responsibilities between the Federal Government and Indian tribes.

Energy Effects

We have analyzed this rule under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. We have determined that it is not a ''significant energy action'' under that order because it is not a ''significant regulatory action'' under Executive Order 12866 and is not likely to have a significant adverse effect on the supply, distribution, or use of energy. The Administrator of the Office of Information and Regulatory Affairs has not designated it as a significant energy action. Therefore, it does not require a Statement of Energy Effects under Executive Order 13211.

Technical Standards

The National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note) directs agencies to use voluntary consensus standards in their regulatory activities unless the agency provides Congress, through the Office of Management and Budget, with an explanation of why using these standards would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., specifications of materials, performance, design, or operation; test methods; sampling procedures; and related management systems practices) that are developed or adopted by voluntary consensus standards bodies.

This rule does not use technical standards. Therefore, we did not consider the use of voluntary consensus standards.

Environment

We have analyzed this rule under Department of Homeland Security Management Directive 5100.1 and Commandant Instruction M16475.lD, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have concluded under the Instruction that there are no factors in this case that would limit the use of a categorical exclusion under section 2.B.2 of the Instruction. Therefore, this rule is categorically excluded, under figure 2–1, paragraph (34)(g), of the Instruction, from further environmental documentation. An environmental analysis checklist and a categorical exclusion determination will be available in the docket where indicated under **ADDRESSES**.

List of Subjects in 33 CFR Part 165

Harbors, Marine safety, Navigation (water), Reporting and recordkeeping requirements, Security measures, Waterways.

■ For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 165 as follows:

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

■ 1. The authority citation for part 165 continues to read as follows:

Authority: 33 U.S.C. 1226, 1231; 46 U.S.C. Chapter 701, 3306, 3703; 50 U.S.C. 191, 195; 33 CFR 1.05–1, 6.04–1, 6.04–6, 160.5; Pub. L. 107–295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

■ 2. Add § 165.T05–0838, to read as follows:

§ 165.T05–0838 Safety Zone: Christmas Holiday Boat Parade Fireworks Event, Appomattox River, Hopewell, VA.

(a) *Regulated Area.* The following area is a safety zone: All navigable waters of the Captain of the Port Sector Hampton Roads zone, as defined in 33 CFR 3.25–10, in the vicinity of the Appomattox River in Hopewell, VA within 420 feet of position 37°19′34″ N/77°16′00″ W (NAD 1983).

(b) *Definitions.* As used in this section, Captain of the Port Representative means any U.S. Coast Guard commissioned, warrant or petty officer who has been authorized by the Captain of the Port, Hampton Roads, Virginia to act on his behalf.

(c) *Regulations.* (1) In accordance with the general regulations in § 165.23 of this part, entry into this zone is prohibited unless authorized by the Captain of the Port, Hampton Roads or his designated representatives.

(2) The operator of any vessel in the immediate vicinity of this safety zone shall:

(i) Stop the vessel immediately upon being directed to do so by any commissioned, warrant or petty officer on shore or on board a vessel that is displaying a U.S. Coast Guard Ensign.

(ii) Proceed as directed by any commissioned, warrant or petty officer on shore or on board a vessel that is displaying a U.S. Coast Guard Ensign.

(3) The Captain of the Port, Hampton Roads and the Sector Duty Officer at Sector Hampton Roads in Portsmouth, Virginia can be contacted at telephone number (757) 668–5555.

(4) The Captain of the Port Representative enforcing the safety zone can be contacted on VHF–FM marine band radio, channel 13 (156.65 Mhz) and channel 16 (156.8 Mhz).

(d) *Enforcement.* The U.S. Coast Guard may be assisted in the patrol and enforcement of the zone by Federal, State, and local agencies.

(e) *Enforcement Period.* This rule will be enforced from 8 p.m. to 9 p.m. on December 6, 2008.

Dated: October 17, 2008.

Patrick B. Trapp,

Captain, U.S. Coast Guard, Captain of the Port, Hampton Roads.

[FR Doc. E8–26523 Filed 11–5–08; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF AGRICULTURE

Forest Service

36 CFR Part 261

RIN 0596–AC38

Clarification for the Appropriate Use of a Criminal or a Civil Citation To Enforce Mineral Regulations

AGENCY: Forest Service, USDA.

ACTION: Final rule.

SUMMARY: This final rule amends certain Forest Service regulations to allow, if necessary, for a criminal citation to be issued for unauthorized mineral operations on National Forest System (NFS) lands.

DATE: The final rule is effective December 8, 2008.

ADDRESSES: The documents used to develop this final rule, along with comments, including names and addresses when provided are placed in the record and are available for inspection and copying. The public may copy or inspect these items at the Office of the Director, Minerals and Geology Management (MGM), Forest Service, USDA, 1601 N. Kent Street, 5th Floor, Arlington, VA 22209 during regular business hours (8:30 a.m. to 4 p.m.), Monday through Friday except holidays. Visitors are encouraged to call ahead at (703) 605–4545 to facilitate entry into the building.

FOR FURTHER INFORMATION CONTACT: Ivette Torres, Minerals and Geology Management Staff, (703) 605–4792, or electronic mail to *itorres@.fs.fed.us.* Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m., Eastern Standard Time, Monday through Friday.

SUPPLEMENTARY INFORMATION:

Background and Need for Proposed Rule

The Forest Service currently uses two enforcement options, civil and criminal, to enforce its mining regulations at 36 CFR part 228, subpart A. Criminal enforcement pursuant to 36 CFR part 261, subpart A is often preferred in those situations that are factually straightforward and where immediate action is needed, and other resolutions have failed.

In 1984, a federal district judge ruled in an unpublished decision, *United States* v. *Craig,* No. CR–82–8–H, slip op. at 9–10 (D. Mont. Apr. 16, 1984), that the prohibitions at 36 CFR 261.10 did not apply to locatable mineral operations subject to 36 CFR part 228, subpart A. On August 4, 1983, during the pendency of the *Craig* prosecution, the Forest Service issued a proposed rule to amend 36 CFR part 261, subpart A. Among the proposed amendments to that subpart, were adding the phrase ''or approved operating plan'' at end of both 36 CFR 261.10(a) and the section presently designated as 36 CFR 261.10(l). On June 21, 1984, the Forest Service adopted the proposed rule, including these amendments. The applicability of these sections to locatable mineral operations was further clarified in 1990 when a definition of the term ''operating plan'' was added to 36 CFR 261.2.

In *United States* v. *McClure,* 364 F. Supp.2d 1183, 1183–84 (E.D. Cal. 2005), the Forest Service cited the defendant for operating a gold mining suction dredge without obtaining prior Forest Service authorization. The citation charged the miner with violating 36 CFR 261.10(k) which prohibits use or occupancy of NFS lands without a special use authorization. *Id.* 1183. The judge determined that the miner's gold dredging operations were subject to 36 CFR part 228, subpart A (*id.* at 1185) and consequently, pursuant to 36 CFR 251.50(a), those operations were not special uses for which a special use authorization may be issued (*Id.* 1186). Accordingly, the court dismissed the charge that the miner violated 36 CFR 261.10(k) by occupying NFS lands without a special use authorization. *Id.* 1187.

Given the *McClure* decision, this Department believes it is again advisable to amend 36 CFR part 261, subpart A to clearly provide that conducting unauthorized locatable mineral operations subject to 36 CFR part 228, subpart A, or other unauthorized mineral operations subject to different subparts of 36 CFR part 228, is prohibited by 36 CFR part 261, subpart A and may lead to the operator's criminal prosecution. The Regions dealing with suction dredge operators are particularly concerned about the effects of the two adverse rulings on their use of prohibitions set forth in 36 CFR part 261.

The amendments to 36 CFR part 261, subpart A rely on the Forest Service's clear statutory authority to adopt regulations providing for the issuance of a criminal citation to persons who commit prohibited acts on NFS lands. The amendments reflect the clear distinction between a special-use authorization and an operating plan as those terms are defined at 36 CFR 261.2. They also define the term ''residence'' to clarify a prohibition concerning shelters and structures on NFS lands used as living or sleeping quarters. The amendments apply to all persons conducting mineral operations subject to any subpart of 36 CFR part 228, including locatable mineral operations subject to subpart A.

The Forest Service recognizes that it cannot preclude use and occupancy of NFS lands for locatable mineral operations, including camping or residential use, if those operations are conducted so as to minimize their adverse environmental impacts, the operations are limited to locatable mineral prospecting, exploration, development, mining, processing, reclamation, closure and those uses reasonably incidental thereto, and the operations are appropriate in terms of their type, duration, and stage. However, this does not preclude Forest Service adoption of rules requiring written authorization for some or all of these operations by means such as a notice of intent to conduct operations or an approved plan of operations when the Forest Service deems it appropriate. Nonetheless, this rulemaking has no effect whatsoever on a miner conducting operations specified by 36 CFR 228.4(a)(1) that do not require prior notice to the Forest Service. Nor does this rulemaking have any affect whatsoever on a miner's duty to submit a notice of intent to conduct locatable mineral operations, including reasonably incidental camping, which might cause significant disturbance of surface resources. Nor does this rulemaking have any effect whatsoever on a miner's need to obtain approval of a plan of operations, and if necessary, a reclamation bond, to conduct locatable mineral operations, including reasonably incidental camping, which will likely cause significant disturbance of surface resources. Those matters continue to be governed by 36 CFR part 228, subpart A.

Analysis of Public Comment

Overview

The comment period opened on May 10, 2007, and closed on July 9, 2007. Forty-three responses were received asking for an extension of the comment period and for public meetings. Most of these requests were identical in wording with just different names. The agency decided not to hold public meetings since it was the middle of the field season, but did reopen the comment period on the proposed rule for another 30 day comment period, beginning on October 23, 2007, and closing on November 23, 2007. The Forest Service received a total of 86 responses to the proposed rule (72 FR 59979).

Two comments were received in favor of the rule as written. Two industry organizations supported the basic idea of the proposed rule, but suggested minor revisions. Eighty-two comments were received that opposed the proposed rule primarily on the grounds that the Forest Service did not have the authority to use criminal citations for locatable mineral operations. Most of the 82 comments in opposition to the proposed rule were submitted by individuals, many of whom identified themselves as prospectors or miners in small scale mining operations.

Commenters who opposed the rule primarily thought the Forest Service did not have the authority to issue criminal citations for locatable mineral operations. Almost invariably, they said 36 CFR part 261, subpart A is statutorily inapplicable to persons conducting locatable mineral operations pursuant to the United States mining laws. Those respondents pointed to provisions of the Forest Service's Organic Administration Act of 1897 or the United States mining laws they said the rule would violate.

Many of the respondents also said the rule would be inconsistent with existing Forest Service regulations pointing to three different parts of Title 36 of the Code of Federal Regulations. A small number of respondents opposed the rule on the ground that this rulemaking is invalid for other reasons. Most of them asserted that the rulemaking violates other Federal law or regulation. A few question the rule's consistency with other materials, not all of which are Federal.

Several respondents' comments were obvious copies from comments sent in responding to the **Federal Register** Notice of July 9, 2004, (69 FR 41428) ''Clarification as to When a Notice of Intent to operate and/or Plan of Operations is Needed for Locatable Mineral Operations on National Forest System lands.'' These comments will

not be listed since they do not apply to this rulemaking. Many comments to the proposed rule were very similar in content. Consequently, similar comments were combined and responded to only once.

All comments submitted on the proposed rule and the administrative record are available for review in the Office of the Director, Minerals and Geology Management, 1601 N. Kent St., 5th Floor, Arlington, Virginia 22209, during regular business hours (8:30 a.m. to 4 p.m.), Monday through Friday, except Federal holidays. Those wishing to view the comments and the administrative record should call in advance to arrange access to the building (See: **FOR FURTHER INFORMATION CONTACT**).

