different management responsibilities. BLM will continue to work with the Forest Service to use common standards and procedures wherever practicable.

Some commenters asserted that it is premature to conclude that additional enforcement and penalty provisions are needed in the absence of information (other than anecdotal) demonstrating whether existing authorities are being applied in a consistent and uniform manner.

BLM disagrees that it should wait for further information before updating its enforcement regulations. The NRC Report did not indicate that action in this area was premature. The enforcement provisions adopted today provide practical methods for BLM to assure compliance with its rules. We hope that BLM will not have widespread need to use enforcement actions to compel compliance, but the availability of such remedies should help to prevent unnecessary or undue degradation of the public lands.

NRC Report Recommendation 6

Recommendation 6 of the NRC Report stated that BLM should have both (1) authority to issue administrative penalties for violations of the hard rock mining regulations, subject to appropriate due process, and (2) clear procedures for referring activities to other Federal and State agencies for enforcement. NRC Report at p. 102. The committee found that administrative penalty authority should be added to the array of enforcement tools in order to make the notice of noncompliance a credible and expeditious means to secure compliance. NRC Report at p. 103.

Commenters asserted that the NRC concluded BLM does not have administrative penalty authority under current law. One State agreed that Congressional action would be necessary to give BLM authority to issue administrative penalties. Therefore, it considered NRC Report Recommendation 6 as a proposal for legislative change, not a change in the regulations. In addition, the commenter noted that the NRC Report endorsed only administrative penalty authority. The commenter concluded that proposed revisions to the 3809 regulations include broad new inspection and enforcement authority for BLM which it characterized as neither authorized by statute nor required to administer an effective program.

BLM disagrees with the commenters' assertion that the NRC Report concluded that BLM did not have authority to establish administrative penalty authority. The NRC was neutral on the issue of BLM authority to establish administrative penalty authority. It expressly stated that BLM should seek additional authority from Congress only ''if statutory authorization is necessary'' NRC Report at p. 104. BLM also disagrees with the characterization of the recommendation as solely a proposal for legislative change. The NRC Report discussion made clear that, assuming BLM found that authority already existed for it, BLM should revise and expand the existing enforcement provisions in the 3809 regulations to include administrative penalty authority for violations of the regulations. NRC Report at p. 104.

Commenters concluded that because the NRC Report recommended no changes in regulatory provisions regarding inspections and enforcement apart from the administrative penalty recommendation, the proposed enforcement revisions are inconsistent with the recommendations of the NRC Report. Commenters suggested that in order to remain consistent with the recommendations of the NRC Report, BLM should defer any proposed changes in the inspection and enforcement provisions of the regulations until it has implemented those measures recommended by the NRC Report to improve efficiency and the use of staff and resources to implement the existing inspection and enforcement requirements.

BLM disagrees that the final enforcement rules are inconsistent with the NRC Report recommendations. BLM construes the term ''administrative penalty'' as used by the NRC to encompass the full range of proposed administrative sanctions, including suspension and revocation orders, as well as monetary penalties. Recommendation 6 was intended to make notices of noncompliance a credible and expeditious means of securing compliance (NRC Report at p. 103), and the NRC Report stated in connection with the Recommendation that an operator should be given the opportunity to rectify the circumstance of noncompliance (NRC Report at p. 104). This applies equally to suspension and revocation orders, as to monetary penalties. To the extent that the NRC Report recommendations simply do not address certain provisions of the final rule, such as inspection, no inconsistency exists with regard to the recommendations. Therefore, there is no need to defer changes to the inspection and enforcement rules for purposes of consistency.

At the other end of the spectrum, some commenters asserted that the NRC Report supported establishing a ''mandatory'' enforcement program for regulating mining on Federal lands. They stated that the NRC Report affirms that a clear and effective enforcement is needed to replace the existing enforcement mechanisms, and DOI's

proposed rules need to be strengthened to achieve the goals of this recommendation. The commenters stated that this recommendation makes clear that BLM enforcement on the ground is imperative to protecting against unnecessary or undue degradation. The commenters focused on a passage of the NRC Report that states, ''[f]ield-level BLM and Forest Service personnel told the committee that they have experienced difficulty, in some cases, in enforcing compliance with regulations and the requirements of notices and plans of operations.'' NRC Report at p. 102.

The commenters concluded that the best way to ensure that BLM field personnel take the required measures to ensure compliance with the regulations is to make such enforcement mandatory, *i.e.* require BLM to take enforcement action and to assess fines against all observed violations. For instance, a commenter stated that operations that are clearly hazardous to the environment and to human health and public safety should be closed down until brought into compliance. Others suggested that any and all violations should be documented and, when the health of the watershed is threatened, operations ordered to cease until the operator can show compliance. Others urged enforcement to protect groundwater from violations. Without mandatory enforcement, commenters asserted BLM field personnel will experience the same ambiguity and confusion as to what degree of enforcement is appropriate.

Commenters objected that the discretionary enforcement system proposed by BLM will be rendered meaningless by what they say are poorly trained agency staff who are more likely to ''try to work things out'' with representatives of the mining industry when conflicts over land regulations exist, rather than take action that would compel compliance with the regulations. In the commenters' view, even in the event of gross abuse of public resources at a mine site, BLM will not mandate that enforcement actions be taken. The commenters state that this approach to enforcing the proposed regulations fails to create a climate in which effective regulation is likely to take place. Thus, some commenters conclude, allowing wholly discretionary enforcement of violations out in the field would be inconsistent with the NRC Report recommendations.

Commenters representing State regulatory authorities urged BLM to make enforcement discretionary, so that BLM and the States do not get caught up in unnecessary disputes as to what constitutes a violation and to avoid suits to compel compliance with duties established by the rules. Commenters supporting discretionary enforcement asserted that there are numerous ways to gain compliance, and issuing violations with associated civil penalties should be looked at as only one possible tool. Some stated that coordination on enforcement activities with State regulatory agencies is an absolute necessity, and States should be allowed to take the lead on enforcement. These commenters asserted that State enforcement can usually occur in a more timely manner, resulting in improved on the ground compliance.

BLM agrees that a firmly administered enforcement program will improve compliance, but concludes such a program is possible without mandatory enforcement. Under the final rules, trained professional BLM inspectors will exercise their judgment and take enforcement actions when necessary. BLM has been concerned that mandating enforcement action for every violation, no matter how small, would clog the system with unnecessary administrative proceedings and delays, and tend to create the confrontational atmosphere that BLM, the States, and the regulated community wish to avoid. BLM certainly intends to coordinate with State regulators and, where appropriate to assure timely compliance, allow other Federal agencies and States to take the enforcement lead. What BLM has tried to do in these regulations is to make enforcement tools available to BLM inspectors so they will not be hamstrung by the lack of administrative remedies. Providing these tools will strengthen BLM enforcement, without requiring operators be cited for every violation. BLM also disagrees that the NRC Report recommends that BLM enforcement be mandatory rather than discretionary. To the contrary, the NRC Report suggests that BLM acknowledge and rely on enforcement authorities of other Federal, State, and local agencies as much as possible. NRC Report at p. 104.

Authority

One theme addressed repeatedly by the comments is BLM's authority to promulgate the administrative enforcement rules. Some commenters agreed that enforcement is a necessary part of any regulatory program, but opposed the proposed enforcement rules as exceeding the BLM's legal authority under FLPMA. The commenters reasoned that FLPMA provides express enforcement authorities, both civil and criminal, and BLM is limited to the bounds of the statutory provisions. These commenters asserted that when Congress intends to grant administrative enforcement and penalty mechanisms, it provides specific statutory authority, which does not appear in FLPMA. For example, in the context of regulation of the mining industry, it has done so in the Federal Mine Safety and Health Act of 1977 and in SMCRA. Specific proposals that commenters asserted go beyond the BLM's authority include: Suspension and revocation orders, administrative civil penalties, and criminal penalties.

Multiple provisions of FLPMA, and one under the mining laws, authorize the establishment of administrative sanctions, including suspension and revocation orders and monetary civil penalties. These include the first and last sentences of 43 U.S.C. 1732(b), 43 U.S.C. 1732(c), the first sentence of 43 U.S.C. 1733, 43 U.S.C. 1740, and the authority to prescribe regulations under 30 U.S.C. 22 (R.S. § 2319). Section 302(b) provides the Secretary the authority to publish rules to regulate the use, occupancy, and development of the public lands. The last sentence of section 302(b) directs the Secretary to take any action necessary to prevent unnecessary or undue degradation of the public lands. Section 302(c) provides for the suspension and revocation of instruments providing for the use, occupancy, and development of the public lands. The first sentence of 43 U.S.C. 1733 directs the Secretary to issue regulations with respect to the management, use, and protection of the public lands. The use of suspension and revocation orders and administrative civil penalties are an integral part of a regulatory scheme to manage and protect the public lands. Administrative enforcement orders and monetary penalties establish more immediate and tangible consequences than the possibility of future judicial enforcement after a referral to the Attorney General. All of these sanctions will help achieve compliance with subpart 3809, and will help prevent continuing unnecessary or undue degradation of the public lands when violations occur.

BLM disagrees with the commenters' assertion that the provision allowing the Attorney General to seek the judicial imposition of injunctive or other judicial relief, 43 U.S.C. 1733(b), limits the Secretary's administrative authority. That section, together with a portion of 43 U.S.C. 1733(a) establishing criminal violations, provides affirmative authority for judicial enforcement. They do not, however, address or limit the scope of the Secretary's authority to regulate activities on the public lands

under other provisions of FLPMA and to establish administrative enforcement remedies.

Commenters stated that BLM's previous subpart 3809 regulations reflect the correct interpretation of FLPMA's enforcement authorities, and discussed the history of the previous enforcement rules. In the Subpart 3809 regulations as originally proposed (41 Fed. Reg. 53428 (Dec. 6, 1976)), § 3809.2–5(b) would have authorized initiation of suspension of operations if BLM ascertained the existence of ''significant disturbance of * * * surface resources * * * unforeseen at the time of filing the Plan of Operations.'' *Id.* at 53431. Suspension would have been obligatory for operations, or parts thereof, which were ''unnecessarily or unreasonably causing irreparable damage to the environment.'' *Id.* See also proposed §§ 3809.4–1 and 3809.4–2. *Id.* at 53432. These provisions were not included, however, when BLM reproposed the Subpart 3809 rules on March 3, 1980. 45 FR 13956, explaining: ''After further examination of the authority of the Secretary to issue these regulations, it has been decided that [BLM] will not unilaterally suspend operations without first obtaining a court order enjoining operations which are determined to be in violation of the regulations.'' *Id.* at 13958. Thus, the commenters concluded the Interior Department's contemporaneous interpretation of FLPMA was that the Department lacked administrative authority to suspend operations associated with mining claims without first obtaining injunctive relief pursuant to section 303(b) of FLPMA, 43 U.S.C. 1733(b).

BLM acknowledges that the previous rules reflected a permissible implementation of FLPMA, but not the only permissible one. The Department of the Interior did not state in 1980 that it had concluded the Secretary lacked legal authority to suspend mining operations by administrative order; it concluded only that it would not assert such authority in its subpart 3809 regulations. BLM's earlier policy approach was to ask the Attorney General to initiate a civil action under 43 U.S.C. 1733(b) for failure to comply with a notice of noncompliance, without the intermediate step of BLM issuance of an administrative order, for instance, directing an operator to suspend its operations. Section 1733(b), however, does not circumscribe the Secretary's actions before he or she asks that a civil action be initiated.

The current rule takes a different approach from the previous rules, one that is also consistent with section 1733(b). Under these final rules, before seeking judicial enforcement BLM may issue enforcement orders in addition to issuing a notice of noncompliance, including issuance of suspension orders, plan revocations, or monetary penalties. If an operator does not comply with any of these administrative orders, the Secretary may then seek judicial enforcement under section 1733(b).

Commenters also asserted that Congress apparently limited BLM's enforcement authority because it authorized the Secretary of the Interior to achieve ''maximum feasible reliance'' upon State and local law enforcement officials in enforcing the Federal laws and regulations ''relating to the public lands or their resources.'' 43 U.S.C. at 1733(c)(1).

BLM disagrees with the commenter's interpretation of FLPMA. Section 1733(c)(1) authorizes the Secretary of the Interior to enter into contracts for the assistance of and use appropriate local officials in enforcing Federal laws and regulations relating to the public lands or their resources. That section does not constrain the Secretary from establishing necessary enforcement regulations.

Commenters asserted that BLM's reliance on section 302(c) of FLPMA, 43 U.S.C. 1732(c), to justify suspensions or revocations of plans is misplaced. FLPMA section 302(c) provides suspension and revocation authority for ''instrument[s] providing for the use, occupancy or development of the public lands.'' The commenter asserted that a plan of operations under the 3809 regulations is not ''an instrument providing for the use, occupancy, or development of the public lands * * *,'' because the mining laws already authorize the ''use, occupancy, or development of the public lands.'' In the commenter's view, the plan of operations is simply an administrative means of regulating that development activity to prevent unnecessary or undue degradation of the public lands as addressed by FLPMA. A commenter asserted, moreover, that Section 302(c) is inapplicable to mining operations because section 302(b) provides that no provision of the Act shall ''in any way'' amend the mining laws unless that provision is specifically cited.

BLM disagrees with the assertion that plans of operations are not instruments providing for the use, occupancy, or development of the public lands, and that suspension or revocation of a plan of operations under FLPMA section 302(c) interferes with an operator's rights under the mining laws. Rights under the mining laws are subject to the FLPMA section 302(b) requirement to prevent unnecessary or undue degradation of the public lands. Approval of the plan of operations is the key to allowing use, occupancy, and development in a manner that will prevent unnecessary or undue degradation. Until BLM approves a plan of operations, an operator cannot use, occupy or develop its mineral interests in the public lands even if it has rights under the mining laws. The next-to-last sentence of section 302(b) of FLPMA makes this clear when it says, in pertinent part, that ''except as provided * * * in the last sentence of this paragraph,'' nothing in FLPMA amends the 1872 Mining Law or impairs the ''rights of any locators or claims under that Act.'' The ''last sentence of this paragraph'' it refers to sets out the Secretary's duty to protect the public lands from unnecessary or undue degradation. A plan of operations is the instrument allowing an operator to proceed with its use, occupancy or development of public lands consistent with the duty not to unnecessarily or unduly degrade the lands.[6] Suspension or revocation doesn't interfere with operator rights under the mining laws because such rights are dependent upon operator compliance with the approved plan. Accordingly, section 302(c) is a statutory basis for the sections providing for suspension and revocation of plans of operation.

A commenter requested that the new regulations clearly identify when BLM will refer a documented noncompliance to the Department of Justice for initiation of judicial action. The commenter stated that this information should also describe and evaluate the consequences of any differences between the various Department of Justice units having jurisdiction over mining and how these differences can be resolved to assure that all similar documented noncompliances are treated in a similar manner.

The standards for referral to the Department of Justice for judicial enforcement are not covered by subpart 3809. This will either be handled on a case-by-case basis or be the subject of BLM guidance.

A number of comments supported BLM's proposed enforcement rules. For instance, EPA supported BLM's

[6] The Interior Board of Land Appeals has held that the requirements of 43 U.S.C. section 1732(c) are not restricted to instruments issued by BLM under section 1732(b). ''Inclusion of the fourth proviso [of 43 U.S.C. section 1732(c)] makes it clear that Congress intended this requirement to extend to all land use authorizations issued by the Department under any law for lands managed by BLM.'' *James C. Mackay,* 96 IBLA 356 at 365.

proposed regulations at §§ 3809.601 and 3809.602, including the authority for BLM to suspend operations, and at §§ 3809.702 and 3809.703 to issue administrative civil penalties based on non-compliance with the subpart. Commenters stated that BLM clearly needs to have the tools available to shut down a ''renegade'' mining operation or jail a ''renegade'' operator. One commenter pointed out that when the BLM issues a Record of Decision based on a final EIS, the operator is responsible for carrying out the Plan as specified, and if the operator makes changes without BLM analysis and approval, the BLM should have the authority to levy fines and suspend operations. BLM agrees with these comments.

Permit Blocks

A number of commenters recommended adoption of a rule which would prevent BLM from approving future plans of operation for operators with unresolved noncompliances until the violations are corrected. A commenter stated that the new BLM rules—while certainly an improvement—do not allow the agency to reject an operation outright. These commenters asserted that BLM needs the ability to block historically irresponsible operators, as well as parent and subsidiary companies, from obtaining new mining permits. These commenters believed that denial of plans of operations is an important tool to protect public lands and waters from environmental damage. One State suggested language preventing the operator from obtaining a permit anywhere on public lands until all compliance issues have been resolved to the satisfaction of the BLM. That State said it uses a permit block section, and has found it to be useful, especially in addressing the repeat offender issue.

BLM has decided not to institute such a system at this time. The improvements in the enforcement mechanisms contained in this final rule have the promise, BLM believes, to satisfactorily address all enforcement issues. They should be given the chance to work before something as administratively complex and cumbersome as a ''permit block'' system is considered further.

Citizen Petitions and Suits

A commenter suggested that citizens and tribes should have the right to petition for inspection and enforcement in order to spur the BLM into fully implementing its FLPMA obligations.

BLM disagrees that a rule is needed to address the commenter's concerns. Individuals can presently request BLM conduct an inspection and can obtain copies of inspection reports. The commenter did not show that BLM is not adequately responding to citizen or tribal requests to inspect. As explained earlier in this preamble, BLM has decided that enforcement should remain discretionary.

A number of comments supported a provision providing citizens the right to sue to correct violations. Such a provision is beyond BLM authority and would require a legislative change.

Additional Definitions Requested

Commenters suggested that BLM define a number of the terms used in the enforcement context. These include ''noncompliance order'' as used in final § 3809.601(a), ''suspension orders'' as used in final § 3809.601.(b), ''immediate, temporary suspension'' as used in final § 3809.601(b), ''imminent danger or harm'' as used in final § 3809.601(b)(2)(ii), ''violation'' as used in final § 3809.702, and ''pattern of violations'' as used in final § 3809.602(a)(2). Specifically, the commenter stated that the BLM standard or threshold must be included to avoid ambiguity and arbitrary and capricious application by the responsible BLM field official.

BLM declines to add the suggested definitions. The meaning of many of the terms are apparent from their context. Implementation will occur on a case-by-case basis. Where necessary BLM will issue guidance to assure consistent application of the enforcement provisions.

Section-Specific Issues and Comments

Section 3809.601 What Type of Enforcement Action May BLM Take if I Do Not Meet the Requirements of This Subpart?

Final § 3809.601 specifies the kinds of enforcement orders BLM may issue, when they can be issued, the contents of such orders, and when they will be terminated. For the most part, the final rule tracks the proposal. Final § 3809.601(a) allows the issuance of noncompliance orders for operations that do not comply with provisions of a notice, plan of operations, or requirement of subpart 3809. Final § 3809.601(b)(l)(i) provides that the BLM may order suspension of operations if the operator fails to timely comply with a noncompliance order for a significant violation. A significant violation is one that causes or may result in environmental or other harm or danger or that substantially deviates from the complete notice or approved plan of operations. Thus, unless the violation may result in harm or danger or substantially departs from the notice or plan, BLM cannot suspend operations. Before issuance of a suspension order, BLM is required to notify the recipient of its intent to issue a suspension order; and to provide an opportunity for an informal hearing before the BLM State Director to object to a suspension. These latter procedures are intended to satisfy the procedural requirements of FLPMA section 302(c).

Final § 3809.601(b)(2) provides that BLM may order an immediate, temporary suspension of all or any part of operations for noncompliance without issuing a noncompliance order, advance notification, or providing an opportunity for an informal hearing if an immediate, temporary suspension is necessary to protect health, safety, or the environment from imminent danger or harm. This provision implements the third proviso of FLPMA section 302(c). Being mindful of the importance of an advance opportunity to object, the final rule limits temporary immediate suspensions to situations involving imminent danger, that is, situations where the harm could occur before a hearing would be held and a decision issued.

The final rule establishes one presumption. BLM may presume that an immediate suspension is necessary if a person conducts notice- or plan-level operations without having an approved plan of operations or having submitted a complete notice, as applicable. BLM believes that operations that have not undergone the required BLM review and approval, including operator preparation and submittal of detailed plans, are presumed to be operating without the care necessary to operate properly, and thus constitute an imminent danger to the environment. In a clarifying change from the proposal, the final rule references the sections requiring plan approvals and notice submittals.

Final § 3809.601(b)(3) provides that BLM will terminate a suspension order when BLM determines the violation has been corrected. The proposed rule would have had BLM terminate the suspension order no later than the date a person corrects the violation, but unless BLM is present, it would not be able to terminate the suspension on that date. Thus, the final rule bases the termination on the date BLM determines the correction has occurred.

Final § 3809.601(c) specifies the contents of enforcement orders, including: (1) How an operator failed to comply with the requirements of subpart 3809; (2) the portions of operations, if any, that must cease; (3)

the corrective actions to be taken, and the time, not to exceed 30 calendar days, to begin such actions; and (4) the time to complete corrective action. A minor change from the proposal clarifies that the 30 days to begin corrective action are calendar days.

Commenters stated that for the mainstream mining industry, a notice of noncompliance will almost invariably resolve the problem without protracted controversy. These commenters asserted that mine operators have enormous incentives to maintain positive and cooperative relations with the Federal land management agencies, and that judicial enforcement is pursued in rare instances of recalcitrant operators, usually where individuals are engaging in sham operations. The commenters conclude that the rare use of judicial enforcement authorities in the past attests to the lack of need for new enforcement authorities today.

BLM agrees that in many instances notices of noncompliance will lead to successful resolution and abatement of violations. There will be instances, however, where notices of noncompliance will not completely resolve the issue, and the danger of harm will continue. That is when the other remedies can prove useful. The rare use of judicial enforcement in the past may be attributed to the difficulty in successfully initiating civil actions rather than the lack of need for such actions.

Commenters asserted that in both subparagraphs of § 3809.601(b), BLM officials should not be authorized to shut down operations unless there is a significant violation that both may result in environmental harm and that substantially deviates from the completed notice or approved plan of operations.

BLM disagrees with the comment. BLM believes that a suspension is warranted under § 3809.601(b)(2) in either situation when an operator fails to correct the significant violation within the allotted time. The danger of environmental or other harm from an unabated violation justifies a suspension. BLM also believes that it should be authorized to direct an operator to suspend activities that substantially deviate from what was approved.

A commenter stated that although FLPMA allows BLM to use specific enforcement mechanisms in cases when the operator is noncompliant, the proposed regulations exceeded BLM authority by giving BLM the power to suspend and nullify operations. The commenter asserted FLPMA intended to limit BLM's enforcement capability in order to specifically promote the dissemination of information and to advise the public and to use administrative resolution rather than prosecution for violation.

BLM disagrees with the comment. BLM has a duty to take any action needed to prevent unnecessary or undue degradation as stated in section 302(b) of FLPMA. Suspending operators that are causing unnecessary or undue degradation is within BLM's authority.

Commenters stated that the proposed rules are entirely too vague and leave too much power in the hands of a few BLM employees. For instance, the rules would leave to the BLM inspector's discretion just what is imminent danger or harm to the public health, safety or environment. Commenters asserted that no business should be shut down without a ruling by a Federal judge.

BLM disagrees with the comment. In implementing the procedure contemplated by FLPMA section 302(c), trained professional BLM inspectors will exercise their judgment carefully. In the absence of imminent danger, an operator will have the opportunity to raise objections to the State Director. And operators will be able to immediately appeal temporary immediate suspensions to the Interior Board of Land Appeals. Although judicial rulings may ultimately occur, the BLM has the initial responsibility to administer the provisions of FLPMA, including section 302(c).

Commenters asserted that the proposed rule allowing BLM to order a temporary suspension without issuing a noncompliance order violates the principle of due process to which all individuals and companies are entitled to under United States Law. Commenters also asserted that suspension and revocation orders indefinitely shutting down entire mine operations would ''impair the rights of'' locators under the mining laws. These commenters stated that such enforcement authorities cannot reasonably be implied from the general mandate to ''prevent unnecessary or undue degradation'' of the public lands. Furthermore, the commenters stated that if finalized as proposed, a temporary suspension order presumably would be considered final agency action since there exist no provisions for a hearing either prior to or within a reasonable time after the suspension. Thus, the party adversely affected by such action may seek review and relief from a Federal District Court pursuant to the APA.

BLM disagrees with the comment. It is well established that due process may be, as here, satisfied through an administrative appellate process. Any BLM enforcement order may be appealed to the Interior Board of Land Appeals, and a stay may be requested under the provisions of 43 CFR 4.21. Thus a temporary suspension is not final agency action, for which review is available in Federal Court. Rights of claimants under the mining laws are not impaired by BLM enforcement actions because such rights do not include the right to operate in a manner that causes unnecessary or undue degradation.

Commenters suggested that BLM revise proposed § 3809.601(b) to substitute the term ''unnecessary or undue degradation'' for language like ''imminent danger or harm to the environment.'' The commenters stated that there is only one primary authority for BLM to issue a noncompliance finding or temporary suspension—the approved plan of operations is not being followed and BLM has determined that the variance is significant.

BLM declines to accept the suggestion. Although BLM recognizes that failure to comply with the regulations and an approved plan of operations constitutes unnecessary or undue degradation, the suspension rules implement FLPMA section 302(c) as well as FLPMA section 302(b). BLM believes that the terminology of the final rule provides a better sense of when suspension orders can be issued than the use of the phrase ''unnecessary or undue degradation.''

The commenters also asked that BLM and the Forest Service use comparable standards for non-compliance and temporary suspension. BLM declines because the two agencies' regulations are based on different authority.

A commenter requested that BLM revise proposed § 3809.601 to identify the responsible BLM official for issuing noncompliance and suspension orders, and to include the place and time of any appeal so [that] there is a clear understanding of the DOI administrative appeal process. The commenter stated that because the appeal process varies according to the level of the BLM official signing the order, it is important for everyone to know that process.

BLM declines to modify the rules as suggested. In addition to subpart 3809 specifying appeal procedures in final § 3809.800, each enforcement order ordinarily will inform the recipient of his or her appeal rights.

One commenter asserted that the suspension order process proposed by § 3809.601 is too cumbersome for a declining BLM workforce. The commenter requested that BLM clarify that the BLM notification of its intent to issue a suspension order

(§ 3809.601(b)(1)(ii)) can be combined with notification of the opportunity for an informal hearing (§ 3809.601(b)(1)(iii)).

The process set forth in final § 3809.601(b) is necessary to implement the notice and hearing requirement of FLPMA section 302(c). BLM agrees with the commenter that the BLM notification of its intent to issue a suspension order (§ 3809.601(b)(1)(ii)) can be combined with notification of the opportunity for an informal hearing (§ 3809.601(b)(1)(iii)).

One commenter recommended that once an operator files bankruptcy, the operation should automatically receive a record of non-compliance subjecting all notices and plans of operations to a higher level of compliance enforcement (more frequent inspections), bonding, and penalties. Another commenter suggested the rule include a provision for EPA or a State environmental agency to petition BLM to suspend operations or withdraw an operating plan if there is a continued history of non-compliance with environmental regulations.

BLM agrees that the operations of an entity that files for bankruptcy should be subject to continual scrutiny to assure that regulatory obligations are satisfied. BLM also agrees with the commenter that it is important to assure the adequacy of the financial guarantee of an operator in bankruptcy. BLM believes, however, that enforcement action should await the occurrence of violations, and that a bankruptcy filing does not necessarily represent the existence of violations. Once a violation occurs, BLM will take whatever action is best to assure that the violation will be corrected.

A commenter stated that under 43 U.S.C. 1732(c), an immediate temporary suspension is separate from, rather than a subtype of, a suspension. The commenter recommended that, for the sake of more clearly distinguishing between the two types of suspension orders, change the labeling in § 3809.601 to the following: (a) Noncompliance order; (b) Suspension order; (c) Immediate temporary suspension order; and (d) Contents of enforcement orders. These proposed subdivisions would more faithfully represent the intent of 43 U.S.C. 1732(c) and also make this section more understandable to the public by clearly differentiating between a suspension order and an immediate temporary suspension order, which is one of the goals of rewriting these regulations in plain language. In addition, this proposed labeling would allow for a complete one-to-one correlation with the set of orders identified in 43 CFR 3715.7–1, with the exception of the suspension order being called a cessation order in § 3715.7–1.

BLM has chosen not to make these suggested changes because the suggested reordering does not appear to be much different from the final and proposed rules, and even with the changes there would not be a complete correlation with subpart 3715.

A commenter requested that BLM revise proposed § 3809.601 to provide that BLM is liable for all owner/operator documented costs from an arbitrary and capricious suspension order that is overturned during the administrative appeal process or from litigation.

BLM does not intend to take enforcement actions in an arbitrary and capricious manner. Furthermore, it is not authorized to assume monetary liability in such circumstances. There are situations in which, either through Congressional statute or court-evolved common law, the regulated community may sometimes recover their costs or attorneys fees if they are successful in overturning an agency regulatory decision. But agencies may not make commitments to spend money or provide compensation that has not been authorized or appropriated by Congress.

A commenter objected that the feature of the proposed rule that would authorize BLM to issue temporary immediate suspensions without first holding an informal hearing violates an operator's due process rights. BLM disagrees. Section 302(c) of FLPMA, 43 U.S.C. 1732(c), specifically provides for the issuance of temporary immediate suspensions prior to a hearing. Final § 3809.601(b)(2) carries out the statutory provision. The statute and the implementing regulation are limited to situations where BLM determines that such action is necessary to protect health, safety or the environment. The rule adds the further gloss that temporary immediate suspensions not occur unless imminent danger or harm exists. Thus, temporary immediate suspensions are intended to address those situations where a delay in making the suspension effective could exacerbate existing or imminent harm. Under such circumstances and well-established case law, an operator's due process rights are fully satisfied by the operator's ability to seek administrative review of the temporary suspension from the Interior Board of Land Appeals, including the right to request a stay of the BLM action under IBLA procedures set forth at 43 CFR 4.21.

