

FEDERAL REGISTER: 52 FR 4244 (February 10, 1987)

DEPARTMENT OF THE INTERIOR

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

30 CFR Parts 731, 732, 761, 772, 773, 779, 780, 783, and 784

Protecting Historic Properties From Surface Coal Mining Operations

ACTION: Final rule.

SUMMARY: The Office of Surface Mining Reclamation and Enforcement (OSMRE) is amending its regulations with respect to how historic properties are considered during conduct of surface coal mining operations. Provisions addressing the definition of cemetery, collection of information on historic properties, preparation of reclamation plans by applicants for permits to conduct coal mining operations, and consideration of historic properties by State regulatory authorities are included. These rules are being promulgated (1) to implement a decision by the U.S. District Court for the District of Columbia, (2) in order to facilitate the implementation of OSMRE's responsibilities under the Surface Mining Control and Reclamation Act of 1977 (the Act or SMCRA), and under the National Historic Preservation Act of 1966, as amended (NHPA), and (3) in response to a petition for rulemaking filed with OSMRE by the Society of Professional Archeologists (SOPA). These rules clarify the responsibilities of OSMRE, State regulatory authorities, and applicants for permits to conduct surface coal mining operations and coal exploration to ensure appropriate consideration of important historic properties.

EFFECTIVE DATE: March 12, 1987.

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SUPPLEMENTARY INFORMATION:

- I. Background.
- II. Rules Adopted and Responses to Public Comments.
- III. Procedural Matters.

I. BACKGROUND

A. INTRODUCTION

These rules are being promulgated (1) to implement a decision by the U.S. District Court for the District of Columbia, (2) in order to facilitate the implementation of OSMRE's responsibilities under the Surface Mining Control and Reclamation Act of 1977, and under the National Historic Preservation Act of 1966, as amended, and (3) in response to a petition for rulemaking filed with OSMRE by the Society of Professional Archeologists (SOPA).

B. STATUTORY AUTHORITY

SURFACE MINING CONTROL AND RECLAMATION ACT

Historic properties are addressed by the Surface Mining Control and Reclamation Act of 1977 (SMCRA), *30 U.S.C. 1201 et seq.* Section 102 of the Act provides that the purposes of the Act include establishing a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations, assuring that the rights of surface landowners and other persons with a legal interest in the land or appurtenances are fully protected from such operations, and assuring that such operations are conducted to protect the environment. Section 201(c)(2) provides that the Secretary, acting through OSMRE, shall publish and promulgate such rules and regulations as may be necessary to carry out the purposes and provisions of the Act, and section 201(c)(13) provides that the Secretary shall perform such other duties as may be provided by law and related to the purposes of the Act. Section 501(b) requires the Secretary to promulgate regulations covering a permanent regulatory program and establishing procedures and requirements for State programs. Historic properties are addressed specifically in sections 507(b)(13), 522(a)(3)(B), 522(e)(3) and 522(e)(5) of the Act. Section 507(b)(13) of the Act requires applicants for permits to conduct coal mining operations to include in

their applications accurate maps showing all manmade features and significant known archeological sites existing on the date of application.

Section 522(a)(3)(B) of the Act authorizes regulatory authorities to determine that an area is unsuitable for all or certain types of coal mining if it would affect fragile or historic lands in which such operations could result in significant damage to important historic, cultural, scientific, and esthetic values and natural systems.

Section 522(e) of the Act prohibits or limits surface coal mining operations on or near certain private, Federal, and other public lands. Section 522(e)(3) prohibits surface coal mining operations "which will adversely affect any publicly owned park or places included in the National Register of Historic Sites (sic) unless approved jointly by the regulatory authority and the Federal, State, or local agency with jurisdiction over the park or the historic site," and section 522(e)(5) prohibits surface coal mining operations "within one hundred feet of a cemetery." The prohibitions in section 522(e) are subject to valid existing rights and do not apply to operations existing on August 3, 1977.

NATIONAL HISTORIC PRESERVATION ACT

The National Historic Preservation Act of 1966, as amended (Pub. L. 89-665, *16 U.S.C. 470 et seq.*), established that it was national policy to encourage historic preservation in Federal, State, and private sectors. It established the National Register of Historic Places, State Historic Preservation Programs, and the President's Advisory Council on Historic Preservation.

The National Register of Historic Places is a Federal list of historic properties important in American history, architecture, archeology, engineering, and culture. Properties listed on and eligible for listing on the National Register receive special consideration during the planning and implementation of Federal, federally assisted, and federally licensed projects.

The State Historic Preservation Officer is responsible for administering the State Historic Preservation Program. Among other duties, this officer is to prepare and implement a comprehensive statewide historic preservation plan and to advise and assist, as appropriate, Federal and State agencies and local governments in carrying out their historic preservation responsibilities. He is also to cooperate with the Department of the Interior, the Advisory Council on Historic Preservation, and other Federal and State agencies, local governments, and organizations and individuals to ensure that historic properties are taken into consideration at all levels of planning and development.

The President's Advisory Council on Historic Preservation advises the President and the Congress on matters relating to historic preservation. Among other functions, the Advisory Council recommends measures to coordinate activities of Federal, State, and local agencies and private institutions and individuals in relation to historic preservation, and reviews the policies and programs of Federal agencies and recommends to such agencies methods to improve the effectiveness, coordination, and consistency of those policies and programs with the National Historic Preservation Act.

Section 106 of the National Historic Preservation Act requires Federal agency heads, prior to authorizing expenditure of Federal funds on a Federal or federally assisted undertaking; or prior to issuing a Federal license for such an undertaking, to consider the effect of the undertaking on historic resources and to provide the Advisory Council on Historic Preservation (Advisory Council) with a reasonable opportunity to comment on the undertaking. The States do not have any direct responsibilities under this section. However, OSMRE's responsibilities for the review and approval of State programs are subject to this section. In order to meet its own section 106 responsibilities, OSMRE reviews State program provisions as well as its own operations to ensure that appropriate consideration is being given to historic properties.

C. REGULATORY HISTORY

Provisions for consideration of historic properties were promulgated by OSMRE as part of the permanent regulatory program for surface coal mining and reclamation operations on March 13, 1979 [*44 FR 15324 et seq.*] and on September 14, 1983 [*48 FR 41348 et seq.*]. Amendments to relevant sections of the individual parts which deal with historic properties were promulgated on the following dates: 30 CFR Part 731 -- June 17, 1982, (*47 FR 26364*) and January 18, 1983 (*48 FR 2272*); 30 CFR Part 732 -- January 23, 1981 (*46 FR 7907*), and June 17, 1982 (*47 FR 26366 and 26367*); 30 CFR Part 772 -- September 8, 1983 (*48 FR 40634*); 30 CFR Part 773 -- September 28, 1983 (*48 FR 44391*); and 30

CFR Part 779 -- August 24, 1979 (*44 FR 49685*), August 4, 1980 (*45 FR 51550*), April 5, 1983 (*48 FR 14822*), and September 14, 1983 (*48 FR 41356*).

OSMRE's regulations established certain procedures which affect the consideration of historic properties, as follows:

1. An applicant for a permit must identify eligible and listed properties based on all available information. [Sections 779.12(b) and 779.24(i)]

The regulations further specify that available information includes, but is not limited to, data of State and local preservation agencies.

2. The State Historic Preservation Officer (SHPO) is notified of all permit applications, and given an opportunity to comment. [Sections 773.13(a)(3)(ii) and 773.13(b)]

3. The public is also notified in a local newspaper of the complete permit application and given an opportunity to comment. [Section 773.13]

4. Any person having an interest that may be adversely affected may request an informal conference to submit information to the regulatory authority. [Section 773.13(c)]

5. The regulatory authority, based on such comments, records of any informal conferences, and on the information in the application, may require modification of the permit application. [Section 773.15]

This modification could include a requirement to obtain additional information and conduct new analyses to determine whether historic properties eligible for inclusion in the National Register of Historic Places are present in a proposed permit area.

Although not mandatory, the use of a field survey or background research could be required by the regulatory authority at this time.

6. The regulatory authority should be able to demonstrate that it has given consideration to a State Historic Preservation Officer's well reasoned comments. [Section 773.15]

7. The regulatory authority has the authority to require the operator to conduct appropriate mitigation measures to preserve important historic resources. Such measures could include a variety of activities from photographic recordation through archeological data recovery. [Section 773.15]

8. Procedures are available for the administrative and judicial review of decisions or permits. [Part 775]

In late 1980, OSMRE and the Advisory Council on Historic Preservation entered into a programmatic memorandum of agreement setting forth a process for consultation between OSMRE and the Advisory Council in connection with the Secretary of the Interior's approval of State permanent regulatory program submissions. The agreement required OSMRE to propose amendments to certain of its permanent program regulations and to provide the Advisory Council with the opportunity to comment on proposed State programs and amendments prior to OSMRE's recommendation to the Secretary of the Interior on the approval or disapproval of the proposed programs. OSMRE will review this agreement for consistency with the provisions of these rules, once these rules become effective, and will renegotiate it, if necessary.

In the last two years, OSMRE has directed substantial resources to interpreting the regulatory program to provide clearer guidance on appropriate consideration of historic resources. OSMRE's historic preservation requirements were set forth in several letters to State Historic Preservation Officers and the State regulatory authorities. In these letters, OSMRE set forth the following basic concepts:

1. In accepting financial assistance for its program from OSMRE, a State regulatory authority assures the Secretary that it will assist him in his compliance with section 106 of the NHPA by consulting with the State Historic Preservation Officer on the identification of properties listed on or eligible for listing on the National Register of Historic Places and

by complying with the Secretary's requirements to avoid or mitigate adverse impacts upon such properties. (This assurance is required to be included in every Federal grant by the Office of Management and Budget Circular A-102, Attachment M.)

2. State programs must contain provisions no less effective than OSMRE's permanent program regulations.

3. OSMRE requires through the national regulations that individual permit decisions by the State regulatory authority take into account comments or recommendations from the State Historic Preservation Officer concerning the effect of the decision on historic properties.

4. The national regulatory program provides the basis and authority for State programs to assure that appropriate consideration is given to historic properties.

OSMRE has received a large number of inquiries from State regulatory authorities, State Historic Preservation Officers, the professional archeological and historic preservation community, and the coal mining industry concerning the historic preservation requirements in the program. Clarification of the responsibility and authority of the State regulatory authorities regarding historic properties has been sought by a number of correspondents. Additionally, information on the effect of the provisions of the National Historic Preservation Act on the State programs has been sought by the States, industry, and the preservation community.

D. DISTRICT COURT DECISIONS

Section 522(e)(3) of SMCRA prohibits surface coal mining operations "which will adversely affect any publicly owned park or places included in the National Register of Historic Sites (sic), unless approved jointly by the regulatory authority and the Federal, State, or local agency with jurisdiction over the park or the historic site." In March 1979, OSMRE implemented this section of the Act through rules at 30 CFR Part 761 by providing protection both for those historic properties eligible for listing on the National Register of Historic Places, and properties actually listed on the National Register. The regulations protected privately owned places in addition to publicly owned places eligible for or listed on the National Register. These provisions of the permanent program regulations were challenged in the U.S. District Court for the District of Columbia (*In Re: Permanent Surface Mining Regulation Litigation*, No. 79-1144 D.D.C. 1980) by citizen, industry, and environmental plaintiffs. As a result, OSMRE voluntarily suspended those provisions of the rules on November 27, 1979 (*44 FR 67942*) to the extent that such rules applied to any places eligible for listing on the National Register and to privately owned places listed on the National Register. On February 26, 1980, the district court recognized the government's concession that the Secretary's rules implementing section 522(e)(3) of SMCRA should not extend to places eligible for listing, but only to places listed on the National Register. (*ibid* at p. 22-23). In 1983, OSMRE revised sections 761.11(c) and 761.12(f) to limit the protections of section 522(e)(3) of the Act to publicly owned properties listed on the National Register of Historic Places (*48 FR 41348*).

The 1983 regulations were also challenged in *In Re: Permanent Surface Mining Regulation Litigation (II)*, No. 79-1144 (D.D.C. 1985), July 15, 1985, Mem. Op. at p. 77. In that litigation, the District Court held that OSMRE had properly excluded properties eligible for listing on the National Register of Historic Places from the protections offered by section 522(e)(3) of the Act.

However, the court also determined that the exclusion of privately owned properties listed on the National Register of Historic Places from the protections offered by section 522(e)(3) was improper, and that the Congress intended to protect both privately owned and publicly owned places on the National Register of Historic Places. These final rules respond to this decision of the District Court.

Citizen and environmental plaintiffs in *In Re: Permanent (II)* also challenged OSMRE's definition of "cemetery" in Section 761.5. Section 522(e)(5) of the Act prohibits surface coal mining operations "within one hundred feet of a cemetery." In 1979, OSMRE defined a cemetery as "any area of land where human bodies are interred" (30 CFR 761.5, March 13, 1979, *44 FR 15342*). However, in September 1983, OSMRE amended the definition of "cemetery" to be "any area of land where human bodies are interred, except for private family burial grounds" (*48 FR 41348*, September 14, 1983). This revision was made in response to the type of situation that arose in *Holmes Limestone Co. v. Andrus*, 655 F. 2d 732 (6th Cir. 1981), cert. denied, 456 U.S. 995 (1982), in which the owners of a private burial plot wanted to allow mining closer to the plot than the 1979 regulations allowed. The District Court decided that the 1983 definition was

inconsistent with the Act (July 15, 1985 Mem. Op. at p. 83). Consequently, the court remanded the definition of "cemetery" in Section 761.5. The final rules promulgated here respond to this decision by eliminating the exclusion for "private family burial grounds" from the definition of "cemetery".