General Comments

Occupancy and Forest ''Stay Limits''

Several commenters asked for a clarification about how local forest ''stay limits'' on recreational camping apply to locatable mineral activities. Regardless of the local stay limit, reasonably incidental residential use of NFS lands by persons conducting locatable mineral prospecting, exploration, mining, or processing that might cause significant disturbance of NFS surface resources requires prior submission of a notice of intent to conduct operations. Reasonably incidental residential use of NFS lands by persons conducting locatable mineral prospecting, exploration, mining, or processing that is likely to cause, or is causing, a significant disturbance of NFS surface resources must be authorized by an approved plan of operations. Reasonably incidental residential use of NFS lands by persons conducting locatable mineral prospecting, exploration, mining, or processing that will not cause significant disturbance of NFS surface resources does not require prior submission of a notice of intent to conduct operations or approval of a plan of operations. When the probability of significant NFS surface resource disturbance is being evaluated in connection with locatable mineral operations consisting of appropriate prospecting, exploration, development, mining, processing, reclamation and closure, and accompanying reasonably incident residential use of NFS lands, the operations in their totality, including the reasonably incidental residential use, must be considered. Residential use of NFS lands which is not reasonably incidental to appropriate locatable mineral prospecting, exploration, development, mining, processing, or reclamation and closure operations being conducted by miners on NFS lands pursuant to 36 CFR part 228, subpart A is impermissible unless it complies with requirements pertaining to special uses of NFS lands, including an applicable stay limit.

An operator, consequently, is not required to notify the Forest Service prior to conducting locatable mineral operations which involve occupancy of NFS lands providing that those operations meet two conditions: (1) The occupancy is reasonably incidental to locatable mineral prospecting, exploration, mining, or processing and (2) those proposed (or ongoing) operations, including such reasonably incidental occupancy, cumulatively will not cause (or are not causing) significant disturbance of NFS surface resources. Moreover, when occupancy is reasonably incidental to prospecting, exploration, mining, and processing operations, then the level of surface disturbance, not the duration of the occupancy, will determine whether a Notice of Intent or a Plan of Operations is required. For example, no Forest Service authorization is needed if a miner wants to camp on his mining claim while suction dredging under a state permit and the authorized officer determines that the proposed operation meets the two conditions above.

Specific Comments

Comment: Several commenters questioned the Forest Service's authority to criminally enforce any Forest Service regulation.

Response: The Organic Administration Act of 1897 confers authority upon the Department to promulgate regulations protecting the NFS as well as making contravention of those protective rules a criminal offense for which a fine or imprisonment may be imposed. That authority flows from 16 U.S.C. 551, a portion of the Organic Administration Act providing in pertinent part:

> The Secretary of Agriculture shall make provisions for the protection against destruction by fire and depredations upon the public forests and national forests * * *; and he may make such rules and regulations * * * as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction; and any violation of * * * such rules and regulations shall be punished by a fine * * * or imprisonment * * *, or both.

Doubts regarding the legality and scope of the Department's authority under 16 U.S.C. 551 were dispelled in 1911 by the United States Supreme Court's decision in *United States* v. *Grimaud,* 220 U.S. 506 (1911). In *Grimaud*, the Supreme Court rejected a challenge to 16 U.S.C. 551 on the ground it ''was unconstitutional, in so far as [Congress] delegated to the Secretary of Agriculture power to make rules and regulations, and made a violation thereof a penal offense.'' The decision squarely holds that 16 U.S.C. 551 both authorizes the Department to adopt regulations governing the occupancy and use of NFS lands set aside from the public domain and provides that violation of such regulations is a criminal offense. *Id.* at 522–23.

Comment: Two respondents stated that the Forest Service, in adopting this rule, is attempting to circumvent the decisions in *United States* v. *Lex,* 300 F. Supp. 2d 951 (E.D. Cal. 2003), and *U.S.* v. *McClure,* 364 F. Supp. 2d 1183 (E.D. Cal., 2005), claiming that the Forest Service has no authority to cite a miner under 36 CFR part 261.

Response: Nothing in *Lex* or *McClure* could, or purports to, restricts the Forest Service's clear authority to promulgate rules regulating the effects of locatable mineral resources on Forest Service lands. Indeed, the court specifically recognizes that one of the government's remedies for the court's adverse opinion is to amend 36 CFR part 261, subpart A.

> The Court understands that pursuing a Part 261 violation against a noncomplying miner is a preferred remedy since it is expeditious and often results in a probationary term which mandates the miner's compliance. Here, the Government is not without remedy. It has always had the option of pursuing civil abatement. Likewise, the Government is free to pursue criminal proceedings under appropriate sections of Part 261 for ''waste'' or ''resource destruction''; and Title 18 U.S.C. Similarly, it may simply choose to amend 261.10 to make criminal a miner's failure to file a notice of intent and/or plan of operation. See Lex & Waggener at 962.

United States v. *McClure,* 364 F. Supp. 2d 1183, 1186 n.7 (E.D. Cal. 2005).

In the earlier *Lex* decision, the court set aside the decision of a United States Magistrate convicting miners cited for violating 36 CFR § 261.10(b) which prohibits residential use or occupancy of NFS lands without authorization by means of a special use authorization or other Federal law or regulation. Here too, the court, after noting that it was not unsympathetic to the problematic effect of its decision upon Forest Service efforts to regulate the defendants, occupancy of NFS lands, specifically stated that ''[t]he solution to this problem * * * is to amend the regulations.* * *'' *United States* v. *Lex,* 300 F. Supp. 2d 951 (E.D. Cal. 2003).

Comment: Many respondents claimed that the Forest Service has no authority

to apply the prohibitions at 36 CFR part 261 provisions to mining or to restrict or regulate mining operations by means of 36 CFR part 261. Several believed the regulations at 36 CFR part 228, subpart A should be revised to include enforcement provisions and the regulations at 36 CFR part 261, subpart A should not be applicable to mining operations. Another believes that CFR part 228, subpart A precludes the application of the remaining regulations in Title 36, Chapter II to locatable mineral operations.

Response: The conclusion that 36 CFR part 261 is not applicable to locatable mineral operations conducted pursuant to the proposed rule or the remainder of 36 CFR part 228, subpart A, is directly contrary to the holding of *United States* v. *Doremus*, 888 F.2d 630, 631–32 (9th Cir. 1989). In *Doremus*, the appellants argued that their operations were authorized by the United States mining laws. Consequently, they contended that they were exempt from the prohibitions set forth at 36 CFR part 261 by virtue of 36 CFR 261.1(b), which, as the respondents note, states that ''[n]othing in this part shall preclude operations as authorized by * * * the U.S. Mining Laws Act of 1872 as amended.'' However, the court directly rejected their argument, stating that:

> Part 228 does not contain any independent enforcement provisions; it only provides that an operator must be given a notice of noncompliance and an opportunity to correct the problem. 36 CFR 228.7(b) (1987). The references to operating plans in § 261.10 would be meaningless unless Part 261 were construed to apply to mining operations, since that is the only conduct for which operating plans are required under Part 228. In addition, 16 U.S.C. 478 (1982), which authorizes entry into national forests for all proper and lawful purposes, including that of prospecting, locating, and developing the mineral resources thereof, specifically states that such persons must comply with the rules and regulations covering such national forests. This statutory caveat encompasses all rules and regulations, not just those (such as Part 228) which apply exclusively to mining claimants. In this context, § 261.1(b) is merely a recognition that mining operations may not be prohibited nor so unreasonably circumscribed as to amount to a prohibition. *United States* v. *Weiss,* 642 F. 2d 296, 299 (9th Cir. 1981).

Thus, ''[t]he law is clear that the Forest Service may proceed by criminal prosecution for violations of the regulations governing mining and protection of the National Forest lands.'' *United States* v. *Good,* 257 F.Supp.2d 1306, 1319 (D. Colo. 2003).

The additional regulations applicable to locatable mineral operations are not restricted to 36 CFR part 261, subpart A. Other portions of Title 36 of the Code of Federal Regulations which can govern locatable mineral operations include, but are not limited to, part 212, subpart A, which governs administration of the Forest Transportation System; part 215, which sets forth notice, comment and appeal procedures for NFS projects and activities; and part 251, subpart C, which sets forth procedures for appeal of decisions relating to NFS occupancy and use.

The Department disagrees with the suggestion to include all prohibitions applicable to locatable mineral operations in 36 CFR part 261, subpart A. While some prohibitions are uniquely applicable to miners, such as new Sec. 261.10(p), most are applicable to other NFS users, including amended Sec. 261.10(a), (b) and (l). Others such as 36 CFR 261.4 and 261.11, governing disorderly conduct and sanitation, respectively are applicable to all users of the NFS, including miners. Repeating all these generic prohibitions in the parts of Title 36, Chapter II relevant to different groups of NFS users clearly would be unwieldy. However, having the prohibitions targeted to specific users of NFS lands set forth in the CFR part applicable to those users while having the generic prohibitions in another part of the CFR could lead to persons being unfairly surprised about the scope of prohibited conduct.

For these reasons, no change has been made in the final rule as a result of these comments.

Comment: One respondent claimed that because 36 CFR 261.10 regulations are not mentioned in the 36 CFR part 228 subpart A regulations, the Forest Service has no authority to cite, using the 36 CFR 261.10 regulations.

Response: The Forest Service's authority to apply the 36 CFR 261.10 prohibitions to operations subject to 36 CFR part 228, subpart A is explained in the previous response.

Comment: Several respondents were concerned that the Forest Service District Rangers and Mineral administrators would overstep their authority and unduly use criminal citations as a ''fix'' for any mining related problem.

Response: The Forest Service has had the authority to use criminal citations for over 30 years and has not had a track record of overuse of the criminal citation authority. In fact, many respondents did not know the Forest Service had the authority to use criminal citations, adding weight to the fact that there is no history of abuse. Criminal citations have always been a tool of last resort. If noncompliance is not resolved through the process of communication and willing compliance, civil citations are usually considered before criminal citations. Criminal citations are only used when the facts of the noncompliance warrant a criminal citation. Further Forest Service Manual direction will be issued to ensure criminal citations are properly used.

Comment: Several respondents claimed that the proposed rule would increase the time needed for the Forest Service to process either a notice of intent or a plan of operations. The respondents asserted that such delay would be prohibitive in the context of small-scale mining operations.

Response: These comments reflect a fundamental misperception of the effect of this rule. The amendments to 36 CFR part 261, subpart A do not alter the requirements applicable to persons conducting mineral operations on NFS lands pursuant to 36 CFR part 228. The purpose of 36 CFR part 261, subpart A is to give the public notice of those few requirements set forth in other parts of the Forest Service's rules where violations have been made criminal. However, 36 CFR part 261, subpart A does not create the underlying requirements whose violation that subpart prohibits.

Comment: Many respondents complained about the fact that they were not personally notified about the proposed rule.

Response: Outside of publishing the proposed rule in the **Federal Register**, there is no legal requirement to notify every ''miner'' about the proposed rule. Some Forest Supervisors published news releases in local papers; some did not. Additional notification is not legally required. Several national mining organizations were notified of the proposed rule and asked to distribute to their members and associated organizations. Forty-three respondents asked for an additional 30-day comment period. The comment period was reopened on October 23, 2007, and closed on November 23, 2007.

Comment: Two respondents stated that the Small Business Administration (SBA) would find that the proposed rule will have a major impact on small entities given the SBA's finding that a purportedly similar rule, 43 CFR part 3800, subpart 3809, would have a major impact on small entities.

