



United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, DC 20240

PETITION TO DESIGNATE CERTAIN LANDS WITHIN THE NORTH CUMBERLAND WILDLIFE MANAGEMENT AREA AND EMORY RIVER TRACTS CONSERVATION EASEMENT, TENNESSEE AS UNSUITABLE FOR SURFACE COAL MINING OPERATIONS

RECORD OF DECISION AND STATEMENT OF REASONS

I. INTRODUCTION

On September 30, 2010, the State of Tennessee filed a petition with the Office of Surface Mining Reclamation and Enforcement (OSMRE) to designate certain lands in the State as unsuitable for surface coal mining operations. These lands include the area within 600 feet of all ridgelines lying within the North Cumberland Wildlife Management Area (NCWMA) - comprised of the Royal Blue Wildlife Management Area, the Sundquist Wildlife Management Area, and the New River Wildlife Management Area (also known as the Brimstone Tract Conservation Easement) and the Emory River Tracts Conservation Easement (ERTCE), encompassing approximately 67,326 acres. The State noted two statutory criteria under section 522(a)(3) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA) as the basis of its petition. The following is a discussion of the reasons supporting my decision.

II. LEGAL BACKGROUND

Section 522 of SMCRA allows “any person having an interest which is or may be adversely affected . . . 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.” 30 U.S.C. § 1272(c).

Pursuant to Section 522(a)(3) of SMCRA, an area may be found unsuitable for surface coal mining operations if certain criteria are met. 30 U.S.C. § 1272(a)(3). The State’s petition cites two of these criteria, specifically asserting that surface coal mining operations in the petition area would:

- “be incompatible with existing federal, state, and local land use plans or programs; or
- affect fragile or historic lands in which such operations could result in significant damage to important historic, cultural, scientific, or esthetic values and natural systems...”

30 U.S.C. § 1272(a)(3)(A)(B). The SMCRA regulatory program for Tennessee is set out at 30 CFR part 942. Under that program, and pursuant to SMCRA section 504(a)(3), 30 U.S.C. § 1254(a)(3), OSMRE is the regulatory authority for Tennessee. Specific criteria and procedures for processing a petition to designate non-federal lands in Tennessee are incorporated by reference

in 30 CFR §§ 942.762 and 924.764. Those sections incorporate the criteria set out in 30 CFR part 762 and the procedures set out in 30 CFR part 764. OSMRE has complied with these provisions in reaching the decision on this petition.

Prior to making a determination, the OSMRE must prepare a detailed statement that assesses the potential coal resources of the area, the demand for coal resources, and the impact of a designation on the environment, economy, and the supply of coal. 30 U.S.C. § 1274(d). Any decision that the OSMRE may make on the State's petition is considered a federal action subject to the requirements of the National Environmental Policy Act (NEPA). As a decision could result in the designation of the petition area as unsuitable for surface coal mining operations, the OSMRE considers this decision to be a major federal action with potentially significant effects to the quality of the human environment. Thus, in accordance with NEPA, section 102(2)(C), 42 U.S.C. § 4332(2)(C), an environmental impact statement (EIS) has been prepared and my decision is based on review of this document. Consistent with the requirements of 40 CFR § 1506.4, the OSMRE combined the petition evaluation document (PED) with the EIS to improve efficiencies. Among other things, the PED/FEIS contains an evaluation of reasonable alternatives to the petitioned action, the affected environment, an evaluation of coal resources in the petition area as required by SMCRA, and an evaluation of direct, indirect and cumulative environmental consequences. The analysis contained in the PED/FEIS was taken into consideration as part of this decision.

As noted previously, the petition requests the designation of areas within the NCWMA and ERTCE on the basis of the criteria outlined in sections 522(a)(3)(A) and (B) of SMCRA. The petition contains numerous factual allegations and documentation to support the petitioner's claims that the area should be designated under the discretionary criteria.

III. FACTUAL BACKGROUND

The petition area encompasses areas within 600 feet on either side of certain ridgelines within the NCWMA which is comprised of the Royal Blue Wildlife Management Area, the Sundquist Wildlife Management Area, and the New River Wildlife Management Area (also known as the Brimstone Tract Conservation Easement), and the ERTCE. The petition area encompasses approximately 67,326 acres located in Scott, Anderson, Campbell, and Morgan Counties, Tennessee.

The NCWMA unsuitability petition was submitted to the OSMRE on September 30, 2010, by the State of Tennessee. The OSMRE responded to the petitioners by letter dated October 29, 2010, with a request for additional information in order to finalize the completeness review. The petitioners responded to the OSMRE request on November 8, 2010. The OSMRE determined the petition to be complete on November 23, 2010, and initiated evaluation of the petition allegations.

As previously stated, because the decision of this petition may have a significant effect on the quality of the human environment, the OSMRE decided to prepare a combined PED and EIS. The OSMRE published a Notice of Intent to prepare a draft PED/EIS, including a request for public participation in determining the scope of the issues to be addressed in the February 8, 2011, *Federal Register* (76 FR 6826) and in the February 3, 2011, *Tennessee Administrative Record*. On February 23, 2011, the OSMRE mailed 794 notices to the petitioners, interested state and federal agencies, landowners, intervenors, and other interested parties to announce the date, time, and place of public scoping meetings. Advertisements announcing the intent to prepare a PED/EIS

and to hold public scoping meetings were published in several newspapers: *Clinton Courier News* on February 27 and March 6, 2011; *Knoxville News Sentinel* on February 27 and March 6, 2011; *Lafollette Press* on February 24 and March 3, 2011; *Morgan County News* on February 23 and March 2, 2011; and *Scott County News* on February 24 and March 3, 2011. In addition, several special-interest groups and organizations published announcements in their newsletters, websites, and through social networking services. Statewide newspapers in Nashville, Knoxville, and Chattanooga, Tennessee, published articles related to the meetings. In addition, WVLT Channel 8, in Knoxville, Tennessee, provided news coverage.

Three public scoping meetings were held in Scott, Campbell, and Anderson Counties, Tennessee on March 8, March 10, and March 15, 2011, respectively. In all, 311 people attended the meetings, and 81 spoke for the record. By the close of the scoping comment period on April 14, 2011, the OSMRE, in addition to the oral comments, had received 25,639 email and 36 other written comment submissions. Of the 25,639 emails, 25,116 contained duplicate messages. In determining the scope of the PED/EIS, the OSMRE considered all comments contained in the public record for the petition and the proposed PED/EIS.

In addition, in an effort to become more familiar with the petition area and the concerns and issues of the people most likely to be affected by any decision on the petition, the Director of the OSMRE spent three days in the four counties associated with the petition area. From April 26 through April 28, 2011, the Director toured much of the petition area, including various points along the Cumberland Trail as well as active and reclaimed coal mining operations. During this time, the Director met with local citizens, representatives of local environmental organizations, the Tennessee coal mining industry, local and state officials, and representatives of the petitioner and the interveners.

The OSMRE announced the availability of the draft PED/EIS and requested public comments in the December 11, 2015, *Federal Register* (80 FR 77018) and in local newspapers. The public comment period lasted through January 24, 2016. In these notices and newspaper advertisements, the OSMRE also gave notice of public meetings held at four locations in Scott, Morgan, Anderson, and Campbell Counties, Tennessee. A total of 210 people attended the meetings and of those, 89 presented oral comments. In addition, a total of 2,138 additional unique letters or emails were received, all of which were considered in developing the final PED/EIS. In response to comments seeking additional time to comment on the draft PED/EIS, the OSMRE extended the comment period until February 26, 2016. OSMRE's PED/EIS comment responses are available in Appendix J in the final PED/EIS.

