

**FEDERAL REGISTER: 48 FR 41312 (September 14, 1983)**

DEPARTMENT OF THE INTERIOR

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

30 CFR Parts 736, 760, 761, 762, 764, 765, 769, 779 and 783

Areas Unsuitable for Surface Coal Mining; Areas Designated by Act of Congress;  
Criteria for Designating Areas; State Processes for Designating Areas;  
Designating Lands as Unsuitable Under a Federal Program for a State;  
and Petition Process for Designation of Federal Lands

ACTION: Final rules.

**SUMMARY:** The Office of Surface Mining Reclamation and Enforcement (OSM) is amending its permanent program rules which establish procedures for implementing the requirements of the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act) for designating lands 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, and for implementing those limits and prohibitions. The final rules afford States greater flexibility to accommodate unique State circumstances and will also enable OSM to implement the unsuitability process for Federal lands more efficiently.

EFFECTIVE DATE: October 14, 1983.

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**SUPPLEMENTARY INFORMATION:**

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

**I. BACKGROUND**

**A. INTRODUCTION**

Section 522 of 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. Section 522(a) of the Act establishes requirements for State regulatory programs and specifies the criteria for determining whether an area may be declared unsuitable for mining. Section 522(b) of the Act establishes a review process to determine whether there are Federal lands which are unsuitable for mining. Section 522(c) of the Act describes the procedures and requirements for submitting and reviewing petitions to have areas designated as unsuitable for mining. Section 522(d) of the Act requires the consideration of certain factors prior to designating an area as unsuitable. Section 522(e) of the Act forbids mining in areas expressly designated by Congress as unsuitable for mining, with certain exceptions.

On March 13, 1979, the Secretary promulgated final rules (30 CFR Chapter VII) for the permanent regulatory program under the Act. A portion of these rules (30 CFR Parts 760 through 769) 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 the Act, and for implementing those limits and prohibitions.

On June 10, 1982 (47 FR 25278), OSM published a notice of proposed rulemaking to amend 30 CFR Chapter VII, Subchapter F. OSM today adopts final rules on these areas, amending the rules originally promulgated by the Secretary on March 13, 1979. All of Subchapter F is being repromulgated for convenience to the reader. Where there have been no changes proposed and made, no discussion appears in this preamble.

## **B. PUBLIC PARTICIPATION**

The June 10, 1982 Federal Register notice solicited written public comments and specified that the comment period would remain open until the close of the comment period on the draft supplemental environmental impact statement (EIS) that considered the proposed rules. The comment period on the draft EIS (and the proposed rules) closed on August 25, 1982 (*47 FR 30266*). The comment period was reopened during September 7-10, 1982 (*47 FR 39201*, September 7, 1982) to allow for further comment which was expected to be received at oversight hearings scheduled for September 9 and 10 by the United States House of Representatives Committee on Interior and Insular Affairs. Relevant portions of the transcripts of the hearings, as well as all other comments received during the period, were inserted in the Administrative Record and considered in developing the final rules. OSM received more than 175 comments on the June 10, 1982 proposed rules.

The June 10, 1982 notice also announced that public hearings would be held only if a timely request for a hearing was received and noted that if only one person requested a hearing, a public meeting, rather than a hearing, might be held. OSM received no requests for a public hearing and none was held. However, two public meetings were held in Pittsburgh, Pennsylvania and Washington, D.C. A written summary of each public meeting was placed in the Administrative Record.

## **II. RULES ADOPTED AND RESPONSES TO PUBLIC COMMENTS ON PROPOSED RULES**

### **A. SUMMARY OF RULES ADOPTED**

These final rules modify the requirements to provide States with new flexibility in carrying out the requirements of the Act. In some cases, the rules allow regulatory authorities to modify procedural requirements for determining areas designated unsuitable by Act of Congress and processes for designating areas unsuitable for surface coal mining operations. Specifically, the changes --

1. Eliminate duplicative regulatory language, or modify such language to more accurately reflect provisions of the Act;
2. Modify definitions and requirements, including the definition of the term "valid existing rights" (VER);
3. Give States and OSM (in a Federal program or Federal lands program) an opportunity to require more information from the petitioners for complete petitions;
4. Allow States to suspend and OSM to reject petitions where no real and foreseeable potential for mining to occur is found;
5. Revise standing requirements for persons to submit a petition or intervene in the petition evaluation process;
6. Provide States and OSM with more flexibility regarding the fulfillment of public notice obligations;
7. Provide States and OSM with greater flexibility in the implementation of the unsuitability process, including acceptance of petitions and the nature of the hearing to be held on petitions for designation and termination of designation;
8. Provide States and OSM with the authority to withhold historic resources information from public disclosure, where such disclosure would expose the resources to substantial risk of harm or destruction (pursuant to 1980 Amendments to the National Historic Preservation Act); and
9. Streamline the petition process on Federal lands.

States may, of course, have rules which are different from the Federal requirements as long as they are consistent with them. "Consistent with" is defined by 30 CFR 730.5, as amended October 28, 1981 (*46 FR 53376 et seq.*), as "no less effective than." Thus, some States may wish to retain existing requirements even though this rulemaking would allow change. The changes and the public comments received are discussed below.

OSM has made numerous changes for editorial clarity. Those which have no substance are not specifically discussed. For example, wherever the term "Regional Director" was used, the term is changed to "OSM" or "Director" to reflect the September 13, 1981, reorganization of OSM.

## **B. DISCUSSION OF FINAL RULES AND COMMENTS**

### **PART 736 -- FEDERAL PROGRAM FOR A STATE**

#### **SECTION 736.15 - IMPLEMENTATION, ENFORCEMENT, AND MAINTENANCE OF A FEDERAL PROGRAM**

OSM has revised Section 736.15 to include the effective date for a Federal program for designating lands unsuitable for mining. This requirement had been included in Section 765.13(a), which is being removed. In response to comment, the amended rule provides that when a Federal program is promulgated for a State which has not previously had a State program, the designation process shall not apply for a period of one year following implementation of the Federal program. However, when a complete or partial Federal program is promulgated for a State which has failed adequately to maintain or enforce its approved State program, the designation provisions will be implemented to the same extent and at the same time that other aspects of surface coal mining operations are to be regulated by the Director.

One commenter observed that the proposed rule, which would have delayed implementation of an unsuitability program for one year in all cases where a Federal program is required for a State, could disrupt an unsuitability program already in place. Such action could result in a one year moratorium on designations as a result of State failure to carry out a designation program.

The commenter noted that OSM's preamble to the original rule states that "although Section 504 of the Act provides that implementation of Section 522 (a), (c) and (d) shall be delayed for one year after a Federal program is implemented, that provision of the Act does not address the situation where the failure of a State designation program is the reason for implementing the Federal program. Rather, it envisions that a State designation program would already be in place and should not be dismantled by the Federal program. But, where there is no adequate State designation program, it is essential that a Federal designation program be implemented immediately in order to satisfy the mandate of Section 504 of the Act that all aspects of the permanent program be fully in place by 34 months after enactment." (*44 FR 15007*, March 13, 1979).

OSM agrees with the commenter that it was not Congress' intent to disrupt an unsuitability program already in place, or to cause a moratorium when a State fails to carry out an adequate program. The final rule therefore requires that Federal program provisions become effective immediately when the reason for the Federal program is a State failure.

### **PART 760 -- GENERAL**

OSM is removing all of Part 760, consisting of Sections 760.1, 760.2, 760.3 and 760.4. Each of these sections repeats information contained elsewhere in Subchapter F, merely explains requirements which follow, or does not contain substantive requirements.

OSM received no comments specifically addressed to the changes to this part, although one commenter generally supported all the proposed changes which would eliminate duplicative regulatory language.

### **PART 761 -- AREAS DESIGNATED BY ACT OF CONGRESS**

#### **SECTIONS 761.2 AND 761.4**

As proposed, Sections 761.2 and 761.4 are being removed to streamline the regulations by deleting redundant material. OSM received no comments specifically addressed to these changes, although one commenter generally supported all the proposed changes to eliminate duplicative regulatory language.

## **SECTION 761.3 - AUTHORITY**

Previous Section 761.3 provided that the State regulatory authority or the Secretary is authorized by section 522(e) of the Act to prohibit or limit surface coal mining operations on or near certain private, Federal, and other public lands, except for those operations which existed on August 3, 1977, or were subject to valid existing rights (VER) on that date. The modifications to the definition of valid existing rights allow valid existing rights to be vested after August 3, 1977, pursuant to circumstances specified in Section 761.5. In correlation with these modifications, Section 761.3 is being amended to provide that the State regulatory authority or the Secretary has the authority to prohibit or limit operations, subject to valid existing rights and except for those operations which existed on August 3, 1977.

## **SECTION 761.5 - DEFINITIONS: VALID EXISTING RIGHTS**

OSM proposed three alternatives to the definition of valid existing rights -- a modification of the "all permits" test, ownership of coal, and ownership plus right to mine. Based on the extensive comments received, OSM has decided that none of the proposed definitions adequately defines VER. As indicated in the legislative history of the Act and the preamble to the previous definition, VER was included in section 522(e) of the Act to avoid "takings" for which compensation would be required through application of the prohibitions in section 522(e). Consequently, OSM has decided that VER is best defined as those rights, which if denied by the application of section 522(e), would require compensation under the Fifth and Fourteenth Amendments to the U.S. Constitution.

OSM has recognized from the outset that Congress created the valid existing rights exemption of section 522(e) to avoid potential legislative takings of property interests through inverse condemnations which would require compensation under the Fifth and Fourteenth Amendments to the U.S. Constitution. Congress recognized that the mining prohibitions established in section 522(e), if applied to certain existing property interests, would deprive the property owner of all reasonable beneficial use of the property, and thus entitle the owner to just compensation. Congress chose not to define further the types of property rights which qualify as "valid existing rights." Thus, it falls to OSM to define valid existing rights in a manner which avoids all potential takings through inverse condemnations, but otherwise gives full force to the prohibitions contained in section 522(e).

Relying upon the Act's legislative history, "valid existing rights" with regard to protected areas existing on the date of enactment, August 3, 1977, may be generally defined as property rights existing on that date which, if affected by the prohibitions established in section 522(e), would entitle the property owner to payment of just compensation under the 5th and 14th Amendments. If OSM is to craft a more particular definition, the agency must identify those circumstances in which application of the mining prohibitions contained in section 522(e) would invariably result in a compensable taking under the Fifth and Fourteenth Amendments. Such a definition would have to encompass every such circumstance in order to avoid the creation of valid "takings" claims by owners of property interests excluded from the definition.

OSM's first attempt to define "valid existing rights" was an unsuccessful effort to specifically limit the exemption to those property rights in existence on August 3, 1977, the owners of which either had obtained all necessary mining permits on or before August 3, 1977, or could demonstrate that the coal for which the exemption was sought was both needed for and immediately adjacent to, a mining operation in existence prior to August 3, 1977. Both of these classes of circumstances describe property interests which, if affected by section 522(e) prohibitions, would invariably entitle an owner to payment of just compensation under the Fifth Amendment. The definition failed on judicial review, however, because it omitted other types of circumstances in which application of these mining prohibitions would result in takings. In re Permanent Surface Mining Regulation Litigation, No. 79-1144 (D.D.C. Feb. 26, 1980) at p. 20.

The three options identified in OSM's proposed rulemaking were attempts to identify the class or classes of circumstances which include all potential takings under section 522(e), but exclude all else. Commenters have criticized each of these options as either overinclusive or underinclusive. Many raised the issue of taking without compensation on one or more of the proposed options. These comments have led OSM to examine the nature of the case law applying the "just compensation clause" of the Fifth Amendment. This body of law is unusual in its case-by-case approach. The courts uniformly refuse to establish specific formulas for determining whether a taking will occur in a broad class of circumstances, preferring instead to examine the particular facts of each case.

As a result of its examination of the case law on takings, OSM has determined that there is an insufficient legal basis for defining "valid existing rights" in terms of any class of circumstances. Because the courts refuse to prescribe set

formulas for takings, OSM is convinced that it cannot specifically delineate a class of circumstances with the assurance that the class is neither overinclusive or underinclusive of all potential takings which might result from section 522(e) prohibitions. For this reason, OSM has adopted a definition of "valid existing rights" as those rights which, if affected by the prohibitions in section 522(e), would entitle the owner to payment of just compensation under the Fifth and Fourteenth Amendments. This definition permits OSM to approach the determination of valid existing rights in the same case-by-case manner in which the courts approach related takings questions under the Fifth and Fourteenth Amendments. Indeed, the definition which OSM adopts today will allow the agency to conform the determination of valid existing rights to the continuing development of takings law in the courts.

OSM plans to apply this standard on a case-by-case basis. Any person who proposes to conduct surface coal mining and reclamation operations in an area where such mining would be prohibited by section 522(e) except for valid existing rights first must seek a determination of VER from the regulatory authority. No permit to mine may be issued for a prohibited area unless such a determination has been made. Under recently revised Federal lands rules, 30 CFR 740.4 and 745.13, determinations of VER regarding Federal lands subject to the prohibitions of sections 522(e)(1) and (e)(2) of the Act will always be made by OSM. (See *48 FR 6912*, February 16, 1983.)

A VER determination may be requested either in advance or at the time a permit application is submitted. Advance determinations have the advantage that no funds will be wasted in developing or reviewing a permit application for an area for which there are no valid existing rights. While OSM will not delay the processing of a permit application until a VER finding is made, it strongly encourages operators to seek advance determinations.

A person who seeks a VER determination is responsible for compiling and submitting to the decisionmaker all information necessary to make a finding. The types of information which should be submitted include:

(1) A description of the land in question, including the area(s) and corresponding coal seam(s) for which a VER determination is required.

(2) The name of the owner(s) of record of the mineral rights on August 3, 1977, and a copy of the legally binding conveyance, lease, deed, contract, or other document granting those rights.

(3) The name of the current owner of the mineral rights in question, if different from the person(s) identified in (2), and a copy of the legally binding conveyance, lease, deed, contract, or other document granting those rights.

(4) The current status of the applicant's interest in the land, and intended future status (ownership, lease, etc.).

(5) Application, approval and issuance dates, and identification numbers of all permits and amendments, etc., held or applied for by the applicant or by any successor(s) in interest, including:

(a) Surface and/or underground (as appropriate) coal mining permit from the State;

(b) NPDES permit;

(c) States air pollution control permit; and,

(d) Any other applicable Federal permits (e.g., Special Use Permit from U.S. Forest Service).

The applicant should specify whether the land in question is included wholly in these permits and whether additional land is also included.

(6) Any other information which the applicant believes will support his or her claim.

OSM or the regulatory authority will review the information submitted for each claim to determine whether the application of the prohibition in section 522(e) would result in a taking under the Fifth and Fourteenth Amendments to the U.S. Constitution. No permit will be issued unless and until VER is found. Any decision made on VER is administratively and judicially reviewable. Further procedures regarding VER determinations are expected to be proposed in the near future.

### **CONTINUALLY CREATED VER**

Paragraph (a) of the VER definition applies to situations where the protected activities existed on August 3, 1977, the date the Act was enacted. Paragraph (d) of the definition relates to protected activity that began after the date of

enactment. OSM proposed a new provision which would protect a right to mine once a permit had been issued even though some third party might later establish a dwelling, cemetery or other activity on adjoining property which would limit mining under section 522(e). Comments received were sharply divided on the basic issue. Many commenters strongly supported the proposal, and recommended that the protection be extended to the time a permit application is filed, rather than a permit issued. Others opposed any such protection, stating that it is not explicitly authorized by the Act.

OSM has adopted a modification of the proposed regulation in paragraph (d) of the VER definition. OSM has not adopted the suggestion of some commenters that the protection be extended to the date when the permit application is filed, because it would be inconsistent with the "takings" test established in paragraph (a) for determining VER. However, to the extent that a validly authorized surface coal mining and reclamation operation exists on the date a protected activity begins, OSM has concluded that there would be a taking if one of the prohibitions or limitations of section 522(e) resulting from the protected activity were applied to deprive the operator of the right to mine. If on the date the protected activity begins, no such operation is in existence, then under the second part of the paragraph the "takings" test would be applied to determine whether under the specific fact situation, a taking would occur. Thus, the existence of VER created after August 3, 1977 does not relate specifically to the issuance of, or an application for, a surface coal mining permit, but rather relates to whether on the date the protected activity begins the operation is legally in existence or, if it is not, whether a "taking" would occur if it is prohibited. There are the same considerations OSM examines for determining VER regarding areas for which protected activities existed on August 3, 1977.

Without the protection provided by this provision, it would be possible, for instance, for a person who objected to a mining operation to move a mobile home to the edge of the property adjoining a mine, and occupy it, thereby forcing the operator to cease all operations within 300 feet of this occupied dwelling. OSM does not believe that this is the intended result of section 522(e) of the Act. Congress provided the public ample opportunity to review and make objections to any proposed mining operation through the permitting process. The regulatory authority is required to seek and consider the views of the public it issues or denies a permit. To allow any person the opportunity to take extraordinary means to disrupt mining or deprive the operator of a right to mine after the operator has made the substantial investments required to obtain a permit and begin operations is totally inconsistent with the framework of protection the Act gives to both operators and citizens.

Neither paragraph (a) nor paragraph (d) of the VER definition may be used to create rights where none would otherwise exist. For example, if a person owns both the surface and mineral rights within an area where mining is prohibited by Section 522(e)(1), and it is determined that the person has no valid existing rights to mine the minerals because such a prohibition would not constitute a compensable taking, the person may not sever the mineral rights and sell them to another person and thereby create a new right to mine. Since no valid existing right existed prior to sale of the minerals, there would be no valid existing right after the transaction. The transaction cannot create new rights; it can only transfer existing ones.

## **INTERPRETATION OF DOCUMENTS**

Previous paragraph (c) of the VER definition at 30 CFR 761.5 provided that interpretation of the document relied upon to establish VER under paragraph (a) would be based upon the usage and custom at the time and place where the document came into existence and upon a showing by the applicant that the parties to the document actually contemplated a right to conduct the same mining activities for which the applicant claims VER. As proposed, paragraph (c) is redesignated paragraph (e) and amended to provide that where a State has statutory or case law establishing some standard for interpreting documents conveying mineral rights, that law will be used to interpret documents executed in that State. Only if no such statutory or case law exists, will custom and usage be relied upon for interpretation. This change is made to implement Congress' intent that State case law on interpretation of documents not be overruled. As stated in the 1974 Conference Committee Report to a predecessor of the Act, "the language of 522(e) is in no way intended to affect or abrogate any previous State court decisions." (H. Rept. No. 93-1522, 93rd Cong., 2nd sess. 85 (1974)).

## **PRECLUSION OF MINING IN PROTECTED AREAS**

OSM has included Section 761.11(h) in response to voluminous comments by persons who fear that mining or drilling may occur in the National Parks or other statutorily protected areas. There will be no surface coal mining, permitting,

licensing or exploration of Federal lands in the National Park System, National Wildlife Refuge System, National System of Trails, National Wilderness Preservation System, Wild and Scenic Rivers System, or National Recreation Areas unless called for by Acts of Congress. The Secretary will employ the full range of his legal capabilities to meet this objective. If any person successfully establishes valid existing rights to conduct mining operations within these areas, the Secretary may use authority granted under other statutes to acquire these rights by purchase, exchange, or condemnation so that mining does not occur.

The National Park Service was concerned that it be given an adequate opportunity to prevent mining on any lands within the boundaries of units of the National Park System when persons may be determined to possess valid existing rights (VER) to mine within such units. In response to this concern, OSM has agreed to ensure that the National Park Service receives notice of permit applications in which it may have an interest. This change will be made in Section 773.13(a)(3)(ii) of the final permitting rules. This notification at the beginning of the application review process will enable the National Park Service to take any action at its disposal, including possible acquisition of the property, to protect the National Park System. Additional, notification of the National Park Service and U.S. Fish and Wildlife Service will be required for any request for a determination that a person has valid existing rights under 30 CFR 761.5 for any lands within the boundaries of units of the National Park System and the National Wildlife Refuge Systems. This notification requirement has been added to final Section 761.12(b)(2).

## **OTHER CHANGES**

No change was proposed for the provision defining VER for haul roads in paragraph (b) of the VER definition. Some commenters proposed that mine access roads also be included. However, this suggestion is beyond the scope of the proposed rulemaking, and has not been adopted. VER for haul roads included as part of an operation established after August 3, 1977, would also be determined under paragraph (d) of the definition.

OSM proposed a minor addition to the portion of the VER definition which included coal both needed for and immediately adjacent to an ongoing surface coal mining operation existing on August 3, 1977. OSM proposed to define the term "needed for" to require a finding that the extension of mining is essential to make the operation as a whole economically viable. One commenter suggested that the definition be based on maximum utilization and conservation of the coal to minimize future land disturbances. OSM applauds this commenter's aim to reduce future disturbances; however, this provision sets forth a highly specific example of VER, which is a set of particular legal rights -- not a set of environmental objectives, no matter how worthy. Therefore, OSM has adopted the proposed language in paragraph (c) of the VER definition.

Another commenter proposed that the concept of coal needed for an ongoing operation be expanded to cover rights acquired after August 3, 1977. Such an interpretation is inconsistent with the statutory requirement that VER cannot be created after August 3, 1977 for areas which were subject to the protections of section 522(e) on that date. In some instances, there may be valid existing rights associated with lands acquired after August 3, 1977; however, that would have to be determined case by case using the definition set forth in paragraph (a).

Where a person claims VER on the basis that the coal from the proposed operation is "needed for" an ongoing operation, information regarding the size of the proposed site and the proportion it represents of the whole operation is helpful to evaluate this claim. In addition, the information described above in the list of information needed for a general VER claim is required on the "immediately adjacent" ongoing surface coal mining operation to establish VER for that operation, if applicable. Further, OSM needs documentation to verify the location of any such operations with respect to the proposed area and the coal seam(s) into which the proposed operation is directed. Maps or diagrams of the areas should be submitted if they would clarify or establish the proximity of the ongoing operation to that which has been proposed.

## **RELATIONSHIP TO "SUBSTANTIAL LEGAL AND FINANCIAL COMMITMENTS"**

In the preamble to the proposed rules (*47 FR 25280*, June 10, 1982), OSM discussed its original rationale for the linkage of the previous definition of valid existing rights to the concept of substantial legal and financial commitments in section 522(a)(6) of the Act, as defined in 30 CFR 762.5. Section 522(a)(6) exempts lands from the unsuitability petition process (but not from the section 522(e) prohibitions) if substantial legal and financial commitments has been made in such operations prior to January 4, 1977.

When the previous VER definition was developed, OSM reasoned that to be entitled to an exemption from the area where Congress had prohibited mining, property owners "must have a property interest in the mine that is even greater than the substantial legal and financial commitments needed to mine despite a designation by petition under section 522(a). Thus, OSM believe[d] that VER must be more than 'significant investment, that have been made on the basis of a long-term coal contract, in powerplants, railroads, coal preparation, extraction, handling and storage facilities, and other capital-intensive activities \* \* \* .' " (44 FR 14991-2; March 13, 1979).

However, OSM reexamined the definition of VER and determined that the relationship between VER and substantial legal and financial commitments is not suggested by the legislative history. Both concepts were covered repeatedly in the long legislative history. Each was discussed separately in every case. Nowhere in the legislative history does Congress compare the two concepts. Thus, the two concepts are separate and distinct.

### **PRIVATE INHOLDINGS WITHIN NATIONAL FORESTS**

OSM proposed to clarify, in the VER definition, that the Act's section 522(e) prohibition on mining within national forest boundaries does not apply to private inholdings. The legislative history makes clear that Congress did not intend that private inholdings be covered by section 522(e)(2) of the Act. House Report 95-218 (95th Cong., 1st sess., p. 95 (1977)) states "it is not the intent, nor is it the effect of this provision to preclude surface coal mining on private inholdings within the national forests."

However, OSM has decided that the language of section 522(e)(2) is sufficiently clear as it prohibits surface coal mining operations "on any Federal lands within the boundaries of any national forest." Therefore, OSM is not adopting the proposed change to amend the rule language itself. This requirement is also clearly stated in Section 761.11(b).

It should be noted that the Act clearly distinguishes between private inholdings within the boundaries of a national forest and private inholdings within the boundaries of the National Park System and the other statutorily protected areas of section 522(e)(1). Subject to valid existing rights, section 522(e)(2) prohibits mining on any Federal lands within national forests, while section 522(e)(1) prohibits mining on any lands within the boundaries of units of the National Park System and other areas.

### **SECTION 761.5 - DEFINITIONS: NO SIGNIFICANT RECREATIONAL, TIMBER, ECONOMIC, OR OTHER VALUES INCOMPATIBLE WITH SURFACE COAL MINING OPERATIONS**

This provision defines those values that might be damaged by mining and are not compatible with mining for the purposes of determining when mining could be allowed in national forests, under Section 761.12(b). Four changes were proposed to the previous definition. First, the use of the word "no" in the previous rule was not necessary to the term to be defined and was proposed to be eliminated. "No" refers to the type of findings to be made, not to the phrase requiring definition. Second, the term "damaged" was proposed to be changed to "irreparable damaged," to reflect the fact that, under the Act, mining is intended to be a temporary use of the land. Third, the term "offsite areas," which in the previous definition indicated that values outside the permit are to be considered, was proposed to be changed to "affected areas," a more precise and usable term. Finally, paragraph (d) was proposed to be changed to "other values which may be incompatible with surface mining operations" from the previous paragraph listing a number of such values. This was proposed to reflect the specific language of SMCRA.

The final rule adopted today is a hybrid of the previous rule and the proposed rule. The word "no" is eliminated from the term being defined and the term "offsite areas" is changed to "affected areas," as proposed. However, instead of modifying the word damaged with the term "irreparably," the term is changed to "damaged beyond an operator's ability to repair or restore." This is meant to include a determination of whether such repair or restoration is possible using available reclamation practices. Whether a particular operator can and will use such practices will be part of the findings necessary for a permit to be issued. Finally, instead of substituting the phrase "other values" for a specific list of values, the list will be retained. Both of these modifications are a result of public comment received on the proposed rule.

A number of commenters objected to the proposed amendments, with the exception of dropping the word "no" from the definition. The majority of these commenters stated that addition of the word "irreparably" was inappropriate and disagreed with OSM's reasoning, in the preamble to the proposed rules, that mining is intended to be a temporary use of

the land which when fully repaired, is consistent with the standards of the Act. First, the commenters questioned the idea that "temporary" disruption is acceptable, noting that temporary could mean a very long period of time. Second, the commenters objected that conceivably any impact is repairable by natural processes, given enough time, and therefore "irreparable" damage is a much stricter standard than Congress intended to be met in order to prevent mining. One commenter noted that, contrary to OSM's statement, Congress evinced a belief that mining, even though temporary, is not necessarily an appropriate use of land and may be prohibited even where reclamation is feasible. The commenter quoted from a report on H.R. 25 by the House Committee on Interior and Insular Affairs:

"While coal surface mining may be an important and productive use of land, it also involves certain hazards and is but one of many alternative land uses. In some circumstances, therefore, coal surface mining should give way to competing uses of higher benefit." H.R. Rep. No. 94-45, 94th Cong., 1st Sess. 90 (1975); (emphasis added).

OSM agrees that the proposed word "irreparably" was not precise. As the commenters noted, conceivably any damage can be repaired given sufficient time and resources. Therefore, OSM is adopting the term "damage beyond an operator's ability to repair or restore," which is a clearer standard. To the extent an operator completely repairs the damage caused by mining, then the values will ultimately be compatible with the mining operation. During mining itself there could be a temporary interruption of important activities. However, the mere interruption does not necessarily make the mining incompatible with the long-term resumption of the activity. In each instance, a determination must be made whether the values affected are significant, whether damage to them can be repaired or restored by an operator, and whether such values are capable of existing together with surface coal mining operations because of the undesirable effects mining would have on those values. It should be noted that this definition applies only to Federal lands within the boundaries of a national forest and only for the purpose of determining whether there are significant values which would be incompatible with surface coal mining operations. It is, therefore, only one of a number of ways in which the Act and regulations address other land uses. OSM continues to believe that mining is an acceptable temporary use of the land in most situations. Mining, even when fully reclaimed, may result in permanent changes which may be undesirable. In such cases, this definition and other provisions allow for protection.

Several commenters objected to substituting the term "affected areas" for "offsite areas," stating that the existing term is clear and unambiguous because it is qualified in the definition as those offsite areas which could be affected by mining.

However, OSM believes that "offsite areas" is imprecise and could imply coverage of an undefined, perhaps remote, area away from the minesite. By contrast, "affected areas" is a more precise term which draws more closely the relationship to the surface coal mining operation. Therefore, the final rule uses the term "affected areas".

Finally, several commenters objected to the proposed change to refer to "other values" which may be incompatible with surface mining operations, rather than specifying that "other values" includes scenic, historic, archaeological, esthetic, fish, wildlife, plants or cultural interests. The commenters stated that the proposed elimination of specific values is arbitrary and vague and would result in inadequate consideration of these values.

OSM has decided to retain the list of examples which constitute "other values" which may be incompatible with surface coal mining. A rule containing a list of examples could tend to limit the scope of the inquiry into other values. On the other hand, OSM did not intend to suggest by proposing to eliminate the examples that adequate consideration should not be afforded them. Therefore, the final rule includes a list of values, but should not be considered limited to those examples. Neither should the existence of one of the values listed be construed to require a prohibition of mining; each must be evaluated for its importance and the nature and extent of the impact which would occur.

Several commenters supported the proposed definition and addition of the modifier "irreparably" to reflect that mining is an appropriate temporary use of the land. For the reasons noted above, OSM has decided to adopt the phrase "damaged beyond an operator's ability to repair or restore." Two commenters also suggested that although the preamble is clear, OSM should clarify in the rule itself that the definition applies only to areas within a national forest. OSM believes that the definition, coupled with the use of the defined phrase in Section 761.11(c) sufficiently clarifies that it applies only to Federal lands within a national forest. Thus, the language of the rule has not been modified as suggested by the comments.