Section 3809.602—Can BLM Revoke My Plan of Operations or Nullify My Notice?

Final § 3809.602 tracks the proposed rule and implements the revocation portion of FLPMA section 302(c). It provides that BLM may revoke a plan of operations or nullify a notice upon finding that—(1) a violation exists of any provision of the notice, plan of operation, or subpart 3809, and the violation was not corrected within the time specified in an enforcement order issued under § 3809.601; or (2) a pattern of violations exists at the operations. The finding is not effective until BLM notifies the operator of its intent to revoke the plan or nullify the notice, and BLM provides an opportunity for an informal hearing before the BLM State Director. The final rule also provides that if BLM nullifies a notice or revokes a plan of operations, the operator must not conduct operations on the public lands in the project area, except for reclamation and other measures specified by BLM.

A commenter asserted that although revocation of a plan of operations is the last step in the enforcement process, it must be used in those circumstances in which other enforcement orders have failed to compel compliance with the regulations governing mining on public lands. The commenter stated that BLM must be willing to stop an operation in which major environmental damage is occurring, or other impacts are taking place, and all other efforts to stop the problem have failed. The commenter requested that proposed § 3809.602(a) should be revised to change the ''may'' to ''shall'', to make permit revocation mandatory. The commenter stated that BLM's mandate to prevent ''unnecessary or undue degradation'' is not discretionary—it is a mandatory duty, and cited *Sierra Club* v. *Hodel,* 848 F.2d 1068 (10th Cir. 1988). According to the commenter, this revision would also be consistent with the NRC Report recommendations.

BLM declines to make permit revocation mandatory. BLM agrees that it is important to achieve operator compliance with BLM regulations, and has provided a range of actions it can take, including administrative enforcement orders, such as suspension and revocation, administrative penalties, and judicial intervention. The appropriate remedy may differ in individual cases and the rules provide flexibility for BLM to use whichever one will cause the violations to be corrected. BLM agrees that it is required to prevent unnecessary or undue degradation of the public lands, but concludes that it

has some discretion in how to achieve that goal, and the final rule is a sound exercise of that discretion.

A commenter suggested that BLM revise proposed § 3809.602 to inform operators expressly that the BLM will revoke their plan of operations or nullify their notice if the financial guarantee is not properly maintained.

BLM does not accept the suggestion. As mentioned in the previous response, BLM will do what is necessary to achieve compliance, but BLM has a variety of means to do so. Plan revocation is but one such means.

Among those objecting to the policies embodied in the proposal, commenters asserted that it is too harsh for BLM to be able to revoke a plan of operations for a single violation.

BLM generally agrees that a plan of operations should not be revoked on the basis of one violation. If the violation is significant enough, however, with the potential to cause serious harm, and the operator refuses to correct the violation, BLM needs to have the option to consider whatever remedy-including revocation-that it believes will best achieve compliance.

A commenter suggested that BLM revise proposed § 3809.602(c) to clarify that operators continue to be authorized to use equipment and perform necessary reclamation following the suspension or revocation of a plan of operations. The commenter questioned what form of authorization BLM will use, who is the responsible BLM official to issue that authorization, and the extent, if any, for public and other Federal, State, local, native, and private surface ownership input to the new BLM authorization.

Revocation of a plan of operations does not terminate an operator's obligation to satisfy outstanding obligations. The authorization to perform the activities to fulfill such obligations can derive from the original plan, or be part of the order revoking the plan. Because this would be a continuation of existing obligations, BLM does not contemplate formal public participation. On the other hand, BLM intends to coordinate with State and other interested Federal agencies before revoking a plan of operations.

Section 3809.603 How Does BLM Serve Me With an Enforcement Action?

Final § 3809.603 deals with the means by which BLM will serve a noncompliance order, a notification of intent to issue a suspension order, a suspension order, or other enforcement order. The previous service provision appeared in § 3809.3–2(b)(1).

Under the final rule, service will be made on the person to whom it is directed or his or her designated agent by different methods. Service could occur by sending a copy of the notification or order by certified mail or by hand to the operator or his or her designated agent, or by any means consistent with the rules governing service of a summons and complaint under rule 4 of the Federal Rules of Civil Procedure. Service is complete upon offer of the notification or order or of the certified mail.

Service could also occur by offering a copy at the project area to the designated agent or to the individual who, based upon reasonable inquiry, appears to be in charge. If no such individual can be located at the project area, BLM may offer a copy to any individual at the project area who appears to be an employee or agent of the person to whom the notification or order is issued. Service would be complete when the notice or order is offered and would not be incomplete because of refusal to accept. In response to a comment, the final rule requires that if service occurs at the project area, BLM will send an information copy by certified mail to the operator or the operator's designated agent. This will assure that regardless of who receives the copy of the order at the project area, operator management will receive a copy.

The service rules recognize that mining claimants, as well as operators, are responsible for activities on a mining claim or mill site and provide that BLM may serve a mining claimant in the same manner an operator is served.

The final rule allows a mining claimant or operator to designate an agent for service of notifications and orders. A written designation has to be provided in writing to the local BLM field office having jurisdiction over the lands involved.

Commenters objected to proposed § 3809.603(a)(1), which provided that BLM may serve an enforcement action on ''an individual at the project area who appears to be an employee or agent of the operator.'' Commenters asserted that this method of service, particularly considering the seriousness of enforcement actions under these regulations, does not comply with fundamental principles of due process. These commenters recommended that this section be revised to require BLM to serve notices by certified mail or personally on the person the operator designates as authorized to accept service.

BLM agrees in part. The final rule will continue to allow service to be complete based on actions at the project area because persons conducting activities at the site of an operation will ordinarily be responsible. BLM agrees, however, that an information copy should be promptly mailed to the operator or his or her agent to assure that responsible management persons not located at the mining site are notified of the BLM actions.

Commenters also suggested that BLM revise proposed § 3809.603 to require BLM to provide a copy of any noncompliance or suspension order to all other Federal, State, and local entities that have permits or authorizations and Native entities and private landowners of the surfaces that are directly linked with the BLM-approved plan of operations.

BLM declines to accept the suggestion to put such a requirement into its rules. BLM intends to consult with other regulators, both State and Federal, when it takes enforcement action. Private entities, however, will not ordinarily be party to enforcement actions and will not necessarily receive copies of enforcement orders.

Section 3809.604 What Happens if I Do Not Comply With a BLM Order?

Final § 3809.604 is adopted as proposed. Final § 3809.604(a) provides that if a person does not comply with a BLM order issued under §§ 3809.601 or 3809.602, the Department of the Interior may request the United States Attorney to institute a civil action in United States District Court for an injunction or order to enforce its order, prevent an operator from conducting operations on the public lands in violation of this subpart, and collect damages resulting from unlawful acts. This reflects the judicial remedies provided in 43 U.S.C. 1733(b), and informs the regulated community of the tie between BLM administrative enforcement and subsequent judicial actions.

The final rule makes clear that judicial relief may be sought in addition to the enforcement actions described in §§ 3809.601 and 3809.602 and the penalties described in §§ 3809.700 and 3809.702.

A commenter recommended that civil actions be brought by States rather than in Federal Court as specified in proposed § 3809.604 because State procedures tend to be quicker, more cost-effective, and more outcome-based than Federal actions, and that implementation of Federal enforcement will be delayed by the existing DOI appeals process.

Final § 3809.604(a) identifies the availability of civil actions in United States District Courts, as provided in FLPMA section 303(b). It does not

preclude States from enforcing their programs in State courts. BLM will work with State regulators to determine which entity, State or Federal, should have the enforcement lead, and the appropriate judicial forum to initiate any required civil action.

Final § 3809.604(b) specifies that if a person fails to timely comply with a noncompliance order issued under § 3809.601(a), and remains in noncompliance, BLM may order that person to submit plans of operations under § 3809.401 for current and future notice-level operations. This paragraph continues the requirement contained in previous § 3809.3–2(e).

Section 3809.605 What Are Prohibited Acts Under This Subpart?

Final § 3809.605 is a new section that lists certain prohibited acts under subpart 3809. The list includes the most significant and most commonly violated prohibitions, but is not intended to be exhaustive. BLM reserves the right to take enforcement action on other violations of the requirements of this subpart that are not specifically listed in this section. None of the items on the list are new requirements; all were included in the proposed rule.

We added this section in response to comments. Some commenters suggested that a list of prohibited acts would be beneficial to regulated parties by alerting them to potential pitfalls. Other commenters suggested that the list would be helpful to those engaged in carrying out the enforcement program under this subpart, such as BLM rangers, U.S. District Attorneys, and judges, by providing an easily referenced and clearly stated list of the most common violations on which to base enforcement actions, prosecutorial decisions, and judgments.

Sections 3809.700 Through 3809.703 Penalties

Section 3809.700 What Criminal Penalties Apply to Violations of This Subpart?

Final § 3809.700 tracks the proposal and describes criminal penalties associated with violations of subpart 3809. Final § 3809.700 identifies the criminal penalties established by statute for individuals and organizations for violations of subpart 3809. It was previously included in § 3809.3–2(f) of the rules that were remanded in May 1998. This regulation is intended to inform the public of existing criminal statutory provisions. These statutes exist independent of subpart 3809, and persons can be prosecuted, and have been prosecuted, regardless of whether BLM promulgates this section. Such prosecutions can occur regardless of whether BLM identifies specific prohibited acts, as some commenters urge. The necessary element of a ''knowing and willful'' violation can be satisfied in a specific case regardless of a regulatory listing of such acts by BLM. Such a listing is not required by 43 U.S.C. 1733(a).

Final § 3809.700(a) specifies that individuals who knowingly and willfully violate the requirements of subpart 3809 may be subject to arrest and trial under section 303(a) of FLPMA. 43 U.S.C. 1733(a). Individuals convicted are subject to a fine of not more than $100,000 or the alternative fine provided for in the applicable provisions of 18 U.S.C. 3571, or imprisonment not to exceed 12 months, or both, for each offense.

Final § 3809.700(b) specifies that organizations or corporations that knowingly or willfully violate the requirements of subpart 3809 are subject to trial and, if convicted, will be subject to a fine of not more than $200,000, or the alternative fine provided for in the applicable provisions of 18 U.S.C. 3571.

Many of the comments supporting strengthened enforcement also supported the criminal sanctions described in proposed § 3809.700. BLM received a considerable number of comments, however, objecting to the criminal sanctions provision, proposed § 3809.700. Commenters asserted that provision is beyond the scope of BLM's FLPMA authority and would unintentionally criminalize actions that are not appropriately subject to prosecution. Commenters stated that these are rules and not laws, so no criminal penalties should be assigned by these rules. Under no circumstances should the BLM or the Department of the Interior be given authority to file criminal charges against a citizen of this country.

These rules do not establish new criminal sanctions, and BLM itself does not file criminal charges; only the Department of Justice may do that on behalf of the United States. These rules are intended to bring existing criminal provisions to the attention of the regulated community, and for that reason are included in subpart 3809. The conduct that is criminal is exactly that provided for in 43 U.S.C. 1733(a)

Some commenters objected to the establishment of ''across the board'' criminal penalties for any knowing and willful violations of the requirements of subpart 3809. Commenters stated that this is unjustified overkill, and that in no other public land management program does BLM establish that it is a crime to violate any provision of an entire subpart. Rather, commenters asserted, in other public land management programs, BLM has taken the essential effort of distilling those substantive violations that will be subject to criminal sanctions. Commenters asked that the agency specifically identify and list in the rule those actions by operators which are so serious as to justify criminal sanctions, or else delete the entire section. The commenters asserted that the preamble must state the basis for BLM's conclusion that it needs, to assure compliance, to have the threat of criminal penalties for such ''crimes'' as: submitting an incomplete plan of operations; holding financial guarantees that BLM has determined (in its revision of an estimate of reclamation costs under § 3809.552(b)) is no longer adequate; failing to modify a notice under § 3809.331(a)(2) that BLM thinks (and the operator does not think) constitutes a ''material change'' to the operations. The commenter stated that the list of ''violations'' of the rules is endless, and most ''violations'' are minutiae. The commenter stated that if a plan is incomplete, this is not a crime; the plan must be completed before processing can occur.

As discussed above, BLM has not accepted the commenters' suggestion and has published a list providing examples of the more common prohibited acts under subpart 3809. It is impractical, and probably not possible, to catalog all the violations of the regulations that could warrant criminal prosecution, and the list is not intended to be exhaustive. FLPMA establishes that knowing and willful violations of the regulations can be prosecuted under section 303(a). 43 U.S.C. 1733(a). BLM does not expect or advocate that minor violations be prosecuted. BLM expects that United States Attorneys will continue to exercise their prosecutorial discretion in determining when to bring criminal prosecutions.

A commenter stated that if proposed § 3809.700 is just informational, criminal enforcement cannot occur until 43 CFR part 9260 is changed. Those rules provide ''in a single part a compilation of all criminal violations relating to public lands that appear throughout title 43.'' 43 CFR 9260.0–2. There were and are no provisions of 43 CFR 3809 listed there. In fact, ''Subpart 9263-Minerals Management'' is ''Reserved.'' Thus, the unrevised part 9260 remains the controlling, effective criminal penalty rule, and the absence of any provisions in that subpart pertaining to hardrock mining operations means there are none.

Although BLM disagrees with the assertion that prosecutions cannot occur under 43 U.S.C. 1733(a) until BLM changes 43 CFR part 9260, BLM agrees that to avoid confusion subpart 9263 should contain a cross-reference to subpart 3809. Thus, this final rule incorporates such a cross-reference in subpart 9263. Again, the statute controls, regardless of what is contained in either subpart 3809 or subpart 9263 of BLM's regulations. The absence of such a cross-reference would not invalidate any properly obtained conviction under 43 U.S.C. 1733(a).

Commenters objected to the criminal enforcement provisions as violating the mining laws. One commenter stated that section 302(b) of FLPMA indicates that, unless specified otherwise, FLPMA does not amend the mining laws. FLPMA section 303 is not listed in section 302(b). The commenter asserted that there were no criminal penalty provisions in the 1980 3809 regulations for this reason. The Secretary's authority to prevent unnecessary and undue degradation must exercised by other, lawful means, not by means that Congress specifically established would not apply to ''locators or claims'' under the mining laws.

BLM disagrees with these comments. Criminal enforcement under 43 U.S.C. 1733(a) neither amends the mining laws, nor impairs rights established under that law. The mining laws create no right in any person to violate BLM's lawfully promulgated regulations, particularly those implementing the unnecessary or undue degradation standard of FLPMA section 302(b), which does amend the mining laws.

A commenter requested that BLM define the term ''knowingly and willingly'' as used in proposed § 3809.700. The commenter stated that this is especially important since BLM has chosen to include this section only for information purposes.

BLM does not accept this suggestion. The Congress defines, and the courts apply, the elements of such generic criminal statutes.

A commenter asked that BLM revise proposed § 3809.700 to make it clear the extent, if any, this section applies to existing approved mining operations on public lands.

As stated earlier, 43 U.S.C. 1733(a) applies by its own terms to any person who knowingly and willfully violates a regulation issued under FLPMA. There is no exception for existing approved operations. To the degree, however, that subpart 3809 excepts existing approved operations from certain new regulatory requirements, such requirements cannot form the basis for criminal conduct.

Section 3809.701 What Happens if I Make False Statements to BLM?

Final § 3809.701 tracks the proposed rule. It informs the regulated community of the existing criminal sanctions for making false statements to BLM. Under Federal statute (18 U.S.C. 1001), persons are subject to arrest and trial before a United States District Court if, in any matter under this subpart, they knowingly and willfully falsify, conceal, or cover up by any trick, scheme, or device a material fact, or make any false, fictitious, or fraudulent statements or representations, or make or use any false writings or document knowing the same to contain any false, fictitious, or fraudulent statement or entry. If a person is so convicted, he or she will be subject to a fine of not more than $250,000 or the alternative fine provided for in the applicable provisions of 18 U.S.C. 3571, or imprisonment of not more than 5 years, or both. As with final § 3809.700, BLM is not establishing any criminal sanctions by promulgating final § 3809.701.

Some commenters thought that proposed §§ 3809.700 and 3809.701 provide excessively severe penalties of from $100,000 to $250,000 fines and/or imprisonment for five years for violations of the regulations or making of false statements.

BLM is simply providing, as a matter of information to the regulated community, pertinent information about the existing statutes. The penalties the commenters object to cannot be changed by BLM regulation.

Commenters asked: What does the BLM consider to be a false statement? Will the BLM include false statements or accusation made by private parties against operators during comment period for bonding or other NEPA processes? What standards will the BLM use to determine if the statements are false?

U.S. Attorneys initiate prosecutions under 18 U.S.C. 1001. The courts interpret that law, and a body of case law exists interpreting 18 U.S.C. 1001. BLM defers interpretation of the statute to appropriate officials with responsibility to enforce that statute.

Section 3809.702 What Civil Penalties Apply to Violations of This Subpart?

Final § 3809.702 adopts the civil penalty provision that was proposed. This is consistent with NRC Report Recommendation 6 by providing administrative civil penalties, subject to appropriate due process. Administrative penalties are described in the NRC Report as necessary ''to make the notice of noncompliance a credible and expeditious means to secure compliance.'' NRC Report at p. 103.

The final rule provides that following issuance of an order under § 3809.601, BLM may assess a proposed civil penalty of up to $5,000 for each violation against a person who (1) violates any term or condition of a plan of operations or fail to conform with operations described in a notice; (2) violates any provision of subpart 3809; or (3) fails to comply with an order issued under § 3809.601. The rule provides that BLM may consider each day of continuing violation a separate violation for purposes of penalty assessments. In determining the amount of the penalty, BLM will consider the violator's history of previous violations at the particular mining operation; the seriousness of the violation, including any irreparable harm to the environment and any hazard to the health or safety of the public; whether negligence is involved; and whether the violator demonstrates good faith in attempting to achieve rapid compliance after notification of the violation. BLM will also accommodate small entities and will, under appropriate circumstances, consider reducing or waiving a civil penalty and may consider ability to pay in determining a penalty assessment.

To afford due process of law, the rule specifies that a final administrative assessment of a civil penalty occurs only after BLM has notified the violator of the assessment and provided a 30-day opportunity to request a hearing by the Office of Hearings and Appeals (OHA). BLM may extend the time to request a hearing during settlement discussions. If the violator requests a hearing, OHA will issue a decision on the penalty assessment. If BLM issues a proposed civil penalty and the recipient fails to request a hearing on a timely basis, the proposed assessment becomes a final order of the Department, and the penalty assessed becomes due upon expiration of the time allowed to request a hearing.

The proposed rules allowing BLM to assess monetary penalties drew many comments. Many commenters stated that BLM enforcement should allow for the assessment of administrative civil penalties against mining operators. Commenters stated that civil penalties will play a vital role in providing an incentive that operators understand. Commenters asserted that enforcement only works if the penalties for being ''caught'' are far more expensive than the profits to be made through non-performance. EPA supported the authority for BLM to issue civil administrative penalties based on non-

compliance with subpart 3809. BLM agrees with the comments supporting the use of administrative penalties.

A commenter suggested that the penalties BLM collects be put into a fund for reclaiming mine lands and not go into the U.S. Treasury or some general Department of the Interior fund. The proper disposition of penalties collected is, however, determined by Congress and may not be changed by BLM regulation.

Commenters asserted that FLPMA is quite specific about the enforcement authorities provided to BLM by Congress, stating 43 U.S.C. 1733(b) expressly allows only the Attorney General to institute civil penalties for violations of regulations promulgated by the Secretary of Interior pursuant to FLPMA, The commenter asserts that the absence of express administrative civil penalty provisions in FLPMA confirms the Congressional intent that BLM not impose civil penalties.

BLM disagrees with the commenters' assertion that the provision allowing the Attorney General to seek the judicial imposition of injunctive or other judicial relief limits the Secretary's administrative authority. That section, together with a portion of 43 U.S.C. 1733(a) establishing criminal violations, provides affirmative authority for judicial activity. As discussed earlier, neither provision addresses the scope of the Secretary's authority to establish civil penalties under other provisions of law.

Commenters stated that although they recognize that BLM wants new civil penalty authorities to address ''bad actors,'' recalcitrant operators would continue to flout any new BLM administrative authorities, and that civil or criminal court action would ultimately be necessary to resolve such problems as in the case now. The commenters asserted that BLM's proposed new bonding authorities will help make such cases of noncompliance more clear-cut and render easier the task of persuading a U.S. Attorney to pursue such actions.

BLM disagrees with the comment. Although BLM cannot assure that the imposition of civil penalties will always cause entities to come into compliance, the additional administrative sanctions will provide greater incentive for operators to do so. A person may decide to delay correcting a violation to see whether a court will issue injunctive relief, but that person may decide to abate a violation in the face of a Federal administrative order directing him or her to suspend operations or a continually accruing monetary penalty. BLM also is not persuaded that the existence of new bonding authorities will lead to greater success in bringing civil actions for injunctive relief.

A commenter emphasized the NRC Report statement that ''federal land management agencies need to acknowledge and to rely on the enforcement authorities of other federal, State, and local agencies as much as possible'' (NRC Report at p. 103) and suggested that the regulations should incorporate the requirement that BLM defer to enforcement by Federal or State agencies with primary jurisdiction over environmental requirements. The commenter suggested the regulations should also incorporate the NRC Report statement that BLM develop formal understandings or memoranda of understanding with State and Federal permitting agencies to prevent duplication and promote efficiency (NRC Report at p. 104). The commenter stated that the NRC Report intended that the BLM use the new administrative penalty authority only where the agency ''needs to act immediately to protect public lands or resources, or in cases where the other agency is unable or unwilling to act with appropriate speed'' (NRC Report at p. 104) and suggested that these limitations should be written directly into the regulations.

BLM agrees with the policies embodied in the NRC Report, to the extent reliance on other agencies will achieve compliance with BLM regulations and public lands and resources will be adequately protected. Inclusion of the suggested limits in the regulations, however, could be construed to establish jurisdictional bars to BLM enforcement. Such limits would complicate individual enforcement actions with issues related to matters such as the extent of BLM reliance on other agencies. These types of issues can lead to disputes between BLM and the States, as is evidenced by the experience of the Office of Surface Mining in implementing 30 U.S.C. 1271. BLM believes it preferable, instead, to develop understandings and agreements with States and other agencies to exercise its discretion appropriately to defer to other agencies, without including jurisdictional bars in the BLM regulations.

Other commenters asserted that the administration of a civil penalty system will impose new and unjustified resource and personnel requirements on the agency, not to mention the States. Commenters stated that from a practical perspective, BLM should also consider the procedural issues and complexities associated with the civil penalty policies and the implementation of similar programs by other agencies, such as EPA. For example, the commenter stated that BLM's penalty assessments would likely be the subject of innumerable appeals. That reality should be considered in light of the fact that the Interior Board of Land Appeals is already staggering under a multi-year backlog. Appeals stemming from BLM penalty assessments would have the potential to bring the system to a complete halt. The commenter also stated that BLM assumption of civil penalty responsibilities would impair the agency's capacity to perform its land management responsibilities.

Although the use of civil penalties could increase BLM's workload and add additional appellate cases, BLM disagrees that the additional resource needs will be as dramatic as the commenters assert. BLM does not expect that a great number of civil penalties will be issued, particularly if States and other Federal agencies take the enforcement lead in many instances.

Final § 3809.702 provides civil penalties of up to $5,000 per day for violation of the regulations, violation of a plan of operations, or failure to comply with an order of the BLM. Commenters stated that the draft penalties section is extremely stringent and excessive considering that a single violation of one of the new performance standards could likely occur even if the operator was diligent, prudent and acting in good faith. One commenter suggested the maximum penalty should be $1,000 per day, a noncompliance order be issued first, together with an opportunity to cure the violation, and appeals of penalty assessments be heard, in the first instance, by BLM State Directors.

BLM believes that the administrative civil penalty system is fair. The issuance of monetary penalties in any amount is discretionary. In many instances, BLM will not issue any monetary penalty. The $5,000 per day maximum amount of a penalty is just that, a maximum. BLM does not expect that penalty amounts will always approach the maximum, particularly if a violation is an isolated incident and an operator is diligent, prudent, and acting in good faith. The rule contains criteria for assessing penalties, with appropriate reductions for small entities. Setting a maximum amount of less than $5,000 per day may be inadequate to reflect the harm caused by serious violations.

Before any penalty becomes final, the recipient may seek a settlement agreement with the BLM State Director under final § 3809.703, discussed below. The recipient may also petition OHA for a hearing under final § 3809.702(b). A hearing gives the person assessed a

penalty the opportunity to explain extenuating circumstances and seek a reduction in the penalty amount or a determination that the violation did not occur. The Hearings Division of OHA has extensive experience with monetary penalty hearings. BLM agrees that generally penalties will not be assessed until a noncompliance order has been issued and there has been a failure to comply, but occasionally a serious violation may warrant the issuance of monetary penalty, or another agency may have issued the enforcement order and BLM would not wish to duplicate that order.

Instead of penalties, a commenter asserted that compliance through financial guarantees should be adequate. BLM disagrees with the comment. BLM would prefer that an operator correct violations that occur. Administrative enforcement orders and civil penalties provide an incentive for operator action that does not exist through the financial guarantee. In addition, forfeiting and collecting on a financial guarantee can be a lengthy process and may not be warranted for individual violations.

A commenter suggested the BLM should use the judicial system for the assessment of civil penalties, as the only fair way to administer penalties. The commenter felt that if a violation is serious enough to warrant a penalty, then the judicial system should administer it. The commenter was concerned about the impartiality of BLM and the Interior Board of Land Appeals. Another commenter suggested that the BLM should provide a fair appeal process from civil penalties, which includes a committee composed of representatives of both government and industry.

BLM disagrees with the comment. The same difficulties and uncertainties exist with obtaining judicial imposition of civil penalties under 43 U.S.C. as with getting injunctive relief under that section. Persons who believe they are treated unfairly by the Department may appeal an IBLA ruling to Federal District Court. BLM also disagrees with the suggested use of multi-interest appeal boards. The appeal of a civil penalty involves an individual factual dispute involving a specific application of the regulations. This is not the type of proceeding where a committee composed of multiple interests would add value, such as in making recommendations on policy issues.

A commenter asked that BLM define the term ''small entity'' as used in proposed § 3809.702(a)(3). In the commenter's view, the current interpretation of the term conflicts with the term ''small business'' as used by BLM in 1998 legal briefs defending its earlier bonding rules. BLM will interpret the term ''small entity'' consistent with the definition of that term established by the Small Business Administration in its regulations at 13 CFR 121.201.

A commenter asked whether the 30-day appeal period specified in proposed § 3809.702(b) referred to calendar days or business days. The final rule includes the phrase ''calendar days'' to clarify this.

A commenter recommended that a system of positive incentives be developed in lieu of administrative penalties to encourage environmental stewardship, keeping in mind that financial assurance in the form of reclamation bonds will still be in place to ensure compliance. The commenter was also concerned that the rules do not provide enough guidance to provide for consistent application of the administrative civil penalty provisions without imposing personal biases of individual regulators. Although BLM encourages environmental stewardship and positive incentives (such as reclamation awards to operators who provide environmentally superior reclamation), it also needs to have administrative sanctions available. These rules provide such sanctions, while providing opportunities for appeals and review that will guard against enforcement biases.

Section 3809.703 Can BLM Settle a Proposed Civil Penalty?

Final § 3809.703 clarifies that BLM may negotiate a settlement of civil penalties, in which case BLM will prepare a settlement agreement. The BLM State Director or his or her designee must sign the agreement. This section is unchanged from the proposal.

Sections 3809.800 Through 3809.809 Appeals

Proposed § 3809.800 addressed appeals of BLM decisions, but also said that State Director review would occur if consistent with 43 CFR part 1840, anticipating BLM publication of revised BLM State Director review rules. The October 26, 1999 supplemental proposed rule elaborated and sought comments on BLM's State Director review provisions for subpart 3809 because separate BLM State Director review regulations were not published at that time and part 1840 did not allow State Director review. See 64 FR 57613, 57618.

These final rules finalize in modified form the February 9, 1999 proposal for appeals to the Office of Hearings and Appeals (OHA), and also adopt in modified form the State Director review provisions proposed in October 1999. BLM has revised final § 3809.800 and added §§ 3809.801 through 3809.809 to account for the two processes for seeking review.

Section 3809.800 Who May Appeal BLM Decisions Under This Subpart?

Final § 3809.800 establishes the two review processes. Portions of proposed § 3809.800 are contained in final §§ 3809.801, 3809.802 and 3809.803, discussed below.

Final § 3809.800(a) provides that a party adversely affected by a decision under subpart 3809 may ask the State Director of the appropriate BLM State Office to review the decision. Final § 3809.800(b) provides that an adversely affected party may bypass State Director review, and directly appeal a BLM decision under subpart 3809 to OHA under 43 CFR part 4. In other words, a party may elect to ask for State Director review or may appeal to OHA.

Providing a choice of appealing either to OHA or seeking State Director review is consistent with the October 1999 proposal. It is a change from the previous rule which required operators to appeal to the State Director before being able to file an appeal with OHA, and did not allow other parties to seek State Director review. This choice may allow issues to be resolved at the State Director review level without the necessity of a potentially more complex IBLA appeal. In addition, operators may decide to proceed directly with an appeal to the IBLA, thus reducing the State Director review workload.

