dwelling. All of the following requirements apply to the calculation of the increased interest element:

(i) Increased interest includes the interest to be paid on the replacement dwelling's mortgage plus other debt service costs, including points. The amount which may be paid is limited to the increase in interest costs payable on the balance of the acquired dwelling's mortgage (at acquisition) over the remaining term of the mortgage of either the acquired or the replacement dwelling, whichever is less.

(ii) Present value shall be based on the prevailing interest rate paid on passbook (or similar) savings deposits by commercial banks in the area in which the replacement dwelling is located.

(iii) For purposes of computing increased interest, the interest rate on the new mortgage may not exceed the prevailing rate charged by mortgage lending institutions in the area.

(iv) The acquired dwelling must have been encumbered by a mortgage for at least 180 days before initiation of negotiations.

(c) *Incidental expenses.* Actual reasonable costs which the displaced person incurs as a part of the purchase of the replacement dwelling. Prepaid expenses (such as insurance premiums and tax escrows) may not be reimbursed. Incidental expenses include:

(1) Customary legal, closing and related costs;

(2) Lender's, FHA or VA appraisal fees;

(3) FHA or VA application fees;

(4) Credit report, title policy, escrow fee; and

(5) Revenue stamps or transfer taxes.

§ 4.720 Replacement housing payment for tenants and 90-day homeowners.

A payment under this section may be made to a renter or to a homeowner who was an owner/occupant for less than 180 days. The renter or homeowner must be displaced from a dwelling which he rented or owned, as appropriate, and which he occupied for at least 90 days prior to the initiation of negotiations to acquire the property. Displaced renters or 90-day homeowners (see § 4.700) are eligible to receive one of two types of payment, either a rental assistance payment (§ 4.721) or a payment for downpayment assistance (§ 4.722).

§ 4.721 Rental assistance payment.

(a) *General.* A homeowner or renter must rent and occupy a comparable replacement dwelling (see § 4.740) within one year of his effective date of displacement to receive this payment.

(b) *Computation of rental assistance payment.* A rental assistance payment is computed using the difference between the displaced person's base monthly housing costs (see paragraph (b)(1) of this section) and the lesser of similar costs for a comparable replacement dwelling or the actual replacement dwelling to which the displaced person moves. That difference multiplied by 48 equals the payment, up to a maximum of $4,000. The following limitations apply to the calculation of this payment:

(1) Base monthly housing cost is the greater of the actual costs which the displaced person paid for the acquired unit or 25% of the displaced person's gross monthly income.

(2) If the actual housing cost for the acquired dwelling is less than the economic rent, or if the displaced person is a homeowner moving to rental housing, base monthly housing cost shall be computed as the economic rent.

(3) A displaced homeowner's payment may not exceed the amount he would receive if he were eligible for a replacement housing payment for homeowners.

(4) The cost of comparable rental housing must be based on the rental price of at least three comparable dwellings available on the private market. Schedules of replacement housing costs shall not be used.

§ 4.722 Down payment assistance.

(a) *General.* Only a tenant or a 90 day homeowner (as described in § 4.720) who occupied the dwelling from which he was displaced for at least 90 days prior to the initiation of negotiations for the acquired property and who purchases a comparable replacement dwelling within one year of his effective date of displacement may be eligible for this payment.

(b) *Computation of down payment assistance payment.* The down payment assistance payment may not exceed a total of $4,000. The payment includes:

(1) The amount necessary to make a down payment on the lesser of the actual replacement dwelling or a comparable dwelling, not to exceed the amount which would be required on a conventional loan at prevailing interest rates in the area; and

(2) Incidental expenses as described in § 4.710(c).

(c) *Limitations.* The following limitations apply to this payment:

(1) Any portion of this payment over $2000 must be matched by the tenant.

(2) The full amount of this payment including the matching amount must be applied to the down payment (including incidental expenses).

§ 4.730 Multiple occupancy and replacement housing payments.

When the occupants of an acquired dwelling choose to move to separate replacement housing, or when a combination of families and/or individuals shares a dwelling, the displacing agency may prorate replacement housing payments for persons who did not constitute separate households before the move.

§ 4.740 Standards for comparable housing.

Replacement housing is comparable if it meets the standards for living space and for quality of living conditions in this section.

(a) *Living space.* Replacement housing must provide the greater of:

(1) Living space equivalent to that of the dwelling from which displacement occurred, or

(2) Living space equal to the need of the displaced person as required by local housing codes.

(b) *Living conditions.* Replacement housing must provide the greater of:

(1) State or local housing codes; or

(2) EPA minimum standards:

(i) Sound, clean, and weathertight;

(ii) Has an adequate and safe wiring system for lighting and other electrical services;

(iii) Provides heating or cooling as required by climatic conditions;

(iv) For dwelling (housekeeping) units, includes a sink, stove or connection for same, a complete bathroom, and hot and cold running water in the bath and kitchen; and

(v) For rooming (non-housekeeping) units, provides the use of a complete bathroom which has hot and cold running water and which affords privacy to a person within it.

[FR Doc. 82-13729 Filed 5-19-82; 8:45 am]

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Thursday
May 20, 1982

Part V

Department of Education

College Housing Program; Final Regulations and Application Notice for New Projects for Fiscal Year 1982

DEPARTMENT OF EDUCATION

34 CFR Part 614

College Housing Program

AGENCY: Education Department.

ACTION: Final regulations.

SUMMARY: The Secretary issues final regulations for the College Housing Program with the exception of the part dealing with loan management, which will be issued separately. These regulations establish selection criteria for the award of low-interest loans to assist eligible institutions in (1) providing housing and other educational facilities for students and faculty members and (2) conserving energy and reducing related operating costs.

EFFECTIVE DATE: Unless Congress takes certain adjournments, these regulations will take effect 45 days after publication in the **Federal Register**. If you want to know the effective date of these regulations, call or write the Department of Education contact person. At a future date, the Secretary will publish a notice in the **Federal Register** stating the effective date of these regulations.

FOR FURTHER INFORMATION CONTACT: Mr. Charles I. Griffith, (Room 3058, ROB–3), Department of Education, 400 Maryland Avenue, SW., Washington, D.C. 20202. Telephone: (202) 245–9868.

SUPPLEMENTARY INFORMATION: Final regulations with comments invited were published in the **Federal Register** on July 29, 1981. Interested persons were given 45 days in which to submit written comments. Several comments were received suggesting changes. Those comments, the Secretary's responses to them, and other substantive changes are summarized below:

Summary of Changes

The original regulations with comments invited, published in July, 1981, are reissued to incorporate technical amendments and minor changes that—

(1) Simplify and clarify regulations;

(2) Eliminate duplication with the provisions of the Education Department General Administrative Regulations (EDGAR);

(3) Reflect procedural modifications resulting from the new administration of this program by the Department of Education;

(4) Incorporate amendments of a minor nature resulting from comments and suggestions received in response to the invitation for comment.

As a result of several deletions, §§ 614.36 through 614.62 have been renumbered.

A. Summary of Technical Revisions

§ 614.3 Limitations of eligibility.

In the interest of diligent credit management practices, the regulations are revised to exclude from eligibility for College Housing loans, institutions in default of loans made under the Higher Education Act as well as the Housing Act.

§ 614.5 What definitions apply to the College Housing Program?

The definition of "construction" is clarified in these regulations, to state that College Housing loans may be used for the purchase of existing facilities.

§ 614.32 Selection criterion for housing loans.

A fourth element is added to the criterion of housing deficiency to include students residing in facilities leased by colleges with terminating leases as an eligible factor in the calculation of housing deficiency.

§ 614.36 Determination of economical construction.

This section is eliminated because it is redundant with the provisions for construction in EDGAR (34 CFR 75.607).

§ 614.50 Prior determination of eligible costs.

This section is deleted bacause its provisions are inconsistent with the current administrative practices of the Department.

§ 614.52 Additional ineligible cost.

A provision is added to exclude from eligibility, costs for purchases of land incurred more than two years prior to application, and costs for acquisition of existing structures incurred more than one year prior to application. This provision is included to ensure valid allocation of Federal funds and to limit Federal support to costs directly attributable to current housing shortages. In view of limited Federal resources, the provision serves to contain eligible costs so that a greater number of projects may be supported.

§ 614.56 Investment of idle construction funds.

A provision is added to protect the Federal interest by requiring that any interest earned on Federal funds shall revert back to the Federal government through a credit to the Federal loan account.

§ 614.67 Procedures for loan disbursement.

Paragraphs (a), (c), and (d) are deleted, because the provisions are inconsistent with the current administrative practices of the Department.

B. Summary of Comments and Responses

General

Comment. One commenter suggested that loan recipients be granted some recourse in the event of undue delays caused by the administering office.

Response. No change has been made. The recent transfer of the program to the Department of Education has served to reduce administrative delays in the operation of the program. As the new administering office, the Department is utilizing its every resource to expedite the processing of applications.

Comment. One commenter cited typographical errors in §§ 614.3, 614.27, and 614.35.

Response. Corrections have been made in §§ 614.3, 614.27, and 614.35.

§ 614.2 Who is eligible to apply for a loan?

Comment. One commenter suggested that the eligibility criteria discriminated against two-year institutions by stipulating that (a) the institution must offer at least a two year program acceptable for full credit toward a bachelor's degree and (b) the institution must be administered by an accredited college or university.

Response. No change has been made. The definition and criteria for an eligible institution are taken directly from Section 404(b) of the statute. These regulation requirements are therefore consistent with the statute. It should be noted that the stipulation under paragraph (a) requires only that at least a two year program creditable toward a bachelor's degree be offered. The provision under paragraph (b) regarding administration of institution by an accredited college or university is only one of the six possible conditions for eligibility.

§ 614.5 What definitions apply to the College Housing Program?

Comment. Two commenters felt that the current definition of "reasonable commuting distance" had an unfair impact on urban institutions. The recommendation was made that the definition be changed to the distance a student can travel in forty-five minutes from his or her residence to the applicable institution by automobile or public transportation, rather than the existing one-hour time frame.

Response. No change has been made. The Secretary feels that the one- hour time frame is a reasonable limit for commuting distances for both urban and

rural contexts. Urban institutions may have the advantage of public mass transit thereby counter-balancing any negative impact.

Comment. Two commenters indicated the need for a definition of "assignable square feet."

Response. A change has been made. The definition has been added.

§ 614.21 OMB Circular A-95 requirements.

Comment. One commenter recommended that State postsecondary education coordinating agencies be given the opportunity to review and comment on the applications for College Housing Loans, similar to the A-95 review process.

Response. The change has been made. The section on A-95 requirements has been expanded to include a provision for the submission of applications to the appropriate State agency for postsecondary education for review and comment. In his report on the College Housing Program, the Comptroller General recommended that State education officials be consulted on proposed college housing projects so that they may provide the administering office with relevant information to support the awarding of valid loans. The provision is added to provide these agencies the opportunity for comment on the College Housing applications. This provision does not require the approval of State postsecondary education agencies.

Comment. One commenter recommended that applicants be required to submit applications to areawide A-95 clearinghouses as well as State A-95 clearinghouses.

Response. A change has been made. Inclusion of areawide clearinghouses was inadvertantly omitted in the original regulations. These regulations are amended to require submission of applications to areawide clearinghouses as well as State clearinghouses in order to comply with the purposes and requirements of OMB Circular A-95.

§ 614.32 Selection criteria for housing loan.

Comment. One commenter recommended including the number of students on waiting lists with paid deposits in the calculation of housing deficiency.

Response. No change has been made. The use of waiting lists and housing deposits is not a universal practice. The need for accountability would create an undue burden on institutions for verification of data.

Comment. One commenter recommended that a specific allowance be made for institutions housing students in temporary, off-campus situations such as motels and hotels. The commenter suggested that older institutions with smaller rooms are disadvantaged in that they can not temporarily house students in excess of design capacity and thus cannot qualify under this criterion element.

Response. No change has been made. The Secretary feels that the existing criteria sufficiently account for housing deficiency on the bases of overcrowding and residence in substandard housing. The claim that older insitutions are disadvantaged due to smaller dorm rooms is a broad and possibly unjustified generalization. Older institutions may in fact have an advantage under the criterion of substandard housing in that aging housing structures are more likely to fail building codes.

Comment. One commenter recommended that a scaling system be utilized in the awarding of loans in order to equitably distribute awards among large and small institutions.

Response. No change has been made. The criteria of "relative deficiency" and "relative impact" were designed specifically to account for institutional size differentials. An analysis of fiscal year 1981 loan recipients revealed an equitable distribution of awards among small, moderate, and large institutions.

Comment. One commenter recommended the modification of selection criteria to allow for planned expansion of services as a basis for funding. Another commenter objected to the criterion of previous residential history and use of existing dormitories as bases for funding.

Response. No change has been made. The Secretary feels that the intent of the program, as expressed by Congress in the appropriations report, is to remedy existing housing deficiencies and relieve severe, localized housing shortages as demonstrated on campuses, rather than to support first-time or expansion oriented housing construction. The Comptroller General supports this position in his report on the College Housing Program.

Comment. One commenter recommended that preferential consideration be given to institutions engaged in cooperative activities aimed at relieving operational costs in housing facilities.

Response. No change has been made. The Secretary does not wish to grant preference based on a specific means of maintenance. The only regulatory requirement with respect to maintenance is that a recipient agree to repair and maintain its project facilities.

§ 614.33 Apportionment of loan funds.

Comment. One commenter proposed that an allocation based on postsecondary enrollment would be more equitable than the existing 12½ percent limitation per State.

Response. No change has been made. The 12½ percent limitation per State is set by statute.

§ 614.42 Limitation on loan amounts.

Comment. One commenter questioned the minimum limit on loan amounts.

Response. No change has been made. The minimum limit was established in the interest of administrative cost-effectiveness.

Executive Order 12291

These regulations have been reviewed by the Department in accordance with Executive Order 12291. They are classified as non-major regulations because they do not meet the criteria for major regulations established in the order.

Invitation to comment

To assist the Department in complying with the specific requirements of Executive Order 12291 and its overall objective of reducing regulatory burden, public comment is invited on whether there may be further opportunities to reduce any regulatory burden found in these regulations, especially with regard to paperwork and compliance requirements.

List of Subjects in 34 CFR Part 614

Colleges and Universities, Education, Grant programs—housing and community development, Housing, Loan programs—housing and community development.

Citation of Legal Authority

A citation of statutory or other legal authority is placed in parentheses on the line following each substantive provision of these regulations.

Dated: May 12, 1982.

T. H. Bell,

Secretary of Education.

(Catalog of Federal Domestic Assistance No. 84.142—College Housing Program)

The Secretary revises Part 614 of the Code of Federal Regulations to read as follows:

PART 614—COLLEGE HOUSING PROGRAM

Subpart A—General

Sec.

Sec.

Authority: Title IV of the Housing Act of 1950, 64 Stat. 48, 77; Pub. L. 81-475; (12 U.S.C. 1749-1749d). Sec. 306 of the Department of Education Organization Act, Pub. L. 96-88; (20 U.S.C. 3446).

Subpart A—General

§ 614.1 College Housing Program.

The College Housing Program provides low-interest loans to institutions of postsecondary education for the construction, rehabilitation, or purchase of hosuing or other educational facilities for students or faculty members.

(12 U.S.C. 1749-1749d)

§ 614.2 Who is eligible to apply for a loan?

The following are eligible to apply for a loan under the College Housing Program:

(a) Any public or nonprofit private educational institution that offers, or will offer within a reasonable time after completion of the proposed project, at least a two-year program acceptable for full credit toward a bachelor's degree.

(b) Any public educational institution that—

(1) Is administered by an accredited college or university;

(2) Offers technical or vocational instruction; and

(3) Provides residential facilities for some or all of the students.

(c) Any public or nonprofit private hospital that operates—

(1) A school of nursing beyond the level of high school and approved by State authority; or

(2) An internship program approved by a recognized authority.

(d) Any public body, established for the purpose of providing or financing housing or other educational facilities for students and faculty members at any institution referred to in paragraphs (a) or (b) of this section.

(e) Any nonprofit student housing cooperative established for the purpose of providing housing for students at any institution referred to in paragraphs (a) or (b) of this section.

(f) Any nonprofit corporation established for the sole purpose of providing housing or other educational facilities for students or faculty of one or more institutions referred to in paragraphs (a) or (b) of this section if—

(1) The housing or facilities are not restricted to students or faculty on the basis of their membership in or affiliation with any social, fraternal, or honorary society or organization; and

(2) Upon dissolution of the nonprofit corporation all title to any property built or purchased with proceeds of the loan will go to the institutions or for some other nonprofit educational purpose.

(12 U.S.C. 1749c; 1749(g))

§ 614.3 Limitations on eligibility.

(a) An institution may not apply for a reservation of funds for a housing loan under the Act sooner than the fourth year in which Congress makes funds available for the program subsequent to the last reservation of funds for that institution. This does not apply to energy conservation loans. In calculating this interval, the Secretary includes only reservations of funds made after fiscal year 1981.

(b) An institution may not apply for a reservation of funds for any loan under the Act if it is in default on a loan previously made under the Act or the Higher Education Act— whether or not the Secretary has agreed to any deferment—until the default has been removed.

(12 U.S.C. 1749a (c) (1); 1749a (c) (8); 20 U.S.C. 3474 (b))

§ 614.4 What regulations apply to the College Housing Program?

The following regulations apply to the College Housing Program:

(a) The Education Department General Administrative Regulations (EDGAR) 34 CFR 75.170 through 75.173 (Clearinghouse Procedures) and 75.600 through 75.615 (Construction), 34 CFR 77.1 (Definitions), and 34 CFR Part 74 Subpart P.

(b) The regulations in this Part 614.

(20 U.S.C. 3474)

§ 614.5 What definitions apply to the College Housing Program?

(a) *Definitions in EDGAR.* The following terms used in this part are defined in 34 CFR 77.1:

EDGAR	Public
Nonprofit	Secretary
Private	State

(20 U.S.C. 3474)

(b) *Definitions that apply to this part.* "Act"means Title IV of the Housing Act of 1950, as amended.

(12 U.S.C. 1749-1749d)

"Assignable square feet" means the square footage of floor-space in facilities designed and available for assignment to specific functional purposes, such as student sleeping rooms, apartments and related dining areas, and including purposes that are ineligible for assistance under Title IV, such as instruction, research, administration, and religious worship.

"Branch campus"means, within an educational institution, a unit that—

(1) Is separately organized;

(2) Is located apart from the parent institution; and

(3) Has its own Federal Interagency Committee on Education (FICE) identification number.

"Construction" means—

(1) Erection of new structures; or

(2) Rehabilitation, conversion, or improvement of existing structures.

(3) Purchase of existing facilities.

"Design capacity" of housing means the number of occupants a building was designed to house, or, if that information is not available, the maximum number of occupants residing in the facility in any of its first three years of use as student housing.

"Development cost"—

(1) This term means the costs of construction of the housing or other educational facilities and the land on which they are located, including necessary site improvements to permit the use of the land for housing or other educational facilities;

(2) However, in the case of the purchase of facilities, the term means the cost as approved by the Secretary.

"Full-time enrollment" means the number of full-time undergraduate and graduate, resident and non-resident students, as reported by the educational institution—for the fall semester of the year prior to that in which the application is filed—to the National Center for Educational Statistics (NCES) of the Department of Education for its annual survey entitled "Fall Enrollment in Institutions of Higher Education."

"Historically residential institution" means an educational institution that prior to 1976 provided on-campus housing for at least 10 percent of its full-time enrollment.

"Housing" means—

(1) New or existing structures suitable for dwelling use by students or faculty, including (i) single-room dormitories and (ii) apartments; and

(2) Dwelling facilities for student occupancy provided by rehabilitation, alteration, conversion, or improvement of existing structures that are otherwise inadequate for the proposed dwelling use.

"Housing shortage" means an existing need for decent, safe, and sanitary housing for currently enrolled full-time students and faculty.

"Other educational facilities" means—

(1) New or existing structures suitable for—

(i) Use as cafeterias or dining halls, student centers or student unions, infirmaries, or other inpatient or outpatient health facilities; and

(ii) Other essential service facilities; and

(2) Structures—

(i) Suitable for the uses in paragraph (1) of this definition; and

(ii) Provided by rehabilitation, alteration, conversion, or improvement of existing structures that are otherwise inadequate for those uses.

"Reasonable commuting distance" means the distance a student can travel in one hour from his or her residence toward the applicant educational institution by automobile or public transportation, whichever is more expeditious.

"Substandard housing" means student housing, either on campus or off campus, that—

(1) Is owned, leased, or subsidized by an eligible institution under § 614.2; and

(2) Fails substantially to meet applicable State or local building code requirements.

(12 U.S.C. 1749c, 1749a(c)(1))

Subpart B—What Kinds of Projects Does the Secretary Assist Under This Program?

§ 614.10 Eligible projects.

The Secretary makes loans for two categories of projects:

(a) Projects to reduce fuel consumption or related operating costs of existing housing and other educational facilities as defined in §614.5. These loans are referred to in these regulations as "energy conservation loans."

(b) Projects to alleviate severe student or faculty housing shortage. These loans are referred to in these regulations as "housing loans."

(12 U.S.C. 1749, 1749a(c)(1))

§ 614.11 Conditions for eligibility of project.

The Secretary considers a project eligible to receive assistance only if—

(a) After October 1, 1981 the applicant has not contracted for construction before filing its application, and has not begun construction prior to execution of loan agreement.

(b) The facility will not be used—

(1) For religious worship;

(2) In connection with a school or department of divinity; or

(3) For a school providing either training for religious purposes or principally sectarian instruction.

(12 U.S.C. 1749a(c)(1); *Tilton* v *Richardson*, 403 U.S. 672 (1971))

Subpart C—How Does One Apply for a Loan?

§ 614.20 Submission of application.

(a) An applicant for a reservation of funds for a loan shall submit an application to the Secretary at the time, in the manner, and containing the information specified in the application notice.

(b)(1) An applicant may submit only one application for a reservation of funds for each category of project described in § 614.10.

(2) For purposes of paragraph (b)(1) of this section, the Secretary considers as a separate applicant a branch campus of a multi-campus institution if that branch campus has its own Federal Interagency Committee on Education (FICE) identification number.

(12 U.S.C 1749a(c)(1) and 1749c)

§ 614.21 OMB Circular A-95 requirements and other clearance procedures.

(a) An applicant shall submit a copy of its application to the State and areawide clearinghouses established in compliance with the Office of Management and Budget Circular A-95.

(b) When the applicant submits its application to the Secretary, the applicant shall forward to the Secretary all State and areawide clearinghouses comments.

(c) An applicant shall submit one copy of its application to the appropriate State agency for postsecondary education to give the agency the opportunity to make comments or recommendations on the application. The applicant shall forward any comments it may receive to the Secretary.

(12 U.S.C. 1749a(c)(1), 20 U.S.C. 3474)

§ 614.22 Evidence and assurances.

An applicant shall submit to the Secretary, as part of its application, the following evidence and assurances:

(a) Satisfactory evidence that the applicant has or will have—based on title or lease—an interest in the site, including the right of access, that is sufficient to insure the applicant's undisturbed use and possession of the facilities for not less than the useful life of the facilities or 50 years, whichever is longer.

(b) Satisfactory evidence that the applicant has the necessary legal authority to—

(1) Finance, construct, rehabilitate, purchase or maintain the proposed facilities;

(2) Apply for and receive the proposed loan; and

(3) Pledge or mortgage any assets or revenues to be given as security for the proposed loan.

(c) Satisfactory assurance that if the Secretary offers and the applicant accepts the loan, the applicant will comply with the terms and conditions for repayment of the loan.

(d) Satisfactory assurance that the applicant will secure the loan in a manner the Secretary finds will reasonably assure repayment. The

security may be one or a combination of procedures listed in §614.37.

(e) Satisfactory assurance that the applicant will not, without consent of the Secretary, sell, mortgage, encumber, or lease to others during the life of the loan the facility constructed with the aid of the loan.

(12 U.S.C. 1749a(c)(1))

§ 614.23 Demonstration of need for an energy conservation loan.

In order to be considered for an energy conservation loan, an applicant must demonstrate in its application that the proposed project will provide savings in fuel consumption and related costs above those achieved by implementation of the measures similar to those described in Appendix A of this part.

(12 U.S.C. 1749a(c)(1))

§ 614.24 Demonstration of need for a housing loan.

(a)(1) In order to be considered for a housing loan, an applicant must demonstrate in its application a housing shortage in excess of the greater of 50 students or five percent of full-time enrollment.

(2) The percentage of full-time enrollment affected by a housing shortage is determined by dividing the applicant's housing shortage computed in accordance with paragraph (b) of this section, by the applicant's full-time enrollment.

(b) Housing shortage is measured as the sum of—

(1) The number of students in on-campus facilities in excess of the design capacity of the facilities;

(2) The number of students living in substandard housing both on and off campus;

(3) The number of students commuting to the campus from beyond a reasonable commuting distance; and

(4) The number of students residing in facilities leased by the college with leases which will terminate and will not be renewed within 12 months from the date of application.

(12 U.S.C. 1749a(c)(1)

§ 614.25 Application by a nonprofit student housing cooperative.

A nonprofit student housing cooperative—as described in § 614.2(e)—that applies for a reservation of funds for a loan must assure the Secretary at the time of its application that—

(a) The educational institution the proposed project is intended to serve has agreed to cosign the loan; or

(b) If State law in effect on September 7, 1964, prevents the institution from cosigning the loan, the institution has approved the cooperative and the proposed project.

(12 U.S.C. 1749c(b))

§ 614.26 Application by a nonprofit corporation.

(a) The provisions of paragraph (b) of this section apply to a nonprofit corporation—

(1) As described in § 614.2(f); and

(2) That has not been established by the institution or institutions for whose students or faculty the loan is intended to provide housing or other educational facilities.

(b) If a nonprofit corporation that meets the description of paragraph (a) of this section applies for a reservation of funds for a loan, it must assure the Secretary at the time of its application that—

(i) The educational institution or institutions the proposed project is intended to serve have agreed to cosign the loan; or

(ii) If State law in effect on September 7, 1964, prevents the institution or institutions from cosigning the loan, the institution or institutions have approved the corporation and the proposed project.

(12 U.S.C. 1749c(b))

§ 614.27 Facilities located in jurisdiction without applicable building code.