The Environmental Protection Agency (EPA) and the OSMRE published notices of availability of the final PED/EIS in the *Federal Register*, on October 28, 2016. Public notice of the availability of the PED/EIS was also made via an OSMRE press release, posting on OSMRE's website, and postcards mailed to interested parties. Governing regulations at 40 CFR § 1506.10(b)(2) require that no decision be made until 30 days after the EPA notice of availability is published in the *Federal Register*.

IV. THE PETITION

The NCWMA Lands Unsuitable for Mining Petition contains two primary allegations, with numerous factual allegations and supporting statements. In primary allegation (1), the petitioner

contends that the petition area should be designated unsuitable for surface coal mining operations because mining in the area would be incompatible with existing state or local land use plans or programs. In primary allegation (2), the petitioner contends that the OSMRE should designate the petition area as unsuitable for surface coal mining operations because such operations would affect fragile or historic lands, resulting in significant damage to important historic, cultural, scientific, and aesthetic values and natural systems. The petition is reprinted in Appendix B of the final PED/EIS.

V. DECISION ALTERNATIVES

Since project inception, the OSMRE has worked in close partnership with the cooperating agencies in developing the alternatives and the current suite of options presented in the draft and final PED/EIS to develop a reasonable range of alternatives, as required by NEPA. The six alternatives in the final PED/EIS, including the no action alternative, was developed after considering the original petition boundaries within the NCWMA, the inclusion of additional ridges not considered in the original petition, impacts of allowing roads and remining, and the evaluation of unique and sensitive areas within the NCWMA.

In developing the six alternatives, the OSMRE used the petitioner's ridgeline boundaries for alternative 2, and then considered the impacts of allowing roads and remining within the original petition boundaries (alternative 3), the impacts of including additional ridgelines while still allowing roads and remining (alternative 4), and narrower ridgeline buffers (alternative 6). For alternative 5, the OSMRE considered the intent of the petition and focused on the sensitive and unique resources within the NCWMA, including sensitive wetlands, the elk viewing tower area, and core breeding habitat for the cerulean warbler. The full text discussion of the petition decision alternatives and their environmental impacts is found in chapter 3 and chapter 6 of the final PED/EIS.

The OSMRE has identified two environmentally preferable alternatives. Alternative 2, the short-term environmentally preferable alternative, would designate the largest area of land while avoiding the impacts of remining and access road development. However, the long-term impacts associated with acid mine drainage and sedimentation from pre-SMCRA mine sites would continue. Alternative 4 is considered the alternative that is environmentally preferable over the long-term because it would designate the largest area and potentially reduce the impacts of acid mine drainage and residual sedimentation, although there would be short-term impacts as a result of remining and mining road construction. Therefore, alternatives 2 and 4 are considered the alternatives that best protect, preserve, and enhance historic, cultural, and natural resources.

The agency's preferred alternative, alternative 4, is the alternative that OSMRE believes would best accomplish the purpose of and need for action, and fulfill its statutory mission and responsibilities, giving consideration to economic, environmental, technical, and other factors. The agency's preferred alternative does not necessarily have to be the same as the proposed action, e.g., the non-Federal entity's proposal, or the environmentally preferred alternative. 43 CFR § 46.420. OSMRE originally identified alternative 3 as its preferred alternative in the draft PED/EIS. However, based on public and agency comments, OSMRE identified alternative 4 as the preferred alternative in the final PED/EIS because it is the most consistent with the intent of the State's request. Although alternative 2 reflects the State's original request, in a subsequent letter dated September 25, 2015, to OSMRE, the State indicated that it would support an alternative

that included re-mining because of the long-term benefits that re-mining might afford the environment by resolving legacy water quality and slope stability problems in the designation area. The State also indicated that re-mining would allow for the balancing of mining and conservation interests. Additionally, in letters dated January 2016, Tennessee Department of Environment & Conservation (TDEC) and Tennessee Wildlife Resources Agency (TWRA) both voiced support for alternative 4 and the expanded ridgeline designation based on their review of the draft PED/EIS. Therefore, for all of the reasons listed above, OSMRE has determined that alternative 4 is the alternative that is most consistent with SMCRA and the State's intent. As noted above, based on the analysis contained within the FEIS, alternative 4 is the environmentally preferable alternative over the long-term, due to the size of the petition area and the potential to reduce the impacts of acid mine drainage and residual sedimentation through re-mining. With the adoption of conditions set forth below to ensure that re-mining will only be conducted in a manner consistent with the purposes for this designation, all practicable means to avoid or minimize environmental harm from the alternative selected have been adopted.

VI. FINDINGS

The petitioner presented two primary allegations under section 522(a)(3) of SMCRA as the basis of its petition. The petitioner also presented allegations of fact and supporting statements in support of the two primary allegations. Two sets of intervenors presented allegations, one in support of and the other in opposition to designation. A summary of the petitioner's and intervenors' allegations follows, along with my findings relative to each allegation. The primary allegations are presented in the order in which they appear in the petition. These findings are based upon all the information contained in the public record for this petition.

1. PRIMARY ALLEGATION NO. 1 – INCOMPATIBLE WITH EXISTING STATE AND LOCAL LAND USE PLANS AND PROGRAMS

Petitioner's Allegations: Primary Allegation (1)

Allegation 1 is that the petition area should be designated unsuitable for surface coal mining operations because mining in the area would be incompatible with existing state or local land use plans or programs.

Petitioner's Allegations: Allegation of Fact (1)

The petitioner alleges that surface mining in the petition area would be incompatible with the State's conservation plan for this area as reflected in the 2007 "Connecting the Cumberlands" conservation project. The petitioner submitted a number of statements in support of this allegation of fact as follows:

Supporting Statements – Allegation of Fact (1)

1. The petitioner states that the purpose and vision of the "Connecting the Cumberlands" conservation project, which was a successful collaboration between the State of Tennessee, the Nature Conservancy and two timber companies to acquire public access rights on approximately 127,000 acres of land in the North Cumberland Plateau through targeted land purchases, working forest agreements, and conservation easements, is to

ensure the integrity and protection of public lands on a landscape scale by preserving large blocks of land to avoid landscape fragmentation. The petitioner contends that surface mining and the associated clearcutting that precedes such mining directly damages wildlife and wildlife habitat within, surrounding, and downstream of mined areas and fragments forests in direct conflict with State goals. The petitioner further contends that these impacts occur even when coal mining is conducted in full compliance with SMCRA.

2. The petitioner states that the “Connecting the Cumberlands” conservation project not only preserves valuable natural lands but also provides long-term support for local economies. The petitioner indicates that the keys to the State’s long-term, sustainable economic development plans are preservation of the land’s natural and ecological values that attract tourism and management of forest for the permanent provision of valuable products and local jobs. The petitioner further states that, unlike tourism and sustainable forestry, surface mining provides only short-term benefits, siphons the majority of profits out of the area, and leaves local communities with very few, if any, postmining economic opportunities. The petitioner contends that, as surface mining damages the natural and scenic values that attract tourism and destroys forest that would provide a sustainable timber harvest, such mining undermines state plans for sustainable economic development.
3. The petitioner indicates that one of the primary purposes of the conservation project that are part of the recent property acquisition is to protect the “conservation values” of the land. The petitioner goes on to state that these values include protection of native flora and fauna and the ecological processes that support them; threatened and endangered animal species and other animals; neotropical migrant songbirds; wetland, riparian, and aquatic habitat; and biological diversity. The petitioner concludes that these values would be negatively impacted by surface coal mining.
4. The petitioner states that the “Connecting the Cumberlands” conservation project advances the State’s strategy as set forth in the Tennessee State Recreation Plan and Tennessee 2020, a 10-year plan for creating a recreation development corridor in the Cumberland Plateau. The petitioner further indicates that the State has an interest in promoting recreational uses for Royal Blue and Sundquist Wildlife Management Areas for hunting and wildlife watching. The petitioner concludes that surface mining causes impacts such as damage to scenic resources, noise, dust, and vibration; and that surface mining activities are inconsistent with State goals of creating and enhancing recreational opportunities and protecting the area for public recreation.

