■ 2. Revise paragraph (b)(1) and the first sentence of paragraph (c) of § 75.336 to read as follows:

§ 75.336 Sampling and monitoring requirements.

* * * * *

(b) * * *

(1) Except as provided in § 75.336(d), the atmosphere in the sealed area is considered inert when the oxygen concentration is less than 10.0 percent or the methane concentration is less than 3.0 percent or greater than 20.0 percent.

* * * * *

(c) Except as provided in § 75.336(d), when a sample is taken from the sealed atmosphere with seals of less than 120 psi and the sample indicates that the oxygen concentration is 10 percent or greater and methane is between 4.5 percent and 17 percent, the mine operator shall immediately take an additional sample and then immediately notify the District Manager. * * *

* * * * *

Dated: May 8, 2008.

Jack Powasnik,

Deputy Director, Office of Standards, Regulations and Variances.

[FR Doc. E8–10662 Filed 5–13–08; 8:45 am]

BILLING CODE 4510–43–P

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 926

[SATS No.: MT–026/027–FOR; Docket ID: OSM–2008–0006]

Montana Regulatory Program

AGENCY: Office of Surface Mining Reclamation and Enforcement, Interior.

ACTION: Final rule; approval of amendment.

SUMMARY: We are approving amendments to the Montana regulatory program (the Montana program) under the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act). Montana proposed revisions to, additions to, and deletions from its program statutes and corresponding regulations about: procedures for contested case hearings; permit fees and surety bonds; applications for increase or reduction in permit area; prospecting permits; refusal of permits; submission of actions on reclamation plans; required area mining bonds and alternative plans; planting of vegetation following grading of disturbed areas; determination of successful reclamation and final bond release; noncompliance, and suspension of permits; violations, penalties, and waivers; penalty factors; and collection of penalties, fees, late fees, and interest. Montana intends to revise its program to be consistent with the corresponding Federal regulations and SMCRA, clarify ambiguities, and improve operational efficiency.

DATES: *Effective Date:* May 14, 2008.

FOR FURTHER INFORMATION CONTACT: Jeffrey W. Fleischman, Telephone: 307.261.6550, E-mail address: *jfleischman@osmre.gov*.

SUPPLEMENTARY INFORMATION:

I. Background on the Montana Program

Section 503(a) of the Act permits a State to assume primacy for the regulation of surface coal mining and reclamation operations on non-Federal and non-Indian lands within its borders by demonstrating that its State program includes, among other things, ''a State law which provides for the regulation of surface coal mining and reclamation operations in accordance with the requirements of this Act * * *; and rules and regulations consistent with regulations issued by the Secretary pursuant to this Act.'' 30 U.S.C. 1253(a)(1) and (7). On the basis of these criteria, the Secretary of the Interior conditionally approved the Montana program on April 1, 1980. You can find background information on the Montana program, including the Secretary's findings, the disposition of comments, and conditions of approval of the Montana program in the April 1, 1980, **Federal Register** (45 FR 21560). You can also find later actions concerning Montana's program and program amendments at 30 CFR 926.15, 926.16, and 926.30.

Rules for the Montana program are contained in the Administrative Rules of Montana (ARM), Title 17 Chapter 24 (ARM 17.24.101 through 17.24.1820) entitled ''Reclamation.'' The enabling statutes for the Montana program are contained generally under Montana Code Annotated (MCA) Title 82 (MCA 82–1–101 through 82–15–207) entitled ''Minerals, Oil, and Gas,'' and more specifically, under Chapter 4 (MCA 82–4–101 through 82–4–1002) entitled ''Reclamation'' and Chapter 4, Part 2 (MCA 82–4–201 through 82–4–254) entitled ''Coal and Uranium Mine Reclamation.'' Provisions for penalties, fees, and interest are found in Chapter 4, Part 10 (MCA 82–4–1001 through 82–4–1002) and procedures for initiating and holding contested case administrative hearings are found in Chapter 4, Part 2 (MCA 82–4–206) and under Title 2, Chapter 4, Part 6 (MCA 2–4–601 through 2–4–631). Provisions providing for judicial review of contested case decisions are found under Title 2, Chapter 4, Part 7 (MCA 2–4–701 through 2–4–711).

II. Submission of the Proposed Amendments

By letter dated January 18, 2006, Montana sent us a proposed amendment to its program (MT–026–FOR, Administrative Record No. MT–23–1) under SMCRA (30 U.S.C. 1201 *et seq.*). Montana sent the amendment in response to an April 2, 2001, letter that we sent in accordance with 30 CFR 732.17(c) (pertaining to valid existing rights). The proposed amendment also includes revisions in response to changes in Montana's statutes enacted in 2005. The provisions of the MCA that Montana proposes to revise or add are:

MCA 82–4–206, Procedure for contested case hearings; MCA 82–4–223, Permit fee and surety bond; MCA 82–4–225, Application for increase or reduction in permit area; MCA 82–4–226, Prospecting permit; MCA 82–4–227, Refusal of permit; MCA 82–4–231, Submission of and action on reclamation plan; MCA 82–4–232, Area mining required—bond—alternative plan; MCA 82–4–233, Planting of vegetation following grading of disturbed area; MCA 82–4–235, Determination of successful reclamation—final bond release; MCA 82–4–251, Noncompliance—suspension of permits; MCA 82–4–254, Violation—penalty—waiver; MCA 82–4–1001, Penalty factors; and MCA 82–4–1002, Collection of penalties, fees, late fees, and interest.

We announced receipt of the proposed amendment in the March 27, 2006, **Federal Register** (71 FR 15090). In the same document, we provided opportunity for public comment and a public hearing or meeting on the amendment's adequacy (Administrative Record No. MT–23–5). The public comment period ended on April 26, 2006.

In addition to the proposed changes to its statute, by letter dated November 6, 2006, Montana sent us proposed changes to its program rules (MT–027–FOR, Administrative Record No. MT–24–1). These changes reflect the revisions to the statute submitted on January 18, 2006. In its November 6, 2006 letter, Montana suggested that the

regulatory changes be combined with the January 18, 2006 submittal for purposes of conducting a more efficient review. We announced receipt of the proposed rule changes in the February 6, 2007, **Federal Register** (FR 5377). In the same document, we provided opportunity for public comment and a public hearing or meeting on the amendment's adequacy (Administrative Record No. MT–24–6). The public comment period ended on March 8, 2007.

We did not hold a public hearing or meeting for either proposal because no one requested one. We received one public comment which is discussed under section IV below. This document contains our decision and findings for both submissions.

III. OSM's Findings

Following are the findings we made concerning the amendments under SMCRA and the Federal regulations at 30 CFR 732.15 and 732.17.

1. Montana proposed revisions to 82–4–206, MCA, to provide that an applicant, permittee, or person with an interest that is or may be adversely affected may request a hearing before the Board of Environmental Review (Board) on decisions of the Department of Environmental Quality (Department) pertaining to (a) approval or denial of an application for a permit pursuant to 82–4–231; (b) approval or denial of an application for a prospecting permit pursuant to 82–4–226; (c) approval or denial of an application to increase or reduce a permit area pursuant to 82–4–225; (d) approval or denial of an application to renew or revise a permit pursuant to 82–4–221; or (e) approval or denial of an application to transfer a permit pursuant to 82–4–238 or 82–4–250.

In its proposed revision to 82–4–206, MCA, Montana changes the phrase from ''persons aggrieved by a final decision of the Department'' to ''applicants, permittees or persons with an interest that is or may be adversely affected.'' This defines who can request a hearing before the Board. In subparagraph (1)(a) through (e), Montana also specifies the types of permitting decisions that can be contested. The revised wording and types of decisions are in accordance with SMCRA Section 514(c) which states that any person with an interest which is or may be adversely affected may request a hearing on the reasons for the final determination. The proposed State statute provides more detail as to who may request a contested case hearing and for what reasons without altering the provision's consistency with Federal law. We are approving the revisions to 82–4–206, MCA.

2. Montana proposed to revise 82–4–223, MCA, to: (1) Delete ''permit fee'' from the title; and (2) delete the provision for a permit application fee; and (3) make editorial changes. Under Section 507(a) of the Act and 30 CFR 777.17, the amount of a permit fee is to be determined by the regulatory authority. Montana proposes to delete its existing requirement for a $100 application fee because the administrative burden to collect it exceeds the value of the fee. We accept Montana's reason for deleting the fee and approve it.

The proposal to modify 82–4–223, MCA also includes minor substitutions and editorial changes which do not change the meaning of the existing statute. We approve these minor changes.

3. Montana proposed to revise 82–4–225, MCA, to delete the requirement for a $50 application fee when revising a permit to increase or decrease the permitted area. Montana claims that the administrative burden to collect this fee exceeds the fee's value. Section 507(a) of SMCRA states that applications ''* * * shall be accompanied by a fee as determined by the regulatory authority. Such fee may be less than but shall not exceed the actual or anticipated cost of reviewing, administering, and enforcing such permit issued pursuant to a State or Federal program.'' It is evident that Congress enacted this provision to enable the regulatory authority to (among other things) recoup administrative costs associated with processing permit applications. However, Montana has stated that, under its current program, the administrative burden to collect the $50 application fee exceeds the fee's value. Given this explanation, and given the fact that Section 507(a) of the Act vests complete discretion in the regulatory authority to determine the amount of the fee (even in this case where the amount of the fee will be zero), we find that Montana's proposed revision is in accordance with the Act, and we approve it.

A minor editorial revision replaces ''in no case shall'' with ''may not.'' This minor revision is for clarification and does not alter the meaning of the provision. We approve it.

4. Montana proposed to delete 82–4–226 (3), deleting the requirement for a $100 fee accompanying an application for a prospecting permit. Montana claims that the administrative burden to collect the fee exceeds the fee's value. Section 507(a) of SMCRA states that applications ''* * * shall be accompanied by a fee as determined by the regulatory authority. Such fee may be less than but shall not exceed the actual or anticipated cost of reviewing, administering, and enforcing such permit issued pursuant to a State or Federal program.'' It is evident that Congress enacted this provision to enable the regulatory authority to (among other things) recoup administrative costs associated with processing permit applications. However, Montana has stated that, under its current program, the administrative burden to collect the $100 application fee exceeds the fee's value. Given this explanation, and given the fact that Section 507(a) of the Act vests complete discretion in the regulatory authority to determine the amount of the fee (even in this case where the amount of the fee will be zero), we find that Montana's proposed revision is in accordance with the Act, and we approve it.