Response: The scope of the proposed rule only addresses a clarification for criminal citations for unauthorized occupancy and use of the National Forest and the authorization required for conducting locatable mineral operations on Forest Service lands. The proposed rule is dramatically less

sweeping than the scope of the proposed changes to 43 CFR part 3800, subpart 3809. While 43 CFR part 3800, subpart 3809, addresses a similar issue for lands administered by Bureau of Land Management (BLM), it additionally sets forth a host of other requirements. Therefore, any finding which the SBA made on the effect of 43 CFR part 3800, subpart 3809, on small entities consequently has exceedingly limited predictive value in terms of the SBA's possible assessment of the impact of the Forest Service's proposed and final rule.

Comment: Several respondents were concerned about the possible misuse of the criminal citations and quoted at length from the 2810 section of the Forest Service manual. They cautioned that before a person can be charged under 36 CFR part 261, the Forest Service must first demonstrate that a miner has violated 36 CFR part 228, subpart A.

Response: These amendments will require the revision of the Forest Service Manual to better explain under what circumstances the Forest Service will use criminal rather than civil enforcement measures. The revised manual will also include how the agency will monitor, manage, and prevent possible abuse of the criminal citations by untrained and unqualified Forest Service employees. Locatable minerals administration training will include an extra emphasis on the proper use of criminal citations. The Forest Service is reinforcing the agency policy of requiring only certified and qualified minerals administrators involved in determining when an operator is in noncompliance. The final rule will also require that Forest Service law enforcement personnel work only with Forest Service Certified Mineral Administrators to determine and document that an operator is in violation of 36 CFR part 228 subpart A, prior to issuing a violation notice under 36 CFR part 261, subpart A.

Comment: Several respondents asked how the Forest Service intends to reconcile its issuance of citations pursuant to 36 CFR part 261, subpart A with the noncompliance procedures already existing at 36 CFR 228.7.

Response: The revised Forest Service Manual and locatable minerals training discussed in previous responses will emphasize that criminal citations are tools of last resort, and 36 CFR 228.7 generally requires that a miner be served a notice of noncompliance prior to the Forest Service taking any kind of enforcement action. A Forest Service notice of noncompliance is a Forest Service decision, and consistent with 36 CFR 228.14, a miner will be given the opportunity to appeal the notice under 36 CFR part 251, subpart C. Furthermore, FSM 2817 requires that prior to any citation, except in emergency circumstances, the Forest Service has to work with the miner to secure willing compliance. Only after a reasonable effort has been made to secure the operator's willing compliance, will a notice of noncompliance generally be issued. Continued refusal by the miner to comply with the notice of noncompliance usually requires enforcement action. Enforcement action may be either civil or criminal in nature. The appropriate minerals staff, in addition to the Office of the General Counsel and the United States Attorney will be consulted prior to the citation of anyone operating under the United States mining laws.

Comment: Several respondents asked under what circumstances a criminal citation under 36 CFR part 261, subpart A would be issued.

Response: A criminal citation may be appropriate in cases where unnecessary and unreasonable damage is occurring and all reasonable attempts to obtain the operator's willing compliance with 36 CFR part 228, subpart A, or the terms of an approved plan of operations have failed.

Comment: Several respondents expressed their concern that criminal citations will be misused against miners who camp on their mining claims longer than a forest recreational camping limit.

Response: This comment concerns Forest Orders which limit the duration of temporary recreational camping on many National Forests depending on site conditions. In many places, campers are limited to a 14-day overnight stay, within a 30–60 day period, in a particular location. The purpose of such a Forest Order, also known as a ''stay limit,'' is to provide an enforceable standard pursuant to 36 CFR 261.58(a) which local Forest Service offices use to protect conditions at camping sites and prevent unlimited, unregulated recreational camping and associated impacts.

We agree that the potential for misuse of the criminal citations against operators camping on their mining claims exists. Additional training and direction will be given to the field that requires the Forest Service to distinguish between recreational campers and those who are legitimately carrying out activities under the United States mining laws. If an operator asserts that they are operating under the United States mining laws, and documents that need to camp on the site longer than the Forest recreational camping limit for the purpose of conducting locatable mineral operations that will not cause significant disturbance of NFS surface resources, the Forest Service is obligated to consider these facts prior to taking enforcement action under 36 CFR part 261. Furthermore, the training will emphasize that issuance of a citation pursuant to 36 CFR part 261, subpart A is inappropriate unless the Forest Service believes that the proposed or ongoing operations, including the reasonably incidental camping, require prior submission and approval of a plan of operations. This requirement flows from the fact that the prohibitions set forth at 36 CFR part 261, subpart A are predicated upon an operator's failure to obtain a required plan of operations under 36 CFR 228.4(a), not upon the operator's failure to submit a notice of intent to conduct operations.

Thus, regardless of the local stay limit, an operator is not required to submit a notice of intent to conduct operations unless the locatable mineral prospecting, exploration or mining, and processing, and the reasonably incidental camping, might cause significant disturbance of NFS surface resources. Moreover, as discussed above, an approved plan of operations is not required for the locatable mineral prospecting, exploration or mining, and processing, and the reasonably incidental camping, unless those operations are likely to cause a significant disturbance of surface resources. An operator, consequently, is not required to notify the Forest Service prior to conducting locatable mineral operations which involve occupancy of NFS lands providing that those operations meet two conditions: (1) The occupancy is reasonably incidental to locatable mineral prospecting, exploration, mining, or processing and (2) those proposed (or ongoing) operations, including such reasonably incidental occupancy, cumulatively will not cause (or are not causing) significant disturbance of NFS surface resources.

This process is consistent with the United States mining laws, in particular 30 U.S.C. 22 and 612, which grant an operator the right to occupy Federal lands subject to the United States mining laws for locatable mineral prospecting, exploration, mining, and processing operations and uses reasonable incidental thereto. Accordingly, where the proposed occupancy of NFS is reasonably incidental to prospecting, exploration, mining, and processing operations, the level of surface disturbance of the operations in totality, including

reasonably incidental occupancy of NFS lands, not the duration of the occupancy, will determine whether submission of a notice of intent to conduct operations or submission and approval of a plan of operations is required. For example, a miner is not required to give prior notice to the Forest Service when the miner plans to camp on the miner's mining claim while suction dredging under a state permit if the miner believes that the proposed operation meets the two conditions above. However, the miner should be aware that if the authorized officer determines that those operations, whether proposed or ongoing, will likely cause or are causing, significant disturbance of NFS surface resources, the authorized office can require the miner to submit and obtain approval of a plan of operations and that those operations cannot be conducted until the plan is approved pursuant to 36 CFR 228.4(a)(4).

Comment: Several respondents thought that including caves and cliff ledges in the new definition of the term ''residence'' at 36 CFR 261.2 is unnecessary. Another commenter objected to the inclusion of tunnels in the definition because the Forest Service does not have authority over operations occurring underground.

Response: The Department agrees that the Forest Service generally does not have authority to regulate locatable mineral operations conducted underground. However, the Forest Service's regulatory authority does extend to locatable mineral operations conducted underground if those operations may or are likely to cause significant disturbance of NFS surface resources. Nonetheless, the Department agrees that it is so unlikely that a miner would reside in caves or tunnels or on cliff ledges, with or without authorization, that inclusion of those terms in the new definition of residence is unnecessary.

For these reasons, the final rule's definition of the term ''residence'' does not include the caves, cliff ledges, or tunnels.

Comment: Several respondents recommended that the final rule should contain a clarification that states under the United States mining laws an operator may ''use and occupy'' NFS lands under a notice as long as the use and occupancy is reasonably incidental to prospecting, exploration, mining, and processing, and there is no significant disturbance of surface resources.

Response: The Department agrees with the respondents' conclusions about the scope of the United States mining laws as reflected by the answer to a previous comment. The Department believes that the extensive treatment of this issue in that answer and in the upcoming revision of the Forest Service Manual together with the emphasis that will be placed on it in Forest Service's training concerning the amendments adequately responds to the comment.

Comment: Several respondents suggested that the final rule should clarify that the special use regulations, 36 CFR part 251, subpart B, do not apply to locatable mineral operations on NFS lands.

Response: The preamble to the May 10, 2007 proposed rulemaking (72 FR 26578) expressly makes the point that *United States* v. *McClure*, 364 F. Supp.2d 1183, 1183–84 (E.D. Cal. 2005) directly holds that the special uses regulations at 36 CFR part 251, subpart B do not govern locatable mineral operations conducted on NFS lands themselves. (The same discussion appears in the preamble for this final rule.) This holding is based on 36 CFR 251.50(a) which this Department agrees the courts properly interpreted.

However, the Department notes that a mineral operator who also is using NFS lands in a manner not within the scope of the statutes authorizing the regulations at 36 CFR part 228 might be subject to the special uses regulations at 36 CFR part 251, subpart B as well as 36 CFR part 228, subpart A. Yet even assuming that the operations being conducted by an operator are regulated pursuant to 36 CFR part 228 alone, the prohibitions in proposed 36 CFR 261.10(a) and (b) are applicable to the mineral operator if a provision in 36 CFR part 228 requires the operator to hold an approved operating plan as that term is defined by proposed 36 CFR 261.2.

Some respondents appear to have been confused by the retention of the reference to a ''special use authorization'' in Sec. 261.10(a) and (b) given that those provisions also refer to an ''operating plan.'' The reference to a special use authorization in proposed and final Sec. 261.10(a) and (b) does not reflect this Department's contention that mineral exploration, development and mining constitute special uses subject to 36 CFR part 251, subpart B instead of operations subject to 36 CFR part 228. Rather, the retention of the special use authorization reference reflects that fact that the prohibitions in those sections apply in two different contexts. One is the use of NFS lands by persons conducting operations pursuant to the United States mining laws subject to 36 CFR part 228, subpart A. The other independent category is use of NFS lands that constitutes a special use governed by 36 CFR par 251, subpart B. Indeed, the fact that 36 CFR 261.10(b) is being amended to reference an ''approved operating plan'' as well as a ''special use authorization'' demonstrates that the two documents are mutually exclusive. (The applicability of 36 CFR 261.10(p) is undisputable given that it solely pertains to those mineral operations for which an operating plan, as that term is defined by section 36 CFR 261.2, is required.)

Comment: Several respondents believe that the amendments to 36 CFR part 261, subpart A will deny them due process.

Response: The amendments to 36 CFR part 261, subpart A adopted by this rule do not deny locatable mineral operators due process. Miners are being given notice of the amended prohibitions by means of the rulemaking and the codification of those prohibitions in 36 CFR part 261, subpart A. The amended prohibitions clearly are tied to locatable mineral operations subject to the requirements of 36 CFR part 228, subpart A which mandate an approved plan of operations when the operations are likely to cause significant disturbance of NFS surface resources.

A citation issued pursuant to 36 CFR part 261, subpart A will not be the operator's first notice that the Forest Service believes that operations the operator is conducting require an approved operating plan. When unauthorized operations unnecessarily or unreasonably cause injury, loss or damage to surface resources, 36 CFR 228.7(b) requires the authorized officer to first serve a notice of noncompliance upon the operator. Pursuant to the requirements of the Forest Service Manual, the authorized officer then must make a reasonable effort through negotiation to secure the miner's willing cooperation in bringing the operations into compliance with 36 CFR part 228, subpart A. The Forest Service also will give the operator a reasonable opportunity to complete actions required to bring the operations into compliance with 36 CFR part 228, subpart A. If the operator disagrees with the authorized officer's decision to issue a notice of noncompliance, the operator may administratively appeal that decision utilizing the procedures in 36 CFR part 251, subpart C. Finally, an operator who is issued a Citation will receive all legally required due process procedures for the imposition of a criminal penalty when the operator appears for trial before a United States Magistrate Judge or a United States District Court Judge in accordance with

Rule 58 of the Federal Rules of Criminal Procedure.