Intervenors’ Response – Allegation of Fact (1)

Supporting Intervenors: Supporting intervenors generally affirm the allegations and statements of support made by the petitioner. The intervenors provide no new information relevant to this allegation of fact.

Opposing Intervenors: Opposing intervenors contend that the petition fails to specify how surface mining operations in the petition area would be “incompatible with the conservation goals of Tennessee’s ‘Connecting the Cumberlands’ project.” The intervenors further state that the petitioner’s admission that “no comprehensive management plan has yet been developed for the

new North Cumberland Wildlife Management Area” indicates that “it is quite possible—if not likely—that surface mining operations, and in particular certain reclamation plans developed for specific habitats or that would reclaim abandoned mine lands, could be entirely compatible and consistent with the same goals as the state.” The intervenors conclude that the “... petitioner fails to present any basis, facts, or evidence supporting this allegation.”

Petitioner’s Allegations: Allegation of Fact (2)

Allegation of fact (2) is that surface mining in the petition area would be incompatible with state management plans for wildlife management areas. The petitioner submitted a number of statements in support of this allegation of fact as follows:

Supporting Statements – Allegation of Fact (2)

1. The petitioner states that, although a comprehensive management plan for the NCWMA has not yet been developed, the Royal Blue management plan currently provides guidance for a large portion of the NCWMA. The list of goals for the wildlife management area in the Royal Blue plan includes providing opportunities for “wildlife enjoyment,” “plant and animal restoration,” “non-wildlife associated recreation,” and protection and management of “threatened and endangered flora and fauna.” The petitioner continues by stating that, while the Royal Blue and Sundquist plans include timber harvest, neither plan allows clearcutting on the massive scale associated with surface mining. The petitioner contends that surface mining in the petition area will impair human recreational and wildlife viewing opportunities in the NCWMA and in so doing, conflicts with the NCWMA plans. The petitioner further states that scenic resources of the NCWMA will be degraded by surface mining while noise and dust will further lower the recreational value of the area. The petitioner concludes by stating that the OSMRE acknowledged the impacts of dust and noise on recreational values in the Flat Fork Watershed unsuitability petition statement of reasons. In the Flat Fork Watershed unsuitability petition, petitioners sought to have designated a 5,250-acre parcel in the Flat Fork watershed in Morgan County Tennessee.
2. The petitioner acknowledges that the Royal Blue management plan notes that mining has occurred and is likely to continue into the future. However, the petitioner indicates that the plan makes clear that such mining must be environmentally sound and compatible with the wildlife-centered uses for the NCWMA. The petitioner states that the plan further notes that mining should be limited to situations where it is possible to ensure wildlife habitat and water quality are not adversely impacted. The petitioner concludes that mining in the NCWMA cannot meet these requirements because of its effect on wildlife enjoyment and viewing, scenic resources, and recreational satisfaction.
3. On September 25, 2015, the State wrote a letter to the OSMRE to provide additional support for its petition. The letter and corresponding documents and data included updated draft plans, such as the State Wildlife Action Plan and Northern Cumberland Forest Resources Habitat Conservation Plan, cerulean warbler white papers and habitat data, rare plant data, and information on cultural resources. In addition to the supplemental information, the letter reaffirmed the State’s position that the State had

no opposition to remining or deep mining within the NCWMA or the proposed petition area.

Intervenors' Response – Allegation of Fact (2)

Supporting Intervenors: Supporting intervenors affirm the allegation and supporting statements made by the petitioner. The supporting intervenors rely on a prior lands unsuitable petition, Fall Creek Falls, to further contend that inherent impacts of surface mining identified in the “statement of reasons” for the Fall Creek Falls PED/EIS, including elevated total dissolved solids, increased sedimentation, increased alkalinity, and increased pH, “would further impair aquatic habitat within the Wildlife Management Area, contrary to the habitat recovery and watershed restoration goals set forth in the Royal Blue Plan.” In the Fall Creek Falls petition, petitioners sought to have approximately 85,500 acres designated as unsuitable for surface coal mining operations.

Opposing Intervenors: Opposing intervenors contend that the text of the Royal Blue Wildlife Management Area management plan contains numerous examples of how coal mining and management of the wildlife management area are compatible. The intervenors note that the Royal Blue Wildlife Management Area plan indicates the following:

1. The State of Tennessee intends to work with post-1977 coal leases.
2. The Tennessee Department of Environment & Conservation (TDEC) and Tennessee Wildlife Resources Agency (TWRA) were among the agencies “that would evaluate permits for surface coal mining under criteria set out in the agreement,” and these State agencies never indicated that any surface mining operation in the Royal Blue Wildlife Management Area ever failed to meet the criteria the State had established.
3. The TWRA would have a role in the development of mine reclamation plans such that “these mine sites [would] be left with better overall habitat than existed before the coal harvest began.”
4. Roads were “to be left in usable states” and “in a manner to separate game population from public activities.”

Petitioner's Allegations: Allegation of Fact (3)

Allegation of fact (3) is that surface mining in the petition area would be incompatible with state plans for the Cumberland Trail, the Tennessee Greenways and Trails Plan, and the Tennessee state park plans.

Supporting Statements – Allegation of Fact (3)

The petitioner submitted a number of statements in support of this allegation of fact as follows:

1. The petitioner states that continued development and eventual completion of the Cumberland Trail is a priority of the Greenways and Trails advisory committee and that surface mining would frustrate the goals of the Tennessee Greenways and Trails plan and the management objectives for Tennessee state parks.
2. The petitioner states that Tennessee law requires that as a state park, the trail will “be preserved in a natural condition so far as may be consistent with its human use and

safety, and all improvements shall be of such character as not to lessen its inherent recreational value.” The petitioner contends that as surface mining would harm scenic, historic, natural, cultural, and ecological qualities of the area through which the trail passes, these impacts would directly conflict with the mission of the state park to preserve and protect in perpetuity the trail as well as the recreational uses of the NCWMA.

Intervenors’ Response – Allegation of Fact (3)

Supporting Intervenors: Supporting intervenors generally affirm the allegation and statements of support made by the petitioner. The intervenors provide no new information relevant to this allegation of fact.

Opposing Intervenors: Opposing intervenors provide no new information relevant to the petitioner’s allegation of fact.

Petitioner’s Allegations: Allegation of Fact (4)

The petitioner alleges that surface mining in the petition area would be incompatible with Tennessee’s Comprehensive Wildlife Conservation Strategy, a statewide plan that addresses all activities that could impact state terrestrial, aquatic, and subterranean species. The plan discusses the different habitat areas of the state, identifies activities that would threaten species within these areas, and lists a number of proposed alternatives to address those activities and their related impacts.

In a follow-up letter to the OSMRE, dated September 25, 2015, the petitioner alleges that new surface mining is inconsistent with its 2015 Tennessee State Wildlife Action Plan. The 2015 Tennessee State Wildlife Action Plan by TWRA, an update to Tennessee’s 2005 Comprehensive Wildlife Conservation Strategy, emphasizes the importance of the NCWMA in protecting, managing, conserving, and restoring Greatest Conservation Need (GCN) species and their habitats and found that “[c]oal mining activities, from site preparation to postmining impacts, can introduce a spectrum of problems for GCN species and their habitats,” citing a 2002 EPA study that found that coal mining activities can cause “unacceptable losses of valuable and rare native fish and mussels.” *Id.* at 88. The 2015 Tennessee State Wildlife Action Plan defines “incompatible management practices” as those that “modify habitat composition, type, and/or ecological process in a way that is not compatible with the needs of target wildlife or plant species.” *Id.* at 191. The plan also states:

Another important approach to ensuring compatible resource use is the advance designation of sites and areas for which particular land or resource utilization would not advance habitat and species conservation goals. The NCWMA offers one of Tennessee’s premier opportunities to protect, manage, conserve, and restore GCN species and their habitats, with special emphasis on aquatic, riparian zone, and ridgeline hydrological and ecological function. Over 150 wildlife and plant GCN species are dependent upon adequate protection of these habitat features and their ecological function in the landscape.