One change from the proposal made in response to comments is to limit appeal rights to an adversely affected ''party,'' as was set forth both in previous § 3809.4 and in the current OHA appellate rules at 43 CFR 4.410(a), rather than to allow any adversely affected ''person'' to file an appeal. The word ''party'' is intended to include a person who previously participated in the BLM proceeding, such as by filing comments or objections with BLM.

Commenters objected to the granting of appeal rights to an ''undefined and open-ended'' class of ''persons adversely affected by a decision made under this subpart.'' Commenters stated that the preamble to the proposal contains no rationale whatsoever for this ''wholly unauthorized expansion of rights.'' Another commenter suggested that BLM should adopt the Alaska standard that administrative appeals and litigation can be initiated only by persons that meaningfully participated in the public participation elements of the decision process. A commenter

pointed out the difference in language between proposed § 3809.800(a) which authorized any ''person'' adversely affected by a BLM decision to appeal the decision under 43 CFR parts 4 and 1840, and the wording of 43 CFR section 4.410 which states: ''Any *party* to a case which is adversely affected * * *'' shall have a right to appeal'' (emphasis added). The commenter correctly observed that a potential appellant may be adversely affected by a BLM decision, but not be a party to the BLM proceeding. A commenter requested that BLM clarify the discrepancy between these sections by providing for appeal by parties which can show they are adversely affected or have a legitimate interest in the effects of the action either on or off-site.

As noted above, the final rule limits appeals to ''parties.'' BLM agrees that it is helpful for potentially adversely affected persons to participate meaningfully in the BLM proceeding, and to raise objections or concerns before BLM makes a decision. In the absence of comments or objections, BLM will not necessarily be aware of particular issues and its decision will be reasonable based on the information before it. Although persons who do not participate in a BLM proceeding could be aggrieved by either the on- or off-site effects of a decision, BLM does not think it burdensome for those persons to have voiced their concerns to BLM before BLM makes a decision. In most instances BLM expects that persons who will be adversely affected will inform BLM of their objections, particularly in light of the opportunity to submit public comments under final § 3809.411(c). Finally, BLM has concluded that the issue of who has standing to file an appeal to OHA should be resolved consistently for all of BLM's programs, and BLM should not create an exception for an individual program, such as for subpart 3809.

Section 3809.801 When May I File an Appeal of the BLM Decision With OHA?

Final § 3809.801 describes when an appeal can be filed with OHA. Final § 3809.801(a) describes the various scenarios when an appeal may be filed with OHA, taking the State Director review process into account. These are as follows:

Under final § 3809.801(a)(1), if a party does not request State Director review, the party has 30 calendar days from receipt of the original BLM decision to file an OHA appeal. This is consistent with the February proposal, and the OHA regulations.

Under final § 3809.801(a)(2), if a party requests State Director review and the State Director declines to accept the request for review, the party may file with OHA an appeal of the original decision within 30 calendar days of the date the party receives the State Director's decision not to review. Thus a party seeking third party review will not be prejudiced and lose his or her appeal rights to OHA if the State Director declines to accept the request for review.

Under final § 3809.801(a)(3), if a party requests State Director review and the State Director has agreed to accept the request for review, a party may file with OHA an appeal of the original decision before the State Director makes a decision. This allows a party to change his or her mind and appeal to OHA if, for instance, he or she does not receive a timely decision from the State Director.

Under final § 3809.801(a)(4), if a person requests State Director review and the State Director makes a decision, a person may file with OHA an appeal of the new decision within 30 calendar days of the date the person receives or is notified of the State Director's decision.

Under final § 3809.801(b), and as provided in the February proposal, a person must file a notice of appeal in writing with the BLM office where the decision was made in order for OHA to consider an appeal of a BLM decision.

Section 3809.802 What Must I Include in My Appeal to OHA?

Final § 3809.802 addresses the contents of appeals to OHA, and includes the material proposed as § 3809.800(c). It provides that a written appeal must contain the appellant's name and address, and the BLM serial number of the notice or plan of operations that is the subject of the appeal. The person must also submit a statement of reasons for the appeal and any arguments the appellant wishes to present that would justify reversal or modification of the decision within the time frame specified in 43 CFR part 4 (usually within 30 calendar days after filing the appeal). The word ''calendar'' was added as a clarification.

Section 3809.803 Will the BLM Decision Go Into Effect During an Appeal to OHA?

Under final § 3809.803, and also as provided in proposed § 3809.800(b), all BLM decisions under subpart 3809 go into effect immediately and remain in effect while appeals are pending before OHA, unless a stay is granted under 43 CFR § 4.21(b). This derives from previous § 3809.4(f).

Comments Related to Appeals to the IBLA

A commenter on the February proposal stated that it thought that the intent of proposed § 3809.800(a) is to have both the operator and affected third parties appeal directly to IBLA. It stated the sentence about the BLM State Director review and the reference in part 1840 is rather confusing and does not clearly state when the BLM State Director would or would not review an appeal. Therefore, the commenter stated BLM should remove the last sentence about the BLM State Director review, since all appeals are going to be sent to IBLA.

BLM attempted to clarify its intent in the October 1999 supplemental proposed rule. The confusing sentence has been removed. The final rule allows operators and adversely affected third parties the choice of seeking State Director review or appealing to the IBLA. The final rules clarifies when appeals may be made.

Commenters stated that BLM should carefully weigh the impacts of additional appeals on the agency and its resources. A number of comments focused on the increased workload and delays that would be caused by the appeal process of proposed § 3809.800. Commenters stated that the detailed new permitting requirements contained in the 3809 proposal will greatly increase the number of BLM decisions that ultimately will be subject to administrative appeals to the Interior Board of Land Appeals (''IBLA''), as well as increase the potential grounds for such appeals. Commenters asserted that an appeal to the IBLA is relatively simple and inexpensive for opponents to a mining project because opponents can simply repackage their NEPA comments as a statement of reasons, and obtain an administrative rehearing on all of their claims, regardless of whether they have merit. But, the commenters continued, the burden of an appeal on BLM is substantial. Regulations require that the agency assemble and transmit the entire administrative record to the IBLA and the agency must respond to an appellant's statement of reasons. Responding to an appeal can require a substantial amount of time from field office personnel, time that is lost from permit processing, compliance inspections or enforcement, or other duties. Commenters stated that BLM cannot ignore an appeal, because if BLM does not respond adequately, the decision will likely be remanded, imposing an additional burden on the agency and its employees. BLM's draft EIS acknowledges that the ''current

backlog in IBLA for a routine appeal is about three years.'' Commenters asserted that adoption of the proposed rules will increase the backlog beyond already intolerable levels. The commenter concluded that protracted administrative appeals and litigation over permitting decisions compound the delays and uncertainties in the permitting process.

Commenters also asserted that vague regulatory standards governing BLM's discretionary judgments will make the appeals that are filed more complex. Exercise of agency judgment and discretion will ultimately be judged by the standards written into the regulations. Such standards, the commenters pointed out, include determinations of MATP, the application of the performance standards, the completeness of plans of operations, adequacy of reclamation plans, the amount of financial guarantees, and innumerable enforcement decisions (including the decision whether to allow a member of the public to accompany a BLM inspector). BLM's intent about the way particular provisions should be implemented will be meaningless if that intent is not clearly stated in the regulatory language. The commenter stated that because many of the provisions in the proposed rule, particularly the ''performance standards,'' are written in absolute terms, the potential for legal challenges is a source of great concern to the industry, and should be of great concern to BLM.

Although BLM agrees that appeals to the IBLA of BLM decisions under subpart 3809 use BLM resources, BLM concludes such appeals need to be available to provide basic procedural fairness to parties who may be aggrieved by the decision. Under the previous rules, parties could appeal to the IBLA (although operators were required to go through the State Director review process before appealing to the IBLA). As noted, many commenters objected not to the appeal process as much as to the revised rules leading to the underlying decisions that are appealed. The potential consequences from an increased number and greater complexity of appeals, however, does not dissuade BLM from promulgating needed standards and procedures.

Commenters pointed out that allowing operators to appeal both a noncompliance order and a subsequent suspension order would also be time-consuming and costly to both the BLM and IBLA. Moreover, BLM proposes that it may eliminate certain appeals to the State Director, which will further increase appeals to IBLA.

BLM recognizes that each enforcement action may have separate appeals, but it may not be necessary to relitigate issues that the same parties have already litigated. Persons who previously requested State Director review can do so under these final rules, plus the State Director review process has been made available to any aggrieved person. To the extent issues are resolved before the State Director, appeals may not have to be taken to the IBLA.

A commenter asked that BLM revise proposed § 3809.800(b) to require the decision to indicate the appropriate next level of appeal. The commenter supported having appeals from local decision to go directly to the State Director, as a time-saving mechanism. The commenter suggested that the appeal process would be further streamlined if the next level above the BLM State Director is the Secretary of the Interior.

BLM agrees in part. The process BLM adopts in these final rules allow a party to seek review by the State Director (to save time or for some other reason) or to appeal directly to the IBLA. Ordinarily, appeal rights are specified in BLM decisions. The Interior Department's Office of Hearings and Appeals is the Secretary's representative for handling appeals from BLM decisions, and OHA decisions are ordinarily final decisions of the Department which can be appealed to an appropriate court.

Some commenters suggested a streamlined appeals process under which an appeal from a field-level operation can only be reviewed timely (suggesting seven calendar days for each of the two reviews) by the Office Manager and State Director responsible for public land management in the area of the proposed mining operation. Under this suggested procedure, appeals would immediately be taken to Federal District Court as litigation. The commenter stated that this modification would be similar to an existing U.S. Forest Service appeal process. The commenter asserted that since the Secretary of the Interior is the ultimate policy setter for IBLA and the Solicitor and has ultimate hiring/firing authority over the Assistant Secretary, BLM Director, and the BLM State Directors, the proposed appeals would be futile and a waste of time. The commenter concluded that this is a major modification that would be a step to effectively implement NRC Report Recommendations 15 and 16.

BLM declines to accept the suggestion. One level of review within the State should be sufficient, and BLM doubts that seven days for each review would allow for meaningful review. Based on past experience, BLM disagrees that appeals to the IBLA are futile. The IBLA assures that there will be national consistency to the interpretation and implementation of BLM rules, and does not always support local BLM decisions as the commenter asserts. BLM also disagrees that the commenter's suggestions would be an effective step to implement the NRC Report recommendations.

Industry commenters stated that because the NRC Report made no recommendation that previous appeals procedures be changed, and BLM is limited to promulgating rules that are consistent with the NRC Report recommendations, BLM is not authorized to modify the current appeals provisions in the previous 3809 regulations. The commenters recommended that the previous regulations, which allow operators to appeal to the BLM State Director in certain circumstances, but direct other appeals to the IBLA, should be retained.

BLM disagrees with the comments. The legislative standard is that the BLM final rule not be inconsistent with the NRC Report recommendations. Recommendation 6 specifically states that BLM administrative penalties be subject to appropriate due process. The BLM appeal procedures and State Director review procedures are intended to assure that BLM enforcement decisions, as well as its other decisions, are subject to due process of law. Thus, the appeals rules are clearly not inconsistent with the NRC Report recommendations.

A commenter stated that the proposed rule contains no mechanism (nor did its cross-referenced citations) which provide for public notice of the submittal of a plan of operations or notice under the proposed regulations. The commenter stated that without notice how is a person who may be adversely affected aware of the plan of operations or notice activity? The commenter recommended that a public notice procedure should be established for concerned individuals, adjoining property owners, and the public at large of the submittal of a plan of operations or notice so that they can participate in the process.

As discussed above, BLM agrees (although not solely for the reasons raised by the commenter) and has modified final § 3809.411(c) to establish a public participation provision.

Sections 3809.804 Through 3809.809 State Director Review

Final §§ 3809.804 through 3809.809 flesh out the mechanics of the State Director review process, and generally follow the process described in the October 1999 supplemental proposal.

Section 3809.804 When May I Ask the BLM State Director To Review a BLM Decision?

Final § 3809.804 establishes the time frame for requesting State Director review. It provides that the State Director must receive a request for State Director review no later than 30 calendar days after a person receives or is notified of the BLM decision sought to be reviewed. The supplemental proposed rule did not detail the time frame for requesting State Director review, and the 30-day period is consistent with the period specified in previous § 3809.4(b) for requesting State Director review. Thus, an adversely affected party has 30 days to request State Director review or to file an OHA appeal.

Section 3809.805 What Must I Send BLM To Request State Director Review?

Final § 3809.805 specifies what a person must send BLM to request State Director review. It provides that a State Director review request must be a single package that includes a brief written statement explaining why BLM should change its decision and any documents that support the written statement. The envelope should be marked ''State Director Review,'' and a telephone or fax number should be provided. These requirements are consistent with those previously found in § 3809.4(c). A person may accompany his or her request for State Director review with a request for a meeting with the State Director. Holding a meeting is discretionary, but the State Director will notify the person seeking review as soon as possible if he or she can accommodate the meeting request.

Section 3809.806 Will the State Director Review the Original BLM Decision if I Request State Director Review?

Final § 3809.806(a) provides that the State Director may, but is not obliged to accept requests for State Director review. Based on factors such as workload or complexity of the issues, the State Director may conclude that it is appropriate for appeals to be heard directly by OHA rather than at the BLM State Director level. The October proposal stated that the State Director would have seven days to decide whether to accept a request for review. BLM has revisited this and has concluded that seven days may not be sufficient for the State Director to determine whether to conduct the review of an earlier decision and thus has provided 21 days to make that determination.

Final §§ 3809.806(b) and (c) describe address possible overlapping OHA appeals and State Director review proceedings. Final § 3809.806(b) provides that a State Director will not begin a review, and will end an ongoing review if the party who requested State Director review or another party files an appeal of the original BLM decision with OHA under § 3809.801 before the State Director issues a decision, unless OHA defers consideration of the appeal pending the State Director decision.

Final § 3809.806(c) provides that a party filing an appeal with OHA after requesting State Director review must notify the State Director. After receiving such a notice, the State Director may request OHA to defer consideration of the appeal. Final § 3809.806(d) provides that if a party who requested State Director review fails to notify the State Director of his or her appeal to OHA, any decision issued by the State Director may be voided by a subsequent OHA decision.

Section 3809.807 What Happens Once the State Director Agrees to My Request for a Review of a Decision?

Final § 3809.807(a) directs the State Director to promptly send the requester a written decision. BLM intends to act promptly on requests for State Director review. This is consistent with previous § 3809.4(d). Although there is no consequence if the State Director does not issue the decision promptly, the party may choose to appeal the original BLM decision to OHA at any time before the State Director issues the decision.

Under the final rule, the State Director's decision may be based on any of the following: the information the requester submits; the original BLM decision and any information BLM relied on for that decision; and any additional information, including information obtained from a meeting the requester held with the State Director. The State Director may affirm, reverse, or modify the original BLM decision, and the State Director's decision may incorporate any part of the original BLM decision. If the original BLM decision was published in the **Federal Register**, the State Director will also publish his or her decision in the **Federal Register**.

Section 3809.808 How Will Decisions Go into Effect When I Request State Director Review?

Final § 3809.808 describes how decisions go into effect when a person requests State Director review. Under final § 3809.808(a), the original BLM decision remains in effect while State Director review is pending, except that the State Director may stay the decision during the pendency of his or her review. This is consistent with previous § 3809.4(b) and (f). Under final § 3809.808(b), the State Director's decision will be effective immediately and remain in effect, unless a stay is granted by OHA under 43 CFR 4.21.

Section 3809.809 May I Appeal a Decision Made by the State Director?

Final § 3809.809 addresses whether a party may appeal a decision made by the State Director. Final § 3809.809(a) provides that an adversely affected party may appeal the State Director's decision to OHA under 43 CFR part 4 except that a party may not appeal a denial of his or her request for State Director review or for a meeting with the State Director. This is consistent with previous § 3809.4(e). Persons who did not participate in the State Director review process, but who participated in the underlying BLM proceeding that was appealed are considered parties and may appeal State Director review decisions.

Final § 3809.809(b) provides that once the State Director issues a decision on the review, only the State Director's decision can be appealed, and not the original BLM decision. This is because when the State Director issues a decision, it replaces the original BLM decision, which is no longer in effect.

Comments on State Director Review

Some commenters supported having the opportunity to appeal BLM field office decisions to BLM State Directors. Some stated that they favored State Director review as a mechanism to save time on appeal. Others favored the development of an appeals process that involves and emphasizes the input of local and State managers. Others objected to State Director review. BLM agrees that it is useful to have a process whereby the appeals can be resolved in a timely manner in the State where the decision was made.

A commenter interpreted the proposed regulations as allowing each BLM State Director to grant a stay on a positive Record of Decision for a mining operation. The commenter stated that this power is currently reserved to the Interior Board of Land Appeals,

comprised of a group of judges, and that allowing a decision whether to grant a stay to be determined by one person is contrary to the intent of Congress.

The commenter is correct that under the final rules the BLM State Director may stay a BLM field office or other decision that approves a plan of operation. The commenter is not correct, however, in asserting that this is a new feature. Previous § 3809.4(b) specifically provided that a request for a stay could accompany an appeal to the State Director.

Section 3809.900 Will BLM Allow the Public To Visit Mines on Public Lands?

The discussion of final § 3809.900 appears earlier in this preamble under the discussion of comments received on the proposed requirement to allow citizens to accompany BLM inspectors to mine sites, proposed § 3809.600(b).

Section 9263.1 Operations Conducted Under the Mining Law of 1872

The discussion of final § 9263.1 appears earlier in this preamble under the discussion of comments received on the proposed penalty provisions at § 3809.700.

III. How Did BLM Fulfill Its Procedural Obligations?

Executive Order 12866, Regulatory Planning and Review

These regulations are a ''significant regulatory action,'' as defined in section 3(f) of Executive Order 12866, and require an assessment of potential costs and benefits of the regulatory action, including an explanation of the manner in which the regulatory action is consistent with a statutory mandate and, to the extent permitted by law, promotes the President's priorities and avoids undue interference with State, local, and tribal governments in the exercise of their governmental functions. As a ''significant regulatory action,'' the regulations are subject to review by the Office of Management and Budget.

In accordance with E.O. 12866, BLM performed a benefit-cost analysis for the proposed action. We used as a baseline the existing regulation and current BLM administrative costs. The potential costs associated with the regulation are increased operating costs for miners and increased administrative costs for BLM. The potential benefits are environmental improvements. Both benefits and costs are difficult to quantify because many of the possible impacts associated with the regulation will be site- or mining-operation-specific.

The intent of the benefit/cost/Unfunded Mandate Act analysis and the Regulatory Flexibility Act analysis is to satisfy the requirements of E.O. 12866, the Unfunded Mandates Reform Act (UMRA), and the Small Business and Regulatory Enforcement Flexibility Act (SBREFA). E.O. 12866 and UMRA require agencies to undertake benefit-cost analysis for regulatory actions. The material presented below summarizes the analyses that have been conducted.

Background and Need for the Regulation

The need for the regulation is associated with both a compelling public need and market failures. Congress, the General Accounting Office, and the public have increasingly recognized the need for improving BLM's surface management program under the subpart 3809 regulations. Since the original subpart 3809 regulations were issued in 1980, mining technology and processes have changed considerably. The following list of issues related to the 1980 regulations suggests that revisions are warranted:

- Plan-level operations are not required to have financial guarantees; BLM has discretion whether to require a financial guarantee. The regulations do not allow BLM to require financial guarantees for notice-level operations. A large number of operations have gone unreclaimed, causing environmental damage and imposing reclamation costs on taxpayers as a whole. A 1999 survey of BLM field offices found more than 500 operations that operators had abandoned and left BLM with the reclamation responsibility. Many of these were small mining operations conducted under notices. The NRC Report recommended that secure financial assurances be required for reclamation of all disturbances beyond casual use, including notice-level activity and that all mining and milling operations be conducted under plans of operations, and that notices be used only for exploration.
- Some small mining operations with high environmental risks, such as cyanide use or acid drainage potential, can proceed without NEPA review or BLM approval, simply because they disturb less than 5 acres and qualify as a notice.
- The lack of clarity in the types of activities permissible under ''casual use'' has led to inconsistencies and environmental damage in some instances.
- BLM has no official way of clearing records for notices. Notice-level activities are often never completed, or in some cases never started. Without a reclamation bond, or an expiration term, notices are often left open for years with no incentive for the operator to complete the reclamation, notify BLM, and get the notice closed.
- BLM lacks clear, consistent standards for environmental protection in the existing regulations. As the NRC noted, although mining operations are regulated under a variety of environmental protection laws implemented by Federal and State agencies, these laws may not adequately protect all the valuable environmental resources at a particular location proposed for mining development. Furthermore, the existing definition of ''unnecessary or undue degradation'' does not explicitly provide authority to protect all valuable resources.
- Mitigation is not defined in BLM regulations to allow BLM to compensate for impacts offsite where disturbed areas cannot be reclaimed to the point of giving plants, animals, and people the same benefits that existed before disturbance. This fact has resulted in an overall decrease in productivity around the area of operations.
- BLM cannot suspend or nullify operations that disregard enforcement actions or pose a imminent danger to human safety or the environment. Criminal penalties under the existing regulations have often proven ineffective. The existing regulations do not allow BLM to use civil penalties as an enforcement tool. The NRC Report recommended that BLM have the authority to issue administrative penalties for violations of the regulations.
- BLM can require modifications to plans of operations only after review by the State Director concludes that the event could not have reasonably been foreseen in the original approval. The NRC Report recommended that this ''looking backward'' process should be abandoned in favor of one that focuses on what may be needed in the future to correct the environmental harm and that the regulations be revised to provide more effective criteria for BLM to require plan modifications where needed to protect Federal land.
- The existing regulations do not distinguish between temporarily idle mines and abandoned operations. This distinction is needed to determine which mines need just to be stabilized, if idle, or reclaimed, if abandoned. The NRC Report recommended that the regulations be changed to define the temporary versus abandoned conditions and to require interim management plans for operations that are only temporarily closed.
- The existing regulations do not provide for long-term site maintenance, water treatment, or protection of

reclaimed surfaces. The NRC Report recommended BLM plan for and assure the long-term post-closure management of mine sites.

• The lack of clarity in the types of activities permissible under ''casual use'' has led to inconsistencies and, occasionally, environmental damage. Damage results mostly when many people concentrated in a small area engage in casual use. The cumulative impacts of such groups often exceeds the ''negligible disturbance'' in the existing definition of casual use.

• In some operations proposed under the 1980 regulations, the legal status of the material to be mined is in dispute as to locatable under the mining laws or saleable as a common variety mineral. BLM needs regulations to resolve disputes without unreasonably delaying mining operations.

• The 1980 regulations have no requirement for preventing disturbances in areas closed to mineral entry until a discovery is determined to be valid or not. In areas closed to the operation of the mining laws, surface disturbance should be allowed only where the right to mine predates the segregation or withdrawal.

Absent a regulatory intervention, the market alone would be unlikely to ensure that sufficient and timely reclamation occurred or that society had sufficient information to minimize environmental damages and determine appropriate reclamation activities. Without requirements for financial guarantees, firms would have weaker incentives to reclaim disturbed lands. The costs associated with offsite damages would be particularly difficult to internalize absent some type of market intervention. The extent to which the parties could resolve these situations themselves is limited due to the high transaction costs and the unequal bargaining power of the entities involved. Currently, a large class of operators on public lands are not required to provide financial guarantees. These operators have little incentive to restore mined lands to a state where they will be able to provide a pre-mining level of ecosystem services. Absent revisions to the regulations, operators would have fewer incentives to undertake sufficient baseline environmental studies, disclose the nature and extent of their activities to the public, and monitor environmental conditions during and after mining.

Description of Regulation and Alternatives Considered

The alternatives we considered are described in detail in the Final EIS and elsewhere in the preamble. Briefly, they include the following:

Alternative 1: Current regulations. The 1980 regulations would be retained.

Alternative 2: State Management. Under this alternative, BLM would rescind the 1980 regulations and return to the prior surface management program strategy, under which State or other Federal regulations governed locatable mineral operations on public land.

Alternative 3: Proposed Regulations. This final rule would replace the regulations at 43 CFR 3809.

Alternative 4: Maximum Protection. Under Alternative 4, the 3809 regulations would contain prescriptive design requirements for resource protection. These requirements would increase the level of environmental protection and give BLM very broad discretion in determining the acceptability of proposed operations. Major changes from the current regulations include the following:

• Expanded application to public lands with any mineral or surface interest.

• Numerical performance standards for mineral operations.

• Required pit backfilling.

• Elimination of notices so that all disturbances greater than casual use require plans of operations.

• Required conformance with land-use plans.

• Prohibitions against causing irreparable harm or having to permanently treat water.

Alternative 5: NRC Recommendations. Alternative 5 would change the existing regulations only where specifically recommended by the NRC Report. Under Alternative 5, the definition of ''unnecessary or undue degradation'' would remain same as the current regulations. The prudent operator standard would be retained, and operators would have to follow ''usual, customary, and proficient'' measures, mitigate impacts, comply with all environmental laws, perform reclamation, and not create a nuisance.

Disturbance categories and thresholds would be the same as under Alternative 3, but Alternative 5 would not expand the types of special status lands. The change threshold would be based on the division between exploration and mining. All mining, milling, and bulk sampling involving more than 1,000 tons would require a plan. Exploration disturbing less than 5 acres would still require a notice unless occurring on special status lands. Actual-cost bonding would be required for all notices and plans.

Summary of the Benefit/Cost Analysis

In response to comments on the initial benefit/cost analysis, BLM attempted to account for the economic value of any foregone minerals production that might result from the regulations. This value can change over time, depending on the time path of prices, interest rates, and extraction costs. Estimating these values is also complex due to uncertainty about timing effects, technology changes, and future commodity prices.

Information from mine cost models was used with other data collected by BLM to develop estimates of the annual cost of the regulation. Given the limitations of the models, the uncertainty about the magnitude of permitting costs, the extent to which delays can be attributed to the regulations, and the wide variety of mining activity occurring on public lands, these estimates should be interpreted with some caution. In particular, the baseline cost information best applies to the operations modeled and may not accurately describe the cost conditions associated with operations of different size or commodities. To account for the fact that the cost models may not be representative of the types of mining activity occurring on public land, sensitivity analysis was done by varying the baseline costs by plus or minus 20%.

The economic cost of the permitting/compliance components regulation were developed by estimating the annual cost changes associated with the regulation for new and existing plans of operation and for new and existing notices. This manner in which this was done is described in detail in the benefit/cost analysis. The analysis incorporates a number of behavioral assumptions concerning the extent to which the regulation might affect the number and distribution of future notices and plans. These assumptions parallel those used in the final EIS to project minerals activity.

New plans of operations: For new plans of operations, the estimated number of plans was multiplied by the appropriate cost increase for each mine model. This total was then adjusted to account for the fact that only 20% of the plans would be affected by the regulation, given that an estimated 80% of the operators are already complying with the requirements of the regulation. Permitting costs were assumed to increase from $600,000 to $900,000 for the open pit model; from $100,000 to $125,000 for the strip/industrial model; from $50,000 to $80,000 for the medium placer model; from $10,000 to $100,000 for the underground model; and from

$50,000 to $75,000 for the medium exploration model. The maximum protection model assumed that permitting costs increased from $600,000 to $1 million for the open pit model; from $100,000 to $150,000 for the strip/industrial model; from $10,000 to $150,000 for the underground model; from $50,000 to $80,000 for the medium placer model; and from $50,000 to $80,000 for the medium exploration model. For these models, permitting costs are annualized over the life of the model mine using a 7% discount rate. Permitting costs for exploration activities were not annualized, but were included as a lump sum.

Under this final rule, some mining and explorations activities that would have operated under notices previously would now have to operate under plans of operations. For the preferred alternative, BLM assumed that 90% of the new open pit, industrial/strip, exploration, and underground operations that would have operated previously under notices would file plans; 70% of the new placer operations would file plans; and 10% of the exploration operations would file plans. The remaining new notices would be composed only of exploration activities. Notices are not allowed under the maximum protection alternative. The maximum protection alternative assumed that: 70% of the open pit, industrial/strip, exploration, and underground notices would file plans; 60% of the placer notices would file plans; and 80% of the exploration notices would file plans. These assumptions are consistent with the final EIS.

For the preferred alternative, it was assumed that close to 45% of the total number of new notices submitted annually would be required to file plans of operation under the regulation regardless of the type of mining activity. This implies that 270 notices out of the annual baseline number of 600 would be required to submit plans. Adjusting for the estimated reduction in the number choosing to submit plans (10% reduction for open pit, strip, and underground; 30% reduction for placer) gives an estimate of 210 new plans (that formerly would have been notices). Each new plan would bear permitting, reclamation, and bonding costs. For the NRC alternative, the parameters are largely the same, except that the estimated reductions in the number choosing to submit plans are smaller (5% reduction for open pit, strip, and underground; 20% reduction for placer). The cost associated with ''converting'' to a plan vary widely.

For mining activities, permitting costs were assumed to average about $60,000 per plan; permitting costs for exploration activities were assumed to average about $33,000. Sensitivity analysis also examined the implications of conversion costs (for all notices regardless of type of activity) of $100,000 and $20,000. The analysis assumes that the regulation increases reclamation costs for the average 2.5 acre notice by $500 and $1,500 per acre, respectively for exploration and mining activities. Bonding costs were assumed to be $500 per notice. For the purposes of developing a cost estimate, it was assumed that the activities included in the these new plans would occur for 5 years. It was also assumed that given that mining would be conducted under a plan, the acreage disturbed would be somewhat larger than if this class of notices had remained notices. Bonding and reclamation costs were increased 30% to account for this.

