



DEPARTMENT OF AGRICULTURE

Forest Service

36 CFR Part 228

RIN 0596-AD32

Locatable Minerals

AGENCY: Forest Service, Agriculture (USDA).

ACTION: Proposed rule; request for public comment.

SUMMARY: The U.S. Department of Agriculture, Forest Service (Agency), is proposing to revise its regulations governing occupancy and use of the surface of National Forest System lands in connection with prospecting, exploration, development, mining, processing, and reclamation and reasonably incident uses authorized by U.S. mining laws and the Organic Administration Act of 1897. Regulatory revisions are needed to improve the efficiency and transparency of Forest Service regulation of locatable mineral operations conducted on National Forest System lands under the mining laws, and to minimize, to the fullest extent practicable, adverse impacts on surface resources. In addition, the revisions will support Federal policy to secure reliable and sustainable supplies of strategic and critical minerals in the United States.

DATES: Comments must be received in writing by **[Insert date 60 days from date of publication in the FEDERAL REGISTER]**.

ADDRESSES: Please submit comments via one of the following methods:

- Federal eRulemaking Portal: <https://www.regulations.gov>. In the search box, enter 0596-AD32, which is the RIN for this proposed rulemaking. Then, in the search panel on the left side of the screen, under the Document Type heading, click on the “Notice” link to locate this document. You may submit a comment by clicking on the “Comment” button.

- Mail: Send written comments to USDA-Forest Service, Sidney Yates Building, 1400 Independence Avenue SW, 1SE – Mailstop Code: 1124, Attn: Director-LMG Staff, Washington, DC 20250.

We request that you send comments only by the methods described above.

Comments should be confined to issues pertinent to the proposed rule, should explain the reasons for any recommended changes, and should reference the specific section and wording being addressed, where possible. All timely comments, including names and addresses when provided, will be placed in the record and will be available for public inspection and copying. Comments may be viewed on the Federal eRulemaking Portal at <https://www.regulations.gov>. In the search box, enter 0596-AD32 and click the “Search” button. Note personal information provided such as name, telephone, and mailing address provided will be included in the record.

FOR FURTHER INFORMATION CONTACT: Tracy Parker, Acting Director, Lands, Minerals, and Geology Management at 202-644-5974 or by email at tracy.parker@usda.gov. Individuals who use telecommunications devices for the hearing-impaired may call 711 to reach the Telecommunications Relay Service, 24 hours a day, every day of the year, including holidays.

SUPPLEMENTARY INFORMATION:

Background and Need

The Mining Law of 1872 (30 U.S.C. 22, *et seq.*, as amended) (hereafter referred to as the mining laws) states, “except as otherwise provided, all valuable mineral deposits in lands belonging to the United States ... shall be free and open to exploration and purchase” The mining laws originally authorized prospecting, exploration, development, mining, processing, and uses reasonably incident thereto, of all minerals on Federal lands that are open to the operation of the mining laws, including National Forest System (NFS) lands reserved from the public domain, unless they have been withdrawn

from entry and appropriation under the mining laws. Congress excluded certain public domain lands in Michigan, Wisconsin, Minnesota, Missouri, and Kansas from the operation of the mining laws. Congress subsequently amended the mining laws and provided separate authority for other methods of disposal for some mineral resources, including coal; phosphate; sodium; oil; oil shale; gilsonite; gas; sulfur occurring in the States of Louisiana and New Mexico; potassium; petrified wood and common varieties of sand, stone, gravel, pumice, pumicite, cinders and clay; and geothermal resources. Mining laws do not apply to land acquired by the United States. This includes land acquired through purchase, donation, condemnation, or exchange. Minerals from acquired lands are disposed via the Mineral Leasing Act for Acquired Lands (30 U.S.C. 351-359). Therefore, the “locatable minerals” subject to the Part 228, Subpart A regulations are those that can still be appropriated under the mining laws.

The Organic Administration Act of 1897 (16 U.S.C. 472, *et seq.*) authorized the Secretary of Agriculture to make rules to regulate occupancy and use of the land and preserve the forests from destruction. The Act also specifically declared it does not prohibit prospecting, locating, and developing mineral resources within the national forests. However, the Act requires that everyone must comply with rules and regulations covering the national forests.