Other changes recodify previous subsections (4) through (8) as subsections (3) through (7) as a result of deleting the prospecting permit fee provision at original subsection (3). This recodification does not alter the content of the existing provisions. We approve these changes.

5. Montana proposed to revise 82–4–227(13)(a), MCA, to add the national system of trails, Wild and Scenic Rivers Act study rivers and study river corridors, and Federal lands within National Forests, to areas where mining is prohibited (subject to valid existing rights).

Montana submitted this proposal in response to an OSM letter dated April 2, 2001, notifying Montana that revisions to the Federal rules on valid existing rights required the State to revise equivalent provisions in the State program. There are no additions to 82–4–227(13)(a), MCA that are not fully expressed in the corresponding Federal counterpart, Section 522(e) of SMCRA, which states:

(e) After the enactment of this Act and subject to valid existing rights no surface coal mining operations except those which exist on the date of enactment of this Act shall be permitted—

(1) on any lands within the boundaries of units of the National Park System, the National Wildlife Refuge Systems, the National System of Trails, the National Wilderness Preservation System, the Wild and Scenic Rivers System, including study rivers designated under section 5(a) of the Wild and Scenic Rivers Act and National Recreation Areas designated by Act of Congress;

(2) on any Federal lands within the boundaries of any national forest: Provided, however, That surface coal mining operations

may be permitted on such lands if the Secretary finds that there are no significant recreational, timber, economic, or other values which may be incompatible with such surface mining operations and—(A) surface operations and impacts are incident to an underground coal mine; or

(B) where the Secretary of Agriculture determines, with respect to lands which do not have significant forest cover within those national forests west of the 100th meridian, that surface mining is in compliance with the Multiple-Use Sustained-Yield Act of 1960, the Federal Coal Leasing Amendments Act of 1975, the National Forest Management Act of 1976, and the provisions of this Act: And provided further, That no surface coal mining operations may be permitted within the boundaries of the Custer National Forest;

In 82–4–227(13)(b), MCA Montana adds ''* * * subject to the exceptions and limitations of 30 CFR 761.11(b) and the procedures of 30 CFR 761.13.'' 30 CFR 761.11(b) is substantively identical to Section 522(e)(1) and (2) of the Act. 30 CFR 761.13 provides that, if applicants intend to rely on the provisions in 30 CFR 761.11(b) they must request that OSM first obtain the Secretarial findings required by Section 761.11(b). Thus, by making 82–4–227(13)(b), MCA subject to the exceptions and limitations in these two Federal regulations, Montana's proposal is consistent with the Federal regulations and in accordance with Section 522(e)(1) and (2) of the Act. Also, Montana proposed changing ''systems'' to ''system'' for grammatical correctness. For the above reasons, we approve Montana's proposed changes.

6. Montana proposed to revise 82–4–231(9), MCA, to specify the Environmental Quality Board, or its hearing officer, as the authority to hold hearings appealing adverse permit decisions by the Department, and to clarify that hearings must be started, rather than held, within the 30-day timeframe. Montana is establishing that, since appeals of permit decisions of the Department are contested cases, they will be heard by the Board and not the Department in compliance with the provisions in 82–4–206, MCA. These minor changes clarify Montana's specific processes and do not alter the requirements of existing statutory provisions. Therefore, we find that they are consistent with and will not make Montana's statute less stringent than its Federal counterpart, SMCRA Section 514(c). We approve these changes to 82–4–231, MCA.

7. Montana proposed to revise 82–4–232(6), MCA, concerning bond release applications to:

(1) Change the term bond release ''requests'' to bond release ''applications'' ((6)(a));

(2) Provide that a bond release application is administratively complete if it includes:

(6)(b)(i) The location and acreage of the land for which bond release is sought;

(ii) The amount of bond release sought;

(iii) A description of the completed reclamation, including the date of performance;

(iv) A discussion of how the results of the completed reclamation satisfy the requirements of the approved reclamation plan; and

(v) Information required by rules implementing this part.

(3) Provide that:

(6)(c) The [D]epartment notify the applicant in writing of its determination no later than 60 days after submittal of the application; if the [D]epartment determines that the application is not administratively complete, it shall specify in the notice those items that the application must address; after an application for bond release has been determined to be administratively complete by the [D]epartment, the permittee shall publish a public notice that has been approved as to form and content by the [D]epartment at least once a week for 4 successive weeks in a newspaper of general circulation in the locality of the mining operation.

(4) Provide that:

(6)(d) Any person with a valid legal interest that might be adversely affected by the release of a bond or the responsible officer or head of any federal, state, or local governmental agency that has jurisdiction by law or special expertise with respect to any environmental, social, or economic impact involved in the operation or is authorized to develop and enforce environmental standards with respect to the operation may file written objections to the proposed release of bond to the [D]epartment within 30 days after the last publication of the notice. If written objections are filed and a hearing is requested, the [D]epartment shall hold a public hearing in the locality of the operation proposed for bond release or in Helena, at the option of the objector, within 30 days of the request for hearing. The [D]epartment shall inform the interested parties of the time and place of the hearing. The date, time, and location of the public hearing must be advertised by the [D]epartment in a newspaper of general circulation in the locality for 2 consecutive weeks. Within 30 days after the hearing, the [D]epartment shall notify the permittee and the objector of its final decision.

(5) Provide that:

(6)(e) Without prejudice to the rights of the objector or the permittee or the responsibilities of the [D]epartment pursuant to this section, the [D]epartment may establish an informal conference to resolve written objections.

(6) Provide that:

(6)(f) For the purpose of the hearing under subsection (6)(d), the [D]epartment may administer oaths, subpoena witnesses or written or printed materials, compel the attendance of witnesses or the production of materials, and take evidence, including but not limited to conducting inspections of the land affected and other operations carried on by the permittee in the general vicinity. A verbatim record of each public hearing required by this section must be made, and a transcript must be made available on the motion of any party or by order of the [D]epartment.

(7) Provide that:

(6)(g) If the applicant significantly modifies the application after the application has been determined to be administratively complete, the [D]epartment shall conduct a new review, including an administrative completeness determination. A significant modification includes, but is not limited to:

(i) The notification of an additional property owner, local governmental body, planning agency, or sewage and water treatment authority of the permittee's intention to seek a bond release;

(ii) A material increase in the acreage for which a bond release is sought or in the amount of bond release sought; or

(iii) A material change in the reclamation for which a bond release is sought or the information used to evaluate the results of that reclamation.

(8) Provide that:

((6)(h)) The [D]epartment conduct an inspection and evaluation of the reclamation work involved within 30 days of determining that the application is administratively complete or as soon as weather permits;

(9) Provide that:

(6)(i) The [D]epartment shall review each administratively complete application to determine the acceptability of the application. A complete application is acceptable if the application is in compliance with all of the applicable requirements of this part, the rules adopted under this part, and the permit.

(10) Provide that:

(6)(j)(i) The [D]epartment shall notify the applicant in writing regarding the acceptability of the application no later than 60 days from the date of the inspection.

(ii) If the [D]epartment determines that the application is not acceptable, it shall specify in the notice those items that the application must address.

(iii) If the applicant revises the application in response to a notice of unacceptability, the [D]epartment shall review the revised application and notify the applicant in writing within 60 days of the date of receipt as to whether the revised application is acceptable.

(iv) If the revision constitutes a significant modification, the [D]epartment shall conduct a new review, beginning with an administrative completeness determination.

(v) A significant modification includes, but is not limited to:

(A) The notification of an additional property owner, local governmental body, planning agency, or sewage and water treatment authority of the permittee's intention to seek a bond release;

(B) A material increase in the acreage for which a bond release is sought or the amount of bond release sought; or

(C) A material change in the reclamation for which a bond release is sought or the information used to evaluate the results of that reclamation.

(11) Recodify original subsections (6)(c) through (e) as (6)(k) through (m), with some minor editorial changes, and,

(12) Recodify original subsections (6)(f) through (6)(h) as (6)(d) through (f).

The proposed changes in Paragraph 3 above (MCA 82–4–232(6)(c)) require that public notice be published (at least once a week for 4 successive weeks in a newspaper of general circulation in the locality of the mining operation) after the bond release application has been reviewed and is determined to be administratively complete by the Department. These changes also include a provision which states that the Department will notify the applicant of its determination no later than 60 days after it receives the application. Although there is no direct Federal counterpart to this provision, we find that it is generally in accordance with Section 519 of SMCRA. The proposed changes at Paragraph (2) (MCA 82–4–232(b)(2)) state that a bond release application shall be administratively complete if it includes certain specific information specified in (6)(b)(i) through (v) listed above. The corresponding Federal counterpart to the above provisions, SMCRA 519(a), requires the operator to publish (at least once a week for 4 successive weeks in a newspaper of general circulation in the locality of the mining operation) a notice within 30 days of filing an application for bond release containing the location of the land affected, the number of acres, the permit and the date approved, the amount of the bond filed, and the portion sought to be released, the type and dates of reclamation performed, and a description of the results as they relate to the operator's approved reclamation plan. Proposed 82–4–232(6)(b) and (c) are substantively identical to and in accordance with the requirements of Section 519(a) of the Act. We approve the changes.

The changes in Paragraphs 4 through 10 above (MCA 82–4–232(6)(d) through (j)) specify requirements for bond release applications including criteria for administrative completeness and procedures for review. These provisions are similar to the provisions for permit and permit revision applications in MCA 82–4–231. While providing more specificity, revised MCA 82–4–232(6) (d), (e), (f), and (h) through (j) include all of the provisions contained in Sections 519 (a), (b), (d), (f), (g), and (h) of SMCRA regarding bond release procedures. MCA 82–4–232(6) (g), (i), and (j) elaborate on administrative completeness determinations and procedures, and have no Federal counterparts. These additions add specificity to Montana's requirements and exceed SMCRA's requirements. For the above reasons, we find these changes to be no less stringent than comparable provisions in SMCRA, and we approve them.

