**DEPARTMENT OF THE INTERIOR**

**Bureau of Land Management**

**43 CFR Part 3800**

**[WO–300–1990–PB–24 1A]**

**RIN 1004–AD44**

## Mining Claims Under the General Mining Laws; Surface Management

**AGENCY:** Bureau of Land Management, Interior.

**ACTION:** Final rule.

**SUMMARY:** The Bureau of Land Management (BLM or ''we'') amends its regulations governing mining operations involving metallic and some other minerals on public lands. We are amending the regulations by removing certain provisions of the regulations and returning others to those in effect on January 19, 2001. We intend these regulations to prevent unnecessary or undue degradation of BLM-administered lands by mining operations authorized under the mining laws. The approach BLM takes today balances the nation's need to maintain reliable sources of strategic and industrial minerals, while ensuring protection of the environment and natural resources on public lands. The hardrock mining regulations, including the changes adopted today, are consistent with the recommendations of the National Research Council (NRC), and protect the Federal Government from financial risk if operators are unable to perform reclamation.

**EFFECTIVE DATE:** This rule is effective December 31, 2001.

**ADDRESSES:** You may send inquiries or suggestions to Director (630), Bureau of Land Management, 401 LS, 1849 C Street, NW, Washington, DC 20240.

**FOR FURTHER INFORMATION CONTACT:** Robert M. Anderson, 202/208–4201; or Michael Schwartz, 202/452–5198. Individuals who use a telecommunications device for the deaf (TDD) may contact us through the Federal Information Relay Service at 1–800/877–8339, 24 hours a day, 7 days a week.

**SUPPLEMENTARY INFORMATION:**

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

## I. What Is the Background of This Rulemaking?

On March 23, 2001, BLM published a proposed rule (66 FR 16162) to suspend, in whole or in part, the regulations we issued on November 21, 2000 (65 FR 69998), which became effective on January 20, 2001 (hereinafter, the 2000 rule), and put in their place, in whole or in part, the regulations that existed on January 19, 2001, which, for the most part, BLM adopted in 1980 (hereinafter, the 1980 rule). As stated in the proposal, the suspension would provide BLM the opportunity to review some of the requirements of the 2000 rule in light of issues the plaintiffs raised in legal challenges to the rule and concerns expressed by others, including several states. We also requested comment on whether we should retain some combination of the 2000 regulations and the 1980 regulations. The 45-day comment period on the proposal closed on May 7, 2001. BLM received approximately 49,000 comments.

On June 15, 2001 (66 FR 32571), we published a final rule revising section 3809.505, which addressed how the new financial guarantee requirements of the 2000 rule affect existing approved plans of operations. The final rule made no substantive change in the requirements except to postpone the date by which operators must comply with the financial guarantee requirements. The rule changes the date by which operators with plans of operation approved by BLM before January 20, 2001, must provide a new financial guarantee—from July 19, 2001, to November 20, 2001, and to September 13, 2001, for operations without any financial guarantee. The extension was intended to give BLM field offices and state government agencies time to prepare to administer the requirements. We also announced in that rule that it is our intention to retain the financial guarantee provisions of the 2000 rule.

Congress also directed BLM as to how to conduct the rulemaking and what provisions BLM could include in a final rule. In particular, Congress provided express guidance to BLM in the FY 2000 and FY 2001 Interior Appropriations Acts as follows:

> None of the funds in this Act or any other Act shall be used by the Secretary of the Interior to promulgate final rules to revise 43 CFR subpart 3809, except that the Secretary, following the public comment period required by section 3002 of Public Law 106–31, may issue final rules to amend 43 CFR Subpart 3809 which are not inconsistent with the recommendations contained in the National Research Council report entitled ''Hardrock Mining on Federal Lands'' so long as these regulations are also not inconsistent with existing statutory authorities. Nothing in this section shall be construed to expand the existing statutory authority of the Secretary. (Public Law 106–113, 113 Stat. 1501, App. C., 113 Stat. 1501A–210 sec. 357 (1999).)

(See the National Research Council Report , entitled *Hardrock Mining on Federal Lands* (NRC Report), September, 1999).

An identical provision was enacted in Sec. 156 of the FY 2001 Interior Appropriations Act (Public Law 106–291, sec. 156, 114 Stat. 922, 962–63 (Oct. 11, 2000)).

Following issuance of the 2000 rule four lawsuits were filed challenging the rule, three in the U.S. District Court for the District of Columbia (brought by the National Mining Association (NMA), the Newmont Mining Corporation, and the Mineral Policy Center and two other environmental groups), and one in the U.S. District Court for Nevada (brought by the State of Nevada). These cases include *National Mining Association* v. *Department of the Interior*, No. 00CV–2998 (D.D.C. filed December 15, 2000); *Newmont Mining Corporation* v. *Department of the Interior,* No. 01CV–23 (D.D.C. filed January 5, 2001); *Mineral Policy Center* v. *Department of the Interior,* No. 01CV–73 (D.D.C. filed January 16, 2001); and *State of Nevada* v. *DOI,* No. CV–N01–0040–ECR–VPC (D. NV filed January 19, 2001).

The industry plaintiffs and the State of Nevada assert that BLM improperly issued the 2000 rule and violated numerous statutes, including:

- The specific congressional provisions cited above applicable to promulgation of the revised 3809 rule;
- The notice and comment provisions of the Administrative Procedure Act, particularly with regard to the ''substantial irreparable harm'(SIH) standard of the final regulatory definition of the term ''unnecessary or undue degradation;'
- The National Environmental Policy Act;
- The Regulatory Flexibility Act;
- The Federal Land Policy and Management Act; and
- The General Mining Law.

The environmental plaintiffs assert that the 3809 regulations are not sufficiently stringent and improperly allow mining operations on lands without valid mining claims or mill sites.

On January 19, 2001, the Federal District Court in the National Mining Association suit denied NMA's motion for a preliminary injunction to stay the effective date of the final rules, holding that the plaintiff did not successfully meet its burden of showing that the revised 3809 rule becoming effective would cause irreparable harm. As to the merits of the plaintiff's claims, the Court concluded that, although such claims

may or may not have merit, it was unclear at the preliminary injunction stage of the proceeding that the NMA would eventually prevail. The litigation is currently stayed pending this rulemaking.

On February 2, 2001, the Nevada Governor sent a letter to the Secretary of the Interior requesting postponement of the effective date and the implementation of the revised 3809 rule based on legal deficiencies associated with promulgation of the new regulations and the assertion that the revised 3809 rules were unnecessary. In his February 2, 2001, letter, the Governor expressed concern that:

> These new regulations will, if not overturned, impose significant new and unnecessary regulatory burdens on Western States and will preclude mining companies from engaging in operations they might otherwise pursue, thereby leading to a dramatic decrease in employment and revenue in the mining sector and a corresponding decrease in tax revenue and other economic benefits to Western states. BLM's own Final Environmental Impact statement concludes that the new rules will result in a loss of up to 6,050 jobs, up to $396 million in total income and up to $877 million in total industry output.

The Governor was particularly concerned because Nevada would bear the greatest impact of the revised 3809 regulations.

In the March 23, 2001, proposal, BLM acknowledged that the plaintiffs, including the State of Nevada, raised serious concerns regarding the revised 3809 regulations. These factors were, in part, the basis for BLM's proposal to suspend the 2000 rule.

In the March 23, 2001, proposal we stated:

> If BLM were to implement the new regulations, and then be required to change back again if the new rules are found deficient, the impact on both large and small miners is of substantial concern. Many of the latter, particularly, may not be sophisticated in dealing with changing regulatory requirements. On a larger scale, implementation of the 2000 rule could create an uncertain economic environment. (66 FR 10164)

In addition we also stated:

> * * * we specifically solicit comments as to whether some provisions of the revised 3809 rules should not be suspended while BLM conducts its review of the issues. For example, rather than suspending all of the revised 3809 rules, BLM could leave in place some or all of the new revisions that address the specific regulatory gaps identified by the National Research Council (as identified in Alternative 5, the ''NRC Alternative,'' in BLM's final environmental impact statement), which most commenters agreed are warranted. BLM requests comments on this approach or others, e.g., whether all of the revised rules should be suspended until either BLM completes further rulemaking or until the litigation is resolved.

*Basis and Purpose of the Rule*

After reviewing comments, we have decided that acting in phases provides the best approach to achieving the overall objective of preventing unnecessary or undue degradation while providing opportunities to explore, develop, and produce minerals.

The first phase was to postpone the deadlines in the financial guarantee requirements for those operating under plans of operations approved before January 20, 2001, to enable both BLM and states to prepare to implement the requirements. At the same time we affirmed our intention to retain the substantive financial guarantee requirements of the 2000 rule. We published a final rule to this effect in the **Federal Register** on June 15, 2001 (66 FR 32571).

Today's action is the second step in the process. We are amending the regulations in a way that removes from the regulatory scheme the components of the 2000 rule that created the most uncertainty regarding proper regulatory standards, while leaving in place the remainder of the rule. BLM continues to believe that undertaking implementation of certain provisions of the new regulatory program applicable to hardrock mining on public lands before additional examination of the legal, economic, and environmental concerns that plaintiffs raise could prove unnecessarily disruptive and confusing to the mining industry and the states that, together with BLM, regulate the mining industry. We removed these provisions in today's rulemaking.

The provisions we are retaining reflect the many comments that support retention of the 2000 rules. The retained provisions will not unnecessarily disrupt the mining industry and will prevent unnecessary or undue degradation of the public lands while the agency considers whether further changes to the rules are warranted. For the most part, the rationale for retaining many sections of the 2000 rules is set forth in the November 2000 **Federal Register** preamble to those rules. The provisions we are leaving in place implement recommendations of the NRC Report, although we are continuing to consider whether we should modify specific provisions.

In an effort to avoid a regulatory vacuum, the March 23 notice proposed a regulatory scheme wherein the 2000 rules would have been suspended in one part of the Code of Federal Regulations (proposed subpart 3809a) and the 1980 rules would have been reinstated as subpart 3809. We do not need such an approach in these final rules because, for the most part, we are retaining the overall regulatory structure of the 2000 rules. With such a scheme in place we avoid a regulatory vacuum by removing specific provisions of the 2000 rules, replacing such provisions by corresponding provisions of the 1980 rules, or by continuing provisions from the 2000 rule that reflect the previous status quo that existed in the absence of specific provisions in the 1980 rules. We explain this latter situation in the discussion of specific sections.

As the next phase, we are also publishing in the **Federal Register** a proposed rule containing the same changes as in this final rule, as well as some additional changes we had not considered previously. The proposed rule we published on March 23, 2001, provides a logical and legally sufficient basis for today's action which changes only a few sections of the 2000 rules. However, we recognize that because of the high level of interest in this rule among affected industry groups, environmental organizations, and states, we might benefit from providing an opportunity to comment on the specific changes we are adopting today. As a result of those comments we may make further adjustments to the rules.

While we considered providing an opportunity for further public comment before issuing this final rule, we decided that it is more important to resolve as much uncertainty as to the status of the 2000 rules as quickly as possible. This benefits all affected parties by clarifying the Department's position on several issues involved in the litigation challenging the 2000 rules. However, if comments in the companion proposed rule indicate that additional changes to the rules are warranted, we will make these changes in a subsequent final rule.

This final rule is authorized by the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1701 *et seq.*) (FLPMA) and the Mining Law of 1872, as amended (hereinafter ''mining laws''). Section 302(b) of FLPMA, 43 U.S.C. 1732(b), directs the Secretary to manage development of the public lands. In addition, the final rule we are adopting today carries out the FLPMA directive that, ''[i]n managing the public lands, the Secretary shall, by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the public lands.'' See 43 U.S.C. 1732(b).

The final rule we are adopting today is consistent with the FLPMA directive. We issue it under the general rulemaking authorities of FLPMA and the mining laws (43 U.S.C. 1733 and 1740 and 30 U.S.C. 22, respectively).

*Consistency With the NRC Report Recommendations*

As described earlier, in the fiscal year 2001 appropriations act for the Department of the Interior (Pub. L. 106–113, Sec. 357), Congress prohibited the Secretary from spending money to issue final 3809 rules other than those ''which are not inconsistent with the recommendations contained in the [NRC Report] so long as these regulations are also not inconsistent with existing statutory authorities.'' Comments we received during this and earlier comment periods indicate that there are divergent views on the consistency question. Some respondents strongly believe that the ''not inconsistent with'' provision sets strict limits on what we can include in this rule. That is, we can promulgate only regulations that conform exactly to specific NRC Report recommendations, and no more. Commenters on the March 23 proposal made extensive arguments in support of their views. Much discussion reiterated the positions and comments received before the November 2000 rules were published.

In the **Federal Register** preamble of the 2000 rule (65 FR 69999), we discussed this issue at length, and we continue to stand by the points we made in that discussion. There is no need to repeat those discussions here. It is clear that ''not inconsistent with'' is a more lenient standard than others that Congress could have chosen to use. For instance, Congress could have expressly said that the BLM rules could not ''go beyond'' the NRC recommendations, but it did not. Accordingly, BLM continues to interpret the Appropriations Act as not barring BLM from promulgating rules that address matters not expressly covered by the NRC Report. Nevertheless, BLM has carefully considered the entire NRC Report in deciding what course of action to take.

Today's rule continues in place those sections that specifically address NRC recommendations. As a practical matter, however, it is not feasible to publish a regulation which so narrowly interprets the Appropriation Act that BLM could not promulgate rules with provisions necessary to implement the specific overall recommendation. For example, the public and the regulated industry are better served if the financial guarantee requirements the NRC recommends include a description of acceptable instruments, and provisions on release and forfeiture, to mention a few components of a sound financial guarantee program.

In addition, we continue to leave in place portions of the 2000 rule that specific NRC recommendations do not address. We do so because BLM needs such provisions for sound land management. For example, this rule retains section 3809.101, which addresses what an operator may do with mineral materials on mining claims. Although the NRC did not discuss this issue, the problem has existed for years and the rule helps alleviate industry concerns and improves the Bureau's ability to manage mineral resources. We are still considering whether we need to make additional changes. However, today's action removes those provisions that created the most questions regarding consistency with the NRC Report. We now see ourselves in a position to learn more through the implementation of these rules before we engage in additional rulemaking.

*Summary of Rule Adopted*

Today's rule makes several changes to the 2000 rule. The rule continues to address regulatory gaps identified in the NRC Report. Today's changes do not affect that.

We are changing the definition of ''operator,'' found at section 3809.5. We are restoring the definition contained in the 1980 regulations.

We are also changing the definition of ''unnecessary or undue degradation'' found at section 3809.5. The proposal leading to the 2000 rule did not contain the ''substantial irreparable harm'' clause in the definition of unnecessary or undue degradation (paragraph 4). As discussed above, all but one of the lawsuits contended that the SIH provision in the definition of unnecessary or undue degradation violated the Administrative Procedure Act, NEPA, and FLPMA. Today's action removes that provision.

We also amend section 3809.116 by revising paragraph (a), which established a joint and several liability provision. This also was a provision generating numerous comments suggesting that (1) BLM had exceeded its authority and (2) liability should be proportional. As with the SIH provision, the comments we received were highly critical of the policy itself and also questioned its legality. In its revised form, the paragraph provides that mining claimants and operators are liable for obligations that accrue while they hold their interests. In effect, this returns the regulation to that in place prior to the 2000 rule.

We also amend the standards contained in section 3809.420. We removed most of the 2000 rules' environmental and operational performance standards and replaced them with the 1980 rule standards. We chose to maintain the general standards in section 3809.420(a), because these standards form a foundation upon which operators should base their plans of operations. We are unaware of widespread concern addressing these broad standards. From the 2000 rule we have retained and renumbered sections 3809.420(c)(3) and (4). These sections codify the longstanding BLM policies on acid mine drainage and use of cyanide.

The last substantive changes are the elimination of sections 3809.702 and 3809.703, which established administrative civil penalties. Throughout the process of preparing the 2000 rule, BLM was aware, as was the NRC, that BLM's authority to impose civil penalties is uncertain. Therefore, we have decided to remove these sections. At the same time, we intend to work with the Congress to clarify our authority. BLM's authority to establish an administrative penalty scheme is uncertain and, until such authority is clearly established, administrative penalties should not be part of subpart 3809.

In addition, we made a few technical changes to correct errors which appeared in the November publication of the 2000 rules. All these are discussed in more detail below.

## II. How Did BLM Change the Proposed Rule in Response to Public Comments?

BLM received approximately 49,000 comments on the March 23, 2001, proposal. Mail campaigns generated the majority of the comments, as 3 repeated messages constituted over 95 percent of the comments. Each comment succinctly asked us to retain the 2000 regulations because they would better protect the environment than the previous regulations. The comments also pointed out that the 2000 rule followed years of public comment and congressional debate, and deserve a chance to work. This last point clearly disputes the uncertainty argument BLM noted in the March 23, 2001, proposal.