Id. at 134.

Supporting Statements – Allegation of Fact (4)

The petitioner states that the primary goal of Tennessee’s Comprehensive Wildlife Conservation Strategy is to prevent nongame wildlife from declining to the point of endangerment. To accomplish this, the petitioner indicates that Tennessee’s Comprehensive Wildlife Conservation Strategy establishes a process that includes categorizing habitats for state-designated GCN species, assessing priority problems for those species and identifying conservation actions that are likely to be most effective in addressing priority problems across the state. The petitioner states that Tennessee’s Comprehensive Wildlife Conservation Strategy identifies coal mining as a particularly problematic source of habitat destruction in the Cumberland region which encompasses the petition area. The petitioner contends that continued surface mining in the petition area would be incompatible with several priority conservation actions of Tennessee’s Comprehensive Wildlife Conservation Strategy. The petitioner offers the following supporting statements for this allegation:

1. With respect to the 2015 Tennessee State Wildlife Action Plan, the petitioner states that “new contour, cross-ridge, or mountain top removal coal mining is incompatible with agency management and restoration goals for the NCWMA.” The plan acknowledges that surface coal mining activities “permanently disrupt and degrade the hydrologic and ecologic function of surrounding forests, springs seeps, streams, and riparian zones. These activities also disrupt and degrade the ecological function and connectivity of ridgeline habitat corridors.” The petitioner points to an appendix to the 2015 Tennessee State Wildlife Action Plan which contains a “detailed list of [greatest conservation need (GCN)] species associated with ridgeline areas in the NCWMA and potentially affected by the stresses of surface mining activities in that area.” The petitioner specifically points out that green salamanders, Allegheny woodrats, and Indiana and gray bats are found in the ridgeline corridors. The petitioner also states that a “variety of aquatic GCN species, including the emerald darter and the blackside dace,” are supported by “the more pristine streams in the area.” The petitioner further identifies several GCN plant species as “potentially affected by incompatible mining in the NCWMA, including the Ozark bunchflower...Canada lily...and pale corydalis.” The petitioner states that the Ozark bunchflower, which is state-listed as endangered, occurs in the Royal Blue Wildlife Management Area. According to the petitioner, this occurrence “represents one of only nine known occurrences in Tennessee.”
2. In the 2015 Tennessee State Wildlife Action Plan, the petitioner states that reining, when properly done, is not incompatible with its management of the area, as it resolves “outstanding water quality and slope stability problems.”

Intervenors’ Response – Allegation of Fact (4)

Supporting Intervenors: Supporting intervenors generally affirm the allegation and statements of support made by the petitioner. The intervenors provide no new information relevant to this allegation of fact.

Opposing Intervenors: Opposing intervenors contend that in filing the petition, the state fails to show how surface coal mining operations conducted pursuant to established regulations would negatively impact land uses. To the contrary, the intervenors contend that surface coal mining in

the petition area provides an opportunity to improve the area. The intervenors note that reclamation in the petition area is accomplished in cooperation with the TWRA to improve the area for wildlife habitat. The intervenors indicate that the petitioner relies heavily on Tennessee's Comprehensive Wildlife Conservation Strategy. The intervenors contend that this TWRA document "makes it a priority to reclaim pre-law mining sites." The intervenors note that pre-SMCRA mine problems such as highwalls are prevalent throughout the petition area and that remining "will be the best, and quite possibly the only opportunity to reclaim the pre-law sites." The intervenors conclude that "surface coal mining in the petition area is not only compatible with the area, it will enhance the habitat through remining and restoration of pre-Surface Mining Control and Reclamation Act sites."

FINDINGS OF PRIMARY ALLEGATION NO. 1 - INCOMPATIBLE WITH EXISTING STATE AND LOCAL LAND USE PLANS AND PROGRAMS

Allegation 1 is that the petition area should be designated unsuitable for surface coal mining operations because mining in the area would be incompatible with existing state or local land use plans or programs. 30 CFR § 762.11(b)(1).

After reviewing all information available relevant to primary allegation (1), I conclude that surface coal mining operations would be incompatible with the 2015 Tennessee State Wildlife Action Plan and the associated Comprehensive Wildlife Conservation Strategy. This conclusion is based on the 2015 Tennessee State Wildlife Action Plan's explicit statement that "new contour, cross-ridge, or mountain top removal coal mining is incompatible with agency management and restoration goals for the NCWMA," and supporting maps and appendices. My conclusion that that surface coal mining operations would be incompatible with the 2015 Tennessee State Wildlife Action Plan is sufficient to support my decision on this petition. 30 CFR § 762.11(b)(1). Additionally, although not necessary for my findings, as further support, I also conclude that surface coal mining is incompatible with the 2014 draft Northern Cumberlands Forest Resources Habitat Conservation Plan's limitations on silvicultural treatments in high elevation areas within the NCWMA. Under this plan, forest and woodland reserves, which serve as core areas of cerulean warbler habitat, cannot be clear cut. This suggests that the activities and operations necessary to conduct surface coal mining, especially at altitudes above 1,800 feet, would be incompatible with the draft habitat conservation plan. As further explained in Chapter 2 of the PED/EIS, this draft plan is an "existing state or local land use plan" under SMCRA Section 522(a)(3)(A), 30 U.S.C. § 1272(a)(3)(A), and 30 CFR § 762.11(b)(1) because it has been formally proposed and is being actively considered by decision makers.

However, I also conclude that surface coal mining is not inherently inconsistent with other statewide plans, including the "Connecting the Cumberlands" project, Tennessee 2020, and the 2008 Tennessee Greenways and Trails Plan. Regarding the "Connecting the Cumberlands" project and Tennessee 2020, the petitioner failed to provide specific evidence to support their assertions that surface mining was inconsistent with the plans' purposes, goals, and priorities. In the case of the 2008 Tennessee Greenways and Trails Plan and the Cumberland State Trail, the record does not support a broad-based conclusion that all mining within the petition area would result in inherent conflict with the Cumberland Trail State Park. Finally, I conclude that the draft plans for the Royal Blue Wildlife Management Area and the Sundquist Wildlife Management Area, as well as the conservation easements in the Brimstone and ERTCE, are not existing state or local land

use plans for the purposes of 30 CFR § 762.11(b)(1). This is because the Royal Blue and Sundquist plans have not been officially adopted, nor are they being actively considered for adoption, as they have remained in draft form for a decade or more. However, despite this conclusion that the Royal Blue and Sundquist draft plans are not existing state or local land use plans, I have examined them thoroughly and have concluded that surface mining is not incompatible with either of them. I find that because the conservation easements are private agreements and were not subject to a public decision-making process, they are not state or local land use plans or programs.

These conclusions are further supported in Chapter 2 of the PED/EIS, which fulfills OSMRE's obligations under SMCRA 522(c) and 30 CFR § 764.19.