As discussed below, additional changes at MCA 82–4–232(11) and (12) are minor wording, editorial, punctuation, grammatical and recodification changes to existing statutes. More specifically, former MCA 82–4–232 (6)(c) through 82–4–232 (6)(e) have been recodified as 82–4–232 (6)(k) through 82–4–232 (6)(m). These changes are required by other recodification changes within the statute. ''[O]r deposit'' has been deleted from 82–4–232 (6)(k). The term ''bonds'' means deposits such as cash or securities as well as other types of bonds and therefore the term ''deposits'' is not necessary. ''[O]r county'' was added to 82–4–232 (6)(m), clarifying that an applicant for total or partial bond release must notify the municipality or county in which a prospecting or mining operation is located 30 days prior to the bond release. This minor addition clarifies applicant responsibilities and does not alter the requirements of the provision. We find that these recodification and editorial changes are minor and do not change the meaning of existing statutes. We approve these changes.

Former MCA 82–4–232(6)(f) through 82–4–232(6)(h) have been recodified as 82–4–232(6)(d) through (6)(f). These changes are required by recodification changes to the previously approved statute (January 22, 1999) (64 FR 3604). The content of these provisions was unaffected, and we approve these changes.

MCA 82–4–232(8) deals with proposals in postmining land use. Montana proposed in (a) to change ''alternate'' to ''alternative'' for consistency of terminology within the Montana statute and also with the revisions to rules approved by OSM on February 16, 2005 (70 FR 8018), where ''alternative'' was used. This is a minor wording change that is consistent with previously approved statutes and regulations. We approve this change.

8. Montana proposed to revise 82–4–233, MCA, by deleting existing Paragraph (5) concerning special revegetation requirements for land that was mined, disturbed, or redisturbed after May 2, 1978, and that was seeded prior to January 1, 1984. Subsection (5) is no longer necessary as its provisions are now included in subsections (1) and (2) of 82–4–233, MCA. This is a result of changes to 82–4–233, MCA approved by OSM on February 16, 2005, (70 FR 8001). Subsections (1) and (2) include all the provisions of 30 CFR 816.111 for revegetation general requirements that were previously approved in subsection (5). We approve this change.

9. Existing MCA 82–4–235(a) prescribes revegetation success criteria and the time requirements for reclamation responsibility for lands with regard to coal removal and disturbance or redisturbance before and after May 2, 1978. SMCRA took effect in two stages, an initial regulatory program described in Section 502, and the permanent regulatory program. On and after nine months from the date of enactment of the Act, on lands where surface coal mining operations were regulated by States, the initial regulatory program required compliance with Section 515(b)(19) of SMCRA requiring establishment of vegetative cover but did not require compliance with Section 515(b)(20) establishing the responsibility period for successful revegetation. The initial regulatory program became effective on May 3, 1978. The permanent regulatory program became effective with permits issued under approved State regulatory or Federal programs. Under MCA 82–4–235(a), lands mined for coal or redisturbed prior to May 3, 1978 are subject to revegetation requirements listed in existing MCA 82–4–235(3)(a)(i) and (ii). Existing MCA 82–4–235 (2) sets a period of 5 years after planting as the responsibility period for lands mined for coal or redisturbed prior to May 3, 1978. Montana proposes additional language to MCA 82–4–235(3)(a) to clarify that lands disturbed by mining at any time prior to May 3, 1978 that were permitted under Montana programs that preceded SMCRA are required to meet the vegetation requirements in MCA 82–4–235(3)(a)(i) and (ii). For the most part, this additional provision deals with lands not subject to SMCRA provisions. Despite this proposed change, MCA 82–4–235 remains in accordance with requirements in SMCRA in Sections 515(b)(19) and (20) and in Section 502 (c). The addition also provides clarification to the statute that was previously approved by OSM in the January 22, 1999 **Federal Register** (64 FR 3604). We approve the changes.

10. Montana 82–4–251(3), MCA, pertains to orders issued to the permittee to show cause as to why the permit should not be suspended or revoked based on a determination that a pattern of violations exists. The existing provision provides for the opportunity for a public hearing in accordance with Section 521(a)(4) of SMCRA. In addition, Montana proposed that the permittee may request a contested case hearing. Pursuant to

Montana's Administrative Procedures Act, whenever a statute requires a license or permit decision to be preceded by a hearing, the contested case provisions apply pursuant to MCA 82–4–206(2). Procedures for contested case hearings are contained in Title 2, chapter 4, part 6, MCA (2–4–601 through 2–4–631). The contested case procedures provide for opportunity for reasonable notice, requiring the reason for and details of the hearing, and prescribe hearing procedures and time limits for decisions. Applying the contested case provisions of the Montana Administrative Procedures Act to hearings required in the Montana regulatory program is reasonable, is not inconsistent with the requirements of Section 521(a)(5) of the Act for notices and orders, public hearings conferences, and procedures associated with enforcement matters, and does not alter our previous approvals of MCA 82–4–251(3). We approve the change.

In 82–4–251(5), MCA, revisions are proposed to (a) allow an opportunity by a permittee to request an informal public hearing on any notice or order issued by the Department under this section of the Montana Code, and (b) specify the procedures for such informal hearings. More specifically, Montana proposes the above revisions to provide that informal public hearings on notices or orders that require cessation of mining must be requested by the person to whom the notice or order was issued. Further, if the Department receives a request for an informal public hearing 21 days after service of the notice or order, the period for holding the informal public hearing will be extended by the number of days after the 21st day that the request was received. Montana's previous statute did not provide for an opportunity by a permittee to request an informal public hearing on any notice or order issued by the Department under the statute. Therefore, it was inconsistent with the provisions in Section 521(a)(4) of SMCRA which provide the opportunity for a public hearing to be requested by the permittee after service of ''* * * an order to the permittee to show cause as to why the permit should not be revoked or suspended * * *.'' The proposed changes are in accordance with Section 521(a)(4) of SMCRA and the requirements for notices and orders, public hearings conferences, and procedures associated with enforcement matters contained in Section 521(a)(5). We approve these changes.

Montana proposes to revise 82–4–251(6), MCA, to allow an alleged violator to ''request a hearing before the [B]oard,'' and delete existing requirements for Departmental investigations. Previously, hearings under this subsection were limited to notices of violation and cessation orders. The previous version also specified that the hearings were to be conducted by the Department, and the Department was required to make findings and issue a decision from such hearings. By definition, this is contrary to 82–4–205(2) which requires that contested cases must be heard and decided by the Board of Environmental Review and not the Department. The above changes rectify this problem and are in accordance with the requirements for notices and orders, public hearings conferences, and procedures associated with enforcement matters contained in Section 521(a)(5) of SMCRA. Therefore, we approve these changes.

The following paragraphs, 11 through 27, address proposed changes to Montana statutes and regulations dealing with penalties. The standard for penalty provisions in a State program is established in Section 518(i) of SMCRA. This provision states that civil and criminal penalty provisions shall incorporate penalties no less stringent than those set forth in Section 518 of the Act, and shall contain the same or similar procedural requirements. OSM suspended 30 CFR 732.15(b)(7) and 840.13(a) (which implement Section 518(i) of the Act) insofar as they require State programs to establish a point system for assessing civil penalties or impose civil penalties as stringent as those appearing in 30 CFR 845.15 (which deals with the assessment of separate violations for each day) (August 4, 1980) (45 FR 51548). Hence, if the State program requires consideration of the four mandatory statutory criteria—history of previous violations, seriousness, negligence, and good faith in attempting to achieve compliance—when determining whether to assess a penalty and in determining the penalty amount, the program meets the Federal requirements. 30 CFR Part 846 covers the assessment of individual civil penalties and is the basis for State regulations.

11. Montana proposed to revise 82–4–254(1)(a), MCA, to provide individual administrative penalties determined in accordance with 82–4–1001, MCA, for persons who ''purposely or knowingly,'' rather than ''willfully,'' authorize, order, or carry out violations. Montana explains that the terms ''purposely or knowingly'' are used in the Montana Criminal Code, and ''willfully'' is not; therefore, this change will provide consistency within Montana state law. OSM believes that Montana's term ''purposely or knowingly'' is substantively the same as ''willfully and knowingly,'' as used in Section 518(e) of SMCRA and we are approving it.

Montana proposes further additions and deletions in (1)(a) that are minor wording, editorial, punctuation, grammatical and recodification changes to existing statutes. Additionally, the term ''civil'' is replaced with ''administrative'' to clarify that penalties assessed by the Department are administrative penalties, rather than judicial penalties that are levied by Montana State District Court. This proposed change is consistent with Section 518(b) of SMCRA which provides for penalties to be assessed by the regulatory body, and not through the courts. This change is therefore consistent with SMCRA, and we approve it.

Proposed part (b) references a new section, MCA 82–4–1001, which sets forth guidelines for determining the amount of administrative penalty to be assessed (discussed below).

82–4–254(2), MCA, is revised to add that the Department may not waive a penalty assessed under the section if the person or operator fails to abate the violation as directed under MCA 82–4–251. This revision does not have a Federal counterpart and is more stringent than requirements in Section 518 of SMCRA dealing with the assessment of penalties. Moreover, the addition provides clarification and specificity to existing provisions. We approve this change.

Montana also proposes additions and deletions in 82–4–254(2), MCA that are for clarification of terminology. These changes are minor and do not alter the meaning of the existing regulation. We approve these minor changes.

Montana adds new requirements at 82–4–254(3)(a), MCA, providing that:

> To assess an administrative penalty under this section, the Department shall issue a notice of violation and penalty order to the person or operator, unless the penalty is waived pursuant to subsection (2). The notice and order must specify the provision of this part, rule adopted or order issued under this part, or term or condition of a permit that is violated and must contain findings of fact, conclusions of law, and a statement of the proposed administrative penalty. The notice and order must be served personally or by certified mail. Service by mail is complete 3 business days after the date of mailing. The notice and order become final unless, within 30 days after the order is served, the person or operator to whom the order was issued requests a hearing before the Board.

A requirement is added to Paragraph (3)(a) that on receiving a request, the Board must schedule a hearing. The

changes in proposed MCA 82–4–254(3)(a) are for the purpose of converting the current two-step process of assessing a penalty into a more streamlined one-step process. The Department would now issue a Notice of Violation and Administrative Penalty Order (NOV/APO) that would contain all of the relevant components from the existing two-step process. If a hearing is not requested, the NOV/APO would become final and eliminate the need to issue separate findings of fact and conclusions of law.

New Paragraph (3)(b) indicates that only persons or operators issued a final order may obtain judicial review. The changes in MCA 82–4–254(3)(b) reflect the changes in (3)(a) and provide additional clarification.