E. PETITION FOR RULEMAKING

The Society of Professional Archeologists filed a petition for rulemaking with OSMRE on September 15, 1983. The petition asserted that because of the absence of guidance in the regulatory program, State regulatory authorities are implementing historic preservation provisions inconsistently; Subsequently, that Society joined with the National Trust for Historic Preservation in the legal challenge before the District Court for the District of Columbia to OSMRE's regulations implementing section 522 of SMCRA promulgated during 1983. This case is discussed above under D. Court Decisions.

The Society for Professional Archeologists' principal concerns in the petition were that the existing regulations are silent as to (1) how properties eligible for, but not yet listed on, the National Register of Historic Places are to be identified by applicants, and (2) what a State regulatory authority is to do when mining will impact such properties.

On August 23, 1985 (*50 FR 34167*), OSMRE published a notice requesting public comment on the rulemaking petition. On December 13, 1985, the Director of OSMRE decided to grant the petition in principle by initiating rulemaking to address the concerns of the petitioner. However, the Director determined that it would be inappropriate to propose the specific provisions suggested by the petitioner. This decision is discussed in more detail in the January 30, 1986, Federal Register (*51 FR 3802*). The final rules published here result in part from the proposed rules OSMRE committed to publish in response to the Society for Professional Archeologists petition.

F. PUBLIC PARTICIPATION

OSMRE issued a notice of proposed rulemaking on March 11, 1986 (*51 FR 8466*). The proposed regulations were available for public comment until June 9, 1986. In the notice, OSMRE provided an opportunity for the public to request hearings on the issue. One hearing was requested; it was held in Columbus, Ohio, on June 3, 1986.

Comments were received from a broad array of private individuals, local, State, and Federal agencies, amateur and professional historic resource associations, scientific and educational institutions, and industry representatives. Seventeen individuals presented testimony at the public hearing. A total of 52 written responses were received prior to the end of the public comment period; these public comments addressed all sections of the proposed rules, as well as some sections for which OSMRE had not proposed any changes. These responses addressed well over 300 separate issues, many of which were general in nature rather than directed at specific sections in the proposal.

II. RULES ADOPTED AND RESPONSES TO PUBLIC COMMENTS

A. REGULATORY APPROACH

Section 101(f) of SMCRA provides that because of the diversity in terrain, climate, biologic, chemical, and other physical conditions in areas subject to mining operations, the primary governmental responsibility for developing, authorizing, issuing, and enforcing regulations for surface coal mining and reclamation operations should rest with the States.

At this time, twenty-four States have been granted primacy for the regulation of surface coal mining operations. Prior to assuming primacy, those States developed programs meeting the requirements of SMCRA. The intent of the rules adopted here is to ensure that as part of those programs regulatory authorities have regulations and procedures which enable them to make reasonable and informed decisions about the disposition of important historic resources. The rules are designed to allow regulatory authorities maximum flexibility in adopting procedures which are suitable for conditions existing in the individual States. The rules emphasize reasonable decision making about historic resources without specifying all the means by which State regulatory authorities choose to achieve the specified results. This approach is consistent with that adopted by OSMRE throughout its regulatory program and with the intent of SMCRA to place primary regulatory responsibility on the States.

OSMRE recognizes that this approach requires regulatory authorities to develop provisions for the consideration of historic resources and for making decisions about those resources, including about situations that are open to differing interpretations. Nevertheless, OSMRE believes that this flexible approach is critical to the principle of State primacy and, properly applied by the regulatory authorities, will facilitate protection of important historic resources with minimum impact on the mining industry in each State.

B. SUMMARY OF RULES ADOPTED

These final rules include the following provisions:

PART 731 -- SUBMISSION OF STATE PROGRAMS.

Section 731.14(g) contains a new paragraph (17) separating the requirement for States to provide OSMRE with information on their provisions to consult with State, Federal, and local agencies with responsibility for historic and archeological resources from the requirement to consult with agencies with responsibility for fish and wildlife and related resources.

PART 732 -- PROCEDURES AND CRITERIA FOR APPROVAL OR DISAPPROVAL OF STATE PROGRAM SUBMISSIONS.

Section 732.17 contains a new paragraph (h)(4) requiring that OSMRE submit all State program amendments which may have an effect on historic or archeological resources to the State Historic Preservation Officer and to the Advisory Council on Historic Preservation for comment.

PART 761 -- AREAS DESIGNATED BY ACT OF CONGRESS.

The definition of cemetery in Section 761.5 is revised to mean "an area of land where human bodies are interred."

Section 761.11(c) is amended to provide that, unless an operator has valid existing rights or an operation existed on August 3, 1977, any places listed on the National Register of Historic Places cannot be adversely affected by surface coal mining operations, regardless of ownership, unless joint approval is obtained from the regulatory authority and the agency with jurisdiction over the place. Section 761.11(g) is amended expressly to acknowledge that cemeteries may be relocated if relocation is authorized by applicable State law or regulations.

Paragraph 761.12(f)(1) is amended to require that the regulatory authority transmit to an agency with jurisdiction over a place listed on the National Register of Historic Places, regardless of ownership, a copy of applicable parts of the permit application, where the regulatory authority determines that the proposed operation will adversely affect that place.

PART 772 -- REQUIREMENTS FOR COAL EXPLORATION.

Paragraph 772.12(b)(8)(iv) is amended to provide that the regulatory authority can require an applicant to provide necessary information on historic or archeological resources as part of an application for permission to explore for coal.

PART 773 -- REQUIREMENTS FOR PERMITS AND PERMIT PROCESSING.

Section 773.12 is amended to add the Archaeological Resources Protection Act to the list of statutes with which the review and issuance of permits under SMCRA must be coordinated.

Paragraph 773.15(c)(11) provides that the regulatory authority must make a finding that the effect of a proposed permitting action on properties listed on and eligible for listing on the National Register of Historic Places has been taken

into account in the permitting process, which may be evidenced in part by appropriate conditions on the permit protecting important historic properties.

PARTS 779 AND 783 -- PERMIT APPLICATIONS -- MINIMUM REQUIREMENTS FOR INFORMATION ON ENVIRONMENTAL RESOURCES.

Sections 779.12(b) and 783.12(b) provide that permit applications must include information on the nature of historic and archeological resources listed or eligible for listing on the National Register of Historic Places, based on all available information, including information from the State Historic Preservation Officer and local archeological and historical groups. The sections are amended further to provide that the regulatory authority may require an applicant to identify and evaluate important historic and archeological resources that may be eligible for listing on the National Register of Historic Places through collection of additional information, conduct of field investigations, or other appropriate analyses.

Sections 779.24(j) and 783.24(j) are amended to provide that maps included with a permit application must show each cemetery that is located in or within 100 feet of the proposed permit area.

PARTS 780 AND 784 -- PERMIT APPLICATIONS -- MINIMUM REQUIREMENTS FOR RECLAMATION AND OPERATION PLAN.

Sections 780.31 and 784.17 are amended to require that the reclamation and operation plan shall describe the measures to be used to prevent adverse impacts to any places listed on the National Register of Historic Places, regardless of ownership. If valid existing rights exist, or if approval to mine is to be obtained from the regulatory authority and the agency with jurisdiction over the place, as required under 30 CFR 761.12(f), the plan shall describe the measures to be used to minimize impacts. The regulatory authority may require the applicant to protect historic and archeological properties listed on or eligible for listing on the National Register of Historic Places through appropriate mitigation and treatment measures. However, any such measures may be implemented prior to the time the properties would be affected by the mining operation, rather than prior to permit issuance.

B. GENERAL COMMENTS.

Numerous comments were made that addressed the overall rulemaking, rather than specific sections. Additionally, many respondents made similar comments about several different sections of the proposed rule. These comments are addressed in this section.

AUTHORITY.

Several respondents questioned OSMRE's authority to promulgate regulations placing requirements for the consideration of historic properties on applicants for permits to conduct surface coal mining operations. OSMRE believes that it has the authority under SMCRA to require States and permit applicants to undertake activities necessary to enable the Secretary to meet his responsibilities under the National Historic Preservation Act. These rules enable the States to assist the Secretary in carrying out his responsibilities under SMCRA and under the National Historic Preservation Act by specifying that regulatory authorities have the authority to ensure that adequate information on historic resources is contained in the permit application so that informed and reasoned decisions about such resources can be made. Additionally, they clarify that regulatory authorities have the responsibility and authority to require protection of important historic properties when it is in the public interest to do so.

As discussed more fully above under Statutory Authority, Section 106 of the National Historic Preservation Act requires Federal agency heads, prior to authorizing expenditure of Federal funds on a Federal or federally assisted undertaking, to consider the effect of the undertaking on historic resources and to provide the Advisory Council on Historic Preservation with a reasonable opportunity to comment on the undertaking. The regulations implementing that section of the National Historic Preservation Act, 36 CFR 800.2(o), define "undertaking" as any project, activity, or

program that is under the direct or indirect jurisdiction of a Federal agency or licensed or assisted by a Federal agency, and that can result in changes in the character or use of historic properties.

The Secretary's approval of State programs to regulate surface coal mining operations under SMCRA, and OSMRE's approval of amendments to such State programs are Federal undertakings. The continued implementation of those programs and subsequent amendments constitute Federally-assisted programs within the meaning of the term "undertaking," because those programs are supported by Federal grants under Section 705 of SMCRA. Thus the Secretary, acting through OSMRE, is responsible for assuring that those programs include consideration of historic resources and alternatives to avoid or mitigate adverse effects. Consideration of the effects of surface coal mining operations extends both to known resources and to situations where a well reasoned conclusion has been reached that there may be resources which are likely to be impacted, as well as to properties listed on, and those eligible for listing on, the National Register of Historic Properties.

OSMRE has implemented its responsibilities both by consulting with the Advisory Council concerning initial approval of State programs, and by ensuring that the substantive provisions of those programs will enable States to assist OSMRE in carrying out its Section 106 responsibilities. The substantive provisions include the State's process for consulting with federal, State and local agencies having responsibility for historic resources, permit application information, permitting decisions, and decisions on areas unsuitable for mining under section 522. The States, in turn, are responsible for implementing those substantive provisions so that decisions at the State level are consistent with the assurances they provided in accepting Federal funds that they would assist OSMRE to meet its Section 106 responsibilities.

Several commenters asserted that in the proposed rules OSMRE was attempting to justify imposition of substantive requirements on the States and permittees on the basis of the National Historic Preservation Act because, in the commenters' view, OSMRE lacks authority to do so under SMCRA. Some of these commenters also asserted that OSMRE is limited in its authority to impose requirements for the content of State programs and permit applications to those requirements specifically enumerated in SMCRA in sections 503, 507, and 508, among others. OSMRE does not agree with these assertions. OSMRE does not rely on the National Historic Preservation Act for its authority to impose these requirements. SMCRA contains a broad grant of rulemaking authority to the Secretary under sections 201(c)(2) and 501(b) to promulgate those regulations necessary to carry out the purposes and provisions of SMCRA.

The Secretary's authority to promulgate regulations specifying permit application requirements beyond those specifically enumerated in SMCRA has been upheld by the Court of Appeals for the District of Columbia Circuit, as found in *In Re: Permanent Surface Mining Regulation Litigation*, 653 F. 2d 514 (D.C. Cir. 1981). The court stated that "the Act's explicit listings of information required to permit applicants are not exhaustive, and do not preclude the Secretary from requiring the states to secure additional information needed to ensure compliance with the Act" (653 F. 2d 514, 527).

Several commenters objected to what they perceived as OSMRE's use of OMB Circular A-102 as an authority for these rules. OSMRE has not used this circular as a source of regulatory authority. However, this circular does not reaffirm the application of the requirements of the National Historic Preservation Act to OSMRE's continued funding of State programs.

COMPLIANCE WITH EXECUTIVE ORDER 12291 AND THE REGULATORY FLEXIBILITY ACT.

Two commenters took issue with OSMRE's statement that these rules are not a major rule requiring a regulatory impact analysis under Executive Order 12291 or a regulatory flexibility analysis under the Regulatory Flexibility Act. OSMRE bases this statement on the fact that in general these rules are a clarification of existing provisions, in OSMRE's rules. As enumerated earlier in this preamble, OSMRE's existing regulatory program already provided the authority and responsibility for State regulatory authorities to consider historic resources. Therefore, although these rules provide greater specificity and guidance, they should not have a major effect within the meaning of EO 12291 or the Regulatory Flexibility Act.

One commenter stated that if OSMRE requires archeological surveys, this will duplicate programs of the State Historic Preservation Officer established under the National Historic Preservation Act, and will therefore violate the provisions of Executive Order 12291 intended to avoid such duplication. OSMRE does not agree that these are duplicate programs. First, these rules do not require surveys; rather, they authorize the regulatory authority to require them, if

appropriate. The programs of the State Historic Preservation Officer are intended to prepare and implement a comprehensive statewide historic preservation plan and to advise and assist, as appropriate, Federal and State agencies and local governments in carrying out their historic preservation responsibilities. OSMRE's responsibility is to protect society and the environments from the adverse effects of surface coal mining operations. These specific rules are intended to ensure that OSMRE and State regulatory authorities can carry out that responsibility with respect to historic resources. Duplicative surveys are not needed or required for areas where surveys have already been conducted nor are surveys necessary in all instances.

