

**FEDERAL REGISTER: 51 FR 3802 (January 30, 1986)**

DEPARTMENT OF THE INTERIOR

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

30 CFR Parts 772, 773, 774, 779, 780, 783, and 784

Surface Coal Mining Permit Applications and Coal Exploration, Historic Preservation Requirements;  
Petition for Rulemaking

ACTION: Notice of decision on petition for rulemaking.

**SUMMARY:** The Office of Surface Mining Reclamation and Enforcement (OSMRE) makes available to the public its final decision on a petition for rulemaking from the Society of Professional Archeologists (SOPA). The petition requested that OSMRE revise the historic preservation requirements found throughout various sections of 30 CFR Chapter VII by amending 30 CFR Parts 772, 773, 779, 780, 783, 784, and 788 (now 774). On December 13, 1985, the Director made a decision granting the petition in principle.

**ADDRESS:** Copies of the petition, and other relevant materials comprising the administrative record of this petition are available for public review and copying at OSMRE, Administrative Record, Room 5315L, 1100 L Street NW, Washington, DC.

**FOR FURTHER INFORMATION CONTACT:** Dr. Annetta Cheek, Office of Surface Mining Reclamation and Enforcement, U.S. Department of the Interior, 1951 Constitution Ave., NW., Washington, DC 20240; telephone 202-343-7951.

**SUPPLEMENTARY INFORMATION:**

**I. PETITION FOR RULEMAKING PROCESS**

Pursuant to section 201(g) of the Surface Mining Control and Reclamation Act, any person may petition the Director of OSMRE for a change in OSMRE's regulations. Under the applicable regulations for rulemaking petitions, 30 CFR 700.12, the Director must first determine whether the petition has a reasonable basis. If the petition has a reasonable basis, notice is published in the Federal Register seeking comments on the petition and the Director may hold a public hearing, conduct an investigation, or take other action to determine whether the petition should be granted. If the petition is granted, the Director initiates a rulemaking proceeding. If the petition is denied, the Director notifies the petitioner in writing setting forth the reasons for denial. Under Section 700.12(d), the Director's decision constitutes the final decision for the Department of the Interior.

**II. THE SOPA PETITION**

OSMRE received a letter dated September 15, 1983, from SOPA presenting a petition for revision of the historic preservation requirements found throughout various sections of 30 CFR Chapter VII by amending 30 CFR Parts 772, 773, 774 (formerly 788), 779, 780, and 784. Part 783 for underground mines would be subject to the same changes as Part 779 for surface mines.

On January 13, 1984, the Director notified SOPA that the petition was being rejected. Subsequently, SOPA requested that the petition be reconsidered. SOPA was notified that the petition would be reconsidered; however, because several of the issues addressed by the petition were at that time before the District Court of the District of Columbia, and SOPA was a party to the litigation, OSMRE postponed further consideration of the petition pending a decision in the litigation. On July 15, 1985, the District Court issued its decision. In Re: Permanent Surface Mining Regulation Litigation (II), No. 79-1144 (D.D.C. 1985).

On August 9, 1985, the Director determined that the petition for amendment of the regulations had a sufficient basis to seek comments on the proposed rule changes. Accordingly, on August 23, 1985, OSMRE published in the Federal Register (50 FR 34167) a request for public comments on the amendments suggested by SOPA. The comment period began August 23, 1985, and was closed on October 7, 1985. The notice presented the petition and noted the availability

of the OSMRE staff to meet with the public on the petition until the close of the comment period. Fifty-six persons submitted written comments during the public comment period.

The December 13, 1985, decision announced here the petition in principle. The decision accepts the general concerns of the petitioner while rejecting the specific language changes suggested by the petitioner. As a result of this decision, OSM will initiate rulemaking proceedings and publish a Notice of Proposed Rulemaking with an appropriate public comment period prior to the issuance of the final rulemaking notice.

The Director's letter response to the petitioner on this rulemaking petition appears as an appendix to this notice. This letter reports the Director's decision to the petitioner. It also contains a summary description of the issues raised by the petitioner, a discussion of the applicability of section 106 of the National Historic Preservation Act, OSMRE's current regulatory program, an analysis of the petitioner's proposed regulatory changes, and a discussion of the comments received on the petition.

