120 feet. Add note... If local altimeter setting not received, use hibbing altimeter setting and increase all MDAS 140 feet. This is NDB 34 Amdt 5A.

Marshall

Marshall Muni-Ryan Field
Minnesota
VOR Rwy 12 AMDT 5...
Effective: 05/06/92

FDC 2/2611/MML/ FI/P Marshall Muni-Ryan Field, Marshall, MN. VOR Rwy 12 Amdt 5...Notes—Delete notes... Obtain Local altimeter...Thru...MDAS 140 feet. Activate MIRL...thru...ODALS Rwy 12—CTAF. Add Note... If Local altimeter setting not received, use Redwood Falls altimeter setting and increase all MDAS 140 feet. This is VOR Rwy 12 Amdt 5A.

Marshall

Marshall Muni-Ryan Field
Minnesota
VOR/DME Rwy 30 Amdt 1A...
Effective: 05/06/92

FDC 2/2612/MML/ FI/P Marshall Muni-Ryan Field, Marshall, MN. VOR/DME Rwy 30. Amdt 1A...Minimums—Delete Redwood Falls ALSTG Minimums. Notes—Delete notes... Obtain local altimeter... thru...Redwood Falls altimeter setting. Activate MIRL...thru...ODALS Rwy 12—CTAF. Add Note... If local altimeter setting not received, use Redwood Falls altimeter setting and increase all MDAS 140 feet. This is VOR/DME Rwy 30 Amdt 1B.

New Ulm

New Ulm Muni
Minnesota
NDB Rwy 15 Orig...
Effective: 05/06/92

FDC 2/2613/ULM/ FI/P New Ulm Muni, New Ulm, MN. NDB Rwy 15 Orig...Notes—Delete notes... Obtain local altimeter...thru...MDAS 120 feet. Activate MIRL...thru...ODALS Rwy 33—CTAF. Add note... If local altimeter setting not received, use Redwood Falls altimeter setting and increase all MDAS 120 feet. This is NDB Rwy 15 Orig A.

New Ulm

New Ulm Muni
Minnesota
NDB Rwy 33 Orig...
Effective: 05/06/92

FDC 2/2614/ULM/ FI/P New Ulm Muni, New Ulm, MN. NDB Rwy 33 Orig...Notes—Delete notes... Obtain local altimeter...thru...MDAS 120 feet. Activate MIRL...thru...ODALS Rwy 33—CTAF. Add note... If local altimeter setting not received, use Redwood Falls altimeter setting and increase all MDAS 120 feet. This is NDB Rwy 33 Orig A.

Grand Rapids

Grand Rapids/Itasca County-Gordon Newstrom Field
Minnesota
VOR Rwy 34 Amdt 8...
Effective: 05/06/92

FDC 2/2616/GPZ/ FI/P Grand Rapids/Itasca County-Gordon Newstrom Field, Grand Rapids, MN. VOR Rwy 34 Amdt 8...Notes—Delete notes... Obtain local altimeter...thru...MDA's 120 feet. Activate MALSR...thru...REIL Rwy 16—122.8. Add note... If local altimeter setting not received, use Hibbing altimeter setting, and increase all MDAS 120 feet. Minimums—Alternate Minimums Standard. This is VOR 34 Amdt 8A.

St Louis

Lambert-St Louis Intl
Missouri
ILS RWY 30R AMDT 6A...
Effective: 05/06/92

FDC 2/2597/STL/FI/P Lambert-St Louis, Intl, St Louis, MO. ILS Rwy 30R Amdt 6A...Delete Circling Minima. This becomes ILS Rwy 30R Amdt 6B.

Lorain/Elyria

Lorain County Regional
Ohio
VOR-AAMDTD 1...
Effective: 05/06/92

FDC 2/2615/22G/FI/P Lorain County Regional, Lorain/Elyria, OH. VOR-A Amdtd 1...Change note to... Obtain local altimeter setting on CTAF, When not received, use Cleveland Hopkins altimeter setting and increase all MDAS 60 feet and visibilities CAT C ¼ mile. This is VOR-A Amdt 1A.

Oklahoma City

Wiley Post
Oklahoma
ILS RWY 17L AMDT 9...
Effective: 05/04/92

FDC 2/2552/PWA/FI/P Wiley Post, Oklahoma City, OK, ILS Rwy 17L Amdt 9...Add... Altn Mins NA when control zone not in effect. This becomes ILS Rwy 17L Amdt 9A.

Medford

Medford-Jackson county
Oregon
ILS/DME RWY 14, AMDT 13...
Effective: 04/24/92

FDC 2/2294/MFR/FI/P Medford-Jackson County, Medford, OR, ILS/DME Rwy 14, Amdt 13...S-ILS 14 CAT A DH 1570, HAT 260, RVR 4000. CAT B DH 1630, HAT 320, RVR 4000. CATS C and D DH 1860, HAT 550, VIS 1 ½...S-Loc 14 CAT A MDA 1680, HAT 370, RVR 4000. CAT B MDA 1640 HAT 530, RVR 4000. CAT C MDA 1960, HAT 650, RVR 6000. CAT D MDA 2000, HAT 690, VIS 1 ¾. Circling CAT A MDA 2000, HAA 669 VIS 1. CAT B MDA 2000, HAA 669, VIS 1 ¼. CAT C MDA 2000, HAA 669, VIS 2. CAT D MDA 2340, HAA 1009, VIS 3...Delete notes, CAT D S–14 VIS increased ¼ mile for INOP MALSR and activate MALSR Rwy 14-CTAF. Add notes...for INOP MALSR, increase S-ILS VIS to RVR 6000 CAT B, and VIS 2 miles CATS C and D. For INOP MALSR increase S-LOC VIS to RVR 5000 CATS A and B, INOP table does not apply to MM...Change missed Apch to read... CAT C Climb to 2000, CAT B TO 2200, CATS C and D to 2400, then climbing RT to 6000 direct OED VORTAC and hold. Change MSA ALT 090–180 from MF to 8700 ft. This becomes ILS/DME Rwy 14 Amdt 13A.

Commerce

Commerce Muni
Texas
VORTAC-A AMDT 1...
Effective: 04/24/92

FDC 2/2292/2F7/FI/P Commerce Muni, Commerce, TX. VORTAC-A Amdt 1...PROC title Changed to read...VOR/DME-A. Change note to read...Use Dallas-Love Field ALSTG. This becomes VOR/DME-A AMDT 1A.

Seattle

Seattle-Tacoma Intl
Washington
NDB RWY 16R, ORIG...
Effective: 05/06/92

FDC 2/2619/SEA FI/P Seattle-Tacoma Intl, Seattle, WA, NDB Rwy 16R, orig...Delete Trml Rte from PAE VOR/DME to SZ LOM. Add note in plan view...Radar required...Profile starts at SZ LOM. This becomes NDB Rwy 16R, Orig-A.

The FAA published an Amendment in Docket No. 26854, Amdt. No. 1490 to part 97 of the Federal Aviation Regulations (VOL 57 FR No. 85 Page 18813; dated May 1, 1992) under § 97.23 effective 04–10–92, which is hereby amended as follows: Please delete the following "P" NOTAM FDC 2/2027 The Dalles, OR. The Dalles Muni.

[FR Doc. 92–11946 Filed 5–20–92; 8:45 am]
BILLING CODE 4910–13–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Social Security Administration

20 CFR Part 404

[Regulations No. 4]

RIN 0960-AD27

Federal Old-Age, Survivors, and Disability Insurance; Limitation on New Entitlement to Special Age 72 Payments

AGENCY: Social Security Administration, HHS.

ACTION: Final rule.

SUMMARY: This final rule amends our regulations to reflect section 5114 of Public Law (Pub. L.) 101-508, the Omnibus Budget Reconciliation Act of 1990, enacted on November 5, 1990. Section 5114 amended section 228(a)(2) of the Social Security Act (the Act) to prohibit the entitlement to special age 72 payments of any individual attaining age 72 after 1971. The statutory amendment is effective with respect to payments payable on the basis of applications filed after November 5, 1990.

EFFECTIVE DATE: This rule is effective on May 21, 1992.

FOR FURTHER INFORMATION CONTACT: Cassandra Bond, Legal Assistant, Office of Regulations, Social Security Administration, 6401 Security Boulevard, Baltimore, MD 21235, (301) 965-1794.

