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DEPARTMENT OF THE INTERIOR

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

30 CFR Chapter VII: Subchapter F – Areas Unsuitable for Mining: Parts 760, 761, 762, 764, 765, 769
Surface Coal Mining and Reclamation Operations Permanent Regulatory Program

ACTION: Proposed rules.

SUMMARY: The Office of Surface Mining Reclamation and Enforcement is seeking comments on these proposed rules which would implement a nationwide permanent program for the regulation of surface and underground mining operations by the States and the Federal Government as required by the Surface Mining Control and Reclamation Act of 1977 (SMCRA). These proposed rules are intended to strike a balance between protection of the environment and agricultural productivity and the Nation's need for coal as an essential source of energy.

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{Preamble: 43 FR 41683}

SUBCHAPTER F – AREAS UNSUITABLE FOR MINING

Section 522 of the Surface Mining Act establishes a procedure to designate areas unsuitable for all or certain types of coal mining, thereby enabling the State and Federal governments to respond to conflicts which often arise between coal mining and other uses of the land. This Subchapter implements the provisions of Section 522(a)(1) for establishing a State planning process, of 522(a)(2) for mandatory designations when reclamation is infeasible, 522(a)(3) for discretionary designations according to the criteria in 522(a)(3)(A) (D), 522(a)(4) state process requirements, 522(a)(5) implementation requirements, 522(a)(6) exemptions, 522(c) petitions, 522(d) economic, environmental and resource impact statements, and 522(e) limitations and prohibitions of mining.

Lands covered by the petition process are all private and State-owned lands within a State and all Federal lands as defined in the Act. Additionally, for Federal lands, the Act provides for a Federal coal lands review which is a review process for Federal lands in addition to the petition process. Indian lands are not covered by these regulations. The petition process, the Congressional designations, except where specifically exempt and the Federal coal lands review all apply to the surface effects of underground mining as well as surface mining.

Under the procedures for designation, citizens can petition the regulatory authority to designate certain areas unsuitable for all or certain types of surface or underground coal mining. If the regulatory authority designates an area unsuitable for mining, it is then prohibited from issuing permits for that area. Additionally, there are procedures for citizens to petition the regulatory authority to terminate a designation of unsuitability for mining. If a petition to terminate a designation is successful, the regulatory authority may then issue permits for that area.

The regulatory authority must consider petitions which are filed after a permit application has been filed. Once a permit has been granted however, the regulatory authority cannot retract a permit when a petitioner seeks to designate a permitted area.

The regulatory authority is required to respond to two types of petitions. If a petition alleges that reclamation is not technologically and economically feasible under the standards of the Act, these regulations, or the laws and regulations pursuant to an approved State or Federal program, and the regulatory authority agrees, the regulatory authority is then required to designate an area unsuitable for all or certain types of surface mining. If a petition seeks to designate certain fragile, historic, renewable resource or natural hazard lands unsuitable for all or certain types of surface mining, the regulatory authority has discretion to designate an area unsuitable if it finds that surface mining operations would: {41684}

""be incompatible with existing State or local land use plans or programs"; or

""cause significant damage to important cultural, scientific, and esthetic values and natural systems"; or

""result in a substantial loss or reduction of long range food or fiber productivity"; or

""substantially endanger life and property in areas subject to frequent flooding or unstable geology."

Unlike the permit application process, the designation process is to be applied on a natural area basis, rather than a specific mine or site-by-site basis. Congress determined that the area-by-area approach will benefit the coal industry because the industry can learn, in advance of permit application, those areas which are not open to mining or certain mining methods. Report of the House Committee on Interior and Insular Affairs, Surface Mining Control and Reclamation Act of 1977, p. 95.

The regulations of this Subchapter are divided as follows:

1. Part 760 explains the general requirements for State programs, Federal programs within States, the petition process, and areas where the Act prohibits or limits surface coal mining operations under certain conditions.
2. Part 761 establishes procedures to be followed in determining whether a proposed surface coal mining operation is prohibited or limited by the requirements of Section 522(e) of the Act. It also contains definitions and procedures to be used in determining whether a proposed surface coal mining operation is exempt from these prohibitions or limitations.
3. Part 762 contains the criteria to be used in determining whether an area (either State or Federal lands) is unsuitable for all or certain types of surface coal mining operations.
4. Part 764 sets forth the minimum requirements for a State program to designate areas unsuitable for all or certain types of surface coal mining operations.
5. Part 765 provides the minimum requirements for a Federal program in a State to designate areas unsuitable for all or certain types of surface coal mining operations.
6. Part 769 contains the process for petitioning Federal lands as unsuitable for all or certain types of surface coal mining operations.

The main issues facing the drafters of these regulations are:

1. Who may petition for designation or termination;
2. How to resolve potential conflicts between the permit process and the designation process when petitions are filed for areas where a permit application is pending;
3. Whether to protect the confidentiality of a petitioner;
4. How to implement Section 522(a)(4)(c) which requires States ""to have a method or methods for implementing land use planning decisions concerning surface coal mining operations.""
5. How extensive should be the data base and inventory system that a State is required to establish;
6. Whether to require the regulatory authority to hold a fact finding or an adjudicatory hearing;
7. How to define valid existing rights and substantial legal and financial commitment;
8. What judicial review is required after State regulatory authority decisions on petitions;
9. Whether to develop criteria for where designations should be made because reclamation is not technologically and economically feasible;
10. Whether to establish some thresholds for determining when the regulatory authorities would be required to designate areas unsuitable for mining under the discretionary criteria; and
11. Coordination of petitions for Federal-State areas, cross State areas, and Indian lands and other areas.

Who may petition:

The Act states, ""Any person having an interest which is or may be adversely affected shall have the right to petition the regulatory authority to have an area designated as unsuitable for surface coal mining operations or to have such a designation terminated." (522)(c).

The definition of ""person" partly determines who may petition. The OSM regulations expand on the language of the Act. In the Act, the term, ""person" is defined as follows: ""individual, partnership, association, society, joint stock company, firm, company, corporation or other business organization." The present draft of the regulations expands the definition of person by incorporating all governmental entities listed in Section 524 of the Act. That Section lists the following entities: ""Any agency, unit, or instrumentality of Federal, State, or local government, including any publicly owned utility or publicly owned corporation of Federal, State or local government". Thus, under the present draft, State agencies and local units of government have been included in the definition of person and may petition to have areas designated unsuitable. Previous drafts of these regulations did not contemplate an expanded definition of person; instead it had been left to the States to decide whether to expand the definition.

The other requirement for a petitioner is to have standing. The legislative history indicates Congress intended ""an interest which is or may be adversely affected" to be construed to be coterminous with the broadest standing requirements enunciated by the U.S. Supreme Court. See: *Sierra Club v. Morton*, 405 U.S. 727 (1972). The legislative history further indicates that where there is doubt, the doubt should be resolved in favor of public participation. (121 Cong. Rec. 13368, May 7, 1975).

A petitioner must state which of his/her activities or interests would be adversely affected by mining the area which is proposed for designation. The regulatory authority must then determine if the petitioner has standing. Where there is doubt, however, the legislative history indicates that Congress intended for the regulatory authority to resolve the doubt in favor of public participation.(121 Cong. Rec. 13368, May 7, 1975).