In response to these comments, we are retaining intact most of the 2000 regulations. We are removing several provisions that seem particularly and unnecessarily onerous and raise clear legal and policy issues. Some industry comments made recommendations as to particular sections of the 2000 regulations that we should retain. Since we are retaining most of those regulations, we do not need to discuss

these recommendations individually, and rely on the November 21, 2000, **Federal Register** preamble to support individual sections. On June 15, 2001 (66 FR 32571), we published the final rule saying that we would retain the financial guarantee provisions from the 2000 regulations, but postponing their effective date for operations BLM approved prior to January 20, 2001.

We received comments in support of the March 23, 2001, proposal that generally contained arguments that were made in opposition to the 2000 rule when it was proposed. We also received new arguments concerning the SIH provision. These detailed comments generally came from state governments, industry associations, and mining companies. A limited number of individuals also submitted detailed comments. A joint comment from several environmental organizations included a detailed analysis opposing the proposal. Responses to these specific comments follow in the next paragraphs.

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

Casual Use

Several comments from persons who engage in small scale placer mining objected to language in the definition of ''casual use'' allowing employment of only hand or battery-powered dry washers, as part of casual use. Many recreational miners use dry washers powered by small gasoline motors that are roughly equivalent to lawn mower motors. The comments said that this definition would bar these miners from using public lands for their activities due to the cost of acquiring battery-powered dry washers. We are not making this change in the final rule. However, in the proposed rule that we are issuing today, we will propose amending the definition of ''casual use'' to accommodate this small-scale use.

Operator

This final rule revises the definition of the term ''operator'' to say that it means any person who is conducting or proposing to conduct operations. This is a return to the definition set forth in the 1980 regulations. It does not contain the 2000 rule provisions that expressly include persons who manage or direct operations and corporate parents and affiliates who materially participate in the operations. We also removed the statement that the operator can also be the claimant. Of course, the claimant may operate his or her mining claim, but stating that in the definition is unnecessary, and confusing as it could be interpreted to mean that BLM will always treat the claimant as the operator.

BLM is concerned that the 2000 rule definition of the term ''operator,'' by referencing ''parent'' entities and affiliates, appeared to authorize BLM routinely to breach the corporate veil that generally is established under state corporate laws to protect such entities. As explained in the **Federal Register** preamble to the 2000 rule (65 FR 70013), BLM adopted the ''material participation'' standard in the 2000 rules based on a concept authorized under CERCLA, as enunciated in a recent Supreme Court decision. However, there is no indication that Congress intended to override state laws in this regard under FLPMA. Unlike statutes such as the Surface Mining Control and Reclamation Act (*see, e.g.,* 30 U.S.C. 1260(c)) that expressly focus on ''ownership'' and ''control'' of entities, neither the mining laws nor FLPMA expressly holds parent entities and affiliates responsible for activities which occur at mining operations conducted by other entities. Thus, we decided we will not include the concept of ''parent'' or ''affiliate'' responsibility in the definition of the term ''operator'' in subpart 3809. Under these final rules, we will hold the appropriate entity liable through established state common law principles.

Commenters objected to the 2000 rules' definition of the term ''operator'' because of their concern that the definition, working together with the principle of joint and several liability in section 3809.116(a), would create a presumption that parents and affiliates of an entity conducting mining operations at a mine site each would be 100 percent liable for activities at the mine site. Many stakeholders consider this standard to be inequitable in its application. As described below, the principle of joint and several liability has been removed from subpart 3809, and merely characterizing an entity as an ''operator'' does not establish a particular level of responsibility, absent a specific and significant degree of involvement with the mining operation that we must determine on a case-specific basis, guided by common law principles.

At this time, the least confusing course of action is to reinstate the definition that BLM used for 20 years and is familiar to BLM and the states, while considering whether changes are appropriate.

Unnecessary or Undue Degradation

The final rule amends the definition of the term ''unnecessary or undue degradation'' by removing paragraph (4) which included in the definition conditions, activities, or practices that occur on mining claims or millsites located after October 21, 1976, (or on unclaimed lands) and result in substantial irreparable harm to significant scientific, cultural, or environmental resource values of the public lands that cannot be mitigated (the ''SIH'' standard). This paragraph, which was included in the final rule without first appearing in either of BLM's proposals which preceded the November 2000 final rules, gave BLM authority to deny plans of operation even if all of the other standards could be satisfied. Of all the provisions in the 2000 rules, this one paragraph had more projected economic impacts than all of the other sections combined. It is this provision that the Nevada Governor most strenuously objects to, and various plaintiffs have challenged. BLM has concluded that, as a matter of basic fairness, we should not have adopted this truly significant provision without first providing affected entities an opportunity to comment both as to its substance and as to its potential impacts. Because the potential impacts of the SIH standard are so dramatic, BLM is reluctant to continue to include such a provision at all. BLM is also concerned that it would be very difficult to implement the standard fairly as it relates to significant cultural resource values. In addition, the Interior Department Solicitor has issued an opinion (M–37007) addressing the legal authority of the SIH standard. This opinion has been placed in the Administrative Record.

Persons commenting on the March 23 proposed rule objected to the SIH standard. Commenters said that including the ''substantial irreparable harm'' standard in the final rule was not lawful for the following reasons:

(1) The introduction of the term ''substantial irreparable harm'' in the final rule did not constitute a legal rulemaking. Commenters stated that its inclusion violated the Administrative Procedure Act as it had not been directly used in the proposed rule and therefore did not receive adequate public scrutiny. Most of these commenters also noted their belief that the economic analysis and NEPA analysis of SIH in support of the 2000 rule was inadequate. Comments also asserted that the SIH standard is contrary to the Appropriations Act provision regarding consistency with the NRC Report; and,

(2) SIH would improperly give the BLM the right to disapprove plans of operations after an applicant has spent

considerable sums. Comments said that this creates uncertainty for the industry and its financing, and therefore provides a strong disincentive against conducting exploration and development activities in the United States. As mentioned above, commenters such as the Governor of Nevada were concerned about the dramatic economic impacts the SIH standard might cause.

Comments supporting the 2000 rule endorsed the reasoning behind the SIH provision, namely that some locations contain resources which BLM should protect from the impacts of mining. Some of these comments came from Indian tribes, which were concerned about the impact of mining on cultural resources.

One of the primary factors prompting the March 23, 2001, proposed rule was the concern about the SIH provision. Regardless of whether this provision was legally promulgated in the 2000 rule, BLM has determined that we should remove the provision, since other means exist to protect the resources covered by the SIH standard.

Because the term ''unnecessary or undue degradation'' is not defined in FLPMA, BLM has substantial discretion in defining the term and in establishing the appropriate means to prevent unnecessary or undue degradation of the public lands. BLM does not need an SIH standard in its rules either to protect against unnecessary degradation or to protect against undue degradation. FLPMA does not define either concept to mean substantial irreparable harm. Moreover, BLM has other statutory and regulatory means of preventing irreparable harm to significant scientific, cultural, or environmental resource values. These include the Endangered Species Act, the Archaeological Resources Protection Act, withdrawal under Section 204 of FLPMA (43 U.S.C. 1714), the establishment of areas of critical environmental concern (ACECs) under Section 202(c)(3) of FLPMA (43 U.S.C. 1712(c)(3)), and the performance standards in section 3809.420, to recite a partial list.

In particular, FLPMA defines ACECs as ''areas within the public lands where special management attention is required * * * to protect and prevent irreparable damage to important historic, cultural, or scenic values, fish and wildlife resources or other natural systems or processes, or to protect life and safety from natural hazards.'' 43 U.S.C. 1702(a). Thus, FLPMA established a specific means to protect resources on the public lands from irreparable damage. Congressional intent to protect these resources can clearly be satisfied by using the statutorily created land use planning process of establishing ACECs, without creating an additional overlay in the definition of ''unnecessary or undue degradation.'' It should be understood that, although 43 U.S.C. 1712, which provides for the designation of ACECs, does not impair the rights of claimants under the mining law, BLM may establish protective conditions to prevent irreparable damage within ACECs.

Another comment supporting the reinstatement of the 1980 unnecessary or undue degradation definition containing a ''prudent operator'' standard noted that the NRC Report did not advocate abandoning the prudent operator standard. BLM carefully considered reinstating the previous definition. On balance, however, BLM decided simply to strike paragraph (4) from the definition in the 2000 rule rather than completely reinstating the 1980 rule. Thus the definition of unnecessary or undue degradation resulting from today's action does not use the term ''prudent operator.'' In effect, paragraph (1) of the definition of unnecessary or undue degradation sets forth how a prudent operator would conduct operations. Such an operator would comply with the performance standards in this subpart and other environmental protection statutes, which describe a prudent way to conduct operations to prevent surface disturbance greater than necessary. This is the basis of the previous definition. The NRC Report (p. 121) discusses the ambiguity resulting from the 1980 rule definition of unnecessary or undue degradation. The current definition has the benefit of being a clearer exposition of what constitutes unnecessary or undue degradation than the definition in the 1980 regulations. To comply with NRC Report recommendation 15, BLM intends to develop guidance manuals to communicate the agency's authority under the definition of unnecessary or undue degradation to protect resources that may not be protected under other laws. For these reasons, we believe the definition in the 2000 rule is not inconsistent with the NRC Report and, other than removing paragraph 4, we did not change it in today's rule.

*Section 3809.11 When Do I Have To Submit a Plan of Operations?*

One comment from an industry trade association generally approved of this section, saying that the NRC had recommended most of its provisions. However, the comment stated that BLM should remove paragraphs (c)(6) and (7). These paragraphs require a plan of operations for operations causing surface disturbance greater than casual use in lands or waters known to contain Federally proposed or listed threatened or endangered species or critical habitat, or in any of BLM's National Monuments or National Conservation Areas. The comment stated that ''[t]he NRC Report did not recommend any additions to the list of 'special status areas,' '' and that ''requiring a plan because the mining activity will take place in a 'so called' special status area is in violation of the withdrawal procedures of FLPMA.''

No change was made in response to these comments. These same points were made in comments on the 1999 proposed rule (*see* 65 FR 70021). Our response in the preamble of the 2000 rule still applies: these provisions do not withdraw any land from the operation of the mining law. They merely establish a threshold for requiring a plan of operations for exploration activities. (All mining operations are required to submit a plan of operations under the 2000 rule, regardless of whether they are located in a special status area.) The NRC Report, which focused only on the 1980 regulations, acknowledged that certain lands require a greater degree of protection than others. In 1980, BLM did not manage National Monuments and therefore could not have included them as lands requiring a plan of operations. With respect to threatened and endangered species, as a practical matter, even under the 1980 regulations BLM looked carefully at any activity in lands or waters where surface disturbance could cause an impact to species or habitat. This scrutiny helps the operator avoid inadvertently violating the Endangered Species Act.

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

We added the phrase ''For other than Stock Raising Homestead Act lands'' to the beginning of paragraph (e) to make it clear that paragraph (c) does not apply to Stock Raising Homestead Act lands, which we address in paragraph (d). We made the change because it was possible to construe paragraph (e) in such a way that it could be read to include Stock Raising Homestead Act lands. This was not our intent in the 2000 rule, as demonstrated by the presence of paragraph (d), which applies only to Stock Raising Homestead Act lands.

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

One comment from a state government agency said, ''The requirement for validity determinations of mining claims on withdrawn or segregated lands prior to approval of a Plan of operations is unwarranted and will present an unnecessary and burdensome cost to many small independent miners* * *''

We appreciate the concern expressed by the state. BLM recognizes that conducting validity determinations is a resource intensive process that can take a considerable amount of time, particularly given the competing demands on BLM's mineral examiners. We also understand that the resulting delays could affect small operators. However, we made no change in this provision. Lands are withdrawn or segregated from the operation of the Mining Law, except for valid existing rights, for many resource protection reasons. The withdrawal or segregation would be seriously weakened if there were no process for determining whether a mining claim is valid and was valid at the time of withdrawal or segregation. The requirement for validity determinations before approval of plans of operations ensures that the withdrawn areas will not suffer resource damage from operations on invalid claims. This tradeoff provides an additional measure of protection for the public lands while allowing mining to proceed once a determination is made that the claims are valid (and BLM could otherwise approve the plans). In many instances, operators planning to operate in withdrawn areas should be able to allow in advance for the time necessary for a validity examination to be performed. The process in this section is similar to that in BLM's wilderness management regulations. We note that the impacts the state is concerned about may not occur in segregated areas because the validity process is discretionary in such areas (for reasons described in the preamble to the 2000 rule).

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

The 2000 rules stated expressly that mining claimants and operators were ''jointly and severally'' liable for obligations arising under subpart 3809. Together with the revised definition of the term ''operator,'' the 2000 rules expressly established the principle that all claimants and operators would each be 100 percent liable for all obligations that accrued while they held their interests.

The 1980 rules contained no express provision addressing the apportionment of liability among operators and mining claimants. Under the previous (1980) regulatory scheme, liability was established on a case-by-case basis under state common law principles. The BLM Manual in effect since 1985 reflected that under the 1980 rules both operators and mining claimants could be liable for reclamation. The Manual provided: ''Reasonable reclamation of surface disturbance is required of all operators, regardless of the level of operations. Mining claims are commonly leased and the claimants are often unaware of the level of operations occurring on the claims. The mining claimants are ultimately responsible for reclamation if the operator abandons the operation.'' BLM Manual, Section 3809.11. Thus, even without an express regulatory provision, BLM considered operators and mining claimants responsible for reclamation.

In this final rule, we eliminated the reference in section 3809.116(a) to ''joint and several'' liability. The 2000 rules provided a series of examples. These are also removed in this final rule. Revised section 3809.116(a) thus provides that mining claimants and operators (if other than the mining claimant) are liable for obligations under this subpart that accrue while they hold their interests. BLM recognizes that neither FLPMA nor the Mining Laws expressly provide for joint and several liability, and such an approach has not been shown to be necessary to prevent unnecessary or undue degradation of the public lands. Establishment of adequate financial guarantees should be the first line of defense against incomplete of reclamation responsibilities. The underlying liability scheme serves as a backstop and has not been demonstrated to be inadequate.

BLM intends the effect of this new provision to be equivalent to the situation that existed under the 1980 rules. The apportionment of liability among various responsible persons, including operators and mining claimants, will be established on a case-by-case basis under state common law principles, depending on the specific actions and express responsibilities of the entities involved. In some instances, mining claimants, as the entities who located the claims and have the development rights associated with the mining claims, could have the ultimate responsibility for reclamation if an operator is not available to complete its obligations.

BLM considered removing section 3809.116(a) completely, replacing it with nothing (as existed in 1980), but rejected that option because it would have been more confusing and left all liability questions unanswered. The final rule adopted today codifies the scheme in effect under the 1980 rules, but removes the standard that operators and mining claimants will always be jointly and severally liable.

One comment stated that this section's imposition of joint and several liability on claimants and operators has no statutory basis, since no provisions of FLPMA contemplate or support the imposition of such a liability scheme. It went on that there are both practical and due process problems with imposing joint and several liability for civil and criminal penalties, because such penalties could be considered ''obligations under this subpart.''

The comment stated that only operators should be liable for compliance with operator requirements. Claimants who have leased claims, sold them reserving a royalty, or contributed them to a joint venture, have no control over operations other than those conferring operator status on claimants. The comment said that making claimants liable for the acts of others would chill, and probably eliminate, these types of transactions in mining claims.

The comment concluded that the imposition of joint and several liability is inconsistent with the NRC Report recommendations, saying that the NRC Report did not endorse this approach. In fact, according to the comment, a joint and several liability scheme undermines the NRC recommendation to remove barriers to reclaiming abandoned mine sites through limiting the liability of the new operator as relates to previous contamination. The imposition of joint and several liability will discourage such cleanups.

In light of these arguments and the equity issues involved, the final rule no longer expressly provides that claimants and operators are jointly and severally liable for damage caused by the operator. If the operator is bankrupt or out of business, and damage needs to be repaired, BLM will rely on other financial resources to perform the clean-up. The resources of first resort will normally be the bond or other financial guarantee posted by the operator. Liability may extend to parent companies, in some cases, under state common law principles. As mentioned earlier, claimants may also be ultimately responsible because they are the ones

who have rights and responsibilities under the mining laws.

Some comments compared the requirements of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. 9601 *et seq.*, to mining operations. In response, we note that subpart 3809 only covers liability for reclamation of mining operations under FLPMA and the mining laws. Unlike CERCLA, these statutes do not establish joint and several liability. To the extent obligations associated with mining operations arise under CERCLA or any other statute, such obligations are independent of those that subpart 3809 establishes. Subpart 3809 is not intended to affect any obligations established under other statutes, and liability schemes under such other statutes do not determine the entities responsible under subpart 3809. BLM will determine the appropriate degree of liability on a case-specific basis, guided by common-law principles.

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

This final rule does not amend section 3809.401 except to change a cross-reference to a renumbered performance standard. Section 3809.401(b), which specifies the required content of a plan of operations, contains more detail than its equivalent in the 1980 regulations did, former section 3809.1–5(c). For example, section 3809.1–5(c)(4) of the 1980 regulations required:

> Information sufficient to describe or identify the type of operations proposed, how they will be conducted, and the period during which the proposed activity will take place.

