

FEDERAL REGISTER: 52 FR 49322 (December 30, 1987)

DEPARTMENT OF THE INTERIOR

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

30 CFR Parts 764 and 769

State and Federal Processes for Designating Lands Unsuitable for Surface Coal Mining Operations

ACTION: Final rule.

SUMMARY: The Office of Surface Mining Reclamation and Enforcement (OSMRE) is amending its permanent program rules that govern the processing of petitions to designate specified areas of land as unsuitable for surface coal mining operations. The amendments eliminate provisions providing for the suspension of petition processing and make the State and Federal processes consistent in the completeness review. These changes are being made in response to a decision by the U.S. District Court for the District of Columbia and comments on the proposed rule.

EFFECTIVE DATE: January 29, 1988.

ADDRESS: Office of Surface Mining Reclamation and Enforcement, U.S. Department of the Interior, 1951 Constitution Avenue, NW., Washington, DC 20240.

FOR FURTHER INFORMATION CONTACT: Catherine Roy, Office of Surface Mining Reclamation and Enforcement, 1951 Constitution Avenue, NW., Washington, DC 20240; telephone 202-343-5143 (FTS 343-5143).

SUPPLEMENTARY INFORMATION:

I. Background

II. Public Comments on Proposed Rule and Responses to Comments

III. Procedural Matters

I. BACKGROUND

Section 522 of the Surface Mining Control and Reclamation Act of 1977, *30 U.S.C. 1201* et seq. (SMCRA), establishes a process through which mining may be limited or prohibited where other values are found to be more important than mining and specifies certain areas as unsuitable for mining. OSMRE promulgated rules implementing this section of SMCRA as part of the permanent regulatory program for surface coal mining operations on March 13, 1979 (*44 FR 14901*). These rules provided for the designation of lands as unsuitable for all or certain types of surface coal mining operations, for terminating such designations, for identifying lands on which surface coal mining operations are limited or prohibited under section 522(e) of SMCRA, and for implementing those limits and prohibitions. The State processes for submitting and reviewing petitions to designate areas as unsuitable are at 30 CFR Part 764. Procedures for such petitions for Federal lands are at 30 CFR Part 769.

OSMRE revised 30 CFR Part 764 and 30 CFR Part 769 on September 14, 1983 (*48 FR 41312*). The State process for unsuitability petitions was amended to allow the regulatory authority to hold a hearing or solicit written comments on the completeness of petitions. The time period for the regulatory authority to make a completeness review and determination under Part 764 was extended from 30 days to 60 days (30 CFR 764.15(a)(1)).

The 1983 revisions also included a provision to allow the regulatory authority to suspend the processing of an unsuitability petition if certain conditions exist. In the State processes, the regulatory authority was allowed to suspend petitions where there was found to be no real or foreseeable potential for surface coal mining to occur. Real or foreseeable potential was defined as meaning that "the petitioned lands are likely to be subject to leasing or mining activity within 5 years" (30 CFR 764.15(a)(3)).

For Federal Lands, a "ripeness" test was added, and the Director was allowed to suspend a petition for lack of ripeness. Ripe was defined in 30 CFR 769.14(a)(3) as meaning that the petitioned lands are (1) subject to a Federal coal lease, (2) included in a tract for which land use planning has been completed and which tract is available for further consideration for Federal coal leasing, (3) not required to be leased because the mineral rights are not owned by the

United States or are owned by the Tennessee Valley Authority, or (4) over unleased Federal coal and subject to surface disturbance from neighboring surface coal mining operations.

The petition process for designation of Federal lands as unsuitable for all or certain types of surface coal mining operations (and for termination of previous designations) was challenged in the U.S. District Court for the District of Columbia (In re: Permanent Surface Mining Regulation Litigation, C.A. No. 79-1144). In a decision dated July 15, 1985, the court upheld the Secretary's petition process; however, it noted that the Secretary had failed to justify the procedural differences in the State and Federal petition processes, specifically, the differences in the length of time for the completeness review and the absence in the Federal procedures of the possibility of a hearing or other form of public participation during this review, as was provided in the regulations that apply to State programs (and non-Federal lands in Federal program States).

In the same order, the court remanded the portions of the rule allowing suspension of processing unsuitability petitions on the grounds of no real or foreseeable potential for mining and on the ground of ripeness. The court found Sections 764.15(a)(3), 769.14(a)(3) and 769.14(b)(2) inconsistent with law. The court further found that the Secretary had provided no rational basis or justification in the preamble to 30 CFR 764.15(a)(3).