Related to the issue of who may petition is the issue of whether or not a State agency could initiate a designation without petitioning. This procedure would parallel the Federal coal lands review under 522(c). The Act does not explicitly authorize any such procedure, yet the legislative history explicitly states that designations must be initiated by petitions. S. Rep. No. 128, 95th Cong., 1st Sess. 93 (1977).

OSM considered two alternative solutions to the issue of who may petition. Leaving the definition of person as it stands in the Act would exclude local governments and State agencies from filing petitions. This solution was rejected because the drafters believe that participation in the process of designating lands unsuitable and terminating designations should be as broad as possible. Permitting State agencies to initiate designations without filing petitions was considered but was rejected because the legislative history (*Ibid*) explicitly states that designations must be pursuant to petitions.

How to resolve potential conflicts between the permit process and the designation process when petitions are filed for areas where a permit application has also been filed.

Section 510(b)(4) of the Act states that no permit may be issued by the regulatory authority unless it finds in writing that ""the area proposed to be mined is not included within an area designated unsuitable for surface coal mining pursuant to Section 522 of this Act or is not within an area under study for such designation in an administrative proceeding commenced pursuant to Section 522(a)(4)(D) or Section 522(c)." {41685 }

As drafted, these regulations establish the point at which a permit application will be deemed so close to approval that, even if a designation petition is filed, the permit can still be issued in spite of Section 510(b)(4). In this draft that point is by the end of the informal conference period, or if there is no conference, at the end of the comment period. Without some limitation a petitioner could tie up the permit for a mining operation indefinitely by filing repeated petitions, no matter how frivolous.

One alternative considered was not including a time limit for petitions to affect application process. OSM explicitly solicits comment and guidance on how to resolve this problem.

CONFIDENTIALITY OF PETITIONER.

Section 703 of the Act protects employees from being fired or otherwise suffering discrimination. The Act is unclear how much, if any, similar protection should be afforded a person who files a petition to designate lands unsuitable. The present draft of the regulations requires a petitioner to give his/her name in order to make the petition complete. The present draft of the regulations would afford some measure of confidentiality to a petitioner only if the petition were filed by an organization rather than an individual because an individual's name is not required where an organization files a petition.

OSM considered the alternative of not requiring the petitioner to state his/her name in a petition. This alternative was not adopted because the drafters did not believe that protecting the identity of the petitioner was authorized by the Act. The drafters believe there are countervailing concerns of providing due process for owners of coal whose use of the coal in an area proposed for designation would be affected versus providing some measure of protection for a citizen who exercises his right to petition under the Act. The drafters believe that it is extremely difficult to hide the identity of a petitioner. Attempting to do so might persuade some citizens to petition, believing that their identities were protected when, in fact, their identities might be revealed.

How to implement Section 522(a)(4)(C) which requires States to have, ""a method or methods for implementing land use planning decisions concerning surface coal mining operations."

The Act requires each State to have as part of its designation process a method for implementing land use planning decisions concerning surface coal mining operations. It also provides in 522(a)(3)(A) that, where coal mining would be incompatible with land use plans, this incompatibility is grounds for granting a petition to have an area designated unsuitable for mining.

The present draft of the regulations requires only that in implementing a designation decision the regulatory authority not issue permits which would be inconsistent with designations.

This draft does not expand on the implied authority to require States to have land use planning authority because this is a much larger question than regulation of surface coal mining. Nationwide land use planning was rejected by Congress when it defeated proposed legislation for national land use planning. The drafters believe that the Act does not require that a State obtain land use planning authority, but only that it develop a method for implementing designation decisions.

This issue is also important in many States that have statutes prohibiting zoning against mining, because zoning and land use planning are sometimes viewed as synonymous. The drafters of these regulations disagree with this view; instead the drafters maintain that zoning is only one method of implementing land use plans which can be implemented in a variety of ways such as tax policies, and purchasing and receiving easements. Although the drafters considered requiring States to repeal laws prohibiting zoning against mining, this alternative was rejected because the drafters believe zoning and land use planning are not synonymous.

EXTENT OF THE REQUIREMENT FOR A STATE TO ESTABLISH A DATA BASE AND INVENTORY SYSTEM.

The Act requires that, as part of the approved State program under Section 503(a), a State ""must demonstrate that it has developed or is developing a process which includes. . . (B) a data base and an inventory system which will permit proper evaluation of the capacity of different land areas of the State to support and permit reclamation of surface coal mining operations" (522(a)(4))

The present draft of the regulations does not require a complete data base for State program approval and does not spell out detailed minimum requirements for a State data base and inventory system. Instead, this draft restates the language of the Act, provides for the data base to include information relevant to all the criteria to designate lands unsuitable, the Clean Air Act, information from the U.S. Fish and Wildlife Service, and information from State Historic Officers. For additional guidance, the States are referred to a Missouri River Basin Commission report, Designating Areas Unsuitable for Surface Coal Mining: Preliminary Interpretation of Section 522 of Public Law 95-87 (Missouri River Basin Commission, May 1978). The regulations also provide for adding to the data base as new information becomes available from petitions, publications, experiments, permit applications, mining operations and other sources. {41686}

An alternative considered was requiring each State to have an on-line computer-based data system at the time the State

applies for State program approval. The drafters rejected this alternative because of the difficulty in anticipating exactly what kinds of data would be required in each State and because of the expense to the State and to OSM. Under Part 740 of the regulations OSM will fund States to establish and maintain data bases. OSM does not intend to fund efforts which would duplicate existing data, however.

Another alternative considered was requiring each petition to be considered on a site-specific basis, with no burden on the State to compare the area proposed for designation with other similar areas in the State. The drafters rejected this alternative because it would not provide any way of comparing the value of the area proposed for designation with other similar areas in the State. The drafters believe there is a burden on the State to establish a measure of uniqueness for areas covered by petitions under the discretionary criteria of Section 522(a)(3). For example, if there is only one spruce bog within a State which also happens to be threatened by mining there would be more reason to designate that one spruce bog unsuitable for mining than if there were 100 spruce bogs within a State, most of which were not threatened by mining. A data base and inventory system should enable the State to measure the uniqueness of areas and resources proposed for designation.

WHETHER TO REQUIRE THE REGULATORY AUTHORITY TO HOLD A FACT-FINDING HEARING OR AN ADJUDICATORY HEARING

The Act provides that the regulatory authority must hold a "public hearing in the locality of the affected area, after appropriate notice and publication of the date, time, and location of such hearing" (522(c)). The Act does not specify the type of hearing required but it does spell out the kinds of information required of a petitioner: "allegations of facts with supporting evidence which would tend to establish the allegations" (522(c).) Thus, the Act does not require the petitioner to establish at the outset that what is in the petition is fact, but only to provide allegations and supporting evidence. This requirement therefore suggests that the hearing should be legislative and fact-finding, rather than adjudicatory. Consequently, the present draft of the regulations requires that the regulatory authority hold a legislative or fact-finding hearing. The drafters of the regulations believe a legislative hearing is consistent with the Act's threshold requirement for the petitions.

An alternative considered was to require an adjudicatory hearing with cross-examination of witnesses. The drafters rejected this alternative because an adjudicatory hearing would be inconsistent with the threshold for a complete petition.

