

**FEDERAL REGISTER: 52 FR 18792 (May 19, 1987)**

DEPARTMENT OF THE INTERIOR

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

30 CFR Part 762

Surface Coal Mining and Reclamation Operations; Permanent Regulatory Program;  
Areas Unsuited for Mining; Definitions of Fragile Lands and Historic Lands

ACTION: Final rule.

**SUMMARY:** The Office of Surface Mining Reclamation and Enforcement (OSMRE) is amending its permanent program rule that defines "fragile lands" and "historic lands," two types of lands that may be found unsuitable for certain types of surface coal mining operations. Both of these definitions, which apply throughout the lands unsuitable petition process, are being changed to eliminate the requirement of a finding of irreparable damage. These changes are being made in response to a settlement agreement resulting from litigation. In addition, the definition of fragile lands is being changed to remove buffer zones adjacent to areas where mining is prohibited, as an example of fragile lands, in response to comments on the proposed rule.

EFFECTIVE DATE: June 18, 1987.

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

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**SUPPLEMENTARY INFORMATION:**

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

**I. BACKGROUND**

The Surface Mining Control and Reclamation Act of 1977 (SMCRA), *30 U.S.C. 1201* et seq., sets forth the general regulatory requirements governing surface coal mining and reclamation operations and the surface impacts of underground coal mining. Section 522 of SMCRA, *30 U.S.C. 1272*, establishes a process through which surface coal mining operations may be prohibited or limited under certain circumstances. Section 522(a)(3) establishes four categories of surface areas that may be determined unsuitable for certain types of surface coal mining operations, and specifies the criteria for making that determination for each category. Fragile or historic lands are included in one of these categories.

In 1979, OSMRE established performance standards under 30 CFR Chapter VII of its permanent regulatory program in order to implement SMCRA. The rules at 30 CFR 762.5 defined fragile and historic lands; 30 CFR 762.11 established criteria under which lands could be designated unsuitable for surface coal mining operations.

On September 14, 1983 (*48 FR 41312*), the Secretary of the Interior promulgated rules amending OSMRE's permanent regulatory program. Among other things, those rules revised the definitions of "fragile lands" and "historic lands" in Section 762.5 by incorporating an irreparable damage standard. The effect of the change was to require a petitioner to show that lands would suffer irreparable damage or be destroyed before they would be considered fragile or historic.

The September 14, 1983, rules were challenged in Round III of *In re: Permanent Surface Mining Regulation Litigation II*, No. 79-1144 (D.D.C. 1984). On December 3, 1984, the district court issued an order approving an agreement between the Plaintiff Citizen and Environmental Organizations and the Defendant Secretary of the Interior. The order withdrew from the litigation an issue concerning the definitions of "fragile lands" and "historic lands."

Under the terms of the agreement, the Secretary suspended portions of the definitions of "fragile lands" and "historic lands" in Section 762.5 by a Federal Register notice published on January 3, 1985 (50 FR 257). The notice also stated that to implement the agreement OSMRE would propose a rule to amend the fragile lands and historic lands definitions to require only a finding of significant damage, in contrast to the 1983 rule which required a finding of irreparable damage or destruction.

On July 25, 1985, (50 FR 30408), OSMRE proposed rulemaking to further implement the settlement agreement. In that notice, OSMRE solicited public comments and made provision to hold public hearings upon request. Comments were received from industry, government agencies, and environmental groups during the 70-day comment period. No public hearings were requested, and none were held.

On December 10, 1986 (51 FR 44484), OSMRE reopened the comment period in order to analyze more fully the request of commenters on the proposed rule that the phrase "buffer zones adjacent to the boundaries of areas where surface coal mining operations are prohibited under section 552(e) of SMCRA and Part 761 of this chapter, if those areas have characteristics requiring additional areal protection or if the buffer zone itself contains fragile resources" be removed from the list of examples in the definition of fragile lands. Comments were received from industry and one government agency during the 60-day comment period. No public hearings were requested, and none were held.

## **II. PUBLIC COMMENTS ON PROPOSED RULE AND RESPONSE TO COMMENTS**

This rule defines "fragile lands" and "historic lands," two types of lands that may be found unsuitable for certain types of surface coal mining operations. Both of these definitions, which apply throughout the lands unsuitable petition process, are being changed to eliminate the requirement of a finding of irreparable damage. In addition, the definition of fragile lands is being changed to remove buffer zones adjacent to areas where mining is prohibited under section 522(e) of SMCRA and Part 761 of this chapter as an example of fragile lands.

Fragile lands are defined by this rule to include such areas as valuable habitats for fish or wildlife, critical habitats for endangered or threatened species of animals or plants, uncommon geologic formations, paleontological sites, National Natural Landmarks, areas where mining may result in flooding, environmental corridors containing a concentration of ecologic and esthetic features, and areas of recreational value due to high environmental quality.