This previous requirement was vague and left a considerable amount of discretion to the BLM field manager. This created problems both with consistency among the BLM offices and uncertainty among operators as to which information to submit. Section 3809.401 in the 2000 rules specifies exactly what BLM needs: designs, cross-sections, and operating plans for mining areas, processing facilities, and waste disposal facilities; water management plans; rock characterization and handling plans; quality assurance plans; a schedule of operations; and access plans.

One comment from an industry trade association specifically addressed this section, saying that it imposed ''[c]onsiderable new and burdensome information gathering and application requirements for proposed mining plans of operations.'' The respondent included this section in a list of provisions it considered ''inconsistent with the NRC Report.'' BLM disagrees with this comment. All the material specified in section 3809.401 is information that a field manager requires to analyze whether the plan of operations will comply with the performance standards and the National Environmental Policy Act. Many operators were already providing this level of detail under BLM's 1980 regulations and under corresponding state rules. An important factor in industry decision-making is uncertainty, in this case as to whether BLM will approve a plan of operations. Spelling out the information requirements in the regulations goes a long way toward removing this uncertainty. Rather than being inconsistent with the NRC Report, section 3809.401 facilitates compliance with Recommendation 9 of the report, which endorses BLM use of the NEPA process in its permitting decisions. (See NRC Report at pp. 108–109.) The information BLM collects under section 3809.401 assists us in performing the analyses NEPA requires.

*Section 3809.411 What Action Will BLM Take When it Receives my Plan of Operations?*

This final rule amends section 3809.411 by removing a portion of paragraph 3809.411(d)(3)(iii), which would have implemented the substantial irreparable harm standard. This is a corresponding change, part of the removal of the SIH standard from the definition of unnecessary or undue degradation.

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

This final rule amends section 3809.415 by removing paragraph (d), which would have implemented the substantial irreparable harm standard. This is a corresponding change, part of the removal of the SIH standard from the definition of unnecessary or undue degradation.

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

The performance standards of subpart 3809 are key to establishing the adequacy of environmental protection that the rules require. In deciding which performance standards to include in the final rule, we carefully considered the NRC Report. The general conclusion of the NRC Report is that the existing regulations are generally effective, although some changes are necessary. (NRC Report, p. 5.) The NRC Report continues that the ''overall structure of the federal and state laws and regulations that provide mining-related environmental protection is complicated but generally effective.'' *Id.* This conclusion and the material in the NRC Report that follows has led BLM to conclude that we should not have adopted an entire new set of performance standards, and that we should reinstate the performance standards from the 1980 rules. Thus, this final rule reinstates the standards that were formerly set forth in sections 3809.1–3(d) and 3809.2–2. These have been incorporated into section 3809.420, as paragraph (a)(6) and paragraphs (b)(1) through (b)(10) and (b)(13).

In addition to reinstating the 1980 performance standards, we decided to retain the general performance standards (paragraphs (a)(1) through (a)(5)) from the 2000 rule because they provide an overview of how an operator should conduct operations under an approved plan of operations and clarify certain basic responsibilities, including the operator's responsibility to comply with applicable land use plans and BLM's responsibility to specify necessary mitigation measures. We included paragraph (a)(6) in the general standards to make clear that operators must comply with pertinent state and Federal laws and regulations. This paragraph derives from the introductory text of former section 3809.2–2. These standards of final section 3809.420, while general in nature, provide ample guidance on how to conduct operations. In addition, we decided to retain from the 2000 rule the performance standards which address acid-forming, toxic, and deleterious materials and the standards governing leaching operations and impoundments. These latter standards reflect BLM's acid rock and cyanide policies, which have been in effect since before the 2000 rule was published. They have been redesignated as sections 3809.420(c)(11) and (c)(12).

In general, we believe there is merit in the comments criticizing the 2000 rule for imposing requirements that differ from those imposed by states and other Federal agencies. The approach BLM now prefers to take is to avoid establishing new and unnecessary standards that apply to resources that are already covered by another agency's standards. Except in those instances we cite below, the 1980 regulations provide an appropriate level of protection without imposing a duplicative set of standards.

The large majority of individual comments, most generated by mailing

campaigns, supported the performance standards in the 2000 regulations. However, numerous comments opposed the standards in this section. For example, one comment said that'

> new §§ 3809.420(a)(4), (b)(2), (b)(3), (b)(6), (c)(3), (c)(4), (c)(5), and 3809.5 require compliance with environmental or reclamation standards different from those imposed by states and other federal agencies, even though the NRC Report did not recommend that compliance with such standards was needed to prevent unnecessary or undue degradation of public lands.

This comment went on to cite specific instances in this section where the regulations established more stringent environmental protection measures than required by law or other Federal agency or state regulations. The comment concluded that this section in the 2000 rule lets BLM disregard EPA and state permits that an operator may have obtained and impose additional requirements upon mining operations that do not apply to other industrial activities.

We understand that it is our responsibility to implement FLPMA and prevent unnecessary or undue degradation. To the extent that compliance with other Federal and state requirements will prevent unnecessary or undue degradation, BLM prefers to rely on such standards. Contrary to the assertion in the comment, neither this final rule nor the 2000 rule was intended to allow operators to operate in a manner out of compliance with EPA and state discharge or other requirements. In areas such as the handling of acid-forming, toxic, and other deleterious materials, and leaching operations and impoundments, BLM previously determined that a need for BLM surface management guidance existed and established policies, which we codify in this rule. These standards, as well as the reinstated 1980 standards, are authorized by FLPMA, and can be implemented in a manner to harmonize with standards established by the states, EPA, and other Federal agencies. Section 3809.420(a)(4) requires operators to comply with NEPA, and to protect public land resources where adequate resource protection may not exist under other laws. This is precisely what the NRC Report was concerned about in Recommendation 15 (NRC Report, pp. 120–122).

The comment also questioned BLM's authority to establish environmental protection performance standards under the unnecessary or undue degradation standard of section 302(b) of FLPMA, 43 U.S.C. 1732(b), other than in the California Desert Conservation Area and in wilderness study areas. The comment noted that the text of a proviso to an exception in FLPMA section 603(c), 43 U.S.C. 1782(c), concerning wilderness study areas treats ''unnecessary or undue degradation'' differently from ''environmental protection'' and that the protection standard for the California Desert Conservation area in FLPMA section 601(f), 43 U.S.C. 1781(f), protects scenic, scientific, and environmental values of the public lands against ''undue impairment'' and against pollution of streams and waters. In comparing these two sections of FLPMA to Sec. 302(b), the comment concluded that Congress plainly differentiates between preventing unnecessary or undue degradation of the lands, and protecting resources and the environment.

BLM rejects the comment's analysis. FLPMA section 601(f) does not use the unnecessary or undue degradation standard of FLPMA section 302(b) and thus does not provide any indication of the meaning of section 302(b). The ''afford environmental protection'' language of FLPMA section 603(c) does not contain the modifiers ''unnecessary'' or ''undue'' and thus cannot be directly compared either. Moreover, BLM's subpart 3809 rules are based not only on the last sentence of FLPMA section 302(b), but are also based on the general management mandate of section 302(b), the rulemaking authority of 43 U.S.C. 1733 and 1740, congressional policy set forth in FLPMA section 102(a)(8), 43 U.S.C. 1701(a)(8), and the rulemaking authority of the 1872 Mining Law, 30 U.S.C. 22. Clearly, FLPMA's overall structure protecting the public lands from unnecessary or undue degradation reflects congressional intent that unnecessary or undue environmental impacts not occur. For the past 20 years, BLM's 3809 regulations have been in place to protect the public lands against unnecessary or undue degradation, including environmental protection considerations, and they continue to do so in this rule.

The comment also asserted that in other provisions of FLPMA, Congress directed BLM to ''provide for compliance with applicable pollution control laws'' in developing land use plans (Sec. 202(c)(8), 43 U.S.C. 1712(c)(8)). The comment interpreted this to mean that Congress imposed limits on BLM's environmental protection responsibilities, instructing BLM to defer to other agencies, Federal and state.

Although BLM rules do provide for compliance with applicable pollution control laws, the land use planning requirements do not control the interpretation of the unnecessary or undue degradation standard. However, we believe these arguments miss the point. The Secretary may exercise discretion to protect the environment through the process of approving a plan of operations under section 3809.411 of these regulations. The salient question is whether BLM's protection scheme should extend beyond the requirements state and other Federal agencies establish. Our response is that, as a general matter, it should not, for those areas and subjects adequately addressed by other agencies' requirements. Therefore, we do not intend to include environmental protection measures or resource protection measures in this subpart, where we can rely on those imposed by environmental protection laws such as the Clean Water Act, or regulations promulgated by the Environmental Protection Agency or jurisdictional state agencies. Thus, we concluded that the 1980 performance standards generally were more appropriate than those in section 3809.420(b) and (c) in the 2000 rule, if we include those in paragraphs (c)(3) and (c)(4) in the 2000 rule.

A number of other comments repeated this theme, and asserted that under the 2000 rule, ''operators must comply with performance standards that go beyond federal and state environmental requirements. Among other things, operators must minimize all impacts to the environment and to public lands, even if those impacts do not result in degradation of the lands and even if such impacts are specifically authorized by permits issued by other federal or state agencies.'' In response to these concerns and the conclusion of the NRC Report that environmental protection under the 1980 rules was generally effective, BLM has removed the environmental performance standards and most of the operational performance standards of sections 3809.420(b) and (c) of the 2000 rules. In their place BLM has reinstated the standards of the 1980 rules.

Despite the critical comments, BLM has decided to retain section 3809.420 (c)(3) and (c)(4), on acid-forming, toxic, or other deleterious materials (''acid rock''), and leaching operations and materials (''cyanide''), respectively. Although the acid rock and cyanide standards were first inserted into BLM's regulations as part of the 2000 rule, the reality is that BLM instituted these policies many years ago and they have become standard industry practice on the public lands. Thus, they should be considered the baseline requirements the NRC Report considered. As mentioned earlier, these are redesignated in this rule as sections

3809.420 (c)(11) and (c)(12). The provision on acid rock drainage implements water pollution control laws by stating the preferred venues for control: (1) Prevent or minimize the formation of the acid-forming toxic or deleterious materials; (2) if that can't be done, prevent such materials from migrating; and (3) if that can't be done, capture and treat the materials. This is a common-sense approach, but it is limited or mitigated by the statement in paragraph (c)(3)(iii) that operators do not have to go to lengths that are beyond ''reasonable'' for source and migration control. As to treatment, discharges of pollutants must meet state and EPA standards.

On the other hand, comments from individuals opposing the suspension of the 2000 rule, along with some Indian tribes, said that ''[t]he old rule contained no environmental performance standards while the current [2000] rule requires protection of rivers, streams and groundwater.'' These comments mis-characterize the 1980 regulations. Former section 3809.2–2(b), which we restore in this rule as section 3809.420(b)(5), required all operators to ''comply with applicable Federal and state water quality standards, including the Federal Water Pollution Control Act, as amended (30 U.S.C. 1151 *et seq.*).'' Further, as we explained in the preceding paragraph, we are retaining the ''acid rock'' and ''cyanide'' provisions from the 2000 rule, which are partly intended as water protection measures.

Along with the water quality provisions from the 1980 regulations, to accompany the ''acid rock'' and ''cyanide'' provisions from the 2000 rule, we are restoring from the 1980 rule the paragraphs on air quality, solid wastes, fisheries, wildlife and plant habitat protection, cultural and paleontological resource protection, as well as cadastral survey monument protection. Thus, it is abundantly clear that today's regulations ensure protection of the environment and of natural and cultural resources.

One comment addressed the cost allocation paragraph of the provision on cultural, paleontological, and cave resources, in which the 2000 rule gave BLM the responsibility for deciding who should pay for investigation, recovery, and preservation of such resources. The comment suggested an alternative scheme under which BLM would lease or sell the rights to recover and preserve such resources. The comment is moot because we are removing the provision in question and restoring the 1980 provision, which charged the costs to BLM.

Restoring provisions from the 1980 regulations will cause the removal of the specific reference to protection of cave resources in paragraph (b)(7), since caves were not mentioned in the 1980 regulations. However, paragraph (a)(6) in today's rule requires operator compliance with all pertinent Federal and state laws, which includes the Federal Cave Resources Protection Act (16 U.S.C. 4301 *et seq.*).

BLM expects that implementation of the performance standards of this rule will be straightforward because this final rule does not introduce new performance standards. We recognize that some confusion could exist as to which performance standards apply to particular operations. The following table clarifies which set of performance standards you should follow:

| If | Then |
|---|---|
| BLM approved your plan of operations prior to the effective date of this rule. | Continue to operate under your approved plan. |
| Your plan of operations was pending prior to January 20, 2001 ..... | If approved, you must conduct your plan of operations under the performance standards in place before January 20, 2001. |
| You filed an application on or after January 20, 2001, and BLM has not acted on it as of the effective date of this rule. | If approved, you must conduct your plan of operations under the performance standards in place as of the effective date of this rule. |

We should also note we did not change the plan content requirements in Section 3809.401.

*Section 3809.421 Enforcement of Performance Standards*

In restoring provisions from the 1980 regulations containing performance standards, we have added section 3809.421 containing language on enforcing the performance standards. This section is taken from section 3809.1–3 of the 1980 regulations. The new section is helpful to remind operators that failure to comply with the performance standards subjects them to enforcement under this subpart. We included this as a separate section because it does not fit into the structure of section 3809.420 of this final rule.

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

Numerous comments, including those of Indian tribes, supported the bonding and other financial guarantee provisions in the 2000 rule. Industry comments also acknowledged the need for financial guarantee requirements for all mining activities beyond casual use, as recommended by the NRC Report. As stated in our final rule of June 15, 2001 (66 FR 32571), we are not changing the overall financial guarantee requirements in the 2000 rule.

At this time we want to reiterate the Department's commitment to allow the use of existing state bond pools, if the BLM State Director determines that they provide an adequate level of protection to meet the requirements of this subpart. In particular, we wish to respond to comments suggesting that the State of Alaska bond pool would no longer be available for operations on BLM lands. That is an erroneous interpretation. Under these regulations, BLM could continue to use the State of Alaska bond pool to satisfy the requirements of subpart 3809. BLM and the State of Alaska are currently negotiating a revised Memorandum of Understanding to continue use of the bond pool. The previous Memorandum of Understanding allowing use of the bond pool has been extended until January 6, 2002 and may be extended twice again for a total of two years at the request of the State Governor. Thus negotiations can take place through the year 2003 before there would be a question as to whether BLM will accept a financial guarantee that uses the bond pool. In addition, you should note that BLM can accept other instruments, such as insurance.

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

One comment stated that the 2000 rule should have adopted standard bond amounts for certain activities and types of terrain. The comment said that some of the new financial assurance requirements do not properly reflect the NRC recommendations or would have counterproductive consequences. For example, it said that the 2000 rule does not incorporate the NRC Report statement that standard bond amounts be established for certain types of activities in specific kinds of terrain, especially for the activities of

prospectors, small exploration companies, and small miners. Specifically, the NRC Report states:

> Standard bond amounts for certain types of activities on specific kinds of terrain should be established by the regulatory agencies. It should be recognized that certain types of activities are less costly to reclaim than others. A set of activity- and terrain-dependent standard bond amounts (by state, BLM district, or forest) should be established for typical activities, especially those of prospectors, small exploration companies, and small miners, so that adequate bonds are posted for activities under 5 acres and so that the permitting process is expedited. Standard bond amounts (a certain number of dollars per acre of land disturbed for a particular type of activity) should be used in lieu of detailed calculations of bond amounts based on the engineering design of a mine or mill.

(NRC Report at pp. 94–95.)

According to the NRC Report, BLM should use these standard bond amounts, which would be in the form of a certain number of dollars per acre of land disturbed, instead of detailed calculations of bond amounts based on the engineering design of a mine or mill.

As we stated on November 21, 2000 65 FR 70070), ''[T]he rule is flexible enough to permit the BLM field manager to establish fixed amounts for activities under his or her jurisdiction, but also allows the field manager to require a financial guarantee in an amount over or under the fixed amount if the cost of reclamation of a specific operation deviates from the fixed amount.'' This is in keeping with our continued belief, which the NRC Report endorses, that good management principles require that an operator post a financial guarantee covering actual reclamation costs. A national rule is impractical for the establishment of fixed bond amounts, because costs of reclamation would vary from state to state and by terrain. BLM will consider whether fixed bond amounts can be set during the implementation process for this final rule.

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

In section 3809.598, we removed a reference to joint and several liability to conform to changes we made to section 3809.116. This change is supported by the discussion of the corresponding change in section 3809.116. We will determine on a case-by-case basis the apportionment of liability between operators and mining claimants to cover the full cost of reclamation.

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

In today's final rule we remove a reference in paragraph (a) of this section to civil penalties in former section 3809.702. As BLM is removing the provisions for civil penalties this cross reference is no longer necessary.

*Section 3809.702 What Civil Penalties Apply to Violations of This Subpart?/ Section 3809.703 Can BLM Settle a Proposed Civil Penalty?*

Two comments from mining interests—a company and a trade association—addressed these sections. Both expressly stated that it would be a good idea for BLM to have civil penalty authority, and noted that the NRC recommended that we seek this authority from Congress, if statutory authority is necessary. One of the comments stated flatly that FLPMA does not provide authority for administrative penalties, and that BLM cannot retain these provisions without the appropriate statutory authority, and the other said that it would be prudent for BLM to ascertain whether it has administrative penalty authority before retaining these provisions.