CONSISTENCY OF TERMINOLOGY.

Several commenters noted that OSMRE did not use such terms as "historic," "cultural," and "archeological" consistently in its proposed rule. OSMRE agrees, and will change all references to the types of resources protected by this rule itself to "historic and archeological" for purposes of consistency. This phrase is intended to include all property types defined in section 301(5) of the National Historic Preservation Act. Throughout this preamble, any references to "historic" resources should generally be considered to cover archeological properties as well.

DETAIL OF THE RULE.

A number of commenters suggested that the rule as proposed did not contain enough information and definition of terms to provide adequate direction to regulatory authorities for the consideration of important historic properties. Some commenters were concerned that this lack of specificity would result in uneven treatment of historic resources and of applicants under different State regulatory programs. One commenter asked what were the limits of regulatory discretion under these rules.

Like other parts of OSMRE's regulatory program, these rules assure that State regulatory authorities have the authority and obligation to meet minimum Federal requirements for compliance with the statutory mandates. Regulatory authorities may impose additional requirements if they believe that such requirements are appropriate. Additionally, OSMRE believes that the details of procedures used in each State for considering important historic properties in an effective and efficient manner are best developed on a State by State basis by the regulatory authority that must implement them, with continuing oversight by OSMRE. Although this will require regulatory authorities to use judgment in determining what is an appropriate action in a specific case, this approach will allow each regulatory authority to develop procedures best suited to the individual circumstances of its State. Through its State program review OSMRE will monitor State activities to ensure that the requirements of the approved State program are being met.

Moreover, technical guidance is available to regulatory authorities from the State Historic Preservation Officer, the Secretary of the Interior's Standards and Guidelines for Archeology and Historic Preservation (discussed below), and from other similar sources. Should it become apparent in the future that regulatory authorities need additional assistance, OSMRE will consider developing guidance to address specific issues.

CLARIFICATION OF EXISTING PROVISIONS.

Several commenters disagreed with OSMRE's statement in the preamble to the proposed rules that the proposed rules clarify existing authorities and responsibilities, and impose no new responsibilities. One reason these rules are being promulgated is to resolve questions from industry, State Historic Preservation Officers, historic preservation groups, and others concerning those authorities and responsibilities. In resolving these questions, additional detail has been added to the regulatory program. This detail may introduce more specific program requirements in certain cases where States did not interpret their programs to provide the authority which OSMRE maintains existed in the national rules. OSMRE is primarily concerned whether these rules can be reasonably implemented and are consistent with law. OSMRE has concluded that these criteria have been satisfied in this rulemaking.

ROLE OF THE STATE HISTORIC PRESERVATION OFFICER.

Numerous commenters requested that OSMRE include a formal role throughout the permitting process for the State Historic Preservation Officer. They stated that OSMRE should specify that regulatory authorities had to seek the input of that official on eligibility of sites to the National Register of Historic Places, need for and types of surveys, effects of proposed surface coal mining activities on important historic resources, need for and types of mitigation or treatment,

and on any other decisions involving historic resources. OSMRE agrees that the SHPO has an important role to play in determining eligibility of historic resources to the National Register of Historic Places, as specified by the National Historic Preservation Act, and in providing the regulatory authority with advice and technical assistance throughout the permitting process. Therefore, the State Historic Preservation Officer is notified of each permit application and given an opportunity to comment. Moreover, the permit application is to be based in part on information available from the State Historic Preservation Officer. However, both the State Historic Preservation Officer and the regulatory authority are State agencies, and OSMRE believes that it is appropriate to leave the details of the consultation processes between them to the individual States.

REQUIREMENTS OF STATE PROGRAMS.

Some commenters stated that they believed the proposed rules did not include any requirements that would cause regulatory authorities to adequately consider the effects of their undertakings on significant historic properties. OSMRE does not agree. Under these rules, regulatory authorities will be required to make a written finding, prior to issuing a permit, that significant historic resources have been considered. This finding, in turn, is based on a requirement to determine that a permit application is complete and accurate. The permit applicant is required to include both the environmental information in Parts 779 and 783 and the reclamation and operation plan in Parts 780 and 784. These must include information on historic resources.

One commenter stated that operators should be required to develop a plan to provide for adequate evaluation and mitigation measures. Parts 780 and 784 provide authority to the regulatory authority to require adequate evaluation and mitigation measures. OSMRE believes it is appropriate for the regulatory authority to determine, on a case by case basis, whether such measures are necessary.

Numerous commenters stated that OSMRE should require State regulatory authorities to undertake certain activities to ensure protection of important historic resources. They criticized the proposed rules as providing too much discretion, and stated that it was unlikely that regulatory authorities would undertake any activities to protect such properties unless they were required to do so.

OSMRE intends these rules to ensure that important historic properties receive adequate consideration during the permitting process. The regulatory authority is required by the revised paragraph 773.15(c)(11) to make a written finding that properties listed on and eligible for listing on the National Register of Historic Places have been taken into account in the permit process. Under section 522(e) of SMCRA, the regulatory authority (and OSMRE for permits it issues) must protect publicly and privately owned properties listed on the National Register of Historic Places. There is no obligation under section 522(e)(3) to protect properties that are eligible for, but not listed on, the National Register. However, this finding requires the regulatory authority to consider such resources when making permitting decisions in order to assure that the regulatory authority can assist the Secretary in implementing his responsibilities under section 106 of the National Historic Preservation Act. For regulatory authorities to give adequate consideration to such properties, additional information about their existence, location, and nature may be necessary. Regulatory authorities will have to undertake whatever steps are needed as a basis for the finding. As discussed above, OSMRE has concluded that the specific process selected by a particular State in a particular permit situation should be determined by the State itself. It is neither necessary nor desirable to specify particular activities that States must undertake at any specific stage of the permitting process.

RELATIONSHIP TO THE 36 CFR PART 800 PROCESS.

A number of commenters suggested that the regulations should include provisions which would require the State regulatory authorities to establish a system parallel to that established by the Advisory Council on Historic Preservation in 36 CFR Part 800. Those regulations (which have been revised, effective October 1, 1986, since submission of the comments on this rulemaking (*51 FR 31115*)), implement section 106 of the National Historic Preservation Act. These comments were based on the incorrect premise that State regulatory authority implementation of State programs is subject to 36 CFR Part 800 because OSMRE is subject to those rules when it administers a regulatory program.

Because considerable confusion exists about the relationship of the requirements in 36 CFR Part 800 to the different programs which OSMRE implements, further explanation is appropriate.

1. In some cases, OSMRE functions as the regulatory authority in the permitting of surface coal mining operations. This occurs in Federal program states and on Indian lands. In these situations, permits issued by OSMRE are direct Federal actions or undertakings, subject to all the requirements of various Federal laws such as the National Environmental Policy Act (NEPA) and the National Historic Preservation Act, including section 106.

2. In States with regulatory programs approved by OSMRE, the regulatory authority issues permits for surface coal mining operations. These permits are State undertakings, not Federal undertakings, and thus the provisions of Federal laws and rules, such as NEPA, the National Historic Preservation Act and 36 CFR Part 800, do not apply directly. The provisions of 30 CFR 730.5 require State programs to be consistent with SMCRA and rules adopted by OSMRE under SMCRA. However, they do not require direct State program implementation of other Federal laws such as the National Historic Preservation Act. Thus, State programs must be no less stringent than SMCRA, and no less effective than the Secretary's regulations in meeting the requirements of SMCRA. There is no requirement in SMCRA that the approved State programs be "no less effective" than the requirements of the National Historic Preservation Act.

On the other hand, the Secretary's approval of State regulatory programs and OSMRE's approval of amendments to approved State programs under SMCRA are Federal undertakings. Therefore, in order to implement its responsibilities under section 106 of the National Historic Preservation Act, OSMRE is promulgating these regulations to ensure that State regulatory authorities can assist the Secretary in the implementation of those responsibilities. Moreover, because the granting of Federal monies constitutes a Federally assisted undertaking subject to section 106, all Federal grantees, including State regulatory authorities, are required to assure Federal grantor agencies that they will provide such assistance, as a condition of receiving the Federal grants.

3. In States with cooperative agreements with OSMRE that make the State the regulatory authority on Federal lands, the provisions of section 106 do not apply to the issuance of permits by the State regulatory authority. However, permit issuance is, with rare exceptions, accompanied by other Federal actions, such as leasing or mining plan approval, which are subject to section 106. Additionally, whenever Federal lands are involved the land managing agency has responsibilities for protection of historic resources under section 110 of the National Historic Preservation Act.

APPLICATION OF THE SECRETARY OF THE INTERIOR'S STANDARDS AND GUIDELINES FOR ARCHEOLOGY AND HISTORIC PRESERVATION.

A number of commenters noted that OSMRE had not mentioned the Secretary's Standards and Guidelines for Archeology and Historic Preservation (*48 FR 44716*) in its discussion of what historic preservation activities are appropriate under particular circumstances. This document was issued by the Secretary under the authority of the National Historic Preservation Act to provide general guidance to Federal agencies, States, and the public on appropriate archeological and historic preservation activities. Some of these commenters recommended that OSMRE require that these standards be applied to the State programs. OSMRE does not believe it is appropriate to require application of a document which was meant to be advisory. However, OSMRE uses these Standards and Guidelines, when appropriate, in its Federal program activities, and it does agree that these Standards and Guidelines offer useful assistance to anyone involved in the consideration of important historic properties.

ELIGIBILITY.

Several commenters asked what process would be followed in making determinations of the eligibility of properties for listing on the National Register of Historic Places, and how eligibility was defined. There are four basic criteria for eligibility; these criteria are found at 36 CFR 60.4. The Advisory Council's regulations at 36 CFR 800.2(e) state that properties eligible for inclusion in the National Register includes both properties formally determined as such by the Secretary of the Interior and all other properties that meet National Register listing criteria. The National Register has regulations at 36 CFR 60 and 63 which describe the process through which such determinations are made. In brief, the process established by the National Register's rules requires the State Historic Preservation Officer and the Federal agency to make such determinations.

In cases of unresolved conflicts regarding eligibility of properties, they can be submitted to the Keeper of the National Register, National Park Service, whose decision is final.

DETERMINATIONS OF EFFECT.

Several commenters asked how "effect" was defined, and how regulatory authorities will determine when an important historic resource would be adversely affected by surface coal mining operations. For Federal undertakings subject to the provisions of section 106 of the National Historic Preservation Act OSMRE will use the definition of effects and adverse effects in 36 CFR 800.9 for purposes of complying with 36 CFR Part 800. The concepts of effect and adverse effect are relevant under that Part in initiating the consultation process among the Federal agency, the State Historic Preservation Officer, and the Advisory Council on Historic Preservation. Briefly, 36 CFR 800.9 states that adverse effects occur when an activity diminishes the integrity of the property's location, design, setting, materials, workmanship, feeling, or association. Regulatory authorities administering the prohibitions of section 522(e)(3) of SMCRA are not obligated to use the definitions at 36 CFR 800.9 for determining an adverse effect on historic resources from surface coal mining operations. However, regulatory authorities may want to use the definitions in 36 CFR 800.9 as guidance in applying section 522(e)(3) to places listed on the National Register of Historic Places.

PREDICTIVE MODELING.

Two commenters expressed concern that the entire approach taken in the proposed rules would preclude use of predictive modeling techniques and was based on a view that proper management of historic resources mandates that all such resources should be preserved undisturbed or mitigated at all costs regardless of the site's historic value in relation to other similar sites outside the impact area. This is not the case. Nothing in the proposed rules discourages State regulatory authorities from using predictive modeling techniques when such techniques are appropriate; nothing in these rules requires identification, treatment or preservation of all historic resources. Indeed, OSMRE's commitment to allowing regulatory authorities flexibility in determining what specific processes are necessary to ensure adequate consideration of important historic resources would clearly allow predictive modeling to be used and encourages regulatory authorities to make decisions concerning historic resources which balances the interest of the public in such resources against the need to mine coal. Furthermore, the Secretary of the Interior's Standards and Guidelines for Archeology and Historic Preservation, which OSMRE recommends to regulatory authorities as a guide to determine what activities might be appropriate in any particular case to protect historic resources, is based on the concept that decisions about historic properties should take place within the historic context of the area, including what other similar resources occur.

QUALIFIED STAFF.

Numerous commenters suggested that OSMRE should require that any historic resource activities conducted or caused to be conducted by a regulatory authority be done by qualified professional personnel, and that regulatory authorities themselves be required to hire an historic resource professional. OSMRE does not agree that it is necessary to specify that all historic resource activities that a regulatory authority may require a permittee or permit applicant to conduct be carried out by professional personnel. The regulatory authorities are responsible for making reasonable decisions about historic resources and for ensuring that they have been considered in the permitting process. Issuance of a permit requires a finding that they have fulfilled this responsibility. Regulatory authorities have to ensure that the information available to them as a basis for such decision making is of a dependable professional nature, and thus they may want such information to be collected by qualified professionals. However, this does not need to be specified in the rules.

As far as requiring the regulatory authority to have its own professional historic resource staff is concerned, the State Historic Preservation Officer is the official representative of the State on matters dealing with historic resources. Although some regulatory authorities may decide to hire their own staff historic resource personnel, they may also decide that the assistance available to them in the State Historic Preservation Office is adequate to deal with these issues.