Comment: Several respondents observed that the definition of the term ''residence'' in proposed 36 CFR 261.2 is contradictory because it lists tents and recreational vehicles among the shelters and structures that can be a residence, yet the paragraph's final clause excludes ''structures or objects used for camping'' from the definition.

Response: The Department agrees that the proposed definition is not clear. It is revised in this final rule to provide: ''Residence means any structure or shelter, whether temporary or permanent, including, but not limited to, buildings, buses, cabins, campers, houses, lean-tos, mills, mobile homes, motor homes, pole barns, recreational vehicles, sheds, shops, tents and trailers, which is being used, capable of being used, or designed to be used, in whole or in part, full or part-time, as living or sleeping quarters by any person, including a guard or watchman.'' As revised, the definition is consistent with the Department's intent.

Comment: Several respondents suggested adding metal detectors to the list of motorized equipment not requiring a plan of operation. Others suggested adding small hand operated drills and rocks saws.

Response: The definition of ''motorized equipment'' in 36 CFR 261.2 does not affect the requirements of 36 CFR part 228, subpart A which are applicable to locatable mineral operations conducted pursuant to the United States mining laws. The prefatory language in proposed 36 CFR 261.2 specifically provides that the definitions set forth in that section ''apply to this part,'' that is, 36 CFR part 261. Indeed, this definition is only relevant to two prohibitions, 36 CFR 261.18(a) and 36 CFR 261.21(b), which govern the conduct of all users of National Forest Wilderness and National Forest primitive areas, including mineral operators. The effect of the proposed amendment also appears to have been cause for great alarm to the persons who commented on the proposed rule. For these reasons, the definition of the term ''motorized equipment'' is not being amended by this final rule.

Comment: Five respondents commented that the Forest Service violated the Regulatory Flexibility Act by failing to prepare and make available for public comment a regulatory flexibility analysis on the rule's potential economic costs on heritage, individuals, development, and productivity. Additionally, those respondents stated that these violations of the Regulatory Flexibility Act also constitute a violation of the Congressional review requirements at 5 U.S.C. 801(a)(1)(B)(iii) and (iv).

Response: Prior to publishing the proposed rule in the **Federal Register**, the Office of Management and Budget (OMB) reviewed the proposed rule and determined that it was not a significant rulemaking. Consequently, the economic analysis described by the comment was not required.

Given that the Forest Service did not violate the Regulatory Flexibility Act in promulgating the proposed rule, there is no cumulative violation of 5 U.S.C. 801(a)(1)(B)(iii) and (iv).

Comment: Several respondents believe the wording of the proposed rule implies that the rule would ''override'' or ''change'' the United States mining laws and was therefore illegal. Several respondents stated that the Forest Service can not amend the United States mining laws, the Mining and Mineral Policy Act of 1970, or the Surface Resource Act of 1955 by issuing administrative rules. Four respondents stated that the Forest Service can not substitute its regulatory authority under the 1897 Organic Act for that of the United States mining laws.

Response: The Department agrees that only the United States Congress has authority to make or amend Federal laws. However, the changes to 36 CFR part 261, subpart A do not amend, change or alter any Federal laws. Nor does the proposed regulation conflict with the United States mining laws.

As discussed above, the statutory authority to regulate locatable mineral operations conducted on NFS lands that may disturb surface resources clearly both exists and has been delegated to the Sectary of Agriculture, not the Secretary of the Interior. ''[T]here can be no doubt that the Department of Agriculture possesses statutory authority to regulate activities related to mining * * * in order to preserve the national forests.'' *Clouser* v. *Espy*, 42 F.3d 1522, 1530 (9th Cir. 1994), *cert. denied sub nom. Clouser* v. *Glickman*, 515 U.S. 1141 (1995). Indeed, ''[s]ince 1897 the Secretary of Agriculture has had authority under sections 478 and 551 of Title 16 [The Organic Administration Act of 1897] to promulgate regulations concerning the methods of prospecting and mining in national forests. * * *'' *United States* v. *Richardson*, 599 F.2d 290, 292 (9th Cir. 1979).

As also discussed above, this Department has authority to adopt regulations prohibiting conduct on NFS lands and to permit the issuance of a criminal citation for the violation of those prohibitions. Responses to previous comments demonstrate that there is no reasonable basis to doubt the legality of applying the prohibitions set forth in 36 CFR part 261, subpart A to operations conducted pursuant to the United States mining laws.

For these reasons, these comments did not warrant changing the final rule.

Comment: Two respondents stated that the proposed rule violated E.O. 13132 by permitting the Forest Service to regulate locatable mineral operations taking place in waters, failing to disclose the rule's effect upon Federalism principles, and failing to consult with affected State and local officials. The commenters further asserted the Department's violation of E.O. 13132 also violates 5 U.S.C. 801(a)(1)(B)(iii) and (iv).

Response: E.O. 13132 is only applicable to rulemakings having Federalism implications which by definition are those ''regulations * * * that have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government'' (Sec. 1(a)). This rulemaking amends the list of prohibited actions involving occupancy of National Forest System lands set forth in 36 CFR 261.10. If a person commits an act prohibited by 36 CFR 261.10, that person may receive a citation pursuant to 36 CFR part 261, subpart A which initiates a criminal misdemeanor prosecution in federal court pursuant to Fed. R. Crim. P. 58. Such a prosecution does not have substantial direct effects on States, the relationship between the Federal government and the States, or the distribution of power and responsibilities among the various levels of government.''

For these reasons, in proposing or adopting the amendments to 36 CFR part 261, subpart A, the Department did not violate E.O. 13132 or cumulatively violate 5 U.S.C. 801(a)(1)(B)(iii) and (iv).

Given that the Forest Service did not violate E.O. 13132 in promulgating the proposed rule, there is no cumulative violation of Congressional reporting requirements.

Comment: One respondent claimed that the proposed rule's bonding requirement was preclusive in that a bond would be required for every mining operation regardless of size or impact level.

Response: The proposed rule does not address bonding requirements. Bonding requirements are described at 36 CFR 228.13. Indeed, as discussed above, this rule does not impose any requirement governing locatable mineral operations.

Comment: One respondent stated that the proposed rule is ''time prohibitive'' in that there are no time limits on processing either a notice of intent or a plan of operations.

Response: Nothing in the proposed rule addresses time limitations on processing notices or plans of operation, nor should it. Time limitations are addressed in the regulations at 36 CFR part 228, subpart A. Again, this rule does not impose any requirement governing locatable mineral operations.

Comment: Four respondents stated that nowhere in the history of the 36 CFR part 228, subpart A regulations (from 1974) did the Forest Service ever tell Congress that the Forest Service would ever issue a criminal citation pursuant to 36 CFR part 261 to enforce the locatable mineral regulations.

Response: Given the passage of 35 years, it is impossible to determine what representatives of the Department told representatives of Congress in connection with the promulgation of the regulations currently designated as 36 CFR part 228, subpart A. In any event, the will of an individual Congressman, or even a Congressional committee, must be distinguished from the will of Congress, as a legislative body that enacts, amends and repeals laws, usually by majority vote. Insofar as the Department's authority with respect to locatable mineral operations on NFS lands is concerned, Congress as a body passed legislation transferring to the Secretary of Agriculture the authority to administer NFS lands reserved from the public domain except as provided by the Transfer Act of 1905. Thus, the Department is charged to administer these lands under the terms of the Organic Administration Act.

Members of Congress certainly have learned of judicial decisions, including, without doubt, *United States* v. *Doremus*, 888 F.2d 630, 632 (9th Cir. 1989), *cert. denied*, 498 U.S. 1046 (1991), the first Court of Appeals decision holding that the prohibitions in 36 CFR part 261, subpart A apply to persons operating on NFS lands under the United States mining laws and 36 CFR part 228, subpart A. However, Congress as a legislative body took no action to enact legislation depriving the Department of this authority had it been Congress' intent to do so. Thus, there is no reason to suppose that Congress as a legislative body has an intent different from what it had in enacting the Organic Administration Act and the Transfer Act. As explained by the Supreme Court in *United States* v. *Grimaud*, 220 U.S. 506, 517 (1911), pursuant to that Congressional intent, the Department ''is required to make provision to protect [the forest reservations] from depredations and from harmful uses'' and ''to regulate the occupancy and use and to preserve the forests from destruction.'' The Department's promulgation of both 36 CFR part 228, subpart A and 36 CFR part 261, subpart A serve to fulfill those twin Congressional intents.

Comment: Who has the right to decide what mineral operations are ''unauthorized''?

Response: The District Ranger, not a Forest Service Law Enforcement Officer, makes the determination whether mineral operations are consistent with 36 CFR part 228, subpart A.

Comment: One respondent stated the Forest Service has no jurisdiction to administer activities conducted under the United States mining laws.

Response: Clearly, the Secretary of the Interior is statutorily charged with the administration of the United States mining laws. However, there is a difference between administering the United States mining laws and regulating locatable mineral operations conducted on NFS lands that may disturb surface resources.

United States v. *Weiss*, 642 F.2d 296, 298 (9th Cir. 1981) holds ''the Act of 1897, 16 U.S.C. 478 and 551, granted to the Secretary the power to adopt reasonable rules and regulations regarding mining operations within the national forests.'' That holding has never been meaningfully questioned by any court. Consequently, ''[t]he Forest Service may properly regulate the surface use of forest lands. While the regulation of mining per se is not within Forest Service jurisdiction, where mining activity disturbs national forest lands, Forest Service regulation is proper.'' *United States* v. *Goldfield Deep Mines Co.*, 644 F.2d 1307, 1309 (9th Cir. 1981), *cert. denied*, 455 U.S. 907 (1982). Simply put, ''there can be no doubt that the Department of Agriculture possesses statutory authority to regulate activities related to mining * * * in order to preserve the national forests. *Clouser* v. *Espy,* 42 F.3d 1522, 1530 (9th Cir. 1994), *cert. denied sub nom. Clouser* v. *Glickman*, 515 U.S. 1141 (1995).

Comment: Several respondents claimed that the Forest Service violated the Endangered Species Act (ESA) by failing to engage in formal consultation with the Department of the Interior before publishing the proposed rule. Those respondents further said that the violation of the ESA also constitutes a violation of Congressional review requirements.

Response: This rulemaking has no impact on any threatened or endangered species or the habitat of a threatened or endangered species. As discussed previously, the rule amends 36 CFR part 261, subpart A, which specifies prohibited acts whose commission by a person conducting mineral operations pursuant to 36 CFR part 228 may result in that person being charged with committing a misdemeanor. However, 36 CFR part 261, subpart A does not create the underlying requirements whose violation that subpart prohibits. Rather, those circumstances requiring an approved operating plan are set forth in the subpart of 36 CFR part 228 applicable to the mineral operations in question. The ESA consequently imposes no obligation upon the Forest Service to engage in formal consultation before the agency receives a proposed plan of operations from a miner. Given that the Forest Service did not violate the ESA in promulgating the proposed rule, there is no cumulative violation of Congressional review requirements.

Comment: A number of commenters contend that the Forest Service's adoption of the amendments to 36 CFR part 261, subpart A will violate Executive Order 12630 which requires Federal agencies to avoid interference with private property rights. The respondents believe that such interference will arise from the Forest Service's plan to use the amendments to prohibit occupancy of NFS lands which they further expect will be implemented without meaningful administrative notice and opportunity for a hearing. They also point to the rule's supposed preclusion of the use of motorized mining equipment for small scale mining operations as another prohibited interference with their property rights. Finally, the commenters see such interference resulting from the Forest Service's asserted intention to require a bond for all small scale mining operations. The commenters further say that the violation of the E.O. also will constitute a violation of 5 U.S.C. 801(a)(1)(B)(iii) and (iv).

