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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

with current BLM management practices.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

followed, these phrases became redundant and have been deleted.

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

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

*Sections 3809.430 Through 3809.434 Modifications of Plans of Operations*

*Section 3809.430 May I Modify My Plan of Operations?*

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

*Section 3809.431 When Must I Modify My Plan of Operations?*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

was needed to prevent unnecessary or undue degradation.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

not contingent upon any change in the financial guarantee.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

BLM understands that the economics of a specific operation were determined by the regulations in place at the time the project was first approved. That is why BLM believes it is appropriate that parts of the regulations be applied prospectively to new plans of operations or expanded activities that require modification of already approved or pending plans of operations. BLM believes that final § 3809.433(b) provides a reasonable transition approach allowing the operator and the BLM to consider whether a certain measure can be applied to satisfy the purpose of the statute and these regulations to prevent unnecessary or undue degradation while respecting the investments operators have made. In response to the commenter's concern, we have revised the provision to replace ''feasible'' with ''practical'' to account for the economic factors that must be considered, and we have added the word ''economic.'' BLM does not believe it is necessary to introduce the term ''integral operating area'' into the regulations.

Several commenters were concerned that proposed § 3809.433 would be creating too much confusion by setting up a situation where one set of regulations governs part of an operation and another set governs another part, especially when it is not simply parts of ''an operation'' that may be under different standards, but parts of the same, integrated ''facility''—an individual milling unit, an individual pit, a leach pad, or a waste rock repository. The commenters proposed that the regulations in effect when a plan of operations is submitted would govern the plan and all subsequent modification to avoid confusion. Another commenter suggested letting the operator decide where and how they wanted the new regulations to apply on future modifications.

BLM does not believe that allowing operations to continue to expand or modify indefinitely under the old regulations is a reasonable transition approach. Given the incremental nature of mining, and the need to achieve economies of scale, it is not uncommon for a modification to be larger in size and scope than the initial approved plan of operations. Final § 3809.433(b) provides a reasonable test of practicality in applying the new requirements to future modifications of existing mine facilities. BLM believes that as long as the overall facility design and operating parameters are clearly laid out in the approved plan of operations, the BLM inspector should be able to discern the appropriate requirements.

One commenter was concerned that a literal reading of the proposal required an operator who wished to modify a facility to incorporate new environmentally protective technology could do so only if first retrofitting the entire facility to comply with all of the proposed performance standards or established to BLM's satisfaction that retrofitting was not ''feasible.'' The commenter stated that in such circumstances, the operator would likely not install the new environmentally protective technology. For these reasons, the commenter suggested that the new rules should at most apply only to the modified portions of an existing facility.

BLM agrees with the comment and notes that the intent of final § 3809.433 is not to apply the new regulations to the entire mine facility, but only to the portion that is being modified, and only if the application of the new regulations is practical. The final regulations have been revised to clarify that the requirement applies to the modified portion of the mine facility.

Another person commented that under proposed § 3809.433(b), the term ''feasible'' can be interpreted to mean that it is simply not possible. This in turn could mean that absent bankrupting the company, an operator could be required to expend enormous sums to retrofit an existing facility merely because it came to BLM proposing to make only a minor change to the facility.

For clarity, BLM has, throughout the final regulations, modified the term ''feasible'' by ''technically'' and ''economically'' as appropriate to make it clear when we intend ''feasible'' to include economic considerations. In final § 3809.433(b), we have replaced ''feasible'' with ''practical'' to acknowledge that economics (cost) is one of the factors that will be considered in deciding to exempt a modification of an existing mine facility from the new performance standards.

One commenter asked that the regulations be clarified regarding whether, when a modification is filed, it opens the entire plan of operations to the new 3809 regulations.

The final rule makes it clear that the review and approval are for the modification being proposed, so that a proposed modification does not open the entire plan of operations to re-approval. However, it should be noted that while the modification is what would be review and approved, the scope of any NEPA analysis that might be required would have to consider the cumulative impacts of all the past actions.

Another commenter asserted that the last sentence of proposed § 433(b) (in the ''Then'' column of the table) contained a minor and a major defect. The minor one is that ''areas'' do not ''operate.'' Rather, ''operators use areas.'' The major one is that, as written, it only expressly provides for the operator to continue to operate facilities, or in areas, NOT subject to the modification. The negative implication is that all use of facilities or areas in the modification area must cease (leaching must cease in the pad to be enlarged; excavation must cease in the pit to be laid back). The commenter questioned whether this was intended and sought to have the regulations make clear that operations may continue, under the existing terms of approval, in the area of facility subject to the modification. The comment suggested that the sentence should read, ''You may continue to operate under your existing plan of operations, including at those facilities and in those areas that are the subject to the modification.''

In response, BLM intended that all operations not part of the modification, including portions of the facility to be modified, would not be subject to the new regulations and could continue to operate as approved under the existing plan of operations. In addition, an operator may continue to conduct activities at the facility proposed to be modified under the approved plan of operations until BLM acts on the proposed modification. The sentence is unnecessary, and BLM has deleted it to avoid confusion.

One commenter was concerned that BLM could simply undo decisions made and compromises wrought in the initial plan approval process regarding facility siting and operation, after the operator has invested in opening the mine under the terms of the original approval, by simply issuing a directive to modify the plan.

BLM notes that existing approved facilities, while subject to modification

under the existing regulations as needed to prevent unnecessary or undue degradation, would not be required to change from the old performance standard to the new standards. The modification language under final § 3809.433(b) applies the new performance standards only to that portion of the new facility being modified, and does not mean the entire facility would be subject to new requirements.

Another comment on proposed § 3809.433 concerned how to apply the performance standards of the new regulations to the expansion of an existing facility, in areas of mixed ownership. The commenter cited an example where an open pit mine on private land would require a small area of BLM land for expansion of the mine pit slope. The commenter was concerned that under final § 3809.420(c)(7), BLM would be able to require backfilling of the part of the pit that expanded onto BLM land, which would effectively require backfilling the entire pit, even on the private land part of the mine, and even though a minuscule area of BLM land may be involved. The commenter cited this example as a reason for exempting all modifications of existing operations from application of the final regulations.

The backfilling situation described above, with a large amount of private land, is a good example of where BLM would allow an exclusion from the new regulations as specified in final § 3809.433(b) based upon practicality, or a determination made under final § 3809.420(c)(7) that backfilling was not necessary. Other mine design and operation aspects, such as leach pad containment design, would be reviewed in a similar fashion and a determination made regarding the practicality of applying the new regulations to the modification.

Changes made in the final regulations to § 3809.433 occur in paragraph (b) of the table. BLM has deleted the last sentence in the ''Then'' column to avoid confusion regarding continued operations. We have edited the text to specify that the paragraph applies to the modified portion of facility. We have replaced the term ''feasible'' with ''practical,'' added the word ''economic,'' and provided a citation to the 3809 regulations that were in effect prior to these final regulations.

Final § 3809.433 is not inconsistent with the NRC Report. While NRC did not specifically address how to transition existing operations into any new regulations, it did discuss the need for regulations to have ''safeguards to assure that modifications are imposed only after serious consideration and following a procedure that protects the interests of the mining company in continuing to conduct operations, consistent with the avoidance of unnecessary or undue degradation.'' (p. 101) Under final § 3809.433, operators proposing a modification do not have to retrofit existing mine facilities. In addition, operators may be given an exemption from the content and performance standards of the new regulations by showing it is not practical to apply them to the modification of an existing mine facility. This approach is not inconsistent with the discussions contained in the NRC Report regarding plan modifications.

*Section 3809.434 How Does This Subpart Apply to Pending Modifications for New or Existing Facilities?*

We have combined proposed §§ 3809.434 and 3809.435 into final § 3809.434. This section describes how the regulations will apply to modifications of plans of operations for new or existing mine facilities that are pending before BLM when the final regulations go into effect. We have rewritten both proposed sections, deleted the tables, and simplified the concepts.

The final regulations provide that modifications pending on the effective date of the final regulations will be subject to the new regulations, except for the plan of operations content requirements (final § 3809.401) and performance standard requirements (final §§ 3809.415 and 3809.420). The existing plan of operations content requirements and performance standards that were in effect when the modification was submitted would continue to apply to the modification.

Several commenters said that BLM was making these subsections too complicated, burdensome, and cumbersome. The commenters suggested that if the new facility or modification can be done under an EA/FONSI then the standards in effect at the time of plan approval should apply. If the modification or new facility requires amendment to the EIS prepared for the original decision by BLM, then the Supplemental EIS should determine the extent, if any, new regulations apply.

BLM did consider using a NEPA criteria such as EA/Supplemental EIS for when to apply the new regulations to a pending modification, but did not adopt it because of potential problems with consistency and fairness. Instead, BLM has simplified these sections. We have combined proposed § 3809.435 with proposed § 3809.434. The cutoff for application of the new regulations to pending modifications has been relaxed from the NEPA document publication date in the proposed regulations, to the effective date of the final regulations. If an operator's modification was filed before the effective date of the new regulations it remains under the previous plan content and performance standard requirements.

Other comments were concerned that proposed § 3809.434 would create too much confusion by setting up a situation where one set of regulations governs a part of an operation and another set governs another part. The commenters felt that it is even more inappropriate to apply new standards to existing facilities than it is to apply them to a wholly new plan of operations submitted prior to adoption of new standards. This is because the operator relies on the terms and conditions of the initial approval in deciding whether to expand operations. A new facility at an existing mine is proposed because it fits, economically, logistically, and operationally into an existing operation. It can only be designed and located in ways dependent on the design and operation of the existing mine. The commenters were concerned that new facilities would be prohibited by standards that would not have allowed the initial facilities to be located where they are, or to be operated as they are, and felt that the same standards that governed approval of the initial facility location and mode of operations must govern the new facility.

BLM understands the concern that modifications may not be able to occur if held to a higher standard than the initial plan of operations. However, BLM believes the performance standards in final § 3809.420 will generally be compatible with existing operations when applied on a site-specific basis. Modifications under the existing regulations happen frequently, yet evolving changes in reclamation technology and regulatory approaches get incorporated successfully, even when it may be years between the initial facility approval and the modification. It won't be that different with a change in regulations. As long as the approved plan of operations clearly identifies how the overall facility is to be constructed, operated, and reclaimed, there should not be any more confusion over expected performance than occurs today with modifications processed under the existing regulations. Nor does BLM expect facilities be prohibited from expansion due to the changes in performance standards in final § 3809.420.

One comment suggested that we use completion of the public scoping process, instead of the publication date for the NEPA document, as the cutoff for applying this final rule to pending modifications. BLM does not agree with the comment, but we have revised final § 3809.434 to provide that a project modification submitted prior to the effective date of the final regulations may continue under the existing 3809 regulations. Using the cutoff date for the scoping process, as suggested by the comment, would have generated the same confusion as the proposal.

Changes have been made in the final regulations to proposed §§ 3809.434 and 3809.435. All of proposed § 3809.435 has been deleted. Final § 3809.434 has been rewritten to address pending modifications for an existing mine facility that were covered in proposed § 3809.435, as well as pending modifications for new mine facilities. The title of final § 3809.434 has been changed to: How does this subpart apply to pending modifications for new or existing facilities? The table has been deleted and the text presented in four paragraphs.

Final § 3809.434(a) says that this section applies to modifications pending before BLM on the effective date of the final rule to construct a new facility, such as a waste rock repository, leach pad, drill site, or access road; or to modify an existing mine facility such as expansion of a waste rock repository or leach pad.

Final § 3809.434(b) states that all provisions of this subpart, except plan content and performance standards (§§ 3809.401 and 3809.420, respectively) apply to any modification of a plan of operations that was pending on the effective date of final rule. It also cross references § 3809.505 on the applicability of financial guarantee requirements.

Final § 3809.434(c) provides a reference to the plan content requirements (§ 3809.1–5) and the performance standards (§§ 3809.1–3(d) and 3809.2–2) that were in effect immediately before the final rule which apply to a pending modification of a plan of operations.

Final § 3809.434(d) provides that operators could choose to have the new rules apply to their pending modification of a plan of operations, where not otherwise required.

The cutoff date for applicability of the final regulations to pending modifications has been changed from when the NEPA document has been published, to whether the proposed modification has been submitted to BLM prior to the effective date of the final regulations. The reason for this change is that BLM was persuaded by comments concerning the amount of effort that goes into preparing a plan of operations and associated NEPA documents which might have to be partially redone or supplemented, and by the fact that the operator has very little control over when the NEPA document is actually published. BLM believes that using the effective date of the final regulations to determine ''grandfathered'' plans of operations, or modifications, would be simpler to administer and more fair to the operators. However, BLM does expect that in order for pending plans or modifications to be grandfathered, they will have to be substantially complete in addressing the content requirements of the existing regulations before the effective date of the new regulations.

Final § 3809.434 is not inconsistent with the NRC Report. While NRC did not specifically address how to transition pending modifications into any new regulations, they did express concern for the protection of an operator's investment and that the regulations in general contain procedural protections. Under final § 3809.434 operators with a pending modification do not have to redo designs or reopen NEPA analysis that was underway. This approach is not inconsistent with the discussions contained in the NRC Report regarding plan modifications

*Sections 3809.500 Through 3809.551 Financial Guarantee Requirements—General*

Today's rule establishes mandatory provisions for financial guarantees for all activities greater than casual use, expands the types of financial guarantees available, and establishes the circumstances and procedures under which BLM will pursue forfeiture of a guarantee. It also requires that financial guarantees be redeemable by the Secretary while allowing BLM to accept financial guarantees posted with the State in which operations take place if the level of protection is compatible with this subpart. The rule authorizes the establishment of a trust fund in those circumstances where long-term, post-mining operations and water treatment will be necessary.

This final rule is different from the proposed rule in several significant ways. First, we are not adopting part of the proposal contained in the supplemental rule published on October 26, 1999. See 64 FR 57613, proposed § 3809.552(d). That proposal would have required an operator, when BLM identifies a need for it, to put portion of the financial guarantee in an immediately redeemable funding mechanism that would enable BLM to quickly obtain use of the funds for site stabilization during forfeiture proceedings.

Second, we will no longer accept corporate guarantees for plans approved after the effective date of this regulation. BLM will continue to allow corporate guarantees which are in effect on the effective date of the regulation. However, if a plan modification results in an increase in the estimated costs of reclamation we will require a financial guarantee in a form other than a corporate guarantee for the area covered by the modification.

A third change will provide BLM discretion in determining whether to seek forfeiture of a financial guarantee.

Also, BLM will not require a 30-day period for public comment prior to releasing financial guarantees associated with notice-level activities but will have a 30-day comment period for plans of operation. The comment period will be posted in the BLM field office having jurisdiction, published in a local newspaper, or both.

*General Comments on Financial Guarantees*

BLM received numerous comments addressing the proposed rules related to financial guarantees. Commenters generally supported the concept that BLM require financial guarantees for all operations beyond casual use. However commenters diverged widely on specific contents of the rule.

*General Comments Supporting the Proposal*

Numerous commenters supported the notion that adequate bonding is necessary to protect the public from bearing the financial burdens of cleanup should an operator declare bankruptcy and abandon a mine site. In particular, this included industry support for bonding of notice-level operations. BLM received comments in favor of the wide range of financial instruments we proposed to accept and the continued use of State bond pools. Industry expressed satisfaction that BLM proposed to continue to allow corporate guarantees. The environmental community generally supported the provisions proposing a trust fund to cover the cost of post-mining operations and water treatment, although some commenters suggested this did not go far enough. Non-industry commenters supported the provisions allowing a time period for public participation both before plan approval [proposed § 3809.411(d)] and prior to final

financial guarantee release [proposed § 3809.590(c)]. One commenter asked that BLM amend the rule to clarify how we will implement it for a variety of conditions covered in the individual sections of the rule.

*General Comments Opposing the Proposal*

Some small miners expressed opposition to bonding for notice-level activities because, they felt, this would establish a hardship. There were numerous comments opposing BLM's proposal to accept corporate guarantees and State financial guarantees. Regarding the former, commenters saw this as a risk because if commodity prices decline, corporate assets would also drop. Some commenters expressed that accepting State financial guarantees is risky because of the possibility that a State could call a financial guarantee, leaving the Federal government holding a financial guarantee which would not cover the full cost of reclamation. There was also opposition to the public participation proposal on the part of industry which sees this as creating an unnecessary delay. They see the NEPA process as already affording the public an opportunity to comment on financial guarantee amounts. Industry strongly opposed the provisions calling for a trust fund and the posting of a financial guarantee to cover unforeseen contingencies. With respect to the trust fund, commenters felt that once a financial guarantee is released that is a recognition that reclamation is complete. With respect to contingency bonding, many commenters expressed the belief that it is not workable to provide such an instrument.

**Consistency With the National Resource Council Report**

Recommendation 1 of the NRC Report stated; ''Financial assurance should be required for reclamation of disturbances to the environment caused by all mining activities beyond those classified as casual use, even if the area disturbed is less than 5 acres.'' The report justifies the recommendation by pointing out it observed unreclaimed exploration and mining sites that operated under a notice. The NRC expressed the belief that disturbances beyond casual use are significant and that financial guarantees would protect the taxpayer by allowing agencies to reclaim lands but not at taxpayer expense. The NRC also thought that a financial guarantee could provide an incentive ''for operators to reclaim land in a timely manner.'' The proposed rule and the final rule carry out this recommendation.

The NRC goes on to describe how it believes BLM could implement a bonding program and suggests BLM should establish standard financial guarantee amounts for ''typical activities'' which it describes as limited activities of under 5 acres. This would preclude the need to calculate a financial guarantee for each activity. The NRC suggests that if BLM were to do this, the amount of bonding must be adequate. Language in both the proposed and final rule is broad enough to allow BLM field managers to establish and accept standard financial guarantee amounts. However, regardless of the standard, and consistent with the NRC Report, if the ''standard'' would result in the filing of an insufficient guarantee, the BLM field manager must require the posting of a greater guarantee, even if this requires a calculation. Likewise, there may be instances when the ''standard'' amount exceeds the likely cost of reclamation. In those cases, BLM would permit the operator to demonstrate this and the field manager could accept a guarantee in an amount less than the ''standard.''

The NRC Report (p. 95) also encourages the use of bond pools. Today's action permits operators to use bond pools provided the pool is adequate to protect the public in case of default.

Except for the items discussed above, the NRC Report provides no guidance on how to operate a bonding program. But it is difficult to imagine a rule which addresses financial guarantees in such a limited manner that BLM and the public would not know the conditions of surety release, forfeiture, or how the States and BLM will work together. Therefore today's action includes provisions necessary to implement the recommendations of the Report.

*Section 3809.500 In General, What Are BLM's Financial Guarantee Requirements?*

This section requires operators to provide financial guarantees for all activities other than casual use. It mirrors exactly Recommendation 1 of the NRC Report. The only difference from the proposed rule is language we added to state explicitly that if a notice is on file with BLM as of the effective date of the regulation, the operator doesn't need to post a financial guarantee. However, if an operator modifies or extends a notice, the operator will have to post a financial guarantee. (See final § 3809.503)

We received numerous comments in support of requiring financial guarantees for notice-level activities. The majority of the commenters expressed the feeling that financial guarantees should protect the public from having to bear the financial burdens of cleanup should an operator declare bankruptcy and abandon a mine.

Comments opposing this section generally complained that requiring all notice-level operators to post a financial guarantee will create hardships that small operators might not be able to overcome and therefore would be unable to continue in the business. Several Alaska miners thought that the rules would be especially difficult for them and would make it difficult to use the Alaska bond pool. One commenter suggested that BLM be flexible so as to not overly burden small businesses. Hardships were described both as financial, *i.e.*, the cost of the financial guarantee and procedural, *i.e.*, small miners find it difficult to obtain a bond (the most common form of financial guarantee). One commenter suggested that BLM has not demonstrated that the requirement will provide additional environmental protection given that so few notice-level operations actually result in unnecessary or undue degradation.

Commenters suggested that exploration activities not be subject to environmental review or bonding if the operations don't use chemicals. Under these circumstances, some saw bonding as unnecessary given the low level of environmental degradation. Others believe that requiring a financial guarantee would adversely impact the recreational mining community. In a similar vein, commenters suggested that it would cost BLM more to administer a financial guarantee program for notice-level operations than it would cost to simply reclaim the few operations where an individual or company has left their obligations. Several commenters expressed the belief that notice-level bonding is appropriate, but asked that it be done as a separate rulemaking. They believe this would ensure consistency with State laws. One commenter asks how BLM will protect the miner from trespassers who cause degradation that results in the legal miner forfeiting a financial guarantee.

Commenters expressed a concern and requested clarification concerning the possibility that a mine could be double bonded for some parts of an operation because of the requirements for calculating reclamation costs.

One State suggested that BLM distinguish between mining and exploration and not require a financial guarantee for certain exploration projects of less than 5 acres. Recreational miners and hobbyists

expressed concern that the financial guarantee requirements would prevent them from continuing to pursue mining.

BLM believes, along with the NRC, that the posting of a financial guarantee protects the public, and its very existence might encourage an operator to promptly reclaim once the activities have ended. In fact, the NRC was quite specific that operators undertaking exploration activities should post a financial guarantee. With respect to recreational miners and hobbyists, they must follow the requirements of § 3809.11 to determine if their activities go beyond casual use. If so, we must require a financial guarantee because of the potential cumulative impacts and the need to assure reclamation activities are carried out. With respect to the possibility of double bonding, BLM wrote these rules in such a manner that through State-BLM cooperation, double bonding should normally not occur. The only time double bonding might occur is when BLM and State interests diverge, and the parties can't agree on bonding requirements.

If BLM were not to adopt this requirement, we would be inconsistent with a specific NRC Report recommendation. While we can be sympathetic toward those who may face a hardship in securing a financial guarantee, this potential hardship cannot override the Secretary's responsibility under FLPMA section 302(b) to ''prevent unnecessary or undue degradation.'' The NRC said posting a financial guarantee may provide an incentive to reclaim land and also protects the taxpayer from having to pay for the failure of an operator to do so. We agree. This is why we include the requirement in today's action.

A commenter stated that at the time the previous rules were adopted, BLM decided not to burden the small miner with ''confiscatory'' bonding or undue impairment to the point that mining was no longer feasible. The commenter asserted that BLM previously concluded that requiring notice-level operations to obtain bonds was unreasonable enforcement and the taking of capital to mine through bonding, a hardship that took the operating capital from a small-entity operation.

BLM disagrees as to the relevance of its decision in 1980 not to require that notice-level operations be bonded. BLM has documented over 500 cases since 1980 where the operators, most of them at the notice level, have abandoned their operation without performing the required reclamation. BLM now believes that bonding is necessary to ensure performance of reclamation. The bonding provisions have been structured so that the amount of the financial assurance can be incrementally posted and released to correspond with the on-the-ground disturbance or the performance of reclamation. This should keep the impact to operating capital at a minimum while promoting performance of reclamation.

Today's action does not intend to limit the use of State bond pools, including the Alaska bond pool, provided the BLM State Director is satisfied that the bond pool will actually provide the funds BLM might need to carry out reclamation in the event operators fail to carry out their obligations.