New Paragraphs (3)(c) and (4) allow (1) the Department, rather than the Attorney General, to file actions for collection, (2) filing in the first judicial district (if agreed by the parties), and (3) the Department, rather than the Attorney General, to bring actions for judicial relief. Additionally, the changes in MCA 82–4–254(3)(c) specify that the Department, not the Attorney General, may file an action in District Court to recover penalties; Department attorneys are special assistants to the Attorney General and are authorized to file such cases in District Court. The changes in MCA 82–4–254(4) reflect changes in (3)(c) specifying that the Department, rather than the Attorney General, may file an action for a restraining order or temporary or permanent injunction against an operator or person meeting criteria outlined in subsections (4)(a) through (f).

These changes will result in assessment and collection of civil penalties by Montana in accordance with the provisions for assessing and collecting civil penalties found in Section 518(a), (b), (c) and (d) of SMCRA. The changes provide clarification and specificity to existing provisions. We approve the proposed changes, finding that the additions and deletions are reasonable and do not alter OSM's previous decision to approve MCA 82–4–254(1) through (3) in the January 22, 1999 **Federal Register** (64 FR 3604).

12. Montana proposed revisions to ARM 17.24.1219(1) and (2) for individual civil penalties and procedures for assessments that reflect revisions discussed above to 82–4–254(3)(a), MCA. The proposed amendments to (1) and (2) provide for the Department to issue a penalty order rather than a statement of proposed penalty. The proposed amendment to subparagraph (1) also deletes the requirement that the penalty document give an explanation for the penalty as well as its amount. These requirements are now set forth in 82–4–254(3)(a) and 82–4–1001, MCA (see Findings 11 and 15). It is, therefore, unnecessary to impose them by administrative rule. These changes to ARM 117.24.1219, reflect the changes in 82–4–254(3)(a), MCA that were approved by OSM on February 16, 2005 (70 FR 8018). We approve the changes to ARM 17.24.1219(1) and (2).

13. Montana proposed revisions to ARM 17.24.1220(1), (2) and (3) concerning individual civil penalty payments. The proposed amendment to subparagraph (1) reflects the proposed changes to MCA 82–4–254 discussed above, and requires the payment of a penalty within 30 days after the expiration of the period for requesting a hearing rather than upon issuance of the final order. Pursuant to 82–4–254, MCA, the notice of violation and penalty order become final by operation of law if a request for hearing is not made in a timely manner. Therefore, the deadline for paying the penalty must be keyed to the expiration of the period for requesting a hearing (rather than to the issuance of a final order as previously required under 82–4–254, MCA).

Subparagraph (2) replaces the phrase ''proposed individual civil penalty assessment'' with ''violation and penalty order'' to maintain consistency with MCA 82–4–254. To further maintain this consistency, the phrase ''[U]pon issuance'' (of a final administrative order) is replaced with ''within 30 days after the issuance'' (of a final administrative order).

Under 30 CFR 846.17(b), the notice of proposed individual civil penalty assessment shall become a final order of the Secretary 30 days after service upon the individual unless:

(1) The individual files within 30 days of service of the notice of proposed individual civil penalty assessment a petition for review with the Hearings Division, Office of Hearings and Appeals; or

(2) The Office [of Surface Mining] and the individual or responsible corporate permittee agree within 30 days of service of the notice of proposed individual civil penalty assessment to a schedule or plan for the abatement or correction of the violation.

Under 30 CFR 846.18(a) a penalty for an individual civil penalty assessed in accordance with 30 CFR 846.17, in the absence of a petition for review or abatement agreement, shall be due upon issuance of the final order.

The Federal and proposed State provisions have similar procedural requirements, differing only in that in the absence of requesting a hearing or a petition for review, the Federal notice becomes a final order and payment is due 30 days after issuance, whereas the State allows an additional 30 days (total of 60 days) for payment. The State's extra 30 days is keyed to the time allowed to file an appeal. OSM finds Montana's reference to the time period for requesting review to be reasonable since, until the time has passed to file a petition for review, the penalty may yet be subject to change. A comparison of the time frames for the Federal regulations and Montana's program, from detection of a violation, to the issuance of a notice of violation, to the issuance of civil penalties and individual civil penalties and the requirements for payment of penalties, indicates slight differences between the steps; however, the steps are similar from violation issuance to payment of the penalty. In addition, a petition for review under both the State and Federal schemes can delay the issuance of a final order affirming a penalty well beyond 30 days. These considerations reduce the importance of each specific Federal timeframe. For these reasons, Montana's proposed revisions to ARM 17.24.1220(1) and (2) are consistent with 30 CFR 846.17 and 846.18 and we approve them.

Section (3) currently provides that an individual who has entered into a written agreement with the Department for ''abatement of the violation'' or ''compliance with the unabated order'' may postpone payment until receiving a final order indicating that the penalty is due or has been withdrawn. Compliance with an unabated order is synonymous with the abatement of the violation. The proposed amendment to (3) deletes two unnecessary references to the phrase ''compliance with the unabated order.''

Section (3) is nearly identical to its Federal counterpart at 30 CFR 846.18(c), which states that ''[w]here the Office and the corporate permittee or individual have agreed in writing on a plan for the abatement of or compliance with the unabated order, an individual named in a notice of proposed civil penalty assessment may postpone payment until receiving either a final order from the Office stating that the penalty is due on the date of such final order, or written notice that the abatement or compliance is satisfactory and the penalty has been withdrawn.'' The changes to subsection (3) are for clarification and reduce redundancy without altering the meaning of the existing regulation. Accordingly, we approve the proposed changes.

14. Montana proposed to revise 82–4–254(6) and (8), MCA, to provide criminal sanctions against persons who purposely or knowingly, rather than willfully, commit certain acts. The term ''willfully'' is changed to ''purposely or knowingly'' for clarification and consistency with 82–4–254(1)(a), MCA, and other provisions of State law. In a previous finding (see Paragraph 11 above), we found that the term, ''purposely and knowingly,'' is substantively the same as ''willfully and knowingly'' used in Section 518(e) of SMCRA. For the above reasons, we are approving the proposed changes to 82–4–254(6) and (8), MCA, because they are minor and do not change the meaning of the existing statute.

Montana adds a new Paragraph, 82–4–254(10), MCA, providing that within 30 days after receipt of full payment of an administrative penalty assessed under this section, the Department will issue a written release of civil liability for the violations for which the penalty was assessed. This provides a legal conclusion to violations that have been satisfactorily resolved. This is an addition for which there is no Federal counterpart. Section 518(i) of SMCRA states that ''any State program * * * shall, at a minimum, incorporate penalties no less stringent than those set forth in this section, and shall contain the same or similar procedural requirements relating thereto.'' We find the proposed addition does not jeopardize other Program requirements that ensure assessment and collection of civil penalties in accordance with the requirements of Section 518 of SMCRA. Therefore, we approve this addition.

15. Montana proposed a new section, 82–4–1001, MCA, as follows:

Penalty factors.

(1) In determining the amount of an administrative or civil penalty assessed under the statutes listed in subsection (4), the [D]epartment of [E]nvironmental [Q]uality or the district court, as appropriate, shall take into account the following factors:

(a) The nature, extent, and gravity of the violation;

(b) The circumstances of the violation;

(c) The violator's prior history of any violation, which:

(i) Must be a violation of a requirement under the authority of the same chapter and part as the violation for which the penalty is being assessed;

(ii) Must be documented in an administrative order or a judicial order or judgment issued within 3 years prior to the date of the occurrence of the violation for which the penalty is being assessed; and

(iii) May not, at the time that the penalty is being assessed, be undergoing or subject to administrative appeal or judicial review;

(d) The economic benefit or savings resulting from the violator's action;

(e) The violator's good faith and cooperation;

(f) The amounts voluntarily expended by the violator, beyond what is required by law or order, to address or mitigate the violation or impacts of the violation; and

(g) Other matters that justice may require.

(2) Except for penalties assessed under 82–4–254, after the amount of a penalty is determined under (1), the [D]epartment of [E]nvironmental [Q]uality or the district court, as appropriate, may consider the violator's financial ability to pay the penalty and may institute a payment schedule or suspend all or a portion of the penalty.

(3) Except for penalties assessed under 82–4–254, the [D]epartment of [E]nvironmental [Q]uality may accept a supplemental environmental project as mitigation for a portion of the penalty. For purposes of this section, a ''supplemental environmental project'' is an environmentally beneficial project that a violator agrees to undertake in settlement of an enforcement action but which the violator is not otherwise legally required to perform.

(4) This section applies to penalties assessed by the [D]epartment of [E]nvironmental [Q]uality or the district court under 82–4–141, 82–4–254, 82–4–361, and 82–4–441.

(5) The [B]oard of [E]nvironmental [R]eview and the [D]epartment of [E]nvironmental [Q]uality may, for the statutes listed in subsection (4) for which each has rulemaking authority, adopt rules to implement this section.

The purpose of this new section is to create a standard set of factors that can be used to assess and enforce penalties for the Montana Program and 15 other environmental programs under the Department's jurisdiction. This enables staff to apply fair and consistent penalties Department wide.

Section (1)(a) lists the following factor for consideration: ''the nature, extent and gravity of the violation.'' In considering the ''nature'' of a violation, Montana states in its submission that the Department will determine whether the violation harms or has the potential to harm human health or the environment, or whether the violation adversely impacts the Department's administration of the Montana Act. This is consistent with and corresponds to the consideration of ''seriousness'' in Section 518(a) of SMCRA.

Montana further explains in its submission that the consideration of ''extent'' takes into account the degree of harm or potential harm to human health and the environment, or the degree of adverse impact to the Department's administration of the Montana Act. As such, Montana states that violations resulting in a higher degree of harm or potential harm or a higher degree of adverse impact to the Department's administration of the Montana Act will be assigned higher points under ''extent.'' This too is in accordance with the ''seriousness'' factor in Section 518(a) of SMCRA.

Next, Montana states that the consideration of ''gravity'' in (1)(a) factors in the probability of occurrence. Specifically, a violation that results in a higher probability of occurrence of the event that a standard is designed to prevent is more grave than a violation with a lower probability of the occurrence of the event, and will be assigned more points. This also is consistent with the consideration of ''seriousness'' in Section 518(a) of SMCRA.

In its submission, Montana states that the consideration of ''circumstances'' in (1)(b) directly relates to the negligence or culpability of the violator. This definition also is set forth under proposed ARM 17.4.302 (1), described below. Under the Department's proposed penalty rules, the more negligent or culpable the violator is, the higher the penalty will be. This is consistent with the consideration of ''negligence'' in Section 518(a) of SMCRA.