Dated: January 24, 1986.

Jed D. Christensen, Acting Director, Office of Surface Mining Reclamation and Enforcement.

Mr. Charles Niquette,  
Society of Professional Archeologists,  
626 Portland Drive, Lexington, Kentucky 40503.

Dear Mr. Niquette:

This letter is in response to the September 15, 1983, petition for rulemaking to the Office of Surface Mining Reclamation and Enforcement (OSMRE) on behalf of the Society of Professional Archeologists (SOPA) requesting amendments to certain rules promulgated as part of the Federal regulatory program.

On January 13, 1984, the Director notified SOPA that the petition was being rejected. On March 9, 1984, SOPA requested that the petition be reconsidered. In July of 1984, OSMRE determined that the petition should be reconsidered; however, because several of the issues addressed by the petition were at that time before the District Court of the District of Columbia, and SOPA was a party to the litigation. OSMRE postponed further consideration of the petition pending a decision in the litigation. On July 15, 1985, the District Court issued its decision. *In Re Permanent Surface Mining Regulation Litigation (II)*, No. 79-1144 (D.D.C. 1985).

On August 9, 1985, the Director determined that the petition for amendment of the regulations had a sufficient basis to seek comments on the proposed rule changes. Accordingly, on August 23, 1985, OSMRE published in the Federal Register (*50 FR 34167*) a request for public comments on the amendments suggested by SOPA. The comment period began August 23, 1985, and was closed on October 7, 1985. Fifty-seven persons submitted written comments during the comment period. This letter informs you of my decision which, as provided in 30 CFR 700.12(d), constitutes the final decision for the Department of the Interior.

This letter is divided into six parts. The first part, Final Decision, summarizes this decision. The second part, Substance of the Petition, is a discussion of issues raised by the petitioner and the requested amendments. The third part discusses the Applicability of Section 106 of the National Historic Preservation Act (NHPA); the fourth describes the Current OSMRE Regulatory Program, and the fifth provides the Analysis of SOPA's Recommended Regulatory Changes. The sixth part, Comments Received, discusses comments submitted by persons other than the petitioner.

## **FINAL DECISION**

I am granting the petition to initiate rulemaking in principle. As a result, rulemaking will be initiated to address the concerns of the petitioner. As discussed herein, the specific language suggested by the petitioner is apparently premised on a misconception of the applicability of section 106 of the NHPA and, if implemented, would lead to unreasonable compliance costs that would not be commensurate with the benefits obtained. Although the specific language suggested by SOPA is not acceptable, certain of the petitioner's concerns are valid. Thus, OSMRE is developing appropriate regulatory language to address these concerns.

## **SUBSTANCE OF THE PETITION**

The petitioner expressed concern that OSMRE's existing regulations are silent as to:

(a) How properties eligible for but not yet listed in the National Register of Historic Places are to be identified by applicants to conduct surface mining operations, and

(b) What a State regulatory authority is to do when mining will impact such a property.

The petitioner stated that absent guidance from the regulations on these matters, some States have reached the conclusion that they should establish procedures parallel with those used by the Department of the Interior and the Advisory Council on Historic Preservation (ACHP); other States require consideration only of properties already entered into the National Register of Historic Places (National Register) and exclude from any consideration in coal mine operation planning all historic properties except those that are publicly owned and included in the National Register. The petitioner requested that OSMRE provide clear guidance as to how properties eligible to but not yet listed on the National Register are to be identified and considered during the permit decision process, so that such properties are not lost without prior scientific study.

The petitioner suggested that the following language be inserted into the existing regulations to resolve its concerns.

(1) Amend 30 CFR 772.12(b)(8)(ii), 779.12(b), and 788.12(b) (now 774) by adding language similar to the following:

"To identify resources eligible for listing on the National Register of Historic Places, the applicant shall review files and publications made available by the State Historic Preservation Officer and other authorities on the history, prehistory, architectural history, and archaeology of the region in which the permit area lies, and conduct such field inspections as the State Historic Preservation Officer recommends in a manner consistent with applicable Department of the Interior and Advisory Council on Historic Preservation standards and guidelines."

