STATE OF ILLINOIS
DEPARTMENT OF MINES AND MINERALS
LAND RECLAMATION DIVISION

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PERMANENT PROGRAM

INTERPRETATION MEMO - 82-1

TO: Coal Staff

FROM: Douglas Downing, Supervisor
Land Reclamation Division

DATE: June 2, 1982

RE: Abatement Deadlines, Notices of Violation and Cessation Orders.

If failure to abate a notice of violation (N.O.V.) within the period originally set occurs, the following procedure shall be followed:

a. The original abatement period may only be extended if the Department can find that the failure to correct the problem was not caused by lack of diligence on the part of the person to whom it was issued. (See 1843.12(c) and 30 CFR 843.12(c)).

b. If the failure to abate within the time period set was caused by lack of diligence, the Department cannot further extend the time and must issue a cessation order under Illinois Rule 1843.11(b). (See Ill. Rule 1843.12(d) and 30 CFR 843.12(d)).

c. The total time for abatement under a notice of violation, including all extensions properly granted under paragraph a of this memo shall not exceed 90 days from the date of issuance, except upon a showing by the permittee that it is not feasible to abate the violation within 90 calendar days due to one or more of the following circumstances:

1. where the permittee of an ongoing permitted operation has timely applied for anddiligently pursued a permit renewal or other necessary approval of designs or plans but such permit or approval has not been or will not be issued within 90 days after a valid permit expires or is required, for reasons not within the control of the permittee;

2. where there is a valid judicial order precluding abatement within 90 days as to which the permittee has diligently pursued all rights of appeal and as to which he or she has no other effective legal remedy;

3. where the permittee cannot abate within 90 days due to a labor strike;

4. where climatic conditions preclude abatement within 90 days, or where, due to climatic conditions, abatement within 90 days clearly:

   (i) would cause more environmental harm than it would prevent; or

   (ii) requires action that would violate safety standards established by statute or regulation under the Mine Safety and Health Act.

   (See 30 CFR 843.12(f)).

d. For procedural details regarding extensions under paragraph c of this memo, please refer to 30 CFR 843.12(g)-(j) a copy of which is attached and the following:

1. Whenever an abatement time in excess of 90 days is permitted, interim abatement measures shall be imposed to the extent necessary to minimize harm to the public or the environment.

2. If any of the conditions in paragraph c (1)-(4) of this memo exists, the permittee may request the authorized representative to grant an abatement period exceeding 90 days.

3. The authorized representative shall not grant such an abatement period without the concurrence of the Division Supervisor or his or her designee and the abatement period granted shall not exceed the shortest possible time necessary to abate the violation.

4. The permittee shall have the burden of establishing by clear and convincing proof that he or she is entitled to an extension under the provisions of 30 CFR 843.12(c) and (f).

5. In determining whether or not to grant an abatement period exceeding 90 days the authorized representative may consider any relevant written or oral information from the permittee or any other source.

6. The authorized representative shall promptly and fully document in the file his or her reasons for granting or denying the request.

7. The inspector's immediate supervisor shall review this document before concurring in or disapproving the extended abatement date and shall promptly and fully document the reasons for his or her concurrence or disapproval in the file.

8. Any determination made under 30 CFR 843.12(h) shall be in writing and shall contain a right of appeal in accordance with Ill. Rule 1843.16.

9. No extension granted under 30 CFR 843.12(h) may exceed 90 days in length. Where the condition or circumstances which prevented abatement within 90 days exists at the expiration of any such extension the permittee may request a further extension in accordance with the procedures of 30 CFR 843.12(h).

e. For your reference a copy of 30 CFR 843.12(c) and (f)-(j) and the preamble are attached. This rule was finally adopted 8/17/81.

Attachments

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Parts 722 and 843

Interim and Permanent Regulatory Program Modifications

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

ACTION: Final rules.