SUPPLEMENTARY INFORMATION: In 1966, section 228 of the Act was enacted to provide special age 72 payments for workers who, when the Social Security program began or when coverage was extended to their jobs, were too old to earn enough quarters of coverage to be insured for regular retirement benefits.

When the special age 72 payments were created, it was expected that new entitlement under this provision would not be possible for anyone attaining age 72 after 1971. This is because, under the provision, female workers attaining age 72 through December 31, 1969, and male workers attaining age 72 through December 31, 1971, needed fewer quarters of coverage to qualify for special age 72 benefits than to qualify for regular retirement benefits. Thereafter, however, the number of quarters of coverage needed to qualify for special age 72 payments either (1) equaled the number needed to qualify for regular retirements benefits (in the case of female workers attaining age 72 on January 1, 1970, through December 31, 1970); or (2) exceeded the number needed to qualify for regular retirement benefits (in the case of female workers attaining age 72 beginning January 1, 1971, and male workers attaining age 72 beginning January 1, 1972). And, because the special age 72 payment amount was less than the minimum regular retirement benefit amount payable at age 62, no new entitlement to special age 72 payments would occur.

Subsequently, however, the minimum regular retirement benefit was eliminated for new entitlements effective January 1982 and continuing (affecting workers born January 2, 1920, and later). Thus, beginning in January 1992 these workers could attain age 72 and thus potentially become entitled to the higher special age 72 payment if they have the greater number of quarters of coverage needed. The current amendment limits entitlement to special age 72 payments to those workers for whom it was originally intended, i.e., workers who attained age 72 before 1972.

This rule amends § 404.381 of our regulations to reflect the change made by section 5114 of Public Law 101-508 which limits entitlement to special age 72 payments to workers attaining age 72 before 1972.

Regulatory Procedures

We are publishing this rule without prior notice and public comment thereon. The Department, even when not required by statute, as a matter of policy, generally follows the Administrative Procedure Act (APA) notice of proposed rulemaking and public comment procedures specified in 5 U.S.C. 553 in the development of regulations. The APA provides exceptions to its notice and comment requirements when an agency finds there is good cause for dispensing with such procedures on the basis that they are impracticable, unnecessary, or contrary to the public interest. We have determined that under 5 U.S.C. 553(b)(B) good cause exists for waiver of proposed rulemaking and public comment procedures in the case of this rule because we are only reflecting a statutory change. This change is not discretionary and does not involve the setting of policy. Therefore, opportunity for prior public comment is unnecessary and these changes to our regulations are being issued as a final rule.

Executive Order 12291

The Secretary has determined that this is not a major rule under Executive Order 12291 because the issuance of this regulation is not expected to result in significant costs. Therefore, a regulatory impact analysis is not required.

Paperwork Reduction Act

This regulation imposes no new reporting or recordkeeping requirements subject to Office of Management and Budget clearance.

Regulatory Flexibility Act

We certify that this regulation will not have a significant economic impact on a substantial number of small entities because this rule will affect only individuals. Therefore a regulatory flexibility analysis as provided in Public Law 96-354, the Regulatory Flexibility Act, is not required.

(Catalog of Federal Domestic Assistance Program Nos. 93.802, Social Security Disability Insurance; 93.803, Social Security Retirement Insurance; and 93.805, Social Security Survivors Insurance)

List of Subjects in 20 CFR Part 404

Administrative practice and procedure; Death benefits; Disability benefits; Old-Age, Survivors and disability insurance.

Dated: October 10, 1991.

Gwendolyn S. King,

Commissioner of Social Security.

Approved: November 5, 1991.

Louis W. Sullivan,

Secretary of Health and Human Services.

Part 404 of title 20 of the Code of Federal Regulations is amended as follows:

PART 404—FEDERAL OLD-AGE, SURVIVORS AND DISABILITY INSURANCE (1950-)

1. The authority citation for subpart D of part 404 is revised to read as follows:

Authority: Secs. 202, 203 (a) and (b), 205(a), 216, 223, 228(a)-(e), and 1102 of the Social Security Act; 42 U.S.C. 402, 403 (a) and (b), 405(a), 416, 423, 428(a)-(e), and 1302.

2. Section 404.381 is amended by revising paragraph (a) to read as follows:

§ 404.381 Who is entitled to special age 72 payments.

You are entitled to a special age 72 payment if—

(a) You have attained the age of 72; and

(1) You attained such age before 1968; or

(2) You attained such age after 1967—or, for applications filed after November 5, 1990, you attained age 72 after 1967 and before 1972—and have at least 3 quarters of coverage for each calendar year elapsing after 1966 and before the year in which you attained age 72 (see

subpart B for a description of quarters of coverage);

* * * * *

[FR Doc. 92-11860 Filed 5-20-92; 8:45am]
BILLING CODE 4190-29-M

20 CFR Part 404

RIN 0960-AC91

Correction of Earnings Records After Expiration of Time Limitation

AGENCY: Social Security Administration, HHS.

ACTION: Final rule.

SUMMARY: In this final regulation, we are amending our rules on correcting records we estabish and maintain to show the wages and self-employment income covered under the Social Security Act (the Act) for a worker or a self-employed individual. We may now correct our records at any time up to 3 years, 3 months, and 15 days after the year in which wages were paid or self-employment income was derived. After this time, we can make various revisions, including ones based on an employer's failure to report any covered wages for the period involved. In this final regulation, we are implementing section 10304 of the Omnibus Budget Reconciliation Act of 1989 (OBRA 1989), (Public Law (Pub. L.) 101-239). Under this statutory amendment, which was effective on December 19, 1989, we now also may correct an earnings record after the time limitation has expired to credit wages if an employer reported an amount of wages for an employee that is less than the correct amount.

EFFECTIVE DATE: This regulation is effective May 21, 1992.

FOR FURTHER INFORMATION CONTACT: Jack Schanberger, Legal Assistant, Office of Regulations, Social Security Administration, 3-B-1 Operations Building, 6401 Security Boulevard, Baltimore, Maryland 21235, (410) 965-8471.

SUPPLEMENTARY INFORMATION: Under section 205(c)(2)(A) of the Act, 42 U.S.C. 405(c)(2)(A), the Secretary of Health and Human Services (the Secretary) is required to establish and maintain records of the wages and self-employment income of individuals and to furnish, upon request, a statement of the amounts credited to an individual's record of earnings and the periods for which the amounts are credited. Section 205(c)(3) of the Act states that the Secretary's records are evidence of a person's Social Security wages and self-employment income.

Section 205(c)(4) of the Act authorizes the Secretary to correct an earnings record prior to the expiration of the statutory time limitation of 3 years, 3 months, and 15 days after the year in which the wages were paid or self-employment income was derived if it is brought to his or her attention that an entry is erroneous or that an amount has been omitted. Section 205(c)(5) of the Act provides that after the expiration of this limitation, the Secretary, under specified circumstances, may change, delete, or include an item of wages or self-employment income.

In this final rule, we are revising § 404.822(e)(5) to explain that we now may correct an earnings record after the time limitation has expired to enter amounts of wages paid to an individual if less than the correct amounts paid by an employer had previously been entered on the record. This regulation implements section 10304 of OBRA 1989, which amended section 205(c)(5)(H) of the Act. Before the OBRA 1989 amendment, section 205(c)(5)(H) provided that we could correct an earnings record, after expiration of the time limitation, to include wages paid during any period in a year to an individual by an employer, only if there was an absence of an entry in the Secretary's records of wages having been paid by such an employer to the individual in such period. Under this regulation, we will correct an earnings record after the expiration of the time limitation to add wages that were paid to an individual, even if there is an entry in the Secretary's records. However, under this final regulation, we will not delete or reduce earnings after the end of the time limitation for correcting earnings records.

We believe that the final regulation is consistent with the intent of Congress as expressed in the House Report and the Conference Report on OBRA 1989. These reports state that the current list of revisions the Secretary may make after the time limitation has expired would be expanded "to permit adding wages to a record where an entry for an employer is present but incorrect." See H.R. Rep. No. 386, 101st Cong., 1st Sess. 711 (1989). See also H.R. Rep. No. 247, 101st Cong., 1st Sess. 961 (1989).

Discussion of Comments

On May 9, 1991, we published a proposed rule in the **Federal Register** at 56 FR 21455 with a 60-day comment period. We received comments from three Federal agencies. The comments and our responses are discussed below.