On November 20, 1986, OSMRE published a notice (*51 FR 41952*) suspending the rules which authorize the suspension of processing of unsuitability petitions and all references to suspended petitions in other portions of the regulations. In the rules applying to petitions to State regulatory authorities to designate non-Federal or non-Indian lands unsuitable (and petitions to OSMRE for all lands in Federal program States), the suspended portions include 30 CFR 764.15(a)(3) and 764.15(a)(8). In the rules applying to petitions for Federal lands, the suspended portions include paragraphs 769.14(a)(3), (b)(2), and (h). In addition, portions of sections 769.14(a)(1) and (c) were also suspended in regard to their references to suspension of petitions.

On June 9, 1987, OSMRE proposed a rulemaking (*52 FR 21904*) that would delete the provision for suspension of processing unsuitability petitions and provide consistency between the Federal and State processes to determine whether a petition is complete. In that notice, OSMRE solicited public comments and made provisions to hold public hearings upon request. Industry and environmental groups sent comments during the 70-day comment period. No one requested a public hearing, and none was held.

II. PUBLIC COMMENTS ON PROPOSED RULE AND RESPONSE TO COMMENTS

Four groups commented on this proposed rule: one industry group and three environmental groups. The comments addressed each of the changes proposed for the processing of unsuitability petitions. A discussion of these comments and OSMRE's responses follows.

1. DELETION OF THE SUSPENSION OF PROCESSING UNSUITABILITY PETITIONS

In this final rule, OSMRE adopts the proposal to remove the concepts of "ripeness" and "foreseeable potential for mining" as grounds on which regulatory authorities could decide not to process unsuitability petitions. Three commenters supported OSMRE's proposal to eliminate "ripeness" in 30 CFR Part 769 and "foreseeable potential for mining" in Part 764. One commenter suggested that OSMRE incorporate these concepts as a reason for rejecting petitions as frivolous, on the grounds that if the coal reserves underlying a petition area have not been demonstrated to be economically recoverable with current technology, the regulatory authority should have the discretion to reject the petition as lacking merit.

OSMRE disagrees. The comment, if adopted, would be inconsistent with the Act, as already determined in litigation. In the decision dated July 15, 1985, cited above, the court held that the regulatory authority must process unsuitability petitions in a timely manner, which in no way is dependent upon the imminence of mining. Also, the question of whether a petition is frivolous is unrelated to the imminence of mining, but rather relates to the merits of the allegations that mining would harm people, land, air, water, or other resources.

2. DELETION OF THE OPPORTUNITY FOR PUBLIC COMMENT DURING COMPLETENESS REVIEW

This section is amended as proposed. All commenters supported the proposal to delete the opportunity for public comment during the regulatory authority's review to determine whether the petition is complete. This is an administrative decision on whether all the information required by the regulations is contained in the petition. If a petition is complete, the public has the opportunity to comment on the substance of the petition (the allegations upon which the request for an unsuitability designation is based) during the formal review stage.

One commenter suggested that the public should be allowed to comment on completeness during this later stage and that if substantial questions are raised, the regulatory authority should reconsider its decision that the petition is complete. OSMRE disagrees with this suggestion. Once a petition is determined to be complete, processing of the petition may proceed, and no further completeness determination is necessary. Questions that subsequently arise as to the adequacy of the allegations may be dealt with in determining whether the petition should be granted.

3. EXTENSION OF COMPLETENESS REVIEW PERIOD FOR THE FEDERAL PROCESS

One commenter supported the proposed provision that would extend the time frame for completeness review under the Federal process from thirty to sixty days. Three commenters opposed this extension, arguing for a thirty-day review period for both State and Federal processes. OSMRE's regulations at 30 CFR 764.15(a)(7) and 769.14(g) address the circumstance in which an unsuitability petition has been received and a complete permit application submitted for the same lands before a completeness determination is made on the petition. In such a case, the regulatory authority may proceed to process the permit application and delete those lands included in the permit application from the petition. The commenters felt that by extending the completeness review period and delaying a decision on completeness, OSMRE would restrict the ability of a petitioner to protect eligible lands. The commenters further suggested that there was no need to extend the review period because there was no indication that the existing thirty days is administratively unworkable or constitutes an administrative burden on the agency.

OSMRE has reviewed this issue further and agrees that the thirty-day review period is not an administrative burden. In States where a greater than an average number of unsuitability petitions have been filed, the regulatory authority has been able to make a completeness determination in fewer than thirty days with no problems. OSMRE, therefore, accepts the comment and adopts a thirty-day completeness review period in the final rule for both State and Federal processes.