## **SECTION 761.5 - DEFINITIONS: OCCUPIED DWELLING**

Section 522(e) of SMCRA prohibits mining within 300 feet of an occupied dwelling. The previous rules defined an occupied dwelling as "any building that is currently being used on a regular or temporary basis for human habitation."

OSM proposed to clarify the term "occupied dwelling" by defining the term "temporary" to mean that the dwelling is used for human habitation for not less than three consecutive months each year. The 3-month standard was suggested because it corresponds to a full season of use. OSM reasoned that less than 3 months suggests intermittent use, which would not expose an occupant to the steady impact of nearby mining. OSM requested comments on other periods of time which would be an appropriate standard for temporary use.

Several commenters opposed the proposed definition stating that the proposal would violate Congress' intent that occupants be spared the impacts of mining within 300 feet of their dwellings. The commenters disagreed with OSM's assumption in the preamble to the proposed rules that the intent of section 522(e) was to prevent only the "steady" impacts of mining on nearby residents. Rather, the commenters argued that Congress intended to prevent all impacts within 300 feet of an occupied dwelling.

One commenter noted that the proposed definition would allow mining to the borders of the Santa Ana Pueblo, a historic pueblo maintained as a ceremonial village which is occupied for only a few days each year. The commenter also noted that under the proposal mining would be permitted near numerous hogans and other small dwellings which are occupied on an irregular basis by farmers, herders, or migrant laborers.

Several commenters stated that the existing definition should be retained as it provides States with the flexibility to determine, on a case-by-case basis, the circumstances under which a dwelling is, in fact, occupied. One commenter suggested that temporary be defined as an aggregate of three months rather than three consecutive months.

Several commenters supported adoption of the proposed definition and several suggested further changes. Two commenters suggested the definition be revised to mean "any building that is currently being used on a permanent or temporary basis for human habitation. Temporary means that the dwelling is used as the occupant's principal residence for not less than three consecutive months each year." The word "permanent" would be substituted for regular to prevent a situation where a dwelling is occupied only on the opening day of hunting season each year, thus qualifying as "regular" use. The second change would avoid the need for a buffer zone around cabins or weekend homes which are occupied for only a couple of weekends during certain seasons.

Several other commenters suggested further changes to the proposed rule to clarify that three consecutive months means continuous habitation or close to 90 days of habitation. One commenter suggested clarifying that the definition excludes buildings such as barns or other outbuildings not specifically occupied by humans as residences. Outbuildings and barns not occupied by humans as residences have never been considered to be included in the definition. Other commenters suggested specifically including summer and weekend homes in the definition.

The very diverse comments received on the proposed rule indicate that there is no consensus on how the term "temporary" should be defined. No compelling case has been presented to support either the proposed change or any alternative to it. Consequently, OSM has decided to retain the existing definition. The existing definition, as pointed out by several commenters, provides the regulatory authority with the flexibility to determine, on a case-by-case basis, what constitutes an occupied dwelling and what temporary use means.

## **SECTION 761.5 - DEFINITIONS: PUBLIC BUILDING**

Section 522(e)(5) of the Act forbids mining within 300 feet of public buildings. "Public building" was previously defined as "any structure that is owned by a public agency or used principally for public business, meetings, or other group gatherings." OSM proposed two options to amend the definition of public building. Option 1 would have defined public building to mean "any structure that is owned, leased, or principally used by a governmental agency for public business, meetings, or other group gatherings." This revision would have modified the previous definition by including structures not only owned or used but also those leased by government agencies for public purposes. Modifying the term "public" to "governmental" would eliminate certain community buildings from consideration in this context. However, community and institutional buildings are covered in a separate definition.

Option 2 would have revised the definition to encompass only those structures that are owned by a public agency. Under this revision, the definition would have narrowed considerably the application of the prohibition on mining within 300 feet of a public building.

OSM requested comments on these two proposed options and whether the existing definition was satisfactory. OSM has decided to adopt Option 1, with two modifications suggested by commenters.

A number of commenters opposed revising the definition because they believed it would eliminate community and institutional buildings from the protections of section 522(e)(5) of SMCRA. However, as noted above, community and institutional buildings are covered by a separate definition in Section 761.5, which is not being revised, and a separate prohibition in Section 761.11(f). Two commenters expressed concern that rest homes, hospitals and nursing homes would be excluded. These types of facilities are included in the definition of community or institutional building.

Several commenters supported Option 1, because they believed Option 2 was too narrow, as it would eliminate leased buildings. However, several modifications to Option 1 were suggested. A number of commenters recommended requiring both some property interest (ownership or lease) and use by a governmental agency to prevent unnecessary protection of garages or warehouses. One of these commenters suggested deleting the term "or other group gatherings" because it is vague and adds nothing to the concept of public building. OSM agrees with these suggestions and has adopted them for the final rule. Three commenters supported adoption of Option 2, because ownership of a building indicates commitment and because a narrower definition would allow more development of the coal resource. However, as several commenters noted, government agencies frequently lease, rather than own, the buildings they occupy and this flexibility is necessary. OSM believes that public buildings should be protected regardless of the nature of the property interest involved.

#### **SECTION 761.5 - DEFINITIONS: PUBLIC PARK AND PUBLICLY OWNED PARKS**

Section 522(e)(5) of the Act prohibits mining within 300 feet of public parks. The previous definition of "public park" included areas dedicated or designated by a public agency for public recreation, including lands leased, reserved or held open for that use. OSM proposed two options to modify the definition. First, OSM considered eliminating the existing reference to lands "held open to the public" because it is not clear that Congress intended to cover private lands that have not been designated as a public park by a government agency. OSM rejected similar comments in the preamble to the previous rules (*44 FR 14991*, March 13, 1979) by noting that lands which are owned by nonprofit organizations whose primary purpose is the protection of natural resources, and which are open to the public, should be protected as provided under this definition since they are dedicated for public purposes. Such lands have no official status as parks, however, and could include areas which could not meet the usual governmental standards for public recreation areas.

The second option considered by OSM would limit the definition of public park to areas or portions of areas "dedicated or designated by any Federal, State, or local agency primarily for public recreational use \* \* \*." This suggestion was based on concerns that, under the previous definition, in some circumstances, lands which are reserved as watershed property or other public service facility areas may be considered public parks. In some cases, parts of a broader area might be designated as a public park under the proposed revision, allowing other parts of the area to be managed for other purposes. Also, certain areas are devoted to mixed uses, which, at the discretion of the regulatory authority, may be deemed public parks.

In addition to these two options, OSM considered another option which would allow the classification of multiple use areas to change, depending upon the use which is dominant at the time. For example, the use of an area might shift from timber management to wildlife to public recreation; it might be designated as a public park only during the recreation phase.

Several commenters opposed revising the definition and favored retention of the previous definition, which was not limited to sites with public ownership or particular uses. One of these commenters noted that the National Park Service (NPS) often enters into contracts with private landowners to maintain areas in or adjacent to NPS units. These interests are acquired to protect the associated natural and scenic resources or rights of public access across lands and are generally more cost effective than outright fee purchase. The commenter objected that neither of the proposed options would include these areas because they are not "dedicated or designated" by a governmental agency. However, less than fee interests can qualify as public parks if other conditions are met. Contractual arrangements with NPS or other

governmental agencies could be used to dedicate an area for public recreational use. A second problem raised by the commenter concerned the proposed language "primarily for recreational use." The commenter noted that many units of the National Park System were established for a variety of purposes, and that public recreation is not usually the primary purpose for establishment. Therefore, the commenter stated that the proposed definition would be more restrictive than anticipated by the language of section 522(e)(3) of the Act.

OSM disagrees with the comment concerning the relationship of the term "primarily for public recreational use" with the protection provided to units of the National Park System. Section 522(e)(3) of the Act is principally for the protection of publicly owned parks other than units of the National Park System. The various units of the National Park System specifically are protected by the Congress through Section 522(e)(1) of the Act.

Another commenter also noted that the National Park Foundation, a non-profit organization, purchases land for public use and holds the land until the NPS wishes to add the land to the National Park System. The commenter suggested that OSM should distinguish between such arrangements and the situation where a private landowner or group labels an area "open to the public" in order to prevent its being mined. OSM agrees that such arrangements could qualify as public parks only if a public agency in some way dedicates or designates its public recreational status, and believes that the definition adopted today includes such arrangements.

A number of commenters supported Options 1 or 2 and some suggested further modifications. Some commenters suggested that a public park be one designated solely for public recreational use, or where the dominant use is not recreation, those portions of the area designated and managed for high density recreational use as determined by the regulatory authority. The commenters stated that this definition recognizes the concept of multiple use, eliminates lands "leased or reserved", which may never be used for recreational purposes, and tightens up the definition by using the term "managed" to recognize the fact that public parks are not primitive unused areas.

The concept of a public park as one designated solely for recreational use goes beyond the accepted idea of a park. Parks are established for many reasons and often for multiple uses. Under the definition adopted today, parts of a broader area may be designated as a park, allowing other parts to be managed for other purposes. OSM believes primitive areas may be public parks if so designated.

Several commenters supported Option 2 and suggested deleting the phrase "held open to the public" for the same reasons it was deleted from Option 1. OSM is retaining this phrase but such lands must be recognized as being dedicated or designated primarily for public recreational use by a public agency. Such a requirement will prevent the situation where a private landowner labels an area "open to the public" in order to prevent its being mined. Two commenters suggested that actual public use of the area be considered a criterion. One commenter urged OSM to limit the definition to lands owned by governmental entities. OSM believes these suggestions limit the definition too much. Actual public use should not be controlling as it may ebb and flow over time. Ownership is not the key criterion because as noted above, contractual arrangements may provide for recognition of less than fee interests. Another objected that numerous reservoirs exist which were primarily authorized for flood control, yet are among the most frequently used recreational areas, which would satisfy the average person's idea of a public park. Under the definition adopted today, the regulatory authority will have the flexibility to determine whether such an area qualifies as a public park, or whether mining can occur.

Based on these comments, OSM has decided to adopt Option 2, which defines public park as areas or portions of areas dedicated or designated by any Federal, State, or local agency primarily for public recreational use, whether or not such use is limited to certain times or day, including any land leased, reserved, or held open to the public because of that use. This definition provides the flexibility for the regulatory authority to determine on a case-by-case basis whether a particular area or portion of an area should be defined as a public park.

Section 522(e)(3) of the Act prevents surface coal mining operations from adversely affecting any "publicly owned park." Commenters confused this term with the term "public park" in Section 522(e)(5). To resolve the confusion over these related terms and to establish consistency in their relationship, this final rule includes a definition of "publicly owned park." "Publicly owned park" is defined to mean "a public park that is owned by a Federal, State or local governmental entity."

## **SECTION 761.5 - DEFINITIONS: PUBLIC ROAD**

OSM proposed to delete the definition of "public road" and use the definition of "road" and the public road concept contained in the definition of "affected area" to define public roads in the future.

However, as a result of public comment, OSM has decided to retain a definition of public road in this section, and to define it in accordance with the preamble discussion of the definition of "affected area" published on August 2, 1982 (47 FR 33424). Only two commenters supported deletion of the definition. [134B, 100E] Numerous commenters urged that a definition of public road be retained, as it is used repeatedly throughout the regulations and is significant enough to warrant separate consideration and attention. A few of these commenters suggested that the previous definition should be retained. However, the previous definition was suspended on November 27, 1979 (44 FR 77447) as a result of a litigation challenge in *In re Permanent Surface Mining Regulation Litigation*, No. 79-1144 (D.D.C. Feb 26, 1980) at p. 23. Other commenters suggested adopting a definition similar to that discussed in the January 4, 1982 and August 2, 1982 Federal Register (47 FR 41 and 47 FR 33424). The August 2 Federal Register discussed the definition of public road in the context of the definition of affected area for the purpose of clarifying which roads are to be included in an operator's "affected area." In the January 4, 1982 Federal Register, OSM proposed four alternatives for the definition of which roads are to be considered included in the "affected area."

The first alternative would have excluded from the "affected area" any part of a road used for coal haulage or access which is owned unconditionally, controlled and maintained by a public entity, used frequently for purposes other than coal haulage or access, and maintained (using public funds) in a manner similar to other public roads of a similar nature in the jurisdiction.

The second alternative would have excluded from the "affected area" any part of a road which: (a) Was designated as a public road pursuant to the laws of the jurisdiction in which it is located; (b) is maintained with public funds in a manner similar to other public roads of the same classification within the jurisdiction; (c) there is substantial (more than incidental) public use; and (d) meets road construction standards at least as a stringent as the standards applicable to access and haul roads under the State program.

The third alternative replaced the public use and road construction criteria of the second alternative with a requirement that the road be paved. "Paved" meant that the entire length of the road be surfaced with all weather surfacing material of asphalt, concrete or similar consolidated, hard and durable material. The placement of gravel, rock or other unconsolidated material would not constitute paving.

The fourth alternative replaced the paving requirement of alternative three with the requirement that the road meet the road classification standards for a class 1, 2, or 3 road under the mapping system established by the U.S. Geological Survey for 7.5 minute topographic maps.

OSM stated in the August 2, 1982 Federal Register that it intended to adopt a final rule similar to the second alternative. Specifically, a road would be excluded from the "affected area" for a mine if it met three criteria: (a) The road has been designated as a public road pursuant to the laws of the jurisdiction in which it is located; (b) the road is maintained with public funds, and constructed, in a manner similar to other public roads of the same classification within the jurisdiction in which it is located; and (c) there is substantial (more than incidental) public use of the road. OSM is incorporating these concepts in its definition adopted today. Comments received in response to this proposed change were addressed in detail in the August 2, 1982 Federal Register and need not be repeated here.

## **SECTION 761.5 - DEFINITIONS: CEMETERY**

OSM proposed to revise the definition of "cemetery" to reflect the August 6, 1981, decision of the United States Court of Appeals for the Sixth Circuit. *Holmes Limestone Co. v. Watt*, 655 F. 2nd 732 (6th Cir. 1981).

In that decision, the Court distinguished between public cemeteries and private family burial plots. It stated "There is no evidence that Congress ever intended to regulate private family burial plots not open to the public. It can hardly be claimed that the mining close to the graves on private property interferes with interstate commerce." *Id.* at 738.

In reviewing the legislative history, OSM found no statement that indicated Congress intended that private family burial grounds should be considered cemeteries for the purpose of section 522(e) of the Act. Accordingly, OSM proposed to add to the existing definition the phrase "but does not include family burial grounds."

The majority of commenters opposed excluding family burial grounds from the definition of cemetery. A number of these commenters pointed out that the impact of the proposed change would be especially acute in Appalachia or in areas where the predominant cultural groups do not recognize communal burial as part of their traditional practices. A number of comments cited the extensive amount of testimony offered at Congressional hearings, concerning past disturbances of family and private burial grounds, to demonstrate that the legislative history shows Congress intended to include family burial plots under the protection of section 522(e). However, testimony often includes material on both sides of issues, and is not by itself an indication of Congressional intent. Two commenters discussed the Holmes Limestone case, to which OSM referred in the preamble to the proposed rules. These commenters noted that while the U.S. Supreme Court declined to hear the case, it considered only the question of the Ohio district court's jurisdiction to review a permanent program rule and did not reach the merits of the definition of the word cemetery. One of the commenters suggested that if OSM decided to promulgate a new definition, it should be limited to the fact situation of the Holmes Limestone case. That decision concerned only those private cemeteries where the owner of the cemetery and the mineral estate underlying the land also owns and resides on adjacent land. However, this suggestion is not responsive to the findings of the Circuit Court. Finally, one commenter who supported the previous definition suggested that a waiver should be provided for, to allow mining within a closer distance to the cemetery. OSM has no authority under section 522(e)(5) of the Act to provide for a waiver. The Act provides for a waiver of protection afforded under section 522(e)(5) of the Act only in the situation of an occupied dwelling.

Several commenters supported the proposed amendment and some suggested the proposal be further clarified or amended. Two commenters suggested that cemetery be defined as any identifiable area of land where human bodies are interred, but not to include family burial grounds. The commenters stated that adding this term would prevent rumored burial grounds from being included and would necessitate some physical evidence or readily observable markers. OSM intends that the new definition applies only to "identifiable" burial grounds. One commenter suggested that "abandoned" cemeteries be excluded from the definition, but offered no criteria to be used in deciding what constitutes an abandoned cemetery. One commenter suggested that OSM provide for a waiver and allow the operator or owner of the cemetery to agree to move the interred bodies. OSM has no authority, as noted above, to provide for a waiver. However, graves may be moved if State law allows.

One commenter who supported the proposal suggested that the prohibited distance should be measured from the nearest grave within a cemetery rather than the boundary of the cemetery itself. The commenter stated that many cemeteries consist of large tracts of land, but may only have graves within a small portion of that area. Adopting this suggestion, the commenter stated, would adequately protect the graves, as well as the public's access to them, while at the same time allowing cemetery owners who wish to do so to allow mining under certain portions of their property. OSM rejects this suggestion because the Act's protection extends to lands within 100 feet from a "cemetery" not from the nearest gravesite.

OSM has decided to adopt the proposed definition, with a slight modification to exclude private family burial grounds, to reflect the decision of the Sixth Circuit. However, in response to those comments concerned with elimination of protection for private family burial grounds, the permitting process will provide an additional level of protection for private family burial grounds. A new requirement is being added to Sections 779.24(j) and 783.24(j) to require the permit applicant to identify all private family burial grounds in or within 100 feet of the proposed permit area. These two revisions are included as a part of this final rule. New Section 773.15(c)(11) will require the regulatory authority to find, prior to issuing a permit, that mining activities would not adversely affect private family burial grounds. If the regulatory authority finds that the mining operation would adversely affect a private family burial ground, the burial ground may be relocated if allowed by State law, and if performed in accordance with State law. If the burial ground cannot be moved, no mining which would adversely affect the burial ground may be permitted. This recognizes OSM's intent that, although not statutorily protected under section 522(e) of the Act, these sensitive areas will receive the necessary degree of protection. For convenience, the regulatory language in Section 773.15 will be included as part of the revisions to 30 CFR Chapter VII, Subchapter G in which a new Part 773 is being promulgated.

## **SECTION 761.11 - AREAS WHERE MINING IS PROHIBITED OR LIMITED**

### **SECTION 761.11(a): WILD AND SCENIC RIVERS**

Section 761.11(a) provides that, subject to valid existing rights, no surface coal mining operations shall be conducted within the boundaries of certain national systems, such as the Wild and Scenic Rivers System, including study rivers designated under section 5(a) of the Wild and Scenic Rivers Act (*16 U.S.C. 1276(a)*). A proposed boundary for rivers under study for wild and scenic designation has been identified by the National Park Service (NPS) in guidelines published in the Federal Register on January 28, 1981 (*46 FR 9148*).

The study area defined by NPS would cover, at a minimum, a corridor extending the length of the study segment and extending in width one-quarter mile from each bank of the river. Accordingly, OSM proposed to revise Section 761.11(a) to include this clarification, which would give States discretion to establish these boundaries or others which would exceed the minimum standard established by NPS. As a result of public comment, the final rule provides that the corridor for study rivers shall not exceed, one-quarter mile from each bank of the river.

Some commenters had no objection to the proposed rule. One commenter supported the previous rule, arguing that there is no authority in the Act to provide buffer zones for study rivers. The corridor, however, is not a buffer zone -- rather, it is an integral part of the study river. The commenter noted that the proposed rule contained minimum, but no maximum boundaries, and therefore, it is conceivable that the buffer zone could be larger than the actual area of land to be protected. OSM has modified the final rule to provide that the one-quarter mile corridor will be the maximum limitation.

Several commenters objected that the one-quarter mile boundary was too inflexible. The commenters noted that in some cases the corridor might not protect the values under consideration, while in other cases it might be too restrictive. These commenters suggested that no boundary be specified, but that it be determined on a case-by-case basis, perhaps by the regulatory authority in consultation with the NPS.

A standard corridor for study rivers will provide greater certainty and uniformity in establishing the prohibition on mining. Historically there have been long delays in establishing a specific study corridor. This definition sets the corridor within which mining cannot occur, avoids delay and uncertainty, and affords the needed protection. One commenter suggested specifying that the quarter-mile boundary would exist only during the time a river was under study and once a corridor was determined then the actual corridor would become the boundary.

OSM agrees with the commenter's statement, but believes the rule language is sufficiently clear on this point. Clearly, the one-quarter mile corridor applies only to study rivers. Once a river is designated as wild or scenic river, its actual corridor is set by law and will become the official boundary.

### **SECTION 761.11(c): NATIONAL REGISTER OF HISTORIC PLACES**

Section 522(e)(3) of the Act prohibits, subject to valid existing rights, 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." When promulgating Section 761.11(c) of the permanent program rules, OSM interpreted section 522(e)(3) to be as broad as the National Historic Preservation Act of 1966, as amended (*16 U.S.C. 470*), and thus to include privately owned properties listed in the National Register and properties, publicly or privately owned, eligible for listing in the National Register. As a result of a litigation challenge in the United States District Court for the District of Columbia, *In re Permanent Surface Mining Regulation Litigation*, No. 79-1144 (D.D.C. 1980), OSM suspended Section 761.11(c) on November 27, 1979 (*44 FR 67942*) insofar as it covered areas eligible for listing in the National Register and privately owned properties listed in the National Register. OSM is today finalizing those earlier suspensions by amending Section 761.11(c) to apply only to publicly owned properties listed on the National Register.

The change deletes privately owned properties listed in the National Register and all eligible properties from the prohibition and procedures established in section 522(e)(3) of the Act and Part 761. This amended language is consistent with OSM's present interpretation of section 522(e)(3) of the Act and with the amendment to Section 761.12(f)(1),

discussed below. A number of commenters objected to adopting a rule which excludes privately owned properties and all eligible properties from the areas where mining is prohibited. Other commenters argue that the word "publicly" in section 522(e)(3) of the Act also applies to places listed in the National Register, as well as to parks. One commenter noted that the phrase "publicly owned park" was an attempt to distinguish between parks that are privately owned, such as amusement parks, and parks owned by public agencies of some kind. Other commenters maintained that the type of ownership is irrelevant to the protection required by the National Historic Preservation Act of 1966. They asserted that because more than 90% of all properties listed are privately owned, it could not have been Congress' intention to protect only publicly owned places. OSM disagrees with these commenters. When the language of section 522(e)(3) of the Act is read in its entirety, it supports the interpretation that "publicly owned" applies to places as well as parks. Section 522(e)(3) of the Act prohibits mining operations "which will adversely affect any publicly owned park or places included in the National 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" (emphasis added). The implication from the latter phrase is that a governmental agency will have legal authority or control over the historic site, not just an interest or affinity. A number of the commenters who objected to the proposed rule, as well as several who supported the deletions, noted that OSM has a responsibility, apart from SMCRA, under the National Historic Preservation Act of 1966 (NHPA) to protect historic properties. These commenters noted that a mechanism already exists for OSM to carry out its responsibilities, in the form of a Programmatic Memorandum of Agreement (PMOA) ratified by OSM and the Advisory Council on Historic Preservation. The commenters suggested that the PMOA be implemented as signed or that OSM develop implementing regulations.

OSM does not agree with those commenters who object that the rule changes abrogate OSM's responsibility under the NHPA. The rule changes implement SMCRA only. OSM agrees that it has a responsibility under section 106 of the NHPA to consider historic properties in decisions that it makes. However, this responsibility is separate both from the protections provided by section 522(e) of the Act and from the regulations in Part 761. OSM currently renegotiating the PMOA and will take any actions needed in the future to comply with the NHPA.

One commenter urged that the prohibition be amended to require a showing of "significant and irreparable adverse effects" on public parks and public places before mining would be prohibited. The commenter stated that such a requirement would be consistent with certain other OSM proposed changes, that under the Act, mining is a temporary use of the land which when fully repaired is not a matter of serious concern. However, the actual language of section 522(e)(3) is "adversely affect." If Congress had intended to require a showing of greater impact, it would have so specified.

One commenter had no specific objection to the changes proposed, but believed that delays in mining might result if the regulations are changed because there would be no need to survey the permit area for cultural resources. The changes being made to the unsuitability regulations do not change the permit requirements to identify cultural resources.

#### SECTION 761.11(d)(2): PUBLIC ROAD DECISIONS

Previous Section 761.11(d)(2) provided that, subject to valid existing rights, no surface coal mining operations shall be conducted after August 3, 1977, within 100 feet, measured horizontally, of the outside right-of-way line of any public road, except where the regulatory authority allows the public road to be relocated or the area affected to be within 100 feet of the road. OSM has found that decisions regarding public road relocations are rarely made solely by the regulatory authority but are typically made by a public road authority in coordination with the regulatory authority. Thus, OSM proposed amending Section 761.11(d)(2) by providing that the regulatory authority, or public road authority upon being designated as the responsible agency by the regulatory authority, may take action provided that the procedures in Section 761.11(d) are followed. In addition, this section was proposed to be modified to allow roads to be closed as an alternative to relocation.

The final rule is adopted as proposed. Several commenters supported allowing the public road authority to take action upon being designated as the responsible agency. Several commenters opposed allowing roads to be closed as an alternative to relocation. These commenters argued that section 522(e)(4) of the Act does not authorize the closing of public roads. One commenter asserted that road closures are governed by state statutes and once a public road is closed pursuant to law, there is no "public road" to be regulated under section 522(e)(4) of the Act.

OSM agrees with the latter commenter. In allowing the relocation of roads, Section 522(e)(4) of the Act does not preclude road closings undertaken in accordance with the applicable State laws or local ordinances, so long as the interests of the affected public and landowners are protected.

#### SECTION 761.11(e): 300-FOOT LIMITATION ON MINING

Previous Section 761.11(e) provided that, subject to valid existing rights, no surface coal mining operations shall be conducted after August 3, 1977, unless those operations existed on that date, within 300 feet, measured horizontally, of any occupied dwelling, except when the owner thereof has provided a written waiver consenting to operations closer than 300 feet. OSM is adding a second exception for haul roads and access roads which connect with public roads opposite occupied dwellings.

This provision addresses the issue of whether an existing public road adjacent to and within 300 feet of an occupied dwelling essentially negates the purposes of prohibiting a haul road that intersects the public road on the opposite side and within 300 feet of the dwelling. Such a haul road does not bring impacts any closer to a dwelling on the opposite side of the road, because the dwelling is already subject to the impacts of public road use, including traffic that uses the haul road.

Several commenters supported the proposed amendment and some suggested that this exception be further amended to include mine access roads, roads located on the same side of the public road as the occupied dwelling, and other coal transport systems such as conveyors or slurry lines. OSM has accepted the suggestion that access roads as well as haul roads should be excepted from the prohibition. All mine roads, whether access or haul roads, would not bring the impacts of mining any closer to the dwelling. OSM does not believe the same rationale holds true for mine operations on the same side of the public road and has not adopted that suggestion. OSM also has not adopted the suggestion that other coal transport systems be excepted from the prohibition. Other transport systems involve impacts different in nature from the impacts associated with roads. In addition, there are many more options for the location of other transport systems than there are for mine roads.

Several commenters objected to excepting haul roads from the prohibition, noting that the impacts of haul roads are different and more severe than those of public roads. The commenters stated that increased usage would produce greater noise and dust and a potential for safety problems for normal traffic. The commenters argued that the proposed change would violate section 522(e)(5) of SMCRA, which prohibits surface coal mining operations within 300 feet of an occupied dwelling. OSM believes, however, that the change is consistent with SMCRA in that the impacts of mining will not be any closer to the dwelling because the dwelling is already subject to the impacts of public road use. While the impacts of coal trucks may be more severe, those same trucks will be using the public roads whether or not a haul road is permitted within 300 feet of the dwelling.

#### SECTION 761.11(h): AREAS WHERE MINING IS PROHIBITED

A new Section 761.11(h) is added. See the discussion under Section 761.5, Definition of Valid Existing Rights.

#### SECTIONS 761.12 (a), (b) and (d): PROCEDURES FOR REVIEWING PERMIT APPLICATIONS

##### SECTION 761.12(a)

Section 761.12(a), which is not being amended at this time, requires the regulatory authority, upon receipt of a permit application, to review the application to determine whether the proposed operation would be limited or prohibited under section 522(e) of the Act. Section 761.12(a) is a non-exclusive means for an operator to obtain a VER determination. To avoid the expense of an operator preparing and submitting permit applications based on uncertain claims of VER, OSM strongly encourages operators to seek advance determinations of VER. The recent amendments to OSM's Federal lands rules (*48 FR 6912*, February 16, 1983) explicitly reserve to the Federal government the responsibility to make VER determinations for Federal lands on which the prohibitions of sections 522(e)(1) or (2) of the Act apply. Thus, for States that have entered into cooperative agreements with OSM in which the State regulatory authority administers the permanent program regulations on Federal lands, OSM, not the State regulatory authority, will make the VER determination.

## SECTION 761.12(b)

Previous Section 761.12(b) provided that, where a proposed surface coal mining operation would be located on any lands listed in Section 761.11 (a), (f), or (g), the regulatory authority shall reject the application if the applicant had no valid existing rights for the area on August 3, 1977, or if the operation did not exist on that date. The modifications to the definition of valid existing rights allow valid existing rights to be vested after August 3, 1977, pursuant to circumstances specified in Section 761.5. In correlation with these modifications, Section 761.12(b)(1) is being amended to provide that the regulatory authority shall reject the application if the applicant has no valid existing rights for the area or if the operation did not exist on August 3, 1977. Section 761.12(b)(2) provides that, when the regulatory authority is unable to determine whether the proposed operation is located within the boundaries of certain prohibited or limited areas, it will transmit information to the appropriate agency, which must respond within 30 days of receipt of the request.

Section 761.12(b)(2) is being revised to provide that the appropriate agency has 30 days from receipt of the request in which to respond or the regulatory authority may make a determination based on available information. In response to comments, an additional amendment is being made to allow the regulatory authority to grant an extension, upon request of the appropriate agency, of up to 30 days.