In 1955, Congress passed the Surface Resources Act (30 U.S.C. 612, *et seq.*), which amended the mining laws by stating that, “... mining claims shall not be used for any purposes other than prospecting, mining, or processing operations and uses reasonably incident thereto” (30 U.S.C. 612(a)). Congress provided that any rights under the mining laws are subject to the right of the United States to manage and dispose of the vegetative surface resources thereof and to manage other surface resources (except mineral deposits subject to location under the mining laws of the United States). The statute also amended the mining laws by providing that mining claims are also subject to

the right of the United States, its permittees, and licensees to use as much of the surface as may be necessary or for access to adjacent land (30 U.S.C. 612(b)). However, the use of the surface by the United States, its permittees, and licensees cannot endanger or materially interfere with prospecting, mining, or processing operations or uses reasonably incident thereto.

In the 1960 Multiple Use Sustained Yield Act (16 U.S.C. 528–531), Congress stated the national forests are established and shall be administered for certain purposes, namely outdoor recreation, range, timber, watershed, and wildlife and fish. However, it was also noted that nothing within the Act would affect the use or administration of the mineral resources on NFS lands. Congress later passed the Mining and Mineral Policy Act of 1970 (30 U.S.C. 21a), setting a national policy to foster private development of domestic mineral resources to help ensure the satisfaction of industrial, security, and environmental needs. Acting under these established legal authorities, the Forest Service manages surface use and occupancy associated with locatable minerals operations within the national forests and grasslands.

The Forest Service regulations governing operations under the mining laws conducted on NFS lands were first promulgated in 1974 at 36 CFR Part 252 (39 FR 31317, Aug. 28, 1974). The regulations were later reorganized at 36 CFR Part 228, Subpart A in 1981 (46 FR 36142, July 14, 1981). In 2005, the Forest Service adopted a final rule clarifying when a plan of operations is required (§ 228.4(a); 70 FR 32731, June 6, 2005). Aside from these changes, however, the rule has not seen significant revision since 1974.

Part 228, Subpart A regulates occupancy and use of NFS lands authorized by the mining laws, whether within or outside the boundaries of a mining claim, including the prospecting, exploration, development, mining, and processing of locatable minerals

(operations). This subpart also regulates other activities, such as the subsequent reclamation and long-term post-closure management of such operations.

NFS lands reserved from the public domain are open to operation of the mining laws unless they have been withdrawn from entry or appropriation. The majority of withdrawn NFS lands have been withdrawn pursuant to designations under the Wilderness Act (16 U.S.C. 1131, *et seq.*) and the Wild and Scenic Rivers Act (16 U.S.C. 1271, *et seq.*). The regulations in 36 CFR Part 228, Subpart A apply to operations on NFS lands that have not been withdrawn from mineral entry and on NFS lands that are withdrawn “subject to valid existing rights” and such rights have been confirmed.

In administering the 36 CFR Part 228, Subpart A regulations since 1974, the Forest Service has identified a number of issues that provide opportunities to modernize the Agency’s administration of surface use and occupancy of NFS lands for mining operations, and to provide additional clarity for operators subject to these regulations, while continuing to minimize adverse impacts on surface resources on NFS lands.

Other actions prompting this revision of the 36 CFR Part 228, Subpart A regulations include the 2016 U.S. Government Accountability Office (GAO) report, *Hardrock Mining: BLM and Forest Service Have Taken Some Actions to Expedite the Mine Plan Review Process but Could Do More* (GAO-16-165; <https://www.gao.gov/assets/680/674752.pdf>), which found that insufficient information provided in operator mine plan submittals adds time to the mine plan review process and requires increased use of limited Agency resources. The GAO report recommended the Forest Service take action to help operators improve the quality of mine plan submissions.

Additionally, the Administration, Congress, and stakeholders are focusing attention on ways to improve administration of locatable minerals, including critical minerals, on Federal lands. Products that our military, national infrastructure, and clean

energy technologies, as well as everyday products and technologies such as smartphones, tablets, electric vehicles, global positioning system (GPS) units, medical devices, and other markers of modern life, require critical minerals.

The Forest Service expends substantial resources evaluating, conducting environmental analyses, and approving plans of operations under the current regulations. From 2004 to 2019, the Forest Service received 3,171 plans of operations (on average, 198 plans of operations per year) for proposed mining operations on NFS lands that would have been considered likely to cause a significant disturbance of surface resources under the existing regulations. Of those 3,171 plans of operations, 2,951 (184 plans of operations per year) were submitted for operations that disturbed less than 5 acres of land. Many of these plans of operations were exploration operations that generally have minor environmental impacts and do not involve difficult mitigation issues.