(a) The provision of paragraph (b) of this section applies to an application for a reservation of funds for a housing loan if—

(1) One of the factors supporting the claim of a housing shortage is the existence of substandard housing; and

(2) The facilities that the loan is intended to replace or rehabilitate do not meet the terms of paragraph (2) of the definition of "substandard housing" in § 614.5(b) because the State or local jurisdiction in which those facilities are located—

(i) Has no building code; or

(ii) Has no building code that applies to the facilities or to the applicant.

(b) An applicant affected by the condition described in paragraph (a)(2)(i) or (ii) of this section shall submit to the Secretary, together with its application, evidence that the facilities would not meet the building code of the geographically nearest jurisdiction with a building code pertinent to the deficiency noted in the application.

(12 U.S.C. 1749a(c)(1))

§ 614.28 Opinion of bond or legal counsel.

(a) An applicant shall submit—or arrange to have submitted—to the Secretary, either by bond counsel, as described in paragraph (b) of this section, or legal counsel, as described in paragraph (c) of this section, legal opinions with respect to—

(1) The legality of the note or the bond issue that the applicant proposes to offer to secure the loan;

(2) The legal authority of the applicant to offer the note or bond issue and secure it by the proposed collateral; and

(3) The legality of the debt instrument and collateral on delivery.

(b) As used in this section, "bond counsel" means a law firm or individual lawyer—

(1) Who is thoroughly experienced in the financing of construction or rehabilitation of housing through the issuance of bonds;

(2) Whose approving opinions have been previously accepted by purchasers of bonds offered at public sales; and

(3) Who, if the borrower is a public institution or agency, is a recognized bond counsel in the municipal field.

(c) As used in this section, "legal counsel" means a law firm or individual lawyer—

(1) Having experience in the financing of construction or rehabilitation of housing; and

(2) Whose opinions with regard to that type of financing have been accepted previously by responsible lenders or lending institutions.

(12 U.S.C. 1749a(c)(1))

Subpart D—How Does the Secretary Make a Loan?

§ 614.30 How does the Secretary rank applications for loans?

(a) The Secretary ranks applications for energy conservation loans according to the criteria in § 614.31.

(b) The Secretary ranks applications for housing loans according to the evaluation criteria in § 614.32.

(12 U.S.C. 1749a(c)(1))

§ 614.31 Selection criteria for energy conservation loans.

For projects designed to conserve energy, the Secretary evaluates each application according to the following criteria, for a total of 100 possible points:

(a) *Savings in annual operating costs.* (1) The Secretary examines each application for information that shows the extent to which the proposed project will result in savings in fuel consumption and other energy costs on an annual basis.

(2) The estimated savings in annual operating costs are the difference between—

(i) Average annual routine expenses for heating and cooling and related

energy costs for the previous three years; and

(ii) Projected annual operating costs based on current prices of fuel and related services for the same purposes for the proposed project.

(3) The Secretary awards up to 50 points for this criterion.

(b) *Extent of savings compared with assistance.* (1) The Secretary examines each application for information that shows the extent to which the savings projected for the proposed project will recoup the assistance received under this program.

(2) The Secretary awards up to 50 points for this criterion, and assigns the highest score to projects requiring the least number of months.

(12 U.S.C. 1749a(c)(1))

§ 614.32 Selection criteria for housing loans.

For construction projects, the Secretary evaluates each application according to the following criteria, for a total of 100 possible points:

(a) *Previous residential history.* (1) The Secretary examines each application for information that shows whether the applicant qualifies as a historically residential institution.

(2) The Secretary awards 6 points for this criterion.

(b) *Use of existing dormitories.* (1) The Secretary examines each application for information that shows the extent to which the applicant makes effective use of dormitory space that it owns or leases.

(2) Use of dormitory space is measured by the number of assignable square feet per occupant.

(3) The Secretary awards up to 20 points for this criterion, and assigns the highest scores to applicants with the smallest amount of space per occupant.

(c) *Housing deficiency.* (1) The Secretary examines each application for information that shows the extent to which the applicant has a housing deficiency.

(2) Housing deficiency is measured by the number of student accommodations required to—

(i) Eliminate overcrowding; that is, occupancy in excess of design capacity;

(ii) Provide accommodations for students living in substandard housing; and

(iii) Provide accommodations for students living beyond a reasonable commuting distance.

(iv) Provide accommodations for students residing in facilities leased by the college with leases which will terminate and will not be renewed within 12 months from the application date.

(3) The Secretary awards up to 20 points for this criterion and assigns the highest scores to applicants with the greatest housing deficiency.

(d) *Relative housing deficiency.* (1) The Secretary examines each application for information that shows the extent to which the applicant has a relative housing deficiency.

(2) Relative housing deficiency is measured as a percentage obtained by dividing the total housing deficiency in § 614.32(c) by the institution's full-time enrollment.

(3) The Secretary awards up to 20 points for this criterion and assigns the highest scores to applicants with the highest relative housing deficiency.

(e) *Impact of the proposed project.* (1) The Secretary examines each application for information that shows the impact of the proposed project.

(2) Impact is measured by the number of necessary student accommodations the applicant proposes to add.

(3) The Secretary awards up to 17 points for this criterion and assigns the highest scores to the applicants proposing the largest number of necessary accommodations.

(f) *Relative impact of the proposed project.* (1) The Secretary examines each application for information that shows the relative impact of the proposed project.

(2) Relative impact is measured as a percentage obtained by dividing the number of necessary accommodations to be provided by the project by the total housing deficiency obtained under § 614.32(c).

(3) The Secretary awards up to 17 points for this criterion and assigns the highest scores to applicants with the highest relative impact.

(12 U.S.C. 1749a(c)(1))

§ 614.33 Apportionment of loan funds.

(a) The Secretary indicates in the application notice published in the **Federal Register**, the amount of funds available in any fiscal year that will be awarded for projects in each category.

(12 U.S.C. 1749(a)(c)(1))

(b) The Secretary awards to educational institutions in any one State not more than 12.5 percent of the total funds available for loans under this program in any fiscal year.

(12 U.S.C. 1749b)

§ 614.34 Reservation of funds for applications from historically black colleges and inversities.

(a) Subject to the restriction in § 614.33, the Secretary, as necessary, may deviate from the rank order of applications for energy conservation loans and for housing loans to ensure that not less than 10 percent of total funds available and not less than 10 percent of the number of loans that the Secretary makes are reserved for applications from historically black colleges.

(b) The purpose of this reservation of funds is to assist historically black colleges in remedying the adverse effects of past or present discrimination on the adequacy of those colleges' housing facilities or other educational facilities.

(12 U.S.C. 1749a(c)(1))

§ 614.35 Determination of non-availability of equally favorable terms and conditions.

(a) The Secretary makes a loan only if the Secretary finds that the applicant is unable to secure from other sources a loan with terms and conditions equally as favorable as the terms and conditions applicable to loans under this part.

(b) In order to assist the Secretary in making this determination, the applicant shall comply with any procedures the Secretary may establish, including—if bonds are to be issued—public advertising for bids.

(12 U.S.C. 1749a(1))

§ 614.36 Loan agreements.

(a) The Secretary prepares and sends a loan offer to an applicant if—

(1) The application meets all requirements of the Act and the regulations governing administration of the Act; and

(2) The Secretary approves the project and reserves funds for it.

(b) The loan offer—

(1) Contains the terms and conditions for the loan; and

(2) Is conditioned on the acceptance of these terms and conditions.

(c) The accepted loan offer constitutes the agreement between the Secretary and the applicant for the loan.

(12 U.S.C. 1749a)

§ 614.37 Security for the loan.

(a) A borrower shall evidence its loan by either notes or bonds issued by the borrower, secured by a mortgage, a trust indenture, or project revenue, or any combination thereof.

(b) If the Secretary determines that additional security is needed to reasonably assure loan repayment, the Secretary may require one or more of the following:

(1) A pledge of income from endowment funds.

(2) Securities or other revenue sources.

(3) A mortgage on other facilities.

(4) A guarantee of the payment of principal and interest by a third party.

(12 U.S.C. 1749a(c)(1))

§ 614.38 Evidence of approved debt instrument.

(a) After signifying to the Secretary its acceptance of a loan offer, a borrower shall furnish to the Secretary a debt instrument in the form the Secretary prescribes in the loan agreement and in accordance with the terms and conditions of the loan agreement.

(b) The approved debt instrument referred to in paragraph (a) of this section shall include as appropriate—

(1) A recorded copy of the executed trust indenture between the borrower and the trustee institution or other paying agent; and

(2) The bond, note, or other security approved by the Secretary.

(12 U.S.C. 1749(a); 1749a(c)(1))

§ 614.39 Loan closing.

Loan closing occurs at a time determined by the Secretary.

(12 U.S.C. 1749a(c)(1))

§ 614.40 Interim financing.

(a) A borrower may arrange for interim financing, subject to approval of the Secretary, to cover the cost of construction pending the loan closing.

(b) If the Secretary finds that the borrower is unable to secure necessary interim financing on reasonable terms, the Secretary may provide for advances against the approved loan.

(12 U.S.C. 1749a(c)(1))

§ 614.41 Limitation on loan amounts.

(a) The maximum loan that the Secretary makes to an eligible applicant is $3,500,000.

(b) The minimum loan that the Secretary makes to an eligible applicant is $100,000.

(12 U.S.C. 1749a(c)(1), 20 U.S.C. 3474)

Subpart E—What Conditions Must Be Met by a Borrower?

§ 614.50 Eligible development costs.

Eligible development costs under this program include architectural and engineering services, construction, legal and administrative services, interest during construction, built-in or installed kitchen equipment, such as ranges and refrigerators, and equipment for food service in central dining facilities.

(12 U.S.C. 1749a(c)(1))

§ 614.51 Ineligible development costs.

Ineligible development costs are the cost of furnishings, other than kitchen and food service equipment, such as beds, dressers, and tables, whether built-in or movable.

(12 U.S.C. 1749c(c); 1749a(c)(1))

§ 614.52 Additional ineligible costs.

(a) If, under the Act, an applicant files for assistance for a proposed project after the effective date of these regulations, the Secretary excludes from eligible development costs any cost for construction, or for otherwise eligible equipment, if the contract was entered into—

(1) Before the date the applicant filed the application; and

(2) Before the Secretary concurred in the award of the contract.

(b) The Secretary excludes from eligible development costs—

(1) Any costs for land incurred more than two years prior to application date; and

(2) Any costs for the acquisition of an existing structure incurred more than one year prior to the application date.

(12 U.S.C. 1749(c); 1749a(c)(1))

§ 614.53 Fee for government field expense.

(a) For each approved loan, a borrower shall pay a fixed fee that is sufficient to cover the cost to the Government for the site inspections and reviews.

(b) The fixed fee shall be an amount equal to one-eighth of one percent (.00125) of the loan amount, with a minimum charge of $500 and maximum charge of $1,500.

(c)(1) The borrower shall compute the fixed fee on the loan amount at the time of the original loan agreement.

(2) After the execution of the loan agreement, the borrower may not make an adjustment in the specified fixed fee.

(12 U.S.C.1749d)

§ 614.54 Construction account.

(a) A borrower shall deposit in a separate bank account known as the Construction Account—

(1) The proceeds of the sale of the bonds or notes;

(2) Any interim advances against the approved loans; and

(3) All other money that the borrower will use in paying for the construction, of the approved project.

(b) If the borrower is expending funds of its own on the project, it shall deposit those funds in the Construction Account and expend those funds prior to obtaining any advances from the Secretary.

(c) The borrower shall make all expenditures for construction, rehabilitation or acquisition from this account.

(d) Accounting for this account shall be in accordance with generally accepted accounting principles.

(12 U.S.C. 1749a(c)(1))

§ 614.55 Investment of idle construction funds.

(a) If the money on deposit in the Construction Account exceeds the estimated disbursements for the next 90 days, the Secretary encourages the borrower to invest those excess funds.

(b) If the borrower chooses to invest the funds referred to in paragraph (a) of this section, the borrower—unless otherwise prohibited by State or local law—shall invest those funds in—

(1) Direct obligations of the U.S. Government; or

(2) Obligations whose principal and interest are guaranteed by the U.S. Government.

(c) An inestment made in accordance with paragraph (b) of this section shall be in obligations that will mature not later than 18 months from the date of the investment.

(d) Any interest earned on the investment of idle funds in the Construction Account during the construction period shall be deposited in the Construction Account. Any such interest shall be credited against the interest expense accruing during the construction period. In the event that interest earned exceeds interest expense, the excess shall be used to reduce the outstanding principal amount of the loan.

(12 U.S.C. 1749a(c)(1))

§ 614.56 Procedure for loan disbursement.

(a) The borrower shall submit requests for loan disbursement on forms prescribed by the Secretary and shall furnish to the Secretary any additional information the Secretary may request.

(b) The Secretary charges interest on the advances at the same rate the Secretary charges interest on the loan.

(12 U.S.C. 1749a(c)(1))

§ 614.57 Disposal of balance remaining in the Construction Account.

Upon full settlement with all contractors, suppliers, and the other parties to whom it has incurred obligations under the project, a borrower shall dispose of any money remaining in the Construction Account in accordance with the provisions of the loan agreement.

(12 U.S.C. 1749a(c)(1))

§ 614.58 Determination of final approved development costs.

(a) For the purpose of determining the final approved development costs, the

Secretary may permit a borrower to use—in place of an audit by the Government—a certificate of project development cost prepared on forms prescribed by the Secretary and executed by the borrower.

(b)(1) In conjunction with the Secretary's determination of final approved development costs, the borrower shall submit to the Secretary whatever documentation the Secretary requires.

(2) This documentation may include but is not limited to, a certificate of actual cost—in a form prescribed by the Secretary—showing the actual cost to the borrower for construction, architectural, legal, organizational, and offside costs and other items of expense approved by the Secretary.

(12 U.S.C. 1749c(c); 1749a(c)(1))

§ 614.59 Application of pledged revenues.

(a) A borrower that has pledged project revenues—either net or gross—as security for its loan must deposit all pledged revenues into a separate fund in accordance with the terms of the loan agreement.

(b) This fund is known as the Revenue Fund.

(c) The borrower shall make repayments on the loan from this fund in accordance with the terms of the loan agreement.

(12 U.S.C. 1749a(c)(1)

§ 614.60 Length and maturity of loan.

(a)(1) The maximum repayment period for a housing loan under this program is 30 years, unless the Secretary finds that a longer repayment period is necessary.

(2) In no case may a loan repayment period exceed the lesser of 50 years or the estimated useful life of the facilities to be constructed, renovated or purchased with the proceeds.

(b) The repayment period for an energy conservation loan shall normally be the time required for projected operating savings to equal the costs of the project, plus 2 years.

(c) Loans shall bear interest at a rate not to exceed three percent per annum.

(d) Unless the Secretary authorizes otherwise—

(1) The borrower shall repay the loan in not less than annual nor more than semiannual equal installments of principal and interest.

(2) However, for a reasonable period of time—normally not exceeding two years following the date of the loan—a borrower may make payments of interest only.

(12 U.S.C. 1749(c))

§ 614.61 Borrower's non-financial obligations.

In addition to its financial obligations under the loan agreement, a borrower under this program must—as required in the loan agreement—agree to—

(a) Maintain its status as an eligible educational institution;

(b) Use the project for the purpose or purposes for which the loan was made, unless the Secretary approves a change of purpose;

(c) Maintain insurance on the project facilities; and

(d) Repair and maintain the project facilities.

(12 U.S.C. 1749a(c)(1))

§ 614.62 Deferments.

(a) A borrower may request—and the Secretary may grant—deferment of any repayment due on a loan under this program if the borrower has—

(1) Complied with—

(i) The terms and conditions of the loan agreement; and

(ii) All nonfinancial obligations under § 614.61;

(2) Properly applied and accounted for all assets pledged as security under the loan agreement; and

(3) Submitted a financial plan that satisfies the Secretary that the borrower is remedying the conditions that caused the request for deferment.

(b) If the Secretary agrees to a deferment, that deferment normally does not exceed one year unless the borrower provides evidence, and the Secretary agrees, that a longer deferment is necessary.

(c) The Secretary does not grant a deferment if the borrower proposes to do any of the following:

(1) Use pledged revenues for any purpose or purposes other than that provided in the loan agreement.

(2) Create another lien on the facilities assisted under this program.

(3) Release obligors, co-obligors, or guarantors under the loan.

(4) Request a reduction of principal or interest.

(12 U.S.C. 1749a(c)(8))

Appendix A.—Guides for Determining Minimum Energy Savings

In connection with projects intended to conserve energy, the applicant indicates its compliance with minimum energy conservation measures through completion of the following checklist:

Code: 1=No (no considerable involvement in this activity).
Code: 2=Yes (considerable involvement in this activity).
Code: 3=N.A. (not applicable).

Specific temperature ranges and thermostat settings:
- ☐ 65°–68° Winter
- ☐ 75°–80° Summer

☐ Reduction in illumination levels and lamp wattage
☐ Substantial night and weekend building shutdowns
☐ Consolidation of activities into fewer buildings, particularly during evenings and weekends
☐ Development of energy efficient space allocation practices
☐ Scheduling of institutional vacations during energy intensive periods
☐ Restrictive policy on appliance usage
☐ Restrictive policy on air conditioning installation
☐ Reduction of domestic hot water temperature
☐ Manual reduction of fresh air makeup
☐ Manual monitoring of buildings
☐ Work schedule adjustments to maximize daylight working hours
☐ Reduction of building heat leakage by using blinds and drapes
☐ Maintenance review of existing energy systems:
- ☐ Inspection and regularized maintenance of steam traps

☐ Inspection and correction of valve functions and air filtration systems where needed
☐ ORSAT analysis of flue gases
☐ Total involvement of institutional community:
- ☐ Faculty, staff, and student energy committee
- ☐ Appointment of building energy monitors
- ☐ Energy briefing sessions with building occupants
- ☐ Campus-wide energy awareness programs

If the answer to any of the above is "no," please attach a brief explanation.

[FR Doc. 82-13512 Filed 5-19-82; 8:45 am]
BILLING CODE 4000-01-M

DEPARTMENT OF EDUCATION

Office of Postsecondary Education

Application Notice for New Projects Under the College Housing Program for Fiscal Year 1982

Applications are invited for new projects under the College Housing Program.

Authority for this program is contained under Title IV of the Housing Act of 1950, 64 Stat. 48, 77; Pub. L. 81–475; 12 U.S.C. 1749–1749d, and under Section 306 of the Department of Education Organization Act (Pub. L. 96–88).

Under this program, the Secretary is authorized to award low-interest loans to assist eligible institutions (1) in providing housing and other educational facilities for student and faculty members, and (2) in conserving energy, and reducing related operating costs.

Closing Date for Transmittal of Applications: Applications for awards must be mailed (post-marked) or hand-delivered by June 30, 1982.

Applications Delivered by Mail: An application sent by mail must be addressed to the U.S. Department of Education, Attention: 84.142, College Facilities Branch, 400 Maryland Avenue, SW., (ROB–3, Room 3717), Washington, D.C. 20202.

An applicant must show proof of mailing consisting of one of the following:

(1) A legibly dated U.S. Postal Service Postmark.

(2) A legible mail receipt with the date of mailing stamped by the U.S. Postal Service.

(3) A dated shipping label, invoice or receipt from a commercial carrier.

(4) Any other proof of mailing acceptable to the U.S. Secretary of Education.

If an application is sent through the U.S. Postal Service, the Secretary does not accept either of the following as proof of mailing: (1) A private metered postmark, or (2) a mail receipt that is not dated by the U.S. Postal Service.

An applicant should note that the U.S. Postal Service does not uniformly provide a dated postmark. Before relying on this method, an applicant should check with its local post office.

Applications Delivered by Hand: An application that is hand-delivered must be taken to the U.S. Department of Education, College Facilities Branch, Room 3717, Regional Office Building 3, 7th and D Streets, SW., Washington, D.C. between 8:00 a.m. and 4:30 p.m. (Washington, D.C. time) daily except Saturday, Sunday, or Federal holidays. Applications that are hand-delivered will not be accepted after 4:30 p.m. on the closing date.

Program Information: The College Housing Program provides low-interest 3 percent long-term loans to postsecondary educational institutions for the construction, rehabilitation or acquisition of student and faculty housing and related facilities and for conserving energy and reducing related operating costs.

Regulations for this program are published in the regulations section in this issue of the **Federal Register.** The regulations specify selection criteria for the two types of loans available under this program. All applications are ranked according to the criteria contained in §§ 614.31 and 614.32 of the program regulations.

Available Funds: There is authorized $75,000,000, or the amount of income less expenses, whichever is less, to be made available for College Housing Loans. Funds available for commitment for new loans in fiscal year 1982 are estimated to be approximately $10,000,000. However, the total amount available will not be known until the end of the fiscal year. Gross commitments for the principal amount of direct loans may not exceed $75,000,000. If the amount of available funds is greater than $30,000,000, twenty-five percent of the available funds will be apportioned for energy conservation loans and seventy-five percent of the available funds will be apportioned for housing loans. If the amount of available funds is $30,000,000 or less, the total amount will be used for energy conservation loans.

Application Forms: Application forms and program information packages are available.

Application packages will not automatically be mailed to all institutions of higher education. Copies may be obtained by writing to the College Facilities Branch, U.S. Department of Education, 400 Maryland Avenue, SW., (ROB–3, Room 3717), Washington, D.C. 20202.

Applications must be prepared and submitted in accordance with the criteria, instructions, and forms included in the program information packages.

Applicable Regulations: The regulations applicable to this program are—

(a) The Education Department General Administrative Regulations (EDGAR) in 34 CFR 75.179—75.173; and

(b) The final regulations governing the College Housing Program, 34 CFR Part 614, published in this issue of the **Federal Register.**

Special Procedures: On or before the deadline for submitting its application to the Secretary, the applicant shall submit a copy of its application, with a letter asking for comment, to the State and areawide clearinghouses established in compliance with the Office of Management and Budget Circular A–95. The applicant shall also submit a copy of its application to the appropriate State agency for postsecondary education. Comments, if any, are to be addressed to the College Facilities Branch, U.S. Department of Education, 400 Mary land Avenue, SW., (ROB–3, Room 3717), Washington, D.C. 20202. Comments must be received within 20 days after the deadline date if they are to be considered. The applicant shall attach to its application to the Secretary a copy of its letter requesting the State and areawide clearinghouses to comment on the application.

FOR FURTHER INFORMATION CONTACT:

Charles I. Griffith, College Facilities Branch, Department of Education, 400 Maryland Avenue, SW., (ROB–3, Room 3717), Washington, D.C. 20202. Telephone: (202) 245–3253.

(12 U.S.C. 1749–1749d)

Dated: May 12, 1982.

(Catalog of Federal Domestic Assistance No. 84.142, College Housing Program)

Thomas P. Melady,

Assistant Secretary for Postsecondary Education.

[FR Doc. 82–13511 Filed 5–19–82; 8:45 am]

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federal register

Thursday
May 20, 1982

Part VI

Department of the Interior

Office of Surface Mining Reclamation and Enforcement

Conditional Approval of the Permanent Regulatory Program Submission From the State of Alabama Under the Surface Mining Control and Reclamation Act of 1977

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 901

Conditional Approval of the Permanent Regulatory Program Submission From the State of Alabama Under the Surface Mining Control and Reclamation Act of 1977

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

ACTION: Final rule.

SUMMARY: On January 11, 1982, the State of Alabama resubmitted to the Department of the Interior its proposed permanent regulatory program under the Surface Mining Control and Reclamation Act of 1977 (SMCRA) 30 U.S.C. 1201 *et seq.* This resubmission follows an initial disapproval which was published in the **Federal Register,** on October 16, 1980 (45 FR 68665–68673). The purpose of the resubmission is to demonstrate the State's intent and capability to administer and enforce the provisions of SMCRA and the permanent regulatory program regulations, 30 CFR Chapter VII. Since the original submission was disapproved, the resubmission consists of the entire program which will be considered in its entirety on this decision. This rule grants conditional approval of the Alabama permanent program. A new Part 901 is being added to 30 CFR Chapter VII to implement this decision.

EFFECTIVE DATE: This conditional approval is effective May 20, 1982. This conditional approval will terminate as specified in 30 CFR 901.11 unless the deficiencies below have been corrected in accordance with the dates specified in 30 CFR 901.11.

ADDRESSES: See "Supplementary Information" for addresses where copies of the Alabama Program and administrative record on the Alabama program are available.

FOR FURTHER INFORMATION CONTACT: Mr. Arthur Abbs, Chief, Division of State Program Assistance, Office of Surface Mining Reclamation and Enforcement, U.S. Department of the Interior, South Building, 1951 Constitution Avenue, N.W., Washington, D.C. 20240, Phone: 202/343–5351.

SUPPLEMENTARY INFORMATION:

Availability of Copies

Copies of the Alabama program and the administrative record on the Alabama program are available for public inspection and copying during regular business hours at:

Administrative Record Room, Office of Surface Mining, Region II, 530 Gay Street, S.W., Suite 500, Knoxville, TN 37902.

Office of Surface Mining, Administrative Record Room, Room 5315, 1100 L Street, N.W., Washington, D.C. 20204.

Alabama Surface Mining Commission, Central Bank Building, 2nd Floor, 811 Second Avenue, Jasper, AL 35501.

In addition, copies of the full text of the program are available for inspection during regular business hours at the following locations:

Office of Surface Mining, Administrative Record Room, Room 5315, 1100 L Street, N.W., Washington, D.C. 20204.

Alabama Surface Mining Commission, 100 Third Street, Fort Payne, AL 35967.

Background

The general background on the permanent program, the program approval process, and the Alabama program submission were discussed in the **Federal Register,** October 16, 1980 (45 FR 68665–68673). Subsequent to that **Federal Register** notice, amendments to the Federal regulations were published December 12, 1980 (45 FR 82084); July 17, 1981 (46 FR 37233); September 29, 1981 (46 FR 47720); October 8, 1981 (46 FR 50018); October 28, 1981 (46 FR 53376) and December 7, 1981 (46 FR 59934). An interpretive rule was published November 7, 1980 (45 FR 73945–73946). Additional regulations were suspended pending further rulemaking August 19, 1981 (46 FR 42063).

Also, in the October 16, 1980, **Federal Register** notice the Secretary announced his disapproval of the Alabama program and specified the reasons for disapproval.