This change would clarify that regulatory authorities have the discretion to proceed with determining areas prohibited or limited by Congress when response from outside agencies is not forthcoming within the designated comment period or the extended period granted by the regulatory authority. In any event, regulatory authorities are responsible for making sure that section 522(e) of the Act is not violated.

Two commenters supported the proposed amendment to Section 761.12(b)(1), but one noted that instead of rejecting an application outright, the applicant should be allowed to modify the application to exclude any area for which the applicant has no valid existing rights.

A regulatory authority could allow an applicant to modify its application if a portion of the permit area contained lands on which mining was prohibited. Only if the permit area was composed entirely of lands for which the applicant had no valid existing rights would the application be rejected. OSM strongly encourages operators to seek advance determinations of VER. Two commenters objected to the proposed change because of their objection to the changes to the definition of VER in Section 761.5.

Several commenters supported the amendment to Section 761.12(b)(2). One commenter suggested that an extension of time be allowed for the appropriate agency to respond. This suggestion has been adopted. One commenter recommended that the regulatory authority be required to make the determination if a response is not forthcoming. This recommendation has not been adopted. Although the regulatory authority has the discretion to make the determination, it is responsible for assuring that section 522(e) of the Act is not violated. To require the regulatory authority to make a determination based on inadequate information might result in the issuance or denial of a permit which would not be in accordance with either the Act or the regulations.

Three commenters opposed the amendment and suggested that additional time be granted on a case-by-case basis. In response to these comments, OSM has added a provision whereby the appropriate agency may request an extension of time.

## SECTION 761.12(c)

Section 761.12(c) requires a person to file a permit application before a determination may be made that mining on Federal lands within a national forest may be allowed under Section 761.11(b). OSM expects to propose procedures that will allow a determination of rights under Section 761.11(b) in advance of the filing of a permit application.

## SECTION 761.12(d)

Section 761.12(d) provides procedures for obtaining approval to mine within 100 feet of a public road or to relocate public roads. OSM is revising this section to reflect the change to Section 761.11(d) to allow a public road authority, as appropriate, to act on road relocation and to include the additional option of closing a road. Actions involving roads generally are required to be coordinated with the agency responsible for public roads. OSM believes that there is no need for regulatory authorities to duplicate the actions of a road authority. If the road authority provides the opportunity, notice, and findings consistent with these rules to protect the interests of the public and landowners, the road authority should be able to take action. OSM also is allowing roads to be closed using the same procedures. Road closings are presently available to States to deal with other problems. Provided that the public interest is protected, OSM believes that closings should be available to deal with mining problems.

Sections 761.12(d) (2) and (3) are being revised for clarity. No substantive change is intended.

One commenter objected that OSM has exceeded the requirements of the Act by requiring an additional two-week notice of a public hearing on a road decision. The commenter suggested that once the initial notice is published providing the opportunity for a public hearing, those persons concerned can be notified directly. However, notice of a public hearing must be provided in advance to all who might wish to participate or attend. Therefore, this suggestion was not adopted.

Section 761.12(d)(4) specifies that a written finding will be made based upon information received at the public hearing within 30 days after completion of the hearing as to whether the interests of the public and affected landowners will be protected from the proposed mining operations. This section is being revised in conjunction with the changes to Section 761.12(d) (2) and (3) to provide that a finding will be made within 30 days after completion of the hearing, or after the public comment period ends if no hearing is held.

One commenter supported the amendments to Section 761.12(d), except for the amendment to Section 761.12(d)(4), which the commenter believed to be too restrictive on the regulatory authority. The amendment is being made to clarify that if no hearing is held, the regulatory authority must make a decision after the public comment period ends. If the amendment were not made, there would be no requirement that the regulatory authority make a decision in those cases where no hearing is held.

## SECTION 761.12(e): WAIVERS

Section 761.12(e) provides requirements for obtaining waivers from the prohibition on mining within 300 feet, measured horizontally, of an occupied dwelling. OSM previously proposed changes for this section (*45 FR 8240-8245*, February 6, 1980) and repropoed these and additional amendments in the June 10, 1982 Federal Register. OSM is adopting Option 2 for Section 761.12(e)(1), as proposed on June 10. Second, OSM is adopting the proposals for new paragraphs (e)(2) and (e)(3). The final rule provides the following:

Previously Section 761.12(e) is redesignated as Section 761.12(e)(1), providing that where proposed surface coal mining operations will be conducted within 300 feet, measured horizontally, of any occupied dwelling, the permit applicant shall submit with the application a written waiver by lease, deed, or other conveyance from the owner of the dwelling, clarifying that the owner and signator had the legal right to deny mining and knowingly waived that right. The waiver shall allow such operations within a closer distance of the dwelling as specified.

A new Section 761.12(e)(2) is added providing that where an applicant for a permit after August 3, 1977, had obtained a valid waiver from the owner of an occupied dwelling prior to August 3, 1977, a new waiver will not be required to mine within 300 feet of that dwelling.

A new Section 761.12(e)(3)(i) is added, which provides that where an applicant for a permit after August 3, 1977, had obtained a valid waiver, the waiver will remain effective against subsequent purchasers who had actual or constructive knowledge of the existing waiver at the time of purchase. New Section 761.12(e)(3)(ii) provides that a subsequent purchaser shall be deemed to have constructive knowledge if the waiver has been properly filed in public property records pursuant to State laws or if mining has already proceeded to within the prohibited distance at the time of purchase.

A number of commenters opposed the proposed amendment to Section 761.12(e)(1) that provided that the waiver could be submitted as part of a lease, deed, or other conveyance and that clarified that the owner and signator had the legal right to deny mining and must knowingly waive that right. The commenters objected that this specificity exceeds the requirement of section 522(e)(5) of the Act which does not specify the form or language of the waiver. One commenter noted that the change appears unnecessary since the previous regulatory language already provided that the "waiver must be knowingly made and separate from a lease or deed unless the lease or deed contains an explicit waiver ." (emphasis added by commenter). Finally, one of these commenters noted that a waiver is in the nature of a license which is not an estate in land such as would be transferred by a lease, deed, or other conveyance.

The final rule specifies the minimum requirements necessary to interpret the waiver provision of section 522(e)(5) of the Act and does not specify in detail the form or language required. The term "other conveyance" is intended to cover any written instrument, not just land conveyance procedures. Therefore, in those States where waivers would not normally be found in deeds, or leases, the regulation provides an alternative means for the owner to waive the distance limitation.

Several commenters supported the proposed amendments to Section 761.12 (e)(2) and (e)(3).

Two of these commenters suggested that constructive notice of a waiver should not include mining has already proceeded to within the 300 foot limit. One of them stated that open, visible mining is actual notice, not constructive notice and suggested that instead, constructive notice should include "if mining within the 300-foot limit has been proposed in a permit application on file with the regulatory authority." OSM agrees that visible mining is actual notice of mining, but it is constructive notice that a waiver exists. For example, an owner waives the right to prohibit mining within 300-feet of his dwelling and allows the operator to mine to within 200 feet of his dwelling. A subsequent purchaser is not told of the written waiver, but upon inspecting the property prior to settlement sees that mining has been conducted within 250 feet of the dwelling. The purchaser would then be deemed to have constructive notice of the waiver and would be well-advised to discover the exact provisions of it prior to purchase.

The other commenter who objected to this provision stated that there would be nothing to prohibit an operator who has mined within 295 feet of an occupied dwelling with the knowledge of the previous owner to continue to mine to within 50 feet of the dwelling when a subsequent purchaser has moved in. The commenter has misunderstood the provision. Constructive notice can only be based upon an actual, written waiver which specifies the distance to which the operator may mine. Illegal mining to within 295 feet of the dwelling does not give rise to an implied waiver. An operator who has mined to within 295 feet of an occupied dwelling without valid existing rights or a written waiver, is either operating under an invalid permit or is outside the approved permit area.

Finally, one commenter was disturbed by the sentence in the preamble to the proposed rules which stated: "It should be noted that a valid waiver may encompass the transfer of both valid leases and permits." The commenter expressed concern that this sentence might mean that waivers are assignable and may be transferred to other operators. The commenter stated that waivers are a personal right which cannot be assigned. As an example, the commenter noted that it was possible that an owner might allow a reputable coal company to mine within 300 feet of his dwelling, but would not want less reputable operators to do so.

The Act does not preclude a waiver from being assigned or transferred. The Act is also silent as to whether the waiver can or must be irrevocable. The specific terms of the waiver must be based upon local law. Section 510(b)(6) of the Act clearly provides that "nothing in this Act shall be construed to authorize the regulatory authority to adjudicate property rights disputes." However, the waiver must remain valid during the time that mining occurs within 300 feet of the occupied dwelling.

#### SECTION 761.12(f): AGENCY REVIEW OF NATIONAL REGISTER OF HISTORIC PLACES

Section 761.12(f)(1) establishes requirements and procedures for consulting with agencies which have responsibility for reviewing the impact of mining on public parks and historic places. OSM is revising this section to eliminate reference to privately owned places or to places eligible for listing on the National Register of Historic Places. This reflects a change similar to that for Section 761.11(c), discussed above. This amendment also modifies the language to "Where the regulatory authority determines that the proposed surface coal mining operation will adversely affect any public park or

any publicly owned site \* \* \*." (Emphasis added.) The previous rules used "may" rather than "will." These changes are made to reflect the actual wording of section 522(e)(3) of the Act. The change further provides that the regulatory authority will make the determination of whether the proposed operation will adversely affect the park or place. Having the regulatory authority make this determination will reduce the number of permit applications that will have to be referred to consulting agencies.

A number of commenters objected to substituting the word "will" for "may" since the change will allow the regulatory authority to prejudge the impact of mining without the benefit of the input from the agency with expertise. The language change, however, reflects the actual wording of the Act. If it appears that a public park will be adversely affected by a proposed mining operation, the regulatory authority must seek joint approval. In addition, concerned agencies will have an opportunity to comment on all permit applications during the public comment period. One commenter stated that the National Park Service (NPS) Regional Director should have the opportunity to make a case-by-case determination as to whether a proposed operation will adversely affect any unit of the National Park System, and that upon such a finding, the regulations should provide that the NPS Regional Director have consent authority over issuance of the permit. The determination of whether a proposed operation will adversely affect an NPS unit will be made by the regulatory authority. The NPS will be afforded the opportunity to comment as an affected agency. The regulations provide that a permit shall not be issued for an operation which will adversely affect any publicly-owned park or publicly owned place listed on the National Register unless approved jointly by all affected agencies. For NPS units, this will include the National Park Service.

OSM is also revising this section to provide that where other agencies with jurisdiction over parks or places on the National Register fail to interpose an objection within 30 days from receipt of the request, this will constitute approval of the proposed permit, subject to final regulatory authority determination. This change is made because a lack of agency action could otherwise result in long delays to permit approval. It is important to establish a regularized procedure that will allow timely decision making, which at the same time does not impose an unrealistic deadline upon the responsible agencies. This rule sets such a procedure. One additional change is made, as a result of public comment, to allow the regulatory authority to grant, upon request by the appropriate agency, an additional 30 days extension of time within which to respond. Sixty days should be sufficient to overcome administrative delays, do necessary analysis, and, at the very least, interpose an interim objection.

Several commenters objected to requiring the affected agency to respond within 30 days or the lack of response would be considered approval of the permit application. These commenters suggested additional flexibility in the form of an extension of time. OSM agrees and has provided that the regulatory authority, upon request, may grant an extension of up to 30 additional days. Three commenters maintained that under no circumstances should a non-response be considered an approval. These commenters argued that the Act requires affirmative action and that silence should constitute disapproval. Although the suggestion is not accepted, OSM agrees that an agency which objects to a mining operation should do so promptly, directly, and on the record, rather than through inaction.

On the other hand, while OSM recognizes that uninformed inaction would not constitute the requisite approval, the rule includes sufficient safeguards to avoid this outcome. By providing that the regulatory authority shall specifically request the reviewing agency's approval or disapproval, the rule provides for actual notice that a decision is required. By providing that the applicable parts of the permit application shall accompany this request, the rule insures that the reviewing agency will have the information necessary to make its decision. By providing for notice that the agency has 30 days in which to respond, and that failure to respond within this or an extended period shall constitute approval, the rule underscores the consequences of inaction. And by providing for a thirty-day extension upon request, the rule gives even a hard-pressed agency ample time in which to respond. Moreover, if an agency needs additional time for deliberations, it is not precluded from interposing an interim objection until it is ready to make a final decision.

The Congress itself has explicitly recognized by statute that administrative failure to interpose an objection in the face of a stated deadline can be a legitimate mechanism for signifying lack of objection, and thus, approval. See, *42 U.S.C. Section 1973c*, and interpretation thereof in *United States v. Board of Commissioners of Sheffield, Ala.*, *435 U.S. 110, 136 (1978)*. Furthermore, in analogous situations, the U.S. Supreme Court has held repeatedly that informed inaction by the Congress can constitute approval of the interpretation given to legislation by the Executive Branch. See, e.g., *Bob Jones University v. United States*, *--- U.S. ---*, (1983); *Haig v. Agee*, *453 U.S. 280, 297-298 (1981)*. Thus, OSM has ample precedent for employing this approval mechanism in order to establish an orderly procedure for timely decisionmaking.

Section 761.12(f)(2) is revised to delete the words "mine plan approval or" from the requirement that a mine plan approval or permit for the operation shall not be issued unless jointly approved by all affected agencies. This change is made to be consistent with rules published April 5, 1983 (*48 FR 14814*) which delete the definition of mine plan area and the use of the phrase "mine plan" in all of 30 CFR Chapter VII.

OSM also considered clarifying what are the "affected agencies" which must approve of a permit where the proposed operation will adversely affect places listed on the National Register. However, the term "affected agencies" is adequately defined in paragraph (f)(1) as "the Federal, State, or local agency with jurisdiction over the publicly owned park or publicly owned National Register place." In the June 10 preamble, OSM stated that proposed paragraph (f)(1) would read "the Federal, State, or local agencies with jurisdiction over, or a statutory or regulatory responsibility for, the public park or publicly owned National Register site." (emphasis added). However, the underlined phrase was suspended on November 27, 1979, as a result of the litigation on the permanent program rules. (*44 FR 67942*). The phrase was inadvertently included in the proposed rule and therefore it is not being adopted today.

OSM received a number of comments objecting to the elimination from Section 761.12(f) of privately owned places listed on the NRHP and privately or publicly owned places eligible for listing on the NRHP. Several commenters supported the proposed changes. These comments are addressed in the discussion of the amendments to Section 761.11(c), as are comments relating to OSM's responsibility under the National Historic Preservation Act.

#### SECTION 761.12(h): ADMINISTRATIVE AND JUDICIAL REVIEW

Section 761.12(h) is being amended to reflect the expected revision of 30 CFR Parts 787 and 788, which will be consolidated into a new Part 775. No substantive change is being made to Section 761.12(h); the revisions are the cross-references to new Part 775.

### **PART 762 -- CRITERIA FOR DESIGNATING AREAS AS UNSUITABLE FOR SURFACE COAL MINING OPERATIONS**

#### **SECTION 762.5 - DEFINITIONS**

**FRAGILE LANDS:** Previous Section 762.5 provided that the term "fragile lands" means geographic areas containing natural, ecologic, scientific, or esthetic resources that could be damaged or destroyed by surface coal mining operations. A number of examples were then provided, including uncommon geologic formations and buffer zones adjacent to the boundaries of areas where surface coal mining operations are prohibited. OSM proposed two alternative revisions to this definition and is adopting Option 1 with one modification.

In Option 1, as proposed, the term "damaged" was proposed to be modified by adding "irreparably" to reflect the fact that mining is an appropriate temporary use of the land and should not be prohibited where adequate reclamation can be accomplished. Instead of adding the work "irreparably," OSM in response to numerous comments has decided to add the modifier "beyond an operator's ability to repair or restore." This phrase is a clearer standard consistent with OSM's reasoning that mining is a appropriate temporary use of the land in most situations. An interruption of certain activities or a diminution of particular values during mining is not sufficient to classify the land as fragile if the activities or values can be restored. However, mining, even when fully reclaimed, may result in permanent changes which may be undesirable. In such cases, this definition and other provisions allow for protection. In addition, the "fragile lands" example of "areas where mining may cause flooding" is changed, as proposed, to "areas where mining may result in flooding" as mining may not in itself be the direct cause.

Several commenters suggested that OSM delete all definitions in Section 762.5, including the definition of fragile lands. These commenters contended that the States are better equipped to define these terms on the basis of local variables, and Congress intended the States to be responsible for implementing the designation process by applying the criteria on a petition-by-petition basis. The commenters argued that the definitions exceed Congressional intent and are unnecessary because decisions must be made on a case-by-case basis. These commenters suggested that if the definitions are retained, the examples listed should be completely eliminated, because they are unnecessary or beg further definition. OSM agrees that petition decisions are made on a case-by-case basis, but some standard is needed to assist regulatory authorities. Thus, OSM has decided to retain the list of examples, at the request of other commenters who find the

examples helpful. The list of examples is not intended to be all-inclusive. Rather, the examples are intended to assist States, petitioners and operators in interpreting the Act's use of the phrase "fragile lands."

A number of commenters supported adoption of Option 2. Option 2, as proposed, would have narrowed the definition still further from the changes proposed for Option 1. In addition to those changes, the qualifying words "important" and "significantly" would be added so that the definition would have read: Fragile lands means geographic areas containing important natural, ecologic, scientific or esthetic resources that could be irreparably and significantly damaged or destroyed by surface coal mining operations. Adding the words "important" and "significantly" would parallel the wording of section 522(a)(3)(B) of the Act. However, OSM is not adopting the modifiers "important" and "significantly" because these qualifying terms are already included in the criteria of Section 762.11 to ensure that areas lacking important values are not designated unsuitable. OSM also proposed in Option 2 to eliminate the reference to "buffer zones" since Congress specifically included certain buffer zones in the limitations of section 522(e) where it wanted to establish such buffer zones.

One of the commenters who supported Option 2 recommended deleting "ecologic" resources, as the term is not used in the Act or defined in the rules. The term "ecologic" is generally defined as the branch of biology dealing with the relations between organisms and their environment. OSM believes the meaning of the term is generally understood and has decided to retain it.

Commenters suggested deleting the examples of "environmental corridors containing a concentration of ecologic and esthetic features" and "areas of recreational value due to high environmental quality" as being vague and overly difficult to interpret. As noted above, however, OSM has decided to retain the examples, while emphasizing that the list is not all-inclusive.

One commenter suggested deleting the example of "areas where mining may result on flooding" as the concept of flood damage would be more appropriate under the definition of natural hazard lands. However, the two concepts of flood damage are dissimilar. In the case of natural hazard lands, the danger of flooding is inherent. In fragile lands, the potential danger is produced by artificial means.

Several commenters supported deletion of the example of buffer zones. Other commenters strongly supported retention of the example because of Congress' interest in protecting the areas adjacent to areas where mining is prohibited or limited in section 522(e) of the Act. As one commenter noted, OSM's statement in the previous preamble (March 13, 1979) was that "(b)y providing for buffer zones, OSM is ensuring that areas around national parks and other section 522(e) areas not be overlooked as fragile lands. (Including these areas as examples (of fragile lands) does not mean that they would automatically be designated unsuitable." *44 FR 14996*. OSM has decided to retain the example, but has modified the language to indicate expressly that buffer zones do not automatically qualify as fragile lands. Buffer zones adjacent to the boundaries of Congressionally protected areas in section 522(e) may be considered fragile lands if the protected areas have characteristics which require additional areal protection or if the buffer zones themselves contain fragile resources.

Several commenters objected to any revision in the definition and particularly urged that the word "irreparably" not be added to modify the term "damaged". These commenters disputed OSM's statement in the preamble to the proposed rules that "mining is an appropriate temporary use of land and should not be prohibited where adequate reclamation is possible." *47 FR 25286*. The commenters noted that the mandatory "reclamation" criteria of section 522(a)(2) of the Act for designating lands unsuitable are distinct from the discretionary bases of impacts on fragile and historic lands in section 522(a)(3) of the Act and should not be linked by the word "irreparable".

In response to these comments and for the reasons noted above, OSM has decided to substitute the phrase "damaged beyond an operator's ability to repair or restore" in place of "irreparably damaged". OSM agrees that the mandatory criteria in section 522(a)(2) are distinct from the discretionary criteria in section 522(a)(3) of the Act. However, clarifying the definition does not diminish the discretion of the regulatory authority to designate areas as unsuitable.

**HISTORIC LANDS:** The previous definition of "historic lands" included a broad array of historic, cultural, and scientific areas.

OSM proposed to define "historic lands" to mean "important historic, cultural, and scientific areas that could be irreparably damaged or destroyed by surface coal mining operations. Examples of historic lands include sites listed on the National Register of Historic Places, National Historic Landmark sites, and sites for which historic designation is pending." This change would have added the terms "important" and "irreparably" to make clear that areas of minor importance or temporary disruptions would not qualify a site for designation. In addition, OSM proposed to reduce the list of examples to the types of areas which would clearly qualify for designation and delete the term "eligible for listing" to eliminate confusion over its meaning.

OSM has chosen to adopt a final definition which parallels the final definition for "fragile lands". Instead of adding the term "irreparably", OSM is substituting the phrase "damaged beyond an operator's ability to repair or restore" which is consistent with OSM's belief that mining is an appropriate use of the land in most situations. OSM is not adopting the modifier "important" because this qualifying term is already included in the criteria of Section 762.11 to ensure that areas lacking important values are not designated unsuitable.

As with the definition of "fragile lands", the list of examples is being retained at the request of commenters who find it helpful. The comments received on this definition are substantively identical to those received on the definition of "fragile lands" and are discussed above under that definition.

**RENEWABLE RESOURCE LANDS:** OSM proposed to add a definition of the term "renewable resource lands" to clarify its use as a discretionary basis for designation of unsuitability under the Act (section 522(a)(3)(C)). "Renewable resource lands" was proposed to mean "geographic areas which contribute significantly to the long-range productivity of water supply or of food or fiber products, such lands to include aquifers and aquifer recharge areas." OSM is adopting the definition as proposed. Two commenters suggested that the term "geographic areas" should be further defined. The term is generally understood to mean an area defined by its physical or natural characteristics and OSM believes further definition is unnecessary. One commenter suggested substituting the word "substantially" for the word "significantly" and modifying aquifers with the word "important". However, the word "substantial" is more appropriate to the criteria to be used by the regulatory authority and is already included in Section 762.11. The phrase "such lands to include aquifers and aquifer recharge areas" is the actual wording used in section 522(a)(3)(C), so OSM is not adding the modifier "important". For this reason, OSM also rejected the suggestion of another commenter who advocated expanding the definition to include watershed lands and cultural or grazing lands. While these types of lands may, on a case-by-case basis, be determined to be renewable resource lands, there is no reason to list them specifically in the rule. One commenter objected to inclusion of the qualifier "significantly", for the same reasons that the commenter objected to the definitions of "fragile lands" and "historic lands". OSM believes, however, that some qualification is necessary to provide guidance to the regulatory authority.

**SUBSTANTIAL LEGAL AND FINANCIAL COMMITMENTS:** OSM proposed to revise the definition of substantial legal and financial commitments (SLFC). The existing definition requires both investments and commitments in capital-intensive activities and a long-term coal contract. The proposed revision would have recognized that substantial commitments can be made with or without a long-term coal contract.

Following a review of the legislative history, OSM has decided to retain the existing definition.

Several commenters contradicted OSM's statement in the preamble to the June 10 proposed rules that the House committee which discussed the role of contracts may have been merely describing an example of the type of commitment required (H. Rept. No. 95-218, 95th Cong., 1st Sess. 95 (1977)). The commenters noted that the House Report states:

The phrase substantial legal and financial commitments in the designation section and other provisions of the Act is intended to apply to situations where, on the basis of a long-term coal contract, investments have been made in power plants, railroads, coal handling and storage facilities and other capital-intensive activities. The Committee does not intend that mere ownership or acquisition costs of the coal itself or the right to mine it should constitute "substantial legal and financial commitments".

The commenters further note that it was the House bill that was adopted by the Conference Committee and passed by the Senate. Moreover, the statutory phrase "substantial legal and financial commitments" originated in the first version of SMCRA in S. 425 in 1973. The Senate Report on S. 425 stated:

Mere ownership of the coal resource with the intent to surface mine would not qualify for the exemption from designation as unsuitable for surface mining based on "firm plans for and substantial legal and financial commitments". In order to preclude designation, it must be established that specific plans and specific contracts for sale of coal and purchase of necessary equipment for an actual mining operation were in existence on the date of enactment.

S. Rept. No. 93-402, 93rd Cong., 1st Sess. 68 (1973).

The coal contract requirement as a precondition to granting an exemption from designation on the grounds of substantial legal and financial commitments, is repeated throughout the legislative history. See, e.g., H. R. Rept. 94-95, 94th Cong., 1st Sess. 91 (1975).

Therefore, OSM is retaining the existing definition.

**NATURAL HAZARD LANDS:** OSM proposed no change to the definition of "natural hazard lands". Two commenters suggesting deleting all the definitions in Section 762.5. However, as stated in the discussion of "fragile lands", OSM has decided to retain the definitions.

#### **SECTION 762.11 - CRITERIA FOR DESIGNATING LANDS AS UNSUITABLE**

OSM considered revising Section 761.11(b) to provide that lands should be designated only on the basis of allegations raised in the petition rather than on the basis of any or all criteria for designation specified in the Act, regardless of whether or not they were alleged by the petitioner. This concept would deny regulatory authorities the discretion to designate areas on the basis of information or allegations not provided in a petition. OSM has chosen, as discussed in the proposed rules, to maintain the existing rule intact, at the request of States which want an opportunity to implement the processes for designating lands unsuitable under the identified criteria in a variety of acceptable ways.

#### **SECTION 762.12 - ADDITIONAL CRITERIA**

Section 762.12 provides that State regulatory authorities and the Secretary may establish additional criteria for determining whether lands within their jurisdiction should be designated as unsuitable for surface mining operations. As noted in the June 10, 1982 preamble to the proposed rules, OSM has received comments requesting deletion of this section. However, OSM notes that, as stated by the court in *In re Permanent Surface Mining Regulation Litigation*, No. 79-1144 (D.D.C. Feb. 26, 1980 at p. 26), section 523(a) of the Act states: "The Federal lands program shall, at a minimum, incorporate all of the requirements of this act \* \* \*." The decision goes on to state that "The language 'at a minimum' indicates Congressional authorization for the Secretary to establish additional criteria for Federal lands. Similarly, the language 'more stringent' in section 505(b) of the Act, permits State regulatory authorities to promulgate factors in addition to those enumerated in the SMCRA." The provisions of additional criteria are at the discretion of the States. Therefore, no change was proposed for or is being made to Section 762.12.

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

#### **PREVIOUS SECTIONS 764.2 AND 764.3**

As proposed, previous Sections 764.2 and 764.4, entitled "Objective" and "Authority," are removed to streamline the chapter by eliminating unnecessary and redundant provisions.

#### **SECTION 764.13(a): RIGHT TO PETITION**

Section 764.13(a) specifies who has the right to petition to have an area designated unsuitable. OSM proposed to restrict the right to petition (standing) to persons having a property interest in land or mineral resources which is or may be adversely affected. This would have limited the right to petition to persons with tangible ownership interests in land or mineral resources. The proposal was an effort to balance the interests of potential mine operators or mineral owners with

the non-economic interests usually represented in petitions. OSM was concerned that the previous rule was so broadly stated that persons with a very minor interest might be able to prevent mining. Several commenters also expressed this concern and suggested the petitioner be directly impacted by potential mining. Most commenters, however, opposed the proposal, and pointed out that there is no basis in the Act or its legislative history for such a restrictive position.

The majority of commenters opposed the proposed property ownership restriction; however, a few commenters supported limiting standing to property ownership. One commenter suggested that "water rights" be included with land and mineral resources. Another commenter recommended that standing be limited to owners of land adjacent to the minesite. One commenter suggested that other "real legal interests" be added to land and mineral resources. Several commenters support restricting standing to individuals suffering a direct injury but not bound to property ownership. Several commenters warned OSM of the need to restrict standing to avoid harassment petitions.

OSM has decided to adopt an "injury in fact" test to ensure that petitioners have a significant interest, but not necessarily a property interest. The "injury in fact" test requires the petitioner to demonstrate that he or she is among the injured and how the alleged adverse impact will directly affect him or her. OSM will not adopt the property ownership restriction or other like limitations. A review of legislative history indicates that Congress did not intend to place such specific restrictions on who may petition for an area to be designated as unsuitable for mining. The House Committee Report No. 95-218, April 22, 1977, states that "a number of decisions to be made by the regulatory authority in the designation process is contingent on the outcome of land use issues which require analyses of various local and regional consideration and that citizen involvement in all phases of the regulatory scheme will help ensure that the decisions and actions of the regulatory authority are grounded upon complete and full information." The Committee further stated that "any person having an interest which is or may be adversely affected" shall be construed to be coterminous with the broadest standing requirements enunciated by the U.S. Supreme Court. The Court sanctioned broad principles of standing in *Association of Data Processing Service v. Camp*, 397 U.S. 150 (1970), and held that in the absence of a given statute's intent to narrow the availability of judicial review, standing is extended to any person who (a) suffered "injury in fact" and (b) the interest is arguably within the zone of interests to be protected or regulated under that substantive statute governing the agency's action. The legislative history and the Supreme Court rulings reflect that standing should not be limited to property owners but to those suffering direct injury.