Historic lands are defined by this rule to mean areas containing historic, cultural, or scientific resources. Examples of historic lands include archeological sites, properties listed on or eligible for listing on a State or National Register of Historic Places, National Historic Landmarks, properties having religious or cultural significance to Native Americans or religious groups, and properties for which historic designation is pending.

OSMRE is also moving the example of paleontological lands, previously included as a type of historic land, to the definition of fragile lands. Additionally, a minor wording change, from historic "sites" to historic "property" is being made. Finally, OSMRE is removing the concept of "significant damage" from the definition of historic lands.

Twenty-two comments were received on the proposed rule. Of these, 13 came from industry or from groups representing industry, 6 came from Federal agencies, 1 came from an environmental organization, and 2 came from a State historic preservation officer.

The comments raised several major issues and a number of minor ones. A discussion of these comments and OSMRE's responses follow:

### **1. INCLUSION OF THE CONCEPT OF "IMPORTANT" RESOURCES IN THE DEFINITION**

A number of commenters suggested that the proposed definitions of "fragile lands" and "historic lands" were vague, and that OSMRE erred in not including in them the concept of "important" resources. As OSMRE has noted previously in responding to comments on earlier versions of this rule (44 FR 14996, March 13, 1979), qualifiers addressing the importance of fragile and historic lands are included in the criteria for finding such lands to be unsuitable for surface coal mining operations, i.e. in 30 CFR 762.11. The definitions provide guidance on what types of resources are fragile or historic, not the criteria for designating lands as unsuitable. Section 522(a)(3)(B) of SMCRA authorizes the protection of fragile or historic lands in which surface coal mining operations could result in significant damage to important resources.

Thus, it is more consistent with SMCRA to address the issue of importance in the rules specifying the criteria for determining lands unsuitable than in these definitions. For these reasons, OSMRE has not included the concept of importance in the final rule defining fragile and historic lands.

## **2. INCLUSION OF THE CONCEPT OF DAMAGE TO THE RESOURCES AS PART OF THE DEFINITION OF FRAGILE AND HISTORIC LANDS**

A number of commenters noted that it was illogical to include a concept of damage as part of the definition of fragile and historic lands. The suggestion was made that it was more appropriate to reserve such considerations for the section of the rules dealing with the criteria for finding lands unsuitable for mining.

The regulations promulgated in 1979 (*44 FR 15344*, March 13, 1979) included the concept of damage from surface coal mining operations in the definition of fragile lands, but not in the definition of historic lands. Revisions in 1983 (*48 FR 41351*, September 14, 1983) introduced the concept that both fragile and historic lands were those which could be damaged beyond an operator's ability to repair or restore, or be destroyed by surface coal mining operations. This language was suspended under the terms of the settlement agreement resulting from *In Re: Permanent Surface Mining Regulation Litigation II*, discussed above. The proposed rule included the concept of significant damage in the definitions of both fragile and historic lands.

OSMRE agrees in part that it is confusing to include the issue of degree of damage in both of the definitions. On the one hand, the status of historic lands does not depend on their potential for incurring significant damage. Therefore, this final rule does not include the criterion of significant damage in the definition of historic lands.

On the other hand, however, OSMRE believes that the concept of damage is critical to the definitions of fragile lands; the term "fragile" itself implies that the lands in question are delicate and subject to damage from surface coal mining activities. Therefore, OSMRE has retained the language concerning significant damage in the definition of fragile lands.

## **3. INCLUSION OF TERMS "IMPORTANT RESOURCES" AND "SIGNIFICANT DAMAGE"**

A number of commenters noted that the terms "important resources" and "significant damage" were not defined in the rules, either in the definitions at Section 762.5 or in the discussion of unsuitability criteria at 30 CFR 762.11. They proposed that these terms be further defined in one or the other section of the rules.

OSMRE does not believe that it is appropriate to include such guidance in a rule that will apply to all State programs. Rather, it is a matter for the individual regulatory authorities to determine what specific resources are important and what degree of damage is significant. Adoption of specific definitions for these terms is likely to generate needless controversy in an already settled process. The concepts of significant damage and important resources have been used in the unsuitability petition process since 1979 without regulatory definitions for these terms. The process has worked reasonably well and no need has been demonstrated for national definitions of these concepts.

