

99-044



THE SECRETARY OF THE INTERIOR
WASHINGTON

JAN - 6 1997

Memorandum

To: Assistant Secretary, Land & Minerals
Acting Director, Bureau of Land Management

From: Secretary *[Signature]*

Subject: Upgrading Hardrock Mining Environmental Regulation

The Bureau of Land Management (BLM) first implemented its hardrock mining surface management regulations in 1981 (codified at 43 CFR 3809; "3809 regulations"). The preamble to the final rule committed that the regulations would be reviewed for possible revisions in three years. No such review took place, but at the very end of the Reagan Administration, on January 11, 1989, the BLM Director established a Mining Law Administration Program Task Force to address significant issues.¹

After extensive review and coordination within BLM, the Task Force reported in December 1989 that, among other things:

[s]everal issues have been raised internally and externally regarding reclamation under the BLM's 43 CFR 3809 regulations . . . [including a]dequacy and consistency of reclamation standards . . . [and a]dequacy of the 5-acre threshold for Notices.

Eventually another Task Force was formed within BLM, chaired by California State Director Ed Hastey, and in October 1991, the BLM published an advance notice of proposed rulemaking on possible amendments to the 3809 regulations. 56 Fed. Reg. 54815. Noting that "various questions related to the effectiveness of the regulations have been raised by BLM field offices, the General Accounting Office, Members of Congress, and the general public," BLM identified some "major questions that have surfaced in recent years" about the existing regulations. These included eliminating or modifying the 5-acre threshold for notices, revising the definition of unnecessary or undue degradation, expanding environmental and reclamation requirements, and clarifying casual use.

¹ From 1986 on, a steady stream of congressional hearings (e.g., July 1989, House Mining Subcommittee; and June 1991, Senate Subcommittee on Mineral Resources Development and Production), GAO reports (e.g., GAO/RCED 86-48; 88-123BR; 89-72; 90-111), and DOI Inspector General reports (e.g., IG Audit Report, September 1991; IG Report Nos. 90-84; 91-I-654; 91-I-198) addressed issues concerning Mining Law administration and enforcement, often with criticism of the Department.

BLM followed up this invitation for comment by holding four public workshops in December 1991, in Anchorage, Spokane, Denver, and Reno. Approximately 140 written comments and petitions containing 250 signatures were received from the public, and more than 250 people attended the public hearings. Following the close of the comment period, the task force began work on proposed revisions to the 3809 regulations and an environmental impact statement to accompany the rulemaking.

In the summer of 1993, the task force submitted some initial recommendations, but the BLM leadership, in consultation with my office, decided to put this initiative on hold because the Congress was then seriously considering legislative proposals to reform the Mining Law. If enacted, the reforms being considered would have superseded the regulatory improvement effort.

Although both Houses of the 103rd Congress did enact reform bills, the conference convened to reconcile the two versions failed to reach agreement in the fall of 1994 before Congress adjourned. The 104th Congress included a very weak version of "reform" in the budget reconciliation bill that was vetoed by the President in early 1996.

While the proposal to undertake comprehensive revisions in the 3809 regulations has been on hold since 1993, BLM has moved forward to complete and implement other proposals that stemmed from the initiatives begun in earlier Administrations. Specifically,

A final rule tightening standards of and strengthening enforcement against improper use and occupancy of mining claims was published on July 16, 1996.

An acid mine drainage policy to ensure uniform consideration of this issue in hardrock mine plans of operations was completed April 1996.

A final rule on hardrock mine bonding, to strengthen financial assurance requirements to meet reclamation responsibilities, is expected to be published shortly.

It is plainly no longer in the public interest to wait for Congress to enact legislation that corrects the remaining shortcomings of the 3809 regulations. Instead, the time has come to resume the process of modernizing the 3809 regulations first promised at the end of the Carter Administration and begun at the end of the Reagan Administration.

To that end, I direct you to restart this rulemaking process by preparing and publishing proposed regulations (along with whatever supporting economic, environmental and other analyses are required by law or executive order) for public comment as soon as practicable. This is an important effort and should involve a collaborative process using available expertise from around the Department. Please form a task force composed of appropriate people from the BLM (at least some members of the Task Force that worked on this effort in the early 1990s may still be available), the Solicitor's Office, and the Office of Policy Analysis. You should also consider involving persons from the Office of Surface Mining familiar with developing and implementing a regulatory program for coal mining, as well as Fish & Wildlife Service and U.S. Geological

Survey personnel as appropriate.