Through this revision, the Forest Service proposes to redefine the threshold at which the operator must submit a plan of operations. The Forest Service proposes to replace the existing subjective threshold of “likely to cause a significant disturbance of surface resources” with a threshold comprising specific requirements. Under the proposed regulations, an operation would require the approval of a plan of operations when it meets any of the following criteria: operations resulting in surface disturbance greater than 5 acres, operations other than exploratory or investigative operations, and additional criteria for protection of surface resources. Operations that do not meet any of the criteria that require a plan of operations, but do not fit into the “no notice” category of operations, would be required to submit a newly defined operating notice, which can be prepared by operators and reviewed by the Agency much more quickly and efficiently. It is expected this will increase the efficiency of Forest Service review of mining operations and provide greater clarity for operators (for example, an estimated annual average of 62

operations that currently require a plan of operations would be conducted under an operating notice under the proposed rule).

The Forest Service proposes to adopt measures identified in the 2016 GAO report to improve the quality of plans of operations submitted to the Agency. One measure would require a pre-submittal meeting for persons seeking to conduct locatable minerals operations requiring an operating notice or a plan of operations. This will ensure the operator is familiar with requirements that must be met for an operating notice or a proposed plan of operations to be determined complete. Other measures include a detailed listing of information that must be included in a plan of operations in the proposed rule as well as a requirement that the Forest Service must ensure all proposed plans of operations are complete before beginning required environmental analysis of the proposed mining operations. Improving the quality of the plans of operations submitted to the Forest Service would increase the Agency's ability to evaluate proposed plans and their associated environmental impacts, better inform consultation with federally recognized tribes, and reduce processing time.

Other provisions of the proposed rule include more detailed requirements regarding when and how to modify approved operating notices and plans of operations; activities considered "reasonably incident" to mining; enhancements to Agency enforcement procedures; surface resource protection requirements and operating standards; and establishing, maintaining, and releasing financial assurances.

The Forest Service's 36 CFR Part 228, Subpart A regulations and the corresponding Bureau of Land Management (BLM) surface management regulations at 43 CFR Subparts 3715, 3802, and 3809 govern the same types of operations and actions, which result in very similar surface impacts. Differences between the two sets of regulations may result in confusion and frustration among the public and operators, especially for operators who operate on lands managed by both agencies or when a single

operation covers lands managed by both agencies. The Forest Service seeks to minimize this potential for confusion and improve operator compliance by revising 36 CFR Part 228, Subpart A, to increase consistency with the BLM's regulations and bring the two agencies into closer alignment regarding the management of surface operations authorized by the mining laws, taking into account the differences in the statutes governing the two agencies. The proposed regulations therefore contain many similarities to the BLM's regulations, but also contain provisions that are unique to NFS lands.

The proposed rule would increase efficiencies in managing locatable minerals operations and help the Forest Service deliver benefits to the public more efficiently while continuing to minimize impacts on surface resources. The Forest Service is proposing to revise its regulations to reflect current practices and legal requirements; increase consistency in implementing the rule across national forests and grasslands; clarify an operator's responsibility to protect natural resources and the environment; and clarify the Forest Service's procedures regarding administration, inspections, and compliance. The proposed changes are also intended to better align Forest Service and BLM regulations to improve efficiency and minimize confusion for operators. The Forest Service is seeking comments on all aspects of the proposed regulations. Specifically, the Agency requests comment on the proposed criteria and circumstances to clarify thresholds that will best facilitate orderly development of the nation's minerals while minimizing impacts on surface resources, including Tribal resources. To submit comments, see instructions in the ADDRESSES section above.

Advance Notice of Proposed Rulemaking

The Forest Service published an advance notice of proposed rulemaking (ANPR) in the *Federal Register* on September 13, 2018 (83 FR 46451), inviting public input regarding the need to clarify or otherwise enhance the present regulation at 36 CFR Part 228, Subpart A. In addition to general comments, the Forest Service asked for input on a

series of questions regarding topics of concern. The public comment period was open for 30 days and served as the scoping period for the environmental analysis.

The Forest Service received 172 total responses. Ninety-eight comments included statements of general opposition, and forty-seven comments included statements of general support for the proposed rule. The remainder did not express either opposition or support.