The regulations place the burden of gathering facts on the regulatory authority. It must gather all the facts it can before making a decision on a petition. Under Section 764.19 the regulatory authority is required to use information from the data base and inventory system, information provided by other governmental agencies, an economic and environmental report under Section 764.17(b) and any other information submitted to the regulatory authority prior to or in connection with the public hearing in reaching a decision. Thus this draft places a burden on the regulatory authority to make a substantial case for its decision. If a decision is appealed, it is the regulatory authority which must defend that decision in administrative hearings or in court.

Another alternative considered was requiring the burden of proof to be placed on the petitioner. OSM rejected this alternative, believing that placing a burden of proof on the petitioner was inconsistent with the Act's explicit provision that a petitioner need only provide "supporting evidence which would tend to establish the allegations." (522(c).) With the large amount of discretion afforded the regulatory authority it makes little sense to place a burden of proof on the petitioner. However, under these regulations, the petitioner must meet the statutory burden of going forward and cannot trigger the process on nothing more than a request for designation.

HOW TO DEFINE VALID EXISTING RIGHTS AND SUBSTANTIAL LEGAL AND FINANCIAL COMMITMENTS.

Section 522(e) of the Act states, "After the enactment of this Act and subject to valid existing rights no surface coal mining operations except those which exist on the date of enactment of this Act shall be permitted" on lands in certain Federal systems, on land which would adversely affect any publicly owned park or place included in the National Register of Historic Sites with certain exemptions, and within certain limits of public roads, occupied dwellings, public buildings, schools, churches, community or institutional buildings, public parks or cemeteries.

Valid existing rights has different meanings depending on whether the land in question is Federal land subject to the Federal mining and leasing laws or is private or State-owned land. The definition of valid existing rights in the proposed regulations reflects this distinction. For Federal lands, a valid existing right does not include having a permit to mine, but

includes stages just short of a permit. For State lands a valid existing right includes having all necessary State and Federal permits.

The drafters considered not defining valid existing rights, but rejected this alternative because not defining the term would lead to inconsistencies across the nation. The definition adopted is consistent with Federal mining and leasing law and practice in many States.

Substantial legal and financial commitments applies to all the categories of designations mentioned in 522(a) where the substantial legal and financial commitments were established prior to January 4, 1977.

The drafters considered not defining "substantial legal and financial commitments" but rejected this alternative because a reading of the legislative history made it clear that Congress intended a specific meaning in using this term in the Act. See: 121 Cong. Rec. 6114, March 11, 1975, p. 6120.

WHAT JUDICIAL REVIEW IS REQUIRED AFTER STATE REGULATORY AUTHORITY DECISIONS ON PETITIONS.

The Act does not mention judicial review specifically in relationship to Section 522 of the Act, but states in Section 526 that "(e) Action of the State Regulatory Authority pursuant to an approved State program shall be subject to judicial review by a court of competent jurisdiction in accordance with State law."

This draft of the regulations provides for judicial review of questions of determinations concerning valid existing rights and substantial legal and financial commitment in order to settle whether or not certain lands are subject to the designation procedures or the Congressional designation under 522(e).

The drafters considered not requiring separate judicial review of valid existing rights and substantial legal and financial commitment. This alternative was rejected on the grounds that it would be to the advantage of all parties to have those questions settled separately from any designation or permit application proceedings.

Whether to develop criteria for when designations should be made because reclamation is not technologically and economically feasible.

Section 522(a)(2) of the Act requires the regulatory authority to designate an area unsuitable for all or certain types of surface coal mining operations if it determines that reclamation pursuant to the requirements of the Act is not technologically and economically feasible.

The present draft of the regulations does not contain any criteria for reaching this determination other than the language of the Act. The drafters believe there is a burden on State regulatory authorities to collect data relevant to reclamation feasibility for inclusion in the data base to use in these determinations.

The drafters considered developing special criteria for designations in the case of economic and technological infeasibility of reclamation, but decided against this approach because the technology and economics of reclamation are constantly changing, outdating any criteria developed at a fixed point in time. The drafters believe the language of the Act, the regulations, and approved State programs will provide sufficient guidance for making these designation decisions.

Whether to establish some thresholds for determining when the regulatory authorities would be required to designate areas unsuitable for mining under the discretionary criteria.

The Act states that designations pursuant to criteria under 522(a)(3)(A)(B)(C) and (D) are discretionary and should, to be considered "upon petition" and the language of the Act makes it clear that even where the regulatory authority acknowledges that coal mining would damage these categories of lands, it has discretion to disapprove a designation petition, allowing a permit applicant to pursue a permit under the standards established by the Act, the regulations, and an approved State program. The Act establishes no thresholds which would indicate where designations should be made, unlike 522(a)(2) which requires the regulatory authority to designate an area as unsuitable if it determines that reclamation is not possible.

The drafters considered adopting some threshold criteria for requiring a regulatory authority to make designations pursuant

to 522(a)(3) but rejected this alternative for two reasons. There is no authority in the Act to do so and there are no threshold criteria which would apply nationwide. Instead of providing for threshold criteria, the Act requires States to adopt

all the designation criteria under Section 522 and where discretion is provided under 522(a)(3), to use that discretion on a petition-by-petition basis. {41687}

COORDINATION OF PETITIONS FOR FEDERAL-STATE AREAS, CROSS-STATE AREAS, AND INDIAN LANDS AND OTHER AREAS.

The Act requires that the designation process must be part of every approved State program for non-Federal and non-Indian lands within each State. The Act specifically reserves the designation determinations on Federal lands to the Secretary of the Interior (523(c)) and makes no provisions for designations on Indian lands until the Secretary of the Interior has studied the question of the regulation of surface mining on Indian lands (710(a)).

These regulations are silent on coordination of petition processes for State, Federal, and Indian lands. The drafters solicit comment on this problem in order to ensure that the designation process is orderly and coordinated among the various categories of land ownership or management.

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{Regulations: 43 FR 41825}

SUBCHAPTER F – AREAS UNSUITABLE FOR MINING

PART 760 – GENERAL

Section

760.1	Scope.
760.2	Objectives.
760.3	Authority.
760.4	Responsibility.

Authority : Sections 102, 201, 501(b), 510, 522, and 523, Pub. L. 95 87, 91 Stat. 445 (30 U.S.C. 1202, 1211, 1251, 1260, 1272, and 1273).

SECTION 760.1 - SCOPE.

This subchapter establishes procedures for implementing the requirements of the Act for designating lands unsuitable for all or certain types of surface coal mining operations and for terminating such designations.

SECTION 760.2 - OBJECTIVES.

The objectives of this subchapter are to establish:

- (a) Procedures for consideration of petitions for the designation of lands as unsuitable for all or certain types of surface coal mining operations, for the termination of these designations, and for public participation in the petition proceedings;
- (b) The minimum standards for obtaining, maintaining and analyzing information on the effects of coal development in areas covered by a petition in light of other potential uses and activities;
- (c) Procedures for identifying lands on which mining is prohibited or limited by Section 522(e) of the Act; and
- (d) Criteria for determining if an area should be designated as unsuitable for all or certain types of surface coal mining operations.

SECTION 760.3 - AUTHORITY.

(a) Each State regulatory authority is authorized, under Sections 522 (a) and (c) of the Act, to establish a data base and inventory system and a petition process to designate any non-Federal and non-Indian land areas of the State that are unsuitable for all or certain types of surface coal mining operations.