The rule attempts to eliminate hardships by requiring bonding for the actual cost of reclamation rather than requiring a minimum financial guarantee as we did in the remanded 1997 rule. In response to those who believe this would cause hardship, BLM contacted the Small Business Administration (SBA) to see how its Surety Bond Guarantee Program might be applied to small mining businesses. The SBA concluded that it is unable to accommodate our request at this time.

*Section 3809.503 When Must I Provide a Financial Guarantee for My Notice Level Operations?*

This section of the final rule requires an operator to provide a financial guarantee before beginning operations, if the operator files a notice on or after the effective date of the rule. Operators must provide a financial guarantee for operations that existed before today's rule becomes effective only if they modify their operation or extend it beyond two years.

Today's action differs from the proposal in that we modified paragraph (b) to make clear that if an operator modifies a notice that the operator submitted prior to the effective date of the rule, the operator must post a financial guarantee to ensure reclamation for the entire area covered by the notice. We believe that this language, coupled with final § 3809.300 clearly answers any questions regarding the posting of financial guarantees for notices. This change is in response to comments that the proposal was unclear as to whether an operator has to post a financial guarantee if the operator modifies a notice that existed before the effective date of this rule.

We also received a comment asking BLM to clarify that the operator is only responsible for the disturbances created by that operation. The commenter feared that BLM would hold operators responsible for disturbance created by previous operations. One commenter asked BLM to clarify whether if the operator modifies a notice, a financial guarantee is required for the entire notice or just the modified part of the notice. One commenter suggested that we add words to clarify that the State might have requirements for a financial guarantee beyond what BLM requires.

The intent of this section is to state that financial guarantees are posted for current notice-level operations. However, if the operations are continuing under a notice which has been transferred, the joint and several liability provisions of final § 3809.116 would apply. If an operator begins a new operation on lands disturbed by an earlier operation, and if the new operation is not a continuation of the earlier operation, the new operator is responsible for the earlier disturbances only to the extent the new operator redisturbs the area. If an operator modifies a notice, BLM will consider the notice as a new notice, and we will regulate the modified notice under the rules we are issuing today. Therefore, as stated above, we added language to this section to clarify that the operator will have to post a financial guarantee for the entire notice.

We do not think it is necessary to address State requirements for a financial guarantee. Operators know that in addition to the requirements of this subpart, they must comply with all local, State, and Federal requirements. We have made clear that the plan of operations must comply with State, local, Tribal, and other Federal requirements. Where those requirements include the posting of a financial guarantee beyond the BLM requirements, the operator is responsible for doing so.

*Section 3809.505 How Do the Financial Guarantee Requirements of This Subpart Apply to My Existing Plan of Operations?*

This section allows those operating under an existing plan of operations 180 days from the effective date of today's action to comply with the financial guarantee requirements of this rule. There are no substantive changes from the proposed rule; however we did add a sentence to clarify that if an existing financial guarantee complies with the requirements of this subpart, the operator need not file a new financial guarantee.

We received some comments asking that we lengthen the time period for operators to comply to one year. Some holders asked that BLM extend the requirements from 180 days to one year

to cover seasonal situations and to give the operator additional time to decide whether to continue the notice. We received a comment from a Federal agency asking that we shorten the period to 60 days. We also received a few comments suggesting that we clarify that notice level operators are not subject to the requirements of this section. Several commenters asked that we clarify proposed § 3809.505 to state that the obligation to provide a financial guarantee meeting the requirements of this subpart will not restrict the ability of an operator to continue to operations under an approved plan of operations. One commenter said that the existing financial guarantee should remain in place unless the operator modifies the approved plan of operations.

There were comments that the provisions of the rule for existing plans require clarification. One commenter suggested that proposed §§ 3809.430–434 appear to have requirements that conflict with proposed § 3809.505. Final §§ 3809.430–434 apply to modifications of existing plans of operations whereas this section states that an operator has 180 days to post a financial guarantee meeting the requirements of this subpart. The financial guarantee requirements are independent of modifications. Any modification of an approved plan of operations would require the operator to adjust the financial guarantee before beginning to operate under the modifications. One commenter asked that we modify this section to state explicitly, ''This obligation does not affect your right to continue to operate under the approved plan of operations both before and after complying with the obligation in this section.'' As stated above, we adopted language to make clear that operations may continue during the 180-day period we grant in final § 3809.50.

BLM decided to leave the 180-day transition period in place as this provides ample time to come into compliance. The 180-day period applies to plans of operations, not notices. As most currently operating under a plan will already be complying with these provisions, we believe few, if any, operations will be impacted. But if an existing plan of operations does not have a financial guarantee meeting the requirements of this subpart, there is a need to upgrade the guarantee. Plans of operations frequently result in significant on-the-ground disturbance and other impacts. However, shortening the time period to 60 days has the potential to unnecessarily cause hardship in some instances due to the fact that some work is seasonal and that requiring a financial guarantee could take more than 60 days. If the operator cannot secure an adequate financial guarantee in 180 days, the operator will be in noncompliance. We believe that BLM can justifiably say the operations pose a potential threat and take appropriate enforcement action.

*Section 3809.551 What Are My Choices for Providing BLM With a Financial Guarantee?*

These rules allow an operator to provide:

- An individual financial guarantee for a single notice or plan of operations,
- A blanket financial guarantee for State-wide or nation-wide operations or,
- Evidence of an existing financial guarantee under State law or regulations.

These choices are identical to those contained in the proposed rule.

Several members of the mining industry commented that companies with several notice- or plan-level operations would be better served with one large financial guarantee, rather than having several different financial guarantees. Conversely, a large financial guarantee is seen by some commenters as a way that industry can skimp on bonding and have all of their operations covered. In addition, the same commenters believe having one financial guarantee for several plans of operations would make defaulting on a financial guarantee more of a possibility.

Commenters suggested that the blanket financial guarantee provision is unclear as to whether the sum of the financial guarantees will equal the sum of financial guarantees required for individual operations. Others objected to blanket guarantees because of the administrative difficulties they could cause BLM.

BLM allows nationwide blanket guarantees in other mineral programs, and we believe we can administer the program soundly. Final § 3809.560(b) states that BLM will accept the blanket financial guarantee if we determine that its terms and conditions are sufficient to comply with this subpart. As the operator must post a sufficient financial guarantee to cover the cost of reclamation for each individual project, we believe that the amount of the financial guarantee must equal the sum of the reclamation estimates for each project.

*Sections 3809.552 Through 3809.556 Individual Financial Guarantee*

*Section 3809.552 What Must My Individual Financial Guarantee Cover?*

This final rule requires an individual financial guarantee to cover reclamation costs as if BLM were to contract for reclamation with a third party. The rule also requires financial guarantees to cover all reclamation obligations arising from an operation, regardless of the areal extent or depth of activities the operator describes in the notice or the approved plan of operations. Paragraph (b) BLM establishes the goal of periodic BLM review of the adequacy of the estimated reclamation cost. Paragraph (c) authorizes BLM to require the operator to establish a trust fund or other funding mechanism to ensure the continuation of long-term water treatment to achieve water quality standards or other long-term, post-mining maintenance requirements.

The final rule omits a portion of the proposal contained in the supplemental proposed rule published on October 26, 1999 (64 FR 57613). See proposed § 3809.552(d). That portion of the proposal would have required an operator, when BLM identifies a need for it, to establish a portion of the financial guarantee used to conduct site stabilization and maintenance in a funding mechanism that would be immediately redeemable by BLM. BLM would then use the funds to maintain the area of operations in a safe and stable condition during the period needed for bond forfeiture and reclamation contracting procedures.

Some commenters feared that it would require operators to put up front substantial sums of capital for reclamation which could be used at BLM's whim. Some saw it as potentially giving a competitive advantage to larger companies. Others, silent on how BLM would use the money, felt the provision would tie up large sums of capital. Another comment suggested that all guarantees should be immediately redeemable. We also received several comments suggesting that the supplemental proposed rule did not follow the requirements of the Small Business Regulatory Enforcement and Fairness Act, 5 U.S.C. 601–612, because the regulatory flexibility document did not consider the impact of this proposed change.

We decided to omit this provision from the final rule for some of the reasons expressed in the comments. Requiring a separate interim funding mechanism, while useful, could be complicated, and the complications of creating and maintaining such a fund in every case could outweigh the advantage of having the fund available in the relatively fewer occasions when it would be helpful. We believe the regulatory flexibility document meets the requirements of the Act, even though the economic analysis dated

December 18, 1998, did not specifically address the potential for increased cost of a financial guarantee that would be immediately available to BLM, and the impact of this proposal would have been minimal.

We are adopting the part of the October proposal that requires the financial guarantee to cover any interim stabilization and infrastructure maintenance costs necessary to maintain the area of operation while third-party contracts were being developed and executed. See the last sentence of final § 3809.552(a), which clarifies the February 9, 1999, proposed rule.

One commenter suggested that we amend proposed § 3809.552(b) to require BLM to annually send each operator a written report on the adequacy of the financial guarantee. The same comment asked that we amend paragraph (c) of that section to include a provision to require BLM to show that the trust fund does not duplicate any other authority.

When we published the proposed rule we specifically asked for comments on whether additional financial assurances should be required to satisfy operational or environmental contingencies. We received a number of comments objecting to bonding for contingencies or worst-case scenarios. Numerous commenters suggested that operators have liability insurance to protect against the financial consequences of unforeseen activities. Operators would presumably use the proceeds of this insurance to fund corrective actions that a contingency requires. Other comments see contingency bonding as inconsistent with reclamation and also see the long-term trust fund as something that State and Federal water quality laws address. The potential cost led one commenter to conclude this ''would be a potential violation of the right to mine.''

A national industry association questioned the concept of contingency bonding, stating that this runs counter to the notion of bonding for ''specific and calculable reclamation requirements established in the approved plan of operations.'' These comments describe this requirement as ''phantom bonding'' and suggest that operators liability insurance would provide protection if an unforseen accident occurred. They asserted it would be difficult to obtain a financial guarantee under these circumstances.

One industry comment suggested that requiring contingency bonding is difficult to implement because all mine models are uncertain. This commenter suggested that BLM should consider the worst case and the probability that this would occur. Another commenter pointed out that the expense of such bonding and the infrequency of worst-case occurrences that were beyond the ability of the operators to redress with their funds.

Others believe that bonding for unforeseen contingencies in the reclamation process is an unreasonable requirement. They contend this would give BLM too much discretion in determining the amount of the financial guarantee for an unplanned events. Another commenter suggested this is possible to do through using modeling and determining the probability of an impact occurring.

There were also numerous comments asking BLM to incorporate contingency bonding into these rules because the impact of mining is often not known for many years after it is concluded. One comment suggested we hold a portion of the financial guarantee beyond the time of surface reclamation to assure that off-site impacts will not occur. One Interior Department agency noted that long-term financial support is an important tool for environmental protection.

BLM has decided not to require bonding for contingencies because of the uncertainties involved in calculating the amount. The rules do require that the financial guarantee be sufficient to cover the costs of reclamation described in the plan of operations or notice. If a contingency occurs and creates a new reclamation obligation, the operator must adjust the financial guarantee upward accordingly to cover the new obligation.

Some commenters objected to proposed § 3809.552(c) on the basis that a financial guarantee to establish long-term water treatment or water quality standards should be left to EPA or State regulators. A Federal agency noted the proposal didn't define the criteria BLM would use to base the ''need'' for a long-term trust fund. One commenter asked that we clarify that the State may require financial assurances for water quality requirements that go beyond the requirements of this subpart.

In some circumstances, an important or perhaps the only way an operator may protect water quality from unnecessary or undue degradation is to provide for long-term water treatment. The trust fund or other funding mechanism is appropriate to assure that long-term treatment and other maintenance will continue. The final rule does not preclude States from establishing additional financial guarantee requirements.

Some commenters said that paragraph (c) should be deleted because BLM should not approve any plan of operation that would create the need for long-term water treatment because that constitutes unnecessary or undue degradation. This suggestion is not incorporated into the final rule. BLM defines ''unnecessary or undue degradation'' in such a way that long-term water treatment by itself is not an indicator of unnecessary or undue degradation.

One commenter asked that we revise proposed § 3809.552(a) to specify that BLM administrative costs associated with a default be limited to direct costs of BLM staff directly responsible for implementing the approved reclamation plan. One commenter suggested that instead of financial guarantees BLM (and the Forest Service) should have the funding authority to spend Federal dollars on the ''few, if any'' operations causing unnecessary or undue degradation.

In the final rule we are not limiting the administrative costs to direct BLM costs. Such an action could result in BLM having to use taxpayer funding to properly monitor reclamation contracts. Likewise we did not impose a requirement to send an annual status letter to the claimant/operator or to impose a specific time period for BLM to review the adequacy of a financial guarantee. Both proposals would impose an unnecessary administrative burden on BLM because the normal claim/plan management process affords us the opportunity to review the adequacy of financial guarantees when it is necessary. This final rule also declines to adopt the rules of any one State. We intend this rule to be flexible, avoiding a one size fits all approach. Adopting a rule which mirrors that in one State could inadvertently negatively affect other States. We also decided not to accept the suggestion that BLM seek authority to spend tax dollars to reclaim lands because BLM already has the authority, and it is the objective of these rules to *prevent* unnecessary or undue degradation, not simply to make arrangements for cleaning up problems after they occur at the expense of taxpayers.

BLM has explained on many occasions that these rules do not establish water quality standards. States establish the standards for ground water, and EPA establishes the standards for surface water unless EPA has delegated this function to the State. Final § 3809.420 describes what constitutes an acceptable plan of operations. In this section (final § 3809.552) we are requiring the posting of a financial guarantee to assure that State water quality standards will be

maintained on public lands as a result of mining operations.

BLM did not attempt to define ''need'' because this will differ on a case-by-case basis. BLM believes that allowing the local field manager to work with the operator to determine need is preferable to trying to force a one-size-fits-all set of criteria.

One comment asked that paragraph (b) of this section require BLM to prepare an annual report on the adequacy of the financial guarantee. An association asked BLM to consider incorporating the financial assurance requirement used under California laws, including an annual review. Another commenter recommended that we amend paragraph (b) to require BLM to review the adequacy of financial guarantees at least once every three years.

We are not requiring review of the amounts of financial guarantees at predetermined periods. If a financial guarantee is linked to market fluctuations, the operator must certify annually to BLM that the market value of the instrument is sufficient to cover the cost of reclamation. See final § 3809.556(b). In other cases, the BLM will monitor the adequacy of financial guarantee amounts through our inspection program.

*Section 3809.553 May I Post a Financial Guarantee for a Part of My Operations?*

This final rule permits operators to provide financial guarantees on an incremental basis to cover only those areas being disturbed. Paragraph (b) establishes BLM's goal of reviewing the financial guarantee for each increment of an operation at least annually. The final rule is unchanged from the proposed rule.

We received one comment on this section which supported incremental bonding as a ''welcome regulatory innovation.''

*Section 3809.554 How Do I Estimate the Cost To Reclaim My Operations?*

This section requires that an operator estimate the reclamation cost as if BLM were to hire a third-party contractor to perform reclamation of the operation after the operator has vacated the project area. It is unchanged from the proposed rule.

There were numerous comments opposing this provision. Some expressed the belief that the rule should limit financial guarantees to 100% of reclamation costs so that BLM administrative costs would not be part of the calculation. This was seen as an incentive to achieve reclamation. Another comment wanted to limit BLM administrative costs to the direct costs of individuals implementing the approved reclamation plan. Other comments aimed at cost reduction objected to third-party reclamation cost calculations as requiring contractors to pay Davis-Bacon wages.

Others believed that calculating the amount of each financial guarantee was too labor intensive and suggested alternatives such as:

- Establishing thresholds, for example, under $100,000, under $500,000 and over $500,000, for determining the amount of the financial guarantee;
- For notices, establishing a fixed amount;
- Giving notice-level operators the option of using either a dollar per acre figure or a site-specific amount that the operator calculates; or
- Establishing Statewide amounts.

We received a series of comments suggesting that BLM incorporate State models and guidelines to calculate the costs of reclamation. Some see this as a way of avoiding double bonding.

The NRC Report discussion of bonding notes that ''standard bond amounts for certain types of activities on specific kinds of terrain should be established by the regulatory agencies. * * * in lieu of detailed calculations of bond amounts based on the engineering design of a mine or mill.'' Numerous commenters, while expressing general support for the NRC discussion, noted that it would also be reasonable to calculate the amount for individual operations as necessary. One mining association thought BLM ought to allow operators to choose between a per-acre amount and an actual-cost-to-reclaim amount. Another industry group wrote that a one-size-fits-all standard financial guarantee amount would be counter to the heart of the NRC Report which emphasizes the need for site-specific flexibility. One mining company expressed specific support for the cost-estimating approach BLM used in the proposed rule. However, other mining groups suggested that an amount could be set at the State level if BLM and the State worked cooperatively.

Alaskan miners argued that BLM should establish standard amounts and that it is inappropriate to base financial guarantee amounts on the basis of third-party contractor rates.

There were comments that asked BLM to incorporate the NRC proposal to establish fixed amounts for financial guarantees as a means of streamlining the process, while also giving operators a way of knowing ahead of time what their financial guarantee requirements will be.

One commenter asked that we explain what constitutes an ''acceptable'' reclamation cost estimate. We chose not to define ''acceptable'' because the decision as to what constitutes ''acceptable'' must be made at the local level by the field manager for each project.

There were comments asking that BLM reinstate the remanded regulations requiring a third-party professional engineer to certify the reclamation estimate, even suggesting that BLM foot the bill if this would be overly burdensome to small miners. The argument presented was that a company would ''lowball'' the estimate to lower its costs.

This final rule requires that financial guarantees cover actual costs. We believe this is consistent with the NRC Report, which recommends that operators post financial guarantees adequate to cover reclamation costs. The rule is flexible enough to permit the BLM field manager to establish fixed amounts for activities under his or her jurisdiction, but also allows the field manager to require a financial guarantee in an amount over or under the fixed amount if the cost of reclamation of a specific operation deviates from the fixed amount.

As we stated in the preamble of the proposed rule (64 FR 6442, Feb. 9, 1999), the purpose of this section is to ensure that the estimated cost of reclamation, on which the financial guarantee amount is based, is sufficient to pay for successful reclamation if the operator does not complete reclamation. We explained that if funding were not available in the financial guarantee to pay the administrative costs, the costs would have to come out of the funds available for the on-the-ground reclamation. This could result in incomplete or substandard reclamation. This final rule reconfirms BLM's desire to assure complete reclamation without the use of taxpayer funds.

The comments that advocate excluding BLM's administrative costs from the amount of the financial guarantee would not achieve the goal of avoiding the taxpayer bearing the cost of reclamation. Arguments that BLM administrative costs should be limited to direct costs were not accepted because BLM's general policy regarding cost recovery is to include all charges, direct and indirect. We found no reason for making an exception where reclamation financial guarantees are calculated. Similarly, inclusion of Davis-Bacon wages for third-party contracts in the calculation is something

BLM, as well as all other Federal agencies, are required to do as a matter of law.

We decided not to accept suggestions that we establish financial guarantee thresholds, establish fixed amounts, or have different processes for notice operations. Again, the purpose of these provisions is to assure the availability of funding to complete reclamation. Especially in the case of operations beyond the notice level, reclamation costs vary widely depending on size, location, and the mineral being developed. Using a threshold amount would leave BLM vulnerable to having an insufficient guarantee, especially in the case of larger mines.

Notice-level operations pose a different set of problems. While estimated reclamation costs might vary, the range of costs will not be as great. The rule will permit local BLM field managers to establish fixed amounts for reclamation of notice-level activities and work with the operator to adjust the amount of financial guarantee in specific cases. This could work on a district-wide basis. Establishing Statewide amounts is more problematic. For example, within a single State such as California, climate, soil conditions, water quantity may differ widely with an accompanying difference in reclamation costs. The approach we are taking is not inconsistent with the NRC Report, which recognized that different on-the-ground conditions require different levels of financial guarantees.

This final rule does not incorporate State models and guidelines for calculating the cost of reclamation. It would be very difficult to issue a national regulation incorporating the guidelines of the individual States. However, there is nothing to prevent individual States from working with BLM to incorporate all or part of their guidelines into BLM-State MOUs. This approach has advantages over a regulatory solution in that the site-specific needs can be addressed by those most familiar, and, as conditions or knowledge change, it is easier to make adjustments if parties are not locked into a methodology prescribed by regulation.

When we proposed the financial guarantee portion of today's rulemaking, BLM chose not to incorporate a provision of the rules we previously published on this subject that were remanded by a district court, which would have required a third party to certify the estimated cost of reclamation bonding. The experience under the remanded rules was that requiring a third party to certify the estimated cost of reclamation was a burden, particularly on small miners, and on BLM because the BLM field manager must still had to pass on the adequacy of the estimate to make sure the amount of the guarantee was adequate, regardless of who made the estimate. The benefits of the process did not outweigh these burdens. The final reinforces BLM field managers' responsibility to have an adequate financial guarantee in place before operations begin.

*Section 3809.555 What Forms of Individual Financial Guarantee Are Acceptable to BLM?*

The final rule expands the kinds of financial instruments that are acceptable. In addition to surety bonds, cash, and negotiable securities, which were acceptable under the previous rule, this expanded list of acceptable instruments includes letters of credit, certificates of deposit, State and municipal bonds, investment-grade rated securities, and insurance.

The final rule differs from the proposed rule in that we have decided to include insurance as an acceptable form of financial guarantee as paragraph (f) of this section. The form and function of the insurance must be to guarantee the performance of regulatory obligations in the event of operator default. In adding insurance, we determined that the company must have an A.M. Best rating of AA. This rating limits the risk to the government that the company will be unable to pay should the operator fail to reclaim land after completing operations. Several commenters suggested that we add insurance because it provides BLM as much protection as the other instruments and operators are often able to obtain insurance at a reasonable cost.

We also added language to reference Treasury Circular 570 and removed the word ''Non-cancellable.'' We added the reference to Treasury Circular 570 in response to suggestions that we clarify that BLM will not accept any surety. BLM will only accept bonds of sureties that Treasury Circular 570 authorizes to write Federal bonds.

We took out the word ''non-cancellable'' after considering comments which emphasized the difficulty of obtaining a surety if it could never be canceled. BLM decided these concerns had merit and that an operator's liability would not change and BLM's protection would not be appreciably diminished so long as the liability period of the surety would cover any situation where BLM would make a demand on the surety. If a surety intends to cancel a bond, the operator must have a replacement financial guarantee in place at the time of cancellation to avoid a gap in coverage.

Several commenters asked BLM to consider operators' liability insurance as an additional funding mechanism. Another comment asked us to include language which would, in essence, allow BLM to take any form of guarantee if it would achieve the objectives and purposes of the bonding program. The intent of this suggestion was to provide the greatest possible flexibility for both operators and BLM.