SUMMARY: The Office of Surface Mining (OSM) proposed rules on April 22, 1981 (46 FR 22902) to provide OSM authority in certain limited cases to extend beyond 90 days the total time, as originally fixed and subsequently extended, for abatement of violations during both the interim and permanent regulatory programs.

In administering the Act and these regulations, OSM has found that there are certain very limited cases where, because of the nature of the violation or circumstances beyond a permittee's control, abatement within 90 days is impossible or would cause greater environmental harm than would abatement at a later date. These revisions identify those limited circumstances where abatement times in excess of 90 days will be permitted and set forth the conditions that will apply to these situations.

EFFECTIVE DATE: September 16, 1981.

FOR FURTHER INFORMATION CONTACT: Murray Newton, Chief, Enforcement Branch, Office of Surface Mining, Washington, D.C. 20240. Telephone: (202) 343-8081.

SUPPLEMENTARY INFORMATION:

Background

Section 521(a)(3) of the Surface Mining Control and Reclamation Act of 1977 (Act), 30 U.S.C. 1271, provides, among other things, that an authorized representative of the Secretary shall issue a notice to a permittee or his or her agent fixing a reasonable time, but not more than ninety days, for the abatement of any violation. OSM's regulations implementing this sectin (30 CFR 722.12 and 843.12) provide for issuance of notices of violation whenever OSM finds violations of applicable performance standards which do not create an imminent danger of harm to the health or safety of the public. These sections of the Act and regulations also provide that the total time for abatement, as originally fixed in the notice of violation and subsequently extended, shall not exceed 90 days. If the permittee fails to abate within 90 days, OSM is required (under 30 CFR 722.12 and 843.11) to issue a cessation order closing down the operation. Issuance of a cessation order can have a significant economic impact on a permittee. Not only does production stop; section 518(h) of the Act also requires OSM to assess a civil penalty of at least $750 for each day a violation continues past the abatement date.

In administering section 521(a)(3) of the Act and these regulations, OSM has found that there are certain very limited cases where, because of the nature of the violation or circumstances beyond a permittee's control, abatement within 90 days is impossible or would cause greater environmental harm than would abatement at a later date. OSM believes that Congress did not intend section 521(a)(3) to have these results. At the same time OSM believes that, where abatement must take more than 90 days, it is imperative that interim measures be established to minimize environmental harm pending full abatement. These revisions identify those limited circumstances where abatement times in excess of 90 days will be permitted and set forth the conditions that will apply to these situations.

The first situation addressed in these rules (30 CFR 722.12(e)(1) and 843.12(f)(1)), which OSM has encountered with some frequency, is where an ongoing permitted operation is required by the Act to have a new type of permit or approval, but the permittee is unable to obtain it (in spite of timely and diligent efforts to do so) because the regulatory authority is unable to process it within 90 days after a valid permit expires or is required. The Secretary believes that Congress did not intend to shut down and fine an ongoing and otherwise lawful operation for failure of the permittee to perform an act which is not within his or her control.

30 CFR 722.12(e)(2) and 843.12(f)(2) address a circumstance where compliance by the permittee within 90 days would violate a valid court order, possibly subjecting the permittee to contempt proceedings. The rule provides that, where the permittee is diligently pursuing all rights of appeal and has no other effective legal remedy, it is reasonable to allow abatement beyond the 90-day period.

Finally, where the permittee cannot (or should not) abate within 90 days because of a labor strike or climatic conditions, as set forth in 30 CFR 722.12(e) (3) and (4) and 843.12(f) (3) and (4), an operator may be allowed an abatement time in excess of 90 days. In all of these situations the rules will allow the permittee the necessary time to fully abate the violation, but also require that he or she concurrently apply interim measures (if needed) to effectively prevent or mitigate environmental damage to the extent possible.