In light of these comments, we have decided to remove these two sections in the final rule. We agree that FLPMA does not contain a section expressly addressing administrative penalties. Although in the November 2000, **Federal Register** preamble we made an argument in support of the agency's authority to assess administrative penalties, this is an unsettled area for which it is prudent to await clear guidance from Congress before promulgating rules. Leaving the administrative penalty rules in effect will no doubt lead to continued litigation on the issue which the agency believes can be avoided by future legislation.

Removing these provisions should not hamper our efforts to protect human health and the environment in the event that an operator misuses a mining claim or public lands and poses an immediate threat to these values. While it would be extremely useful to be able to impose civil penalties administratively, especially as a tool to penalize delayed compliance, we can pursue alternate remedies.

We have retained the enforcement provisions of sections 3809.601 through 3809.605. This contains a significant expansion of enforcement remedies available to BLM beyond those available under the 1980 rules. Under Sec. 303(b) of FLPMA, BLM, through the Secretary of the Interior, can request the Attorney General to seek injunctive relief or other appropriate remedy, which would include a temporary restraining order in an emergency, to prevent unnecessary or undue degradation, and the collection of monetary damages resulting from unlawful acts. In appropriate circumstances, monetary damages can be large, and provide a disincentive to unlawful conduct. Section 3809.604(a) of the 2000 regulations, which we do not amend in this final rule except to correct a cross-reference, describes this statutory authority.

We have additional remedies under 43 CFR subpart 3715. The use and occupancy regulations apply to all uses of mining claims and public lands. A use must be reasonably incident (as defined in section 3715.0–5) and in compliance with all applicable Federal and state environmental standards. Further, the operator must have obtained all required permits before beginning a use, including approvals under 43 CFR part 3800 and subpart 3809. Thus, a failure to be in compliance allows BLM to issue an immediate suspension order under section 3715.7–1(a), and, where appropriate, to arrest individuals who fail to comply with such an order. At trial, the United States can demand monetary compensation for damages.

Finally, BLM may seek cooperative enforcement by a state or other Federal agency that unquestionably has civil penalty authority.

Other Comments Not Directed at Particular Sections

One comment urged that BLM, in its reconsideration of these regulations during the time they are suspended, add provisions to allow and promote the cleanup of abandoned mine sites in or adjacent to new mine areas without causing mine operators to incur additional environmental liabilities, which was an NRC recommendation. Our response to a similar comment in the 2000 rule was that ''subpart 3809 applies to active operations, not to cleaning up previously abandoned mines.''

We are also correcting a cross-reference in section 3809.2 by removing the term ''§ 3809.31(c)'' at the end of the first sentence of paragraph (a), and adding in its place the term ''§ 3809.31(d) and (e).'' This change is merely ministerial, to correct a mistake in the reference to section 3809.31, whose relevant paragraphs are (d) and (e), not (c). The discussion under section 3809.31 contains a more complete explanation.

## III. How Did BLM Fulfill its Procedural Obligations?

*Executive Order 12866, Regulatory Planning and Review*

BLM found in the 2000 rule that the new subpart 3809 regulations were a significant regulatory action under section 3(f) of Executive Order 12866 and require an assessment of potential costs and benefits under section 6(a)(3) of that Executive Order. Since we are retaining most of the 2000 rule, while amending selected provisions, we rely in today's rule on the regulatory impact analysis and benefit-cost analysis prepared for the 2000 rule and summarized in that rule. The full analyses remains on file in the BLM Administrative Record at the address specified in the **ADDRESSES** section. In the following paragraphs, we describe how the changes presented in today's rule affect this analysis.

The estimated costs associated with this rule are significantly lower than those associated with the 2000 rule. Over the 10 year period that we analyzed, we do not expect today's rule to have significant annual impacts on the economy.

The lower expected costs arise primarily from removing the SIH provision of the 2000 rule. Relative to the 2000 rule, substantial production benefits could accrue as a result of eliminating the SIH standard. However, uncertainly exists with respect to how eliminating the SIH provision will affect net economic benefits. Uncertainty about how the SIH provision would be implemented, site specific factors, and any exploration and production effects (and the timing of these effects) make evaluating net economic benefits very difficult.

The net economic effects associated with eliminating joint and several liability, civil penalties, and revising the performance standards (with the exception of the acid rock drainage and cyanide standards, which would be retained) are equally difficult to quantify but are not significant because the economic costs associated with these provisions are likely to be overshadowed by the potential economic costs associated with the SIH provision. We estimated the net effect of modifying the performance standards from the 1980 rule to the 2000 rule as being limited. Similarly, changing the 2000 standards back to the 1980 standards will result in negligible impact.

*Clarity of the Regulations*

Executive Order 12866 requires each agency to write regulations that are simple and easy to understand. We invite your comments on how to make these final regulations easier to understand, including answers to questions such as the following:

(1) Are the requirements in the final regulations clearly stated?

(2) Do the final regulations contain technical language or jargon that interferes with their clarity?

(3) Does the format of the final regulations (grouping and order of sections, use of headings, paragraphing, etc.) aid or reduce their clarity?

(4) Would the regulations be easier to understand if they were divided into more (but shorter) sections? (A ''section'' appears in bold type and is preceded by the symbol ''§ '' and a numbered heading, for example ''§ 3809.420 What performance standards apply to my notice or plan of operations?'')

(5) Is the description of the final regulations in the **SUPPLEMENTARY INFORMATION** section of this preamble helpful in understanding the final regulations? How could this description be more helpful in making the final regulations easier to understand?

Please send any comments you have on the clarity of the regulations to the address specified in the **ADDRESSES** section.

*National Environmental Policy Act*

The 2000 rule found that the new subpart 3809 regulations constituted a major Federal action significantly affecting the quality of the human environment under section 102(2)(C) of the National Environmental Policy Act of 1969, 42 U.S.C. 4332(2)(C). BLM prepared an environmental impact statement (EIS), which remains on file and is available to the public in the BLM Administrative Record at the address specified in the **ADDRESSES** section. Because this final rule retains most of the provisions of the 2000 rule, we rely on the findings in the EIS. In the following paragraphs, we discuss the extent to which we expect this rule to change the impacts on the human environment that we anticipated in the 2000 rule.

Record of Decision Under the National Environmental Policy Act

This preamble constitutes BLM's record of decision required under the Council on Environmental Quality regulations at 40 CFR 1505.2. The decision is based on the proposed action and alternatives presented in the Final Environmental Impact Statement, ''Surface Management Regulations for Locatable Mineral Operations,'' (BLM, October 2000).

BLM has since reevaluated its policy direction. The action BLM is taking today is to choose a new alternative as the preferred alternative, but which is made up entirely of elements from the range of alternatives in the FEIS, whose impacts have already been analyzed. Therefore, the existing FEIS provides adequate support and will serve as the basis of today's decision. This document contains a determination of NEPA adequacy with respect to each provision that has been altered from the 2000 regulation.

After reconsidering all relevant issues, alternatives, potential impacts, and management constraints, BLM is modifying its decision of November 21, 2000, which selected Alternative 3 of the Final EIS for implementation. BLM is reissuing its Record of Decision and selecting a modified Alternative 3 from the Final EIS. The selected alternative retains many aspects of the regulations issued in 2000 while incorporating other elements of Alternative 1 (the 1980 surface management regulations) and Alternative 5 (the NRC Recommendation Alternative).

The new selected alternative (the 2001 regulations) changes the 1980 surface management regulations, which were the baseline for analysis in the EIS, in several general areas. The changes include:

(1) Modifying the definition of unnecessary or undue degradation to provide a closer link between the performance standards and prevention of unnecessary or undue degradation;

(2) Requiring mineral operators to file a Plan of Operations for any mining activity beyond casual use regardless of disturbance size;

(3) Requiring operators to provide reclamation bonds for any disturbance greater than casual use;

(4) Specifying outcome-based performance standards for conducting operations on public lands; and,

(5) Providing options for Federal-state coordination in implementing the regulations.

We present a side-by-side comparison of the 2001 regulations alternative with the regulations that were issued in 1980 (Alternative 1), 2000 (Alternative 3), and the NRC Recommendations Alternative 5 in this Record of Decision under the section titled, ''Determination of NEPA Adequacy.''

*Alternatives Considered*

BLM considered a full range of program alternatives when developing the 2000 rule. Chapter 2 of the Final EIS provides a description of how key issues drove the formulation of the alternatives. BLM developed the five

alternatives considered in the EIS in response to issues the public raised during the EIS scoping period and comments we received on the Draft EIS. The alternatives ranged from the required ''no action'' alternative (Alternative 1), which would have retained the 1980 regulations, to Alternative 4, the ''maximum protection'' alternative. We added a fifth alternative, Alternative 5, to the Final EIS in response to comments that BLM should only make changes to the 3809 regulations that were specifically recommended in the NRC Report. The following is a brief description of the alternatives we presented in the FEIS and the rationale behind their formulation:

*Alternative 1, No Action*—This alternative would have retained the 1980 surface management regulations for management of locatable mineral operations. This alternative served as the baseline for the EIS analysis. The No Action alternative encompasses the view expressed by many in industry and state governments that changes in the regulations are not needed, and that BLM should make non-regulatory changes to improve the program prior to proposing any regulatory changes.

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

*Alternative 3, Year 2000 Regulations*—This alternative considered the implementation of the proposed regulations developed by the 3809 Task Force. Alternative 3 was the BLM's proposed action and the agency's ''preferred alternative'' in the Final EIS. The alternative was changed between the draft and final EIS in order to incorporate conclusions and recommendations from the NRC Report and in response to public comments. This alternative was selected for implementation in November 2000, but no longer represents the preferred regulatory approach.

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

*Alternative 5, NRC Recommendations*—Alternative 5, like Alternative 3, incorporates the recommendations made by the NRC Report. However, Alternative 5 limits changes in the regulations to those specifically recommended by the NRC. See the NRC Report, especially pages 7 to 9. We developed this alternative in response to public comments and a then-pending appropriations bill provision that would have restricted BLM to issuing a rule covering the regulatory gaps identified in pages 7–9 of the Report.

*New Selected Alternative, Year 2001 Regulations*—The 2001 regulation alternative retains most of the regulatory language of Alternative 3. The 2001 regulation alternative incorporates changes in five general areas to Alternative 3 to create the new preferred and selected alternative. The changes:

(1) Revise the definition of ''operator'' by reinstating the 1980 definition;

(2) Remove paragraph four from the definition of unnecessary or undue degradation, which defined unnecessary or undue degradation, in part, as ''substantial irreparable harm to significant scientific, cultural, or environmental resource values of the public lands that cannot be effectively mitigated';

(3) Remove the joint and several liability provision to ensure fairness to all persons;

(4) Revise the section on performance standards to retain the general performance standards and the standards on acid-forming materials and leaching operations but to replace the other specific standards with those from the 1980 regulations;

(5) Remove the sections on civil penalties for noncompliance; and,

(6) Include minor editing of other sections to correct errors or provide references to appropriate sections.

This alternative was developed after reconsidering legal authority, the policy direction that will best serve the public interest, weighing the environmental benefit (including implementation burdens) and impacts to industry from Alternative 3, while ensuring that the result will not be inconsistent with the NRC recommendations.

*Environmentally Preferred Alternative*

Although we did not select it, the environmentally preferred alternative is Alternative 4, the maximum protection alternative. While many of the environmental protection measures contained in Alternative 4 were included in the 2001 regulations, the BLM decided not to select Alternative 4 due to its adverse economic impact and administrative cost compared to the environmental benefit.

*Decision Rationale*

BLM has included all practical means to avoid or minimize environmental harm in the new selected alternative. The following is a summary of the rationale for selection of the preferred alternative as compared to the other alternatives with respect to the key regulation issues. A detailed rationale for the selection of each regulatory provision, and the changes made to the 2000 regulations, is discussed elsewhere in this preamble.

Definition of ''Unnecessary or Undue Degradation'

The selected alternative satisfactorily addresses the overall program issue of improving BLM's ability to prevent unnecessary or undue degradation, as required by FLPMA. The regulations change the definition of ''unnecessary or undue degradation'' to clarify that operations on public lands must be reasonably incident to prospecting, mining or milling activities, that operators must meet the performance standards, follow their Notice or Plan of Operations, and comply with other state and Federal laws related to environmental protection. The new regulations more closely tie the prevention of ''unnecessary or undue degradation'' to objective performance standards rather than the approach in the 1980 regulations, which tended to

rely upon standard industry practices to protect public resources.

As we have stated earlier in this preamble we did not select the portion of the definition of ''unnecessary or undue degradation'' under Alternative 3, which contained the SIH provision. Although some comments with regard to this provision were received at the time that it was analyzed in the FEIS, BLM asked for further comments in its March 23, 2001, notice in order to enlist the aid of the public in its review of the rule, as well as ensure that the public has had ample opportunity to review and comment on the impact of the prohibition in paragraph (4) against substantial irreparable harm to significant resources. After reviewing the comments received and evaluating BLM's policy direction in order to better implement its mission in the manner that will best serve the public interest, BLM decided that implementation and enforcement of the SIH standard would be difficult and potentially subjective, as well as expensive for both BLM and the industry. The remainder of the 2000 definition of unnecessary or undue degradation, based more closely upon performance standards, will accomplish this goal in a more objective and practical manner.

The impacts upon the level of protection afforded to sensitive resources by this change from the 2000 definition will not differ significantly from the range of alternatives analyzed in the FEIS, and will probably fall between Alternatives 1 and 3.

In comparison, Alternatives 1 and 5 would not provide BLM with the maximum ability to determine necessary resource protection measures with its ''prudent operator'' standard for what constitutes ''unnecessary or undue degradation.'' BLM believes that the ''prudent operator'' standard in these Alternatives gives the operator too great a role in determining the appropriate level of protection of public resources.

Alternative 2 would remove the definition of ''unnecessary or undue degradation'' as a regulatory criterion and rely on the requirement for operators to comply with state regulations and other environmental laws to protect public lands. BLM decided not to select this alternative since certain resources, wildlife not proposed or listed as threatened or endangered, cultural resources, and riparian areas would, not receive the same level of consideration in planning and conducting mineral operations at the state level as under other alternatives. Alternative 2 did not provide a reasonable assurance that unnecessary or undue degradation would be prevented for a variety of public resources without a BLM role in the review of individual projects.

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

Performance Standards

The new alternative retains the general performance standards from Alternative 3 but replaces the specific and environmental standards , except those relating to acid rock and cyanide, with those in Alternative 1. The new selected alternative provides performance standards that enumerate specific outcomes or conditions, yet do not mandate specific designs. This type of performance standard provides BLM with the level of detail needed to ensure that all environmental components are addressed, and at the same time preserves flexibility to consider site-specific conditions and allows for innovation in environmental protection technology. The performance standards developed under the selected alternative often require compliance with, or achievement of, the applicable Federal or state standard. We believe this is appropriate as it facilitates coordination with the states and reduces the potential for a single operation to be subject to conflicting standards. The 2001 regulations also provide that BLM may take enforcement actions where the performance standards are not being met. We included these requirements because without enforcement the performance standards may not be effective in protecting or reclaiming public resources.

We did not select Alternatives 1 or 5, which would retain only the performance standards in the 1980 regulations, because the regulations did not include recent program guidance related to the performance of operations using cyanide, or operations where acid rock drainage is an issue. This alleviates any concerns that policy and guidance documents may not provide an adequate basis for enforcement if either Alternative were selected.

We did incorporate the 1980 performance standards into the selected alternative, but have added language linking the standards to existing state and Federal law and tied compliance with these standards more closely to the definition of unnecessary or undue degradation.

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

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

Notice Plan of Operations Threshold

BLM's main mechanism for preventing unnecessary or undue degradation is through the review of Notices and the review and approval of Plans of Operations. The threshold for when to file a Plan, what it must contain, and how it is reviewed, are part of this mechanism. After considering a variety of approaches for setting the notice/plan of operations threshold, including the NRC Report recommendations, BLM has decided the threshold should generally be set between the exploration and mining levels of activity. In special category lands, BLM has decided to set the threshold at any activity greater than ''casual use.'' By using these thresholds, the selected alternative focuses the detailed review upon the site-specific environmental analysis process conducted for a Plan of Operations. The basis is the level of harm likely to result from the activity, rather than its purpose or intended result, and so a distinction has been drawn between exploration activities and mining operations. Exploration generally has not created major environmental impacts, nor is it difficult to mitigate. Casual use generally results in no or negligible disturbance of the public lands. The

requirement to file a Notice for operations involving exploration activities, combined with the selected alternative's financial guarantee requirements and performance standards, will prevent unnecessary or undue degradation while focusing agency resources at the activity with the greatest potential to cause impacts.

BLM has also included other changes to the regulations applicable to Plans of Operations in the selected alternative. We have developed a more comprehensive list of content requirements, as compared to Alternative 1, to ensure that critical items, such as plans and standards for reclamation, interim management and environmental monitoring, are not overlooked. We have added a mandatory public notice and comment requirement to the process of reviewing proposed Plans of Operations to ensure the public has an opportunity to comment prior to approval of plan activity that may impact public resources. The provisions in the selected alternative are the same as those found in Alternative 3.