Another comment suggested that BLM require operators to replace an expiring letter of credit 30 days before it expires, because after its expiration there would be no guarantee to collect. The same commenter said BLM should redeem the letter of credit 30 days before it expires if the operator has not replaced it. One comment objected to our proposal to accept investment-grade securities because the commenter views them as close to accepting corporate guarantees. One comment suggested that BLM explore with the States creative forms of guarantees including liens on property. This suggestion was proffered to ease the burden on small business. One comment asked BLM to require the custodian of the security to submit monthly statements to BLM attesting to the market value.

BLM chose not to incorporate any of the above suggestions. We did not include operators' liability insurance because we consider liability insurance to be more appropriate for work-related liability, such as worker injury as opposed to liability for completing reclamation. Companies routinely acquire this type of insurance and while it would normally cover unintended events during mining, such insurance would not cover post-mining liabilities.

BLM chose not to add language regarding expiring letters of credit because in most cases the letter of credit will be for a significant time period. As BLM will be reviewing the adequacy of financial guarantees on a periodic basis, the field manager will be aware of any letter of credit which is about to expire and take appropriate action if the operator is not moving to replace it in a timely manner. Redeeming a letter of credit solely because it is about to expire would not be consistent with the objective of the rule. We would only redeem the letter of credit if the operator were unwilling or unable to complete reclamation.

BLM can explore creative forms of guarantees with the States, but our experience is that the rules should not provide open-ended discretion in this area. If we determine a ''creative'' method is worth including in the list of

acceptable instruments we can incorporate that in a separate rulemaking.

The notions that BLM should not accept investment-grade securities or, if we do, require the custodian to submit monthly statements attesting to their market value, are overly burdensome. In the first instance, an investment-grade security is not equivalent to a corporate guarantee because the value can be determined daily in the marketplace without having to consider intangible corporate assets. Final § 3809.556 provides BLM adequate protection from any declines in the value of the security. The suggestion that the custodian provide a monthly statement would place an unnecessary burden on the custodian without substantially increasing BLM's protection. It would also place a burden on BLM to review and file monthly reports. We believe requiring annual review of these types of financial guarantee instruments will be adequate.

*Section 3809.556 What Special Requirements Apply to Financial Guarantees Described in § 3809.555(e)?*

This section of the rule requires operators to provide BLM an annual statement describing the market value of a financial guarantee which is in the form of traded securities. Paragraph (b) requires the operator to post an additional financial guarantee if the values decline by more than 10 percent or if BLM determines that a greater financial guarantee is necessary. Paragraph (c) allows the operator to ask BLM to release that portion of an account exceeding 110 percent of the required financial guarantee. BLM will allow the release if the operator is in compliance with the terms and conditions of the operator's notice or approved plan of operations. It is unchanged from the proposed rule.

One commenter suggested deleting this paragraph because § 3809.552(b) contains the same general requirement for an annual review.

We chose not to delete paragraph (b) because it provides the specific requirements for certain types of financial guarantees. As the instruments vary in value, it is important that BLM annually review the value to assure their adequacy. In contrast, final § 3809.552 establishes the framework for all financial guarantees. Part of that framework is paragraph (b) which tells operators that BLM will periodically review financial guarantees without establishing any specific time period for the review. Unlike this section, § 3809.552(b) does not require the operator to submit anything to BLM unless specifically requested by BLM.

Commenters asked why BLM is requiring assets to be 110 percent of estimated reclamation costs before BLM will authorize releasing that portion of the guarantee that exceeds 110 percent. The comment suggests that a guarantee covering 100 percent of the reclamation cost is sufficient. The purpose of requiring 110 percent is to provide assurance that an adequate financial guarantee remains in place regardless of market fluctuations. If we were to use 100 percent it would be logical for us to ask for an increase in the guarantee if the level drops to 95 percent. This would impose a burden on industry and BLM to constantly adjust the level of the guarantee while not providing any real increase in protection.

*Section 3809.560 Under What Circumstances May I Provide a Blanket Financial Guarantee?*

This section allows operators to provide a blanket guarantee covering State-wide or nation-wide operations. The amount of any blanket financial guarantee would have to be sufficient to cover all of an operator's reclamation obligations. This final rule is unchanged from the proposed rule.

We received a comment asking whether the purpose of this section was to provide administrative convenience or something else. Other comments expressed the fear that blanket guarantees make it easier for companies to post insufficient financial guarantees, declare bankruptcy and walk away. Others see blanket guarantees as a way of avoiding detailed calculations of financial guarantee amounts based on the engineering design of a mine or mill. Others expressed the concern that the blanket guarantees will not equal the sum of guarantees needed for all individual projects.

BLM decided to maintain the option allowing blanket guarantees. The system has been in place for many years and provides administrative convenience to both the operator and BLM. It is a system which is used successfully in other BLM programs. In our experience, a blanket guarantee does not increase BLM's risk of having to use taxpayer funds to reclaim operations. BLM must work with its field managers to review the blanket guarantees to be certain that sufficient funds are available for each project covered in the event the operator does not complete reclamation for whatever reason.

*Sections 3809.570 Through 3809.574 State-Approved Financial Guarantee*

*Section 3809.570 Under What Circumstances May I Provide a State-Approved Financial Guarantee?*

This section permits BLM to accept a State-approved financial guarantee that is redeemable by the Secretary, is held or approved by a State agency for the same operations covered by a notice or plan of operations, and provides at least the same amount of financial guarantee as required by this subpart. We are requiring that any State-approved financial guarantee be redeemable by the Secretary so that, in case of failure to reclaim, we have independent authority to initiate forfeiture of the financial guarantee to ensure reclamation of public lands. The redeemability requirement would not apply to State bond pools. The final rule is unchanged from the proposed rule.

We received one comment asking that BLM amend proposed paragraph (c) to provide that the State guarantee need not include funds to cover BLM costs for issuing a third-party contract when the State agreement provides for the State to implement a jointly approved reclamation plan that is in default.

There were comments that the proposal would end joint bonding because a surety would not issue an instrument redeemable by both the State and the Secretary of the Interior. One State asked that we amend the section so that the Secretary of the Interior would not have to sign the guarantee, citing the MOU as providing a means to protect both the State and BLM. Another State pointed out that its law does not provide for jointly held financial guarantees and suggested that to make an MOU workable with respect to financial guarantees could require the State legislature to act. One State expressed concern that BLM should allow that State to hold the financial guarantee instrument because a joint instrument would be difficult to administer.

In the context of State bonding, there were many comments about using State bond pools. One comment stated, ''We are pleased that the State bond pool may continue to work as a means of allowing placer miners and others to easily comply with proposed regulations. In Alaska, all operations disturbing 5 acres or more are required to be bonded for reclamation, and reclamation is required for all operations of any size. The State of Alaska bond pool has been used successfully for many years, and has been approved by the BLM for many operations.''

Another comment said that BLM shouldn't be able to recoup administrative costs from the State bond pool because utilizing the pool saves BLM money. The same commenter noted that States ''have the ability to audit all reclamation costs claimed under a default situation, when monies are drawn from the existing State bond pool.'' Finally, the commenter suggested that BLM proceed with legal action against any and all liable parties before using State bond pool money to remedy the reclamation obligation.

There were comments asserting BLM should not accept financial guarantees that are part of State bond pools. These commenters see such pools as not always solvent and note that one large cost recovery may exceed the value of the pool.

Other commenters asked why BLM would not adopt State rules. Commenters also questioned whether operators would be able to obtain an instrument from a surety that named two different entities with the ability to redeem a guarantee.

BLM did not accept the suggestion that a third-party contract not be included. Even when a State agreement exists, the responsibility for protecting Federal lands remains with BLM. BLM must still administer any third party contracts needed to reclaim land after operations, and this is a legitimate expense. Estimates of the amount of the financial assurances are expected to consider the administration of contracts, so it is not unreasonable to have proceeds from a State bond pool pay this expense. BLM believes it must include its direct and indirect administrative costs in calculating the estimated reclamation costs. These costs should apply to State bond pools as well. In the event of a disagreement with the State, BLM should be certain to have sufficient funds to pay for reclamation. See also the response to comments about the calculation of the estimate in final § 3809.554.

We believe that making a financial guarantee redeemable by the Secretary is a fundamental principle of the financial guarantee program. In final § 3809.203, we state clearly that if the financial guarantee is a single instrument, it must be redeemable by both the Secretary and the State, and this section is consistent with that requirement. We believe that surety companies will cooperate and accept the notion, and that joint State-BLM bonding may proceed. We recognize that sometimes State and Federal interests are not the same. Under FLPMA, the Secretary of the Interior is ultimately responsible for assuring that operators not cause unnecessary or undue degradation, and this appropriately includes a requirement that they assure reclamation of Federal land after mining.

We believe that continuing to use State bond pools is appropriate, especially to assist small miners who might otherwise have difficulty obtaining a financial guarantee from other sources, so long as the conditions of the next section are met. The BLM State Director will have to determine whether the pool is sound (see final § 3809.571) before an operator would be able to post a financial guarantee through the pool. If one large claim would make the pool insolvent, the State would need to find a means to supply the financial guarantees necessary to comply with the requirements of subpart 3809.

We also received a comment asking BLM to add language that would clarify that BLM may still require its own financial guarantee even if there is an existing State-approved financial guarantee. We did not accept this suggestion because we believe the language in final § 3809.570 makes clear that BLM will review State-held financial guarantees and make an independent decision on whether to accept them.

Finally, BLM disagrees that it should have to bring legal action against liable parties before using a bond pool. One principal purpose of financial guarantees is to avoid the necessity of lawsuits to accomplish reclamation.

*Section 3809.571 What Forms of State-Approved Financial Guarantee Are Acceptable to BLM?*

This section allows an operator to provide a State-approved financial guarantee subject to the conditions in final § 3809.570, in the following forms:

- The kinds of individual financial guarantees specified under § 3809.555;
- Participation in a State bond pool, if the State agrees it will draw on the pool where necessary to meet obligations on public lands, and the BLM State Director determines that State bond pool provides equivalent level of protection as required by this subpart; or
- A corporate guarantee existing on the effective date of this final rule.

The final rule differs from the proposed rule regarding whether BLM will accept a corporate guarantee as a financial guarantee. BLM proposed to continue its policy of accepting corporate guarantees under certain circumstances if the State in which the operations are occurring did so and if the BLM State Director determined that the corporate guarantee would provide an appropriate level of protection. We asked for public comment on whether to continue this policy. A new section, final § 3809.574, explains that BLM will no longer accept corporate guarantees, but will allow those in place to continue for that portion of the operation covered by a corporate guarantee existing on the effective date of this rule.

Numerous commenters argued against permitting corporate guarantees, stating that financial guarantees should be held by an independent third party. Commenters noted that if BLM allows corporate bonding, the value of the ore should not be considered an asset as it fluctuates over time and loses value as it is mined. Thus, the soundness of the guarantee might be most questionable at the time it is most needed. We also received a comment suggesting that allowing corporate guarantees could be inconsistent with the first recommendation in the NRC Report because they may not provide assurance that reclamation will be completed.

Other commenters supported allowing corporate guarantees and suggested approaches the commenters considered workable. One commenter suggested that if BLM decides to permit corporate bonds, we should use a system similar to the system that the Office of Surface Mining (OSM) uses. This is an elaborate system which limits the percentage of corporate bonding based on the assets of a corporation. Other commenters suggested that BLM look at State models (specifically Nevada and California) for determining the levels of corporate guarantees. One comment described and supported the Nevada reclamation regulations pertaining to corporate guarantees, which allow them under certain conditions of corporate financial soundness, but only for 75 per cent of the estimated cost of reclamation. Another comment urged BLM to consider, for small entities, the salvage value of equipment and other property at the mine site. Numerous comments asked that we amend the rule to state that guarantees under the California program are automatically acceptable.

One commenter suggested that BLM use the OCS system which measures assets over liabilities on an annual basis. One commenter suggested that BLM consider using as a model the regulations adopted under Subtitle C of the Resource Conservation and Recovery Act (''RCRA'') with respect to the financial assurance of closure and abandonment costs.

During a January 11, 2000 meeting with the Western Governors' Association, some State representatives

expressed concern about continuing to accept corporate guarantees, for reasons similar to those in the comments we received from others opposing corporate guarantees. However, some State laws specifically allow corporate guarantees. We recognize that the final rule will, in some cases, require a reworking of MOUs with the States.

We found the arguments opposing corporate guarantees persuasive. We agree that a corporate guarantee is less secure than other forms of financial guarantees, especially in light of fluctuating commodity prices. Recent bankruptcies added to the concern that corporate guarantees don't provide adequate protection. We believe the number of new mines that might have wanted to rely on corporate guarantees is relatively small, and we also believe, given the economics of the industry, that companies that would have been eligible to hold a corporate guarantee should not have a significant problem finding a third-party surety, or posting the requisite assets.

BLM currently accepts a corporate guarantee only if there is an MOU with the State and the State accepts corporate guarantees. The proposed rules would have required BLM to evaluate the assets of individual companies before allowing corporate guarantees. Specific models cited in the comments all have requirements to evaluate assets, liabilities, and net worth. Some require judgments as to the amount of a company's net worth in the United States. Annual reviews would be necessary. BLM does not currently have the expertise to perform these reviews on a periodic basis, and even if we did, a risk of default would remain. This contributed to our decision not to allow additional corporate guarantees.

BLM and the State of Nevada currently hold a significant number of corporate guarantees. Some other States also allow corporate guarantees. We have decided not to invalidate existing guarantees, so as not to require these operators to secure an alternative financial guarantee instrument, so long as they are operating under already approved plans. While we have decided not to require operators who currently hold State-approved corporate guarantees to post an alternative guarantee, the final rule seeks to reduce the associated risk by explicitly requiring periodic review of financial guarantees, and directing that appropriate steps be taken if they are determined to be no longer adequate.

*Section 3809.572 What Happens if BLM Rejects a Financial Instrument in My State-Approved Financial Guarantee?*

This section states that BLM will notify the operator and the State in writing if it rejects a financial instrument in an existing State-approved financial guarantee. BLM will notify the operator within 30 days and explain why it is taking such action. This section requires an operator to provide BLM with a financial guarantee acceptable under this subpart at least equal to the amount of the rejected financial instrument before mining may continue.

The final rule is slightly different from the proposal. In response to comments, we have added language which directs BLM to notify the State if we do not accept a State-approved financial guarantee. We are making this change to assure that lines of communication between BLM and State governments are adequately maintained.

Some commenters stated that BLM should defer to the States on financial guarantees. Many comments questioned the criteria under which BLM would not accept a State bond, saying ''if a state accepts a bond, BLM should accept it.'' To do otherwise, these commenters suggest, might result in duplicate bonding. One commenter asked for a list of criteria under which BLM would not accept a financial guarantee which the State accepts. Other commenters noted that in the event BLM does not accept a State financial guarantee, there is no mechanism or time frame for BLM and the State to resolve what is an acceptable financial guarantee. Another commenter suggests establishing a time frame for the operator to remedy the situation. The same commenter asked BLM to establish an appeals procedure under which BLM would accept the State guarantee while the appeal is pending. Final §§ 3809.800–3809.809 establishes an appeals procedure.

There were some comments in opposition to BLM accepting State financial guarantees on the grounds that the interests of the State and Federal government can diverge.

The process we establish in this section assures that a strong financial guarantee will protect the Secretary if an operator is unable or chooses not to complete reclamation, or if a State establishes a requirement that does not provide adequate protection. If BLM does not accept a State-approved financial guarantee, the operator may not begin mining activities. For this reason, we have declined to accept the recommendation to add a time frame.

Although the appeals procedures in final §§ 3809.800 through 3809.809 apply to all BLM decisions, including whether to approve a financial guarantee, a rejected financial guarantee will not satisfy the regulatory requirement during the pendency of the appeal, because a sufficient guarantee must be in force at all times.

*Section 3809.573 What Happens if the State Makes a Demand Against My Financial Guarantee?*

Final § 3809.573 requires an operator to replace or augment a financial guarantee within 30 days when the State makes a demand against the financial guarantee and the available balance is insufficient to cover the remaining reclamation cost. This differs from the proposed rule by the addition of a 30-day time frame for augmenting or replacing a financial guarantee. This action conforms to the NRC Report's first recommendation that ''[f]inancial assurance should be required for reclamation of disturbances to the environment caused by all mining activities beyond those classified as casual use.'' It also responds to a comment from a Federal agency asking how BLM and a State would handle a situation where a financial guarantee is inadequate to cover demands made by both entities, and another comment that suggested BLM should add language specifying that the operator must inform BLM within 15 days of the demand's occurrence and require a replacement or augmented guarantee within 15 days. We decided 15 days was too short, and stretching the process beyond 30 days would leave a troubled operation operating too long without a sufficient financial guarantee. Such situations should be avoided if possible by taking care to establish a proper financial guarantee amount to cover both Federal and State obligations.

*Section 3809.574 What Happens if I Have an Existing Corporate Guarantee?*

As stated earlier, the final rule continues to allow corporate guarantees for existing operations to satisfy financial guarantee requirements, if they were accepted before the effective date of this rule. BLM will not allow an operator to transfer a corporate guarantee to another entity or operator.

Paragraph (b) specifies that if the State changes its corporate guarantee criteria or requirements, the BLM State Director will review any outstanding guarantees to ensure they still afford adequate protection. If the State Director determines they won't provide adequate protection, the State Director may terminate the existing corporate

guarantee and require the operator to post an alternative guarantee.

*Sections 3809.580 Through 3809.582 Modification or Replacement of a Financial Guarantee*

*Section 3809.580 What Happens if I Modify My Notice or Approved Plan of Operations?*

This section requires an operator to adjust the financial guarantee if the operator modifies a plan of operations or a notice and the estimated reclamation cost increases. The final rule clarifies the regulatory text by also explaining that if the estimated reclamation cost decreases, the operator may request BLM reduce the amount of the required financial guarantee. This change in the final rule was suggested by numerous commenters who noted that the language in the proposed rule did not allow BLM to approve a decrease in the amount of a financial guarantee even if a modification resulted in a lower estimated reclamation cost.

One comment asked us to clarify that an operator may request BLM to lower the amount of the financial guarantee. As noted in the preamble to the proposed rule (see 64 FR 6443, Feb. 9, 1999), this section makes clear that the proposed section does not preclude an operator from requesting BLM's approval to decrease the financial guarantee if the estimated reclamation cost decreases.

*Section 3809.581 Will BLM Accept a Replacement Financial Instrument?*

Final § 3809.581(a), unchanged from the proposed rule, authorizes BLM to approve an operator's request to replace a financial instrument. BLM will review and act on the request within 30 calendar days. We received no comments specific to this section.

BLM has added final § 3809.581(b) to clarify a surety's obligations, if for some reason a surety bond is no longer in effect. See, for example, the standard BLM surety bond form entitled, *Surface Management Bond Form* (February 1993), Bond Condition No. 8. See also *U.S. and Nevada* v. *SAFECO Insurance Co. of America,* CV–N–99–00361–DWH(PHA), Order dated Aug. 12, 1999. The final rule makes it clear that a surety is not released from an obligation that accrued while the surety bond was in effect, unless the replacement financial guarantee covers such obligations to BLM's satisfaction. This is not a new policy, but BLM believes it should be stated expressly so that if a surety bond is canceled or terminated, all parties understand that the surety cannot unilaterally terminate liability for obligations that have accrued while the bond was in effect. If the operator submits, and BLM accepts, an adequate replacement financial guarantee that covers the obligations covered by the previous surety bond. Then the earlier surety may be released from its obligations.

*Section 3809.582 How Long Must I Maintain My Financial Guarantee?*

This section requires an operator to maintain the financial guarantee until the operator, or a new operator, replaces it, or until BLM releases the requirement to maintain the financial guarantee after the operator completes reclamation. With minor editing, it is unchanged from the proposed rule.

One comment suggested that the rule contain criteria for release of a financial guarantee. BLM will not release the financial guarantee until we determine reclamation is complete. The standard is the reclamation plan in the notice or approved plan of operations . The sole criterion for judging whether the standard is met is the successful completion of reclamation. The regulation is clear and therefore we did not change it.

*Sections 3809.590 Through 3809.594 Release of Financial Guarantee*

*Section 3809.590 When Will BLM Release or Reduce the Financial Guarantee for My Notice or Plan of Operations?*

The final rule authorizes an operator to notify BLM that reclamation is complete on all or part of notice or approved plan of operations and to request a reduction in the financial guarantee upon BLM's approval of the adequacy of the reclamation. BLM must promptly inspect the area, and we encourage the operator to accompany the BLM inspector. If the reclamation is acceptable to BLM, the operator may reduce the financial guarantee as allowed in final § 3809.591. Paragraph (c) of this section requires BLM to post the proposed final release of the financial guarantee in the field office having jurisdiction, or to publish notice of the proposed final release in a local newspaper of general circulation and accept public comments for 30 calendar days.

We received several comments asking that notice-level activities not be included in the release procedures of paragraph (c). Because notice level activities entail less than 5 acres of surface disturbance, commenters suggested that there is no added value to allowing the public 30 calendar days to review a financial guarantee release.

The final rule differs from the proposed rule by excluding notice-level activities from the public notice and comment provisions of paragraph (c). Release of financial guarantees for notice-level operations do not need to undergo the same level scrutiny as the release of financial guarantees for plans of operations. Notice-level operations are much less likely to involve significant disturbance and in most cases generate little or no public interest. Additionally, the timing of the release of the financial guarantee is important to many notice-level operators as they need the release of one guarantee to post a guarantee on a new notice. Because the final rule limits notices to exploration, this change benefits small business without posing a significant threat to the environment.

A second change from the proposed rule is that the final rule includes language that will give the BLM field manager the discretion to post the proposed release of the financial guarantee in the BLM office or publish it in a local newspaper of general circulation, or both. The proposed rule would have required BLM to publish the proposed release of all financial guarantees in the newspaper. We chose this approach because today's rule limits notices to exploration, which generally has limited impact and limited interest. A newspaper notice for these actions is probably unnecessary. Moreover, BLM already posts many proposed actions in its office for public review; for example, Congress mandated that BLM post all oil and gas applications for permit to drill (APD) in the office as a way of promoting public involvement in decision making. In many cases, the (APD) results in more surface disturbance than small mining operations.

Several commenters believe that BLM should amend paragraph (b) by including a specific number of days within which we will inspect the operation. These commenters consider the term ''promptly inspect'' to be too vague. Other comments suggested we continue the current requirement that the inspection include the owner and/or operator unless they notify BLM in writing that the joint inspection is waived. Another commenter says that BLM should publish the date of inspection so that interested persons can attend.

The opportunity for public participation is controversial. Many respondents stated BLM should give the public an opportunity to be involved in all phases of planning, assessment, and

bond setting, noting that mining may affect local residents for a long period of time. Many others assert the public already has input into this process during the EIS stage, and their further involvement will slow down the process due to the 30-day period for public comment. These commenters feel that financial guarantee release is largely a mathematical exercise where a body of literature provides guidance on how to do the calculations. Other comments stated the general public is not educated in calculating and setting financial guarantees, and the BLM professionals should continue to set these requirements. We also received comments criticizing BLM for not discussing the value of public comment and explaining how differences would be resolved. There were several comments suggesting that the final rules should allow 30 days for BLM to inspect an operation and release financial guarantee, and to require BLM to pay interest if we take longer than 30 days to release the financial guarantee.