Response: Nothing in the proposed or final rule reflects a Forest Service intention, desire or policy to prohibit ''mining occupancy''. Nor does the rule address, or purport to address, bonding requirements for locatable mineral operations or the use of motorized equipment during such operations. Moreover, as discussed above, it is plain on the face of proposed and final Sec. 261.10(a), (b) and (p) that those prohibitions do not add to the regulatory requirements applicable to persons subject to 36 CFR part 228. Rather, the amendments to 36 CFR part 261, subpart A provide for criminal prosecution of miners who violate critical requirements governing mineral

operations set forth at 36 CFR part 228, subpart A. (In actuality, the amendments adopted by this rulemaking do not work to halt prohibited aspects locatable mineral operations. The amendments simply serve to deter persons from committing the prohibited acts, and to provide for the criminal enforcement of the prohibitions should deterrence fail.)

More fundamentally, the proposed amendments to 36 CFR part 261, subpart A can have no effect on any person conducting mining operations who complies with the requirements of 36 CFR part 228, subpart A. This fact itself disposes of the claim that the amendments to 36 CFR part 261, subpart A will take the property of miners because a person has no constitutionally protected right to commit illegal acts. Imposing criminal penalties for conducting illegal operations consequently does not take miners' property.

Comment: Four respondents provided a series of citations of the U.S. Code, along with narrative comments addressing rights granted under the United States mining laws. The comments center around the legality of the Forest Service proposing the regulatory clarifications as published in the **Federal Register** on May 10, 2007. The respondents state that the amendments ''*are prohibitive and not merely regulatory*'' and therefore are unlawful. The four respondents view the changes as an attempt to modify laws that Congress has enacted.

Response: The Forest Service has a clear and substantial responsibility to regulate the occupancy and use of NFS lands, including those lands used for activities conducted under the United States mining laws, as amended. The Forest Service fulfills this responsibility by working with prospectors and miners to comply with the locatable mineral regulations at 36 CFR part 228, subpart A. It follows that prospectors and miners who are not complying with the regulations and are conducting activities without authorization, when it has been determined that such authorization is needed, must be prevented from violating the locatable mineral regulations. As a result, the 36 CFR 261.10 ''Prohibitions'' define the occupancy and uses that are in deed, prohibited activities on NFS lands.

In the background discussion published in the **Federal Register** on May 10, 2007, it was explained that the Forest Service has two enforcement options, civil and criminal. The proposed regulatory clarification addresses only the criminal enforcement course of action. The regulation does not ''make miners criminals''; it is a legal course of action to enforce activities that fall within the locatable mineral regulations. In some cases, the Forest Service must initiate legal action to obtain compliance with the locatable mineral regulations.

As an example, if an operator intends to construct a permanent structure on NFS land in connection with some mining activity and the District Ranger determines this activity requires an approved plan of operation pursuant to 36 CFR 228.4(a), then the operator is ''prohibited'' from constructing such a structure until obtaining an approved Plan of Operation. If the operator began such unauthorized construction, the Forest Service, could issue the operator a criminal citation under the final rule for conducting a prohibited activity on NFS lands. Alternatively and depending on the facts of the case, the Forest Service could seek to obtain the operator's compliance through a civil procedure by bringing an enforcement case in civil court.

Comment: One person suggested that the amendments to 36 CFR part 261, subpart A, will discourage small operators from seeking approval of a plan of operations under 36 CFR part 228, subpart A. The individual identified the disincentive as he perceives it: An operator's admission that a plan of operations is required subjects the operator to the risk of fines and imprisonment if the operator simply runs a vehicle, generator, or other basic machinery before the Forest Service approves a plan of operations pursuant to 36 CFR 228.5, completely detailing permitted work.

Response: The regulations at 36 CFR part 228, subpart A specify when a plan of operation is necessary and describe the type of information that must be submitted to the District Ranger. The regulations at 36 CFR part 261, subpart A, do not address when a plan of operation is needed or what information the operator is required to submit.

Comment: Several respondents stated that they view the amendments to 36 CFR part 261, subpart A, under consideration as a Forest Service attempt to stymie multiple use of NFS lands by stopping mining.

Response: Under the Multiple-Use Sustained-Yield Act of 1960, renewable surface resources are to be managed as multiple uses. 16 U.S.C. 529. Mineral development is not a multiple use of NFS lands. 16 U.S.C. 528. But this does not mean development of minerals resources has no role on NFS lands. In 16 U.S.C. 528, Congress provided that ''[n]othing herein shall be construed so as to affect the use or administration of the mineral resources of national forest lands * * *''. Thus, the amendments to 36 CFR part 261, subpart A will have no effect on the Department's charge to administer NFS lands for multiple use.

Comment: Some respondents stated that use of criminal enforcement options was contrary to the Mining and Mineral Policy Act of 1970, which promoted terms later adopted as part of the Forest Service Minerals and Geology Program Policy of ''*fostering and encouraging the private development of the Nation's mineral wealth*''.

Response: It is a misunderstanding of the Mining and Minerals Policy Act of 1970 to conclude that enforcing the requirements of 36 CFR part 228, subpart A on NFS lands is contrary to the Act or the corresponding Forest Service policy. Having the option to criminally enforce 36 CFR part 228, subpart A when a miner fails or refuses to minimize the adverse environmental impacts of the miner's operations or when an operator is using NFS lands for purposes that are not reasonably incidental to appropriate locatable mineral prospecting, exploration, development, mining, processing, reclamation, or closure does nothing to ''foster and encourage'' responsible mineral development.

The Forest Service would shirk its statutorily assigned mandate to preserve National Forests if it countenanced non-compliant mineral operations under the guise of ''fostering and encouraging'' mineral development. As discussed above, the Act establishes that the nation is served by Forest Service regulation of mineral operations as provided for by 36 CFR part 228, and to enforce those regulations.

Comment: A respondent expressed the opinion that 36 CFR 261.10(p), should be revised to provide that some types of mineral related activities do not require either a special use authorization under 36 CFR part 251, subpart or an approved operating plan pursuant to 36 CFR part 228.

Response: The Department does not agree with this suggestion. As proposed, 36 CFR 261.10(p) prohibits ''[u]se or occupancy of National Forest System lands or facilities without an approved operating plan when such authorization is required.'' This language leaves no doubt that there are mineral operations for which an approved plan of operations is not required.

Nor does the Department agree that Sec. 261.10(p) needs to address the fact that mineral operations do not require a special use authorization. The inapplicability of the special uses regulations at 36 CFR part 251, subpart B, to mineral operations subject to 36

CFR part 228 is explicitly stated by 36 CFR 251.50(a). This issue is also discussed extensively in the preamble.

For this reason, no change was made in final Sec. 261.10(p) in response to this comment.

Comment: Where is ''significant surface disturbance'' defined?

Response: The term ''significant surface disturbance'' appears in final Sec. 261.10(a) among a listing of prohibited actions with respect to certain uses of NFS lands without an ''approved operating plan when such authorization is required. It refers to the ground disturbance resulting from a ''significant disturbance of NFS surface resources'' for purposes of 36 CFR part 228, subpart A.

Significant surface disturbance is a site-specific term and the responsibility for making the determination of what disturbances are likely to be ''significant'' to the environment belongs to the District Ranger. According to published response to public comments in the final rule dated June 6, 2005, the District Ranger uses past experience, direct evidence, or sound scientific projection to determine whether a proposed impact is likely to cause a significant surface disturbance.

Comment: Four respondents appear to read the proposed change as an outright prohibition on mine access or occupancy and conclude that the changes will materially interfere with existing rights to access under the United States mining laws.

Response: As discussed above, the amendments to 36 CFR part 261, subpart A being adopted by this rulemaking do not establish requirements governing mineral operations. The amendments merely provide an avenue for the Forest Service to use the criminal judicial process to bring mineral operations that are not in compliance with the requirements set forth in the applicable subpart of 36 Code part 228. Those regulations continue to provide the regulatory framework for operators to use and occupy NFS lands for mining purposes, and reasonably incidental uses while minimizing adverse environmental impacts (See 36 CFR 228.1 and 228.3(a)).

Comment: A mining district stated its interest pertains directly to how the amendments would be applied to mining operations and reasonably incidental uses of the NFS that normally do not require prior approval pursuant to 36 CFR 228.4(a). They note that these operations typically include *prospecting, small-scale mining, and suction dredge mining*.

Response: Proposed Sec. 261.10(a), (b) and (p) specifically prohibits conduct not provided for by an operating plan ''*when such authorization is required*.'' As discussed extensively above, operations not requiring an operating plan as that term is defined by Sec. 261.2 are not subject to 36 CFR part 261. Thus, the prohibitions in Sec. 261.10(a), (b), and (p) do not apply when an operator is conducting operations which do not require an operating plan.

For example, if an operator intends to conduct prospecting activities such as panning and hand-sluicing and, providing it is reasonably incidental, to camp on site for some period of time, then a Plan of Operations would not be required under 36 CFR 228.4 unless those operations are likely to cause significant disturbance of surface resources. If the level of locatable mineral prospecting, exploration, development, mining or processing, and reasonably incidental activities do not trigger the need for prior notice or prior approval under 36 CFR part 228, subpart A, then 36 CFR part 261, subpart A would not apply to those operations because they do not require an approved plan of operations.

Comment: A respondent claims Forest Service wishes to presume regulatory authority, in the form of requiring approved plans of operations, for all prospecting and/or small-scale mining activities and camping in connection with such activities that last longer than the undefined term ''temporary.''

Response: The proposed rule to amend 36 CFR part 261, subpart A sets forth prohibited acts whose commission by a person conducting mineral operations pursuant to 36 CFR part 228 may result in that person being charged with committing a misdemeanor. The prohibitions forbid specified acts without an ''approved operating plan when such authorization is required.'' However, the amendments do not specify any circumstance in or for which persons conducting mineral operations must obtain an approved operating plan. Rather, those circumstances requiring an approved operating plan are set forth in the subpart of 36 CFR part 228 applicable to the mineral operations in question. The sole function of the provisions in the amendments is to attach a consequence, a possible criminal sanction, to a person's failure to comply with 36 CFR part 228 provisions requiring that person to hold an approved operating plan. Thus, provisions in the subparts of 36 CFR part 228 create enforceable duties while provisions in the amendments authorize criminal enforcement for violating a few of those enforceable duties.

Comment: Respondents want to know how adoption of the proposed amendments will affect camping, or occupancy of NFS lands which does not represent conventional notions of residing on property, in connection with small-scale mining and prospecting activities.

Response: The scale of residence generally is not relevant to the application of 36 CFR part 261, subpart A. However, there is an exception insofar as residence involving permanent structures is concerned. Over time, the requirement that maintenance or other use of a permanent structure on NFS lands by an operator must be authorized by an approved plan of operations has been judicially recognized. Thus, even if occupancy of NFS lands involving a permanent structure is reasonably incidental to locatable mineral prospecting, exploration, development, mining or processing, it invariably requires a plan of operations. Thus, an operator's failure to obtain an approved plan of operations before conducting operations on NFS lands that will involve a permanent structure clearly would violate Sec. 261.10(b) because those operations clearly require prior submission and approval of a plan of operations. Any other form of camping or use of NFS lands for living or sleeping quarters will be analyzed in the manner discussed in detail in response to previous comments.