Proposed section MCA 82–4–1001(1)(c) defines the ways a violator's prior history of violations may result in increased penalty assessment. Subsections (1)(c)(i), (ii), and (iii) specify that for violations to be considered as prior history, they must be less than 3 years old, a violation of the same chapter and part as the violation for which the penalty is assessed, and not under administrative appeal or judicial review. This section is in accordance with the requirement in Section 518(a) of SMCRA to consider the permittee's history of previous violations.

Proposed section MCA 82–4–1001(1)(d) allows the Department in assessing a penalty to consider the economic benefit or savings resulting from the violator's action. The new text in (1)(d) takes into account the extent to which a violator has gained any economic benefit as a result of its failure to comply. The Federal regulations do not contain a similar provision. However, Montana's provision can only result in an increased penalty should there have been an economic benefit or savings resulting from the violator's action. Therefore, we find new (1)(d) to be no less effective than the Federal regulations and we approve it.

The assessment of ''good faith and cooperation'' under proposed section MCA 82–4–1001(1)(e) relates to a violator's willingness to abate the violation, and measures employed to abate the violation in the timeliest manner possible, with the least amount

of environmental harm possible. In its submission, Montana explains that, if a person has a high degree of good faith and cooperation, the Department will calculate a lower penalty. This subsection is consistent with Section 518(a) of SMCRA dealing with the consideration of ''demonstrated good faith'' by the permittee in attempting to achieve compliance and we approve it.

Proposed section MCA 82–4–1001(1)(f) allows the Department to consider the amount voluntarily expended by the violator beyond what is necessary to address or mitigate the violation or impacts of the violation. There is no counterpart in the Federal regulations allowing for consideration of effort or amounts expended beyond the necessary minimum. However, a provision of 30 CFR 845.16(a) allowing for waiver of use of the formula to determine civil penalty provides that ''the Director shall not waive the use of the formula or reduce the proposed assessment on the basis of an argument that a reduction in the proposed penalty could be used to abate violations of the Act, this chapter, any applicable program, or any condition of any permit or exploration approval.'' Under Montana's proposed (1)(f) the amount of funding or effort required to abate the violation cannot be considered in reducing the penalty. Rather, this provision gives the Department the authority to consider amounts expended by the operator beyond that which is necessary to abate the violation. Therefore, we find that new (1)(f) is not inconsistent with the Federal regulations and we approve it.

In its submission, Montana states that provision (1)(g) was inserted to cover other circumstances that warrant consideration in penalty assessment, e.g. to provide for fairness and effectiveness. Montana goes on to explain that the Department expects that this factor will only be used when, based on particular facts and circumstances, the application of the penalty factors would not result in a fair and just penalty. 30 CFR 845.16(a), concerning waiver of use of the formula to determine civil penalty, states that ''The Director, upon his own initiative or upon written request received within 15 days of issuance of a notice of violation or a cessation order, may waive the use of the formula contained in 30 CFR 845.13 to set the civil penalty, if he or she determines that, taking into account exceptional factors present in the particular case, the penalty is demonstrably unjust.'' We find proposed (1)(g) to be consistent with this provision in the Federal regulations and we approve it.

Subsections (2) and (3) allow for penalties in other Departmental programs to be reduced and waived, but do not apply to penalties assessed in the coal regulatory program under 82–4–254, MCA. Thus, these provisions are of no concern for purposes of this amendment.

Subsection (4) states that the provisions of this section (82–4–1001, MCA) will apply to penalties assessed by the Department or District Court, and subsection (5) empowers the Department and Board to adopt rules to implement this new statute. This delegation of authority is acceptable under Montana's permanent regulatory program approved by OSM in the April 1, 1980 **Federal Register** (45 FR 21560), and we approve it.

We are approving each of the proposed changes above in MCA, 82–4–1001, finding that the additions and deletions incorporate penalties that are no less stringent than those set forth in Section 518 of the Act and contain the same or similar procedural requirements relating thereto.

16. Consistent with 82–4–254(1), MCA (discussed above), Montana proposed revisions to ARM 17.24.1218 to require that individual civil penalties be calculated based on criteria specified in 82–4–1001, MCA. The changes to ARM 17.24.1218 implement and are consistent with changes to the corresponding statute and we are approving them.

17. Montana proposed revisions to 17.4.303, ARM concerning base penalties. Montana proposes that the Department shall calculate the penalties according to the following:

(1) The base penalty is calculated by multiplying the maximum penalty amount authorized by statute by a factor from the appropriate base penalty matrix in (2) or (3). In order to select a matrix from (2) or (3), the nature of the violation must first be established. For violations that harm or have the potential to harm human health or the environment, the [D]epartment shall classify the extent and gravity of the violation as major, moderate, or minor as provided in (4) and (5). For all other violations, the extent factor does not apply, and the [D]epartment shall classify the gravity of the violation as major, moderate, or minor as provided in (5).

(2) The [D]epartment shall use the following matrix for violations that harm or have the potential to harm human health or the environment:

Extent	Gravity		
	Major	Moderate	Minor
Major	0.85	0.70	0.55
Moderate	0.70	0.55	0.40
Minor	0.55	0.40	0.25

(3) The [D]epartment shall use the following matrix for violations that adversely impact the [D]epartment's administration of the applicable statute or rules, but which do not harm or have the potential to harm human health or the environment:

Gravity		
Major	Moderate	Minor
0.50	0.40	0.30

(4) In determining the extent of a violation, the factors that the [D]epartment may consider include, but are not limited to, the volume, concentration, and toxicity of the regulated substance, the severity and percent of exceedance of a regulatory limit, and the duration of the violation. The [D]epartment shall determine the extent of a violation as follows:

(a) A violation has a major extent if it constitutes a major deviation from the applicable requirements;

(b) A violation has a moderate extent if it constitutes a moderate deviation from the applicable requirements;

(c) A violation has a minor extent if it constitutes a minor deviation from the applicable requirements.

(5) The [D]epartment shall determine the gravity of a violation as follows:

(a) A violation has major gravity if it causes harm to human health or the environment, poses a serious potential to harm human health or the environment, or has a serious adverse impact on the [D]epartment's administration of the statute or rules. Examples of violations that may have major gravity include a release of a regulated substance that causes harm or poses a serious potential to harm human health or the environment, construction or operation without a required permit or approval, an exceedance of a maximum contaminant level or water quality standard, or a failure to provide an adequate performance bond.

(b) A violation has moderate gravity if it:

(i) Is not major or minor as provided in (5)(a) or (c); and

(ii) Poses a potential to harm human health or the environment, or has an adverse impact on the [D]epartment's administration of the statute or rules. Examples of violations that may have moderate gravity include a release of a regulated substance that does not cause harm or pose a serious potential to harm human health or the environment, a failure to monitor, report, or make records, a failure to report a release, leak, or bypass, or a failure to construct or operate in accordance with a permit or approval.

(c) A violation has minor gravity if it poses no risk of harm to human health or the environment, or has a low adverse impact on the [D]epartment's administration of the statute or rules. Examples of violations that may have minor gravity include a failure to submit a report in a timely manner, a failure to pay fees, inaccurate recordkeeping, or a failure to comply with a minor operational requirement specified in a permit.

Pursuant to the above-described regulations, the first step in the penalty calculation process is to identify a base penalty, which is a percentage of the statutory maximum penalty. The percentage varies depending on how the three statutory factors of ''nature'', ''extent'', and ''gravity'' are weighed. These three statutory factors are defined and two matrices are created for determining the amount of the base penalty.

The ''nature'' of a violation is determined on the basis of whether it harms or has the potential to harm human health or the environment.

The ''extent'' of a violation is determined by considering such factors as the volume, concentration and toxicity of the regulated substance, the severity and percent exceedance of a regulatory limit, and the duration of the violation.

The ''gravity'' of a violation is determined by considering (among other things) such factors as whether a release of a regulated substance has occurred, the degree of risk to human health or the environment, and the extent of impact to the Department's ability to administer the statute and rules.

The rule clarifies how the statutory factors will be implemented, and ensures that a consistent penalty calculation process is used for all of the environmental laws subject to 82–4–1001, MCA.

The additions noted above under ARM 17.4.303 implement 82–4–1001, MCA. OSM approved the proposed changes to 82–4–1001, MCA in Paragraph 15 above. Penalties under 82–4–1001, MCA are based on the ''nature, extent, gravity, and circumstances'' of the violation. The violator's history and good faith abating the violation are also factors in determining penalties in 82–4–1001, MCA. Our approval found that 82–4–1001, MCA incorporated factors for determining penalties in accordance with Section 518 of the Act. ARM 17.4.303 clarifies how the statutory factors in 82–4–1001, MCA will be implemented. It includes a procedure for calculating penalties. As discussed above, the standard for penalty provisions in a State program is established in Section 518(i) of SMCRA. This provision states that civil and criminal penalty provisions shall incorporate penalties no less stringent than those set forth in Section 518 of the Act, and shall contain the same or similar procedural requirements. OSM suspended 30 CFR 732.15(b)(7) and 840.13(a) insofar as they require State programs to establish a point system for assessing civil penalties or to impose civil penalties as stringent as those appearing in 30 CFR 845.15 (August 4, 1980) (45 FR 51548). Hence, if the State program requires consideration of the four mandatory statutory criteria—history of previous violations, seriousness, negligence, and good faith in attempting to achieve compliance—when determining whether to assess a penalty and in determining the penalty amount, the program meets the Federal requirements. 30 CFR Part 846 covers the assessment of individual civil penalties and is the basis for State regulations.

We find that Montana's procedure for calculating penalties incorporates criteria consistent with the four criteria of Section 518(a) of SMCRA. Additionally, we find that ARM 17.4.303 is consistent with 82–4–1001, MCA, and that both of these provisions provide for civil penalties in accordance with Section 518 of the Act. Therefore, we approve the additions to ARM 17.4.303.

18. Montana proposed revisions to ARM 17.4.304, for adjusted base penalty.

(1) As provided in this rule, the [D]epartment may consider circumstances, good faith and cooperation, and amounts voluntarily expended to calculate an adjusted base penalty. Circumstances may be used to increase the base penalty. Good faith and cooperation and amounts voluntarily expended may be used to decrease the base penalty. The amount of adjustment for each of the above factors is based upon a percentage of the base penalty. The amount of the adjustment is added to the base penalty to obtain an adjusted base penalty.