(2) Amend 30 CFR 772.12(b)(8) by adding language similar to the following:

"A program, developed in consultation with the Advisory Council on Historic Preservation, the National Conference of State Historic Preservation Officers, and the relevant State Historic Preservation Officer, to ensure that cultural, historical, and archaeological resources are not adversely affected during the proposed exploration or, if adverse effect is unavoidable, that the effect is appropriately mitigated."

(3) Amend 30 CFR 780.11 and 784.11 by adding language similar to the following:

"A program, developed in consultation with the Advisory Council on Historic Preservation, the National Conference of State Historic Preservation Officers, and the relevant State Historic Preservation Officer, to ensure that properties included in and eligible for the National Register of Historic Places and known archaeological sites are physically preserved or subjected to such recordation and data recovery as is necessary to preserve their research and other values in the public interest."

(4) Amend 30 CFR 773.12 by adding language similar to the following:

"Pursuant to Section 106 of the National Historic Preservation Act, the Advisory Council on Historic Preservation and the State Historic Preservation Officer will be afforded the opportunity to consult with the regulatory authority and the applicant regarding the applicant's program for preserving historic properties under Section 772.12(b)(8), Section 780.11, or Section 784.11, whichever is applicable."

Each of these four suggested amendments would impose additional obligations on applicants for surface coal mining or coal exploration permits.

## **APPLICABILITY OF SECTION 106 OF THE NATIONAL HISTORIC PRESERVATION ACT**

nAll of the specific suggestions offered by the petitioner are apparently based on the premise that permits to conduct surface coal mining operations issued by State regulatory authorities are subject to the provisions of section 106 of the NHPA. This section requires the head of any Federal agency, prior to authorizing the expenditure of Federal funds or prior to issuing a Federal license, to consider the effects of the Federal or federally assisted undertaking on historic resources. The section further requires that the ACHP be given a reasonable opportunity to comment on the undertaking.\*

n\*The text of section 106 of the NHPA reads as follows: "The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation established under Title II of this Act a reasonable opportunity to comment with regard to such undertaking.

However, section 106 of the National Historic Preservation Act does not apply to the issuance of permits to conduct surface coal mining operations by State regulatory authorities. Although section 106 does apply to the Secretary's approval of State regulatory programs, surface coal mining operations permitted under those programs are not Federal or federally assisted or licensed undertakings. There is, therefore, no legal requirement in section 106 of the NHPA for including in OSMRE's permanent program regulations provisions necessitating consultation with the ACHP during permit processing or authorizing the State Historic Preservation Officer (SHPO) to establish requirements for field inspections, mitigation, or other activities related to the protection of historic properties.

### **CURRENT OSMRE REGULATORY PROGRAM**

Although section 106 of the NHPA does not apply directly to State issuance of coal mining or exploration permits, OSMRE has provided for State protection of important historic resources, both under its current program and in grants to the States. In accepting financial assistance for its program, a State assures the Director of OSMRE that it will assist in OSMRE's compliance with section 106 by consulting with the SHPO on the identification of properties listed on or eligible for listing on the National Register of Historic Places and by complying with OSMRE's requirements to avoid or mitigate adverse impacts upon such properties. This assurance is required to be included in every Federal grant by the Office of Management and Budget (Circular A-102, attachment M).

On at least one occasion, OSMRE has specifically reminded a State of its obligation to satisfy this grant condition. OSMRE's regulatory program provides the basis and authority for State programs to assist OSMRE in protecting historic properties. Under 30 CFR 732.15(a), State programs must contain regulations that are no less effective than OSMRE's permanent program regulations. As part of the permanent program regulations, numerous provisions exist which authorize and direct State regulatory authorities to collect necessary information on historic properties, and to consider such properties during the permit decision process. This fact was recognized by the court in *In Re: Permanent II*, Mem. Op. at 73. The general policy is set forth at 30 CFR 773.12. This section states that, to avoid duplication, each State regulatory program shall provide for the coordination of review and issuance of surface coal mining permits with applicable requirements of the National Historic Preservation Act. Additionally, the regulations impose the following specific requirements:

-- Applicants for a permit must identify eligible and listed sites based on all available information. [30 CFR 779.12(b), 779.24(i), 783.12(b), and 783.24(i)]. The regulations further specify that information is to include, but not be limited to, data of State and local preservation agencies.