Other commenters pointed out that the impact of mining is not always known immediately at the time BLM approves reclamation, and therefore BLM should establish a mechanism to hold bonds after reclamation approval.

We changed the current rule which requires written waivers of joint inspections, and decided not to establish a time frame for when a joint inspection can occur. It is our intent to promptly inspect the reclaimed area, usually within 30 days. However, the time when we do it depends not only on our workload, but the availability of the operator and weather conditions. To state a time frame in the rule would be too inflexible. Requiring the release within a finite number of days could lead to the inappropriate release of some guarantees, or time-consuming appeals when we have legitimate reasons for delaying the release.

One overall purpose of these final rules is to permit an increase in public review of mining. The release of the financial guarantee is an important step in the mine closure process. Allowing the public an opportunity to comment on it should add value to the BLM review. The logistics of including the public on inspections could result in many of the same problems that we identified in deciding not to incorporate the proposal for ''citizen inspections'' (See the discussion of proposed § 3809.600(b) below.). Therefore, we did not add this as a step in the release of financial guarantees.

We view the opportunity for outside parties to comment as a positive. The public that is likely to comment tends to be well-versed in many aspects of mining or be familiar with the on-the-ground condition of the area for which the operator seeks release. BLM will review public comments as promptly as possible to see if they should affect the release of the guarantee. Then we will either release the guarantee or require additional work to meet the requirements of the performance standards and the approved plan of operations. Given the differences in the size and complexity of mines and the number of comments BLM might receive, the time it will take to analyze comments will vary greatly. Therefore, we choose not to place a time limit on the time to analyze comments.

We also chose not to hold financial guarantees after release. The performance bond guarantees reclamation. BLM will release it when it determines that the operator has successfully accomplished reclamation. While we know that the impacts of mining are not always readily apparent, and mining-related problems can subsequently occur, under final § 3809.592, the operator and mining claimant remain responsible for such problems. However, BLM does not think it necessary to hold a financial guarantee longer than the periods specified in final § 3809.591.

*Section 3809.591 What Are the Limitations on the Amount by Which BLM May Reduce My Financial Guarantee?*

This section governs incremental financial guarantee release. Paragraph (a) provides that this section does not apply to any long-term funding mechanism that an operator establishes under final § 3809.552(c). Paragraph (b) states that BLM will release up to 60 percent of a financial guarantee for a portion of a project area when BLM determines the operator has successfully reclaimed that portion of the project area. Paragraph (c) states that BLM will release the remainder of the financial guarantee when we determine the operator has successfully completed reclamation, if the area meets water quality standards for one year without needing additional treatment or if the operator has established a long-term funding mechanism under § 3809.552(c). These are unchanged from the proposed rule.

Several commenters suggested that the release of financial guarantee should be on a dollar by dollar basis as the reclamation work is completed, rather than, as proposed, holding of a financial guarantee for ''contingency or other unquantified purpose. Some commenters asserted that by the time an operator completes regrading he has spent more than 60 per cent of the total cost of reclamation. These commenters state that even if there were to be a default on the remainder of the financial guarantee, there would be more than adequate funds remaining to cover actual costs and BLM administrative costs. Some suggest we should release 80 percent of the financial guarantee, as once revegetation is completed, there is little left to reclaim. Conversely, other comments asked that we reduce the amount BLM releases to 40 per cent to assure that funds are available for use if necessary. These comments also suggested setting a ten-year period for full release, because problems are often undetected in the first year after mining.

One commenter suggested that we add language requiring the NEPA document to identify the amount of financial obligation BLM should release as each discrete phase of reclamation is completed.

Releasing financial guarantee on a dollar-for-dollar basis would create a somewhat more cumbersome process than relying on a fixed percentage. In addition, it would create a greater risk that toward the end of the reclamation process, the financial guarantee would prove inadequate to cover the cost of the remaining reclamation. Whether to release 40, 60, or 80 percent of a financial guarantee is admittedly a judgment call. In the proposed rule we chose 60 percent to assure that funds would be available at the end of the reclamation process. The comments on both sides of the issue suggest that our proposal took a reasonable middle ground. Therefore, we decided not to change the percentage of the financial guarantee we will release.

The final rule provides that once an operator completes reclamation, including revegetation of the disturbed area, the financial guarantee should be released when the water quality standards are achieved for one year. We believe this will provide a reasonable degree of confidence that reclamation is truly complete. In arid areas of the West, a determination that an area has been successfully revegetated may require the passage of several growing seasons. Until BLM makes that determination, we will not fully release the financial guarantee.

BLM decided not to accept the suggestion to use the NEPA document to identify financial release amounts at discrete phases of reclamation. This would overly complicate the NEPA document and would have the same problems associated with releasing the financial guarantee on a dollar-for-basis as discussed above. Also, because most

plans undergo numerous modifications, BLM and the operator would have to review the financial guarantee release points as we review each modification. Such a process would be overly burdensome.

*Section 3809.592 Does Release of My Financial Guarantee Relieve Me of All Responsibility for My Project Area?*

The final rule states that an operator's liability does not terminate when BLM releases the financial guarantee. We have included this provision to cover situations where latent defects exist, such as, for example, where a regraded and revegetated slope begins to slump or fail. Paragraph (b) of the final rule provides that release of a financial guarantee does not release or waive claims by BLM or other persons under the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended, 42 U.S.C. 9601 *et seq.*, (CERCLA) or under any other applicable statutes or regulations. This is unchanged from the proposed rule.

We received a number of comments opposing the concept of continued liability. Their primary arguments are: (1) because release of the financial guarantee means BLM determined the operator has successfully met the reclamation terms of the approved notice, it is not reasonable for BLM to later say that reclamation is no longer considered successful; and (2) once the reclamation is complete and the land opened up to other uses, someone other than the operator may be responsible for any degradation occurring.

Other commenters found continued liability objectionable because it could last into perpetuity, with the operator never knowing when BLM might require additional mitigation. Some commenters compared FLPMA to CERCLA and stated that FLPMA does not permit BLM to hold operators perpetually liable. Some commenters pointed out that financial guarantee release and release from environmental liability are different issues. One commenter suggested that we add a section addressing the release of a long-term funding mechanism if the anticipated problem never occurs, or is eliminated prior to reclamation.

Other commenters see this section as meaning financial guarantees will either never be returned, or it will be difficult or impossible to obtain financial guarantees because surety underwriters will see this provision as exposing themselves to an unacceptable risk. Another commenter stated that the standards for the release of the financial guarantee are part of the approved plan of operations and thus when they are met, the guarantee should be released. A few commenters suggested that we address definitive termination of liability for notice-level activities and add it as a new section under notices.

On the other side of the issue, some commenters expressed the opinion financial guarantees should address perpetual treatment scenarios, and objected that one year of satisfactory water quality is not sufficient for release of the financial guarantee, because contaminants may not be observed for years after closure. This commenter suggested releasing the financial guarantee after increasing by 50 per cent the time predicted in the mine model estimate.

In the preamble to the proposed rule (64 FR 6444), BLM anticipated these types of objections to paragraph (a). We pointed out that the issue of residual responsibility for a project area after release of the financial guarantee has come up many times since 1980 and the current rules do not address this. We continue to believe that this provision is necessary to cover situations where, for example, a totally regraded and revegetated slope begins to slump or fail. As we pointed out in the preamble to the proposed rule: ''If BLM could not require the operator or mining claimant to come back and fix the problem, unnecessary or undue degradation of public lands caused by the operator's activities would be a likely result.'' We do not anticipate a large number of cases where we would have to direct an operator to come back after release and fix problems, but we believe the final rule will help prevent unnecessary or undue degradation.

Regarding the concerns expressed about perpetual liability, and about possible difficulties in establishing a causal link between mining and subsequently occurring degradation, for liability to be imposed, there must be evidence that ties the on-the-ground problem to the operator's activities. As time passes, it may be increasingly difficult to demonstrate that a particular environmental problem was caused by an operator's mining activities, and not by independent causes.

As we explained in the preamble to the proposed rule, paragraph (b) clarifies the relationship between this subpart and other regulations, by providing that the release of a financial guarantee held to satisfy the requirements of this subpart doesn't affect any responsibility an operator may have under other laws.

We believe it is not necessary to include language here addressing the release of a long-term funding mechanism (trust fund) established under § 3809.552 in the event that the anticipated problem never occurs, or is eliminated prior to reclamation. If the problem does not occur or is eliminated, it is clear that the BLM field manager may release these funds as part of the reclamation release process.

*Section 3809.593 What Happens to My Financial Guarantee if I Transfer My Operations?*

This section states that a new operator must satisfy the financial guarantee requirements of this subpart. It also states that the previous operator remains responsible for obligations or conditions created while that operator conducted operations unless the new operator accepts responsibility. This means that a financial obligation must remain in effect until BLM determines that the operator is no longer responsible for all or part of the operations. BLM has added the word ''must'' to clarify the intent of the proposal.

We received comments that the rule does not make clear that BLM will promptly release the guarantee once the new operator provides a satisfactory guarantee and assumes the obligations of the former operator. We believe the rule is clear that once, in the language of the rule, ''BLM determines that you are no longer responsible for all or part of the operation,'' BLM will promptly release the financial guarantee. Therefore, we did not adopt the suggestion.

*Section 3809.594 What Happens to My Financial Guarantee When My Mining Claim or Mill Site Is Patented?*

This section states BLM will release the portion of a financial guarantee that applies to operations within the boundaries of the patented land. The final rules added the term ''mill site'' to make clear that BLM will also release any financial guarantee associated with a patented mill site.

We received one comment asking to delete paragraph (c) from the proposed rule because it addressed only access and therefore does not belong in this rule. We agree and have deleted it in the final rule.

We received one comment asking that BLM assign the financial guarantee on newly patented land to the State to assure that the private surface is reclaimed according to State law. Similarly, the EPA commented that if a cleanup became necessary on patented land, the government would likely have to spend money, thereby suggesting that we maintain the financial guarantee on newly patented land.

Once land is patented, BLM is no longer a party in interest with regard to

the reclamation of the patented land. BLM will, however, retain portions of a financial guarantee whose purpose is to guarantee reclamation of the public lands. BLM will work with States to see if portions of the financial guarantee can be transferred to States to meet State bonding requirements. Because this is likely to vary from State to State, we did not incorporate these suggestions into this final rule.

*Sections 3809.595 Through 3809.599 Forfeiture of Financial Guarantee*

*Section 3809.595 When May BLM Initiate Forfeiture of My Financial Guarantee?*

This section states BLM may initiate forfeiture procedures for all or part of a financial guarantee if the operator refuses or is unable to complete reclamation as provided in the notice or the approved plan of operations, if the operator fails to meet the terms of the notice or decision approving the plan of operations, or if the operator defaults on any condition under which the operator obtained the financial guarantee.

The final rule changes the word ''will'' in the proposed rule to ''may,'' to clarify that BLM has discretion in deciding under what circumstances to initiate forfeiture. Many commenters suggested that the term ''will'' would require BLM to initiate forfeiture procedures even for minor violations, and that this was not a reasonable approach, because it would be burdensome on BLM and would not give the operator an opportunity to correct the violation. We agree and made the change to indicate that BLM may, but does not have to, initiate forfeiture for every violation. Final § 3809.596(d) describes how an operator may avoid forfeiture after BLM issues a decision to require forfeiture.

An industry association suggested that we consider using California statutory language for clarity. We have generally avoided using State-specific language to ensure the rule is flexible enough to meet conditions in all States.

*Section 3809.596 How Does BLM Initiate Forfeiture of My Financial Guarantee?*

Except for minor editing, this section is unchanged from the proposed rule. It describes the process BLM will follow to initiate forfeiture of a financial guarantee. The section also describes the actions an operator can take to avoid forfeiture by demonstrating that the operator or another person will complete reclamation.

A State agency and others commented that Federal procedures are more protracted than State-level procedures and that State procedures can actually resolve the on-the-ground problem quicker. In response, we hope we will only rarely have to initiate forfeiture procedures, and that BLM and the State will be able as necessary to work together to resolve the issues before initiating forfeiture. Of course, if the operator, State, and BLM cannot agree on a course of action, BLM must take the steps necessary to prevent unnecessary or undue degradation. Although the procedures may appear detailed, BLM doesn't view them as protracted. Therefore, we decided to keep the proposed language in the final rule.

*Section 3809.597 What if I Do Not Comply With BLM's Forfeiture Decision?*

This section describes the next steps in the forfeiture process—how BLM will collect the forfeited amount, and how BLM will use the funds to implement the reclamation plan. This final rule differs from the proposed rule in that we changed the term ''forfeiture notice'' to ''forfeiture decision.'' We believe this is a more accurate description and is consistent with final § 3809.596 which discusses ''BLM's decision to require the forfeiture.'' BLM begins forfeiture by issuing a formal decision.

One comment said the State, not BLM, should be the collection agency and that this should be established in an MOU. Another commenter asked us to add language allowing BLM to use the funds to continue interim reclamation operations as permitted in proposed § 3809.552.

As BLM has the ultimate responsibility to protect Federal lands from unnecessary or undue degradation, BLM and a State may use a general or site-specific MOU to address procedures and responsibilities to assure that monies are collected and used to perform needed reclamation.

The final rule does not include language contained in proposed § 3809.552 that would have allowed BLM to continue interim reclamation, and does not incorporate the suggestion regarding interim reclamation in this section.

*Section 3809.598 What if the Amount Forfeited Will Not Cover the Cost of Reclamation?*

This section makes clear that if the amount of the financial guarantee forfeited by an operator is insufficient to pay the full cost of reclamation, the operator(s) and mining claimants(s) are jointly and severally liable for the remaining costs. It is unchanged from the proposed rule.

One commenter suggested BLM amend the rule to limit recovery to ''reasonable'' costs of reclamation. Another commenter said that the joint and several liability provisions should be eliminated because BLM does not have the authority to propose such a requirement.

The ''reasonable cost'' of reclamation is what it takes to reclaim the land and associated resources in accordance with these regulations. The primary purpose of posting a financial guarantee is to ensure that the taxpayer does not have to pay for the failure of an operator to reclaim land after completing operations. We have not incorporated the suggestion to limit recovery to the ''reasonable'' costs of reclamation, which are in the eye of the beholder.

Regarding BLM's authority to impose joint and several liability, see the discussion earlier in this preamble of the provisions of final § 3809.116.

*Section 3809.599 What if the Amount Forfeited Exceeds the Cost of Reclamation?*

This section states that BLM will return the unused portion of a forfeited guarantee to the party from whom we collect it. It is unchanged from the proposed rule. We did not receive any comments on this section.

*Sections 3809.600 Through 3809.605 Inspection and Enforcement*

This portion of the final rule (§§ 3809.600 through 3809.605) sets forth BLM's policies applicable to inspection of operations under subpart 3809. The final rules follow the proposed rules, with one exception related to allowing members of the public to accompany BLM inspectors to the site of a mining operation. The final rules also set forth the procedures BLM will use to enforce the subpart, including identifying several types of enforcement orders, specifying how they will be served, outlining the consequences of noncompliance, and specifying certain prohibited acts. The inspection and enforcement rules apply to all operations on the effective date of the final rule.

*Section 3809.600 With What Frequency Will BLM Inspect My Operations?*

Final § 3809.600 clarifies BLM's authority, as the manager of the public lands under FLPMA and the entity that administers the mining laws, to conduct inspections of mining operations. BLM's authority to inspect operations on the public lands derives from 43 U.S.C. sections 1732, 1733, and 1740 and 30 U.S.C. 22 (RS 2319). This section

incorporates previous §§ 3809.1–3(e) and 3809.3–6.

Final § 3809.600(a) provides that at any time, BLM may inspect all operations, including all structures, equipment, workings, and uses located on the public lands, and that the inspection may include verification that the operations comply with subpart 3809. Final § 3809.600(b), which was proposed as paragraph (c), provides that at least 4 times each year, BLM will inspect operations using cyanide or other leachate or where there is significant potential for acid drainage. This paragraph codifies existing BLM policy with regard to inspection of those operations at which this hazard exists. See Cyanide Management Policy, Instruction Memorandum 90–566, August 6, 1990, amended November 1, 1990. As was stated in the proposed rule, BLM believes that cyanide and acid-generating operations have the potential for greater adverse impacts to the public lands than other types of operations and should receive a greater quantity of BLM's inspection resources.

Proposed paragraph (b) is not adopted as proposed, but has been replaced by a more moderate provision allowing once-a-year public visits to mines, codified as § 3809.900, discussed below.

The recommendations of the NRC Report did not address BLM's inspection program. Therefore, the inspection provisions of the final rules are not inconsistent with the NRC Report.

*Comments Related to Inspection*

BLM received numerous comments addressing the proposed rules related to inspection and enforcement, both for and against the proposal. A number of the comments addressed inspection and enforcement together, and are discussed together for convenience.

*General Comments Supporting the Proposal*

Many commenters urged that inspection and enforcement must be improved, asserting that inspection and enforcement of mining regulations is a critical element of the regulatory process. Without it, they asserted, improved rules will be meaningless. These commenters asserted that inspection and enforcement activities also need to be strengthened to assure that environmental damage is as limited as possible and, in particular, to protect people, livestock, water, wildlife, and all other resources, from the modern realities of mining activity. One commenter stated that although many miners now operate and clean up in a responsible manner, unfortunately, based on observations ''for many years, both near home and also throughout the region,'' many others fail miserably. The commenter urged that land managers need enough teeth in the regulations to insure the compliance of all. Other commenters asserted that the proposed inspection and enforcement rules do not go far enough and supported the stronger inspection and enforcement measures set forth in Alternative 4 of the draft EIS .

BLM generally agrees with the commenters who urged strengthening of the BLM inspection and enforcement rules.

*General Comments Against the Proposal*

Some commenters opposed the proposed inspection and enforcement rules, asserting that this section is overly broad and will be administratively infeasible. Commenters stated that the industry's record with notice level compliance, although not spotless, is generally very good. Instead of revising the regulations, they urged, BLM should allocate more resources and get more inspection personnel in the field. BLM disagrees with the comment, and believes that the rules, are not too broad and will be workable.

*Budget*

The adequacy of BLM resources was a recurring theme. Commenters asserted that BLM must evaluate the personnel and funding it will take to implement the proposed inspection and enforcement provisions since BLM's current resources will be inadequate and no funding increases have been requested. For example, a commenter asserted, it is questionable whether BLM has the necessary resources to conduct inspections ''at least four times a year * * * if you use cyanide or where there is significant potential for acid drainage.'' Rather than cut back on the proposal, some commenters suggested a cost-recovery program, under which miners pay fees to cover inspection and enforcement. These commenters stated that it is sad if fees and reclamation requirements put mining companies out of business, but the reality is that our nation's history has brought many changes since 1872 that alter how we look at and value safety and environmental integrity along with the importance of mineral wealth. If operators cannot afford to mine responsibly, then they should not be mining at all. Other commenters stated that the agency needs to build in budget line items for inspection and enforcement.

BLM is cognizant of budgetary issues related to implementation of these rules. These final rules reflect policy choices that BLM believes appropriate. BLM will determine whether budget and resources are sufficient for implementation and, if they are not, seek additional resources consistent with fiscal constraints and Administration priorities.

Specific inspection issues raised by commenters follow:

*Inspection Frequency*

A number of commenters addressed the issue of inspection frequency. On one side, commenters urged that inspection and enforcement of the regulations need to be more frequent and rigorous, and include unannounced inspection of mining operations, and more frequent inspections of high-risk operations. These commenters asserted that mining companies have shown through the years that they will not conduct environmentally responsible operations unless forced to by law. Therefore, it is extremely important that enforcement include frequent unannounced inspections. A commenter requested that the final rule address whether inspections would be scheduled in advance or unannounced.

Some commenters suggested mandated inspection schedules for all operations, suggesting quarterly for example. For others, quarterly inspection is not sufficient, urging that every mine needs to be inspected at least monthly, and a sophisticated BLM lab needs to be big enough to process samples of air, water, tailings, dumps, etc. on a monthly basis, including chemical analysis of ground water, tailings, air, etc. Others suggested that the number and frequency of BLM inspections should be directly linked to documented risk evaluated in the NEPA compliance documents and incorporated in the approved plan of operations.

Several commenters opposed incorporating into the rules the current BLM policy of inspecting cyanide operations four times a year. There were suggestions that the number is arbitrary and does not reflect any documented problem with a lack of BLM inspections nor does it recognize that many operations in some areas like Alaska are seasonal. Some complained that the requirement for a minimum frequency of inspections appears to be based, at least in part, on an incomplete assessment of other State and Federal regulatory programs, and that BLM failed to properly account for the number of inspections which are required by States (*e.g.*, pursuant to the air, water, waste and cyanide processing programs) and by EPA.

BLM agrees that inspections are an important part of any regulatory program, but one limited by available resources. BLM has decided to inspect the more hazardous operations at least four times a year, and not to mandate an inspection frequency for other operations. When necessary, the inspections will be unannounced.

The U.S. Environmental Protection Agency suggested that to assure effective environmental compliance at mine sites, inspection efforts must occur from the start of operations and be ongoing. It suggested that the regulations be amended to require that BLM coordinate with the applicable State and Federal environmental agencies to conduct a complete multi-media inspection of mines within five years after beginning full-scale operations. The regulations should send a strong message that a coordinated Federal and State effort will occur at the beginning of the mine life to check environmental compliance. EPA suggested that these types of coordinated compliance inspections should also occur every five years throughout the mine life.

Other commenters asserted that proposed § 3809.600, which would establish new provisions related to the nature and frequency of BLM's inspections of mining operations, are generally unnecessary and inappropriate and reflect BLM's failure to consider the substantial implications of its proposal. Some commenters disagreed with BLM's statement that establishing a specific number of inspections is needed to prevent adverse environmental impacts, although certain large operators did not object to more frequent BLM inspections or visits to the mine sites. These operators stated that contact between BLM and the operator keeps the operator informed of BLM's concerns and educates BLM about the mine operations, concluding that this is desirable and can prevent misunderstandings or compliance problems.

One operator expressed two concerns with the proposed rule. First, it is not clear that a mandatory inspection schedule is the most efficient use of BLM's limited resources. Second, BLM has considered its own inspection program in isolation from other State and Federal regulatory authorities. The operator asserted that a mandatory inspection frequency is inappropriate if it has no relationship to the risk or compliance problems associated with the site to be inspected. The operator pointed to an Office of Surface Mining rule that eliminated a mandatory inspection frequency for certain categories of coal mines ''to free resources that can focus on existing or potential problems at high risk sites.'' 59 FR 60876 (Nov. 18, 1994) (OSM rule reducing frequency of inspections for abandoned, but not completely reclaimed, coal mines). The operator concluded that the goal of quarterly inspections is a useful goal, but should not be written into the regulations as a mandatory requirement. The operator suggested as an alternative, BLM should consider regulatory language that directed the BLM field officers to target their inspection and compliance resources at ''high risk'' sites or at sites during critical periods (such as placement of liners or during construction periods). The operator also proposed that the regulations include a provision that would require a follow-up inspection when a major notice of noncompliance has been issued. These provisions would give the agency more flexibility and would be more effective in preventing unnecessary or undue degradation than a formulaic approach to compliance inspections.