Comment: A few respondents seek an explanation for the presence of the terms ''temporary'' and ''permanent'' in proposed Sec. 261.2, the definition of ''residence.'' They express their belief that these terms reflect the Forest Service's obvious intent to require miners to obtain approval in order to camp on NFS lands in conjunction with locatable mineral operations for a period longer than the local stay limit. They also speculate that the Forest Service intends to prosecute criminally miners who camp for periods in excess of the stay limit without obtaining such approval.

Response: The primary reason for distinguishing residence on the basis of its permanence relates to United States efforts to combat attempted occupancy trespass on NFS lands under the color of the United States mining laws. By occupancy trespass, the Department refers to attempts to justify structures on NFS lands on the grounds that they are reasonably incidental to bona fide operations under the United States mining laws when their intended purpose is a weekend cabin, a summer

or hunting camp, and even full-time residences and the proposed operations are merely a ruse. Residential occupancy trespass is a pervasive problem on Federal lands. The magnitude of this and other abuses of the United States mining laws led to the enactment of the Surface Resources Act, as the BLM noted in the preamble for 43 CFR part 3710, subpart 3715.

''[B]y the 1950's it had become clear that widespread abuse of the general mining law was taking place. People were locating mining claims who either had no intention of mining or who never got around to it. Some of the uses taking place on unpatented claims included permanent residences, summer homes, townsites, orchards, farms, a nudist colony, restaurants, a rock museum, a real estate office, hunting and fishing lodges, filling stations, curio shops and tourist camps. To deal with this, Congress passed the Surface Resources Act of 1955 (69 Stat. 367, 30 U.S.C. 601–615), which included a provision that any unpatented mining claim may not be used for purposes other than prospecting, mining or processing operations and reasonably incident uses.'' (61 FR 37116 (July 16, 1996))

As noted in the previous response, the courts have recognized that an approved plan of operations is invariably required where operations will involve maintenance or other use of a permanent structure on NFS lands.

The Department should not be understood to suggest that actions involving a permanent structure can never be reasonably incident to bona fide locatable mineral operations. When intensive operations are proposed in a very remote area where there is no private land in reasonable proximity to a mining claim, an operator's construction and use of a permanent residence certainly could be reasonably incidental to the proposed mining. Nonetheless, even in this case, the Department considers requiring prior approval of permanent structures essential to discharging the Forest Service's duty to protect and preserve NFS lands given the magnitude and duration of the disturbance of surface resources usually associated with residential occupancy of NFS lands.

To the extent that respondents fear the Forest Service might cite an operator who is camping on NFS for the operator's failure to submit a notice of intent to operate when one is required, those fears are groundless. None of the prohibitions set forth in 36 CFR part 261, subpart A, including those adopted by this final rule, prohibit an action requiring a notice of intent to operate. Rather, the prohibitions applicable to occupancy of lands in conjunction with locatable mineral operations that require prior notice or approval apply when an operator acts ''without * * * an operating plan when such authorization is required.'' For purposes of 36 CFR part 228, subpart A, Sec. 261.2 defines the term ''operating plan'' to mean a plan of operations that has been approved. There is no prohibition applicable to acting without a notice of intent to operate when it is required by 36 CFR part 228, subpart A.

Absent extraordinary circumstances such as conducting operations on withdrawal lands or within areas of NFS lands or waters known to contain Federally listed threatened or endangered species or their designated critical habitats it would be very unusual for a plan of operations to be triggered simply because a miner proposes to occupy lands using a temporary shelter or structure. However, a plan of operations easily could be triggered by the cumulative effect of proposed locatable mineral prospecting, exploration, development, mining, or processing in combination with reasonably incidental occupancy of NFS lands using a temporary shelter or structure.

Note, however, it is the effects associated with the occupancy of NFS lands for living or sleeping quarters that determines the need for an approved plan of operations, not whether it exceeds the local stay limit. Of course, the duration of such occupancy could have a bearing on the effects of that occupancy. But the duration of such occupancy per se does not determine the need for an operator to submit a notice of intent to conduct operations or submit and obtain approval of a proposed plan of operations.

Moreover, nothing in the proposed or final definition of residence appearing in Sec. 261.2 nor in the proposed or final text of Sec. 261.10(a), (b) or (p) requires an operator to submit and obtain approval of a plan of operations to camp longer than permitted by a Forest Order. Nor is this rulemaking prompted by an intent to require mineral operators to comply with the camping limits published in the Forest Orders.

Pursuant to 36 CFR 228.4, an operator's need to submit a plan of operations arises when the operator reasonably expects or is uncertain whether the proposed operations, including reasonably incidental occupancy of NFS lands, is likely to cause significant surface disturbance. Alternatively, if the District Ranger determines that an operation is causing or is likely to cause significant disturbance of NFS surface resources, the district ranger can require an operator to submit and obtain approval of a plan of operations pursuant to 36 CFR 228.4(a)(4).

However, there is a more fundamental issue concerning the acceptability of occupancy of NFS lands for living or sleeping quarters: Whether that occupancy is reasonably incidental and necessary for the type, duration and stage of the proposed mining operations themselves. If locatable mineral prospecting, exploration, development, mining or processing is absent or not robust, that activity might not justify any, or more than limited, residency on site. If so, residence exceeding this level is not an operation for purposes of 36 CFR 228.3 which is authorized by the United States mining laws. In this circumstance, residence exceeding the reasonably incidental level constitutes a special use and is subject to the applicable stay limit.

Comment: One respondent suggests revising the definition of the term ''motorized equipment'' which appears in proposed Sec. 261.2. The respondent proposes defining the term as mining equipment able to move more than 20 yards of material per operational hour. The respondent also proposes that the definition note that suction dredges that move less than 20 yards of material are not mechanized earthmoving mining equipment.

Response: As discussed above, the final rule does not alter the definition of the term ''motorized equipment'' which currently appears in 36 CFR 261.2.

Comment: Several respondents who stated that their locatable mineral operations are recreational or a hobby, observed that most miners and prospectors respect the land and do not ''damage'' it.

Response: The Department agrees that most miners and prospectors respect the land and do not intend to affect surface resources adversely. Occasionally, miners and prospectors unintentionally cause such effects and are responsive when Forest Service employees seek changes in their mining practices. Unfortunately, some prospectors and miners who are adversely affecting surface resources refuse to work with the Forest Service to minimize those impacts. This rulemaking provides a means for the Department to enforce the requirements of 36 CFR part 228, subpart A, in situations where the Forest Service is unable to obtain the miner's willing compliance with those rules and excessive adverse environmental effects result. The proposed clarification to the regulation will address the criminal enforcement options available to the Forest Service to bring unauthorized occupancy and use into compliance with the locatable

mineral regulations. The proposed rule does not affect activities that are in compliance with the locatable mineral regulations.

Comment: Two respondents said that the Forest Service, in promulgating the proposed rule, violated E.O. 12866 by failing to make a required disclosure as to the effect of the rule on the Federal budget. Those respondents further stated that this violation of the E.O. also constitutes a violation of Congressional reporting requirements.

Response: The respondents did not cite the applicable provision of E.O. 12866 which they believe requires ''disclosures concerning whether the proposed rule represents a government action that would significantly effect the Federal budget'' and the E.O. does not use the term ''Federal budget'' or any obvious synonym. The only provision in the E.O. to which the respondents might be referring appears to be Sec. 6(a)(3)(C)(ii) which requires ''an assessment * * * of costs anticipated from the regulatory action (such as, but not limited to, the direct cost * * * to the government in administering the regulation * * *).'' However, such an assessment only is required ''for those matters identified as, or determined by the Administrator of OIRA to be, a significant regulatory action. * * *'' (Sec. 6(a)(3)(C)).

The Administrator of the Office of Information and Regulatory Affairs of the OMB found that the proposed rule for 36 CFR 261.10 was non-significant for purposes of E.O. 12866. Thus, the assessment mandated by Sec. 6(a)(3)(C)(ii) of the E.O. was not required for the proposed rule.

Given that the Forest Service did not violate E.O. 12866 in promulgating the proposed rule, there is no cumulative violation of Congressional reporting requirements.

Comment: A respondent asked how many serious problems really exist with mineral operators right now that cannot be managed with the civil remedies. The respondent also asks whether there would be an additional cost in relying upon the existing civil remedy, rather than a penal remedy which requires the United States to meet the burden of proving there is a violation of Sec. 261.10(a), (b) or (p) beyond a reasonable doubt.

Response: The respondent infers that only ''mineral operators'' are subject to the Part 261 prohibitions and this final rule. However, the prohibitions generally apply to all persons who use NFS lands. Practically speaking, the Department believes the amended prohibitions will have little or no effect on the large majority of legitimate locatable mineral operators who are complying with the requirements of both the United States mining laws and the regulations governing those operations set forth at 36 CFR part 228, subpart A. These conclusions are based upon the fact that the amendments to Sec. 261.10(a) and (b) prohibit specified actions without an ''approved operating plan when such authorization is required'' pursuant to 36 CFR part 228.

Comment: Respondents asserted that this rulemaking could not affect maintenance work on roads constructed before 1976 in accordance with 43 U.S.C. 932 (1938), which is commonly known as ''R.S. 2477'' and was repealed by Federal Land Policy and Management Act of 1976, § 704(a), 90 Stat. 2743, 2792 (1976).

Response: Given that work on R.S. 2477 roads is not an operation subject to 36 CFR part 228 and does not involve residence on National Forest System lands, this comment is beyond the scope of this rulemaking. For this reason, the rule was not changed in response to this comment.

Comment: A number of commenters asserted that as a matter of law, unauthorized occupancy does not exist if that occupancy occurs with mining operations, regardless of the type of mining operations, as long as a prudent prospector or miner requires that occupancy for the mining operations.

Response: The commenters' understanding of the law is incorrect. Occupancy of National Forest System lands is not analyzed in a vacuum. By definition, uses of National Forest System lands that are reasonably incidental to locatable mineral prospecting, exploration, development, mining or processing are a component of locatable mineral operations (36 CFR 228.3(a)). Assuming that proposed operations, including all reasonably incident uses, will likely cause a significant disturbance of surface resources, they must be authorized by an approved plan of operations before those operations commence (36 CFR 228.4(a)(2) through (a)(4)).

The United States Court of Appeals for the Ninth Circuit has consistently rejected miners' arguments that reasonably incidental uses of National Forest System lands are not subject to regulation by the Forest Service. *United States* v. *Doremus*, 888 F.2d 630, 633 n.2 (9th Cir. 1989), *cert. denied*, 498 U.S. 1046 (1991) was the first decision to do so. It was followed by *United States* v. *Campbell*, 42 F.3d 1199, 1203 (9th Cir. 1994) in which the Ninth Circuit held:

> In *United States* v. *Doremus*, 888 F.2d 630 (9th Cir. 1989), two miners cut timber on National Forest lands without an approved plan of operations. We upheld their convictions for damaging ''any natural feature or other property of the United States'' 36 CFR 261.9(a) (1987). We rejected the argument, raised by Campbell on this appeal, that in order to prosecute the government must first prove that the unauthorized logging was not ''reasonably incident'' to legitimate mining operations under 30 U.S.C. 612. Here, as in *Doremus*, ''[t]he flaw in appellant's argument is that 30 U.S.C. 612 does not authorize mining operators to act without Forest Service approval, and the operating plan did not authorize the cutting of live trees.'' *Id.* at 635.

