

**DEPARTMENT OF THE INTERIOR****Office of Surface Mining Reclamation and Enforcement****30 CFR Part 732**

RIN 1029-AC06

**Revisions to the State Program Amendment Process**

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

**SUMMARY:** We, the Office of Surface Mining Reclamation and Enforcement (OSM), are revising our regulations pertaining to the processing of State program amendments submitted by a State for approval under the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act). The specific regulations being revised govern the standards for determining when proceedings that lead to the substitution of Federal enforcement for all or part of an approved State program should be initiated because of the State's failure to amend its program as directed. These revisions provide us with the discretion to consider additional relevant factors regarding the performance of the State in effectively maintaining its program before determining that proceedings leading to the substitution of Federal enforcement are warranted. We are also revising our regulations that govern the time periods and schedule for processing State program amendments.

**EFFECTIVE DATE:** November 21, 2005.

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**SUPPLEMENTARY INFORMATION:**

- I. Background Information on the Rulemaking
- II. Discussion of the Revisions and Our Response to the Comments Submitted
- III. Procedural Matters and Required Determinations for This Rule

**I. Background Information on the Rulemaking***Why are we revising our regulations?*

On December 3, 2003 (68 FR 67776), we published proposed revisions to our regulations that govern the processing of State program amendments submitted by a State for approval under SMCRA. We proposed the revisions because of a perceived need to provide OSM with discretion to resolve issues affecting

approved State regulatory programs, their maintenance, and amendment. The revisions will allow us to focus our attention and resources on State program deficiencies that have adverse on-the-ground effects, or indicate that the State may not have the capability or intent to effectively administer and maintain all or part of its approved program. Our experience in processing State program amendments over the past 20 years has demonstrated a need for greater discretion when working in partnership with the States to maintain an effective nationwide program for the regulation of surface coal mining and reclamation operations. Recent developments with regard to the availability of future funding for States with approved programs have added to the need for revising our regulations. These reasons are discussed in greater detail in Section II where we describe the revisions we are making, the comments received on the proposed revisions, and our response to them. Before proceeding to Section II, we would like to provide some of the background information necessary for a better understanding of the regulatory plan established by SMCRA and the need for the revisions we are adopting today.

*What is an approved State program?*

Section 503 of SMCRA grants each State in which there are or may be surface coal mining and reclamation operations conducted on non-Federal lands the right to assume exclusive jurisdiction (primacy) over those operations. To assume primacy, the State must submit to the Secretary of the Interior (Secretary) for approval, a State program that demonstrates that the State has the capability for carrying out the provisions of SMCRA. As of the date of this rulemaking, 24 States have primacy. The implementing regulations at 30 CFR part 732 (hereinafter referred to as Part 732) provide the criteria and procedures for decisions to approve or disapprove submissions of State programs.

*What is a State program amendment?*

Although SMCRA does not specifically address the State program amendment process, by regulation at § 732.17, we provided the criteria and procedures for amending State programs in anticipation of a need to modify the programs as conditions or national rules change. For various reasons, such as legislative changes to the provisions of SMCRA, litigation resulting in adverse court decisions, or changes in coal mining technology, we are required to revise our regulations. As a result, all 24 States with approved State programs

may be required to amend their programs in order to be "no less effective" than the OSM regulatory program. Also, States may decide to amend their programs on their own initiative.

If we determine that a State program amendment is necessary, then, as required by § 732.17(d), we must notify the State regulatory authority of the need to amend its approved program. Within 60 days after notification, the State must submit (1) a proposed written amendment, or (2) a description of an amendment and a timetable for enactment that is consistent with established administrative or legislative procedures in the State. Pursuant to § 732.17(f)(2), the Director of OSM (Director) must begin proceedings under 30 CFR part 733 (hereinafter referred to as Part 733) if the State regulatory authority does not submit the proposed amendment or a description and timetable within the 60 days, does not subsequently comply with the submitted timetable, or if the amendment is not approved.

Another situation in which the Director may be required to begin Part 733 proceedings under 30 CFR 732.17(f)(2) involves an obligation called a "required amendment." When a deficiency has been identified in a State program and a State's proposed amendment to remedy that deficiency is incomplete, (i.e., when it fails to include all necessary elements or supporting documentation but does not actually conflict with the corresponding Federal requirement), we issue a final rule establishing additional requirements that the State must meet by submitting a new amendment. The new amendment, called a "required amendment," must resolve any deficiencies and noted inconsistencies. We consider a final rule imposing a "required amendment" to be the equivalent of the Part 732 notification required by § 732.17(c) and (d) and, therefore, subject to the provisions of § 732.17(f)(2) if the State fails to comply with the terms of a required amendment.<sup>1</sup>

*What is a Part 733 proceeding?*

If the Director has reason to believe that a State is not effectively implementing, administering, maintaining, or enforcing any part of its approved State program, then, under § 733.12(b), the Director must promptly notify the State regulatory authority in writing. The notification must provide sufficient information to allow the State

<sup>1</sup> See OSM Directive STP-1 (July 31, 2000) at 4.e, 4.f, and 4.1.

to determine what portions of the program the Director believes are not being effectively implemented, administered, maintained, or enforced; provide the reasons for such belief; and specify the time period for the State to accomplish any necessary remedial actions. If, after certain hearing procedures, the Director finds under § 733.12(e) that (1) the State has failed to effectively implement, administer, maintain, or enforce all or part of its approved State program, and (2) the State has not demonstrated its capability and intent to administer the State program, the Director must take one of the following actions. The Director must either initiate direct Federal enforcement of all or part of the State program; or recommend to the Secretary that he/she withdraw approval of the State program, in whole or in part, and establish a Federal program for the State.

*What are the consequences of a Part 733 Proceeding?*

The substitution of Federal enforcement under § 733.12(e) for all or part of an approved State program results in substantial disruption to the State, the Federal government, and the coal industry. We have initiated a Part 733 action ten times in our history. We initiated action under Part 733 in Oklahoma (1981, 1983, and 1993), Kansas (1983), Tennessee (1983), Montana (1993), Utah (1995), West Virginia (2001), Missouri (2003), and Ohio (2005). In the Montana, Utah, Kansas, West Virginia, and the 1981 and 1993 Oklahoma actions, the issues were resolved without Federal takeover of any part of the State programs. In three cases, we did take over partial enforcement of the State program—Oklahoma in 1984, Tennessee in 1984, and Missouri in 2003. In Oklahoma, the State took action to address the deficiencies, and full authority was returned to the State. In Tennessee, after we took over partial enforcement, the State chose to terminate its approved program and repealed the Tennessee Coal Surface Mining Act and its implementing regulations. We promulgated a Federal program for that State in 1984. After implementing the Federal program, we were required under section 504(d) of SMCRA to review all the permits issued by the State of Tennessee under the standards of the new Federal program. All coal operators who had posted bonds with the State for permits issued under the approved State program were required to post new bonds payable to the United States or execute assignments of the existing bonds. See 49 FR 38874

(October 1, 1984). The substitution of the Federal program in Tennessee resulted in delays in processing and issuing new coal permits in the State.

With regard to the situation in Missouri, on July 21, 2003, the Governor of Missouri notified us that the State was experiencing difficult budgetary and revenue shortfalls. As a result of the situation, the Governor requested assistance with permit reviews, inspection activities, and general oversight of the active coal mining operations in the State. The Governor indicated that he was hopeful his request would be temporary and that he would continue to work with the State legislature in an attempt to assure adequate funding for all State program responsibilities.

On August 4, 2003, we notified the Governor that we were obligated, in accordance with § 733.12(e), to substitute Federal enforcement for those portions of the Missouri program that were not fully funded and staffed. We cited problems with the State's implementation of the Missouri program in several areas including inspection, enforcement, permitting, and bonding activities. As a result of substituting Federal enforcement, we became responsible for, among other things, approximately 40 permitting actions, 24 inspectable units, and an unsuitability petition filed on October 20, 2003.

Missouri recently addressed the issues leading to the substitution of Federal enforcement by completing certain remedial actions. On May 27, 2005, the Governor petitioned OSM for the termination of Federal enforcement, we are in the process of reviewing the petition. For more details on the Part 733 action in Missouri, see 68 FR 50944, August 22, 2003, and 69 FR 19927, April 15, 2004.

The most recent Part 733 action was initiated on May 4, 2005, when we sent a letter to the State of Ohio concerning problems with its alternative bonding system. That matter is still pending.

While the Tennessee Federal program resulted from the termination of the State program by the State, and Federal enforcement in Missouri resulted from budgetary problems within the State, and neither resulted from a delinquent State program amendment, both provide an illustration of the difficulties and hurdles we face when we are required to take over a State program or substitute partial Federal enforcement.