EXISTING MINES AND RESOURCES DISCOVERED AFTER PERMIT ISSUANCE.

Several commenters asked whether the specific provisions of these rules will apply to existing mines. Although the general provisions discussed here already exist in OSMRE's rules, and therefore apply to all existing mines, any specific permitting requirements not already included in OSMRE's rules will not apply retroactively to existing, permitted mines. However, they will apply to pertinent permit revisions that occur in the future. The portions of section 522(e) covered by

this rule, including extension of the mining prohibitions to privately owned places listed in the National Register of Historic Places and privately owned burial grounds, apply to all mines.

Similarly, several commenters asked how historic resources discovered subsequent to permit issuance or during mining activities will be handled. Regulatory authorities will have taken into account the probability that currently unknown resources may occur in a particular permit area and will have taken appropriate steps, such as conditioning the permit, to ensure adequate consideration of such properties. However, resources discovered after permit issuance or during mining will not be protected unless they are properties covered by section 522(e) of SMCRA or unless the regulatory authority has conditioned the permit to provide for their protection.

APPLICATION TO OTHER RESOURCE TYPES.

One commenter stated that these rules should apply to other resource types, such as limestone, sandstone and gravel. SMCRA applies only to surface coal mining and reclamation operations. These rules are intended to cover OSMRE and State activities regarding such operations.

D. DISCUSSION OF FINAL RULES.

The following text, which describes the final rule and responds to the specific public comments OSMRE received on the proposed rules, is organized by the part and section numbers of the affected provisions. Grammatical or stylistic changes that do not affect the substance of the final rule are not discussed.

1. PART 700 -- GENERAL

Although OSMRE had not proposed any changes for this Part, one commenter suggested that definitions of certain terms dealing with historic resources be included in this Part. OSMRE believes that it is neither appropriate nor necessary to include definitions in this general section. Necessary definitions are included in Parts 701, 705, 761 or in the specific part dealing with the term being defined.

2. PART 731 -- SUBMISSION OF STATE PROGRAMS

SECTION 731.14(g) - CONTENT REQUIREMENTS FOR PROGRAM SUBMISSIONS.

Part 731 provides authority for a State to submit a program to OSMRE for review which, when, approved, allows the State to regulate coal exploration and surface coal mining and reclamation operations on non-Federal and non-Indian lands within its boundaries. It also establishes general content requirements for program submissions.

OSMRE proposed to amend paragraph 731.14(g)(10), which requires program submissions to include a narrative description, flow chart, or other appropriate documents of the State's proposed system for consulting with State and Federal agencies having responsibility for the protection or management of fish and wildlife and related environmental values; and historic, cultural, and archeological resources. OSMRE proposed to remove the reference to historic, cultural, and archeological resources from paragraph 731.14(g)(10), and create a new paragraph 731.14(g)(17), to address these resources specifically. OSMRE proposed that the new paragraph require the description to include the State's proposed system for consulting with local as well as State agencies having responsibility for historic and archeological resources, and include a description of the State's system for making decisions regarding such resources. This provision was included to clarify the procedures to be followed in a specific State to ensure that the regulatory authority has enough information to make reasonable decisions concerning the effect on historic properties of surface coal mining and reclamation operations and coal exploration under SMCRA. The provision was also intended to provide the Secretary with additional information to assess the effect of State program approval on cultural and historic resources.

In the final rule, OSMRE has adopted the proposal, but has added a requirement to consult with Federal agencies, for the reasons discussed below. No other changes were made to the proposed language.

Several commenters believed that the language proposed for this section would require most State programs to be resubmitted to OSMRE for approval. This is not the case. Following promulgation of these rules, OSMRE will follow the process established in rules at 30 CFR Part 732 to notify States of any program changes which will be necessary to bring that State's program into compliance with these rules.

Several commenters suggested that OSMRE require the regulatory authority to consult with the State Historic Preservation Officer (SHPO) to develop the systems for consultation required under this section of the rule. OSMRE believes that such a requirement is redundant, because Section 731.14 already requires consultation with "State agencies having responsibility" for historic resources.

Other commenters suggested that the list of agencies to be consulted under this section be expanded to include various professional societies, Federal agencies, museums, Indian tribes and other preservation groups. OSMRE believes that State and local preservation groups, museums, research institutions, and others can ensure that their concerns are considered by making them known to the State Historic Preservation Officer. They can also contact the regulatory authority directly to comment or to request an informal hearing on a permit application or other area of concern. It would be unduly burdensome to require the regulatory authority to consult with such groups routinely.

In the proposed rule OSMRE inadvertently omitted Federal agencies from the required narrative description of agencies to be consulted. A description of the State's system for consulting with Federal and State agencies concerning historic resources has been required since the permanent program regulations were promulgated in 1979. OSMRE has rectified this oversight in the final rule.

Two commenters asked why suggested language for this and other sections of the proposed rules submitted by the Society for American Archaeology during the public comment period on the Society of Professional Archeologists' petition for rulemaking, had not been used. The Society for American Archaeology's suggested language was considered during the initial drafting of the proposed rule. While the proposed rules reflected the general concerns of the Society for American Archaeology, OSMRE determined that the language suggested was too detailed and conflicted with the general principle of State primacy and regulatory flexibility taken throughout OSMRE's regulatory program. The comments were considered again during the development of these final rules, and OSMRE has reached the same conclusion concerning the specific suggestions made. The suggested language would have specified requirements for State programs in this part; as discussed earlier, OSMRE believes it is more desirable to establish general standards which will allow individual State regulators to make decisions about the specific means to be used to meet those standards.

Several commenters asked how OSMRE would evaluate decisions made by the State regulatory authorities pursuant to State programs described in response to Section 731.14. As with any program component, OSMRE will evaluate the State's process through oversight by examining whether the process is operating in accordance with the approved State program. This evaluation will consider procedures followed and the overall pattern and consistency of the regulatory authority's decision making. Among the factors to be examined, OSMRE will evaluate whether the record indicates that the regulatory authority considered comments on historic resources from the State Historic Preservation Officer and from interested members of the public. OSMRE will follow the same method it uses to evaluate the regulatory authority's consideration of comments from other agencies with special technical expertise, such as the Soil Conservation Service and the Fish and Wildlife Service.

Several commenters noted that OSMRE should provide for annual review and revision of the system established by State regulatory authorities. OSMRE evaluates the administration of each State program annually, including this component.

One commenter asked that OSMRE ensure that there was adequate opportunity for public participation in the development of each State's system for consulting with agencies having responsibility for historic resources, and for making decisions about those resources. Adequate provision for public participation is made at Section 731.14(g)(14), which requires the State program to include a narrative description of the proposed system for providing for public participation in the development, revision, and enforcement of State regulations, the State program, and permits issued under the program, and 30 CFR 731.15(b)(10), which provides that the Secretary may not approve a State program unless he finds that it provides for public participation consistent with the requirements of SMCRA and the Federal

regulations. In addition, the Secretary may not approve a State program or program amendment until the public has had the opportunity to comment on the program or amendment.

Several commenters believed that the requirements for historic resources contained in this section were not consistent with section 503 of SMCRA, which specifies the required content of an approvable State program. SMCRA specifies minimum requirements for the development of State programs. The Secretary has the authority to promulgate such regulations as are necessary to meet the purposes and provisions of SMCRA, and of related statutory requirements. Section 503(a)(7) provides that State programs have rules and regulations consistent with regulations issued by the Secretary.

3. PART 732 -- PROCEDURES AND CRITERIA FOR APPROVAL OR DISAPPROVAL OF STATE PROGRAM SUBMISSIONS.

SECTION 732.15 - CRITERIA FOR APPROVAL OR DISAPPROVAL OF STATE PROGRAMS.

Although OSMRE had not proposed any changes for this section, three commenters suggested additions that would have required State programs to contain provisions consistent with the National Historic Preservation Act and its implementing regulations. As discussed above in the section on general comments, this is based on a misunderstanding of the relationship of the National Historic Preservation Act to State programs. Therefore, OSMRE has made no changes to this section.

SECTION 732.17 - STATE PROGRAM AMENDMENTS.

Section 732.17 details the procedures and criteria that OSMRE uses in approving or disapproving amendments to approved State programs. OSMRE uses the applicable criteria for approval or disapproval of State programs at 30 CFR 732.15 in reviewing State program amendments. For approval, such criteria require that a State's laws and regulations be in accordance with the provisions of the Act and consistent with the requirements of 30 CFR Chapter VII.

OSMRE proposed to amend Section 732.17(h) by adding a new paragraph (4). The proposed paragraph required OSMRE to provide all State program amendments for comment to the State Historic Preservation Officer for the State to which the amendment applied, and required that all program amendments which may have a significant impact on historic properties also be submitted to the Advisory Council on Historic Preservation for comment.

Under the proposed rule, the State Historic Preservation Officer and the Advisory Council would have been provided the same comment period the public is provided under paragraph (h)(3) of Section 732.17. This section provides a minimum of 30 days for public comment for each proposed State program amendment, with certain exceptions when 15 days are allowed.

The Advisory Council objected to this proposal because it believed that it would establish a separate comment process that would contradict its own rules at 36 CFR Part 800. In response, OSMRE has changed the final rule to indicate simply that amendments will be provided to the State Historic Preservation Officer and to the Advisory Council for comment. Currently, these amendments are provided to the Council under the terms of a 1980 agreement between OSMRE and the Advisory Council. OSMRE will continue submitting amendments to the Advisory Council following the procedures in this agreement until after these regulations become effective. At that time, OSMRE will review the agreement for consistency with these rules, and will consider renegotiating or terminating the agreement, as appropriate.

In the final rule, in addition to the change discussed above, OSMRE has added the term "archeological" resources for consistency with other sections of the rules, and has changed the term "significant impact" to "effect," for consistency with the Advisory Council's rules at 36 CFR Part 800.

Finally, the requirement to send all proposed amendments to the State Historic Preservation Officer for comment has been replaced with a requirement to send only those amendments which may have an effect on historic properties. This change was made to eliminate unnecessary and burdensome paperwork which would have been placed on both OSMRE

and the State Historic Preservation Officer if there were a requirement to send all proposed amendments for comment, even if they would have had no impact on historic resources.

One commenter suggested that the term "significant impact" be changed to "clear effect." OSMRE agrees in part, and has changed the term to "effect" to be consistent with the language of the regulations of the Advisory Council in 36 CFR Part 800. OSMRE sees no need to add the term "clear," which is an undefined term not in common use in the process established in 36 CFR Part 800.

One commenter asked how OSMRE would evaluate comments received from the Advisory Council on Historic Preservation on proposed State program amendments. Since the Advisory Council is expert on matters involving the effect of Federal undertakings on historic properties, OSMRE intends to give serious consideration to any comments from the Advisory Council on proposed State program amendments, in order to ensure that OSMRE's responsibilities under the National Historic Preservation Act have been met.

Several commenters noted that any State program amendments provided to the Advisory Council on Historic Preservation should be provided by OSMRE, not the State, because this is a Federal agency responsibility under section 106 of the NHP A, as amended. OSMRE agrees with this comment. However, it is not necessary to add such language to the rule, since this section refers specifically to actions that OSMRE, not a State regulatory authority, would undertake.

Several commenters questioned whether OSMRE should provide the Advisory Council on Historic Preservation and the State Historic Preservation Officer an opportunity to comment on proposed State program amendments, because Section 503 of SMCRA requires only that OSMRE obtain the views of Federal agencies with expertise pertinent to the State program in question. These commenters questioned whether the Advisory Council was an "agency" for purposes of this part.

OSMRE will submit any program amendments which affect historic resources to the Advisory Council to fulfill its responsibilities under Section 106 of the National Historic Preservation Act. OSMRE's review and approval of such amendments are Federal undertakings, subject to the provisions of the National Historic Preservation Act. Thus, OSMRE is required by that Act and its implementing regulations to provide the Advisory Council and the State Historic Preservation Officer with an opportunity to comment. Accordingly, a determination of whether the Advisory Council is a Federal agency under the provisions of Section 503 of SMCRA is not essential.

Two commenters requested that OSMRE define the term "significant impact" as used in this section of the rule. Since OSMRE is not using this term in the final rule, a definition of the term is not relevant.

One commenter asked whether OSMRE intended that the State Historic Preservation Officer make the determination that a particular State program amendment should be sent to the Advisory Council on Historic Preservation. Responsibility for this decision lies with OSMRE, not the State Historic Preservation Officer. However, since the State Historic Preservation Officer is the State's expert on historic resource matters OSMRE intends to consider carefully any opinion from that official that a particular proposed State program amendment will have an adverse effect on historic resources.

Two commenters, including the Advisory Council on Historic Preservation, noted that this section was not consistent with the Advisory Council's own regulations, and appeared to establish a process separate and different from those regulations, by which OSMRE will provide proposed State program amendments to the Advisory Council for comment. The Advisory Council requested that it be consulted further before the rule was finalized. OSMRE has consulted with the Advisory Council on this matter, and has changed the rule to provide simply that amendments will be provided by OSMRE to the Advisory Council and the State Historic Preservation Officer for comment. As discussed above, at present OSMRE is providing amendments to the Advisory Council according to the terms of an agreement between OSMRE and the Advisory Council.