One agency was concerned that under the proposed rule incorrect earnings would not be deleted from earnings records after the time limitation of 3 years, 3 months, 15 days for correcting records has expired. This agency was concerned that with the advent of the Federal Employees' Retirement System (FERS), which provided Social Security coverage for many Federal employees, noncovered earnings of some employees still under the Civil Service Retirement System (CSRS) were mistakenly reported as covered earnings under FERS. Section 205(c)(5)(H) of the Social Security Act, as amended on December 19, 1989 by section 10304 of OBRA 1989, provided no authority for us, after the time limitation has expired, to delete or revise downward any earnings that were reported by an employer and posted to an earnings record by the Social Security Administration. Therefore, we have no authority to revise our regulations as the commenter suggested.

Another agency suggested that the proposed regulation be revised to specify whether Social Security earnings records can be corrected when a Federal employee's retirement system coverage is changed from CSRS to FERS or vice versa after the time limitation for correcting the earnings record has expired. As explained in our response to the first comment, we have no authority to delete or revise downward after the time limitation has expired any reported and posted earnings, but as the proposed rule and the final rule state, we can add or revise upward.

A third Federal agency, also concerned with mistaken reporting of CSRS earnings, asked whether, under the proposed rule, an upward revision could be made after the time limitation has expired to correct wages earned in calendar year 1987 or earlier. The answer to this question is "yes," because section 10304 of OBRA 1989, which amended section 205(c)(5)(H) of the Act, placed no limit on the retroactivity of the amendment. Consistent with that legislation, no such limitation is contained in this rule.

We are publishing this final rule unchanged from the proposed rule.

Regulatory Procedures

Executive Order 12291

The Secretary has determined that this is not a major rule under Executive Order 12291 because the costs of the OBRA 1989 provision, which are expected to increase program costs by $1 million in both FY 1992 and FY 1993 and by $2 million in both FY 1994 and FY 1995, are required by law. Therefore, a regulatory impact analysis is not required.

Regulatory Flexibility Act

We certify that this regulation will not have a significant economic impact on a substantial number of small entities because it affects only the correction of individuals' earnings records. Therefore, a regulatory flexibility analysis as provided in Public Law 96–354, the Regulatory Flexibility Act, is not needed.

Paperwork Reduction Act

This final regulation imposes no additional reporting and recordkeeping requirements subject to Office of Management and Budget clearance.

(Catalog of Federal Domestic Assistance Program Nos. 93.802 Social Security—Disability Insurance; 93.802 Social Security—Retirement Insurance; 93.805 Social Security—Survivors Insurance)

List of Subjects in 20 CFR Part 404

Administrative practice and procedure; Death benefits; Disability benefits; Old-Age, Survivors, and Disability insurance.

Dated: December 2, 1991.

Gwendolyn S. King,

Commissioner of Social Security.

Approved: December 30, 1991.

Louis W. Sullivan,

Secretary of Health and Human Services.

For the reasons set out in the preamble, subpart I of part 404 is amended as follows:

PART 404—FEDERAL OLD-AGE, SURVIVORS AND DISABILITY INSURANCE

1. The authority citation for subpart I continues to read as follows:

Authority: Secs. 205(a), (c)(1), (c)(2)(A), (c)(4), (c)(5), (c)(6), and (p), and 1102 of the Social Security Act; 42 U.S.C. 405(a), (c)(1), (c)(2)(A), (c)(4), (c)(5), (c)(6), and (p), and 1302.

2. Section 404.822(e)(5) is revised to read as follows:

§ 404.822 Correction of the record of your earnings after the time limit ends.

* * * * *

(e) * * *

(5) *Less than correct wages on SSA records.* We may enter wages paid to you by an employer for a period if no part of those wages or less than the correct amount of those wages is entered on SSA records.

* * * * *

[FR Doc. 92–11944 Filed 5–20–92; 8:45 am]

BILLING CODE 4190–29–M

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 943

Texas Permanent Regulatory Program

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

ACTION: Final rule; approval of proposed amendment.

SUMMARY: OSM is announcing its decision to approve, with certain exceptions and additional requirements, a proposed amendment to the Texas permanent regulatory program (hereinafter, the Texas program) under the Surface Mining Control and Reclamation Act of 1977 (SMCRA). The proposed amendment consists of changes to Texas' existing regulations pertaining to definitions, identification of interests and compliance information, review of permit applications, conditions of permits, and Railroad Commission of Texas (Commission) review of outstanding permits. The amendment is intended to revise the Texas program to be consistent with the corresponding Federal standards.

EFFECTIVE DATE: May 21, 1992.

FOR FURTHER INFORMATION CONTACT: James H. Moncrief, telephone: (918) 581–6430.

SUPPLEMENTARY INFORMATION:

I. Background on the Texas Program

On February 16, 1980, the Secretary of the Interior conditionally approved the Texas program. General background information on the Texas program including the Secretary's findings, the disposition of comments, and the conditions of approval of the Texas program can be found in the February 27, 1980, **Federal Register** (45 FR 12998). Subsequent actions concerning the Texas program and program amendments are codified at 30 CFR 943.15 and 943.16.

II. Proposed Amendment

By letter dated September 12, 1989 (Administrative Record No. TX–457), Texas submitted to OSM a proposed amendment to its program pursuant to SMCRA. Texas submitted the proposed amendment in response to a letter dated May 11, 1989, that OSM sent to Texas in accordance with 30 CFR 732.17(c) (Administrative Record No. TX–447). The provisions of chapter IV of the Coal Mining Regulations that Texas proposed to revise are the definitions of "owned or controlled" and "owns and controls" at Texas Coal Mining Regulations (TCMR) 701.008(53), identification of interests and compliance information at TCMR 778.116, review of permit applications at TCMR 786.215(e) through (g), conditions of permits at TCMR 786.221(d), and Commission review of outstanding permits at TCMR 788.225 (e) through (h).

OSM published a notice in the September 25, 1989, **Federal Register** (54 FR 39206) announcing receipt of the amendment and inviting public comment on the adequacy of the proposed amendment (Administrative Record No. TX–464). The public comment period closed October 25, 1989.

During its review of the amendment, OSM identified concerns relating to identification of interests and compliance information at TCMR 778.116 (j) and (1), review of permit applications at TCMR 786.215 (e)(1), (e)(2), and (g), and Commission review of outstanding permits at TCMR 788.225 (e), (f), and (g). OSM notified Texas of the concerns by letter dated November 28, 1989 (Administrative Record No. TX–471). By letter dated January 16, 1990, Texas provided an interpretation of portions of the proposed amendment (Administrative Record No. TX–491). By letter dated February 5, 1990 (Administrative Record No. TX–492), OSM notified Texas that the concerns identified in the November 28, 1989, letter still remained. Because Texas chose not to revise the amendment in response to OSM's February 5, 1990, letter, OSM proceeded with this final rule **Federal Register** notice.

III. Directors Findings

After a thorough review, pursuant to SMCRA and the Federal regulations at 30 CFR 732.15 and 732.17, the Director finds, with certain exceptions and additional requirements, that the proposed amendment as submitted by Texas on September 12, 1989, is no less stringent than SMCRA and no less effective than the corresponding Federal regulations.

1. Revisions to Texas' Regulations That Are Substantively Identical to the Corresponding Federal Regulations

Texas proposed revisions to the following regulations that are substantive in nature and contain language that is substantively identical to the corresponding Federal regulations:

Definitions of "owned or controlled" and "owns or controls" at TCMR 701.008(53) (corresponding Federal regulations 30 CFR 773.5);

Identification of interests and compliance information at TCMR 778.116 (a) through (i), (k), and (n) (30 CFR 778.113 (a) through (g), and (i), and 778.14(d)); and

Permit conditions at TCMR 786.221(d) (30 CFR 773.17(i)).

Because the proposed revisions to these Texas regulations are substantively identical to the corresponding Federal regulations, the Director finds that these proposed Texas regulations are no less effective than the corresponding Federal regulations. Therefore, the Director approves these proposed regulations.