Existing exploration notices: For the purpose of developing a cost estimate, the following assumptions were used. For exploration notices, in year 1 it was assumed that 5% of the notices were modified or extended and 5% dropped out; in year 2, 10% of the remaining notices modified or extended and 10% dropped out; and in year 3, 25% modified or extended, 25% dropped out, and 3% became plans. In years 4 to 10, 1% of the remaining notices become plans and 5% drop out each year. Over the 10-year period of analysis, this implies that about 4% of the total existing stock of notices become plans and about 40% drop out. Once a notice converts to a plan or modifies/extends, it incurs permitting, reclamation, and bonding costs. It was assumed that all permitting costs were incurred in the year in which the conversion occurred (permitting costs were not annualized); that the duration of all mining activities was 5 years and that reclamation costs were incurred in equal annual increments over this period; and that bonding costs were incurred over the 5-year period during which mining was occurring.

Existing placer mining notices: About 20% of the stock of existing notices are associated with placer mining. To estimate the cost of the regulation, the following assumptions were used: in year 1, 5% of the existing notices drop out; in year 2, 10% drop out; in year 3, 20% (or 225) of the remaining placer notices convert into plans and 80% drop out. During years 4–8 these 225 plans continued to operate; however, they ceased to operate beginning in year 9. The placer plans incurred permitting costs of $20,000 per plan in year 3, and bonding ($1,000 per plan) and reclamation costs (an increase of $1,500 per acre relative to the baseline for each plan) in each year they operated. Bonding and reclamation costs were also increased 20% to account for the fact that the placer plans might disturb somewhat larger acreage than if they had remained notices. All other existing notices: 10% were assumed to drop out in year 1; 20% were assumed to drop out in year 2; and in year 3, 50% of the remainder were assumed to drop out and 50% converted into plans. It was assumed that permitting costs were $40,000 per plan and that reclamation costs increased by $1,500 per acre over the existing baseline. Bonding and reclamation costs were also increased 20% to account for the fact that the plans might disturb somewhat larger acreage than if they had remained notices. The parameters for NRC alternative are similar. The maximum protection alternative assumed similar permitting costs, annual bonding costs of $1,500 per ''small'' plan, and a cost increase factor of 30% to account for the fact that plans might disturb somewhat larger acreage.

The net benefits of the alternatives considered cannot be quantified because information on site-specific and other operation-specific factors is not readily available. Implementation of the SIH standard also introduces a substantial degree of uncertainty in estimates of net benefits. At the same time, however, the fact that this standard could be applied to unique resources implies that it may be associated with substantial economic benefits. Costs are somewhat more amenable to analysis, though still subject to considerable uncertainty due to the extent to which prices, production, technology, and costs may change over time. Table 21 in the benefit/cost analysis, reproduced below, summarizes the estimated costs of the alternatives.

Table 21. Estimated Change in the Cost of the New Regulation Relative to the Existing Regulation [a]

	Annualized Cost ($ mil)			NPV Cost ($ mil)		
TYPE OF ACTIVITY	Preferred	NRC	Max protect	Preferred	NRC	Max protect
PLANS						
New and existing Plans	1.6	0.3	4.8	11.5	2.0	33.5
New Notices required to be Plans	4.9	4.1	21.6	34.1	29.0	151.6
Existing Notices required to be Plans	5.1	4.9	6.2	35.9	34.4	43.4
Casual use required to be Plans [suction dredge]	0.6	0.6	0.5	4.4	4.4	3.5
Subtotal	12.2	9.9	33.0	85.9	69.7	232.0
NOTICES						
New notices	0.4	0.43	0	2.6	2.9	0
Existing notices that remain Notices (or "small" plans)	1.0	1.03	1.6	7.2	7.2	11.3
Subtotal	1.4	1.5	1.6	9.8	10.2	11.3
BLM ADMIN COSTS	3.0	3.3	8.5	20.4	23.2	60.0
TOTAL PERMITTING/ COMPLIANCE	16.5	14.3	43.2	116.2	100.4	303.4
Total less BLM Admin	13.6	11.4	34.7	95.8	79.9	243.4
Value of forgone prod	0 - 133	0 - 31.7	175.2 - 413.8	0 - 934.5	0 - 222.5	934.5 - 2,610
TOTAL COST						
Low forgone production	16.5	14.3	209.9	116.2	100.4	1,237.9
High forgone production	149.6	46.0	457.0	1,050.7	322.9	2,913.4
Sensitivity Analysis - compliance costs						
+20%	19.9	17.1	51.8	139.5	120.4	364.0
-20%	13.3	11.4	34.6	93.0	80.3	242.7

[a] Costs discounted at 7%.

As discussed in the analysis, in response to many comments concerning the quantification of benefits, BLM's final analysis does not attempt to quantify the net benefits of the regulation. However, it should be noted that a commenter on BLM's initial benefit-cost analysis revised BLM's initial analysis and calculated that the total npv costs ranged from $106 million to $649 million; benefits were recalculated to range from $11 million to $161 million. Even though this commenter was critical of BLM's analysis, their own results suggest that there is a substantial range where there may be positive net benefits. For example, if the costs were at the low end of the range of costs ($106 million) and the benefits at the upper end of the range of benefits ($161 million), then the net benefits would be $55 million.

Because both the costs and benefits vary across the alternatives, it is not possible to compare the cost effectiveness of the alternatives. Some comparisons, however, can be made between the preferred alternative and the NRC alternative.

The results of the analysis suggest that the annual compliance/permitting cost of the preferred and NRC alternatives is about $15–20 million (giving a ±20% range of about $12 million to $24 million). In present value terms (over 10 years and using a 7% discount rate), these annual costs are equivalent to $105–141 million. The annual cost of forgone production for the preferred alternative is estimated to range from $0 to $133 million; for the NRC alternative forgone production is estimated to be $0–$32 million. Note that these values may overstate actual losses because a number of factors will act to mitigate any production losses and because they are calculated using a base of total U.S. gold production, not production originating from public lands. Simply adjusting for production originating on public lands could reduce the value of forgone production by half. Other mitigating factors could include: increasing production from existing mines, shifting production to non-Federal lands, technologic change, the ability to increase recycling, and sales of gold from existing stocks. Similarly, it is expected that both BLM and operators will become more efficient at administering and meeting the requirements of the regulation as time progresses. Assuming that most of the forgone production would be due to the application of the SIH standard, not including this element in the regulation

would leave the preferred and NRC alternatives as providing roughly equivalent levels of net benefits. On this basis, the NRC alternative would appear to have slightly lower costs to attain the same level of benefits as provided by the preferred alternative.

Including the SIH standard could result in substantially higher benefits (if it results in the preservation of unique resources), but it is also likely to have production effects. The opportunity cost associated with preserving these resources is the forgone production. These values could be quite large, but one would need to account for the probability of occurrence (*i.e.,* the probability the SIH standard would be invoked and result in the preservation of a unique resource) and for timing effects. These probability and timing effects are very difficult to evaluate.

The net benefits associated with the maximum protection alternative cannot be easily compared to the other alternatives because both the costs and benefits differ. However, the economic benefits would have to be substantially larger than those associated with the other alternatives to offset the higher estimated costs.

As stated above, it is difficult to quantify the net benefits of the alternatives. However, if the costs are relatively low (as in the preferred and NRC alternatives in the case of low forgone production which have estimated annual costs of about $15–20 million), the benefits would not have to be large to equal or exceed the costs.

Table 26 in the benefit-cost analysis, reproduced below, summarizes the estimated cost of the regulation on a per-capita and per-acre basis. Based on the population and number of households in the study area, the estimated annual cost per capita of the preferred alternative ranges from about $0.23–$2.70. Based on the estimated population residing within 5 miles of a mine, the annual costs per capita range from $5.3–$61; based on the number of households within 5 miles, the annual per household costs range from about $13–$153. Annual cost per acre for the preferred alternative, based on the estimated reduction in the number of acres disturbed could range up to about $2,500 per acre, depending on the change in acreage disturbed. On a per-capita basis, the magnitude of environmental benefits associated with the regulation could be quite small and still offset the estimated costs. Also, in some locations mining has the potential to impact unique resources. The potential environmental benefits of protecting even a small number of unique resources over time could easily offset the costs of the regulation.

Table 26. Per Capita and Per Acre Estimated Economic Costs

Category		Preferred [a]		NRC [b]		Max protection [c]	
		Compliance cost	Including forgone production	Compliance cost	Including forgone production	Compliance cost	Including forgone production
Population [d]	Pop or hh	($ per capita or $ per household)					
Est. total study area pop	57,300,000	0.23 - 0.35	up to 2.7	0.2 - 0.3	up to 0.85	0.6 - 0.9	up to 3.2
Est. no. households in study area	27,285,714	0.5 - 0.74	up to 5.6	0.42 - 0.63	up to 1.79	1.3 - 1.9	up to 6.8
Est. pop w/in 5 mi of mines	2,500,000	5.3 - 7.9	up to 61	4.6 - 6.9	up to 19.5	13.8 - 20.7	up to 74.0
Est. households w/in 5 mi. of mines	1,002,440	13.2 - 19.8	up to 153	11.4 - 17.1	up to 48.7	34.5 - 51.7	up to 184.4
Estimated change in acres disturbed due to regulation [d]							
Total reduction in acres disturbed over 10 yrs	Acres disturbed	($ per acre)					
Low estimate	100,000	930 - 1,395	up to 2,493	803 - 1,204	up to 1,320	2,227-3,640	up to 4,364
Medium estimate	300,000	310 - 465	up to 831	268 - 401	up to 440	809-1,213	up to 1,455
High estimate	500,000	186 - 279	up to 499	161 - 241	up to 264	485 - 728	up to 873

[a] Based on annual permitting/compliance costs ranging from $14 million to $20 million. Annual forgone production estimated at 20%; annual value of production reduction estimated to be $0 - 133 million.

[b] Based on annual permitting/compliance costs ranging from $12 - 18 million. Annual forgone production ranges from 0% - 5%; annual value of production reduction estimated to be $0 - 32 million.

[c] Based on annual permitting/compliance costs ranging from $38 - 57 million. Annual forgone production estimated at 20%; annual value of production reduction estimated to be $133 million.

[d] The per capita and per household costs are based on annual costs; the per acre estimates are based on total acreage disturbed over 10 years and npv costs.

BLM is placing the full benefit/cost analysis on file in the BLM Administrative Record at the Nevada State Office, P.O. Box 12000, Reno, Nevada 89520, or you may contact BLM's Regulatory Affairs Group at 202/452–5030.

National Environmental Policy Act

These proposed regulations constitute a major Federal action significantly affecting the quality of the human environment under section 102(2)(C) of the National Environmental Policy Act of 1969, 42 U.S.C. 4332(2)(C). BLM has prepared a final environmental impact statement (EIS), which will be on file and available to the public in the BLM Administrative Record at the Nevada State Office, P.O. Box 12000, Reno, Nevada 89520, and on BLM's home page at www.blm.gov.

Regulatory Flexibility Act and Small Business Regulatory Enforcement Fairness Act

Congress enacted the Regulatory Flexibility Act of 1980 (RFA), as amended, 5 U.S.C. 601–612, to ensure that Government regulations do not unnecessarily or disproportionately burden small entities. The RFA requires a regulatory flexibility analysis if a rule would have a significant economic impact, either detrimental or beneficial, on a substantial number of small entities. The purpose of the final RFA analysis is to estimate the number of entities potentially impacted, the magnitude of the impacts, summarize the significant issues raised in public comment on the proposed rule, and identify the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of the applicable statutes. The final RFA analysis also fulfills the requirements of the Small Business and Regulatory Enforcement Flexibility Act (SBREFA) analysis. SBREFA requires agencies to analyze the impact of regulatory actions on small entities; to prepare and publish an initial regulatory flexibility analysis when proposing a regulation; and a final analysis when issuing a final rule for each rule that will have a significant

economic impact on a substantial number of small entities. The Small Business Administration (SBA) has determined that the size standard for businesses engaged in mining of metals and non-metallic minerals, except fuels, is 500 employees. See 13 CFR 121.201. Thus, any business employing 500 or fewer employees is considered ''small'' for the purposes of this analysis. We believe that virtually all businesses currently engaged in mining on public lands could be considered ''small'' under the SBA 500-employee standard.

In February 1999 BLM published a proposed rule for regulating mining activities on public lands. BLM also prepared and made available for comment an initial RFA analysis. BLM published a summary of the initial RFA analysis along with the proposed rule, made the full initial RFA analysis available along with the proposed rule, and sought public comment on its findings. BLM received about 2,500 public comments on the proposed regulation and associated documents. BLM has undertaken a substantial effort to both consider and disclose the potential implications of the regulation for small entities. The final RFA analysis also summarizes the significant public comments received on the initial RFA analysis and responses to these comments.

The public comments we received enabled us to refine and revise our analysis of the potential impact of subpart 3809 on small entities. BLM has concluded that the final regulation will have a significant economic impact on a substantial number of small entities.

BLM notes that one of the primary differences between the proposed and final rule is the inclusion of the ''significant irreparable harm'' standard. In the interest of informing the public about the impacts of the rule on small entities, the implications of including this provision are summarized below and discussed in more detail in section X of the Final RFA.

You can find detailed information on the alternatives considered in the summary of the benefit/cost analysis above, the preamble, the Final EIS, and the benefit/cost analysis. The alternative selected was judged to be the best in terms of not being inconsistent with the recommendations in the NRC report, being responsive to public comments, maximizing net economic benefits, and minimizing the impacts on small entities while still achieving the desired objectives.

Comments on the Proposed Rule

This section summarizes the significant public comments received on the initial RFA analysis and responses to these comments. More detailed responses to comments are found in Appendix A to the final RFA analysis.

Many commenters asserted that the proposed regulation would substantially reduce profits in the mining industry. BLM agrees that the new regulations could reduce profits, but that the extent to which this occurs and which firms are affected depends on a variety of factors that include commodity prices, management expertise and firm capitalization, technological changes over time, location and type of activities, other Federal and non-Federal regulations, as well as any BLM regulation-driven operating and permitting cost changes. BLM also notes that evaluating profit changes is difficult in many situations where small entities are involved due the discretion these entities often have in the treatment of certain costs.

Commenters stated that BLM did not adequately consider what constituted a ''significant impact'' on a small entity. BLM considered these comments and believes its approach is reasonable. The initial RFA analysis specifically identified what BLM considered to be a ''significant impact.'' The final RFA analysis evaluates ''significance'' based on both cost and profit changes. The definition of ''significant impact'' used in this analysis is an impact that causes a 3% or more impact on estimated annual operating costs or on the ratio of the annualized compliance costs to annual gross revenues or a greater than 10% reduction in annual profits.

As with the other concepts, ''significance'' is a relative measure. The criteria used to evaluate ''significant'' are similar to that adopted by other agencies. NOAA defines a ''significant impact'' as: a regulation that is likely to result in a reduction in gross revenues by more than 5%; a regulation that increases total costs of production by more than 5%; a regulation that causes small entities to incur compliance costs that are 10% more than the compliance costs of large entities; or a regulation that causes 2% of small entities to cease business operations. See, for example, 64 FR 6869–75, Feb. 11, 1999 and 64 FR 28143–51, May 25, 1999. EPA defines ''significant'' as an impact of more than 3% on small business sales, cash flow, or profit (Small Business Administration (SBA), undated; EPA, 1997). The SBA (The Regulatory Flexibility Act: An Implementation Guide for Federal Agencies, 1998, p. 17–18) discusses the use of criteria to determine ''significance.'' SBA identifies several examples where Federal agencies have used cost-based criteria. SBA goes on to state, ''Moreover, over 60 percent of small businesses do not claim a profit and do not pay taxes; therefore, an agency would not be able to apply a profit-based criterion to these firms.'' This point is particularly relevant for exploration activities and for small miners who may not be involved in commercial scale activities. As recommended by the SBA in their comments on the proposed rule, the revised analysis also shows estimated impacts based on changes in estimated annual profits for the mine models. In commenting on a proposed BLM rule dealing with onshore oil and gas leasing operations, SBA asserted that a 10% impact on a business's profits is the threshold for determining significance (See comments submitted by SBA's Office of Advocacy on proposed rule ''Onshore Oil and Gas Leasing Operations''). SBA did not, however, state whether the 10% threshold is on an annual basis, on a net present value basis over the period of analysis, or whether it represents an average over some period. SBA also did not discuss how it arrived at its estimate of ''significant.'' BLM views the 10% threshold as a percentage that would be considered significant under any terms. Finally, the significance threshold is important in situations where determinations are made that a rule will not have a significant impact on a substantial number of small entities. In this case, as discussed above, BLM has determined that the final rule will have a significant impact.

Commenters stated that BLM did not adequately evaluate the impact of the proposed bonding requirements on small entities. BLM believes that the initial RFA analysis adequately analyzed the bonding requirements in the proposed rule. However, the final RFA analysis includes results from additional mine models that have bonding requirements that vary somewhat depending on the type of mining activity. The final rule has also adopted a number of measures that will mitigate the impact of bonding on small entities. See section IX of the final RFA analysis. Given that bonding for all mining operations is a specific NRC recommendation, BLM's ability to mitigate potential the impacts of bonding requirements on notices is limited (this of course would not preclude non-Federal entities from developing mechanisms to facilitate small entities obtaining appropriate financial guarantees). If small mining entities were not required to have financial guarantees, BLM would not be

in compliance with the direction of Congress not to be inconsistent with the NRC Report recommendations, and the objectives of the rule could not be achieved. BLM also notes that in some States bond pools are available for entities that can't otherwise obtain bonds.

Commenters stated that BLM did little to minimize the compliance burden on small entities. BLM has taken a number of steps in the final rule to minimize the impacts of the rule on small entities. The preamble to the regulation has an extensive discussion on how the rule was changed in response to comments. Section IX highlights some of the specific changes that mitigate the impact of the regulation on small entities.

Commenters stated that the proposed regulation would result in severe reductions in gold production from Alaska. BLM's analysis suggests that the final regulation is unlikely to be the major determinant of any changes in total gold production in Alaska. The regulations may, however, affect which entities produce mineral commodities, with relatively less being produced by small entities.

Commenters stated that BLM used 1992 data in the initial RFA analysis. BLM has used 1997 Census data in the Final RFA analysis, as well as the most recent BLM data available. BLM has also included additional references to the modeling assumptions used. These references are found in the Appendix E of the Final EIS and in the benefit/cost analysis.

Commenters stated that the initial RFA analysis didn't contain a discussion of significant alternatives to the proposed rule. The initial RFA analysis did contain a discussion of the alternatives considered. The final benefit/cost analysis, the final EIS, the preamble to the rule, and Section III of the final RFA contain additional discussion and analysis of the alternatives.

The Number of Potentially Affected Entities

Table 9 (reproduced below) from the final RFA analysis summarizes the universe of potentially affected small entities. Estimates are presented using both BLM and Census data. Based on BLM's data and using the SBA's definition of small mining entity, the universe of potentially affected entities would essentially be all existing notices and plans of operation and all new notices and plans. Assuming that each notice and plan of operations represents a unique small entity provides an upper bound estimate for the number of potentially affected entities. A lower bound would be the number of individual operations with plans and notices. Because all operations under subpart 3809 involve ''small'' entities, that is, operations with less than 500 employees, BLM also examined a subset of the industry, operations with fewer than 20 employees, to get a more complete understanding of the impacts of the rule.

TABLE 9.—ESTIMATED NUMBER OF SMALL ENTITIES POTENTIALLY AFFECTED BY THE REGULATION

Employment category	BLM data		Census data	
	Notices [b]	Plans [b]	Est. number of firms	Estimated percent of companies [d]
500 or fewer employees	All: 6,213 existing; an estimated 350–850 submitted annually by individual operations.	All: 900 existing; an estimated 110–190 submitted annually by individual operations. In addition, 200 existing suchtion dredgers plus 50 submitted annually in the future.	Approx. 700 [c]	15
Fewer than 20 employees [a]	About 2,604 existing; 350–850 submitted annually.	342 existing; about 40–70 of the those submitted annually. In addition, 250 existing suction dredgers plus 50 submitted annually in the future.	Approx. 520 [d]	16

[a] Notices—calculated by assuming that all notices have fewer than 20 employees, but that 50% of notices are small in terms of company assets, production, and cash flows; plans—calculated by assuming that 75% of the plans are associated with less than 20 employees and that of these, 50% have sufficient assets, production, and cash flows such as to be relatively unimpacted by the proposed rule.

[b] Annual number of notices and plans: the range represents the approx. 1999 figure (600 notices, 150 plans) plus/minus one standard deviation based on the 1996–99 average.

[c] 1997 Census data indicate that there were a total of 629 metal mining and 3,746 non-metallic mining firms. Assume that 50% of the metal mining activity and 10% of the non-metallic mineral mining occurs on public lands. This suggests that the total number of firms potentially impacted might be 315 + 375 = 690. Percentage based on total number of metal mining and non-metal mining firms.

[d] 1997 Census data indicate that there were 487 metal mining and 2,754 non-metallic mining firms with 0–19 employees. Assume that 50% of the metal mining activity and 10% of the non-metallic mineral mining occurs on public lands. This suggests that the total number of firms potentially impacted might be 244 + 275 = 519. Percentage based on total number of metal mining and non-metal mining firms with 0–19 employees.

Source: BLM; www.sbaonline.sba.gov/advo/stats.

Estimated Impacts

We developed cost models for the following types of mines: a small and medium size placer mine; an open pit mine; an industrial/strip mine; an underground mine; and a small and large exploration operation. These models were selected because they capture, in general terms, the wide range of mining activities that occur on public lands. The assumptions used in the models also were designed to represent a wide range of potential costs across the alternatives considered. Additional details on the mine cost models is included in Appendix B of the benefit/cost analysis and in Appendix E of the final EIS. Models do not include estimates for SIH which could not be easily modeled. The impacts of the SIH provision were captured through analysis of potential production declines described below.

Table 24 (reproduced below) from the final RFA analysis summarizes the estimated range of compliance/permitting cost impacts based on the mine models. These impacts vary substantially across the different types of mines modeled. Impacts on some types of entities are significant. Additional detailed information about

the mine models and assumptions used, as well as about the IMPLAN analysis, can be found in Appendix E of the Final EIS and in the benefit/cost analysis.

The IMPLAN analysis offers some indication of the distribution of the costs potentially facing small entities of the regulation across the study area. Direct annual regional economic impacts could vary widely, ranging from $0 to $900 million. However, the degree of impact would vary by State depending primarily on the dominant types of mining and/or commodities mined in each State. For example, in States with relatively little metal mining (Oregon, Washington, and Wyoming), the estimated decrease in value of production would be lower (−5% to −15% in Oregon and Wyoming; −5% to −20% in Washington) than for those States with relatively greater amounts of metal mining (−10% to −30% in Arizona, Colorado, Montana, Nevada, New Mexico, and Utah; −10% to −20% in Alaska; and −10% to −25% in California).

TABLE 25.—SUMMARY OF ESTIMATED IMPACTS FROM THE MINE MODELS [a]

Mine model	Estimated annual percentage		Comment
	Cost change	Profit reduction	
Small and medium placer	11–13	2.6–20.4	Does not include permitting cost; in worst case scenario (low gold prices-low ore grades), permit costs of $10,000–$20,000 could cause estimated profits to decline to $0.
Open pit	0–6	0–13.5	Results depend on: extent of delay—if any—in mining caused by the regulation; the magnitude of any permit cost increases; and the price of gold. The higher estimates of profit reductions reflect a 1 year delay in mining, permitting costs that increase from $1 million to $1.5 million, and a gold price of $250/ounce.
Industrial/strip	5.8–9.3	8.5–15.3	Results reflect varying increases in permitting costs; price of gypsum = $7/ton.
Underground	0–3.0	2.4–62	Results depend on: the length—if any—of delays in mining caused by the regulation; gold prices; and permitting costs. The higher estimates of profit reductions reflect a 2 year delay in mining, a gold price of $250/ounce, and permitting costs that increase from $10,000 to $100,000.
Exploration			Results depend on baseline permit costs and the extent of any increases in these costs; whether validity exam is required and who bears this cost; and whether notice is required to convert to a plan.
Medium	0–48	Not applicable	
Small	6–100+		

[a] Given that the rule has ''significant'' impacts, the impacts for each alternative are not shown. The table summerize results for models under alternatives 3 and 5. The upper end of the range of costs associated with the alternative 4 models would be higher the upper end for the alternatives 3 and 5 models.

For most types of smaller exploration and mining operations (*i.e.* less than five acres), the main components of the proposed regulations affecting mining would be new administrative requirements designed to increase resource protection. The degree to which these factors (workload, time, and cost) would increase would depend on the type of operation and the reason a plan would be required instead of a notice.

Current corporate guarantees will not be affected, but will not be allowed in the future. This will increase the cost of bonding to those operations who use corporate guarantees. This impact would be concentrated in Nevada where corporate guarantees are currently allowed and there are a number of large mining companies using them.

The performance standards under the proposed regulations are expected to have a relatively larger impact on future large operations (*i.e.* greater than five acres) than the administrative-type provisions. Of the performance standards, the requirement to avoid substantial irreparable harm (SIH) to significant resource values which cannot be effectively mitigated has the greatest potential for affecting mining activities (both large and small). In some cases, this provision could preclude operations altogether. It is expected that the substantial irreparable harm standard would preclude exploration or mining only in exceptional circumstances.

The SIH standard has the potential to impact operators who might otherwise engage in mineral exploration and/or development activities. The impacts are site specific and difficult to quantify. The magnitude of the impacts, the incidence of the costs, the potentially affected entities (and their employment size class), and the timing of the impacts are also difficult to determine. All of these factors could affect the costs. We gain some sense of the relative magnitude of the gross costs across the alternatives by comparing the IMPLAN results for alternatives 3 and 5 (for additional discussion of the IMPLAN results see the discussion above and the Final EIS). The gross direct costs associated with alternative 3 were estimated to be $305 million—$877 million; the gross direct costs associated with alternative 5 were estimated to be $22 million—$182 million. However, it should be kept in mind that these costs need to be weighted by their probability of occurrence. It is not possible to estimate this probability.

The performance standard related to pit backfilling is another provision which could affect small and large open pit operations. However, the proposed backfilling provision is similar to existing requirements in Nevada, and is thus expected to have little effect on operations in that State. Other performance standards are also expected to affect operations, although not to the same degree as pit backfilling. Standards for revegetation and protection and restoration of fish and wildlife habitat are expected to have their greatest impact on small exploration projects and small placer mining.

The IMPLAN analysis estimates that the value of mine production originating from public lands under the proposed action will decrease by 10% to 30%, or $169 million to $484 million across the study area. This level of decreased production is associated with the following decreases across the study area: 2,100 to 6,050 jobs, $305 million to $877 million in total industry output, $138 million to $396 million in total personal income (of which $76 million to $218 million is employee compensation), and $157 million to $453 million in value-added. For the study areas's total current value-added as measured by gross state product (GSP), this $157 to $453 million would represent a 2%—6% decrease in GSP-related value in the metals and nonmetallic sectors.

Most States would see decreased levels of mining on public lands, ranging from $101,000 to $302,000 thousand in Oregon to $117 million to $351 million in Nevada. Nevada's share of the loss would be 70% of the loss for the study area as a whole. However, with the exception of the substantial irreparable harm standard, Nevada's existing regulations already incorporate most of the provisions of the proposed action, so the estimated 10%—30% decline in that State's production is likely to be overstated. On the other hand, the impacts in Nevada are based only on the portion of production coming from public lands. To the extent that the affected portion coming from public lands may negatively affect a larger portion of production coming from non-BLM lands, the impacts to Nevada may be understated; conversely, if it leads to more production from non-BLM lands, the impacts may be overstated.

A 10%–30% decline overall in mineral production from current levels would result from a variety of responses by the mining industry. Some potential future operations would now be considered uneconomic and therefore would not be developed. Future operations might have shorter mine lives. Or current operations that might expand under these new regulations might close sooner than they otherwise would, holding constant other factors (*e.g.* technology, commodity prices, and political and economic conditions for mining in other countries). A lower level of exploration due to more restrictions would also tend to decrease opportunities for future development, so some deposits would not even be found.

This analysis is based on BLM's best estimates of potential overall reductions in the level of production of mineral commodities and estimates of increased costs borne by firms. But aggregate levels of output might not change, given more efficient mining and reclamation techniques, a possible shift in production to non-Federal lands, or other changes in market conditions. Total quantity produced could remain unchanged. Alternatively, the regulatory cost burden imposed by the proposed regulations could be overwhelmed by other market forces—such as commodity prices—that might play a relatively more important role in miners' production decisions.

Further, the regulations would not be implemented in a static environment. Both miners and BLM would probably become more efficient in meeting the requirements of the regulations over time. In the long run, the regulations might even create incentives for firms to seek new lower cost approaches to mining and reclamation. This is a reasonable assumption given the inclination most firms have to constantly seek least-cost technology and business practices. This assumption implies that the costs of the regulations could decline over time.

Rural communities might or might not be affected, depending on a variety of factors: the current local level of activity; the degree of dependency or ''specialization'' a community may have in mining subject to proposed regulations; and the size of the community, its isolation, and other factors. Except possibly in Nevada, small rural communities in most States would lose only a small number of jobs and output relative to overall employment and output levels. And some or all of this decrease might be due to forgone future mining rather than current operations shutting down, or closing earlier than originally planned due to a reduction in economic reserves. In other words, there might be no impact to current mining in these communities, but new operations in the future might not be developed.

In Nevada, impacts to rural communities might be greater than in other States due to the greater estimated decrease in activity (1,050 to 3,200 jobs and $181 to 543 million in industry output). But the impact to any particular community in the State would depend on whether it results from existing mines closing prematurely or potential future operations not being developed. Any impacts at the community level would not likely occur in the short term while the proposed regulations are being implemented because mines with existing permits would not be affected unless they submit amendments to their plans of operations. But, as previously stated, Nevada's existing regulations already incorporate most of the provisions of the proposed action, so the estimated 10%–30% decline in production might be overstated.