One commenter stated that this proposed section was unclear with regard to the consequences of a "negative" review of a State program amendment by either the State Historic Preservation Officer or the Advisory Council. OSMRE is required by the National Historic Preservation Act to consider the impacts of its undertakings on historic resources. OSMRE will follow the process outlined in that Act and its implementing regulations in consulting with the State

Historic Preservation Officer and the Advisory Council on State program amendments. Once that process has been satisfied, OSMRE will make a decision based on all pertinent considerations.

4. PART 761 -- AREAS DESIGNATED BY ACT OF CONGRESS

This part establishes the procedures and standards to be followed in determining whether a proposed surface coal mining and reclamation operation can be authorized in light of the prohibitions and limitations established by Congress in section 522(e) of the Act on certain Federal, public, and private lands. Section 761.5 defines a series of terms and phrases of special importance for areas designated by Congress in that section of the Act. These definitions are used consistently for purposes of this part. Section 761.11 discusses areas where mining is prohibited. Section 761.11 discusses procedures used by the regulatory authority to determine whether surface coal mining operations are limited or prohibited by Section 761.11 in a particular area that could be impacted by proposed operations.

SECTION 761.5 - DEFINITIONS.

OSMRE proposed to amend the definition of "cemetery" to mean "any area of land where human bodies are purposely interred." The word "purposely" in the proposed rule was included to emphasize that only intentional interments are cemeteries. The proposed definition thus included private family burial grounds and other sites where human bodies were intentionally buried, such as Indian burial mounds.

In the final rule, OSMRE has removed the term "purposely" from the definition of cemetery. No other change has been made in the proposed rule.

Many commenters objected to the inclusion of the term "purposely" in the definition of cemetery. They reasoned that the term "interred" necessarily implied that the act of burial was intentional. OSMRE agrees with this reasoning, and has deleted this term from the final rule. As OSMRE noted in the preamble to its 1979 definition of cemetery (*44 FR 14991*, March 13, 1979), the term "interred" indicates that a cemetery is where bodies are intentionally buried.

Other commenters asserted that the word "purposely" in the proposal clouded the definition by requiring an analysis of intent or speculation on whether the burial was intentional, and asked how determinations that a burial was or was not purposeful will be verified. As noted above, OSMRE has taken out the term "purposely" from the final rule. OSMRE interprets these rules to mean that burials are intentional unless there is clear evidence to the contrary. This is now a new interpretation. Furthermore, OSMRE believes it is less burdensome, overall, to presume that burials are intentional that to require an analysis of intent in every case.

Other commenters suggested that a more formal definition of cemetery was in order and should include the concepts of dedication or recognition of lands specifically set apart for a cemetery. OSMRE believes that this is too limited an interpretation of Congress' intent to protect human remains from disturbance by surface coal mining operations. Additionally, any such definition would require the regulatory authority to make a judgment, often in the absence of relevant information, concerning the intent and attitude of the individual(s) who originally interred the remains.

Several commenters suggested that "bodies" be changed to "remains", to clarify that all types of human remains in various states of preservation are covered by this definition. While OSMRE agrees that all types of human remains are indeed covered by this definition, it does not believe that this wording is necessary or advisable. The term "bodies" has been part of this definition for a number of years, and there does not seem to be any confusion about its meaning. Additionally, the term "remains" could be confused with material cultural remains, such as pottery, jewelry, and other similar items. OSMRE does not want the definition to imply that a cemetery can exist in the absence of some remnant of human bodies. A burial area with no trace of human bodies remaining but with burial goods or furniture might be an archeological site but it would not be a cemetery.

Some commenters questioned whether "bodies" was meant to imply that more than one body must be present before an area could be considered a cemetery; others asserted that more than one burial must be present for a cemetery to exist. Clearly, depending on the specific situation, a single body could constitute a cemetery. However, the plural "bodies"

more adequately expresses the typical situation, and rather than include the awkward phrase "body or bodies" in this instance OSMRE intends that the plural term include the singular.

Numerous commenters were concerned about the process for identifying unmarked cemeteries. Some suggested that permit applicants should be required to identify and locate all cemeteries within a permit area, whether presently marked or not. OSMRE believes that this would be unduly burdensome on the applicant. The regulatory authority is required by paragraph 773.15(c)(3)(ii) to make a written finding that a proposed permit area is not within an area designated as unsuitable for mining, which includes cemeteries and a 100 foot zone around them. Moreover, the regulatory authority is required by the newly revised paragraph 773.15(c)(11) to make a written finding that properties listed on and eligible for listing on the National Register of Historic Places have been taken into account in the permit process. Sections 779.24(j) and 783.24(j) require the applicant to include maps showing each cemetery that is located in or within 100 feet of the proposed permit area. If the regulatory authority had reason to believe that the information in a permit application was inadequate concerning these resources, the regulatory authority must require the information that would allow those two findings to be made, as well as the finding at Section 773.15(c)(1) that a permit application is complete and accurate. However, it is not practical to require the applicant to undertake possibly expensive identification projects in the absence of information indicating the likelihood that a cemetery might be present.

A decision that a permit application is incomplete and must be supplemented needs to be based on all information available to the regulatory authority, not just on maps or records of known cemeteries. Indeed, the regulatory authority should be particularly sensitive to all information on the occurrence or location of cemeteries because they may be unmarked, because there is a prohibition of mining within 100 feet of such areas, and because once such resources have been destroyed by mining they are impossible to restore. For example, if evidence suggests that a specific permit area has a high likelihood of containing a type of prehistoric village site that is known to contain human interments, the regulatory authority will probably want to require additional information on the presence or absence of such a site to make the two findings.

Several commenters asked how cemeteries discovered after permits were issued were to be treated. Because of the requirements of section 522(e)(5) of SMCRA, mining could not proceed within 100 feet of any cemetery, even one discovered after a permit is issued. However, OSMRE expects that the provision to relocate cemeteries, discussed at Section 761.11(g) below, would allow operators in many instances to continue mining following removal of the cemetery under State law.

SECTION 761.11 - AREAS WHERE MINING IS PROHIBITED OR LIMITED.

This section discusses what lands are covered by the prohibitions against mining contained in section 522(e) of SMCRA. Two separate paragraphs of this section were affected by proposed changes: Section 761.11(c) and (g).

OSMRE proposed to amend paragraph 761.11(c) to extend the prohibition on mining to privately owned places, as well as publicly owned places, listed on the National Register of Historic Places. This proposed change was in response to the July 15, 1985 decision of the District Court, discussed above. The final rule is adopted as it was proposed.

One commenter requested that the term "publicly or privately owned" be added to clarify explicitly that all National Register listed properties, regardless of ownership, are protected by these provisions. OSMRE believes it is clear that all listed properties are protected, and that the language suggested would be redundant.

OSMRE proposed to amend paragraph 761.11(g) to include a provision previously included in Section 773.15(c)(11). Section 773.15(c)(11) specified that private family burial grounds could be relocated, if authorized by applicable State law or regulations.

The provision as proposed in paragraph 761.11(g) specified that cemeteries could be relocated if authorized by applicable State law or regulations. This amendment was proposed in conjunction with the proposed definition of cemetery in Section 761.5, which deleted the exception for private family burial grounds found in the 1983 rule. Since such burial grounds are no longer singled out for separate treatment, there was no reason to retain the provision in paragraph 773.15(c)(11). However, since such grounds are now included in the definition of cemetery, as are all other areas where human bodies are interred, OSMRE considered it reasonable to acknowledge that all such properties may be

relocated in accordance with applicable State law, and that once cemeteries are relocated the prohibition of section 522(e)(5) no longer applies. OSMRE has made no changes in the final rule.

Most comments on this paragraph were concerned about the identification of cemeteries and their scientific importance. Commenters were concerned that OSMRE's provision to relocate cemeteries consistent with State law would allow remains with scientific and historic importance to be moved without any protection for the information they contain. This concern results from the dual nature of cemeteries, and the somewhat differing provisions for their protection contained in SMCRA and in various pieces of historic preservation legislation. Section 522(e)(5) of SMCRA protects cemeteries due to their association with cultural values involving disposition of and reverence for the dead. However, cemeteries may also be significant for their scientific and historic value. These values are not protected by section 522(e)(5), but can be protected by regulatory authorities under the provisions of these rules requiring consideration of important historic properties.

One commenter believed that OSMRE should provide guidance for recording the information content of gravestones. OSMRE does not believe that it would be appropriate to include such direction in these regulations. As noted above, regulatory authorities can, on a case by case basis, determine what, if any, means are appropriate to protect the historic value in cemeteries, based on comments from the State Historic Preservation Officer, other public comments, and information contained in the permit application.

One commenter suggested that permission of the regulatory authority should be required prior to the relocation of a cemetery. Regulatory authorities would have to be given such authority by State law, not by OSMRE.

SECTION 761.12 - PROCEDURES.

This section specifies how the regulatory authority will review applications for permits to conduct surface coal mining operations to determine whether the operations are limited or prohibited under Section 761.11. OSMRE proposed to amend paragraph 761.12(f), consistent with the proposed amendment to paragraph 761.11(c), to require the regulatory authority to transmit a copy of the permit application to the Federal, State, or local agency with jurisdiction where it determines that a proposed operation would adversely affect any place, whether publicly or privately owned, that is listed on the National Register of Historic Places. This proposed change was in response to the July 15, 1985, decision of the District Court, discussed above. The final rule is adopted as proposed.

Two commenters asked for clarification on which agency or entity has jurisdiction over privately owned places listed on the National Register. Generally, the agency with jurisdiction would be the agency responsible in the State or local area for determining what properties are historic and for designating them as such. For example, this could be a State Historic Preservation Officer, the preservation officer for a local government "certified" by the Secretary of the Interior to assume some of the State's responsibilities under the National Historic Preservation Act, a local zoning board or landmark commission, or a County Board of Supervisors. As noted by the District Court for the District of Columbia in its July 15, 1985, memorandum opinion in *In Re: Permanent Surface Mining Regulation Litigation (II)*, No. 79-1144 at p. 76, "jurisdiction" does not necessarily imply ownership or control over a property.

One commenter stated that the procedures in this section were inconsistent with 36 CFR Part 800, in that they allowed the regulatory authority to make the initial determination that a proposed surface coal mining operation would adversely affect a park or National Register site, and that other concerned agencies would not be allowed to comment on an application unless such a determination had been made.

These procedures are intended to implement the provisions in section 522(e) of SMCRA, not the provisions of the National Historic Preservation Act or 36 CFR Part 800. (The relationship between State programs and 36 CFR Part 800 is discussed earlier in this preamble.) While these rules do provide for the regulatory authority to make an initial decision on what resources will be affected by surface coal mining operations, the State Historic Preservation Officer or any other concerned agency or individual can comment on or object to such decisions through the permitting process specified in Part 773.

The same commenter believed that this section should provide protection for both National Register listed and National Register eligible properties. This comment confuses the provisions of this part, which apply to areas designated

by Congress in section 522(e) of SMCRA as unsuitable for mining, with the permitting provisions contained elsewhere in these rules. The court's decision in *In Re: Surface Coal Mining Regulation Litigation* discussed above specified that this prohibition against mining in section 522(e)(3) does not extend to properties eligible for listing on the National Register of Historic Places. However, such properties can be protected by regulatory authorities under the permit requirements and other provisions contained elsewhere in these rules.

5. PART 722 -- REQUIREMENTS FOR COAL EXPLORATION

SECTION 772.12 - PERMIT REQUIREMENTS FOR EXPLORATION REMOVING MORE THAN 250 TONS OF COAL.

This part establishes the requirements and procedures applicable to coal exploration operations. Specific consideration of historic properties is found in paragraph 772.12(B)(8). OSMRE proposed to amend paragraph 772.12(b)(8) to clarify that the regulatory authority could require additional information regarding known or unknown historic resources needed to process permits for coal exploration.

In the final rule, OSMRE has added the word "archeological" to the term "historic resources" in order to be consistent throughout the rules. No other changes to the proposal were made.

Several commenters asked how the regulatory authority would determine whether additional information is needed. OSMRE expects comments from the State Historic Preservation Officer, and any comments submitted by other interested parties. The procedure followed by the regulatory authority in making such decisions will be determined on a State by State basis, and will be part of the State's system to ensure adequate consideration of these resources.

Several commenters suggested that OSMRE clarify the process by which the regulatory authority would obtain additional information by adding a phrase specifying that surveys of the exploration area by qualified professionals could be required. OSMRE believes that it is not necessary to add this detail in the body of the regulations. When a regulatory authority determines that additional information is needed as a basis for making a reasonable decision about historic resources, the regulatory authority would require the information to be collected in a manner that would obtain dependable results. In general, this means that the information will need to be collected by qualified professionals. However, OSMRE believes that this is a decision to be made by the regulatory authority on a case by case basis. One commenter suggested making the language of this section identical to the language at Section 779.12(b), which concerns permit application information required for surface coal mining operations. OSMRE believes that the added detail at Section 779.12(b) is not appropriate that the regulatory authority would make this decision based on information previously submitted with the exploration application, for Section 772.12. Exploration activities typically involve small areas of disturbance and may result in little or no damage to resources, in comparison with the relatively large areas of disturbance that would result from the surface coal mining operations addressed by Section 779.12(b). Thus, OSMRE believes that the requirement adopted for Section 772.12 is appropriate, because it provides more latitude to the regulatory authority to determine what information is necessary and how it should be collected.