Background on the Alabama Resubmission

In accordance with the procedures set forth in 30 CFR 732.13(f), The State of Alabama originally had 60 days from the date of publication of the Secretary's disapproval decision on October 16, 1980, to resubmit a revised program for consideration. On November 12, 1980, the Circuit Court of Walker County, Alabama, enjoined the Alabama Surface Mining Reclamation Commission from submitting or resubmitting to the Office of Surface Mining (OSM) the Alabama Permanent State program. By order of the court dated January 8, 1982, the injection was dissolved and the State was ordered to submit the State program on or before January 11, 1982. The State submitted its revised program for consideration on January 11, 1982. Announcement of Alabama's resubmission was made in newspapers of general circulation within the State of Alabama and published in the **Federal Register** on January 15, 1982 (47 FR 2338–2340). That **Federal Register** notice also announced a public comment period extending to February 16 , 1982, and a public hearing which was held on February 11, 1982, in Jasper, Alabama. Alabama submitted modifications to the resubmission on April 9, 1982, and a public comment period was opened on these modifications April 20 through April 30, 1982 (47 FR 16797, April 20, 1982).

Public disclosure of comments by Federal agencies was made on May 13, 1982 (47 FR 20631.) On May 13, 1982, the Administrator of the Environmental Protection Agency transmitted her written concurrence on the Alabama program.

The Regional Director completed his program review on May 6, 1982, and forwarded the public hearing transcripts, written presentations, and copies of all comments to the Director together with a recommendation that the program be conditionally approved.

On May 11, 1982, the Director recommended to the Secretary that the Alabama program be conditionally approved

The basis and purpose statement for the Secretary's decision to conditionally approve Alabama's consists of this notice. The Alabama program consists of the formal submission of January 11, 1982, (Administrative Record No. AL–326A), as clarified in a meeting with OSM on April 9, 1982. (See AL–347.)

Throughout the remainder of this notice, "Alabama program," "Alabama submission," or "Alabama resubmission" is used to mean the documents cited above. The term "original submission" is used to mean the submission of March 3, 1980, which was subsequently disapproved by the Secretary. The terms "Alabama Surface Mining Reclamation Commission" and "Alabama Surface Mining Commission" are synonymous, the word "Reclamation" having been dropped recently from the former term.

The Secretary's Findings below are organized to follow the order set forth in section 503 of SMCRA and 30 CFR 732.25, respectively. These sections specify the findings which the Secretary must make before he may approve a regulatory program.

Secretary's Findings

Section 503(a) of SMCRA Findings: In accordance with section 503(a) of SMCRA, the Secretary finds that Alabama has the capability to carry out the provisions of SMCRA. Findings

made in accordance with section 503(a) of SMCRA are set forth in Findings 1 through 7 below.

Finding 1

The Secretary finds that the Alabama Surface Mining Control and Reclamation Act of 1981, Act No. 81–435 (Alabama SMCRA), and the regulations adopted thereunder provide, except as noted below, for the regulation of surface coal mining and reclamation operations on non-Indian and non-Federal lands in Alabama in accordance with SMCRA. This finding is based on the requirements of section 503(a)(1) of SMCRA (30 U.S.C. 1253(a)(1)). The issues underlying this finding are anlyzed in finding 1.1 and 1.2 below.

1.1 In section 10(f), the Alabama SMCRA provides that appeals to circuit court from Commission decisions are to be tried *de novo*. Section 526(b) of SMCRA provides that when decisions of the Secretary are reviewed judicially in Federal Court, the review is "soley on the record made before the Secretary." Section 526(e) also states that "Action of the State regulatory authority pursuant to an approved State program shall be subject to judicial review by a court of competent jurisdiction in accordance with State law * * *". The practice of *de novo* appeals is acceptable provided seven specific conditions or criteria are met.

In an executive session at OSM Headquarters in Washington, D.C. on April 9, 1982, duly authorized representatives of Alabama committed the State to the seven specific criteria as indicated under the following individual items (a) through (g). (Administrative Record No. AL–347).

(a) Insure preservation of the administrative record, including all exhibits and transcripts of all testimony taken at the proceeding. Alabama referenced section 10(e) of the Alabama SMCRA which assures compliance with the criterion.

(b) Guarantee that the party to a *de novo* review proceeding has the right to use any evidence contained in the administrative record whenever such evidence cannot otherwise be practicably obtained. Alabama explained that, under its case law, prior sworn testimony may be used if a witness is unavailable. Additionally, such testimony may be used at any time for impeachment.

(c) Insure that any money paid into escrow is held until there is a final binding resolution of the controversy. Alabama referenced section 26(c) of ASMCRA to satisfy the criterion.

(d) Demonstrate that the provisions for trial *de novo* will not result in undue delay so as to undermine the effectiveness of the enforcement program. Alabama referenced section 10(f) of ASMCRA to satisfy the criterion.

(e) Make trial *de novo* review available to any party to the administrative proceeding, including the regulatory authority and any intervening parties. Alabama referenced section 10(f) of ASMCRA to satisfy the criterion.

(f) Insure that review by trial *de novo* is not available to a person who has failed to appear at or waived his right to an administrative hearing. Alabama referenced section 10(d)(2) of ASMCRA to satisfy the criterion.

(g) Provide for representation of the regulatory authority by a licensed attorney at law at every stage of the judicial review proceeding. Alabama referenced section 10(d)(1) of ASMCRA and assured that the regulatory authority will be represented at every stage of the judicial review proceeding by the Alabama Attorney General's Office.

In view of these commitments, the Secretary finds that Alabama's procedure for trial *de novo* under the prescribed conditions is no less effective than the Federal review procedure.

1.2 In section 27(f) the Alabama SMCRA fails to provide for "reasonable attorney and expert witness fees" as required by section 520(f) of SMCRA. Since the Federal Act imposes this requirement, the State program is not in accordance with that Act. Therefore, approval of the Alabama program is conditioned upon a statutory amendment to the Alabama SMCRA to provide for reasonable attorney and expert witness fees.

Finding 2

The Secretary finds that the Alabama SMCRA provides sanctions for violations of Alabama laws, regulations or conditions of permits, and these sanctions meet the minimum requirements of SMCRA. This finding is based on the requirements of section 503(a)(2) of SMCRA (30 U.S.C. 1253(a)(2)).

Finding 3

The Secretary finds that the Alabama Surface Mining Commission has sufficient administrative and technical personnel and sufficient funds to enable Alabama to regulate surface coal mining and reclamation operations in accordance with the requirements of SMCRA. This finding is based on the requirements of section 503(a)(3) of SMCRA (30 U.S.C. 1253(a)(3)).

Finding 4

The Secretary finds that the Alabama SMCRA provides for the effective implementation, maintenance, and enforcement of a permit system that meets the requirements of SMCRA. This finding is based on the requirements of section 503(a)(4) of SMCRA (30 U.S.C. 1253(a)(4)).

Finding 5

The Secretary finds that Alabama has established an adequate process for the designation of areas as unsuitable for surface coal mining in accordance with section 522 of SMCRA, 30 U.S.C. 1271. This finding is based on the requirements of section 503(a)(5) of SMCRA (30 U.S.C. 1253(a)(5)).

Finding 6

The Secretary finds that Alabama has established, for the purpose of avoiding duplication, a process for coordinating the review and issuance of permits for surface coal mining and reclamation operations with other Federal and State permit processes applicable to the proposed operations. This finding is based on the requirements of section 503(a)(6) of SMCRA (30 U.S.C. 1253(a)(6)).

Finding 7

The Secretary finds that Alabama has fully enacted regulations which, except for minor deficiencies discussed in the Findings, are no less effective than 30 CFR Chapter VII. This finding is based on the requirements of section 503(a)(7) of SMCRA (30 U.S.C. 1253(a)(7)). The issues underlying this finding are analyzed in Findings 12 through 30, below.

Section 503(b) of SMCRA Findings

As required by section 503(b)(1)–(3) of SMCRA, 30 U.S.C. 1253(b)(1)–(3), and 30 CFR 732.11–732.13, the Secretary has, through OSM, fulfilled the requirements set forth in Findings 8 through 10 below.

Finding 8

The Secretary has solicited and publicly disclosed the views of the Administrator of the Environmental Protection Agency, the Secretary of Agriculture, and the heads of other Federal agencies concerned with or having special expertise pertinent to the proposed Alabama program.

Finding 9

The Secretary has obtained the written concurrence of the Administrator of the Environmental Protection Agency with respect to those aspects of the Alabama program which

relate to air or water quality standards promulgated under the authority of the Federal Water Pollution Control Act, as amended (33 U.S.C. 1151–1175) and the Clean Air Act, as amended (42 U.S.C. 1857 *et seq.*).

Finding 10

The Secretary held a public hearing in Jasper, Alabama on February 11, 1982, on the adequacy of the Alabama program submission.

Finding 11

The Secretary finds that the State of Alabama has the legal authority and qualified personnel necessary for the enforcement of the environmental protection standards of SMCRA. This finding is based on the requirements of section 503(b)(4) of SMCRA (30 U.S.C. 1253(b)(4)).

CFR 732.15 Findings

In accordance with 30 CFR 732.15, the Secretary makes Findings 12 through 30 below on the basis of information in the Alabama program resubmission, public comments and testimony, written representations at the public hearings, and other relevant information in the administrative record. At a meeting on April 9, 1982, at OSM Headquarters, Washington D.C. (Administrative Record No. AL–347) Alabama agreed to certain regulation changes and interpretations, and to certain policies to be implemented by the State. In the following findings the term "the State has agreed" or similar terms refer to agreements reached at that meeting.

Finding 12

In accordance with § 732.15(a), the Secretary finds that, except as noted below, the program provides for Alabama to carry out the provisions and meet the purposes of SMCRA. The State legislative authority is discussed in Findings 1, 2 and 4. State regulations and narrative descriptions are discussed in Findings 12 through 30. Issues which are general in nature and do not apply to individual sections are analyzed as follows:

12.1 In the definition of *"Extraction of Coal as an Incidental Part"* at section 700.5, the State has omitted from its definition all except the first sentence of the Federal definition (30 CFR 700.5). The omitted part contains language stating that extraction of coal from areas outside the right of way or boundaries of the area affected by the construction of a government financed project shall be subject to regulation. The intent of SMCRA and the Federal regulations is to exempt only the area directly affected by construction of the project, not some larger area being mined. Approval of the Alabama program is conditioned upon a change to the Alabama regulations to include provisions no less effective than the Federal definition. Alabama has agreed that until a regulation change is accomplished, the State will interpret the present wording to include regulation of all areas included by the Federal definition. The Secretary finds this solution to be no less effective than the Federal definition.

12.2 The State's definition of "Federal Lands" at section 700.5 states: "any land, including mineral * * *". The Federal definition at 30 CFR 700.5 states: "any land, including mineral interests * * *". This is a typographical error and the word "interests" should be included. Approval of the Alabama program is conditional upon a revision to the regulation to correct the typographical error by inserting "interests" after "mineral". The Secretary finds that the insertion will render the State definition no less effective than the Federal definition.

12.3 The State's definition of "Groundwater" at section 700.5 states: "Groundwater means subsurface water that fills available openings in rock or soil materials below the zone of saturation". The Federal definition at 30 CFR 701.5 states: "Groundwater means subsurface water that fills available openings in rock or soil material to the extent that they are considered water saturated." Further, Alabama's definition of water table is inconsistent with its own definition of groundwater. The Federal definition includes the water table (irregular), capillary water (if appropriate) and the zone of saturation (groundwater). The State's definition includes only that water below (the bottom of) the zone of saturation. Consequently, much water included in the Federal definition is omitted from the State definition. As a condition of approval, Alabama must revise its regulations to correct the deficiency by substituting "in" for "below". The Secretary finds that the substitution will render the definition no less effective than the Federal counterpart.

12.4 In its definition of "Surface Coal Mining Operations" at section 700.5, the State has omitted language stating that extraction of coal from refuse piles is covered. Remining coal refuse piles is an activity contemplated by SMCRA as requiring regulation. The Federal definition of "surface mining activities" at 30 CFR 701.5 makes it clear that such activity is covered. Alabama has agreed, as a matter of policy to interpret its regulations to include within the scope of the regulatory program remining of coal refuse piles. Based on this assurance, the Secretary finds that this interpretation will render the definition no less effective than the Federal counterpart.

12.5 The Federal definition of "Historic Lands" at 30 CFR 762.5 includes important language relative to: (1) "Sites having religious or cultural significance * * *" and (2) "sites for which historic designation is pending." This language is omitted from the State definition at section 700.5. The Secretary finds that the omitted or comparable provisions should be included in the State's definition so as to define those sites which the regulatory authority must consider in the designation of lands unsuitable process. Therefore, as a condition of approval, Alabama must amend its unsuitability regulations to provide for lands having religious, cultural or historic significance. The Secretary believes the present language, while lacking desirable details, is sufficiently specific to enable the Regulatory Authority to offer the necessary protection to valuable sites until a regulation change can be accomplished.

Finding 13

The Secretary finds that the Alabama program submission demonstrates, except as noted below, that the Alabama Surface Mining Commission has authority under Alabama laws to implement, administer, and enforce all applicable requirements consistent with 30 CFR Chapter VII, Subchapter K, and the Alabama program includes provisions adequate to do so. Special provisions comparable to 30 CFR Parts 820, 822 and 825 for anthracite mines and operations in alluvial valley floors are not applicable to or included in the Alabama law or regulations. This finding is made under the requirements of 30 CFR 732.15(b)(1). Alabama incorporates provisions corresponding to sections 515 and 516 of SMCRA in Title III, Alabama SMCRA sections 22 and 23 and in the Alabama Regulations Subchapter K.

Discussion of significant issues raised during the review of the Alabama environmental performance standards follows.

13.1 Section 815.15(a) of 30 CFR states that wildlife habitats "shall not be disturbed during coal exploration." Alabama's section 815.15(a) qualifies this prohibition by stating that such habitats "shall not be *unnecessarily* disturbed." Therefore, as a condition of approval, Alabama must amend its regulation to delete the word "unnecessarily". The Secretary has

agreed to Alabama's suggestion that "significantly" may be substituted for "unnecessarily". Alabama has further agreed that until a regulation change is accomplished, any significant disturbance will be considered to be unnecessary.

13.2 Alabama section 819.11(c) requires that auger holes be plugged and sealed "contemporaneous" with the mining. Section 819.11(c) of 30 CFR requires sealing within 72 hours in some instances. Although a review of the preamble of the Federal regulations failed to produce support for the specific time period listed (72 hours), support is found for requiring that auger holes be plugged quickly after they are drilled. The State uses the phrase "contemporaneous with the augering operation". It was unclear what amount of time the State contemplates in the use of the word "contemporaneous". Alabama has agreed that it will interpret "contemporaneous" to mean seventy-two (72) hours when an acid coal seam is encountered or other hazardous or potentially harmful conditions are present. Based on this interpretation, the Secretary finds Alabama section 819.11(c) to be no less effective than the Federal counterpart.

13.3 Part 823 of Alabama's regulations does not include a proper "Scope" section comparable to 30 CFR 823.1. Instead of a "Scope" section which sets out what the part regulates, Alabama has stated what is not regulated. Alabama has indicated that a large part of the Scope section was omitted through typographical error and has agreed to include an appropriate Scope section. As a condition of approval Alabama must revise its regulations to include an appropriate Scope section.

13.4 Section 823.12 of the State's prime farmland regulations allows the C horizon or a combination of horizons to be substituted for the A horizon. No provision is made for a like substitution in 30 CFR 823.12. Alabama's regulations state that when C horizon or a combination of horizons is substituted for the A horizon, the substitute shall "be equal or more favorable for plant growth than the A horizon". The State, however, fails to specify that any tests be made to provide that the substituted horizons are sufficient. Alabama has agreed that it will obtain a recommendation from the U.S. Soil Conservation Service (SCS) and that the Regulatory Authority will not approve the substitution unless said substitution is approved by SCS. Based on this policy, the Secretary finds that Alabama section 823.12 is no less effective than the Federal counterpart.

13.5 The State language at section 823.15 is less effective than 30 CFR 823.15. State section 823.15 reads "* * * shall meet the following revegetation requirements of section 816.116(c) and * * *". By inclusion of the word "following" it is implied that only those parts of section 816.116(c) which appear thereafter need be adhered to. If interpreted in this way, a good part of section 816.116(c) would be voided. Therefore, as a condition of approval, Alabama must revise its regulations to omit the word "following" or place it after "and". The Secretary believes that the above change will render State section 823.15 no less effective than the Federal counterpart.

13.6 State section 824.11(a)(3) includes "forestry" as an approved postmining land use for mountain top removal areas. Section 824.11(a)(3) of 30 CFR omits "forestry" as an approved postmining land use for such areas. Section 515(c)(3) of SMCRA also does not allow "forestry" as a land use when the mountain top removal exception to the approximate original contour (AOC) is used. SMCRA allows only "industrial, commercial, agricultural, residential or public facility" uses. Alabama has agreed to limit its interpretation of forest land or forestry to encompass only land used for, or the process of tree farming or silviculture. The planting of trees as ground cover only or to establish woodlands is not included. Based on this interpretation, the Secretary finds Alabama section 824.11(a)(3) no less effective than the Federal counterpart.

13.7 Sections 816.42 (a) and (c) and 817.42 (a) and (c) of 30 CFR require that all surface drainage from the disturbed area must be passed through a sedimentation pond or a series of sedimentation ponds before leaving the permit area. OSM has determined that sedimentation ponds represent the best technology currently available. The State regulations at 816.42(a) and 817.42(a) direct that such drainage be passed through sedimentation ponds "or a treatment facility".

Therefore, as a condition of approval Alabama must revise its regulations or otherwise amend its program to provide that at the present time, the best technology currently available for sediment control is sedimentation ponds, and should Alabama wish to approve any other technology, the State will first submit the proposal to OSM for review and approval as either an experimental practice or a program amendment. Furthermore, pending completion of the above, Alabama has agreed not to use its authority to approve treatment facilities other than sedimentation ponds or the approval will terminate immediately.

Additionally, the State regulations contain no counterpart to the Federal regulations at 30 CFR 816.42 (a) and (b) and 817.42 (a) and (b). These Federal regulations require that where drainage from the disturbed area and drainage from areas not currently disturbed are mixed in the same sedimentation pond or ponds, the specified effluent limitations must be met by the ponds' total discharge. The State has agreed that all discharges from ponds, whatever the source, will be required to meet the specified effluent limits. Based on this interpretation, the Secretary has determined that the above policy statement renders the State regulations regarding sediment ponds no less effective than 30 CFR 816.42 (a)–(c) and 817.42 (a)–(c).

13.8 Sections 816.49(b) and 817.49(b) of 30 CFR reference 30 CFR 816.46(e)–(u) and 817.46(e)–(u) respectively. State sections 816.49(b) and 817.49(b) reference only State sections 816.46(c)–(h) and 817.46(c)–(h), respectively because other sections have been omitted from the State sections 816.46 and 817.46. As a condition of approval, Alabama must revise its regulations to include criteria no less effective than those at 30 CFR 816.46(e)–(u) and 817.46(e)–(u) and to reference all appropriate sections in Alabama regulations 816.49(b) and 817.49(b). Alabama has agreed that until a regulation change is accomplished, it will not issue any permanent program permits that are inconsistent with Federal requirements of 30 CFR 816.46 (e)–(u) and 817.46(e)–(u). The Secretary believes that the above regulation change and policy statement render the State regulations no less effective than the Federal counterparts.

13.9 Alabama sections 816.49(c) and 817.49(c) specify a static safety factor of 1.5 and perimeter slopes that are stable. Sections 816.49(c) and 817.49(c) of 39 CFR specify slopes not steeper than 1v:2h and stable. The State leaves the design to the engineer. Some slopes would not be stable at grades flatter than 1v:2h. The issue is not a matter of 1.5 safety factor vs 2:1 slope. The Federal regulations require a minimum slope in addition to stability which provides an additional degree of safety. Therefore, as a condition of approval, Alabama must revise its regulations to include the 1v:2h slope limit requirement. Alabama has agreed that until a regulation change is accomplished, the State will not issue

any permanent program permits that permit a slope greater than 1v:2h. The Secretary finds that the agreed upon regulation change and policy statement render the above State sections no less effective than the Federal counterparts.

13.10 Sections 816.49(f) and 817.49(f) of 30 CFR provide that all dams and embankments meeting criteria for regulation under 30 CFR 77.216(a) shall be routinely inspected in accordance with 30 CFR 77.216–3. The State sections 816.49 and 817.49 contain no counterpart and should be amended. Additionally, the State sections 816.49(g) and 817.49(g) require that dams and embankments be certified by a qualified registered professional engineer only immediately after construction while sections 816.49(h) and 817.49(h) of 30 CFR also require annual certification. Therefore, as a condition of approval Alabama must revise its regulations to include provisions for routine inspections meeting the standards of 30 CFR 77.216–3 and requiring that all inspection reports thus generated be kept available for inspection at the mine site, and to provide that all appropriate dams and embankments shall be routinely inspected in accordance with 30 CFR 77.216–3 and that all resulting reports be kept on the minesite. In addition, all certifications, reports, and statements required by MSHA must be filed with the Regulatory Authority. Alabama agreed that until a regulation change was accomplished, it would implement the new language as a matter of policy. The Secretary finds that the agreed upon regulation change and policy statement render the above State sections no less effective than the Federal counterparts.

13.11 Alabama sections 816.311(c) and 817.313(c) enable interruption of operations due to events of *"force majeure"*, including labor disputes not to be considered temporary cessations. Section 816.131 of 30 CFR does not contain a comparable provision. Labor "dispute" is too broad a term. Alabama has agreed to define *"force majeure"* as applying only to actual labor strikes. The Secretary agrees that this clarification of this provision renders the State regulations no less effective than the Federal regulations.

13.12 Alabama sections 816.71(o) and 817.71(o) allow disposal of coal processing waste in head-of-hollow and valley fills. This is contrary to 30 CFR 816.71(k) and 817.71(k) which specifically forbid such disposal. As a condition of approval, Alabama must revise its regulations to the effect that disposal of processing waste in head-of-hollow and valley fills is not allowed. Alabama has further agreed that until a regulation change is accomplished it will, as a matter of policy, not allow disposal of coal processing waste in head-of-hollow and valley fills. The Secretary finds that the agreed upon regulation change and policy statement render Alabama sections 816.71(o) and 817.71(o) no less effective than the Federal counterparts.

13.13 Sections 816.71(f) and 817.71(f) of 30 CFR require the spoil to be placed in horizontal lifts. The corresponding State sections 816.71(c) and 817.71(c) omit this requirement. Horizontal lift placement is essential to ensure proper compaction. As a condition of approval, Alabama must revise its regulations to the effect that spoil will be placed in 4' horizontal lifts unless other placement is specifically agreed to by OSM. Alabama has agreed that, until a regulation change is accomplished, the State will issue no permits which are at variance with existing Federal regulations. The Secretary finds that the agreed upon regulation change and policy statement render Alabama sections 816.71(f) and 817.71(f) no less effective than the Federal counterparts.

13.14 Sections 816.71(i) and 817.71(i) of 30 CFR contain provisions for slopes greater than 36% and reference other sections for additional requirements (referenced are 30 CFR 780.35(c) and 784.19, respectively). The corresponding State sections are missing and no equivalent references are included. Consequently, Alabama regulations contain no special provisions for handling slopes greater than 36%. As a condition of approval, Alabama must revise its regulations to include counterparts to 30 CFR 816.71(i) and 817.71(i) with appropriate inclusion and references to counterparts of all sections referenced in 30 CFR 816.71(i) and 817.71(i). Alabama has further agreed that until a regulation change is accomplished the State would, as a matter of policy, require adherence to the provisions of 30 CFR 816.71(i) and 817.71(i). The Secretary finds that the agreed upon regulation change and policy statement render the above mentioned State sections no less effective than the Federal counterparts.

13.15 The State has omitted sections comparable to 30 CFR 816.72, 816.73, 817.72 and 817.73. The omission completely deletes specific requirements for head-of-hollow and valley fills from the State regulations. Specific criteria required by present Federal regulations include underdrain sizing criteria and lift thickness limitations. As a condition of approval, Alabama must revise its regulations to include the omitted sections regarding specific requirements for head-of-hollow and valley fills. Alabama has agreed that until a regulation change is accomplished it will, as a matter of policy, require compliance with applicable provisions of 30 CFR 816.72, 816.73, 817.72 and 817.73. The Secretary finds that the agreed upon regulation changes and policy statement render the above State regulations no less effective than the Federal counterparts.

13.16 State sections 816.46 and 817.46 do not provide a minimum sediment storage volume. Certain criteria required for the design of sedimentation structures in 30 CFR 816.46 and 817.46 were suspended. (See 44 FR 77447 (Dec. 31, 1979).) However, the portions of 30 CFR 816.46(b) and 817.46(b) requiring some minimum sediment storage volume have not been remanded. In addition, both Federal and State sections 780.25(b) and 784.25(b) require that the design plan conform to 816.46 and 817.46, respectively. Therefore, the basic criteria for a minimum storage volume should be included in State sections 816.46 and 817.46 so that some minimum storage volume will have to be included in the design, even though the specific criteria of 816.46(b)(1) & (2) and 817.46(b)(1) & (2) are not required. Such minimum storage criteria can be determined by the regulatory authority on a blanket basis or a case by case basis or left to the engineer with the approval of the regulatory authority.

Therefore, as a condition of approval, Alabama must revise its regulations to include the basic criteria for minimum storage volume no less effective than the Federal requirements. Alabama has further agreed that until a regulation change is accomplished, the State will as a matter of policy adopt the new language. The Secretary finds that the agreed upon regulation revision and policy statement render the above State section no less effective than the Federal counterparts.

13.17 Sections 816.46(u) and 817.46(u) of 30 CFR require that after the pond is removed, revegetation be conducted in accordance with 816.100–816.106 and 817.101–817.106, respectively. Alabama regulations require compliance with 816.101–816.106 and 817.101–817.107 respectively. Sections 816.100 and 817.100 require reclamation as contemporaneously as practicable with mining operations. As a condition of approval, Alabama must correct the typographical errors to read "816.100 and 817.100" instead of "816.101 and 817.101". Alabama has agreed that until such corrections are made the State will require adherence to 30 CFR 816.100 and

817.100. The Secretary finds that the proposed corrections and policy statement render the State regulations no less effective than the Federal counterparts.

13.18 State sections 816.46 and 817.46 do not contain design criteria for sedimentation ponds found at 30 CFR 816.46 (e)–(u) and 817.46 (e)–(u). As a condition of approval, Alabama must revise its regulations to include in State sections 816.46 and 817.46 design criteria no less effective than those found in 30 CFR 816.46(e)–(u) and 817.46(e)–(u). Alabama has agreed that until a regulation change is accomplished, the State will not issue any permanent program permits that are inconsistent with the Federal requirements of 30 CFR 816.46(e)–(u) and 817.46(e)–(u). The Secretary finds that the agreed upon regulation change and policy statement render the State regulation no less effective than the Federal counterparts.