We did not choose Alternative 1 because to do so would have been inconsistent with the NRC Report. Some small mining operations disturbing less than 5 acres have created significant environmental impacts or compliance problems. These problems could have been avoided or reduced if BLM had required the operator to submit a Plan of Operations and the plan had been subject to NEPA review.

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

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

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

Financial Guarantees

The posting of a financial guarantee for performance of the required reclamation is a major component of the regulatory program under all the alternatives BLM considered. The new selected alternative is the same as Alternative 3. It requires all notice- and plan-level operators to post a financial guarantee adequate to cover the cost as if BLM were to contract with a third party to complete reclamation according to the reclamation plan, including construction and maintenance costs for any treatment facilities necessary to meet Federal and state environmental standards. BLM decided to require financial guarantees for all Notices and Plans of Operations because of the inability or unwillingness of some operators to meet their reclamation obligations. At present, the potential taxpayer liability for reclamation of operations conducted under the 3809 regulations and not having a financial guarantee is in the millions of dollars. BLM has decided that to protect and restore the environment and to limit taxpayer liability, financial guarantees for reclamation should be required at 100 percent of the estimated cost for BLM to have the reclamation work performed. This includes any costs that may be necessary for long-term water treatment or site care and maintenance.

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

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

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

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

Enforcement

The new selected alternative for enforcement of the regulations does not include the civil penalties provisions that were contained in Alternative 3. Throughout the process of preparing the 2000 rules, BLM was aware, as was the NRC, that it is not clear FLPMA provides BLM the authority to impose civil penalties is uncertain. In light of comments questioning BLM's authority to assess civil penalties the new selected alternative does not include provisions for assessment of civil penalties. We intend to work with the Congress, as recommended by the NRC Report, to clarify our authority with respect to civil penalties. While it would be extremely useful to be able to impose civil penalties administratively, especially as a tool to penalize delayed compliance in cases where unnecessary or undue degradation is ongoing or imminent, BLM can pursue alternate remedies such as injunctive relief, suspension orders under the regulations at 43 CFR 3715, and cooperative

enforcement agreements with states that do have civil penalty authority.

The new selected alternative retains the language from Alternative 3 regarding procedures for enforcement orders and criminal penalties. BLM believes the language regarding enforcement orders clarifies the sometimes cumbersome procedure related to notices of noncompliance in the 1980 regulations. The selected alternative also makes clear what constitutes prohibited acts under the regulations. BLM has decided to include language regarding criminal penalties in the selected alternative to make clear the potential criminal penalties for violation of the regulations. These penalties existed before the rulemaking.

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

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

Federal/State Coordination

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

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

While the 1980 regulations (Alternative 1) provide for Federal/state agreements, we did not select it because such agreements do not require BLM to concur in the state's approval of each Plan of Operations; or in the approval, release, or forfeiture of a financial guarantee. In the 2000 rule, BLM concluded that retaining at least a concurrence role in these actions is the minimum we need to prevent unnecessary or undue degradation of the public lands.

Alternative 2 would leave review, approval, and enforcement for mineral operations to the respective state programs. Total reliance on state regulation may not be adequate to protect all the public land resources from unnecessary or undue degradation. BLM as a land manager has to meet a comprehensive requirement to protect all the resources on public lands from unnecessary or undue degradation. In addition, this would be a burden on the state for which BLM would not be able to provide compensation. For these reasons, we did not select Alternative 2.

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

Federal/state coordination under Alternative 5 would not differ greatly from the 1980 regulations. Alternative 5 would provide procedures for referral of enforcement actions to the state. However, it would not provide for retention of a minimal level of involvement by BLM in individual project approvals or financial guarantees. In the 2000 rule, BLM concluded this minimal level of participation is needed to meet its obligation to prevent unnecessary or undue degradation.

Consistency With the NRC Report

Since release of the NRC Report, ''Hardrock Mining on Federal Lands,'' recent Congressional appropriations acts have contained a requirement that any final 3809 regulations must be ''not inconsistent with'' the recommendations in the NRC Report. This Congressional requirement places some management constraints on the selection of a final alternative. Of the five alternatives in the Final EIS, only Alternatives 3 and 5 are not inconsistent with the recommendations in the NRC Report.

Alternative 1, retaining the 1980 regulations completely, would be inconsistent with the recommendations of the NRC Report. The NRC report identified specific gaps in the regulations and made six recommendations for regulatory changes. See the NRC Report, pages 7–9. BLM could not now decide to select the 1980 regulations, en toto, without being inconsistent with the NRC recommendations.

Alternative 2 would be inconsistent with most of the NRC recommendations. Alternative 2 does not provide reclamation bonding for all disturbance greater than casual use, does not provide for a Plan of Operations for all mining activity, does not provide for clear procedures for modifying plans of operations, and does not require interim management plans. The NRC report clearly recommends regulatory changes that are inconsistent with the decreased BLM role inherent in Alternative 2.

BLM has decided not to select Alternative 3, as presented in the Final EIS, due to legal and policy considerations and in light of the comments received. BLM has determined that we should remove the SIH standard as unnecessary and possibly needlessly burdensome to industry since other means exist to protect the resources covered by the SIH standard. In addition, BLM may not have the authority to implement the civil penalties provisions. Other changes to Alternative 3 reflect new policy choices.

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

Alternative 5 was designed specifically to compare the impacts resulting from, and limited to, incorporating the specific recommendations in the NRC Report. Both Alternative 5 and the new selected alternative incorporate the NRC recommendations into the 3809 regulations. The main difference between these two alternatives is that Alternative 5 limits the changes in the regulations to the specific NRC recommendations, while Alternative 3 includes both the changes recommended by NRC and some additional regulatory changes that BLM believes are necessary to address program issues.

The new selected alternative for the 2001 regulations incorporates most of the requirements from Alternative 3, but removes the substantial irreparable harm provision in the definition of unnecessary or undue degradation. Other changes made to Alternative 3 are included in the new selected alternative. These additional changes reflect the Secretary's judgment as to what BLM requires to prevent unnecessary or undue degradation of the public lands. Because many regulatory sections are not addressed in the NRC Report, they would not be inconsistent with it. In addition, selection of the alternative for the 2001 regulations does not preclude BLM from pursuing the NRC suggestions for non-regulatory improvements to the surface management program.

In other portions of the preamble you can find additional discussion of how the NRC Report and Appropriations Act provisions affect today's final rule.

*Determination of NEPA Adequacy*

Since the final selected alternative represents a combination of several alternatives, this Record of Decision includes a review of the adequacy of the Final EIS in addressing the potential impacts that would occur under the 2001 regulations as compared to the impacts we analyzed under the range of alternatives in the FEIS. The table presented below shows how key regulatory provisions of the 2001 regulations are included in the analysis under one or more of the alternatives, and notes how impacts under the selected alternative compare with those predicted in the Final EIS. We have found that the impacts resulting from the new 2001 alternative, with respect to the baseline established by the 1980, as well as the change from the 2000 regulations, would fall within the range of impacts analyzed, and thus are not significantly different. All the provisions adopted in 2001 were options that could have been adopted in 2000. No significant new information or change in circumstances has occurred that would alter the analysis or findings in the FEIS. Based on this review, it is our determination that the Final EIS prepared in November 2000 provides adequate analysis of the impacts that would occur from implementation of the new selected alternative.

Changes From the 2000 Regulations

The determination of NEPA adequacy is prepared for this Record of Decision based upon the following changes to the 3809 regulations that were promulgated in 2000 under Alternative 3:

1. Revision of the definition of ''operator,'' and changes in the section on responsibilities under § 3809.116 to eliminate the joint and several liability provisions.

2. Removal of paragraph (4) of the definition of ''unnecessary or undue degradation,'' which defined unnecessary or undue degradation, in part, as causing substantial irreparable harm to significant scientific, cultural, or environmental resource values of the public lands that cannot be effectively mitigated. Also removal of similar language from sections 3809.415(d) and 3809.411(d)(3)(iii).

3. Revision of section 3809.420 on performance standards. Retain the general performance standards and the standards on acid-forming materials and leaching operations. Replace the other specific standards with performance standards from the 1980 regulations.

4. Removal of sections 3809.702 and 3809.703 regarding civil penalties from the 2000 regulations.

5. Other minor edits to correct errors or provide references to appropriate sections.

Comparison of EIS Alternatives and 2001 Regulations

The following table compares provisions of the 1980 regulations alternative, the 2000 regulations alternative, the NRC recommendation alternative and the 2001 regulation alternative. Immediately below the side-by-side comparison is an evaluation of the adequacy of the Final EIS in identifying and analyzing impacts that would result from selecting the 2001 regulations.

## 3809 Regulation Alternatives Comparison and Determination of NEPA Adequacy

| Regulation component | EIS alternative 1: 1980 regulations | EIS alternative 3: 2000 regulations | EIS alternative 5: NRC recommendations | New selected alternative 2001 regulations |
|---|---|---|---|---|
| Casual Use Definition/Suction Dredging [3809.5]. | Activities resulting only in negligible surface disturbance and not involving mechanized earthmoving equipment, explosives, or vehicle use in areas closed to off-road vehicles. Interior Board of Land Appeals (IBLA) has ruled that suction dredges are not casual use under the 1980 regulations. | Cumulative impacts could not exceed casual use level.<br>Regulations would specify that small suction dredges could be casual use.<br>BLM would not require a Notice or Plan for suction dredging if a state permit is required and BLM has a MOU with the state on suction dredging. | Same as Alternative 1. | Same as Alt. 3. |
| Adequacy of NEPA analysis: The 2001 regulations are the same as the 2000 regulations regarding casual use and suction dredging. Impacts from casual use activities are described in the Final EIS under Alternative 3. Requiring suction dredge operators to contact BLM would delay activity, increase operation costs, and restrict access of small miners and recreationists to minerals. There would be an estimated 5 to 10% decrease in overall casual use activity, with an up to 25% decrease in suction dredging activity. Anticipated environmental benefits include prevention of impacts to T&E species and their habitat, and a decrease in cumulative impacts from large numbers of casual use operators working in a single area. | | | | |
| Definition of Project Area [3809.5]. | A tract of land upon which operations are conducted. Includes area required for building or maintaining roads, powerlines, pipelines, or other means of access. Project area may include one or more mining claims, but claims must be under one ownership. | Changed to not specify that mining claims involved in a project be under single ownership. | Same as Alternative 1. | Retain language in 2000 regulations. |
| Adequacy of NEPA analysis: The definition of ''project area'' is covered under the analysis of Alt. 3 in the Final EIS. The definition was not identified during the EIS process as a significant impact to the environment or the operator. Intent of ''project area'' definition is to make sure that all support facilities are considered in the review and analysis processes. | | | | |
| Definition of Operator [3809.5]. | Operator means a person conducting or proposing to conduct operations. | Operator means any person who manages, directs or conducts operations at a project area, ... including a parent entity or an affiliate who materially participates in such management, direction, or conduct. An operator on a particular mining claim may also be the mining claimant. | Same as Alternative 1. | Same as Alternative 1. Remove 2000 Operator definition and joint and several liability in 3809.116. Return to 1980 operator definition. Operator means a person conducting or proposing to conduct operations. |
| Adequacy of NEPA analysis: The definition of ''operator'' is covered under the analysis of Alts. 1 and 5 in the Final EIS; although it was not identified as a significant EIS issue. The impact of the change in ''operator'' definition from the 2000 regulations to the 2001 regulations would only be significant where a reclamation liability existed that was not covered by a bond and BLM had to pursue legal action to obtain reclamation. The change in ''operator'' definition would make obtaining reclamation more difficult in these situations. However, we predict the number of such occurrences will be quite low given the improved financial guarantee regulations that were put in place with the 2000 regulations and would remain under the 2001 regulations. | | | | |
| Definition of Public Lands (Lands where regulations would apply) [3809.5]. | BLM-administered lands subject to the Mining Law. Does not include lands where only minerals or surface is federal, except that amendments to the Stock Raising Homestead Act require BLM involvement when surface owner does not consent to mineral development. | Expand definition to include lands where mineral estate is federal, subject to the Mining Law, and surface estate is private. Lands with reserved minerals from a sale or exchange could be open to operation of the Mining Law through a land use plan. | Same as Alternative 1. | Retain language in 2000 regulations. |
| Adequacy of NEPA analysis: This provision of the 2001 regulations is covered under the existing analysis of Alt. 3 in the Final EIS. Impacts to minerals are both positive, with the potential to open lands with reserved minerals to exploration and development; and negative, by increasing the amount of future operations that fall under the 3809 regulations. Impacts to non-mineral resources are generally positive, with additional environmental review for projects on the split-estate lands which were previously regulated by the states without BLM involvement. | | | | |
| Unnecessary or Undue Degradation Definition (UUD) [3809.5]. | Prudent operator standard. Follow ''usual, customary, and proficient'' measures. Mitigate impacts. Comply with environmental laws. Perform reclamation. Do not create a nuisance. | Replace prudent operator standard with requirement to comply with performance standards.<br>Activity must be reasonably incident to prospecting, mining, or processing operations.<br>Could not create substantial irreparable harm to significant scientific, cultural, or environmental resources that cannot be effectively mitigated. | Same as Alternative 1. | Definition of UUD is similar to 2000 regulations except delete paragraph (4) which defined unnecessary or undue degradation in part as causing substantial irreparable harm to significant scientific, cultural, or environmental resource values of the public lands that cannot be effectively mitigated. Also removal of similar language from § 3809.415(d) and § 3809.411(d)(3)(iii). |
| Adequacy of NEPA analysis: The change in the definition of ''unnecessary or undue degradation'' is covered by the analysis in the Final EIS of Alternative 5, with some impacts reflected in the Alternative 3 analysis. The 2001 definition would not be exactly the same as Alt. 5, which would have retained the 1980 UUD definition. The addition of the link to the performance standards in the UUD definition falls between Alt. 1 and Alt. 3. Impacts of the 2001 Alternative's definition of UUD is within the range of alternatives analyzed in the Final EIS, but not substantially different from those described for Alt. 5. The ''substantial irreparable harm'' provision in the UUD definition was responsible for a large portion of the reduction in mineral activity predicted for the 2000 regulations. Removal of this provision would result in mineral activity levels at slightly less than predicted under Alternative 5 (see Final EIS Table 2.3). The slightly lower activity levels from Alt. 5 are due to other provisions from the 2000 regulations which were retained in the 2001 regulations that would contribute to a reduction in mineral activity. | | | | |

3809 REGULATION ALTERNATIVES COMPARISON AND DETERMINATION OF NEPA ADEQUACY—Continued

| Regulation component | EIS alternative 1: 1980 regulations | EIS alternative 3: 2000 regulations | EIS alternative 5: NRC recommendations | New selected alternative 2001 regulations |
|---|---|---|---|---|
| The overall acreage disturbed by mineral activity under the 2001 regulations would be at the lower end of the range described in Final EIS Table 2.3 for Alt. 5 at 8,120 to 9,630 acres per year. This would be less than the estimated 8,700 acres per year of disturbance that occurred under the 1980 regulations, but is greater than the 6,700 to 7,580 acres per year of disturbance that was predicted to occur under the 2000 regulations. While the intent was to invoke the ''substantial irreparable harm'' provision of the 2000 regulations only rarely, it was recognized that when it came to American Indian traditional cultural practices and resources the provision might be applied quite frequently. The Final EIS determined that the 2000 regulations would result in a moderate decrease in impacts to traditional cultural practices and resources, due at least in part to the definition of UUD (Final EIS, Table 2–3). Selection of the 2001 definition of UUD would instead result in impacts similar to those described for Alt. 5, which include a reduction in impacts from Notice operations to traditional cultural practices and resources when compared to the 1980 regulations. | | | | |
| Notice vs. Plan of Operations Threshold [3809.11]. | Surface disturbance less than 5 acres per calendar year requires a Notice. Plans required for more than 5 acres a year of disturbance or for any activity above casual use in special status areas such as ACECs, California Desert Conservation Area, wild and scenic rivers, wilderness areas, and areas closed to off-road vehicles. | Change threshold on the basis of division between exploration and mining.<br>All mining, milling, and bulk sampling over 1,000 tons would require Plans.<br>Exploration disturbing less than 5 acres would require Notices.<br>Exploration in special status lands or disturbing more than 5 acres would require Plans.<br>Expand special status lands to include: national monuments/conservation areas, and lands containing proposed or listed T&E species or their critical habitat. | Same as Alternative 3. Use 1980 special status lands. | Retain language in 2000 regulations. |
| Adequacy of NEPA analysis: Since there would be no change from the 2000 regulations, the impacts of the 2001 regulations are covered by the analysis in the Final EIS of Alt. 3. Impacts would not be quite the same as Alt. 5 due to the expansion of special category lands in the 2000 and 2001 regulations to include monuments and T&E species areas. Previously described impacts in the Final EIS note that: Notices only for exploration would drive up costs for small mine operators, bonding of Notices would increase exploration costs and reduce exploration activity, using a Plan of Operations to review all mines would increase likelihood that operations would meet the performance standards, costs and workload for operators and BLM would increase, and the bonds for reclamation would be adequate to ensure reclamation performance. These same impacts would occur under the 2001 regulations. | | | | |
| Mining Claim Validity, Existing Rights, and Mine Economics [3809.100]. | Not addressed in 3809 regs. Validity exams are required before Plan approval in wilderness areas per 8560 regulations. BLM has option of determining valid existing rights before approving Plans in segregated or withdrawn areas. | Require that validity exams determine valid existing rights before approval of Plans in areas withdrawn from operation of mining laws.<br>Discretion to perform validity exams for segregated lands. | Same as Alternative 1. | Retain language in 2000 regulations. |
| Adequacy of NEPA analysis: This provision of the 2001 regulations is covered under the existing analysis of Alt. 3 in the Final EIS. BLM would conduct such exams to ensure that surface disturbance did not occur without prior existing valid mining claims on lands where a withdrawal was protecting nonmineral resources. | | | | |
| Common Variety Minerals [3809.101]. | Not addressed in 3809 regs. Policy provides for holding escrow during operations if materials to be mined may be of a common variety and subject to payment of fair market value. | Regulations would provide for holding escrow during operations if materials to be mined may be of a common variety and subject to payment of fair market value. | Same as Alternative 1. | Retain language in 2000 regulations. |
| Adequacy of NEPA analysis: This provision of the 2001 regulations is covered under the existing analysis of Alt. 3 in the Final EIS. BLM would protect potential Federal income from common variety minerals by establishing an escrow account. | | | | |
| State and Federal Government Coordination [3809.201–204]. | MOUs in each state provide for coordination for review, approval, bonding, monitoring, and enforcement. State may have lead for some program elements. Most restrictive requirements (BLM or state) apply. | When requested, BLM must give states the lead where state program is as strict as BLM requirements.<br>BLM must concur on Plan approvals. BLM retains inspection and enforcement option and NEPA, NHPA, Tribal Govt.-Govt. coordination and T&E species responsibilities. | Same as Alternative 1. MOUs would be developed or modified to provide clear procedures for BLM to refer certain noncompliance actions to other federal and state agencies for enforcement. | Retain language in 2000 regulations. |
| Adequacy of NEPA analysis: This provision of the 2001 regulations is covered under the existing analysis of Alt. 3 in the Final EIS. | | | | |