2. PRIMARY ALLEGATION NO. 2 – FRAGILE AND HISTORIC LANDS

Petitioner's Allegations: Primary Allegation (2)

Allegation 2 is that “the petition area should be designated unsuitable for surface coal mining operations because such operations would affect fragile or historic lands, resulting in significant damage to important historic, cultural, scientific, and aesthetic values and natural systems, within the meaning of section 522(a)(3)” of SMCRA.

Allegation of Fact (1)

Citing the definition of “fragile lands” in 30 CFR § 762.5, the petitioner alleges that “surface mining in the petition area would damage important environmental corridors and areas that are of recreational value due to high environmental quality.”

Supporting Statements – Allegation of Fact (1)

The petitioner submits a number of statements in support of this allegation of fact as follows:

1. The petitioner states that lands within the petition area have a concentration of ecologic and aesthetic features such as corridors of unfragmented forest, scenic vistas, and superb biological diversity. As an example, the petitioner states that Royal Blue and Sundquist Wildlife Management Areas serve as a corridor of vital habitat for priority songbirds. The petitioner points out that the American Bird Conservancy has designated the Royal Blue Wildlife Management Area as a Globally Important Bird Area in Tennessee. The petitioner states that surface mining would destroy valuable wildlife habitat. The petitioner also identifies three rare floral species—the Canada lily, the Ozark bunchflower, and the leatherleaf meadowrue—that are present in the NCWMA. The petitioner contends that mining under SMCRA does not provide sufficient protection for these species.
2. The petitioner states that the public lands of the petition area are popular outdoor recreation destinations. Recreational activities that take place in the petition area include hiking, fishing, biking, camping, hunting, and wildlife viewing. The petitioner contends that this area offers unique opportunities for bird watching and that the Royal Blue and Sundquist Wildlife Management Areas are popular destinations among birdwatchers. Between 2000 and 2008, 201 elk were released in the Royal Blue and

Sundquist Wildlife Management Areas. The Cumberland Plateau was chosen for elk reintroduction due to the area's suitable habitat for elk herds and because it contained fewer farm crops and people than other areas. The Hatfield Knob Elk Viewing Tower was constructed in 2005 on the Sundquist Unit of the NCWMA and is the only place in Tennessee where elk can be viewed. Visitation to the Hatfield Knob Elk Viewing Tower has increased from 468 people in 2006 to 14,370 visitors in 2013. The petitioner contends that surface mining in the petition area would interfere with these recreational opportunities. Visual impacts and noise impacts would deplete the scenic quality of the petition area, reducing its appeal for these activities. Further, rock and debris from blasting, and potential landslides from mining sites and haul roads, could present significant hazards to recreational users. The petitioner states that surface mining conflicts with recreational activities because public safety considerations would require closing areas near mining operations to recreational uses. Finally, the petitioner states that the negative impacts of surface mining on water quality of streams in the petition area would further deter hikers and campers, who use the waters for drinking water and fishing.

3. The petitioner states that the recreational value of the Cumberland Trail State Park would be adversely impacted by surface mining. The petitioner states that the Cumberland Trail provides opportunities to "explore and enjoy the unique natural, scenic, and cultural qualities of the Cumberland Plateau." The petitioner contends that "potential noise, water, and air pollution from surface mining in the petition area would significantly diminish the aesthetic and recreational values of the Cumberland Trail, obscuring scenic vistas and impairing water quality within the nearby rivers and streams that are used by hikers and campers as a supply of potable water." The petitioner states that normal SMCRA permitting procedures "do not provide sufficient protection for the unique resources of the Cumberland Trail." The petitioner contends that in past unsuitability designations for Fall Creek Falls State Park and Flat Fork, the OSMRE recognized that the 300-foot buffer requirement in SMCRA section 522(e)(5) was insufficient to protect recreational values from the impacts of surface coal mining.
4. The petitioner states that the public lands of the petition area have a concentration of aesthetic features such as scenic vistas. The petitioner contends that mining within portions of the Royal Blue Wildlife Management Area would also detract from the recreational value of the Interstate 75 corridor, "a popular scenic drive for tourists." The petitioner further contends that in the statement of reasons for the Flat Fork Lands Unsuitable for Mining petition, the OSMRE recognized scenic overlooks from outside and within a petition area as aesthetic values that qualify as fragile lands. The petitioner states that just as in the Flat Fork petition, the recreational values provided by the views from overlooks along Interstate 75 constitute fragile lands that could be significantly damaged by surface mining in the petition area. The petitioner concludes that the visual and noise impacts of surface mining operations would deplete the scenic quality of the petition area.
5. On September 25, 2015, the petitioner provided the OSMRE with additional data regarding the presence of sensitive plant species the petition area. Specifically, the petitioner noted that the 2015 Tennessee State Wildlife Action Plan lists a number of GCN plant species which the petitioner states are "potentially affected by incompatible

mining in the NCWMA, including the Ozark bunchflower and Canada Lily.” The petitioner also states that the Ozark bunchflower and the pale corydalis are “within the ridgeline buffer of the State’s petition area.” The petitioner further states that the Ozark bunchflower, which is state-listed as endangered, occurs within the Royal Blue Wildlife Management Area and that this occurrence is one of only nine in the State of Tennessee.

Intervenors’ Responses – Allegation of Fact (1)

Supporting Intervenors: Supporting intervenors affirm the allegations and supporting statements made by the petitioner. The intervenors largely focus their support of this allegation on four areas: (1) surface mining in the petition area would significantly damage important habitat for the cerulean warbler and other migratory songbirds; (2) surface mining in the petition area would damage important environmental corridors and areas of recreational value due to high environmental quality; (3) surface mining in the petition area could significantly damage water quality and important aquatic habitat for threatened and endangered mussel and fish species; and (4) recent studies further document the adverse environmental impacts from surface mining on aquatic systems.

Relevant to the intervenors’ concern about important songbird habitat, the intervenors identify the presence of numerous songbird species in this area of the Northern Cumberland Plateau that are designated by Partners in Flight as “priority species for conservation.” Discussion of these species of concern is largely limited to information on the cerulean warbler. The intervenors contend that “designation of the ridgelines in the Petition Area is essential to protect the habitat” of the cerulean warbler. The intervenors cite data and a number of studies that they contend confirm the imperiled status of this bird and that directly or indirectly demonstrate the importance of the petition area in protecting this species. The intervenors conclude by stating that “the Surface Mining Control and Reclamation Act regulations do not require reforestation” and “the [approximate original contour] provision cannot and does not recreate the ridges, steep slopes, and mature forest habitat that existed prior to mining, the serious long-term impacts of coal mining on the large blocks of mountain forests that Cerulean warblers and other wildlife require for survival” are not addressed and “mining in the Petition Area would be devastating for the Cerulean warbler and other vulnerable bird species...” Intervenors suggest 80% of the cerulean warblers in the NCWMA fall within the State petition area and 85% of the high-density areas occur within the petition area. When this area is expanded by a 100-foot buffer, those numbers increase to 91% and 95%, respectively.

In the intervenors’ second statement of support for the petitioner’s allegation, the intervenors focus their discussion on the presence of Big South Fork National River and Recreation Area downstream of the petition area, identifying it as a fragile land and expounding on the alleged impacts that surface mining within the petition area would have on the recreation area.

In their third statement of support for the petitioner’s allegation, the intervenors conclude that surface mining in the petition area could significantly damage water quality and important aquatic habitat for threatened and endangered mussel and fish species. They state that streams in and downstream of the petition area provide valuable habitat for a number of threatened and endangered mussel and fish species, including federally designated critical habitat for endangered mussels, and as such, these streams qualify as fragile lands under SMCRA criteria. The intervenors

conclude that surface mining in the petition area could result in significant harm to these species and their habitat. The intervenors cite data from a number of sources and references from various studies and reports that they contend confirm the imperiled status of these threatened and endangered species and directly or indirectly demonstrate the importance of the petition area in protecting these species.