2. TCMR 778.116 (j), (l), and (m), Identification of Interests and Compliance Information

(a) TCMR 778.116(j)

Proposed TCMR 778.116(j) requires that an applicant for a mining permit "submit the information required by this section in any prescribed format that is issued." The corresponding Federal regulation at 30 CFR 778.13(j) requires the applicant to "submit the information required by this section and by [section] 778.14 of this part in any prescribed OSM format that is issued." The preamble to the Federal regulation states that the purpose for requiring a "prescribed OSM format" is to increase efficiency of data entry and processing in the Applicant/Violator System (AVS), and that use of an issued standard form "will be required regardless of whether the permit application is filed with OSM or a State regulatory authority" (54 FR 8982, 8985, March 2, 1989). Because OSM has not yet issued a standard format for submittal of AVS information and Texas' proposed rule does not preclude Texas from using OSM's format when it is issued, the Director finds that proposed Texas rule at TCMR Rule 778.116(j) is no less effective than the counterpart Federal regulation at 30 CFR 778.13(j). The Director approves Texas' proposed rule with the understanding that Texas will adopt the OSM-prescribed format once it is issued.

(b) TCMR 778.116(l)

Proposed TCMR 778.116(l) requires an applicant for a mining permit to include an explanation of the facts surrounding any suspension, revocation, or forfeiture identified under the requirements of "paragraphs (a) (1) and (2) of this section." With one exception, proposed TCMR 778.116(l) is substantively identical to the corresponding Federal regulation at 30 CFR 778.14(b). The exception is that the reference to "paragraphs (a) (1) and (2) of this section" is incorrect. There are no paragraphs (a) (1) and (2) in proposed TCMR 778.116.

The Federal regulation at 30 CFR 778.14(b) refers to paragraphs (a) (1) and (2) of § 778.14, which require an applicant to include specified information relative to suspended or revoked coal mining permits and forfeited performance bonds. At proposed TCMR 778.116(k) (1) and (2), Texas has identical requirements.

The Director finds that, with the exception of the incorrect reference to paragraphs (a) (1) and (2) of § 778.116, Texas' proposed TCMR 778.116(l) is no less effective than the corresponding Federal regulation at 30 CFR 778.14(b). The Director approves proposed TCMR 778.116(l) but requires Texas to revise it to reference paragraphs TCMR 788.116(k) (1) and (2) rather than "paragraphs (a) (1) and (2) of this section."

(c) TCMR 778.116(m)

Proposed TCMR 778.116(m) requires:

[f]or any violation of a provision of the Act, or of any law, rule or regulation of the United States, or of any State law, rule or regulation pertaining to air or water environmental protection incurred in connection with any surface coal mining operation a list of all violation notices received by the applicant during the three-year period preceding the application date, and a list of all unabated cessation orders and unabated air and water quality violation notices received prior to the date of the application by any surface coal mining and reclamation operation owned or controlled by either the applicant or by any person who owns or controls the applicant.

(emphasis added).

The above-emphasized language of proposed TCMR 778.116(m) follows almost verbatim the corresponding Federal regulations at 30 CFR 778.14(c), but as discussed below, its requirements differ substantively from the Federal requirements.

With respect to the phrase "[f]or any violation of a provision of the Act," Texas at TCMR 700.003(l) defines "Act" to mean the "Texas Surface Coal Mining Control and Reclamation Act" (TSCMRA). Therefore, when Texas requires at proposed TCMR 778.116(m) information "[f]or any violation of a provision of the Act," it requires information regarding violations received pursuant to TSCMRA, or any Texas law, rule or regulation enacted or promulgated pursuant to TSCMRA. In contrast, the term "Act" as used in 30 CFR 778.14(c) and section 510(c) of SMCRA, includes SMCRA, its implementing Federal regulations, and all State and Federal programs approved under SMCRA (See 48 FR 44389, September 28, 1983). Therefore, the corresponding Federal regulation at 30 CFR 778.14(c) requires information regarding violations received pursuant to SMCRA, its implementing Federal regulations, and all State and Federal programs approved under SMCRA, including the Texas program.

In comparison, Texas' proposed phrase "[f]or any violation of a provision of the Act," does not include, as the Federal regulation does, violations issued pursuant to SMCRA-approved State programs other than the Texas program, and pursuant to OSM Federal programs (OSM-administered Indian lands program and Federal programs for States).

With respect to Texas' proposed phrase "of any law, rule or regulation of the United States, or of any State law, rule or regulation pertaining to air or water environmental protection," the corresponding Federal regulations at 30 CFR 778.14(c) require information regarding non-SMCRA violations "of any law, rule or regulation of the United States, or of any State law, rule or regulation *enacted pursuant to Federal law, rule or regulation* pertaining to air or water environmental protection" (emphasis added). Proposed TCMR 778.116(m) does not include the emphasized Federal phrase. The effect of this omission is that Texas would require information on all non-SMCRA violations of State law, rule or regulation pertaining to air or water environmental protection, not just those promulgated pursuant to Federal requirements. Because proposed TCMR 778.116(m) requires information on violations of a broader range of State laws, rules or regulations than is required by the Federal regulation at 30 CFR 778.14(c), this aspect of Texas' proposed phrase "of any law, rule or regulation of the United States, or of any State law, rule or regulation pertaining to air or water environmental protection" is more stringent than, but not inconsistent with, the Federal requirement.

However, also with respect to Texas' proposed phrase "of any law, rule or regulation of the United States, or of *any State* law, rule or regulation pertaining to air or water environmental protection" (emphasis added), it does not appear that Texas interprets this phrase in proposed TCMR 778.116(m) to mean any non-SMCRA State (not just Texas) laws, rules, or regulations, as OSM interprets section 510(c) of SMCRA and 30 CFR 778.14(c).

Section 21(c) of TSCMRA requires an application to include a listing of "notices of violations of this Act and any law, rule, or regulation of the United

States, or the State of Texas, or of any department or agency in the United States pertaining to air or water environmental protection incurred by the applicant in connection with any surface coal mining operation *within the state*" (emphasis added). The phrase "in connection with any surface coal mining operation within the state" limits the non-SMCRA violations that must be reported to those that occur in Texas. This limitation is inconsistent with section 510(c) of SMCRA and OSM's interpretation of the phrase "any department or agency in the Untied States." The preamble to the Federal regulations at 30 CFR 778.14 states that

> [t]he phrase "in the United States" is construed by courts to mean physically located within the United States * * *. Therefore, * * * [OSM] construe[s] "department or agency in the United States" to mean "any governmental department or agency" physically located within the United States, which would include State and local governmental entities

(44 FR 14902, 15023; March 13, 1979). This includes the State and local governmental entities of all States, not just those within the State in which the application is submitted.

For the aforementioned reasons, the Director finds the Texas' proposed regulation at TCMR 778.116(m) is less effective than the corresponding regulation at 30 CFR 778.14(c) and less stringent than section 510(c) of SMCRA because (1) it does not require information regarding violations received pursuant to SMCRA-approved State programs other than the Texas program, and pursuant to OSM Federal programs, and (2) it does not require information regarding air or water environmental protection violations received pursuant to non-SMCRA State laws, rules or regulations enacted pursuant to Federal laws, rules, or regulations and incurred by the applicant outside of the State of Texas. The Director does not approve proposed TCMR 778.116(m) and requires Texas to revise it or otherwise modify its program to require an application to include information on (1) violations received pursuant to any SMCRA-approved State programs, including the Texas program, and OSM Federal programs (OSM-administered Indian lands program and Federal programs for States), and (2) air or water environmental protection violations received pursuant to any non-SMCRA State laws, rules or regulations enacted pursuant to Federal laws, rules, or regulations and incurred by the applicant in any State, including the State of Texas.

3. TCMR 786.215 (e), (f), and (g), Review of Permit Applications

(a) TCMR 786.215(e)(1)

Proposed TCMR 786.215(e)(1) provides, in part, that "[i]n the absence of a failure-to-abate cessation order, the Commission may presume that a notice of violation issued pursuant to Section .681 or under a Federal or State program has been or is being corrected to the satisfaction of the agency with jurisdiction over the violation * * *." This proposed language is substantively identical to the Federal provisions at 30 CFR 773.15(b)(1). However, the Secretary of the Interior, in *National Wildlife Federation* v. *Lujan*, Civ. Nos. 88–3117, *et seq.* (Consolidated, D.D.C. filed October 27, 1988), has expressed his intention to reconsider the issue of whether, in the absence of a failure-to-abate cessation order, the regulatory authority may presume that a notice of violation has been or is being corrected, as set forth in the Federal regulation (Memorandum of Points and Authorities In Support of the Federal Defendants' Cross-Motion For Summary Judgment and In Opposition to Plaintiffs' Motions For Summary Judgment, pp. 89–90).