13.19 State section 816.64(b)(2)(ii) does not contain the Federal requirement at 30 CFR 816.46(b)(2)(ii) that blasting periods shall not exceed an aggregate of four hours in any one day. Section 515(b)(15)(A) of SMCRA requires blasting according to a schedule. The State's regulations would allow time periods to be listed which would cover almost all hours of daylight and this could not be construed as a schedule. Therefore, Alabama's rule is not in accordance with SMCRA. Therefore, as a condition of approval, Alabama must revise its regulations to provide a requirement consistent with the four-hour aggregate provision of 30 CFR 816.64(b)(2)(ii). Alabama has agreed that until a regulation change is accomplished, it will not issue any permanent program permits that are inconsistent with 30 FR 816.64(b)(2)(ii). The Secretary finds that the agreed upon regulation change and policy statement render the above State regulation no less effective than the Federal counterpart.

13.20 Sections 816.65(i) and (k) of 30 CFR require the maximum ground vibrations from an explosion detonation not to exceed 1.0 inch per second. The State counterpart allows the maximum peak particle velocity to be as high as 1.4 inches per second. Also, the formula and table in the State's 816.65(1) and (2) do not comply with the Federal counterpart. The U.S. District Court for the District of Columbia did not invalidate or remand 30 CFR 816.65(i) in its May 16, 1980, decision on the permanent program rules (*In re: Permanent Surface Mining Regulation Litigation*, (D. D.C. May 16, 1980) CA No. 79–1144 (Round 2)). Therefore, as a condition of approval, Alabama must revise its regulations to reflect the 1.0 inch per second criterion and to adopt a scale distance of 60 in the formula in section 816.65(k)(1) with appropriate corrections to the table in section 816.65(k)(2). Alabama has agreed that until a regulation change is accomplished, it will not issue any permanent program permits which are inconsistent with 30 CFR 816.65(i), (k), and (1). The Secretary finds that the agreed upon regulation changes and policy statement render the above State regulation no less effective than the Federal counterpart.

13.21 At section 817.101 the State has added to its regulations which require that surface areas which are disturbed incident to underground mining be backfilled and graded the approximate original contour, Subsection (c) which gives the Regulatory Authority discretion not to require operators to redistribute fills which have become settled, stabilized and revegetated. SMCRA requires that areas which have been disturbed by surface coal mining (including surface impacts incident to underground mines) shall be backfilled and graded to restore AOC. Section 516 of SMCRA does not exempt any part of an underground operation from this requirement. While the addition could be as effective as the Federal regulation and has merit in that it would prevent redisturbance of partially recovered land, additional safeguards are necessary to prevent misuse of the provision.

Alabama has agreed to interpret existing regulations for the permit reclamation plan to not allow irregular or incongruent contours as a result of long-term spoil disposal. Based on this interpretation, the Secretary finds the State's addition, together with this policy statement, to be no less effective than the Federal counterpart.

Finding 14

The Secretary finds, except as noted below, that the Alabama program demonstrates that the Alabama Surface Mining Commission has the authority under Alabama laws and the Alabama program includes provisions to implement, administer and enforce a permit system consistent with 30 CFR Chapter VII, Subchapter G. This finding is made under the requirements of 30 CFR 732.15(b)(2). Alabama incorporates provisions corresponding to Sections 506, 507, 508, 510, 511 and 513 of SMCRA and Subchapter G of 30 CFR Chapter VII in Title III, Alabama SMCRA Sections 13, 14, 15, 16, 17, 18 and 20 and in the Alabama regulations Subchapter G. Discussion of significant issues raised during the review of the Alabama permitting provisions follows.

14.1 The map scale of 1"-1000' required by the State regulations at 780.14(b) for permit maps was originally considered inadequate for technical review and less effective than the scale required by 30 CFR 771.23(e)(1). Alabama has explained that Alabama Section 780.14 establishes a minimum scale of 1"-1000'. Alabama stated this latitude is necessary because of the three distinctly different types of coal deposits found in Alabama: the Appalachian Plateau, the Valley and Ridge, and the Gulf Coast lignite. Each of these coal deposits when covered under a multi-year permit could cover very large or highly elongated tracts of land. To be limited to a single scale of 1"-500' could create situations that would be less accurate than would be found on a map of a larger scale. Drainage patterns and area may not be adequately represented, and critical physical features could be omitted. It also gives the Regulatory Authority discretion to require a larger scale when needed to clearly show all critical natural and man-made features. The Secretary finds that with proper exercise of discretionary power by the Regulatory Authority, Alabama section 780.14, is no less effective than 30 CFR 771.23(e)(1).

14.2 State Regulations 780.14(a) and 784.14(a) omit the requirement to identify the current use of the buildings which is included in 30 CFR 780.14(a) and 784.14(a) and is needed to ensure public health and safety and to allow the Regulatory Authority to apply the requirement of section 522(e)(5) of SMCRA. This requirement is necessary to identify occupied dwellings or other occupied structures that are within 300 feet of the mining operation. The blasting section does not clearly require the operator to identify the use of buildings; consequently, the blasting sections (State sections 816.65(f)(3) and 816.65(i)) are inadequate to cover or substitute for the omitted material identified in this issue. As a condition of approval, Alabama must revise its regulations to correct the deficiency. Alabama has agreed to require that the "current use of buildings" be indicated on an appropriate map until a regulation change can be accomplished. The Secretary finds that the agreed upon regulation changes and policy statement render the above State regulations no less effective than the Federal counterparts.

14.3 The corresponding sections 780.14 and 784.14 of the Alabama program are less effective than 30 CFR

779.25(k) and 783.25(k). These Federal sections require "sufficient slope measurements to adequately represent the existing land surface configuration * * *" and give criteria for such measurements including (1) angle of inclination, (2) extent, and (3) natural variations. Such measurements are necessary in order to determine the adequacy of the mining plan and to confirm the validity of other data presented. The Secretary finds that the omitted or comparable provisions should be included in the Alabama program. As a condition of approval, Alabama must amend its regulations to include the following language: "* * * sufficient slope measurements to adequately represent the natural premining land surface of the proposed permit area expressed in degrees or percent of slope. Such measurements shall take into consideration natural variations in the land surface". Alabama has further agreed that it will interpret its regulations to include the above language until a regulation change is accomplished. The Secretary finds the above proposed regulation change and interpretation to be no less effective than the Federal counterpart.

14.4 It was originally thought that several essential requirements found in 30 CFR 780.14 and 784.23 had been omitted from the corresponding Alabama Part 780 and 784. The State has pointed out through explanation and presentation of new material at the April 9 meeting that these requirements or their equivalent can be found in other sections and paragraphs of State Parts 780 and 784. Sections 30 CFR 780.14(a) and 784.23(a), "Lands Affected", are covered by State sections 780.14(a)(3) and 784.14(a)(3). Sections 30 CFR 780.14(b)(1) and 784.23(b)(1), "Existing Facilities", are covered by State sections 780.25 and 784.25. Sections 30 CFR 780.14(b)(2) and 784.23(b)(2), "Sequence of Operations", are covered by 780.11(b) and 784.11(b). Sections 30 CFR 780.14(b)(4), 780.14(b)(8), 784.23(b)(4) and 784.23(b)(8), "Coal Storage, Cleaning and Loading Areas" and "Source of Waste", are covered by State sections 780.14(a)(15) and 784.14(a)(15). After considering the explanations and additional material presented by the State at the April 9 meeting, the Secretary finds the above State sections no less effective than the Federal counterparts.

14.5 Section 708.35(a) of the Federal regulations references sections 816.71–816.74. 30 CFR 816.71 covers general requirements for excess spoil disposal. Sections 816.72–.74 cover excess spoil disposal in specialized cases (Valley Fills, Head-of-Hollow Fills and Durable Rock Fills). the Alabama regulations contain only section 816.71, and consequently this is the only reference given in State section 780.35(a). 30 CFR 816.72 includes underdrain sizing criteria and lift thickness limitations which are not included under Alabama section 816.71. State sections 816.72 and .73 were improperly omitted (omission of section 816.74 is proper since it is an option). Therefore, as a condition of approval, Alabama must revise its regulations to include provisions comparable to 30 CFR 816.72–.73 and to reference these provisions at State section 780.35(a). Alabama has agreed that until such time that a regulation change is accomplished, the State will not issue permanent program permits at variance with the excess spoil disposal requirements of the Federal rules (See Finding 13.15 for sections 816.72.–73). The Secretary finds that the agreed upon regulation changes and policy statement render the above State regulations no less effective than the Federal counterparts.

14.6 State sections 778.13(a) and 782.13(a) omit the requirement to include "equitable owners of record" as provided in 30 CFR 778.12(a)(2) and 782.13(a)(2). As a condition of approval, Alabama must revise its regulations to the effect that equitable owners of records found in a standard title search of the standard chain of title will be included. Alabama has agreed that until a regulation change is accomplished, the State will interpret its present regulations to mean that equitable owners of record found in a standard title search of the standard chain of title will be included. The Secretary finds that the agreed upon regulation change and policy statement render the above State regulations no less effective than the Federal counterparts.

14.7 In State section 778.13(d) the refererence to "paragraph (b)(3) of this section" is incorrect since there is no (b)(3). The correct reference should be Regulation 13.14(d). Therefore, as a condition of approval, Alabama must correct this typographical error. The Secretary finds that this correction will render State section 778.13(d) no less effective than the Federal counterpart.

14.8 State section 786.11(d) provides an exclusion of permit information "pertaining to the coal seam itself" which is not found in 30 CFR 786.11(d). This exclusion could be interpreted broad enough to preclude public participation and identification of vital information relative to potential environmental harm. Therefore, as a condition of approval, Alabama must revise its regulations to grant to the Regulatory Authority the mandatory authority to provide to the public information on acid and acid-forming materials in the coal seam. The Secretary finds the agreed upon regulation change will render the above State regulation no less effective than the Federal counterpart.

14.9 State sections 785.18(c)(7) and (d)(7) do not contain references to related State sections comparable to 30 CFR 816.72 thru 816.74 dealing with disposal of excess spoil in valley fills, head-of-hollow fills, and durable rock fills. The omission of section 816.74 is proper since this is an alternative. However, without proper reference to sections 816.72 and 816.73, which have been omitted from the State regulations, specific requirements outlined for head-of-hollow and valley fills regarding underdrain, filter and lift thickness requirements have been omitted. Therefore, as a condition of approval, Alabama must revise its regulations to reference the reincluded sections 816.72.73 in State section 785.18(c)(7). (See Finding 13.15 for reinclusion of section 816.72-.73.) Alabama has further agreed that until a regulation change is accomplished, the State will not issue any permanent program permits that are inconsistent with the Federal requirements of 30 CFR 816.72.73. The Secretary finds that the agreed upon regulation changes and policy statement render the above State regulations no less effective than the Federal counterparts.

14.10 State sections 786.21(a)(1) and (2) do not provide that the permit applicant demonstrate to the Regulatory Authority that the use of existing structures will not result in significant harm to the environment or public health or safety as do 30 CFR 786.21(a)(1)(ii) and (a)(2)(i). Under State section 701.11 the Regulatory Authority may grant an exemption from design standards of Subchapter K, providing performance standards are met, only if they make the findings required by section 786.21. Otherwise, the structure must be reconstructed or modified to meet standards pursuant to a compliance plan as part of the permit application. Consequently, the omission from section 786.21 leaves other section(s) deficient. Therefore, approval of the Alabama program is conditioned upon Alabama amending its regulations to include the equivalent of language in 30 CFR 786.21(a)(1)(ii) and (a)(2)(i)(B). Alabama has agreed that until a regulation change is accomplished, the State will require surface coal mine operators to demonstrate that the use of

existing structures will not result in harm to the environment or impair public health or safety in accordance with 30 CFR 786.21. The Secretary finds that the agreed upon regulation change and policy statement render the above State regulation no less effective than the Federal counterparts.

14.11 Sections 786.19(a) and (b) of 30 CFR require that permit applications to comply with all requirements of SMCRA and the regulatory program. Alabama's section 786.19(a) and (b) require that applications comply only with requirements of its Act. The permit requirements listed in Alabama SMCRA have been detailed by its regulations. Permit applications should abviously meet all of the requirements of the whole program, those set out in the Act and those more fully detailed in the regulations. Alabama has agreed to adhere to and enforce all applicable requirements found in both its Act and regulations. The Secretary finds that the agreed upon policy statement renders the above State regulations no less effective than the Federal counterparts.

14.12 Section 785.21 of 30 CFR and State section 785.21 concern the requirement that coal processing plants and other support facilities be permitted. Alabama's section 785.21 limits this requirement to those facilities located "at or near the mine site" while 30 CFR 785.21 covers all facilities not within the permit area of a specific mine. The U.S. District Court for the District of Columbia (*In re: Permanent Surface Mining Regulation Litigation*, CA 79–1144 (May 16, 1980)) and the Sixth Circuit Court of Appeals (Shawnee Coal Co. v. Andrus, 661 F.2d 1083 (6th Cir. 1981) have both construed SMCRA to cover processing facilities whether or not they are located at or near a mine site. As a condition of approval, Alabama must amend its regulations to eliminate the requirement that such facilities must be "at or near the mine site" before being required to be permitted. Alabama has agreed that until a regulation change is accomplished, the State will exert jurisdictional authority over all coal processing facilities including those not at or near the mine site. (Alabama stated that it reserves the right to litigate this issue). The Secretary finds that the agreed upon regulation change and policy statement render the above State regulation no less effective than the Federal counterpart.

14.13 Section 785.18(d)(9) of 30 CFR requires that before a variance to contemporaneous reclamation requirements may be granted, a permit contain three specified conditions. These specific conditions deal with (i) delineation of the area authorized for variance (ii) identifying substitute requirements and (iii) providing a detailed schedule for compliance. Alabama section 785.18(d) only requires the permits to be granted a variance to have conditions "such as" the three listed conditions. Alabama's Section is less effective than the Federal provision because it does not absolutely require the three conditions specified but allows a permit to contain conditions "such as" the necessary conditions. Therefore, as a condition of approval, Alabama must revise its regulations to require that all three of the specific conditions of section 785.18(d)(9) be met prior to the granting of the variance. Alabama has agreed that until a regulation change is accomplished, it will as a matter of policy not issue any permanent program permits that are inconsistent with the 30 CFR 785.18(d)(9). The Secretary finds that the agreed upon regulation change and policy statement render the above State regulation no less effective than the Federal counterpart.

14.14 State section 786.19 does not include the provision that a determination be made by the Regulatory Authority that the activities proposed by the permit will not adversely affect endangered species. Section 30 CFR 786.19(o) includes such a provision and the Secretary has determined that, under primacy, the endangered species provision is the responsibility of the State. Alabama has stated that, as a matter of policy, it will consult with the appropriate State or Federal agencies to assure that activities would not affect the continued existence of endangered species or result in the destruction or adverse modification of their critical habitats. Based on this policy statement, the Secretary finds that the policy statement renders the above State regulation no less effective than the Federal counterpart.

Finding 15

The Secretary finds that, except as noted below, the Alabama program demonstrates that the Alabama Surface Mining Commission has the authority to regulate or prohibit coal exploration consistent with 30 CFR Parts 776 and 815, and that the Alabama program includes provisions adequate to do so. This finding was made under the requirements of 30 CFR 732.15(b)(3). The Alabama program incorporates provisions corresponding to section 512 of SMCRA and 30 CFR Parts 776 and 815 in Title III, Alabama SMCRA section 19 and in the Alabama Regulations, Parts 776 and 815. Discussion of significant issues raised during the review of the Alabama program follows.

15.1 Section 776.17(b) of 30 CFR prescribes specific conditions necessary for information relative to coal exploration to be considered and treated as confidential. These conditions include (b)(1) Regulatory Authority determination that the information is indeed confidential; (b)(2)—specific guidelines for this determination and; (b)(3)—provisions for both the person desiring confidentiality and the person desiring disclosure to be heard by the Regulatory Authority. State section 776.17 contains no conditions except that the operator submit the request for confidentiality in writing and clearly mark the material confidential. The Secretary finds that conditions comparable to 30 CFR 776.17 (b)(1) and (b)(2) are needed and, while not essential, (b)(3) should also be included in fairness to the operator. It would not be necessary for the Regulatory Authority to determine at the time of submittal whether or not the "marked" information was indeed confidential. It could be placed directly in the "confidential" file. Then, if such information was requested the Regulatory Authority would make the decision. If the Regulatory Authority determined that the information was confidential, it would not be disclosed. If the Regulatory Authority were to doubt its legitimate "confidential" status, a meeting would be held with the operator at which time the operator would have the opportunity to defend the claim of confidentiality. Should the operator refuse the opportunity to meet or otherwise defend the claim to confidentiality or should the operator otherwise fail to successfully convince the Regulatory Authority of the legitimate confidentiality of a given parcel of information, that parcel of information would no longer be considered confidential. The Secretary believes that such conditions as the above may be included in the regulation, but that the final discretionary power as to the legitimacy of a "confidential" claim must rest with the regulatory authority. It is also important that if release or divulgence is forthcoming it should be within a reasonable length of time after the request for the information. The matter of access to confidential information by OSM personnel is not discussed since the Secretary assumes that all authorized OSM personnel will have total access to all State permit exploration, inspection and enforcement related information, whether or not it is labeled confidential.

Therefore, as a condition of approval, Alabama must revise its regulations to include provisions no less effective than the Federal provisions.

Finding 16

The Secretary finds that the Alabama program demonstrates that the Alabama Surface Mining Commission has the authority under Alabama laws and regulations to require that persons extracting coal incidential to government-financed construction maintain information on site consistent with 30 CFR Part 707. This finding was made under the requirements of 30 CFR 732.15(b)(4). The Alabama program incorporates provisions corresponding to section 528 of SMCRA and 30 CFR Part 707 in Title III, Alabama SMCRA section 31 and the Alabama Regulations Part 707.

Finding 17

The Secretary finds, that except as noted below, the Alabama program demonstrates that the Alabama Surface Mining Commission has the authority under Alabama laws to enter, inspect and monitor all coal exploration and surface coal mining and reclamation operations consistent with section 517 of SMCRA and 30 CFR Chapter VII, Subchapter L and that the Alabama program includes provisions adequate to do so. This finding is made under the requirements of 30 CFR 732.15(a)(5).

Provisions corresponding to section 517 of SMCRA and Subchapter L of 30 CFR Chapter VII for inspection and monitoring are found in Title III, Alabama SMCRA sections 24 and 25 and in the Alabama Regulations, Subchapter L. Discussion of significant issues raised during the review of the Alabama program follows.

17.1 Sections 843.11(a) of 30 CFR requires that when a cessation order has been issued because an authorized representative has discovered a situation where a condition creates an imminent danger to the health or safety of the public, or is causing, or can reasonably be expected to cause significant imminent environmental harm to land, air or water resources, but the ceasing of operations will not completely abate the danger or harm, the authorized representative shall impose affirmative obligations on the operator as a part of the cessation order requiring abatement of the condition in the most expeditious manner physically possible. Section 843.11(b) of 30 CFR requires that when an authorized representative issues a cessation order for an operator's failure to abate a violation within the time prescribed, the authorized representative shall require, in the order, that the operator perform certain actions necessary to abate the violation in the most expeditious manner physically possible. These requirements are based on sections 521(a)(2) and (3) of SMCRA which require the aforementioned conditions be ceased or abated "immediately", that unabated violations be remedied "in the most expeditious manner possible", and that "affirmative obligations" be imposed upon an operator to take whatever steps necessary to abate the imminent danger or significant environmental harm.

State sections 843.11(a)(2) and 843.11(b)(2) require that when a cessation order has been issued for whatever reason, "the State Regulatory Authority" shall impose affirmative obligations on the operator. The State believes that an authorized representative may not be eminently qualified to determine in the field what affirmative steps should be imposed.

While the Secretary believes that the State's position has merit, SMCRA requires that a cessation order be issued immediately for imminent dangers or significant environmental harm and that unabated violations be remedied "in the most expeditious manner possible" upon issuance of the order. The State's plan could result in delays in imposing the necessary affirmative obligations. Since consultation with experts before imposing affirmative obligations is desirable, the State may institute internal policies regarding consultation when possible. However, if the supervisor is unavailable or the consultation cannot be otherwise arranged, the authorized representative must be authorized to, and shall impose the affirmative obligations at the time the cessation order is issued. Therefore, as a condition of approval, Alabama must change its regulations, to be consistent with 30 CFR 843.11(a)(2) and (b)(2). Alabama has agreed that until a regulation change is accomplished it will, as a matter of policy, give authorized representative the necessary authority to, and require that authorized representatives impose affirmative obligations and to require the necessary actions to abate violations or the effect of violations in the most expeditious manner possible. The Secretary finds that the agreed upon regulation changes and policy statement render the above State regulations consistent with the Federal counterparts.

Finding 18

The Secretary finds that, except as noted below, the Alabama program demonstrates that the Alabama Surface Mining Commission has the authority under Alabama laws and regulations and the Alabama program includes program provisions for implementation, administration and enforcement of a system of performance bonds and liability insurance, or other equivalent guarantees, consistent with 30 CFR Chapter VII, Subchapter J. This finding was made under the requirements of 30 CFR 732.15(b)(6). The performance bond and liability insurance provisions of sections 507(f), 509, 510, and 519 of SMCRA and Subchapter J of 30 CFR Chapter VII are incorporated in Title III, Alabama SMCRA sections 15, 17, and 21 and in the Subchapter J of the Alabama regulations. Discussion of significant issues raised during the review of the Alabama program follows.

18.1 30 CFR 805.11(a) requires that a factor should be included in the bond amount representing the cost of additional work to be performed by the Regulatory Authority to achieve compliance with revegetation standards in the event the permittee fails to implement the approved alternative postmining land use plan within two years. The State regulations section 807.12(d)(3) do not include this factor. Alabama has agreed to interpret State section 807.12(d)(3) to take into consideration and meet the two-year delay requirement. Based on this interpretation, the Secretary finds that with such an agreement the State program regarding the two-year delay, is no less effective than the Federal counterpart.

In addition the State section 805.11 contains a subsection (d) not found in the Federal § 805.11. This addition consists of a section concerning disposal of excess spoil generated by a current operation on areas which have been previously disturbed but not adequately reclaimed. The previously disturbed area must be included within the currently permitted area, but an additional bond amount is not required. In an attempt to ensure the reclamation of the entire area in the event an operator defaults on his obligations and abandons the job, the State regulation states that the condition of the entire area will be considered before full bond release is granted. Since Federal regulations require that all areas to be used for excess spoil disposal must be bonded, the Secretary is concerned that the State's plan might spread bond amounts too thin, resulting in less rather than more reclamation. However, since the plan has possibilities for increased reclamation activities, the Secretary proposes to allow its implementation on a controlled basis for an appropriate trial period. For a one year trial period,

the State will be allowed to put its plan into effect under the following conditions: (1) Prior to approval of any application involving the above described spoil disposal plan, the State Regulatory Authority must notify the OSM State Office and submit to that Office a report stating the relevant particulars concerning the request indicating that the State approves; (2) the OSM State Office will then review the matter and notify the State within 30 days of its approval or objection; (3) at the end of one year, the State shall submit to the OSM State Office a report on the project; (4) the OSM State office will then review the State report, add data or material as needed and transmit the material to OSM Headquarters; (5) a decision will then be made concerning the success or failure of the trial. It is recognized that a one year trial period may not be sufficient to adequately evaluate the initial results. Consequently the Office may extend this period as needed until sufficient data for appropriate evaluation is obtained. Alabama has agreed to the conditions specified above. Based on this understanding, the Secretary finds that Alabama's commitment to the above conditions renders the Alabama regulation no less effective than the Federal regulation.

Finding 19

The Secretary finds that the Alabama program demonstrates that the Alabama Surface Mining Commission has the authority under Alabama law and provides regulations for civil and criminal sanctions for violations of Alabama law, regulations and conditions on permits and exploration approval in accordance with Sections 518 of SMCRA and consistent with 30 CFR VII, Part 845. This findings was made under the requirements of 30 CFR 732.15(b)(7).

The Alabama program incorporates provisions corresponding to section 518 of SMCRA and 30 CFR Part 845 in Title III, Alabama SMCRA section 26 and in Part 845 of the Alabama Regulations.

Finding 20

The Secretary finds that the Alabama program demonstrates that the Alabama Surface Mining Commission has the authority under Alabama laws to issue, modify, terminate and enforce notices of violations, cessation orders and show cause orders in accordance with section 521 of SMCRA (30 U.S.C. 1271) and with 30 CFR Chapter VII, Subchapter L, and that the Alabama program includes provisions, adequate to do so. This finding is made under the requirements of 30 CFR 732.15(b)(8).

The authority to issue, modify, terminate and enforce notices of violations, cessation orders and show cause orders in contained in Title III, Alabama SMCRA Section 25 and in the Alabama Regulations Subchapter L.

Finding 21

The Secretary finds that the Alabama program demonstrates that the Alabama Surface Mining Commission has the authority under Alabama laws and regulations to provide for designation of areas as unsuitable for surface coal mining consistent with section 522 of SMCRA and 30 CFR Chapter VII, Subchapter F. This finding is made under the requirements of 30 CFR 732.15(b)(9).

Alabama incorporates provisions corresponding to section 522 of SMCRA and 30 CFR Chapter VII, Subchapter F in Title III, Alabama SMCRA section 28, and in the Alabama Regulations Subchapter F.

Finding 22

The Secretary finds that the Alabama program demonstrates that the Alabama Surface Mining Commission has the authority under Alabama laws and the Alabama program contains provisions for public participation in the development, revision and enforcement of the Alabama regulations and program. This finding is made under the requirements of 30 CFR 732.15(b)(10).

Alabama provides authority for public participation in the development, revision and enforcement of the Alabama program throughout the Alabama SMCRA and Coal Surface Mining Regulations.

Finding 23

The Secretary finds that the Alabama program demonstrates that the Alabama Surface Mining Commission has the authority under Alabama laws and the Alabama program includes provisions to monitor, review and enforce the prohibition against indirect or direct financial interests in coal mining operations by employees of the Alabama Surface Mining Commission consistent with 30 CFR Part 705. This finding is made under the requirements of 30 CFR 732.15(b)(11).

Alabama incorporates provisions which prohibit financial interests in coal mining operations in Title I, Alabama SMCRA section 7, in the Alabama Regulations Part 705, and in section 731.14(g)(12) of the Alabama Systems Section.