Several commenters stated that they do not believe that OSMRE has any authority to require information on unknown archeological sites. Section 772.12(b) does not require submission of information on unknown archeological sites. Rather, OSMRE is making explicit that the regulatory authority has the discretion to require such information, should the regulatory authority need the information to make informed decisions in the public interest concerning important historic properties that may be disturbed by coal exploration activities. The basis for such authority is the same as for requiring information on historic resources in the permitting process, discussed in the preceding portion of this preamble.

One commenter was concerned about protecting the integrity of information about historic resources, given the fact that permit information is public. OSMRE shares this concern. Section 304 of the National Historic Preservation Act requires the head of Federal agencies, after consulting with the Secretary of the Interior, to withhold information on the location or nature of historic properties from the public when disclosure of such information may result in harm to such properties. Each regulatory authority may develop procedures to protect such sensitive information. In the future, if OSMRE finds that disclosure of such information is resulting in harm to historic properties, OSMRE will consider appropriate regulatory changes to ensure that such properties are protected.

Several commenters stated that they believed that OSMRE should not make the requirements for exploration more stringent than for permit applications, and that this section was more stringent than the provisions for historic resources in permit applications in parts 779 and 783. OSMRE does not agree that the provisions in this part are more stringent. Section 772.12 merely clarifies that the regulatory authority has the authority to require information it may need to make reasoned decisions about historic resources. Parts 779 and 783 require specific information about such resources.

6. PART 773 -- REQUIREMENTS FOR PERMITS AND PERMIT PROCESSING

This part provides minimum requirements for permits and permit processing and covers obtaining and reviewing permits, coordination with other laws, public participation, permit decisions and notification, permit conditions, and permit term and right of renewal.

Specific consideration of historic properties is found in Section 773.12, which lists other laws with which surface coal mining permitting processes must be coordinated. These include the National Historic Preservation Act of 1966, as amended, Executive Order 11593 (subsequently codified as section 110 of the NHPA), and for Federal programs only, the Archeological and Historic Preservation Act.

SECTION 773.12 - REGULATORY COORDINATION WITH REQUIREMENTS UNDER OTHER LAWS.

OSMRE proposed to amend Section 773.12 to add the Archaeological Resources Protection Act of 1979 (ARPA) to the existing list of Federal statutes with which the processing of permits for coal mining operations needs to be coordinated. The proposed rule limited the requirement to coordinate with the requirements of ARPA to those situations where OSMRE is the regulatory authority, and where lands covered by that Act are involved. Any archeological excavation or removal of archeological materials from either Federal or Indian lands is governed by the provisions of ARPA. State and private lands are not covered by ARPA. ARPA requires a permit for such activities, issued by the land manager. Because OSMRE, or a State under a Federal lands cooperative agreement, is responsible for environmental compliance activities prior to the issuance of permits to mine coal on Federal and Indian lands, coordination of processing of permits to conduct coal mining operations with the specific provisions of ARPA is needed to prevent delay and duplication of compliance activities.

In the final rule, OSMRE has deleted the phrase "where OSMRE is the regulatory authority" and has added the phrase "Federal and Indian lands" to clarify the application of ARPA. OSMRE has also deleted the reference to Executive Order 11593 in both the text and the authority section as redundant. No other substantive changes were made to the proposed rule.

Several commenters noted that, contrary to the implications of the preamble to the proposed rule (*51 FR 8489*), coordination with the requirements of other laws is required to avoid duplication of activities in the review and issuance of permits under SMCRA, rather than requiring general coordination in the overall SMCRA program. This interpretation is correct. However, it is appropriate to list statutes which themselves contain no permitting requirement, since those statutes may require activities which might be duplicated during the SMCRA permitting process, if coordination did not occur.

Several commenters expressed confusion about the application of ARPA to mining, and asked that OSMRE provide clarification. As those commenters note, an ARPA permit is not needed to conduct mining, although archeological activities performed in advance of, and because of, mining on Federal and Indian lands do require such a permit. As discussed above, OSMRE has changed the wording of the final rule to clarify that ARPA applies only to Federal and Indian lands.

Several commenters requested that OSMRE provide more detail on the exact nature of "applicable requirements" of the National Historic Preservation Act. The exact nature of the "applicable provisions" of the National Historic Preservation Act, or any other statute in the list, would depend on the specific circumstances of the situation. For example, if a permit to conduct surface coal mining operations were to be issued by OSMRE, the issuance would be a Federal undertaking, and OSMRE would be required to comply with the requirements of section 106 of NHPA.

Several commenters noted that the reference in this section to Executive Order 11593 could be deleted, since that order was codified by amendments to the National Historic Preservation Act passed by Congress in 1980. OSMRE agrees that this reference is redundant, and has deleted it accordingly.

SECTION 773.15 - REVIEW OF PERMIT APPLICATIONS.

OSMRE proposed to amend paragraph 773.15(c) (11) to delete a provision concerning treatment of private family burial grounds. This provision is no longer necessary since the definition of cemetery is being revised to include private family burial grounds. OSMRE proposed to add a new paragraph 773.15(c) (11), requiring that the regulatory authority make a written finding that it has taken into account the effect of a proposed permitting action on properties listed on and eligible for listing on the National Register of Historic Places.

In the final rule, OSMRE has added a sentence specifying some of the ways in which the regulatory authority can demonstrate that the finding requirement has been satisfied.

Most of the comments on this section suggested that additional detail be added, consistent with the National Historic Preservation Act and the regulations which implement that Act. As explained above, provisions of that Act and its implementing regulations do not apply directly to permits to conduct surface coal mining operations issued by State regulatory authorities. Therefore, it is not appropriate to add such terminology.

One commenter suggested that the regulation should require language in the finding specifying that appropriate conditions be placed on permits to protect the public interest. OSMRE believes that the decision to include conditions on a permit is best made on a case-by-case basis by the regulatory authority. However, OSMRE agrees that a regulatory authority has the authority to fulfill this requirement by inclusion of appropriate permit conditions, and has added language to clarify that authority in the final rule. For example, appropriate permit conditions could establish certain procedures to be followed by an operator if a previously unknown historic resource were discovered, or to treat important historic properties that would not be affected by surface coal mining operations for several years after permit issuance. However, inclusion of permit conditions is not intended to be an allowable substitute for the provision of information, or for any other permitting requirements upon which the decision to issue a permit has to be based.

One commenter requested that OSMRE revise the language of the finding to require regulatory authorities to specify how they have taken into account impacts of surface mining operations on historic properties. OSMRE does not believe this is necessary or desirable, since the process followed by the regulatory authority may vary from one permit application to another to allow for specific circumstances. However, OSMRE has added a sentence describing some of the options available to the regulatory authority to support the finding.

One commenter asked if a regulatory authority could issue a permit in contravention of a recommendation by the State Historic Preservation Officer, when a known eligible site would be destroyed. OSMRE believes that, since the regulatory authority is responsible for all final decisions about such properties, it has the authority to make such a decision. However, OSMRE expects that the regulatory authority will make well-reasoned decisions based on all available information, including the public interest, and would allow such destruction only if it were reasonable under the circumstances.

7. PARTS 779 AND 783 -- PERMIT APPLICATIONS -- MINIMUM REQUIREMENTS FOR INFORMATION ON ENVIRONMENTAL RESOURCES

These two parts will be discussed together, since they contain similar provisions and revisions for surface mining and underground mining permit applications, respectively. Sections 779.12 and 783.12 discuss general environmental resources information which must be included in permit applications, including the nature of cultural and historic resources listed or eligible for listing on the National Register of Historic Places and known archeological features within the proposed permit and adjacent areas. The description is to be based on all available information, including, but not limited to, that from State and local archeological, historical, and cultural preservation agencies.

Sections 779.24 and 783.24 discuss the general requirements for maps which must accompany permit applications, which include an indication of the boundaries of any public park and locations of any resources listed or eligible for listing on the National Register of Historic Places and known archeological sites within the permit and adjacent areas, and each area where human bodies are interred that is located in or within 100 feet of the proposed permit area.

Sections 779.12(b)(1) and (2)/783.12(b)(1) and (2) GENERAL Environmental Resources Information. OSMRE proposed to amend Section 779.12(b) and 783.12(b) to place the existing language in an introductory sentence and in a new paragraph (b)(1), and add a new paragraph (b)(2). OSMRE proposed to amend the existing language in paragraph (b)(1) to change the phrase "archeological features" to "archeological sites" to be consistent with section 507(b)(13) of SMCRA and with the language in other sections of the rules.

OSMRE also proposed to add a sentence at the end of paragraph (b)(1) that would allow the applicant to recommend to the regulatory authority what identification, evaluation, or mitigation measures were appropriate for a proposed permit area. This sentence was intended to provide an applicant with an opportunity to plan a complete sequence of whatever preservation activities were appropriate, to ensure that there would be no delay in mining because of such activities required later by the regulatory authority.

In the final rule at paragraph (b), OSMRE has reworded the language listing the resource types covered, for consistency with other sections of the rule. In paragraph (b)(1), the term "data" was changed to "information." OSMRE believes that the latter, more general term more accurately reflects the need of the regulatory authority to obtain not just factual data, but guidance, from the State Historic Preservation Officer and other suitable sources on appropriate activities to preserve important historic values in a proposed permit area. This change responds to a series of comments, discussed below. In the same paragraph, OSMRE has not adopted the last sentence referring to the applicant suggesting appropriate preservation activities because of the confusion this sentence caused among the commenters. This issue is discussed in more detail below.

OSMRE proposed to add a new paragraph (2) to clarify that the regulatory authority can, when appropriate, require applicants to identify and evaluate important historic resources and archeological sites that may be eligible for listing on the National Register of Historic Places. This could be accomplished through (1) the collection of additional information, (2) the conduct of field investigations, or (3) other appropriate measures. Because field investigations could be costly, it would be expected that they would be required only where substantial likelihood of undiscovered resources exists.

In the final rule at paragraph (b)(2), OSMRE has added the word "archeological" to indicate coverage of that resource type, and for consistency with other portions of the rule.

Several commenters asked OSMRE to clarify the purpose of the last sentence of paragraph (b)(1). As noted above, OSMRE intended this sentence to provide an opportunity for the applicant to propose a program to deal with historic resource issues, rather than waiting for the regulatory authority to make determinations as to appropriate actions. This would allow the applicant to move forward with necessary preservation activities and would ensure that there would be no unnecessary delay in mining caused by such activities. This provision was not intended to shift any of the regulatory authority's responsibilities to the permit applicant, but to give the applicant more flexibility in providing information on, and any necessary treatment or mitigation of, historic resources. However, since this sentence caused much confusion among the commenters, OSMRE has not adopted it. Removing this specific provision from the rule in no way prevents the applicant from proposing such activities to the regulatory authority, if the applicant so desires.

Numerous commenters believed that it was important for the regulatory authority to consult with the State Historic Preservation Officer concerning historic resources in proposed permit areas, not to just obtain "data" from the State Historic Preservation Officer. OSMRE agrees that in many cases the regulatory authority would need more than "data" from the State Historic Preservation Officer. That official has a responsibility to advise and assist, as appropriate, Federal and State agencies and local governments in carrying out their historic preservation responsibilities, and to cooperate with such agencies to ensure that historic properties are taken into consideration at all levels of planning and development. Accordingly, OSMRE has changed the term "data" to the more general term "information," to reflect the need of the regulatory authority to obtain more than just factual data from the State Historic Preservation Officer and other suitable sources on appropriate activities to preserve important historic resources in a proposed permit area. The State Historic Preservation Officer should have ample opportunity to provide such information to the regulatory authority during the permitting process.

Numerous commenters suggested that OSMRE should clarify how the regulatory authority would arrive at decisions, based on the data required by this section, concerning additional identification, evaluation, and/or mitigation of historic resources. OSMRE believes that it is more desirable to allow the individual regulatory authority to develop such procedures on a State by State basis. This approach provides flexibility to tailor the procedures to local conditions. The exact procedure to be followed by the regulatory authority in making such decisions will be determined on a State by State basis. OSMRE expects that these procedures will be designed to ensure that the regulatory authorities acquire information needed to make reasonable, informed decisions about these resource types, and to determine that permit applications are complete and accurate.

One commenter requested that OSMRE add at the end of (b)(1) a sentence stating that surveys would be required only where there was a substantial likelihood of important resources being found. OSMRE does not believe it is appropriate to add such language to the regulation. It is more appropriate for the regulatory authority to make such decisions on a case by case basis. However, OSMRE agrees that in general the regulatory authority should strive to limit survey requirements to situations in which there is a substantial likelihood of important resources being found.

One commenter noted that the description of historic resources required by Section 779.12(b) should include information from the results of any field surveys. OSMRE agrees that such information would be appropriately included when field surveys have been conducted. However, it is not necessary to add language to this effect since this would be "available information," as specified in paragraph (b)(1).

Several commenters believed that OSMRE was impermissibly extending the provisions of this section to sites eligible for listing on the National Register of Historic Places. OSMRE did not propose to change this language. The existing regulation already required permit application information on resources eligible for listing on the National Register.

One commenter stated that section 106 of the National Historic Preservation Act covered only public properties. This is not correct. Section 106 applies to any properties listed on or eligible for listing on the National Register of Historic Places which would be affected by any Federal undertaking or any Federally licensed or assisted undertaking.