Therefore, pending final resolution of the reconsideration currently being pursued by the Secretary regarding the Federal regulation at 30 CFR 773.15(b)(1), the Director defers action on that portion of proposed TCMR 786.215(e)(1) that addresses the presumption discussed above.

Texas' proposed TCMR 786.215(e)(1) also provides that "the Commission *may* deny the permit if any surface coal mining and reclamation operation owned or controlled by either the applicant or by any person who owns or controls the applicant is currently in violation of the Act [TSCMRA] or any other law, rule or regulation referred to in this paragraph" (emphasis added).

Section 510(c) of SMCRA provides that a regulatory authority cannot issue a permit "if any surface coal mining operation owned or controlled by the applicant is currently in violation of this Act [SMCRA] or such other laws referred to in this subsection" until the applicant submits proof to the regulatory authority that the violation has been or is being corrected. Furthermore, the Federal regulation at 30 CFR 773.15(b)(1) requires that the regulatory authority "*shall not* issue the permit" where the controlling entity is found to have outstanding violations (emphasis added). Both the Federal regulation and the proposed Texas regulation go on to specify requirements for obtaining a conditional permit when current violations exist.

By inclusion of the phrase "may deny the permit," the Commission would have the option but would not be required to deny a permit where the controlling entity is found to have violations outstanding. The corresponding Federal requirements do not grant the regulatory authority discretion to issue a permit under such circumstances.

In addition, the first sentence of proposed TCMR 786.215(e)(1) is confusing because of its structure, and it contains an incorrect reference to section .116(h). The sentence begins with the phrase "[i]f the Commission determines," but the thought is not completed. It is unclear what the Commission is to determine from the listed information sources. The proposed regulation references the required lists of unabated cessation orders and violation notices "under section(s) .116(h)." However, proposed section .116(h) pertains to a statement regarding the applicant's interest in lands contiguous to the area described in the permit application, and not to the required lists. The correct reference is section .116(m).

Finally, proposed TCMR 786.215(e)(1) includes, as a basis for permit denial, information on "delinquent civil penalties issued pursuant to the Act." The corresponding Federal regulation at 30 CFR 773.15(b)(1) also bases permit denial, in part, on information concerning delinquent civil penalties issued pursuant to SMCRA. However, the preamble to 30 CFR 778.14(c) (48 FR 44344, 44389, September 28, 1983) explains that the reference to the "Act" in section 510(c) of SMCRA, on which the Federal regulation is based, includes all State and Federal programs approved under SMCRA (See also 53 FR 38868, 38882–38883, October 3, 1988). As discussed in finding No. 2(c), Texas' definition of "Act" includes only TSCMRA, and any Texas law, rule, or regulation enacted or promulgated pursuant to TSCMRA. It does not include OSM Federal programs (OSM-administered Indian lands program and Federal programs for States), or SMCRA-approved State programs, other than the Texas program. Therefore, Texas' proposed phrase "delinquent civil penalties issued pursuant to the Act" does not include as a basis for permit denial, as the Federal regulation at 30 CFR 773.15(b)(1) does, delinquent civil penalties issued pursuant to OSM Federal programs, and pursuant to SMCRA-approved State programs other than the Texas program.

For the aforementioned reasons, the Director finds that, except for the provision that in the absence of a

failure-to-abate cessation order the regulatory authority may presume that a notice of violation has been or is being corrected, which provision the Director is deferring decision on, proposed TCMR 786.215(e)(1) is less stringent than section 510(c) of SMCRA and less effective than the corresponding Federal regulation at 30 CFR 773.15(b)(1). Therefore, the Director does not approve proposed TCMR 786.215(e)(1) and requires Texas to revise it so that (1) it references the required lists of unabated cessation orders and violation notices at TCMR 778.116(m), (2) the Commission shall not issue a permit if it is determined by the Commission that any surface coal mining and reclamation operation owned or controlled by either the applicant, or by any person who owns or controls the applicant, is currently in violation of TSCMRA or any other applicable law, rule or regulation referred to in TCMR 786.215(e)(1), and (3) available information concerning delinquent civil penalties issued pursuant to any OSM Federal programs, or any SMCRA-approved State programs other than the Texas program is included as a basis for permit denial.

(b) TCMR 786.215(e)(2)

Proposed TCMR 786.215(e)(2) would require that a permit must be conditionally issued if issuance is based either on (1) the proof submitted under TCMR 786.215(e)(1)(A); or (2) "pending the outcome of an appeal described in paragraph *(e)(1)(A)* of this section" (emphasis added). With the exception of an incorrect reference to paragraph (e)(1)(A), the proposed regulation is identical to the corresponding Federal regulation at 30 CFR 773.15(b)(2).

The Federal regulation at 30 CFR 773.15(b)(2) refers to the "outcome of an appeal described in paragraph (b)(1)(ii)" of § 773.15, which describes the option for issuing a conditional permit in cases where the controlling entity is currently in violation of the SMCRA or any other law, rule or regulation. This option requires the applicant to establish that the controlling entity has filed and is pursuing a direct administrative or judicial appeal to contest the validity of a current violation. Texas has identical provisions at paragraph (e)(1)(B), rather than at paragraph (e)(1)(A), of proposed TCMR 786.215. Therefore, the Director finds that, with the exception of the incorrect reference to paragraph (e)(1)(A) of TCMR 786.215, Texas' proposed TCMR 786.215(e)(2) is no less effective than the corresponding Federal regulation at 30 CFR 773.15(b)(2). The Director approves the proposed regulation but requires Texas to revise TCMR 786.215(e)(2) to reference the outcome of the appeal described in paragraph (e)(1)(B) of TCMR 786.215, rather than "paragraph (e)(1)(A) of this section."

(c) TCMR 786.215(f)

Proposed TCMR 786.215(f) requires that "[b]efore any final determination by the Commission that the applicant, anyone who owns or controls the applicant, or the operator specified in the application, controls or has controlled mining operations with a demonstrated pattern of willful violation of the Act of such nature, duration, and with such resulting irreparable damage to the environment that indicates an intent not to comply with the provisions of the Act, no permit shall be issued before a hearing." The proposed regulation further provides that the controlling entity shall be afforded the opportunity for an adjudicatory hearing in accordance with TCMR 787.222.

Section 510(c) of SMCRA and the Federal regulation at 30 CFR 773.15(b)(3) prohibit issuance of a permit where patterns of willful violations are found to exist. However, the Federal requirements provide that before such a prohibition is finalized, the applicant or operator must be given an opportunity for an adjudicatory hearing on the determination as provided for at 30 CFR 775.11.

The phrase "no permit shall be issued before a hearing" makes proposed TCMR 786.215(f) confusing and its requirements unclear. Read literally, the phrase inappropriately conditions the permit denial requirement by limiting such denial to some period of time "before a hearing." The proposed regulation does not specifically require denial of a permit once the Commission finalizes, after a hearing, a determination that a pattern of willful violations exists. It only requires that issuance of a permit be deferred until after a hearing is held. Thus, a permit could be issued, even in cases where patterns of willful violations are found to exist, if a hearing were held before the issuance.

Because the proposed Texas regulation does not specifically require denial of a permit if, after a hearing, the Commission finalizes a determination that a pattern of willful violations exists, the Director finds that proposed TCMR 786.215(f) is less stringent than section 510(c) of SMCRA and is less effective than the corresponding Federal regulation at 30 CFR 773.15(b)(3). The Director does not approve the proposed regulation and requires Texas to revise TCMR 786.215(f) to prohibit issuance of permits in all situations where the applicant, anyone who owns or controls the applicant, or the operator specified in the application controls or has controlled surface coal mining and reclamation operations with a demonstrated pattern of willful violation of TSCMRA of such nature, duration, and with such resulting irreparable damage to the environment that indicates an intent not to comply with TSCMRA.

(d) TCMR 786.215(g)

Proposed TCMR 786.215(g) would require the Commission, prior to issuing a permit, to review any new compliance information that may have been submitted pursuant to the requirements of TCMR 778.116. If the applicant fails or refuses to respond as required, or if the new information shows that the controlling entity is in violation, "the Commission *may* deny the permit" (emphasis added).