Finding 24

The Secretary finds that the Alabama program demonstrates that the Alabama Surface Mining Commission has the authority under the Alabama SMCRA section 5 to require the training, examination, and certification of persons engaged in or responsible for blasting and the use of explosives. The State program need contain only sufficient legal provisions to allow promulgation of rules in accordance with section 719 of SMCRA until such time as the Federal rules on blaster certification are promulgated.

Finding 25

The Secretary finds that the Alabama program demonstrates that the Alabama Surface Mining Commission has the authority under the Alabama law and regulations to provide for a Small Operator Assistance Program (SOAP) consistent with section 507 (c) of SMCRA and 30 CFR Part 795. This finding is made under the requirements of 30 CFR 732.15(b)(13).

The Alabama program incorporates provisions corresponding to section 507(c) of SMCRA and 30 CFR Part 795 in Title III, Alabama SMCRA section 15(c) and in the Alabama Regulations Part 795.

Finding 26

The Secretary finds that the Alabama program demonstrates that the Alabama Surface Mining Commission has the authority under Alabama laws and regulations to provide for protection of its employees in accordance with the protection afforded Federal employees under section 704 of SMCRA. This finding is made under the requirements of 30 CFR 732.15(b)(14).

The Alabama program incorporates provisions corresponding to section 704 of SMCRA in Title III, Alabama SMCRA section 26(j).

Finding 27

The Secretary finds that the Alabama program demonstrates that the Alabama Surface Mining Commission has the authority under Alabama law and the Alabama regulations provide for administrative and judicial review of State program actions in accordance with sections 525 and 526 of SMCRA and Subchapter L of 30 CFR Chapter VII. This finding is made under the requirements of 30 CFR 732.15(b)(15).

The Alabama program incorporates provisions corresponding to sections 525 and 526 of SMCRA and 30 CFR Chapter VII, Subchapter L in Title II, Alabama SMCRA section 10 and in Subchapter L of the Alabama Regulations.

Finding 28

The Secretary finds that the Alabama program demonstrates that the Alabama Surface Mining Commission has the authority under Alabama laws, and the Alabama program contains provisions to cooperate and coordinate with and provide documents and other information to the Office of Surface Mining under the provisions of 30 CFR Chapter VII. There is nothing in the Alabama Legislation or regulations which would prohibit dissemination of information to the Office, and the Secretary assumes that all authorized OSM personnel will have total access to all State permit exploration, inspection and enforcement related information, whether or not it is labeled confidential. This finding was made under the requirements of 30 CFR 732.15(b)(16).

Finding 29

The Secretary finds that neither Alabama SMCRA and regulations adopted thereunder nor other laws and regulations of Alabama contain provisions that would interfere with or preclude implementation of the provisions of SMCRA and 30 CFR Chapter VII. This finding is made under the requirements of 30 CFR 732.15(c).

Finding 30

The Secretary finds that the Alabama Surface Mining Commission and other agencies having a role in the program have sufficient legal, technical, and administrative personnel and funds to implement, administer and enforce the provisions of the program, the requirements of 30 CFR 732.15(d) and other applicable State and Federal laws. This finding is made under the requirements of 30 CFR 732.15(d).

Agency and Public Comments for First Comment Period

January 16, 1982–February 16, 1982

Comments have been accepted and considered on Alabama's program resubmission of January 11, 1982 (Administrative Record AL–326A) and information provided by Alabama in connection with a reopened public comment period. Comments from groups or agencies are identified by name but names of individuals have not been used. Comments are organized into seven groups as follows: (I) General, (II) Alabama Law, (III) Definitions, (IV) Designating Lands Unsuitable, (V) Permitting, (VI) Bonding and Insurance, (VII) Performance Standards, and (VIII) Inspection and Enforcement.

I. General

1. the Fish and Wildlife Service (FWS) furnished a Biological Opinion pursuant to section 7 of the Endangered Species Act which stated that the program would not likely jeopardize the continued existence of Endangered or Threatened species or result in the adverse modification of their critical habitat. However, the FWS recommended that the OSM work with Alabama to develop procedures for on-site inspections of the area with regard to endangered, species since the Federal regulations requiring a fish and wildlife plan (30 CFR 779.2 and 780.16) were remanded. FWS also advised that its Biological Opinion extended only to the approval of the program and that another Biological Opinion was needed for OSM's oversight program.

OSM is presently developing regulations to replace the remanded 30 CFR 779.20 and 780.16 and full promulgation along with the subsequent amendment to Alabama's program may eliminate some of the FWS's concern. Pending this revision, the Secretary will request that OSM work with Alabama to ensure that the State is meeting its responsibilities for protection of Endangered and Threatened Species as set out in the Alabama Program. The FWS comments will also be considered in the development of an oversight plan.

2. The Minerals Management Service, United States Department of the Interior, commented that Alabama's general applicability provisions at Part 700.11 would include provisions for State regulation of coal exploration on Federal lands outside a permit area. This requirement, asserts the commenter, has no legal basis because Federal regulations at 30 CFR 730.1 only authorize States to develop a program for Non-Indian and Non-Federal lands. Further, the commenter points out that 30 CFR 700.11(g) clearly states that Chapter VII regulations do not apply to coal exploration on Federal lands outside permit areas.

The Secretary agrees that the scope (i.e., lands covered) of Alabama's regulations is not clearly defined. This lack of clarity may cause some confusion among persons intending to explore for coal on Federal lands. It is not, however, perceived as a major issue nor does the Secretary find that Alabama intended to attempt to contravene Federal regulations at 30 CFR Subchapter D. On the contrary, communications with State Officials indicate an awareness that, upon the Secretary's decision to grant primacy, the State will only have regulatory responsibility on State and private lands, unless the State requests and consummates a State/Federal cooperative agreement under 30 CFR Part 745. Even under an agreement permitting the State to regulate operations on Federal lands, the State would not assume responsibility over certain functions reserved by the Secretary, such as the review and approval of exploration operations on Federal coal lands subject to leasing under the Mineral Leasing Act of 1920, as amended.

3. Drummond Coal Company expressed concern that the Alabama Surface Mining and Reclamation Commission did not consider various proposed changes to the Federal regulatory program. Overlooking these changes could place the Alabama coal industry in a competitively disadvantageous position.

The Secretary maintains that State regulations must be evaluated relative to current Federal regulations and not with proposed or draft regulations. As changes to the Federal requirements are approved, States having primacy will be notified of the changes and will be authorized or directed, as appropriate, to revise their own programs. This will ensure that uniform rules and regulations will exist nationwide providing, to the extent possible, a competitive balance in the coal mining industry.

4. Citizens for Responsible Resources Development (CRRD) commented that Alabama's permanent program submission at section 731.14(d)(1) identifies those agencies to receive notices and copies of new, revised, or renewed permit applications. Absent from this list is the Alabama Water Improvement Commission (AWIC). Because this agency has jurisdiction over NPDES permits needed by most surface mining operators, it seems essential that AWIC be included in the list of recipients.

As pointed out by CRRD, Alabama has omitted reference to the AWIC at the State's 731.14(g)(1). The Secretary finds, however, that Alabama's description at the State's 731.14(g)(9) specifically addresses the role of AWIC in the surface mining program. In particluar, the Alabama Surface Mining Commission (ASMC) will be required to work closely with the AWIC to ensure that all water pollution control programs and plans meet the Federal and State water quality standards.

5. CRRD asserts that the State has failed to demonstrate, in State sections 731.14(j) and 732.15(d), that it has adequate legal staff to ensure that surface mining and reclamation will be

regulated in accordance with State and Federal laws and regulations.

The Secretary finds that the commenter has made some erroneous assumptions in presenting its contention that Alabama does not have sufficient legal staff. The commenter, for example, assumes that 139 operations per year will involve failure to reclaim. This would represent nearly 30 percent of the estimated number of annual violations and involve over 55 percent of the permits issued annually. The Secretary believes that this is far too high for a permanent program which will have bonding requirements encouraging contemporaneous reclamation. Some estimates of the time required to handle some of the legal aspects of enforcement will undoubtedly be high, while others will be low. The State and the Secretary have considered the resulting need for flexibility in the reallocation of attorney time to those areas having time budget deficits.

6. The Sierra Club, Environmental Policy Institute (EPI) and Legal Environmental Assistance Foundation (LEAF) stated that Alabama's regulation 10.109 fails to incorporate the Federal standards for mandatory intervention in administrative review proceedings. Federal regulations at 43 CFR 4.1110 state that a petitioner shall be granted intervention if the petitioner demonstrates that he or she has a statutory right or an interest which is or may be adversely affected. Since a statutory right to initiate or intervene in an administrative action under SMCRA is based upon a person having an interest which is or may be adversely affected, these two tests are actually the same. Discretionary intervention may be granted if other criteria are met. The State's regulation, 10.109, states that a petitioner shall assert that he or she has a statutory right to intervene, or the hearing officer may consider other relevant circumstances (which match the Federal discretionary criteria) in deciding whether or not to grant intervention.

The Secretary assumes that State hearing officers and other State administrative personnel are bound by the State statute. Those petitioners who assert a statutory right of intervention shall be allowed to intervene in the action. Other petitioners may be granted intervention if the hearing officer finds it to be appropriate after considering the criteria listed.

7. The Sierra Club, RPI, and LEAF assert that the State requires interested parties to seek an appeal of a "decision" within thirty days of the date it is mailed, while parties to the "decision" are allowed forty days to seek an appeal. The commenter states that this procedure is contrary to Federal regulations and is unfair.

The Secretary finds the commenter has misunderstood the regulations. While Federal regulations at 43 CFR 4.1162 do allow persons who have been cited for violations to apeal within thirty days of receipt of the enforcement documents and other persons not served with copies of such documents forty days, the Secretary finds that Alabama's plan of allowing everyone thirty days is no less effective than the Federal plan. The intent of the regulations is to allow interested persons and parties sufficient time in which to decide to appeal and draft the necessary documents. Since the documents required to perfect an administrative appeal are not lengthy or detailed in nature, thirty days is sufficient time. The State's regulations allow only thirty days for all persons to appeal enforcement action and to appeal the decision of a hearing officer to the Commission. Thus, the Secretary concludes that the commenter was mistaken concerning the forty days time period mentioned.

8. The Sierra Club, EPI, and LEAF stated that Alabama has not adopted standards for the award of costs and expenses, including attorney and expert witness fees, as required by SMCRA and Federal regulations at 43 CFR 4.1290 *et seq.*

The Secretary agrees with the comment and is requiring that the State amend its statute and regulatory program appropriately See Finding Number 1.2.

9. The Sierra Club, EPI, and LEAF stated that the Alabama regulations are unclear concerning who administrative hearing officers will be and who they will be supervised by. The commenter believes that hearing officers should not be supervised by the Director of the State Regulatory Authority.

The State statute and regulations create a Division of Hearings and Appeals. This Division is supervised by the Director; however, a Chief Hearing Officer will be responsible for the direct supervision of the other hearing officers. The line of authority runs from the Commission to the Director, from the Director to the Chief Hearing Officer and from the Chief Hearing Officer to the individual Hearing Officers. The Division is thus a separate branch within the Regulatory Authority; its employees come under the State Merit System; and section 26(j) of the Alabama SMCRA makes it a criminal offense to willfully resist, prevent, impede, or interfere with any agent of the Regulatory Authority in the performance of the agent's duties. The Secretary finds that Alabama's plan is no less effective than the Federal requirements in ensuring that Hearing Officers are fair and impartial.

10. The Sierra Club, EPI and LEAF commented that the State's program is unclear concerning whom the hearing officer will be in an adjudicatory administrative hearing and that the State program provides for a *de novo* review of agency decisions, which the commenter believes to be contrary to the type of review required by SMCRA.

Section 8 of the Alabama SMCRA creates a Division of Hearings and Appeals within the Alabama Surface Mining Commission. This Division is empowered to hear and determine appeals from regulatory, enforcement or other activities of the Commission. It is further provided that the Director of the Commission shall appoint one or more hearing officers to preside over such appeals. The State's program submittal shows at pages V–128, 131, 136 and 156 that it intends to implement these provisions of the Alabama SMCRA by organizing the Division directly under the Director with a Chief Hearing Officer and three Hearing Officers, all of whom will be attorneys licensed to practice in Alabama.

As to *"de novo"* review, the Alabama SMCRA does authorize a *"de novo"* review of agency actions while SMCRA requires a review on the record for appeals of OSM decisions. As the result of litigation concerning the permanent program regulations, the Secretary proposed and the court accepted a plan whereby *"de novo"* review might be structured so that it is in accordance with SMCRA. The Secretary developed seven criteria which a State must demonstrate that its procedures meet. At a meeting held between OSM and State officials on April 9, 1982, the State demonstrated that its *"de novo"* review procedures satisfy the seven criteria required by the Secretary; therefore, the Secretary finds that Alabama's *"de novo"* review procedures are in accordance with SMCRA. See Finding No. 1.1.

11. Citizens for Responsible Resource Development (CRRD) assert that the Alabama submission did not contain the required legal opinion from the Attorney General or the Chief Legal Officer of the State Regulatory Authority. Instead, the legal opinion provided was signed by an Assistant Attorney General. Further, the commenter pointed out that the required side-by-side comparison of State and Federal regulations was not mentioned in the legal opinion provided and it did not fully explain the legal effect of

differences between the State and Federal requirements.

The Secretary finds that the legal opinion provided by the State correctly reflects the opinion of the Attorney General's Office, even though not personally signed by the Attorney General. The Assistant Attorney General who signed the opinion is assigned to and in charge of the legal affairs of ASMC. Consequently, the Secretary regards him as the Chief Legal Officer of the Regulatory Authority. Further, the side-by-side comparison of State and Federal requirements together with other material available for review was sufficiently developed to permit an evaluation of all of the State requirements to determine if they satisfied Federal law and regulation.

II. Alabama Law

Citizens for Responsible Resources Development (CRRD) provided several comments on the Alabama SMCRA. Following is a synopsis of each of the comments along with the Secretary's response.

1. CRRD asserts that section 2 of the Alabama SMCRA contains language which tends to promote the development of coal resources. Such language, contends the commenter, is inconsistent with comparable wording at section 102 of SMCRA, which emphasizes protection of the environment from the adverse effects of surface mining and provides for a balance between protection of the environment and the nation's need for coal.

The Secretary finds that the commenter's concern results from a misinterpretation of the Alabama SMCRA. For example, the commenter suggests that the language "the extraction of coal by surface mining * * * is an essential and necessary activity which contributes to the economic and material well-being of the State" promotes coal development over protection of the environment. The Secretary does not agree with this view. On the contrary, in reading the full text of section 2 of the Alabama SMCRA it is clear, in his opinion, that the Alabama Legislature recognized and provided guidance for balancing the need for coal mining with protection of the environment.

2. CRRD indicates that section 21(c) of the Alabama SMCRA permits the State Regulatory Authority to approve an alternative bonding system. This, asserts the commenter, is inconsistent with section 509(c) of SMCRA which requires that an alternative system may be adopted only upon approval by the Secretary of the Interior.

The Secretary does not find that Alabama's provision under section 21(c) of the Alabama SMCRA for an alternative bond system is inconsistent with the section 509(c) of SMCRA. An alternative bonding system is authorized by section 509(c) of SMCRA. Before such system may be implemented, however, it must be approved by the Secretary of the Interior, as well as the Regulatory Authority. Since Federal law provides that the Secretary must approve alternative bonding systems, it is unnecessary for State law to repeal this requirement.

3. CRRD asserts that the language of section 21(k) of the Alabama SMCRA is inconsistent with section 519(f) of SMCRA. Sepcifically, the State language provides for public hearings at Jasper, Alabama (Office of the State Regulatory Authority), instead of the State Capitol, as required by SMCRA.

The Secretary agrees that the Alabama wording does not "track" the Federal language exactly. However, the State requirement is believed to be in accordance with SMCRA in providing for opportunity for public hearing and public participation. In fact, because Jasper is closer to the coal mining region, the State requirements may be more effective in providing the public with an opportunity to participate in bond release proceedings. The Alabama provision is in accordance with SMCRA.

4. CRRD points out that section 519(h) of SMCRA requires that a transcript be made available on the motion of any party or by order of the Regulatory Authority. Section 9 of ASMCRA, on the other hand, directs that a transcript be made only when an appeal is taken. The commenter asserts that this is inconsistent with the Federal requirement.

The Secretary does not find that the language differences pointed out by the commenter render Alabama's provision less effective than the Federal requirement. Although section 9 of the Alabama SMCRA specifies that transcripts will only be made available upon appeal, Alabama's implementing regulation at section 10.120 provides much greater flexibility. Here, the transcript must be made available upon appeal or at the direction of the State Regulatory Authority. This discretionary authority, which "tracks" the Federal requirements, provides for reasonable access to transcripts without appeal, while at the same time, protecting the State Regulatory Authority from having to unnecessarily bear the cost of transcribing some hearing records.

5. CRRD notes that section 515(b)(15)(A) of SMCRA requires daily notice to residents and occupiers living within one-half mile of a blasting area prior to blasting. in contrast, comparable provisions of section 22(b)(15)(A) of the Alabama SMCRA allow for a daily notice or audible warnings. In order that the State requirements be equally effective, the commenter suggests that the audible warnings must be heard up to one-half mile distance and persons within range must understand the meaning of the warnings.

The Secretary points out that section 816.65(c) of Alabama's implementing regulations requires that warnings and all clear signals must have an audible range of at least one-half mile from the point of blast. Also this same section specifies that the permittee must notify affected persons of the meaning of the signals through appropriate instructions. The Secretary finds these regulatory procedures consistent with the Federal requirements.

6. CRRD asserts that section 22(b)(15)(E) of the Alabama SMCRA would allow the State Regulatory Authority to promulgate provisions for pre-blasting surveys different from those promulgated by the Secretary.

The Secretary believes that although the Alabama SMCRA at section 22(b)(15)(E) is somewhat more general that the Federal counterpart at section 515(b)(15)(E) of SMCRA, it does not relieve the State of the responsibility for publishing a program that will be no less effective than the Federal requirements. In this regard the State has drafted implementing regulations at Part 816.62 for "Pre-blasting Surveys" which fully recognize the Secretary's provisions mentioned at section 515(b)(15)(E) of SMCRA and published at 30 CFR 816.62. Because Alabama's program satisfies the intended purpose of SMCRA, the Secretary finds the language of the Alabama SMCRA in accordance with SMCRA.

7. CRRD notes that delayed reclamation is authorized by section 515(b)(16) of SMCRA. Such delay, however, is limited only to operations which combine surface and underground mining operations. Alabama SMCRA contains language which would extend delayed reclamation provisions to "other types of mining operations". This, contends the commenter, is inconsistent with SMCRA, because it would permit reclamation delays for operation which involve only surface mining activities.

The Secretary recognizes that the wording "where the applicant proposes to combine surface mining operations with such other operations" (Section 22(b)(16) of the Alabama SMCRA), is somewhat ambiguous. Reasonable interpretation of this wording, however,

would suggest that Alabama intended "other operations" to mean underground mining for the following reasons: First, the term "surface (coal) mining operations" is defined at section 3(t) of the Alabama SMCRA to include the various forms of surface operations. It would, therefore, be redundant to also include such activities, within the meaning of "other operations". Also, the Seretary finds that the terms "surface mining operations" and "other operations", as used in the same sentence, were intended to have opposite meanings, i.e., "surface mining operations" encompasses all stripping activities while "other operations" includes underground mining. For these reasons, the Secretary finds that the Alabama SMCRA is consistent with the Federal requirement.

8. CRRD suggests that the construction of the Alabama SMCRA at section 22(c)(5) is ambiguous as to whether or not the State Regulatory Authority (SRA) has authority to impose certain requirements beyond those specified in Alabama's regulations. If the SRA cannot do so, then the State law, according to the commenter, is less effective than SMCRA.

The Secretary believes the commenter has misinterpreted the provisions of section 515(c)(5) of SMCRA. The Secretary does not believe Congress intended that the SRA must have authority to unilaterally impose permit requirements which do not have basis in law or regulations and are without Secretarial approval. Rather, section 515(c)(5) of SMCRA intends that the State Regulatory Authority develop, have approved, and promulgate regulations which implement the minimum permit requirements of the section 515. In addition, the SRA may (at its discretion) develop, have approved, and promulgate *other* permitting regulations which it deems are necessary to effectively implement and administer a permitting program in the State. The Secretary believes that the State's discretionary authority to promulgate additional requirements is reflected in the State's language and, therefore, provides requirements in accordance with the Federal counterpart.

III. Definitions

1. Citizens for Responsible Resource Development (CRRD) asserts that Alabama's definition of the term "valid existing rights" (VER) is inconsistent with the Federal definition at 30 CFR 761.5. The commenter points out that the State has included language which would only require the permit applicant to demonstrate a "good faith effort" to obtain all permits, instead of having obtained all permits prior to August 3, 1977, as required by the Federal definition. In addition, the State has extended the "good faith effort" test to the haul-roads portion of the VER definition. The commenter contends that these less stringent criteria for determining VER result in less effective protection for the Non-Federal and Non-Indian lands listed under Alabama regulation 761.4.

The Secretary points out that the U.S. District Court, District of Columbia, ruled in Civil Action No. 79–1144 that under the all permits test required under the Federal definition of VER an operator need only demonstrate a "good faith effort" to have obtained the necessary permits and ordered OSM to revise its definition accordingly. (*In Re: Permanent Surface Mining Regulation Litigation*, 14 ERC 1083 (D.D.C. Feb. 20, 1980) (Round 1).)

On Tuesday, November 27, 1979, following the Court's ruling, OSM published notice in the **Federal Register** (44 FR 67942) that the definition of VER had been remanded. Until a revised definition is published, OSM will rely on existing State law to interpret whether the document relied upon establishes valid existing rights and will interpret its definition as requiring a "good faith effort" to obtain all permits. Alabama has exercised this option in drafting its regulations. The Secretary finds that the State requirement is in accordance with the requirements intended by SMCRA in providing equal protection for all categories of land covered by Sections 761.4 of the State and Federal regulations.

2. CRRD stated that Alabama's definition of the term "historic lands" omits the Federal wording "eligible for listing on a State or National Register of Historic Places". Also, the definition does not contain the Federal language "sites having religious or cultural significance to native Americans or religious groups or sites for which historic designation is pending". These omissions, contends the commenter, do not provide protection comparable to the Federal requirements.

OSM suspended the language, "eligible for listing * * *." (**Federal Register**, November 27, 1979 (44 FR 67942–67943)) in accordance with its concession in *In Re: Permanent Surface Mining Regulation Litigation*, Round 1, supra. Regarding the omission of the language "sites having religious or cultural significance * * *", the Secretary has notified Alabama (on April 9—Administrative Record Number AL–347), that similar or equally effective language must be included in the State program before full approval can be granted. See Finding 12.5.

3. Drummond Coal Company indicated that the definition of roads should be consistent with SMCRA. The commenter suggests using the "Interim definition".

It is unclear to the Secretary what the commenter means by "interim definition" of (public) roads. It should be pointed out, however, that the U.S. District Court for the District of Columbia, announced in Civil Action No. 79–1144 that the government conceded that the Federal definition of the term "public road" was inconsistent with SMCRA. (See *In Re: Permanent Surface Mining Regulation Litigation*, Round 2, May 16, 1980, pp. 32–36.) Specifically, the concession was that the Federal definition was found to be too broad, encompassing too many thoroughfares open to the passage of vehicles. A new definition is being drafted. Until promulgated, the Secretary will rely on section 522(e)(4) of SMCRA to interpret the definition of "public road". The Secretary finds that Alabama's proposed definition is consistent with both the Court's ruling and section 522(e)(4) of SMCRA.

IV. Designating Lands Unsuitable

1. Sierra Club, Environmental Policy Institute, and Legal Environmental Assistance Fund commented that Alabama's submission does not show any evidence of the establishment of a data base and inventory system, as required by 30 CFR 760.4 and 764.2. According to the commenters, this process should commence prior to program approval. Alabama indicates at section 731.14(g)(11) that ASMC has in-house data banks covering biological, hydrological, historical, and geological information. ASMC also has access to other literature and registers maintained and/or cataloged by other State agencies. The Secretary, therefore, finds that the State has inventoried and established a data base for processing lands unsuitable petitions.

2. CRRD believes that State regulation 762.11(a) is less effective than the Federal counterpart at 30 CFR 762.11(a) because the State's determination of reclamation feasibility will be done only under the Alabama SMCRA, while the Federal requirement specifies that it must be done under SMCRA, Federal regulations, and the State program.

The Secretary finds that inclusion of the language "Federal regulations and the State program", although clarifying, would be somewhat redundant and, therefore, unnecessary. Further, the

Secretary believes that Alabama's reference to State law necessarily implies that it must also comply with the implementing State regulations. See Finding No. 14.11.

V. Permitting

1. Citizens for Responsible Resource Development (CRRD) stated that Alabama has omitted from the State program, Federal provisions at 30 CFR 776.11(b) and 30 CFR 776.12(a) which would require, among other data, the submission of certain information about the company representative who has on-site responsibility for conducting exploration operations. This, according to the commenter, will place the SRA at a disadvantage in monitoring exploration operations. The Secretary finds that Alabama's requirements concerning information on the exploration operation will be no less effective than the Federal requirement even though there is no provision for giving specific data concerning the company representative who has on-site responsibility for conducting the operation. Further, Alabama believes, and the Secretary finds, that such a requirement could be unnecessarily cumbersome and may be difficult to monitor because of frequent changes in company personnel responsibilities. The State does require the name and other specific data properly identifying the entity responsible for the exploration operation, and will thus know whom to contact if enforcement action is necessary.

2. CRRD points out that Alabama regulations 776.12(a)(3)(i) and 783.12(b) do not address the Federal requirement to include identification of "districts, sites, building, structures or other objects eligible for listing on the National Register of Historic Places". Also, the commenter indicates that the State's use of the language "known significant" may compromise the level of protection for some archeological resources, because it leaves it to the discretion of the operator to determine what is significant.

The Secretary contends that Alabama's regulation, as it concerns National Register sites, accurately reflects the ruling of the U.S. District Court, District of Columbia, of February 1980 (Civil Action No. 79–1144) in which the Federal language "eligible for listing" was suspended. With regard to the terminology "known significant", as used by Alabama, the Secretary does not believe this language gives the operator any discretionary authority to determine significance. Rather, it obligates the operator to include, in his application, sites which have been judged significant by historians and archeologists. Viewed in this context, the Secretary finds that Alabama's regulation provides protection no less effective than to the Federal rule.