A number of commenters asked what "eligible" for listing on the National Register meant. This term is defined by the criteria for the National Register found at 36 CFR 60.4 and by the regulations of the Advisory Council at 36 CFR 800.2.

Several commenters believed that this section should include the phrase "known and unknown" before the phrase "cultural and historic resources." OSMRE does not believe this is necessary. Clearly, paragraph (b)(2) allows the regulatory authority to require identification and necessary treatment or mitigation of currently unknown resources, when the regulatory authority determines that such activities are appropriate.

One commenter believed that OSMRE should specify that resources found by surveys must be evaluated according to the National Register of Historic Places criteria in 36 CFR Part 60. The same commenter noted that this evaluation is OSMRE's responsibility under the National Historic Preservation Act. OSMRE agrees that historic resources to be evaluated for eligibility should be evaluated according to the National Register criteria. However, it does not believe that it is necessary to specify this further within the body of the regulations themselves. The reference to the National Register in these sections should make it clear that those criteria are to be used. Moreover, regulatory authorities seem to be working satisfactorily with State Historic Preservation Officers in determining what properties are eligible to the National Register of Historic Places. Although OSMRE can of course become involved in cases where the SHPO and a regulatory authority do not agree on the eligibility of a particular property, it is not appropriate for OSMRE to become involved routinely in questions of eligibility arising from State actions.

Numerous commenters suggested that regulatory authorities should discuss the disposition of historic properties with the State Historic Preservation Officer not only during the initial review of permit applications, but as a basis for any subsequent decisions by the regulatory authority concerning historic resources. OSMRE does not believe that this is a matter to be covered in these regulations, since conditions may differ from State to State which would require different procedures to be followed. Each regulatory authority will establish its own procedures for obtaining information from the State Historic Preservation Officer and other concerned parties that it needs to make reasonable decisions about the identification, evaluation, or mitigation of historic resources.

Several commenters stated that applicants should be required to obtain information not only from the State Historic Preservation Officer, but also from relevant professional and amateur societies, museums, universities, and other appropriate experts. OSMRE believes it is unduly burdensome and unnecessary to place this requirement on applicants. State Historic Preservation Officers are the official representatives of historic resources in the States. As such, they can be expected to possess the relevant data concerning such resources. Regulatory authorities can make other provisions in their own programs in those States where this is not the case, for example where State site files reside at a university rather than with the State Historic Preservation Office. This is a problem to be resolved on a State by State basis.

One commenter asked how OSMRE defined "adjacent areas." This term is defined in 30 CFR 701.5 as the area outside a permit area where a resource or resources are or reasonably could be expected to be adversely impacted by proposed mining operations.

SECTIONS 779.24/783.24 - MAPS: GENERAL REQUIREMENTS.

OSMRE proposed to revise these sections to include a minor change at paragraph (j). These changes removed specific references to Indian burial grounds, private cemeteries, and other areas where human bodies are interred, which would make the language in these sections consistent with the revised definition of "cemetery" in Section 761.5, discussed above. OSMRE is adopting the rule as proposed.

Several commenters stated that it would be desirable to retain language concerning Indian burial grounds and mounds. OSMRE believes that Indian burial grounds are included in the definition of "cemetery" and thus inclusion of this language in Sections 779.24 and 783.24 would be redundant.

PARTS 780 AND 784 -- PERMIT APPLICATIONS -- MINIMUM REQUIREMENTS FOR RECLAMATION AND OPERATION PLAN.

These two parts will be discussed together, since they contain similar provisions and revisions regarding requirements for reclamation and operation plans for surface and underground mining permit applications, respectively. They provide that, for any public parks or historic places that may be adversely affected by the proposed operations, each plan shall describe the measure to be used to minimize or prevent these impacts and to obtain approval of the regulatory authority and other agencies as required in paragraph 761.12(f). These sections ensure that the regulatory authority has the information necessary to meet the provisions of section 522(e)(3) of the Act, which states that, subject to valid existing rights, and except for operations existing on August 3, 1977, no surface coal mining operations shall be permitted which will adversely affect any publicly owned park or places included in the National Register of Historic Places unless approved jointly by the regulatory authority and the Federal, State, or local agency with jurisdiction over the park or the historic site. This statutory language does not provide for adverse impacts to occur absent this joint approval, unless the applicant has valid existing rights or the operation existed on August 3, 1977.

These two sections also help ensure that the regulatory authorities will be able to assist the Secretary implement his responsibilities under the National Historic Preservation Act.

SECTIONS 780.31/784.17 - PROTECTION OF PUBLIC PARKS AND HISTORIC PLACES.

OSMRE proposed to restructure these two sections by placing a modified version of the previous provision in paragraph (a), and by adding a new paragraph (b). The proposal tracked the statutory requirements of section 522(e)(3) to prevent adverse impacts and, if the prohibition is not applicable, to protect such parks or places using a minimization standard. Thus, each permit application would need to include a description of the measures to be used either (1) to prevent impacts to publicly owned parks or any places listed on the National Register of Historic Places, or (2) if valid existing rights exists or joint agency approval is to be obtained under Section 761.12(f), to minimize impacts. This revised language clarified that unless valid existing rights exists or joint approval is obtained, the statutory intent is avoidance, not minimization, of adverse impacts.

OSMRE proposed to add a new paragraph (b) in Sections 780.31 and 784.17 to clarify the authority of the regulatory authority specifically to require operators to perform necessary mitigation and treatment activities for historic properties listed on or eligible for listing on the National Register of Historic Places prior to the commencement of any specific mining operations which would affect such properties. This change was not intended to implement section 522(e)(3) of SMCRA, but rather to aid in enabling the States to assist the Secretary in fulfilling his responsibilities under section 106 of the National Historic Preservation Act. The proposed sections allowed regulatory authorities to require operators to perform the necessary activities either before or after permit issuance, for example by conditioning a permit, so long as it would occur before the commencement of mining operations that would affect such properties. Taken together with proposed Sections 773.15(c)(11), 779.12(b), and 783.12(b), Sections 780.31(b) and 784.17(b) clarified the State's authority and responsibility regarding historic properties.

OSMRE has made several changes in the final rule. In paragraph (a) of these sections, the word "any" has been added before "places listed on the National Register of Historic Places." This change was made for consistency with other sections of the rule and to clarify that privately owned, as well as publicly owned, National Register listed properties are covered by these provisions. Additionally, the word "adverse" has been added before the term "impacts" in paragraph (1) of this section to clarify that only adverse impacts must be prevented. In the same paragraph, OSMRE has changed the term "public parks" to "publicly owned parks," to track the language of SMCRA more accurately. This is discussed in more detail below.

In paragraph (b) of these sections, OSMRE had added the term "archeological" properties to clarify that any properties listed on or eligible for listing on the National Register of Historic Places are covered by this provision. It should be noted that, as specified in paragraph (a) of these sections, in general it will not be possible for regulatory authorities to allow permit applicants to impact adversely properties actually listed on the National Register. However, the provision for listed properties has been retained in paragraph (b) because in some instances such impacts may occur because of the existence of valid existing rights or because joint agency approval has been obtained.

Finally, a new sentence has been forced out of what was previously the last phrase of paragraph (b), to specify that any required mitigation and treatment measures need not be completed prior to permit issuance, but must be completed prior to any impacts from specific mining operations.

Numerous commenters noted that the word "any" needed to be added before "places listed in the National Register" in paragraph (a), to clarify that all places on the National Register, regardless of ownership, were covered. OSMRE agrees, and has made the suggested change. This is consistent with language in other sections of these rules.

Numerous commenters noted that the statute intended that only adverse impacts, not any impacts, to publicly owned parks and properties listed on the National Register of Historic Places were to be avoided. OSMRE agrees, and has added the term "adverse" to clarify this.

One commenter noted that these sections should apply to "publicly owned parks" rather than "public parks," since these sections implement section 522(e)(3) of SMCRA, which uses the former terminology. The term "public park" is appropriate in reference to section 522(e)(5) of SMCRA. OSMRE agrees, and has changed the language in these sections to read "publicly owned parks."

Other commenters believed it was not appropriate to require minimization of impacts to publicly owned parks or places listed on or eligible for listing on the National Register of Historic Places, if valid existing rights exist or if joint agency approval is obtained. OSMRE did not propose any changes to the protection afforded publicly owned parks by this regulation. The provision for minimizing impacts to properties listed on or eligible for listing on the National Register of Historic Places is intended to ensure that the regulatory authority can help the Secretary meet his obligations under the National Historic Preservation Act. OSMRE believes that requiring minimization of impacts to properties listed on the National Register of Historic Places is appropriate for that purpose, and has retained this provision in the final rule. Moreover, the Secretary has ample authority under sections 201(c)(2), 201(c)(13) and 501(b) of SMCRA for the protection of environmental and historic resources.

Several commenters suggested that it was more appropriate to have these sections apply to historic properties that will be affected by mining operations, rather than properties that may be affected. OSMRE believes it is more appropriate to retain the terminology "may be affected." At times, particularly with regard to archeological sites, it is difficult to

determine whether a property would be affected without some additional investigation. Thus, it is appropriate to allow the regulatory authority the discretion to determine whether such additional investigation is necessary.

Numerous commenters believed that additional detail was necessary to ensure that the regulatory authority makes the decisions required by these provisions in an appropriate manner. OSMRE believes that it is more desirable to allow the individual regulatory authority to develop such procedures on a State by State basis. This approach provides flexibility to tailor the procedures to local conditions. The exact procedure followed by the regulatory authority in making such decisions will be determined on a State by State basis. OSMRE expects that these procedures will be designed to ensure that the regulatory authority acquires the information needed to make informed decisions about these resource types, and to determine that permit applications are complete and accurate.

Several commenters noted that although it was appropriate to allow permittees to delay treatment or mitigation activities until historic properties were about to be disturbed by mining operations, it was not appropriate to delay identification activities until this late in the process. OSMRE agrees. In general, early identification of important historic resources will benefit the resources by ensuring that adequate time is available for evaluation and to plan for any necessary treatment, and will benefit the operator by ensuring that historic resource issues do not cause a delay in mining. However, OSMRE believes that the regulatory authority should have the discretion to determine appropriate timing of needed preservation activities on a case by case basis. Nothing in this section is inconsistent with either of these principles.

One commenter suggested that OSMRE did not understand the nature of the interaction between joint agency approval and valid existing rights in section 522(e) of SMCRA. This commenter suggested that impacts should be prevented even if joint agency approval is to be obtained, but could simply be minimized where valid existing rights exist. OSMRE disagrees, and believes that if joint agency approval is to be obtained, it is sufficient to minimize impacts to properties covered by these provisions.

Another commenter stated that if valid existing rights exist, there should be no requirement for minimization of impacts. Under section 522(e), if such rights exist there is no authority to preclude mining, and these regulations do not create an absolute requirement for minimization of impacts. However, OSMRE has clarified that the regulatory authority has the discretion to require minimization of impacts when it determines that such minimization is in the public interest. This provision helps ensure that the regulatory authority can assist the Secretary in meeting the requirements of Section 106 of the National Historic Preservation Act.

One commenter asked whether preservation in place is an appropriate treatment option. Preservation in place is certainly an appropriate, and often preferable, option for important historic resources. OSMRE did not treat this issue specifically in the rules since it assumes that in most cases where surface mining operations will affect an historic resource, preservation in place will not be practical.

Several commenters requested that OSMRE clarify the timing of any necessary mitigation and treatment measures for historic resources and their relationship to permit issuance. OSMRE has done so with the addition of new paragraph (c), which specifies that required measures can be completed after permit issuance, as long as they are completed prior to affected properties being affected by mining operations.

8. PARTS 816 AND 817 -- PERMANENT PROGRAM PERFORMANCE STANDARDS.

One commenter suggested that language be added to these parts to cover historic preservation activities. OSMRE believes that the existing standards, coupled with the foregoing clarifications of OSMRE's rules, will provide adequate protection for important historic properties.

III. PROCEDURAL MATTERS

Federal Paperwork Reduction Act

The information collection requirements in this rule were submitted to the Office of Management and Budget under 44 U.S.C. 3507. The following clearance numbers were assigned: 30 CFR Part 732-1029-0024, 30 CFR Part

772-1029-0033, 30 CFR Part 773-1029-0041, 30 CFR Part 779-1029-0035, 30 CFR Part 780-1029-0036, 30 CFR Part 783-1029-0038, and 30 CFR Part 784-1029-0038. The information is needed to meet the requirements of sections 507, 508 and 522 of Pub. L. 95-87 and Section 106 of the National Historic Preservation Act, and will be used by the regulatory authority to evaluate the presence and importance of historic and archeological properties in the proposed permit area.

Executive Order 12291

The DOI has examined this rule according to the criteria of Executive Order 12291 (February 17, 1981) and has determined that it is not major and does not require a regulatory impact analysis.

The primary purposes of this rule is to clarify the authorities previously existing in OSMRE's regulatory program. Additional requirements imposed upon coal operators are not expected to be major.

Regulatory Flexibility Act

The DOI has also determined, pursuant to the Regulatory Flexibility Act, *5 U.S.C. 601* et seq. that the rule will not have a significant economic impact on a substantial number of small entities. The primary purpose of this rule is to clarify the authorities previously existing in OSMRE's regulatory program. Additional requirements imposed upon coal operators are not expected to be major. Moreover, the principal economic impacts of these rules will be borne by coal operators which are not small entities. Thus, any impact of the rule on small entities would not be significant.