(2) The [D]epartment may increase a base penalty by up to 30 percent based upon the circumstances of the violation. To determine the penalty adjustment based upon circumstances, the [D]epartment shall evaluate a violator's culpability associated with the violation. In determining the amount of increase for circumstances, the [D]epartment's consideration must include, but not be limited to, the following factors:

(a) How much control the violator had over the violation;

(b) The foreseeability of the violation;

(c) Whether the violator took reasonable precautions to prevent the violation;

(d) The foreseeability of the impacts associated with the violation; and

(e) Whether the violator knew or should have known of the requirement that was violated.

(3) The [D]epartment may decrease a base penalty by up to 10 percent based upon the violator's good faith and cooperation. In determining the amount of decrease for good faith and cooperation, the department's consideration must include, but not be limited to, the following factors:

(a) The violator's promptness in reporting and correcting the violation, and in mitigating the impacts of the violation;

(b) The extent of the violator's voluntary and full disclosure of the facts related to the violation; and

(c) The extent of the violator's assistance in the [D]epartment's investigation and analysis of the violation.

(4) The [D]epartment may decrease a base penalty by up to 10% based upon the amounts voluntarily expended by the violator, beyond what is required by law or order, to address or mitigate the violation or the impacts of the violation. The amount of a decrease is not required to match the amounts voluntarily expended. In determining the amount of decrease for amounts voluntarily expended, beyond what is required by law or order, the [D]epartment's consideration must include, but not be limited to, the following factors:

(a) Expenditures for resources, including personnel and equipment, to promptly mitigate the violation or impacts of the violation;

(b) Expenditures of resources to prevent a recurrence of the violation or to eliminate the cause or source of the violation; and

(c) Revenue lost by the violator due to a cessation or reduction in operations that is necessary to mitigate the violation or the impacts of the violation.

This proposed rule implements 82–4–1001, MCA (discussed above), and sets out procedures for adjusting the base penalty based upon a consideration of the three statutory factors of ''circumstances,'' ''good faith and cooperation,'' and ''amounts voluntarily expended.''

The rule provides for an increase to the base penalty by up to 30 percent based upon the circumstances of the violation. In determining the adjustment for circumstances, the rule requires a consideration of factors that reflect the culpability of the violator. As discussed in Paragraph 15 above, circumstances directly relate to the negligence or culpability of the violator. Under both State and Federal regulations, a more negligent violator will receive a higher penalty. Therefore, we find that the

consideration of ''circumstances'' in Section (2) is consistent with the consideration of ''negligence'' in Section 518(a) of the Act.

The rule provides for a decrease to the base penalty up to 10 percent based upon a consideration of certain factors that reflect the good faith and cooperation of a violator, and a decrease to the base penalty up to 10 percent based upon certain voluntary expenditures. Good faith and cooperation relate to a violator's willingness to abate the violation, and measures employed to abate the violation in the timeliest manner possible, with the least amount of environmental harm possible. If a person has a high degree of good faith and cooperation, the Department will calculate a lower penalty. This is in accordance with SMCRA Section 518(a) dealing with ''good faith'' in attempting to achieve compliance. We approve ARM 17.4.304.

19. Montana proposed adding a new section 82–4–1002, MCA, covering collection of penalties, fees, late fees, and interest as follows:

(1) If the [D]epartment of [E]nvironmental [Q]uality is unable to collect penalties, fees, late fees, or interest assessed pursuant to the provisions of this chapter, the [D]epartment of [E]nvironmental [Q]uality may assign the debt to a collection service or transfer the debt to the [D]epartment of [R]evenue pursuant to Title 17, chapter 4, part 1.

(2)(a) The reasonable collection costs of a collection service, if approved by the [D]epartment of [E]nvironmental [Q]uality, or assistance costs charged the [D]epartment of [E]nvironmental [Q]uality by the [D]epartment of [R]evenue pursuant to 17–4–103(3) may be added to the debt for which collection is being sought.

(b)(i) All money collected by the [D]epartment of [R]evenue is subject to the provisions of 17–4–106.

(ii) All money collected by a collection service must be paid to the [D]epartment of [E]nvironmental [Q]uality and deposited in the general fund or the accounts specified in statute for the assessed penalties, fees, late fees, or interest, except that the collection service may retain those collection costs or, if the total debt is not collected, that portion of collection costs that are approved by the [D]epartment.

The purpose of this new section is to assist the Department in the collection of penalties. There is no Federal counterpart to this section. We are approving the proposed changes, finding that they add specificity to the Montana program and are not inconsistent with SMCRA or the Federal regulations.

In various provisions mentioned above, Montana proposes changes to paragraph numbering where provisions are proposed to be added, deleted, or provide clarity. Montana also proposes editorial revisions not specified above. Because such changes and revisions are minor and do not alter the meanings of the respective provisions, we approve them.

Montana proposes changes and additions to other regulations implementing changes to the MCA that are discussed above. The proposed regulation changes to implement 82–4–254, 1000, 1001, and 1002, MCA deal with civil penalty assessments and procedures for collection, waivers, and conferences related to penalty assessments. Montana proposes regulations that track the Federal regulations in 30 CFR 845. Normally, OSM would review these regulations for consistency with the counterpart Federal regulations. However, the Federal regulations at 30 CFR 845.12 through .15 have been suspended insofar as they require State programs to establish a point system for assessing or imposing civil penalties as stringent as those appearing in 30 CFR 845.15. Section 518(i) of SMCRA only requires the incorporation of penalties and procedures explicated in Section 518 of the Act. The system proposed by the State must incorporate the four criteria of Section 518(a) (August 4, 1980) (45 FR 51548). As previously stated, Montana proposes changes to provisions for waivers, procedures, conferences, hearings and payment. The counterpart Federal provisions at 30 CFR 845.16 through .20 have not been suspended. Therefore, Montana's provisions for these subjects are evaluated below for consistency with the Federal provisions.

20. Montana has proposed new rules at ARM 17.4.301, ARM 17.4.302, and ARM 17.4.305 through ARM 17.4.308 (as discussed in the findings that follow) to implement 82–4–1001, MCA and set out the details of how the statutory penalty factors will be used in the penalty calculation process. 82–4–1001, MCA is discussed and approved above. Specifically, Montana proposed new subchapter ARM 17.4.301:

(1)(a) Through (d) which implements 82–4–1001, MCA, and provides factors for calculating penalties assessed under several titles including Title 82, chapter 4, parts 1, 2, 3, and 4, MCA, insofar as they relate to reclamation requirements.

(2) The purpose of the penalty calculation process is to calculate a penalty that is commensurate with the severity of the violation, that provides an adequate deterrent, and that captures the economic benefit of noncompliance. The [D]epartment shall provide a copy of the penalty calculation to the alleged violator.

(3) The [D]epartment may not assess a penalty that exceeds the maximum penalty amount authorized by the statutes listed in (1).

Proposed ARM 17.4.301(2) describes the overall purpose of penalties relating to severity of the violation, adequate deterrent, and the principle that economic benefit of noncompliance is a consideration. Proposed ARM 17.4.301(3) states that the [D]epartment may not assess a penalty that exceeds the maximum penalty amount authorized by the statutes listed in subparagraph (1). The objectives for civil penalties are described in 30 CFR 845.2. Civil penalties are assessed under Section 518 of SMCRA which is intended to deter violations and ensure maximum compliance with the terms and purposes of the Act. There is no requirement for a State to incorporate counterparts to the Federal provisions describing scope and objectives. However, introductory regulations such as Montana's overall purpose states in ARM 17.4.301(2) do not conflict with purposes and objectives in SMCRA or the Federal regulations. ARM 17.4.301(3) states that penalties cannot exceed maximum authorized penalty amounts. For the reasons discussed above, we find subparagraphs (2) and (3) to be reasonable and not in conflict with Section 518 of SMCRA or 30 CFR part 845 and we approve them.

21. Montana proposed new subchapter ARM 17.4.302, Definitions. Montana adds definitions for terms used throughout its regulations and statutes. In its submittal, Montana explains that the definitions are necessary to clarify the meaning of the rules and achieve consistent and fair penalty calculations. The definitions are:

(1) ''Circumstances'' means a violator's culpability associated with a violation.

(2) ''Continuing violation'' means a violation that involves an ongoing unlawful activity or an ongoing failure to comply with a statutory or regulatory requirement.

(3) ''Extent'' of the violation means the violator's degree of deviation from the applicable statute, rule or permit.

(4) ''Gravity'' of the violation means the degree of harm, or potential for harm, to human health or the environment, or the degree of adverse effect on the [D]epartment's administration of the statute and rules.

(5) ''History of violation'' means the violator's prior history of any violation, which:

(a) Must be a violation of a requirement under the authority of the same chapter and part as the violation for which the penalty is being assessed;

(b) Must be documented in an administrative order or a judicial order or judgment issued within three years prior to the date of the occurrence of the violation for which the penalty is being assessed; and

(c) May not, at the time that the penalty is being assessed, be undergoing or subject to administrative appeal or judicial review.

(6) ''Nature'' means the classification of a violation as one that harms or has the potential to harm human health or the environment or as one that adversely affects the department's administration of the statute and rules.

These regulatory definitions define terms used in Montana's statutes which we approved in Paragraph 15 above. We find these definitions to be reasonable and consistent with their use within the Montana program and statutes. OSM is approving the additions noted above under ARM 17.4.302, Definitions.

22. Montana proposed the following revisions to ARM 17.4.305, Total Adjusted Penalty—Days of Violation:

(1) The [D]epartment may consider each day of each violation as a separate violation subject to penalties. The [D]epartment may multiply the adjusted base penalty calculated under [NEW RULE IV] by the number of days of violation to obtain a total adjusted penalty.

(2) For continuing violations, if the application of (1) results in a penalty that is higher than the department believes is necessary to provide an adequate deterrent; the [D]epartment may reduce the number of days of violation.

Montana represents in its submittal that the environmental laws provide the Department with discretion whether and how to bring enforcement actions, and that most of the laws state that each day of violation constitutes a separate violation. Montana goes on to explain that this rule clarifies that the Department may limit the number of days for which it assesses penalties if an assessment for the full number of violation days would result in a penalty that is higher than the Department believes is necessary to provide an adequate deterrent. Lastly, Montana states that, under this rule, the adjusted base penalty calculated under ARM 17.4.304 (as discussed in Paragraph 18 above) is multiplied by the appropriate number of days to arrive at a total adjusted penalty.