To expedite this process, after reviewing the efforts to date, I believe the following regulatory revisions should be proposed for public comment, along with others you deem appropriate:

1. The definition of "unnecessary and undue degradation" should be rewritten to more clearly require the use of "best available technology and practices" or other similar technology-based standards appropriate in the conduct of hardrock mining.
2. Performance standards should be developed for the conduct of hardrock mining and reclamation, addressing such areas as revegetation, contouring, hydrology, etc.
3. Existing 3809 regulations contain a different process for many hardrock operations that disturb 5 acres or less. These operations do not require advance approval of a plan of operations by the BLM; instead, an operator merely has to provide "notice" to BLM of what it intends to do and how it intends to protect the environment at least 15 calendar days before beginning. 43 CFR 3809.1-3. This makes BLM administration of environmental standards on these mines primarily an after-the-fact exercise. I understand that in practice it is relatively unusual for BLM to question what happens on these operations. The Forest Service has no such exception.

The proposed rules should contain at least three alternative ways of addressing this issue. One is to repeal the notice provision and treat smaller operations like larger ones, on the Forest Service model. A second alternative is to narrow the scope of the notice exception, so that it does not apply in any areas of environmental sensitivity.² A third alternative is to tighten up the current approach to better protect the environment against abuse, such as by requiring more information from the operators, a longer time for BLM to review the notices, and possible greater penalties for not meeting the requirements of the notice. You are, of course, free to address some of these in combination, or to explore and publish other alternatives as well.

4. Coordination with state regulatory programs should be carefully addressed, to ensure that FLPMA's purpose of avoiding unnecessary or undue degradation is achieved, while minimizing duplication and promoting cooperation among regulators.

Please report back to me within thirty days with a plan for organizing and managing this effort, and propose a timetable for moving forward.

Finally, I have been formally petitioned by the Mineral Policy Center and others to introduce more sunshine into the processing of patents under the Mining Law, primarily by making public

The notice exception does not apply in the California desert, certain areas of critical environmental concern, wilderness and wilderness study areas, wild and scenic river study areas, and a few others. See 43 CFR 3809.1-4(b); 43 CFR 3802.1-1.

BLM followed up this invitation for comment by holding four public workshops in December 1991, in Anchorage, Spokane, Denver, and Reno. Approximately 140 written comments and petitions containing 250 signatures were received from the public, and more than 250 people attended the public hearings. Following the close of the comment period, the task force began work on proposed revisions to the 3809 regulations and an environmental impact statement to accompany the rulemaking.

In the summer of 1993, the task force submitted some initial recommendations, but the BLM leadership, in consultation with my office, decided to put this initiative on hold because the Congress was then seriously considering legislative proposals to reform the Mining Law. If enacted, the reforms being considered would have superseded the regulatory improvement effort.

Although both Houses of the 103rd Congress did enact reform bills, the conference convened to reconcile the two versions failed to reach agreement in the fall of 1994 before Congress adjourned. The 104th Congress included a very weak version of "reform" in the budget reconciliation bill that was vetoed by the President in early 1996.

While the proposal to undertake comprehensive revisions in the 3809 regulations has been on hold since 1993, BLM has moved forward to complete and implement other proposals that stemmed from the initiatives begun in earlier Administrations. Specifically,

- A final rule tightening standards of and strengthening enforcement against improper use and occupancy of mining claims was published on July 16, 1996.

- An acid mine drainage policy to ensure uniform consideration of this issue in hardrock mine plans of operations was completed April 1996.

- A final rule on hardrock mine bonding, to strengthen financial assurance requirements to meet reclamation responsibilities, is expected to be published shortly.

It is plainly no longer in the public interest to wait for Congress to enact legislation that corrects the remaining shortcomings of the 3809 regulations. Instead, the time has come to resume the process of modernizing the 3809 regulations first promised at the end of the Carter Administration and begun at the end of the Reagan Administration.

To that end, I direct you to restart this rulemaking process by preparing and publishing proposed regulations (along with whatever supporting economic, environmental and other analyses are required by law or executive order) for public comment as soon as practicable. This is an important effort and should involve a collaborative process using available expertise from around the Department. Please form a task force composed of appropriate people from the BLM (at least some members of the Task Force that worked on this effort in the early 1990s may still be available), the Solicitor's Office, and the Office of Policy Analysis. You should also consider involving persons from the Office of Surface Mining familiar with developing and implementing a regulatory program for coal mining, as well as Fish & Wildlife Service and U.S. Geological

information about mineral reserves and costs. A notice of this petition was published in the Federal Register on August 15, 1996, and several comments received. After reviewing the comments, I direct you to work with the Solicitor's Office to address the issues raised in the petition and consider the extent to which proposed regulations should be developed, including the scope of the information to be disclosed, and the effect, if any, that such disclosure might have on the patenting process. If you decide to recommend publishing proposed regulations, the proposal should contain two alternatives, one that would and one that would not apply the new rules to pending patent applications (some of which are grandfathered from the moratorium currently in effect).

cc: Chief of Staff
Solicitor
Assistant Secretary, Policy, Budget and Administration