*What are the problems with the current regulations?*

As previously mentioned, our regulations at § 732.17(f)(2) require us to begin proceedings against a State under

Part 733 when the State fails to (1) submit a requested amendment or description and timetable for enactment within 60 days from the receipt of notification, (2) comply with the submitted timetable, or (3) obtain approval of the program amendment.

While there may be circumstances in which the substance of an outstanding State program amendment is such that the State's failure to make the required submissions or obtain approval of the amendment may warrant proceedings under Part 733, that is not the case in most instances. As required by section 503(a)(1)–(7) of SMCRA and 30 CFR 731.14(g), each State program is required to contain approximately 17 systems involving permitting, lands unsuitability petitions, administrative and judicial review, inspection and enforcement, civil penalties, etc. Most deficiencies in State programs that we identify are either minor in nature or do not render any major system within an approved State program inoperable or ineffective, in whole or in part.<sup>2</sup> Nevertheless, under the standards of § 732.17(f)(2), the Director has no discretion and must begin proceedings under Part 733.

The standards for beginning Part 733 proceedings in all other circumstances are found at § 733.12(b), which specifies that:

If the Director has reason to believe that a State is not effectively implementing, administering, maintaining or enforcing any part of its approved State program, the Director shall promptly notify the State regulatory authority in writing.

By requiring the commencement of a Part 733 proceeding, the provisions of § 732.17(f)(2) seem to create an irrebuttable presumption that, under § 733.12(b), the "Director has reason to believe that a State is not effectively implementing, administering, maintaining or enforcing any part of its approved State program" when the timetable for submission has not been met or the amendment has not been approved. Once we initiate proceedings under Part 733, the Director may not substitute direct Federal enforcement for all or part of the State program or

<sup>2</sup> For an example of a required State program amendment, see 30 CFR 938.16(qqq) requiring that "[b]y January 6, 1998, Pennsylvania \* \* \* submit a proposed amendment to \* \* \* require that any applications for permit renewal be submitted at least 120 days before the permit expiration date." Also, see 30 CFR 948.16(l) requiring that "[b]y February 20, 2001, West Virginia must submit either a proposed amendment or a description of an amendment to \* \* \* provide that \* \* \* soil substitute material \* \* \* be equally suitable for sustaining vegetation as the existing topsoil and the resulting medium is the best available in the permit area to support vegetation."

recommend to the Secretary that he/she withdraw approval of the State program, unless the Director makes the findings required by § 733.12(e). In that regard, the Director must find that the State has both failed to implement, administer, maintain or enforce effectively all or part of its approved State program, and has not demonstrated its capability and intent to administer the State program. In a situation where there is only one outstanding amendment that is administrative in nature, with no resulting adverse on-the-ground effects, it is unlikely that the Director would be able to make the two findings required by § 733.12(e); nevertheless, under the current regulations, the Director would still be required to begin Part 733 proceedings.

*How were the regulations in § 732.17(f) developed?*

The regulations in § 732.17(f) were proposed on September 18, 1978 (43 FR 41662, 41678) and issued as final rules on March 13, 1979 (44 FR 14902, 14967), prior to OSM's having any experience in processing State program amendments. Section 732.17(f) was written under the assumption that, once a State had an approved State program, revisions to that program would be few and far between. In fact, while section 503 of SMCRA sets forth detailed information on the initial submission, resubmission, and approval of State programs, no detailed guidance is provided for amending an approved State program. The only place in SMCRA where amendments to approved State programs are discussed is in section 102(i) which states that one of the purposes of SMCRA is to "assure that appropriate procedures are provided for \* \* \* the public participation in the development, revision, and enforcement of regulations, standards, reclamation plans, or programs established by the Secretary or any State under this Act."

The 1979 regulations at § 732.17(f)(1) specified that:

If the State regulatory authority does not propose an amendment within 60 days from the receipt of the notice, or the amendment is not approved under this Paragraph, the Director shall begin proceedings under 30 CFR [part] 733, to either enforce that part of the State program affected or withdraw approval, in whole or in part, of the State program and implement a Federal program.

We proposed revising § 732.17(f)(1) on December 4, 1981 (46 FR 59482, 59487) because of the "difficult administrative burden" it imposed on the States by requiring them to submit a written amendment within 60 days after notification by the Director. The

1981 proposed revision allowed the State the option of either submitting the State program amendment within 60 days "or a description of an amendment to be proposed that meets the requirement of the Act, and this chapter, and a timetable for enactment which is consistent with established administrative or legislative procedures in the State." Some States, such as West Virginia, must have their regulations approved by the State legislature. One comment was submitted on the proposed revision and it was in support of the change. The proposed revision was adopted on June 17, 1982 (47 FR 26358) and it is the language that is currently in § 732.17(f)(2).

*Why are so many State program amendments required?*

As previously indicated, the regulations in Part 732 were most likely written under the assumption that, once a State program was approved, there would be few amendments required. Unfortunately, that has not been the case. The main reason for this is that nearly every time we issue a substantive Federal regulation, it ends up in litigation. As the United States Court of Appeals for the District of Columbia Circuit stated in 1991 in *National Wildlife Federation v. Lujan*, 950 F.2d 765, 767 (D.C. Cir. 1991), "[a]s night follows day, litigation follows rulemaking under this statute." The ongoing litigation has resulted in a substantial number of revisions to the Federal regulations.

Shortly after the permanent program rules were issued in 1979, challenges to them were filed in court by the coal industry, several States, and citizen and environmental groups. The court resolved those challenges in three opinions issued in 1980. While those opinions were on appeal to the United States Court of Appeals for the District of Columbia Circuit, OSM announced that it would promulgate revised regulations in order to allow the States and operators greater flexibility in how they achieved compliance with SMCRA. The main thrust of the revisions was a change from regulations that contained design criteria to those that contained performance standards. The revised regulations were in turn challenged by various citizens and environmental groups as well as coal industry representatives. Some challenged rules were upheld, while others had to be rewritten by OSM. Each time a rule had to be rewritten, States had to amend their programs. Currently, two significant OSM rules are the subject of pending litigation (Valid Existing Rights and Ownership and Control). Both will

require the submission of State program amendments from the 24 States with approved programs.

Beginning in 1991, we have tracked the number of State program amendments processed each year in our annual report. In the past 14 years, 1991–2004, a total of 1378 State program amendments (proposed and final) have been published in the **Federal Register**, for an average of approximately 100 per year. Each State program amendment may contain more than one issue. A December 27, 2001, final rule (66 FR 67010) issued on a Pennsylvania State program amendment analyzed over 140 separate issues and ordered the State to submit an additional 47 required amendments. Recently, a final rule (70 FR 8002; February 16, 2005) issued on a Montana State program amendment analyzed revisions to nine sections of the Montana Code Annotated. These examples give an indication of the work involved for both the States and OSM in maintaining State programs. This amount of work was never contemplated when the provisions of § 732.17(f) were promulgated in 1979 or were revised in 1982.

We believe that, in situations where the State has not submitted and obtained approval of an amendment within certain time periods, a less disruptive and more effective way to obtain the delinquent amendment is to continue discussions with the State, for a reasonable period of time, in an attempt to resolve issues rather than to automatically begin formal proceedings under Part 733. To automatically begin proceedings under Part 733, as currently required by § 732.17(f)(2), damages the working relationship we have with a State that has voluntarily agreed to work in partnership with OSM to implement and administer the provisions of Title V of SMCRA. This is particularly so when the nature of the delinquent amendment does not warrant such action.

## **II. Discussion of the Revisions and Our Response to the Comments Submitted**

*What are the revisions to § 732.17(f)(2)?*

Under the existing regulation in § 732.17(f)(2), the Director is required to begin proceedings either to enforce that part of the State program affected or to recommend to the Secretary that he/she withdraw approval, in whole or in part, and implement a Federal program, if (1) the State fails to submit a requested amendment or description and timetable for enactment within 60 days from the receipt of notification, (2) the State fails to comply with the submitted

timetable, or (3) the amendment is not approved.

In addition to making certain non-substantive editorial changes for clarity, this rule revises that requirement by adding the words "if the Director has reason to believe that such action is warranted because the State is not effectively implementing, administering, maintaining or enforcing all or part of its approved State program." The revised rule language in § 732.17(f)(2) will read as follows:

If the State regulatory authority does not submit the information required by paragraph (f)(1), or does not subsequently comply with the submitted timetable, or if the resulting proposed amendment is not approved under this section, then the Director must begin proceedings under 30 CFR part 733 if the Director has reason to believe that such action is warranted because the State is not effectively implementing, administering, maintaining or enforcing all or part of its approved State program.