It should be noted that, in response to public comments received, the rules as promulgated here differ form those proposed at 46 FR 22902 (April 22, 1981). Two circumstances that had been proposed to justify an extension under these rules are deleted: (1) Where requiring abatement within 90 days clearly would cause more environmental harm than it would prevent (which has been incorporated into 30 CFR 722.12(e)(4) and 843.12(f)(4)—see *Disposition of Comments*, comment 12); and (2) Where abatement of the violation within 90 days would create an imminent danger to the health or safety of the public or would cause, or could reasonably be expected to cause, significant, imminent environmental harm to land, air, or water resources (see *Diposition of Comments*, comment 16).

The final rules provide for an extension where, due to climatic conditions, abatement within 90 days requires action that would violate safety standards of the Mine Safety and Health Administration (see 30 CFR 722.12(e)(4)(ii) and 843.12(f)(4)(ii), and *Disposition of Comments*, comment 8).

The final rules specify that any determination made under these rules shall be in writing and shall contain a right of appeal in accordance with 43 CFR 4.1281 and the regulations at 43 CFR Part 4 (see 30 CFR 722.12(h) and 843.12(i), and *Disposition of Comments*, comment 14).

These rules do not affect the provision of 30 CFR 722.17 and 843.18 that inability to comply with a notice of violation or cessation order does not constitute an affirmative defense to the issuance of such notice or order (see *Disposition of Comments*, comment 11).

Finally, 30 CFR 722.12(i) and 843.12(j) provide that no extension granted under these rules may exceed 90 days in length. The operator will be subject to the issuance of a cessation order at the expiration of any such extension unless he or she has abated the underlying violation or has applied for and been granted a new extension under 722.12(g) or 843.12(h) (see *Disposition of Comments*, comment 13).

In the preamble to the proposed rules, OSM requested written and oral comments from all interested persons. Those comments received and the disposition of each are described below.

Disposition of Comments

1. OSM received several comments which fully supported its effort to provide narrowly drawn exceptions to the requirement that violations be abated within 90 days. These commenters generally asserted that the rules as proposed provided a reasonable and workable solution to the problem of violations which by their nature require more than 90 days to abate.

2. One commenter expressed concern that the proposed rules might be construed as requiring OSM's concurrence in the granting of an extension by a State regulatory authority under an approved State program.

While the promulgation of these rules enables States to initiate similar rules in their own programs, the Federal rules apply only to actions of OSM.

3. The same commenter recommended deletion of the requirement contained in 30 CFR 722.12(g) and 843.12(h) for concurrence and documentation by the inspector's immediate supervisor. The commenter contended that there are sufficient safeguards against abuse of the rules without imposing "bureaucratic paper shuffling" in the process.

OSM disagrees. The agency's exercise of discretion in applying these rules will be subject to public scrutiny (see 30 CFR 722.12(h) and 843.12(i)) and must be fully supportable on the record. The agency believes that this paperwork is essential to the effective administration of the rules.

4. One commenter suggested that OSM clarify the procedures it will follow in assessing penalties under these rules. The commenter raised the possibility of per-day penalty assessments, and suggested that the agency waive penalties where abatement periods exceed 90 days under these rules.

These rules will have no impact on the assessment procedures that the agency now follows. However, a permittee who is granted an extension under these rules will not be subject to the mandatory $750-per-day penalty unless and until he or she fails to abate within the extended abatement time, at which time he or she will also receive a cessation order as required by section 521(a)(3) of the Act.

5. One commenter recommended that OSM extend the 90-day abatement period when an operator found not to be in compliance is given the option of either modifying his or her mining and reclamation plan, or bringing his or her operation into compliance with the original plan.

OSM believes that this situation is adequately addressed in 30 CFR 722.12(e)(1) and 843.12(f)(1).

6. The same commenter suggested that, where an operator elects to challenge a notice of violation under the Department's administrative review procedures, the abatement period should be tolled pending a decision.