3809 REGULATION ALTERNATIVES COMPARISON AND DETERMINATION OF NEPA ADEQUACY—Continued

| Regulation component | EIS alternative 1: 1980 regulations | EIS alternative 3: 2000 regulations | EIS alternative 5: NRC recommendations | New selected alternative 2001 regulations |
|---|---|---|---|---|
| Applying Regulation Changes to Existing Operations or Facilities [3809.300] [3809.400] [3809.433–434]. | Not applicable | Existing Notices expire in 2 years unless bonded and extended.<br>Existing Notices for mining are not required to refile as a Plan if disturbance area does not increase.<br>Existing Plans, pending Plans, or Plan modifications need not comply with new performance standards if filed before effective date of new regulations. All existing Plans would have to meet new bonding requirements.<br>New mine facilities added to existing Plans after effective date would have to meet new regulation requirements.<br>Modifications to existing mine facilities after effective date would have to comply with new regulations unless shown not practical for economic, environmental, safety, or technical reasons. | Same as Alternative 3 but without new performance standards.<br>Existing Plans, pending Plans, or Plan modifications would be subject to new regula-tions and would have to meet new bonding requirements within 180 days of effective date of new regulations.<br>Modifications to existing mines after effective date would have to comply with new regulations unless shown not practical for economic, environmental, safety, or technical reasons. | Retain language in 2000 regulations. |
| Adequacy of NEPA analysis: This provision of the 2001 regulations is covered under the existing analysis of Alt. 3 in the Final EIS. | | | | |
| Notice and Plan of Operations Contents and Processing [3809.301–313] [3809.401–412]. | BLM review of Notices required in 15 calendar days. Plans, 30 days, with option of 60 more days.<br>Open-ended time frame for Plans for NEPA (EIS), NHPA, and T&E species compliance.<br>Public comment period on EA if BLM determines there is substantial public interest. | Expanded detail on Notice and Plan contents. Includes plans for interim management during temporary closures.<br>Operators also required to provide all studies/data BLM needs to comply with NEPA.<br>Review Plan for completeness within 30 days. Notice time frame 15 days.<br>Clarify review time frames begin when complete Notice or Plan is received.<br>Mandatory public comment period on all Plans for at least 30 days. | Same as Alternative 1.<br>Must provide interim management plans for periods of temporary closure. | Retain language in 2000 regulations. Edits to reflect other changes in definition of unnecessary or undue degradation. |
| Adequacy of NEPA analysis: The impact of the Notice or Plan content and review requirements is covered under the existing analysis of Alt. 3 in the Final EIS. The regulatory language regarding denial on the basis a plan violating the SIH standard is revised from the 2001 regulations to reflect the change in definition of UUD described previously. However, the processing steps would remain the same as described for the 2000 regulations up to the decision point where the option of denial due to substantial irreparable harm is no longer available. The potential for denial or non-acceptance of Plans and Notices was the main reason for the number of projected Notices and Plans in Final EIS Table 2–3 to be lower for Alt. 3 compared to Alt. 5. With the new UUD definition in the 2001 regulations the number of Notices and Plans processed is anticipated to be between the numbers shown under Alt. 3 and Alt. 5 in Final EIS Table 2–3, but probably much closer to Alternative 5. It is therefore estimated that the 2001 regulations would result in an average of 360 to 380 Notices per year and 340 to 360 Plan per year. The content and processing requirement for these Plans and Notices would result in a more comprehensive review and better protection of resources than would occur using the 1980 regulations, and would be nearly the same as that which would occur under the 2000 regulations. | | | | |
| Modifications [3809.330–331] [3809.430–431]. | Operator-initiated modifications are processed similar to original Notice or Plan.<br>Agency-required modifications must show need and that the issue was unforeseen at the time of initial Plan approval. | Eliminated requirement for BLM to show unforeseen issues that warrant modification.<br>BLM may require operator to modify Notice or Plan to prevent unnecessary or undue degradation (UUD). Only test is that the modification is needed to prevent UUD.<br>Plan modifications required at final closure to address unanticipated conditions or new information. | Same as Alternative 3. | Retain language in 2000 regulations. |
| Adequacy of NEPA analysis: This provision of the 2001 regulations is covered under the existing analysis of Alt. 3 in the Final EIS. | | | | |

3809 REGULATION ALTERNATIVES COMPARISON AND DETERMINATION OF NEPA ADEQUACY—Continued

| Regulation component | EIS alternative 1: 1980 regulations | EIS alternative 3: 2000 regulations | EIS alternative 5: NRC recommendations | New selected alternative 2001 regulations |
|---|---|---|---|---|
| Temporary or Permanent Closure [3809.334] [3809.336] [3809.424]. | Site must be maintained in safe and clean condition. May require removal of all structures and equipment, and site reclamation after unspecified period of nonoperating. | Must follow interim management plans during periods of temporary closure.<br>Notices expire after 2 years. BLM may consider projects abandoned, depending on time and condition of sites and equipment.<br>Plans are similar to Notices. After 5 consecutive years of inactivity, Plans may be terminated. | Same as Alternative 3. | Retain language in 2000 regulations. |
| Adequacy of NEPA analysis: This provision of the 2001 regulations is covered under the existing analysis of Alt. 3 in the Final EIS. | | | | |
| Financial Guarantee Requirement (Bonding) [3809.500—.599]. | Bonds required only for Plans at BLM's discretion. Expired policy limits bond amounts to $1,000/acre for exploration and $2,000/acre for mining, except for areas with cyanide use or BEEN potential which are bonded at 100% estimated BLM reclamation cost.<br>Use state bonding programs to meet these requirements through agreements. | Actual-cost bonding required for all Notices and Plans.<br>Operator would provide initial reclamation cost estimate.<br>Financial guarantee must cover 100% of reclamation costs, including any post-closure water treatment or other site maintenance.<br>Equivalent state bonding instruments could be used to meet requirements, but must be redeemable by the Secretary of the Interior.<br>Discontinue accepting corporate guarantees. | Same as Alternative 3. | Retain language in 2000 regulations; and the changes made in the time frames under regulations promulgated on June 15, 2001 for existing operations to meet the new bonding requirements. |
| Adequacy of NEPA analysis: This provision of the 2001 regulations is covered under the existing analysis of Alt. 3 in the Final EIS. | | | | |
| Inspection and Monitoring [3809.600]. | Operators must allow BLM to inspect operations. Policy is for inspections four times annually where cyanide is used or significant potential for acid rock drainage and twice annually for all other operations. Monitoring programs are developed during Plan review. The operator conducts environmental testing (water, air, soil, etc.) and submits the results to BLM. BLM may take check samples during inspections. | Same as Alternative 1. Add: Mandate current policy of inspections four times annually where cyanide is used or potential exists for acid rock drainage. | Same as Alternative 1. | Retain language in 2000 regulations. |
| Public Mine Visits [3809.900]. | | Upon prior notification to BLM, in certain circumstances, may allow the public to annually tour mines. | | |
| Adequacy of NEPA analysis: The inspection, monitoring, and public mine tour provisions of the regulations are covered under the existing analysis of Alt. 3 in the Final EIS. | | | | |
| Type and Adequacy of Penalties for Non-compliance [3809.700]. | BLM issues notices and records of noncompliance. Federal injunctions and criminal prosecution may be used. | Similar to Alternative 1. Add: BLM would issue discretionary administrative penalties ($5,000/day), suspensions, revocation of Plan approval, and nullification of Notice for failure to comply with enforcement orders.<br>Under MOUs, BLM would refer certain noncompliance actions to other federal and state agencies for enforcement. | Same as Alternative 3.<br>No additional regulations on criminal penalties. Use current criminal penalties process (Alt. 1). | Delete the civil administrative penalties in sections 3809.702 and 3809.703<br>Add reminder in 3809.421 that failure of the operator to prevent undue or unnecessary degradation or to complete reclamation to the standards described in this subpart may cause the operator to be subject to enforcement actions. This was in the 1980 regulations. |
| Adequacy of NEPA analysis: The penalties provision of the regulations is covered under the existing analysis of Alt. 1 in the Final EIS. The deletion of civil penalties from the 2000 regulations leaves only a criminal penalty framework which most closely resembles that which was used in the 1980 regulations per Alt. 1. Difficulties with enforcement using only criminal penalty provisions would continue as described in the Final EIS under Alt. 1. New section 3809.421 does not change any operator requirements or create any additional level of environmental protection over that presented in the 2000 regulations. | | | | |

3809 REGULATION ALTERNATIVES COMPARISON AND DETERMINATION OF NEPA ADEQUACY—Continued

| Regulation component | EIS alternative 1: 1980 regulations | EIS alternative 3: 2000 regulations | EIS alternative 5: NRC recommendations | New selected alternative 2001 regulations |
|---|---|---|---|---|
| Appeals Process [3809.800]. | BLM decisions must be appealed within 30 days.<br>Operators must appeal to BLM state director, then to the Interior Board of Land Appeals (IBLA).<br>Third-party appeals of BLM decisions are made to IBLA.<br>BLM's decision is in full force and effect during an appeal, unless IBLA grants a written request for a stay. | Both operator and third parties could request a state director review of any decisions, or appeal directly to IBLA.<br>State Director decisions could also be appealed to IBLA.<br>All decisions would be in full force and effect unless a written request for a stay is granted by the reviewing entity (state director or IBLA). | No Change. Same as Alternative 1. | Retain language in 2000 regulations. |
| Adequacy of NEPA analysis: This provision of the 2001 regulations is covered under the existing analysis of Alt. 3 in the Final EIS. | | | | |
| Performance Standards, Generally [3809.420]. | Prevent unnecessary or undue degradation. Follow requirements at 3809.1–3(d).<br>Other site-specific requirements may be developed during individual project review. | Outcome-based standards with site-specific allowances. Includes BLM cyanide and acid rock drainage requirements. Use proper equipment, devices, and practices.<br>Follow reasonable and customary sequence of exploration, development, and reclamation. | Same as Alternative 1. | Retain language in 2000 regulations regarding general performance standards. Add reminder that operations must be conducted in compliance with all Federal and state laws<br>Retain the performance standards in the 2000 rule related to BEEN and cyanide management. Combine them with the 1980 performance standards. |
| Adequacy of NEPA analysis: The rewritten performance standards in the 2001 regulations are covered by analysis under either Alts. 1, 3, or 5 in the Final EIS. In overall effect, the performance standards most closely resemble those put forward in Alt. 3, the 2000 regulations, with some of the performances standards from the 1980 regulation rewritten in Plain English and presented as they would be used under Alt. 5.<br>There would not be a substantial change in environmental protection, environmental impact, or operator requirements in going from the 2000 regulations to the 2001 regulations for several reasons. One, the two sets of regulations have performance requirements that are very similar, and in some cases identical. And two, performance requirements for mineral operations are not set until completion of the individual project review process. The actual performance standards in the regulations serve mostly as a guide for the site specific requirements. This is especially true with ''outcome-based'' performance standards such as those in Alts. 1, 3, and 5. A comparison of the individual performance standards follows: | | | | |
| Land Use Plans ..... | Not addressed ..... | Consistent with the Mining Law, operations and postmining land use must comply with land use plans and coastal zone management plans. | Same as Alternative 1. | Retain language in 2000 regulations. |
| Adequacy of NEPA analysis: This provision of the 2001 regulations is covered under the existing analysis of Alt. 3 in the Final EIS. | | | | |
| Surface and Ground Water Protection. | All operators must comply with federal and state water quality standards. | Same as Alternative 1, plus pit water quality must not endanger wildlife, public water supplies, or users..<br>To meet this standard, operators would use operation and reclamation practices that minimize water pollution and changes in flow in preference to water treatment or replacement. | Similar to Alt. 1 plus:.<br>Project approvals would establish acceptable postclosure water quality conditions for pit lakes suitable to long-term use of the site and those needed to adequately protect ground and surface waters, as well as wildlife and waterfowl. | Water quality. All operators shall comply with applicable Federal and state water quality standards, including the Federal Water Pollution Control Act, as amended (30 U.S.C. 1151 et seq.). |
| Adequacy of NEPA analysis: This provision of the 2001 regulations is covered under the existing analysis of Alt. 1 in the Final EIS. | | | | |
| Wetlands and Riparian Area Protection. | Not specified. State and 404 permits (from the Army Corps of Engineers) must be acquired for dredging or filling in U.S. waters. | Same as Alternative 1 with specific site-selection criteria added:.<br>Operator must: (1) avoid locating operations in wetlands and riparian areas where possible, (2) minimize impacts to wetlands and riparian areas, and (3) mitigate damage to wetlands and riparian areas through measures such as restoration or off-site replacement. | Same as Alternative 1. | Same as Alt. 1. No specific standard for a riparian area. |
| Adequacy of NEPA analysis: This provision of the 2001 regulations is covered under the existing analysis of Alts. 1 and 5 in the Final EIS. | | | | |

3809 REGULATION ALTERNATIVES COMPARISON AND DETERMINATION OF NEPA ADEQUACY—Continued

| Regulation component | EIS alternative 1: 1980 regulations | EIS alternative 3: 2000 regulations | EIS alternative 5: NRC recommendations | New selected alternative 2001 regulations |
|---|---|---|---|---|
| Soil or Growth Media Handling. | Where reasonably practicable, topsoil must be saved and reapplied to disturbed areas after areas have been reshaped. | Topsoil or other growth media must be removed, segregated, and preserved for later use in revegetation during reclamation. Must transport soil from original location to point of reclamation without stockpiling where economically and technically feasible. | Same as Alternative 1. | Same as Alternative 1. |
| Adequacy of NEPA analysis: This provision of the 2001 regulations is covered under the existing analysis of Alts. 1 and 5 in the Final EIS. | | | | |
| Revegetation Requirements. | Where reasonable and practicable, disturbed areas must be revegetated. Revegetation is to provide a diverse vegetation cover and is a component of the requirement to rehabilitate wildlife habitat. Ban on creating a nuisance would be used to address noxious weed control. | Same as Alternative 1 with more specifics on outcome. All disturbed lands must be revegetated to establish a stable and long-lasting cover that is self-sustaining and comparable in both diversity and density to preexisting natural vegetation. Use native species to the extent feasible and establish success according to schedule in reclamation plan. Operations must prevent and control noxious weed infestations. | Same as Alternative 1. | Same as Alternative 1. |
| Adequacy of NEPA analysis: This provision of the 2001 regulations is covered under the existing analysis of Alts. 1 and 5 in the Final EIS. | | | | |
| Fish, Wildlife and Plant Protection and Habitat Restoration. | Operator must act to prevent adverse impacts to threatened and endangered species and their habitats that might be affected by operations..<br>Reclamation must include rehabilitating fisheries and wildlife habitat. | Similar to Alternative 1, plus: .....<br>Operators must minimize disturbances and adverse impacts to fish, wildlife, and related environmental values..<br>All processing solutions, reagents, or mine drainage toxic to wildlife must be fenced or netted to prevent wildlife access. | Same as Alternative 1. | Same as Alternative 1. |
| Adequacy of NEPA analysis: This provision of the 2001 regulations is covered under the existing analysis of Alts. 1 and 5 in the Final EIS. | | | | |
| Protecting Cultural Resources. | National Historic Preservation Act Section 106 process used to develop mitigation for cultural resources found before Plan approval.<br>Operators cannot knowingly disturb, alter, injure, or destroy any historical or archaeological site, structure, building, object, or cultural site discovered during operations.<br>Operators must immediately notify BLM of any cultural resources found during operations and must leave such discoveries intact. BLM has 10 working days to protect or remove discovery at the government's cost, after which operations may proceed. | Same as Alternative 1, except 30 calendar days instead of 10 working days would be allowed for data recovery.<br>BLM would determine who bears cost of recovery on a case-by-case basis. | Same as Alternative 1. | Same as Alternative 1. |
| Adequacy of NEPA analysis: This provision of the 2001 regulations is covered under the existing analysis of Alts. 1 and 5 in the Final EIS. | | | | |
| Protecting Paleontological Resources. | Operators cannot knowingly disturb, alter, injure, or destroy any scientifically important paleontological remains.<br>Operators must immediately notify BLM of any paleontological resources discovered during operations and must leave such discoveries intact. BLM has 10 working days to protect or remove discoveries at the government's cost, after which operations may proceed. | Same as Alternative 1, except 30 calendar days instead of 10 working days would be allowed for data recovery.<br>BLM would determine who bears cost of recovery on a case-by-case basis. | Same as Alternative 1. | Same as Alternative 1. |
| Adequacy of NEPA analysis: This provision of the 2001 regulations is covered under the existing analysis of Alts. 1 and 5 in the Final EIS. | | | | |