## **4. BUFFER ZONES**

Buffer zones that provide additional protection to areas where surface coal mining operations are prohibited under section 522(e) of SMCRA and 30 CFR Part 761, and buffer zones that themselves contain fragile resources, were cited as examples of fragile lands in the proposed definition of "fragile lands." Several commenters questioned the legitimacy of such buffer zones, claiming that they were not authorized if not specifically required under section 522(e). Contrary to what these commenters claim, however, the buffer zone concept is authorized by SMCRA. It was upheld by court decision in *In Re: Permanent Surface Mining Regulation Litigation II*, No 79-1144 (D.D.C., July 15, 1985). This concept is based on section 522(a)(3) of SMCRA, which states that an area may be designated unsuitable for surface coal mining operations which "will \* \* \* affect fragile lands" that contain specified "important" resources that could be significantly damaged by such operations. Thus, operations may be prohibited in a buffer zone to protect important resources that could be damaged on adjacent fragile lands. Areas on which mining is prohibited under section 522(e) also can be fragile lands which may require such protection.

Other commenters stated that buffer zones were unnecessary and inappropriate examples of "fragile lands." OSMRE agrees. Although buffer zones may be found unsuitable for mining to protect important resources of fragile lands,

including those in section 522(e) prohibited areas, buffer zones which do not themselves contain important resources are inappropriate examples of "fragile lands" because they do not meet the terms of the definition. Furthermore, where a buffer zone itself contains important fragile resources, its status as "fragile lands" is independent of its status as a buffer zone. Thus, an example which singles out such buffer zones for protection is unnecessary. Accordingly, all reference to buffer zones has been deleted from the rule.

Other commenters wondered why the proposed rule provided buffer zones around fragile lands, but not around historic lands. As explained previously, the final rule does not include buffer zones as examples of either fragile lands or historic lands. Nevertheless, buffer zones around historic lands may be appropriate for the same reasons as given in the previous discussion of fragile lands.

## **5. PALEONTOLOGICAL SITES**

Several commenters suggested that it is more appropriate to include paleontological sites under the definition of fragile lands, rather than historic lands. OSMRE agrees, and has moved this language accordingly. This change will have no effect on the protection afforded such lands under these rules.

## **6. HISTORIC PROPERTY TERMINOLOGY**

Several commenters noted that the use of the term "historic sites" was inconsistent with common usage and with other Department of the Interior regulations. OSMRE agrees, and has changed the term historic "sites" to historic "properties."

## **7. INCLUSIVENESS OF THE TERM "HISTORIC LANDS"**

Several commenters questioned inclusion of properties "for which historic designation is pending" and "properties eligible for, but not listed on, the National Register of Historic Places" as historic lands. This issue was addressed by the district court in *In Re: Permanent Surface Mining Regulation Litigation II*, No. 79-1144 (D.D.C., July 15, 1985). The court agreed that the Secretary acted within his authority in including such properties under the definition of historic lands. The court noted that it is not unreasonable to protect lands which are in the process of possibly being declared historic. To do otherwise would run the risk of damaging lands before such a determination could be made. Therefore, OSMRE intends to retain these examples within the definition of historic lands. This does not mean that such properties must be considered unsuitable for mining under section 522(a)(3) of SMCRA. Rather, it gives regulatory authorities the discretion to do so.

## **8. INCLUSION OF SCIENTIFIC RESOURCES AS BOTH FRAGILE AND HISTORIC LANDS**

One commenter questioned why scientific resources were included under both definitions. Such resources are included since both types of lands may contain properties important for the scientific information they can provide, such as geologic formations and archeological sites.

## **9. PROBABILITY OF HISTORIC PROPERTIES**

One commenter suggested that the definition of historic lands be expanded to include areas likely to contain historic properties, even though the occurrence of such properties cannot be demonstrated. OSMRE believes that it would be confusing to introduce such a concept into the definition of historic lands. The discretion to consider such areas as historic is best left to the individual regulatory authorities, to be considered on a case-by-case basis.

## **10. SCENIC VALUES**

Two commenters suggested that scenic values be addressed specifically in the definition of fragile lands. This change is not necessary because scenic values could be protected as esthetic resources under one of the examples in the final definition of fragile lands. For this reason, OSMRE is retaining the proposed language.

## **11. INCLUSION OF FLOODING IN THE DEFINITION OF FRAGILE LANDS**

One commenter suggested that the inclusion of "areas where mining may result in flooding" in the definition of fragile lands exceeded OSMRE's mandate. The commenter suggested that if the phrase were not deleted it should at least be modified to clarify that not all flooded lands would be protected, but only those which were fragile. OSMRE believes it is reasonable to include areas susceptible to flooding within the definition of fragile lands. Furthermore, it would be confusing to use the term "fragile lands" within one of the examples of the fragile lands definition. Therefore, OSMRE has retained the proposed language in the final rule. However, it should be clear that all lands which may be flooded are not automatically fragile. Rather, a regulatory authority would have to consider the nature of the resources within an area which might be flooded and whether they could be significantly damaged as a result of surface coal mining operations. Finally, a regulatory authority would have to apply the criteria in Sections 762.11 and 762.12 before determining that an area was unsuitable for mining.