OSM disagrees. The Act and OSM regulations provide for the granting of temporary relief from any notice or order, where appropriate (see sections 525(c) and 526(b) of the Act, 30 U.S.C. 1275(c), 1276(b)). OSM knows of no authority that would enable it to suspend, as a matter of policy, the abatement period prescribed by the Secretary's authorized representative simply because an operator challenges a citation. Moreover, such a policy could invite dilatory tactics whereby operators might file otherwise spurious appeals for the sole purpose of tolling the abatement period.

7. Several commenters expressed the view that the rules as proposed were drawn too loosely and would result in abuses. Specific exceptions were taken with the expressions "labor dispute" (proposed 722.12(e)(4) and 843.12(f)(4), 46 FR 22904, April 22, 1981) and "climatic conditions" (proposed 722.12(e)(5) and 843.12(f)(5), 46 FR 22904, April 22, 1981). It was suggested that "dispute" be replaced with "strike" and that "climatic conditions" be replaced with "cataclysmic events."

OSM agrees that the word "strike" is less ambiguous than "dispute" and has adopted this language in the final rules (see 30 CFR 722.12(e)(4) and 843.12(f)(4)). However, OSM believes there are certain climatic conditions (e.g., frozen ground) that may justify the granting of an extension even though they cannot be characterized as "cataclysmic events." OSM does not believe that the extensions granted under these rules should be limited to cataclysmic events. Moreover, the procedural safeguards contained in 30 CFR 722.12(g) and 843.12(h) insure the limited and judicious application of these rules.

8. One commenter asserted that the rules should provide for circumstances where abatement within 90 days would jeopardize miners' safety. An example was cited where weather conditions (particularly heavy rainfall over an extended period) made work on a steep slope hazardous.

OSM agrees, and has inserted new language into 30 CFR 722.12(e)(4) and 843.12(f)(4) to provide for an extension where, due to climatic conditions, abatement within 90 days would require action violative of safety standards of the Mine Safety and Health Administration.

9. The same commenter asserted that the phrase "despite extraordinary efforts" contained in proposed 30 CFR 722.12(d) and 843.12(c) is unnecessary due to the specific criteria contained in proposed 30 CFR 722.12(e)(1)–(6) and 843.12(f)(1)–(6) (46 FR 22904, April 22, 1981). The commenter further contended that the phrase is contradictory, since elsewhere in these paragraphs the threshold for granting an extension is whether or not the failure to abate was caused by a "lack of diligence or intentional delay by the permittee."

OSM agrees that not all circumstances justifying an extension under these rules contemplate "extraordinary efforts" by the permittee (e.g., 30 CFR 722.12(e)(3) and 843.12(f)(3)), and has deleted this language from the final rules. Additionally, the word "possible" in proposed 30 CFR 722.12(d) and 843.12(c) has been replaced with "feasible," since not all circumstances justifying an extension under these rules involve impossibility of abatement (e.g., 30 CFR 722.12(e)(4) and 843.12(f)(4)).

10. Several commenters contended that the rules as proposed are contrary to the law, for the following reasons:

(a) The mandatory 90-day abatement period has been upheld in the courts and, because that judicial determination was not appealed, it is binding on the Secretary;

(b) The legislative history is clear concerning congressional intent to make the 90-day period mandatory;

(c) The preamble to the permanent program regulations makes clear that the Secretary considers the 90-day period to be mandatory; and

(d) The rules as proposed are "clearly inconsistent" with section 521(a)(3) of the Act.

The agency's position on this issue in prior litigation and rulemaking represented a good faith effort to implement the intent of Congress that violations of the Act and applicable regulations be abated rapidly. In the vast majority of cases OSM does not intend to stray from that position. However, in the three years it has administered the Act, the agency has encountered circumstances which make an overly restrictive reading of the Act work counter to the purposes Congress expressed in enacting it. Those circumstances are specifically enumerated in these rules.

As stated in the preamble to the proposed rules (46 FR 22903, April 22, 1981), "[t]he Secretary has previously recognized certain of these necessary exceptions to the 90-day abatement

period, both in his conditional approval of the permanent program submission of the State of West Virginia (46 FR 5915, January 21, 1981, codified at 30 CFR Part [redacted] and in 30 CFR 710.11(d)(2), which identifies the circumstances that justify exempting nonconforming structures or facilities from the requirement of rapid compliance."