BLM fully intends to cooperate with other agencies with regulatory jurisdiction over mining operations. BLM agrees that it should coordinate both its inspection and enforcement activities with State agencies and with other Federal agencies. Such coordination can become formalized through memoranda of understanding of agreements, as suggested by the NRC Report, to prevent duplications of effort and to promote efficiency. See NRC Report at p. 104. Nevertheless BLM believes it important to codify its existing policy of four inspections a year for operations using cyanide or other leachate or which have a significant acid-generating potential. This policy has been effective so far, in BLM's judgment. The reference to the OSM rule is not on point because that rule dealt with situations involving abandoned coal mines where continued quarterly inspections serve no purpose.

On a technical level, one commenter asked that BLM define the term ''significant potential for acid drainage,'' asserting that there is a wide range of confusing and ambiguous applications of the concept of a mining operation that may or may not produce significant acid drainage. These can range from standard core drilling a high sulfide mineral deposit, to open trenching, to underground mining, to open pit mining to road or airport construction that will expose sulfide bearing country rock. Even where there may be high acid drainage potential, a small scale mining operation may not be threatening. Conversely, a large-scale operation in an area with low acid drainage potential might be significant concern. The commenter suggested that a table such as BLM has used in other parts of the proposed 3809 regulations would help sharpen BLM intentions and provide for uniform application between Resource Area, Districts, and States.

BLM appreciates the comment, but does not believe it requires providing a definition of the concept of ''significant potential for acid drainage,'' but rather calls for common sense in administering this section of the rules.

*Requests for Inspection*

Some commenters wanted BLM to provide opportunities for citizens to request inspections of mines. BLM does not view it necessary for its rules to provide citizens with the opportunity to request inspections. Anyone may inform BLM of the existence of problems and request inspections. BLM is not aware of a lack of responsiveness of its personnel that needs to be addressed in its rules.

*Inspection—How?*

Commenters addressed the nature of inspections and the measurement of compliance. One commenter asserted that the practical realities of judging compliance with unachievable performance standards to eliminate impacts will create substantial problems for both the BLM and the mining industry. For instance, how will BLM inspectors determine when erosion control and acid generation management measures comply with the ''minimize'' performance standard? Will each mine or mineral exploration site be judged on a case-by-case basis, subject to the individual inspectors' discretionary interpretation of what constitutes minimize? BLM disagrees that substantial problems will result. Trained, professional BLM inspectors will use their best judgment in determining whether operators comply with their approved plan of operations. Although the rules contain standards such as ''minimize'' rather than numeric standards, the plans will specify the activities that are allowable, and where appropriate, the acceptable parameters at a particular location.

*Scope and Timing of Inspections*

Some commenters objected to the scope and timing of inspections, asserting the BLM inspector cannot inspect ''at any time'' as provided by proposed § 3809.600(a). Some mining companies did not object to BLM's proposal for BLM employees to inspect mining operations on public lands, as long as such inspections are made at reasonable times—during normal

business hours. These commenters asserted that without a specific grant of authority from Congress, inspections must be conducted at reasonable times. Some commenters asserted that inspectors must notify the operator of their presence, and must permit representatives of the operator to accompany them during any such inspections. In addition, allowing inspectors unrestricted access to ''all structures, equipment, workings and uses located on public lands'' is too sweeping in its effect and creates significant safety concerns. Inspectors' access should be limited to property (both real and personal) having a reasonable relationship to BLM's role of ensuring compliance with the proposed revisions. Such limited access is especially appropriate in light of applicable Federal and State health and safety mandates.

To perform its inspections properly, BLM needs to be able to inspect whenever, wherever, or whatever is required to assure compliance with its regulations on the public lands. Many mining operations are conducted around the clock, and problems can arise anytime and anywhere on a mine site. When appropriate, BLM inspectors may allow operator representatives to accompany them, but not to the extent of interfering with their inspections. BLM expects that its inspectors will ordinarily inform operators of their presence. BLM inspectors will conform to applicable health and safety mandates.

*Who Should Inspect?*

A number of commenters asserted that those who enforce the regulations should not be the same as those who approve mine permits, if possible, and that the enforcement and regulatory processes should be otherwise kept apart. Such commenters were concerned about the independence of the inspectors. They suggested that BLM should consider dividing the agency into those who approve the mines and those who enforce environmental protection.

Although BLM understands the commenters' concern, the final rules do not address who can or cannot perform inspections. BLM agrees that inspectors need to be impartial in enforcing the rules, but persons who are involved in making decisions on plans of operations should not necessarily be precluded from determining whether operators have complied with the plans. Such persons will be more familiar with what is allowable under a plan of operations than a person who has had no earlier involvement.

*Inspection of Residential Structures*

A commenter asked that BLM revise proposed § 3809.600(a) to indicate the extent and authority of BLM to inspect the inside of private residential structures owned by workers at the mine site. The commenter asked that BLM define residential structures for the purposes of this subpart because the referenced 43 CFR 3715.7 focuses on a wide variety of uses that are exclusive of mining. For example, the commenter asked, does this include unlimited BLM inspection of living accommodations for the work force at a medium-sized remote mine in Alaska with workers living in trailers/campers. The commenter requested that BLM define how this provision applies to large and small size mines where there are no alternative living provisions.

As referenced in the rule for the convenience of readers, inspection of residences located on the public lands is covered by 43 CFR 3715.7. Section 3715.7(b) provides that BLM will not inspect the inside of structures used solely for residential purposes, unless an occupant or court of competent jurisdiction gives permission. For additional information concerning BLM's occupancy rules, the reader is directed to the July 16, 1996 **Federal Register** preamble at 61 FR 37125.

*Self-Monitoring*

Commenters opposed self-monitoring by operators. The commenters asserted that mine operators have a huge vested interest in ensuring that the results of such testing do not adversely affect operations at the mine. They questioned the reliability of asking someone in such a position to produce accurate and honest results. Also, commenters asserted that there are some mine operators who may be honest but unskilled in doing accurate scientific measurements.

Although BLM will perform inspections, the rules also require monitoring plans under which operators perform monitoring. Despite the concerns expressed by commenters, operator monitoring can be an effective way to keep track of activities at an operation. Records have to be maintained, and falsification or misrepresentation is a violation of Federal law.

*Proposed § 3809.600(b) Citizen Participation in Inspection*

One of the most controversial issues in the proposed rule, generating many comments, was the BLM proposal to allow members of the public to accompany BLM inspectors on mine inspections. Under the proposal, BLM would have been able to authorize members of the public to accompany a BLM inspector onto mining sites, as long as the presence of the public would not materially interfere with mining operations or with BLM's activities, or create safety problems. Under the proposal, when BLM authorized a member of the public to accompany the inspector, the operator would have been required to provide access to operations.

*Opposition to BLM Proposal*

Many commenters opposed public involvement in the inspection process. Specific objections included:

Undue influence—The only members of the public likely to accompany a BLM inspector onto a mine site are apt to be political opponents of the mine or other individuals with anti-mining agendas looking for a means to harass the mine operators. To allow ''biased environmentalists'' along will create unnecessary and undue influence.

Safety considerations—Allowing the public on mine sites with BLM inspectors poses an unacceptably high risk. There is no guarantee or assurance of personal safety of the visitor. MSHA requires that the BLM inspectors have specific MSHA training in order to enter certain hazardous areas of the mine such as the pits and mill. Citizens do not have that level of training and would not be allowed in most areas of a mine. Untrained people could cause a serious accident, if not a fatality.

Liability—BLM and mine operators could incur liability for injury or death of public or BLM personnel resulting from untrained people being allowed on mining sites. There could be BLM liability for public claims of exposure to toxic chemicals while at mine or mill sites. Increased risk to BLM personnel could also occur because of such personnel being responsible for untrained accompanying public. One commenter asserted that ''[i]t is unreasonable to require the company to carry liability insurance for the public at large on-site. It is also unfair to the BLM employee. There is no place for the public on a mine site unless the company provides the tour and is able to set access limits. It is unreasonable for the federal government to establish regulations that create unnecessary risk to the industry and the public, unless the government is willing to assume all liability created by this action.''

Authority—Commenters asserted the ''BLM does not have the authority to allow citizen inspections and therefore, the citizen inspection provision should be deleted. FLPMA is silent on this issue and cannot be cited as providing

such authority. * * * . In fact, FLPMA prohibits such citizen inspections. * * * Citizens cannot be permitted to accompany BLM inspectors without the specific consent of the mine operator.'' A commenter asserted that allowing members of the public to accompany BLM officials when they make inspections would be a Government authorization of trespass.

Confidentiality—Allowing a member of the public to accompany BLM officials during a site inspection raises serious issues of confidentiality. ''There is nothing in the proposal to constrain citizens from disseminating and disclosing information about the confidential business materials and processes they may encounter during an inspection. Nothing could stop a potential competitor from accompanying BLM as a ruse to obtain such information, and due to the difficulty in proving disclosure of confidential information, it would be hard to rewrite this provision in a manner that would allow meaningful policing of a nondisclosure agreement.'' A company whose shares are traded on any stock exchange cannot allow member(s) of the public to gain insider information that would affect the trading of the company's stock. This issue is of critical importance during the initial exploration stages when a mineral discovery is being made.

Vandalism and Theft—Small miners have a lot of supplies and small equipment at their remote mining camps. If non-BLM people visit the claims, it may result in loss of equipment, vandalism, or both. Citizens entering a mining operation could learn where each piece of equipment is located and what is vulnerable to acts of destruction.

Workload—Public participation in field inspections could be a cumbersome task if multiple people show up at some remote site and need to be transported. ''BLM should also consider how the presence of the public may affect the conduct of an inspection. Certainly, a trained inspector who is familiar with a mine site will be considerably slowed by the presence of untrained members of the public. Longer inspections will require more inspectors or fewer inspections will be completed.''

Comments also questioned how citizen involvement in inspections would work. For instance, if the BLM visits the site, is this the point when the proposed citizen inspector accompanies the BLM inspector? Will the operator be told that citizen inspectors are coming, and under what circumstances will the inspection be done?

*Support for Public Participation in Inspections*

Some commenters supported public participation in inspection and monitoring. They noted that citizens should have access to public lands and that the BLM should allow citizens to accompany BLM employees on mine inspections to ensure that no violations of regulations occurs. One commenter asserted that public involvement in the inspections of mines is merely an extension of open government and should be part of the privilege of operating on the public lands. ''The land the mining companies use are public lands, which the public should be allowed to visit, especially during these inspections, because the mining company is present during these inspections. * * * to balance that 'undue influence' on the inspectors from the mining companies, the public should have their own people present too. This would create a balance among the miners, the public, and the government caught in between.'' A commenter supporting the BLM proposal agreed that public involvement in mine inspections must depend upon the caveat that there are no significant safety concerns.

A commenter agreed that the public should be kept away from any potentially dangerous situations such as underground mines, but asserted there are safe opportunities for the public to view what is going on. Allowing inspections may have to be considered on a case-by-case basis rather than opening everything up to inspections as was proposed. The commenter asserted that the public should be allowed to see what's happening, with some restrictions, and the mining industry should be willing to go along with that, especially since they are always complaining about the public not understanding the industry.

*BLM Conclusion*

BLM has carefully considered all of the comments concerning members of the public accompanying BLM inspectors on inspections, as well as its own experience on those few occasions when members of the public did accompany BLM inspectors. BLM has decided not to finalize the provision as proposed. Many of the objections and risks pointed out by the commenters have merit. In addition, BLM's experience with allowing members of the public to accompany inspectors is that the site visits typically become more of a tour than an actual inspection, and that the inspector has to reinspect the operation to perform his or her job properly. Thus, BLM has concluded that the provision as proposed would not be workable.

*Section 3809.900 Public Visits to Mines*

On the other hand, BLM firmly believes that the public should be able to observe activities on the public land, including mining operations. BLM has thus adopted a provision, to be codified as § 3809.900, designed to allow public *visits* to mines once each year, but not in such a way to interfere with BLM or operator activities or to compromise safety or confidentiality. This provision is intended to respond to many of the objections raised by commenters. A visit will effectively be a mine tour, not an inspection, and operators can specify areas that will not be available, and limit the nature of the visit.

Specifically, final § 3809.900 provides that if requested by a member of the public, BLM may sponsor and schedule a public visit to a mine on public land once each year. The purpose of the visit is to give the public an opportunity to view the mine site and associated facilities. Visits will be limited to surface areas and surface facilities ordinarily made available to visitors on public tours. BLM will schedule visits during normal BLM business hours at the convenience of the operator to avoid disruption of operations. Under the final provision, operators must allow the visit and must not exclude persons whose participation BLM authorizes. BLM may limit the size of a group for safety reasons. An operator's representative must accompany the group on the visit. Operators must make available any necessary safety training that they provide to other visitors. BLM will provide the necessary safety equipment if the operator is unable to do so. Members of the public must provide their own transportation to the mine site, unless provided by BLM. Operators don't have to provide transportation within the project area, but if they don't, they must provide access for BLM-sponsored transportation.

BLM believes that a once a year visit sponsored by BLM will not impose unreasonable burdens on operators, who typically already provide limited mine tours, or interfere with operators' rights to develop minerals under the mining laws. The provision is authorized by FLPMA sections 302(b), 303(a), and 310 (43 U.S.C. 1732, 1733, and 1740), as well as by the mining laws, 30 U.S.C. 22 (R.S. 2319).

*Enforcement*

BLM is adopting its enforcement provisions generally as proposed. Each

section of the final rule is discussed below, together with comments received relating to the specific sections. First, however, BLM discusses the general enforcement comments and issues raised by commenters.

*General Comments Received*

Commenters supporting the proposal stated that strengthening BLM's administrative enforcement mechanisms and penalties for enforcing its surface mining regulations will help to prevent unnecessary or undue degradation of public land resources by mining operations, and wanted particularly to endorse the enforcement and penalty provisions in §§ 3809.600 and 3809.700. If BLM does not strengthen its administrative sanctions, the commenters asserted, it sends a message that BLM does not care about the health and welfare of the citizens and of the environment . Commenters stated that all of BLM's proposed changes are for naught if enforcement is not strengthened, and that stiff fines and the real threat of losing the right to mine are necessary to prevent harm to the taxpayer, environment, and local community. Commenters stated that if mining companies can't meet these standards they shouldn't be permitted to mine. Some commenters stated that mining companies have shown through the years that they will not conduct environmentally responsible operations unless forced to by law. Therefore, it is extremely important that enforcement be strong.

BLM agrees that it is important that BLM have strong enforcement remedies available to assist in preventing unnecessary or undue degradation of the public lands. BLM recognizes that many operators conduct operations in a responsible manner in compliance with regulatory standards. These final rules will not impede such operators in continuing their lawful conduct. On the other hand, violations do occur, and BLM must be able to deal with those in a firm, but fair manner. The rules provide the flexibility for BLM to take enforcement action when warranted, or to defer such action if violations will otherwise be timely corrected.

Commenters opposing the proposal asserted that BLM misled the public in the draft EIS by stating, as a ''gap'' not adequately covered in the existing 3809 regulations, that ''BLM lacks provisions for suspending or nullifying operations that disregard enforcement actions or pose an imminent danger to human safety or the environment.'' In support of its assertion, the commenter stated that previous 3809 regulations adequately addressed the issue of enforcement, and referred to previous § 3809 .3–2 ''Noncompliance,'' which provided that mining operations that were issued a notice of noncompliance pursuant to the regulations may be enjoined by a court order from continuing such operations, and may be liable for damages for unlawful acts. Other commenters pointed out that earlier BLM changes to its ''use and occupancy'' rules in 43 CFR part 3710 addressed the only enforcement needs BLM identified in 1992. Commenters also asserted that the BLM also fails to consider authority under RCRA, or authority delegated from the President of the United States to use the tools of CERCLA to address noncompliance and ''imminent dangers.''

BLM disagrees with the comments. BLM's previous rules did not provide adequate enforcement authority. Notices of non-compliance were not self-enforcing, and BLM was unable to compel compliance without seeking to invoke the aid of the Federal courts, in what could be a lengthy and uncertain process, which usually did not mean immediate compliance. The NRC Report discussed this problem at some length and made a specific recommendation for strengthening BLM policy on the subject. See the NRC Report at pp. 102–04. These final rules will increase the incentives for operators to correct violations in a timely manner.

Although BLM's ''use and occupancy'' rules adopted in 1996 (43 CFR subpart 3715) addressed certain abuses occurring on the public lands, those rules were somewhat limited in as to the types of activities regulated, focusing in large part on whether activities are ''reasonably incident'' to mining. The enforcement rules adopted today are broader than the 1996 rules and cover all activities the operator engages in, and in particular whether unnecessary or undue degradation occurs.

BLM acknowledges that RCRA and CERCLA provide a basis for enforcement of certain activities, and will work with EPA, as appropriate, so as not to duplicate enforcement actions, but BLM needs its own enforcement provisions as the land manager of the public lands.

Some commenters asserted that other enforcement mechanisms exist. For instance, operations that pose an imminent danger to human safety on public lands, are under the Federal jurisdiction of the U.S. Department of Labor, Mine Safety and Health Administration, whose regulations at 30 CFR 57.1800 ''Safety Program,'' require operators to inspect each working place at least once each shift for conditions that may adversely affect safety or health, and promptly initiate appropriate action to correct such conditions. In addition, conditions that may present an imminent danger, require the operator to withdraw all persons from the area affected until the danger is abated. These inspections are required to be recorded, and are available to the Secretary of Labor, or his authorized representative. Others asserted that State regulatory inspection and enforcement are sufficient.

BLM recognizes that other Federal and State enforcement agencies share the responsibility for regulating mining operations on the public lands, and that with respect to certain matters, other agencies will have the lead responsibility. BLM will work with the other agencies so as not to duplicate enforcement, and will refer violations to other agencies in appropriate cases. Notwithstanding this coordination, BLM believes it important to have its own enforcement actions available to use to assure the prevention of unnecessary or undue degradation of the public lands.

Other commenters urged a program based on cooperation: Cooperate with the obviously good operators, enlist their support and help, create a feeling of trust, and follow through with a positive program. Some felt that current rules were not adequately enforced until recent years and that there was little effort to take serious violators to task. Some commenters thought that it is inappropriate to dwell on the one or two ''bad apples'' of mining, such as the Summitville situation in Colorado and the Zortman-Landusky situation in Montana. The commenter asserted that both of these were in States that have very stringent environmental laws and that if these laws had been enforced and monitored, the environmental problems probably would not have occurred.

BLM agrees that it is important for BLM to cooperate with the industry, and vice versa. BLM intends to work with the industry to assure compliance with its rules, but is adopting the new rules to provide more effective, and a wider array, of remedies for use where needed. Although the high-visibility problems mentioned by the commenters perhaps could have been limited through better enforcement of existing authorities, these problems, as well as the recent overflow of a tailings dam at a gold mine in Romania, do show that mining operations sometimes carry a risk of serious environmental harm that is very expensive, or even impossible to repair. Stronger enforcement tools will allow more effective BLM intervention if other agencies need BLM assistance.

A commenter stated that if BLM proceeds with this final rulemaking, BLM will indeed change the way the surface management regulations are working on the public lands. It will change the regulatory system from one which encourages cooperation between mine operators and regulatory agencies into one which relies upon confrontational enforcement authorities.

BLM disagrees with the comment. BLM will continue to encourage cooperation between the regulated community and the regulators. Cooperation and seeking voluntary compliance will remain the top priority, but BLM must have, as the NRC Report has underscored, better access to an array of enforcement tools, for use when cooperation and voluntary compliance don't work.

A commenter concluded that the information provided to the public in the draft EIS and preamble was misleading, self-serving, and violates the conditions of several court rulings, NEPA, Department of Interior policy and regulations, and the Administrative Procedure Act.

BLM disagrees with this comment. BLM perceived a need to strengthen its enforcement remedies and so informed the public in the draft EIS and the proposed rule. The NRC Report also recognized the need for better enforcement mechanisms.

Some commenters stated that BLM could make better use of the enforcement tools it currently possesses through improved implementation and training. BLM agrees that improved implementation and training are useful, but that does not negate the need for better enforcement tools.

For consistency in enforcement, one commenter thought the same definitions and standards should be applied for all Federal lands, regardless of which agency managed the lands (for example, BLM, Forest Service), referring as an example, the 5-acre limitation on disturbance. A number of commenters repeated the theme that the BLM and the Forest Service should have comparable provisions and definitions.

The goal of having BLM and the Forest Service use the same definitions and standards is laudable. However, it must be recognized that the two agencies operate under different organic statutes and have different management responsibilities. BLM will continue to work with the Forest Service to use common standards and procedures wherever practicable.

Some commenters asserted that it is premature to conclude that additional enforcement and penalty provisions are needed in the absence of information (other than anecdotal) demonstrating whether existing authorities are being applied in a consistent and uniform manner.

BLM disagrees that it should wait for further information before updating its enforcement regulations. The NRC Report did not indicate that action in this area was premature. The enforcement provisions adopted today provide practical methods for BLM to assure compliance with its rules. We hope that BLM will not have widespread need to use enforcement actions to compel compliance, but the availability of such remedies should help to prevent unnecessary or undue degradation of the public lands.

*NRC Report Recommendation 6*

Recommendation 6 of the NRC Report stated that BLM should have both (1) authority to issue administrative penalties for violations of the hard rock mining regulations, subject to appropriate due process, and (2) clear procedures for referring activities to other Federal and State agencies for enforcement. NRC Report at p. 102. The committee found that administrative penalty authority should be added to the array of enforcement tools in order to make the notice of noncompliance a credible and expeditious means to secure compliance. NRC Report at p. 103.

Commenters asserted that the NRC concluded BLM does not have administrative penalty authority under current law. One State agreed that Congressional action would be necessary to give BLM authority to issue administrative penalties. Therefore, it considered NRC Report Recommendation 6 as a proposal for legislative change, not a change in the regulations. In addition, the commenter noted that the NRC Report endorsed only administrative penalty authority. The commenter concluded that proposed revisions to the 3809 regulations include broad new inspection and enforcement authority for BLM which it characterized as neither authorized by statute nor required to administer an effective program.

BLM disagrees with the commenters' assertion that the NRC Report concluded that BLM did not have authority to establish administrative penalty authority. The NRC was neutral on the issue of BLM authority to establish administrative penalty authority. It expressly stated that BLM should seek additional authority from Congress only ''if statutory authorization is necessary'' NRC Report at p. 104. BLM also disagrees with the characterization of the recommendation as solely a proposal for legislative change. The NRC Report discussion made clear that, assuming BLM found that authority already existed for it, BLM should revise and expand the existing enforcement provisions in the 3809 regulations to include administrative penalty authority for violations of the regulations. NRC Report at p. 104.