In the intervenors' final statement of support for the petition, they cite or reference numerous recent studies that they contend further document the adverse environmental impacts from surface mining on aquatic systems. They conclude that "...the extensive evidence cited in this and the previous section (Part II.B.3) overwhelmingly shows, the Surface Mining Control and Reclamation Act permitting and performance requirements are not sufficiently protective of water quality or aquatic species and habitat."

Opposing Intervenors: Opposing intervenors make a number of statements relevant to the petitioner's assertion that the petition area should be designated as unsuitable for mining because such operations would affect fragile or historic lands, resulting in significant damage to important historic, cultural, scientific, and aesthetic values and natural systems. The intervenors conclude that the "state apparently makes an inconsistent illogical leap that the ridgelines..." in the petition area "...are ecologically different from other lands in the affected wildlife management areas." The intervenors assert that "the state submitted no scientific evidence or basis that any of the so-called fragile features will be significantly damaged."

Relevant to the petitioner's concern about important songbird habitat, the intervenors opposing the petition state that the petitioner does not show that such habitat is restricted to the petition area and, assuming mining is properly conducted, does not explain how the temporary nature of the mining activity will significantly impact such habitat. To the contrary, the intervenors contend that mining-related "reclamation and reforestation efforts should significantly enhance" songbird habitat.

The intervenors opposing the petition contend that while the petitioner alleges that recreational activities including hiking, biking, fishing, camping, and wildlife viewing would be significantly affected by surface mining activities, the petitioner offers no evidence or supporting documentation. The intervenors state that the petitioner "provides no source of information to support their allegations that wildlife viewing opportunities would be destroyed, visual and noise impacts would deplete the scenic quality, or that the water quality would be impacted." Instead, the intervenors contend that "these same recreational activities have actually been enhanced in the area through surface coal mining." The petitioner links alleged impacts to the above identified recreational activities in the petition area to adverse impacts to the tourism potential of the petition area. The intervenors state that the petitioner cited no studies or other information that the current ability to develop these lands for tourism has been impacted by surface mining and instead concludes that the area is used successfully for tourism.

The intervenors opposing the petition note that the petition discusses a number of alleged impacts to the Cumberland Trail State Park. However, the intervenors argue that the state developed the trail / park "...knowing that surface coal mining operations were being conducted and would continue to be conducted in the foreseeable future." The intervenors conclude that "the state, therefore, believed the trail would be compatible with surface coal mining." The intervenors also

state that the petitioner “does not even know if coal exists under portions of the Cumberland Trail in the Petition area.” The intervenors state that if contemporary mining practices are complied with, “any disturbance to the viewshed would be temporary at best, and any physical impact to the trail would be restored.” The intervenors go on to note that much of the ridgeline in the petition area shows scarred remnants of previously mined and unreclaimed areas and that in petitioning that these areas be declared unsuitable for surface mining, the petitioner is advocating a position that is “...contrary to the SMCRA’s policy to reclaim these pre-law sites...” Finally, intervenors contend that the petitioner’s reference to the “so-called Smoky Mountain segment” of the Cumberland Trail State Park is a “misnomer” and that “the name of that segment is the New River segment not Smoky Mountain.”

The intervenors opposing the petition observe that the State is relying on the OSMRE decision on the Fall Creek Falls petition to support its argument that the Cumberland Trail is fragile land, that mining-related impacts are significant, and that therefore the petition area should be declared unsuitable for such mining. However, the intervenors state that the contrast between the two situations is significant. The intervenors note that land for Fall Creek Falls Park and surrounding areas was acquired in the 1930s, well before coal mining operations had commenced in the area. In contrast, “all of the surface rights to the petition area were acquired by the state with written documents acknowledging that surface coal mining operations were being conducted in the area and would be conducted in the foreseeable future.” The intervenors contend that the OSMRE decision for Fall Creek Falls “was based on the fact that the park was designed for the purpose of keeping the park in its natural, un-mined condition. Such cannot be said for the petition area.”

The intervenors opposing the petition make two general assertions concerning the petition. First, the intervenors state that “much of the state’s public statements and filings of intervenors in support of the petition focus on the need to grant the petition to prevent mountaintop removal mining associated with valley fills.” The intervenors opposed to the petition note that as “the state does not permit overburden from mining to be placed within 100 feet of a stream,” TCA 69-3-108(f)(1), this effectively precludes the mountaintop removal mining method in Tennessee. The intervenors conclude by stating that “the ridgelines will remain intact following reclamation, contrary to the state’s assertions and/or concerns that they wish to preserve unbroken ridgelines.” Second, the intervenors assert that in evaluating the petition, the OSMRE must assume that the coal mining will be conducted using contemporary mining practices (and thus in compliance with applicable law). For example, the intervenors assert that the OSMRE “must assume that the mining will comply with the state’s water quality laws” and that these laws impose “strict effluent limitations and standards in its water quality related permits.” The intervenors point out that the state’s definition of pollution includes any alteration of the waters of the state that would “...result or will likely result in harm, potential harm or detriment to the health of animals, birds, fish, or aquatic life” or would “render or will likely render the waters substantially less useful for domestic, municipal, industrial, agricultural, recreational, or other reasonable uses.” The intervenors state that, as “no permit can be issued that would cause a condition of pollution as defined by the state, the state’s allegations related to concerns over water-based recreation and other such uses are groundless.” The intervenors conclude that if the state can issue a water quality permit, the OSMRE “must assume that no discharges from the surface coal mining operations in the petition area will cause the harms that petitioner claims will occur.” The intervenors assert that “while the petition addresses destruction of habitat and other resources, there are no facts that would show that the habitat would not be restored even if temporarily impacted,” and the OSMRE “must

assume that the Surface Mining Control and Reclamation Act permit, the state permits, and the reclamation plans will be designed to offset any temporary impacts during the active mining phase.”

Petitioner’s Allegations: Allegation of Fact (2)

Citing the definition of “historic lands” in 30 CFR § 762.5, the petitioner alleges that “surface mining in the petition area would damage important historic and cultural values.”

Supporting Statements – Allegation of Fact (2)

1. The petitioner states that the Cumberland Trail has gained national significance as the lynchpin of the Great Eastern Trail, a new long-distance hiking trail that will run from the Alabama / Florida state line to New York, furthering a network of trails across the entire Appalachian region. The petitioner contends that, for reasons previously identified, SMCRA and its regulations are not sufficient to protect the trail from the negative impacts of mining.
2. The petitioner states that the value of the petition area as a place of historic, scientific, and cultural resources is further evidenced by the proposal to congressionally designate the Cumberland Plateau region as a National Heritage Corridor. The petitioner alleges that surface mining in the petition area would damage important historic and cultural resources.
3. The petition asserts that “the State of Tennessee has recognized lands within the petition area as containing important historic, cultural, and scientific values, as a result of the Connecting the Cumberlands project, the largest of its kind in Tennessee since the creation of the Great Smoky Mountains National Park.”
4. In its September 25, 2015, follow-up letter, the petitioner identifies “eight recorded archeological sites completely or partially within the State’s Petition area.” The petitioner states that these areas are of archaeological significance and that mining could damage them. The petitioner also states that these sites enhance the recreational experience within the NCWMA and Cumberland Trail State Park.

Intervenors’ Response – Allegation of Fact (2)

Supporting Intervenors: The intervenors who support the petition reaffirm the allegation and supporting statements made by the petitioner. The intervenors provide no new information relevant to this allegation of fact.