By adding the words "if the Director has reason to believe that such action is warranted because the State is not effectively implementing, administering, maintaining or enforcing all or part of its approved State program," we are adopting the same standard set forth in § 733.12(b) that is used for commencing a Part 733 proceeding in all other situations. Therefore, under the revised regulations, in addition to the State's failure to (1) submit a requested amendment or description and timetable for enactment within 60 days from the receipt of notification, (2) comply with the submitted timetable, or (3) obtain OSM approval of an amendment submitted in response to the notification under paragraph (f)(1), there must also be a determination by the Director that commencement of a Part 733 proceeding is warranted because of circumstances that tend to indicate that the State is not effectively implementing, administering, maintaining or enforcing all or part of its approved State program. Those circumstances may be that one amendment of critical importance has been outstanding for a short period of time or they may be that a series of non-critical amendments have been outstanding for a long period of time with little or no effort on the part of the State to amend its program. Under our revision, the mere failure to meet a timetable, by itself, will no longer be sufficient to require the commencement of a Part 733 proceeding.

In the proposed rule, we had included a cross-reference to § 732.17(h)(8) in § 732.17(f)(2). Section 732.17(h)(8) provides for the submission of revised

State program amendments when the original submission is not approved. Section 732.17(f)(2), as it currently stands, is silent on the submission of revised amendments submitted pursuant to § 732.17(h)(8). There was no discussion of the inclusion of the cross-reference in the proposed rule, but the intent was to add clarity to the regulations by tying the two provisions together. After further consideration, we have concluded that, for two reasons, the cross-reference should not be included in the final rule language. First, the cross-reference is unnecessary because § 732.17(f)(2) pertains to a situation in which an amendment is "not approved under this section." The term "this section" refers to all of § 732.17, which includes paragraphs (a)–(h).

Second, there are situations in which our decision not to approve an amendment or amendment provision does not create an obligation on the part of the State to resubmit a revised version of the amendment or amendment provision. Such situations can occur when a State submits an amendment that, if approved, would make the approved State program less stringent than the Act or less effective than the Secretary's regulations. Under § 732.17(g), if we do not approve an amendment, it does not take effect and does not become part of the State program. Therefore, in the absence of a requirement to submit a new amendment, established by OSM in a final rule or other Part 732 notification, the State has no obligation to submit a revised version of an amendment that we did not approve. If we included the cross-reference to § 732.17(h)(8) in § 732.17(f)(2), and if we made the corresponding changes to § 732.17(h)(8) that we proposed, then the State would be obligated to submit a revised version of an amendment that we did not approve even if that revision is not required to make the State program no less stringent than the Act or no less effective than the Secretary's regulations.

One recent example of a situation in which there was no need for the State to resubmit an amendment that we did not approve involved a proposed State program amendment providing for the construction of durable rock fills with erosion protection zones (EPZs). EPZs are extensions of underdrains within durable rock fills that are used to control erosion, dissipate runoff from the fill, and enhance the stability of the durable rock fill. Under the proposed amendment, an EPZ could remain after mining if it was approved in the reclamation plan. Because the EPZ

resulted in additional stream loss without any apparent environmental benefit, the U.S. Environmental Protection Agency (EPA) conditioned its concurrence in our approval of the amendment on the addition of a requirement that all EPZs be removed after mining. In response to this EPA requirement, we did not approve the phrase, "Unless otherwise approved in the reclamation plan." In the absence of that clause, the remaining portion of the proposed State program amendment, which we approved, requires operators to remove EPZs after mining. Therefore, there was no need for the State to amend its regulatory program because, as provided by 30 CFR 732.17(g), the clause that we did not approve never became part of the State program.

Finally, we have inserted the words "resulting proposed" before "amendment" in paragraph (f)(2) to clarify that the provisions of that clause of that paragraph apply only to decisions on amendments that States propose in response to Part 732 notifications, not to decisions on amendments that States propose on their own initiative. This editorial clarification does not alter the meaning of the existing rule.

*What were the comments submitted on our proposed revisions to § 732.17(f)(2)?*

Two commenters stated that the proposal is irresponsible, in direct conflict with SMCRA, and is contrary to law because it is an abrupt reversal of agency regulatory policy without a rational and adequate basis. They asserted that the proposal eliminates a former regulation deemed necessary to assure proper implementation of SMCRA without replacing the removed provision with another equally permissible and effective mechanism for satisfying the Congressional goal.

We disagree. Federal courts have held that an agency's rules, once adopted, are not frozen in place. An agency may alter its rules in light of its accumulated experience in administering them. An agency must, however, offer a reasoned explanation for the change. *Citizens Awareness Network, Inc. v. United States*, 391 F.3d 338, 352 (1st Cir. 2004) (and cases cited therein). If an agency changes its course by rescinding a rule, it is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983). In reviewing actions by OSM to promulgate national rules, a court will use the criteria specified in section 526(a)(1) of SMCRA to determine if the

action was arbitrary, capricious, or otherwise inconsistent with law. In making that determination, the court will look to the authorizing statute, here SMCRA, to determine whether Congress has directly spoken to the precise question at issue. If the statute is silent or ambiguous, the court typically defers to the agency's reasoned interpretation to determine if the agency's action is based on a permissible construction of the statute. *Pennsylvania Coal Ass'n v. Babbitt*, 63 F.3d 231, 236 (3rd Cir. 1995) (and cases cited therein).

SMCRA does not specify any process for amending an approved State program other than the requirement for public participation found in section 102(i). The existing provisions in § 732.17, including the submission/approval process and time periods, were promulgated by OSM as permissible under the authority provided in SMCRA, but not mandated by SMCRA or its legislative history. The process in § 732.17(f)(2) requiring a Part 733 proceeding was initially proposed in 1978 and adopted in 1979 before OSM had extensive experience in processing State program amendments. Neither the preamble to the 1978 proposed rule nor the preamble to the 1979 final rule gives any explanation as to why § 732.17(f)(1) required the Director to begin Part 733 proceedings without first going into the reasoned determination required by § 733.12(b) for all other types of State deficiencies. The preambles give no indication the drafters of the regulations ever contemplated the volume of State program amendments that would be required by OSM, or the possibility that a delinquent program amendment might be so inconsequential to the effectiveness of the approved State program that Part 733 proceedings would not be warranted.

Although we are revising a longstanding agency standard, one based on timetables, we are replacing it with an OSM standard that is equally longstanding and one more rationally related to the findings required by § 733.12(e). The new standard for § 732.17(f)(2) is the same as the standard found in § 733.12(b) for determining when Part 733 proceedings should be initiated for all other types of State deficiencies. Adoption of this standard will give us the discretion needed to consider other relevant factors in determining when to initiate Part 733 proceedings against a State. Those factors include the importance of the outstanding amendment to the effectiveness of the approved State program, the effect its absence is having on the environment and public health and safety, and the lack of any

reasonable explanation for failing to comply with submission requirements. Our decision to initiate Part 733 proceedings will no longer be controlled primarily by timetables.

We proposed our revisions after many years of experience in processing State program amendments, and with a firm understanding of how difficult it can be for a State administrative agency to submit an amendment compatible with the Federal regulation, particularly when the submission requires action by the State legislature. In the preamble to the December 3, 2003, proposed rule (68 FR 67777), we stated that:

[I]n situations where the State has not submitted and obtained approval of a required amendment, a less disruptive and more effective way to obtain the required amendment is to work with the State at the staff level to discuss problems and resolve issues rather than automatically begin formal proceedings under Part 733. To automatically begin proceedings under Part 733, as currently required by 30 CFR 732.17(f)(2), damages the working relationship we have with a State that has voluntarily agreed to work in partnership with OSM to implement and administer the provisions of Title V of SMCRA.

SMCRA is very clear with regard to the State-Federal working relationship. Section 101(f) of SMCRA provides that the primary governmental responsibility for developing, authorizing, issuing, and enforcing regulations for surface coal mining and reclamation operations should rest with the States. Section 102(g) of SMCRA specifies that one of the purposes of SMCRA is to assist the States in developing and implementing a program to achieve the purposes of SMCRA.

It should be noted that, in support of the State-Federal working relationship envisioned by SMCRA, section 705(a) authorizes the Secretary to make an annual grant of up to 50 percent of the cost incurred by a State in administering and enforcing its approved regulatory program (a Title V grant). In addition, if a State has an approved State program under section 503 of SMCRA, and has an approved State Abandoned Mine Reclamation Program submitted under section 405(b) of SMCRA, then the State is entitled to an annual grant under section 405(c) for the reclamation of abandoned mine lands within the State (a Title IV grant). As an example of how this works, in Fiscal Year 2004, the State of West Virginia received a \$10,520,169 Title V grant from OSM for regulating surface coal mining under its approved State program. That sum was determined to be 50 percent of the cost of regulating surface coal mining within West Virginia. The State appropriated

and spent an additional \$10,520,169 of its own money to cover the remaining 50 percent of the regulatory program cost. As an inducement to, and in consideration for assuming Title V regulatory responsibility and spending \$10,520,169 of its own funds, the State received a Title IV abandoned mine land reclamation grant of \$33,040,900.