Commenters concluded that because the NRC Report recommended no changes in regulatory provisions regarding inspections and enforcement apart from the administrative penalty recommendation, the proposed enforcement revisions are inconsistent with the recommendations of the NRC Report. Commenters suggested that in order to remain consistent with the recommendations of the NRC Report, BLM should defer any proposed changes in the inspection and enforcement provisions of the regulations until it has implemented those measures recommended by the NRC Report to improve efficiency and the use of staff and resources to implement the existing inspection and enforcement requirements.

BLM disagrees that the final enforcement rules are inconsistent with the NRC Report recommendations. BLM construes the term ''administrative penalty'' as used by the NRC to encompass the full range of proposed administrative sanctions, including suspension and revocation orders, as well as monetary penalties. Recommendation 6 was intended to make notices of noncompliance a credible and expeditious means of securing compliance (NRC Report at p. 103), and the NRC Report stated in connection with the Recommendation that an operator should be given the opportunity to rectify the circumstance of noncompliance (NRC Report at p. 104). This applies equally to suspension and revocation orders, as to monetary penalties. To the extent that the NRC Report recommendations simply do not address certain provisions of the final rule, such as inspection, no inconsistency exists with regard to the recommendations. Therefore, there is no need to defer changes to the inspection and enforcement rules for purposes of consistency.

At the other end of the spectrum, some commenters asserted that the NRC Report supported establishing a ''mandatory'' enforcement program for regulating mining on Federal lands. They stated that the NRC Report affirms that a clear and effective enforcement is needed to replace the existing enforcement mechanisms, and DOI's

proposed rules need to be strengthened to achieve the goals of this recommendation. The commenters stated that this recommendation makes clear that BLM enforcement on the ground is imperative to protecting against unnecessary or undue degradation. The commenters focused on a passage of the NRC Report that states, ''[f]ield-level BLM and Forest Service personnel told the committee that they have experienced difficulty, in some cases, in enforcing compliance with regulations and the requirements of notices and plans of operations.'' NRC Report at p. 102.

The commenters concluded that the best way to ensure that BLM field personnel take the required measures to ensure compliance with the regulations is to make such enforcement mandatory, *i.e.* require BLM to take enforcement action and to assess fines against all observed violations. For instance, a commenter stated that operations that are clearly hazardous to the environment and to human health and public safety should be closed down until brought into compliance. Others suggested that any and all violations should be documented and, when the health of the watershed is threatened, operations ordered to cease until the operator can show compliance. Others urged enforcement to protect groundwater from violations. Without mandatory enforcement, commenters asserted BLM field personnel will experience the same ambiguity and confusion as to what degree of enforcement is appropriate.

Commenters objected that the discretionary enforcement system proposed by BLM will be rendered meaningless by what they say are poorly trained agency staff who are more likely to ''try to work things out'' with representatives of the mining industry when conflicts over land regulations exist, rather than take action that would compel compliance with the regulations. In the commenters' view, even in the event of gross abuse of public resources at a mine site, BLM will not mandate that enforcement actions be taken. The commenters state that this approach to enforcing the proposed regulations fails to create a climate in which effective regulation is likely to take place. Thus, some commenters conclude, allowing wholly discretionary enforcement of violations out in the field would be inconsistent with the NRC Report recommendations.

Commenters representing State regulatory authorities urged BLM to make enforcement discretionary, so that BLM and the States do not get caught up in unnecessary disputes as to what constitutes a violation and to avoid suits to compel compliance with duties established by the rules. Commenters supporting discretionary enforcement asserted that there are numerous ways to gain compliance, and issuing violations with associated civil penalties should be looked at as only one possible tool. Some stated that coordination on enforcement activities with State regulatory agencies is an absolute necessity, and States should be allowed to take the lead on enforcement. These commenters asserted that State enforcement can usually occur in a more timely manner, resulting in improved on the ground compliance.

BLM agrees that a firmly administered enforcement program will improve compliance, but concludes such a program is possible without mandatory enforcement. Under the final rules, trained professional BLM inspectors will exercise their judgment and take enforcement actions when necessary. BLM has been concerned that mandating enforcement action for every violation, no matter how small, would clog the system with unnecessary administrative proceedings and delays, and tend to create the confrontational atmosphere that BLM, the States, and the regulated community wish to avoid. BLM certainly intends to coordinate with State regulators and, where appropriate to assure timely compliance, allow other Federal agencies and States to take the enforcement lead. What BLM has tried to do in these regulations is to make enforcement tools available to BLM inspectors so they will not be hamstrung by the lack of administrative remedies. Providing these tools will strengthen BLM enforcement, without requiring operators be cited for every violation. BLM also disagrees that the NRC Report recommends that BLM enforcement be mandatory rather than discretionary. To the contrary, the NRC Report suggests that BLM acknowledge and rely on enforcement authorities of other Federal, State, and local agencies as much as possible. NRC Report at p. 104.

*Authority*

One theme addressed repeatedly by the comments is BLM's authority to promulgate the administrative enforcement rules. Some commenters agreed that enforcement is a necessary part of any regulatory program, but opposed the proposed enforcement rules as exceeding the BLM's legal authority under FLPMA. The commenters reasoned that FLPMA provides express enforcement authorities, both civil and criminal, and BLM is limited to the bounds of the statutory provisions. These commenters asserted that when Congress intends to grant administrative enforcement and penalty mechanisms, it provides specific statutory authority, which does not appear in FLPMA. For example, in the context of regulation of the mining industry, it has done so in the Federal Mine Safety and Health Act of 1977 and in SMCRA. Specific proposals that commenters asserted go beyond the BLM's authority include: Suspension and revocation orders, administrative civil penalties, and criminal penalties.

Multiple provisions of FLPMA, and one under the mining laws, authorize the establishment of administrative sanctions, including suspension and revocation orders and monetary civil penalties. These include the first and last sentences of 43 U.S.C. 1732(b), 43 U.S.C. 1732(c), the first sentence of 43 U.S.C. 1733, 43 U.S.C. 1740, and the authority to prescribe regulations under 30 U.S.C. 22 (R.S. § 2319). Section 302(b) provides the Secretary the authority to publish rules to regulate the use, occupancy, and development of the public lands. The last sentence of section 302(b) directs the Secretary to take any action necessary to prevent unnecessary or undue degradation of the public lands. Section 302(c) provides for the suspension and revocation of instruments providing for the use, occupancy, and development of the public lands. The first sentence of 43 U.S.C. 1733 directs the Secretary to issue regulations with respect to the management, use, and protection of the public lands. The use of suspension and revocation orders and administrative civil penalties are an integral part of a regulatory scheme to manage and protect the public lands. Administrative enforcement orders and monetary penalties establish more immediate and tangible consequences than the possibility of future judicial enforcement after a referral to the Attorney General. All of these sanctions will help achieve compliance with subpart 3809, and will help prevent continuing unnecessary or undue degradation of the public lands when violations occur.

BLM disagrees with the commenters' assertion that the provision allowing the Attorney General to seek the judicial imposition of injunctive or other judicial relief, 43 U.S.C. 1733(b), limits the Secretary's administrative authority. That section, together with a portion of 43 U.S.C. 1733(a) establishing criminal violations, provides affirmative authority for judicial enforcement. They do not, however, address or limit the scope of the Secretary's authority to regulate activities on the public lands

under other provisions of FLPMA and to establish administrative enforcement remedies.

Commenters stated that BLM's previous subpart 3809 regulations reflect the correct interpretation of FLPMA's enforcement authorities, and discussed the history of the previous enforcement rules. In the Subpart 3809 regulations as originally proposed (41 Fed. Reg. 53428 (Dec. 6, 1976)), § 3809.2–5(b) would have authorized initiation of suspension of operations if BLM ascertained the existence of ''significant disturbance of * * * surface resources * * * unforeseen at the time of filing the Plan of Operations.'' *Id.* at 53431. Suspension would have been obligatory for operations, or parts thereof, which were ''unnecessarily or unreasonably causing irreparable damage to the environment.'' *Id.* See also proposed §§ 3809.4–1 and 3809.4–2. *Id.* at 53432. These provisions were not included, however, when BLM reproposed the Subpart 3809 rules on March 3, 1980. 45 FR 13956, explaining: ''After further examination of the authority of the Secretary to issue these regulations, it has been decided that [BLM] will not unilaterally suspend operations without first obtaining a court order enjoining operations which are determined to be in violation of the regulations.'' *Id.* at 13958. Thus, the commenters concluded the Interior Department's contemporaneous interpretation of FLPMA was that the Department lacked administrative authority to suspend operations associated with mining claims without first obtaining injunctive relief pursuant to section 303(b) of FLPMA, 43 U.S.C. 1733(b).

BLM acknowledges that the previous rules reflected a permissible implementation of FLPMA, but not the only permissible one. The Department of the Interior did not state in 1980 that it had concluded the Secretary lacked legal authority to suspend mining operations by administrative order; it concluded only that it would not assert such authority in its subpart 3809 regulations. BLM's earlier policy approach was to ask the Attorney General to initiate a civil action under 43 U.S.C. 1733(b) for failure to comply with a notice of noncompliance, without the intermediate step of BLM issuance of an administrative order, for instance, directing an operator to suspend its operations. Section 1733(b), however, does not circumscribe the Secretary's actions before he or she asks that a civil action be initiated.

The current rule takes a different approach from the previous rules, one that is also consistent with section 1733(b). Under these final rules, before seeking judicial enforcement BLM may issue enforcement orders in addition to issuing a notice of noncompliance, including issuance of suspension orders, plan revocations, or monetary penalties. If an operator does not comply with any of these administrative orders, the Secretary may then seek judicial enforcement under section 1733(b).

Commenters also asserted that Congress apparently limited BLM's enforcement authority because it authorized the Secretary of the Interior to achieve ''maximum feasible reliance'' upon State and local law enforcement officials in enforcing the Federal laws and regulations ''relating to the public lands or their resources.'' 43 U.S.C. at 1733(c)(1).

BLM disagrees with the commenter's interpretation of FLPMA. Section 1733(c)(1) authorizes the Secretary of the Interior to enter into contracts for the assistance of and use appropriate local officials in enforcing Federal laws and regulations relating to the public lands or their resources. That section does not constrain the Secretary from establishing necessary enforcement regulations.

Commenters asserted that BLM's reliance on section 302(c) of FLPMA, 43 U.S.C. 1732(c), to justify suspensions or revocations of plans is misplaced. FLPMA section 302(c) provides suspension and revocation authority for ''instrument[s] providing for the use, occupancy or development of the public lands.'' The commenter asserted that a plan of operations under the 3809 regulations is not ''an instrument providing for the use, occupancy, or development of the public lands * * *,'' because the mining laws already authorize the ''use, occupancy, or development of the public lands.'' In the commenter's view, the plan of operations is simply an administrative means of regulating that development activity to prevent unnecessary or undue degradation of the public lands as addressed by FLPMA. A commenter asserted, moreover, that Section 302(c) is inapplicable to mining operations because section 302(b) provides that no provision of the Act shall ''in any way'' amend the mining laws unless that provision is specifically cited.

BLM disagrees with the assertion that plans of operations are not instruments providing for the use, occupancy, or development of the public lands, and that suspension or revocation of a plan of operations under FLPMA section 302(c) interferes with an operator's rights under the mining laws. Rights under the mining laws are subject to the FLPMA section 302(b) requirement to prevent unnecessary or undue degradation of the public lands. Approval of the plan of operations is the key to allowing use, occupancy, and development in a manner that will prevent unnecessary or undue degradation. Until BLM approves a plan of operations, an operator cannot use, occupy or develop its mineral interests in the public lands even if it has rights under the mining laws. The next-to-last sentence of section 302(b) of FLPMA makes this clear when it says, in pertinent part, that ''except as provided * * * in the last sentence of this paragraph,'' nothing in FLPMA amends the 1872 Mining Law or impairs the ''rights of any locators or claims under that Act.'' The ''last sentence of this paragraph'' it refers to sets out the Secretary's duty to protect the public lands from unnecessary or undue degradation. A plan of operations is the instrument allowing an operator to proceed with its use, occupancy or development of public lands consistent with the duty not to unnecessarily or unduly degrade the lands.[6] Suspension or revocation doesn't interfere with operator rights under the mining laws because such rights are dependent upon operator compliance with the approved plan. Accordingly, section 302(c) is a statutory basis for the sections providing for suspension and revocation of plans of operation.

A commenter requested that the new regulations clearly identify when BLM will refer a documented noncompliance to the Department of Justice for initiation of judicial action. The commenter stated that this information should also describe and evaluate the consequences of any differences between the various Department of Justice units having jurisdiction over mining and how these differences can be resolved to assure that all similar documented noncompliances are treated in a similar manner.

The standards for referral to the Department of Justice for judicial enforcement are not covered by subpart 3809. This will either be handled on a case-by-case basis or be the subject of BLM guidance.

A number of comments supported BLM's proposed enforcement rules. For instance, EPA supported BLM's

[6] The Interior Board of Land Appeals has held that the requirements of 43 U.S.C. section 1732(c) are not restricted to instruments issued by BLM under section 1732(b). ''Inclusion of the fourth proviso [of 43 U.S.C. section 1732(c)] makes it clear that Congress intended this requirement to extend to all land use authorizations issued by the Department under any law for lands managed by BLM.'' *James C. Mackay,* 96 IBLA 356 at 365.

proposed regulations at §§ 3809.601 and 3809.602, including the authority for BLM to suspend operations, and at §§ 3809.702 and 3809.703 to issue administrative civil penalties based on non-compliance with the subpart. Commenters stated that BLM clearly needs to have the tools available to shut down a ''renegade'' mining operation or jail a ''renegade'' operator. One commenter pointed out that when the BLM issues a Record of Decision based on a final EIS, the operator is responsible for carrying out the Plan as specified, and if the operator makes changes without BLM analysis and approval, the BLM should have the authority to levy fines and suspend operations. BLM agrees with these comments.

*Permit Blocks*

A number of commenters recommended adoption of a rule which would prevent BLM from approving future plans of operation for operators with unresolved noncompliances until the violations are corrected. A commenter stated that the new BLM rules—while certainly an improvement—do not allow the agency to reject an operation outright. These commenters asserted that BLM needs the ability to block historically irresponsible operators, as well as parent and subsidiary companies, from obtaining new mining permits. These commenters believed that denial of plans of operations is an important tool to protect public lands and waters from environmental damage. One State suggested language preventing the operator from obtaining a permit anywhere on public lands until all compliance issues have been resolved to the satisfaction of the BLM. That State said it uses a permit block section, and has found it to be useful, especially in addressing the repeat offender issue.

BLM has decided not to institute such a system at this time. The improvements in the enforcement mechanisms contained in this final rule have the promise, BLM believes, to satisfactorily address all enforcement issues. They should be given the chance to work before something as administratively complex and cumbersome as a ''permit block'' system is considered further.

*Citizen Petitions and Suits*

A commenter suggested that citizens and tribes should have the right to petition for inspection and enforcement in order to spur the BLM into fully implementing its FLPMA obligations.

BLM disagrees that a rule is needed to address the commenter's concerns. Individuals can presently request BLM conduct an inspection and can obtain copies of inspection reports. The commenter did not show that BLM is not adequately responding to citizen or tribal requests to inspect. As explained earlier in this preamble, BLM has decided that enforcement should remain discretionary.

A number of comments supported a provision providing citizens the right to sue to correct violations. Such a provision is beyond BLM authority and would require a legislative change.

*Additional Definitions Requested*

Commenters suggested that BLM define a number of the terms used in the enforcement context. These include ''noncompliance order'' as used in final § 3809.601(a), ''suspension orders'' as used in final § 3809.601.(b), ''immediate, temporary suspension'' as used in final § 3809.601(b), ''imminent danger or harm'' as used in final § 3809.601(b)(2)(ii), ''violation'' as used in final § 3809.702, and ''pattern of violations'' as used in final § 3809.602(a)(2). Specifically, the commenter stated that the BLM standard or threshold must be included to avoid ambiguity and arbitrary and capricious application by the responsible BLM field official.

BLM declines to add the suggested definitions. The meaning of many of the terms are apparent from their context. Implementation will occur on a case-by-case basis. Where necessary BLM will issue guidance to assure consistent application of the enforcement provisions.

*Section-Specific Issues and Comments*

*Section 3809.601 What Type of Enforcement Action May BLM Take if I Do Not Meet the Requirements of This Subpart?*

Final § 3809.601 specifies the kinds of enforcement orders BLM may issue, when they can be issued, the contents of such orders, and when they will be terminated. For the most part, the final rule tracks the proposal. Final § 3809.601(a) allows the issuance of noncompliance orders for operations that do not comply with provisions of a notice, plan of operations, or requirement of subpart 3809. Final § 3809.601(b)(l)(i) provides that the BLM may order suspension of operations if the operator fails to timely comply with a noncompliance order for a significant violation. A significant violation is one that causes or may result in environmental or other harm or danger or that substantially deviates from the complete notice or approved plan of operations. Thus, unless the violation may result in harm or danger or substantially departs from the notice or plan, BLM cannot suspend operations. Before issuance of a suspension order, BLM is required to notify the recipient of its intent to issue a suspension order; and to provide an opportunity for an informal hearing before the BLM State Director to object to a suspension. These latter procedures are intended to satisfy the procedural requirements of FLPMA section 302(c).

Final § 3809.601(b)(2) provides that BLM may order an immediate, temporary suspension of all or any part of operations for noncompliance without issuing a noncompliance order, advance notification, or providing an opportunity for an informal hearing if an immediate, temporary suspension is necessary to protect health, safety, or the environment from imminent danger or harm. This provision implements the third proviso of FLPMA section 302(c). Being mindful of the importance of an advance opportunity to object, the final rule limits temporary immediate suspensions to situations involving imminent danger, that is, situations where the harm could occur before a hearing would be held and a decision issued.

The final rule establishes one presumption. BLM may presume that an immediate suspension is necessary if a person conducts notice- or plan-level operations without having an approved plan of operations or having submitted a complete notice, as applicable. BLM believes that operations that have not undergone the required BLM review and approval, including operator preparation and submittal of detailed plans, are presumed to be operating without the care necessary to operate properly, and thus constitute an imminent danger to the environment. In a clarifying change from the proposal, the final rule references the sections requiring plan approvals and notice submittals.

Final § 3809.601(b)(3) provides that BLM will terminate a suspension order when BLM determines the violation has been corrected. The proposed rule would have had BLM terminate the suspension order no later than the date a person corrects the violation, but unless BLM is present, it would not be able to terminate the suspension on that date. Thus, the final rule bases the termination on the date BLM determines the correction has occurred.

Final § 3809.601(c) specifies the contents of enforcement orders, including: (1) How an operator failed to comply with the requirements of subpart 3809; (2) the portions of operations, if any, that must cease; (3)

the corrective actions to be taken, and the time, not to exceed 30 calendar days, to begin such actions; and (4) the time to complete corrective action. A minor change from the proposal clarifies that the 30 days to begin corrective action are calendar days.

Commenters stated that for the mainstream mining industry, a notice of noncompliance will almost invariably resolve the problem without protracted controversy. These commenters asserted that mine operators have enormous incentives to maintain positive and cooperative relations with the Federal land management agencies, and that judicial enforcement is pursued in rare instances of recalcitrant operators, usually where individuals are engaging in sham operations. The commenters conclude that the rare use of judicial enforcement authorities in the past attests to the lack of need for new enforcement authorities today.

BLM agrees that in many instances notices of noncompliance will lead to successful resolution and abatement of violations. There will be instances, however, where notices of noncompliance will not completely resolve the issue, and the danger of harm will continue. That is when the other remedies can prove useful. The rare use of judicial enforcement in the past may be attributed to the difficulty in successfully initiating civil actions rather than the lack of need for such actions.

Commenters asserted that in both subparagraphs of § 3809.601(b), BLM officials should not be authorized to shut down operations unless there is a significant violation that both may result in environmental harm and that substantially deviates from the completed notice or approved plan of operations.

BLM disagrees with the comment. BLM believes that a suspension is warranted under § 3809.601(b)(2) in either situation when an operator fails to correct the significant violation within the allotted time. The danger of environmental or other harm from an unabated violation justifies a suspension. BLM also believes that it should be authorized to direct an operator to suspend activities that substantially deviate from what was approved.

A commenter stated that although FLPMA allows BLM to use specific enforcement mechanisms in cases when the operator is noncompliant, the proposed regulations exceeded BLM authority by giving BLM the power to suspend and nullify operations. The commenter asserted FLPMA intended to limit BLM's enforcement capability in order to specifically promote the dissemination of information and to advise the public and to use administrative resolution rather than prosecution for violation.

BLM disagrees with the comment. BLM has a duty to take any action needed to prevent unnecessary or undue degradation as stated in section 302(b) of FLPMA. Suspending operators that are causing unnecessary or undue degradation is within BLM's authority.

Commenters stated that the proposed rules are entirely too vague and leave too much power in the hands of a few BLM employees. For instance, the rules would leave to the BLM inspector's discretion just what is imminent danger or harm to the public health, safety or environment. Commenters asserted that no business should be shut down without a ruling by a Federal judge.

BLM disagrees with the comment. In implementing the procedure contemplated by FLPMA section 302(c), trained professional BLM inspectors will exercise their judgment carefully. In the absence of imminent danger, an operator will have the opportunity to raise objections to the State Director. And operators will be able to immediately appeal temporary immediate suspensions to the Interior Board of Land Appeals. Although judicial rulings may ultimately occur, the BLM has the initial responsibility to administer the provisions of FLPMA, including section 302(c).

Commenters asserted that the proposed rule allowing BLM to order a temporary suspension without issuing a noncompliance order violates the principle of due process to which all individuals and companies are entitled to under United States Law. Commenters also asserted that suspension and revocation orders indefinitely shutting down entire mine operations would ''impair the rights of'' locators under the mining laws. These commenters stated that such enforcement authorities cannot reasonably be implied from the general mandate to ''prevent unnecessary or undue degradation'' of the public lands. Furthermore, the commenters stated that if finalized as proposed, a temporary suspension order presumably would be considered final agency action since there exist no provisions for a hearing either prior to or within a reasonable time after the suspension. Thus, the party adversely affected by such action may seek review and relief from a Federal District Court pursuant to the APA.

BLM disagrees with the comment. It is well established that due process may be, as here, satisfied through an administrative appellate process. Any BLM enforcement order may be appealed to the Interior Board of Land Appeals, and a stay may be requested under the provisions of 43 CFR 4.21. Thus a temporary suspension is not final agency action, for which review is available in Federal Court. Rights of claimants under the mining laws are not impaired by BLM enforcement actions because such rights do not include the right to operate in a manner that causes unnecessary or undue degradation.

Commenters suggested that BLM revise proposed § 3809.601(b) to substitute the term ''unnecessary or undue degradation'' for language like ''imminent danger or harm to the environment.'' The commenters stated that there is only one primary authority for BLM to issue a noncompliance finding or temporary suspension—the approved plan of operations is not being followed and BLM has determined that the variance is significant.