(b) The Secretary is authorized, under Sections 522(b) and (c) of the Act,:

(1) Conduct a review of Federal lands to determine whether any area on Federal lands is unsuitable for all or certain types of surface coal mining operations;

(2) Establish a process for the public to petition to have an area on Federal lands designated as unsuitable for all or certain types of surface coal mining operations.

(3) Implement, as part of a Federal program for a State, a process for designation of areas unsuitable for surface coal mining operations on non-Federal lands within a State.

SECTION 760.4 - RESPONSIBILITY.

Section 522 of the Act requires that:

(a) The Secretary shall conduct a review of Federal coal lands to determine whether there are areas which are unsuitable for surface coal mining operations;

(b) In order to be eligible to assume primary regulatory authority, a State shall establish a process that includes a data base and inventory system for designating lands unsuitable for surface coal mining operations which shall be available to the public;

(c) The regulatory authority shall integrate as closely as possible decisions to designate lands as unsuitable for surface coal mining with present and future land-use planning and regulation processes at the Federal, State, and local levels; {41826}

(d) The regulatory authority shall establish a petition process that allows any person having an interest which is or may be adversely affected to petition to have an area designated as unsuitable for surface coal mining operations, or to have the designation terminated;

(e) The regulatory authority shall prohibit or limit surface coal mining operations mining on certain lands and in certain locations designated by Congress in Section 522(e) of the Act;

(f) A person with an interest which is or may be adversely affected may petition the regulatory authority to have an area designated unsuitable for surface coal mining operations, or to have such a designation terminated. {41826}

PART 761 – AREAS DESIGNATED BY ACT OF CONGRESS

Section

761.1	Scope.
761.2	Objectives.
761.3	Authority.
761.4	Responsibility.
761.5	Definitions.
761.11	Areas where mining is prohibited.
761.12	Procedures.

Authority: Sections 102, 201, 501(b), and 522, Pub. L. 95 87, 91 Stat. 445 (30 U.S.C. 1202, 1211, 1251, and 1272).

SECTION 761.1 - SCOPE.

This part establishes the procedures to be followed in determining whether a proposed surface coal mining operation can be permitted in light of the prohibitions and limitations in section 522(e) of the Act for those operations on certain Federal, public and private lands.

SECTION 761.2 - OBJECTIVES.

The objectives of this part are to implement the prohibitions and limitations of surface coal mining operations on certain Federal, public and private lands under section 522(e) of the Act.

SECTION 761.3 - AUTHORITY.

The State regulatory authority or the Secretary under section 522(e) of the Act, is authorized to prohibit or limit surface coal mining operations on certain Federal, public and private lands except for those operations which existed on August 3, 1977, or were subject to valid existing rights on that date.

SECTION 761.4 - RESPONSIBILITY.

(a) The Secretary shall:

- (1) Determine whether any application for a permit for surface coal mining operations on Federal lands, must be denied because such operations on those lands are prohibited or limited by section 522(e) of the Act;
- (2) Determine whether an applicant for a permit covering Federal lands either_
 - (i) Had any valid existing rights on August 3, 1977; or
 - (ii) Was conducting an existing surface coal mining operation on those lands on August 3, 1977.
- (3) Withdraw lands designated unsuitable for all or certain types of surface coal mining operations from leasing.

(b) The State regulatory authority shall:

- (1) Meet the requirements of this part and subchapter G on reviewing applications for permits; and
- (2) Determine whether an application must be denied because surface coal mining operations on those lands are prohibited or limited by section 522(e) of the Act and whether an applicant for a permit covering such lands either had any valid existing rights on August 3, 1977, or was conducting a surface coal mining operation on those lands within a prohibited area on August 3, 1977.

(c) The Director shall determine:

- (1) Whether any application for a permit for surface coal mining operations on non-Federal lands where a Federal program for a State has been implemented must be denied because the operations on those lands are prohibited or limited by section 522(e) of the act; and
- (2) Whether an applicant for a permit covering non-Federal lands, where a Federal program for a State has been implemented, either had any valid existing rights on August 3, 1977, or was conducting an existing surface coal mining operation on those lands on August 3, 1977.

SECTION 761.5 - DEFINITIONS.

For the purposes of this Part:

VALID EXISTING RIGHTS means:

- (a) In relation to those lands specified in Sections 552(e) (1) and (2) of the act, valid existing rights means those property rights in existence on August 3, 1977, that were created by a legally binding conveyance, lease, deed, contract or other document which expressly authorizes the applicant to produce coal by surface coal mining operations and the exercise of such rights cannot, under applicable State or Federal law, be conditioned or denied in the manner provided in this part. Interpretation of the terms of the document will be based upon the usage and custom at the time and place where it came into existence and upon a showing by the applicant that the parties to the document actually contemplated a right to conduct the same underground or surface mining activities for which the applicant claims a valid existing right; or
- (b) In relation to those lands specified in 761.11 (c), (d), (e), (f), and (g), valid existing rights means that, on or

before August 3, 1977, the person proposing to conduct surface coal mining operations on such lands had been validly issued all State and Federal permits necessary to conduct such operations on those lands.

(c) A mere expectation of a right to conduct surface coal mining operations or the right to conduct underground coal mining does not qualify as a valid existing right to conduct surface mining activities. Examples of rights which along do not constitute valid existing rights include coal exploration permits or licenses, and applications or bids for leases and prospecting permits, and situations where an operator has only applied for a State or Federal permit or has received a permit but its issuance has been stayed and not subsequently affirmed by an administrative or judicial review body.

NO SIGNIFICANT RECREATIONAL, TIMBER, ECONOMIC OR OTHER VALUES INCOMPATIBLE WITH SURFACE COAL MINING OPERATIONS means the land included in the permit application or off-site land to be affected by the operations does not have any appreciable, measurable or noteworthy uses, which would be disturbed, hampered, destroyed or eliminated by the impacts of surface coal mining operations and related activities, for:

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

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 700.5 of this chapter.

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.

OCCUPIED DWELLING means any building that is currently being used on a regular or temporary basis, for human habitation. {41827}

PUBLIC BUILDING means any structure that is owned by a public agency or used for public business, meetings or other group gatherings.

COMMUNITY OR INSTITUTIONAL BUILDING means any structure other than a public building which is used for meetings, gatherings or functions of local civic organizations or other community groups, or 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.

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.

PUBLIC PARK means an area adopted, dedicated or designated by any Federal, State, or local agency 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 any thoroughfare open to the public for passage of vehicles or pedestrians, regardless of whether it is maintained by any Federal, State or local agency.

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

SECTION 761.11 - AREAS WHERE MINING IS PROHIBITED OR LIMITED

Subject to valid existing rights on August 3, 1977, or unless surface coal mining operations existed on that date, no surface coal mining operations shall be conducted after August 3, 1977:

- (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 study rivers designated under Section 5(a) of the Wild and Scenic Rivers Act, 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 such surface 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, the Federal Coal Leasing Amendments Act of 1975, and the National Forest Management Act of 1976, and the provisions of the Act; and provided further, that no surface coal mining operation may be permitted within the boundaries of the Custer National Forest;

(c) Which will adversely affect any public park or any places included on, or eligible for listing in, the National Register of Historic Places, unless approved jointly by the regulatory authority and the Federal, State or local agency with jurisdiction over such park or places after they have jointly determined that:

(1) There is no feasible or prudent alternative to the proposed surface coal mining operation,

(2) The operation includes all possible actions to minimize harm to such park or places from the proposed surface coal mining operation;

(3) The need for the coal outweighs the need for such park or places.