III. PROCEDURAL MATTERS

Federal Paperwork Reduction Act

The final rule does not contain new information collection requirements which require approval by the Office of Management and Budget under *44 U.S.C. 3501* et seq.

Executive Order 12291 and the Regulatory Flexibility Act

The Department of the Interior has determined that this document is not a major rule under E.O. 12291 and certifies that it will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (*5 U.S.C. 601* et seq). The rule would not cause major economic impacts and would have no adverse effects on competition, employment, investment, productivity, or innovation, or on the ability of U.S. enterprises to compete in domestic or export markets.

National Environmental Policy Act

OSMRE has prepared an environmental assessment (EA) on this final rule and has made a finding that it would not have a significant impact on the quality of the human environment under section 102(2)(C) of the National Environmental Policy Act of 1969, *42 U.S.C. 4332(2)(C)*. The EA and the finding of no significant impacts are on file in the OSMRE Administrative Record at the Office of Surface Mining Reclamation and Enforcement, U.S. Department of the Interior, 1100 L Street, NW., Room 5131, Washington, DC 20240.

Author

The author of this final rule is Catherine Roy, Division of Technical Services, Office of Surface Mining Reclamation and Enforcement, U.S. Department of the Interior, 1951 Constitution Avenue, NW., Washington, DC 20240. Telephone: 202-343-5143 (FTS 343-5143).

LIST OF SUBJECTS

30 CFR Part 764

Administrative practice and procedure, Reporting and recordkeeping requirements, Surface mining, Underground mining.

30 CFR Part 769

Administrative practice and procedure, Public lands, Reporting and recordkeeping requirements, Surface mining, Underground mining.

For the reasons set out in this preamble, 30 CFR Parts 764 and 769 are amended as set forth below.

Date: November 19, 1987.

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

PART 764 -- STATE PROCESSES FOR DESIGNATING AREAS UNSUITABLE FOR SURFACE COAL MINING OPERATIONS

1. The authority citation for Part 764 is revised to read as follows:

Authority: *30 U.S.C. 1201* et seq. and Pub. L. 100-34.

2. Section 764.15 is amended by revising paragraph (a)(1) to read as follows:

SECTION 764.15 - INITIAL PROCESSING, RECORDKEEPING, AND NOTIFICATION REQUIREMENTS.

(a)(1) Within 30 days of receipt of a petition, the regulatory authority shall notify the petitioner by certified mail whether the petition is complete under Section 764.13(b) or (c). Complete, for a designation or termination petition, means that the information required under Section 764.13(b) or (c) has been provided.

* * * * *

3. Section 764.15 is further amended by removing paragraphs (a)(3), (a)(8), and (b)(2), by redesignating paragraphs (a)(4) through (a)(7) as (a)(3) through (a)(6) respectively, and by redesignating paragraph (b)(3) as (b)(2).

PART 769 -- PETITION PROCESS FOR DESIGNATION OF FEDERAL LANDS AS UNSUITABLE FOR ALL OR CERTAIN TYPES OF SURFACE COAL MINING OPERATIONS AND FOR TERMINATION OF PREVIOUS DESIGNATIONS

4. The authority citation for Part 769 is revised to read as follows:

Authority: *30 U.S.C. 1201* et seq. and Pub. L. 100-34.

5. Section 769.14 is amended by revising paragraphs (a)(1), (a)(4), and (c) to read as follows:

SECTION 769.14 - INITIAL PROCESSING, RECORDING, AND NOTIFICATION REQUIREMENTS.

(a)(1) Within 30 days of receipt of a petition, OSMRE shall determine whether the petition is complete and not frivolous. OSMRE may request other supplementary information that is readily available to be provided by the petitioner. Any request for such supplementary information from the petitioner shall not affect OSMRE's determination that the petition is complete for further processing.

* * * * *

(4) Frivolous, for a designation or termination petition, means that:

(i) The allegations of harm lack serious merit; or

(ii) Available information shows that no "mineable" coals resources exist in the petitioned area or that the petitioned area is not or could not be subject to related surface coal mining operations and surface impacts incident to an underground coal mine or an adjoining surface mine (mineable coal is coal with development potential as mapped or reported by the Bureau of Land Management under 43 CFR 3420.1-4(e)(1); and privately owned coal under land owned by the United States).

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(c) When the Director finds that the petition is complete and not frivolous, he or she shall initiate the petition review and so advise the petitioner via certified mail.

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6. Section 769.14 is amended by removing paragraph (a)(3), (b)(2), and (h), and by redesignating paragraphs (a)(4) as (a)(3) and (b)(1) as (b).

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