Under the Federal regulation at 30 CFR 773.15(b)(1), the regulatory authority may not issue a permit if the controlling entity is currently in violation of SMCRA or certain other laws and regulations. The Federal regulation at 30 CFR 773.15(e), which corresponds to proposed TCMR 786.215(g), requires that before a permit is issued the regulatory authority must conduct, in light of any new information submitted pursuant to 30 CFR 778.13(i) and 778.14(d), another compliance review pursuant to 30 CFR 773.15(b)(1). If this final compliance review finds that the controlling entity is currently in violation, or if the applicant fails or refuses to respond so that a final compliance review cannot be conducted, then a permit cannot be issued.

With one exception, proposed TCMR 786.215(g) has the same requirements as the corresponding Federal regulation at 30 CFR 773.15(e). The exception is that, through inclusion of the phrase "the Commission *may* deny the permit" (emphasis added), the Commission has the option but is not required to deny a permit in those instances that the applicant fails or refuses to provide compliance information as required at TCMR 778.116, or when the information supplied shows that the controlling entity is "in violation." The corresponding Federal regulation at 30 CFR 773.15(e), by reference to 30 CFR 773.15(b)(1), does not allow discretion in such cases but requires denial of the permit if a violation exists or if a final compliance review cannot be conducted because the applicant fails or refuses to submit the required information.

The Director finds that proposed TCMR 786.215(g) would grant the

Commission discretion to issue a permit under circumstances where no such discretion is allowed by the Federal regulations. Therefore, proposed TCMR 786.215(g) is less effective than the Federal regulation at 30 CFR 773.15(e), and the Director does not approve it. The Director requires Texas to revise proposed TCMR 786.215(g) to require the Commission to deny issuance of a permit to any applicant failing or refusing to provide compliance information as required at proposed TCMR 778.116, or when the information supplied shows that the applicant or anyone who owns or controls the applicant is currently in violation of TSCMRA or any other law, rule, or regulation referred to in TCMR 786.215(e)(1).

4. TCMR 788.225, Commission Review of Outstanding Permits

Texas proposed to revise its regulations at TCMR 788.225 by adding paragraphs (e) through (h) addressing procedures for reviewing permits that may have been improvidently issued.

(a) TCMR 788.225(e)

Proposed TCMR 788.225(e) would require Texas to reassess whether a permit was improvidently issued at such times as (1) "the Commission has reason to review an issued surface coal mining and reclamation permit at any time during its term" or (2) when the three criteria specified at TCMR 788.225(f) (1), (2) and (3), which set forth conditions under which the Commission shall review a permit, are met. The Federal regulations at 30 CFR 773.20(a) require the regulatory authority to review the circumstances under which a permit was issued any time there is "reason to believe" that a permit was improvidently issued. In the discussion that follows, the mechanism that triggers an improvident issuance review under the Federal regulations is referred to as the "reason-to-believe standard."

Texas proposed to limit the requirement to conduct reviews of permits that potentially were improvidently issued to the two specific situations described at TCMR 788.225 (e) and (f). These provisions are less inclusive than the more general reason-to-believe standard of the Federal regulations at 30 CFR 773.20(a). In addition, because there is no obvious mechanism to trigger the permit review required at proposed TCMR 788.225(f), it is not clear that proposed TCMR 788.225(f) in fact describes a second situation where the Commission is required to conduct a review to determine whether a permit has been improvidently issued.

Furthermore, proposed TCMR 788.225(e) would require that "where the Commission finds conditions that would *not* satisfy the criteria of paragraph (f), it shall comply with paragraph (g) of this section" (emphasis added). Referenced paragraph (f) of TCMR 788.225 sets forth criteria for determining whether a permit has been improvidently issued. Referenced paragraph (g) specifies the remedial measures that are to be imposed. Therefore, proposed TCMR 788.225(e) would require the Commission to implement the remedial measures at paragraph (g) for all permits that have not been improvidently issued. The Federal regulations at 30 CFR 773.20(c) require implementation of remedial measures for all permits that have been improvidently issued.

The Director finds that TCMR 788.225 would (1) set an unwarranted limitation on the situations that would require Texas to reassess whether a permit was improvidently issued and (2) require application of remedial measures for all permits that have not, rather than have, been improvidently issued. Therefore, proposed TCMR 788.225(e) is less effective than the corresponding Federal regulations at 30 CFR 773.20(a). The Director does not approve the proposed regulation and requires Texas to revise TCMR 788.225(e) to require the Commission to (1) review an outstanding permit any time there is reason to believe that the permit was improvidently issued and (2) impose remedial measures no less effective than those provided for in the Federal regulations at 30 CFR 773.20(c) when it finds that a permit was improvidently issued.

(b) TCMR 788.225(f)

Proposed TCMR 788.225(f) requires the Commission to "review a permit under the authority of section 22(c) of the Act" when the conditions set forth at paragraphs (f) (1) through (3) are met. The corresponding Federal regulations at 30 CFR 773.20(b) require the regulatory authority to make a finding that a permit was improvidently issued when all the conditions specified at paragraphs (b) (1) through (3), which address permit review criteria, are met.

Proposed TCMR 788.225(f) differs from the Federal regulations at 30 CFR 773.20(b) in that the proposed rule does not require the Commission to make a finding. Instead, the Commission would "review a permit" when the conditions set forth at paragraphs (f) (1) through (3) are met. As discussed in finding No. 4(a), it is not clear whether the permit review required at proposed TCMR 788.225(f) is the same review provided for in TCMR 788.225(e) or whether TCMR 788.225(f) describes an additional situation where the Commission is required to conduct a review. It is also not clear what would trigger the required permit review. Thus, in addition to TCMR 788.225(f) not requiring the Commission to make a finding when the conditions set forth at proposed TCMR 788.225(f) (1) through (3) are met, TCMR 788.225(f) is ambiguous.

Further, proposed TCMR 788.225(f)(1)(A) limits the consideration of unabated violations, delinquent penalties, or fees to any "which was not included in the application's review." The corresponding Federal regulation at 30 CFR 773.20(b)(1)(i) provides no such limitations but requires consideration of all instances where a regulatory authority should not have issued a permit because of an unabated violation or a delinquent penalty or fee, regardless of whether or not the violation, penalty, or fee was included in the permittee's application.

For these reasons, the Director finds that, except for paragraph (f)(1)(B), proposed TCMR 788.225(f) is less effective than the corresponding Federal regulations at 30 CFR 773.20(b). The Director does approve proposed TCMR 788.225(f) because it (1) does not require a finding that a permit improvidently issued when the conditions set forth at proposed TCMR 788.225(f) (1) through (3) are met, and (2) does not require at TCMR 788.225(f)(1)(A) consideration of all unabated violations or delinquent fees and penalties.

Proposed TCMR 788.225(f)(1)(B) provides that the Commission shall review a permit if "[t]he permit was issued on the information that a notice of violation was in the process of being corrected to the satisfaction of the agency with jurisdiction over the violation * * *." This proposed language is substantively identical to the corresponding Federal regulation at 30 CFR 773.20(b)(1)(ii). However, because this subsection relates to the same presumption issue discussed in finding No. 3(a) above, and the Secretary has indicated his intention to reconsider the corresponding Federal regulation at 30 CFR 773.20(b)(1)(ii) in addition to 30 CFR 773.15(b)(1)(i) (Memorandum of Points and Authorities, p. 124), the Director defers action on proposed TCMR 788.225(f) (1)(B).

The Director requires Texas to revise TCMR 788.225(f) to (1) require the Commission to make a finding that a permit was improvidently issued if the criteria at TCMR 788.225(f)(1) through (3) are met, and (2) require consideration of all unabated violations, delinquent

penalties or fees regardless of whether or not the violations, penalties, or fees were included in the permittee's application.

(c) TCMR 788.25(g)

Proposed TCMR 788.225(g) requires the Commission, upon finding that "a permit should be reviewed," to implement one or more of three specified remedial measures. The Federal regulations at 30 CFR 773.20(c) require the regulatory authority, upon finding that a permit was improvidently issued, to implement one or more of four specified remedial measures.

Proposed TCMR 788.225(g) differs from the Federal regulations at 30 CFR 773.20(c) in that Texas' proposed rule does not indicate that remedial measures must be applied when a permit was improvidently issued. Instead, it requires implementation of remedial measures when the Commission finds that "a permit should be reviewed." As discussed in finding Nos. 4 (a) and (b), it is not clear that Texas' proposed TCMR 788.25 (e) and (f) would require implementation of remedial measures in cases where permits have been imnprovidently issued.