(d) Within 100 feet 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 allows the public road to be relocated 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 778.14(d) of this chapter, and

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

(e) Within 300 horizontal feet from any occupied dwelling, unless the owner thereof has provided a written waiver consenting to surface coal mining operations closer than 300 feet;

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

(g) Within 100 horizontal feet of a cemetery.

SECTION 761.12 - PROCEDURES.

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

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

(2) If there is any question about whether the proposed operation is located within the boundaries of any of the lands in 761.11(a) or closer than the limits provided in 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 must respond within 30 days from receipt of the request.

(c) Where the proposed operation is on Federal lands within the boundaries of any national forest, and the applicant seeks a determination that mining is permissible under 761.11(b) of this part, the regulatory authority shall transmit a copy of the completed application to the Director, who shall make the determination. Before acting on such permit application, the regulatory authority shall insure that the Director's determination has been received and the findings required by section 522(e)(2) (A) or (B) of the Act have been made.

(d) Where the proposed mining operation is to be conducted within 100 feet of the outside right-of-way line of any public

road (except where mine access roads or haulage roads join such right-of-way line) or where the applicant proposes to relocate any public road, the regulatory authority shall:

(1) Require the applicant to obtain the approval of the authority with jurisdiction over the public road to conduct a mining operation within 100 feet of the outside right-of-way line of the public road;

(2) Provide notice in a newspaper of general circulation in the affected locale of a public hearing at least 2 weeks before the hearing;

(3) Provide an opportunity for a fact-finding public hearing at which any member of the public may participate in the locality of the proposed mining operations for the purpose of determining whether the interests of the public and affected landowners will be protected; and

(4) Make a written finding based upon information received at the public hearing within 10 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.

(e) Where the proposed surface coal mining operations would be conducted within 300 feet of any occupied dwelling, the applicant shall submit with the application a written waiver of the owner and occupant of the dwelling, consenting to such operations within a closer distance of the dwelling as specified in the waiver. The waiver must be separate from a lease or deed and must be given knowingly. The applicant must reveal to the regulatory authority all consideration given for the waiver. {41828}

(f) Where the proposed surface coal mining operation may adversely affect any public park or any places included on, or eligible for listing in, the National Register of Historic Places, the regulatory authority shall transmit to the Federal, State or local agencies with jurisdiction over or interest in the park or historic place a copy of the completed permit application containing the following:

(1) A request for that agency's approval or disapproval of the operations;

(2) The determinations required in 761.11(c) and a statement of reasons therefore; and

(3) A notice to the appropriate agency that it must respond within 30 days from receipt of the request. 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 designate such lands as unsuitable for all or certain types of surface coal mining operations pursuant to parts 762, 764, 765 or 769.

(h) A determination of a State regulatory authority that a person holds or does not hold a valid existing right, as defined in 761.5, or operations existing on the date of enactment, as defined in 761.5, shall be subject to judicial review by a court of competent jurisdiction in accordance with State law, as required by section 526(e) of the Act. A determination of these issues by the Director concerning any Federal lands or under a Federal program for a State shall be subject to judicial review under section 526(a)(2) of the Act. {41828}

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 of land designated as unsuitable for surface coal mining operations.

Authority. Sections 102, 201, 501(b), 503, 504, 512, and 522 of Pub. L. 95 87, 91 Stat. 445 (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 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 or destroyed by surface coal mining operations. Examples of fragile lands include valuable habitats for fish, wildlife, and other environmental values, critical habitats for endangered or threatened species of animals or plants, uncommon geologic formations, areas where mining may cause 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 Subchapter.

HISTORIC LANDS means historic or cultural districts, places, structures or objects, including archeological and paleontological sites, natural historic landmark sites, sites listed in or eligible for listing in a State or National Register of Historic Places, sites having religious or cultural significance to Indian tribes or sites for which historic designation is pending.

NATURAL HAZARD LANDS means areas subject to such natural hazards as landslides, cave-ins, subsidence, large or encroaching sand dunes, severe wind or soil erosion, or frequent flooding, and areas of unstable geology.

RENEWABLE RESOURCE LANDS means aquifers and areas for the recharge of aquifers and other underground waters, areas for agricultural or silvicultural production of food and fiber, grazing lands and areas for the yield of game and commercial or sport fish and other forms of aquaculture.

SUBSTANTIAL LEGAL AND FINANCIAL COMMITMENTS IN A SURFACE COAL MINING OPERATION means major investments of money in power plants, railroads, coal-handling or storage facilities and other capital intensive improvements and fixed equipment made on the basis of long-term, legally enforceable coal sales contracts which cannot be cancelled except upon payment of a substantial penalty. Investments are "major" if they are substantial both (a) in relationship to the aggregate assets of the proposed operator and the operator's beneficial owners, other than non-controlling shareholders in publicly held corporations, and (b) in relation to the aggregate capital expenditures which reasonably can be anticipated to be made for capital improvements and fixed equipment at the mine site to, and including, completion of all reclamation operations. Costs of the acquisition of the coal in place or of the right to mine it do not constitute "substantial legal and financial commitments."

SECTION 762.11 - CRITERIA FOR DESIGNATING LANDS AS UNSUITABLE.

(a) 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 requirements of the Act, the regulations of this Chapter or an approved State program.

(b) An area may be designated as unsuitable for all or 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, ecologic, 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.

SECTION 762.12 - ADDITIONAL CRITERIA.

The State regulatory authority and the Secretary may establish more stringent criteria for determining whether lands under their jurisdiction should be designated as unsuitable for surface coal mining operations.

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

(a) The requirements of this Part shall not apply to:

- (1) Lands on which surface coal mining operations were being conducted on August 3, 1977, as defined in 30 CFR 761 (5);

- (2) Lands under a permit issued pursuant to the Act; or

- (3) Lands where substantial legal and financial commitments in surface coal mining operations were in existence prior to January 4, 1977. {41829}

(b) When the operator to whom the exemption applies no longer controls the rights to the land, any exemptions from designations of unsuitability no longer apply.

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

(a) 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 the mineral exploration of the area in accordance with provisions of the Act, the regulations issued under the Act, any approved State or Federal program, and other applicable requirements. Exploration on any lands designated unsuitable for surface coal mining operations must be approved by a State regulatory authority pursuant to Part 30 CFR 776 to insure that exploration does not interfere with any value for which the area has been designated unsuitable for surface coal mining. {41829}

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

Section

764.1	Scope.
764.2	Objectives.
764.3	Authority.
764.4	Responsibility.
764.11	Procedures: General process requirements.
764.13	Procedures: Petitions.
764.15	Procedures: Initial processing, recordkeeping, and notification requirements.
764.17	Procedures: Hearing requirements.
764.19	Procedures: 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, and 522, Pub. L. 95 87, 91 Stat. 445 (30 U.S.C. 1202, 1211, 1253, and 1272).

SECTION 764.1 - SCOPE.

This Part establishes minimum procedures to be included in each approved State program for designating land areas in a State as unsuitable for all or certain types of surface coal mining operations and for terminating designations.

SECTION 764.2 - OBJECTIVE.

The objective of this part is to insure that States wishing to administer the Act on non-Federal and non-Indian lands implement processes to designate lands unsuitable for all or certain types of surface coal mining operations, and for terminating designations, as required under Sections 503(a)(5) and 522 of the Act.