Doremus was also cited with approval in *Clouser* v. *Espy*, 42 F.3d 1522, 1530 (9th Cir. 1994), *cert. denied sub nom. Clouser* v. *Glickman*, 515 U.S. 1141 (1995). ''In reaffirming the Forest Service's authority to regulate mining, the *Doremus* court rejected a miner's contention that conduct 'reasonably incident[al]' to mining could not be so regulated. *Doremus*, 888 F.2d at 632.'' *Id.*

For these reasons, no change has been made in the final rule in response to these comments.

Comment: Several respondents said the Department violated the Congressional Review Act, 5 U.S.C. 801(a)(1)(A), by failing to submit the proposed rule to amend 36 CFR part 261, subpart A to the Administrator of the Office of Information and Regulatory Affairs of the Office of Management and Budget for a determination as to whether the rule, if ultimately adopted, would be a major rule as defined by 5 U.S.C. 801(a)(1)(A)(i), 804(2). The commenter insists that the rule clearly would be a major rule for purposes of the Congressional Review Act because it would have an annual effect on the economy of $100,000,000 and meet other criteria in the Act's definition of the term ''major rule.'' 5 U.S.C. 804(2) The commenter also maintains the Department violated the Act by failing to submit required reports on the proposed rule to each House of Congress and the Comptroller General.

Response: The statute to which the respondent refers, 5 U.S.C. 801–808, is officially titled the Small Business Regulatory Enforcement Fairness Act of 1996 but often is referred to as the Congressional Review Act.

As discussed in response to a previous comment, before the proposed rule was published in the **Federal Register**, the Administrator of the Office of Information and Regulatory Affairs of the Office of Management and Budget reviewed the proposed rule and determined that it was not a significant rulemaking because it would not have an annual effect on the economy of at

least $100,000,000. Consequently, this rule as proposed and as adopted is not a major rule for purposes of 5 U.S.C. 801(a)(1)(A)(i), 804(2). When the final rule is published, reports will be sent to Congress and the GAO as required by SBA.

For these reasons, the Department has not violated the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 801–808 in publishing the proposed rule or adopting the final rule.

Comment: Several respondents claimed that the proposed rule was vague and standardless.

Response: It is not our desire to produce a rule that is vague or standardless. The consequence is that the rule would not be enforceable. However, only the judicial branch of government can conclusively resolve the question of the proper interpretation of any rule or decide whether a rule is impermissibly vague.

Comment: One respondent faulted the Department for its failure to comply with the Administrative Procedure Act (APA), 5 U.S.C. 553(b), by giving public notice and providing an opportunity for comment before this Department ''implement[ed] the Proposed Rule * * *,'' that the respondent asserts is a substantive rule. The commenter said this Department's violation of the APA also violates the Small Business Regulatory Enforcement Fairness Act's requirements at 5 U.S.C. 801(a)(1)(B)(iii) and (iv).

Response: The Department agrees that the regulations under consideration in this rulemaking primarily are substantive rules for purposes of the APA, 5 U.S.C. 553(b). The Department also agrees this rulemaking is subject to 5 U.S.C. 553(b) and (c) because there is not good cause to find those procedures ''impracticable, unnecessary, or contrary to the public interest'' and the Department voluntarily partially waived the Act's notice and comment procedures for rulemakings such as the instant one involving ''public property.'' (36 FR 13804 (Jul. 24, 1971))

The proposed rulemaking complying with the Act's requirements to give ''[g]eneral notice of proposed rulemaking * * * published in the **Federal Register** including a statement of the ''nature of the public rule making proceedings; * * * the legal authority under which the rulemaking is proposed; and * * * the terms or substance of the proposed rule * * *'' (5 U.S.C. 553(b)) is the one published at 72 FR 26578–80 (May 10, 2007). The Department also complied with the Act's requirements to ''give interested persons an opportunity to participate in the rulemaking through submission of written data, views, or arguments'' (5 U.S.C. 553(c)) as evidenced by the respondent's comments. After considering all such comments, this Department is promulgating this final rule in accordance with 5 U.S.C. 553(c).

The respondent's uncertainty as to the nature of this rulemaking may stem from another rulemaking this Department undertook several years ago. There, the rulemaking was initiated by promulgation of an interim rule which took effect 30 days after its **Federal Register** publication (69 FR 41428) given the Department's conclusion that the earlier rulemaking was not subject to the APA's requirements for prior notice and opportunity for public comment (69 FR 41429). However, the current rulemaking, which is subject to those requirements, was initiated by publication of a proposed rule that has not taken effect (see 72 FR 26578–80).

For these reasons, neither the proposal or the adoption of the amendments to 36 CFR part 261, subpart A violated the APA or, cumulatively, 5 U.S.C. 801(a)(1)(B)(iii) and (iv).

Comment: One commenter said this rule is substantive because it will substantially change 36 CFR parts 228, 250 and 261. The commenter asserted that the Forest Service failed to acknowledge that this rule will effectively cancel or void 36 CFR part 228 and 36 CFR 251.50(a).

Response: The Department agrees that the rule is substantive and this point is discussed in more detail in the response to a comment concerning the applicability of the Administrative Procedure Act to the rule. Other comments also contain detailed explanations of the reasons why this rulemaking has not effect on 36 CFR part 228 and 36 CFR 251.50(a), 36 CFR part 228 and 36 CFR 251.50(a).

Comment: One respondent said the amendments to 36 CFR part 261, subpart A are tantamount to requiring a new and different collection of information in the form of either a notice of intent to conduct operations or a plan of operations from everyone conducting locatable mineral operations on NFS lands. Accordingly, the respondent believes that the Forest Service violated the Paperwork Reduction Act of 1995, 44 U.S.C. 3501–3520, by failing to obtain OMB Control Numbers for these collections of information. The respondent asserts the violation's consequence is locatable mineral operators cannot be cited or penalized under 36 CFR part 261, subpart A rendering the amendments to 36 CFR part 261, subpart A and 36 CFR 228.4 unenforceable.

Two other respondents said it was possible that the Forest Service will violate the Paperwork Reduction Act if the agency has not obtained an OMB Control Number for the amended definition of the term ''operating plan'' to be set forth in 36 CFR 261.2 given that definition's inclusion of plans of operation required by 36 CFR 228.4.

Response: As previously noted, the amendments to 36 CFR part 261, subpart A do not alter the requirements applicable to persons conducting mineral operations on NFS lands pursuant to 36 CFR part 228. The function of the amendments is two-fold. They authorize criminal enforcement for selected serious violations of the regulations governing mineral operations, 36 CFR part 228. They also provide the public notice of actions prohibited on NFS lands whose commission can lead to the criminal prosecution of the person or an organization who violated a prohibition. No collection of information subject to the Paperwork Reduction Act is required by 36 CFR part 261, subpart A currently, or as it will be amended.

Moreover, the Paperwork Reduction Act specifically provides that it does ''not apply to the collection of information * * * during the conduct of a Federal criminal investigation or prosecution, or during the disposition of a particular criminal matter.'' 44 U.S.C. 3518(c)(1)(A). A citation issued by a Forest Service official pursuant to 36 CFR part 261, subpart A is the charging document which initiates a criminal prosecution, in accordance with FED. R. CRIM. P. 58. Consequently, even if the amendments were found to contain a collection of information, the Paperwork Reduction Act unquestionably would not govern those amendments given their function in criminal prosecutions.

For these reasons, in proposing, adopting and administering the amendments to 36 CFR part 261, subpart A, the Department did and will not violate Paperwork Reduction Act and the Act will not shield anyone who commits a prohibited act.

Comment: Commenters said the adoption of definition of the term ''operating plan,'' a catch-all term, in Sec. 261.2 coupled with the definition's inclusion of a plan of operations for purposes of 36 CFR part 228, subpart A violates the ''Right to Privacy Act'' and possibly the Paperwork Reduction Act.

Response: The respondent's comments concerning the Privacy Act and the Paperwork Reduction Act are too general to permit a detailed response. Neither statute is applicable to

this rulemaking. The Paperwork Reduction Act is discussed in more detail in response to a specific comment above.

Comment: Two respondents contend that the Forest Service's publication of the proposed rule violated Subchapter II of the Unfunded Mandates Reform Act of 1955, 2 U.S.C. 1531–38. They maintain the proposed rule would have an impact on the private sector of more than 100 million dollars per year triggering preparation of a statement required by 2 U.S.C. 1532, consultation with affected State, local and tribal governments pursuant to 2 U.S.C. 1534, and consideration of regulatory alternatives to the rule pursuant to 2 U.S.C. 1535. Those respondents further asserted that the Department, by violating the Unfunded Mandates Reform Act, in turn, violated 5 U.S.C. 801(a)(1)(B)(iii) and (iv).

Response: A written statement under 2 U.S.C. 1532 is required when an agency publishes a general notice of proposed rulemaking that is likely to include a Federal mandate that may cause expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more in any 1 year * * *'' The Act recognizes two types of ''federal mandates'' (2 U.S.C. 658(6)), a ''Federal intergovernmental mandate'' and a ''Federal private sector mandate'' as defined by 2 U.S.C. 658(5), 658(7), respectively.

The amendments do not create a Federal intergovernmental mandate for purposes of 2 U.S.C. 658(5) because they will not impose enforceable duties upon any State, local, or tribal government (2 U.S.C. 658(5)(A)(i)) and they do not relate to a then-existing Federal program under which $500,000,000 or more is provided annually to State, local, and tribal governments under entitlement authority * * *'' (2 U.S.C. 658(5)(B)). Nor do the amendments create a Federal private sector mandate for purposes of 2 U.S.C. 658(7) because they will not impose enforceable duties upon anyone in the private sector (2 U.S.C. 658(7)(A)) and they do not ''reduce or eliminate the amount of authorization of appropriations for Federal financial assistance that will be provided to the private sector for the purposes of ensuring compliance with'' an enforceable duty the adopted regulation imposes on the private sector (2 U.S.C. 658(7)(B)). For these reasons, the amendments to 36 CFR part 261, subpart A do not contain a Federal mandate (2 U.S.C. 658(6)).

Consequently, the requirements to prepare a written statement and to seek input from elected officers of State, local, and tribal governments set forth at 2 U.S.C. 1532 and 1534, respectively, were not applicable because the proposed rulemaking was not likely to result in promulgation of any rule that includes a Federal mandate. In turn, the requirement set forth at 2 U.S.C. 1535 and to consider regulatory alternatives to the amendments to 36 CFR part 261, subpart A, was not applicable because it is dependent upon a written statement being required pursuant to 2 U.S.C. 1535(a).

For these reasons, in publishing the proposed rule, the Department did not violate the Unfunded Mandates Reform Act, or cumulatively violate 5 U.S.C. 801(a)(1)(B)(iii) and (iv).

Comment: Several respondents said that the Forest Service violated the National Environmental Policy Act (NEPA) by failing to prepare an environmental impact statement (EIS).

Response: The respondents' assertion that an EIS was required for the promulgation of the proposed rule is solely predicated upon the conclusion that the rule's promulgation was a major Federal action which, under NEPA, requires the preparation of an EIS. However, NEPA requires the preparation of an EIS only for those major Federal actions significantly affecting the quality of the human environment (42 U.S.C. 4332(2)(C)) and does not require an EIS for a major action which does not have a significant impact on the environment. *Sierra Club* v. *Hassell*, 636 F.2d 1095, 1097 (5th Cir. 1981); *Cf. Marsh* v. *Oregon Natural Resources Council*, 490 U.S. 360, 374 (1989).

The respondents do not identify or describe the significant environmental impacts they believe resulted from promulgation of the proposed rule. In fact, the proposed rule has no impact on the human environment. For these reasons, NEPA did not require the preparation of an EIS prior to the promulgation of the proposed rule. As noted below, this rule is categorically excluded from the requirements of additional NEPA documentation.

Comment: Several respondents stated the Forest Service violated NEPA by failing to use reliable methodology.