The rule adopted is equivalent to an "injury in fact" test. This will ensure that petitioners have legitimate interests in the specific area being petitioned as unsuitable for surface coal mining operations. The "injury in fact" test requires more than an injury to a cognizable interest. It requires the party seeking review to be himself among the injured. "Injury in fact" had been previously defined by the U.S. Supreme Court in *Association of Data Processing Service v. Camp*, *supra* and in *Barlow v. Collins*, 397 U.S. 150 (1970), to mean that the person seeking review alleges the challenged action caused or will cause him "injury in fact" and the alleged injury was to an interest arguably within the zone of interests to be protected or regulated by statute. The test adopted will limit standing only to persons who are or will be directly injured by surface coal mining operations in a specific area and encourage petitions that have serious merit.

#### SECTION 764.13(b): DESIGNATION PETITIONS

Section 764.13(b) lists the information that a petitioner must set forth in a petition. OSM proposed two options to revised existing requirements, primarily by providing the State regulatory authority flexibility to impose additional information requirements and to require more substantive information for designation petitions.

OSM will adopt a combination of Option 1 and Option 2 as the final rule. The requirements being adopted for the contents of a petition are intended to provide substantive facts for the regulatory authority to evaluate the petition, to emphasize the importance of the petition, and to provide a specific presentation of allegations as they relate to the petitioner's described interests and to the criteria specified in the Act.

First, OSM will adopt the requirement the petitioner(s)' signature(s) be notarized. Most commenters support this requirement. A notarized signature will emphasize the importance of the petition and the need for a serious document. The requirement for notarized signatures will also prevent the inclusion of unauthorized names on a petition.

Second, OSM is adopting a requirement that the petition area be identified on a U.S. Geological Survey (USGS) topographic map outlining the perimeter of the petitioned area. This change is specifically supported by some

commenters and will assist both the petitioner and the regulatory authority in identifying the petition area. Such maps are inexpensive and easily obtained.

Third, OSM is adopting a requirement that the petitioner demonstrate how he or she meets the "injury in fact" test provided in Section 764.13(a). This is no more than a showing that the petitioner has interests that would be directly affected. Such showings are fully consistent with judicial requirements for standing and are neither unusual nor onerous.

Fourth, OSM is adding a requirement that the facts and evidence provided cover the entire petitioned area. Without this requirement, it is possible for a petitioner to include large areas for which allegations are made but no evidence presented. Section 522(c) of the Act specifically requires both allegations of fact and supporting evidence. It is neither logical nor proper to include areas in a petition which are not covered by such evidence. In effect it would allow a person to submit a petition without meeting the requirements of the Act.

Fifth, OSM is adding a requirement that the petitioner assume contemporary mining practices required under the applicable regulatory program will be followed. That is, any mine would have to meet the requirements of the Act; a petitioner may not assume mining impacts that would be prevented by the environmental protection requirements mandated by the Act. Any petition based upon such preventable impacts would have no merit.

Sixth, petitioners will be required to relate allegations and evidence to the criteria for designating an area unsuitable for mining. This requires no new evidence; rather, a petitioner must describe how the problems presented meet one or more of the mandatory or discretionary criteria for designation. This will help focus the evidence presented and avoid collection or consideration of materials which are not relevant. If a planned mining operation is known, the allegations should relate to the specifics of the operation.

Many commenters supported retaining the previous regulation with minor changes such as adding the requirement to identify the area by legal description. These commenters argued the previous regulation was adequate and that the proposed options would stifle the petition process. OSM disagrees that the proposed substantive informational requirements will adversely affect the petition process. The changes require little additional detail; rather, the petitioner is being required to relate the facts presented in the petition to the requirements of the Act. Substantive information requirements that are not onerous will improve the quality of the petition process. OSM has found that under the previous regulation, very large areas for which no evidence was presented were included in petition areas (Alton petition, Tongue River petition), thus requiring significant efforts by OSM and other interested parties on issues of questionable merit. Also, some petition allegations have been based on mining damage which would be prevented or mitigated by following the requirements of the Act. The adopted informational requirements will require little or no additional information gathering on the part of a petitioner, but will require the petitioner to focus the allegations and supporting evidence to demonstrate that mining in this specific area will result in a direct injury to the petitioner's interests and that the area is worthy of designation under the criteria specified by the Act.

Several commenters supported Option 1 or Option 2 with various minor modifications. A combination of these options will be adopted to assure that the requirements are specific, address relevant issues, identify the specific area petitioned for designation, and allow the State regulatory authority flexibility to request additional supplementary information.

One commenter suggested that the regulatory authority require county plat maps as well as USGS topographical maps. The regulatory authority has the discretion in Section 764.13(b)(2) to require these maps, if desired, so long as they are readily available to the petitioner.

Some commenters questioned the definition of the term "contemporary mining practices." These commenters contended that the term "contemporary mining practices" is vague, subjective and an indefensible concept that varies with local geographic and economic conditions. The commenters urged that the regulatory authority specify what constitutes "contemporary mining practices" in the specific surface coal mining areas. Surface mining operations are required to conform to contemporary mining practice as required by States' regulatory programs. Each regulatory authority defines required contemporary mining practices under its applicable regulatory program. Petitioners should assume that such practices will be followed by a potential mining operation when determining possible adverse effects of the surface mining operations.

Some commenters wanted the State regulatory authorities to have no discretion in petition content or procedures. These commenters contended nationwide consistency will be impossible if discretion is given to regulatory authorities. Several commenters supported this flexibility for the State. OSM agrees with the latter commenters that discretion to address specific needs of the particular State will enhance the petition process. OSM is providing a list of basic petition requirements for State regulatory authorities. States may modify this so long as the result is no less effective than the Federal requirement. That is, the petition process must be open and available to the public, yet sufficiently focused to permit rational decision making. These requirements will foster a high degree of nationwide consistency.

Some commenters endorsed the proposed restrictions and safeguards to guarantee that the petition process be a serious one. OSM agrees that the petition process is indeed a serious matter and the provisions adopted are intended to safeguard the process.

One commenter recommended that proposed Section 764.13(b)(1)(v) be amended by removing the words "has affected" from the provision that reads "\* \* \* how mining of the area has affected or may adversely affect people, \* \* \*." OSM rejects this suggestion. The proposed language has been adopted in Section 764.13(b)(1)(iv). The language "has affected" is useful to show that what has happened in the past may recur if not precluded by designation.

Another commenter urged that petitioners not be required to notify property owners of the petition. The commenter believed that Congress implied that the State give proper notice. OSM agrees that notice is potentially too heavy a burden for a petitioner and is likely to discourage or prevent certain individuals from petitioning. It is more appropriately a government function and should not fall on the petitioner. Consequently, OSM has not adopted this proposed provision. The regulatory authority will be required to notify the general public, interested governmental agencies, intervenors, persons with an ownership interest of record, and other persons pursuant to the criteria set forth in Section 764.15.

Several commenters wanted to require petition allegations to be based on competent information and scientifically sound data. Section 764.13(b)(1)(v) requires allegations of fact and supporting evidence which tend to establish that the area is unsuitable for all or certain types of surface coal mining operations. Section 522(c) of the Act mandates that the petition contain allegations of facts with supporting evidence which would tend to establish the validity of the allegations. The language from the Act is used in the final regulation for petition requirements. Section 522(a)(1) provides for the State regulatory authority to make designation decisions based on competent and scientifically sound data and information. The regulatory authority is required to evaluate sound information and scientific data from all sources, including its own files and investigations. Petitioners are required to submit sound information. However, many sound presentations can be made without "scientific" data, if that term is used in a restrictive sense. Scientific data will not be required as this type of requirement could potentially limit citizen participation in the designation process, thereby defeating the purpose of the process.

#### SECTION 764.13(c): TERMINATION PETITIONS

Section 764.13(c) identifies information required in petitions for the termination of unsuitability designations. Like Section 764.13(b), this section was proposed to be amended in its entirety to allow regulatory authorities to expand the information requirements for termination petitions. The proposed changes are similar to those proposed in Option 1 for designation petitions. The main difference is that allegations of facts and supporting evidence must be focused on the reasons why the designation now is inappropriate and should be terminated.

OSM is adopting the proposals for Section 764.13(c)(1) with only a minor modification to Section 764.13(c)(1)(iii) and by adding a sentence to clarify the nature of designation in Section 764.13(c)(1)(iv). A complete petition for termination must include: (1) petitioner's name, address, telephone number, and notarized signature, (2) an identification of the petitioned area, including its location and size and a U.S. Geological Survey topographic map outlining the perimeter of the petitioned area, (3) an identification of the petitioner's interest which is or may be adversely affected by the continuation of the designation, (4) and specific allegations of facts included for all lands for which the termination is proposed with supporting evidence not contained in the record of the proceeding in which the area was designated unsuitable that tend to establish that the designation should be terminated. OSM believes that petition requirements should be consistent for termination and designation petitions.

OSM is also adopting the portion of proposed Section 764.13(c)(2) that required that the petition include allegations of fact with supporting evidence that tends to establish that the petitioner has an interest which may be adversely affected by the continuation of the designation. This requirement is now included in Section 764.13(c)(1)(iii). OSM is also adopting a provision requiring that allegations be specific as to the portions of the designated area to which they apply and be supported by evidence that tends to establish the validity of the allegations for the portion of the designated area, assuming that contemporary mining practices required under applicable regulatory programs would be followed if the area were to be mined. This provision, which is now included in paragraph (c)(1)(iv), will provide States a focused presentation of allegations, reasons for the determination designating the area as unsuitable, and the reasons the designation should now be terminated. For areas previously and unsuccessfully proposed for termination, significant new allegations of fact and supporting evidence must be presented in the petition.

OSM is adopting the proposal in Section 764.13(c)(3), now renumbered (c)(2), that allows the regulatory authority to request the petitioner to provide other supplementary information which is readily available. Readily available information could include public documents or other publicly available information which can be obtained and used by a person who has no special training or knowledge. Failure to include such information will not make a petition incomplete.

Several commenters urged that termination petition requirements be consistent with those adopted for designation petitions. OSM agrees with these commenters. The changes described above will make the requirements consistent.

Comments that address both designation and termination petitions will not be discussed separately for termination petitions when the discussion under designation petitions would also apply to termination petitions. These issues include the discussion for requiring the petitioner to use competent and sound data, regulatory authority flexibility to require additional information, specific identification of the area being petitioned, and property ownership to restrict standing.

One commenter urged that the previous requirements be retained for termination petitions. The same commenter asserted that the proposed changes are consistent with Option 1 for designation petitions and have no legal, substantive or procedural justification for the added information requirements. A detailed analysis of the proposed information requirements for designation petition can be found in the discussion of comments for Section 764.13(b). OSM is adopting requirements that are consistent for both types of petitions.

One petitioner recommended that OSM adopt requirements similar to Option 2 proposed requirements for designation petitions because it requires the most information. This commenter urged that petitioners be required to provide complete available information. OSM is adopting some Option 2 requirements for termination and designation petitions as described above.

## **SECTION 764.15 - PROCEDURES**

### **SECTION 764.15(a)(1): COMPLETENESS FINDING**

Previous Section 764.15(a)(1) provided a 30-day time limit within which the regulatory authority must notify the petitioner by certified mail as to whether the petition is complete. OSM proposed and will adopt an amendment to allow the regulatory authority 60 days to make a completeness determination. The extended time limit will allow use of new initial hearing procedures and more extensive analysis of the requirements provided in Section 764.13 (b). Additionally, OSM will adopt the proposal defining "complete," to mean that the information required under Section 764.13 (b) or (c) is contained in the petition.

Commenters expressed various ideas for the completeness review proposal. Some commenters support allowing 60 days for a completeness review as a measure to ensure that a complete initial scrutiny of the petition can be accomplished before beginning the next step in the process. Some supported the extended review period, but opposed a hearing. Other commenters oppose extending the time to 60 days. These commenters see the extension as increasing the vulnerability for surface coal mining operators.

Sixty days will allow the regulatory authority to make a detailed review of the petition for completeness, and decrease the vulnerability of operators by screening out incomplete petitions early in the process. Operators and petitioners are exposed to less financial or opportunity risk when a "completeness" determination can be made during the initial steps of the process.

This hearing and extended completeness review process is a discretionary means of helping the regulatory authority make its initial determination. It is not specifically required by the Act. Moreover, a hearing on completeness does not substitute for the later hearing on substantive issues, and is not itself the appropriate means to consider substantive issues.

Some commenters urged that completeness be more specifically defined. The completeness definition adopted is adequately specific to identify the information required. Additional detail would unnecessarily limit regulatory authority discretion.

#### SECTION 764.15(a)(2)

Section 764.15(a)(2) has been retained unchanged.

#### SECTION 764.15(a)(3) Real and Foreseeable Potential

Final Section 764.15(a)(3) is being adopted to enable the regulatory authority to suspend petitions on lands where there is no real and foreseeable potential for surface coal mining operations to occur. "Real and foreseeable" potential means that the petitioned lands are likely to be subject to leasing or mining activity within 5 years. This concept will allow regulatory authorities to set a time frame for evaluating petitions in relation to the likelihood of mining activity. Unless regulatory authorities can limit their evaluation of petitions to areas where mining is likely to occur within a reasonable period of time, they could be obligated to process unsuitability petitions immediately for which a clear need could not be shown. OSM considered various other options, which would have given regulatory authorities discretion to define "real and foreseeable potential," including 1 year, 10 years, and no specific time frame. Any such provision would have had to include a requirement that no mining could occur until any suspended petition was evaluated.

If a petition is suspended under Section 764.15(a)(3) because there is no real or foreseeable potential for mining to occur, once a year the petitioner may request the regulatory authority to reaffirm its earlier determination. If it is determined that there is a real or foreseeable potential for mining to occur, processing of the petitions would continue. New Section 764.15(a)(8) clarifies that when a petition has been suspended pursuant to Section 764.15(a)(3), the regulatory authority will activate the suspended petition for review upon the filing of a permit application. A decision must be made on the petition before a decision is made on any permit application received for land included in the previously suspended petition.

Some commenters supported the proposal to provide for suspension of petitions on lands with "no real or foreseeable potential" for mining. OSM agrees that the concept will provide a more flexible petitioning process while also protecting the petitioners' interests.

One commenter was concerned that this provision will in effect only allow consideration of a petition to designate lands unsuitable after mining has begun. One commenter objected to OSM providing that petitions may be disallowed for lands that have no real or foreseeable potential for mining. Another commenter believes that suspension of a petition for over a period of one year is illegal. This commenter referred to Senate Report 94-28, March 7, 1975, and maintained that Congress intended to impose a one-year deadline on petition decisions. OSM agrees that Senate Reports 94-28 and the more recent S. Rep. No. 95-128, 95th Cong., 1st Sess. (May 10, 1977), convey the intention that the State regulatory authority should be prevented from making an indefinite review by imposition of a one-year deadline on all decisions as to designations. However, the Senate connected this requirement with its intent to prevent the forestalling of coal production needlessly. OSM disagrees with the assertion that the suspension of a petition pending an imminent need for review is contrary to the Act. The real and foreseeable potential concept carries out the Congress' intent by allowing for a prudent and timely review process. OSM is not providing for petitions to be rejected, but is allowing the regulatory authority to suspend the review of petitions until the area petitioned is determined by the regulatory authority to have a real or foreseeable potential for surface coal mining operations. Once this potential is realized, the petition will be processed according to the time limitations provided by the Act and 30 CFR Part 764. The petition will then be reviewed in the same manner as petitions that are not suspended. No permit may be issued in an area covered by a suspended petition until the petition is processed (Section 764.15(a)(8)). Section 764.15(a)(3) will facilitate efficient administration of the petition process.

Some commenters endorsed the concept of real and foreseeable potential, but were not comfortable with the proposed five-year time period. Some commenters thought that there is no consistent method available to judge an appropriate

time period for real and foreseeable potential. One commenter warned that the five-year time period may interfere with the land use planning process. Another commenter recommended a two-year period based on the permitting process instead of the five years. The same commenter suggested that petitions not be accepted until leasing has actually occurred. The commenter reasoned that until the lease has been negotiated and a mine plan developed, there can be no real or foreseeable potential for the area to be mined. One commenter objected to the use of the term "leasing" because mining may not occur for many years after a lease is negotiated. OSM believes the recommendation to assess real and foreseeable potential solely by the leasing process will not necessarily decrease the time period and in some cases might extend it. Leasing and imminent mining activity are not always synonymous, particularly if there are no Federal lands involved. The proposed language is being adopted to provide the broadest possible protection by allowing real or foreseeable potential to be based on either leasing or mining activity. The five-year time period will not prejudice long-term land use planning programs but actually may benefit such programs by early identification of land requiring designation review. OSM agrees that in some cases a five-year time period is not needed. However, in other cases it will prove to benefit the operator, the petitioner and the State.

One possible benefit of such forecasting and early identification could be the conservation of resources for potential petitioners. By focusing on areas where mining is a real possibility, petitioners can avoid costly and time consuming petitions for areas which will not be affected.

One commenter suggests the concept of "frivolous" be utilized to dispose of petitions where there is no real and foreseeable potential. Frivolous and real and foreseeable potential are two separate concepts with completely different purposes. The "frivolous" standard is utilized to reject a petition lacking serious merit, whereas the "real and foreseeable" standard only suspends the review of a petition until there is a real and foreseeable potential for surface coal mining operations to exist. Merging the two concepts would not be consistent with OSM's intent.

#### SECTION 764.15(a)(4): REJECTION OF PETITIONS

Previous Section 764.15(a)(3), which is renumbered Section 764.15(a)(4), has been expanded. It requires petitions to be returned if the regulatory authority determines that a petition is incomplete, frivolous, or that the petitioner has not adequately described his or her specific affected interest and demonstrated the nature of the injury. Incomplete petitions must be returned with a written statement of the reasons for the determination and the categories of information needed to make the petition complete. The provision requiring the return of incomplete petitions is the necessary complement to Section 764.15(a)(1). Section 764.15(a)(4) also provides the standard for determining if a petition is "frivolous." Frivolous was proposed to mean that a petition or the allegations of fact and supporting evidence are "trivial, insignificant, or unworthy of serious attention" (47 FR 25302). OSM is adopting language to define a "frivolous" petition as one in which the allegations of harm lack serious merit. The concept of "frivolous" is intended to assist the States in determining if petitions lack merit. This procedure will enable the States to return petitions to the petitioner if the allegations lack serious merit. Petitions not warranting serious consideration can be identified early in the designation process. This process will enable States to allocate their resources more efficiently.

One commenter proposed that OSM adopt criteria similar to the "sufficient merit" test proposed in Section 769.14(a)(3) for frivolous. Some commenters supported the "frivolous" provision as proposed. A few commenters opposed the "frivolous" provision on the grounds that it will curb the petitioning process and lead to the establishment of a subjective petition process. Some commenters thought the use of the word "frivolous" denotes cultural or non-economic values as trivial or unworthy of serious consideration. This interpretation of frivolous was not the intent of OSM. OSM, in proposing a "frivolous" definition, was attempting to comply with the intent of Congress that criteria be adopted to preclude the consideration of frivolous petitions. See Senate Report 95-128, 95th Congress, 1st sess., 94 (1977). Most commenters supported the concept of "frivolous" but did not believe the proposed definition adequately described the process. OSM has defined frivolous in the final regulation to mean that the allegations in the petition lack serious merit. The regulatory authority must carefully evaluate the petition allegations and determine if the allegations have a serious basis for the area being petitioned. The adoption of the "frivolous" standard is not intended to exclude cultural, aesthetic or any other valid set of values from being considered in the petition process. All allegations must stand on their own merit for the specific area being petitioned as unsuitable.

## SECTION 764.15(a)(5): PREVIOUSLY PETITIONED AREAS

Previous paragraph (a)(4) of Section 764.15 is renumbered paragraph (a)(5) and modified to allow the regulatory authority not to consider a designation petition for an area which has been previously and unsuccessfully petitioned that does not contain new significant allegations of fact, together with supporting evidence. OSM is adopting this provision as proposed to provide regulatory authorities the discretion to determine whether allegations for a repeted area are nontrivial, substantive in nature, and warrant in-depth review.

Only a few comments were received on this proposal, but these comments were sharply divided. Some commenters opposed discretion for the regulatory authority to choose not to consider the petition. These commenters suggested the phrase "significant new allegations of facts" be defined to prevent ill-advised value judgments by a regulatory authority which would preclude the consideration of the petition. Other commenters recommended that discretion not be allowed and that regulatory authorities be required not to process petitions when no new allegations are presented. These commenters believed this discretion opens the door for the same lands to be subjected to review over and over without a valid reason.

In the preamble for the proposal, OSM characterized "significant" to mean allegations which are nontrivial and substantive in nature, warranting in-depth review (*47 FR 25289*). This characterization remains valid. The regulatory authority must evaluate the allegations in the previous unsuccessful petition as they relate to the new petition and determine if the new allegations present a basis to re-evaluate the area. Regulatory authorities must have the discretion to decide when areas warrant further review. However, regulatory authorities should not reopen an area for review without just cause.

## SECTION 746.15(a)(7): TIMING

Paragraph (a)(7) of Section 764.15 was proposed to be renumbered paragraph (a)(8) for editorial purposes. However, in the final rule the section number will remain Section 764.15 (a)(7).

Two options for revising the previous regulation were proposed. The previous Section 764.15(a)(7) allowed the regulatory authority to proceed with permit decisions if a petition is received after the end of the public comment period. Proposed Option 1 would allow the regulatory authority not to process any petition which pertains to lands for which an administratively complete permit application had been filed and the first newspaper notice had been published. Based on such a determination, the regulatory authority could issue a decision on such a permit application and return the petition to the petitioner with a statement explaining why the regulatory authority could not consider it. This provision was proposed to protect the interests of operators who have invested significant expense and time in preparing and submitting extensive documentation and information required for a permit application. This provision would not be applicable in cases where a permit application is filed for an area after the suspension of a petition due to a determination that no real and foreseeable potential to mine exists. In such cases, the regulatory authority is required to immediately initiate petition review upon receipt of a permit application and not issue any permit until a decision has been made on the petition.

Option 2 would provide, as did the previous rule, that any petition received after the close of the public comment period on a permit application relating to the same permit area will not prevent the regulatory authority from issuing a decision on that permit application. Under this option, OSM redefined "close of the public comment period" to mean 30 days after the last advertisement giving notice of filing of a permit application under Section 786.11(a). The previous regulation defined "close of the public comment period" as the close of any informal conference held under Section 786.14, or, if no conference is requested, at the close of the period for filing written comments and objections under Sections 786.12 and 786.13. An informal conference must be requested within 30 days of the last advertisement giving notice of the filing, but may be held at an unspecified later date. The close of the period for filing written comments was not specified; the regulatory authority was required only to provide a "reasonable time." Option 2 was proposed in response to concerns that the close of the public comment period, as defined in the previous rules, was too vague for the purpose of implementing the unsuitability process requirements. Other potential cutoff points for the public comment period were also considered.

OSM is adopting Option 1 with only a slight modification which does not change the substance of the provision. OSM is deleting the provision to return the petition to the petitioner in cases where the regulatory authority determines not to process the petition. OSM is also adding the word "insofar," to clarify that the provision applies only to lands for which

an administratively complete permit application has been received and the first newspaper notice published. A petition which included lands in addition to those covered by the permit application could be processed for consideration of these other lands. Returning the petition would be unnecessary in such cases.

Several commenters opposed Option 1 because it would allow the regulatory authority not to process any petition received after a complete permit application has been filed and the first newspaper notice has been published. These commenters believed potential petitioners will be unjustly precluded from the petition process because of inadequate knowledge of the permit status. One commenter believes the proposals will undermine the preservation of historic areas.

OSM disagrees with these comments. The provision recognizes the time after which the filing and consideration of a petition will preclude action on a permit application. The new provision will prevent the administrative processing of petitions from being used to impede surface mining operations on lands for which petitioners could earlier have filed petitions. It does not take away the right for citizen participation, but does set limits on the effects the timing of a petition filing as on a permit application. The petition process is more a general land-use planning tool than it is a means to make site specific decisions. The types of information required, the balancing of interests, the non-adjudicatory hearing and other factors all emphasize the planning nature of the process. Petitioners should be looking ahead to identifying areas which should not be mined, not reacting on a site-by-site basis. The House Committee Report No. 95-218 (1977) on page 95 states "It should be noted that the designation process is structured to be applied on an area basis, rather than a site-by-site determination which presents issues more appropriately addressed in the permit application process." This new rule does not mean, however, that important issues will not be considered or that the public will be excluded in the consideration of permits. The permit review process includes means for citizen input and for consideration of important issues. Permits may be conditioned or denied as needed to meet the requirements of the Act. Thus, although the means for participation and consideration of issues change, they are not eliminated. A further discussion of the impacts of this rule and its alternatives is contained in the "Final Environmental Impact Statement, OSM-EIS-1: Supplement." Volume I, p. IV-44.

Several commenters supported Option 1 because it recognizes the very real implications a petition has on an operator who has expended substantial resources to prepare and submit a complete permit application. One commenter compared this situation to Judge Flannery's holding (described earlier in the discussion of VER) that a "good faith" effort to obtain all permits to mine was sufficient to confer valid existing rights in areas in which Congress prohibited mining. This commenter thought no stricter rule should apply for discretionary prohibitions on mining. A few commenters supported Option 1 but recommended that it be mandatory, not discretionary, for the regulatory authority not to process any petition received which pertains to lands for which a complete permit application has been filed and the first newspaper notice has been published. Some commenters stated that any person really interested in protecting an area from surface coal mining should file a petition and not wait for mining company to begin preparing to permit the area.

The filing of a permit application does not confer statutory immunity from the filing of unsuitability petitions. Such a right exists only where an operation satisfies the criteria set forth in Section 762.13. This rule is the result of the reasonable exercise of OSM's discretion in implementing the Act. OSM has determined that the State regulatory authority should have the discretion to consider petitions filed after the publication of the first newspaper notice on a permit application if the regulatory authority believes the area warrants review. But OSM agrees generally that petitions should be submitted at an earlier time and can be so submitted without significantly disrupting the petition process. The final rule will strike a fair balance between the petitioner's interest and an operator's commitment to mine.

One commenter provided OSM with an example of how the previous designation process had delayed a specific permit decision. The petition was filed on the date of the public hearing for the permit application. This timing delayed extensively the completion of a nearly completed permit review. The "timing" provisions adopted in this section will reduce the opportunity for intentionally causing this type of delay by giving the regulatory authority the discretion to not process a petition filed after a complete permit application has been received and the first newspaper notice published.

One commenter recommended Option 1, but cautioned that it should be consistent with the proposed revisions to the permit regulations which use the concept of "administratively complete". OSM agrees and is adopting the requirement that an administratively complete permit application has been filed.

Another commenter suggested Option 1 be adopted excepting the last proposed sentence which provides for automatic petition review in cases where a petition has been suspended pending real and foreseeable potential. The

commenter urged that these conflicts can be addressed during normal permit application review.

OSM rejects this suggestion and has adopted Section 764.15(a)(8), described above. OSM's intention in providing for suspension of petitions pending a real need for review is not to circumvent the petition process. The purpose is to review the petition in a more timely manner as the regulatory authority becomes aware that a real and foreseeable potential for mining exists. Petitions that have been suspended under Section 764.15(a)(3) should generally be processed prior to the permit application review stage, but if they have not, they must be considered on their own merit and according to the petition provisions and not be made part of the permit review process. This does not preclude the two processes from being conducted simultaneously if the regulatory authority wishes.

One commenter was concerned that after an initial petition is rejected, the petitioner could continue to raise new issues in subsequent petitions, thereby blocking permits year after year. OSM agrees that this type of situation would be undesirable and has included several safeguards to help prevent this type of situation, including the provision to allow the regulatory authority to determine not to process any petition received insofar as it pertains to lands for which a complete permit application has been filed and the first newspaper notice published. Also Section 764.15(a)(5) allows the regulatory authority to choose not to consider a petition filed for an area which was previously unsuccessfully petitioned if the subsequent petition does not contain significant new allegations of facts with evidence which tends to establish the allegations. This commenter also recommended that OSM adopt a provision that subsequent petitions be considered frivolous and rejected if they make allegations which could have been raised in an earlier petition. Such a restriction would be impractical and unenforceable. Further, it is unreasonable to require a petitioner to have knowledge of all possible bases for a petition. This commenter also urged that for subsequent petitions for the same area there be no "permit block." OSM believes that it has established a reasonable safeguard by providing the regulatory authority the discretion to not process any petition received insofar as it pertains to lands for which an administratively complete permit application has been filed and the first newspaper notice published and in adopting a "frivolous" petition determination and procedures in Section 764.15(a)(4). The commenter also wanted the regulatory authority to be given the discretion to require a petitioner to post bond for injury caused any person resulting from a petition being filed if it is subsequently rejected. OSM has rejected this suggestion because Congress intended the lands unsuitable process to be open to public participation. To require the petitioner to post bond would be contrary to the intent of Congress and would preclude persons with limited financial resources from petitioning.

Several commenters were concerned with protecting operators who have made substantial legal and financial commitments for a surface coal mining operation before the petition to designate the area as unsuitable was filed. One commenter suggested that OSM adopt a requirement that the petition must be filed before the company files notice of exploration. OSM has not accepted this comment, as exploration is often speculative, may be years in advance of mining and does not otherwise provide a reasonable basis for cutting off an important citizen right.

Option 2 also would have amended Section 764.15(a)(7) by providing that, if a petition submitted during the public comment period on a permit application (i.e., prior to the filing deadline), is deemed incomplete, the State regulatory authority may allow the petitioner to resubmit the petition within 15 days from the date of rejection, even if the deadline for petition submission has passed. The proposal would have allowed a petitioner, in any case, to submit a revised petition prior to the deadline. Resubmissions after the deadline would have been solely for the purpose of clarifying or refining the materials which were originally submitted; new allegations as the basis of the petition would not be accepted. The proposal was not intended to allow petitioners to correct frivolous petitions or petitions where no apparent effort was made to meet minimum requirements. This proposed option was intended to give petitioners an opportunity to adequately respond to the requirements for completeness in proposed Section 764.13. The previous rule did not provide any mechanism for resubmission of incomplete petitions.