SECTION 764.3 - AUTHORITY.

- (a) The Secretary has authority to approve State programs, including the procedures to designate lands as unsuitable for all or certain types of surface coal mining operations and for terminating such designations.
- (b) The States have authority to develop and include in their State programs procedures consistent with this Part to designate lands unsuitable for all or certain types of surface coal mining operations and to terminate such designations.

SECTION 764.4 - RESPONSIBILITY.

- (a) A person with an interest which is or may be adversely affected may petition the regulatory authority in order to have an area designated unsuitable for all or certain types of surface coal mining operations or to have such a designation terminated.
- (b) The regulatory authority shall respond to petitions consistent with the procedures in this Part.

SECTION 764.11 - PROCEDURES: GENERAL PROCESS REQUIREMENTS.

Each State shall establish a process enabling objective decisions based upon competent and scientifically sound data and other relevant information concerning which, if any, land areas of a State are unsuitable for all or certain types of surface coal mining operations. This process shall include the requirements listed in Sections 764.13 764.25.

SECTION 764.13 - PROCEDURES: 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.
- (b) Designation. A petitioner shall provide the following information for a complete and adequate petition to designate an area as unsuitable for surface coal mining operations:
 - (1) The location and approximate size of the area covered by the petition;
 - (2) Statements or allegations of facts and supporting evidence indicating that the area is unsuitable for all or certain types of surface coal mining operations;
 - (3) A brief description of how mining of the area has affected or may adversely affect people, land, air, water or other resources;
 - (4) The petitioner's name, address and telephone number; and
 - (5) Identification of the petitioner's interest which is or may be adversely affected.
- (c) Termination. The only information that a petitioner need provide for a complete and adequate petition to terminate a designation of an area as unsuitable for all or certain types of surface coal mining operations:
 - (1) The location and approximate size of the area covered by the petition;
 - (2) Statements or allegations of facts, with supporting evidence not contained in the record of the proceeding in which the area was designated unsuitable, which evidence would tend to establish the statements or allegations, and which statements or allegations indicate that the designation of the area as unsuitable for all or certain types of coal mining

operations should be terminated based on either:

- (i) The nature or abundance of the protected resource or condition or other basis of the designation; or
- (ii) Either:

(A) Reclamation being technologically and economically feasible if the designation was based on the criteria found in section 762.11(a) of this Subchapter; or

(B) The resources or condition being protectable during and after mining if the designation was based on the criteria found in section 762.11(b) of this Subchapter;

(3) The petitioner's name, address and telephone number; and

(4) Identification of the petitioner's interest which is or may be adversely affected by the designation.

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

(a) (1) Within 30 calendar days of receipt of a petition, the regulatory authority shall notify the petitioner by certified mail whether or not the petition is complete according to Section 764.13 (b) or (c).

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

(3) 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 new allegations of facts. If the petition does not contain new allegations of facts, the regulatory authority shall not consider the petition. The regulatory authority shall return the petitions to the petitioner with a statement of its findings and a reference to the text of the previous designation proceedings where the evidence was considered. {41830}

(4) If the regulatory authority determines that the petition is incomplete, it shall return the petition to the petitioner together with a written statement of the reasons for the determination and the categories of information needed to make the petition complete.

(5) The regulatory authority shall notify the person who submits a petition of any request for a permit received which proposes to include any area covered by the petition.

(6) The regulatory authority shall not consider any petitions received after the close of the public comment period for a permit application covering the same area. The regulatory authority shall return the petitions to the petitioner with a statement of why the regulatory authority cannot consider the petition. For the purposes of this Section, close of the public comment period shall mean at the close of any informal conference held under 30 CFR 787.14, or, if no conferences are requested, then at the close of the period for filing written comments and objections under 30 CFR 787.12 and 787.13.

(b)(1) Within two weeks after the determination that a petition is complete, the regulatory authority shall circulate copies of the petition to, and request submittals of relevant information from other governmental agencies, the petitioner, any person with an ownership interest of record in the property and any other person known to the regulatory authority to have an interest in the property.

(2) Within three weeks after the determination that a petition is complete, the regulatory authority shall notify the general public of the receipt of the petition and request submittals of relevant information by a newspaper advertisement running once a week for two consecutive weeks in the locale of the area covered by the petition, in the newspaper of largest circulation in the State and in the official State register of public notices, if any.

(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, with supporting evidence which would tend to establish the allegations, and a short statement identifying the petition or petitions to which the allegations pertain and the intervenor's name, address and telephone number.

(d) Beginning immediately after a complete petition is filed, the regulatory authority shall compile and maintain a record all documents relating to the petition filed with or prepared by the regulatory authority. The regulatory authority shall make the record available for public inspection and copying, at reasonable cost, during all normal business hours in a central location of the county or multi-county area in which the land petitioned is located, and in the main office of the regulatory authority.

SECTION 764.17 - PROCEDURES: 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 affected area, provided that if all petitioners and intervenors so stipulate, a hearing need not be held. The hearing shall be legislative and fact-finding in nature, without cross examination of witnesses. The regulatory authority shall make a verbatim transcript of the hearing.

(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 it reasonable determines may have an interest in its decision;

(ii) The petitioner and the intervenors;

(iii) Any person with a recorded ownership interest in the area covered by the petition; and

(iv) Any other person known to the regulatory authority to have an ownership interest or any other interest in the area covered by the petition.

(2) Notice of the hearing must be sent by certified mail and be postmarked not less than 30 days before the scheduled date of the public 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 two consecutive weeks 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 advertisement must begin between 4 and 5 weeks before the scheduled date of the public hearing.

(d) The regulatory authority may, with the consent of all petitioners and intervenors, consolidate in a single hearing the hearings required for each of several petitions which relate to areas in the same locale.

(e)(1) At least 15 days before the hearing required under paragraph (a) of this section, the regulatory authority shall issue a detailed statement, subject to amendment based on facts presented at the hearing, 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.

(2) If in accordance with paragraph (a) of this section no hearing is held and the decision is to designate an area as unsuitable for all or certain types of surface coal mining operations, this detailed statement shall be issued at least 15 days before the decision is published.

SECTION 764.19 - PROCEDURES: 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 issued under Section 764.17(e); and

(4) Any other relevant information submitted during the comment period.

(b) Within 60 days after 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 issue a written decision on the petition, which shall state the basis for the decision. At the same time, the regulatory authority shall send the decision by certified mail to the petitioner, every other party to the proceeding, and to the Regional Director for the region in which the State is located.

(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 as required by Section 526(e) of the Act.

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 data base and inventory system information relevant to the criteria in 30 CFR 762.11. Without limitation it must include information the regulatory authority may receive from the United States Fish and Wildlife Service, the State Historic Preservation Officer, and the agency administering the prevention of significant deterioration provisions of the Clean Air Act Amendments of 1977.

(c) The regulatory authority shall add to the data base and inventory system sufficient information on potential coal resources of the State, demand for those resources, the environment, the economy and the supply of coal, to enable the regulatory authority to prepare the statements required by Section 764.17(b).

(d) The regulatory authority shall add to the data base and inventory system relevant information that becomes available from petitions, publications, experiments, permit applications, mining operations and other sources. {41831}

SECTION 764.23 - PUBLIC INFORMATION.

(a) The regulatory authority shall make the information and data base system developed under Section 764.21 available to the public for inspection and copying at reasonable cost.