National Environmental Policy Act

OSMRE has prepared an environmental assessment (EA) on the impacts on the human environment of this rulemaking. This EA is on file in the OSMRE Administrative Record at the address listed in the "ADDRESSES" section of this preamble. On the basis of the analysis in this EA, OSMRE has determined that these rules would not have a significant impact on the quality of the human environment, as specified by section 102(2)(C) of the National Environmental Policy Act of 1969 (*42 U.S.C. 4332(2)(C)*), and that an environmental impact statement is not required.

Author: The author of this final rule is Dr. Annetta Cheek, Office of Surface Mining Reclamation and Enforcement, 1951 Constitution Avenue, NW., Washington, DC 20240; Telephone: 202-343-7951 (Commercial or FTS).

LIST OF SUBJECTS:

30 CFR 731

Coal mining, Intergovernmental relations, Reporting and recordkeeping requirements, Surface mining, Underground mining.

30 CFR 732

Coal mining, Intergovernmental relations, Reporting and recordkeeping requirements, Surface mining, Underground mining.

30 CFR 761

Coal mining, Historic preservation, Monuments and memorials, National Forests, National Parks, Reporting and recordkeeping requirements, Surface mining, Underground mining, Wildlife refuges.

30 CFR 772

Coal mining, Reporting and recordkeeping requirements, Surface mining, Underground mining.

30 CFR 773

Coal mining, Environmental protection, Reporting and recordkeeping requirements, Surface mining, Underground mining.

30 CFR 779

Coal mining, Environmental protection, Reporting and recordkeeping requirements, Surface mining.

30 CFR 780

Coal mining, Reporting and recordkeeping requirements, Surface mining.

30 CFR 783

Coal mining, Environmental protection, Reporting and recordkeeping requirements, Underground mining.

30 CFR 784

Coal mining, Reporting and recordkeeping requirements, Underground mining.

For the reasons set forth in this preamble 30 CFR Parts 731, 732, 761, 772, 773, 779, 780, 783, and 784 are amended as set forth below.

Dated: January 5, 1987.

J. Steven Griles, Assistant Secretary -- Land and Minerals Management.

PART 731 -- SUBMISSION OF STATE PROGRAMS

1. The authority citation for Part 731 is revised to read as follows:

Authority: *30 U.S.C. 1201* et seq. and *16 U.S.C. 470* et seq.

2. Section 731.14 is amended by revising paragraph (g)(10) and by adding a new paragraph (g)(17) to read as follows:

SECTION 731.14 - CONTENT REQUIREMENTS FOR PROGRAM SUBMISSIONS.

* * * * *

(g) * * *

(10) Consulting with State and Federal agencies having responsibility for the protection or management of fish and wildlife and related environmental values.

* * * * *

(17) Consulting with State, Federal, and local agencies having responsibility for historic, cultural, and archeological resources, and for making decisions regarding such resources.

* * * * *

PART 732 -- PROCEDURES AND CRITERIA FOR APPROVAL OR DISAPPROVAL OF STATE PROGRAM SUBMISSIONS

3. The authority citation for Part 732 is revised to read as follows:

Authority: *30 U.S.C. 1201* et seq. and *16 U.S.C. 470* et seq.

4. Section 732.17 is amended by redesignating paragraphs (h)(4) through (h)(12) as paragraphs (h)(5) through (h)(13), respectively, and by adding a new paragraph at (h)(4) to read as follows:

SECTION 732.17 - STATE PROGRAM AMENDMENTS.

* * * * *

(h) * * *

(4) All State program amendments which may have an effect on historic properties shall be provided to the State Historic Preservation Officer and to the Advisory Council on Historic Preservation for comment.

* * * * *

PART 761 -- AREAS DESIGNATED BY ACT OF CONGRESS

5. The authority section for Part 761 continues to read as follows:

Authority: Sections 102, 201, 501(b), 503, 504, 510, 512, 513, 514, 522 and 701 of Pub. L. 95-87, 91 Stat. 448, 449, 468, 470, 471, 480, 483, 484, 485, 507 and 518 (*30 U.S.C. 1202, 1211, 1251, 1253, 1254, 1260, 1262, 1263, 1264, 1272, and 1291.*)

6. Section 761.5 is amended by revising the definition of cemetery to read as follows:

SECTION 761.5 - DEFINITIONS.

For the purposes of this part --

CEMETERY means any area of land where human bodies are interred.

* * * * *

7. Section 761.11 is amended by revising paragraphs (c) and (g) to read as follows:

SECTION 761.11 - AREAS WHERE MINING IS PROHIBITED OR LIMITED.

* * * * *

(c) On any lands where mining will adversely affect any publicly owned park or any places included in the National Register of Historic Places, unless jointly approved by the regulatory authority and the Federal, State, or local agency with jurisdiction over the park or place;

* * * * *

(g) Within 100 feet, measured horizontally, of a cemetery; cemeteries may be relocated if authorized by applicable State law or regulations.

8. Section 761.12 is amended by revising paragraph (f)(1) to read as follows:

SECTION 761.12 - PROCEDURES.

* * * * *

(f)(1) Where the regulatory authority determines that the proposed surface coal mining operation will adversely affect any publicly owned park or any place included in the National Register of Historic Places, the regulatory authority shall transmit to the Federal, State, or local agency with jurisdiction over the park or place a copy of applicable parts of the permit application, together with a request for that agency's approval or disapproval of the operation, and a notice to that agency that it has 30 days from receipt of the request within which to respond and that failure to interpose a timely objection will constitute approval. The regulatory authority, upon request by the appropriate agency, may grant an

extension to the 30-day period of an additional 30 days. Failure to interpose an objection within 30 days or the extended period granted shall constitute an approval of the proposed permit.

* * * * *

PART 772 -- REQUIREMENTS FOR COAL EXPLORATION

9. The authority citation for Part 772 is revised to read as follows:

Authority: *30 U.S.C. 1201* et seq. and *16 U.S.C. 470* et seq.

10. Section 772.12 is amended by adding a new paragraph, (b)(8)(iv), to read as follows:

SECTION 772.12 - PERMIT REQUIREMENTS FOR EXPLORATION REMOVING MORE THAN 250 TONS OF COAL.

* * * * *

(b) * * *

(8) * * *

(iv) Any other information which the regulatory authority may require regarding known or unknown historic or archeological resources.

* * * * *

PART 773 -- REQUIREMENTS FOR PERMITS AND PERMIT PROCESSING

11. The authority citation for Part 773 is revised to read as follows:

Authority: *30 U.S.C. 1201* et seq., *16 U.S.C. 470* et seq., *16 U.S.C. 1531* et seq., *16 U.S.C. 661* et seq., *16 U.S.C. 703* et seq., *16 U.S.C. 668a*, *16 U.S.C. 469* et seq., and *16 U.S.C. 470aa* et seq.

12. Section 773.12 is revised to read as follows:

SECTION 773.12 - REGULATORY COORDINATION WITH REQUIREMENTS UNDER OTHER LAWS.

Each regulatory program shall, to avoid duplication, provide for the coordination of review and issuance of permits for surface coal mining and reclamation operations with applicable requirements of the Endangered Species Act of 1973, as amended (*16 U.S.C. 1531* et seq.); the Fish and Wildlife Coordination Act, as amended (*16 U.S.C. 661* et seq.); the Migratory Bird Treaty Act of 1918, as amended (*16 U.S.C. 703* et seq.); The National Historic Preservation Act of 1966, as amended (*16 U.S.C. 470* et seq.); the Bald Eagle Protection Act, as amended (*16 U.S.C. 668a*); for Federal programs only, the Archeological and Historic Preservation Act of 1974 (*16 U.S.C. 469* et seq.); and the Archaeological Resources Protection Act of 1979 (*16 U.S.C. 470aa* et seq) where Federal and Indian lands covered by that Act are involved.

13. Section 773.15 is amended by revising paragraph (c)(11) to read as follows:

SECTION 773.15 - REVIEW OF PERMIT APPLICATIONS.

* * * * *

(c) * * *

(11) The regulatory authority has taken into account the effect of the proposed permitting action on properties listed on and eligible for listing on the National Register of Historic Places. This finding may be supported in part by inclusion of appropriate permit conditions or changes in the operation plan protecting historic resources, or a documented decision that the regulatory authority has determined that no additional protection measures are necessary.

* * * * *

PART 779 -- SURFACE MINING PERMIT APPLICATIONS -- MINIMUM REQUIREMENTS FOR INFORMATION ON ENVIRONMENTAL RESOURCES

14. The authority citation for part 779 is revised to read as follows:

Authority: *30 U.S.C. 1201* et seq., Section 115 of Pub. L. 98-146, (*30 U.S.C. 1257*), and *16 U.S.C. 470* et seq.

15. Section 779.12 is amended by revising paragraph (b) to read as follows:

SECTION 779.12 - GENERAL ENVIRONMENTAL RESOURCES INFORMATION.

* * * * *

(b)(1) The nature of cultural, historic and archeological resources listed or eligible for listing on the National Register of Historic Places and known archeological sites within the proposed permit and adjacent areas. The description shall be based on all available information, including, but not limited to, information from the State Historic Preservation Officer and from local archeological, historical, and cultural preservation agencies.

(2) The regulatory authority may require the applicant to identify and evaluate important historic and archeological resources that may be eligible for listing on the National Register of Historic Places, through

- (i) Collection of additional information,
- (ii) Conduct of field investigations, or
- (iii) Other appropriate analyses.

16. Section 779.24 is amended by revising paragraph (j) to read as follows:

SECTION 779.24 - MAPS: GENERAL REQUIREMENTS.

* * * * *

(j) Each cemetery that is located in or within 100 feet of the proposed permit area.

* * * * *

PART 780 -- SURFACE MINING PERMIT APPLICATIONS -- MINIMUM REQUIREMENTS FOR RECLAMATION AND OPERATION PLAN

17. The authority citation for Part 780 is revised to read as follows:

Authority: *30 U.S.C. 1201* et seq., Section 115 of Pub. L. 98-146, (*30 U.S.C. 1257*), and *16 U.S.C. 470* et seq.

18. Section 780.31 is revised to read as follows:

SECTION 780.31 - PROTECTION OF PUBLIC PARKS AND HISTORIC PLACES.

(a) For any publicly owned parks or any places listed on the National Register of Historic Places that may be adversely affected by the proposed operation, each plan shall describe the measures to be used

- (1) To prevent adverse impacts, or
- (2) If valid existing rights exist or joint agency approval is to be obtained under Section 761.12(f) of this chapter, to minimize adverse impacts.

(b) The regulatory authority may require the applicant to protect historic or archeological properties listed on or eligible for listing on the National Register of Historic Places through appropriate mitigation and treatment measures. Appropriate mitigation and treatment measures may be required to be taken after permit issuance provided that the required measures are completed before the properties are affected by any mining operation.

PART 783 -- UNDERGROUND MINING PERMIT APPLICATION -- MINIMUM REQUIREMENT FOR INFORMATION ON ENVIRONMENTAL RESOURCES

19. The authority citation for Part 783 is revised to read as follows:

Authority: *30 U.S.C. 1201* et seq., Section 115 of Pub. L. 98-146, (*30 U.S.C. 1257*), and *16 U.S.C. 470* et seq.

20. Section 783.12 is revised by amending paragraph (b) to read as follows:

SECTION 783.12 - GENERAL ENVIRONMENTAL RESOURCES INFORMATION.

* * * * *

(b) The nature of cultural historic and archeological resources listed or eligible for listing on the National Register of Historic Places and known archeological sites within the proposed permit and adjacent areas.

(1) The description shall be based on all available information, including, but not limited to, information from the State Historic Preservation Officer and local archeological, historical, and cultural preservation groups.

(2) The regulatory authority may require the applicant to identify and evaluate important historic and archeological resources that may be eligible for listing on the National Register of Historic Places, through the

- (i) Collection of additional information,
- (ii) Conduct of field investigations, or
- (iii) Other appropriate analyses.

21. Section 783.24 is amended by revising paragraph (j) to read as follows:

SECTION 783.24- MAPS: GENERAL REQUIREMENTS.

* * * * *

(j) Each cemetery that is located in or within 100 feet of the proposed permit area.

* * * * *

PART 784 -- UNDERGROUND MINING PERMIT APPLICATIONS -- MINIMUM REQUIREMENTS FOR RECLAMATION AND OPERATION PLAN

22. The authority citation for Part 784 is revised to read as follows:

Authority: *30 U.S.C. 1201* et seq., Section 115 of Pub. L. 98-146, (*30 U.S.C. 1257*), and *16 U.S.C. 470* et seq.

23. Section 784.17 is revised to read as follows:

SECTION 784.17 - PROTECTION OF PUBLIC PARKS AND HISTORIC PLACES.

(a) For any publicly owned parks or any places listed on the National Register of Historic Places that may be adversely affected by the proposed operation, each plan shall describe the measures to be used.

- (1) To prevent adverse impacts, or
- (2) If valid existing rights exist or joint agency approval is to be obtained under Section 761.12(f) of this chapter, to minimize impacts.

(b) The regulatory authority may require the applicant to protect historic and archeological properties listed on or eligible for listing on the National Register of Historic Places through appropriate mitigation and treatment measures. Appropriate mitigation and treatment measures may be required to be taken after permit issuance provided that the required measures are completed before the properties are affected by any mining operation.

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