3809 REGULATION ALTERNATIVES COMPARISON AND DETERMINATION OF NEPA ADEQUACY—Continued

| Regulation component | EIS alternative 1: 1980 regulations | EIS alternative 3: 2000 regulations | EIS alternative 5: NRC recommendations | New selected alternative 2001 regulations |
|---|---|---|---|---|
| Protecting Cave Resources. | Not specified. | Inventories and mitigation plans would be required before disturbance of cave resources.<br>Operators must immediately notify BLM of any significant cave resources found during operations and leave such discoveries intact. BLM has 30 calendar days to protect a discovery, after which operations may proceed. BLM would determine who bears the cost for protecting cave resources. | Not specified. Same as Alternative 1. | Not specified. Same as Alt. 1. |
| Adequacy of NEPA analysis: This provision of the 2001 regulations is covered under the existing analysis of Alts. 1 and 5 in the Final EIS. | | | | |
| American Indian Traditional Cultural Values, Practices, and Resources. | Not specified in regulations. Consultation with American Indians is used to develop mitigation on a case-by-case basis. | Consultation with American Indians is specified as part of Plan review process. (3809.411(a)(3)). Consultation would be used to develop mitigation on a case-by-case basis where mitigation is possible. | Same as Alternative 1. | Retain language in 2000 regulations. |
| Adequacy of NEPA analysis: This provision of the 2001 regulations is covered under the existing analysis of Alt. 3 in the Final EIS. | | | | |
| Roads and Structures. | Access routes for only the minimum width needed for operations and shall follow natural contours to minimize cut and fill.<br>Require the use of existing roads to minimize the number of access routes, and to construct access roads within a designated transportation or utility corridor. When commercial hauling is involved on public road the operator may be required to make arrangements for use and maintenance.<br>Operators must consult with BLM for roadcuts greater than 3 feet on inside edge.<br>All structures must be built and maintained according to state and local codes. Structures are addressed in separate rules at 43 CFR 3715. | Generally the same as Alt. 1 without the requirement to consult with BLM for roadcuts greater than 3-feet. | Same as Alternative 1. | Same as Alt. 1. |
| Adequacy of NEPA analysis: This provision of the 2001 regulations is covered under the existing analysis of Alts. 1, 3, and 5 in the Final EIS. | | | | |
| Handling of Potentially Acid-Forming, Toxic, or Other Deleterious Materials. | Reclamation must include measures to isolate, remove, or control toxic or deleterious materials.<br>Other requirements imposed would be based on site-specific review according to BLM policies [acid rock drainage (BEEN) policy]. | Includes requirements from BEEN policy. Static or kinetic testing must be used to identify and guide handling and placement of potentially acid-forming materials. BEEN control measures must be fully integrated with operational procedures, facility design, and environmental monitoring programs.<br>BEEN control must focus on prevention or control of acid-forming reaction. If formation of BEEN cannot be prevented, its potential migration must be prevented or controlled. Capture and treatment of BEEN or other undesirable effluent is required if source controls and migration controls do not prove effective. Effluent treatment could be used only after source control has been employed. | Same as Alternative 1. | Retain language in 2000 regulations. |
| Adequacy of NEPA analysis: This provision of the 2001 regulations is covered under the existing analysis of Alt. 3 in the Final EIS. Retaining the performance requirements for handling of potentially acid-forming, toxic, or other deleterious materials in the 2001 regulations, along with the Plan content requirements for information on acid drainage potential, would maintain protection of environmental resources at essentially the same level as the 2000 regulations. | | | | |

3809 REGULATION ALTERNATIVES COMPARISON AND DETERMINATION OF NEPA ADEQUACY—Continued

| Regulation component | EIS alternative 1: 1980 regulations | EIS alternative 3: 2000 regulations | EIS alternative 5: NRC recommendations | New selected alternative 2001 regulations |
|---|---|---|---|---|
| Leaching and Processing Operations and Impoundment. | Reclamation must include measures to isolate, remove, or control toxic or deleterious materials.<br>Other requirements imposed would be based on site-specific review according to BLM policies [cyanide management policy, BLM state cyanide management plans, and acid rock drainage (BEEN) policy]. | Incorporated requirements of BLM's cyanide policy: Cyanide facilities must be able to contain maximum operating solution with capacity for the 100-year, 24-hour storm event, including snowmelt events and expected draindown from heaps during power outages. Secondary containment required for vats, tanks, or recovery circuits to prevent release of toxic solutions. Heaps and other solution containment structures must be monitored for leaks. Cyanide solution and heaps must be detoxified upon release to the environment, at temporary closure, or at final reclamation. Operations must not cause wildlife mortality. Exposed cyanide solutions must be fenced and covered to prevent access by public, wildlife, and livestock. Neutralization may be used in lieu of fencing tailings impoundments. | Same as Alternative 1. | Retain language in 2000 regulations. |
| Adequacy of NEPA analysis: This provision of the 2001 regulations is covered under the existing analysis of Alt. 3 in the Final EIS. Retaining the performance requirements for leaching and processing operations in the 2001 regulations, along with the Plan content requirements for information facility design and reclamation, would maintain protection of environmental resources at essentially the same level as the 2000 regulations. | | | | |
| Stability, Grading, and Erosion Control. | Reclamation must include measures to control erosion, landslides, and runoff. | Erosion must be minimized during all phases of operations. All disturbed areas must be graded or otherwise engineered to a stable condition to minimize erosion and facilitate revegetation. All areas must be recontoured to blend in with the premining natural topography to the extent practical. | Same as Alternative 1. | Same as Alternative 1. |
| Adequacy of NEPA analysis: This provision of the 2001 regulations is covered under the existing analysis of Alts. 1 and 5 in the Final EIS. | | | | |
| Pit Backfilling and Reclamation. | Not specified. Stable highwall might be left where required to preserve evidence of mineralization. Current practice is to determine amount of pit backfilling on case-by-case basis. | BLM would determine degree of backfilling required, if any, from a site-specific operator demonstration of feasibility based on economic, environ-mental, and safety considerations.<br>Mitigation would be required for pit areas that are not backfilled. | Same as Alternative 1. Amount of pit backfilling determined on a case-by-case basis. | Same as Alternative 1. Amount of pit backfilling determined on a case-by-case basis. |
| Adequacy of NEPA analysis: This provision of the 2001 regulations is covered under the existing analysis of Alts. 1 and 5 in the Final EIS. | | | | |
| Waste Rock, tailings, and leach pads. | Mining wastes. All tailings, dumps, deleterious materials or substances, and other waste produced by the operations shall be disposed of so as to prevent unnecessary or undue degradation and in accordance with applicable Federal and state laws. | Must locate, design, construct, operate and reclaim to minimize infiltration and contamination of water, achieve stability; and to the extent economically and technically feasible, blend with the pre-mining natural topography. | Same as Alternative 1. | Same as Alternative 1. |
| Adequacy of NEPA analysis: This provision of the 2001 regulations is covered under the existing analysis of Alts. 1 and 5 in the Final EIS. | | | | |
| Drill Holes ..... | Exploration operations and drill hole plugging are not specified. Decided on case-by-case basis during Notice or Plan review. | All drill cuttings and mud must be contained onsite. All exploration drill holes must be plugged to prevent mixing of waters from aquifers, impacts to beneficial uses, downward water loss, or upward loss from artesian conditions. Bore holes must be plugged on the surface to prevent direct inflow of surface water and to eliminate the open hole as a hazard. | Same as Alternative 1. | Same as Alternative 1. |
| Adequacy of NEPA analysis: This provision of the 2001 regulations is covered under the existing analysis of Alts. 1 and 5 in the Final EIS. | | | | |

3809 REGULATION ALTERNATIVES COMPARISON AND DETERMINATION OF NEPA ADEQUACY—Continued

| Regulation component | EIS alternative 1: 1980 regulations | EIS alternative 3: 2000 regulations | EIS alternative 5: NRC recommendations | New selected alternative 2001 regulations |
|---|---|---|---|---|
| Solid Wastes ..... | All operators shall comply with applicable Federal and state standards for the disposal and treatment of solid wastes. All garbage, refuse or waste shall either be removed from the affected lands or disposed of or treated to minimize, so far as is practicable, its impact on the lands. | Must comply with Federal, state, and where delegated by the state, local standards for the disposal and treatment of solid wastes. Must remove from the project area, dispose of, or treat all non-mine garbage, refuse or waste to minimize their impact. | Same as Alternative 1. | Same as Alternative 1. |
| Adequacy of NEPA analysis: This provision of the 2001 regulations is covered under the existing analysis of Alts. 1 and 5 in the Final EIS. | | | | |
| Protection of survey monuments. | To the extent practicable, all operators shall protect all survey monuments, witness corners, reference monuments, bearing trees and line trees against unnecessary or undue destruction, obliteration or damage. If, in the course of operations, any monuments, corners, or accessories are destroyed, obliterated or damaged by such operations, the operator shall immediately report the matter to the authorized officer. The authorized officer shall prescribe, in writing, the requirements for the restoration or reestablishment of monuments, corners, bearing and line trees. | To the extent economically and technically feasible, you must protect all survey monuments, witness corners, reference monuments, bearing trees, and line trees against damage or destruction.<br>If you damage or destroy a monument, corner, or accessory, you must immediately report the matter to BLM. BLM will tell you in writing how to restore or re-establish a damaged or destroyed monument, corner or accessory. | Same as Alternative 1. | Same as Alternative 1. |
| Adequacy of NEPA analysis: This provision of the regulations is essentially covered under the existing analysis of Alts. 1, 3, and 5 in the Final EIS. | | | | |
| Fire Prevention and control. | The operator shall comply with all applicable Federal and state fire laws and regulations, and shall take all reasonable measures to prevent and suppress fires in the area of operations. | You must comply with all applicable Federal and state fire laws and regulations, and take all reasonable measures to prevent and suppress fires in your area of operations. | Same as Alternative 1. | Same as Alternative 1. |
| Adequacy of NEPA analysis: This provision of the 2001 regulations is covered under the existing analysis of Alts. 1, 3, and 5 in the Final EIS. | | | | |
| Air Quality ..... | All operators shall comply with applicable Federal and state air quality standards, including the Clean Air Act (42 U.S.C. 1857 et seq.). | Your operations must comply with applicable Federal, Tribal, state, and where delegated by the state, local government laws and requirements. | Same as Alternative 1. | Same as Alternative 1. |
| Adequacy of NEPA analysis: This provision of the 2001 regulations is covered under the existing analysis of Alts. 1, 3, and 5 in the Final EIS. | | | | |

One comment stated that the joint and several liability provision in section 3809.116(a) would cause severe disincentives to mineral exploration activities, a ''significant factor'' that should have been analyzed in the draft environmental impact statement. We have removed this provision from paragraph (a).

The Environmental Protection Agency commented on the proposed suspension of the 2000 rule, focusing on two main issues:

(1) EPA suggested ''that the new financial assurance requirements not be suspended but be continued'; and

(2) EPA stated that by amending the definition of ''unnecessary or undue degradation'' to include ''a proposed activity that would cause substantial irreparable harm,'' the 2000 rule ''significantly enhanced BLM's ability to prevent serious and foreseeable environmental harm.'' EPA requested BLM to ''consider these important measures and protections in its review of the 3809 regulations.''

The final rule of June 15, 2001, as stated earlier in this preamble, maintains the financial assurance provisions of the 2000 rule.

Although this final rule removes the substantial irreparable harm provision in the definition of unnecessary or undue degradation, BLM retains ample authority to protect surface resources and the environment. As we stated earlier, in the discussion of public comments, BLM has ample statutory and regulatory means of preventing harm to significant scientific, cultural, or environmental resource values: The Endangered Species Act, the Archaeological Resources Protection Act, withdrawal under Section 204 of FLPMA, the performance standards in section 3809.420, and so forth. Many statutory protections are invoked in the performance standards in section 3809.420.

The revision of section 3809.420 removes duplicative requirements for environmental protection. For example, paragraph (b)(7), on fisheries, wildlife, and plant habitat explicitly protects only threatened and endangered species, while the 2000 rule required that the operator ''must minimize disturbances and adverse impacts on [all] fish, wildlife, and related environmental values.'' However, the requirements that the operator must comply with the Clean Water Act, Clean Air Act, and other environmental laws and regulations will have the same effect. The final rule removes unnecessary language.

*Regulatory Flexibility Act*

Congress enacted the Regulatory Flexibility Act of 1980, as amended, 5 U.S.C. 601–612, (RFA) to ensure that Government regulations do not unnecessarily or disproportionately burden small entities. The RFA requires

a regulatory flexibility analysis if a rule would have a significant economic impact, either detrimental or beneficial, on a substantial number of small entities. BLM prepared a regulatory flexibility analysis on the expected impact of the final 2000 rule on small entities and determined that the final regulations will have a significant economic effect on a substantial number of small entities, and summarized it in the 2000 rule (65 FR 69998, 70103). The regulatory flexibility analysis remains on file in the BLM Administrative Record at the address specified in the **ADDRESSES** section. In this final rule we have made changes that should reduce the burdens on small entities. The regulations no longer provide for joint and several liability for violations of the regulations, no longer provide for civil liability for violations, simplify the definition of ''operator,'' and reduce the burdens of performance standards.

The Small Business Administration (SBA) commented in support of the proposed rule to suspend the 2000 rule. The principal substantive objection of the SBA was to the definition of ''unnecessary or undue degradation'' and the inclusion in it of ''substantial irreparable harm'' as an element. Removing this element from the definition in this final rule should obviate this objection.

One comment stated that BLM must consider ''the impact of the new regulations on small farmers and ranchers, as well as recreation-based businesses,'' in our regulatory flexibility analyses. Since these regulations have little or nothing to do, per se, with the operations of these kinds of business, the unstated implication of this comment is that changing the compliance standards for mining operators might somehow degrade the environment upon which these businesses largely depend.

As discussed earlier in the preamble, we are not abandoning surface resource protection and environmental protection by removing some onerous provisions in the 2000 rule and replacing them with provisions that functioned well for 20 years. Operators must maintain air and water quality to the standards established by Congress in the Clean Air Act and the Clean Water Act, and must manage solid wastes in accordance with the Solid Waste Disposal Act and the Resource Conservation and Recovery Act. These concerns are those most vital to the business interests mentioned in the comment.

*Small Business Regulatory Enforcement Fairness Act*

Evaluated against the baseline of the 2000 rule, BLM has concluded that today's rule will not have a significant economic impact on a substantial number of small entities. This rule should reduce the costs borne by small entities relative to the 2000 rule. However, the magnitude of the cost reductions depends on site and operation specific factors. The removal of the SIH provision will benefit small entities. As stated earlier, the SBA objected to the 2000 rules primarily because of the SIH provision. Today's action obviates that objection and benefits small entities.

*Unfunded Mandates Reform Act*

In the 2000 final rule (65 FR 69998, 70109), BLM found that those final regulations do not impose an unfunded mandate on state, local, or tribal governments or the private sector of more than $100 million per year; nor do these final regulations have a significant or unique effect on state, local, or tribal governments or the private sector. The impacts of this final rule do nothing to change that finding. Therefore, BLM is not required to prepare a statement containing the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1531 *et seq.*). None of the comments we received from state governmental entities or associations of such entities alleged any unfunded mandates in the 2000 rule.