(b) The regulatory authority shall publish a brochure outlining the petition procedures necessary to have an area designated as unsuitable for all or certain types of surface coal mining or to have designations terminated. The brochure must also describe how the inventory and data base system can be used.

(c) The regulatory authority shall make copies of the brochure available to the public and if requested shall advise any person as to the requirements for preparing petitions and complying with the petition procedures.

SECTION 764.25 - REGULATORY AUTHORITY RESPONSIBILITY FOR IMPLEMENTATION.

(a) The regulatory authority shall not issue any surface mining and reclamation operations permits on lands which are designated unsuitable for all surface mining operations. The regulatory authority may issue a permit for surface coal mining and reclamation operations on lands designated unsuitable for certain types of surface coal mining operations only if the permit prohibits the types of operations for which the land was designated unsuitable.

(b) The regulatory authority shall not issue any surface coal mining and reclamation operations permits on lands which are under study or for which a petition to designate them unsuitable has been filed or is pending, as provided in 30 CFR 786.15(d) (1) and (2) and in Section 510(b)(4) of the Act.

(c) The regulatory authority shall maintain a map of areas designated as unsuitable for all or certain types of surface coal mining operations.

(d) The regulatory authority shall make available to any person any information within its control regarding designations except proprietary information on the chemical and physical properties of the coal. {41831}

PART 765 – DESIGNATING LANDS UNSUITABLE FOR SURFACE COAL MINING OPERATIONS UNDER A FEDERAL PROGRAM FOR A STATE

Section

765.1	Scope.
765.3	Responsibility.
765.11	Procedures.
765.12	State variations.
765.13	Effective date.

Authority: Sections 102, 201, 501, 503, 504, and 522, Pub. L. 95 87, 91 Stat. 445 (30 U.S.C. 1202, 1211, 1251, 1253, 1254, and 1272).

SECTION 765.1 - SCOPE.

This Part establishes minimum procedures to be included in each Federal program within a State for the designation of land areas in a State as unsuitable for all or certain types of surface coal mining operations and for the termination of such designations.

SECTION 765.3 - RESPONSIBILITY.

(a) Section 504 of the Act requires the Director to prepare, promulgate and implement an entire Federal program for a State if the State:

- (1) Fails to submit a State program within the time allowed;
- (2) Fails to submit an acceptable State program within either sixty days of a notice of an incomplete submission or within sixty days of disapproval of a proposed State program; or
- (3) Fails to implement, enforce, or maintain an approved State program.

(b) Section 504(g) of the Act also requires the Director to prepare, promulgate, and implement a partial Federal program, if the State fails to implement, enforce, or maintain an approved State program in part.

SECTION 765.11 - PROCEDURES.

At the time a Federal program is promulgated for a State the Director shall develop a process for designating lands unsuitable for all or certain types of surface coal mining operations consistent with the requirements of Parts 761, 762 and 764 of this Subchapter. The Director shall include in that process the procedures, data base, inventory system and public information requirements of Part 764.

SECTION 765.12 - STATE VARIATIONS.

When developing the procedures and criteria for designation lands unsuitable for all or certain types of surface coal mining operations in a Federal program for a State, the Director shall consider:

- (a) The nature of the State's terrain, climate, coal deposits, biological, chemical and other relevant physical characteristics;
- (b) The structure and responsibilities of the State government and local governments within the State including State and local land-use plans;
- (c) Standards adopted by a State which are more stringent than the standards of the Act or the regulations under Part 762; and
- (d) The structure and responsibilities of the State government and local governments within the State.

SECTION 765.13 - EFFECTIVE DATE.

(a) 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 implemented for a State, as required by Section 504(a) of the Act.

(b) Where a Federal program is promulgated because of a State's failure to adequately implement and maintain or enforce its program for designating lands unsuitable for all or certain types of coal mining, the designation procedure of a Federal program for the State shall be effective immediately upon implementation of the Federal program. {41831}

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.
769.3	Authority.
769.4	Responsibility.
769.7	Regulatory Policy.
769.11	Who may submit a petition.
769.12	Where to submit petitions.
769.13	Contents of petitions.
769.14	Petition process prior to hearing.
769.15	Intervention.
769.16	Public information.
769.17	Public hearing.
769.18	Decisions on petitions.

Authority: Sections 102, 201, 522, and 523, Pub. L. 95 87, 91 Stat. 445 (30 U.S.C. 1202, 1211, 1272 and 1273).

SECTION 769.1 - SCOPE.

This part establishes minimum procedures for designating Federal lands as unsuitable for all or certain types of surface coal mining operations and for terminating previous designations, based on petitions submitted by any person having an interest which is or may be adversely affected.

SECTION 769.3 - AUTHORITY.

Section 522(c) of the Act authorizes the Secretary to establish a process for any person having an interest, which is or may be adversely affected by surface coal mining operations or to have such a designation terminated.

SECTION 769.4 - RESPONSIBILITY.

(a) The Regional Director shall act on petitions to have Federal lands designated unsuitable for all or certain types of surface coal mining operations or to have these designations terminated pursuant to the criteria set forth in part 762 of this subchapter. Prior to designation, the Regional Director shall consult with appropriate State and local agencies. {41832}

(b) The Regional Director for the region in which Federal land proposed for designation is located is authorized to receive petitions, conduct public hearings and issue decisions on petitions.

(c) The surface managing agency shall make recommendations for approval or disapproval of petitions based on present and future land use planning and management of public lands.

SECTION 769.7 - REGULATORY POLICY.

(a) The Regional Director shall not issue any permits for surface mining and reclamation operations on Federal lands which are designated unsuitable for all surface mining and reclamation operations. The Regional Director may issue a permit for surface coal mining and reclamation operations on Federal lands designated unsuitable for certain types of surface coal mining and reclamation operations only if the permit prohibits those types of operations for which the Federal lands were designated unsuitable.

(b) The Regional Director shall not issue any surface coal mining and reclamation operations permits on lands which are under study or for which a petition to designate them unsuitable has been filed or is pending, as provided in Sections 786.15(d) (1) and (2) of this chapter.

(c) The Regional Director shall maintain a map of areas designated as unsuitable for all or certain types of surface coal mining operations.

(d) Under the Freedom of Information Act, the Regional Director shall make available to any person any information within its control relating to a petition to designate Federal lands unsuitable for all or certain types of surface coal mining and reclamation operations or to terminate a designation. The Director may not release any information which is proprietary or is confidential under other Federal statutes or regulations.

(e) Once an area of Federal lands is designated as unsuitable for all or certain types of surface coal mining operations, the authorized officer shall condition any permit or lease in a manner so as to limit surface coal mining operations on the designated area.

SECTION 769.11 - WHO MAY SUBMIT A PETITION. {41832}

Any person who has 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 by other acts.

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 Regional Director of the region in which the Federal lands are located.

SECTION 769.13 - CONTENTS OF PETITIONS.

(a) Designation. Each petition for designating areas as unsuitable for all or certain types of surface coal mining operations shall contain the following information:

- (1) The location and approximate size of the area covered by the petition;
- (2) Statements or allegations of facts, with supporting evidence indicating that the area is unsuitable for all or certain types of surface coal mining operations;
- (3) A brief description as to how mining has affected or may adversely affect people, land, air, water or other resources of the area covered by the petition;
- (4) A statement of the petitioner's interest which is or may be adversely affected; and
- (5) The petitioner's name, address and telephone number.