11. One commenter expressed concern that the rules might undercut the provision of 30 CFR 722.17 and 843.18 that inability to comply with a notice of violation or cessation order does not constitute an affirmative defense to the issuance of such notice or order.

The agency considers that provision to be unaffected by these rules.

12. Several commenters suggested that OSM delete from the proposed rules the first circumstance listed as justifying an extension: "Where requiring abatement within 90 days clearly would cause more environmental harm than it would prevent" (proposed 30 CFR 722.12(e)(1) and 843.12(f)(1), 46 FR 22904, April 22, 1981). It was argued that this provision covered no identified problem that could not be addressed under the fifth circumstance: "Where climatic conditions preclude abatement within 90 days" (proposed 30 CFR 722.12(e)(5) and 843.12(f)(5), 46 FR 22904, April 22, 1981).

The agency agrees except to note that, [redacted]ke the fifth circumstance, the first [redacted]umstance does not by its terms limit extensions to cases where abatement would be *precluded*, but would include circumstances where rapid abatement, while possible, would not be environmentally sound. Nevertheless, all examples cited by commenters and encountered by the agency as justifying the first circumstance stemmed from climatic conditions. Accordingly, the consideration of environmental soundness has been incorporated into 30 CFR 722.12(e)(4) and 843.12(f)(4), relating to climatic conditions.

13. The same commenter suggested that the agency consider imposing a maximum time period for abatement where extensions are granted under these rules. The commenter cited instances where, under the Mine Safety and Health Act, the granting of extensions resulted in inordinate delays and procrastination on the part of operators in abating violations.

The agency believes that it would be unwise and imprudent to replace one arbitrary time limit with another, especially since certain circumstances justifying an extension under these rules [redacted]ot lend themselves to *any* time [redacted]s (e.g., labor strikes). However, OSM recognizes the problems cited by the commenter, and has inserted in §§ 722.12(i) and 843.12(j) a requirement that no extension may be granted for longer than 90 days without a fresh showing (under the procedures of 30 CFR 722.12(g) and 843.12(h)) that the condition that had justified an extension in the first instance remains, and that the rules' requirements for an extension are otherwise met.

14. The same commenter recommended that the agency specifically provide for citizen participation in determinations made under these rules.

The agency agrees that citizen participation in determinations made under these rules would foster careful consideration by the agency of requests for extensions, and has provided the opportunity for such participation in 30 CFR 722.12(h) and 843.12(i).

15. One commenter suggested that the second circumstance listed in the proposed rules as justifying an extension (where necessary permits or design approvals will not be issued within 90 days) was too broad and should be narrowed in scope. The commenter cited the Secretary's disapproval of a similar provision submitted by West Virginia (45 FR 69259, October 20, 1980).

The agency disagrees. 30 CFR 722.12(e)(1) and 843.12(f)(1) limit extensions to instances where delay is not within the control of the permittee; this is sufficiently narrow in scope.

16. Several commenters contended that the final circumstance listed in the proposed rules as justifying an extension (where abatement within 90 days would create an imminent danger to the health or safety of the public or would cause significant, imminent environmental harm to land, air, or water resources) is "without any easily ascertainable meaning" and should be deleted.

OSM agrees and has deleted this provision from the final rules.

17. The same commenter suggested that the rules be made retroactive to the beginning of the United Mine Workers (UMW) strike.

OSM agrees, except to note that the recent end to the UMW strike will make circumstances justifying an exemption under these rules rare. In any event, OSM will apply these rules in cases where abatement of violations was precluded by the UMW strike. Additionally, where earlier failures to abate were demonstrably caused by the UMW strike, the agency will take this into account at the time of penalty assessments.

The current regulations shall remain in effect pending the effective date of these final rules.

