

## SUBCHAPTER F—AREAS UNSUITABLE FOR MINING

### PART 761—AREAS DESIGNATED BY ACT OF CONGRESS

Sec.

761.1 Scope.

761.3 Authority.

761.5 Definitions.

761.11 Areas where mining is prohibited or limited.

761.12 Procedures.

AUTHORITY: 30 U.S.C. 1201 *et seq.*

SOURCE: 48 FR 41348, Sept. 14, 1983, unless otherwise noted.

#### §761.1 Scope.

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

#### §761.3 Authority.

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

#### §761.5 Definitions.

For the purposes of this part—

*Cemetery* means any area of land where human bodies are interred.

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

*Occupied dwelling* means any building that is currently being used on a reg-

ular or temporary basis for human habitation.

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

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

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

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

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

*Significant recreational, timber, economic, or other values incompatible with surface coal mining operations* means those values to be evaluated for their significance which could be damaged by, and are not capable of existing together with, surface coal mining operations because of the undesirable effects mining would have on those values, either on the area included in the permit application or on other affected areas. Those values to be evaluated for their importance include:

(a) Recreation, including hiking, boating, camping, skiing or other related outdoor activities;

(b) Timber manager and silviculture;

(c) Agriculture, aquaculture or production of other natural, processed or manufactured products which enter commerce;

(d) Scenic, historic, archeologic, esthetic, fish, wildlife, plants or cultural interests.

*Surface coal mining operations which exist on the date of enactment* means all surface coal mining operations which were being conducted on August 3, 1977.

*Surface operations and impacts incident to an underground coal mine* means all activities involved in or related to underground coal mining which are either conducted on the surface of the land, produce changes in the land surface or disturb the surface, air or water resources of the area, including all activities listed in section 701(28) of the Act and the definition of surface coal mining operations appearing in § 700.5 of this chapter.

*Valid existing rights* means:

(a) Except for haul roads, that a person possesses valid existing rights for an area protected under section 522(e) of the Act on August 3, 1977, if the application of any of the prohibitions contained in that section to the property interest that existed on that date would effect a taking of the person's property which would entitle the person to just compensation under the Fifth and Fourteenth Amendments to the United States Constitution;

(b) For haul roads,

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

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

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

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

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

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

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

[48 FR 41348, Sept. 14, 1983, as amended at 52 FR 4261, Feb. 10, 1987; 56 FR 65634, Dec. 17, 1991]

EFFECTIVE DATE NOTE: At 51 FR 41960, Nov. 20, 1986 in § 761.5:

1. The definition of *Significant recreational, timber, economic, or other values incompatible with surface coal mining operations* was suspended insofar as the listed values are evaluated for compatibility solely in terms of reclaimability; and

2. Paragraphs (a) and (c) of the definition of *Valid existing rights* were suspended, and subparagraph (d)(2) was suspended insofar as it incorporates the takings test of paragraph (a).

**§ 761.11 Areas where mining is prohibited or limited.**

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

(a) On any lands within the boundaries of the National Park System, the National Wildlife Refuge System, the National System of Trails, the National Wilderness Preservation System, the Wild and Scenic Rivers System, including study rivers designated under section 5(a) of the Wild and Scenic Rivers Act (16 U.S.C. 1276(a)) or study rivers or study river corridors as established in any guidelines pursuant

to that Act, and National Recreation Areas designated by Act of Congress.

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

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

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

(c) On any lands where mining will adversely affect any publicly owned park or any places included in the National Register of Historic Places, unless jointly approved by the regulatory authority and the Federal, State, or local agency with jurisdiction over the park or place;

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

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

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

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

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

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

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

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

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

(g) Within 100 feet, measured horizontally, of a cemetery; cemeteries may be relocated if authorized by applicable State law or regulations.

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

[48 FR 41348, Sept. 14, 1983, as amended at 51 FR 25819, July 16, 1986; 51 FR 26385, July 23, 1986; 52 FR 4261, Feb. 10, 1987]

EFFECTIVE DATE NOTE: At 51 FR 41961, Nov. 20, 1986, paragraph (h) of § 761.11 was suspended.

#### § 761.12 Procedures.

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

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

(2) If the regulatory authority is unable to determine whether the proposed operation is located within the boundaries of any of the lands in § 761.11(a) or closer than the limits provided in § 761.11 (f) and (g), the regulatory authority shall transmit a copy of the

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

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

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

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

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

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

(4) Make a written finding based upon information received at the public hearing within 30 days after completion of the hearing, or after any public comment period ends if no hearing is held, as to whether the interests of the public and affected landowners will be protected from the proposed mining operation. No mining shall be allowed within 100 feet of the outside right-of-way line of a road, nor may a road be relocated or closed, unless the regulatory authority or public road authority determines that the interests of the public and affected landowners will be protected.

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

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

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

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

(f)(1) Where the regulatory authority determines that the proposed surface coal mining operation will adversely

affect any publicly owned park or any place included in the National Register of Historic Places, the regulatory authority shall transmit to the Federal, State, or local agency with jurisdiction over the park or place a copy of applicable parts of the permit application, together with a request for that agency's approval or disapproval of the operation, and a notice to that agency that it has 30 days from receipt of the request within which to respond and that failure to interpose a timely objection will constitute approval. The regulatory authority, upon request by the appropriate agency, may grant an extension to the 30-day period of an additional 30 days. Failure to interpose an objection within 30 days or the extended period granted shall constitute an approval of the proposed permit.

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

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

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

[48 FR 41348, Sept. 14, 1983, as amended at 52 FR 4261, Feb. 10, 1987]

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

Sec.

762.1 Scope.

762.4 Responsibility.

762.5 Definitions.

762.11 Criteria for designating lands as unsuitable.

762.12 Additional criteria.

762.13 Land exempt from designation as unsuitable for surface coal mining operations.

762.14 Exploration on land designated as unsuitable for surface coal mining operations.

AUTHORITY: Pub. L. 95-87, 30 U.S.C. 1201 *et seq.*, and Pub. L. 100-34.

SOURCE: 48 FR 41350, Sept. 14, 1983, unless otherwise noted.

### §762.1 Scope.

This part establishes the minimum criteria to be used in determining whether lands should be designated as unsuitable for all or certain types of surface coal mining operations.

### §762.4 Responsibility.

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

### §762.5 Definitions.

For purposes of this part:

*Fragile lands* means areas containing natural, ecologic, scientific, or esthetic resources that could be significantly damaged by surface coal mining operations. Examples of fragile lands include valuable habitats for fish or wildlife, critical habitats for endangered or threatened species of animals or plants, uncommon geologic formations, paleontological sites, National Natural Landmarks, areas where mining may result in flooding, environmental corridors containing a concentration of ecologic and esthetic features, and areas of recreational value due to high environmental quality.

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

*Natural hazard lands* means geographic areas in which natural conditions exist which pose or, as a result of surface coal mining operations, may pose a threat to the health, safety or