## **12. SCOPE OF DEFINITIONS**

Several commenters suggested that the list of examples of fragile and/or historic lands was too broad or included redundant items. Language suggested by the commenters focused on adding qualifiers to the definitions that would limit their scope. OSMRE believes that these commenters have failed to differentiate between these definitions and the criteria by which the regulatory authority determines whether an area such be designated unsuitable, as found in 30 CFR 762.11. OSMRE believes that the examples in the definitions provided useful guidance for regulatory authorities who must apply them to specific situations. The examples are meant to provide guidance on what general types of resources can be considered fragile or historic lands, not a list of areas which can or should automatically be designated unsuitable. The district court in *In Re: Permanent Surface Mining Regulation Litigation II*, No. 79-1144 (D.D.C., July 15, 1985), found that the Secretary is not restricted to words used in SMCRA or the legislative history because to do so would mean that the definitions could only mirror the statute. The court found that the examples were helpful to users of the regulations, and were not all-inclusive, but were intended to assist States, petitioners and operators in interpreting SMCRA.

## **13. PROMULGATION OF RULES IN RESPONSE TO COURT DECISION**

One commenter objected to OSMRE promulgating rules based on a court decision, without giving industry an opportunity to participate in the process. The availability of the proposed rule for public comment and the opportunity to request a public hearing has provided ample opportunity for any interested individual or group to participate in the regulatory process.

## **14. COVERAGE OF PRIVATELY OWNED LANDS**

One commenter objected to the fact that privately owned, as well as publicly owned, lands were covered by the proposed rule.

SMCRA clearly was intended to regulate surface coal mining operations on private lands, and therefore OSMRE is obliged to cover privately owned lands in this rule.

## **15. DELETION OF TERMS "IRREPARABLE OR PERMANENT DAMAGE"**

One commenter objected to the change from the terms "irreparable or permanent damage" to "significant" damage. This change is consistent with section 522(a)(3) of SMCRA which uses the concept of significant damage. Damage does not have to be permanent or irreparable in every instance to be significant. Finally, the rule is consistent with the order of the district court in *In Re: Permanent Surface Mining Regulation Litigation II*, (D.D.C., December 3, 1984).

## **16. REGULATION OF OTHER INDUSTRIES**

One commenter noted that other industries are not required to consider historic or fragile lands. OSMRE is required to implement SMCRA, which includes provisions for the protection of such lands.

### **III. PROCEDURAL MATTERS**

#### Federal Paperwork Reduction Act

This rule contains no information collection requirements requiring approval by the Office of Management and Budget under *44 U.S.C. 3501* et seq.

#### Executive Order 12291 and Regulatory Flexibility Act

The Department of the Interior has determined that this document is not a major rule under E.O. 12291 and certifies that it will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (*5 U.S.C. 601* et seq.). The rule does not distinguish between small and large entities, and will make no change in the threshold for determining whether to grant a petition designating an area as unsuitable for surface coal mining operations because the lands are fragile or historic in nature. No incremental economic effects are anticipated as a result of the rule.

#### National Environmental Policy Act

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

#### Author

The author of this final rule is Annetta L. Cheek, Division of Permit and Environmental Analysis, Office of Surface Mining Reclamation and Enforcement, U.S. Department of the Interior, 1951 Constitution Avenue NW., Washington, DC 20240. Telephone: 202-343-7951.

#### **LIST OF SUBJECTS IN 30 CFR PART 762**

Historic preservation, Surface mining, Underground mining, Wildlife refuges.

For the reasons set out in this preamble, 30 CFR Part 762 is amended as set forth below.

Dated: April 28, 1987.

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

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

1. The authority citation for Part 762 is required to read as follows:

Authority: Pub. L. 95-87 (*30 U.S.C. 1201* et seq.).

2. In Section 762.5, the definitions of "fragile lands" and "historic lands" are revised to read as follows:

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

For purposes of this part:

**FRAGILE LANDS** means areas containing natural, ecologic, scientific, or esthetic resources that could be significantly damaged 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, paleontological sites, National Natural Landmarks, areas where mining may result in flooding, environmental corridors containing a concentration of ecologic and esthetic features, and areas of recreational value due to high environmental quality.

HISTORIC LANDS means areas containing historic, cultural, or scientific resources. Examples of historic lands include archeological sites, properties listed on or eligible for listing on a State or National Register of Historic Places, National Historic Landmarks, properties having religious or cultural significance to Native Americans or religious groups, and properties for which historic designation is pending.

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