The conclusion of this analysis is that the regulation would affect a substantial number of small entities in significant manner. The magnitude of the impacts will vary considerably depending on the nature and location of the activities, site specific factors, the particular financial and managerial characteristics of the operations, the presence (and content) of any agreements with States, and when the operation would be subject, if at all, to the new regulations. Given these uncertainties, it is not possible to estimate specifically which entities would be affected, the magnitude of the impacts, or the average impacts on the potentially affected entities. The modeling undertaken suggests that the largest cost impacts would be felt by exploration activities; however, all of the other modeled mines also have the potential to experience significant profit reductions.

Description of Projected Record Keeping and Other Compliance Requirements

Final §§ 3809.301 and 3809.401 identify the specific information that must be included in a notice or a plan of operations. The level of detail for specific notices and plans of operations will vary depending upon the type of operation, the local environmental setting, and the issues of concern. Often the information provided for an analogous State requirement would be adequate. The general types of skills that might be required includes mining engineering, geology, hydrology, and other natural resource specialties. Not all notices and plans would require these skills. BLM will assist operators in preparing notices or plans when necessary.

In response to comments stating that plan content requirements were too detailed or were too open-ended, BLM has revised the regulations to specify that the level of detail must be sufficient for BLM to determine that the plan of operations would prevent unnecessary or undue degradation. BLM recognizes that the level of detail required will be determined by the needs of the individual review process.

Minimizing the Impacts on Small Entities

This rule is a major rule under SBREFA (5 U.S.C. 804(2)). This rule may have an annual effect on the economy of $100 million or more. See the discussion under E.O. 12866 above. In accordance with SBREFA, BLM has taken steps to minimize the compliance

burden on small miners. During the scoping process for the development of the proposed regulation, BLM actively sought comments from small miners. BLM's activities associated with soliciting comments from interested parties is described in more detail in this final rule preamble.

The following components of the regulation have been explicitly developed to mitigate the potential impacts on small entities. This preamble contains considerable additional detail on changes to the regulation that mitigate the impacts on small entities. Examples include:

• *Plan content and information requirements:* BLM has revised proposed § 3809.401 to specify that the level of detail must be sufficient for BLM to determine that the plan of operations would prevent unnecessary or undue degradation. BLM has also deleted ''fully'' from the paragraph and instead will have the level of detail be driven by the needs of the individual review process. The required level of detail will vary greatly by both type of activity proposed and environmental resources in the project area. On large EIS-level projects scoping may actually start before a plan of operations is submitted through discussion with BLM staff on the anticipated issues and level of details expected. A certain level of detail is needed to begin public scoping. In the initial plan submission it is up to the operator to determine what level of detail to include in the plan. BLM will then advise the operator if more detail is required, concurrent with conducting the scoping under NEPA. BLM has also revised the final regulations to eliminate the ''detailed'' requirement from descriptions of operations and reclamation in order to let the issues of a specific plan of operations determine the appropriate level of detail.

• *Phase in for financial guarantees:* Final § 3809.503 provides that miners do not need to provide a financial guarantee if their existing notice is not changed. Final § 3809.505 provides that miners have 180 days to provide financial guarantee for plans.

• The final regulation does not include contingency bonding because of the uncertainty it might create.

• The final regulation does not prevent BLM field managers from implementing a financial guarantee program on a standard per acre basis as long as the operator posts a financial guarantee covering the full cost of reclamation that is acceptable to BLM.

• *Existing terms and conditions:* Operators can continue to operate under the terms and conditions for existing plans.

• *Pending plans:* If a plan is pending at time regulations are issued, then the pre-existing plan content and performance standards apply.

• *Modifications/extensions:* No changes are required for notices that are not modified or extended.

• *Economically and technically feasible:* The term ''economically and technically feasible'' has been inserted in a number of places in the regulation. For example, requirements to return disturbed wetlands and riparian areas to properly functioning conditions are only required when economically and technically feasible (final § 3809.415); the same ''economically and technically feasible'' standard applies to minimizing surface disturbance associated with roads and structures.

• *Pit backfilling:* Pit backfilling is based on site-specific factors, taking into account ''economic, environmental, and safety concerns'' (section 3809.415). We have removed the proposed presumption from the final rule.

• *Demonstration that implementation is not practical:* Additional site- and operation-specific flexibility in the context of plan modifications is included by providing operators an opportunity to demonstrate to BLM that application of the regulation is ''not practical'' (final § 4809.433).

• *Corporate guarantees:* Existing corporate guarantees can continue to be used (final § 3809.571).

• *Minimize the potential for delays:* The final rule requires to review a notice application within 15 calendar days.

• *Performance standards:* Proposed § 3809.420 was modified in response to comments mainly by providing added flexibility to operators. Requirements to prevent the introduction of noxious weeds, and prevent erosion, siltation and air pollution were replaced with a requirement to minimize introduction of noxious weeds and minimize erosion, siltation, and air pollution. This was done in response to public comments that pointed out an operator cannot always prevent impacts from occurring.

• *Existing State agreements:* Final § 3809.204 provides that portions of existing Federal/State agreements or MOAS that are inconsistent with this final rule can remain in effect for up to three years. For these situations, the implementation of the rule could be delayed for up to three years.

• *State administration:* When requested, BLM must give states the lead where the State program is at least as stringent as BLM requirements. This will allow the surface management program to be tailored to State-specific conditions.

• *State Director appeal:* The regulations provide that individuals who believe a BLM decision adversely affects their interests can appeal to BLM State Directors.

• *Joint and several liability:* BLM revised the final rule (§ 3809.116) to clarify the joint and several liability provisions. The final rule provides that mining claimants are responsible only for obligations arising from activities or conditions on their mining claims or millsites.

• *ESA:* In the final rule, BLM clarified that the reference to ''threatened or endangered species or their critical habitat'' in the proposed rule means Federally proposed or listed threatened or endangered species or their proposed or designated critical habitat.

• *Waiver of penalties:* BLM is allowed to waive and consider ability to pay in civil penalty situations (final § 3809.702).

• *Plain language:* The regulation uses clear and simple language which allows the rule to be easily understood by small entities that do not have access to legal staff or extensive legal experience.

BLM recognized that the requirement to provide a portion of the financial guarantee in a form that would be ''immediately redeemable'' by BLM could impose a cost on operators, particularly small operators. Thus, BLM has deleted this requirement from the final rule.

BLM also has existing procedures in place to mitigate the requirements of the regulation on small entities. These procedures have been used in locations such as the California Desert Conservation Area (CDCA), part of the California Desert District (CDD), where the FLPMA requires stricter permitting requirements. The CDCA area provides an indication of how the regulation will be implemented BLM-wide. The goal in the CDD is to mitigate the burden of the permitting requirements on small entities.

The CDD covers about 12.5 million acres, of which about 11 million are within the CDCA. About 40% of the acreage within the CDCA is classified such that all mineral activity above casual use requires a plan of operation. Recently, CDD averaged about 40–50 plans per year. For a plan that would be a notice in other locations, the information that the operator must submit is not as extensive as that required for a large-scale mining operation. The compliance burdens on small entities are minimized because BLM conducted a programmatic assessment to address most formal ESA section 7 consultation requirements.

Another example of how BLM is likely to undertake program-wide measures to implement the regulation is from Arizona, where BLM prepared a programmatic environmental assessment for processing notices where there are use and occupancy issues (See 43 CFR subpart 3715). Similar programmatic efforts are likely to be undertaken for subpart 3809 in selected areas. This will reduce the burden on small entities. The extent to which this occurs will depend on the nature and extent of the specific activities. One possible case is in locations where known and predictable levels of suction dredging occur.

The final regulation provides substantial opportunities to mitigate the impacts of the regulation on small entities. The elements of the regulation that mitigate the impacts on small entities were identified and discussed above. As required by the Regulatory Flexibility Act, BLM will publish a small entity compliance guide and make the guide readily available.

For additional information, see the final RFA analysis on file in the BLM Administrative Record at the Nevada State Office, P.O. Box 12000, Reno, Nevada 89520, or contact BLM's Regulatory Affairs Group at 202/452–5030.

Unfunded Mandates Reform Act

These regulations do not impose an unfunded mandate on State, local, or tribal governments or the private sector of more than $100 million per year; nor do these proposed regulations have a significant or unique effect on State, local, or tribal governments or the private sector.

Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights (Takings)

The final rule does not have significant takings implications. It doesn't affect property rights or interests in property, such as mining claims; it governs how an individual or corporation exercises those rights. Therefore, the Department of the Interior has determined that the rule would not cause a taking of private property or require further discussion of takings implications under this Executive Order.

Executive Order 13132, Federalism

Executive Order 13132, entitled ''Federalism'' (64 FR 43255, Aug. 10, 1999), requires BLM to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' is defined in the Executive Order to include regulations that have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.''

Under section 6 of E.O. 13132, BLM may not issue a regulation that has federalism implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal Government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, or BLM consults with State and local officials early in the process of developing the proposed regulation. BLM also may not issue a regulation that has federalism implications and that preempts State law, unless the BLM consults with State and local officials early in the process of developing the proposed regulation.

If BLM complies by consulting, E.O. 13132 requires BLM to provide to the Office of Management and Budget (OMB), in a separately identified section of the preamble to the rule, a federalism summary impact statement. The summary impact statement must include a description of the extent of BLM's prior consultation with State and local officials, a summary of the nature of their concerns and BLM's position supporting the need to issue the regulation, and a statement of the extent to which the concerns of State and local officials have been met. Also, when BLM transmits a draft final rule with federalism implications to OMB for review pursuant to E. O. 12866, BLM must include a certification from the agency's Federalism Official stating that BLM has met the requirements of E. O. 13132 in a meaningful and timely manner.

This final rule does have federalism implications in that in certain circumstances it may preempt State law. It will not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. The final rule will provide States greater opportunities to administer the mining regulatory program on public lands. The following paragraphs contain a description of the extent of BLM's prior consultation with State and local officials, a summary of the nature of their concerns and BLM's position supporting the need to issue the regulation, and a statement of the extent to which the concerns of State and local officials have been met.

Extent of Consultation

In the development of this final rule, BLM engaged in a comprehensive consultation process with the States. BLM recognizes that the States are its primary partners in regulating mining activities on public lands. Throughout the process, BLM solicited the States' views, both collectively and individually, on how best to avoid duplication and encourage cooperation. BLM met with the representatives of State agencies under the auspices of the Western Governors Association (WGA) in April 1997, March 1998, September 1998, and January 2000. We also posted two successive drafts of regulatory provisions on the Internet for public information purposes in February and August 1998. We received and considered many comments from a variety of interested parties, including States, as a result of both the WGA meetings and the Internet postings.

In addition to the meetings sponsored by the Western Governors Association, BLM conducted numerous meetings with representatives of individual States. These meetings typically involved BLM State Directors or their staff members briefing representatives of State legislatures and State agencies. As an example of this activity, we are including the following list of meetings conducted in Nevada, the major hardrock mining State:

March 10, 1999
- BLM public briefing for Nevada and California agencies and State mining associations

March 26, 1999
- BLM public briefing for Nevada Department of Conservation and Natural Resources, Advisory Board on Natural Resources

September 9, 1999
- Public briefing for Nevada Legislative Committee on Public Lands

September 13, 1999
- Public briefing for Nevada State Land-Use Planning Advisory Council meeting

October 1, 1999
- Public briefing for Nevada State Land-Use Planning Advisory Council meeting

January 26, 2000
- Public briefing for Nevada Legislative Committee on Public Lands.

Nature of State Concerns and BLM's Response to the Concerns

During the three and one-half years that we have been developing this final rule and throughout the consultation process we have conducted with the

States, we have heard many concerns expressed, both of a general and a specific nature. One general concern expressed by the States in the early stages of our consultation is that BLM must demonstrate a need for any regulatory changes, and in this case, had not demonstrated the need for the 3809 rulemaking. BLM agrees that, in general, a regulatory change should be based on an effort to address a real-world problem. BLM doesn't enter into the lengthy and expensive rulemaking process without sufficient reason. In this case, we responded to the States' concern about the need for the rulemaking by setting forth in detail our reasons for undertaking this rulemaking in the proposed rule preamble. In pertinent part, we said:

''Both the authority and the need exist for this rulemaking. This rulemaking is based upon BLM's non-delegable and independent responsibility under FLPMA to manage the public lands to prevent unnecessary or undue degradation of the public lands, and a recognition that BLM's current rules may not be adequate to assure this result. In enacting FLPMA, Congress intended that the Secretary of the Interior determine what constitutes unnecessary or undue degradation and not that the States would do so on a State-by-State basis. Sections 302(b), 303(a), and 310 of FLPMA reflect this responsibility. This rulemaking, therefore, reflects the Secretary's judgment of the regulations required to prevent unnecessary or undue degradation.

''BLM recognizes that many of the States have upgraded their regulation of locatable minerals mining since 1980. It is clear, however, the Federal rules need upgrading, regardless of State law. Areas where the existing rules require upgrading include financial guarantees (to require financial guarantees for all operations greater than casual use, thereby ensuring the availability of resources for the completion of reclamation); enforcement (to implement section 302(c) of FLPMA and provide administrative enforcement tools and penalties); threshold for notice operations (to require plans of operations for operations more likely to pollute the land and those in sensitive areas); withdrawn areas (to require validity exams before allowing plans of operations to be approved in such areas); casual use (to clarify which activities do or do not constitute casual use); performance standards and the definition of unnecessary or undue degradation (to establish objective standards to reflect current mining technology); and others. As mentioned earlier in this preamble, many of these shortcomings have been pointed out since 1986 in a series of Congressional hearings, General Accounting Office reports, and Departmental Inspector General reports.''

64 FR 6422, 6424, Feb. 9, 1999. After we published the proposed rule, the NRC Report bolstered our view that regulatory changes are necessary by recommending specific actions to address regulatory ''gaps'' (pp. 7–9). A recent communication from the Western Governors Association confirms that they have changed their original view that there is no need for any regulatory changes. A letter to Secretary of the Interior Babbitt, dated February 23, 2000, and signed by 10 Western Governors, states:

''The NRC's report did identify a few regulatory gaps in the current system. We suggest BLM refocus its efforts on addressing those gaps. We recommend that the BLM coordinate with the states to identify any gaps, which may be different for each state, and develop solutions that are state specific. Closing the gaps in each state could involve a combination of policy and rule development at the state and/or federal level.''

A related general concern expressed by the States in the course of the consultation process is that revising BLM's existing regulations would cause duplication of existing State programs. BLM, too, wants to avoid duplication and has carefully designed this final rule to achieve that purpose. The Secretary's January 6, 1997, memorandum, which re-initiated this rulemaking, specifically directed BLM to carefully address coordination with State regulatory programs to prevent unnecessary or undue degradation while minimizing duplication and promoting cooperation among regulators. Following the Secretary's directive, we have designed a set of regulations under which BLM and a State can have an agreement to divide program responsibilities (final § 3809.200(a)) or an agreement under which BLM defers to State administration of some or all of the requirements of this subpart (final § 3809.200(b)). Under the previous rules, BLM only had the authority for the former agreement (previous § 3809.3–1(c)). Thus, in our view, we have created under this final rule greater opportunities for the States to assume control over the surface management program, subject only to BLM oversight or, in the case of approving plans of operations, BLM concurrence.

Another State concern expressed during the consultation process was whether BLM would provide funding for States who elected to operate the regulatory program under a § 3809.200(b) agreement. Some State representatives felt that BLM should turn over to the State a portion of BLM's budget along with the program management responsibility under a § 3809.200(b) agreement. BLM is sensitive to the funding issue and the impact that BLM's deferral to a State of all or part of a program could have on State-level resources. At the same time, we recognize and have explained to the States that BLM does not have the authority to provide funding to States under a § 3809.200(b) agreement. Only Congress can do that.

Early in the consultation process, before the 3809 task force had developed a written proposal, we met with State representatives under the auspices of the Western Governors Association to discuss at a conceptual level the areas the rulemaking should address. At that meeting, which took place in April 1997, the States expressed views on a number of specific issues. For example, several States shared the view that the rulemaking should avoid prescriptive national reclamation standards. The States believe that the regulations have to take into account the differences between the types of minerals sought, the types of mines, climate, topography, and the nature of various mineral processing activities. There should be no one-size-fits-all design or operating blueprint required by the regulations because it could never take into account the inherent variation of mining operations across the West. Other views expressed by the States include the following:

- A regulatory approach that requires best available control technology (BACT) is not effective since it stifles innovative approaches and doesn't take into account differences in geology and climate.
- BLM should not duplicate or supersede Federally delegated or State-legislated environmental authority.
- Specified time frames for BLM to process notices, plans of operations, and other required documents are an important component of regulatory processes.
- Bonding is an integral part of the regulatory and reclamation process.
- BLM should continue to focus its performance standards on outcomes on the ground.
- BLM should examine implementation of existing tools, recognize legitimacy of different approaches, examine claims carefully and avoid extreme or out-of-date examples.
- The revised regulations should focus on interagency and intergovernmental cooperation.

BLM took these views into account in developing our first draft of proposed regulations. We posted this draft on the Internet in February 1998 for public information. In response to the States' concerns, this first draft retained the time frames for BLM to process notices and plans of operations, reinstated the remanded financial guarantee (bonding)

requirement for notices and plans of operations, included an expanded series of outcome-based performance standards, and, as discussed above, added the opportunity for BLM to defer to States to administer the surface management program.

Shortly after releasing our first draft, we again met with State representatives under the auspices of the Western Governors Association to discuss any concerns related to the first draft. This meeting took place in March 1998. Some of the general concerns expressed by the State representatives at this meeting included whether the regulations would preempt more stringent State law; would BLM pay for States to assume some or all of program responsibilities; that the regulations should specify that BLM would ''concur with'' State approval of plans not ''approve'' them; exactly how would a State receive BLM's approval to administer all or part of the surface management program in a State; the regulations should base inspection frequency on risk associated with each operation; and the definition of ''operator'' may extend liability for a site to stockholders in a corporation, an action that may supersede principles of corporate law. There were also a number of specific comments on the February draft.

Following this meeting, the 3809 task force made changes to the working draft of the regulations and posted a revised version on the Internet in August 1988 for public information. In response to the general comments, we clarified that there would be no conflict between the 3809 regulations and State law or regulations if the State law or regulations require a higher standard of protection for public lands than 3809. We changed the draft to require only that BLM ''concur'' with a State approval of a plan of operations, deleting the requirement that BLM ''approve'' the State approval. We added provisions specifying the process that BLM would follow in approving a State request to administer all or part of the surface management program in a State. We also changed the proposed definition of ''operator'' to avoid inadvertently assigning liability to stockholders by requiring material participation in the management, direction, or conduct of a mining operation as a prerequisite for liability.

After the 3809 task force posted a second revised draft on the Internet in August 1998, we met with State representatives in Denver in September. The purpose of the meeting was to get the States' reaction to the changes we had made in response to their comments from the March meeting. The questions and concerns raised by the State representatives at the meeting include the following:

- Would third parties be able to appeal or sue over a BLM State Director decision to defer to State administration of a program?
- One year may not be enough time to complete the review of existing Federal/State memoranda of understanding.
- BLM should look for a pattern of performance in evaluating State operation of a program, as opposed to focusing on individual actions.
- Concurrence by BLM on plans may be interpreted differently by different BLM offices.
- The definition of ''minimize,'' when equated to prevention implies that disturbance can be prevented. When BLM means ''prevent,'' it should say ''prevent,'' not ''minimize.''
- Will existing operations have to comply with bond release provisions?
- Citizens accompanying inspectors will cause problems with joint State/BLM inspections.
- Could an operator be subject to both State and Federal enforcement for a violation?
- BLM shouldn't require a detailed monitoring plan at the time of plan submittal. The monitoring plan should be conceptual at that point.
- BLM shouldn't require public comment on bond amount.
- BLM shouldn't require operators to comply with standards that are the responsibility of other agencies to enforce.

The task force took the comments from this meeting into account in developing the proposed rule that was published on February 9, 1999 (64 FR 6422). Some of the changes we made to the proposed rule as a result of this meeting include asking in the proposed rule preamble for views on whether one year would be enough time to review existing Federal/State agreements for consistency with the 3809 regulations. In the final rule, we are adopting provisions that allow up to 3 years for the review to be completed. BLM responded to another State comment by clarifying in the preamble to the proposed rule that BLM would not look at isolated incidents in determining that a State is not in compliance with a Federal/State agreement. BLM would consider patterns, trends, and programmatic issues more important indicators of State performance. We also changed the proposed definition of ''minimize'' to accommodate the States' concern about the use of the word ''prevent.'' In response to the States' concern about monitoring plans, we explained in the proposed rule preamble that we recognize that in the initial phase of developing a mining operation, complete and detailed designs and plans are not always available.

After we published the proposed rule and the 120-day comment period had closed, Congress directed that BLM pay for a NRC study of the existing regulations. Congress subsequently directed BLM to reopen the comment period for 120 days to give the public an opportunity to comment on the proposed rule in light of the NRC Report. As described earlier in this preamble, BLM published the reopening notice on October 26, 1999 (64 FR 57613). The comment period extended from October 26, 1999 to February 23, 2000. During the comment period, the 3809 task force again met with State representatives under the auspices of the Western Governors' Association. The purpose of the meeting was primarily to get comments on the proposed rule in light of the NRC Report. The meeting took place in Denver in January 2000. The thrust of the States' comments at that meeting was agreement with the conclusions of the NRC Report—that the current regulatory system is working well, and there is no need for sweeping changes. Also, BLM should focus its rulemaking efforts strictly on addressing NRC-identified gaps. And, BLM and the Forest Service should pursue non-regulatory approaches identified in the NRC Report.

Based on the sequence of events summarized above, BLM believes that we have fully complied with the requirement of the Executive Order to consult with State and local officials early in the process of developing the proposed regulation. BLM also believes that we have addressed the concerns expressed by State representatives to the extent possible given the Secretary of the Interior's independent and non-delegable responsibility to determine what constitutes unnecessary or undue degradation of the public lands.

Paperwork Reduction Act

This final rule requires collection of information from 10 or more persons. As required by the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)), BLM submitted an information collection approval package (OMB Form 83–I) to the Office of Management and Budget (OMB) for review when we published the proposed rule in February 1999. We received numerous comments on the approval package and, as a result, re-examined the information collection

burden that these rules would impose. We discussed this matter in our October 26, 1999, supplemental proposed rule. See 64 FR 57618–9. We have now prepared a revised OMB Form 83–I and submitted it to OMB for review. Our responses to the comments we received on the original approval package are part of the revised package, and we have concluded that it is unnecessary for BLM to seek further public comment at this time. OMB has approved the information collections contained in this final rule and has assigned them OMB Clearance Number 1004–0194.

BLM intends to collect information under this final rule to ensure that persons conducting exploration or mining activities on public land conduct only necessary and timely surface-disturbing activities, determine that proposed exploration or mining will meet the performance standards of subpart 3809, determine appropriate mitigation and reclamation measures for the site, ensure compliance with environmental laws, and comply with NEPA, the Endangered Species Act, and section 106 of the National Historic Preservation Act. A response is mandatory and required to obtain the benefit of conducting exploration or mining activities on public land. BLM estimates the total annual burden for subpart 3809 is 306,536 hours.

Authors

The principal authors of this final rule are the members of the Departmental 3809 Task Force, chaired by Robert M. Anderson; Deputy Assistant Director, Minerals, Realty, and Resource Protection; Bureau of Land Management; (202) 208–4201.

List of Subjects

43 CFR Part 2090

Airports, Alaska, Coal, Grazing lands, Indians-lands, Public lands, Public lands-classification, Public lands-mineral resources, Public lands-withdrawal, Seashores.

43 CFR Part 2200

Administrative practice and procedure, Antitrust, Coal, National forests, Public lands.

43 CFR Part 2710

Administrative practice and procedure, Public lands-mineral resources, Public lands-sale.

43 CFR Part 2740

Intergovernmental relations, Public lands-sale, Recreation and recreation areas, Reporting and recordkeeping requirements.

43 CFR Part 3800

Administrative practice and procedure, Environmental protection, Intergovernmental relations, Land Management Bureau, Mines, Public lands-mineral resources, Reporting and recordkeeping requirements, Surety bonds, Wilderness areas.

43 CFR Part 9260

Continental shelf, Forests and forest products, Law enforcement, Penalties, Public lands, Range management, Recreation and recreation areas, wildlife.

Sylvia V. Baca,

Assistant Secretary, Land and Minerals Management.

Accordingly, BLM is amending 43 CFR parts 2090, 2200, 2710, 2740, 3800 and 9260 as set forth below:

PART 2090—SPECIAL LAWS AND RULES

1. The authority citation for part 2090 continues to read as follows:

Authority: 16 U.S.C. 3124; 30 U.S.C. 189; and 43 U.S.C. 322, 641, 1201, 1624, and 1740.

Subpart 2091—Segregation and Opening of Lands

§ 2091.2–2 [Amended]

2. In § 2091.2–2, remove and reserve paragraph (b).

§ 2091.3–2 [Amended]

3. In § 2091.3–2, remove paragraph (c) and redesignate paragraph (d) as paragraph (c).

PART 2200—EXCHANGES: GENERAL PROCEDURES

4. The authority citation for part 2200 continues to read as follows:

Authority: 43 U.S.C. 1716 and 1740.

Subpart 2201—Exchanges—Specific Requirements

§ 2201.1–2 [Amended]

5. In § 2201.1–2, remove paragraph (d) and redesignate paragraph (e) as paragraph (d).

PART 2710—SALES: FEDERAL LAND POLICY AND MANAGEMENT ACT

6. The authority citation for part 2710 continues to read as follows:

Authority: 43 U.S.C. 1713 and 1740.

Subpart 2711—Sales: Procedures

§ 2711.5–1 [Removed]

7. Remove § 2711.5–1.

PART 2740—RECREATION AND PUBLIC PURPOSES ACT

8. The authority citation for part 2740 continues to read as follows:

Authority: 43 U.S.C. 869 *et seq.*, 43 U.S.C. 1701 *et seq.*, and 31 U.S.C. 9701.

Subpart 2741—Recreation and Public Purposes Act: Requirements

§ 2741.7 [Amended]

9. In § 2741.7, remove paragraph (d).

PART 3800—MINING CLAIMS UNDER THE GENERAL MINING LAWS

10. BLM is amending part 3800 by revising subpart 3809 to read as follows:

Subpart 3809—Surface Management

Sec.

General Information

Federal/State Agreements

Operations Conducted Under Notices

Subpart 3809—Surface Management

Authority: 16 U.S.C. 1280; 30 U.S.C. 22; 30 U.S.C. 612; 43 U.S.C. 1201; and 43 U.S.C. 1732, 1733, 1740, 1781, and 1782.

General Information

§ 3809.1 What are the purposes of this subpart?

The purposes of this subpart are to:

(a) Prevent unnecessary or undue degradation of public lands by operations authorized by the mining laws. Anyone intending to develop mineral resources on the public lands must prevent unnecessary or undue degradation of the land and reclaim disturbed areas. This subpart establishes procedures and standards to ensure that operators and mining claimants meet this responsibility; and

(b) Provide for maximum possible coordination with appropriate State agencies to avoid duplication and to ensure that operators prevent unnecessary or undue degradation of public lands.

§ 3809.2 What is the scope of this subpart?

(a) This subpart applies to all operations authorized by the mining laws on public lands where the mineral interest is reserved to the United States, including Stock Raising Homestead

lands as provided in § 3809.31(c). When public lands are sold or exchanged under 43 U.S.C. 682(b) (Small Tracts Act), 43 U.S.C. 869 (Recreation and Public Purposes Act), 43 U.S.C. 1713 (sales) or 43 U.S.C. 1716 (exchanges), minerals reserved to the United States continue to be removed from the operation of the mining laws unless a subsequent land-use planning decision expressly restores the land to mineral entry, and BLM publishes a notice to inform the public.

(b) This subpart does not apply to lands in the National Park System, National Forest System, and the National Wildlife Refuge System; acquired lands; or lands administered by BLM that are under wilderness review, which are subject to subpart 3802 of this part.

(c) This subpart applies to all patents issued after October 21, 1976 for mining claims in the California Desert Conservation Area, except for any patent for which a right to the patent vested before that date.

(d) This subpart does not apply to private land except as provided in paragraphs (a) and (c) of this section. For purposes of analysis under the National Environmental Policy Act of 1969, BLM may collect information about private land that is near to, or may be affected by, operations authorized under this subpart.

(e) This subpart applies to operations that involve locatable minerals, including metallic minerals; some industrial minerals, such as gypsum; and a number of other non-metallic minerals that have a unique property which gives the deposit a distinct and special value. This subpart does not apply to leasable and salable minerals. Leasable minerals, such as coal, phosphate, sodium, and potassium; and salable minerals, such as common varieties of sand, gravel, stone, and pumice, are not subject to location under the mining laws. Parts 3400, 3500 and 3600 of this title govern mining operations for leasable and salable minerals.

§ 3809.3 What rules must I follow if State law conflicts with this subpart?

If State laws or regulations conflict with this subpart regarding operations on public lands, you must follow the requirements of this subpart. However, there is no conflict if the State law or regulation requires a higher standard of protection for public lands than this subpart.

§ 3809.5 How does BLM define certain terms used in this subpart?

As used in this subpart, the term:

Casual use means activities ordinarily resulting in no or negligible disturbance of the public lands or resources. For example—

(1) Casual use generally includes the collection of geochemical, rock, soil, or mineral specimens using hand tools; hand panning; or non-motorized sluicing. It may include use of small portable suction dredges. It also generally includes use of metal detectors, gold spears and other battery-operated devices for sensing the presence of minerals, and hand and battery-operated drywashers. Operators may use motorized vehicles for casual use activities provided the use is consistent with the regulations governing such use (part 8340 of this title), off-road vehicle use designations contained in BLM land-use plans, and the terms of temporary closures ordered by BLM.