A few commenters supported Option 2 based on the increased discretion provided the regulatory authority. The "increased" discretion is the provision that enables the regulatory to allow a resubmission of an incomplete petition in 15 days regardless of the end of the public comment period. Some commenters opposed the proposal because they believe it would encourage petitioners to harass operators. OSM will not adopt this provision due to the increased administrative burden on the States and the possibility of harassment of operators. By making it clear that petitioners have an obligation to submit complete substantive petitions in a timely manner based on the requirements specified in Section 764.13(b), OSM is providing an additional incentive for potential petitioners to file as soon as they can reasonably do so.

## SECTION 764.15(a)(8): PERMIT DECISION WHEN PETITION SUSPENDED

See discussion under Section 764.15(a)(3).

## SECTION 764.15(a)(9): LAND USE PLANNING

Section 764.15(a)(9) was initially proposed in the June 10, 1982, Federal Register (*47 FR 25301*). OSM proposed to allow the regulatory authority to incorporate petitions into State or local land use planning programs provided such programs have protections equivalent to the petition process. To be acceptable for this purpose, a State or local land use planning program would have had to include policies and procedures consistent with those required in Parts 762 and 764 of this subchapter. OSM has decided not to adopt this provision. Commenters raised numerous objections to the proposal, and there was little support for it. No land use program which would meet the criteria set forth in the proposal was brought to OSM's attention.

Many commenters expressed tentative support for the land use planning concept, but raised concerns about how such a broad ranging idea could be effectively administered and monitored. One commenter offered an additional sentence to clarify that the procedure provide for the land use planning process only if it would be completed prior to mining. OSM never intended for this process to allow mining before a determination would be made.

Several commenters opposed the land use planning alternative. Some feared that the proposed process would not provide timely petition decisions and would allow a designation determination to be made in the absence of a petition. These commenters also were concerned that areas subject to land use planning would not receive the same consideration or level of protection as provided for by the lands unsuitable process under Part 764 administered by the State regulatory authority. Another commenter believed this process conflicts with the Act by stifling the narrow-focus petition process in favor of a broad-focus land use planning process. Other commenters asserted that the land use planning process may unnecessarily delay determination decisions and stymie the permit process. A few commenters also believed the provision would lengthen the time for designation decisions and for permit issuance. OSM agrees that an increased delay in either the permitting or petitioning process is undesirable. One commenter was concerned that an operator could begin mining before a land use planning agency had made a determination only to have the land use planning agency declare the area as unsuitable at some later date. This situation would not have occurred because of the requirements which the proposal would have imposed. One commenter suggested regulatory language to clarify the rule. OSM thanks the commenter, but has decided this type of an alternative is clearly too burdensome to adopt.

Given the number of concerns expressed, the lack of support for the proposal, and the apparent absence of any land use planning programs which would meet the criteria in the proposed rule, OSM has decided not to adopt this provision.

## SECTION 764.15(b): NOTIFICATION AND COMPLETENESS PROCEDURES

New Section 764.15(b) provides additional procedures for public participation in the completeness decision. The final rule is adopted with minor changes from the proposed rule. Specific proposed time periods within which regulatory authorities have to provide notice have not been adopted. The regulatory authority will have to act in a timely fashion, but not within 3 or 5 weeks as was proposed. This flexibility will be useful to the regulatory authorities and is consistent with the Act so long as the time periods specified in section 522(c) of the Act are met. For clarity, the discretionary procedure allowing public involvement in the completeness determination is separately included in Section 764.15(b)(2).

Under the new rule, if the regulatory authority desires to conduct a "completeness" hearing or solicit written comments it will be required to inform the specified persons and governmental agencies of the opportunity to request to participate in a completeness hearing, or to provide written comments. A completeness hearing, if scheduled, will be announced by a newspaper advertisement placed in the newspaper providing broadest circulation in the region of the petitioned area and in any State register of public notices. The petitioner is to be notified of the hearing by certified mail. The regulatory authority is required to notify a petitioner whether a petition is complete within 60 days after petition filing, as specified in Section 764.15(a)(1). Thus, a regulatory authority may hold a completeness hearing or solicit comments on completeness, but it must reach its decision on completeness within 60 days.

Several commenters opposed public participation in the completeness determination. These commenters generally believed the proposal represents an attempt to afford coal operators an opportunity to confuse and convolute the process

intended by Congress to be a simple means of designating certain lands as unsuitable for surface coal mining activities. Other commenters thought the proposed public participation procedures will place a substantial burden on the State regulatory authority. One commenter alleged it is improper to allow anyone to contest the completeness of a petition when only persons having a property interest can petition. Commenters also asserted the proposal runs counter to an effort to reduce burdensome and counterproductive regulations. Other commenters believed a "completeness" hearing will drag out the petition process. However, several commenters supported the proposal to allow the public an opportunity to comment on the completeness of a petition.

The new rule is intended to allow regulatory authorities to provide all interested persons, citizens and coal companies alike, the opportunity to comment on whether the petition is complete. The preamble to the proposed regulation explicitly stated that this process is not to be turned "into a complex battle of evidence and counterevidence over whether the area should be designated." (47 FR 25290). The hearing or written comments should address only the completeness of the petition as it relates to the petition criteria identified in Section 764.13(b). This information is not "intangible" and does not call for "arbitrary decisions" as some commenters suggested. While the presence or absence of materials to meet some requirements can be verified easily, such as the requirement for a notarized signature, the presence or absence of allegations and supporting evidence, and similar requirements, is subject to some judgment. The rule allow the regulatory authority the option to allow public participation in the completeness determination. This flexibility to tailor the designation process should not be construed as burdensome or counterproductive, as the regulatory authority has the discretion to adopt or decline this procedure according to its own needs and capabilities. OSM disagrees that a hearing will increase the time required to process a petition. The State regulatory authority is required, regardless whether a hearing is held, in Section 764.15(a)(1) to notify the petitioner within 60 days of receipt of the petition whether the petition is complete. The substance of the comment regarding property ownership is moot since OSM is not adopting the property interest restriction as the criterion to determine who has standing.

One commenter was confused as to why some provisions are triggered by receipt of a petition and others by receipt of a "complete" petition. Sections 764.13 and 764.15 provide rules for the designation and termination petition process from the initial receipt of the petition, prior to a completeness determination. It is appropriate to use receipt of the "petition" in these sections because these sections apply to all petitions. There is no conflict in using the word "complete" petition in Sections 764.17 and 764.19. These sections follow in sequence after the completeness determination. If a petition is found to be incomplete under Section 764.15, it will not be eligible for the hearing provided in Section 764.17 or a decision as provided in Section 764.19.

The proposed Section 764.15(b)(2) is renumbered Section 764.15(b)(3). Section 764.15(b)(3) requires the regulatory authority to seek relevant information on a complete petition from the general public. The previous rule required the regulatory authority to seek information within 3 weeks of a determination of completeness. The previous time period placed an unneeded administrative burden on the regulatory authority. The final rule requires that the regulatory authority act promptly, but does not specify a particular time period.

The previous regulation also required publication of a newspaper advertisement in the locale of the area covered by the petition, in the newspaper of largest circulation in the State, and in any official State register of public notices. OSM proposed to modify this provision by requiring notice in the newspaper providing broadest circulation in the region of the petitioned area rather than the newspaper with largest circulation in the State. The proposal has been adopted. In the context of this rule, "region" is intended to encompass a wider geographic area than the locale of the area covered by the petition; in any case, the advertisement should be placed in the newspaper generally read by residents of the area potentially affected by the designation petition. This change is intended to accommodate the need for adequate notice to persons with an interest in unsuitability proceedings. Publication in the newspaper of largest circulation in the State does not, in a number of circumstances, reach those persons with an interest in such proceedings. Several comments were received on the type of newspaper in which the notices should appear.

One commenter advised that if Option 2 were selected for Section 764.13(b), the newspaper notice should be deleted. Option 2 was not selected. The newspaper notice is needed to request the general public to submit relevant information on the complete petition.

Several comments were received regarding the type and the length of the newspaper notification. One commenter recommended the previous rule be retained which provides one notice for two consecutive weeks within three weeks after the completeness determination is made. One commenter suggested the regulatory authority, in addition to the

newspaper notice, furnish copies of the petition to all property and mineral owners. Section 764.15(b)(1) provides for the regulatory authority to provide copies of the petition to interested governmental agencies, intervenors, persons with an ownership interest of record, and other persons known to the regulatory authority to have an interest in the property. There is no need to furnish the copies a second time. Additionally, the petition is available for inspection and for copying during normal business hours at the main office of the regulatory authority. The regulatory authority has several notification and processing requirements to accomplish within a relatively short time period after the petition is filed. Although the time to notify the general public and request submission of relevant information is not being specified other than by a promptness standard, the advertisement is still required once for two consecutive weeks. The notice requirements adopted in Section 764.15(b)(1), (b)(2), and (b)(3) are sufficient to ensure that the public will be notified of the petition and will be given an opportunity to provide relevant information.

#### SECTION 764.15(c): INTERVENORS

Previous Section 764.15(c) provided that "any person" may intervene in an unsuitability proceeding. The proposed revision would have allowed "any person having a property interest in land or mineral resources which is or may be adversely affected" to intervene in an unsuitability proceeding. This revision was consistent with the proposal for a designation petition. OSM is not adopting the property interest limitation in Section 764.13(a), and will not adopt it in this section. The final rule provides for any person to intervene by filing allegations of facts describing how the designation determination will directly affect the person intervening, supporting evidence, a short statement identifying the petition, and the intervenor's name, address and telephone number. OSM is attempting to provide similar requirements for persons filing designation petitions or termination petitions and for intervenors in an effort to be consistent to all persons potentially involved in the process.

Many commenters advanced identical arguments for the property restrictions proposed for standing to petition, addressed in Section 764.13(a), and standing to intervene. Rather than reiterate those responses here, they are in the discussion of Section 764.13(a). A few commenters urged that "standing requirements" for intervenors be consistent with those adopted for designation petitioners. OSM agrees. OSM is adopting standing requirements consistent with those enunciated by the Supreme Court for both designation and termination petitions. Because the comments support consistent criteria to determine standing for petitioners and intervenors, OSM is adopting the same standard for intervenors.

One commenter stated the time period allowing an intervenor to file should be three weeks instead of three days before the hearing held pursuant to Section 764.17. The commenter believed 3 days will not allow the regulatory authority adequate time to prepare for the hearing. However, there is no requirement for the regulatory authority to address such filings at the hearing. Accordingly, OSM believes that three days is not a significant burden to the regulatory authority and will provide the broadest possible citizen input.

#### SECTION 764.15(d): PETITION RECORD

Previous Section 764.15(d) required the development, maintenance, and availability of a public record both at a central location of the county or multi-county area in which the petitioned land is located and at the main office of the regulatory authority. OSM has received a number of questions regarding the practicality and desirability of maintaining more than one complete public record for each petition. OSM proposed and is adopting a provision that requires the complete record be available to the public for inspection free of charge and for copying at reasonable cost, during all normal business hours at the main office of the regulatory authority. The regulatory authority will also be required to maintain information in or near the area in which the petitioned land is located. This information, at a minimum, will include a copy of the petition and must also be available for inspection and copying. OSM also considered but will not adopt the requirement that copies of the petition be mailed to interested persons and that other information be made available at no expense. OSM believes this requirement would be both burdensome and costly to the State regulatory authority.

Commenters generally supported the proposal to maintain one complete record located at the main office of the State regulatory authority and a partial record consisting, at a minimum, of a copy of the petition at or near the area in which the petitioned land is located. OSM agrees that it is more practical for the regulatory authority to maintain one complete record which is available for public inspection and for copying at a reasonable cost. One commenter noted that mailing copies to the general public or interested persons may at times be necessary. OSM will not require the regulatory

authority to make copies for anyone. The regulatory authority is required to make the information available at the specified locations for inspection and for copying at a reasonable cost. Regulatory authorities may not have the additional time or resources required to comply with unlimited public requests for research and copying.

## **SECTION 764.17 - HEARING REQUIREMENTS**

### **SECTION 764.17(a): HEARING PROCEDURES**

Previous Section 764.17(a) required a legislative hearing be held after receipt of a complete petition. OSM proposed three options that would amend the previous requirement that hearings be purely legislative in nature. Each of the three options proposed that a record of the hearing be made and preserved according to State law, and that no relevant part of the data base and inventory system or public comments would be excluded from consideration in decisions on the petition. Nonrelevant portions of the data base and inventory system have no bearing on the decision and should appropriately be excluded. Factual challenges to the relevant portions of the data base and inventory system would be allowable.

The differences among the three options pertained to subpoena of witnesses, cross-examination of witnesses and burden of proof. Option 1 would have provided that no cross-examination of witnesses would be allowed. Such a provision was included in the previous rules in response to concern that cross-examination procedures would intimidate some interested or affected parties, thus discouraging public participation and cutting off sources of potentially valuable information. Option 1 also had no provision to subpoena witnesses. This option also provided that no party would bear the burden of proof or persuasion.

Option 2 provided for the regulatory authority to subpoena witnesses as necessary and for cross-examination of expert witnesses. Under this option, only those persons qualifying and testifying as expert witnesses would be subject to cross-examination. In addition, the prohibition against imposing a burden of proof on any party would have been deleted, giving the regulatory authority discretion to determine who, if anyone, should bear this responsibility.

Option 3 would have provided for subpoena and cross-examination of all witnesses as an acceptable procedure. The regulatory authority and any party to the petition would have been allowed to cross-examine any or all available witnesses. Additionally, the burden of proof would have been assigned to the petitioner.

Options 2 and 3 provided regulatory authorities with the flexibility to employ a broader range of hearing procedures. These attributes of quasi-judicial hearing procedures are viewed by some States as desirable for resolving factual disputes, assuring due process for landowners where property uses may be limited, and for developing a more complete record by eliciting more information during the hearing.

OSM also proposed to revise the time from when the 10-month period begins for holding the public hearing required by the Act. Options 1, 2, and 3 and previous Section 764.14(a) all required the hearing to be held within 10 months of the receipt of a complete petition. Under this variant, the hearing would have to be held within 10 months after the petition is determined to be complete. The completeness determination can come as long as 60 days after the petition is received. OSM was concerned that a detailed study of a complex petition may require a full 10 months; therefore, the time extension was proposed to allow the regulatory authority to wait until after the completeness determination to begin such a study and still have a full 10 months before the hearing. This variant has not been adopted.

OSM has decided to adopt a modified version of Option 2 that provides:

1. All relevant parts of the data base and inventory system and all public comments received shall be included in the record.
2. The regulatory authority may subpoena witnesses.
3. Only expert witnesses may be cross-examined.
4. No person will bear the burden of proof or persuasion.
5. The hearing must be held within 10 months of the receipt of a complete petition.

Although an informal legislative-type hearing meets the requirements of the Act, some of the techniques of formal hearings can be useful in clarifying factual issues. The inclusion of only some of these techniques in these final rules is

based, in part, upon Congressional intent to encourage broad citizen participation and to ensure that decisions are based on all relevant information available.

Commenters were sharply divided on whether the hearing should be "of record." Some commenters believed an informal hearing would provide the best atmosphere for discussions involving conflicting value determinations. Other commenters wanted more formal procedures to document decisions that affect the availability of valuable resources and possibly terminate property rights of certain persons. OSM is adopting a hearing "of record" according to applicable State law. Information received relevant to the petition decision should be preserved and available for review.

One commenter stated that a hearing "of record" poses serious procedural problems when entering the entire data base and inventory system. The commenter contended this process will be costly and time consuming. The commenter opposed the regulatory authority discretion to exclude from the record non-relevant portions of the data base and inventory system. Other commenters recommended that the parties directly involved in the petition process be allowed to stipulate what parts of the data base and inventory system should be made part of the record. OSM believes a complete record of relevant information pertaining to designation decisions must be preserved for future review and agrees that entering the entire data base and inventory system could be overly burdensome. The regulatory authority is in an objective position to decide the relevance of the information contained in the data base and inventory system to the specific petition. One commenter also expressed concern that the regulatory authority would have to defend the data contained in the data base and inventory system. The purposes of the record is not to defend the data base, but to preserve a complete record of the data relevant to the petition decision for review by the public and the courts. Regardless of any record requirement, the regulatory authority is responsible for properly evaluating the capacity of the petitioned land areas to support and permit reclamation of surface coal mining operations based upon an adequate data base and inventory system.

One commenter supported subpoena authority for the States as a way to dissuade frivolous and unwarranted petitions from being filed. OSM is providing subpoena authority because States should have the ability to subpoena witnesses who may have information relevant to the petition and may otherwise be unavailable. It is not intended to discourage the filing of any serious petition.

Comments were distinctly divided on the cross-examination options. Some commenters urged that cross-examination not be adopted due to possible intimidation of some witnesses. Other commenters wanted to allow cross-examination only of expert witnesses. These commenters believed that experts have a more substantial basis for their testimony and are better qualified to deal with cross-examination procedures. The commenters believed non-expert witnesses should be able to come forward and voice an opinion without the threat of intimidation. Other commenters urged that cross-examination be allowed for all witnesses. These commenters asserted that cross-examination of all witnesses will provide the regulatory authority a direct means of fact-finding from any party involved in the petition process.

Expert witnesses generally do present information of a more substantive nature and are better prepared to testify on specialized or highly technical aspects of the specific conditions alleged by the petition. Therefore, OSM is adopting a provision allowing for cross-examination of expert witnesses only. OSM believes this provision will allow the States adequate opportunity to clarify relevant facts while encouraging broad citizen participation.

Commenters were similarly divided on assigning the burden of proof. Some commenters argued that the petitioner should be required to prove the allegations made in the petition. They asserted that some hearing procedures do assign such a responsibility and that there are at least two reasons for assigning the burden of proof to the petitioner: (1) such a responsibility would discourage frivolous petitions, and (2) it would tend to minimize the disruption that the filing of a petition has on the permitting process. Other commenters believed that petitioners, if assigned the burden of proof, would be severely impaired in their ability to participate in the designation process.

If the burden of proof were to be assigned to petitioners, the petitioning process might be closed off to citizens with limited resources. OSM wants to provide for broad citizen participation in proceedings that encourage disclosure of a full set of facts. Moreover, the petition process resembles long range planning, and provides for the weighing and balancing of many factors. The regulatory authority is required to consider many competing interests. Thus it is inappropriate to assign burden of proof or persuasion to the petitioner or any other person.

Only a few commenters supported the proposal to extend the time to conduct the hearing. These commenters believed the extended time would allow a more complete technical study. The majority of commenters opposed the proposal. These commenters contended that the proposed extended time to conduct the hearing is contrary to the time provision contained in section 522(c) of the Act. The Act specifically provides for the hearing to be conducted "within 10 months after receipt of the petition." OSM agrees that the proposal to extend the time is inconsistent with the Act and the proposal is not being adopted. Another commenter suggested providing more flexibility for the hearing deadline by adding a provision to allow the 10 month deadline to be waived by the petitioner and other interested parties. This alternative is also inconsistent with section 522(c) of the Act, and has not been accepted.

#### **SECTION 764.17(b): HEARING NOTIFICATION**

Previous Section 764.17(b)(1)(iii) required notice of the public hearing to any person who has an ownership or other interest known to the regulatory authority in the area covered by the petition. The proposal required notice only to persons with a property interest of record in the property covered by the petition and other persons known to the regulatory authority to have an ownership interest in the property. It also provided that notice to persons with an ownership interest of record be made according to applicable State law. This proposed change was intended to limit notification under Section 764.17(b)(1)(iii) to persons who have a known property interest and to delete the somewhat vague "other interest" category. OSM has decided to adopt a final rule requiring notice to persons with known property interests in the petitioned area.

Proposed Section 764.17(b)(2) provided that notice of the hearing be sent by certified mail to petitioners and intervenors only. Property owners and government agencies would receive notice by regular mail postmarked at least 30 days before the scheduled hearing date. The previous requirement provided for notices of the hearing to be sent by certified mail to any person required to receive notice. The revision is being adopted as proposed. To require notification by certified mail, other than to those persons who have a direct stake in the petition, has been found by OSM to be burdensome and costly for the regulatory authority.

Only a few comments were received for proposed changes to Section 764.17(b). Most commenters supported the proposal to notify only the petitioners and intervenors by certified mail. Some commenters seemed to believe the proposal would limit notification only to persons with a known property interest. One commenter suggested notice be made according to applicable State law. The proposal does not limit notification to persons with a known property interest. In addition to the notification requirement of Section 764.17(b)(1)(iii), the requirements of Section 764.17(b)(1)(i) and (ii) apply. Notice of the hearing must be provided to petitioners and intervenors and to interested government agencies. Moreover, the general public is notified by newspaper advertisement.

#### **SECTION 764.19 - DECISION PROCEDURES**

Section 764.19 sets forth procedures to be followed by the regulatory authority in deciding whether to designate lands unsuitable for mining. OSM proposed changes to Sections 764.19(a)(3), (b), and (c). Section 764.19(a)(3) was proposed to be amended by clarifying that in reaching a decision, the detailed statement required by Section 764.17(e) on the coal resources, demand for coal, and impacts on the area will be considered only when it is prepared pursuant to section 522(d) of the Act prior to a designation of unsuitability. This change was proposed to reflect the wording of section 522(d) of the Act, which states that the detailed statement shall be prepared prior to designating any land area as unsuitable for surface coal mining operations. The change clarifies when the detailed statement is required. The proposed change is being adopted in the final rule. Three comments were received. All supported the proposal that the statement should only be prepared for those petitions which will cause a designation action. One noted that this change will result in significant cost savings for the regulatory authority.

Section 764.19(b) was proposed to be amended by eliminating the requirement that the decision be sent by certified mail to every party to the proceeding and the Regional Director (OSM), as this could be burdensome and costly. This proposal has been adopted. The amended section requires that the decision be sent by certified mail to the petitioner and intervenors and by regular mail to all other persons involved in the petition. The requirement to furnish a copy of the decision to OSM has been deleted, as it duplicates reporting requirements being developed for oversight of approved State programs. Section 764.19(b) also requires a decision within 12 months of receipt of a complete petition if no hearing is held. The proposed rule would have required that where no hearing is held, the decision must be made within 12 months after a petition is determined to be complete. The proposal was intended to allow the regulatory authority to

adopt a broader review for completeness without reducing the time to study a petition. This portion of the proposal has not been adopted.

The majority of commenters stated their support of the previous rule which provides for the decision to be made within 12 months after receipt of a complete petition. These commenters urged that the time allowed for the completeness hearing is not an addition to the total time allowed for the determination. Some commenters believed the proposed rule would serve only to further delay the decision. One commenter supported the proposal because the additional time would decrease some of the administrative burden on the regulatory authority. OSM will not adopt the proposed extended time period.

Section 522(c) of the Act specifies a time period not to exceed one year for a designation decision. Congress did not intend for the designation process to continue longer and the legislative history speaks to the concern about delaying the permit process.

The other proposed change for Section 764.19(b), providing certified mailing of the decision only to the petitioner and intervenor, received support from the majority of commenters. Commenters generally stated that mass certified mailing of the decision is extremely burdensome and costly for the regulatory authority. No commenters opposed the proposal. OSM will adopt the proposal in an effort to alleviate some of the administrative burden on the regulatory authority.

Section 764.19(c) provides that State regulatory authority decisions with respect to a petition, or failure to act within time limits set forth in Section 764.19(c), be subject to judicial review by a court of competent jurisdiction. An amendment was proposed to require that all relevant portions of the data base and inventory system and public comments received during the public comment period be included in the record of the administrative proceeding. This proposed change is being adopted. It is necessary to ensure that courts review the record as a whole in making their findings as required under Section 526 of the Act. A corresponding change is being made in Section 764.17(a) to ensure that all relevant parts of the data base, inventory system, and public comments be included in the public record.

Commenters supported the proposal to include all relevant portions of the data base and inventory system and public comments in the record. These commenters believed that all data used in the decision process should be available for public review and for judicial review. OSM is adopting the proposal to ensure that all the information germane to the designation decision is of record and available for review.

One commenter urged OSM to provide for immediate judicial review of designation decisions. OSM did not propose to change this provision. The commenter stated that the existing rule provides for eventual review when a permit application is rejected on the grounds that the permit area includes an area designated unsuitable for mining.

Section 764.19(c) already provides for judicial review by a court of competent jurisdiction in accordance with State law under Section 526(e) of the Act and soon to be revised 30 CFR 775.13 of a State regulatory authority decision with respect to a petition or the failure of the regulatory authority to act within the specified time limits. There is no requirement for a prior administrative review, but a regulatory authority may logically provide for such review if it wishes. Therefore, no change is being made to this section. Another commenter suggested two new subsections for Section 764.19 to provide bonding requirements for the petitioner. OSM did not propose "bonding requirements" for petitioners; therefore, the issue is outside the scope of this rulemaking. As indicated earlier, it could also limit participation by the public in the petition process.

## **SECTION 764.23 - PUBLIC INFORMATION**

Section 764.23(a) requires the regulatory authority to make the information and data base system developed under Section 764.21 available to the public for inspection free of charge and for copying at a reasonable cost. OSM proposed and will adopt the amendment to modify public disclosure requirements regarding historic resources information. These changes comply with section 304 of the National Historic Preservation Act Amendments of 1980 (Public Law 96-515) and afford regulatory authorities the discretion to withhold historic resources information from the public where disclosure would expose the resources to risk of harm or destruction. The change will encompass all protected cultural and archeological sites proposed to be nominated to, or listed on the National Register of Historic Places. The regulatory authority, with the assistance of the State Historic Preservation Officer, will make the determinations regarding the withholding of such information and which information must be disclosed when a potential designation for unsuitability

rests primarily on an allegation based on that data. This change was made in conformity with the National Park Service Interim Rules on the National Register of Historic Places (*46 FR 56191*, Nov. 18, 1981; 38 CFR 60.6(x)). All comments supported the proposal. The commenters believed the proposal is consistent with section 304 of the National Historic Preservation Act of 1966, as amended, and stated the proposal provides the required protection of these places from risk or harm.

## **SECTION 764.25 - MAPS**

Section 764.25 was proposed to be amended by requiring States to maintain maps "or other unified and cumulative record" of areas designated unsuitable for all or certain types of surface coal mining operations. The previous rule provided that the regulatory authority must maintain maps of designated areas. The change is being adopted to provide regulatory authorities with additional flexibility concerning the type of records to be maintained. Commenters supported the proposal. The commenters urged that a mapping system alone is too limited. However, two commenters recommended a State or local "land use planning" amendment to accompany the proposed requirement. OSM is not adopting the "state or local land use planning" amendment. OSM has decided not to incorporate a state or local land use planning process into the designation process. The discussion for this issue is in the preamble for Section 764.15(a)(9).

## **PART 765**

OSM is removing all of Part 765, consisting of Sections 765.1, 765.11, 765.12, and 765.13. This part contained provisions for designating lands unsuitable under a Federal program for a State. The substantive provisions of this part are generally covered by Part 736, Federal Program for a State. By adding to Part 736 the requirement to implement a program for designating lands unsuitable one year after a Federal program is established (with the exceptions noted under Section 736.15), all of Part 765 becomes unnecessary. The change to Part 736 is discussed earlier in this preamble.

## **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**

### **PART 769**

Revised 30 CFR Part 769 modifies the previous petition process for designation of Federal lands as unsuitable for mining and for termination of such designations. The process is similar to that required of States in revised 30 CFR Part 764, but with such changes as are needed to reflect the differences between Federal and non-Federal lands, and the organization and management of the process within the Department of the Interior. This section of the preamble discusses in detail only those changes to the rules on Federal lands which are not equivalent to changes for non-Federal lands. Comments which were received on Part 769 that also apply to the revisions to Part 764 are discussed in the preamble to Part 764.

The most significant issue discussed in the proposed rule was whether the petition process applies to Federal lands. That is, should persons having an interest which is or may be adversely affected by surface coal mining operations be allowed to petition to have Federal lands designated as unsuitable for such operations? OSM requested the public to consider two major alternatives on this issue. The first alternative, which OSM has adopted, was to streamline but retain the petition process. The second alternative would have eliminated the petition process for Federal lands. Comments were sharply divided on this issue. Several commenters suggested deleting the entire Part 769 (petition process on Federal lands) for the reasons OSM cited in the preamble to the proposed rule supporting that alternative, and for other reasons. Other commenters suggested that Congress intended that there be a petition process on Federal lands and therefore recommended its retention.

OSM has decided to retain the petition process for Federal lands. In addition, the Secretary of the Interior has directed OSM and the Bureau of Land Management (BLM) to develop another alternative to administering the petition process. That alternative is expected to be proposed by BLM contemporaneously with the issuance of this final rule and would consist of a method of determining the suitability or unsuitability of land for surface coal mining through the land use planning process, because such a process would ensure consideration of unsuitability in a broader context than the site-specific focus of a petition. The new alternative would permit the unsuitability issue to be considered prior to significant expenditures of funds and labor by the Department (through the conduct of the leasing process), industry

(through participation in the leasing process and in the preparation of permit applications), and citizens (through having to respond to two different processes). The final rules for Part 769 adopted today will remain effective until a final decision is reached on whether and how the Act's requirements for designating Federal lands unsuitable for surface coal mining operations can be further integrated into the land use planning process administered by BLM.

The Department of the Interior agrees with the commenters who stated that the permit application review process allows a decision to be made with complete and detailed data available prior to mining on specific areas and that by incorporating the petition process into the BLM land use planning process conflict could be avoided and better public participation would result. It is for that reason that the Secretary has directed the development of the new alternative. The Department of the Interior believes that uniform planning and advance conflict resolution are desirable.

Several commenters expressed concern for designation of Federal lands on "checkerboard" areas of intermingled Federal and non-Federal lands. One commenter stated that without joint, simultaneous consideration of unsuitability by State and Federal government agencies of checkerboard areas, they might make their unsuitability decisions at different times and based upon different data. Experience indicates that the previous petition process on land with intermingled Federal and non-Federal ownership has created that very problem. The Red Rim petition, for example, covers both Federal and private land in the State of Wyoming, and was originally received by the State for the intermingled private land only. In that situation, there has been joint, simultaneous consideration of the intermingled Federal land. Retention of the petition process will allow such joint considerations to continue.