-- The SHPO is notified of all permit applications, and given an opportunity to comment. [30 CFR 773.13(a)(3)(ii) and 773.13(b)]

-- The public is also notified in a local newspaper of the complete permit application and given an opportunity to comment. [30 CFR 773.13]

-- Any person having an interest that may be adversely affected may request an informal conference to submit information to the regulatory authority. [30 CFR 773.13(c)]

-- The regulatory authority, based on such comments, records of any informal conferences, and on the information in the application, may require modification of the permit application. [30 CFR 773.15]. This modification could include a requirement to obtain additional information and conduct new analyses. The use of a field survey could be required by the regulatory authority at this time and would be one of the tools available to develop a complete application.

-- Regulatory authorities should be able to demonstrate through the record of their decision that they have given consideration to a SHPO's well reasoned comments. [30 CFR 773.15]

-- The regulatory authority has the authority to require the operator to conduct appropriate mitigation measures. [30 CFR 773.15]

-- Procedures are available for the administrative and judicial review of decisions on permits. [30 CFR part 775]

As demonstrated in the preceding paragraphs, ample authority is provided to State regulatory authorities to protect both listed sites and those eligible for listing on the National Register. With regard to any specific permit, the regulatory authority is given discretion as to the level of required additional information, analyses, and mitigation. Such flexibility is appropriate because of the diversity among the regions, States, and within the States of types and sizes of mining operations and the physical variability of the lands they affect. This is recognized in section 101(f) of the Surface Mining Control and Reclamation Act of 1977 (Surface Mining Act). However, such flexibility is not unbridled. In reviewing the States' implementation of their programs OSMRE would expect to find that the recommendations of the SHPO have been given consideration. If a regulatory authority were to consistently ignore well reasoned recommendations, it would not be in compliance with OSMRE's requirements for State programs, nor would it be fulfilling its obligation to assist the Director of OSMRE in compliance with section 106 of the NHPA as is required when the State accepts Federal financial support for its programs.

## **ANALYSIS OF SOPA'S RECOMMENDED REGULATORY CHANGES**

SOPA suggests that under 30 CFR 772.12(b)(8), 779.12(b), and 788.12(b) (now 774), permit applicants be required to (1) review the SHPO's files and publications, and (2) conduct whatever field inspections the SHPO recommends.

As to the suggested file review, the applicant for a permit is currently required to identify the nature of cultural and historic resources listed or eligible for listing on the National Register and known archeological features within the proposed permit and adjacent areas. The description is to be based on all available information, including, but not limited to, data of State and local archeological, historical, and cultural preservation agencies. This would include the SHPO. There is not specific requirement for the applicant to search files, and typically this activity is performed by the SHPO in response to an applicant's inquiry, or if the applicant has neglected to contact the SHPO, in response to the regulatory authority's inquiry. The petitioner has not demonstrated any compelling reason why this aspect of the current rules is inadequate.

The new feature in the petitioner's proposal would be to require the permit applicant to conduct whatever field surveys the SHPO recommends. Under the current process, the SHPO does not have this decision making authority. Rather, the State regulatory authority must consider the SHPO's request and determine the appropriate action, if any. The petitioner's language would change the existing decision making process by giving the SHPO's more authority over this part of the permitting process than they now have, and more authority under State programs than they have under any Federal program. Under current rules, the SHPO advises the State regulatory authority. There is no authority in either the Surface Mining Act or the NHPA that would allow OSMRE to delegate the suggested authority to the SHPO. Additionally, the proposal would be a change away from a central decision making authority, the State regulatory authority, and could confuse those involved in the process.

In its suggested amendments to 30 CFR 772.12(b)(8), 780.11 and 784.11 SOPA also requests that permit applicant's and State regulatory authorities be required to provide the ACHP and the SHPO an opportunity to consult regarding a program applicants would have to develop to preserve historic properties in the permit area. This suggestion would (1) require applicants to develop an historic preservation plan for all permit areas, and (2) establish a process similar to the

process developed to implement section 106 of the NHPA by giving the SHPO and the ACHP an expanded role in the permitting process. The suggested language would give those two groups more authority than they have over Federal undertakings pursuant to section 106, since 106 requires only that the Council be given an opportunity to comment, not to consult.