(2) Casual use does not include use of mechanized earth-moving equipment, truck-mounted drilling equipment, motorized vehicles in areas when designated as closed to ''off-road vehicles'' as defined in § 8340.0–5 of this title, chemicals, or explosives. It also does not include ''occupancy'' as defined in § 3715.0–5 of this title or operations in areas where the cumulative effects of the activities result in more than negligible disturbance.

Exploration means creating surface disturbance greater than casual use that includes sampling, drilling, or developing surface or underground workings to evaluate the type, extent, quantity, or quality of mineral values present. Exploration does not include activities where material is extracted for commercial use or sale.

Minimize means to reduce the adverse impact of an operation to the lowest practical level. During review of operations, BLM may determine that it is practical to avoid or eliminate particular impacts.

Mining claim means any unpatented mining claim, millsite, or tunnel site located under the mining laws. The term also applies to those mining claims and millsites located in the California Desert Conservation Area that were patented after the enactment of the Federal Land Policy and Management Act of October 21, 1976. Mining ''claimant'' is defined in § 3833.0–5 of this title.

Mining laws means the Lode Law of July 26, 1866, as amended (14 Stat. 251); the Placer Law of July 9, 1870, as amended (16 Stat. 217); and the Mining Law of May 10, 1872, as amended (17 Stat. 91); as well as all laws supplementing and amending those laws, including the Building Stone Act of August 4, 1892, as amended (27 Stat. 348); the Saline Placer Act of January 31, 1901 (31 Stat. 745); the Surface Resources Act of 1955 (30 U.S.C. 611–614); and the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1701 *et seq.*).

Mitigation, as defined in 40 CFR 1508.20, may include one or more of the following:

(1) Avoiding the impact altogether by not taking a certain action or parts of an action;

(2) Minimizing impacts by limiting the degree or magnitude of the action and its implementation;

(3) Rectifying the impact by repairing, rehabilitating, or restoring the affected environment;

(4) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action; and

(5) Compensating for the impact by replacing, or providing substitute, resources or environments.

Operations means all functions, work, facilities, and activities on public lands in connection with prospecting, exploration, discovery and assessment work, development, extraction, and processing of mineral deposits locatable under the mining laws; reclamation of disturbed areas; and all other reasonably incident uses, whether on a mining claim or not, including the construction of roads, transmission lines, pipelines, and other means of access across public lands for support facilities.

Operator means any person who manages, directs, or conducts operations at a project area under this subpart, including a parent entity or an affiliate who materially participates in such management, direction, or conduct. An operator on a particular mining claim may also be the mining claimant.

Person means any individual, firm, corporation, association, partnership, trust, consortium, joint venture, or any other entity conducting operations on public lands.

Project area means the area of land upon which the operator conducts operations, including the area required for construction or maintenance of roads, transmission lines, pipelines, or other means of access by the operator.

Public lands, as defined in 43 U.S.C. 1702, means any land and interest in land owned by the United States within the several States and administered by the Secretary of the Interior through the BLM, without regard to how the United States acquired ownership, except—

(1) Lands located on the Outer Continental Shelf; and

(2) Lands held for the benefit of Indians, Aleuts, and Eskimos.

Reclamation means taking measures required by this subpart following disturbance of public lands caused by operations to meet applicable performance standards and achieve conditions required by BLM at the conclusion of operations. For a definition of ''reclamation'' applicable to operations conducted under the mining laws on Stock Raising Homestead Act lands, see part 3810, subpart 3814 of this title. Components of reclamation include, where applicable:

(1) Isolation, control, or removal of acid-forming, toxic, or deleterious substances;

(2) Regrading and reshaping to conform with adjacent landforms, facilitate revegetation, control drainage, and minimize erosion;

(3) Rehabilitation of fisheries or wildlife habitat;

(4) Placement of growth medium and establishment of self-sustaining revegetation;

(5) Removal or stabilization of buildings, structures, or other support facilities;

(6) Plugging of drill holes and closure of underground workings; and

(7) Providing for post-mining monitoring, maintenance, or treatment.

Riparian area is a form of wetland transition between permanently saturated wetlands and upland areas. These areas exhibit vegetation or physical characteristics reflective of permanent surface or subsurface water influence. Typical riparian areas include lands along, adjacent to, or contiguous with perennially and intermittently flowing rivers and streams, glacial potholes, and the shores of lakes and reservoirs with stable water levels. Excluded are areas such as ephemeral streams or washes that do not exhibit the presence of vegetation dependent upon free water in the soil.

Tribe means, and *Tribal* refers to, a Federally recognized Indian tribe.

Unnecessary or undue degradation means conditions, activities, or practices that:

(1) Fail to comply with one or more of the following: The performance standards in § 3809.420, the terms and conditions of an approved plan of operations, operations described in a complete notice, and other Federal and State laws related to environmental protection and protection of cultural resources;

(2) Are not ''reasonably incident'' to prospecting, mining, or processing operations as defined in § 3715.0–5 of this title;

(3) Fail to attain a stated level of protection or reclamation required by specific laws in areas such as the California Desert Conservation Area, Wild and Scenic Rivers, BLM-administered portions of the National Wilderness System, and BLM-administered National Monuments and National Conservation Areas; or

(4) Occur on mining claims or millsites located after October 21, 1976 (or on unclaimed lands) and result in substantial irreparable harm to significant scientific, cultural, or environmental resource values of the public lands that cannot be effectively mitigated.

§ 3809.10 How does BLM classify operations?

BLM classifies operations as—

(a) Casual use, for which an operator need not notify BLM. (You must reclaim any casual-use disturbance that you create. If your operations do not qualify as casual use, you must submit a notice or plan of operations, whichever is applicable. See §§ 3809.11 and 3809.21.);

(b) Notice-level operations, for which an operator must submit a notice (except for certain suction-dredging operations covered by § 3809.31(b)); and

(c) Plan-level operations, for which an operator must submit a plan of operations and obtain BLM's approval.

§ 3809.11 When do I have to submit a plan of operations?

(a) You must submit a plan of operations and obtain BLM's approval before beginning operations greater than casual use, except as described in § 3809.21. Also see §§ 3809.31 and 3809.400 through 3809.434.

(b) You must submit a plan of operations for any bulk sampling in which you will remove 1,000 tons or more of presumed ore for testing.

(c) You must submit a plan of operations for any operations causing surface disturbance greater than casual use in the following special status areas where § 3809.21 does not apply:

(1) Lands in the California Desert Conservation Area (CDCA) designated by the CDCA plan as ''controlled'' or ''limited'' use areas;

(2) Areas in the National Wild and Scenic Rivers System, and areas designated for potential addition to the system;

(3) Designated Areas of Critical Environmental Concern;

(4) Areas designated as part of the National Wilderness Preservation System and administered by BLM;

(5) Areas designated as ''closed'' to off-road vehicle use, as defined in § 8340.0–5 of this title;

(6) Any lands or waters known to contain Federally proposed or listed threatened or endangered species or their proposed or designated critical habitat, unless BLM allows for other action under a formal land-use plan or threatened or endangered species recovery plan; and

(7) National Monuments and National Conservation Areas administered by BLM.

§ 3809.21 When do I have to submit a notice?

(a) You must submit a complete notice of your operations 15 calendar days before you commence exploration causing surface disturbance of 5 acres or less of public lands on which reclamation has not been completed. See § 3809.301 for information on what you must include in your notice.

(b) You must not segment a project area by filing a series of notices for the purpose of avoiding filing a plan of operations. See §§ 3809.300 through 3809.336 for regulations applicable to notice-level operations.

§ 3809.31 Are there any special situations that affect what submittals I must make before I conduct operations?

(a) Where the cumulative effects of casual use by individuals or groups have resulted in, or are reasonably expected to result in, more than negligible disturbance, the State Director may establish specific areas as he/she deems necessary where any individual or group intending to conduct activities under the mining laws must contact BLM 15 calendar days before beginning activities to determine whether the individual or group must submit a notice or plan of operations. (See § 3809.300 through 3809.336 and § 3809.400 through 3809.434.) BLM will notify the public via publication in the **Federal Register** of the boundaries of such specific areas, as well as through posting in each local BLM office having jurisdiction over the lands.

(b) *Suction dredges.* (1) If your operations involve the use of a suction dredge, the State requires an authorization for its use, and BLM and the State have an agreement under § 3809.200 addressing suction dredging, then you need not submit to BLM a notice or plan of operations, unless otherwise provided in the agreement between BLM and the State.

(2) For all uses of a suction dredge not covered by paragraph (b)(1) of this section, you must contact BLM before beginning such use to determine whether you need to submit a notice or a plan to BLM, or whether your activities constitute casual use. If your proposed suction dredging is located

within any lands or waters known to contain Federally proposed or listed threatened or endangered species or their proposed or designated critical habitat, regardless of the level of disturbance, you must not begin operations until BLM completes consultation the Endangered Species Act requires.

(c) If your operations require you to occupy or use a site for activities ''reasonably incident'' to mining, as defined in § 3715.0–5 of this title, whether you are operating under a notice or a plan of operations, you must also comply with part 3710, subpart 3715, of this title.

(d) If your operations are located on lands patented under the Stock Raising Homestead Act and you do not have the written consent of the surface owner, then you must submit a plan of operations and obtain BLM's approval. Where you have surface-owner consent, you do not need a notice or a plan of operations under this subpart. See part 3810, subpart 3814, of this title.

(e) If your proposed operations are located on lands conveyed by the United States which contain minerals reserved to the United States, then you must submit a plan of operations under § 3809.11 and obtain BLM's approval or a notice under § 3809.21.

§ 3809.100 What special provisions apply to operations on segregated or withdrawn lands?

(a) *Mineral examination report.* After the date on which the lands are withdrawn from appropriation under the mining laws, BLM will not approve a plan of operations or allow notice-level operations to proceed until BLM has prepared a mineral examination report to determine whether the mining claim was valid before the withdrawal, and whether it remains valid. BLM may require preparation of a mineral examination report before approving a plan of operations or allowing notice-level operations to proceed on segregated lands. If the report concludes that the mining claim is invalid, BLM will not approve operations or allow notice-level operations on the mining claim. BLM will also promptly initiate contest proceedings.

(b) *Allowable operations.* If BLM has not completed the mineral examination report under paragraph (a) of this section, if the mineral examination report for proposed operations concludes that a mining claim is invalid, or if there is a pending contest proceeding for the mining claim,

(1) BLM may—

(i) Approve a plan of operations for the disputed mining claim proposing operations that are limited to taking samples to confirm or corroborate mineral exposures that are physically disclosed and existing on the mining claim before the segregation or withdrawal date, whichever is earlier; and

(ii) Approve a plan of operations for the operator to perform the minimum necessary annual assessment work under § 3851.1 of this title; or

(2) A person may only conduct exploration under a notice that is limited to taking samples to confirm or corroborate mineral exposures that are physically disclosed and existing on the mining claim before the segregation or withdrawal date, whichever is earlier.

(c) *Time limits.* While BLM prepares a mineral examination report under paragraph (a) of this section, it may suspend the time limit for responding to a notice or acting on a plan of operations. See §§ 3809.311 and 3809.411, respectively.

(d) *Final decision.* If a final departmental decision declares a mining claim to be null and void, the operator must cease all operations, except required reclamation.

§ 3809.101 What special provisions apply to minerals that may be common variety minerals, such as sand, gravel, and building stone?

(a) *Mineral examination report.* On mining claims located on or after July 23, 1955, you must not initiate operations for minerals that may be ''common variety'' minerals, as defined in § 3711.1(b) of this title, until BLM has prepared a mineral examination report, except as provided in paragraph (b) of this section.

(b) *Interim authorization.* Until the mineral examination report described in paragraph (a) of this section is prepared, BLM will allow notice-level operations or approve a plan of operations for the disputed mining claim for—

(1) Operations limited to taking samples to confirm or corroborate mineral exposures that are physically disclosed and existing on the mining claim;

(2) Performance of the minimum necessary annual assessment work under § 3851.1 of this title; or

(3) Operations to remove possible common variety minerals if you establish an escrow account in a form acceptable to BLM. You must make regular payments to the escrow account for the appraised value of possible common variety minerals removed under a payment schedule approved by BLM. The funds in the escrow account must not be disbursed to the operator or to the U.S. Treasury until a final determination of whether the mineral is a common variety and therefore salable under part 3600 of this title.

(c) *Determination of common variety.* If the mineral examination report under paragraph (a) of this section concludes that the minerals are common variety minerals, you may either relinquish your mining claim(s) or BLM will initiate contest proceedings. Upon relinquishment or final departmental determination that the mining claim(s) is null and void, you must promptly close and reclaim your operations unless you are authorized to proceed under parts 3600 and 3610 of this title.

(d) *Disposal.* BLM may dispose of common variety minerals from an unpatented mining claim with a written waiver from the mining claimant.

§ 3809.111 Will BLM disclose to the public the information I submit under this subpart?

Part 2 of this title applies to all information and data you submit under this subpart. If you submit information or data under this subpart that you believe is exempt from disclosure, you must mark each page clearly ''CONFIDENTIAL INFORMATION.'' You must also separate it from other materials you submit to BLM. BLM will keep confidential information or data marked in this manner to the extent required by part 2 of this title. If you do not mark the information as confidential, BLM, without notifying you, may disclose the information to the public to the full extent allowed under part 2 of this title.

§ 3809.115 Can BLM collect information under this subpart?

Yes, the Office of Management and Budget has approved the collections of information contained in this subpart under 44 U.S.C. 3501 *et seq.* and assigned clearance number 1004–0194. BLM will use this information to regulate and monitor mining and exploration operations on public lands.

§ 3809.116 As a mining claimant or operator, what are my responsibilities under this subpart for my project area?

(a)(1) Mining claimants and operators (if other than the mining claimant) are jointly and severally liable for obligations under this subpart that accrue while they hold their interests. Joint and several liability, in this context, means that the mining claimants and operators are responsible together and individually for obligations, such as reclamation, resulting from activities or conditions in the areas in which the mining claimants hold mining claims or mill sites or the

operators have operational responsibilities.

Example 1. Mining claimant A holds mining claims totaling 100 acres. Mining claimant B holds adjoining mining claims totaling 100 acres and mill sites totaling 25 acres. Operator C conducts mining operations on a project area that includes both claimant A's mining claims and claimant B's mining claims and millsites. Mining claimant A and operator C are each 100 percent responsible for obligations arising from activities on mining claimant A's mining claims. Mining claimant B has no responsibility for such obligations. Mining claimant B and operator C are each 100 percent responsible for obligations arising from activities on mining claimant B's mining claims and millsites. Mining claimant A has no responsibility for such obligations.

Example 2. Mining claimant L holds mining claims totaling 100 acres on which operators M and N conduct activities. Operator M conducts operations on 50 acres. Operator N conducts operations on the other 50 acres. Operators M and N are independent of each other and their operations do not overlap. Mining claimant L and operator M are each 100 percent responsible for obligations arising from activities on the 50 acres on which operator M conducts activities. Mining claimant L and operator N are each 100 percent responsible for obligations arising from activities on the 50 acres on which operator N conducts activities. Operator M has no responsibility for the obligations arising from operator N's activities.

Example 3. Mining claimant X holds mining claims totaling 100 acres on which operators Y and Z conduct activities. Operators Y and Z each engage in activities on the entire 100 acres. Mining claimant X, operator Y, and operator Z are each 100 percent responsible for obligations arising from all operations on the entire 100 acres.

(2) In the event obligations are not met, BLM may take any action authorized under this subpart against either the mining claimants or the operators, or both.

(b) Relinquishment, forfeiture, or abandonment of a mining claim does not relieve a mining claimant's or operator's responsibility under this subpart for obligations that accrued or conditions that were created while the mining claimant or operator was responsible for operations conducted on that mining claim or in the project area.

(c) Transfer of a mining claim or operation does not relieve a mining claimant's or operator's responsibility under this subpart for obligations that accrued or conditions that were created while the mining claimant or operator was responsible for operations conducted on that mining claim or in the project area until—

(1) BLM receives documentation that a transferee accepts responsibility for the transferor's previously accrued obligations, and

(2) BLM accepts an adequate replacement financial guarantee adequate to cover such previously accrued obligations and the transferee's new obligations.

Federal/State Agreements

§ 3809.200 What kinds of agreements may BLM and a State make under this subpart?

To prevent unnecessary administrative delay and to avoid duplication of administration and enforcement, BLM and a State may make the following kinds of agreements:

(a) An agreement to provide for a joint Federal/State program; and

(b) An agreement under § 3809.202 which provides that, in place of BLM administration, BLM defers to State administration of some or all of the requirements of this subpart subject to the limitations in § 3809.203.

§ 3809.201 What should these agreements address?

(a) The agreements should provide for maximum possible coordination with the State to avoid duplication and to ensure that operators prevent unnecessary or undue degradation of public lands. Agreements should cover any or all sections of this subpart and should consider, at a minimum, common approaches to review of plans of operations, including effective cooperation regarding the National Environmental Policy Act; performance standards; interim management of temporary closure; financial guarantees; inspections; and enforcement actions, including referrals to enforcement authorities. BLM and the State should also include provisions for the regular review or audit of these agreements.

(b) To satisfy the requirements of § 3809.31(b), if BLM and the State elect to address suction dredge activities in the agreement, the agreement must require a State to notify BLM of each application to conduct suction dredge activities within 15 calendar days of receipt of the application by the State. BLM will inform the State whether Federally proposed or listed threatened or endangered species or their proposed or designated critical habitat may be affected by the proposed activities and any necessary mitigating measures. Operations must not begin until BLM completes consultation or conferencing under the Endangered Species Act.

§ 3809.202 Under what conditions will BLM defer to State regulation of operations?

(a) *State request.* A State may request BLM enter into an agreement for State regulation of operations on public lands in place of BLM administration of some or all of the requirements of this subpart. The State must send the request to the BLM State Director with jurisdiction over public lands in the State.

(b) *BLM review.* (1) When the State Director receives the State's request, he/she will notify the public and provide an opportunity for comment. The State Director will then review the request and determine whether the State's requirements are consistent with the requirements of this subpart, and whether the State has necessary legal authorities, resources, and funding for an agreement. The State requirements may be contained in laws, regulations, guidelines, policy manuals, and demonstrated permitting practices.

(2) For the purposes of this subpart, BLM will determine consistency with the requirements of this subpart by comparing this subpart and State standards on a provision-by-provision basis to determine—

(i) Whether non-numerical State standards are functionally equivalent to BLM counterparts; and

(ii) Whether numerical State standards are the same as corresponding numerical BLM standards, except that State review and approval time frames do not have to be the same as the corresponding Federal time frames.

(3) A State environmental protection standard that exceeds a corresponding Federal standard is consistent with the requirements of this subpart.

(c) *State Director decision.* The BLM State Director will notify the State in writing of his/her decision regarding the State's request. The State Director will address whether the State requirements are consistent with the requirements of this subpart, and whether the State has necessary legal authorities, resources, and funding to implement any agreement. If BLM determines that the State's requirements are consistent with the requirements of this subpart and the State has the necessary legal authorities, resources, and funding, BLM must enter into an agreement with the State so that the State will regulate some or all of the operations on public lands, as described in the State request.

(d) *Appeal of State Director decision.* The BLM State Director's decision will be a final decision of BLM and may be appealed to the Assistant Secretary for Land and Minerals Management, but not to the Department of the Interior Office of Hearings and Appeals. See § 3809.800(c) for the items you should include in the appeal.

§ 3809.203 What are the limitations on BLM deferral to State regulation of operations?

Any agreement between BLM and a State in which BLM defers to State regulation of some or all operations on public lands is subject to the following limitations:

(a) *Plans of Operations.* BLM must concur with each State decision approving a plan of operations to assure compliance with this subpart, and BLM retains responsibility for compliance with the National Environmental Policy Act (NEPA). The State and BLM may decide who will be the lead agency in the plan review process, including preparation of NEPA documents.

(b) *Federal land-use planning and other Federal laws.* BLM will continue to be responsible for all land-use planning on public lands and for implementing other Federal laws relating to the public lands for which BLM is responsible.

(c) *Federal enforcement.* BLM may take any authorized action to enforce the requirements of this subpart or any term, condition, or limitation of a notice or an approved plan of operations. BLM may take this action regardless of the nature of its agreement with a State, or actions taken by a State.

(d) *Financial guarantee.* The amount of the financial guarantee must be calculated based on the completion of both Federal and State reclamation requirements, but may be held as one instrument. If the financial guarantee is held as one instrument, it must be redeemable by both the Secretary and the State. BLM must concur in the approval, release, or forfeiture of a financial guarantee for public lands.

(e) *State performance.* If BLM determines that a State is not in compliance with all or part of its Federal/State agreement, BLM will notify the State and provide a reasonable time for the State to comply.

(f) *Termination.* (1) If a State does not comply after being notified under paragraph (e) of this section, BLM will take appropriate action, which may include termination of all or part of the agreement.

(2) A State may terminate its agreement by notifying BLM 60 calendar days in advance.

§ 3809.204 Does this subpart cancel an existing agreement between BLM and a State?

(a) No, this subpart doesn't cancel a Federal/State agreement or memorandum of understanding in effect on January 20, 2001. A Federal/State agreement or memorandum of understanding will continue while BLM and the State perform a review to determine whether revisions are required under this subpart. BLM and the State must complete the review and make necessary revisions no later than one year from January 20, 2001.

(b) The BLM State Director may extend the review period described in paragraph (a) of this section for one more year upon the written request of the Governor of the State or the delegated representative of the Governor, and if necessary, for a third year upon another written request. The existing agreement or memorandum of understanding terminates no later than one year after January 20, 2001 if this review and any necessary revision does not occur, unless extended under this paragraph.

(c) This subpart applies during the review period described in paragraphs (a) and (b) of this section. Where a portion of a Federal/State agreement or memorandum of understanding existing on January 20, 2001 is inconsistent with this subpart, that portion continues in effect until the agreement or memorandum of understanding is revised under this subpart or terminated.

Operations Conducted Under Notices

§ 3809.300 Does this subpart apply to my existing notice-level operations?

To see how this subpart applies to your operations conducted under a notice and existing on January 20, 2001, follow this table:

If BLM has received your complete notice before January 20, 2001—	Then—
(a) You are the operator identified in the notice on file with BLM on January 20, 2001.	You may conduct operations for 2 years after January 20, 2001 under the terms of your existing notice and the regulations in effect immediately before that date. (See 43 CFR parts 1000-end, revised as of Oct. 1, 1999.) After 2 years, you may extend your notice under § 3809.333. BLM may require a modification under § 3809.331(a)(1). See § 3809.503 for financial guarantee requirements applicable to notices.
(b) You are a new operator, that is, you were not the operator identified in the notice on file with BLM on January 20, 2001.	The provisions of this subpart, including § 3809.320, govern your operations for 2 years after January 20, 2001, unless you extend your notice under § 3809.333.
(c) You later modify your notice	(1) You may conduct operations on the original acreage for 2 years after January 20, 2001 under the terms of your existing notice and the regulations in effect immediately before that date (See 43 CFR parts 1000-end, revised as of Oct. 1, 2000.) After 2 years, you may extend your notice under § 3809.333. BLM may require a modification under § 3809.331(a)(1). See § 3809.503(b) for financial guarantee requirements applicable to notices. (2) Your operations on any additional acreage come under the provisions of this subpart, including §§ 3809.11 and 3809.21, and may require approval of a plan of operations before the additional surface disturbance may.
(d) Your notice has expired	You may not conduct operations under an expired notice. You must promptly submit either a new notice under § 3809.301 or a plan of operations under § 3809.401, whichever is applicable, or immediately begin to reclaim your project area. See §§ 3809.11 and 3809.21.

§ 3809.301 Where do I file my notice and what information must I include in it?

(a) If you qualify under § 3809.21, you must file your notice with the local BLM office with jurisdiction over the lands involved. BLM does not require that the notice be on a particular form.

(b) To be complete, your notice must include the following information:

(1) *Operator Information.* The name, mailing address, phone number, taxpayer identification number of the operator(s), and the BLM serial number(s) of any unpatented mining claim(s) where the disturbance would occur. If the operator is a corporation, you must identify one individual as the point of contact;

(2) *Activity Description, Map, and Schedule of Activities.* A description of the proposed activity with a level of detail appropriate to the type, size, and location of the activity. The description must include the following:

(i) The measures that you will take to prevent unnecessary or undue degradation during operations;

(ii) A map showing the location of your project area in sufficient detail for BLM to be able to find it and the location of access routes you intend to use, improve, or construct;

(iii) A description of the type of equipment you intend to use; and

(iv) A schedule of activities, including the date when you expect to begin operations and the date you expect to complete reclamation;

(3) *Reclamation Plan.* A description of how you will complete reclamation to the standards described in § 3809.420; and

(4) *Reclamation cost estimate.* An estimate of the cost to fully reclaim your operations as required by § 3809.552.

(c) BLM may require you to provide additional information, if necessary to ensure that your operations will comply with this subpart.

(d) You must notify BLM in writing within 30 calendar days of any change of operator or corporate point of contact, or of the mailing address of the operator or corporate point of contact.

§ 3809.311 What action does BLM take when it receives my notice?

(a) Upon receipt of your notice, BLM will review it within 15 calendar days to see if it is complete under § 3809.301.

(b) If your notice is incomplete, BLM will inform you in writing of the additional information you must submit. BLM may also take the actions described in § 3809.313.

(c) BLM will review your additional information within 15 calendar days to ensure it is complete. BLM will repeat this process until your notice is complete, or until we determine that you may not conduct operations because of your inability to prevent unnecessary or undue degradation.

§ 3809.312 When may I begin operations after filing a complete notice?

(a) If BLM does not take any of the actions described in § 3908.313, you may begin operations no sooner than 15 calendar days after the appropriate BLM office receives your complete notice. BLM may send you an acknowledgement that indicates the date we received your notice. If you don't receive an acknowledgement or have any doubt about the date we received your notice, contact the office to which you sent the notice. This subpart does not require BLM to approve your notice or inform you that your notice is complete.

(b) If BLM completes our review sooner than 15 calendar days after receiving your complete notice, we may notify you that you may begin operations.

(c) You must provide to BLM a financial guarantee that meets the requirements of this subpart before beginning operations.

(d) Your operations may be subject to BLM approval under part 3710, subpart 3715, of this title relating to use or occupancy of unpatented mining claims.

§ 3809.313 Under what circumstances may I not begin operations 15 calendar days after filing my notice?

To see when you may not begin operations 15 calendar days after filing your notice, follow this table:

If BLM reviews your notice and, within 15 calendar days—	Then—
(a) Notifies you that BLM needs additional time, not to exceed 15 calendar days, to complete its review.	You must not begin operations until the additional review time period ends.
(b) Notifies you that you must modify your notice to prevent unnecessary or undue degradation.	You must not begin operations until you modify your notice to ensure that your operations prevent unnecessary or undue degradation.
(c) Requires you to consult with BLM about the location of existing or proposed access routes.	You must not begin operations until you consult with BLM and satisfy BLM's concerns about access.
(d) Determines that an on-site visit is necessary	You must not begin operations until BLM visits the site, and you satisfy any concerns arising from the visit. BLM will notify you if we will not conduct the site visit within 15 calendar days of determining that a visit is necessary, including the reason(s) for the delay.
(e) BLM determines you don't qualify under § 3809.11 as a notice-level operation.	You must file a plan of operations before beginning operations. See §§ 3809.400 through 3809.420.

§ 3809.320 Which performance standards apply to my notice-level operations?

Your notice-level operations must meet all applicable performance standards of § 3809.420.

§ 3809.330 May I modify my notice?

(a) Yes, you may submit a notice modification at any time during operations under a notice.

(b) BLM will review your notice modification the same way it reviewed your initial notice under §§ 3809.311 and 3809.313.

§ 3809.331 Under what conditions must I modify my notice?

(a) You must modify your notice—

(1) If BLM requires you to do so to prevent unnecessary or undue degradation; or

(2) If you plan to make material changes to your operations. Material changes are changes that disturb areas not described in the existing notice; change your reclamation plan; or result in impacts of a different kind, degree, or extent than those described in the existing notice.

(b) You must submit your notice modification 15 calendar days before

making any material changes. If BLM determines your notice modification is complete before the 15-day period has elapsed, BLM may notify you to proceed. When BLM requires you to modify your notice, we may also notify you to proceed before the 15-day period has elapsed to prevent unnecessary or undue degradation.

§ 3809.332 How long does my notice remain in effect?

If you filed your complete notice on or after January 20, 2001, it remains in effect for 2 years, unless extended under § 3809.333, or unless you notify BLM beforehand that operations have ceased and reclamation is complete. BLM will conduct an inspection to verify whether you have met your obligations, will notify you promptly in writing, and terminate your notice, if appropriate.

§ 3809.333 May I extend my notice, and, if so, how?

Yes, if you wish to conduct operations for 2 additional years after the expiration date of your notice, you must notify BLM in writing on or before the expiration date and meet the financial guarantee requirements of § 3809.503. You may extend your notice more than once.

§ 3809.334 What if I temporarily stop conducting operations under a notice?

(a) If you stop conducting operations for any period of time, you must—

(1) Maintain public lands within the project area, including structures, in a safe and clean condition;

(2) Take all steps necessary to prevent unnecessary or undue degradation; and

(3) Maintain an adequate financial guarantee.