(b) Termination. Petitions to terminate the designation of an area for all or certain types of surface coal mining operations shall contain the following information:

(1) Statements or allegations of facts with supporting evidence indicating that the designation should be terminated. The statements or allegations shall not be contained in the record of the proceeding in which the area was designated unsuitable. The statements or allegations shall concern either_

(i) The nature of abundance of the protected resource or condition or other basis of the designation; or

(ii) Either mining or reclamation technology or economics which would render reclamation technologically and economically feasible where the designation is based on the criteria found in Section 762.11(a) of this Subchapter, or mining or reclamation technology or procedures which would protect the resource or condition during and after mining if the designation is based on the criteria found in Section 762.11(b) of this Subchapter;

- (2) The location and approximate size of the area covered by the petition;
- (3) Identification of the Federal surface managing agency;
- (4) The petitioner's name, address and telephone number; and
- (5) A statement of the petitioner's interest which is or may be adversely affected by the designation of Federal lands.

SECTION 769.14 - PROCEDURES PRIOR TO HEARING.

- (a) Within 30 calendar days of receipt of a petition, the Regional Director shall notify the petitioner by certified mail whether or not the petition is complete according to Section 769.13.
- (b) If the Regional Director determines that the petition is incomplete, he shall return the petition to the petitioner together with a written statement of the reasons for the determination and the categories of information needed to complete the petition.
- (c) The Regional Director shall determine whether any identified or potential coal deposits exist in or near the area covered by the petition. If there are no potential coal deposits in the area covered by the petition, the Regional Director shall reject the petition.
- (d) (1) Within two weeks after the determination that the petition is complete, the Regional Director shall send a copy of the petition to the Authorized Officer of the surface managing agency by certified mail for recommendation.
(2) The Authorized Officer of the surface managing agency shall recommend approval or disapproval of the petition within 30 days of receipt of a copy of the petition providing that the area covered by the petition has been included in a completed Federal lands review or within nine (9) months if the area has not been included in a Federal lands review.
- (e) Within two weeks after the determination that a petition is complete, the Regional Director shall circulate copies of the petition to, and request submittals of relevant information from the surface managing agency, other interested State, local, or Federal agencies, the petitioner, any person with an ownership interest of record in the property and any intervenors.
- (f) (1) The Regional Director shall consider petitions in areas covered by existing land use plans which have specifically considered surface coal mining operations to determine whether:
(i) The petitioner has presented significant new evidence not previously considered, and
(ii) All of the criteria set forth in Part 762 were considered.
(2) Where no new significant evidence is presented and the criteria set forth in Part 762 have been considered, the Regional Director may reject the petition.

SECTION 769.15 - INTERVENTION.

Up to ten days before the Regional Director holds a hearing on a petition under Section 769.17(a)(1), any person may intervene in the proceeding by filing allegations of facts, with supporting evidence which would tend to establish the allegations, together with a short statement identifying the petition or petitions to which the allegations pertain and the intervenor's name, address and telephone number. {41833}

SECTION 769.16 - PUBLIC INFORMATION.

- (a) Within three weeks after determining that a petition is complete, the Regional Director shall notify the general public of the receipt of the petition and request submittals of relevant information by a newspaper advertisement running once a week for two consecutive weeks in the locale of the area covered by the petition, in the newspaper of largest circulation in the State, in the Federal Register and in the official State register of public notices, if any.
- (b) Beginning immediately after a complete petition is filed, the Regional Director shall compile and maintain a record consisting of all documents not otherwise exempt under the Freedom of Information Act, relating to the petition filed with or prepared by the Regional Director. The Regional Director shall make the record available for public inspection and copying, at reasonable costs, during all normal business hours copying, at reasonable costs, at a central location of the county or multi-county area where the land petitioned is located, and at the Regional Office.

SECTION 769.17 - PUBLIC HEARING.

- (a) Within 10 months after receipt of a complete petition, the Regional Director shall hold a public hearing within the locality of the affected area. If all petitioners and intervenors so agree, a hearing need not be held. The hearing shall be legislative and fact-finding in nature, without cross-examination of witnesses. The Regional Director shall make a verbatim transcript of the hearing.

- (b) (1) The Regional Director shall give notice of the date, time and location of the hearing to:
- (i) The surface managing agency, local, State and Federal agencies which it reasonably determines may have an interest in its decision;
 - (ii) The petitioner and the intervenors;
 - (iii) Any person with an ownership interest of record and to any other person known to the Regional Director to have an ownership interest or any other interest in the area covered by the petition.
- (2) Notice of the hearing shall be sent by certified mail and be postmarked not less than 30 days before the scheduled date of the public hearing; and
- (3) The Regional Director shall notify the general public of the date, time and location of the hearing by placing an advertisement once a week for two consecutive weeks 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 advertisement must begin between four and five weeks prior to the scheduled date of the public hearing.
- (c) The Regional Director may consolidate into a single hearing the hearings required for each of several petitions which relate to areas in the same locale.
- (d) Where lands administered by the Department of the Interior and Agriculture are contiguous or intermingled or where one Department's resource management could affect resources or the other Department's land, the Regional Director shall refer a copy of the petition to the Department of Agriculture and shall consider that Department's recommendations about designating those lands unsuitable for all or certain types of surface coal mining, or terminating such designation.
- (e) If any petition relates to an area of Federal lands which is the subject of a pending coal mining and reclamation operations permit application, the Regional Director may coordinate the hearing on the petition required under Paragraph (a)(1) of this Section with any informal conference held in accordance with Section 513(b) of the Act. Nothing in this Part shall in any way relieve an applicant for a mining and reclamation operations permit from the burden of establishing that his application is in compliance with the requirements of the applicable State or Federal programs.
- (f) At least fifteen days prior to the hearing required under paragraph (a) of this Section, the Regional Director shall issue a detailed statement, subject to amendment based on facts presented at the hearing, on:
- (1) The abundance of coal resources of the area,
 - (2) The demand for coal resources, and
 - (3) The impact of such designation on the environment, the economy and the supply of coal.
- (g) If, in accordance with Paragraph (a) of this Section, no hearing is held and the decision is to designate an area as unsuitable for all or certain types of surface coal mining operations, this detailed statement shall be issued at least fifteen (15) days before the decision is published.

SECTION 769.18 - DECISIONS ON PETITIONS.

- (a) In reaching his decision, the Regional Director shall use the information and recommendation of the surface managing agency, information provided by other governmental agencies, the detailed statement issued under Section 769.17(f), and any other relevant information submitted prior to or in connection with the hearing.
- (b) For all petitions, a final written decision must be issued within 60 days after completion of the public hearing, or if no public hearing is held, then within 12 months after receipt of the complete petition.
- (c) The Regional Director shall include in his decision on the petition a statement of reasons for the decision.
- (d) The Regional Director shall send the decision and statement required by paragraphs (b) and (c) of this Section by certified mail to the petitioner, the Secretary, the surface managing agency, and to every other party to the proceeding.
- (e) If the Regional Director concurs with the recommendation of the surface managing agency, the Regional Director's decision becomes final.
- (f) If the Regional Director determines that the recommendation of the surface managing agency is incorrect, he shall so notify the appropriate Regional or State Director of the surface managing agency within 30 days after the public hearing. The

decision will at the same time 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.

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