Federal Register

Tuesday,
November 21, 2000

Part II

Department of the Interior

Bureau of Land Management

43 CFR Part 2090, et al.

Mining Claims Under the General Mining Laws; Surface Management; Final Rule

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

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

[WO–300–1990–00]

RIN 1004–AD22

Mining Claims Under the General Mining Laws; Surface Management

AGENCY: Bureau of Land Management, Interior.

ACTION: Final rule.

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

DATES: This rule is effective January 20, 2001.

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

SUPPLEMENTARY INFORMATION:

I. What is the Background of this Rulemaking?
II. How did BLM Change the Proposed Rule in Response to Comments?
III. How did BLM Fulfill its Procedural Obligations?

I. What Is the Background of This Rulemaking?

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

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

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

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

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

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

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

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

Legal Basis for the Final Rule

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

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

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

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

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

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

Consistency With the NRC Report Recommendations

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

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

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

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

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

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

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

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

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

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

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

Record of Decision Under the National Environmental Policy Act

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

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

Alternatives Considered

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

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

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

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

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

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

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

Environmentally Preferred Alternative

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

Decision Rationale

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

Definition of ''Unnecessary or Undue Degradation''

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

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

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

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

Performance Standards

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

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

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

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

Notice/Plan of Operations Threshold

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

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

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

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

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

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

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

Financial Guarantees

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

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

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

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

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

Enforcement

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

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

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

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

Federal/State Coordination

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

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

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

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

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

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

Consistency With the NRC Report

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

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

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

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

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

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

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

Summary of Rule Adopted

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

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

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

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

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

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

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

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

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

General Comments

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

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

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

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

Sections 3809.1 to 3809.116 General Information

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

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

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

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

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

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

Changes to the Proposal

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

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

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

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

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

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

Consistency With the NRC Report Recommendations

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

Comments and Responses

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

''Casual Use''

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

''Exploration''

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

Military Lands

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

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

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

''Minimize''

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

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

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

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

''Mining Claim''

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

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

''Mitigation''

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

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

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

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

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

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

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

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

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

''Operations''

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

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

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

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

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

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

''Operator''

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

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

''Project Area''

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

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

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

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

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

''Public Lands''

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

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

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

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

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

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

''Reclamation''

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

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

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

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

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

''Riparian Area''

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

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

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

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

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

''Unnecessary or Undue Degradation''

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The revised regulation contains important limits to assure that BLM will

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

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

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

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

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

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

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

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

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

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

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

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

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

Section 3809.10—How Does BLM Classify Operations?

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

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

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

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

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

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

Consistency With NRC Report Recommendation 2

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

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

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

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

(3) Designated Areas of Critical Environmental Concern;

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

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

(6) Lands in the King Range Conservation Area.

The final rule would add the following new exceptions:

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

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

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

(3) Bulk sampling over 1,000 tons.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

environmentally sound development of the nation's mineral resources.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Section 3809.21 When Do I Have To Submit a Notice?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Sections 3809.200 to 3809.204 Federal/State Agreements

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

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

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

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

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

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

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

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

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

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

Section 3809.201 What Should These Agreements Address?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Consistency With the NRC Report Recommendations

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

content or requirements of such agreements.

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

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

General Comments Related to Federal and State Coordination

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Sections 3908.300 to 3809.336 Operations Conducted Under Notices

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Section 3809.330 May I Modify My Notice?

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

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

Section 3809.331 Under What Conditions Must I Modify My Notice?

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

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

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

impacts caused by activities on private lands.

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

Section 3809.332 How Long Does My Notice Remain in Effect?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Section 3809.335 What Happens When My Notice Expires?

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

clearly establishing the operator's responsibilities.

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

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

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

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

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

Sections 3809.400 through 3809.424 Operations Conducted Under Plans of Operations

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

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

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

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

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

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

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

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

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

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

Section 3809.401(b)

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

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

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

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

Operator Information

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

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

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

Description of Operations and Reclamation

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

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

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

that addresses agency and public concerns.

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

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

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

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

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

Monitoring Plan

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

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

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

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

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

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

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

Interim Management Plans

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

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

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

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

Section 3809.401(c)

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

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

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

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

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

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

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

Section 3809.401(d)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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