BLM declines to accept the suggestion. Although BLM recognizes that failure to comply with the regulations and an approved plan of operations constitutes unnecessary or undue degradation, the suspension rules implement FLPMA section 302(c) as well as FLPMA section 302(b). BLM believes that the terminology of the final rule provides a better sense of when suspension orders can be issued than the use of the phrase ''unnecessary or undue degradation.''

The commenters also asked that BLM and the Forest Service use comparable standards for non-compliance and temporary suspension. BLM declines because the two agencies' regulations are based on different authority.

A commenter requested that BLM revise proposed § 3809.601 to identify the responsible BLM official for issuing noncompliance and suspension orders, and to include the place and time of any appeal so [that] there is a clear understanding of the DOI administrative appeal process. The commenter stated that because the appeal process varies according to the level of the BLM official signing the order, it is important for everyone to know that process.

BLM declines to modify the rules as suggested. In addition to subpart 3809 specifying appeal procedures in final § 3809.800, each enforcement order ordinarily will inform the recipient of his or her appeal rights.

One commenter asserted that the suspension order process proposed by § 3809.601 is too cumbersome for a declining BLM workforce. The commenter requested that BLM clarify that the BLM notification of its intent to issue a suspension order

(§ 3809.601(b)(1)(ii)) can be combined with notification of the opportunity for an informal hearing (§ 3809.601(b)(1)(iii)).

The process set forth in final § 3809.601(b) is necessary to implement the notice and hearing requirement of FLPMA section 302(c). BLM agrees with the commenter that the BLM notification of its intent to issue a suspension order (§ 3809.601(b)(1)(ii)) can be combined with notification of the opportunity for an informal hearing (§ 3809.601(b)(1)(iii)).

One commenter recommended that once an operator files bankruptcy, the operation should automatically receive a record of non-compliance subjecting all notices and plans of operations to a higher level of compliance enforcement (more frequent inspections), bonding, and penalties. Another commenter suggested the rule include a provision for EPA or a State environmental agency to petition BLM to suspend operations or withdraw an operating plan if there is a continued history of non-compliance with environmental regulations.

BLM agrees that the operations of an entity that files for bankruptcy should be subject to continual scrutiny to assure that regulatory obligations are satisfied. BLM also agrees with the commenter that it is important to assure the adequacy of the financial guarantee of an operator in bankruptcy. BLM believes, however, that enforcement action should await the occurrence of violations, and that a bankruptcy filing does not necessarily represent the existence of violations. Once a violation occurs, BLM will take whatever action is best to assure that the violation will be corrected.

A commenter stated that under 43 U.S.C. 1732(c), an immediate temporary suspension is separate from, rather than a subtype of, a suspension. The commenter recommended that, for the sake of more clearly distinguishing between the two types of suspension orders, change the labeling in § 3809.601 to the following: (a) Noncompliance order; (b) Suspension order; (c) Immediate temporary suspension order; and (d) Contents of enforcement orders. These proposed subdivisions would more faithfully represent the intent of 43 U.S.C. 1732(c) and also make this section more understandable to the public by clearly differentiating between a suspension order and an immediate temporary suspension order, which is one of the goals of rewriting these regulations in plain language. In addition, this proposed labeling would allow for a complete one-to-one correlation with the set of orders identified in 43 CFR 3715.7–1, with the exception of the suspension order being called a cessation order in § 3715.7–1.

BLM has chosen not to make these suggested changes because the suggested reordering does not appear to be much different from the final and proposed rules, and even with the changes there would not be a complete correlation with subpart 3715.

A commenter requested that BLM revise proposed § 3809.601 to provide that BLM is liable for all owner/operator documented costs from an arbitrary and capricious suspension order that is overturned during the administrative appeal process or from litigation.

BLM does not intend to take enforcement actions in an arbitrary and capricious manner. Furthermore, it is not authorized to assume monetary liability in such circumstances. There are situations in which, either through Congressional statute or court-evolved common law, the regulated community may sometimes recover their costs or attorneys fees if they are successful in overturning an agency regulatory decision. But agencies may not make commitments to spend money or provide compensation that has not been authorized or appropriated by Congress.

A commenter objected that the feature of the proposed rule that would authorize BLM to issue temporary immediate suspensions without first holding an informal hearing violates an operator's due process rights. BLM disagrees. Section 302(c) of FLPMA, 43 U.S.C. 1732(c), specifically provides for the issuance of temporary immediate suspensions prior to a hearing. Final § 3809.601(b)(2) carries out the statutory provision. The statute and the implementing regulation are limited to situations where BLM determines that such action is necessary to protect health, safety or the environment. The rule adds the further gloss that temporary immediate suspensions not occur unless imminent danger or harm exists. Thus, temporary immediate suspensions are intended to address those situations where a delay in making the suspension effective could exacerbate existing or imminent harm. Under such circumstances and well-established case law, an operator's due process rights are fully satisfied by the operator's ability to seek administrative review of the temporary suspension from the Interior Board of Land Appeals, including the right to request a stay of the BLM action under IBLA procedures set forth at 43 CFR 4.21.

*Section 3809.602—Can BLM Revoke My Plan of Operations or Nullify My Notice?*

Final § 3809.602 tracks the proposed rule and implements the revocation portion of FLPMA section 302(c). It provides that BLM may revoke a plan of operations or nullify a notice upon finding that—(1) a violation exists of any provision of the notice, plan of operation, or subpart 3809, and the violation was not corrected within the time specified in an enforcement order issued under § 3809.601; or (2) a pattern of violations exists at the operations. The finding is not effective until BLM notifies the operator of its intent to revoke the plan or nullify the notice, and BLM provides an opportunity for an informal hearing before the BLM State Director. The final rule also provides that if BLM nullifies a notice or revokes a plan of operations, the operator must not conduct operations on the public lands in the project area, except for reclamation and other measures specified by BLM.

A commenter asserted that although revocation of a plan of operations is the last step in the enforcement process, it must be used in those circumstances in which other enforcement orders have failed to compel compliance with the regulations governing mining on public lands. The commenter stated that BLM must be willing to stop an operation in which major environmental damage is occurring, or other impacts are taking place, and all other efforts to stop the problem have failed. The commenter requested that proposed § 3809.602(a) should be revised to change the ''may'' to ''shall'', to make permit revocation mandatory. The commenter stated that BLM's mandate to prevent ''unnecessary or undue degradation'' is not discretionary—it is a mandatory duty, and cited *Sierra Club* v. *Hodel,* 848 F.2d 1068 (10th Cir. 1988). According to the commenter, this revision would also be consistent with the NRC Report recommendations.

BLM declines to make permit revocation mandatory. BLM agrees that it is important to achieve operator compliance with BLM regulations, and has provided a range of actions it can take, including administrative enforcement orders, such as suspension and revocation, administrative penalties, and judicial intervention. The appropriate remedy may differ in individual cases and the rules provide flexibility for BLM to use whichever one will cause the violations to be corrected. BLM agrees that it is required to prevent unnecessary or undue degradation of the public lands, but concludes that it

has some discretion in how to achieve that goal, and the final rule is a sound exercise of that discretion.

A commenter suggested that BLM revise proposed § 3809.602 to inform operators expressly that the BLM will revoke their plan of operations or nullify their notice if the financial guarantee is not properly maintained.

BLM does not accept the suggestion. As mentioned in the previous response, BLM will do what is necessary to achieve compliance, but BLM has a variety of means to do so. Plan revocation is but one such means.

Among those objecting to the policies embodied in the proposal, commenters asserted that it is too harsh for BLM to be able to revoke a plan of operations for a single violation.

BLM generally agrees that a plan of operations should not be revoked on the basis of one violation. If the violation is significant enough, however, with the potential to cause serious harm, and the operator refuses to correct the violation, BLM needs to have the option to consider whatever remedy-including revocation-that it believes will best achieve compliance.

A commenter suggested that BLM revise proposed § 3809.602(c) to clarify that operators continue to be authorized to use equipment and perform necessary reclamation following the suspension or revocation of a plan of operations. The commenter questioned what form of authorization BLM will use, who is the responsible BLM official to issue that authorization, and the extent, if any, for public and other Federal, State, local, native, and private surface ownership input to the new BLM authorization.

Revocation of a plan of operations does not terminate an operator's obligation to satisfy outstanding obligations. The authorization to perform the activities to fulfill such obligations can derive from the original plan, or be part of the order revoking the plan. Because this would be a continuation of existing obligations, BLM does not contemplate formal public participation. On the other hand, BLM intends to coordinate with State and other interested Federal agencies before revoking a plan of operations.

*Section 3809.603 How Does BLM Serve Me With an Enforcement Action?*

Final § 3809.603 deals with the means by which BLM will serve a noncompliance order, a notification of intent to issue a suspension order, a suspension order, or other enforcement order. The previous service provision appeared in § 3809.3–2(b)(1).

Under the final rule, service will be made on the person to whom it is directed or his or her designated agent by different methods. Service could occur by sending a copy of the notification or order by certified mail or by hand to the operator or his or her designated agent, or by any means consistent with the rules governing service of a summons and complaint under rule 4 of the Federal Rules of Civil Procedure. Service is complete upon offer of the notification or order or of the certified mail.

Service could also occur by offering a copy at the project area to the designated agent or to the individual who, based upon reasonable inquiry, appears to be in charge. If no such individual can be located at the project area, BLM may offer a copy to any individual at the project area who appears to be an employee or agent of the person to whom the notification or order is issued. Service would be complete when the notice or order is offered and would not be incomplete because of refusal to accept. In response to a comment, the final rule requires that if service occurs at the project area, BLM will send an information copy by certified mail to the operator or the operator's designated agent. This will assure that regardless of who receives the copy of the order at the project area, operator management will receive a copy.

The service rules recognize that mining claimants, as well as operators, are responsible for activities on a mining claim or mill site and provide that BLM may serve a mining claimant in the same manner an operator is served.

The final rule allows a mining claimant or operator to designate an agent for service of notifications and orders. A written designation has to be provided in writing to the local BLM field office having jurisdiction over the lands involved.

Commenters objected to proposed § 3809.603(a)(1), which provided that BLM may serve an enforcement action on ''an individual at the project area who appears to be an employee or agent of the operator.'' Commenters asserted that this method of service, particularly considering the seriousness of enforcement actions under these regulations, does not comply with fundamental principles of due process. These commenters recommended that this section be revised to require BLM to serve notices by certified mail or personally on the person the operator designates as authorized to accept service.

BLM agrees in part. The final rule will continue to allow service to be complete based on actions at the project area because persons conducting activities at the site of an operation will ordinarily be responsible. BLM agrees, however, that an information copy should be promptly mailed to the operator or his or her agent to assure that responsible management persons not located at the mining site are notified of the BLM actions.

Commenters also suggested that BLM revise proposed § 3809.603 to require BLM to provide a copy of any noncompliance or suspension order to all other Federal, State, and local entities that have permits or authorizations and Native entities and private landowners of the surfaces that are directly linked with the BLM-approved plan of operations.

BLM declines to accept the suggestion to put such a requirement into its rules. BLM intends to consult with other regulators, both State and Federal, when it takes enforcement action. Private entities, however, will not ordinarily be party to enforcement actions and will not necessarily receive copies of enforcement orders.

*Section 3809.604 What Happens if I Do Not Comply With a BLM Order?*

Final § 3809.604 is adopted as proposed. Final § 3809.604(a) provides that if a person does not comply with a BLM order issued under §§ 3809.601 or 3809.602, the Department of the Interior may request the United States Attorney to institute a civil action in United States District Court for an injunction or order to enforce its order, prevent an operator from conducting operations on the public lands in violation of this subpart, and collect damages resulting from unlawful acts. This reflects the judicial remedies provided in 43 U.S.C. 1733(b), and informs the regulated community of the tie between BLM administrative enforcement and subsequent judicial actions.

The final rule makes clear that judicial relief may be sought in addition to the enforcement actions described in §§ 3809.601 and 3809.602 and the penalties described in §§ 3809.700 and 3809.702.

A commenter recommended that civil actions be brought by States rather than in Federal Court as specified in proposed § 3809.604 because State procedures tend to be quicker, more cost-effective, and more outcome-based than Federal actions, and that implementation of Federal enforcement will be delayed by the existing DOI appeals process.

Final § 3809.604(a) identifies the availability of civil actions in United States District Courts, as provided in FLPMA section 303(b). It does not

preclude States from enforcing their programs in State courts. BLM will work with State regulators to determine which entity, State or Federal, should have the enforcement lead, and the appropriate judicial forum to initiate any required civil action.

Final § 3809.604(b) specifies that if a person fails to timely comply with a noncompliance order issued under § 3809.601(a), and remains in noncompliance, BLM may order that person to submit plans of operations under § 3809.401 for current and future notice-level operations. This paragraph continues the requirement contained in previous § 3809.3–2(e).

*Section 3809.605 What Are Prohibited Acts Under This Subpart?*

Final § 3809.605 is a new section that lists certain prohibited acts under subpart 3809. The list includes the most significant and most commonly violated prohibitions, but is not intended to be exhaustive. BLM reserves the right to take enforcement action on other violations of the requirements of this subpart that are not specifically listed in this section. None of the items on the list are new requirements; all were included in the proposed rule.

We added this section in response to comments. Some commenters suggested that a list of prohibited acts would be beneficial to regulated parties by alerting them to potential pitfalls. Other commenters suggested that the list would be helpful to those engaged in carrying out the enforcement program under this subpart, such as BLM rangers, U.S. District Attorneys, and judges, by providing an easily referenced and clearly stated list of the most common violations on which to base enforcement actions, prosecutorial decisions, and judgments.

*Sections 3809.700 Through 3809.703 Penalties*

*Section 3809.700 What Criminal Penalties Apply to Violations of This Subpart?*

Final § 3809.700 tracks the proposal and describes criminal penalties associated with violations of subpart 3809. Final § 3809.700 identifies the criminal penalties established by statute for individuals and organizations for violations of subpart 3809. It was previously included in § 3809.3–2(f) of the rules that were remanded in May 1998. This regulation is intended to inform the public of existing criminal statutory provisions. These statutes exist independent of subpart 3809, and persons can be prosecuted, and have been prosecuted, regardless of whether BLM promulgates this section. Such prosecutions can occur regardless of whether BLM identifies specific prohibited acts, as some commenters urge. The necessary element of a ''knowing and willful'' violation can be satisfied in a specific case regardless of a regulatory listing of such acts by BLM. Such a listing is not required by 43 U.S.C. 1733(a).

Final § 3809.700(a) specifies that individuals who knowingly and willfully violate the requirements of subpart 3809 may be subject to arrest and trial under section 303(a) of FLPMA. 43 U.S.C. 1733(a). Individuals convicted are subject to a fine of not more than $100,000 or the alternative fine provided for in the applicable provisions of 18 U.S.C. 3571, or imprisonment not to exceed 12 months, or both, for each offense.

Final § 3809.700(b) specifies that organizations or corporations that knowingly or willfully violate the requirements of subpart 3809 are subject to trial and, if convicted, will be subject to a fine of not more than $200,000, or the alternative fine provided for in the applicable provisions of 18 U.S.C. 3571.

Many of the comments supporting strengthened enforcement also supported the criminal sanctions described in proposed § 3809.700. BLM received a considerable number of comments, however, objecting to the criminal sanctions provision, proposed § 3809.700. Commenters asserted that provision is beyond the scope of BLM's FLPMA authority and would unintentionally criminalize actions that are not appropriately subject to prosecution. Commenters stated that these are rules and not laws, so no criminal penalties should be assigned by these rules. Under no circumstances should the BLM or the Department of the Interior be given authority to file criminal charges against a citizen of this country.

These rules do not establish new criminal sanctions, and BLM itself does not file criminal charges; only the Department of Justice may do that on behalf of the United States. These rules are intended to bring existing criminal provisions to the attention of the regulated community, and for that reason are included in subpart 3809. The conduct that is criminal is exactly that provided for in 43 U.S.C. 1733(a)

Some commenters objected to the establishment of ''across the board'' criminal penalties for any knowing and willful violations of the requirements of subpart 3809. Commenters stated that this is unjustified overkill, and that in no other public land management program does BLM establish that it is a crime to violate any provision of an entire subpart. Rather, commenters asserted, in other public land management programs, BLM has taken the essential effort of distilling those substantive violations that will be subject to criminal sanctions. Commenters asked that the agency specifically identify and list in the rule those actions by operators which are so serious as to justify criminal sanctions, or else delete the entire section. The commenters asserted that the preamble must state the basis for BLM's conclusion that it needs, to assure compliance, to have the threat of criminal penalties for such ''crimes'' as: submitting an incomplete plan of operations; holding financial guarantees that BLM has determined (in its revision of an estimate of reclamation costs under § 3809.552(b)) is no longer adequate; failing to modify a notice under § 3809.331(a)(2) that BLM thinks (and the operator does not think) constitutes a ''material change'' to the operations. The commenter stated that the list of ''violations'' of the rules is endless, and most ''violations'' are minutiae. The commenter stated that if a plan is incomplete, this is not a crime; the plan must be completed before processing can occur.

As discussed above, BLM has not accepted the commenters' suggestion and has published a list providing examples of the more common prohibited acts under subpart 3809. It is impractical, and probably not possible, to catalog all the violations of the regulations that could warrant criminal prosecution, and the list is not intended to be exhaustive. FLPMA establishes that knowing and willful violations of the regulations can be prosecuted under section 303(a). 43 U.S.C. 1733(a). BLM does not expect or advocate that minor violations be prosecuted. BLM expects that United States Attorneys will continue to exercise their prosecutorial discretion in determining when to bring criminal prosecutions.

A commenter stated that if proposed § 3809.700 is just informational, criminal enforcement cannot occur until 43 CFR part 9260 is changed. Those rules provide ''in a single part a compilation of all criminal violations relating to public lands that appear throughout title 43.'' 43 CFR 9260.0–2. There were and are no provisions of 43 CFR 3809 listed there. In fact, ''Subpart 9263-Minerals Management'' is ''Reserved.'' Thus, the unrevised part 9260 remains the controlling, effective criminal penalty rule, and the absence of any provisions in that subpart pertaining to hardrock mining operations means there are none.

Although BLM disagrees with the assertion that prosecutions cannot occur under 43 U.S.C. 1733(a) until BLM changes 43 CFR part 9260, BLM agrees that to avoid confusion subpart 9263 should contain a cross-reference to subpart 3809. Thus, this final rule incorporates such a cross-reference in subpart 9263. Again, the statute controls, regardless of what is contained in either subpart 3809 or subpart 9263 of BLM's regulations. The absence of such a cross-reference would not invalidate any properly obtained conviction under 43 U.S.C. 1733(a).

Commenters objected to the criminal enforcement provisions as violating the mining laws. One commenter stated that section 302(b) of FLPMA indicates that, unless specified otherwise, FLPMA does not amend the mining laws. FLPMA section 303 is not listed in section 302(b). The commenter asserted that there were no criminal penalty provisions in the 1980 3809 regulations for this reason. The Secretary's authority to prevent unnecessary and undue degradation must exercised by other, lawful means, not by means that Congress specifically established would not apply to ''locators or claims'' under the mining laws.

BLM disagrees with these comments. Criminal enforcement under 43 U.S.C. 1733(a) neither amends the mining laws, nor impairs rights established under that law. The mining laws create no right in any person to violate BLM's lawfully promulgated regulations, particularly those implementing the unnecessary or undue degradation standard of FLPMA section 302(b), which does amend the mining laws.

A commenter requested that BLM define the term ''knowingly and willingly'' as used in proposed § 3809.700. The commenter stated that this is especially important since BLM has chosen to include this section only for information purposes.

BLM does not accept this suggestion. The Congress defines, and the courts apply, the elements of such generic criminal statutes.

A commenter asked that BLM revise proposed § 3809.700 to make it clear the extent, if any, this section applies to existing approved mining operations on public lands.

As stated earlier, 43 U.S.C. 1733(a) applies by its own terms to any person who knowingly and willfully violates a regulation issued under FLPMA. There is no exception for existing approved operations. To the degree, however, that subpart 3809 excepts existing approved operations from certain new regulatory requirements, such requirements cannot form the basis for criminal conduct.

*Section 3809.701 What Happens if I Make False Statements to BLM?*

Final § 3809.701 tracks the proposed rule. It informs the regulated community of the existing criminal sanctions for making false statements to BLM. Under Federal statute (18 U.S.C. 1001), persons are subject to arrest and trial before a United States District Court if, in any matter under this subpart, they knowingly and willfully falsify, conceal, or cover up by any trick, scheme, or device a material fact, or make any false, fictitious, or fraudulent statements or representations, or make or use any false writings or document knowing the same to contain any false, fictitious, or fraudulent statement or entry. If a person is so convicted, he or she will be subject to a fine of not more than $250,000 or the alternative fine provided for in the applicable provisions of 18 U.S.C. 3571, or imprisonment of not more than 5 years, or both. As with final § 3809.700, BLM is not establishing any criminal sanctions by promulgating final § 3809.701.

Some commenters thought that proposed §§ 3809.700 and 3809.701 provide excessively severe penalties of from $100,000 to $250,000 fines and/or imprisonment for five years for violations of the regulations or making of false statements.

BLM is simply providing, as a matter of information to the regulated community, pertinent information about the existing statutes. The penalties the commenters object to cannot be changed by BLM regulation.

Commenters asked: What does the BLM consider to be a false statement? Will the BLM include false statements or accusation made by private parties against operators during comment period for bonding or other NEPA processes? What standards will the BLM use to determine if the statements are false?

U.S. Attorneys initiate prosecutions under 18 U.S.C. 1001. The courts interpret that law, and a body of case law exists interpreting 18 U.S.C. 1001. BLM defers interpretation of the statute to appropriate officials with responsibility to enforce that statute.

*Section 3809.702 What Civil Penalties Apply to Violations of This Subpart?*

Final § 3809.702 adopts the civil penalty provision that was proposed. This is consistent with NRC Report Recommendation 6 by providing administrative civil penalties, subject to appropriate due process. Administrative penalties are described in the NRC Report as necessary ''to make the notice of noncompliance a credible and expeditious means to secure compliance.'' NRC Report at p. 103.

The final rule provides that following issuance of an order under § 3809.601, BLM may assess a proposed civil penalty of up to $5,000 for each violation against a person who (1) violates any term or condition of a plan of operations or fail to conform with operations described in a notice; (2) violates any provision of subpart 3809; or (3) fails to comply with an order issued under § 3809.601. The rule provides that BLM may consider each day of continuing violation a separate violation for purposes of penalty assessments. In determining the amount of the penalty, BLM will consider the violator's history of previous violations at the particular mining operation; the seriousness of the violation, including any irreparable harm to the environment and any hazard to the health or safety of the public; whether negligence is involved; and whether the violator demonstrates good faith in attempting to achieve rapid compliance after notification of the violation. BLM will also accommodate small entities and will, under appropriate circumstances, consider reducing or waiving a civil penalty and may consider ability to pay in determining a penalty assessment.