The ability to make Title IV grants available is dependent on the collection of a reclamation fee established by section 402(a) of SMCRA. The fee is assessed against each ton of coal produced. The authority to collect this fee was scheduled to expire on September 30, 2004, but was extended through June 30, 2005, by Pub. L. 108-447, then through September 30, 2005, by Pub. L. 109-13, and most recently through June 30, 2006, by the Department of the Interior, Environment, and Related Agencies Appropriations Act, 2006 (Pub. L. 109-54). At the writing of this rule, the prospects for the reauthorization of the reclamation fee beyond that date remain uncertain as do the prospects for Title IV grants in future years as existing funds are disbursed and no additional funds are collected.<sup>3</sup> If Title IV grant money is no longer available, the incentive for a State to continue to regulate surface coal mining operations at considerable expense to the State will be diminished. The threat inherent in a Part 733 proceeding lies not only in the resulting public embarrassment to the State but also in the potential loss of its approved State program and eligibility for Title IV grant money. If Title IV grant money is no longer available, the leverage we currently have from the threat of a Part 733 proceeding and the denial of grant money will be substantially diminished.

The possible loss of future Title IV grant money, and with it the incentive for a State to keep its approved regulatory program, provide another reason to revise our regulations. The revisions will provide the Director with the discretion needed to manage the State program amendment process and resolve issues with the States in a less confrontational manner.

Two commenters stated that the proposed rule would eliminate the current mandatory obligation (nondiscretionary duty) under § 732.17(f)(2) and section 504(a) of

<sup>3</sup> During calendar year 2004, at least seven reauthorization bills (H.R. 3778, H.R. 3796, H.R. 4529, S. 2049, S. 2086, S. 2208, and S. 2211), were introduced in Congress but none were enacted into law. As of August 2005, three reauthorization bills (H.R. 1600, H.R. 2721, and S. 961) have been introduced in Congress but none have been enacted into law.

SMCRA to commence proceedings to substitute Federal enforcement for all or part of an approved State program in the event of a failure on the part of the State regulatory authority to amend its approved State program. The commenters stated that the proposed revisions would significantly erode the accountability of the individual State regulatory programs, and, if adopted, would be in direct and irreconcilable conflict with the intent of Congress. In this regard, one commenter stated, Congress intended that the State regulatory programs approved under sections 503(a)(1)–(7) of SMCRA be maintained, administered, and enforced consistently with the Secretary's regulations and with the Secretary's mandatory obligations under sections 504 and 521 of SMCRA. One commenter stated that the mandatory duty in § 732.17(f)(2) to initiate a Part 733 proceeding follows directly from the mandatory duty in section 504(a)(3) of SMCRA. Where a State fails to make a timely submission of a required program amendment, it has "failed to \* \* \* maintain its approved State program" within the meaning of section 504(a)(3). At that point, the commenter stated, section 504(a)(3) does not give the Secretary discretion regarding what to do. It expressly mandates that the Secretary "shall" set in motion the process for promulgation and implementation of a Federal program. The commenter stated that the current, mandatory version of § 732.17(f)(2) is faithful to that mandatory statutory duty. The proposed revisions to § 732.17(f)(2), which would make the initiation of a Part 733 proceeding discretionary, would impermissibly conflict with the mandatory duty under section 504(a)(3) of SMCRA.

We disagree. Our revisions to § 732.17(f)(2) do not eliminate the Secretary's mandatory duty under sections 504(a)(3) and 521 of SMCRA. Section 504(a)(3) requires the Secretary to promulgate and implement a Federal program for a State if the State "fails to implement, enforce, or maintain its approved State program." Section 521(b) provides for Federal enforcement of all or part of an approved State program if the Secretary has reason to believe that violations of all or any part of the State program result from a failure of the State to enforce its program effectively. The provisions of section 504(a)(3) are implemented by our regulations at 30 CFR Parts 733 and 736; and the provisions of section 521(b) are implemented by our regulations at 30 CFR Parts 733, 842, and 843. Those

regulations are not being revised by this rule.

Our revisions to § 732.17(f)(2) do remove the mandatory requirement to begin Part 733 proceedings solely on the basis of a delinquent State program amendment. We are replacing that requirement with a process that requires a reasoned determination that Part 733 proceedings are warranted. Revised § 732.17(f)(2) will continue to lead to the same proceedings under §§ 733.12(b) and (e) as do the existing regulations in § 732.17(f)(2), but only after the Director has made that determination. By inserting the term "warrant" in § 732.17(f)(2), our revisions more closely align the standard for action under § 732.17(f)(2) with the standards of § 733.12(a)(2), "facts which \* \* \* establish the need for evaluation," with the standards of § 733.12(b), "reason to believe that a State is not effectively \* \* \* maintaining \* \* \* its approved State program," and with the factors specified in § 733.13 for determining whether to substitute Federal enforcement.

We do not believe that our revisions will erode the accountability of the individual States. The revised provisions in § 732.17(f)(2) incorporate Part 733 by reference and, therefore, provide for Federal enforcement when required. Section 733.12(a)(1) requires the Director to evaluate the administration of each State program annually, and section 733.12(a)(2) allows any interested person to request a State program evaluation. There remain, therefore, effective safeguards for State accountability.

One commenter stated that our proposed rule implicitly assumes that OSM would not have sufficient "reason to believe" that a State is violating SMCRA even though the State has failed to correct the deficiencies in OSM's Part 732 notification for more than 60 days, in violation of the deadline in § 732.17(f)(2). The commenter stated that this is an even more extreme view than OSM took in *West Virginia Highlands Conservancy v. Norton*, 161 F. Supp. 2d 676 (S.D. W. Va. 2001). In that case, in the government's June 29, 2001, Memorandum in Support of Its Motion to Dismiss, we stated that:

When a State fails to correct the deficiencies identified in the Part 732 notification to the State, OSM has reason to believe that the State is failing to effectively maintain its approved program, which is one of the thresholds for taking action under 30 CFR 733.12(b).

We acknowledge that in the past we have taken that position. We took it because the language in existing § 732.17(f)(2) requires the

commencement of Part 733 proceedings. Part 733 requires the Director to notify the State in writing "if the Director has reason to believe that a State is not effectively \* \* \* maintaining \* \* \* its approved State program." By implication, therefore, a failure under § 732.12(f)(2) results in "a reason to believe" under Part 733. Long experience has shown that if the State fails to meet a deadline or otherwise comply with the requirements of § 732.12(f)(2), there may be reasons for the failure which indicate that the failure is something other than the State's inability or unwillingness to effectively maintain any part of its approved State program. In the past, those reasons have included disagreements with OSM on the interpretation and intent of the program amendment that was submitted, State legislative and regulatory procedures that prohibited the State from complying in a timely fashion, and concerns by the State about complying with a Part 732 notification based on a Federal rule that is being litigated by both the environmental community and the coal industry.

Since 1982, the regulations in Part 733, which implement the provisions of section 504(a) of SMCRA, have used the terms "effectively" in §§ 733.12(b) and (e), and "adequately" in § 733.12(d) indicating that something less than perfect performance by the State is acceptable. In other words, not all defects in maintenance rise to the level where the Director has "reason to believe" that the State is failing to effectively maintain its program. To warrant action under Part 733, something more is needed than the mere failure to meet a timetable. Factors that could raise the defect in maintenance to an unacceptable level might be the importance of the outstanding amendment to the integrity and effectiveness of the State program, the effect its absence is having on the environment and public health and safety, or the lack of any mitigating circumstances for failing to comply with submission requirements. It is precisely because not all defects in maintenance do in fact provide a "reason to believe," and because there may be mitigating circumstances for the noncompliance or delayed compliance by a State that we are revising § 732.17(f)(2) in order to eliminate the irrebuttable presumption that "reason to believe" exists within the scope of § 733.12(b).

Two commenters stated that the current rulemaking is proposed against a backdrop of systemic failures, on the part of the Secretary and OSM, to comply with the current regulatory

mandate to commence Part 733 proceedings in the face of a State's refusal to submit required program amendments. To back their assertions, one commenter referred to a situation in the State of West Virginia where the State failed for 10 years to submit a required amendment to adequately fund its bonding program. In that case, citizens sued OSM in Federal court under the citizen suit provisions of section 520 of SMCRA in order to force OSM to take over the West Virginia bonding program. The second commenter referred to an issue in the Commonwealth of Kentucky and alleged that the Commonwealth had refused, over a period of years and in direct defiance of repeated OSM demands, to amend the State program concerning the exemption of public roads from the definition of "affected area."