The Department of the Interior has determined that this document is not a major rule. The rules will not have any major effect on the national economy, or the economy of a particular region or level of government. The rules will have a minor but beneficial economic impact on the coal industry in two respects: First, by allowing OSM to give operators abatement times of more than 90 days in certain limited cases, OSM can avoid issuing cessation orders which are now required by law. Cessation orders carry a mandatory penalty of $750 for each day the nonabatement continues, as well as imposing upon the operator the costs of having production shut down. Second, the coal industry will realize savings from not having to perform certain abatement actions at times of the year or in other circumstances which guarantee failure, and which would have to be corrected later under more favorable conditions. The rules will have no adverse impact on competition, employment, investment, productivity or the ability of a U.S.-based enterprise to compete. Accordingly, these rules do not require a Regulatory Analysis under Executive Order 12291 and 43 CFR Part 14.

Section 501(a) of the Act exempts the amendment to the regulation at 30 CFR 722.12, which is part of the interim regulations, from the requirement of section 102(2)(e) of the National Environmental Policy Act of 1969. An Environmental Assessment (EA) of the impacts of the amendment to the regulation at 30 CFR 843.12 has resulted in a Finding of No Significant Impacts (FONSI). The EA and FONSI are on file in Room 153, 1951 Constitution Avenue, N.W., Washington, D.C. 20240.

DRAFTING INFORMATION: These regulations were drafted by Harriet Marple, Chief, Division of Enforcement, Murray Newton, Chief, Branch of Enforcement, and Neil Stoloff, Enforcement Specialist, Division of Enforcement.

Dated: July 29, 1981.

Daniel N. Miller, Jr.,

Assistant Secretary, Energy and Minerals.

PART 722—ENFORCEMENT PROCEDURES

Accordingly, Part 722 of 30 CFR is amended in § 722.12 by revising paragraph (d) and by adding paragraph (e) through (i).

§ 722.12 Permits.

* * * * *

(d) The total time for abatement as originally fixed and subsequently extended shall not exceed 90 days

except upon a showing by the permittee that it is not feasible to abate the violation within 90 calendar days due to one or more of the circumstances in section 722.12(e). An extended abatement date pursuant to this section shall not be granted when the permittee's failure to abate within 90 days has been caused by a lack of diligence or intentional delay by the permittee in completing the remedial action required.

(e) Circumstances which may qualify a surface coal mining operation for an abatement period of more than 90 days are:

(1) where the permittee of an ongoing permitted operation has timely applied for and diligently pursued a permit renewal or other necessary approval of designs or plans but such permit or approval has not been or will not be issued within 90 days after a valid permit expires or is required, for reasons not within the control of the permittee;

(2) where there is a valid judicial order precluding abatement within 90 days as to which the permittee has diligently pursued all rights of appeal and as to which he or she has no other effective legal remedy;

(3) where the permittee cannot abate within 90 days due to a labor strike;

(4) where climatic conditions preclude abatement within 90 days, or where, due to climatic conditions, abatement within 90 days clearly:

(i) would cause more environmental harm than it would prevent; or

(ii) requires action that would violate safety standards established by statute or regulation under the Mine Safety and Health Act.

(f) Whenever an abatement time in excess of 90 days is permitted, interim abatement measures shall be imposed to the extent necessary to minimize harm to the public or the environment.

(g) If any of the conditions in paragraph (e) (1–4) exist, the permittee may request the authorized representative to grant an abatement period exceeding 90 days. The authorized representative shall not grant such an abatement period without the concurrence of the Director or his or her designee and the abatement period granted shall not exceed the shortest possible time necessary to abate the violation. The permittee shall have the burden of establishing by clear and convincing proof that he or she is entitled to an extension under the provisions of sections 722.12 (d) and (e). In determining whether of not to grant an abatement period exceeding 90 days the authorized representative may consider any relevant written or oral information from the permittee or any other source. The authorized representative shall promptly and fully document in the file his or her reasons for granting or denying the request. The inspector's immediate supervisor shall review this document before concurring in or disapproving the extended abatement date and shall promptly and fully document the reasons for his or her concurrence or disapproval in the file.