Opposing Intervenors: The intervenors who oppose the petition contend that “the petition itself is devoid of any reference to any of the examples provided in the definition” of “historic lands” as defined in the OSMRE regulations. The intervenors conclude that “the state has not provided any specific findings that would show that it (the petition area) meets the definition of historic lands.” Intervenors state that while “[m]ost of the State’s concerns lie with the Cumberland Trail . . . there are no allegations that coal deposits are even located in areas that might affect the Cumberland Trail.” The intervenors conclude that the petitioner has provided “no support whatsoever” for the

assertion that “the State of Tennessee has recognized lands within the petition area as containing important historic, cultural, and scientific values, as a result of the Cumberlands acquisition”

FINDINGS OF PRIMARY ALLEGATION NO. 2 – FRAGILE AND HISTORIC LANDS

After reviewing all information available relevant to primary allegation (2), I have determined that the record supports a conclusion that portions of the petition area or areas adjacent to it contain valuable fish and wildlife habitat that could be significantly damaged by surface coal mining operations in the petition area, specifically habitat for forest-dependent birds such as the cerulean warbler and plants such as the Ozark bunchflower and pale corydalis. Thus, portions of the area that support forest-dependent birds such as the cerulean warbler and plants such as the Ozark bunchflower and pale corydalis meet the definition of fragile lands as described by 30 CFR § 762.5. I have also determined that the elk viewing tower is fragile land because it provides recreational value due to high environmental quality and could be significantly damaged as a result of surface coal mining operations.

However, I reject the assertion that surface coal mining could significantly damage the Cumberland State Trail, as SMCRA protections are already in place to afford parks sufficient protection from surface coal mining operations. Finally, I reject the assertion that there are historic resources in the petition area that could be significantly damaged as a result of surface coal mining operations. According to the Tennessee Historical Commission, 30 properties on the National Register of Historic Places exist within the four counties that make up the NCWMA and ERTCE: 18 in Anderson County, 6 in Campbell County, 2 in Morgan County, and 4 in Scott County (NPS 2014a). None of the properties appear to be within the petition area. There are 11 known archaeological sites within the evaluation area that are potentially eligible for the National Register of Historic Places. Of these, 7 sites are within 100 feet of coal seams and could be impacted by mining activities, regardless of the type of mining undertaken. As part of the National Historic Preservation Act (NHPA) consultation process, the OSMRE would consult with the State Historic Preservation Office on the potential to adversely affect archeological resources and how project impacts could be limited through avoidance, minimization, or mitigation. Since these resources are already protected under both SMCRA and the NHPA, they do not qualify as historic lands that could be significantly damaged from surface coal mining operations because sufficient protection currently exists to minimize the potential for impacts. Therefore, that portion of the area does not qualify as either historic or fragile lands as defined by 30 CFR § 762.5.

These conclusions are further supported in Chapter 2 of the PED/EIS, which fulfills OSMRE’s obligations under SMCRA 522(c) and 30 CFR § 764.19.

VII. NATIONAL HISTORIC PRESERVATION ACT

OSMRE met its responsibilities pursuant to section 106 of the National Historic Preservation Act, concluding that the proposed action would have no adverse effects on historic properties that may exist in the petition area. OSMRE initiated communication with the Tennessee Historical Commission regarding the proposed petition in January 2011. In February 2015, OSMRE conducted a file search of the petition evaluation area in the offices of the Tennessee Division of Archaeology to inform the development of the draft PED/EIS. Based on this research, OSMRE concluded that previously documented archaeological investigations in the evaluation area (172,000 acre study area) have been on-going since 1982 and these studies have resulted in the identification of 14 sites (3 of which were not recommended as eligible for the National Register of Historic Places). In January 2016, OSMRE released a draft PED/EIS finding that the designation of the petition area would largely protect archeological resources and that any remaining applications would be required to comply with section 106 of the NHPA prior to a project being permitted, consistent with OSMRE's current section 106 NHPA process with the Tennessee Historical Commission. No changes were made to this finding in the final PED/EIS. The Tennessee Historical Commission has also found that no archeological resources would be affected if the petition for lands unsuitable for mining was granted.

VIII. ENDANGERED SPECIES ACT

OSMRE initiated informal consultation pursuant to section 7 of the Endangered Species Act on June 15, 2015, through the request and receipt of a county-based comprehensive species list from the U.S. Fish and Wildlife Service (USFWS) IPac website. The counties included Scott, Morgan, Anderson, and Campbell. This species list was updated on July 1, 2016 to ensure that all potentially affected listed species and designated critical habitat were included. OSMRE developed a biological assessment that assessed the potential effects of the federal action to thirty-five listed species of clams, fishes, mammals, snails and flowering plants. Based on previous surveys and published literature, it was determined that a number of the listed species were not present in the portions of the counties affected by the proposed federal action. On July 12, 2016, OSMRE submitted its biological assessment and effects determination to the USFWS, Cookeville, Tennessee Office for its concurrence that the federal action may affect, but is not likely to adversely affect potentially present listed species. On August 12, 2016, the USFWS concurred with OSMRE's findings. In the future, OSMRE will conduct site-specific section 7 consultation for applications it receives, as warranted.

IX. DECISION ON PETITION - AREAS DESIGNATED AND BASIS FOR DESIGNATION

I am designating 569 miles of ridgeline (with a 1,200-foot corridor; 600 feet on both sides of the ridgeline) as unsuitable for coal mining operations, including surface activities in connection with underground mining operations. This area includes the ridgelines proposed in the State's petition and petition area map, plus additional ridgelines identified by the OSMRE after analysis under NEPA and as shown in the FEIS. Since under 30 CFR § 762.13(b) I cannot designate as unsuitable for surface coal mining operations lands covered by an existing permit issued under SMCRA, 1,165 acres of the 76,133 acres associated with the ridgelines will not be considered as part of this designated area. As such, I am designating approximately 74,968 acres as unsuitable for surface coal mining operations.

The designation does not apply to underground mining and auger mining¹ from outside the designated area that would not result in “surface coal mining operations,” as defined at section 701(28) of SMCRA, 30 U.S.C. § 1291(28), within the designated area. Pursuant to OSMRE’s 1999 final rule on subsidence due to underground coal mining, subsidence from underground mining is not a surface coal mining operation under SMCRA § 701(28). 64 Fed. Reg. 70838 (Dec. 17, 1999). Thus, neither subsidence nor subsurface activities that may result in subsidence would be prohibited by a designation under SMCRA § 522(a) and (c). The proposed action would therefore allow for the recovery of coal resources by underground mining if the necessary surface-disturbing activities took place outside the designated area.

This designation would not prohibit the use of existing access or haul roads. This designation would also not prohibit remining of sites if the proposed remining is consistent with the criteria under which this designation is being granted and other applicable requirements as set forth below.

Remining is engaging in “surface coal mining and reclamation operations which affect previously mined areas.” 30 CFR § 701.5. Previously mined areas are those areas affected by surface coal mining prior to the enactment of SMCRA. Remining allows for the restoration of previously unreclaimed areas back to their original condition. For example, spoil (a mixture of rocks, rock fragments, soil, and other natural materials) generated during active remining would be used as backfill during reclamation to eliminate all highwalls and depressions. OSMRE estimates that the distance over which future remining could occur could be as much as 219.5 miles.

The OSMRE will take the following actions in reviewing any remining proposals partially or completely in the area designated as unsuitable for mining:

1. The OSMRE will consult with the Tennessee Department of Environment and Conservation (TDEC) and the Tennessee Wildlife Resources Agency (TWRA) to determine whether the proposed remining in the designation area would be incompatible with the Tennessee State Wildlife Action Plan and the associated Comprehensive Wildlife Conservation Strategy or with the Northern Cumberland Forest Resources Habitat Conservation Plan, as well as whether the proposed remining would significantly impact the fragile lands identified in this decision or otherwise be inconsistent with the reasons for the unsuitability designation identified in this decision.