3. CRRD stated that Federal regulations require the SRA to disapprove a coal exploration application if the operation will adversly affect sites that are eligible for listing on the National Register of Historic Places. State regulations do not contain a comparable requirement.

The Secretary points out that, as previously indicated, the February 1980 Court ruling in Civil Action No. 79–1144 resulted in the suspension of the Federal wording "eligible for listing". Therefore, the Secretary finds that Alabama's requirement at section 776.13(b)(3) is no less effective than the Federal counterpart, as modified by the Court's decision.

4. According to the CRRD, ASMC 776.17(b) will be less effective than 30 CFR 776.17(b) in providing information to the public. The commenter stated that the Federal rule requires the SRA to determine that data marked confidential is deserving of the classification. State regulations do not require a similar determination.

The Secretary agrees with the commenter and is requiring the State to make program revisions which satisfy the Federal requirement. The Secretary has advised the State that it will not object to permitting the operator to mark information confidential. However, if such information is requested by the public and the SRA suspects that the data is in fact not of confidential nature, the SRA will have to contact the operator who must clearly demonstrate that the data should be withheld from the public. If the operator cannot so demonstrate, then the RA may release the information. See Finding 15.1.

5. CRRD argues that State requirements for permit applications to identify and describe cultural and historic features will not effectively protect these resources, and that Federal regulations are more stringent because they include sites eligible for listing and do not require the significance "test" imposed by the State program.

The Secretary points out that, in February 1980, OSM suspended the Federal language "eligible for listing". Therefore, the Secretary finds that Alabama's regulatory language is consistent with the Court's ruling. Further, Alabama's significance "test" for archeological features is not intended to permit the applicant to determine significance. Rather, the applicant will be required to report those features which have been recognized by appropriate experts and authorities to be important sites.

6. Sierra Club, Environmental Policy Institute, and Legal Environmental Assistance Foundation stated that Alabama in section 778.14 of its regulations limits the information required in permit applications on prior mining activities to five years, since the Federal rules require information on permits subsequent to 1970.

The State rule is identical to 30 CFR 778.14 which requires information on any permits suspended or revoked in the last five years. The Secretary finds, therefore, that the Alabama rule requiring information on permits held during the previous five years requires sufficient information to be no less effective than the Secretary's regulations in meeting section 507(b) of SMCRA.

7. CRRD indicates that Federal regulations at 30 CFR 779.13 and 783.13 require a broader area of environmental study and description than the comparable State regulations, 779.13 and 783.13. Specifically, the State requires study only "on the permit area and off-site areas which may be affected". Federal requirements, on the other hand, include "the permit area, adjacent area, and the general area prior to mining".

The Secretary finds that Alabama's language "* * * permit area and off-site areas that may be affected or impacted" will provide a level of protection no less effective than to the Federal requirement; the State wording "off-site areas that may be affected or impacted" is quite broad and, is no less effective than the Federal language "adjacent area, and the general area prior to mining".

8. CRRD asserts that unlike the Federal requirement at 30 CFR 779.14, State regulation 779.13(b) does not require a description of the physical properties of each stratum within the overburden, Additionally, the commenter points out that there is no State regulation comparable to 30 CFR 779.14(b)(2).

The Secretary points out that a comparison of State regulation 779.13(b) with 30 CFR 779.14 indicates near dentical construction. Both require description of each stratum within the overburden, and the stratum immediately below the lowest coal seam to be mined. With regard to the omission of a State regulation comparable to 30 CFR 779.14(b)(2), it is noted that this requirement is permissive, i.e., the State is not required to adopt a comparable provision.

9. CRRD commented that State regulations 779.13(c)(1) and 783.14(c) do not require a permit applicant to describe the horizontal extent of the water table and aquifers for the proposed permit and adjacent area; Federal regulations at 30 CFR 779.15(a)(1) and 783.15 do.

The Secretary contends that the use of the terminology"horizontal extent of the water table and quifers" is ambiguous and redundant. Federal requirements 30 CFR 779.15(a) and (a)(1) and 30 CFR 783.15(a) and (a)(1) are intended mean that the applicant must describe the horizontal extent of water resources within the proposed permit area and adjacent area. Alabama's regulation satisfies this intent by requiring a description for "the permit area and off-site areas"

10. CRRD contends that the State does not require that a permit application contain a description of the recharge, storage, and discharge characteristics of aquifers and the quality and quantity of ground waters as do Federal regulations 30 CFR 779.15(b) and 783.15(b).

The Secretary finds that State regulations at sections 779.3 (c), (d), and (e) and 783.13 (c), (d), and (e) will effectively satisfy the information needs concerning recharge, storage, and discharge characteristics of aquifers and the quality and quantity of ground water. Sections 779.13(c)(5) and 783.13(c)(5), for example, require rather specific data on ground water quality. Similarly, sections 779.13(e) and 783.13(e) will make it necessary for the applicant to have data on recharge, storage, and discharge characteristics in order for him/her to reach a determination on hydrologic consequences.

11. CRRD pointed out that ASMC 779.13(d) and 783.13(d) require that a permit application describe only important impoundments within the proposed permit area and off-site areas. The commenter stated 30 CFR 779.16 and 783.16(a) have much broader coverage, requiring the description and location of all ponds within the proposed permit and adjacent areas.

The Secretary contends that Alabama's use of the term "important" clarifies ambiguities in the Federal requirement. That is, literal interpretation of 30 CFR 779.16 and 783.16(a) would mean that the applicant would have to describe every pond, regardless of size, located in the proposed permit and adjacent area. The Secretary intends only that those ponds or impoundments which have functional uses be identified and described. The Secretary finds that Alabama's requirement to specifying that only "important impoundments" be included, is no less effective than the Federal provision.

12. CRRD asserts that Federal requirement at 30 CFR 779.16(b)(2)(vii) and 783.16(b)(2)(vii) allow the SRA to request "other relevant data from a permit applicant". The State does not include a comparable provision.

The Secretary does not agree with the comment and points out that Alabama has exercised its option to include additional requirements. Paragraph 779.13(d)(3)(vi) and 783.13(d)(3)(vi), which concern baseline acidity, are State requirements which have no direct Federal counterpart. Likewise, 779.13(d)(4) and 783.13(d)(4) of the Alabama regulations are additional requirements, authorized by 30 CFR 779.16(b)(2)(vii), and 783.16(d)(2)(vii), respectively.

13. CRRD stated that Federal regulations at 30 CFR 779.20 and 783.20 require that the permit contain information on fish and wildlife resources. Alabama's regulations do not. In a related comment, Drummond Coal Company stated that the fish and wildlife section should be modified to be more consistent with SMCRA. Drummond did not provide further detail.

The Secretary points out that the U.S. District Court, District of Columbia, in *In Re-Permanent Surface Mining Regulation Litigation Round 1, Sup.* ruled that the permit and bonding sections of SMCRA did not authorize the Secretary to require applicants to submit the fish and wildlife information at 30 CFR 779.20, 780.16, 783.20, and 784.21. In that the Federal regulations have been suspended, it is not necessary for Alabama to include such provisions in the State Program.

14. CRRD, Sierra Club, Environmental Policy Institute, and Legal Environmental Assistance Foundation noted that Federal regulations at 30 CFR 779.21 and 783.21 require permit applicants to provide adequate soil survey data for the proposed permit area; State regulations do not contain this requirement.

The Secretary points out that Federal regulations 30 CFR 779.21 and 783.21 were remanded by the Court in *Re: Permanent Surface Mining Regulation Litigation,* Round 1, supra.extend they require soil survey information for lands not qualifying as prime farmland. For soil investigation and survey of prime farmland, see Alabama regulation 779.27.

15. CRRD commented that State regulations 780.11 (c) and 784.11 (c) do not include requirements that a permit application contain a narrative explaining the construction, modification, use, maintenance, and removal of dams, embankments, and other impoundments; overburden and topsoil handling and storage areas and structures as do Federal regulations at 30 CFR 780.11 (b) and 784.11 (b).

The Secretary finds that the State has deleted the requirement regarding dams, embankments, and other impoundments, because it would be redundant with State regulations 780.25 and 784.25. The Secretary agrees with this deletion and believes the State's format is no less effective than the Federal counterpart. Also, the Secretary agrees with Alabama that "overburden and topsoil handling and storage areas and structures" are not "facilities", as implied by the Federal provision. They do not require design criteria and very little, if any, maintenance. Plans for their "removal" would be in accordance with section 816.24 and 817.24 of Alabama's regulations.

16. CRRD pointed out that 30 CFR 779.24(i) requires a map showing the boundaries of any cultural or historic resources eligible for listing in the National Register of Historic Places. The State program excludes this provision. CRRD further commented that a map showing the boundaries of all known archeological sites should be included in the permit application. State regulations only require the mapping of known significant archeological sites. Finally, the commenter notes that 30 CFR 779.24 (g) specifies that the location of water supply intakes must be mapped and included in the permit application. The State program has no comparable requirement.

The Secretary points out that the Federal wording "eligible for listing" was suspended by OSM. Therefore, Alabama's regulation at 780.14(7) is consistant with the Court's decision. Regarding the commenter's concern that Alabama omitted the requirement to show locations of water intakes, the Secretary points out that Alabama's regulation 780.14(a)(5) combines Federal requirements 30 CFR 779.24(e) and 779.24(g). Although Alabama's wording is different, the Secretary finds that it effectively covers the requirement for showing the location of water supply intakes.

17. CRRD commented that the State program does not contain requirements for maps and cross-section drawings of measures to be taken to ensure the protection of the hydrologic balance, as required by 30 CFR 780.21.

The Secretary points out that Alabama has recombined several parts and sections in an apparent effort to

consolidate and improve organization. The requirements of 30 CFR 780.21 are found in State section 779.13 with most of the requirements contained in 779.13 (g). The Secretary finds that although reorganization has occurred, all necessary requirements are included and that the applicable Alabama sections are no less effective than the Federal counterparts.

18. Sierra Club, Environmental Policy Institute, and Legal Environmental Assistance Foundation stated that Alabama omitted certain mapping requirements for transportation facilities that are required by 30 CFR 780.37 and 784.37.

Alabama regulation 780.14 provides for an operation plan permit map(s). Item (a)(25) of this section specifically requires, among other things, the mapping of haul roads within the permit area. The Secretary finds that these mapping requirements are no less effective than the provisions of Federal regulations at 30 CFR 780.37 and 784.37.

19. CRRD noted that the State program completely omits the information required to be submitted by 30 CFR 783.14(a)(1) with an underground mining permit application.

The Secretary points out that Federal regulation 30 CFR 783.14(a)(1) was suspended December 31, 1979 (44 FR 77455) insofar as it requires a geologic description of the strata down to and including the strata immediately below any coal seam for areas to be affected only by "surface operations and facilities", where no removal of overburden down to the level of the coal seam will occur. Geologic descriptions will, however, continue to be required for areas where overburden is being removed to the level of the coal seam and for certain specified "surface operations and facilities" where required by other regulatory requirements. See 30 CFR 783.25, 784.16(e) and 784.24(b). Considering the above suspension, the Secretary finds that Alabama's requirements are no less effective than the Federal rules.

20. CRRD indicated that 30 CFR 784.14 requires a reclamation plan to contain a detailed description of the measures to be taken during and after underground mining to ensure protection of the hydrologic balance. State regulations do not require the reclamation plan to include such a description.

The Secretary points out that Alabama has recombined several parts and sections in order to consolidate and improve organization. The requirements of 30 CFR 784.14 are found in State section 783.13, with most of the requirements contained in 783.13(g). The Secretary finds that although reorganization has occurred, all necessary requirements are included and that the applicable Alabama sections are no less effective than the Federal counterparts.

21. CRRD contended that Alabama's regulations at 784.23(c) allow an underground mining operator to first address the proposed postmining land use of an area in a permit revision while Federal regulations contain no similar provisions. The commenter states that Alabama's plan would preclude consideration of the economic and technical feasibility of alternative postmining land uses which, according to the commenter, must precede mining to ensure the viability of the project.

The comment is incorrect in several respects. this issue was litigated as a part of the exhaustive review of the Federal permanent program regulations conducted by the U.S. District Court, District of Columbia. The Court held that, under Federal regulations, an underground mining operator could, near the end of the coal extraction phase of the operation, apply for an alternative postmining land use via the permit revision procedure. The court, therefore, ruled, quoting from a brief filed by the Secretary, "Hence, for underground, as for surface mining, the operator may wait until a reasonable time prior to the end of the coal extraction before applying for the alternative postmining land use."

Alabama's regulations require that a reclamation plan be filed as a part of the permit application and that the plan contain, inter alia a detailed estimate of the cost of reclamation with supporting calculations and a description of measures to be used to maximize the use and conservation of the coal resource. Thus, during the permit review process, the SRA will be able, by reviewing the reclamation plan and the operations plan, to make determinations of the economic and technologic feasibility of the operation and ensure that the site will be reclaimed to the levels required by law. If during the life of the operation, which often is many years in the case of underground mining, an alternative postmining land use becomes available, the operator may apply for a permit revision. At that time, the SRA will determine the viability of the alternative postmining land use. The Secretary, therefore, finds that Alabama's plan is no less effective than Federal requirements.

22. CRRD commented that Alabama regulation 785.10 would authorize off-site placement of spoil in abandoned mine lands with no bond coverage being required. According to the commenter, this will encourage operators to spoil on abandoned mine areas without providing for erosion control or other mitigating measures.

The Secretary finds that Alabama's provision would provide added incentive for operators to reclaim abandoned lands. Indiscriminate spoiling and lack of environmental protection, as suggested by the commenter, can be controlled through the permit terms and conditions and a diligent inspection and enforcement program. It is unlikely that an operator would jeopardize continued operations by knowingly and willfully violating permit provisions. This provision will also be implemented under a controlled plan with OSM oversight, further insuring that sound reclamation is enhanced rather than inhibited. See Finding 18.1.

23. CRRD commented that 30 CFR 785.13(h) requires the SRA to make several written findings before permitting an experimental practice. The State's regulations at 785.13(h) require only that the applicant make certain demonstrations; there is no requirement that the SRA make written findings. The Secretary agrees that the SRA is required to make the written findings. However, the Director of OSM must approve all experimental practices. The Director of OSM will not approve experimental practices prior to written findings by the SRA. Since the written finding by the SRA must be made prior to approval by OSM, the Secretary finds that the Alabama regulation is no less effective than the Federal counterpart.

24. CRRD noted that Federal regulation 30 CFR 785.16(c)(4)(iii) requires approval by the appropriate State Environmental Agency of an applicant's plan which demonstrates that a variance from approximate original contour will improve the watershed. State regulations do not require approval by an appropriate State Environmental Agency.

Although not specifically stated, the appropriate agency is the Alabama Surface Mining Commission; therefore, since the SRA must approve every variance the necessary approval is implicit.

25. CRRD commented that 30 CFR 785.18(d) requires the SRA to make specific written findings before issuing a permit which contains a variance from contemporaneous reclamation. The commenter further stated that the State regulations at 785.18(d) require only that the applicant make certain demonstrations; there is no requirement that the SRA make written findings.

The Secretary agrees that the SRA is required to make the above mentioned

written findings. However, written concurrence from MSHA is required before the variance can be approved. MSHA will not approve variances without written findings from the SRA. Since the written finding must be made by the SRA prior to the concurrence by MSHA, the Secretary finds that the Alabama regulations are no less effective than the Federal counterpart.

26. CRRD commented that 30 CFR 785.20(c) requires that the SRA to make a written finding that in addition to meeting all other applicable requirements, an augering operation will be conducted in compliance with Part 819. The State's regulations at 785.20(c) require only that no permit shall be issued unless the operation will be conducted in compliance with Part 819; there is no requirement that the SRA make a written finding.

The Secretary points out that the State regulations require compliance with Part 819 and all applicable requirements of Subchapter G prior to permit approval. This requirement is considered no less effective than the Federal counterpart. With regard to the written finding, the Secretary finds that the SRA's approval of the application constitutes a written finding that all provisions of Part 819 and Subchapter G have been or will be met; and that State regulation 785.20(c) is no less effective than 30 CFR 785.20(c).

27. Sierra Club, Environmental Policy Institute, and Legal Environmental Assistance Foundation suggested that Alabama's rules at 786.12 be changed to assure the public of a minimum thirty day comment period after the RA determines that a permit application is complete.

Based on the wording of Alabama regulation 786.11(a), newspaper notices will not be published until a complete permit application is filed with the SRA. Therefore, the Secretary interprets the State rules to mean that the public will have thirty days from the last newspaper notice to file comments on a complete application.

28. CRRD commented that 30 CFR 786.17(a)(2) requires the RA to determine the adequacy of the fish and wildlife plan submitted by the applicant in consultation with State and Federal fish and wildlife management agencies. The State program does not include a comparable requirement.

The Secretary points out that, because of the Courts decision in *In Re: Permanent Surface Mining Regulation Litigation*, Round 1, supra, a fish and wildlife plan is not required by Federal regulations. Therefore, Alabama is not obligated to require such plans from permit applicants, unless otherwise required by State law.

29. CRRD contended that Federal regulation 786.19(o) specifies that no permit or revision application will be approved unless the RA finds in writing that endangered and threatened species will not be adversely affected. There is no similar provision in the State's program.

The Secretary points out that in developing an operating plan, the applicant will be obliged to comply with the performance standards for protection of fish and wildlife and related environmental values (State rule 816.97). The applicant's operating plan must also include maps locating any threatened or endangered species (State rule 780.14(11)). Information in the operating plan, which is part of the permit application, will be used by the SRA to determine if the mining operation will affect threatened and endangered species. Approval or denial of the permit will be based on whether "the applicant has demonstrated that * * * operations * * * can be feasibly accomplished under the * * * operations plan contained in the application." (See State regulation 786.19(b)). The Secretary finds that the latter provision adequately includes the more specific Federal requirement at 30 CFR 786.19(o), and assumes that permits will not be issued which will adversely affect threatened or endangered species.

30. According to CRRD, Alabama's definition of self-bonding (State rule 700.5) is less comprehensive than the Federal definition at 30 CFR 800.5. State wording requires only the permittee to execute the indemnity agreement.

The Secretary finds that Alabama has adequately satisfied the Federal requirement through its definitions of the terms "permittee" and "person". See State regulation 700.5. Specifically, Alabama's definition of "permittee" is quite broad, effectively including (through the use of the term "person") individuals, partnerships, associations, etc. Thus, execution of the indemnity agreement by the "permittee", as used in Alabama's program, would have broader meaning and is no less effective than the Federal requirement.

31. CRRD asserts that State regulation 785.10, which permits off-site spoil placement on abandoned surface mine lands without additional bond coverage, will not promote reclamation and may result in spending bond money on lands outside the permit area.

As previously noted (*Permitting* Comment Number 22), the Secretary finds that Alabama's provision for placement of spoil on abandoned mine lands will encourage reclamation of these areas, thus relieving the burden on abandoned mine land reclamation funds. Assurance that operators will reclaim such areas which are required to be included in their permits, will be provided through rigid inspection and enforcement of the permit terms and conditions. This provision will be implemented under a controlled plan, with OSM oversight, further insuring that sound reclamation is enhanced, rather than inhibited. See Finding 18.1.

32. According to the Sierra Club, Environmental Policy Institute, and Legal Environmental Foundation the Federal rules at 30 CFR 788.12(a)(1) require the State Regulatory Authority (SRA) to set parameters in the program for determining what constitutes a significant departure from the approved mining methods.

The Secretary finds that the State has established the required parameters in State sections 788.12(a)(3), (b)(2), and (d), and finds the regulations no less effective than the Federal provisions.

VI. Bonding and Insurance

1. CRRD stated that several of Alabama's bonding requirements, specifically those at State sections 806.12(e)(6)(iii); 806.12(f)(8)(vi)(c); 806.12(g); 806.12(g)(3); 807.11(c); 807.11(h); and 807.12(e) are less effective than their Federal counterparts.

With some exceptions, the Secretary finds that Alabama's program includes provisions for implementation, administration, and enforcement of a system of performance bonds and liability insurance no less effective than 30 CFR Chapter VII, Subchapter J. See Finding 18.1.

2. Drummond Coal Company suggested that bond forfeiture should be based on the failure of reclamation and not on all the performance standards.

The commenter's concern is not clear to the Secretary because they do not focus on specific sections of Alabama programs. In reviewing section 808.13(a) of Alabama's program, however, the Secretary finds that the "criteria for (bond) forfeiture" listed are nearly identical in wording to those required by the Federal regulations at 30 CFR 808.13. Those criteria listed would require forfeiture because the permittee has indicated an inability to comply with State and Federal surface mining laws.

3. CRRD asserts that Alabama's program would entitle the Alabama Water Improvement Commission (AWIC) to make comments on proposed bond releases. The requirements at State regulation 807.11(b) and (c) however, do not provide that the AWIC receive notice of such pending actions,

except for the newspaper notice which is inadequate to provide AWIC with an opportunity to comment.

The Secretary finds that the newspaper notice required under section 807.11 along with the RA's obligation to coordinate and consult with AWIC (See State section 731.14(g)(9)) will ensure that AWIC has opportunity to comment on bond release actions.

VII. Performance Standards

1. CRRD asserts that the State has no statutory authority to "strike a balance between the protection of the environment and agricultural productivity and the nations need for coal", as stated at ASMC 810.2(j).

The Secretary finds that the State has rightfully recognized an obligation to enhance the economic well-being of the State by contributing to the nation's coal needs, and that sufficient statutory authority exists to support this regulation (See the Alabama SMCRA section (2)(a) and (b)). In Section 810.2(j), the State merely provides notice that its obligations to the people of Alabama to protect the State's environment and agricultural productivity will be balanced with economic interests and the development of its coal resources.

2. CRRD argued that the State restriction at sections 815.11 and 815.13 on disturbing more than one-half acre of land in exploration operations should be an alternative limitation, not an additional one. The commenter, therefore, suggests replacing the word "and" with the word "or".

The Secretary points out that the corresponding Federal wording at 30 CFR 815.11 and 815.13 uses "and" rather than "or". However, by adding the one half (½) acre condition, the State has made possible two cases which are not covered by either State section 815.11 or 815.13. These are cases in which: (1) Less than ½ acre is disturbed and more than 250 tons of coal are removed and (2) more than ½ acre is disturbed and less than 250 tons of coal are removed. The first of these two cases is not considered likely to occur. The thickness of coal seams in Alabama indicates that removal of more than 250 tons would involve disturbance of more than ½ acre. The second case is more substantive since it would be possible that more than ½ acre could be disturbed without removing 250 tons. The Secretary assumes that the two cases were not covered by Alabama due to an oversight. The Secretary further assumes that should either of the above cases occur the SRA will regulate the situation as coal exploration or as a surface coal mining operation, as appropriate. Thus, the Alabama regulation is not less effective than its Federal counterpart.

3. CRRD pointed out that 30 CFR 815.15(a) requires that habitats of unique value for fish, wildlife, and other related environmental values shall not be disturbed. The commenter noted that State regulation 815.15(a) is more permissive, requiring that habitat not be "unnecessarily" disturbed.

The Secretary agrees with the comment that the word "unnecessarily" renders the section less effective than the Federal counterpart. The Secretary is conditioning approval of the program upon a revision to the State regulations to replace the word "unncessarily" with the term "significantly". This change will eliminate the permissiveness suggested by the commenter. See Finding 13.1.

4. CRRD noted that 30 CFR 816.11(c)(1) requires the posting of signs at each point of access to a permit area from public roads. State regulation 816.11(c)(1), on the other hand, only requires the posting of signs at each "primary" point of access to the permit area.

The Secretary finds that Alabama's use of the term "primary" clarifies which access points need to be posted with signs. Literal interpretation of the Federal rule, for example, would require posting signs at all paths, trails, fire breaks, roads, etc. that provide access from public roads. The Secretary did not intend that access, not used by the public, should be so marked. Rather, the posting of signs is necessary only on roads, trails, paths, etc. which are commonly used by the public. Such access points are logically designated as "primary" access points by Alabama.

5. CRRD contends that Alabama regulation 816.22(e) would allow a permit applicant to determine acceptability of a soil substitute, rather than the SRA, as required by 30 CFR 816.22(e). The Secretary does not find the State has relieved itself of any responsibility for approving suitable soil substitutes. Although the State has placed the burden of proof on the applicant, it remains the sole responsibility of the SRA to review the material submitted by the applicant and to make a final determination to approve or disapprove the soil substitute proposal; the applicant cannot reach a unilateral determination nor can he proceed with the proposal without proper authorization from the SRA.

6. CRRD made several comments which suggested that State rules 816.41(d)(3); 816.42(a)(2); 816.42(a)(3)(ii); and 816.46(h) address only a limited number of pollutant parameters for water quality. The commenter suggested that State and Federal effluent limitations are more comprehensive and should be required in the State's program. The Secretary believes that the commenter has interpreted the State's regulations too narrowly. The Secretary points out that the general requirements of Alabama regulation 816.41(c) expressly prohibit violation of any Federal and State water quality laws, regulations, standards, or effluent limitations. Although worded differently, the Secretary finds that Alabama's regulation will be no less effective than 30 CFR 816.41(d)(3); 816.42(a)(2); 816.42(a)(3)(B) and 816.46(u) in protecting water resources.

7. CRRD indicated that 30 CFR 816.42(a)(6) requires a permittee to meet specific effluent limitations, regardless of the origin of the drainage entering the permittee's sediment pond. There is no comparable State provision. The Secretary finds that Alabama regulation 816.42(a)(6) is no less effective than the Federal requirement. Alabama's rule states that "Discharges of water disturbed by mining activities shall be made in compliance with all applicable effluent limitations guidelines for coal mining". The State takes the position that all point source discharges, including "mixed source" discharges, must meet the applicable provisions of State and Federal laws and regulations.

8. Sierra Club, Environmental Policy Institute, and Legal Environmental Assistance Foundation commented that Alabama's reference to compliance with State and Federal effluent limits is unclear. The commenters asked that Alabama regulations 816.42(a)(6) and 817.42(a)(6) be clarified to ensure that the numerical limits established by 30 CFR 816.42(a)(7) be met.

The Secretary finds that Alabama's requirements will be no less effective than the Federal rules. State compliance with the minimum State and Federal effluent standards will be monitored in the Secretary's oversight program and defects will be corrected accordingly.

9. CRRD noted that 30 CFR 816.44(a)(1) requires that stream diversions be approved by the RA and the State regulations do not have a similar provision.