(b) If the period of non-operation is likely to cause unnecessary or undue degradation, BLM, in writing, will—

(1) Require you to take all steps necessary to prevent unnecessary or undue degradation; and

(2) Require you, after an extended period of non-operation for other than seasonal operations, to remove all structures, equipment, and other facilities and reclaim the project area.

§ 3809.335 What happens when my notice expires?

(a) When your notice expires, you must—

(1) Cease operations, except reclamation; and

(2) Complete reclamation promptly according to your notice.

(b) Your reclamation obligations continue beyond the expiration or any termination of your notice until you satisfy them.

§ 3809.336 What if I abandon my notice-level operations?

(a) BLM may consider your operations to be abandoned if, for example, you leave inoperable or non-mining related equipment in the project area, remove equipment and facilities from the project area other than for purposes of completing reclamation according to your reclamation plan, do not maintain the project area, discharge local workers, or there is no sign of activity in the project area over time.

(b) If BLM determines that you abandoned your operations without completing reclamation, BLM may initiate forfeiture under § 3809.595. If the amount of the financial guarantee is inadequate to cover the cost of reclamation, BLM may complete the reclamation, and the operator and all other responsible persons are liable for the cost of reclamation.

Operations Conducted Under Plans of Operations

§ 3809.400 Does this subpart apply to my existing or pending plan of operations?

(a) You may continue to operate under the terms and conditions of a plan of operations that BLM approved before January 20, 2001. All provisions of this subpart except plan content (§ 3809.401) and performance standards (§§ 3809.415 and 3809.420) apply to such plan of operations. See § 3809.505 for the applicability of financial guarantee requirements.

(b) If your unapproved plan of operations is pending on January 20, 2001, then the plan content requirements and performance standards that were in effect immediately before that date apply to your pending plan of operations. (See 43 CFR parts 1000–end, revised as of Oct. 1, 1999.) All other provisions of this subpart apply.

(c) If you want this subpart to apply to any existing or pending plan of operations, where not otherwise required, you may choose to have this subpart apply.

§ 3809.401 Where do I file my plan of operations and what information must I include with it?

(a) If you are required to file a plan of operations under § 3809.11, you must file it with the local BLM field office with jurisdiction over the lands involved. BLM does not require that the plan be on a particular form. Your plan of operations must demonstrate that the proposed operations would not result in unnecessary or undue degradation of public lands.

(b) Your plan of operations must contain the following information and describe the proposed operations at a level of detail sufficient for BLM to determine that the plan of operations prevents unnecessary or undue degradation:

(1) *Operator Information.* The name, mailing address, phone number, taxpayer identification number of the operator(s), and the BLM serial number(s) of any unpatented mining claim(s) where disturbance would occur. If the operator is a corporation, you must identify one individual as the point of contact. You must notify BLM in writing within 30 calendar days of any change of operator or corporate point of contact or in the mailing address of the operator or corporate point of contact;

(2) *Description of Operations.* A description of the equipment, devices, or practices you propose to use during operations including, where applicable—

(i) Maps of the project area at an appropriate scale showing the location of exploration activities, drill sites, mining activities, processing facilities, waste rock and tailing disposal areas, support facilities, structures, buildings, and access routes;

(ii) Preliminary or conceptual designs, cross sections, and operating plans for mining areas, processing facilities, and waste rock and tailing disposal facilities;

(iii) Water management plans;

(iv) Rock characterization and handling plans;

(v) Quality assurance plans;

(vi) Spill contingency plans;

(vii) A general schedule of operations from start through closure; and

(viii) Plans for all access roads, water supply pipelines, and power or utility services;

(3) *Reclamation Plan.* A plan for reclamation to meet the standards in § 3809.420, with a description of the equipment, devices, or practices you propose to use including, where applicable, plans for—

(i) Drill-hole plugging;

(ii) Regrading and reshaping;

(iii) Mine reclamation, including information on the feasibility of pit backfilling that details economic, environmental, and safety factors;

(iv) Riparian mitigation;

(v) Wildlife habitat rehabilitation;

(vi) Topsoil handling;

(vii) Revegetation;

(viii) Isolation and control of acid-forming, toxic, or deleterious materials;

(ix) Removal or stabilization of buildings, structures and support facilities; and

(x) Post-closure management;

(4) *Monitoring Plan.* A proposed plan for monitoring the effect of your

operations. You must design monitoring plans to meet the following objectives: To demonstrate compliance with the approved plan of operations and other Federal or State environmental laws and regulations, to provide early detection of potential problems, and to supply information that will assist in directing corrective actions should they become necessary. Where applicable, you must include in monitoring plans details on type and location of monitoring devices, sampling parameters and frequency, analytical methods, reporting procedures, and procedures to respond to adverse monitoring results. Monitoring plans may incorporate existing State or other Federal monitoring requirements to avoid duplication. Examples of monitoring programs which may be necessary include surface- and ground-water quality and quantity, air quality, revegetation, stability, noise levels, and wildlife mortality; and

(5) *Interim management plan.* A plan to manage the project area during periods of temporary closure (including periods of seasonal closure) to prevent unnecessary or undue degradation. The interim management plan must include, where applicable, the following:

(i) Measures to stabilize excavations and workings;

(ii) Measures to isolate or control toxic or deleterious materials (See also the requirements in § 3809.420(c)(4)(vii).);

(iii) Provisions for the storage or removal of equipment, supplies and structures;

(iv) Measures to maintain the project area in a safe and clean condition;

(v) Plans for monitoring site conditions during periods of non-operation; and

(vi) A schedule of anticipated periods of temporary closure during which you would implement the interim management plan, including provisions for notifying BLM of unplanned or extended temporary closures.

(c) In addition to the requirements of paragraph (b) of this section, BLM may require you to supply—

(1) Operational and baseline environmental information for BLM to analyze potential environmental impacts as required by the National Environmental Policy Act and to determine if your plan of operations will prevent unnecessary or undue degradation. This could include information on public and non-public lands needed to characterize the geology, paleontological resources, cave resources, hydrology, soils, vegetation, wildlife, air quality, cultural resources, and socioeconomic conditions in and around the project area, as well as information that may require you to conduct static and kinetic testing to characterize the potential for your operations to produce acid drainage or other leachate. BLM is available to advise you on the exact type of information and level of detail needed to meet these requirements; and

(2) Other information, if necessary to ensure that your operations will comply with this subpart.

(d) *Reclamation cost estimate.* At a time specified by BLM, you must submit an estimate of the cost to fully reclaim your operations as required by § 3809.552. BLM will review your reclamation cost estimate and notify you of any deficiencies or additional information that must be submitted in order to determine a final reclamation cost. BLM will notify you when we have determined the final amount for which you must provide financial assurance.

§ 3809.411 What action will BLM take when it receives my plan of operations?

(a) BLM will review your plan of operations within 30 calendar days and will notify you that—

(1) Your plan of operations is complete, that is, it meets the content requirements of § 3809.401(b);

(2) Your plan does not contain a complete description of the proposed operations under § 3809.401(b). BLM will identify deficiencies that you must address before BLM can continue processing your plan of operations. If necessary, BLM may repeat this process until your plan of operations is complete; or

(3) The description of the proposed operations is complete, but BLM cannot approve the plan until certain additional steps are completed, including one or more of the following:

(i) You collect adequate baseline data;

(ii) BLM completes the environmental review required under the National Environmental Policy Act;

(iii) BLM completes any consultation required under the National Historic Preservation Act, the Endangered Species Act, or the Magnuson-Stevens Fishery Conservation and Management Act;

(iv) BLM or the Department of the Interior completes other Federal responsibilities, such as Native American consultation;

(v) BLM conducts an on-site visit;

(vi) BLM completes review of public comments on the plan of operations;

(vii) For public lands where BLM does not have responsibility for managing the surface, BLM consults with the surface-managing agency;

(viii) In cases where the surface is owned by a non-Federal entity, BLM consults with the surface owner; and

(ix) BLM completes consultation with the State to ensure your operations will be consistent with State water quality requirements.

(b) Pending final approval of your plan of operations, BLM may approve any operations that may be necessary for timely compliance with requirements of Federal and State laws, subject to any terms and conditions that may be needed to prevent unnecessary or undue degradation.

(c) Following receipt of your complete plan of operations and before BLM acts on it, we will publish a notice of the availability of the plan in either a local newspaper of general circulation or a NEPA document and will accept public comment for at least 30 calendar days on your plan of operations.

(d) Upon completion of the review of your plan of operations, including analysis under NEPA and public comment, BLM will notify you that—

(1) BLM approves your plan of operations as submitted (See part 3810, subpart 3814 of this title for specific plan-related requirements applicable to operations on Stock Raising Homestead Act lands.);

(2) BLM approves your plan of operations subject to changes or conditions that are necessary to meet the performance standards of § 3809.420 and to prevent unnecessary or undue degradation. BLM may require you to incorporate into your plan of operations other agency permits, final approved engineering designs and plans, or other conditions of approval from the review of the plan of operations filed under § 3809.401(b); or

(3) BLM disapproves, or is withholding approval of your plan of operations because the plan:

(i) Does not meet the applicable content requirements of § 3809.401;

(ii) Proposes operations that are in an area segregated or withdrawn from the operation of the mining laws, unless the requirements of § 3809.100 are met; or

(iii) Proposes operations that would result in unnecessary or undue degradation of public lands. If BLM disapproves your plan of operations based on paragraph (4) of the definition of ''unnecessary or undue degradation'' in § 3809.5,BLM must include written findings supported by a record clearly demonstrating each element of paragraph (4), including—

(A) That approval of the plan of operations would create irreparable harm;

(B) How the irreparable harm is substantial in extent or duration;

(C) That the resources substantially irreparably harmed constitute significant scientific, cultural, or environmental resources; and

(D) How mitigation would not be effective in reducing the level of harm below the substantial or irreparable threshold.

§ 3809.412 When may I operate under a plan of operations?

You must not begin operations until BLM approves your plan of operations and you provide the financial guarantee required under § 3809.551.

§ 3809.415 How do I prevent unnecessary or undue degradation while conducting operations on public lands?

You prevent unnecessary or undue degradation while conducting operations on public lands by—

(a) Complying with § 3809.420, as applicable; the terms and conditions of your notice or approved plan of operations; and other Federal and State laws related to environmental protection and protection of cultural resources;

(b) Assuring that your operations are ''reasonably incident'' to prospecting, mining, or processing operations and uses as defined in § 3715.0–5 of this title; and

(c) Attaining the stated level of protection or reclamation required by specific laws in areas such as the California Desert Conservation Area, Wild and Scenic Rivers, BLM-administered portions of the National Wilderness System, and BLM-administered National Monuments and National Conservation Areas.

(d) Avoiding substantial irreparable harm to significant scientific, cultural, or environmental resource values of the public lands that cannot be effectively mitigated.

§ 3809.420 What performance standards apply to my notice or plan of operations?

The following performance standards apply to your notice or plan of operations:

(a) *General performance standards.*

(1) *Technology and practices.* You must use equipment, devices, and practices that will meet the performance standards of this subpart.

(2) *Sequence of operations.* You must avoid unnecessary impacts and facilitate reclamation by following a reasonable and customary mineral exploration, development, mining and reclamation sequence.

(3) *Land-use plans.* Consistent with the mining laws, your operations and post-mining land use must comply with the applicable BLM land-use plans and activity plans, and with coastal zone management plans under 16 U.S.C. 1451, as appropriate.

(4) *Mitigation.* You must take mitigation measures specified by BLM to protect public lands.

(5) *Concurrent reclamation.* You must initiate and complete reclamation at the earliest economically and technically feasible time on those portions of the disturbed area that you will not disturb further.

(b) *Environmental performance standards.*

(1) *Air quality.* Your operations must comply with applicable Federal, Tribal, State, and, where delegated by the State, local government laws and requirements.

(2) *Water.* You must conduct operations to minimize water pollution (source control) in preference to water treatment. You must conduct operations to minimize changes in water quantity in preference to water supply replacement. Your operations must comply with State water law with respect to water use and water quality.

(i) *Surface water.* (A) Releases to surface waters must comply with applicable Federal, Tribal, State, interstate, and, where delegated by the State, local government laws and requirements.

(B) You must conduct operations to prevent or control the discharge of pollutants into surface waters.

(ii) *Ground water.* (A) You must comply with State standards and other applicable requirements if your operations affect ground water.

(B) You must conduct operations to minimize the discharge of pollutants into ground water.

(C) You must conduct operations affecting ground water, such as dewatering, pumping, and injecting, to minimize impacts on surface and other natural resources, such as wetlands, riparian areas, aquatic habitat, and other features that are dependent on ground water.

(3) *Wetlands and riparian areas.* (i) You must avoid locating operations in wetlands and riparian areas where possible, minimize impacts on wetlands and riparian areas that your operations cannot avoid, and mitigate damage to wetlands and riparian areas that your operations impact.

(ii) Where economically and technically feasible, you must return disturbed wetlands and riparian areas to a properly functioning condition. Wetlands and riparian areas are functioning properly when adequate vegetation, land form, or large woody debris is present to dissipate stream energy associated with high water flows, thereby reducing erosion and improving water quality; filter sediment, capture bedload, and aid floodplain development; improve floodwater retention and ground-water recharge; develop root masses that stabilize streambanks against cutting action; develop diverse ponding and channel characteristics to provide the habitat and water depth, duration, and temperature necessary for fish production, waterfowl breeding, and other uses, and support greater biodiversity.

(iii) You must mitigate impacts to wetlands under the jurisdiction of the U.S. Army Corps of Engineers (COE) and other waters of the United States in accord with COE requirements.

(iv) You must take appropriate mitigation measures, such as restoration or replacement, if your operations cause the loss of nonjurisdictional wetland or riparian areas or the diminishment of their proper functioning condition.

(4) *Soil and growth material.* (i) You must remove, segregate, and preserve topsoil or other suitable growth material to minimize erosion and sustain revegetation when reclamation begins.

(ii) To preserve soil viability and promote concurrent reclamation, you must directly transport topsoil from its original location to the point of reclamation without intermediate stockpiling, where economically and technically feasible.

(5) *Revegetation.* You must—

(i) Revegetate disturbed lands by establishing a stable and long-lasting vegetative cover that is self-sustaining and, considering successional stages, will result in cover that is—

(A) Comparable in both diversity and density to pre-existing natural vegetation of the surrounding area; or

(B) Compatible with the approved BLM land-use plan or activity plan;

(ii) Take all reasonable steps to minimize the introduction of noxious weeds and to limit any existing infestations;

(iii) Use native species, when available, to the extent technically feasible. If you use non-native species, they must not inhibit re-establishment of native species;

(iv) Achieve success over the time frame approved by BLM; and

(v) Where you demonstrate revegetation is not achievable under this paragraph, you must use other techniques to minimize erosion and stabilize the project area, subject to BLM approval.

(6) *Fish, wildlife, and plants.* (i) You must minimize disturbances and adverse impacts on fish, wildlife, and related environmental values.

(ii) You must take any necessary measures to protect Federally proposed or listed threatened or endangered species, both plants and animals, or their proposed or designated critical habitat as required by the Endangered Species Act.

(iii) You must take any necessary action to minimize the adverse effects of your operations, including access, on BLM-defined special status species.

(iv) You must rehabilitate fisheries and wildlife habitat affected by your operations.

(7) *Cultural, paleontologic, and cave resources.* (i) You must not knowingly disturb, alter, injure, or destroy any scientifically important paleontologic remains or any historic, archaeologic, or cave-related site, structure, building, resource, or object unless —

(A) You identify the resource in your notice or plan of operations;

(B) You propose action to protect, remove or preserve the resource; and (C) BLM specifically authorizes such action in your plan of operations, or does not prohibit such action under your notice.

(ii) You must immediately bring to BLM's attention any previously unidentified historic, archaeologic, cave-related, or scientifically important paleontologic resources that might be altered or destroyed by your operations. You must leave the discovery intact until BLM authorizes you to proceed. BLM will evaluate the discovery and take action to protect, remove, or preserve the resource within 30 calendar days after you notify BLM of the discovery, unless otherwise agreed to by the operator and BLM, or unless otherwise provided by law.

(iii) BLM has the responsibility for determining who bears the cost of the investigation, recovery, and preservation of discovered historic, archaeologic, cave-related, and paleontologic resources, or of any human remains and associated funerary objects. If BLM incurs costs associated with investigation and recovery, BLM will recover the costs from the operator on a case-by-case basis, after an evaluation of the factors set forth in section 304(b) of FLPMA.

(c) *Operational performance standards.*

(1) *Roads and structures.* (i) You must design, construct, and maintain roads and structures to minimize erosion, siltation, air pollution and impacts to resources.

(ii) Where it is economically and technically feasible, you must use existing access and follow the natural contour of the land to minimize surface disturbance, including cut and fill, and to maintain safe design.

(iii) When commercial hauling on an existing BLM road is involved, BLM may require you to make appropriate arrangements for use, maintenance, and safety.

(iv) You must remove and reclaim roads and structures according to BLM land-use plans and activity plans, unless retention is approved by BLM.

(2) *Drill holes.* (i) You must not allow drilling fluids and cuttings to flow off the drill site.

(ii) You must plug all exploration drill holes to prevent mixing of waters from aquifers, impacts to beneficial uses, downward water loss, or upward water loss from artesian conditions.

(iii) You must conduct surface plugging to prevent direct inflow of surface water into the drill hole and to eliminate the open hole as a hazard.

(3) *Acid-forming, toxic, or other deleterious materials.* You must incorporate identification, handling, and placement of potentially acid-forming, toxic or other deleterious materials into your operations, facility design, reclamation, and environmental monitoring programs to minimize the formation and impacts of acidic, alkaline, metal-bearing, or other deleterious leachate, including the following:

(i) You must handle, place, or treat potentially acid-forming, toxic, or other deleterious materials in a manner that minimizes the likelihood of acid formation and toxic and other deleterious leachate generation (source control);

(ii) If you cannot prevent the formation of acid, toxic, or other deleterious drainage, you must minimize uncontrolled migration of leachate; and

(iii) You must capture and treat acid drainage, or other undesirable effluent, to the applicable standard if source controls and migration controls do not prove effective. You are responsible for any costs associated with water treatment or facility maintenance after project closure. Long-term, or post-mining, effluent capture and treatment are not acceptable substitutes for source and migration control, and you may rely on them only after all reasonable source and migration control methods have been employed.

(4) *Leaching Operations and Impoundments.* (i) You must design, construct, and operate all leach pads, tailings impoundments, ponds, and solution-holding facilities according to standard engineering practices to achieve and maintain stability and facilitate reclamation.

(ii) You must construct a low-permeability liner or containment system that will minimize the release of leaching solutions to the environment. You must monitor to detect potential releases of contaminants from heaps, process ponds, tailings impoundments, and other structures and remediate environmental impacts if leakage occurs.

(iii) You must design, construct, and operate cyanide or other leaching facilities and impoundments to contain precipitation from the local 100-year, 24-hour storm event in addition to the maximum process solution inventory. Your design must also include allowances for snowmelt events and draindown from heaps during power outages in the design.

(iv) You must construct a secondary containment system around vats, tanks, or recovery circuits adequate to prevent the release of toxic solutions to the environment in the event of primary containment failure.

(v) You must exclude access by the public, wildlife, or livestock to solution containment and transfer structures that contain lethal levels of cyanide or other solutions.

(vi) During closure and at final reclamation, you must detoxify leaching solutions and heaps and manage tailings or other process waste to minimize impacts to the environment from contact with toxic materials or leachate. Acceptable practices to detoxify solutions and materials include natural degradation, rinsing, chemical treatment, or equally successful alternative methods. Upon completion of reclamation, all materials and discharges must meet applicable standards.

(vii) In cases of temporary or seasonal closure, you must provide adequate maintenance, monitoring, security, and financial guarantee, and BLM may require you to detoxify process solutions.

(5) *Waste rock, tailings, and leach pads.* You must locate, design, construct, operate, and reclaim waste rock, tailings, and leach pads to minimize infiltration and contamination of surface water and ground water; achieve stability; and, to the extent economically and technically feasible, blend with pre-mining, natural topography.

(6) *Stability, grading and erosion control.* (i) You must grade or otherwise engineer all disturbed areas to a stable condition to minimize erosion and facilitate revegetation.

(ii) You must recontour all areas to blend with pre-mining, natural topography to the extent economically and technically feasible. You may temporarily retain a highwall or other

mine workings in a stable condition to preserve evidence of mineralization.

(iii) You must minimize erosion during all phases of operations.

(7) *Pit reclamation.* (i) Based on the site-specific review required in § 3809.401and the environmental analysis of the plan of operations, BLM will determine the amount of pit backfilling required, if any, taking into consideration economic, environmental, and safety factors.

(ii) You must apply mitigation measures to minimize the impacts created by any pits or disturbances that are not completely backfilled .

(iii) Water quality in pits and other water impoundments must comply with applicable Federal, State, and where appropriate, local government water quality standards. Where no standards exist, you must take measures to protect wildlife, domestic livestock, and public water supplies and users.

(8) *Solid waste.* (i) You must comply with applicable Federal, State, and where delegated by the State, local government standards for the disposal and treatment of solid waste, including regulations issued under the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act (42 U.S.C. 6901 *et seq.*).

(ii) You must remove from the project area, dispose of, or treat all non-mine garbage, refuse, or waste to minimize their impact.

(9) *Fire prevention and control.* You must comply with all applicable Federal and State fire laws and regulations, and take all reasonable measures to prevent and suppress fires in the project area.

(10) *Maintenance and public safety.* During all operations and after mining—

(i) You must maintain structures, equipment, and other facilities in a safe and orderly manner;

(ii) You must mark by signs or fences, or otherwise identify hazardous sites or conditions resulting from your operations to alert the public in accord with applicable Federal and State laws and regulations; and

(iii) You must restrict unaccompanied public access to portions of your operations that present a hazard to the public, consistent with §§ 3809.600 and 3712.1 of this title.

(11) *Protection of survey monuments.* (i) To the extent economically and technically feasible, you must protect all survey monuments, witness corners, reference monuments, bearing trees, and line trees against damage or destruction.

(ii) If you damage or destroy a monument, corner, or accessory, you must immediately report the matter to BLM. BLM will tell you in writing how to restore or re-establish a damaged or destroyed monument, corner, or accessory.

§ 3809.423 How long does my plan of operations remain in effect?

Your plan of operations remains in effect as long as you are conducting operations, unless BLM suspends or revokes your plan of operations for failure to comply with this subpart.

§ 3809.424 What are my obligations if I stop conducting operations?

(a) To see what you must do if you stop conducting operations, follow this table:

If—	Then—
(1) You stop conducting operations for any period of time	(1) You must follow your approved interim management plan submitted under § 3809.401(b)(5); (ii) You must submit a modification to your interim management plan to BLM within 30 calendar days if it does not cover the circumstances of your temporary closure per § 3809.431(a); (iii) You must take all necessary actions to assure that unnecessary or undue degradation does not occur; and (iv) You must maintain an adequate financial guarantee.
(2) The period of non-operation is likely to cause unnecessary or undue degradation.	The BLM will require you to take all necessary actions to assure that unnecessary or undue degradation does not occur, including requiring you, after an extended period of non-operation for other than seasonal operations, to remove all structures, equipment, and other facilities and reclaim the project area.
(3) Your operations are inactive for 5 consecutive years	BLM will review your operations and determine whether BLM should terminate your plan of operations and direct final reclamation and closure.
(4) BLM determines that you abandoned your operations	BLM may initiate forfeiture under § 3809.595. If the amount of the financial guarantee is inadequate to cover the costs of reclamation, BLM may complete the reclamation, and the operator and all other responsible persons are liable for the costs of such reclamation. See § 3809.336(a) for indicators of abandonment.

(b) Your reclamation and closure obligations continue until satisfied.

Modifications of Plans of Operations

§ 3809.430 May I modify my plan of operations?

Yes, you may request a modification of the plan at any time during operations under an approved plan of operations.

§ 3809.431 When must I modify my plan of operations?

You must modify your plan of operations when any of the following apply:

(a) Before making any changes to the operations described in your approved plan of operations;

(b) When BLM requires you to do so to prevent unnecessary or undue degradation; and

(c) Before final closure, to address impacts from unanticipated events or conditions or newly discovered circumstances or information, including the following:

(1) Development of acid or toxic drainage;

(2) Loss of surface springs or water supplies;

(3) The need for long-term water treatment and site maintenance;

(4) Repair of reclamation failures;

(5) Plans for assuring the adequacy of containment structures and the integrity of closed waste units;

(6) Providing for post-closure management; and (7) Eliminating hazards to public safety.

§ 3809.432 What process will BLM follow in reviewing a modification of my plan of operations?

(a) BLM will review and approve a modification of your plan of operations in the same manner as it reviewed and approved your initial plan under §§ 3809.401 through 3809.420; or

(b) BLM will accept a minor modification without formal approval if it is consistent with the approved plan of operations and does not constitute a substantive change that requires additional analysis under the National Environmental Policy Act.

§ 3809.433 Does this subpart apply to a new modification of my plan of operations?

To see how this subpart applies to a modification of your plan of operations that you submit to BLM after January 20, 2001, refer to the following table.

If you have an approved plan of operations on January 20, 2001	Then—
(a) *New facility.* You subsequently propose to modify your plan of operations by constructing a new facility, such as waste rock repository, leach pad, impoundment, drill site, or road.	The plan contents requirements (§ 3809.401) and performance standards (§ 3809.420) of this subpart apply to the new facility. Those facilities and areas not included in the modification may continue to operate under the terms of your existing plan of operations.
(b) *Existing facility.* You subsequently propose to modify your plan of operations by modifying an existing facility, such as expansion of a waste rock repository, leach pad, or impoundment; layback of a mine pit; or widening of a road.	The plan contents requirements (§ 3809.401) and performance standards (§ 3809.420) of this subpart apply to the modified portion of the facility, unless you demonstrate to BLM's satisfaction it is not practical to apply them for economic environmental, safety, or technical reasons. If you make the demonstration, the plan content requirements (43 CFR 3809.1–5) and performance standards (43 CFR 3809.1–3(d) and 3809.2–2) that were in effect immediately before January 20, 2001 apply to your modified facility. (See 43 CFR parts 1000–end, revised as of Oct. 1, 2000.)

§ 3809.434 How does this subpart apply to pending modifications for new or existing facilities?

(a) This subpart applies to modifications pending before BLM on January 20, 2001 to construct a new facility, such as a waste rock repository, leach pad, drill site, or access road; or to modify an existing mine facility such as expansion of a waste rock repository or leach pad.

(b) All provisions of this subpart, except plan content (§ 3809.401) and performance standards (§§ 3809.415 and 3809.420) apply to any modification of a plan of operations that was pending on January 20, 2001. See § 3809.505 for applicability of financial guarantee requirements.

(c) If your unapproved modification of a plan of operations is pending on January 20, 2001, then the plan content requirements (§ 3809.1–5) and the performance standards (§§ 3809.1–3(d) and 3809.2–2) that were in effect immediately before January 20, 2001 apply to your modification of a plan of operations. (See 43 CFR parts 1000–end, revised as of Oct. 1, 2000).

(d) If you want this subpart to apply to your pending modification of a plan of operations, where not otherwise required, you may choose to have this subpart apply.

Financial Guarantee Requirements—General

§ 3809.500 In general, what are BLM's financial guarantee requirements?

To see generally what BLM's financial guarantee requirements are, follow this table:

If—	Then—
(a) Your operations constitute casual use,	You do not have to provide any financial guarantee.
(b) You conduct operations under a notice or a plan of operations	You must provide BLM or the State a financial guarantee that meets the requirements of this subpart before starting operations operations. For more information, see §§ 3809.551 through under a 3809.573.

§ 3809.503 When must I provide a financial guarantee for my notice-level operations?

To see how this subpart applies to your notice, follow this table:

If—	Then—
(a) Your notice was on file with BLM on January 20, 2001	You do not need to provide a financial guarantee unless you modify the notice or extend the notice under § 3809.333.
(b) Your notice was on file with BLM before January 20, 2001 and you choose to modify your notice as required by this subpart on or after that date.	You must provide a financial guarantee before you can begin operations under the modified notice. If you modify your notice, you must post a finacial guarantee for the entire notice.
(c) You file a new notice on or after January 20, 2001	You must provide a financial guarantee before you can begin operations under the notice.

§ 3809.505 How do the financial guarantee requirements of this subpart apply to my existing plan of operations?

For each plan of operations approved before January 20, 2001, you must post a financial guarantee according to the requirements of this subpart no later than July 19, 2001 at the local BLM office with jurisdiction over the lands involved. You do not need to post a new financial guarantee if your existing financial guarantee satisfies this subpart.

§ 3809.551 What are my choices for providing BLM with a financial guarantee?

You must provide BLM with a financial guarantee using any of the 3 options in the following table:

If—	Then—
(a) You have only one notice or plan of operations, or wish to provide a financial guarantee for a single notice or plan of operations.	You may provide an individual financial guarantee that covers only the cost of reclaiming areas disturbed under the single notice or plan of operations. See §§ 3809.552 through 3809.556 for more information.
(b) You are currently operating under more than one notice or plan of operations.	You may provide a blanket financial guarantee covering statewide or nationwide operations. See § 3809.560 for more information.
(c) You do not choose one of the options in paragraphs (a) and (b) of this section.	You may provide evidence of an existing financial guarantee under State law or regulations. See §§ 3809.570 through 3809.573 for more information.

Individual Financial Guarantee

§ 3809.552 What must my individual financial guarantee cover?

(a) If you conduct operations under a notice or a plan of operations and you provide an individual financial guarantee, it must cover the estimated cost as if BLM were to contract with a third party to reclaim your operations according to the reclamation plan, including construction and maintenance costs for any treatment facilities necessary to meet Federal and State environmental standards. The financial guarantee must also cover any interim stabilization and infrastructure maintenance costs needed to maintain the area of operations in compliance with applicable environmental requirements while third-party contracts are developed and executed.