We acknowledge that action under § 732.17(f)(2) has been taken only in limited instances even when the situation may have called for more timely and forceful action. Our reluctance to begin Part 733 proceedings should not be construed as an indication that we took no action to remedy State program deficiencies, because we dedicate considerable resources to oversight and the State program amendment process. Typically, discussions between OSM and the States on program amendments begin before submission, and continue throughout the review process that follows submission of the amendments. The communications, negotiations, and meetings between the State and OSM staff are, in many ways, equivalent to those required in §§ 733.12(b) and (c).<sup>4</sup> If the issues involved in the amendment are complex and/or numerous, the "back and forth" between the parties can be extensive.

On September 25, 2000, OSM's Acting Director sent a memorandum (administrative record document no. 22) to OSM's Regional Directors stating that one of the agency's program priorities for Fiscal Year 2001 would be to review individual State programs for any outstanding amendments. The memorandum directed OSM's Regional Offices to survey all State programs to determine what amendments or portions of amendments were outstanding, negotiate specific submission dates with the States, and

make those submission dates a part of each State's Fiscal Year 2001 work plan. Since commencement of that initiative, considerable progress has been made in reducing the backlog of outstanding amendments. The fact that OSM considered the amendment issue a program priority for Fiscal Year 2001, and chose to resolve that issue through negotiations with each of the 24 States rather than use the regulatory process established in § 732.17(f)(2), is a further indication of our belief that the § 732.17(f)(2) procedures are not appropriate for all situations in which there is an outstanding program amendment.

The West Virginia bonding issue was one of those situations where more timely and forceful Federal action was called for in order to remedy a longstanding problem with the State's alternative bonding program. OSM did commence a Part 733 proceeding against the State on June 29, 2001, after a citizen lawsuit had been filed. As a result of the Part 733 proceeding and the citizen lawsuit, the State submitted program amendments that remedied problems with the State's alternative bonding program and the Part 733 proceeding was terminated on June 20, 2002. As discussed in greater detail below, nothing in the revision to Part 732 would preclude the filing of a similar citizen suit at any time in the future.

With regard to the Kentucky roads issue, that matter was resolved by a letter dated April 1, 2004, in which we notified the Commonwealth of Kentucky that we had reconsidered our Part 732 letter dated August 22, 1988, that required Kentucky to revise its definition of "affected area." In the April 1, 2004, letter, we concluded that the Kentucky program provisions concerning public roads are currently no less effective than the counterpart Federal provisions. That letter illustrates our contention that unresolved issues with States over delinquent State program amendments do not necessarily indicate an unwillingness or failure on the part of the State to "maintain" its approved program. In that instance, there was a legitimate issue of whether any amendment from the State was really required.

One commenter stated that the Part 733 regulations give OSM substantial discretion over how to address deficiencies in the design, enforcement, or implementation of State regulatory programs. The commenter stated that the initiation of a Part 733 proceeding, whether pursuant to § 732.17(f)(2) or because OSM otherwise has reason to

believe that a State is not implementing or enforcing its approved program, does not inexorably result in substituted Federal enforcement or ouster of the State as the regulatory authority. The commenter, citing §§ 733.12(e), 733.12(g), and 733.13, stated that, before deciding whether to institute Federal enforcement for all or part of a State program, or to recommend complete or partial withdrawal of the approved State program, OSM must review "all available information" and must consider a number of factors. The commenter stated that there is no mandatory duty to take over enforcement or to replace a State program with a Federal program. Those actions may occur only if the Director or the Secretary, in his or her discretion, makes specific findings. See §§ 733.12(e) and (g)(2)(i). The commenter stated that the proposed rule does not explain why the discretion already available under Part 733 is insufficient to allow OSM to avoid any untoward impacts on its relationships with the States.

With regard to the discretion issue, the commenter fails to realize that it is the lack of discretion under § 732.17(f)(2) that is at issue. It is the commencement of Part 733 proceedings, when such proceedings are not warranted by the circumstances, that injures the working relationship we have with the States and wastes both State and Federal resources.

We agree with the commenter that, once a Part 733 action has been initiated and before Federal enforcement may commence, the Director, under § 733.12(e), must be able to find, based upon the review of all available information, that (1) the State has failed to implement, administer, maintain or enforce effectively all or part of its approved State program; and (2) the State has not demonstrated its capability and intent to administer the State program. In most instances, particularly those in which a State has submitted an amendment that we did not approve, it is unlikely that the Director, based upon the record, would be able to make both findings, particularly the second finding that the State has not demonstrated its intent to administer the State program. The commenter's argument clearly illustrates the problem created by the existing regulations. Under § 732.17(f)(2), we are required to begin proceedings under Part 733 even when the facts tend to indicate that the Director does not have "reason to believe" under § 733.12(b) and will be unable to make the findings required by § 733.12(e). This is precisely why we propose to revise § 732.17(f)(2) in order

<sup>4</sup> Section 733.12(b)(1) requires the Director to provide the State with sufficient information to allow the State to determine what portions of its program are not being effectively maintained and specify the time period for remedial action. Section 733.12(c) authorizes an informal conference between the parties to discuss the facts or the time period for accomplishing remedial action.

to prevent the Director from having to begin Part 733 proceedings in situations where proceedings do not appear to be warranted by the circumstances.

One commenter stated that the proposed revision is an indirect attack on congressional encouragement of citizen participation in, and enforcement of, SMCRA because citizens can only enforce nondiscretionary duties against OSM and primacy States. Another commenter stated that the true intended effect of the proposed rule is to limit and weaken the citizen suit remedy under SMCRA and that OSM's true agenda is not pro-Federalism, but anti-citizen suit.

OSM disagrees. Our revisions do not in any way prohibit citizens from participating in the enforcement of SMCRA. For example, under § 733.12(a)(2), any interested person may request that the Director evaluate a State program. Section 733.12(a)(2) specifies that:

Any interested person may request the Director to evaluate a State program. The request shall set forth a concise statement of the facts which the person believes establishes the need for evaluation. The Director shall verify the allegations and determine within 60 days whether or not the evaluation shall be made and mail a written decision to the requestor.

If the concise statement of facts submitted by the interested person establishes the need for an evaluation, the Director must begin proceedings under § 733.12(b), which specifies that:

If the Director has reason to believe that a State is not effectively implementing, administering, maintaining or enforcing any part of its approved State program, the Director shall promptly notify the State regulatory authority in writing. The Director's notice shall—

(1) Provide sufficient information to allow the State regulatory authority to determine what portions of the program the Director believes are not being effectively implemented, administered, maintained, or enforced;

(2) State the reasons for such belief; and

(3) Specify the time period for the State regulatory authority to accomplish any necessary remedial actions.

Finally, our revisions to § 732.17(f)(2) in no way affect the right of an individual to bring a citizen's suit under section 520(a) of SMCRA which provides in part as follows:

\* \* \* any person having an interest which is or may be adversely affected may commence a civil action on his own behalf to compel compliance with this Act—

(1) Against the United States or any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution which is alleged to be in violation of the provisions of

this Act or of any rule, regulation, order or permit issued pursuant thereto, or against any other person who is alleged to be in violation of any rule, regulation, order or permit issued pursuant to this title; or

(2) Against the Secretary or the appropriate State regulatory authority to the extent permitted by the eleventh amendment to the Constitution where there is alleged a failure of the Secretary or the appropriate State regulatory authority to perform any act or duty under this Act which is not discretionary with the Secretary or with the appropriate State regulatory authority.

Under section 520(a), an individual could commence a civil action against OSM if the Director failed to initiate a Part 733 proceeding against a State when such action is warranted based on a review of all available information. It should be noted that, in those situations where the State has submitted an amendment and the amendment either has not been approved or has been approved with a requirement to further amend the program, we publish the requirement to submit a new amendment in the **Federal Register** and codify the requirement in the Code of Federal Regulations (CFR) so that members of the public have notice of the outstanding amendment.<sup>5</sup> At any time, based on the information published in the CFR, an interested party, under § 733.12(a)(2), may request that the Director conduct an evaluation of the State program. In doing so, the requestor need only submit a concise statement of the facts that the person believes establish the need for such an evaluation.

Two commenters stated that OSM must measure the adequacy of State programs on a part-by-part basis and the trigger in Part 732 must be consistent with the remedy in Part 733 which requires that OSM take over Federal administration and partial enforcement if any part of an approved State program is not being maintained or enforced. The commenters stated that, in contrast, the proposed rule would make the Part 732 trigger (*i.e.*, deficient overall State performance) inconsistent with the Part 733 remedy (*i.e.*, takeover of all or part of a State program). The commenters stated that, under the proposed rule, a State could fall well below Federal standards in one part of its program, but avoid a Federal takeover by maintaining adequate "overall" performance of its program as a whole. According to the commenters, the proposed rule is therefore inconsistent with the clear language and intent of SMCRA.