The Secretary points out that Alabama's regulation 816.44(a)(1) specifies that the diversion must meet the requirements of State regulation 816.57(a). This section, in turn, indicates that no land within 100 feet of a perennial stream or intermittent stream shall be disturbed by surface mining activities unless approved by the RA. The Secretary, therefore, finds that the

content of Alabama's regulations provides protection no less effective than the Federal requirement.

10. CRRD pointed out that Federal regulation 30 CFR 816.45(b)(2) includes the sediment control method, stabilization of backfill material, to promote a reduction in the "volume" of runoff. State regulations, in contrast, address "velocity" of runoff.

The Secretary finds that the intent of 30 CFR 816.45(b)(2) is to identify sediment control measures which can be employed to prevent additional contributions of sediment to streamflow or to runoff outside the permit area. The reduction in "velocity" of runoff will achieve this by: (1) Reducing the sediment carrying capacity of flow and (2) reducing the volume of water and total sediment passing over the permit area. For these reasons, the Secretary finds that Alabama's wording at section 816.45(b)(2) will be no less effective than the Federal requirements in achieving the goal of reducing the amount of sediment reaching water bodies off the permit area.

11. Several CRRD comments and a Sierra Club (et al.) comment pointed out that the State program omits Federal requirements for sedimentation pond sediment storage, minimum detention time, dewatering devices that meet certain criteria, and sediment removal. These commenters contend that the omissions result in a State program that is less effective than Federal regulations at 30 CFR 816.46(b); 816.46(c); 816.46(d); and 816.46(h).

The Secretary points out that, as a result of the Court's decision in *In Re: Permanent Surface Mining Regulations Litigation*, Round 2, supra, OSM published notice at 44 FR 77452, December 31, 1979, that portions of the Federal requirements noted above, concerning sediment pond design capacity and pond size, detention capacity, dewatering, and sediment removal, were temporarily suspended. Certain portions of the Federal pond design requirements, however, have not been suspended. To the extent than Federal requirements remain in effect, State programs must contain requirements that are no less effective that the Federal requirements. The Secretary agrees with the comment and is requiring the State program to contain the prerequisite pond design criteria. See Finding 13.16.

12. CRRD and the Tennessee Valley Authority (TVA) commented that Alabama's section 816.48(c) does not require a 30 day time limit for burying or treating all acid-forming or toxic-forming spoil. The commenters indicated that this will result in less effective protection than that provided by 30 CFR 816.48(c).

The Secretary does not find that the 30 day limit for burying or treating acid-forming or toxic-forming spoil is paramount to achieving a high-level of environmental protection. More important is the physical isolation of these materials from the elements. Alabama's program adequately satisfies this latter requirement through its provisions at State section 816.48(c) that any problem spoils which are to be stored, must be placed on impermeable material and protected from erosion and contact with surface water.

13. CRRD asserted that permanent impoundments should not be allowed unless the discharge from the impoundment meets effluent limitations, not water quality standards, as provided by State rule 816.49(a)(1) and 30 CFR 816.49(a)(1).

The Secretary suggests that the commenter is interpreting the State and Federal requirements too narrowly, particularly the language "water quality standards". This wording has much broader connotation when considered in conjunction with other regulations at Part 816. Specifically, section 816.41(c) of the State and Federal rules state that "in no case shall Federal and State water quality statutes, regulations, standards or effluent limitations be violated."

14. CRRD pointed out that 30 CFR 816.49(h) requires a qualified, registered professional engineer to certify all dams and embankments annually. The State does not include a comparable requirement in its program. In a related comment, Sierra Club, Environmental Policy Institute, and Legal Environmental Assistance Foundation stated that Alabama's program does not require that some dams and embankments be inspected by a qualified professional engineer.

The Secretary agrees with the comments. As a condition of approval, Alabama is required to amend its program to provide that all dams and embankments meeting the criteria for regulation under 30 CFR 77.216(a) shall be routinely inspected as provided in 30 CFR 77.216–3 and that all inspection reports be kept available for inspection at the mine site. Additionally, the State is to amend its program to require that dams and embankments be certified annually by a qualified registered professional engineer and that such reports and certifications be filed with the State Regulatory Authority. See Finding 13.10.

15. CRRD contends that State rule 816.52(b)(2) and 30 CFR 816.52(b)(2) should allow for coordinating the approval to remove water quality or flow control systems with agencies other than the SRA.

The Secretary finds that the coordination suggested by the commenter is not precluded by the referenced requirements. On the contrary, these requirements merely identify an option to the SRA for removing certain systems. Before exercising such an option, however, the SRA will need to observe its responsibilities under its regulations to coordinate these activities with other affected agencies.

16. CRRD commented that discharges to ground water in underground mine workings require a permit from the Alabama Water Improvement Commission (AWIC) and must meet the permit limits of the AWIC. Alabama's regulation 816.55(b) should, therefore, provide that the SRA must coordinate with the AWIC when approving any discharges to underground mine workings.

The Secretary points out that State section 731.14(g)(9) requires that the AWIC be responsible for issuing NPDES permits. The ASMC will work closely with the AWIC to ensure that all water pollution control programs and plans meet the Federal and State quality standards.

17. CRRD commented that Federal regulation 30 CFR 816.64(b)(2)(ii) limits blasting to a maximum of four hours per day. State rule 816.64(b)(2)(ii) does not contain a similar limitation.

The Secretary agrees with the commenter. As a condition of approval, the State is required to amend its program so that blasting may be performed only for an aggregate of four (4) hours of any given day. See Finding 13.19.

18. Sierra Club, Environmental Policy Institute, and Legal Environmental Assistance Foundation stated that Alabama has omitted the requirement contained in Federal rules that blasting not be conducted to within 500 feet of certain facilities.

The Secretary points out that on August 4, 1980, 30 CFR 816.65(f) and 817.65(f) were suspended insofar as they restrict blasting at distances greater than 300 feet from a dwelling or other structure, or from flammable facilities and water lines (See 45 FR 51549, August 4, 1980). Alabama's program submission "compensates" for the suspended language by requiring a blasting plan. The Secretary, therefore, finds that Alabama's requirements are no less effective than the Federal regulations.

19. CRRD, Sierra Club, Environmental Policy Institute, and Legal Environmental Assistance Foundation noted that 30 CFR 816.65(i) allows a 1.0 inch per second particle velocity. Comparable State rule 816.65(i) would permit a 1.4 inch per second velocity. Also, the weight of allowable explosives under ASMC 816.65(1) is greater than under 30 CFR 816.65(1). These less stringent requirements, argue the commenters, will increase the risk of blasting damage.

The Secretary agrees with the comment. As a condition of approval Alabama is required to revise its program to provide for a maximum peak particle velocity of 1 in/sec and to make appropriate adjustments in the scale distance formula and resulting table. Finding 13.20.

20. CRRD argues that ASMC 816.68(a) is less effective than 30 CFR 816.68 because the State requirement does not make blasting records available to the public.

The Secretary agrees that Alabama's regulations are silent with regard to the availability of blasting records. The Alabama SMCRA at section 22(b)(15)(B), however, provides that blasting logs will be maintained for at least three years and will be made available for public inspection upon request. The Secretary finds that since the State's statute specifically provides for the public availability of blasting records and the State regulations do not conflict, the statutory provision governs, and Alabama's program is in accordance with SMCRA.

21. Sierra Club, Environmental Policy Institute, and Legal Environmental Assistance Foundation assert that Alabama fails to adopt standards for the disposal of excess spoil consistent with 30 CFR 816.71. In particular, point out the commenters, Alabama allows disposal of coal processing wastes in head-of-hollow fills. Assuring compaction and stability of these materials may, therefore, be a serious problem.

The Secretary agrees with the comment. As a condition of approval, the State is required to revise its regulations to disallow disposal of processing wastes in head-of-hollow and valley fills. See Finding 13.12.

22. Sierra Club, Environmental Policy Institute, and Legal Environmental Assistance Foundation stated that Alabama's rules fail to incorporate standards required by Federal regulations 30 CFR 816.72–74 for various types of fills.

The Secretary agrees with the comment that Alabama's regulations are less effective than the Federal requirements, as they relate to spoil disposal. As a condition of approval, the State is required to make regulatory revisions which ensure compliance with SMCRA and the implementing regulations. See Finding 13.15, 14.5 and 14.9.

23. CRRD and TVA commented that State rule 816.97(d) omits the fencing and other requirements designed to protect wildlife from hazardous areas.

The Secretary points out that section 816.97(a) of Alabama's regulations require use of the best technology currently available to minimize disturbances and adverse impacts of coal mining activities on fish and wildlife and related environmental values. The Secretary finds that this general requirement will provide protection no less effective than the fencing and other provisions of 30 CFR 816.97(d)(2) and (d)(3), while providing the State with a more flexible program to meet conditions unique to Alabama wildlife and its related environment.

24. Sierra Club, Environmental Policy Institute, and Legal Environmental Assistance Foundation indicate that Alabama regulations 816.103 and 817.103 allows the covering of coal and acid and toxic-forming materials with less than four feet of non-toxic material if approved by the Regulatory Authority. The commenters assert that even in view of suspended Federal rules, Alabama's regulations will be less effective because the State fails to ensure that alternative treatment will provide the necessary protection.

The Secretary does not agree with the comment. Assurance that the alternative treatment will work will be determined at the time an operator submits the proposal. The SRA's determination that the alternative treatment will be effective will be based on a technical review of the applicant's engineering and design data. Where the proposal is defective or deficient, the SRA may require additional measures or it may require covering the problem materials with four feet of "clean" materials.

25. Sierra Club, Environmental Policy Institute, and Legal Environmental Assistance Foundation stated that Alabama has omitted the word "and" between paragraphs 816.112(c) and (d). According to the commenter, this suggests that the requirements are not cumulative, as they are under 30 CFR 816.112.

The Secretary does not agree with the comment. The construction of Alabama's regulations allows use of commercial and introduced species only when *all* of the conditions of section 816.112 are satisfied.

26. Sierra Club, Environmental Policy Institute, and Legal Environmental Assistance Foundation point out that Alabama omitted the provisions at 30 CFR 816.115 that require land approved for grazing use after mining be used for grazing according to certain standards.

The Secretary points out that 30 CFR 816.115 and 817.115 were suspended to the extent they require that land must be used for livestock grazing when the approved postmining land use is range or pasture. See **Federal Register**, Monday, August 4, 1980 (45 FR 81549). The Secretary, therefore, finds that if actual grazing use cannot be required, it would not serve any useful purpose to establish grazing standards.

27. TVA, Sierra Club, Environmental Policy Institute, and Legal Environmental Assistance Foundation pointed out that Alabama has elected to omit the "reference area" and/or "technical standards" requirements at section 816.116(b)(1). Instead, the State specifies that revegetation, with certain restrictions, must cover 80 percent of the affected soil surface area. According to the commenters, this will be less effective than the Federal reference area approach, which requires a productive capacity equivalent to 90 percent of the reference ara.

The Secretary points out that the Federal rule provides alternatives for measuring revegetation success. One of these alternatives is the reference area approach. The other is the use of technical guidance procedures approved for use in the State's regulatory program. Alabama has opted for the letter and the Secretary finds the standards and guidelines published in Alabama's program will be as effective as the Federal requirement in measuring revegetation success.

28. Sierra Club, Environmental Policy Institute, and Legal Environmental Assistance Foundation stated that Alabama regulation 819.11 omits certain Federal performance standards for auger mining.

The commenters do not specifically identify that omitted performance standards. Therefore, the Secretary assumes that commenters are referring to the apparent omission of sealing or plugging auger holes within 72 hours, as required by Federal regulations in some instances. Assuming this is the omitted Federal requirement, the Secretary points out that Alabama requires "contemporaneous" plugging and sealing. The State interprets "Contemporaneous" to mean within 72 hours when an acid coal seam is encountered. The Secretary believes this interpretation is no less effective than

the Federal requirements. See Finding 13.2.

29. Sierra Club, Environmental Policy Institute, and Legal Environmental Assistance Foundation commented that 30 CFR 826.12(a)(1)(i) contains a blanket prohibition on placing spoil on the down slope. Alabama's corresponding rules appear to allow for an exemption from this requirement.

The Secretary does not agree with the comment. Alabama's provisions at 826.12(a)(1)(i) would merely permit use of excess spoil in road embankments located on the down slope. Such use would have to meet engineering and design requirements for road embankments. The Secretary, therefore, finds that Alabama's requirements are no less effective than the Federal rules.

30. CRRD commented that Federal regulations at 30 CFR 828.11(e) require restoration of quality of affected ground water while the State program does not have a similar provision.

Since restoration of the quality of affected ground water is required, the Secretary assumes that Alabama will not issue any in situ processing permits without having first amended its regulations to include this provision.

31. According to Sierra Club, Environmental Policy Institute, and Legal Environmental Assistance Foundation, Alabama does not provide regulations for evaluating the growth of trees and shrubs in wildlife management areas.

The Secretary finds that Alabama's requirements for revegetation success for fish and wildlife management areas are no less effective than Federal rules at 30 CFR 816.116. Alabama has elected not to use the reference area approach for measuring revegetation success. Instead, the State will use "technical guidelines" which will be developed in consultation with appropriate State and Federal agencies and approved by the Secretary. Using technical guidelines to measure revegetation success will produce results similar to the reference area approach.

VIII. Inspection and Enforcement

1. Sierra Club, Environmental Policy Institute and Legal Environmental Assistance Foundation commented that Alabama's regulations allow for a partial inspection to be an on-site inspection. The commenter stated that Alabama's requirements also suggest that aerial inspections may be counted toward the partial inspection requirement.

The Secretary finds that both on-site and aerial inspection methods can be effectively used to assure permit compliance. Alabama section 842.11(a) specifies that no aerial review may be counted as a partial inspection unless it is appropriately documented with observable factors noted. The Secretary finds that inspection results and follow-up action are more important to administering an efficient and effective program than the method of inspection.

Public Comments for Second Comment Period

April 22, 1982–April 30, 1982

1. Alabama By-Products Corporation expressed concern that its coke plant would be regulated by the State Regulatory Authority as a "processing facility". The Secretary has concluded that the commenter's concerns are unfounded. The provisions of SMCRA, the Federal rules at 30 CFR Chapter VII, and the Alabama program are applicable to the suppliers of coal, not coal consumers.

2. The Environmental Policy Institute (EPI) noted that the ten (10) days allowed for public comments on the forty-five (45) issues identified by a the April 20, 1982, **Federal Register** notice (47 FR 16797) did not afford an adequate opportunity for review. The commenter further asked OSM to explain how it justified the addition of new material into the record beyond the time the Secretary was statutorily obligated to reach a decision on the Alabama program. OSM established the ten (10) day public comment period because the materials were not lengthy and because they related to clarifying previously submitted information which was afforded a much longer comment period. The Secretary was also attempting to proceed with the review process without "undue delay" which is explicitly spelled out in the legislative history of the Act. With respect to the commentor's second concern, the Secretary finds that it would be inappropriate to discuss the matter of the adminstrative record relative to SMCRA Section 503 at this time because of pending litigation.

3. EPI objected to OSM's agreement to allow Alabama to permit smaller scale maps since such latitude in the commenter's opinion would ignore the public's right to the detail called for by 30 CFR 771.23(e)(1) and 780.14(b).

The Secretary very diligently considered the view of the commenter in reaching his decision. Alabama has assured the OSM that the flexibility it is afforded will only be used where greater detail is not essential to protect the public and afford implementation of the full intent of Federal regulations and SMCRA. The Secretary, therefore, finds that the public will be provided the opportunity to review maps which depict adequate detail.

4. EPI commented that OSM's suggestion to the State regarding prohibiting "significant" disturbances to unique wildlife relative to coal exploration was less effective than the provisions of 30 CFR 815.15(a). The Secretary finds that the word "significant" is no less effective than the intent of the word "any" used in the Federal regulations. Taken literally, the word "any" could be interpreted to mean a sound wave or cutting of a single bush. The Secretary finds that such an overly restrictive interpretation is not intended and that the term "significant" will be interpreted properly to provide for a State regulation no less effective than the Federal regulation.

5. EPI noted that OSM's recommendation to the State that the State Regulatory Authority include "silviculture" in its definition of "agriculture" or "commercial" contravened OSM's preamble statement excluding silviculture as an appropriate post mining land use for mountaintop removal operations. The Secretary has considered carefully the commentor's concern. See Finding 13.16, for an explanation of the Secretary's disposition of this matter.

6. EPI cited that OSM's reference to sections 816.42(a)(b) and 817.42(a)(b) in the notes of the April 9, 1982 meeting (AL-345) relative to pound water quality discharges resulting from drainage from both disturbed and non-disturbed areas was unclear and requested clarification. OSM simply intended to state that if a sedimentation pond contained water from both a disturbed area i.e. an area off-site with poor water quality and a non-disturbed area, probably with good water quality; any effluent discharge would still have to be monitored according to state regulations no less effective than their Federal counterpart. The Secretary believes that the commenter's concern has been addressed adequately.

7. EPI commented that OSM should require Alabama to amend State regulations 786.19(a) and (b) requiring permit applications to comply with all requirements of the regulatory program as well as the State Act. Alabama informed OSM on April 9, 1982, in executive session that it would as a matter of policy, require compliance with all applicable requirements of both its Act and regulations. For further discussion of this matter, see Finding 14.11.

8. EPI noted that the State program should provide criteria no less effective than the provisions of 30 CFR 786.19(o)

denoting that proposals do not adversely affect endangered species. OSM was informed by the State Regulatory Authority on April 9, 1982, that it will consult with appropriate state agencies to assure that the proposed activities will not affect the continued existence of endangered species or result in the destruction or adverse modification of their critical habitat. See ALA 347. The State will not need a regulation amendment for implementation of this consultation. For further discussion on this issue, see Finding 14.14.

9. Drummond Coal Company (DCC) commented that the omission in the Alabama Statute (Act No. 81–435) of the provision for "reasonable attorney and expert witness fees" is in accordance and consistent with other laws of the State, even though the omission is not in accordance with 30 CFR 840.15. DCC further states that fees and court costs should be awarded by the courts on the basis of the outcome and merit of the suit, and asserts that inclusion of the Federal provision will perpetuate frivolous suits which will be burdensome to taxpayers and coal miners. The subject of this comment has been discussed previously. See Finding 1.2.

10. DCC expressed concern that the terms "having religious or cultural significance" and "sites for which historic designation is pending", which are contained in the definition of "Historic Lands", are not adequately defined. DCC believes this may lead to abuse of the process for designating lands unsuitable for mining by allowing areas to be called historic lands without criteria or evaluation in order to stop or delay mining for reasons other than those intended by SMCRA and the Federal regulations. DCC suggested that specific criteria be established for these two terms along with an evaluation of specific sites against those criteria by a qualified party. For a discussion of the commentor's concern, see Finding 12.5.

11. DCC recommends that if OSM requires the State to include a requirement in regulation 780.14(a)(4) to show the "current use of buildings", the regulation also be revised to reduce the distance requirement from 1000 feet to 300 feet as required by Federal regulations. The State has agreed to require the "current use of buildings" to be shown on an appropriate map, as required. (See Finding 14.2.) The distance requirement of 1000 feet is the same as that required by the Federal regulations at 30 CFR 780.14(a) thru reference to 30 CFR 779.24 and 779.25.

12. DCC states that it is not clear what is meant by the term "equitable owner" since the term is not defined. DCC further contends that requiring the applicant for a permit to investigate in order to determine all the interest in the property to be permitted is nonsensical and places both the applicant and the regulatory authority in the position of inquiring and reviewing private contractual agreements. "Equitable owner" is a standard legal term for any person with an equity interest in a property. The Secretary finds that such owners may be affected by surface mining of their property as much as the "legal owner" who holds the title to the property. The State has agreed to require a showing of the equitable owners of record found in a standard title search of the standard chain of title. The investigation, which concerned the commenter, is limited to a title search and the identification of interests in the property is limited to "legal and equitable owners of record". Such information is a matter of public record through property transfer records. The Secretary does not find obtaining this information to require lengthy investigation or involve reviewing private contracts. See Finding 14.6.

13. DCC stated that it could see no practical or environmental benefit in sealing auger holes in some instances within the arbitrary time limit of 72 hours since all drainage from auger holes can only be discharged after meeting appropriate effluent limits. DCC contends that the Alabama regulations are "as effective as" the Federal regulation in this regard. The Secretary disagrees. The State regulations without the 72 hour time limit in some instances are less effective than the Federal regulations. The 72 hour time limit applies to plugging auger holes with discharges containing toxic-forming or acid-forming material as a practical means of stopping harmful discharges before damage is done and more elaborate discharge control and treatment measures are required. See Finding No. 13.2.

14. DCC contends that the only determination that sedimentation ponds are the best technology currently available has been made by OSM without substantiation, rather than by EPA as OSM claims. DCC asserts that Alabama's regulations are as effective as the current Federal regulations since drainage from a disturbed area must meet effluent limits. DCC claims that State regulations are more effective in preventing environmental problems than the Federal regulations by allowing "treatment facilities", which considers that sediment ponds may cause more environmental degradation than treatment facilities in some areas and which provides for the use of improved technology in the future. DCC states that Alabama presently allows treatment facilities in small drainage areas which results in less environmental degradation. This subject has been discussed previously. See Finding 13.7.

15. DCC believes that sediment pond design should be left to the discretion of the design engineer to meet effluent limitations set forth in the regulations. DDC states that if design criteria are to be specified, they should be limited to the construction of the embankment only and not directed to hydrologic design. DCC further states that embankment slopes should not be specified, but a static safety factor of 1.5 used instead. The Secretary finds that certain basic design criteria must be specified to ensure a minimum safety standard while simultaneously giving flexibility to the engineer to design a structure for a specific situation. The Secretary finds this is accomplished in the current Federal regulations and therefore disagrees with the commenter. For further discussion of this point, see Finding 13.16.

16. DCC commented that OSM should not require Alabama regulations to be consistent with the current 30 CFR 816.72–73 and 817.72–73 dealing with spoil disposal since OSM has proposed new regulations to replace the current regulations. The Secretary can not agree with the comment that it is unwise policy to require the State to promulgate regulations consistent with a current Federal regulation when a less stringent regulation is being proposed. State regulations comparable to current 30 CFR 816.72–73 and 817.72–73 must meet the "no less effective than" criteria as applied to current Federal regulations. The Secretary further concludes that simply because a regulation is proposed to be changed it is not automatically as effective as a current regulation toward meeting the intent of the SMCRA. Public comments could indeed reflect that the proposed regulation did not satisfy the intent of SMCRA and could likewise necessitate a substantial change in such proposed regulation. For further discussion on spoil disposal, see Finding 13.15.

17. DCC noted that current Federal regulations 816.71 and 817.71 do not require spoil placement in four (4) foot lifts and therefore the proposed condition to the Alabama program should be removed. The OSM comment to which DCC has responded, item 8c of AL–347, related to sections 816.72 and 817.72, disposal of excess spoil for valley fills. 30 CFR 816.72(c) and 817.72(c) do reference a four (4) foot lift

maximum which is deemed essential to ensure stability. 30 CFR 816.71 and 817.71 incorporate the provisions of 816.72 and 817.72 making the recommended Alabama regulation no more stringent than Federal regulations. For further discussion, see Finding 13.13.

18. DCC further stated that the Secretary's proposed condition, 10a of AL–347, requiring Alabama's four (4) hour aggregate blasting regulation to be consistent with 30 CFR 816.64(b)(2)(ii) was incompatible with OSM's proposed rule of March 24, 1982. DCC also noted that the four (4) hour limitation also increased the risk of accident and public property damage due to holes left loaded overnight.

The Secretary disagrees with this comment for the reason previously stated under comment 16 of this section. All State revisions to the Federal programs must be analyzed relative to existing regulations, not proposed rules.

Relative to increasing the risk of accident and personal property damage the Secretary finds that this interpretation is not valid, since the loading operation is not initiated until the appropriate amount of time remains prior to scheduled detonation. The Secretary further concludes that existing regulations do provide latitude to the four (4) hour detonation period if in rare instances safety would be involved. For further discussion, see Finding 13.19.

19. DCC commented that the Secretary should not require Alabama to revise its regulation to require a blasting peak particle velocity of 1.0 inches per second and a scale distance of 60 feet because no technical justification for the criteria was identified. DCC went on to say that such a requirement appeared counterproductive since the regulation will probably change in the future.

The Secretary notes that the commenter pointed out the fact that the U.S. District Court for the District of Columbia in its May 16, 1980, decision did not invalidate the 1.0 inch per second criterion in the permanent program. For additional discussion, see Finding 13.20. Also, the Secretary must evaluate the State program in accordance with existing regulations and has no latitude for evaluation based on probable future changes for the reasons set forth under the discussion for comment 16 of this section.

20. DCC and Alabama By-Products Corporation disagreed that the Secretary should impose a condition on Alabama's program necessitating that the State exert jurisdictional authority over all coal processing facilities including those not near or at the mine site. DCC also stated that the objective of the condition was to clarify what the courts had been unable to do—i.e. determine what the phrase "at or near the mine" actually modifies. DCC went on to note that OSM had been selective in its court citations relative to the issue and had ignored a similar case of the United States District Court for the Northern District of Alabama, Southern Division.

The Secretary finds that the ruling by the D.C. District Court very clearly concluded that the phrase "at or near the mine" modifies only the loading of coal. The Secretary also notes that the cited case by the District Court for the Northern District of Alabama, dealt specifically and entirely with OSM interim regulations promulgated under section 501(a) of SMCRA not the permanent program regulations promulgated under section 510(b) *et seq.* of SMCRA. Consequently the D.C. District Court and Sixth Circuit Court proceedings specifically addressed the Act and the permanent program regulations. For further discussion, see Finding 14.12.

Background on Conditional Approval

The Secretary is fully committed to two key aims which underlie SMCRA. SMCRA calls for comprehensive regulation of the effects of surface coal mining on the environment and public health and safety and for the Secretary to assist the States in becoming the primary regulators under the Act. To enable the States to achieve that primacy, the Secretary has undertaken many activities, of which several are particularly noteworthy.

The Secretary has worked closely with several state organizations, such as the Interstate Mining Compact Commission, the Council of State Governments, the National Governors Association and the Western Interstate Energy Board. Through these groups OSM has frequently met with state regulatory authority personnel to discuss informally how SMCRA should be administered, with particular reference to unique circumstances in individual states. Often these meetings have been a way for OSM and the states to test new ideas and for OSM to explain portions of the Federal requirements and how the states might meet them.