(h) Any determination made under paragraph (g) shall be in writing and shall contain a right of appeal to the Office of Hearings and Appeals in accordance with 43 CFR 4.1281 and the regulations at 43 CFR Part 4.

(i) No extension granted under paragraph (b) may exceed 90 days in length. Where the condition or circumstance which prevented abatement within 90 days exists at the expiration of any such extension, the permittee may request a further extension in accordance with the procedures of paragraph (g).

PART 843—FEDERAL ENFORCEMENT

Part 843 of 30 CFR is amended in § 843.12 by revising paragraph (c) and by adding paragraphs (f) through (j).

§ 843.12 Notices of violation.

* * * * *

(c) An authorized representative of the Secretary may extend the time set for abatement or for accomplishment of an interim step, if the failure to meet the time previously set was not caused by lack of diligence on the part of the person to whom it was issued. The total time for abatement under a notice of violation, including all extensions, shall not exceed 90 days from the date of issuance, except upon a showing by the permittee that it is not feasible to abate the violation within 90 calendar days due to one or more of the circumstances in § 843.12(f). An extended abatement date pursuant to this section shall not be granted when the permittee's failure to abate within 90 days has been caused by a lack of diligence or intentional delay by the permittee in completing the remedial action required.

* * * * *

(f) Circumstances which may qualify a surface coal mining operation for an abatement period of more than 90 days are:

(1) where the permittee of an ongoing permitted operation has timely applied for and diligently pursued a permit renewal or other necessary approval of designs or plans but such permit or approval has not been or will not be issued within 90 days after a valid permit expires or is required, for reasons not within the control of the permittee;

(2) where there is a valid judicial order precluding abatement within 90 days as to which the permittee has diligently pursued all rights of appeal and as to which he or she has no other effective legal remedy;

(3) where the permittee cannot abate within 90 days due to a labor strike;

(4) where climatic conditions preclude abatement within 90 days, or where, due to climatic conditions, abatement within 90 days clearly:

(i) would cause more environmental harm than it would prevent; or

(ii) requires action that would violate safety standards established by statute or regulation under the Mine Safety and Health Act.

(g) Whenever an abatement time in excess of 90 days is permitted, interim abatement measures shall be imposed to the extent necessary to minimize harm to the public or the environment.

(h) If any of the conditions in paragraph (f) (1)–(4) exist, the permittee may request the authorized representative to grant an abatement period exceeding 90 days. The authorized representative shall not grant such an abatement period without the concurrence of the Director or his or her designee and the abatement period granted shall not exceed the shortest possible time necessary to abate the violation. The permittee shall have the burden of establishing by clear and convincing proof that he or she is entitled to an extension under the provisions of § 843.12 (c) and (f). In determining whether or not to grant an abatement period exceeding 90 days the authorized representative may consider any relevant written or oral information from the permittee or any other source. The authorized representative shall promptly and fully document in the file his or her reasons for granting or denying the request. The inspector's immediate supervisor shall review this document before concurring in or disapproving the extended abatement date and shall promptly and fully document the reasons for his or her concurrence or disapproval in the file.

(i) Any determination made under paragraph (h) shall be in writing and shall contain a right of appeal to the Office of Hearings and Appeals in accordance with 43 CFR 4.1281 and the regulations at 43 CFR Part 4.

(j) No extension granted under paragraph (h) may exceed 90 days in length. Where the condition or circumstance which prevented abatement within 90 days exists at the expiration of any such extension, the permittee may request a further extension in accordance with the procedures of paragraph (h).

(Secs. 201, 501, 521 of Pub. L. 9587 (30 U.S.C. 1211, 1251, 1271)

[FR Doc. 81-23522 Filed 8-14-81; 8:46 am]
BILLING CODE 4310-05-M