One commenter proposed that the unsuitability regulations be revised to allow the Secretary to use his discretion to enter into an unsuitability analysis on intermingled Federal lands when State lands have been petitioned. The new alternative to be proposed by BLM would allow for this through land use planning. Further, State-Federal cooperative agreements developed pursuant to section 523(c) of the Act would allow joint action, or a State lead, as long as the Secretary retained the final decision.

Another commenter recommended that if the petition process is retained for Federal lands, it should be more closely coordinated with land use planning, as was recommended in the proposed rule. OSM and BLM agree and are working closely to coordinate the petition process with land use planning.

A commenter thought that even if OSM selected the alternative in the proposed rule which does not eliminate the petition process, citizens would be prevented from petitioning to stop mining on Federal land, making it more difficult to block environmentally threatening mining projects. OSM disagrees. Citizens will not be prevented from petitioning under the revised rule, particularly in view of the modifications made from the proposal that parallel those made in Part 764.

Several commenters thought that petitioning is the best form of public input in the decisions as to which lands should be designated as unsuitable for surface coal mining and that it is important that citizens, as owners of public lands, have a voice in their use or potential abuse. Another commenter thought that formal citizen participation occurs during land use planning when BLM, through notice in the Federal Register, calls for Coal Resource Information (43 CFR 3420.1-2(a)). In addition, during land use planning, qualified surface owners are consulted throughout the process for their consent or refusal to permit mining on their lands (43 CFR 3420.1-2(e)(4)(i)). Any qualified surface owner unwilling to consent to mining on his land of coal owned by the United States is protected by section 714 of the Act and his land is subsequently dropped from further consideration for leasing. Another commenter stated his belief that collectively, mine plan reviews, NEPA studies, BLM's review and the Secretary's review are the full equivalent of the citizen petition process. OSM agrees with the need for strong citizen participation, and because Congress provided the petition process as a unique and significant form of citizen involvement, has retained the petition process in the final rule.

One commenter stated that in an unsuitability action on Federal lands, OSM would rely on the same agencies that prepared the land use plans to assist in the evaluation of and to receive guidance on the technical issues brought forward in the petition; and that it is to be expected that these agencies would develop positions based on their land use planning activities, which assess unsuitability criteria in relation to coal leasing potential. OSM-administered unsuitability petitions, the commenter added, are therefore unnecessary. The Secretary agrees with this comment, and for that reason has directed the creation of a new alternative in which BLM would be responsible for the petition process.

Another commenter gave the following as justification for eliminating the petition process: Section 522(a) of the Act, which pertains to State programs, or Federal programs imposed in lieu of a State program, provide for unsuitability

petitions, referring to section 522(c) of the Act. Section 522(c) provides that a person whose interest may be adversely affected has the right to file a petition to designate lands unsuitable for surface coal mining operations with the regulatory authority. There is no mention of the Secretary or OSM Director.

The commenter continued that section 701(22) of the Act defines "regulatory authority" as:

[T]he state regulatory authority where the state is administering this Act under an approved state program or the Secretary where the Secretary is administering this Act under a Federal program.

This definition does not include the Federal lands program, which applies to Federal lands. Furthermore, section 701(6) of the Act defines "Federal program" as:

[A] program established by the Secretary pursuant to [s]ection 504 to regulate surface coal mining and reclamation operations on lands within a state in accordance with the requirement of this Act.

The comment concluded that section 504 of the Act pertains to a Federal program when there is no State program and does not refer to the Federal lands program which is covered by section 523 of the Act.

The commenter further argued that this interpretation appears confirmed by the Conference Report (page 110-111) which states:

State regulatory programs must include a responsible process to respond to petitions to designate areas unsuitable for all or certain types of surface coal mine operations and criteria and procedures for designation are set forth.

With respect to such designation of Federal lands, the report references section 522(b) and notes that it provides that "The Secretary shall conduct a review of the Federal lands to determine \* \* \*." The only reference to the Secretary and the petition process is when the Secretary promulgates a Federal program for a State.

The commenter then concluded that it was clear from the language of the Act that Congress only intended for the petition process to designate lands as unsuitable for surface coal mining operations to apply to lands subject to a State program or a Federal program imposed in lieu of a State program, neither of which cover Federal lands.

Other commenters cited legislative history to support the retention of the petition process for Federal lands. Specifically, Senate Report, Number 95-128, 95th Congress, 1st Session 54 (1977), states that:

A decision to permit surface mining of coal is a land use decision, and as such may at times conflict with other demands on scarce or valued land resources. For this reason, the bill provides for a mechanism -- on both State and Federal lands -- for citizens to petition that certain areas be designated unsuitable for surface coal mining (emphasis added).

House Report Number 94-45, 94th Congress, 1st Session 206 (1975) states that:

The Secretary of the Interior is to review Federal lands and make some determinations based on the standards set forth above. Any person having an interest which may be adversely affected may petition either the State or Federal Government to have an area so designated or to have a designation terminated (emphasis added).

OSM has decided to retain the process to meet many of the concerns of these commenters.

One commenter stated that the Federal lands review process is adequate to protect lands that are not suited for mining; Part 769 should therefore be eliminated from the rules, thereby delegating the review process for Federal lands to BLM with input from and coordination with the various land managing agencies. Conversely, another commenter stated that if OSM decides to delete the petition process for Federal lands, the regulations should reflect the requirement that any determination of unsuitability must be based on all of the criteria of section 522 of the Act; and that the Secretary cannot merely mimic or adopt the BLM Federal lands review determination. The Secretary disagrees with these comments because they confuse two separate requirements of section 522 of the Act. Section 522(b) requires the Secretary to conduct a review of Federal lands to determine whether certain areas should be designated as unsuitable for all or stipulated methods of coal mining. Section 522(c) provides persons having an interest which is or may be adversely

affected with a right to petition the regulatory authority to have an area designated as unsuitable or to have such a designation terminated. The Secretary, however, agrees that these two processes should be coordinated more closely, and has directed the BLM to develop an alternative regulatory approach which would incorporate the petition process into the BLM land use planning process. The BLM proposed regulations are being published contemporaneously with these final regulations.

#### **SECTION 769.3 - AUTHORITY.**

As proposed, this section has been deleted to streamline the chapter by eliminating redundant and unnecessary provisions.

#### **SECTION 769.4 - RESPONSIBILITY.**

As proposed, this section has been deleted to streamline the chapter by eliminating unnecessary provisions.

#### **SECTION 769.7 - REGULATORY POLICY.**

As proposed, paragraphs (a) (c), and (d), which established procedures for maintaining maps, review of permanent program permit applications and review of interim program mining plans, have been removed because they are unnecessary. Paragraph (b), which requires that mining be prohibited or limited in areas designated as unsuitable, has been revised, as proposed, to remove the term "mine plan," which no longer is used under the revised rules for Federal lands. Paragraph (b), as proposed, has been placed in the last paragraph of Section 769.19.

#### **SECTION 769.11 - WHO MAY SUBMIT A PETITION.**

This section, which contains the provision known as "standing" or "interest," enables any person having an interest which is or may be adversely affected by surface coal mining operations to be conducted on Federal lands to petition the Secretary to have an area designated as unsuitable for all or certain types of surface coal mining operations or to have an existing designation terminated. In addition, for the purpose of the section, a person having an interest must pass an "injury in fact" test that requires the party seeking review to be among the injured and to demonstrate what the injury is and how the injury adversely affects him. A discussion and analysis of the comments received on standing may be found in the preamble to Part 764. Although this section was not proposed for revision in the proposed rule, it has nevertheless been revised, for consistency, to reflect related changes in revised Section 769.13 which was proposed for revision.

#### **SECTION 769.12 - WHERE TO SUBMIT PETITIONS.**

As proposed, this section has been revised to reflect OSM's September 13, 1981, reorganization.

#### **SECTION 769.13 - CONTENTS OF PETITIONS.**

OSM proposed two options for revising the content requirements for petitions to designate areas unsuitable for mining. Option 1 was intended primarily to focus and clarify what information is needed. Option 2 would have imposed additional requirements on the petitioner. The regulation being adopted today is a combination of the two options, and is identical to the provision being adopted for State unsuitability processes. Rather than repeat the language from the State requirements, it has been cross-referenced. The comments received and the rationale for the requirements adopted are discussed in the preamble to Part 764.

Revisions proposed for the content of termination petitions were intended to focus the information needed to make informed decisions on such petitions. The changes proposed were parallel to those proposal for State termination petitions. The final regulation is identical to the State requirements, and the language of the State requirement has been included by cross reference. The comments received and the rational for the requirements adopted are discussed in the preamble to Part 764.

#### **SECTION 769.14(a) - INITIAL PROCESSING, RECORDKEEPING, AND NOTIFICATION REQUIREMENTS.**

In order to improve coordination between the petition process and the BLM land use planning and coal leasing processes, OSM proposed that a petition, to be accepted, would have to meet criteria for completeness, ripeness and sufficient merit. Under the proposal, to be complete, a petition would need to contain all of the information required by Section 764.13 (b) or (c). To be ripe, there would have to be real and foreseeable potential for mining within 5 years; that is, the petitioned area would have to be leased, subject to a preference right lease application, included in an area for which land use planning has been completed and the tract was available for further consideration for leasing, or subject to non-competitive leasing. Under the proposed rule, to have sufficient merit, the petition would have to include new allegations and evidence not considered in a previous petition or Federal lands review, demonstrate that the petitioner has interests which are or may be adversely affected by surface coal mining operations and include lands containing mineable coal or lands which would be subject to impacts incident to an underground coal mine.

The final rule includes all of the concepts expressed in the proposal; however, they have been edited and reordered and the term "sufficient merit" has been dropped. Those items previously included under sufficient merit are now covered under "completeness" and "frivolous" criteria. The demonstration of impact on the petitioner's interest and requirements for new allegations and evidence where lands have been previously considered in a petition or Federal lands review are now included under the completeness criterion. If the petition area does not include mineable coal or lands which would be subject to surface impacts from underground mines or adjoining surface mines, the petition will be considered frivolous.

The language proposed for Section 769.14(a) is being adopted with minor changes to reflect elimination of the term "sufficient merit", inclusion of the term "frivolous" and the non-adoption of the proposed requirement in Section 769.14(e) for a "completeness" hearing by shortening the time limits for a decision from 60 days to 30 days. No comments were received on this proposed change.

## **COMPLETENESS**

The language proposed for the meaning of the word "complete" Section 769.14(a)(2) has been expanded to cover the requirement that a petitioner submit new significant allegations of fact and supporting evidence not considered in any previous unsuccessful petition or Federal Lands review conducted under Section 522(b) of the Act. This had been proposed as part of the "sufficient merit" criterion. Although the wording of this requirement has been modified from the proposal, no substantive change is intended.

The proposed revisions included language under "sufficient merit" for termination petitions which would have required significant new evidence not considered in a Federal lands review. One commenter stated that this requirement should not be adopted since a termination petition seeks to reverse the decision made in response to a designation petition. The designation petition evaluation would consider any evidence provided by the Federal lands review conducted by the land management agency, but this evidence would become part of the designation evidence. The proper procedure then, the commenter suggested, is for a termination petition to contain significant new evidence not evaluated in the designation process. The same commenter stated further that the wording of the proposed rule created confusion since it could be misinterpreted to mean that a termination petition is somehow used in an attempt to reverse an unsuitability assessment by a land management agency. The commenter reasoned that this would be a totally incorrect interpretation under the current division of responsibilities between BLM and OSM, since OSM is not bound to act on BLM's assessment in land use planning with either a designation or a termination petition. The commenter then suggested that a new paragraph was needed which would require a termination petition to contain significant new evidence not considered in the designation petition evaluation. OSM agrees and has made the appropriate revision, which is now contained in the completeness criterion and is part of the information required under Section 764.13(c).

Another commenter cited the existing regulation as already authorizing rejection, as Congress intended, of frivolous and incomplete petitions. The commenter argued that nothing in section 522(c) of the Act supports the additional "merit" criteria that have been proposed. OSM agrees that no separate "merit" criterion is specifically mentioned by Section 522(c), and that the use of the term could imply judgments that are not appropriate at this stage in the petition process. The term has therefore been dropped. However, the requirements covered under the proposed "sufficient merit" criterion are relevant and useful as measures of completeness and seriousness; they are now included under the "complete" and "frivolous" criteria. This commenter also stated that the sufficient merit requirement regarding standing for petitioners is inappropriate, as the Act authorizes only the "adversely affected" criterion. The issue of standing is addressed in the discussion of comment for Section 764.13(a). Material required to demonstrate the standing requirements which are

being adopted is listed in Section 764.13(b), Contents of petitions. The initial processing requirements for this material, therefore, have been moved to the criteria for "complete" petitions.

Another commenter stated that to avoid abuse by multiple petitions, the regulatory authority should have the authority to deny future petitions on the grounds that the later petition could have been included in an earlier petition. While OSM is deeply concerned about the potential problem of multiple, serial or successive petitions, denial of future petitions would be a highly questionable solution. It would be unreasonable to require that a potential petitioner know of all possible grounds for a petition. The range of issues which might appropriately merit consideration through the petition process is broad and complex, and generally would not be known to potential petitioners. To require such knowledge would deny the petition process to most citizens, which is clearly contrary to the specific language of Section 522(c) of the Act which allows "Any person having an interest \* \* \* shall have the right to petition \* \* \*". Further, such a restriction would preclude the use of information developed at a later date which is relevant to the issue.

## **RIPENESS**

Another major issue discussed in the proposed rule concerned the integration of the petition process with land use planning. Proposed Section 769.14 stated that, with certain exceptions, petitions would be accepted only if a "real and foreseeable potential exists for surface coal mining operations to occur within 5 years on the lands subject to the petition." In addition, ripeness, as defined in the proposed rule, would mean that formal land use planning by the land management agency had been completed for the area being petitioned, that the petitioned lands are subject to a Federal coal lease, that the area was covered by a Preference Right Lease Application (PRLA) lease issued prior to 1979 or that the area is subject to noncompetitive leasing.

The rule adopted states that ripeness, for a designation petition, means that the petitioned lands are (i) subject to a Federal coal lease; (ii) included in a tract for which land use planning has been completed and which tract is available for further consideration for Federal coal leasing; (iii) not required to be leased because the mineral rights are not owned by the United States; or (iv) subject to surface disturbances over unleased Federal coal.

In commenting on this issue, one commenter suggested that the revised rule should only contain two of the four ripeness criteria that were listed in the proposed rule so that real and foreseeable potential would mean that petitioned lands are A) subject to a Federal coal lease; or B) included in a tract for which land use planning has been completed and which tract is available for further consideration for coal leasing. Since PRLA's would continue to have the unsuitability criteria of 43 CFR 3461 applied to them during processing, it would be premature to accept a petition on PRLA land prior to the completion of the application of the criteria (which is usually done during land use planning). In addition, the commenter suggested the deletion of the ripeness criterion that included lands subject to noncompetitive leasing procedures since even noncompetitive leasing usually only takes place in areas with a completed land use plan. OSM agrees with the commenter and has accordingly deleted the two criteria.

Several commenters thought that the ripeness provision and the related preamble discussion needed clarification of the proposed five year limitation; for example, the proposed revision stated that "petitions would be accepted only if a real and foreseeable potential exists for surface coal mining operations to occur within 5 years on the lands subject to the petition." Literally interpreted, one commenter continued, this language would force a petitioner and the government to forecast the date of commencement of mining operations -- a date which only the lessee/operator is reasonably sure of. An error in predicting the date of mining operations, the commenter reasoned, could result in embarrassment to the government. Federal coal leases are issued with a requirement that the lessee produce commercial quantities of coal within 10 years of lease issuance (diligence); mining operations could therefore commence during any of the 10 years. A petitioner who submits a petition in year one of the diligence period is predicting that for the petition to be ripe, operations will commence by no later than the fifth year. The government in turn would, therefore, have to verify the petitioner's forecast and process the petition, or forecast a more distant start-up date and reject the petition. In the latter instance the government's prediction may prove an embarrassment if the lessee/operator elects to commence mining operations during the first five years. OSM agrees with the commenters against using the "real and foreseeable potential" requirement and has consequently deleted from the ripeness definition in the revised rule all references to any number of years being required for a petition to be ripe. The new requirement allowing OSM to suspend the processing of petitions until after land use planning has been completed is adequate protection against petitions which are received for land on which there is no likelihood of mining.

A commenter suggested that OSM include a provision in the revised rule as to when a termination petition is ripe, and also recommended an option: a termination petition would be ripe one or more years after OSM designates an area to be unsuitable. OSM has declined to accept this suggestion because the key threshold issue regarding termination petitions is whether there is significant new evidence which needs to be considered and not whether a specific period has elapsed. There is no need to make a mining company, or anyone else, wait one year after land has been designated before it may submit a termination petition. The same commenter stated that the legal and administrative differences between being "assessed" unsuitable and being "designated" unsuitable needed clarification. OSM agrees. In addition to the descriptions of "assessment" and "designation" contained in the preamble to the proposed rule, an unsuitability assessment is made pursuant to a number of environmental statutes (only one of which is SMCRA) and executive orders; whereas an unsuitability designation is based solely on section 552(c) of SMCRA.

Another commenter asserted that if petitions were not allowed to be filed before the Federal land use planning process is completed, tracts may be assessed as suitable for leasing and subsequently leased under the Federal Coal Management Program. Since this may occur after a coal operator had purchased the lease and made other financial commitments, an unsuitability designation at this point would cause a financial burden on the local operator unless a mechanism existed to refund the amount paid for the lease. The commenter recommended that OSM, therefore, clarify that petitions may and should be submitted prior to any lease sale so as to prevent this from happening. The Secretary agrees that the petition process needs to be fully coordinated with the land use planning process, and has directed the BLM to develop regulations to do so. BLM, therefore, is proposing regulations for this purpose concurrently with this final regulation. Under these rules however, petitions must be accepted and processed prior to the issuance of a permit unless they pertain to lands for which an administratively complete permit application has been filed and the first newspaper advertisement has been published.

One commenter believes that a petition received for an area that does not fall into one of the categories for ripeness should be placed in a "pending" file and reactivated if the status of the Federal land changes and it becomes ripe. OSM has adopted this suggestion and has added a suspension provision similar to that found in the lands unsuitable regulation for State programs. Where the processing of a petition is suspended under Section 769.14(b)(2) because it is not ripe, under Section 769.14(h) no surface mining and reclamation operation permit may be issued until a decision is reached on the petition.

The same commenter questioned how ripeness would be applied to lands in which the surface rights are owned by the Federal government but the mineral rights are in private ownership, as are substantial amounts of land within the Daniel Boone National Forest in Kentucky which fall into this latter category. This situation was not covered in the proposed rule; accordingly OSM has added a provision to the final rule to make clear that lands underlain by privately owned coal are ripe for petitioning. OSM has also clarified that lands containing unleased Federal coal, the surface of which may be disturbed by operations on adjoining lands, are also ripe for petitioning.

Another commenter stated that the discussion of ripeness in the preamble appeared to relate more to administrative convenience than it did to the needs of other agencies and to the public. The commenter elaborated that if an area of coal lands were adjacent to a National Park and mining would have a high potential for adversely affecting the park when there was a real and foreseeable potential for mining in five years, it would be in the interest of the public to allow petitioning at any time. Moreover, the commenter thought that the designation of certain lands as unsuitable would result in savings over time for the Federal land managing agency because it would be unnecessary to conduct a complete Federal lands review for designated lands.

OSM has decided not to accept this idea. Federal lands located adjacent to a National Park may not be mined until they are leased. They cannot be leased until land use planning is completed. Under Section 769.14(b)(2), if a petition is filed before land use planning is complete, OSM will advise the land management agency of the issues raised by the petition and will request the agency to consider such issues in its planning efforts. Moreover, the petitioner will be advised of the opportunity for public participation in the land use planning process.

Thus, the reasons for adopting the ripeness criterion go far beyond mere convenience. Coordination of land use planning and the petition process will eliminate duplicative efforts and reduce costs. This change will eliminate the unnecessary expense of processing petitions for land assessed as unsuitable as part of the land use planning process. Moreover, the fact that designated lands do not require a Federal lands review is offset by the fact that processing and

unsuitability petition is much more costly (on a per-acre basis) than conducting a Federal lands review. Moreover, an unsuitability designation does not exempt an area from land use planning, which is conducted for many purposes.

Several commenters stated that there is simply not statutory authority whatsoever for the concept of ripeness in the petition process and that contrary to OSM's suggestion in the preamble to the proposed rule that SMCRA implies postponing the petition process, the requirement of section 522(a)(5) for integrating the petition process with land use planning suggests the opposite. The commenter stated that Congress envisioned that land use planning would occur long before coal lands were even subject to lease and thus intended that the petition process would be available to citizens as early as possible in the land use planning process. The proposed rule would postpone the petition process until so close to the commencement of mining that there would be very little opportunity for citizens to utilize this important mechanism for citizen participation. OSM disagrees. The statutory authority for the ripeness criterion is section 522(a)(5) of the Act, which states that "determinations of the unsuitability of land for surface coal mining shall be integrated as closely as possible with present and future land use planning \* \* \*." (emphasis supplied) The basic principle in section 522(a)(5) is the integration of unsuitability determinations with land use planning. In addition, citizens have ample opportunity for participation in land use planning. BLM goes to great lengths in soliciting public participation for its existing land use planning process.

One commenter stated that the new ripeness criterion will foreclose the opportunity for citizens to petition certain lands for unsuitability under any circumstances. For example, in a case where private coal lands are interspersed with Federal coal lands and mining on the private coal lands is imminent, but planning for mining on the Federal lands has not yet been completed, the proposed rule would preclude petitioners from identifying all lands that could be affected by the proposed mining operation in the area. OSM understands the concerns of the commenter but believes that by being discretionary the suspension provision in the revised rule will enable OSM to consider petitions for lands not otherwise ripe for petitioning if a compelling reason exists for doing so. One example in which OSM probably would choose not to suspend a petition would relate to a petition on Federal lands located in a "checkerboard" pattern with non-Federal lands. In such a situation, if a petition has also been filed with the State regulatory authority for the non-Federal lands, simultaneous consideration of the two petitions is logical even if land use planning is not complete for the Federal lands. In addition, the new alternative being developed to allow BLM to process petitions at some point in their land use planning process will help cover such situations.

The same commenter continued by stating that the new ripeness criterion would force citizens to wait until mining is virtually imminent before a petition could be filed. In light of the long lead times needed to plan for a new mine and the advance investments that must be made in all of the equipment and facilities for a new mine, in most cases a potential mine operator will have spent substantial sums of money in acquiring coal rights in the new mine before the proposed ripeness test could be met by citizens. Consequently, the mine would be exempt from an unsuitability designation and the entire petition process on Federal lands would be rendered meaningless. OSM disagrees with this comment. The commenter apparently misunderstands the "substantial legal and financial commitments" exemption as enumerated in section 522(a)(6) of SMCRA. Spending substantial sums of money in acquiring coal rights and preparing to mine does not preclude an area from being petitioned unless it was spent prior to January 4, 1977. In addition, requiring land use planning on an area prior to considering petitions for that area does not mean, as the commenter has suggested, that mining is virtually imminent or that substantial investments and commitments have been made.

Prior to Federal coal being mined, it must be leased by BLM, which is responsible for leasing all Federal coal except that of the Tennessee Valley Authority (TVA). Before the land is leased, BLM or the Federal land management agency administering the land must conduct land use planning pursuant to the Federal Coal Leasing Amendments Act (FCLAA), and the Federal Land Policy and Management Act (*30 U.S.C. 1701*). Pursuant to section 522(b) of SMCRA, the BLM applies unsuitability criteria (43 CFR 3461) during land use planning on any coal lands, as part of a Federal lands review. The full Federal lands review is not completed for a parcel of land until land use planning (43 CFR 3420.1) and activity planning (under 43 CFR 3420.3 pursuant to the National Environmental Policy Act, SMCRA, MLA and the FCLAA) has been completed and BLM has given its concurrence to the approval of the permit application package covering that land. Land may be leased after it undergoes activity planning. It still may be petitioned and designated as unsuitable, however, even after it has been leased.

The same commenter suggested that because BLM has recently revised its coal leasing process for Federal lands, the effects of these new regulations are unknown and the petition process is therefore all the more important as a mechanism for identifying Federal lands that are potentially unsuitable for coal mining under the criteria of section 522(a). It is,

therefore, all the more crucial, according to the commenter, that the proposed ripeness criterion not be adopted so that the designation process can be initiated at an early stage. This result, as the previous regulation has demonstrated, serves the interests of both citizens and potential mine operators. OSM has rejected this suggestion because under the revised rule all interested parties are given an opportunity to petition. BLM procedures, moreover, provide for substantial citizen input during the land use planning process, and for full consideration of allegations that land is unsuitable for mining. Thus, in most instances, petitions will no longer be processed prior to land use planning.

One commenter expressed concern that, under the proposed rule, OSM would not process petitions because of limited funds or for other administrative reasons, but instead would suspend petitions until the permit review and mine plan approval stage. The commenter thought that this would merely result in passing the responsibility to the State regulatory authority to make the unsuitability determination at a later date -- at which point the stakes for a coal company and the State would be much higher. OSM believes that this potential problem is unfounded. Under the revised regulations, petitions may only be suspended until after land use planning if they are found to be not ripe; they cannot simply be ignored or not processed.

Frivolous . The previous rule did not contain a "sufficient merit" criterion. As stated in the preamble to the proposed rule, sufficient merit was intended as an aid in eliminating frivolous petitions. As stated above, OSM has deleted the term sufficient merit and placed the relevant requirements under completeness and frivolousness criteria. Those requirements moved to the completeness category are discussed above.

As with petitions filed under Part 764, a "frivolous" petition is one in which the allegations of harm lack serious merit. In addition, the requirement regarding the existence of mineable coal has been placed under the frivolous criterion. Unless there is "mineable" coal in the petition area or the petitioned area is or could be subject to related surface operations and surface impacts incident to an underground coal mine or an adjoining surface mine there is no reason to accept or process the petition. Such a petition may accurately be described as "frivolous".

A commenter suggested that the reference to Known Recoverable Coal Resource Area (KRCRA) be deleted from the definition of mineable coal because Federal coal leasing is no longer tied to KRCRA's in 43 CFR Part 3400; hence there may in the future be mineable coal under lease outside KRCRA's. In addition, the commenter thought that the discussion of "mineability" in the preamble was unclear. OSM agrees with the commenter and has deleted the reference to "Known Recoverable Coal Resource Area" and clarified the meaning of "mineability" to read as follows: "Mineable coal is coal with development potential as mapped or reported by the Bureau of Land Management under 43 CFR 3420.1-5(e)(1); and privately owned coal under land owned by the United States."

Two commenters stated that the proposed section on sufficient merit for a termination petition was difficult to follow since it used the word "or" between paragraphs, rather than the word "and," which appears to be more appropriate. OSM agrees with the commenter and has included the necessary criteria as part of the completeness criterion under Section 769.14(a)(2) which cross-references Section 764.13(c).

#### SECTION 769.14(b).

Section 769.14(b)(1) is being adopted with minor revisions to reflect the changes to the criteria on ripeness, completeness, sufficient merit and frivolousness discussed above. It also reflects the decision to allow the suspension (discussed in the following paragraph), rather than to require the rejection, of petitions which are not ripe. The last two proposed words "appropriate remedies" have been clarified by using instead the words "deficiencies cured."

Paragraph (b)(2) has been revised to allow for suspension rather than rejection of petitions which are not ripe. This change responds to the comments on ripeness discussed above, which indicated a concern that ripeness would be used to defer or delay petitions to the point where they would become, in effect, meaningless. By allowing for periodic reexamination of ripeness, OSM can help assure that the issues raised by suspended petitions are considered at the appropriate time.

One commenter expressed concern that not all issues are appropriately addressed during land use planning; some may best be done at the permit review stage. Thus, the commenter suggests that the language requiring that the planning agency give consideration to the issues requested by the Director be revised to "the planning agency shall give consideration, to the extent practical, to the issues contained in the Director's request." OSM agrees that in some

instances it may not be possible to fully consider or resolve issues at the planning stage; however, the proposed language requiring consideration does not demand that the planning agency resolve every issue. Appropriate consideration may be that the issue is best left to a subsequent petition or permit review stage; thus the proposal has not been accepted.

SECTION 769.14(c) is adopted with minor editorial revisions to reflect the changes to Section 769.14(a) and for clarity. SECTION 769.14(d) is adopted with minor editorial revisions.

Proposed Section 769.14(e) that would have provided for "completeness" hearings is not adopted. Public participation in a decision to accept a petition on Federal lands is of limited value. The decision is based largely on information contained in Federal agency files and on relatively straightforward technical and administrative determinations where public input would be limited in scope and value. In addition, a completeness hearing would delay the evaluation of the merits of the petition, and might focus undue attention on completeness at the expense of the evaluation, which is where public input is most needed. In place of the proposed language, OSM has retained the requirement for public soliciting of public comment on the merits of the petition which was previously included in paragraph (f). This requirement was inadvertently deleted in the proposal. Instead of a 3-week period for soliciting information, the rule requires that such requests be made "promptly" after deciding to process the petition further.

Section 769.14(f) is adopted as proposed with editing for clarity. One commenter questioned the basis of the provision in Section 769.14(f) of the proposed rule to refer a copy of the petition only to other Federal land management agencies who have land intermingled with the petitioned land. The commenter questioned why the provision was limited only to intermingled Federal land and suggested that there should be a provision for referral to the State where the area contains intermingled Federal and non-Federal lands. OSM has declined to accept this suggestion since it already follows this practice informally as good management. It is therefore not necessary to be in the regulations.

SECTION 769.14(g).