At present, there is no requirement in the OSMRE's regulations for applicants to develop a program, during the permit application process, to address the preservation of historic properties. Such a plan would place a new and frequently unnecessary burden on applicants. Under existing rules the regulatory authority may, if appropriate, require an applicant to provide information on how harm to historic properties will be minimized or mitigated. Also, the current regulations would not prevent the applicant from developing a mitigation program in consultation with the SHPO and the ACHP and including it in the permit application. Moreover, as shown earlier, there is ample opportunity under current rules for the SHPO to consult with the regulatory authority regarding the presence and disposition of historic properties, especially because both are part of the same State government. The petitioner's language would change the existing decision making process by giving the SHPO and the ACHP more authority over this part of the permitting process by establishing procedures closely resembling the Federal procedures for implementing section 106 of the NHPA. OSMRE is not convinced of the inadequacy of the current rules under which the State regulatory authority has the authority and responsibility to determine on a case-by-case basis what further action is needed. Imposition of a general requirement for all applicants would impose an additional regulatory burden the incremental benefits of which are far from certain.

## **COMMENTS RECEIVED**

OSMRE received 57 comments on the petition for rulemaking. These comments can be divided into two major groups: those in favor of the rulemaking and those against. Most of the former came from students of archeology, State Historic Preservation Officers, State archeologists, university faculty in anthropology and archeology, and various archeological and preservation professional groups. The comments opposed to the rulemaking came from individual industry commenters and from groups representing the coal industry.

Those in favor of the rulemaking were concerned with the vagueness of the current program, and with the variety of interpretations being given to this program by State regulatory authorities. The commenters pointed out that while some States are enforcing preservation aspects of the program stringently, others are doing little or nothing regarding the application or enforcement of their own State regulations concerning historic properties. Many commenters saw this as providing economic advantage to operators in some States while penalizing others in States where enforcement is stringent.

Additionally, many of the commenters in favor of the rulemaking asserted that numerous historic properties were being destroyed without recordation and study, resulting in a loss of a portion of America's heritage. Several stated that the lands' unsuitable petition process for preserving historic properties is lengthy and cumbersome. The respondents favoring regulation changes called for a national and uniform set of regulations that deals with the identification, evaluation, and treatment of significant historic properties. Some commenters stated that input by the SHPO and ACHP was lacking. Others believed that this involvement might not be appropriate, but offered suggested additions to the existing regulations to resolve the problems of vagueness and inconsistency in identification, evaluation, and treatment of important historic properties.

The comments from industry representatives opposed to the proposed rulemaking were more varied than the comments from those favoring rulemaking. They stated that there was not a problem with the regulations dealing with historic properties, but a problem in the implementation and administration of the regulations on a State-by-State basis. They suggested that this be resolved during the oversight process in which OSMRE annually reviews the operation of the State programs, and suggested that modifications should be specific to problem States, rather than nationwide. Industry commenters stated that the petitioner's suggested revisions would increase the costs and delays involved in surface coal mining and introduce an additional level of review, while failing to set limits on what could be required of the coal industry to protect historic properties. One commenter noted that issuance of permits to conduct coal operations issued by State regulatory authorities were not Federal undertakings and were therefore not subject to the same requirements to protect historic properties that Federal agencies must follow. Another pointed out that the petitioner's proposed language emphasized protection of currently unknown resources, and stated that it was the intent of Congress to protect only known resources.

All of the comments received have been carefully considered in OSMRE's analysis of the petition. Although the comments submitted by both those in favor of and those opposed to the proposed rulemaking were highly varied, a common theme occurs: the process for protecting important historic properties is unclear and is not applied in a uniform manner by the various State regulatory authorities. This is consistent with OSMRE's observations in correspondence with various State regulatory authorities, industry, State Historic Preservation Officers, and other preservation professionals.

Based on the foregoing, I have concluded that (1) a need to initiate rulemaking exists to clarify existing provisions in OSMRE's permanent program regulations to ensure appropriate consideration of important historic properties by the State regulatory authorities; and (2) it would be inappropriate to propose the specific provisions suggested by the petitioner.

Sincerely,  
Ted O. Christensen,  
Acting Director.

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