<sup>5</sup> Each state is assigned a part number in Title 30 of the CFR, and in that part at section .16, we codify the requirement to submit an amendment. For examples, see 30 CFR 914.16 (Indiana), 948.16 (West Virginia), and 950.16 (Wyoming).

While we disagree with the commenters' analysis, we do agree that the language of the proposed rule should be clarified. We proposed adding the words "if the Director has reason to believe that such action is warranted because the State is not effectively implementing, administering, maintaining or enforcing its approved program", in order to provide the Director with the discretion to determine when proceedings should be started under Part 733. It was our intent under the proposed revision, that the State's failure to submit even a single program amendment by a specific date would be enough to require the Director to begin proceedings under Part 733 if that failure would likely result in a substantial deficiency in just one part of the State program or result in significant on-the-ground impacts, even if all else in the program were in good order. To make this absolutely clear, we are revising the language of the proposed rule by adding the words "all or part of" to the final rule. The language of § 732.17(f)(2) will then read as follows: "if the Director has reason to believe that such action is warranted because the State is not effectively implementing, administering, maintaining or enforcing all or part of its approved program."

One commenter stated that, in adopting the 1979 permanent program regulations (which contained language similar to the current § 732.17(f)(2) but required submission of the actual State program amendment, rather than a timetable for adoption), OSM rejected the suggestion that the State program amendment process be folded into Part 733. The commenter stated that this is the very outcome now proposed by OSM in adopting the Part 733 standard of overall effectiveness in determining whether to act to sanction a State for a knowing failure to maintain program currency.

We disagree. The comments discussed in the 1979 preamble (44 FR 14902, 14967; March 13, 1979) suggested relocating the amendment process or "appropriate amendment provisions" into Part 733 because the amendment process should be part of maintaining State programs, not part of the overall initial State program approval/disapproval process. OSM did not accept the suggestions and stated that "Part 733 is designed to address the State's actual implementation and administrative efforts." Our 1979 response failed to take into consideration that § 733.12(b) specifically uses the term "maintaining" and § 733.12(e) uses the term "maintain." It is obvious, therefore, that



one criterion in a Part 733 proceeding for determining State program effectiveness is maintenance, *i.e.*, keeping the State program current through the amendment process. The existing regulations at § 732.17(f)(2), by requiring Part 733 proceedings, incorporate Part 733 by reference thereby linking Parts 732 and 733 together. The rule we are promulgating today is consistent with the understanding that Parts 732 and 733 are linked.

One commenter stated that the Secretary, in proposing to delink the obligation to submit a program amendment from the sanctions of initiation of Part 733 proceedings, violates several aspects of SMCRA, including section 521(b), which is triggered any time that there is "reason to believe" that violations are resulting from a failure by the State to enforce a program or any part thereof effectively. The commenter stated that the failure of a State regulatory authority to promptly revise a State program when requested and to maintain program currency is a violation that should trigger a mandatory response by the Secretary. Further, the commenter argued that section 504(a) demands a Federal response when any part of a State program is not being properly administered, precluding the "overall" or "aggregate" approach being proposed by OSM in the proposed rule.

OSM disagrees. The commenter fails to realize that section 521(b) applies only when the State is failing to enforce its approved program. A delinquent amendment has yet to become part of the approved program, therefore, action under section 521(b) is inappropriate. With regard to the provisions of section 504(a) requiring promulgation and implementation of a Federal program for a State, those provisions are implemented by the regulations in Parts 733 and 736 and their application has been previously discussed in response to a similar comment.

One commenter stated that, with regard to the language in revised § 732.17(f)(2) which specifies that "the Director must begin proceedings under 30 CFR part 733 if the Director has reason to believe that such action is warranted," the belief of the Director should be documented in writing within a given time frame.

We agree. The Director's reason to believe would be documented when the Director sends notification to the State pursuant to § 733.12(b)(1) which requires the Director to provide sufficient information to allow the State regulatory authority to determine what portions of the State program the

Director believes are not being effectively implemented, administered, maintained, or enforced, and state the reasons for such belief.

One commenter stated that the reason proffered for removing the existing provisions is not a legitimate basis for action and is contrary to legislative intent. According to this commenter, even if we assume that the administrative record demonstrated that the existing regulatory framework has been unduly disruptive or costly, nowhere in the legislative history of SMCRA is administrative inconvenience or cost of implementation a value permitted to be considered, or a value to be exalted over the goals of assuring consistent implementation of SMCRA among the States. Instead, the commenter stated, throughout the legislative history and structure of SMCRA, the overarching goal of assuring consistency in adoption and implementation of SMCRA comes through.

We disagree. Federal rulemaking is governed by numerous provisions in addition to those found in SMCRA. For example, sections 3(f) and 6(a)(B) and (C) of Executive Order 12866—Regulatory Planning and Review (58 FR 51735; October 4, 1993), require a consideration of the costs and benefits in the development of regulations as well as their impacts on grants and the recipients thereof. Because Federal budgets are prepared two years in advance; the commencement of unanticipated Part 733 proceedings could result in funding shortfalls even if such proceedings did not result in Federal enforcement, and, therefore, should not be undertaken without regard for costs or the necessity of the action. Under the current regulations, OSM is required to begin a Part 733 proceeding if there is a delinquency of even one day. We think it prudent to allow more discretion to determine when to commence a Part 733 proceeding.

One commenter criticized our justifications for the proposed rule and stated that, despite the fact that the mandatory language in § 732.17(f)(2) has been on the books for nearly 25 years, OSM now contends that there is a problem with § 732.17(f)(2), namely that it is too disruptive. The commenter stated that the proposed rule mentions two varieties of disruption: (1) The "substantial disruption to the State, the Federal government, and the coal industry that results from the substitution of Federal enforcement," and (2) interference with "the working relationship OSM has with a State." The commenter recounted OSM's history

regarding Part 733 proceedings in which OSM did take over partial enforcement of a State program and stated that there is no current problem with substituted Federal enforcement, and even if there is, it does not result from the fact that initiation of Part 733 proceedings required under § 732.17(f)(2) is mandatory. The commenter further stated that, to the extent the proposed rule is intended to avoid the substantial disruption of substituted Federal enforcement, it is a non-solution to a non-problem. Another commenter criticized our statement that a Part 733 proceeding as required by § 732.17(f)(2) damages the working relationship we have with a State that has voluntarily agreed to work in partnership with OSM to implement and administer the provisions of Title V of SMCRA. The commenter stated that OSM did not and is unable to present a single example supporting this assertion. The commenter stated that, in 26 years, OSM has initiated just nine Part 733 actions and that the rarity of these actions and the extreme rarity of Part 733 actions initiated pursuant to § 732.17(f)(2) show that proceedings initiated under § 732.17(f)(2) have not created problems with Federal-State relationships. The commenter further stated that OSM should not be wasting its resources and rulemaking efforts on hypothetical problems for which there are no real world examples and that without real world examples one cannot determine whether the proposed amendment or some other course of action is the proper solution.

We disagree. The potential for unwarranted disruption exists as long as the requirements of existing § 732.17(f)(2) remain unchanged. Section 732.17(f)(2) requires us to automatically initiate Part 733 proceedings without taking into consideration an individual State's effectiveness in maintaining its approved program. Had OSM initiated a Part 733 proceeding each time a minor State program amendment was delinquent by even one day, as required by § 732.17(f)(2), the disruption in Federal-State relations would have been significant and the complaints from the States and Congressional delegations noticeable. While the examples of Part 733 actions given in the proposed rule (Tennessee and Missouri) did not result from actions commenced as a result of § 732.17(f)(2), they do provide an illustration of the disruptive effects resulting from the substitution of Federal enforcement.

Eliminating the requirement to automatically begin Part 733 proceedings when the circumstances

surrounding a delinquent State program amendment do not warrant such action, will help us preserve the positive working relationship we have developed with State regulatory authorities over the years. The revisions are also consistent with the requirements of Executive Order 13132 on Federalism (64 FR 43255; August 10, 1999). Section 3(c) of Executive Order 13132 states that “[w]ith respect to Federal statutes and regulations administered by the States, the national government shall grant the States the maximum administrative discretion possible. Intrusive Federal oversight of State administration is neither necessary nor desirable.”

One commenter stated that, if OSM had a reputation for strictly complying with its mandatory duty under § 732.17(f)(2), the disincentive of a Part 733 proceeding would spur States to comply with the program amendment submission deadlines in § 732.17(f)(1). Conversely, the failure of States to take the 60-day submission deadline seriously may simply be a symptom of OSM’s failure to abide by its mandatory duty under § 732.17(f)(2).