The Secretary has dispensed over $6.9 million in program development grants and over $37.6 million in initial program grants to help the states to develop their program, to administer their initial programs, to train their personnel in the new requirements, and to purchase new equipment. In several instances OSM detailed its personnel to states to assist in the preparation of their permanent program submissions. OSM has also met with individual states to determine how best to meet SMCRA's environmental protection standards.

Equally important, the Secretary structured the state program approval process to assist the states in achieving primacy. He voluntarily provided his preliminary views on the adequacy of each state program to identify needed changes and to allow them to be made without penalty to the state. The Secretary adopted a special policy to ensure that communication between him and the states remained open and uninhibited at all times (44 FR 54444; September 19, 1979). This policy was critical to avoiding a period of enforced silence between OSM and a state after the close of the public comment period on its program and has been a vital part of the program review process.

The Secretary has also developed in his regulations the critical ability to conditionally approve a state program. Under 30 CFR 732.13 of the Secretary's regulations, conditional approval gives full primacy to a state even though there are minor deficiencies in a program. This power is not expressly authorized by SMCRA; it was adopted through the Secretary's rulemaking authority under 30 U.S.C. 301(c), 502(b), and 503(a)(7).

SMCRA expressly gives the Secretary only two options—to approve or disapprove a state program. Read literally, the Secretary would have no flexibility; he would have to approve those programs that are letter-perfect and disapprove all others. To avoid that result and in recognition of the difficulty of developing an acceptable program, the Secretary adopted the regulation providing the authority to conditionally approve a program.

Conditional approval has a vital effect for programs approved in the Secretary's initial decision. It results in the implementation of the permanent program in a state months earlier than might otherwise be anticipated. It also avoids the costly and cumbersome problem of implementing Federal programs where the state submittal was deficient in only minor respects. While this may not be significant in states that already have comprehensive surface mining regulatory programs, in many states earlier implementation will initiate a much higher degree of environmental protection. It also implements the rights SMCRA provides to citizens to participate in the regulation of surface coal mining through soliciting their views at hearings and meetings and enabling them to file requests to designate lands as unsuitable for mining if they are fragile.

historic, critical to agriculture, or simply cannot be reclaimed to their prior productive capability.

The Secretary considers three factors in deciding whether a program qualifies for conditional approval. First, the state's willingness to make good faith efforts to effect the necessary changes. Without the state's commitment, the option of conditional approval may not be used.

Second, no part of the program can be incomplete. As the preamble to the regulations states, the program, even with deficiencies, must "provide for implementation and administration for all processes, procedures, and systems required by SMCRA and these regulations" (44 FR 14961; March 13, 1979). That is, a state must be able to operate the basic components of the permanent program: the designation process; the permit and coal exploration systems; the bond and insurance requirements; the performance standards; and the inspection and enforcement systems. In addition, there must be a functional regulatory authority to implement the other parts of the program. If some fundamental component is missing, conditional approval may not be granted.

Third, the deficiencies must be minor. For each deficiency or group of deficiencies, the Secretary considers the significance of the deficiency in light of the particular state in question. Examples of deficiencies that would be minor in virtually all circumstances are correction of clerical errors and resolution of ambiguities.

Other deficiencies require individual consideration. An example of a deficiency that would most likely be major would be a failure to allow meaningful public participation in the permitting process. Although this would not render the permit system incomplete, because permits could still be issued, the lack of any public participation could be such a departure from a fundamental purpose of SMCRA that the deficiency would probably be major.

The granting of conditional approval is not and cannot be a substitute for the adoption of an adequate program. The Federal regulations 30 CFR 732.13(i), give the Secretary little discretion in terminating programs where the State, in the Secretary's view, fails to fulfill the conditions. The purpose of the conditional approval authority is to assist states in achieving compliance with SMCRA, not to excuse them from compliance.

The Secretary's Decision

As indicated above under "Secretary's Findings," there are minor deficiencies in the Alabama program which the Secretary requires be corrected. In all other respects, the Alabama program meets the criteria for approval. The deficiencies identified in prior findings are summarized below and an explanation is given to show why each deficiency is minor, as required by 30 CFR 732.13(i). In those cases where agreement by the State (to a regulation change, policy statement or other action) is indicated, such agreement was reached between OSM and State officials in an executive session at OSM Headquarters in Washington, D.C., on April 9, 1982 (Administrative Record Number AL–347).

1. As discussed in Finding 1.2, the Alabama SMCRA fails to specifically provide for reasonable attorney and expert witness fees as required by Section 520(f) of SMCRA. This deficiency is minor since few, if any, cases are expected where these fees would be a factor prior to the projected legislative change. Further, while the Alabama SMCRA does not specifically provide for such fees, neither does it preclude them.

2. There are two definitions in the Alabama regulations which require that approval be conditioned upon a regulation change. These definitions are discused below under (a) and (b).

(a) As discussed in Finding 12.1, Alabama's definition of "Extraction of Coal as an Incidental Part" is deficient in that it could be construed to exempt areas intended to be covered by SMCRA. This deficiency is minor since Alabama has agreed to a regulation change to remove this exemption and has agreed that until a regulation change is accomplished it will, as a matter of policy, interpret the present wording to include as subject to regulation all areas included by the corresponding Federal definition.

(b) As discused in Finding 12.5, Alabama's definition of "Historic Lands" is deficient since it does not specifically delineate sites of religious, cultural or historic significance. This deficiency is minor since Alabama has agreed to change its regulation to provide for lands having religious, cultural or historic significance. In addition, while the present language omits desirable details, it is believed to be sufficiently specific to enable the Regulatory Authority to offer the necessary protection to valuable sites until a regulation change can be accomplished.

3. As discussed in Finding 13.1, Alabama's regulations do not provide sufficient protection for wildlife habitats. This deficiency is minor since Alabama has agreed to a regulatory change to substitute "significantly disturbed" for "unnecessarily disturbed"; and Alabama has further agreed that the State will, as a matter of policy, consider any significant disturbance to be unnecessary until a regulation change is accomplished.

4. Alabama's regulations regarding sedimentation ponds and other impoundments and embankments are less effective than the Federal counterparts.

Individual deficiencies requiring correction are discussed below under (a) through (e).

(a) As discussed in Finding 13.7, Alabama's regulations do not provide sufficient protection to the environment from surface mine drainage since "treatment facilities" are permitted as an alternative to sedimentation ponds. This deficiency is minor since Alabama has agreed to a regulation change or otherwise amends its program to provide that at the present time, the best technology currently available for sediment control is sedimentation ponds, and should Alabama wish to approve any other technology, the State will first submit the proposal to OSM for review and approval as either an experimental practice or a program amendment. Furthermore, pending completion of the above, Alabama has agreed not to use its authority to approve treatment facilities other than sedimentation ponds or the approval will terminate immediately.

(b) As discussed in Findings 13.8 and 13.18, Alabama's regulations fail to provide for sufficient sedimentation pond design criteria since portions of the counterpart to 30 CFR 816.46(e)–(u) and 817.46(e)–(u) have been omitted from the corresponding State sections, 816.46 and 817.46. Consequently, essential references have been omitted from State sections 816.49(b) and 817.49(b). This deficiency is minor since Alabama has agreed to a regulation change to include the missing criteria and to reference the appropriate section in 816.49(b) and 817.49(b). Alabama has further agreed that until a regulation change is accomplished, the State will not issue any permanent program permits that are inconsistent with applicable Federal requirements 30 CFR 816.46(e)–(u) or 817.46(e)–(u).

(c) As discussed in Finding 13.9, Alabama's regulation regarding impoundments is deficient in that it does not prohibit slopes greater than 1v:2h.

This deficiency is minor since Alabama has agreed to a regulation change to include the 1v:2h slope limit requirement and has further agreed that until a regulation change is accomplished, the State will not issue any permanent program permits that allow a slope greater than 1v:2h.

(d) As discussed in Finding 13.10, Alabama's regulation regarding inspection of dams or embankments is deficient in that it does not clearly provide for adequate inspection procedures. This deficiency is minor since Alabama has agreed to a regulation change to provide that all appropriate dams and embankments be inspected in accordance with 30 CFR 77.216–3 and that all resulting reports be kept at the minesite. In addition, Alabama has agreed that all certifications, reports and statements required by MSHA must be filed with the Regulatory Authority. Alabama has further agreed that until a regulation change is accomplished it will implement the new language as a matter of policy.

(e) As discussed in Finding 13.16, Alabama's regulation do not provide for a minimum sediment storage volume. This deficiency is minor since the portion of the Federal regulations which provides for a specific minimum storage volume has been remanded and Alabama has agreed to a regulation change to cover that portion of the regulations which has not been remanded and which requires the basic criteria for a minimum sediment storage volume. Albama has further agreed that until a regulation change is accomplished the State will, as a matter of policy, adopt the new language.

5. Alabama regulations regarding spoil and waste placement are not as effective as the Federal counterpart. Individual deficiencies requiring correction are discussed below under (a) through (d).

(a) As discussed in Finding 13.12, Alabama regulations do not prohibit disposal of coal processing waste in head-of-hollow and valley fills. This deficiency is minor since Alabama has agreed to a regulation change to the effect that disposal of processing waste in head-of-hollow and valley fills is not allowed; and Alabama has further agreed that until a regulation change is accomplished the State will, as a matter of policy, not allow such disposal.

(b) As discussed in Finding 13.13, Alabama regulations do not provide for horizontal lift placement of spoil. This deficiency is minor since Alabama has agreed to a regulation change to the effect that spoil will be required to be placed in 4' horizontal lifts unless other placement is specifically authorized by the Regulatory Authority; and Alabama has further agreed that until a regulation change is accomplished, the State will issue no permits which are at variance with the corresponding existing Federal regulations.

(c) As discussed in Finding 13.14, Alabama regulations do not contain criteria for slopes greater than 36 percent in spoil disposal areas. This deficiency is minor since Alabama has agreed to revise its regulations to include criteria for such disposal area slopes which are no less effective than the Federal counterparts and to reference these sections as indicated in Finding 13.14. Alabama has further agreed that until a regulation change is accomplished, the State will, as a matter of policy, require adherence to the Federal regulations covering slopes greater than 36 percent.

(d) As discussed in Findings 13.15, 14.5 and 14.9, Alabama regulations do not contain adequate criteria with regard to specific requirements for head-of-hollow and valley fills, as do 30 CFR 816.72–.73 and 817.72–.73, and that the references at State sections 780.35(a) and 785.18(c)(7) and (d)(7) are consequently deficient. This deficiency is minor since Alabama has agreed to regulation changes to include the missing sections and to reference the included sections as appropriate. Alabama has further agreed that until such regulation changes are accomplished the State will, as a matter of policy, require compliance with applicable provisions of 30 CFR 816.72–.73 and 817.72–.73.

6. Alabama regulations relative to blasting are not as effective as the Federal counterparts. Individual deficiencies requiring correction are discussed below under (a) and (b).

(a) As discussed in Finding 13.19, Alabama's regulations do not limit blasting periods to an aggregate of four hours per day. This deficiency is minor since Alabama has agreed to revise its regulations to provide a requirement consistent with the four hour aggregate provision of 30 CFR 816.64(b)(2)(ii). Alabama has further agreed that until a regulation change is accomplished it will not issue any permanent program permits that are inconsistent with 30 CFR 816.64(b)(2)(ii).

(b) As discussed in Finding 13.20, Alabama's regulations allow a higher peak particle velocity than does the Federal counterpart, with corresponding adjustment to the scale distance formula and accompanying table. This deficiency is minor since Alabama has agreed to revise its regulations to reflect the 1.0 in/sec. peak particle velocity of the Federal regulations and to correspondingly adopt a scale distance of 60 with appropriate adjustments to applicable tables. Alabama has further agreed that until a regulation change is accomplished, the State will not issue any permanent program permits which are inconsistent with 30 CFR 816.65 (i), (k), and (l).

7. Alabama's regulations relative to requirements for information on maps and plans in permit applications are not as effective as the Federal counterparts. Individual deficiencies requiring correction are discussed below under (a) through (c).

(a) As discussed in Finding 14.2, Alabama regulations omit the requirement to identify the current use of buildings. This deficiency is minor since Alabama has agreed to a regulation change to require identification of the current use of buildings; and Alabama has further agreed to require that the current use of buildings be indicated on an appropriate map until a regulation change can be accomplished.

(b) As discussed in Finding 14.3, Alabama's regulations do not require either sufficient slope measurements to adequately represent the existing land surface configurations or criteria for such measurements. This deficiency is minor since Alabama has agreed to a regulation change to provide for appropriate slope measurements. Alabama has further agreed that until a regulation change is accomplished, the State will interpret its existing regulations to provide for adequate slope measurements as indicated in Finding 14.3.

(c) As discussed in Finding 14.6, Alabama's regulations do not require that information concerning equitable owners of record be included in the permit application. This deficiency is minor since Alabama has agreed to a regulation change to the effect that equitable owners of record found in a standard title search of the standard chain of title will be included. Alabama has further agreed that until a regulation change can be accomplished the State will interpret its regulations to require inclusion of such equitable owners of record.

8. Alabama regulations are not as effective as the Federal counterparts since they contain provisions which could be used to prevent legitimate public access to certain information. Individual deficiencies requiring correction are discussed below under (a) and (b).

(a) As discussed in Finding 14.8, Alabama regulations improperly provide

that permit information pertaining to the coal seam may be excluded from public disclosure. This deficiency is minor since the information will be available to the Regulatory Authority so that inspection and enforcement activities will not be hampered. In addition, Alabama has agreed to a regulation change to grant to the Regulatory Authority the mandatory authority to provide to the public information on acid and acid-forming materials in the coal seam, and few public requests for "confidential" information are anticipated prior to the regulation change.

(b) As discussed in Finding 15.1, Alabama's regulations allow the operator rather than the Regulatory Authority to determine what exploratory information shall be regarded as confidential. The State regulations also omit specific guidelines for determining confidentiality. These conditions are minor since the necessary information will be available to the Regulatory Authority. In addition, Alabama has agreed to a regulation change to incorporate provisions consistent with 30 CFR 776.17(b)(1–3); and few public requests for "confidential" information are anticipated prior to the regulation change.

9. As discussed in Finding 14.10, Alabama's regulations do not provide that the applicant demonstrate that the use of existing structures will not result in significant harm to the environment or impair public health or safety. This deficiency is minor since Alabama has agreed to a regulation change to include such a provision. Alabama has further agreed that until a regulation change is accomplished the State will require such demonstration in accordance with 30 CFR 786.21.

10. As discussed in Finding 14.12, Alabama's regulations do not require permitting of coal processing plants and other support facilities unless they are located at or near the mine site. This deficiency is minor since Alabama has agreed to a regulation change which will include for permitting and regulation of these facilities whether or not they are located at or near the mine site. Alabama has further agreed that until a regulation change is accomplished, the State will exert jurisdictional authority over all coal processing facilities including those not at or near the mine site.

11. As discussed in Finding 14.13, Alabama's regulations do not clearly require the meeting of three specific conditions prior to the granting of a variance. This deficiency is minor since Alabama has agreed to a regulation change to require specific adherence to all three distinct conditions, and until a regulation change is accomplished, to grant no variance without the three specific conditions having been met.

12. As discussed in Finding 17.1, Alabama's regulations fail to provide the authorized representatives with the necessary power in order that they shall impose affirmative obligations on the operator. This condition is minor since Alabama has agreed to change its regulations to be consistent with 30 CFR 843.11(a)(2) and (b)(2), and until a regulation change is accomplished will as a matter of policy, give authorized representatives the necessary authority in order that they shall impose affirmative obligations.

13. Alabama's regulations are not as effective as the Federal counterparts since there are several typographical or clerical errors and minor omissions which could lead to serious misinterpretation of the regulations. These deficiencies are minor since Alabama has agreed to regulation changes in accordance with the following corrections. Alabama has further agreed that until such regulation changes are accomplished, the State will interpret the regulations consistent with the following changes.

(a) As discussed in Finding 12.2, the word "interests" has been erroneously omitted from the definition of "Federal Lands". Alabama has agreed to a regulation change to insert the word "interests" after "mineral".

(b) As discussed in Finding 12.3, the word "below" has been erroneously substituted for the word "in" in the definition of "Groundwater". Alabama has agreed to a regulation change to replace the word "below" with the word "in."

(c) As discussed in Finding 13.3 Part 823, the Alabama regulations do not include an appropriate "Scope" section. Alabama has agreed to a regulation change to correct this oversight.

(d) As discussed in Finding 13.5, the word "following" has been erroneously inserted in State section 823.15. Alabama has agreed to remove the word "following".

(e) As discussed in Finding 13.17, important references have been omitted from State sections 816.46(u) and 817.46(u). Alabama has agreed to a regulation change which will include the missing references.

(f) As discussed in Finding 14.7, there is an erroneous reference in State section 778.13(d). Alabama has agreed to replace the erroneous reference with the correct one.

Given the nature of the deficiencies set forth in the Secretary's findings and their magnitude in relation to all the other provisions of the Alabama program, the Secretary of the Interior has concluded that they are minor deficiencies. Accordingly, the program is eligible for conditional approval under 30 CFR 13(i) because:

1. The deficiencies are of such a size and nature as to render no part of the Alabama program incomplete;

2. All other aspects of the program meet the requirements of SMCRA and 30 CFR Chapter VII;

3. These deficiencies, which will be corrected in a timely manner, will not directly affect environmental performance at coal mines;

4. Alabama has initiated and it activity proceeding with steps to correct the deficiencies; and

5. Alabama has agreed, by Letter dated May 14, 1982, to correct the regulation deficiences by December 1, 1982, and the statutory deficiencies by September 1, 1983.

Accordingly, the Secretary is conditionally approving the Alabama program. If regulations correcting the deficiencies are not enacted by December 1, 1982, or if State legislation correcting the statutory deficiencies is not enacted by September 1, 1983, the Secretary will take appropriate steps under 30 CFR Part 733 to terminate the State program. This conditional approval is effective on May 20, 1982. Beginning on that date, the Alabama Surface Mining Commission shall be deemed the regulatory authority in Alabama and all Alabama surface coal mining and reclamation operations on non-Federal and non-Indian lands and all coal exploration on non-Federal and non-Indian lands in Alabama shall be subject to the permanent regulatory program.

On non-Federal and non-Indian lands in Alabama, the permanent regulatory program consists of the State program approved by the Secretary. Following this approval, in accordance with section 523(c) of SMCRA, Alabama may elect to enter into a cooperative agreement with the Secretary to provide for State regulation of surface coal mining and reclamation operations on Federal lands within the State.

The Secretary's approval of the Alabama program relates at this time only to the permanent regulatory program under Title V of SMCRA. The approval does not constitute approval of any provisions related to implementation of Title IV under SMCRA, the abandoned mine lands reclamation program.

Pursuant to the Regulatory Flexibility Act, Pub. L. 96–354, I have certified that this rule will not have a significant

economic effect on a substantial number of small entities.

Indexing Requirements

List of Subjects in 30 CFR Part 901

Coal mining, intergovernmental relations, surface mining, underground mining.

Therefore, 30 CFR Chapter VI is amended by adding a new Part 901 as set forth herein.

Dated: May 14, 1982

James G. Watt,

Secretary of the Interior.

PART 901—ALABAMA

Sec.
901. Scope.
901.10 State regulatory program approval.
901.11 Conditions of State regulatory program approval.

Authority: Public Law 95–87, Surface Mining Control and Reclamation Act of 1977, (30 U.S.C. 1201 *et seq.*)

§ 901.1 Scope.

This Part contains all rules applicable only within Alabama that have been adopted under the Surface Mining Control and Reclamation Act of 1977.

§ 901.10 State regulatory program approval.

The Alabama State program, as resubmitted on January 11, 1982, and clarified in a meeting with OSM on April 9, 1982, (See Administrative Record No. AL–347) and in a letter to the Director, OSM, of May 14, 1982, is conditionally approved, effective (date of publication). Beginning on that date, the Alabama Surface Mining Commission shall be deemed the regulatory authority in Alabama for all surface coal mining and reclamation operations and all exploration operations on non-Federal and non-Indian lands. Only surface coal mining and reclamation operations on non-Federal and non-Indian lands shall be subject to the provisions of the Alabama permanent regulatory program. Copies of the approved program, together with copies of the letter of the Alabama Surface Mining Commission agreeing to the conditions of 30 CFR 901.11, are available for inspection at:

Alabama Surface Mining Reclamation Commission, Central Bank Building, 2nd Floor, 811 Second Avenue, Jasper, AL 35501
Alabama Surface Mining Reclamation Commission 100 Third Street, Fort Payne, AL 35967
Office of Surface Mining, Region II, 530 Gay Street, S.W., Suite 500, Knoxville, TN 37902
Office of Surface Mining, Administrative Record, Room 5315, 1100 L Street, N.W., Washington, D.C. 20240

§ 901.11 Conditions of State regulatory program approval.

The approval of the Alabama State program is subject to the State revising its program to correct the deficiencies listed in this section. The program revisions may be made, as approrpriate, to the statute, the regulations, the program narrative, or by an Attorney General's opinion. This section indicates, for the general guidance of the State, the component of the program to which the Secretary requires the change be made.

(a) The approval found in § 901.10 will terminate unless Alabama submits to the Secretary by September 1, 1983, copies of enacted legislation providing for attorney and expert witness fees in accordance with Section 520(f) of SMCRA.

(b) The approval found in § 901.10 will terminate unless Alabama submits to the Secretary by December 1, 1982:

(1) Copies of promulgated regulations limiting the definition of "Extraction of Coal as an Incidental Part" to only those areas included in the Federal definition and,

(2) Copies of promulgated regulations redefining "Historic Lands" to include properly designated sites of religious, cultural and historic significance.

(c) The approval found in § 901.10 will terminate unless Alabama submits to the Secretary by December 1, 1982, copies of promulgated regulations changing the term "unnecessarily disturbed" to "significantly disturbed" in order to provide sufficient protection for wildlife habitats.

(d) The approval found in § 901.10 will terminate unless Alabama submits to the Secretary by December 1, 1982:

(1) Copies of promulgated regulations or otherwise amends its program to provide that at the present time, the best technology currently available for sediment control is sedimentation ponds, and should Alabama wish to approve any other technology, the State will first submit the proposal to OSM for review and approval as either an experimental practice or a program amendment. Furthermore, pending completion of the above, Alabama may not use its authority to approve treatment facilities other than sedimentation ponds or the approval will terminate immediately.

(2) Copies of promulgated regulations providing for sufficient sedimentation pond design criteria in accordance with 30 CFR 816.46(e)–(u) and 817.46(e)–(u) and referencing these criteria in appropriate sections.

(3) Copies of promulgated regulations which will limit impoundment slopes to not greater than lv:2h;

(4) Copies of promulgated regulations providing for the inspection of all appropriate dams in accordance with 30 CFR 77.216–3, for all resulting reports to be kept at the mine site, and for all certifications, reports and statements required by MSHA to be filed with the Regulatory Authority and;

(5) Copies of promulgated regulations providing for minimum sediment storage volume for sedimentation ponds.

(e) The approval found in § 901.10 will terminate unless Alabama submits to the Secretary by December 1, 1982:

(1) Copies of promulgated regulations which prohibit the disposal of coal processing waste in head-of-hollow and valley fills;

(2) Copies of promulgated regulations which provide for the placement of spoil in 4' horizontal lifts unless other placement is specifically authorized by the Regulatory Authority;

(3) Copies of promulgated regulations providing for slopes greater than 36% with proper reference to such provisions where applicable throughout the Alabama rules in accordance with the Federal counterparts and;

(4) Copies of promulgated regulations which contain adequate criteria with regard to specific requirements for head-of-hollow and valley fills as effective as 30 CFR 816.72 and 816.73 and which contain references to the added sections as appropriate.

(f) The approval found in § 901.10 will terminate unless Alabama submits to the Secretary by December 1, 1982:

(1) Copies of promulgated regulations which limit blasting periods to an aggregate of four hours per day and;

(2) Copies of promulgated regulations limiting maximum peak particle velocity to 1 in/sec at the location of certain structures and adjusting the scaled distance factor and accompanying tables accordingly.

(g) The approval found in § 901.10 will terminate unless Alabama submits to the Secretary by December 1, 1982:

(1) Copies of promulgated regulations requiring identification of the current use of buildings on maps and plans in permit applications;

(2) Copies of promulgated regulations requiring sufficient slope measurements to adequately represent the existing land surface configuration and;

(3) Copies of promulgated regulations requiring that equitable owners of record found in a standard title search of the standard chain of title be included in the permit application.

(h) The approval found in § 901.10 will terminate unless Alabama submits to the Secretary by December 1, 1982.

(1) Copies of promulgated regulations granting to the Regulatory Authority the mandatory authority to provide to the public information on acid and acid-forming materials in the coal seam and;

(2) Copies of promulgated regulations granting to the Regulatory Authority, rather than the operator, the discretionary power to determine the confidentiality of information relative to exploratory activities, and containing specific criteria for such determination.

(i) The approval found in § 901.10 will terminate unless Alabama submits to the Secretary by December 1, 1982, copies of promulgated regulations which require the applicant to demonstrate that the use of existing structures will not result in significant harm to the environment or impair public health or safety.

(j) The approval found in § 901.10 will terminate unless Alabama submits to the Secretary by December 1, 1982, copies of promulgated regulations which require the permitting of coal processing plants and other support facilities including those not at or near the mine site.

(k) The approval found in § 901.10 will terminate unless Alabama submits to the Secretary by December 1, 1982, copies of promulgated regulations which require the meeting of all three specific conditions contained in 30 CFR 785.18(d)(9) prior to the granting of a variance.

(l) The approval found in § 901.10 will terminate unless Alabama submits to the Secretary by December 1, 1982, copies of promulgated regulations granting authorized representatives the power to and requiring that the authorized representatives shall impose affirmative obligations on the operator in situations of imminent danger or significant environmental harm or when an operator fails to abate the violation in the most expeditious manner physically possible.

(m) The approval found in § 901.10 will terminate unless Alabama submits to the Secretary by December 1, 1982:

(1) Copies of promulgated regulations in which the word "interest" has been inserted after mineral in the definition of "Federal Lands".

(2) Copies of promulgated regulations in which "in" has been substituted for "below" in the definition of "Groundwater".

(3) Copies of promulgated regulations in which an appropriate scope section has been included in Part 823.

(4) Copies of promulgated regulations in which the word "following" has been removed from section 823.15.

(5) Copies of promulgated regulations which include appropriate references in sections 816.46(u) and 817.46(u).

(6) Copies of promulgated regulations which include the correct reference at section 778.13(d).

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