30 CFR 845.16(a) provides that ''[t]he Director, upon his own initiative or upon written request received within 15 days of issuance of a notice of violation or cessation order, may waive the use of the formula contained in 30 CFR 845.13 to set the civil penalty, if he or she determines that, taking into account exceptional factors present in the particular case, the penalty is demonstrably unjust.''

Montana's proposed rule at ARM 17.4.305 provides discretion similar to and consistent with that allowed in 30 CFR 845.16(a) to adjust penalties on a case by case basis to ensure a fair and just penalty. For this reason, OSM is approving the proposed revision.

23. Montana proposed revisions to ARM 17.4.306, Total Penalty, History of Violation and Economic Benefit, as follows:

(1) As provided in this rule, the [D]epartment may increase the total adjusted penalty based upon the violator's history of violation. Any penalty increases for history of violation must be added to the total adjusted penalty calculated under ARM 17.4.305 to obtain a total penalty.

(2) The [D]epartment may calculate a separate increase for each historic violation. The amount of the increase must be calculated by multiplying the base penalty calculated under ARM 17.4.303 by the appropriate percentage from (3). This amount must then be added to the total adjusted penalty calculated under ARM 17.4.305.

(3) The [D]epartment shall determine the nature of each historic violation in accordance with ARM 17.4.302(6). The [D]epartment may increase the total adjusted penalty for history of violation using the following percentages:

(a) for each historic violation that, under these rules, would be classified as harming or having the potential to harm human health or the environment, the penalty increase must be 10% of the base penalty calculated under (ARM 17.4.303); and

(b) for each historic violation that, under these rules, would be classified as adversely impacting the [D]epartment's administration of the applicable statute or rules, but not harming or having the potential to harm human health or the environment, the penalty increase must be 5% of the base penalty calculated under ARM 17.4.303.

(4) If a violator has multiple historic violations and one new violation, for which a penalty is being calculated under these rules, the percentages from (3) for each historic violation must be added together. This composite percentage may not exceed 30%. The composite percentage must then be multiplied by the base penalty for the new violation to determine the amount of the increase. The increase must be added to the total adjusted penalty for the new violation calculated under ARM 17.4.305.

(5) If a violator has one historic violation and multiple new violations, each with a separate penalty calculation under these rules, the base penalties for the new violations calculated under ARM 17.4.303 must be added together. This composite base penalty must then be multiplied by the percentage from (3) for the historic violation to determine the amount of the increase. The increase must then be added to the sum of the total adjusted penalties calculated for each new violation under ARM 17.4.305.

(6) If a violator has multiple historic violations and multiple new violations, for which a separate penalty is being calculated under these rules, the percentages from (3) for each historic violation must be added together, not to exceed 30%, and the base penalties for each new violation calculated under ARM 17.4.303 must be added together. The composite base penalties must be multiplied by the composite percentage to determine the amount of the increase. The increase must be added to the sum of the total adjusted penalties calculated for each violation under ARM 17.4.305.

In its submittal, Montana states that new ARM 17.4.306 sets out procedures for increasing the total adjusted penalty calculated under ARM 17.4.305 (discussed in Paragraph 22 above), based on certain qualifying prior violations, and clarifies how the Department will calculate the adjustment for prior violations. The definitions of what constitutes a qualifying prior violation are set out in newly-proposed and approved 82–4–1001(1)(c), MCA and ARM 17.4.302(5), respectively. Montana further explains that, under this rule, the total adjusted penalty calculated under ARM 17.4.305 is adjusted for prior violations to arrive at a total penalty.

In approving 82–4–1001, MCA (Paragraph 15) above, OSM found that the Department's consideration of a violator's prior history of certain violations to increase a penalty is in accordance with Section 518 of SMCRA. New ARM 17.4.306 implements 82–4–1001, MCA. For the reasons stated in Paragraph 15 above, we approve it.

24. Montana proposed revisions to ARM 17.4.307, Economic Benefit, as follows:

(1) The [D]epartment may increase the total adjusted penalty, as calculated under ARM 17.4.305, by an amount based upon the violator's economic benefit. The [D]epartment shall base any penalty increase for economic benefit on the [D]epartment's estimate of the costs of compliance, based upon the best information reasonably available at the time it calculates a penalty under these rules. The economic benefit must be added to the total adjusted penalty calculated under ARM 17.4.305 to obtain the total penalty.

This proposed rule implements subsection (1)(d) of 82–4–1001, MCA establishing any economic benefit or savings resulting from the violator's action as a factor for possibly increasing the total adjusted penalty. We are approving proposed ARM 17.4.307 because it implements the provisions of 82–4–1001, MCA, which we approved in Paragraph 15 above.

25. Montana proposed ARM 17.4.308, to allow the Department to consider other matters as ''justice may require'' when determining penalties. The Department may consider such matters to either increase or decrease the total penalty. This rule implements 82–4–1001(1)(g), MCA that we approved above. The Department states that this factor will be used only when, based on particular facts and circumstances, the application of the factors in new rules

ARM 17.4.301 through ARM 17.4.307 would result in an injustice.

Although worded differently, this waiver of the use of the penalty factors in certain circumstances to increase or decrease the total penalty amount is consistent with 30 CFR 845.16 that allows a penalty to be adjusted as appropriate so long as a written explanation is provided for the assessment. Accordingly, we find ARM 17.4.308 to be no less stringent than the Federal requirements at SMCRA Section 518 and consistent with 30 CFR 845.16 and we approve it.

26. Montana proposed revisions to ARM 17.24.1206(2), concerning notices and orders of abatement and cessation orders, including issuance and service. The proposed amendment implements 82–4–254(3)(a), MCA, which requires the Department to issue a Notice of Violation and Penalty Order containing (among other things) findings of fact and conclusions of law that, in the absence of a request for a hearing, becomes a final order of the Department. Therefore, for the same reasons discussed in Paragraph 11 above approving the provisions in 82–4–254(3)(a), MCA, we also approve the changes to ARM 17.24.1206(2).

27. Montana proposed revisions to ARM 17.24.1211(2), (3), and (4) addressing the procedure for assessment and waiver of civil penalties. These changes implement changes to the statute at 82–4–254, MCA, discussed in Paragraph 11 above, which we are approving. The proposed amendment to subparagraph (2) replaces the term ''proposed penalty'' with ''penalty order.'' Additionally, the time within which a person charged with a violation can request a contested case hearing is changed from 20 to 30 days to be consistent with the time allowed under 82–4–254, MCA. This proposed change is consistent with Federal regulations at 30 CFR 845.19(a), which allow a person 30 days from the date the proposed assessment or reassessment is received to request a hearing. The proposed amendment further provides that the person charged with a violation may enter into settlement negotiations with the Department prior to the notice and order being finalized (rather than prior to the Department's issuance of findings of fact, conclusions of law and order). Also in ARM 17.24.1211(2), the notice and order become final by operation of law if a request for a hearing is not timely received. As discussed above, this change is consistent with 82–4–254, MCA, and with Federal regulations at 30 CFR 845.20(a) which states ''[i]f the person to whom a notice of violation or cessation order is issued fails to request a hearing as provided in § 845.19, the proposed assessment shall become a final order * * *.''

Lastly, the proposed amendment to subparagraph (2) deletes the requirement that the Department issue findings of fact, conclusions of law and order either after the hearing or after the period of requesting a hearing has expired. This is so because, as previously discussed, the Department will now include findings of fact and conclusions of law in the Notice of Violation and Penalty Order. OSM is approving these changes to ARM 17.24.1211(2), finding that the additions and deletions are consistent with 30 CFR 845.19(a) concerning requests for hearings and 30 CFR 845.20 pertaining to final assessment and payment of penalties.

Montana's proposed amendment to ARM 17.24.1211(2) also requires the Department to serve a notice of violation within 90 days after issuance of the notice of noncompliance. The Federal regulations at 30 CFR 843.14 require the notice to be served on the person to whom it is directed or their designated agent ''promptly after issuance.'' Montana's current regulation requires service within 30 days following issuance of the notice of noncompliance. Montana states that in practice, 30 days has proven to be an insufficient amount of time within which to issue a notice of violation. This is due to the fact that an alleged violator is afforded an opportunity to submit a statement of mitigating circumstances regarding the occurrence of the violation and the assessment of the proposed penalty. The Department then reviews and responds in writing to the statement of mitigating circumstances. This process usually takes more than 30 days. The purpose of this new requirement is to provide notice of the violations as soon as possible. Under Montana's proposal, given the fact that the violator has an opportunity to submit a statement of mitigating circumstances, the operator does have such ''notice.'' Therefore, the violator does not suffer any prejudice by being issued the notice of violation 90 days after the notice of noncompliance is issued. For these reasons, we accept Montana's explanation for allowing 90 days to serve the notice of violation and find it to be consistent with the requirements of 30 CFR 843.14. We approve the change.

Montana's proposed amendment to ARM 17.24.1211(3) provides that penalties are to be calculated pursuant to new 82–4–1001, MCA, which establishes new factors for penalties that are applicable to all environmental programs administered by the Department. We are approving the new 82–4–1001, MCA in Paragraph 15 above. As a consequence, existing ARM 17.24.1212(3), Point System for Civil Penalties and Waivers, is being repealed because its method of penalty calculation is inconsistent with 82–4–1001, MCA.

For the above reasons, OSM approves the revisions to ARM 17.24.1211(3) finding that the revisions and the proposed civil penalty assessment procedure are in accordance with Section 518(i) of SMCRA, which requires State programs to incorporate penalties no less stringent than those set forth in SMCRA.

In ARM 17.24.1211(4), Montana proposes waiver provisions for minor violations. Under these proposals, decisions to waive a penalty for a violation must be based on whether the violation presents potential harm to public health, public safety, or the environment, or impairs the Department's administration of the Strip and Underground Mine Reclamation Act. Provisions for the waiver of use of the formula to determine civil penalty are found at 30 CFR 845.16 and state that, if the Director finds that exceptional factors present in a case demonstrate that the penalty is demonstrably unjust, he may waive the use of the formula for calculating penalties. Montana's provision would allow the penalty to be completely waived, while the Federal provision allows the method of calculating the penalty to be waived, which could result in a penalty being waived. Both provisions are based on a determination that the penalty is demonstrably unjust. Accordingly, OSM finds the waiver provision in revised ARM 17.24.1211(4) to be consistent with the Federal provision at 30 CFR 845.16 and we approve it.