We cannot say if strictly complying with the mandatory requirements under § 732.17(f)(2) would have resulted in all States consistently meeting the timelines for submitting a State program amendment. Each State’s rulemaking process is different; one State may require its rules to be approved by its State legislature while another State does not. It is just as likely that, had we initiated a Part 733 proceeding when there was a delinquent State program amendment, the State might have shifted resources from a higher priority issue in order to prepare for the informal conference authorized under § 733.12(c) or the public hearing under § 733.12(d), or decided that, given the number of amendments being required and the time allowed, it would be better for the State to give up its regulatory program.

*What are the revisions to §§ 732.17(h)(1)–(13) and what were the comments submitted?*

#### Section 732.17(h)(1)

Paragraph (h)(1) currently requires that we publish in the **Federal Register** a notice of receipt of a State program amendment within 10 days after receiving it from the State. We propose increasing the time from 10 days to 30 days because we have found it nearly impossible to meet the 10-day time period. When the regulations were originally written, State program amendments were received and

processed at OSM’s Headquarters in Washington, DC. In 1995, the authority to process State program amendments was delegated to OSM’s three regional offices so that they could work more closely with the States in their regions. This has increased the amount of time needed to obtain final clearance from the Washington office for publication in the **Federal Register**. Also, the Office of the Federal Register needs four days after receipt to schedule the publication of proposed and final rules. That leaves only six days for OSM’s regional offices to draft a **Federal Register** notice and transmit it by mail to the Washington office for additional clearance prior to publication.

One commenter was opposed to the extension of the 10-day period to 30 days as being unnecessary and unjustified. The commenter stated that it is ironic that, in an era of simultaneous electronic submission of data, the agency has become less capable of timely transmitting and processing of information.

We disagree. While most documents can be transmitted electronically, the Office of the Federal Register still requires three hard copies of a document with an original signature which means that the document needs to be hand carried or mailed to the Office of the Federal Register. The Office of the Federal Register is in the process of initiating a pilot program using electronic signatures, but for the time being we are required to transmit paper documents with original signatures. In addition, the Congressional Review Act provisions of the Small Business Regulatory Enforcement Fairness Act (5 U.S.C. 801 *et seq.*) require us to file a copy of each final rule with both houses of Congress and with the Comptroller General. The rule cannot take effect until this requirement is met, and the filing requirement adds to the time it takes to publish a document.

#### Section 732.17(h)(2)(v)

Paragraph (h)(2)(v) currently requires that we publish a schedule for review and action on a State program amendment. Experience has shown that schedules usually change because of extensions of the comment period and delays in obtaining comments from other government agencies. Because these schedules are variable and unreliable, we are removing the requirement. No comments were received on this revision.

#### Section 732.17(h)(8)

Paragraph (h)(8) currently allows the State regulatory authority 30 days to

submit a revised amendment for consideration if its original submission is not approved. Experience has shown that 30 days is insufficient time for the State to accomplish the submission. Because of this, we are increasing the time frame from 30 days to either 60 days or, if more time may be needed by the State, by a date specified by the Director after considering the circumstances of the situation and the established administrative or legislative procedures in the State in question. This will provide the State with a more realistic time frame within which to act.

In the proposed rule, we included the following sentence in paragraph (h)(8): “If no submission is made, then the Director must follow the procedures specified in paragraph (f)(2) of this section.” This language was added for clarity in order to tie the provisions of § 732.17(h)(8) to § 732.17(f)(2). However, as discussed in the analysis of § 732.17(f)(2), our decision not to approve a provision of a proposed State program amendment does not necessarily mean that the approved State program is less stringent than the Act or less effective than the Federal regulations. This is most likely to be true with respect to proposed amendments that the State submits on its own initiative. In those situations where we decide not to approve a proposed amendment and the lack of approval does not result in a situation in which the approved State program no longer meets Federal requirements, there is no reason to require that the State resubmit a revised amendment. Consequently, we are not including the proposed sentence in the final rule. We have also slightly revised the first sentence of paragraph (f)(2) to conform to the elimination of the second sentence; i.e., to clarify that submission of a revised amendment is not always necessary following an OSM decision to not approve a proposed State program amendment.

Two commenters requested that the time frame in § 732.17(h)(8) be extended from 60 to 90 days to allow even more time for submitting a revised amendment. We did not accept the suggestion because the rule provides sufficient flexibility to address situations in which 60 days is inadequate.

One commenter objected to certain language added to § 732.17(h)(8) in the proposed rule. The language objected to reads as follows: “or a time frame consistent with the established administrative or legislative procedure in the State, whichever is later.” The commenter stated that, as drafted, the language makes it impossible to tell

when a State's submission of a revised program amendment is due. The commenter suggested that we remove the language "or a time frame consistent with the established administrative or legislative procedure in the State, whichever is later." As an alternative to that language, the commenter proposed that § 732.17(h)(8) authorize the Director to specify, at the time he issues his disapproval of a State program amendment, an alternative date to the 60-day deadline. This alternative date would be based on the circumstances and the Director's familiarity with the practices of the State in question and the deadline would be clearly stated in the notice of disapproval either as a date certain or as a specific number of days from the publication of the notice of disapproval.

We have accepted the commenter's second suggestion. We had proposed revising § 732.17(h)(8) in order to take into consideration an individual State's established administrative or legislative procedures and to provide the State with a period of time that considers those procedures. It was not our intention to leave the deadline for submitting the revised amendment completely indeterminate. The commenter's suggestion is consistent with our intent and we have, therefore, revised § 732.17(h)(8) to adopt the suggestion that the revised rule require that the Director specify a date by which the State must submit a revised amendment.

#### Section 732.17(h)(9)

Paragraph (h)(9) is being shortened and simplified by cross referencing the processing provisions in paragraph (h) rather than reiterating the procedures specified in paragraph (h)(9). No comments were received on this revision.

#### Section 732.17(h)(12)

Paragraph (h)(12) currently requires that, within 10 days after approving or not approving a State program amendment, the decision must be published in the **Federal Register**. We propose increasing the time period from 10 days to 30 days for the same reasons as discussed for the revisions of paragraph (h)(1) above. See our previous response to comments submitted on this same issue in our revisions to § 732.17(h)(1).

#### Section 732.17(h)(13)

We revised paragraph (h)(13) by deleting the cross reference to the schedule in paragraph (h)(2)(v) because, as previously discussed, we deleted that paragraph. We also revised the time

frame for our final decision on a State program amendment by increasing the time allowed from six months to seven months to allow for the increase in time from 10 to 30 days to publish documents in the **Federal Register**.

One commenter stated that, for State-initiated program amendments, the State would like to see a time frame for review and decision by OSM that is less than the seven months allowed for an amendment required by OSM.

We decline to accept the commenter's suggestion. We increased the time period for processing from six months to seven months to accommodate the additional time needed to publish documents. The time needed to publish a document remains the same whether the amendment is initiated by OSM or the State.

With regard to the processing times specified in the regulations, the general rule is that a statutory or regulatory time period is not mandatory unless it both expressly requires an agency to act within a particular time period and also specifies a consequence for failure to comply. This is true even if the term "shall" is used. Where no such consequence is specified, the time period is regarded as directory only, intended to guide the agency procedures but not to set inflexible requirements. See, *Holland v. Pardee Coal Co.*, 269 F.3d 424, 432 (4th Cir. 2001); *In re Siggers*, 132 F.3d 333, 336 (6th Cir. 1997). Each State program amendment is unique and deals with legal and technical issues of various complexity. Because of this, each amendment requires a different period of time to process. The six month time period was chosen in 1979 because that was the time allowed in section 503(b)(4) of SMCRA for the Secretary to approve or disapprove a State program. We thought a similar time period would be appropriate for all State program amendments, but that has not been the case. While the time frame for processing a State program amendment is directory in nature, we will endeavor to process all amendments in the shortest amount of time possible.

One commenter stated that there should be a conflict resolution process to resolve an impasse when no decision has been made on a submitted program amendment after seven months.

We did not accept the suggestion. If OSM has not made a decision on the amendment within six months (and we acknowledge that that happens), it is because there are significant issues that have to be resolved. During the initial months following submission, there is considerable discussion between the OSM Regional Office, the OSM Field

Office with jurisdiction over the State, the Interior Department legal staff, and the State itself to resolve issues and reach decisions. This discussion is in the nature of a conflict resolution process. If the issues are complicated and/or numerous, the back and forth between OSM and the State can well exceed six months—especially if an issue letter has been sent to the State. If a decision cannot be reached at the staff level, then the Regional Director, acting under authority delegated by the Director, makes a decision. Unfortunately, complicated issues cannot always be resolved in six months (the current time frame). We note that the time for processing a State program amendment varies from State to State and is often influenced by the degree to which the State's submission varies from the Federal rule. Those States that adopt the Federal rule unchanged have shorter processing times than those States that submit variations of the Federal rule for approval.