In addition to the major changes made in Section 769.14, OSM has deleted, as proposed, some of the internal administrative procedures contained in that previous section related to assembling information on the petitioned area. OSM believes that these internal procedures should instead be dealt with by agency and interagency memoranda and directives.

Two options were proposed for Section 769.14(g) which addressed the timeliness of petitions. The revised rule states that OSM may determine not to process any petition received insofar as it pertains to lands for which an administratively complete permit application has been filed and the first newspaper notice has been published. The comments received on these options and an explanation of the option selected is contained in the preamble to Part 764.

Final Section 769.14(h) provides that when a permit application is filed for an area where a petition has been suspended pursuant to Section 769.14(b)(2), OSM shall initiate petition review and not issue a permit until a decision is made on the petition. This is a necessary concomitant for petitions suspended which were not ripe for processing.

#### **SECTION 769.15 - INTERVENTION.**

Section 769.15, pertaining to intervention, has been adopted in the same form as Section 764.15(c). As explanation of Section 764.15(c) is included earlier in this preamble. It is not substantially different from the previous section except for a statement describing how the designation directly affects the intervenor.

#### **SECTION 769.16 - PUBLIC INFORMATION.**

Section 769.16(a), which is adopted substantially as proposed, continues the requirement of previous Section 769.16(a) that after determining the petition is complete, OSM shall promptly notify the general public of the receipt of the petition and request submission of the relevant information by a newspaper advertisement placed once a week for two consecutive weeks and by a Federal Register notice. "Prompt" notice is substituted for the proposed notice within 5 weeks. The provision adds that the notices must include a description of the boundaries of the petitioned area, the allegations of fact and information regarding where the petition is available for public review. Final Section 769.16(b)(1) retains previous Section 769.16(b) concerning the requirement to maintain a public record and its availability. Final Section 769.16 (b)(1) and (b)(2) have the same exception as is contained in Section 764.23 for specific information

pertaining to property proposed to be nominated to be listed, or listed, in the National Register of Historic Places, if it is determined that disclosure of such information would create a risk of destruction or harm to such properties. Withheld information must be disclosed when a designation of unsuitability would rest primarily on an allegation based on that information. A discussion of the comments OSM received on this exception is found in the preamble to revised Section 764.23.

#### **SECTION 769.17 - HEARING REQUIREMENTS.**

This revised section is substantially the same as that for Section 764.17. A discussion of the comments received on the proposed and final revisions are found in the preamble to revised Section 764.17.

#### **SECTION 769.18 - DECISIONS ON PETITIONS.**

The substance of final Section 769.18 is similar to previous Section 769.18, with a change pertaining to mailing of decisions. A discussion and an analysis of the comments OSM received concerning the revision to this section, and the rationale for the revised procedure OSM has selected, are found in the preamble to Section 764.19.

#### **SECTION 769.19 - REGULATORY POLICY.**

As proposed, this section has been revised to ensure that permits and coal leases are conditioned to limit or prohibit surface coal mining operations on land designated as unsuitable for surface coal mining operations.

### **III. PROCEDURAL MATTERS**

A. Paperwork Reduction Act. There are no information collection requirements in 30 CFR Part 761 or 762. The information collection requirements contained in 30 CFR 764.13, 764.15 and Part 769 do not require approval by the Office of Management and Budget under *44 U.S.C. 3507*, because there are fewer than 10 respondents annually.

The information collection requirements contained in 30 CFR Part 764 have been approved by the Office of Management and Budget under *44 U.S.C. 3507* and assigned clearance number 1029-0030. The information is necessary to establish minimum standards to be included in each State program for designating non-Federal and non-Indian lands in a State as unsuitable for all or certain types of surface coal mining operations and for terminating designations. The information required by 30 CFR Part 764 is mandatory. OSM has codified the OMB approval under a new Section 764.10.

The information collection requirements in 30 CFR Parts 779 and 783 have been approved by the Office of Management and Budget under *44 U.S.C. 3507* and assigned clearance numbers 1029-35 and 1029-38, respectively. The information is collected to meet the requirements of sections 507 and 508 of SMCRA, which require the permit applicant to present an adequate description of the existing pre-mining environmental resources within and around the proposed permit area. The information will be used by the regulatory authority to determine whether the applicant can comply with the performance standards. The obligation to respond is mandatory. The OMB approval was codified under Sections 779.10 and 783.10 on August 4, 1982 (*47 FR 33683*).

B. Executive Order 12291 and the Regulatory Flexibility Act. The Department of the Interior has determined that this document is not a major rule under Executive Order 12291 and certifies that this rule will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act, Pub. L. 96-354 (*5 U.S.C. 601 et seq.*). States will incur reduced costs because fewer inadequate petitions will be processed under the revised criteria that a petition must meet of being complete and not frivolous. Costs to the coal industry should also be reduced as industry involvement is decreased in responding to petition allegations and because fewer disruptions and delays in coal development should incur. "Small operators" costs will decrease as fewer inadequate petitions are processed and small operators should be better able to plan and finance their capital needs for coal mine development. Since 1980, fewer than 20 petitions have been received by States and only 5 petitions have been filed with OSM.

C. National Environmental Policy Act. OSM prepared a draft supplemental environmental impact statement under the National Environmental Policy Act of 1969 (NEPA), *42 U.S.C. 4332(2)(c)*, on the cumulative impacts of these and other proposed rules that was made publicly available on June 18, 1982. The "Final Environmental Impact Statement

OSM EIS-1: Supplement" (FEIS) was prepared and made publicly available on January 20, 1983. The FEIS discusses the impacts that these final rules will have on the quality of the human environment. The FEIS is available in OSM's Administrative Record in Room 5315, 1100 L Street, NW., Washington, D.C., or by mail request to the Branch of Environmental Analysis, Room 134, Interior South Building, Office of Surface Mining, 1951 Constitution Ave., NW., Washington, D.C. 20240. This preamble serves as the record of decision under NEPA. It differs from the preferred alternative draft final rules published in Volume III of the FEIS in the following ways:

1. Paragraph (a) of the definition of "valid existing rights" no longer has the phrase "that the regulatory authority shall determine," includes the clarifying references that it applies to areas protected on August 3, 1977 and that the takings analysis applies to property interests that existed on that date. This paragraph also includes a reference to the 14th Amendment to the U.S. Constitution, in addition to the FEIS reference to the Fifth Amendment. The impacts of these changes are all included within the FEIS analysis of the preferred alternative.

2. Paragraph (d) of the definition of VER is clarified to provide that it applies to areas to which the protections of Section 522(e) of the Act first apply after August 3, 1977. VER for existing operations is changed to include only "validly authorized" existing operations. The filing of a permit application and publication of the first accompanying newspaper notice is not a basis for VER; instead a "takings" test similar to paragraph (a) of the VER definition has been adopted. Final Paragraph (d) is more environmentally protective than the preferred alternative for that paragraph. Its impacts are within the scope of the discussion of the VER definition in the FEIS.

3. Paragraph (e) of the final VER definition, although not included in the preferred alternative, was proposed and included in Alternative C of the FEIS. It is therefore within the scope of the FEIS.

4. A number of definitions, or portions thereof, were not included in Volume III of the FEIS, but are being reprinted essentially unchanged from the previous rules. These include definitions of the terms "Surface operations and impacts incident to an underground coal mine," "Significant forest cover," "Occupied dwelling," "Community or institutional building," "Surface coal mining operations which exist on the date of enactment," and the listing of values in the definition of "Significant recreational, timber, economic, or other values incompatible with surface coal mining operations." These have no environmental impact and are included under the minimum action/no action alternative.

5. A definition of the term "publicly-owned park" is added that is consistent with the definition of "public park," but narrower because governmental ownership is required. This new definition will have no environmental effect beyond that associated with the new definition of the term "public park" because the requirement for governmental ownership of the park has already been used in implementing the prohibition in Section 761.11(c).

6. The final definition for the word "cemetery" does not include a cross reference to the permitting requirements regarding cemeteries. This has no environmental effect.

7. In Section 764.13(a), the characterization "injury in fact" test" has been added, but the substance is the same as the preferred alternative in the FEIS. Similarly, in Section 764.13(b)(1)(iii), the same phrase has been removed. These changes have no environmental effect.

8. In Section 764.13(b)(1)(iv), a number of minor changes have been made which should have negligible environmental effect as compared to the preferred alternative in the FEIS. Language has been added to clarify that allegations of fact and supporting evidence cover "all lands in the petition area" and "tend to establish that the area is unsuitable for all or certain types of surface coal mining operations." Under the final rule, allegations "should," rather than "shall" be specific and relate to the mining operation "if known" rather than "if any."

9. In Section 764.13(c)(1)(iv), language has been added to require petitions to terminate an unsuitability designation to include new evidence that was not contained in the designation proceeding and any previous unsuccessful termination proceeding. This provision is expected to have a slightly more environmentally protective effect than the preferred alternative in the FEIS.

10. In Section 764.15(a)(3), language has been added clarifying that when there is a real and foreseeable potential for mining, the processing of the designation petition will proceed. This change has no environmental effect.

11. In Section 764.15(a)(4), the reference to the injury in fact test is replaced with a reference to Section 764.13(a). The description of a frivolous petition has also been revised. These changes are not substantive and thus have no environmental effects.

12. In Section 764.15(a)(7) (and in Section 769.14(g)) language has been added to provide that a petition need not be processed after the filing of an "administratively complete" permit application and publication of the first newspaper advertisement. The language in the FEIS preferred alternative referred to a "complete" permit application. This change, which is made to provide consistency with the expected revisions to OSM's permitting rules (see 30 CFR 773.13(a) of the draft final rules in the FEIS) is not expected to have environmental impacts beyond those analyzed in the FEIS discussion of the preferred alternative. Under the existing permitting rules that allow publication of newspaper advertisements only upon the filing of a complete permit application (30 CFR 786.11(a)), regulatory authorities have allowed publication of such advertisements upon the filing of permit applications that would qualify as being administratively complete. The formalization of this practice and the changed wording in Sections 764.15 and 769.14 should not lead to any substantial impacts.

13. In a number of sections in Parts 764 and 769, the final rule requires "prompt" action by a regulatory authority, rather than specifying a time for action, as was contained in the FEIS. In one provision, Section 764.15(b)(1), a six-week limit for requesting a completeness hearing and providing comments on the completeness of a petition has been removed and left to the discretion of the regulatory authority. These changes are not expected to have any effect on the environment.

14. In final Section 764.15(b)(3), the regulatory authority, while being required to make a completeness determination, is not obligated to issue, upon request, a written decision that a petition is complete. If a petition is incomplete, Section 764.15(a)(4) continues to require a written statement. This change from the FEIS in Section 764.15(b)(3) is not expected to have any environmental effect.

15. In final Section 764.17(b)(1)(iii), the notice requirement no longer specifically includes persons with an "ownership interest," but such persons are included in the class of persons with a "property interest." Thus this change has no effect.

16. In Section 769.11, a clarification is included stating that the right to petition under SMCRA is independent of areas set aside from surface coal mining operations under laws other than the Act. This new sentence has no environmental effect. In that same section of the final rule, a specific reference to an "injury in fact" test has been included, but the substantive requirements are the same as in the preferred alternative in the FEIS.

17. In final Section 769.14(a)(1), the time for determining a petition is complete has been reduced from 60 days under the preferred alternative of the FEIS to 30 days, the time period appearing in the previous rules. This provision is within the scope of the EIS. A clarifying sentence has been added providing that a request for supplementary information will not affect OSM's determination that a petition is complete. This sentence has no environmental effect.

18. In Section 769.14(a), the FEIS preferred alternative concept of "sufficient merit" has been merged into the concept of "complete" under Section 769.14(a)(2) and "frivolous" under Section 769.14(a)(4). The concept of "mineable coal" has been expanded to include privately owned coal under land owned by the United States. This narrows the grounds for rejection of a petition and thus is more environmentally protective than the preferred alternative in the FEIS.

19. The concept of "ripe" under Section 769.14(a)(3) has been expanded from the FEIS preferred alternative to include petitioned lands not required to be leased because the mineral rights are not owned by the United States or are owned by the Tennessee Valley Authority and lands over unleased Federal coal that are subject to surface disturbances from neighboring surface coal mining operations. These changes expand the amount of lands for which potential petitions are ripe for processing and thus are more environmentally protective than the preferred alternative.

20. In Section 769.14(a)(4), the concept of "frivolous," in addition to the components taken from the proposed concept of "sufficient merit," also includes petitions whose allegations of harm lack serious merit. This new description, together with final Section 769.14(b)(1) which requires the rejection of frivolous petitions, are within the ambit of previous Section 769.14(b). Thus these provisions will have little environmental effect.

21. Under final Section 769.14(b)(2), suspension of unripe petitions is discretionary rather than mandatory, as appeared in the preferred alternative of the FEIS. Advancing the time when petitions may be considered is not likely to have any substantial environmental impact because under the preferred alternative, unripe petitions were only suspended and not rejected and have to be considered as soon as they become ripe.

22. In Section 769.14(c), the replacement of the term "sufficient merit" with the term "frivolous" has no environmental effect given the changed meaning of the word "complete" and the meaning of "frivolous."

23. Section 769.14(e) in the FEIS preferred alternative contained a mandatory procedure for notifying the public and requesting information on the completeness, ripeness and sufficient merit of a petition. That procedure has not been adopted. Its omission will have no environmental effect because OSM will continue to be responsible for making the requisite determinations and such a procedure was not included under the previous rules.

24. Final Section 769.14(e) includes provisions from previous Section 769.14(f) and thus has no environmental impacts.

25. Final Section 769.16(b)(2) is more environmentally protective than the corresponding provision in the FEIS preferred alternative because it does not include the FEIS exceptions which would have required disclosure of certain information which could create a risk of destruction or harm to properties listed, or eligible for listing, on the National Register of Historic Places.

26. In final Section 769.17(a), OSM has added a provision that at the hearing on the petition, "[n]o person shall bear the burden of proof or persuasion." Inclusion of this protection for petitioners is more environmentally protective than the FEIS preferred alternative and the previous rule.

27. Final Section 761.12(b) provides 60 days notice to the National Park Service and U.S. Fish and Wildlife Service of VER requests for any lands within the boundaries of areas under their jurisdiction. This is more environmentally protective than the FEIS preferred alternative or the previous rules.

## **LIST OF SUBJECTS**

### **30 CFR Part 736**

Coal mining, Intergovernmental relations, Surface mining, Underground mining.

### **30 CFR Part 760**

Historic preservation, Monuments and memorials, National forests, National parks, Surface mining, Underground mining, Wildlife refuges.

### **30 CFR Parts 761 and 762**

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

### **30 CFR Part 765**

Surface mining, Underground mining.

### **30 CFR Parts 764 and 769**

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

### **30 CFR Part 779**

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

### **30 CFR Part 783**

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

Accordingly, 30 CFR Parts 736, 760, 761, 762, 764, 765, 769, 779, and 783 are amended as set forth herein.

Dated: September 9, 1983.

W. L. Dare, Acting Deputy Assistant Secretary for Energy and Minerals.

## **PART 736 -- FEDERAL PROGRAM FOR A STATE**

1. Section 736.15 is revised to read as follows:

### **SECTION 736.15 - IMPLEMENTATION, ENFORCEMENT, AND MAINTENANCE OF A FEDERAL PROGRAM.**

(a) The Director shall implement, administer, enforce, and maintain a Federal program or any revision thereto not later than 30 days after a Federal program is promulgated or revised.

(b)(1) Except as provided in paragraph (b)(2) of this section, the Director shall implement the procedures and criteria of a Federal program for a State for designating lands unsuitable for all or certain types of surface coal mining one year after a Federal program is made effective for a State.

(2) When a complete or partial Federal program is promulgated because of a State's failure to implement, maintain, or enforce adequately all or a part of its State program, all applicable portions of the Federal program for the State under this part shall be effective immediately upon implementation of the Federal program.

2. Subchapter F of 30 CFR Chapter VII is amended by removing Parts 760 and 765 and revising Parts 761, 762, 764 and 769 as follows:

## **PART 761 -- AREAS DESIGNATED BY ACT OF CONGRESS**

### Section

761.1	Scope.
761.3	Authority.
761.5	Definitions.
761.11	Areas where mining is prohibited or limited.
761.12	Procedures.

Authority: Section 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*).

### **SECTION 761.1 - SCOPE.**

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 in section 522(e) of the Act for those types of operations on certain Federal, public and private lands.

### **SECTION 761.3 - AUTHORITY.**

The State regulatory authority or the Secretary is authorized by section 522(e) of the Act (*30 U.S.C. 1272(e)*) to prohibit or limit surface coal mining operations on or near certain private, Federal, and other public lands, subject to valid existing rights and except for those operations which existed on August 3, 1977.

## **SECTION 761.5 - DEFINITIONS.**

For the purposes of this part --

**CEMETERY** means any area of land where human bodies are interred, except for private family burial grounds.

**COMMUNITY OR INSTITUTIONAL BUILDING** means any structure, other than a public building or an occupied dwelling, which is used primarily for meetings, gatherings or functions of local civic organizations or other community groups; functions as an educational, cultural, historic, religious, scientific, correctional, mental-health or physical health care facility; or is used for public services, including, but not limited to, water supply, power generation or sewage treatment.

**OCCUPIED DWELLING** means any building that is currently being used on a regular or temporary basis for human habitation.

**PUBLIC BUILDING** means any structure that is owned or leased, and principally used by a governmental agency for public business or meetings.

**PUBLIC PARK** means an area or portion of an area dedicated or designated by any Federal, State, or local agency primarily for public recreational use, whether or not such use is limited to certain times or days, including any land leased, reserved, or held open to the public because of that use.

**PUBLIC ROAD** means a road (a) which has been designated as a public road pursuant to the laws of the jurisdiction in which it is located; (b) which is maintained with public funds in a manner similar to other public roads of the same classification within the jurisdiction; (c) for which there is substantial (more than incidental) public use; and (d) which meets road construction standards for other public roads of the same classification in the local jurisdiction.

**PUBLICLY-OWNED PARK** means a public park that is owned by a Federal, State or local governmental entity.

**SIGNIFICANT FOREST COVER** means an existing plant community consisting predominantly of trees and other woody vegetation. The Secretary of Agriculture shall decide on a case-by-case basis whether the forest cover is significant within those national forests west of the 100th meridian.

**SIGNIFICANT RECREATIONAL, TIMBER, ECONOMIC, OR OTHER VALUES INCOMPATIBLE WITH SURFACE COAL MINING OPERATIONS** means those values to be evaluated for their significance which could be damaged beyond an operator's ability to repair or restore by, and are not capable of existing together with, surface coal mining operations because of the undesirable effects mining would have on those values, either on the area included in the permit application or on other affected areas. Those values to be evaluated for their importance include:

- (a) Recreation, including hiking, boating, camping, skiing or other related outdoor activities;
- (b) Timber manager and silviculture;
- (c) Agriculture, aquaculture or production of other natural, processed or manufactured products which enter commerce;
- (d) Scenic, historic, archaeological, esthetic, fish, wildlife, plants or cultural interests.

**SURFACE COAL MINING OPERATIONS WHICH EXIST ON THE DATE OF ENACTMENT** means all surface coal mining operations which were being conducted on August 3, 1977.

**SURFACE OPERATIONS AND IMPACTS INCIDENT TO AN UNDERGROUND COAL MINE** means all activities involved in or related to underground coal mining which are either conducted on the surface of the land, produce changes in the land surface or disturb the surface, air or water resources of the area, including all activities listed in section 701(28) of the Act and the definition of surface coal mining operations appearing in Section 700.5 of this chapter.

**VALID EXISTING RIGHTS** means:

- (a) Except for haul roads, that a person possesses valid existing rights for an area protected under section 522(e) of the Act on August 3, 1977, if the application of any of the prohibitions contained in that section to the property

interest that existed on that date would effect a taking of the person's property which would entitle the person to just compensation under the Fifth and Fourteenth Amendments to the United States Constitution;

(b) For haul roads,

(1) A recorded right of way, recorded easement or a permit for a coal haul road recorded as of August 3, 1977, or

(2) Any other road in existence as of August 3, 1977;

(c) A person possesses valid existing rights if the person proposing to conduct surface coal mining operations can demonstrate that the coal is both needed for, and immediately adjacent to, an ongoing surface coal mining operation which existed on August 3, 1977. A determination that coal is "needed for" will be based upon a finding that the extension of mining is essential to make the surface coal mining operation as a whole economically viable;

(d) Where an area comes under the protection of Section 522(e) of the Act after August 3, 1977, valid existing rights shall be found if --

(1) On the date the protection comes into existence, a validly authorized surface coal mining operation exists on that area; or

(2) The prohibition caused by Section 522(e) of the Act, if applied to the property interest that exists on the date the protection comes into existence, would effect a taking of the person's property which would entitle the person to just compensation under the Fifth and Fourteenth Amendments to the United States Constitution.

(e) Interpretation of the terms of the document relied upon to establish the rights to which the standard of paragraphs (a) and (d) of this section applies shall be based either upon applicable State statutory or case law concerning interpretation of documents conveying mineral rights or, where no applicable State law exists, upon the usage and custom at the time and place it came into existence.

#### **SECTION 761.11 - AREAS WHERE MINING IS PROHIBITED OR LIMITED.**

Subject to valid existing rights, no surface coal mining operations shall be conducted after August, 3, 1977, unless those operations existed on the date of enactment:

(a) On any lands within the boundaries of the National Park System, the National Wildlife Refuge System, The National System of Trails, the National Wilderness Preservation System, the Wild and Scenic Rivers System including, for study rivers designated under section 5(a) of the Wild and Scenic Rivers Act (*16 U.S.C. 1276(a)*), a corridor extending not more than one-quarter mile from each bank for the length of the segment being studied, and National Recreation Areas designated by Act of Congress;

(b) On any Federal lands within the boundaries of any national forest; provided, however, that surface coal mining operations may be permitted on such lands, if the Secretary finds that there are no significant recreational, timber, economic, or other values which may be incompatible with surface coal mining operations; and

(1) Surface operations and impacts are incident to an underground coal mine; or

(2) The Secretary of Agriculture determines, with respect to lands which do not have significant forest cover within those national forests west of the 100th meridian, that surface coal mining operations comply with the Multiple-Use Sustained Yield Act of 1960 (*16 U.S.C. 528-531*), the Federal Coal Leasing Amendments Act of 1975 (Pub. L. 94-377, *30 U.S.C. 201* et seq. ), the National Forest Management Act of 1976 (90 Stat. 2949), and the provisions of the Act. No surface coal mining operation may be permitted within the boundaries of the Custer National Forest;

(c) On any lands where mining will adversely affect any publicly owned park or any publicly owned 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 place;

(d) Within 100 feet, measured horizontally, of the outside right-of-way line of any public road, except --

(1) Where mine access roads or haulage roads join such right-of-way line; or

(2) Where the regulatory authority or the appropriate public road authority, pursuant to being designated as the responsible agency by the regulatory authority, allows the public road to be relocated, closed, or the area affected to be within 100 feet of such road, after --

(i) Public notice and opportunity for a public hearing in accordance with Section 761.12(d); and

(ii) Making a written finding that the interests of the affected public and landowners will be protected;

(e) Within 300 feet, measured horizontally, of any occupied dwelling, except when --

(1) The owner thereof has provided a written waiver consenting to surface coal mining operations closer than 300 feet; or

(2) The part of the mining operation which is within 300 feet of the dwelling is a haul road or access road which connects with an existing public road on the side of the public road opposite the dwelling;

(f) Within 300 feet measured horizontally of any public building, school, church, community or institutional building or public park; or

(g) Within 100 feet measured horizontally of a cemetery;

(h) There will be no surface coal mining, permitting, licensing or exploration of Federal lands in the National Park System, National Wildlife Refuge System, National System of Trails, National Wilderness Preservation System, Wild and Scenic Rivers System, or National Recreation Areas, unless called for by Acts of Congress.

## **SECTION 761.12 - PROCEDURES.**

(a) Upon receipt of a complete application for a surface coal mining and reclamation operation permit, the regulatory authority shall review the application to determine whether surface coal mining operations are limited or prohibited under Section 761.11 on the lands which would be disturbed by the proposed operations.

(b)(1) Where the proposed operation would be located on any lands listed in Section 761.11(a), (f), or (g), the regulatory authority shall reject the application if the applicant has no valid existing rights for the area, or if the operation did not exist on August 3, 1977.

(2) If the regulatory authority is unable to determine whether the proposed operation is located within the boundaries of any of the lands in Section 761.11(a) or closer than the limits provided in Section 761.11 (f) and (g), the regulatory authority shall transmit a copy of the relevant portions of the permit application to the appropriate Federal, State, or local government agency for a determination or clarification of the relevant boundaries or distances, with a notice to the appropriate agency that it has 30 days from receipt of the request in which to respond. The National Park Service or the U.S. Fish and Wildlife Service shall be notified of any request for a determination of valid existing rights pertaining to areas within the boundaries of areas under their jurisdiction and shall have 30 days from receipt of the notification in which to respond. The regulatory authority, upon request by the appropriate agency, shall grant an extension to the 30-day period of an additional 30 days. If no response is received within 30-day period or within the extended period granted, the regulatory authority may make the necessary determination based on the information it has available.

(c) Where the proposed operation would include Federal lands within the boundaries of any national forest, and the applicant seeks a determination that mining is permissible under Section 761.11(b), the applicant shall submit a permit application to the Director for processing under Subchapter D of this chapter. Before acting on the permit application, the Director shall ensure that the Secretary's determination has been received and the findings required by section 522(e)(2) of the Act have been made.

(d) Where the mining operation is proposed to be conducted within 100 feet, measured horizontally, of the outside right-of-way line of any public road (except as provided in Section 761.11(d)(2)) or where the applicant proposes to relocate or close any public road, the regulatory authority or public road authority designated by the regulatory authority shall --

(1) Require the applicant to obtain necessary approvals of the authority with jurisdiction over the public road;

(2) Provide an opportunity for a public hearing in the locality of the proposed mining operation for the purpose of determining whether the interests of the public and affected landowners will be protected;

(3) If a public hearing is requested, provide appropriate advance notice of the public hearing, to be published in a newspaper of general circulation in the affected locale at least 2 weeks prior to the hearing; and

(4) Make a written finding based upon information received at the public hearing within 30 days after completion of the hearing, or after any public comment period ends if no hearing is held, as to whether the interests of the

public and affected landowners will be protected from the proposed mining operation. No mining shall be allowed within 100 feet of the outside right-of-way line of a road, nor may a road be relocated or closed, unless the regulatory authority or public road authority determines that the interests of the public and affected landowners will be protected.

(e)(1) Where the proposed surface coal mining operations would be conducted within 300 feet, measured horizontally, of any occupied dwelling, the permit applicant shall submit with the application a written waiver by lease, deed, or other conveyance from the owner of the dwelling, clarifying that the owner and signator had the legal right to deny mining and knowingly waived that right. The waiver shall act as consent to such operations within a closer distance of the dwelling as specified.

(2) Where the applicant for a permit after August 3, 1977, had obtained a valid waiver prior to August 3, 1977, from the owner of an occupied dwelling to mine within 300 feet of such dwelling, a new waiver shall not be required.

(3)(i) Where the applicant for a permit after August 3, 1977, had obtained a valid waiver from the owner of an occupied dwelling, that waiver shall remain effective against subsequent purchasers who had actual or constructive knowledge of the existing waiver at the time of purchase.

(ii) A subsequent purchaser shall be deemed to have constructive knowledge if the waiver has been properly filed in public property records pursuant to State laws or if the mining has proceeded to within the 300-foot limit prior to the date of purchase.

(f)(1) Where the regulatory authority determines that the proposed surface coal mining operation will adversely affect any publicly owned park or any publicly owned 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 publicly owned park or publicly owned National Register 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.

(2) A permit for the operation shall not be issued unless jointly approved by all affected agencies.

(g) If the regulatory authority determines that the proposed surface coal mining operation is not prohibited under section 522(e) of the Act and this part, it may nevertheless, pursuant to appropriate petitions, designate such lands as unsuitable for all or certain types of surface coal mining operations pursuant to Part 762, 764 or 769 of this chapter.

(h) A determination by the regulatory authority that a person holds or does not hold valid existing rights or that surface coal mining operations did or did not exist on the date of enactment shall be subject to administrative and judicial review under Sections 775.11 and 775.13 of this chapter.

## **PART 762 -- CRITERIA FOR DESIGNATING AREAS AS UNSUITABLE FOR SURFACE COAL MINING OPERATIONS**

### Section

762.1	Scope.
762.4	Responsibility.
762.5	Definitions.
762.11	Criteria for designating lands as unsuitable.
762.12	Additional criteria.
762.13	Land exempt from designation as unsuitable for surface coal mining operations.
762.14	Exploration on land designated as unsuitable for surface coal mining operations.

Authority: Section 102, 201, 501(b), 503, 504, 512 and 522 of Pub. L. 95-87, 91 Stat. 448, 449, 468, 470, 471, 483, 507, (30 U.S.C. 1201, 1211, 1251, 1253, 1254, 1262 and 1272).

### **SECTION 762.1 - SCOPE.**

This part establishes the minimum criteria to be used in determining whether lands should be designated as unsuitable

for all or certain types of surface coal mining operations.

#### **SECTION 762.4 - RESPONSIBILITY.**

The regulatory authority or OSM shall use the criteria in this part for the evaluation of each petition for the designation of areas as unsuitable for surface coal mining operations.

#### **SECTION 762.5 - DEFINITIONS.**

For purposes of this part:

**FRAGILE LANDS** means geographic areas containing natural, ecologic, scientific, or esthetic resources that could be damaged beyond an operator's ability to repair or restore or be destroyed by surface coal mining operations. Examples of fragile lands include valuable habitats for fish or wildlife, critical habitats for endangered or threatened species of animals or plants, uncommon geologic formations, National Natural Landmark sites, areas where mining may result in flooding, environmental corridors containing a concentration of ecologic and esthetic features, areas of recreational value due to high environmental quality, and buffer zones adjacent to the boundaries of areas where surface coal mining operations are prohibited under section 522(e) of the Act and Part 761 of this chapter, if those areas have characteristics requiring additional areal protection or if the buffer zone itself contains fragile resources.