To afford due process of law, the rule specifies that a final administrative assessment of a civil penalty occurs only after BLM has notified the violator of the assessment and provided a 30-day opportunity to request a hearing by the Office of Hearings and Appeals (OHA). BLM may extend the time to request a hearing during settlement discussions. If the violator requests a hearing, OHA will issue a decision on the penalty assessment. If BLM issues a proposed civil penalty and the recipient fails to request a hearing on a timely basis, the proposed assessment becomes a final order of the Department, and the penalty assessed becomes due upon expiration of the time allowed to request a hearing.

The proposed rules allowing BLM to assess monetary penalties drew many comments. Many commenters stated that BLM enforcement should allow for the assessment of administrative civil penalties against mining operators. Commenters stated that civil penalties will play a vital role in providing an incentive that operators understand. Commenters asserted that enforcement only works if the penalties for being ''caught'' are far more expensive than the profits to be made through non-performance. EPA supported the authority for BLM to issue civil administrative penalties based on non-

compliance with subpart 3809. BLM agrees with the comments supporting the use of administrative penalties.

A commenter suggested that the penalties BLM collects be put into a fund for reclaiming mine lands and not go into the U.S. Treasury or some general Department of the Interior fund. The proper disposition of penalties collected is, however, determined by Congress and may not be changed by BLM regulation.

Commenters asserted that FLPMA is quite specific about the enforcement authorities provided to BLM by Congress, stating 43 U.S.C. 1733(b) expressly allows only the Attorney General to institute civil penalties for violations of regulations promulgated by the Secretary of Interior pursuant to FLPMA, The commenter asserts that the absence of express administrative civil penalty provisions in FLPMA confirms the Congressional intent that BLM not impose civil penalties.

BLM disagrees with the commenters' assertion that the provision allowing the Attorney General to seek the judicial imposition of injunctive or other judicial relief limits the Secretary's administrative authority. That section, together with a portion of 43 U.S.C. 1733(a) establishing criminal violations, provides affirmative authority for judicial activity. As discussed earlier, neither provision addresses the scope of the Secretary's authority to establish civil penalties under other provisions of law.

Commenters stated that although they recognize that BLM wants new civil penalty authorities to address ''bad actors,'' recalcitrant operators would continue to flout any new BLM administrative authorities, and that civil or criminal court action would ultimately be necessary to resolve such problems as in the case now. The commenters asserted that BLM's proposed new bonding authorities will help make such cases of noncompliance more clear-cut and render easier the task of persuading a U.S. Attorney to pursue such actions.

BLM disagrees with the comment. Although BLM cannot assure that the imposition of civil penalties will always cause entities to come into compliance, the additional administrative sanctions will provide greater incentive for operators to do so. A person may decide to delay correcting a violation to see whether a court will issue injunctive relief, but that person may decide to abate a violation in the face of a Federal administrative order directing him or her to suspend operations or a continually accruing monetary penalty. BLM also is not persuaded that the existence of new bonding authorities will lead to greater success in bringing civil actions for injunctive relief.

A commenter emphasized the NRC Report statement that ''federal land management agencies need to acknowledge and to rely on the enforcement authorities of other federal, State, and local agencies as much as possible'' (NRC Report at p. 103) and suggested that the regulations should incorporate the requirement that BLM defer to enforcement by Federal or State agencies with primary jurisdiction over environmental requirements. The commenter suggested the regulations should also incorporate the NRC Report statement that BLM develop formal understandings or memoranda of understanding with State and Federal permitting agencies to prevent duplication and promote efficiency (NRC Report at p. 104). The commenter stated that the NRC Report intended that the BLM use the new administrative penalty authority only where the agency ''needs to act immediately to protect public lands or resources, or in cases where the other agency is unable or unwilling to act with appropriate speed'' (NRC Report at p. 104) and suggested that these limitations should be written directly into the regulations.

BLM agrees with the policies embodied in the NRC Report, to the extent reliance on other agencies will achieve compliance with BLM regulations and public lands and resources will be adequately protected. Inclusion of the suggested limits in the regulations, however, could be construed to establish jurisdictional bars to BLM enforcement. Such limits would complicate individual enforcement actions with issues related to matters such as the extent of BLM reliance on other agencies. These types of issues can lead to disputes between BLM and the States, as is evidenced by the experience of the Office of Surface Mining in implementing 30 U.S.C. 1271. BLM believes it preferable, instead, to develop understandings and agreements with States and other agencies to exercise its discretion appropriately to defer to other agencies, without including jurisdictional bars in the BLM regulations.

Other commenters asserted that the administration of a civil penalty system will impose new and unjustified resource and personnel requirements on the agency, not to mention the States. Commenters stated that from a practical perspective, BLM should also consider the procedural issues and complexities associated with the civil penalty policies and the implementation of similar programs by other agencies, such as EPA. For example, the commenter stated that BLM's penalty assessments would likely be the subject of innumerable appeals. That reality should be considered in light of the fact that the Interior Board of Land Appeals is already staggering under a multi-year backlog. Appeals stemming from BLM penalty assessments would have the potential to bring the system to a complete halt. The commenter also stated that BLM assumption of civil penalty responsibilities would impair the agency's capacity to perform its land management responsibilities.

Although the use of civil penalties could increase BLM's workload and add additional appellate cases, BLM disagrees that the additional resource needs will be as dramatic as the commenters assert. BLM does not expect that a great number of civil penalties will be issued, particularly if States and other Federal agencies take the enforcement lead in many instances.

Final § 3809.702 provides civil penalties of up to $5,000 per day for violation of the regulations, violation of a plan of operations, or failure to comply with an order of the BLM. Commenters stated that the draft penalties section is extremely stringent and excessive considering that a single violation of one of the new performance standards could likely occur even if the operator was diligent, prudent and acting in good faith. One commenter suggested the maximum penalty should be $1,000 per day, a noncompliance order be issued first, together with an opportunity to cure the violation, and appeals of penalty assessments be heard, in the first instance, by BLM State Directors.

BLM believes that the administrative civil penalty system is fair. The issuance of monetary penalties in any amount is discretionary. In many instances, BLM will not issue any monetary penalty. The $5,000 per day maximum amount of a penalty is just that, a maximum. BLM does not expect that penalty amounts will always approach the maximum, particularly if a violation is an isolated incident and an operator is diligent, prudent, and acting in good faith. The rule contains criteria for assessing penalties, with appropriate reductions for small entities. Setting a maximum amount of less than $5,000 per day may be inadequate to reflect the harm caused by serious violations.

Before any penalty becomes final, the recipient may seek a settlement agreement with the BLM State Director under final § 3809.703, discussed below. The recipient may also petition OHA for a hearing under final § 3809.702(b). A hearing gives the person assessed a

penalty the opportunity to explain extenuating circumstances and seek a reduction in the penalty amount or a determination that the violation did not occur. The Hearings Division of OHA has extensive experience with monetary penalty hearings. BLM agrees that generally penalties will not be assessed until a noncompliance order has been issued and there has been a failure to comply, but occasionally a serious violation may warrant the issuance of monetary penalty, or another agency may have issued the enforcement order and BLM would not wish to duplicate that order.

Instead of penalties, a commenter asserted that compliance through financial guarantees should be adequate. BLM disagrees with the comment. BLM would prefer that an operator correct violations that occur. Administrative enforcement orders and civil penalties provide an incentive for operator action that does not exist through the financial guarantee. In addition, forfeiting and collecting on a financial guarantee can be a lengthy process and may not be warranted for individual violations.

A commenter suggested the BLM should use the judicial system for the assessment of civil penalties, as the only fair way to administer penalties. The commenter felt that if a violation is serious enough to warrant a penalty, then the judicial system should administer it. The commenter was concerned about the impartiality of BLM and the Interior Board of Land Appeals. Another commenter suggested that the BLM should provide a fair appeal process from civil penalties, which includes a committee composed of representatives of both government and industry.

BLM disagrees with the comment. The same difficulties and uncertainties exist with obtaining judicial imposition of civil penalties under 43 U.S.C. as with getting injunctive relief under that section. Persons who believe they are treated unfairly by the Department may appeal an IBLA ruling to Federal District Court. BLM also disagrees with the suggested use of multi-interest appeal boards. The appeal of a civil penalty involves an individual factual dispute involving a specific application of the regulations. This is not the type of proceeding where a committee composed of multiple interests would add value, such as in making recommendations on policy issues.

A commenter asked that BLM define the term ''small entity'' as used in proposed § 3809.702(a)(3). In the commenter's view, the current interpretation of the term conflicts with the term ''small business'' as used by BLM in 1998 legal briefs defending its earlier bonding rules. BLM will interpret the term ''small entity'' consistent with the definition of that term established by the Small Business Administration in its regulations at 13 CFR 121.201.

A commenter asked whether the 30-day appeal period specified in proposed § 3809.702(b) referred to calendar days or business days. The final rule includes the phrase ''calendar days'' to clarify this.

A commenter recommended that a system of positive incentives be developed in lieu of administrative penalties to encourage environmental stewardship, keeping in mind that financial assurance in the form of reclamation bonds will still be in place to ensure compliance. The commenter was also concerned that the rules do not provide enough guidance to provide for consistent application of the administrative civil penalty provisions without imposing personal biases of individual regulators. Although BLM encourages environmental stewardship and positive incentives (such as reclamation awards to operators who provide environmentally superior reclamation), it also needs to have administrative sanctions available. These rules provide such sanctions, while providing opportunities for appeals and review that will guard against enforcement biases.

*Section 3809.703 Can BLM Settle a Proposed Civil Penalty?*

Final § 3809.703 clarifies that BLM may negotiate a settlement of civil penalties, in which case BLM will prepare a settlement agreement. The BLM State Director or his or her designee must sign the agreement. This section is unchanged from the proposal.

*Sections 3809.800 Through 3809.809 Appeals*

Proposed § 3809.800 addressed appeals of BLM decisions, but also said that State Director review would occur if consistent with 43 CFR part 1840, anticipating BLM publication of revised BLM State Director review rules. The October 26, 1999 supplemental proposed rule elaborated and sought comments on BLM's State Director review provisions for subpart 3809 because separate BLM State Director review regulations were not published at that time and part 1840 did not allow State Director review. See 64 FR 57613, 57618.

These final rules finalize in modified form the February 9, 1999 proposal for appeals to the Office of Hearings and Appeals (OHA), and also adopt in modified form the State Director review provisions proposed in October 1999. BLM has revised final § 3809.800 and added §§ 3809.801 through 3809.809 to account for the two processes for seeking review.

*Section 3809.800 Who May Appeal BLM Decisions Under This Subpart?*

Final § 3809.800 establishes the two review processes. Portions of proposed § 3809.800 are contained in final §§ 3809.801, 3809.802 and 3809.803, discussed below.

Final § 3809.800(a) provides that a party adversely affected by a decision under subpart 3809 may ask the State Director of the appropriate BLM State Office to review the decision. Final § 3809.800(b) provides that an adversely affected party may bypass State Director review, and directly appeal a BLM decision under subpart 3809 to OHA under 43 CFR part 4. In other words, a party may elect to ask for State Director review or may appeal to OHA.

Providing a choice of appealing either to OHA or seeking State Director review is consistent with the October 1999 proposal. It is a change from the previous rule which required operators to appeal to the State Director before being able to file an appeal with OHA, and did not allow other parties to seek State Director review. This choice may allow issues to be resolved at the State Director review level without the necessity of a potentially more complex IBLA appeal. In addition, operators may decide to proceed directly with an appeal to the IBLA, thus reducing the State Director review workload.

One change from the proposal made in response to comments is to limit appeal rights to an adversely affected ''party,'' as was set forth both in previous § 3809.4 and in the current OHA appellate rules at 43 CFR 4.410(a), rather than to allow any adversely affected ''person'' to file an appeal. The word ''party'' is intended to include a person who previously participated in the BLM proceeding, such as by filing comments or objections with BLM.

Commenters objected to the granting of appeal rights to an ''undefined and open-ended'' class of ''persons adversely affected by a decision made under this subpart.'' Commenters stated that the preamble to the proposal contains no rationale whatsoever for this ''wholly unauthorized expansion of rights.'' Another commenter suggested that BLM should adopt the Alaska standard that administrative appeals and litigation can be initiated only by persons that meaningfully participated in the public participation elements of the decision process. A commenter

pointed out the difference in language between proposed § 3809.800(a) which authorized any ''person'' adversely affected by a BLM decision to appeal the decision under 43 CFR parts 4 and 1840, and the wording of 43 CFR section 4.410 which states: ''Any *party* to a case which is adversely affected * * *'' shall have a right to appeal'' (emphasis added). The commenter correctly observed that a potential appellant may be adversely affected by a BLM decision, but not be a party to the BLM proceeding. A commenter requested that BLM clarify the discrepancy between these sections by providing for appeal by parties which can show they are adversely affected or have a legitimate interest in the effects of the action either on or off-site.

As noted above, the final rule limits appeals to ''parties.'' BLM agrees that it is helpful for potentially adversely affected persons to participate meaningfully in the BLM proceeding, and to raise objections or concerns before BLM makes a decision. In the absence of comments or objections, BLM will not necessarily be aware of particular issues and its decision will be reasonable based on the information before it. Although persons who do not participate in a BLM proceeding could be aggrieved by either the on- or off-site effects of a decision, BLM does not think it burdensome for those persons to have voiced their concerns to BLM before BLM makes a decision. In most instances BLM expects that persons who will be adversely affected will inform BLM of their objections, particularly in light of the opportunity to submit public comments under final § 3809.411(c). Finally, BLM has concluded that the issue of who has standing to file an appeal to OHA should be resolved consistently for all of BLM's programs, and BLM should not create an exception for an individual program, such as for subpart 3809.

*Section 3809.801 When May I File an Appeal of the BLM Decision With OHA?*

Final § 3809.801 describes when an appeal can be filed with OHA. Final § 3809.801(a) describes the various scenarios when an appeal may be filed with OHA, taking the State Director review process into account. These are as follows:

Under final § 3809.801(a)(1), if a party does not request State Director review, the party has 30 calendar days from receipt of the original BLM decision to file an OHA appeal. This is consistent with the February proposal, and the OHA regulations.

Under final § 3809.801(a)(2), if a party requests State Director review and the State Director declines to accept the request for review, the party may file with OHA an appeal of the original decision within 30 calendar days of the date the party receives the State Director's decision not to review. Thus a party seeking third party review will not be prejudiced and lose his or her appeal rights to OHA if the State Director declines to accept the request for review.

Under final § 3809.801(a)(3), if a party requests State Director review and the State Director has agreed to accept the request for review, a party may file with OHA an appeal of the original decision before the State Director makes a decision. This allows a party to change his or her mind and appeal to OHA if, for instance, he or she does not receive a timely decision from the State Director.

Under final § 3809.801(a)(4), if a person requests State Director review and the State Director makes a decision, a person may file with OHA an appeal of the new decision within 30 calendar days of the date the person receives or is notified of the State Director's decision.

Under final § 3809.801(b), and as provided in the February proposal, a person must file a notice of appeal in writing with the BLM office where the decision was made in order for OHA to consider an appeal of a BLM decision.

*Section 3809.802 What Must I Include in My Appeal to OHA?*

Final § 3809.802 addresses the contents of appeals to OHA, and includes the material proposed as § 3809.800(c). It provides that a written appeal must contain the appellant's name and address, and the BLM serial number of the notice or plan of operations that is the subject of the appeal. The person must also submit a statement of reasons for the appeal and any arguments the appellant wishes to present that would justify reversal or modification of the decision within the time frame specified in 43 CFR part 4 (usually within 30 calendar days after filing the appeal). The word ''calendar'' was added as a clarification.

*Section 3809.803 Will the BLM Decision Go Into Effect During an Appeal to OHA?*

Under final § 3809.803, and also as provided in proposed § 3809.800(b), all BLM decisions under subpart 3809 go into effect immediately and remain in effect while appeals are pending before OHA, unless a stay is granted under 43 CFR § 4.21(b). This derives from previous § 3809.4(f).

*Comments Related to Appeals to the IBLA*

A commenter on the February proposal stated that it thought that the intent of proposed § 3809.800(a) is to have both the operator and affected third parties appeal directly to IBLA. It stated the sentence about the BLM State Director review and the reference in part 1840 is rather confusing and does not clearly state when the BLM State Director would or would not review an appeal. Therefore, the commenter stated BLM should remove the last sentence about the BLM State Director review, since all appeals are going to be sent to IBLA.

BLM attempted to clarify its intent in the October 1999 supplemental proposed rule. The confusing sentence has been removed. The final rule allows operators and adversely affected third parties the choice of seeking State Director review or appealing to the IBLA. The final rules clarifies when appeals may be made.

Commenters stated that BLM should carefully weigh the impacts of additional appeals on the agency and its resources. A number of comments focused on the increased workload and delays that would be caused by the appeal process of proposed § 3809.800. Commenters stated that the detailed new permitting requirements contained in the 3809 proposal will greatly increase the number of BLM decisions that ultimately will be subject to administrative appeals to the Interior Board of Land Appeals (''IBLA''), as well as increase the potential grounds for such appeals. Commenters asserted that an appeal to the IBLA is relatively simple and inexpensive for opponents to a mining project because opponents can simply repackage their NEPA comments as a statement of reasons, and obtain an administrative rehearing on all of their claims, regardless of whether they have merit. But, the commenters continued, the burden of an appeal on BLM is substantial. Regulations require that the agency assemble and transmit the entire administrative record to the IBLA and the agency must respond to an appellant's statement of reasons. Responding to an appeal can require a substantial amount of time from field office personnel, time that is lost from permit processing, compliance inspections or enforcement, or other duties. Commenters stated that BLM cannot ignore an appeal, because if BLM does not respond adequately, the decision will likely be remanded, imposing an additional burden on the agency and its employees. BLM's draft EIS acknowledges that the ''current

backlog in IBLA for a routine appeal is about three years.'' Commenters asserted that adoption of the proposed rules will increase the backlog beyond already intolerable levels. The commenter concluded that protracted administrative appeals and litigation over permitting decisions compound the delays and uncertainties in the permitting process.

Commenters also asserted that vague regulatory standards governing BLM's discretionary judgments will make the appeals that are filed more complex. Exercise of agency judgment and discretion will ultimately be judged by the standards written into the regulations. Such standards, the commenters pointed out, include determinations of MATP, the application of the performance standards, the completeness of plans of operations, adequacy of reclamation plans, the amount of financial guarantees, and innumerable enforcement decisions (including the decision whether to allow a member of the public to accompany a BLM inspector). BLM's intent about the way particular provisions should be implemented will be meaningless if that intent is not clearly stated in the regulatory language. The commenter stated that because many of the provisions in the proposed rule, particularly the ''performance standards,'' are written in absolute terms, the potential for legal challenges is a source of great concern to the industry, and should be of great concern to BLM.

Although BLM agrees that appeals to the IBLA of BLM decisions under subpart 3809 use BLM resources, BLM concludes such appeals need to be available to provide basic procedural fairness to parties who may be aggrieved by the decision. Under the previous rules, parties could appeal to the IBLA (although operators were required to go through the State Director review process before appealing to the IBLA). As noted, many commenters objected not to the appeal process as much as to the revised rules leading to the underlying decisions that are appealed. The potential consequences from an increased number and greater complexity of appeals, however, does not dissuade BLM from promulgating needed standards and procedures.

Commenters pointed out that allowing operators to appeal both a noncompliance order and a subsequent suspension order would also be time-consuming and costly to both the BLM and IBLA. Moreover, BLM proposes that it may eliminate certain appeals to the State Director, which will further increase appeals to IBLA.

BLM recognizes that each enforcement action may have separate appeals, but it may not be necessary to relitigate issues that the same parties have already litigated. Persons who previously requested State Director review can do so under these final rules, plus the State Director review process has been made available to any aggrieved person. To the extent issues are resolved before the State Director, appeals may not have to be taken to the IBLA.

A commenter asked that BLM revise proposed § 3809.800(b) to require the decision to indicate the appropriate next level of appeal. The commenter supported having appeals from local decision to go directly to the State Director, as a time-saving mechanism. The commenter suggested that the appeal process would be further streamlined if the next level above the BLM State Director is the Secretary of the Interior.

BLM agrees in part. The process BLM adopts in these final rules allow a party to seek review by the State Director (to save time or for some other reason) or to appeal directly to the IBLA. Ordinarily, appeal rights are specified in BLM decisions. The Interior Department's Office of Hearings and Appeals is the Secretary's representative for handling appeals from BLM decisions, and OHA decisions are ordinarily final decisions of the Department which can be appealed to an appropriate court.

Some commenters suggested a streamlined appeals process under which an appeal from a field-level operation can only be reviewed timely (suggesting seven calendar days for each of the two reviews) by the Office Manager and State Director responsible for public land management in the area of the proposed mining operation. Under this suggested procedure, appeals would immediately be taken to Federal District Court as litigation. The commenter stated that this modification would be similar to an existing U.S. Forest Service appeal process. The commenter asserted that since the Secretary of the Interior is the ultimate policy setter for IBLA and the Solicitor and has ultimate hiring/firing authority over the Assistant Secretary, BLM Director, and the BLM State Directors, the proposed appeals would be futile and a waste of time. The commenter concluded that this is a major modification that would be a step to effectively implement NRC Report Recommendations 15 and 16.

BLM declines to accept the suggestion. One level of review within the State should be sufficient, and BLM doubts that seven days for each review would allow for meaningful review. Based on past experience, BLM disagrees that appeals to the IBLA are futile. The IBLA assures that there will be national consistency to the interpretation and implementation of BLM rules, and does not always support local BLM decisions as the commenter asserts. BLM also disagrees that the commenter's suggestions would be an effective step to implement the NRC Report recommendations.

Industry commenters stated that because the NRC Report made no recommendation that previous appeals procedures be changed, and BLM is limited to promulgating rules that are consistent with the NRC Report recommendations, BLM is not authorized to modify the current appeals provisions in the previous 3809 regulations. The commenters recommended that the previous regulations, which allow operators to appeal to the BLM State Director in certain circumstances, but direct other appeals to the IBLA, should be retained.

BLM disagrees with the comments. The legislative standard is that the BLM final rule not be inconsistent with the NRC Report recommendations. Recommendation 6 specifically states that BLM administrative penalties be subject to appropriate due process. The BLM appeal procedures and State Director review procedures are intended to assure that BLM enforcement decisions, as well as its other decisions, are subject to due process of law. Thus, the appeals rules are clearly not inconsistent with the NRC Report recommendations.

A commenter stated that the proposed rule contains no mechanism (nor did its cross-referenced citations) which provide for public notice of the submittal of a plan of operations or notice under the proposed regulations. The commenter stated that without notice how is a person who may be adversely affected aware of the plan of operations or notice activity? The commenter recommended that a public notice procedure should be established for concerned individuals, adjoining property owners, and the public at large of the submittal of a plan of operations or notice so that they can participate in the process.

As discussed above, BLM agrees (although not solely for the reasons raised by the commenter) and has modified final § 3809.411(c) to establish a public participation provision.