One commenter stated a preference for the term "disapprove," currently found in paragraph (h)(8), rather than our revision which uses the term "not approve." The commenter stated that no explanation for this change was provided in the preamble to the proposed rule.

We revised the language in paragraph (h)(8) and (h)(9) in order to conform it with language contained in § 732.17(f)(2).

One commenter requested that we add a procedure that allows for submittal of clarifications of program amendments without extending the processing time specified in (h)(13).

We did not accept the commenter's suggestion. If the response submitted by the State is nothing more than a clarification, then the processing time would not be extended. If the response submitted by the State results in a significant change in the interpretation of the amendment, it could result in an extension of the processing time if we are required to reopen the comment period.

One commenter stated that he would like to see a procedure that allows for program amendments that have no Federal counterpart or are outside the scope of SMCRA to take effect immediately upon publication of the initial **Federal Register** notice. Also, the commenter stated he would like to see a procedure that allows for program amendments that adopt Federal rules verbatim to take effect immediately upon publication of the initial **Federal Register** document.

We did not accept the suggestion. A similar concept was considered by OSM

in a 1981 proposed rule and rejected. The rule would have provided for “automatic approval” of an amendment unless we notified the State within 60 days of the receipt of the amendment that the amendment should be subject to the usual notice and comment procedures for processing State program amendments. In the final rule (47 FR 26356, 26361; June 17, 1982), we stated that “OSM has carefully reviewed all of the comments received on this proposed rule and has determined that the public participation requirements of the Act and rulemaking requirements of the APA [Administrative Procedure Act] preclude approval of amendments without some procedure for public notice and comment.” We believe that the requirement for public participation is applicable to the types of amendments suggested by the commenter.

### III. Procedural Matters and Required Determinations for This Rule

#### *Executive Order 12866—Regulatory Planning and Review*

This document is considered a significant rule under Executive Order 12866 and is subject to review by the Office of Management and Budget. Based on the discussion in the preamble, and the following information, it has been determined that:

a. The rule will not have an annual effect of \$100 million or more on the economy, and will not adversely affect in a material way the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or Tribal governments or communities. The rule is procedural in nature and will not impose any new compliance costs on the coal industry or State governments. Its anticipated benefits are difficult to monetize because they result primarily from the potential administrative costs savings to the Federal government that ensue when the Federal government is not required to immediately begin Part 733 proceedings for minor State program deficiencies. While the rule’s benefits are difficult to monetize, OSM does not expect the rule to result in more than \$100 million per year in cost savings. If we assume, for the purpose of illustration, that every State that has primacy had a minor deficiency which OSM would determine does not warrant further action under this rule, the rule could potentially save the costs of a hearing or \$2,650 per State, or \$63,600 total (24 primacy States × \$2,650 hearing cost per State). However, even in those situations where a Part 733

action is initiated, the matter may be resolved prior to going to the hearing stage. Nevertheless, even if the potential savings would not be fully realized, OSM believes this rule should be adopted because the flexibility it provides will allow OSM to determine which deficiencies are substantive and warrant the expense involved in holding formal proceedings including hearings and which can be better addressed through informal means.

b. This rule will not create a serious inconsistency or otherwise interfere with an action taken or planned by another agency.

c. This rule does not alter the budgetary effects of entitlements, grants, user fees, or loan programs or the rights or obligations of their recipients.

d. This rule may raise novel legal or policy issues which is why it is considered significant under Executive Order 12866.

#### *Regulatory Flexibility Act*

The Department of the Interior certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). This rule will not affect small entities. The revisions to Part 732 will affect the manner in which program amendments submitted by the States (currently 24) with approved State programs are processed. As previously stated, the revisions are not expected to have an adverse economic impact. Further, the rule produces no adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States enterprises to compete with foreign-based enterprises in domestic or export markets.

#### *Small Business Regulatory Enforcement Fairness Act*

For the reasons previously stated, this rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This rule:

a. Does not have an annual effect on the economy of \$100 million or more.

b. Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions.

c. Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises for the reasons stated above.

#### *Unfunded Mandates*

This rule does not impose an unfunded mandate on State, local, or Tribal governments or the private sector of more than \$100 million per year. The rule does not have a significant or unique effect on State, Tribal, or local governments or the private sector. A statement containing the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*) is not required.

#### *Executive Order 12630—Takings*

In accordance with Executive Order 12630, the rule does not have significant takings implications. The revisions are procedural in nature and do not affect private property.

#### *Executive Order 12988—Civil Justice Reform*

In accordance with Executive Order 12988, the Office of the Solicitor has determined that this rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Order.

#### *Executive Order 13132—Federalism*

In accordance with Executive Order 13132, the rule does not have significant Federalism implications to warrant the preparation of a Federalism Assessment for the reasons discussed above.

#### *Executive Order 13175—Consultation and Coordination With Indian Tribal Governments*

In accordance with Executive Order 13175, we have evaluated the potential effects of this rule on Federally-recognized Indian tribes and have determined that the proposed revisions pertaining to actions under Part 733 would not have substantial direct effects on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes.

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

This rule is not considered a significant energy action under Executive Order 13211. The revisions to the provisions governing the processing of State program amendments and the time frames for their publication will not have a significant effect on the supply, distribution, or use of energy.

#### *Paperwork Reduction Act*

This rule does not alter the information collection requirements currently approved for Part 732.

Therefore, approval by the Office of Management and Budget is not required.

*National Environmental Policy Act*

OSM has determined that this rulemaking action is categorically excluded from the requirement to prepare an environmental document under the National Environmental Policy Act of 1969, as amended, 42 U.S.C. 4332 *et seq.* In addition, we have determined that none of the "extraordinary circumstances" exceptions to the categorical exclusion apply. This determination was made in accordance with the Departmental Manual (516 DM 2, Appendixes 1.9 and 2).

*How Will This Rule Affect State Programs?*

Following publication of a final rule, we will evaluate the State and Indian programs approved under section 503 of SMCRA to determine any changes in those programs that may be necessary. When we determine that a particular State program provision should be amended, the State will be notified in accordance with the provisions of 30 CFR 732.17. We have made a preliminary determination that no State program revisions will be required.

**List of Subjects in 30 CFR Part 732**

Intergovernmental relations, Reporting and recordkeeping requirements, Surface mining, Underground mining.

Dated: August 11, 2005.

**Rebecca W. Watson,**  
*Assistant Secretary, Land and Minerals Management.*

■ Accordingly, we are amending 30 CFR part 732 as set forth below.

**PART 732—PROCEDURES AND CRITERIA FOR APPROVAL OR DISAPPROVAL OF STATE PROGRAM SUBMISSIONS**

■ 1. The authority citation for part 732 continues to read as follows:

**Authority:** 30 U.S.C. 1201 *et seq.* and 16 U.S.C. 470 *et seq.*

■ 2. Section 732.17 is amended by:

■ a. Revising paragraphs (f)(2), (h)(1), (h)(8), (h)(9), (h)(12), and (h)(13);

■ b. Amending paragraph (h)(2)(iv) by removing “; and” at the end of the paragraph and adding a period in its place; and

■ c. Removing paragraph (h)(2)(v).

The amendments read as follows:

**§ 732.17 State program amendments.**

\* \* \* \* \*

(f) \* \* \*

(2) If the State regulatory authority does not submit the information required by paragraph (f)(1), or does not subsequently comply with the submitted timetable, or if the resulting proposed amendment is not approved under this section, then the Director must begin proceedings under 30 CFR part 733 if the Director has reason to believe that such action is warranted because the State is not effectively implementing, administering, maintaining or enforcing all or part of its approved State program.

\* \* \* \* \*

(h) \* \* \*

(1) Within 30 days after receipt of a State program amendment from a State regulatory authority, the Director will publish a notice of receipt of the amendment in the **Federal Register**.

\* \* \* \* \*

(8) If the Director does not approve the amendment request, the State regulatory authority will have 60 days after publication of the Director’s decision to submit a revised amendment for consideration by the Director. If more time may be needed by the State to submit a revised amendment, the Director may grant more time by specifying in the decision, a date by which the State regulatory authority must submit a revised amendment. The date specified in the Director’s decision should be based on the circumstances of the situation and the established administrative or legislative procedures of the State in question.

(9) The Director will approve or not approve revised amendment submissions in accordance with the provisions under paragraph (h) of this section.

\* \* \* \* \*

(12) All decisions approving or not approving program amendments must be published in the **Federal Register** and will be effective upon publication unless the notice specifies a different effective date. The decision approving or not approving program amendments will be published in the **Federal Register** within 30 days after the date of the Director’s decision.

(13) Final action on all amendment requests must be completed within seven months after receipt of the proposed amendments from the State.

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