2. The OSMRE will consult with the National Park Service (NPS) to determine whether any proposed remining in the designation area has the potential to adversely affect the Big South Fork National River and Recreation Area or the Obed Wild and Scenic River. If OSMRE determines that a remining proposal would adversely affect either of these areas, those surface mining operations would only be approved pursuant to SMCRA Section 522(e)(3), 30 U.S.C. § 1272(e)(3).

¹ Auger mining is defined as “a method of mining coal at a highwall by drilling holes into an exposed coal seam from the highwall and transporting the coal along an auger bit to the surface.” 30 CFR § 701.5. A highwall is “the face of exposed overburden and coal in an open cut of a surface coal mining activity or for entry to underground mining activities.” 30 CFR § 701.5.

3. The foregoing consultations could occur through the Local Interagency Working Agreement (LIWA) process, in which TDEC participates. If the parties to the LIWA process (TDEC, the OSMRE, the U.S. Environmental Protection Agency, the U.S. Army Corps of Engineers, and the USFWS) agree that TWRA and NPS should participate in this process, the agencies may update the LIWA to specify the circumstances under which TWRA and NPS will do so. If TWRA or NPS does not become a part of the LIWA process, the OSMRE will nonetheless engage them in evaluating remaining proposals in the designated area. After consulting with TDEC, the TWRA, the NPS and the LIWA partners, OSMRE will make a finding on whether the proposed remaining would be incompatible with the above-discussed land use plans, whether the remaining would significantly impact the fragile lands identified by OSMRE in this decision, or whether the remaining would otherwise be inconsistent with the reasons for the unsuitability determination identified in this decision. If it makes a finding of incompatibility, significant impact, or inconsistency, OSMRE will not issue the permit.
4. Where OSMRE determines that a proposed remaining surface coal mining operation in the designation area may affect proposed or federally-listed species or proposed or designated critical habitat, OSMRE will consult with the USFWS under section 7 of the Endangered Species Act, 16 U.S.C. § 1536(a)(2).
5. Where there is insufficient spoil to eliminate all pre-existing highwalls, remaining will only be allowed if (1) all spoil generated by the remaining operation and any other reasonably available spoil is used to reclaim existing highwalls, (2) disturbance of virgin areas is minimized to the extent possible, and (3) the proposed permit is consistent with the Tennessee State Wildlife Action Plan, the associated Comprehensive Wildlife Conservation Strategy, and the Northern Cumberland Forest Resources Habitat Conservation Plan, and (4) will not significantly impact the fragile lands identified in this decision or otherwise be inconsistent with the reasons for the unsuitability designation identified in this decision.
6. Redisturbing previously mined areas that have naturally revegetated over time will be permitted only if (1) consistent with the Tennessee State Wildlife Action Plan, the associated Comprehensive Wildlife Conservation Strategy, and the Northern Cumberland Forest Resources Habitat Conservation Plan, and (2) will not significantly impact the fragile lands identified in this decision or otherwise be inconsistent with the reasons for the unsuitability designation identified in this decision.
7. Before making a decision on an application for remaining in the designation area, OSMRE will require the applicant to address the following issues: sediment transport from the abandoned area, natural revegetation characteristics and impact of disturbing that vegetation on State-designated water uses and water quality, safety considerations with leaving abandoned highwalls, unnatural stream features and likelihood of successful remediation, and any other unique environmental issue(s) that are located in

or adjacent to the proposed application area. OSMRE will assess this permit-specific information to make a finding on the issues and whether any remaining would be in compliance with applicable regulations and would not be inconsistent with the reasons for the unsuitability determination.

8. OSMRE will require that corporate surety or collateral bonds be in place prior to permit issuance in the designation area. OSMRE will not accept self-bonds for proposed permits in the petition area.
9. OSMRE will process an application for a remaining permit using the public participation process set out in 30 CFR 773.6.

I have determined that designation is appropriate under the following discretionary criteria.

1. That surface coal mining operations would be incompatible with existing state or local land use plans or programs. 30 U.S.C. § 1272(a)(3)(A); or
2. That surface coal mining operations affect fragile or historic lands in which such operations could result in significant damage to important historic, cultural, scientific, and aesthetic values and natural systems. 30 U.S.C. § 1272(a)(3)(B).

In summary, my decision to designate portions of the petition area as unsuitable for surface mining operations is based on either (1) its incompatibility with existing state and local land use plans and programs or (2) the inherent risks of surface coal mining operations to fragile lands. Specifically, I have determined that surface mining is incompatible with the 2015 Tennessee State Wildlife Action Plan and the associated Comprehensive Wildlife Conservation Strategy. Surface coal mining is also incompatible with the 2014 draft Northern Cumberland's Forest Resources Habitat Conservation Plan's limitations on silvicultural treatments in high elevation areas in the NCWMA. I have also determined that, if surface coal mining operations were to occur on these lands, such operations could significantly damage the natural, ecological, scientific, or esthetic resources of the NCWMA.

These decisions are based on consideration of the PED/EIS, and of the entire administrative record before me (including all comments received on the final PED/EIS). That information includes the petition; the draft and final PED/EIS; information provided by the petitioners and intervenors; comments in the form of oral testimony at the public hearings; and written submissions received during the public comment periods which ended January 24, 2016, from federal agencies, state agencies, local agencies, and members of the public and industry. The administrative record also includes information from meetings with the petitioners, land owners, lease holders, and intervenors, and any comments received during the prescribed period after publication of the final PED/EIS.

X. EFFECTS OF DECISION AND FUTURE ACTION

In accordance with 30 CFR § 736.15, OSMRE is responsible for approving or denying applications for proposed surface coal mining operations in Tennessee, including in the NCWMA petition area. In accordance with these regulations, OSMRE administers and maintains a monitoring and

enforcement program to assure compliance with SMCRA laws, regulations, policies, and procedures. OSMRE would also require compliance with the restrictions placed on surface coal mining operations in the ridgelines of the NCWMA that have been designated as unsuitable for surface coal mining operations. Under this decision, except for access or haul roads, and proposals to remine, OSMRE would not accept and process applications for proposed surface coal mining operations in designated ridgelines in the NCWMA. However, because I cannot designate as unsuitable for surface coal mining operations lands that are covered by an existing permit issued under SMCRA 30 CFR § 762.13(b), any designation to declare any portion of the petition area unsuitable for mining would not include areas lands covered by a SMCRA permit at the time of this designation.

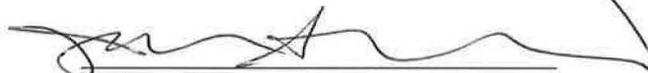
A petitioner may seek termination of this designation with respect to ridgelines in the NCWMA by providing new allegations of fact that support such a termination pursuant to section 522(c), 30 U.S.C. § 1272(c).

XI. NOTIFICATION

Pursuant to 30 CFR § 942.764(b), 30 CFR § 764.19, and 40 CFR § 1506.6, this "Record of Decision and Statement of Reasons" is being sent simultaneously by certified mail to the petitioners and intervenors and by regular mail to every other party to the petition process, including affected Indian tribes, federal and state agencies, commenters who submitted substantive comments, and all others who have requested it. Notification of the availability of the document will be published in four local or regional newspapers, the *Tennessee Administrative Record*, and the *Federal Register*, and will be sent by regular mail to landowners in the petition area and to commenters who submitted general comments. The document will also be placed on the OSMRE web page. My decision becomes final upon the date of signing this statement. Any appeal from this decision must be filed within 60 days from this date in the United States District Court for the Eastern District of Tennessee, as required by Section 526(a)(1) of SMCRA.

12-7-16

Date



Janice M. Schneider
Assistant Secretary
Land and Minerals Management