IV. Summary and Disposition of Comments

Public Comments

One comment letter was received from an individual, dated December 28, 2006 (Administrative Record No. MT–24–7) commenting on SAT–026–FOR. The commenter's overall concern is that with recent amendments, Montana has softened its required enforcement so that it is no longer timely. Specifically, the commenter stated that Montana has no requirements for the Federal regulations at 30 CFR 843.12(b) and for Section 521(a)(4) of SMCRA. As discussed below, Montana has existing provisions that are consistent with 30 CFR 843.12(b) and in accordance with

Section 521(a)(4) of SMCRA. Nonetheless, Montana's provisions are not being changed in this amendment, and therefore are not subject to comment or revision at this time.

30 CFR 843.12(b) requires that notices of violation describe the nature of the violation, the remedial action required, the time for abatement, and a description of the area of the permit to which it applies. Montana's statute at MCA 82–4–251(2) requires that, ''When, on the basis of an inspection, the [D]epartment determines that any permittee is in violation of any requirement of this part or any permit condition required by this part that does not create an imminent danger to the health or safety of the public or cannot be reasonably expected to cause significant and environmental harm to land, air, or water resources, the director or an authorized representative shall issue a notice to the permittee or the permittee's agent fixing a reasonable time, not exceeding 90 days, for the abatement of the violation * * *.''

Section 521(a)(4) of SMCRA requires reviews of violations to determine whether a pattern exists which can lead to suspension or revocation of the permit. Montana has consistent provisions in its statutes at 82–4–251(3), MCA and its regulations at ARM 17.24.1213.

Federal Agency Comments

Under 30 CFR 732.17(h)(11)(i) and Section 503(b) of SMCRA, we requested comments on the amendment from various Federal agencies with an actual or potential interest in the Montana program (Administrative Record Nos. MT–23–3 and MT–24–3). We received comments from two Federal Agencies.

In its December 12, 2006, letter commenting on SATS MT–027–FOR, the United States Geological Survey said it had ''no comments'' (Administrative Record No. MT–24–4). In its December 6, 2006 letter, the Bureau of Indian Affairs (BIA) said it had ''no objections'' (Administrative Record No. MT–24–5) for SATS MT–027–FOR. In its February 7, 2006, letter on SATS MT–026–FOR (Administrative Record No. MT–23–4), BIA said that it did not recognize any deficiencies but commented on some wording in Section 7 of 82–4–226, MCA pertaining to prospecting for which no prospecting permit is required. Specifically, BIA stated that the first sentence in Section 7 is difficult to understand. In response, we note that Section 7 was previously approved by OSM and is not being changed as part of these amendments. Therefore, it is not under consideration. 82–4–226, MCA establishes requirements for prospecting permits, but only Section (3) is being changed in this amendment by eliminating the application fee (see Paragraph 4 above).

Environmental Protection Agency (EPA) Concurrence and Comments

Under 30 CFR 732.17(h)(11)(i) and (ii), we are required to get concurrence from EPA for those provisions of the program amendment that relate to air or water quality standards issued under the authority of the Clear Water Act (33 U.S.C. 1251 *et seq.*) or the Clean Air Act (42 U.S.C. 7401 *et seq.*).

None of Montana's proposed revisions pertains to air or water quality standards. Therefore we did not ask EPA to concur on the amendment.

State Historic Preservation Officer (SHPO) and the Advisory Council on Historic Preservation (ACHP)

Under 30 CFR 732.17(h)(4), we are required to request comments from the SHPO and ACHP on amendments that may have an effect on historic properties. On November 30, 2006, we requested comments on Montana's amendment (Administrative Record No. MT–24–3), but neither responded to our request.

V. Director's Decision

Based on the above findings, the Director approves Montana's proposed amendments as submitted on January 18 and November 6, 2006, respectively.

The Director approves, as discussed in III, OSM's Findings, amendments to MCA 82–4–206, Procedure for contested case hearings; MCA 82–4–223, Permit fee and surety bond; MCA 82–4–225, Application for increase or reduction in permit area; MCA 82–4–226, Prospecting permit; MCA 82–4–227, Refusal of permit; MCA 82–4–231, Submission of and action on reclamation plan; MCA 82–4–232, Area mining required—bond—alternative plan; MCA 82–4–233, Planting of vegetation following grading of disturbed area; MCA 82–4–235, Determination of successful reclamation—final bond release; MCA 82–4–251, Noncompliance—suspension of permits; MCA 82–4–254, Violation—penalty—waiver; MCA 82–4–1001, Penalty factors; and MCA 82–4–1002, Collection of penalties, fees, late fees, and interest; ARM 17.4.301 Purpose; ARM 17.4.302 Definitions; 17.4.303 Base Penalty; ARM 17.4.304 Adjusted Base Penalty—Circumstances, Good Faith and Cooperation, Amounts Voluntarily Expended; ARM 17.4.305 Total Adjusted Penalty—Days of Violation: ARM 17.4.306 Total Penalty—History of Violation, Economic Benefit; ARM 17.4.307 Economic Benefit; ARM 17.4.308 Other Matters as Justice may Require; ARM 17.24.1206 Notices, Orders of Abatement and Cessation Orders: Issuance and Service; ARM 17.24.1211 Procedure for Assessment and Waiver of Civil Penalties; ARM 17.24.1212 Point System for Civil Penalties and Waivers; ARM 17.24.1218 Individual Civil Penalties: Amount; ARM 17.24.1219 Individual Civil Penalties: Procedure for Assessment; and ARM 17.24.1220 Individual Civil Penalties: Payment.

The Federal regulations at 30 CFR Part 926, codifying decisions concerning the Montana program, are being amended to implement this decision. This final rule is being made effective immediately to expedite the State program amendment process and to encourage States to bring their programs into conformity with the Federal standards without undue delay. Consistency of State and Federal standards is required by SMCRA.

VI. Procedural Determinations

Executive Order 12630—Takings

This rule does not have takings implications. This determination is based on the analysis performed for the Federal regulations.

Executive Order 12866—Regulatory Planning and Review

This rule is exempted from review by the Office of Management and Budget (OMB) under Executive Order 12866.

Executive Order 12988—Civil Justice Reform

The Department of the Interior has conducted the reviews required by section 3 of Executive Order 12988 and has determined that this rule meets the applicable standards of subsections (a) and (b) of that section. However, these standards are not applicable to the actual language of State regulatory programs and program amendments because each program is drafted and promulgated by a specific State, not by OSM. Under Sections 503 and 505 of SMCRA (30 U.S.C. 1253 and 1255) and the Federal regulations at 30 CFR 730.11, 732.15, and 732.17(h)(10), decisions on proposed State regulatory programs and program amendments submitted by the States must be based solely on a determination of whether the submittal is consistent with SMCRA and its implementing Federal regulations and whether the other requirements of 30 CFR Parts 730, 731, and 732 have been met.

Executive Order 13132—Federalism

This rule does not have federalism implications. SMCRA delineates the roles of the Federal and State governments with regard to the regulation of surface coal mining and reclamation operations. One of the purposes of SMCRA is to ''establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations.'' Section 503(a)(1) of SMCRA requires that State laws regulating surface coal mining and reclamation operations be ''in accordance with'' the requirements of SMCRA. Section 503(a)(7) requires that State programs contain rules and regulations ''consistent with'' regulations issued by the Secretary pursuant to SMCRA.

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 rule does not have substantial direct effects on any Tribe, 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. The State of Montana, under a Memorandum of Understanding with the Secretary of the Interior (the validity of which was upheld by the U.S. District Court for the District of Columbia), does have the authority to apply the provisions of the Montana regulatory program to mining of some coal minerals held in trust for the Crow Tribe. This proposed program amendment does not alter or address the terms of the MOU.

Executive Order 13211—Regulations That Significantly Affect The Supply, Distribution, or Use of Energy

On May 18, 2001, the President issued Executive Order 13211 which requires agencies to prepare a Statement of Energy Effects for a rule that is (1) considered significant under Executive Order 12866, and (2) likely to have a significant adverse effect on the supply, distribution, or use of energy. Because this rule is exempt from review under Executive Order 12866 and is not expected to have a significant adverse effect on the supply, distribution, or use of energy, a Statement of Energy Effects is not required.

National Environmental Policy Act

This rule does not require an environmental impact statement because Section 702(d) of SMCRA (30 U.S.C. 1292(d)) provides that agency decisions on proposed State regulatory program provisions do not constitute major Federal actions within the meaning of section 102(2)(C) of the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*).

Paperwork Reduction Act

This rule does not contain information collection requirements that require approval by OMB under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*).

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.*). The rule approves the provision of the state submittal which applies only in the state of Montana.

Small Business Regulatory Enforcement Fairness Act

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

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

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.

This determination is based upon the fact that the State submittal applies only in the state of Montana and will have limited economic affect.

Unfunded Mandates

This rule will not impose an unfunded mandate on State, local, or tribal governments or the private sector of $100 million or more in any given year. This determination is based upon the fact that the rule approves the state submittal and does not impose an unfunded mandate.

List of Subjects in 30 CFR Part 926

Intergovernmental relations, Surface mining, Underground mining.

Dated: April 2, 2008.

Billie E. Clark,

Acting Director, Western Region.

■ For the reasons set out in the preamble, Title 30, Chapter VII Subchapter T of the Code of Federal Regulations is amended as set forth below:

PART 926—MONTANA

■ 1. The authority citation for part 926 continues to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*

■ 2. Section 926.15 is amended in the table by adding a new entry in chronological order by ''Date of Final Publication'' to read as follows:

§ 926.15 Approval of Montana regulatory program amendments.

* * * * *

Original amendment submission date	Date of final publication	Citation/description
* *	*	* * * *
1/18/2006	May 14, 2008 ...	Montana Code Annotated (MCA) 82–4–206; 82–4–223; 82–4–225; 82–4–226; 82–4–227; 82–4–231; 82–4–232; 82–4–233; 82–4–235; 82–4–251; 82–4–254; 82–4–1001; 82–4–1002.
11/6/2006	May 14, 2008 ...	Administrative Record of Montana (ARM) 17.4.301; 17.4.302; 17.4.303; 17.4.304; 17.4.305; 17.4.306; 17.4.307; 17.4.308; 17.24.1206; 17.24.1211; 17.24.1212; 17.24.1218; 17.24.1219; 17.24.1220.

[FR Doc. E8–10743 Filed 5–13–08; 8:45 am]

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