*Executive Order 12630, Governmental Actions and Interference With Constitutionally Protected Property Rights (Takings)*

In the 2000 final rule (65 FR 69998, 70109), BLM found that those final regulations do not represent a government action capable of interfering with constitutionally protected property rights. We stated that it doesn't affect property rights or interests in property, such as mining claims; it governs how an individual or corporation exercises those rights. However, one comment on the proposed suspension of the 2000 rule stated that the joint and several liability provision in section 3809.116(a) would diminish the property value by severely restraining alienation and thus amount to a taking in violation of the Fifth Amendment of the Constitution. We have removed this provision in this final rule. Because this final rule does not make any changes that increase the burdens on mining claim owners or other property owners, the Department of the Interior has determined that the rule would not cause a taking of private property or require further discussion of takings implications under this Executive Order.

*Executive Order 13132, Federalism*

In the 2000 rule, BLM found (65 FR 69998, 70109) that it would have federalism implications in that in certain circumstances it may preempt state law. However, we found further that it would not have a substantial direct effect on the states, on the relationship between the Federal Government and the states, or on the distribution of power and responsibilities among the various levels of government. The 2000 rule describes the consultation BLM engaged in with the states and the results of that consultation. The changes made in this final rule and in the final rule of June 15, 2001 (66 FR 32571), will not increase burdens on states, and will facilitate cooperation between states and the United States in the area of surface management of mining claims. This final rule does not change the findings in the 2000 rule. This rule does not change the regulations in a manner contrary to the interests of the states as found from consultation with the states.

Further, we received comments from governors, agencies, or legislatures of or Members of Congress from the following Western States, as well as the Western Governors' Association: Alaska, Idaho, Nevada, Utah, and Wyoming. These comments were critical of the 2000 regulations and supported their suspension and revision. Only one of these provided detailed recommendations that largely tracked those of the NRC. To the extent that those specific recommendations pertain to BLM, or are within the legal responsibility of BLM, we believe this final rule follows those recommendations.

BLM's full Federalism assessment, performed on the 2000 rule, remains on file in the BLM Administrative Record at the address specified in the **ADDRESSES** section.

*Executive Order 12988, Civil Justice Reform*

Under Executive Order 12988, the Office of the Solicitor has determined that this final rule would not unduly burden the judicial system and that it meets the requirements of sections 3(a) and 3(b)(2) of the Order.

*Executive Order 13175, Consultation and Coordination With Indian Tribal Governments*

We rely in part on Tribal consultation that occurred before publication of the 2000 rule. In accordance with Executive

Order 13175, we have also found that this final rule does not include policies that have significant tribal implications. We have made clear that plans of operations under these regulations must comply with state, local, Tribal, and other Federal requirements. Although removing the SIH standard could potentially affect Native American cultural resources on the public lands, in most instances mitigation measures will be possible to reduce such impacts.

In public comments, two tribes strongly opposed the idea of rescinding the 2000 regulations and reverting to the 1980 regulations. In this final rule, we are not reissuing the 1980 regulations. Rather, we are removing or revising a limited number of provisions that:

(a) Courts have been asked to find legally untenable;

(b) Are expected to have severe impacts on employment in Western States where mining is an important industry and a source of employment for Indians and non-Indians alike; and

(c) BLM does not need in the regulations in order to prevent unnecessary or undue degradation of the public lands or to limit the impact of mining on Tribes.

One of the comments said that members of the Tribe in question ''regard salmon as essential to their spiritual and physical well-being,'' and said that maintenance of environmental resources, especially water quality and salmon, is of great importance. Although we have removed the SIH provision from the definition of unnecessary or undue degradation because of the uncertainty and possible economic disruption it causes for the mining industry, we have retained the performance standards in section 3809.420 that are designed to preserve water quality: paragraph (b)(5) which requires operators to comply with Federal and state water quality standards; paragraph (b)(11), which is designed to prevent acid rock drainage into the watershed; and paragraph (b)(12), which is intended to prevent cyanide leaching into the watershed. These provisions provide ample protection to western streams that are habitat for salmon. Retaining these provisions should fully address the Tribe's concerns.

*E.O. 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use*

This rule is not a significant energy action. It will not have an adverse effect on energy supplies. The principal changes proposed in the rule address (1) the definition of an operator, what entities are responsible for reclamation and other duties, (2) the definition of unnecessary or undue degradation, and (3) performance standards that operators must follow. To the extent that the rule affects the mining of energy minerals (*i.e.,* uranium and other fissionable metals), they will tend to increase production marginally.

*Paperwork Reduction Act*

The 2000 final rule (65 FR 69998, 70111) stated that it required collection of information from 10 or more persons. It went on to discuss our compliance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)), and the public comments that discussed the information collection requirements. We continue to rely on the discussion in the 2000 rule as to information collection requirement matters. The Office of Management and Budget has approved those information collection requirements in the final rule under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 *et seq.*, and has assigned clearance number 1004–0194. This final rule does not contain additional information collection requirements that the Office of Management and Budget must approve under the Paperwork Reduction Act of 1995.

*Author*

The principal authors of this rule are members of the Departmental 3809 Task Force, chaired by Robert M. Anderson, Deputy Assistant Director, Minerals, Realty, and Resource Protection, Bureau of Land Management.

**List of Subjects in 43 CFR Part 3800**

Administrative practice and procedure, Environmental protection, Intergovernmental relations, Land Management Bureau, Mines, Public lands-mineral resources, Reporting and recordkeeping requirements, Surety bonds, Wilderness areas.

**P. Lynn Scarlett,**

*Assistant Secretary, Policy Management, and Budget.*

Accordingly, for the reasons stated in the Preamble, and under the authorities cited below, BLM amends Title 43 of the Code of Federal Regulations part 3800 as set forth below:

## PART 3800—MINING CLAIMS UNDER THE GENERAL MINING LAWS

### Subpart 3809—Surface Management

1. The authority citation for subpart 3809 continues to read as follows:

**Authority:** 16 U.S.C. 1280; 30 U.S.C. 22; 30 U.S.C. 612; 43 U.S.C. 1201; and 43 U.S.C. 1732, 1733, 1740, 1781, and 1782.

2. Amend § 3809.2 by removing the term ''§ 3809.31(c)'' at the end of the first sentence of paragraph (a), and adding in its place the term ''§ 3809.31(d) and (e).''

3. Amend § 3809.5 by revising the definitions of ''operator'' and ''unnecessary or undue degradation'' to read as follows:

**§ 3809.5 How does BLM define certain terms used in this subpart?**

* * * * *

*Operator* means a person conducting or proposing to conduct operations.

* * * * *

*Unnecessary or undue degradation* means conditions, activities, or practices that:

(1) Fail to comply with one or more of the following: the performance standards in § 3809.420, the terms and conditions of an approved plan of operations, operations described in a complete notice, and other Federal and state laws related to environmental protection and protection of cultural resources;

(2) Are not ''reasonably incident'' to prospecting, mining, or processing operations as defined in § 3715. 0–5 of this chapter; or

(3) Fail to attain a stated level of protection or reclamation required by specific laws in areas such as the California Desert Conservation Area, Wild and Scenic Rivers, BLM-administered portions of the National Wilderness System, and BLM-administered National Monuments and National Conservation Areas.

4. Amend § 3809.31(e) by removing the word ''If'' and adding the phrase ''For other than Stock Raising Homestead Act lands, if'' at the beginning of the first sentence.

5. Amend § 3809.116 by revising paragraph (a) to read as follows:

**§ 3809.116 As a mining claimant or operator, what are my responsibilities under this subpart for my project area?**

(a) Mining claimants and operators (if other than the mining claimant) are liable for obligations under this subpart that accrue while they hold their interests.

* * * * *

6. Amend § 3809.401 (b)(5)(ii) by removing the term ''§ 3809.420(c)(4)(vii)'', and adding in its place the term ''§ 3809.420(c)(12)(vii).''

7. Amend § 3809.411 by revising paragraph (d)(3)(iii) to read:

**§ 3809.411 What action will BLM take when it receives my plan of operations?**

* * * * *

(d) * * *

(3) * * *

* * * * *

(iii) Proposes operations that would result in unnecessary or undue degradation of public lands.

8. Amend § 3809.415 by removing paragraph (d).

9. Revise § 3809.420 to read as follows:

**§ 3809.420 What performance standards apply to my notice or plan of operations?**

The following performance standards apply to your notice or plan of operations:

(a) *General performance standards.* (1) *Technology and practices.* You must use equipment, devices, and practices that will meet the performance standards of this subpart.

(2) *Sequence of operations.* You must avoid unnecessary impacts and facilitate reclamation by following a reasonable and customary mineral exploration, development, mining and reclamation sequence.

(3) *Land-use plans.* Consistent with the mining laws, your operations and post-mining land use must comply with the applicable BLM land-use plans and activity plans, and with coastal zone management plans under 16 U.S.C. 1451, as appropriate.

(4) *Mitigation.* You must take mitigation measures specified by BLM to protect public lands.

(5) *Concurrent reclamation.* You must initiate and complete reclamation at the earliest economically and technically feasible time on those portions of the disturbed area that you will not disturb further.

(6) *Compliance with other laws.* You must conduct all operations in a manner that complies with all pertinent Federal and state laws.

(b) *Specific standards.* (1) *Access routes.* Access routes shall be planned for only the minimum width needed for operations and shall follow natural contours, where practicable to minimize cut and fill. When the construction of access routes involves slopes that require cuts on the inside edge in excess of 3 feet, the operator may be required to consult with the authorized officer concerning the most appropriate location of the access route prior to commencing operations. An operator is entitled to access to his operations consistent with provisions of the mining laws. Where a notice or a plan of operations is required, it shall specify the location of access routes for operations and other conditions necessary to prevent unnecessary or undue degradation. The authorized officer may require the operator to use existing roads to minimize the number of access routes, and, if practicable, to construct access roads within a designated transportation or utility corridor. When commercial hauling is involved and the use of an existing road is required, the authorized officer may require the operator to make appropriate arrangements for use and maintenance.

(2) *Mining wastes.* All tailings, dumps, deleterious materials or substances, and other waste produced by the operations shall be disposed of so as to prevent unnecessary or undue degradation and in accordance with applicable Federal and state Laws.

(3) *Reclamation.* (i) At the earliest feasible time, the operator shall reclaim the area disturbed, except to the extent necessary to preserve evidence of mineralization, by taking reasonable measures to prevent or control on-site and off-site damage of the Federal lands.

(ii) Reclamation shall include, but shall not be limited to:

(A) Saving of topsoil for final application after reshaping of disturbed areas have been completed;

(B) Measures to control erosion, landslides, and water runoff;

(C) Measures to isolate, remove, or control toxic materials;

(D) Reshaping the area disturbed, application of the topsoil, and revegetation of disturbed areas, where reasonably practicable; and

(E) Rehabilitation of fisheries and wildlife habitat.

(iii) When reclamation of the disturbed area has been completed, except to the extent necessary to preserve evidence of mineralization, the authorized officer shall be notified so that an inspection of the area can be made.

(4) *Air quality.* All operators shall comply with applicable Federal and state air quality standards, including the Clean Air Act (42 U.S.C. 1857 *et seq.*).

(5) *Water quality.* All operators shall comply with applicable Federal and state water quality standards, including the Federal Water Pollution Control Act, as amended (30 U.S.C. 1151 *et seq.*).

(6) *Solid wastes.* All operators shall comply with applicable Federal and state standards for the disposal and treatment of solid wastes, including regulations issued pursuant to the Solid Waste Disposal Act as amended by the Resource Conservation and Recovery Act (42 U.S.C. 6901 *et seq.*). All garbage, refuse or waste shall either be removed from the affected lands or disposed of or treated to minimize, so far as is practicable, its impact on the lands.

(7) *Fisheries, wildlife and plant habitat.* The operator shall take such action as may be needed to prevent adverse impacts to threatened or endangered species, and their habitat which may be affected by operations.

(8) *Cultural and paleontological resources.* (i) Operators shall not knowingly disturb, alter, injure, or destroy any scientifically important paleontological remains or any historical or archaeological site, structure, building or object on Federal lands.

(ii) Operators shall immediately bring to the attention of the authorized officer any cultural and/or paleontological resources that might be altered or destroyed on Federal lands by his/her operations, and shall leave such discovery intact until told to proceed by the authorized officer. The authorized officer shall evaluate the discoveries brought to his/her attention, take action to protect or remove the resource, and allow operations to proceed within 10 working days after notification to the authorized officer of such discovery.

(iii) The Federal Government shall have the responsibility and bear the cost of investigations and salvage of cultural and paleontology values discovered after a plan of operations has been approved, or where a plan is not involved.

(9) *Protection of survey monuments.* To the extent practicable, all operators shall protect all survey monuments, witness corners, reference monuments, bearing trees and line trees against unnecessary or undue destruction, obliteration or damage. If, in the course of operations, any monuments, corners, or accessories are destroyed, obliterated, or damaged by such operations, the operator shall immediately report the matter to the authorized officer. The authorized officer shall prescribe, in writing, the requirements for the restoration or reestablishment of monuments, corners, bearing and line trees.

(10) *Fire.* The operator shall comply with all applicable Federal and state fire laws and regulations, and shall take all reasonable measures to prevent and suppress fires in the area of operations.

(11) *Acid-forming, toxic, or other deleterious materials.* You must incorporate identification, handling, and placement of potentially acid-forming, toxic or other deleterious materials into your operations, facility design, reclamation, and environmental monitoring programs to minimize the formation and impacts of acidic, alkaline, metal-bearing, or other deleterious leachate, including the following:

(i) You must handle, place, or treat potentially acid-forming, toxic, or other

deleterious materials in a manner that minimizes the likelihood of acid formation and toxic and other deleterious leachate generation (source control);

(ii) If you cannot prevent the formation of acid, toxic, or other deleterious drainage, you must minimize uncontrolled migration of leachate; and

(iii) You must capture and treat acid drainage, or other undesirable effluent, to the applicable standard if source controls and migration controls do not prove effective. You are responsible for any costs associated with water treatment or facility maintenance after project closure. Long-term, or post-mining, effluent capture and treatment are not acceptable substitutes for source and migration control, and you may rely on them only after all reasonable source and migration control methods have been employed.

(12) *Leaching operations and impoundments.* (i) You must design, construct, and operate all leach pads, tailings impoundments, ponds, and solution-holding facilities according to standard engineering practices to achieve and maintain stability and facilitate reclamation.

(ii) You must construct a low-permeability liner or containment system that will minimize the release of leaching solutions to the environment. You must monitor to detect potential releases of contaminants from heaps, process ponds, tailings impoundments, and other structures and remediate environmental impacts if leakage occurs.

(iii) You must design, construct, and operate cyanide or other leaching facilities and impoundments to contain precipitation from the local 100-year, 24-hour storm event in addition to the maximum process solution inventory. Your design must also include allowances for snowmelt events and draindown from heaps during power outages in the design.

(iv) You must construct a secondary containment system around vats, tanks, or recovery circuits adequate to prevent the release of toxic solutions to the environment in the event of primary containment failure.

(v) You must exclude access by the public, wildlife, or livestock to solution containment and transfer structures that contain lethal levels of cyanide or other solutions.

(vi) During closure and at final reclamation, you must detoxify leaching solutions and heaps and manage tailings or other process waste to minimize impacts to the environment from contact with toxic materials or leachate. Acceptable practices to detoxify solutions and materials include natural degradation, rinsing, chemical treatment, or equally successful alternative methods. Upon completion of reclamation, all materials and discharges must meet applicable standards.

(vii) In cases of temporary or seasonal closure, you must provide adequate maintenance, monitoring, security, and financial guarantee, and BLM may require you to detoxify process solutions.

(13) *Maintenance and public safety.* During all operations, the operator shall maintain his or her structures, equipment, and other facilities in a safe and orderly manner. Hazardous sites or conditions resulting from operations shall be marked by signs, fenced, or otherwise identified to alert the public in accordance with applicable Federal and state laws and regulations.

10. Add section 3809.421 to read as follows:

**§ 3809.421 Enforcement of performance standards.**

Failure of the operator to prevent unnecessary or undue degradation or to complete reclamation to the standards described in this subpart may cause the operator to be subject to enforcement as described in §§ 3809.600 through 3809.605 of this subpart.

11. Revise section 3809.598 to read as follows:

**§ 3809.598 What if the amount forfeited will not cover the cost of reclamation?**

If the amount forfeited is insufficient to pay for the full cost of reclamation, the operators and mining claimants are liable for the remaining costs as set forth in § 3809.116. BLM may complete or authorize completion of reclamation of the area covered by the financial guarantee and may recover from responsible persons all costs of reclamation in excess of the amount forfeited.

**§ 3809.604 [Amended]**

12. Amend § 3809.604 revising the phrase ''§§ 3809.700 and 3809.702'' to read ''§ 3809.700'' at the end of the last sentence of paragraph (a).

**§ 3809.702 [Removed]**

13. Remove § 3809.702.

**§ 3809.703 [Removed]**

14. Remove § 3809.703.

[FR Doc. 01–27074 Filed 10–29–01; 8:45 am]

BILLING CODE 4310–84–P