**HISTORIC LANDS** means historic, cultural, and scientific areas that could be damaged beyond an operator's ability to repair or restore, or be destroyed by surface coal mining operations. Examples of historic lands include archeological and paleontological sites, sites listed on or eligible for listing on a State or National Register of Historic Places, National Historic Landmark sites, sites having religious or cultural significance to native Americans or religious groups, and sites for which historic designation is pending.

**NATURAL HAZARD LANDS** means geographic areas in which natural conditions exist which pose or, as a result of surface coal mining operations, may pose a threat to the health, safety or welfare of people, property or the environment, including areas subject to landslides, cave-ins, large or encroaching sand dunes, severe wind or soil erosion, frequent flooding, avalanches and areas of unstable geology.

**RENEWABLE RESOURCE LANDS** means geographic areas which contribute significantly to the long-range productivity of water supply or of food or fiber products, such lands to include aquifers and aquifer recharge areas.

**SUBSTANTIAL LEGAL AND FINANCIAL COMMITMENTS IN A SURFACE COAL MINING OPERATION** means significant investments that have been made on the basis of a long-term coal contract in power plants, railroads, coal-handling, preparation, extraction or storage facilities and other capital-intensive activities. An example would be an existing mine, not actually producing coal, but in a substantial stage of development prior to production. Costs of acquiring the coal in place or the right to mine it without an existing mine, as described in the above example, alone are not sufficient to constitute substantial legal and financial commitments.

#### **SECTION 762.11 - CRITERIA FOR DESIGNATING LANDS AS UNSUITABLE.**

(a) Upon petition an area shall be designated as unsuitable for all or certain types of surface coal mining operations, if the regulatory authority determines that reclamation is not technologically and economically feasible under the Act, this chapter or an approved State program.

(b) Upon petition an area may be (but is not required to be) designated as unsuitable for certain types of surface coal mining operations, if the operations will --

- (1) Be incompatible with existing State or local land use plans or programs;
- (2) Affect fragile or historic lands in which the operations could result in significant damage to important historic, cultural, scientific, or esthetic values or natural systems;
- (3) Affect renewable resource lands in which the operations could result in a substantial loss or reduction of long-range productivity of water supply or of food or fiber products; or

(4) Affect natural hazard lands in which the operations could substantially endanger life and property, such lands to include areas subject to frequent flooding and areas of unstable geology.

**SECTION 762.12 - ADDITIONAL CRITERIA.**

(a) A State regulatory authority may establish additional or more stringent criteria for determining whether lands within the State should be designated as unsuitable for coal mining operations. Such criteria shall be approved pursuant to Subchapter C of this chapter.

(b) The Secretary may establish additional criteria for determining whether Federal lands should be designated as unsuitable for surface mining operations.

(c) Additional criteria will be determined to be more stringent on the basis of whether they provide for greater protection of the public health, safety and welfare or the environment, such that areas beyond those specified in the criteria of this part would be designated as unsuitable for surface coal mining operations.

**SECTION 762.13 - LAND EXEMPT FROM DESIGNATION AS UNSUITABLE FOR SURFACE COAL MINING OPERATIONS.**

The requirements of this part do not apply to --

(a) Lands on which surface coal mining operations were being conducted on the date of enactment of the Act;

(b) Lands covered by a permit issued under the Act; or

(c) Lands where substantial legal and financial commitments in surface coal mining operations were in existence prior to January 4, 1977.

**SECTION 762.14 - EXPLORATION ON LAND DESIGNATED AS UNSUITABLE FOR SURFACE COAL MINING OPERATIONS.**

Designation of any area as unsuitable for all or certain types of surface coal mining operations pursuant to section 522 of the Act and regulations of this subchapter does not prohibit coal exploration operations in the area, if conducted in accordance with the Act, this chapter, any approved State or Federal program, and other applicable requirements. Exploration operations on any lands designated unsuitable for surface coal mining operations must be approved by the regulatory authority under Part 772 of this chapter, to ensure that exploration does not interfere with any value for which the area has been designated unsuitable for surface coal mining.

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

Section	
764.1	Scope.
764.10	Information collection.
764.11	General process requirements.
764.13	Petitions.
764.15	Initial processing, recordkeeping, and notification requirements.
764.17	Hearing requirements.
764.19	Decision.
764.21	Data base and inventory system requirements.
764.23	Public information.

764.25 Regulatory authority responsibility for implementation.

Authority: Sections 102, 201, 503, 510 and 522 of Pub. L. 95-87, 91 Stat. 448, 449, 470, 480 and 507 (30 U.S.C. 1202, 1211, 1253, 1260 and 1272).

#### **SECTION 764.1 - SCOPE.**

This part establishes minimum procedures and standards to be included in each approved State program for designating non-Federal and non-Indian lands in a State as unsuitable for all or certain types of surface coal mining operations and for terminating designations.

#### **SECTION 764.10 - INFORMATION COLLECTION.**

The information collection requirements contained in Sections 764.21 and 764.25(b) have been approved by the Office of Management and Budget under 44 U.S.C. 3507 and assigned clearance number 1029-0030. The information required in Section 764.21 is necessary to allow the regulatory authority to develop a data base and inventory system to evaluate whether reclamation is feasible in areas covered by petitions. The information required in Section 764.25(b) is necessary to allow the regulatory authority to determine, when a permit application is filed, whether it includes any areas designated as unsuitable for surface coal mining.

#### **SECTION 764.11 - GENERAL PROCESS REQUIREMENTS.**

Each State shall establish a process enabling objective decisions to be made on which, if any, land areas of the State are unsuitable for all or certain types of surface coal mining operations. These decisions shall be based on competent, scientifically sound data and other relevant information. This process shall include the requirements listed in this part.

#### **SECTION 764.13 - PETITIONS.**

(a) Right to petition. Any person having an interest which is or may be adversely affected has the right to petition the regulatory authority to have an area designated as unsuitable for surface coal mining operations, or to have an existing designation terminated. For the purpose of this Action, a person having an interest which is or may be adversely affected must demonstrate how he or she meets an "injury in fact" test by describing the injury to his or her specific affected interests and demonstrate how he or she is among the injured.

(b) Designation. The regulatory authority shall determine what information must be provided by the petitioner to have an area designated as unsuitable for surface coal mining operations.

- (1) At a minimum, a complete petition for designation shall include --
- (i) The petitioner's name, address, telephone number, and notarized signature;
  - (ii) Identification of the petitioned areas, including its location and size, and a U.S. Geological Survey topographic map outlining the perimeter of the petitioned area;
  - (iii) An identification of the petitioner's interest which is or may be adversely affected by surface coal mining operations, including a statement demonstrating how the petitioner satisfies the requirements of paragraph (a) of this section;
  - (iv) A description of how mining of the area has affected or may adversely affect people, land, air, water, or other resources, including the petitioner's interests; and
  - (v) Allegations of fact and supporting evidence, covering all lands in the petition area, which tend to establish that the area is unsuitable for all or certain types of surface coal mining operations, pursuant to specific criteria of sections 522(a) (2) and (3) of the Act, assuming that contemporary mining practices required under applicable regulatory programs would be followed if the area were to be mined. Each of the allegations of fact should be specific as to the mining operation, if known, and the portion(s) of the petitioned area and petitioner's interests to which the allegation applies and be supported by evidence that tends to establish the validity of the allegations for the mining operation or portion of the petitioned areas.

(2) The regulatory authority may request that the petitioner provide other supplementary information which is readily available.

(c) Termination. The regulatory authority shall determine what information must be provided by the petitioner to terminate designations of lands as unsuitable for surface coal mining operations.

(1) At a minimum, a complete petition for termination shall include --

- (i) The petitioner's name, address, telephone number, and notarized signature;
- (ii) Identification of the petitioned area, including its location and size and a U.S. Geological Survey topographic map outlining the perimeter of the petitioned area to which the termination petition applies;
- (iii) An identification of the petitioner's interest which is or may be adversely affected by the designation that the area is unsuitable for surface coal mining operations including a statement demonstrating how the petitioner satisfies the requirements of paragraph (a) of this section;
- (iv) Allegations of facts covering all lands for which the termination is proposed. Each of the allegations of fact shall be specific as to the mining operation, if any, and to portions of the petitioned area and petitioner's interests to which the allegation applies. The allegations shall be supported by evidence, not contained in the record of the designation proceeding, that tends to establish the validity of the allegations for the mining operation or portion of the petitioned area, assuming that contemporary mining practices required under applicable regulatory programs would be followed were the area to be mined. For areas previously and unsuccessfully proposed for termination, significant new allegations of facts and supporting evidence must be presented in the petition. Allegations and supporting evidence should also be specific to the basis for which the designation was made and tend to establish that the designation should be terminated on the following bases:

(A) Nature or abundance of the protected resource or condition or other basis of the designation if the designation was based on criteria found in Section 762.11(b) of this chapter;

(B) Reclamation now being technologically and economically feasible if the designation was based on the criteria found in Section 762.11(a) of this chapter; or

(C) Resources or conditions not being affected by surface coal mining operations, or in the case of land use plans, not being incompatible with surface coal mining operations during and after mining, if the designation was based on the criteria found in Section 762.11(b) of this chapter;

(2) The State regulatory authority may request that the petitioner provide other supplementary information which is readily available.

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

(a)(1) Within 60 days of receipt of a petition, the regulatory authority shall notify the petitioner by certified mail whether or not 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.

(2) The regulatory authority shall determine whether any identified coal resources exist in the area covered by the petition, without requiring any showing from the petitioner. If the regulatory authority finds there are not any identified coal resources in that area, it shall return the petition to the petitioner with a statement of the findings.

(3) The regulatory authority may suspend petitions related to lands where it finds there is no real or foreseeable potential for surface coal mining operations to occur. Real and foreseeable potential means that the petitioned lands are likely to be subject to leasing or mining activity within 5 years. Where petitions are suspended, the regulatory authority, upon request of the petitioner but not more than once each year, will determine whether there is real and foreseeable potential for surface coal mining operations to occur. If it is determined that there is a real or foreseeable potential for surface coal mining operations to occur, processing of the petition shall proceed.

(4) If the regulatory authority determines that the petition is incomplete, frivolous, or that the petitioner does not meet the requirements of Section 764.13(a), it shall return the petition to the petitioner with a written statement of the reasons for the determination and the categories of information needed to make the petition complete. A frivolous petition is one in which the allegations of harm lack serious merit.

(5) When considering a petition for an area which was previously and unsuccessfully proposed for designation, the regulatory authority shall determine if the new petition presents significant new allegations of facts with evidence which tends to establish the allegations. If the petition does not contain such material, the regulatory authority may choose not to consider the petition and may return the petition to the petitioner, with a statement of its findings and a reference to the record of the previous designation proceedings where the facts were considered.

(6) The regulatory authority shall notify the person who submits a petition of any application for a permit received which includes any area covered by the petition.

(7) The regulatory authority may determine not to process any petition received insofar as it pertains to lands for which an administratively complete permit application has been filed and the first newspaper notice has been published. Based on such a determination, the regulatory authority may issue a decision on a complete and accurate permit application and shall inform the petitioner why the regulatory authority cannot consider the part of the petition pertaining to the proposed permit area.

(8) When a permit application is filed for an area where a petition has been suspended pursuant to Section 764.15(a)(3), the regulatory authority shall initiate petition review and not issue a permit until a decision is made on the petition.

(b)(1) Promptly after a petition is received, the regulatory authority shall notify the general public of the receipt of the petition by a newspaper advertisement placed in the locale of the area covered by the petition, in the newspaper providing broadest circulation in the region of the petitioned area and in any official State register of public notices. The regulatory authority shall make copies of the petition available to the public and shall provide copies of the petition to other interested governmental agencies, intervenors, persons with an ownership interest of record in the property, and other persons known to the regulatory authority to have an interest in the property. Proper notice to persons with an ownership interest of record in the property shall comply with the requirements of applicable State law.

(2) The regulatory authority may provide for a hearing or a period of written comments on completeness of petitions. If a hearing or comment period on completeness is provided, the regulatory authority shall inform interested governmental agencies, intervenors, persons with an ownership interest of record in the property, and other persons known to the regulatory authority to have an interest in the property of the opportunity to request to participate in such a hearing or provide written comments. Proper notice to persons with an ownership interest of record in the property shall comply with the requirements of applicable State law. Notice of such a hearing shall be made by a newspaper advertisement placed in the locale of the area covered by the petition, in the newspaper providing broadest circulation in the region of the petitioned area and in any official State register of public notices. The regulatory authority shall notify the petitioner of such a hearing by certified mail. On the basis of regulatory authority review as well as consideration of all comments, the regulatory authority shall determine whether the petition is complete.

(3) Promptly after the determination that a petition is complete, the regulatory authority shall request submissions from the general public of relevant information by a newspaper advertisement placed once a week for two consecutive weeks in the locale of the area covered by the petition, in the newspaper providing broadest circulation in the region of the petitioned area, and in any official State register of public notices.

(c) Until three days before the regulatory authority holds a hearing under Section 764.17, any person may intervene in the proceeding by filing allegations of facts describing how the designation determination directly affects the intervenor, supporting evidence, a short statement identifying the petition to which the allegations pertain, and the intervenor's name, address and telephone number.

(d) Beginning from the date a petition is filed, the regulatory authority shall compile and maintain a record consisting of all documents relating to the petition filed with or prepared by the regulatory authority. The regulatory authority shall make the record available to the public for inspection free of charge and for copying at reasonable cost during all normal hours at the main office of the regulatory authority. The regulatory authority shall also maintain information at or near the area in which the petitioned land is located and make this information available to the public for inspection free of charge and for copying at reasonable cost during all normal business hours. At a minimum, this information shall include a copy of the petition.

## **SECTION 764.17 - HEARING REQUIREMENTS.**

(a) Within 10 months after receipt of a complete petition, the regulatory authority shall hold a public hearing in the locality of the area covered by the petition. If all petitioners and intervenors agree, the hearing need not be held. The regulatory authority may subpoena witnesses as necessary. The hearing may be conducted with cross-examination of expert witnesses only. A record of the hearing shall be made and preserved according to State law. No person shall bear the burden of proof or persuasion. All relevant parts of the data base and inventory system and all public comments received during the public comment period shall be included in the record and considered by the regulatory authority in

its decision on the petition.

(b)(1) The regulatory authority shall give notice of the date, time, and location of the hearing to:

- (i) Local, State, and Federal agencies which may have an interest in the decision on the petition;
- (ii) The petitioner and the intervenors; and
- (iii) Any person known by the regulatory authority to have a property interest in the petitioned area.

Proper notice to persons with an ownership interest of record shall comply with the requirements of applicable State law.

(2) Notice of the hearing shall be sent by certified mail to petitioners and intervenors, and by regular mail to government agencies and property owners involved in the proceeding, and postmarked not less than 30 days before the scheduled date of the hearing.

(c) The regulatory authority shall notify the general public of the date, time, and location of the hearing by placing a newspaper advertisement once a week for 2 consecutive weeks in the locale of the area covered by the petition and once during the week prior to the public hearing. The consecutive weekly advertisement must begin between 4 and 5 weeks before the scheduled date of the public hearing.

(d) The regulatory authority may consolidate in a single hearing the hearings required for each of several petitions which relate to areas in the same locale.

(e) Prior to designating any land areas as unsuitable for surface coal mining operations, the regulatory authority shall prepare a detailed statement, using existing and available information on the potential coal resources of the area, the demand for coal resources, and the impact of such designation on the environment, the economy, and the supply of coal.

(f) In the event that all petitioners and intervenors stipulate agreement prior to the hearing, the petition may be withdrawn from consideration.

#### **SECTION 764.19 - DECISION.**

(a) In reaching its decision, the regulatory authority shall use --

- (1) The information contained in the data base and inventory system;
- (2) Information provided by other governmental agencies;
- (3) The detailed statement when it is prepared under Section 764.17(e); and
- (4) Any other relevant information submitted during the comment period.

(b) A final written decision shall be issued by the regulatory authority, including a statement of reasons, within 60 days of completion of the public hearing, or, if no public hearing is held, then within 12 months after receipt of the complete petition. The regulatory authority shall simultaneously send the decision by certified mail to the petitioner and intervenors and by regular mail to all other persons involved in the proceeding.

(c) The decision of the State regulatory authority with respect to a petition, or the failure of the regulatory authority to act within the time limits set forth in this section, shall be subject to judicial review by a court of competent jurisdiction in accordance with State law under section 526(e) of the Act and Section 775.13 of this chapter. All relevant portions of the data base, inventory system, and public comments received during the public comment period set by the regulatory authority shall be considered and included in the record of the administrative proceeding.

#### **SECTION 764.21 - DATA BASE AND INVENTORY SYSTEM REQUIREMENTS.**

(a) The regulatory authority shall develop a data base and inventory system which will permit evaluation of whether reclamation is feasible in areas covered by petitions.

(b) The regulatory authority shall include in the system information relevant to the criteria in Section 762.11 of this chapter, including, but not limited to, information received from the United States Fish and Wildlife Service, the State Historic Preservation Officer, and the agency administering section 127 of the Clean Air Act, as amended (*42 U.S.C. 7470 et seq.*).

- (c) The regulatory authority shall add to the data base and inventory system information --
- (1) On potential coal resources of the State, demand for those resources, the environment, the economy and the supply of coal, sufficient to enable the regulatory authority to prepare the statements required by Section 764.17(e); and
  - (2) That becomes available from petitions, publications, experiments, permit application, mining and reclamation operations, and other sources.

**SECTION 764.23 - PUBLIC INFORMATION.**

The regulatory authority shall:

- (a) Make the information in the data base and inventory system developed under Section 764.21 available to the public for inspection free of charge and for copying at reasonable cost, except that specific information relating to location of properties proposed to be nominated to, or listed in, the National Register of Historic Places need not be disclosed if the regulatory authority determines that the disclosure of such information would create a risk of destruction or harm to such properties;
- (b) Provide information to the public on the petition procedures necessary to have an area designated as unsuitable for all or certain types of surface coal mining operations or to have designations terminated and describe how the inventory and data base system can be used.

**SECTION 764.25 - REGULATORY AUTHORITY RESPONSIBILITY FOR IMPLEMENTATION.**

- (a) The regulatory authority shall not issue permits which are inconsistent with designations made pursuant to Part 761, 762, or 764 of this chapter.
- (b) The regulatory authority shall maintain a map or other unified and cumulative record of areas designated unsuitable for all or certain types of surface coal mining operations.
- (c) The regulatory authority shall make available to any person any information within its control regarding designations, including mineral or elemental content which is potentially toxic in the environment but excepting proprietary information on the chemical and physical properties of the coal.

**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**

Section	
769.1	Scope.
769.10	Information collection
769.11	Who may submit a petition.
769.12	Where to submit petitions.
769.13	Contents of petitions.
769.14	Initial processing, recordkeeping, and notification requirements.
769.15	Intervention.
769.16	Public information.
769.17	Hearing requirements.
769.18	Decisions on petitions.
769.19	Regulatory policy.

Authority: Sections 102, 201, 501, 510, 517, 522, and 523 of Pub. L. 95-87, 91 Stat. 448, 449, 468, 480, 498, 507, 510 (30 U.S.C. 1202, 1211, 1251, 1260, 1267, 1272, and 1273).

## **SECTION 769.1 - SCOPE.**

This part establishes minimum procedures and standards for designating Federal lands as unsuitable for all or certain types of surface coal mining operations and for terminating designations pursuant to petition.

## **SECTION 769.10 - INFORMATION COLLECTION.**

The information collection requirements in this part do not require approval of the Office of Management and Budget under *44 U.S.C. 3507* because there are fewer than 10 respondents annually.

## **SECTION 769.11 - WHO MAY SUBMIT A PETITION.**

Any person having an interest which is or may be adversely affected by surface coal mining operations to be conducted on Federal lands may petition the Secretary to have an area designated as unsuitable for all or certain types of surface coal mining operations, or to have an existing designation terminated. This right does not apply to areas set aside from surface coal mining operations under laws other than the Act. For the purpose of this section, a person having an interest which is or may be adversely affected must demonstrate how he or she meets an "injury in fact" test by describing the injury to his or her specific affected interests and demonstrate how he or she is among the injured.

## **SECTION 769.12 - WHERE TO SUBMIT PETITIONS.**

Each petition to have an area of Federal lands designated as unsuitable or to terminate an existing designation shall be submitted to the Director of the OSM Field Office responsible for that area where the Federal lands are located.

## **SECTION 769.13 - CONTENTS OF PETITIONS.**

(a) Designation. The only information that a petitioner need provide to designate lands is that required under Section 764.13(b) of this chapter.

(b) Termination. The only information that a petitioner need provide to terminate a designation is that required by Section 764.13(c) of this chapter.

## **SECTION 769.14 - INITIAL PROCESSING, RECORDKEEPING, AND NOTIFICATION REQUIREMENTS.**

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

(2) Complete, (i) for a designation petition, means that (A) all information required under Section 764.13(b) of this chapter has been provided and (B) the information submitted by the petitioner contains significant new allegations of fact and supporting evidence not considered in any previous unsuccessful petition of Federal lands review conducted under Section 522(b) of the Act, that tends to establish that the lands are unsuitable for surface coal mining operations; and (ii) for a termination petition, means that all information required under Section 764.13(c) has been provided.

(3) Ripe, for a designation petition, means that the petitioned lands are (i) subject to a Federal coal lease; (ii) included in a tract for which land use planning has been completed and which tract is available for further consideration for Federal coal leasing; (iii) 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 (iv) over unleased Federal coal and are subject to surface disturbances from neighboring surface coal mining operations.

(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" coal resources exist in the petitioned area or that the

petitioned area is not or could not be subject to related surface 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 3420.1-5(e)(1); and privately owned coal under land owned by the United States).

(b)(1) When the Director finds that the petition is incomplete or frivolous, he or she shall reject the petition with a written statement of reasons and advise the petitioner, via certified mail, that the petition may be reconsidered upon resubmittal with deficiencies cured.

(2) When the Director finds that a petition is not ripe, he or she may suspend the petition and notify the petitioner via certified mail. Where petitions are suspended, OSM, upon request of the petitioner but not more than once each year, will review the petition to determine whether it is ripe. When lack of ripeness is based on land use planning not having occurred yet on unleased Federal land, the Director shall advise the petitioner of his or her opportunity to participate in the planning process. In addition, the Director shall advise the land management agency of the issues raised by the petitioner and will request the agency to consider the issues so raised in its planning effort and to advise the petitioner of all public participation activities for the planning unit.

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

(d)(1) Within 2 weeks after accepting the petition for further processing, OSM shall send a copy of the petition to the authorized officer of the land management agency for the officer's recommendation on the petition.

(2) The authorized officer of the appropriate Federal land management agency shall furnish a recommendation on the petition to OSM within 30 days of its receipt, if the area covered by the petition has been included in a completed Federal lands review or within 9 months, if the area has not been included in a Federal lands review.

(e) Promptly after accepting a petition for further processing, OSM shall circulate copies of the petition to, and request submissions of relevant information from, other interested governmental agencies, the petitioner, intervenors, and any person, known to OSM to have an ownership interest in the property.

(f) Where lands administered by the Department of the Interior and other Federal land management agencies are contiguous or intermingled or where the Department's resource management could affect resources on the other's land, the Director of OSM shall refer a copy of the petition to the other Federal land management agency and shall consider the agency's recommendations about designating those lands unsuitable for all or certain types of surface coal mining or terminating such designations.

(g) OSM may determine not to process any petition received insofar as it pertains to lands for which an administratively complete permit application has been filed and the first newspaper notice has been published. Based on such a determination, OSM may issue a decision on a complete and accurate permit application and shall inform the petitioner why OSM cannot consider the part of the petition pertaining to the proposed permit area.

(h) When a permit application is filed for an area where a petition has been suspended pursuant to Section 769.14(b)(2), OSM shall initiate petition review and not issue a permit until a decision is made on the petition.

#### **SECTION 769.15 - INTERVENTION.**

Up to 3 days before the OSM holds a hearing on a petition under Section 769.17, any person may intervene in the proceeding by filing a statement describing how the designation directly affects the intervenor, allegations of facts and supporting evidence, a short statement identifying the petition to which the allegations pertain, and the intervenor's name, address and telephone number.

#### **SECTION 769.16 - PUBLIC INFORMATION.**

(a) Promptly after determining that a petition is complete, the Director shall notify the general public of the receipt of the petition and request submissions of the relevant information by a newspaper advertisement placed once a week for two

consecutive weeks in the newspaper providing broadest circulation in the region of the petitioned area, and in the Federal Register. The advertisement and Federal Register notice shall include a description of the boundaries of the petitioned area, the allegations of fact, and information regarding where the petition is available for public review.

(b)(1) Beginning immediately after a petition is filed, OSM shall compile and maintain a record consisting of all documents relating to the petition filed with or prepared by OSM with the exception of that information excluded under Section 769.16(b)(2). OSM shall make the record available to the public for inspection free of charge and for copying at a reasonable cost during all normal business hours at its Washington, D.C. office. OSM shall also maintain information in or near the area in which the petitioned land is located; this information shall be available for public inspection, free of charge, and for copying at reasonable cost during all normal business hours. At a minimum, this information shall include a copy of the petition.

(2) OSM need not make available to any person or entity the specific location of property proposed to be nominated to be listed or listed in the National Register of Historic Places if it is determined that disclosure of that information would create a risk of destruction or harm to such properties. Withheld information must be disclosed when a designation of unsuitability would rest primarily on an allegation based on that information.

### **SECTION 769.17 - HEARING REQUIREMENTS.**

(a) Within 10 months after receipt of a complete petition, OSM shall hold a public hearing in the locality of the area covered by the petition. If all petitioners and intervenors agree, the hearing need not be held. OSM may subpoena witnesses as necessary. The hearing may be conducted with cross-examination of expert witnesses only. A record of the hearing shall be made and preserved. No person shall bear the burden of proof or persuasion. All relevant parts of the data base and inventory system and all public comments received during the public comment period shall be included in the record and considered by OSM in deciding the petition.

(b)(1) OSM shall give notice of the date, time, and location of the hearing to:

- (i) Local, State, and Federal agencies which may have an interest in the decision on the petition;
- (ii) The petitioner and the intervenors; and
- (iii) Any person known by OSM to have a property interest in the petitioned area.

(2) Notice of the hearing shall be sent by certified mail to the petitioner and intervenors, and by regular mail to other persons involved in the proceeding, and postmarked not less than 30 days before the scheduled date of the hearing.

(3) OSM shall notify the general public of the date, time, and location of the hearing by placing a newspaper advertisement once a week for 2 consecutive weeks prior to the scheduled date of the public hearing in the locale of the area covered by the petition and once during the week prior to the scheduled date of the public hearing. The consecutive weekly advertisements must begin between 4 and 5 weeks prior to the scheduled date of the public hearing.

(c) OSM may consolidate into a single hearing the hearings required for each of several petitions which relate to areas in the same locale.

(d) If any petitions relates to an area of Federal lands which is the subject of a pending surface coal mining and reclamation operations permit application, OSM may, with consent of all petitioners and intervenors, coordinate the hearing on the petition required under paragraph (a) of this section with any hearing on the permit application or informal conference held in accordance with section 513(b) of the Act and Section 740.13 of this chapter on the permit application. Nothing in this paragraph shall relieve an applicant for a permit from the burden of establishing that his or her application is in compliance with the requirements of the Federal lands program.

(e) Prior to designating any lands as unsuitable for surface coal mining operations, OSM shall issue a detailed statement on the abundance of coal resources of the area, the demand for coal resources, and the impact of such designation on the environment, the economy, and the supply of coal.

### **SECTION 769.18 - DECISIONS ON PETITIONS.**

(a) In reaching his or her decision, the Director shall use the information and consider the recommendation provided by the Federal land management agency, information provided by other governmental agencies, the detailed statement, when

it is prepared under Section 769.17(e), and any other relevant information submitted during the comment period.

(b) A final written decision shall be issued by the Director, including a statement of reasons, within 60 days of completion of the public hearing, or if no public hearing is held, within 12 months after receipt of the complete petition. The Director shall simultaneously send the decision by certified mail to the petitioner and the intervenors and by regular mail to all other persons involved in the proceeding.

(c) If the Director concurs with the recommendation of the surface managing agency, the Director's decision becomes final. If the Director does not concur with the recommendation, he or she shall notify the Director of the surface managing agency within 30 days after the public hearing, if any. The decision at the same time will be referred to the Secretary through respective agency heads for resolution and issuance of a final decision within 60 days after the hearing, if any.

(d) A final decision of the Director or the Secretary is subject to judicial review in accordance with Section 775.13 of this chapter and section 526(a)(2) and (b) of the Act.

### **SECTION 769.19 - REGULATORY POLICY**

Once an area of Federal lands is designated as unsuitable for all or certain types of surface coal mining operations, any permit or lease shall be conditioned in a manner so as to limit or prohibit surface coal mining operations on the designated areas in accordance with the designation.

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

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

#### **SECTION 779.24 - MAPS: GENERAL REQUIREMENTS.**

\* \* \* \* \*

(j) Each public or private cemetery, Indian burial ground, or other area where human bodies are interred, that is located in or within 100 feet of the proposed permit area;

\* \* \* \* \*

### **PART 783 -- UNDERGROUND MINING PERMIT APPLICATIONS -- MINIMUM REQUIREMENTS FOR INFORMATION ON ENVIRONMENTAL RESOURCES**

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

#### **SECTION 783.24 - MAPS: GENERAL REQUIREMENTS.**

\* \* \* \* \*

(j) Each public or private cemetery, Indian burial ground, or other area where human bodies are interred, that is located in or within 100 feet of the proposed permit area;

\* \* \* \* \*

Pub. L. 95-87; 30 U.S.C. Section 1201 et seq.)

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