In addition, the proposed remedial measure at TCMR 788.225(g)(3) allows the Commission to "[i]ssue a show cause order to suspend or revoke the permit in accordance with part 843." The suspension and revocation requirements of TCMR part 843 pertain only to situations where a pattern of violations exists; they do not pertain to improvidently issued permits. The Federal remedies at 30 CFR 773.20(c) (3) and (4) are not so limited, but respectively provide the regulatory authority with authority to suspend the permit, or to rescind the permit under the procedures of 30 CFR 773.21, even where only one unabated violation, unpaid penalty, or fee exists.

Furthermore, the Federal regulations at 30 CFR 773.21 provide for a process of automatic suspension, rescission, and cessation of operations once the permittee is served notice of the decision to suspend or rescind a permit. The notice must include the reasons for the decision and must state that after a specified period of time not to exceed 90 days, the permit automatically will be suspended, and not to exceed 90 days thereafter will be rescinded, unless the permittee submits proof and the regulatory authority finds that one of the conditions set forth at 30 CFR 773.21(a) (1) through (4) is met. Proposed TCMR 788.225(g)(3) only provides for suspension and rescission through formal adjudicatory proceedings at TCMR part 843. There is no automatic process with specified time limits. Moreover, the proposed regulation does not provide for notice requirements consistent with those specified at 30 CFR 773.20(a).

For the above reasons, the Director finds that proposed TCMR 788.225(g) is less effective than the corresponding Federal regulations at 30 CFR 773.20(c) and 773.21(a) and (b). The Director does not approve the proposed regulation and requires Texas to revise TCMR 788.225(g) to (1) require the Commission to base the implementation of the specified remedial measures upon a finding that a permit was improvidently issued, (2) provide the Commission with authority to suspend or rescind the permit, even where only one unabated violation, unpaid penalty, or fee exists, and (3) require that a notice of intent to supend or rescind an improvidently issue permit include notice requirements no less effective than those specified at 30 CFR 773.21.

(d) TCMR 788.225(h)

Proposed TCMR 788.225(h) provides that a permittee may file an appeal for review under section 32 of TSCMRA and section 16 of the Administrative Procedures and Texas Register Act (APTRA). Subsections 32(c)(4) and (d) of TSCMRA provide a permittee the right to a hearing in relation to a suspension or revocation of a permit, but only in those cases where the Commission believes that a pattern of willful violations exists.

The Federal regulation at 30 CFR 773.21(c) provides a permittee the right to appeal to the Board of Land Appeals under 43 CFR 4.1280 through 4.1286 for administrative review of a notice of proposed suspension or rescission of a permit that was improvidently issued.

Subsections 32(c)(4) and (d) of TSMCRA do not address the suspension or revocation of a permit that was improvidently issued. They do not have procedures equivalent to the Federal suspension and rescission procedures for such permits.

However, section 16 of APTRA sets forth procedures for formal administrative adjudications that are similar to the Federal procedures at 43 CFR 4.1280 through 4.1286. In the preamble to the proposed Federal regulation at 30 CFR 773.20(c), a permittee's appellate rights under Federal and State programs was specifically discussed:

> Under the proposal, permit rescission by OSMRE in its capacity as a regulatory authority would be considered a "final decision" of the Director of OSMRE, subject to administrative review in accordance with 43 CFR part 4. Where a State were the regulatory authority, and in the absence of specific provisions for review of such actions, the right to appeal would be the same as that provided from any other final order of the State regulatory authority.

(51 FR 25822, 25826, July 16, 1986). On the basis that the appeal right afforded by section 16 of APTRA is the same as would be "provided from any other final order of the State regulatory authority," the Director finds that section 16 of APTRA would provide the permittee with appellate rights no less effective than those afforded by the Federal provisions at 43 CFR 4.1280 through 4.1286.

In addition, section 20(f) of TSCMRA provides that all provisions of APTRA apply to permit applications and that notices of hearings and appeals are governed by APTRA. Further, section 19 of APTRA provides the right of judicial review in a District Court of Travis County, Texas to persons who have exhausted all administrative remedies available within the agency and who are aggrieved by a final decision in a contested case.

The Director finds that proposed TCMR 788.225(h), in combination with the requirements of TSCMRA and APTRA, is no less effective than the corresponding Federal regulations at 30 CFR 773.21(c), and he approves this regulation.

IV. Public and Agency Comments

Public Comments

OSM solicited public comments and provided opportunity for a public hearing on the proposed amendment. No comments were received. Because no one requested an opportunity to testify at a public hearing, no hearing was held.

Agency Comments

Pursuant to section 503(b)(1) of SMCRA and 30 CFR 732.17(h)(11)(i), OSM solicited comments from the Administrator of the Environmental Protection Agency (EPA), and various other Federal agencies with an actual or potential interest in the Texas program.

The U.S. Forest Service, Soil Conservation Service, and Bureau of Land Management responded that they had no suggested changes or comments on the proposed amendment (Administrative Record Nos. TX–466, (TX–467, and TX–470).

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

Pursuant to 30 CFR 732.17(h)(4), OSM is required to solicit comments from the

SHPO and ACHP for all amendments that may have an effect on historic properties. The Director solicited comments from these offices. The SHPO did not believe that the proposed amendment "will affect compliance with 36 CFR 800 in Texas" (Administrative Record No. TX–468). ACHP did not respond.

EPA Concurrence

Under 30 CFR 732.17(h)(11)(ii), OSM is required to obtain the written concurrence of the Administrator of the EPA with respect to any provisions of a State program amendment that relate to air or water quality standards promulgated under the authority of the Clean Water Act (33 U.S.C. 1251 *et seq.*) or the Clean Air Act (42 U.S.C. 7401 *et seq.*) By letter dated October 31, 1989, EPA gave its concurrence (Administrative Record No. TX–469).

V. Director's Decision

Based on the above findings, the Director approves, with certain exceptions and additional requirements, the proposed amendment as submitted by Texas on September 12, 1989.

As discussed respectively in finding Nos. 1, 2(a), 2(b), 3(b), and 4(d), the Director approves (1) TCMR 701.008(53), definitions of "owned and controlled" and "owns and controls"; TCMR 778.116(a) through (i), (k) and (n), identification of interests and compliance information; and TCMR 786.221(d), conditions of permits; (2) TCMR 778.116(j), information format; (3) TCMR 778.116(l), facts about any suspension, revocation, or forfeiture; (4) TCMR 786.215(e)(2), conditional permit issuance; and (5) TCMR 788.255(h), right of appeal. The Director approves these proposed regulations because they are no less effective than the corresponding Federal Regulations.

As discussed respectively in finding Nos. 2(c), 3(a), 3(c), 3(d), 4(a), 4(b), and 4(c), the Director does not approve (1) TCMR 778.116(m), violation information; (2) TCMR 786.215(e)(1), review of violations, except for the provision that in the absence of a failure-to-abate cessation order, the Commission may presume that a notice of violation has or is being corrected; (3) TCMR 786.215(f), permit denial for pattern of violations; (4) TCMR 786.215(g), final compliance review; (5) TCMR 788.225(e), review for improvidently issued permits; (6) TCMR 788.225(f), review criteria, except for paragraph (f)(1)(B); and (7) TCMR 788.225(g), remedial measures. The Director does not approve these proposed regulations because they are less effective than the corresponding Federal regulations and less stringent than SMCRA.

As discussed in finding Nos. 3(a) and 4(b), the Director defers action on proposed TCMR 786.215(e)(1) and 788.225(f)(1)(B) to the extent that these subsections provide for a presumption that a notice of violation has been or is being corrected in the absence of a failure-to-abate cessation order. In response to litigation, the Secretary has indicated an intention to reconsider this presumption issue in the corresponding Federal regulations at 30 CFR 773.15(b)(1) and 773.20(b)(1)(ii).

As discussed respectively in finding Nos. 2(b), 2(c), 3(a), 3(b), 3(c), 3(d), 4(a), 4(b), and 4(c), the Director requires Texas to submit further regulatory program amendments regarding (1) TCMR 778.116(1), facts about any suspension, revocation or forefeiture; (2) TCMR 778.116(m), violation information; (3) TCMR 786.215(e)(1), review of violations; (4) TCMR 786.215(e)(2), conditional permit issuance; (5) TCMR 786.215(f), permit denial for pattern of violations; (6) TCMR 786.215(g), final compliance review; (7) TCMR 788.225(e), review of improvidently issued permits; (8) TCMR 788.225(f), review criteria; and (9) TCMR 788.225(g), remedial measures.