Response: The respondents did not explain why they believe that the Forest Service used unreliable methodology in promulgating the proposed rule. In fact, the totality of the respondents' description of this issue consists of the statement that ''[t]he Proposed rule fails to use reliable methodology in violation of NEPA and its implementing regulations.''

The Department's review of the proposed rule identified no instance where unreliable methodology was used in the rule's promulgation.

Comment: Several respondents said that the Forest Service violated NEPA by failing to conduct scoping on the rule.

Response: Scoping is the process by which the agency determines what, if any, environmental issues are presented by a proposed action and how best to involve the public in that process. Here, the agency has given public notice of the proposed rule and received comments from the public on all aspects of the proposal. In such cases, the scoping function is conducted through the rulemaking process.

Comment: Two respondents commented that the Forest Service failed to solicit comment on the proposed rule from Western Governors which violates the spirit of the 1998 Department of the Interior and Related Agencies Appropriations Act, Public Law 105–83, § 339, 111 Stat. 1543, 1602 (1997).

Response: The cited provision of the 1998 Department of the Interior and Related Agencies Appropriations Act does not apply to this rulemaking. All interested parties have had an equal opportunity to submit comments. State and local governments regularly monitor proposed rules promulgated by the Forest Service and frequently submit comments when they believe it serves their interests.

Comment: Numerous respondents said that the proposed rule unfairly restricts entities or persons, whom the respondents characterized as mining clubs, recreational miners, hobby miners, and recreational suction dredgers. Some of the respondents also commented that the proposed rule could collapse the recreational mining industry. Other respondents said that United States mining laws authorize recreational and hobby mining.

Response: The respondents did not describe how the proposed rule would have such a drastic effect on their groups. Consequently, a specific response to this comment cannot be provided.

Nonetheless, the Organic Administration Act (16 U.S.C. 482) reapplied the United States mining laws (30 U.S.C. 22 *et seq.*) to Forest Service lands reserved from the public domain pursuant to the Creative Act of 1891 (§ 24, 26 Stat. 1095, 1103 (1891), *repealed by* Federal Land Policy and Management Act of 1976, § 704(a), 90 Stat., 2743, 2792 (1976)). Under the United States mining laws, United States citizens may enter such reserved NFS lands to prospect or explore for and remove valuable deposits of certain

minerals referred to as locatable minerals. However, no distinction between persons conducting locatable mineral operations primarily for ''recreational'' versus ''commercial'' purposes nor a difference between the requirements applicable to operations conducted for these purposes is recognized by the United States mining laws, the Organic Administration Act, 36 CFR part 228, subpart A or 36 CFR part 261, subpart A. Thus, to the extent that individuals or members of mining clubs are prospecting for or mining valuable deposits of locatable minerals, and making use of or occupying Forest Service lands for functions, work or activities which are reasonably incidental to such prospecting and mining, it does not matter whether those operations are described as ''recreational'' or ''commercial.''

One thing which often is unique insofar as functions, work, or activities are proposed by individuals, members of mining clubs, or mining clubs themselves whose interest in locatable mineral operations is primarily recreational, is that they far exceed the scope of the United States mining laws. Such functions, work, or activities that are not authorized by the United States mining laws include educational seminars, treasure hunts, and use of mining claims as sites for hunting camps or summer homes. Accordingly, a major impetus for this rulemaking culminating in the final rule being adopted is to prohibit operations conducted under the color of the mining laws that clearly are not within the scope of bona fide operations consistent with the United States mining laws. Thus, the final rule being adopted by this rulemaking applies to every person or entity conducting or proposing to conduct locatable mineral operations on Forest Service lands under the United States mining laws.

For these reasons, no change has been made in the final rule as a result of these comments.

Comment: One commenter asserted that adoption of Sec. 261.10(a), (b) and (p) would amount to a *de facto* withdrawal of National Forest System lands from the operation of the United States mining laws. The individual asserted the *de facto* withdrawal would be the consequence of the proposed rule's taking of all mining claims located on National Forest System lands.

Response: As discussed above, the amendments to 36 CFR part 261, subpart A being adopted will not substantively alter the requirements governing locatable mineral operations on NFS lands. Those requirements are set forth at 36 CFR part 228, subpart A, and in some circumstances other parts of Title 36 of the Code of Federal Regulations, not in 36 CFR part 261, subpart A. The amendments solely provide for the imposition of a penalty, in the nature of a fine, incarceration, or both, for a miner's failure to comply with requirements applicable to operator's operations by virtue of 36 CFR part 228, subpart A. Accordingly, adoption of the rule will not affect a taking of a miner's property.

The commenter's assertions concerning the purported withdrawal also are inherently inconsistent. The respondent concluded the comment on this issue by contending that the withdrawal would be void *ab initio* given that it would not comply with the procedures specified by the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1714.

Comment: One respondent claimed that hearings are required prior to revocation of state permits. He claimed that the proposed rule would revoke his California permit without good cause.

Response: The rule does not authorize or effect the revocation of any state permit.

Comment: Several respondents commented that the proposed rule is inconsistent with a National Research Council report entitled ''Hardrock Mining on Federal Lands.''

Response: The comments did not identify or describe in any manner inconsistencies between the proposed rule and the National Research Council report, whose main body is 126 pages in length. The respondents' comments only addressed the BLM's 3809 regulations, not the proposed Forest Service rule. For these reasons, no change has been made in the final rule as a result of these comments.

Regulatory Certifications

Regulatory Impact

This proposed rule has been reviewed under USDA procedures and Executive Order 12866 on Regulatory Planning and Review. It has been determined that this final rule is not significant. It will not have an annual effect of $100 million or more on the economy nor adversely affect productivity, competition, jobs, the environment, public health or safety, nor State or local governments. This proposed rule would not interfere with an action taken or planned by another agency nor raise new legal or policy issues. Finally, this action will not alter the budgetary impact of entitlements, grants, user fees, or loan programs, or the rights and obligations of recipients of such programs.

Moreover, this proposed rule has been considered in light of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), and it has been determined that this action will not have a significant economic impact on a substantial number of small entities as defined by that Act. Therefore, a regulatory flexibility analysis is not required.

Environmental Impacts

This proposed rule more clearly establishes when mineral operators can be issued a criminal citation for unauthorized occupancy and use of National Forest System lands and facilities when such authorization is required. Section 31.1(b) of Forest Service Handbook 1909.15 (57 FR 43168; September 18, 1992) excludes from documentation in an environmental assessment or environmental impact statement ''rules, regulations, or policies to establish Service-wide administrative procedures, program processes, or instructions.'' This proposed rule falls within this category of actions and no extraordinary circumstances exist which would require preparation of an environmental assessment or an environmental impact statement.

Moreover, this rule itself has no impact on the human environment. It requires mineral operations to be conducted in compliance critical provisions of the applicable subpart of 36 CFR part 228, and any operating plan governing such operations. Additionally, the rule provides that an operator's violation of the prohibitions can be enforced criminally. These functions do not have environmental consequences. Actions with the potential to have environmental consequences are those provided for by the applicable subpart of 36 CFR part 228. Therefore, the adoption of this final rule does not require preparation of an environmental assessment or an environmental impact statement.

Energy Effects

This proposed rule has been reviewed under Executive Order 13211 of May 18, 2001, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use.'' It has been determined that this proposed rule does not constitute a significant energy action as defined in the Executive Order.

Controlling Paperwork Burdens on the Public

This proposed rule does not contain any new recordkeeping or reporting requirements or other information collection requirements as defined in 5 CFR part 1320 that are not already

required by law or not already approved for use. Accordingly, the review provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) and its implementing regulations at 5 CFR part 1320 do not apply.

Federalism

The agency has considered this proposed rule under the requirements of Executive Order 13132, Federalism, and Executive Order 12875, Government Partnerships. The agency has completed an assessment finding that the final rule conforms with the federalism principles set out in these Executive orders; would not impose any compliance costs on the States; and would not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

Consultation and Coordination With Indian Tribal Governments

This proposed rule does not have tribal implications as defined by Executive Order 13175, Consultation and Coordination with Indian Tribal Governments; therefore, consultation with tribes is not required.

No Takings Implications

This proposed rule has been analyzed in accordance with the principles and criteria contained in Executive Order 12630—Government Actions and Interference with Civil Constitutionally Protected Property Rights. It has been determined that the proposed rule does not pose the risk of a taking of private property.

Civil Justice Reform

This proposed rule has been reviewed under Executive Order 12988—Civil Justice Reform. Pursuant to this final rule, (1) all State and local laws and regulations that are in conflict with the rule or that impede its full implementation are preempted; (2) no retroactive effect is given to the rule; and (3) the rule does not require administrative proceedings before parties may file suit in court to challenge its provisions.

Unfunded Mandates

Pursuant to title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538), which the President signed into law on March 22, 1995, the Forest Service has assessed the effects of this proposed rule on State, local, and tribal governments and the private sector. This proposed rule would not compel the expenditure of $100 million or more by any State, local, or tribal government or anyone in the private sector. Therefore, a statement under section 202 of the Act is not required.

List of Subjects in 36 CFR Part 261

Law enforcement, Mines, National Forests.

■ Therefore, for the reasons set forth in the preamble, amend subpart A of part 261 of Title 36 of the Code of Federal Regulations as follows:

PART 261—PROHIBITIONS

■ 1. The authority citation for part 261 continues to read as follows:

Authority: 7 U.S.C. 1011(f); 16 U.S.C. 472, 551, 620(f), 1133(c), (d)(1), 1246(i).

Subpart A—General Prohibitions

■ 2. Amend § 261.2 by revising the definition for *operating plan,* and adding a definition for *residence* to read as follows:

§ 261.2 Definitions.

* * * * *

Operating plan means the following documents, providing that the document has been issued or approved by the Forest Service: A plan of operations as provided for in 36 CFR part 228, subparts A and D, and 36 CFR part 292, subparts C and G; a supplemental plan of operations as provided for in 36 CFR part 228, subpart A, and 36 CFR part 292, subpart G; an operating plan as provided for in 36 CFR part 228, subpart C, and 36 CFR part 292, subpart G; an amended operating plan and a reclamation plan as provided for in 36 CFR part 292, subpart G; a surface use plan of operations as provided for in 36 CFR part 228, subpart E; a supplemental surface use plan of operations as provided for in 36 CFR part 228, subpart E; a permit as provided for in 36 CFR 251.15; and an operating plan and a letter of authorization as provided for in 36 CFR part 292, subpart D.

* * * * *

Residence. Any structure or shelter, whether temporary or permanent, including, but not limited to, buildings, buses, cabins, campers, houses, lean-tos, mills, mobile homes, motor homes, pole barns, recreational vehicles, sheds, shops, tents and trailers, which is being used, capable of being used, or designed to be used, in whole or in part, full or part-time, as living or sleeping quarters by any person, including a guard or watchman.

* * * * *

■ 3. Amend § 261.10 by revising paragraphs (a) and (b) and adding paragraph (p) to read as follows:

§ 261.10 Occupancy and use.

* * * * *

(a) Constructing, placing, or maintaining any kind of road, trail, structure, fence, enclosure, communication equipment, significant surface disturbance, or other improvement on National Forest System lands or facilities without a special-use authorization, contract, or approved operating plan when such authorization is required.

(b) Construction, reconstructing, improving, maintaining, occupying or using a residence on National Forest System lands unless authorized by a special-use authorization or approved operating plan when such authorization is required.

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(p) Use or occupancy of National Forest System lands or facilities without an approved operating plan when such authorization is required.

Dated: October 31, 2008.

Mark Rey,

Under Secretary, Natural Resources and Environment.

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