(b) BLM will periodically review the estimated cost of reclamation and the adequacy of any funding mechanism established under paragraph (c) of this section and require increased coverage, if necessary.

(c) When BLM identifies a need for it, you must establish a trust fund or other funding mechanism available to BLM to ensure the continuation of long-term treatment to achieve water quality standards and for other long term, post-mining maintenance requirements. The funding must be adequate to provide for construction, long-term operation, maintenance, or replacement of any treatment facilities and infrastructure, for as long as the treatment and facilities are needed after mine closure. BLM may identify the need for a trust fund or other funding mechanism during plan review or later.

§ 3809.553 May I post a financial guarantee for a part of my operations?

(a) Yes, BLM may authorize you to provide a financial guarantee covering a part of your operations if—

(1) Your operations do not go beyond what is specifically covered by the partial financial guarantee; and

(2) The partial financial guarantee covers all reclamation costs within the incremental area of operations.

(b) BLM will review the amount and terms of the financial guarantee for each increment of your operations at least annually.

§ 3809.554 How do I estimate the cost to reclaim my operations?

(a) You must estimate the cost to reclaim your operations as if BLM were hiring a third-party contractor to perform reclamation of your operations after you have vacated the project area. Your estimate must include BLM's cost to administer the reclamation contract. Contact BLM to obtain this administrative cost information.

(b) Your estimate of the cost to reclaim your operations must be acceptable to BLM.

§ 3809.555 What forms of individual financial guarantee are acceptable to BLM?

You may use any of the following instruments for an individual financial guarantee, provided that the BLM State Director has determined that it is an acceptable financial instrument within the State where the operations are proposed:

(a) Surety bonds that meet the requirements of Treasury Department Circular 570, including surety bonds arranged or paid for by third parties;

(b) Cash in an amount equal to the required dollar amount of the financial guarantee, to be deposited and maintained in a Federal depository account of the United States Treasury by BLM;

(c) Irrevocable letters of credit from a bank or financial institution organized or authorized to transact business in the United States;

(d) Certificates of deposit or savings accounts not in excess of the maximum insurable amount as set by the Federal Deposit Insurance Corporation; and

(e) Either of the following instruments having a market value of not less than the required dollar amount of the financial guarantee and maintained in a Securities Investors Protection Corporation insured trust account by a licensed securities brokerage firm for the benefit of the Secretary of the Interior, acting by and through BLM:

(1) Negotiable United States Government, State and Municipal securities or bonds; or

(2) Investment-grade rated securities having a Standard and Poor's rating of AAA or AA or an equivalent rating from a nationally recognized securities rating service.

(f) Insurance, if its form and function is such that the funding or enforceable pledges of funding are used to guarantee performance of regulatory obligations in the event of default on such obligations by the operator. Insurance must have an A.M. Best rating of ''superior'' or an equivalent rating from a nationally recognized insurance rating service.

§ 3809.556 What special requirements apply to financial guarantees described in § 3809.555(e)?

(a) If you choose to use the instruments permitted under § 3809.555(e) in satisfaction of financial guarantee requirements, you must provide BLM, before you begin operations and by the end of each calendar year thereafter, a certified statement describing the nature and

market value of the instruments maintained in that account, and including any current statements or reports furnished by the brokerage firm to the operator or mining claimant concerning the asset value of the account.

(b) You must review the market value of the account instruments by December 31 of each year to ensure that their market value continues to be not less than the required dollar amount of the financial guarantee. When the market value of the account instruments has declined by more than 10 percent of the required dollar amount of the financial guarantee, you must, within 10 calendar days after its annual review or at any time upon the written request of BLM, provide additional instruments, as defined in § 3809.555(e), to the trust account so that the total market value of all account instruments is not less than the required dollar amount of the financial guarantee. You must send a certified statement to BLM within 45 calendar days thereafter describing your actions to raise the market value of its account instruments to the required dollar amount of the financial guarantee. You must include copies of any statements or reports furnished by the brokerage firm to you documenting such an increase.

(c) If your review under paragraph (b) of this section demonstrates that the total market value of trust account instruments exceeds 110 percent of the required dollar amount of the financial guarantee, you may ask BLM to authorize a written release of that portion of the account that exceeds 110 percent of the required financial guarantee. BLM will approve your request only if you are in compliance with the terms and conditions of your notice or approved plan of operations.

Blanket Financial Guarantee

§ 3809.560 Under what circumstances may I provide a blanket financial guarantee?

(a) If you have more than one notice- or plan-level operation underway, you may provide a blanket financial guarantee covering statewide or nationwide operations instead of individual financial guarantees for each operation.

(b) BLM will accept a blanket financial guarantee if we determine that its terms and conditions are sufficient to comply with the regulations of this subpart.

State-Approved Financial Guarantee

§ 3809.570 Under what circumstances may I provide a State-approved financial guarantee?

When you provide evidence of an existing financial guarantee under State law or regulations that covers your operations, you are not required to provide a separate financial guarantee under this subpart if—

(a) The existing financial guarantee is redeemable by the Secretary, acting by and through BLM;

(b) It is held or approved by a State agency for the same operations covered by your notice(s) or plan(s) of operations; and

(c) It provides at least the same amount of financial guarantee as required by this subpart.

§ 3809.571 What forms of State-approved financial guarantee are acceptable to BLM?

You may provide a State-approved financial guarantee in any of the following forms, subject to the conditions in §§ 3809.570 and 3809.574:

(a) The kinds of individual financial guarantees specified under § 3809.555;

(b) Participation in a State bond pool, if—

(1) The State agrees that, upon BLM's request, the State will use part of the pool to meet reclamation obligations on public lands; and

(2) The BLM State Director determines that the State bond pool provides the equivalent level of protection as that required by this subpart; or

(c) A corporate guarantee that existed on January 20, 2001, subject to the restrictions on corporate guarantees in § 3809.574.

§ 3809.572 What happens if BLM rejects a financial instrument in my State-approved financial guarantee?

If BLM rejects a submitted financial instrument in an existing State-approved financial guarantee, BLM will notify you and the State in writing, with a complete explanation of the reasons for the rejection within 30 calendar days of BLM's receipt of the evidence of State-approved financial guarantee. You must provide BLM with a financial guarantee acceptable under this subpart at least equal to the amount of the rejected financial instrument.

§ 3809.573 What happens if the State makes a demand against my financial guarantee?

When the State makes a demand against your financial guarantee, thereby reducing the available balance, you must do both of the following:

(a) Notify BLM within 15 calendar days; and

(b) Replace or augment the financial guarantee within 30 calendar days if the available balance is insufficient to cover the remaining reclamation cost.

§ 3809.574 What happens if I have an existing corporate guarantee?

(a) If you have an existing corporate guarantee on January 20, 2001 that applies to public lands under an approved BLM and State agreement, your corporate guarantee will continue in effect. BLM will not accept any new corporate guarantees or increases to existing corporate guarantees. You may not transfer your existing corporate guarantee to another operator.

(b) If the State revises existing corporate guarantee criteria or requirements that apply to a corporate guarantee existing on January 20, 2001, the BLM State Director will review the revisions to ensure that adequate financial coverage continues. If the BLM State Director determines it is in the public interest to do so, the State Director may terminate a revised corporate guarantee and require an acceptable replacement financial guarantee after due notice and a reasonable time to obtain a replacement.

Modification or Replacement of a Financial Guarantee

§ 3809.580 What happens if I modify my notice or approved plan of operations?

(a) If you modify a notice or an approved plan of operations under § 3809.331 or § 3809.431 respectively, and your estimated reclamation cost increases, you must increase the amount of the financial guarantee to cover any estimated additional cost of reclamation and long-term treatment in compliance with § 3809.552.

(b) If you modify a notice or an approved plan of operations under § 3809.331 or § 3809.431 respectively, and your estimated reclamation cost decreases, you may request BLM decrease the amount of the financial guarantee for your operations.

§ 3809.581 Will BLM accept a replacement financial instrument?

(a) Yes, if you or a new operator have an approved financial guarantee, you may request BLM to accept a replacement financial instrument at any time after the approval of an initial instrument. BLM will review the offered instrument for adequacy and may reject any offered instrument, but will do so by a decision in writing, with a complete explanation of the reasons for the rejection, within 30 calendar days of the offering.

(b) A surety is not released from an obligation that accrued while the surety

bond was in effect unless the replacement financial guarantee covers such obligations to BLM's satisfaction.

§ 3809.582 How long must I maintain my financial guarantee?

You must maintain your financial guarantee until you or a new operator replace it with another adequate financial guarantee, subject to BLM's written concurrence, or until BLM releases the requirement to maintain your financial guarantee after you have completed reclamation of your operation according to the requirements of § 3809.320 (for notices), including any measures identified as the result of consultation with BLM under § 3809.313, or § 3809.420 (for plans of operations).

Release of Financial Guarantee

§ 3809.590 When will BLM release or reduce the financial guarantee for my notice or plan of operations?

(a) When you (the mining claimant or operator) have completed all or any portion of the reclamation of your operations in accordance with your notice or approved plan of operations, you may notify BLM that the reclamation has occurred and request a reduction in the financial guarantee or BLM approval of the adequacy of the reclamation, or both.

(b) BLM will then promptly inspect the reclaimed area. We encourage you to accompany the BLM inspector.

(c) For your plan of operations, BLM will either post in the local BLM office or publish notice of final financial guarantee release in a local newspaper of general circulation and accept comments for 30 calendar days. Subsequently, BLM will notify you, in writing, whether you may reduce the financial guarantee under § 3809.591, or the reclamation is acceptable, or both.

§ 3809.591 What are the limitations on the amount by which BLM may reduce my financial guarantee?

(a) This section applies to your financial guarantee, but not to any funding mechanism established under § 3809.552(c) to pay for long-term treatment of effluent or site maintenance. Calculation of bond percentages in paragraphs (b) and (c) of this section does not include any funds held in that kind of funding mechanism.

(b) BLM may release up to 60 percent of your financial guarantee for a portion of your project area when BLM determines that you have successfully completed backfilling; regrading; establishment of drainage control; and stabilization and detoxification of leaching solutions, heaps, tailings, and similar facilities on that portion of the project area.

(c) BLM may release the remainder of your financial guarantee for the same portion of the project area when—

(1) BLM determines that you have successfully completed reclamation, including revegetating the area disturbed by operations; and

(2) Any effluent discharged from the area has met applicable effluent limitations and water quality standards for one year without needing additional treatment, or you have established a funding mechanism under § 3809.552(c) to pay for long-term treatment, and any effluent discharged from the area has met applicable effluent limitations and water quality standards water for one year with or without treatment.

§ 3809.592 Does release of my financial guarantee relieve me of all responsibility for my project area?

(a) Release of your financial guarantee under this subpart does not release you (the mining claimant or operator) from responsibility for reclamation of your operations should reclamation fail to meet the standards of this subpart.

(b) Any release of your financial guarantee under this subpart does not release or waive any claim BLM or other persons may have against any person under the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended, 42 U.S.C. 9601 *et seq.*, or under any other applicable statutes or regulations.

§ 3809.593 What happens to my financial guarantee if I transfer my operations?

You remain responsible for obligations or conditions created while you conducted operations unless a transferee accepts responsibility under § 3809.116, and BLM accepts an adequate replacement financial guarantee. Therefore, your financial guarantee must remain in effect until BLM determines that you are no longer responsible for all or part of the operation. BLM can release your financial guarantee on an incremental basis. The new operator must provide a financial guarantee before BLM will allow the new operator to conduct operations.

§ 3809.594 What happens to my financial guarantee when my mining claim or millsite is patented?

(a) When your mining claim or millsite is patented, BLM will release the portion of the financial guarantee that applies to operations within the boundaries of the patented land. This paragraph does not apply to patents issued on mining claims within the boundaries of the California Desert Conservation Area.

(b) BLM will release the remainder of the financial guarantee, including the portion covering approved access outside the boundaries of the mining claim, when you have completed reclamation to the standards of this subpart.

Forfeiture of Financial Guarantee

§ 3809.595 When may BLM initiate forfeiture of my financial guarantee?

BLM may initiate forfeiture of all or part of your financial guarantee for any project area or portion of a project area if—

(a) You (the operator or mining claimant) refuse or are unable to conduct reclamation as provided in the reclamation measures incorporated into your notice or approved plan of operations or the regulations in this subpart;

(b) You fail to meet the terms of your notice or your approved plan of operations; or

(c) You default on any of the conditions under which you obtained the financial guarantee.

§ 3809.596 How does BLM initiate forfeiture of my financial guarantee?

When BLM decides to require the forfeiture of all or part of your financial guarantee, BLM will notify you (the operator or mining claimant) by certified mail, return receipt requested; the surety on the financial guarantee, if any; and the State agency holding the financial guarantee, if any, informing you and them of the following:

(a) BLM's decision to require the forfeiture of all or part of the financial guarantee;

(b) The reasons for the forfeiture;

(c) The amount that you will forfeit based on the estimated total cost of achieving the reclamation plan requirements for the project area or portion of the project area affected, including BLM's administrative costs; and

(d) How you may avoid forfeiture, including—

(1) Providing a written agreement under which you or another person will perform reclamation operations in accordance with a compliance schedule which meets the conditions of your notice or your approved plan of operations and the reclamation plan, and a demonstration that such other person has the ability to satisfy the conditions; and

(2) Obtaining written permission from BLM for a surety to complete the reclamation, or the portion of the reclamation applicable to the bonded

phase or increment, if the surety can demonstrate an ability to complete the reclamation in accordance with the reclamation measures incorporated in your notice or approved plan of operations.

§ 3809.597 What if I do not comply with BLM's forfeiture decision?

If you fail to meet the requirements of BLM's forfeiture decision provided under § 3809.596, and you fail to appeal the forfeiture decision under §§ 3809.800 to 3809.807, or the Interior Board of Land Appeals does not grant a stay under 43 CFR 4.321, or the decision appealed is affirmed, BLM will—

(a) Immediately collect the forfeited amount as provided by applicable laws for the collection of defaulted financial guarantees, other debts, or State bond pools; and

(b) Use funds collected from financial guarantee forfeiture to implement the reclamation plan, or portion thereof, on the area or portion of the area to which financial guarantee coverage applies.

§ 3809.598 What if the amount forfeited will not cover the cost of reclamation?

If the amount forfeited is insufficient to pay for the full cost of reclamation, the operators and mining claimants are jointly and severally liable for the remaining costs. BLM may complete or authorize completion of reclamation of the area covered by the financial guarantee and may recover from responsible persons all costs of reclamation in excess of the amount forfeited.

§ 3809.599 What if the amount forfeited exceeds the cost of reclamation?

If the amount of financial guarantee forfeited is more than the amount necessary to complete reclamation, BLM will return the unused funds within a reasonable amount of time to the party from whom they were collected.

Inspection and Enforcement

§ 3809.600 With what frequency will BLM inspect my operations?

(a) At any time, BLM may inspect your operations, including all structures, equipment, workings, and uses located on the public lands. The inspection may include verification that your operations comply with this subpart. See § 3715.7 of this title for special provisions governing inspection of the inside of structures used solely for residential purposes.

(b) At least 4 times each year, BLM will inspect your operations if you use cyanide or other leachate or where there is significant potential for acid drainage.

§ 3809.601 What types of enforcement action may BLM take if I do not meet the requirements of this subpart?

BLM may issue various types of enforcement orders, including the following:

(a) *Noncompliance order.* If your operations do not comply with any provision of your notice, plan of operations, or requirement of this subpart, BLM may issue you a noncompliance order; and

(b) *Suspension orders.* (1) BLM may order a suspension of all or any part of your operations after—

(i) You fail to timely comply with a noncompliance order for a significant violation issued under paragraph (a) of this section. A significant violation is one that causes or may result in environmental or other harm or danger or that substantially deviates from the complete notice or approved plan of operations;

(ii) BLM notifies you of its intent to issue a suspension order; and

(iii) BLM provides you an opportunity for an informal hearing before the BLM State Director to object to a suspension.

(2) BLM may order an immediate, temporary suspension of all or any part of your operations without issuing a noncompliance order, notifying you in advance, or providing you an opportunity for an informal hearing if—

(i) You do not comply with any provision of your notice, plan of operations, or this subpart; and

(ii) An immediate, temporary suspension is necessary to protect health, safety, or the environment from imminent danger or harm. BLM may presume that an immediate suspension is necessary if you conduct plan-level operations without an approved plan of operations or conduct notice-level operations without submitting a complete notice.

(3) BLM will terminate a suspension order under paragraph (b)(1) or (b)(2) of this section when BLM determines you have corrected the violation.

(c) *Contents of enforcement orders.* Enforcement orders will specify—

(1) How you are failing or have failed to comply with the requirements of this subpart;

(2) The portions of your operations, if any, that you must cease or suspend;

(3) The actions you must take to correct the noncompliance and the time, not to exceed 30 calendar days, within which you must start corrective action; and

(4) The time within which you must complete corrective action.

§ 3809.602 Can BLM revoke my plan of operations or nullify my notice?

(a) BLM may revoke your plan of operations or nullify your notice upon finding that—

(1) A violation exists of any provision of your notice, plan of operation, or this subpart, and you have failed to correct the violation within the time specified in the enforcement order issued under § 3809.601; or

(2) a pattern of violations exists at your operations.

(b) The finding is not effective until BLM notifies you of its intent to revoke your plan or nullify your notice, and BLM provides you an opportunity for an informal hearing before the BLM State Director.

(c) If BLM nullifies your notice or revokes your plan of operations, you must not conduct operations on the public lands in the project area, except for reclamation and other measures specified by BLM.

§ 3809.603 How does BLM serve me with an enforcement action?

(a) BLM will serve a noncompliance order, a notification of intent to issue a suspension order, a suspension order, or other enforcement order on the person to whom it is directed or his or her designated agent, either by—

(1) Sending a copy of the notification or order by certified mail or by hand to the operator or his or her designated agent, or by any means consistent with the rules governing service of a summons and complaint under rule 4 of the Federal Rules of Civil Procedure. Service is complete upon offer of the notification or order or of the certified mail and is not incomplete because of refusal to accept; or

(2) Offering a copy at the project area to the designated agent or to the individual who, based upon reasonable inquiry, appears to be in charge. If no such individual can be located at the project area, BLM may offer a copy to any individual at the project area who appears to be an employee or agent of the person to whom the notification or order is issued. Service is complete when the notice or order is offered and is not incomplete because of refusal to accept. Following service at the project area, BLM will send an information copy by certified mail to the operator or the operator's designated agent.

(b) BLM may serve a mining claimant in the same manner an operator is served under paragraph (a)(1) of this section.

(c) The mining claimant or operator may designate an agent for service of notifications and orders. You must provide the designation in writing to the

local BLM field office having jurisdiction over the lands involved.

§ 3809.604 What happens if I do not comply with a BLM order?

(a) If you do not comply with a BLM order issued under §§ 3809.601 or 3809.602, the Department of the Interior may request the United States Attorney to institute a civil action in United States District Court for an injunction or order to enforce its order, prevent you from conducting operations on the public lands in violation of this subpart, and collect damages resulting from unlawful acts. This relief may be in addition to the enforcement actions described in §§ 3809.601 and 3809.602 and the penalties described in §§ 3809.700 and 3809.702.

(b) If you fail to timely comply with a noncompliance order issued under § 3809.601(a), and remain in noncompliance, BLM may order you to submit plans of operations under § 3809.401 for current and future notice-level operations.

§ 3809.605 What are prohibited acts under this subpart?

Prohibited acts include, but are not limited to, the following:

(a) Causing any unnecessary or undue degradation;

(b) Beginning any operations, other than casual use, before you file a notice as required by § 3809.21 or receive an approved plan of operations as required by § 3809.412;

(c) Conducting any operations outside the scope of your notice or approved plan of operations;

(d) Beginning operations prior to providing a financial guarantee that meets the requirements of this subpart;

(e) Failing to meet the requirements of this subpart when you stop conducting operations under a notice (§ 3809.334), when your notice expires (§ 3809.335), or when you stop conducting operations under an approved plan of operations (§ 3809.424);

(f) Failing to comply with any applicable performance standards in § 3809.420;

(g) Failing to comply with any enforcement actions provided for in § 3809.601; or

(h) Abandoning any operation prior to complying with any reclamation required by this subpart or any order provided for in § 3809.601.

Penalties

§ 3809.700 What criminal penalties apply to violations of this subpart?

The criminal penalties established by statute for individuals and organizations are as follows:

(a) *Individuals.* If you knowingly and willfully violate the requirements of this subpart, you may be subject to arrest and trial under section 303(a) of FLPMA (43 U.S.C. 1733(a)). If you are convicted, you will be subject to a fine of not more than $100,000 or the alternative fine provided for in the applicable provisions of 18 U.S.C. 3571, or imprisonment not to exceed 12 months, or both, for each offense; and

(b) *Organizations.* If an organization or corporation knowingly and willfully violates the requirements of this subpart, it is subject to trial and, if convicted, will be subject to a fine of not more than $200,000, or the alternative fine provided for in the applicable provisions of 18 U.S.C. 3571.

§ 3809.701 What happens if I make false statements to BLM?

Under Federal statute (18 U.S.C. 1001), you are subject to arrest and trial before a United States District Court if, in any matter under this subpart, you knowingly and willfully falsify, conceal, or cover up by any trick, scheme, or device a material fact, or make any false, fictitious, or fraudulent statements or representations, or make or use any false writings or document knowing the same to contain any false, fictitious, or fraudulent statement or entry. If you are convicted, you will be subject to a fine of not more than $250,000 or the alternative fine provided for in the applicable provisions of 18 U.S.C. 3571 or imprisonment for not more than 5 years, or both.

§ 3809.702 What civil penalties apply to violations of this subpart?

(a)(1) Following issuance of an order under § 3809.601, BLM may assess a proposed civil penalty of up to $5,000 for each violation against you if you—

(i) Violate any term or condition of a plan of operations or fail to conform with operations described in your notice;

(ii) Violate any provision of this subpart; or

(iii) Fail to comply with an order issued under § 3809.601.

(2) BLM may consider each day of continuing violation a separate violation for purposes of penalty assessments.

(3) In determining the amount of the penalty, BLM must consider your history of previous violations at the particular mining operation; the seriousness of the violation, including any irreparable harm to the environment and any hazard to the health or safety of the public; whether you were negligent; and whether you demonstrate good faith in attempting to achieve rapid compliance after notification of the violation.

(4) If you are a small entity, BLM will, under appropriate circumstances including those described in paragraph (a)(3) of this section, consider reducing or waiving a civil penalty and may consider ability to pay in determining a penalty assessment.

(b) A final administrative assessment of a civil penalty occurs only after BLM has notified you of the assessment and given you opportunity to request within 30 calendar days a hearing by the Office of Hearings and Appeals. BLM may extend the time to request a hearing during settlement discussions. If you request a hearing, the Office of Hearings and Appeals will issue a decision on the penalty assessment.

(c) If BLM issues you a proposed civil penalty and you fail to request a hearing as provided in paragraph (b), the proposed assessment becomes a final order of the Department, and the penalty assessed becomes due upon expiration of the time allowed to request a hearing.

§ 3809.703 Can BLM settle a proposed civil penalty?

Yes, BLM may negotiate a settlement of civil penalties, in which case BLM will prepare a settlement agreement. The BLM State Director or his or her designee must sign the agreement.

Appeals

§ 3809.800 Who may appeal BLM decisions under this subpart?

(a) A party adversely affected by a decision under this subpart may ask the State Director of the appropriate BLM State Office to review the decision.

(b) An adversely affected party may bypass State Director review and directly appeal a BLM decision under this subpart to the Office of Hearings and Appeals (OHA) under part 4 of this title. See § 3809.801.

§ 3809.801 When may I file an appeal of the BLM decision with OHA?

(a) If you intend to appeal a BLM decision under this subpart, use the following table to see when you must file a notice of appeal with OHA:

If—	And—	Then if you intend to appeal, you must file a notice of appeal with OHA—
(1) You do not request State Director review	.....	Within 30 calendar days after the date you receive the original decision.
(2) You request State Director review	The State Director does not accept your request for review.	On the original decision within 30 calendar days of the date you receive the State Director's decision not to review.
(3) You request State Director review	The State Director has accepted your request for review, but has not made a decision on the merits of the appeal.	On the original decision before the State Director issues a decision.
(4) You request State Director review	The State Director makes a decision on the merits of the appeal.	On the State Director's decision within 30 calendar days of the date you receive, or are notified of, the State Director's decision.

(b) In order for OHA to consider your appeal of a decision, you must file a notice of appeal in writing with the BLM office where the decision was made.

§ 3809.802 What must I include in my appeal to OHA?

(a) Your written appeal must contain:

(1) Your name and address; and

(2) The BLM serial number of the notice or plan of operations that is the subject of the appeal.

(b) You must submit a statement of your reasons for the appeal and any arguments you wish to present that would justify reversal or modification of the decision within the time frame specified in part 4 of this chapter (usually within 30 calendar days after filing your appeal).

§ 3809.803 Will the BLM decision go into effect during an appeal to OHA?

All decisions under this subpart go into effect immediately and remain in effect while appeals are pending before OHA unless OHA grants a stay under § 4.21(b) of this title.

§ 3809.804 When may I ask the BLM State Director to review a BLM decision?

The State Director must receive your request for State Director review no later than 30 calendar days after you receive or are notified of the BLM decision you seek to have reviewed.

§ 3809.805 What must I send BLM to request State Director review?

(a) Your request for State Director review must be a single package that includes a brief written statement explaining why BLM should change its decision and any documents that support your written statement. Mark your envelope ''State Director Review.'' You must also provide a telephone or fax number for the State Director to contact you.

(b) When you submit your request for State Director review, you may also request a meeting with the State Director. The State Director will notify you as soon as possible if he or she can accommodate your meeting request.

§ 3809.806 Will the State Director review the original BLM decision if I request State Director review?

(a) The State Director may accept your request and review a decision made under this subpart. The State director will decide within 21 days of a timely filed request whether to accept your request and review the original BLM decision. If the State Director does not make a decision within 21 days on whether to accept your request for review, you should consider your request for State Director review declined, and you may appeal the original BLM decision to OHA.

(b) The State Director will not begin a review and will end an ongoing review if you or another affected party files an appeal of the original BLM decision with OHA under section § 3809.801 before the State Director issues a decision under this subpart, unless OHA agrees to defer consideration of the appeal pending a State Director decision.

(c) If you file an appeal with OHA after requesting State Director review, you must notify the State Director who, after receiving your notice, may request OHA to defer considering the appeal.

(d) If you fail to notify the State Director of your appeal to OHA, any decision issued by the State Director may be voided by a subsequent OHA decision.

§ 3809.807 What happens once the State Director agrees to my request for a review of a decision?

(a) The State Director will promptly send you a written decision, which may be based on any of the following:

(1) The information you submit;

(2) The original BLM decision and any information BLM relied on for that decision;

(3) Any additional information, including information obtained from your meeting, if any, with the State Director.

(b) Any decision issued by the State Director under this subpart may affirm the original BLM decision, reverse it completely, or modify it in part. The State Director's decision may incorporate any part of the original BLM decision.

(c) If the original BLM decision was published in the **Federal Register**, the State Director will also publish his or her decision in the **Federal Register**.

§ 3809.808 How will decisions go into effect when I request State Director review?

(a) The original BLM decision remains in effect while State Director review is pending, except that the State Director may stay the decision during the pendency of his or her review.

(b) The State Director's decision will be effective immediately and remain in effect, unless a stay is granted by OHA under § 4.21 of this title.

§ 3809.809 May I appeal a decision made by the State Director?

(a) An adversely affected party may appeal the State Director's decision to OHA under part 4 of this title, except that you may not appeal a denial of your request for State Director review or a denial of your request for a meeting with the State Director.

(b) Once the State Director issues a decision under this subpart, it replaces the original BLM decision, which is no longer in effect, and you may appeal only the State Director's decision.

Public Visits to Mines

§ 3809.900 Will BLM allow the public to visit mines on public lands?

(a) If requested by any member of the public, BLM may sponsor and schedule a public visit to a mine on public land once each year. The purpose of the visit is to give the public an opportunity to view the mine site and associated facilities. Visits will include surface areas and surface facilities ordinarily made available to visitors on public tours. BLM will schedule visits during normal BLM business hours at the

convenience of the operator to avoid disruption of operations.

(b) Operators must allow the visit and must not exclude persons whose participation BLM authorizes. BLM may limit the size of a group for safety reasons. An operator's representative must accompany the group on the visit. Operators must make available any necessary safety training that they provide to other visitors. BLM will provide the necessary safety equipment if the operator is unable to do so.

(c) Members of the public must provide their own transportation to the mine site, unless provided by BLM. Operators don't have to provide transportation within the project area, but if they don't, they must provide access for BLM-sponsored transportation.

PART 9260—LAW ENFORCEMENT—CRIMINAL

11. The authority citation for part 9260 continues to read as follows:

Authority: 16 U.S.C. 433; 16 U.S.C. 460l–6a; 16 U.S.C. 670j; 16 U.S.C. 1246(i); 16 U.S.C. 1338; 18 U.S.C. 1851–1861; 18 U.S.C. 3551 *et seq.*; 43 U.S.C. 315(a); 43 U.S.C. 1061, 1063; 43 U.S.C. 1733.

12. BLM is amending part 9260 by adding the text of subpart 9263 consisting of § 9263.1 to read as follows:

Subpart 9263—Minerals Management

§ 9263.1 Operations conducted under the 1872 Mining Law.

See subpart 3809 of this title for law enforcement provisions applicable to operations conducted on public lands under the 1872 Mining Law.

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