To implement this decision, the Director is amending the Federal regulations at 30 CFR part 943 that codify all decisions concerning the Texas program. This final rule is being made effective immediately to expedite the State program amendment process and to encourage States to bring their programs into conformity with the Federal standards without undue delay. Consistency of State and Federal standards is required by SMCRA.

Effect of Director's Decision

Section 503 of SMCRA provides that a State may not exercise jurisdiction under SMCRA unless the State program is approved by the Secretary. Similarly, 30 CFR 732.17(a) requires that any alteration of an approved State program be submitted to OSM for review as a program amendment. Thus, any changes to the State program are not enforceable until approved by OSM. The Federal regulations at 30 CFR 732.17(g) prohibit any unilateral changes to approved State programs. In the oversight of the Texas program, the Director will recognize only the statutes, regulations and other materials approved by OSM, together with any consistent implementing policies, directives and other materials, and will require the enforcement by Texas of only such provisions.

VI. Procedural Determinations

National Environmental Policy Act

Pursuant to section 702(d) of SMCRA, 30 U.S.C. 1292(d), no environmental impact statement need be prepared on this rulemaking.

Executive Order 12291 and the Regulatory Flexibility Act

On July 12, 1984, the Office of Management and Budget (OMB) granted OSM an exemption from sections 3, 4, 7, and 8 of Executive Order 12291 for actions directly related to approval or conditional approval of State regulatory programs. Accordingly, for this section OSM is exempt from the requirement to prepare a regulatory impact analysis, and this action does not require a regulatory review by OMB. The Department of the Interior has determined that this rule will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). This rule will not impose any new requirements; rather, it will ensure that existing requirements established by SMCRA and the Federal rules will be met by the State.

Executive Order 12778

This rule has been reviewed under the principles set forth in section 2 of Executive Order 12778 (56 FR 55195, October 25, 1991) on Civil Justice Reform. The Department of the Interior has determined, to the extent allowed by law, that this rule meets the applicable standards of sections 2(a) and 2(b) of Executive Order 12778. Under SMCRA section 405 and 30 CFR 884 and section 503(a) and 30 CFR 732.15 and 732.17(h)(10), the agency decision on State program submittals must be based solely on a determination of whether the submittal is consistent with SMCRA and the Federal regulations. The only decision allowed under the law is approval, disapproval or conditional approval of State program amendments.

Paperwork Reduction Act

This rule does not contain information collection requirements which require approval by OMB under 44 U.S.C. 3507.

List of Subjects in 30 CFR Part 943

Intergovernmental relations, Surface mining, Underground mining.

Dated: April 24, 1992.

Raymond L. Lowrie,

Assistant Director, Western Support Center.

For the reasons set out in the preamble, title 30, chapter VII, subchapter T of the Code of Federal

Regulations is amended as set forth below:

PART 943—TEXAS

1. The authority citation for part 943 continues to read as follows:

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

2. Section 943.15 is amended by adding a new paragraph (g) as follows:

§ 943.15 Approval of regulatory program amendments.

* * * * *

(g) With the exceptions of TCMR 778.116(m), violation information; TCMR 786.215(e)(1), review of violations; TCMR 786.215(f), permit denial for pattern of violations; TCMR 786.215(g), final compliance review; TCMR 788.225(e), review for improvidently issued permits; TCMR 788.225(f), review criteria; and TCMR 788.225(g), remedial measures, the revisions to the Coal Mining Regulations of the Railroad Commission of Texas as submitted on September 12, 1989, are approved effective May 21, 1992. Revisions to the following regulations are approved:

Definition of "owned and controlled" and "owns and controls"—TCMR 701.008(53).

Identification of interests—TCMR 778.116(a) through (l), and (n).

Review of permit applications: Conditional permit issuance—TCMR 786.215(e)(2).

Conditions of permits—TCMR 786.221(d).

Commission review of outstanding permits: Right of appeal—TCMR 788.225(h).

3. Section 943.16 is amended by adding new paragraphs (b) through (j) to read as follows:

§ 943.16 Required program amendments.

* * * * *

(b) By July 20, 1992, Texas shall formally propose an amendment to OSM revising TCMR 778.116(l) to reference paragraphs TCMR 778.16(k)(1) and (2) rather than "paragraphs (a)(1) and (2) of this section."

(c) By July 20, 1992, Texas shall formally propose an amendment to OSM for TCMR 778.116(m) or otherwise modify its program to require an application to include information on (1) violations received pursuant to any SMCRA-approved State programs, including the Texas program, and pursuant to OSM Federal programs (OSM-administered Indian lands program and Federal programs for States), and (2) air or water environmental protection violations received pursuant to any non-SMCRA State laws, rules or regulations enacted pursuant to Federal laws, rules, or regulations and incurred by the applicant in any State, including the State of Texas.

(d) By July 20, 1992, Texas shall formally propose an amendment to OSM for TCMR 786.215(e)(1) to

(1) Reference the required lists of unabated cessation orders and violation notices at TCMR 778.116(m),

(2) Address the review of permit applications and require that the Railroad Commission of Texas (Commission) shall not issue a permit if it is determined that any surface coal mining and reclamation operation owned or controlled by either the applicant, or by any person who owns or controls the applicant, is currently in violation of the Texas Surface Coal Mining and Reclamation Act of any other applicable law, rule or regulation referred to at TCMR 778.215(e)(1), and

(3) Include, as a basis for permit denial, available information concerning delinquent civil penalties issued pursuant to any OSM Federal programs, or any SMCRA-approved State programs other than the Texas program.

(e) By July 20, 1992, Texas shall formally propose an amendment to OSM revising TCMR 786.215(e)(2) to reference the outcome of the appeal described in paragraph TCMR 786.215(e)(1)(B) rather than "the outcome of the appeal described in paragraph (e)(1)(A) of this section."

(f) By July 20, 1992, Texas shall formally propose an amendment to OSM for TCMR 786.215(f) addressing the review of permit applications and requiring that issuance of permits is prohibited in all situations where the applicant, anyone who owns or controls the applicant, or the operator specified in the application controls or has controlled surface coal mining and reclamation operations with a demonstrated pattern of willful violation of the Texas Surface Coal Mining and Reclamation Act of such nature, duration, and with such resulting irreparable damage to the environment that indicates an intent not to comply with the Act.

(g) By July 20, 1992, Texas shall formally propose an amendment to OSM for TCMR 786.215(g) addressing the review of permit applications and requiring the Commission to deny issuance of a permit to any applicant failing or refusing to provide compliance information as required at TCMR 778.116, or when the information supplied shows that the applicant or any person who owns or controls the applicant is currently in violation of the Texas Surface Coal Mining and Reclamation Act or any other applicable law, rule, or regulation referred to in TCMR 786.215(e)(1).

(h) By July 20, 1992, Texas shall formally propose an amendment to OSM for TCMR 788.225(e) to require the Commission to

(1) Review an outstanding permit any time there is "reason to believe" that the permit was improvidently issued and

(2) Impose remedial measures no less effective than those provided for in the Federal regulations at 30 CFR 773.20(c) when it finds that a permit was improvidently issued.

(i) By July 20, 1992, Texas shall formally propose an amendment to OSM for TCMR 788.225(f) addressing the review of outstanding permits

(1) To require the Commission to make a finding that a permit was improvidently issued if the criteria at TCMR 788.225(f) (1) through (3) are met and

(2) In making such finding, to require consideration of all unabated violations, delinquent penalties, or fees regardless of whether or not the violations, penalties, or fees were included in the permittee's application.

(j) By July 20, 1992, Texas shall formally propose an amendment to OSM for TCMR 788.225(g), the review of outstanding permits, to

(1) Require the Commission to base the implementation of the specified remedial measures upon a finding that a permit was improvidently issued,

(2) Provide the Commission with authority to suspend or rescind the permit, even where only one unabated violation, unpaid penalty, or fee exists, and

(3) Require that a notice of intent to suspend or rescind an improvidently issued permit include notice requirements no less effective than specified at 30 CFR 773.21.

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DEPARTMENT OF TRANSPORTATION

Coast Guard

33 CFR Part 165

[CGD1 92-019]

Safety Zone; North Hempstead Memorial Day Fireworks, Hempstead Harbor, NY

AGENCY: Coast Guard, DOT.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard plans to establish a temporary safety zone for the Hempstead Harbor Memorial Day