Stated reasons for general opposition included aversion to the mining industry, destruction of national forests and natural resources for financial or political interests, inadequate protection of human and environmental health, adverse impacts on recreation opportunities and tourism, and an assertion that the Forest Service does not have the authority to regulate mining operations. In particular, the Forest Service received many comments regarding mining near the Boundary Waters Canoe Wilderness Area of northern Minnesota. The Forest Service clarifies in the preamble that Minnesota is excluded from operation under the mining laws (30 U.S.C. 48), and therefore not subject to the regulations at 36 CFR Part 228, Subpart A.

Stated reasons for general support include the importance of the mineral industry to the national economy, the need to expedite the Forest Service review and approval process, and the need to improve consistency within the Agency and with the BLM surface management regulations.

Many commenters, both in support of and in opposition to the proposed revisions, expressed their concerns regarding Forest Service staffing levels and the capacity of the Agency to carry out the workload to manage locatable minerals operations. Commenters also expressed concerns that Forest Service staff does not have the knowledge or expertise to effectively implement current or proposed regulations, and authorized officers and other staff look for ways to use regulation as a way to impede or prevent mining operations from occurring on NFS lands.

Some commenters expressed support for revising the Part 228, Subpart A regulations to be more consistent with the relevant BLM regulations. Some commenters insisted that the Forest Service should turn over all management of mineral-related activity to the BLM, and still others responded that the Forest Service should not try to be more consistent with the BLM because that will eventually lead to a loss of autonomy in managing NFS lands.

Respondents asked the Forest Service to continue to engage and solicit input from affected stakeholders and local forest users. Respondents stressed the importance of making documents readily accessible and providing continual public involvement in the form of public review, comment, and collaboration to achieve environmental protection on public lands. Commenters also recommended government coordination to increase process efficiency. However, one commenter believed that the Forest Service is soliciting input out of obligation and will not incorporate public comments into the process.

Following the completion of the comment period for the ANPR, the Forest Service analyzed the comments received and used the information to draft the proposed regulation. Public comments and an executive summary of the comments received in response to the ANPR are available in the rulemaking docket ID FS-2018-0052 at <https://www.regulations.gov>. Information can also be found at <https://www.fs.usda.gov/science-technology/geology/minerals/locatable-minerals/current-revisions>.

Petition for Rulemaking to Address State Laws Prohibiting Certain Mining Operations, Including on Federal Lands

The Departments of Agriculture and the Interior received a petition for rulemaking (“the petition”) requesting specific amendments to two sections of the Part 228, Subpart A regulations. The petition was dated June 18, 2019, and transmitted on behalf of a number of mining organizations.

At the time the petition was filed, the Forest Service was actively engaged in a comprehensive revision of the Part 228, Subpart A regulations, as evidenced by the ANPR published on September 13, 2018. Because the Agency had already initiated the rulemaking process and issues raised by the petition were being considered within the context of the broader rulemaking in progress, it was not considered an efficient or effective use of Agency resources to engage in two separate rulemakings at the same time, covering overlapping subject matter. Consequently, the petition was considered in conjunction with this rulemaking effort. The Forest Service considered the petition's proposed changes to the existing regulations but did not adopt those changes in these proposed regulations because they were inconsistent with the Agency's authority under the mining laws. The petition is included in the record for this rulemaking and is available within the docket supporting this revision.

Section-by-Section Explanation of the Proposed Rule

Section 228.1 Purpose

The revision in section 228.1 of the proposed regulation details and clarifies the authority for the Forest Service to develop rules related to occupancy and use of NFS lands authorized by the mining laws and more clearly identifies the statutes authorizing locatable minerals operations on NFS lands.

Section 228.2 Scope

The current regulation specifies that section 228.2 applies to lawful operations conducted on NFS lands authorized under the mining laws. It also specifies that in cases where areas of NFS lands covered by a special act of Congress are subject to the provisions in this section, the provisions of the special act shall apply in the event of conflict between the provisions of the act and this regulation. In addition to the current language, the proposed regulation clarifies that any person conducting operations under this section must comply with regulations having general applicability to NFS lands. The

proposed regulation would also allow the Forest Service to regulate mining operations conducted on NFS lands that are reasonably incident (see definitions and proposed section 228.9) to mining operations on non-NFS lands (any lands that are not part of the National Forest System of lands managed by the Forest Service, including Tribal, privately owned, State-owned, or other Federal lands), provided that nothing in the proposed rule would expand or restrict access rights to the non-NFS lands.

Section 228.3 Definitions

The definitions of “authorized officer,” “mining claim,” and “operations” have all been modified from the existing regulations to better reflect statutory authority and Agency practices. The proposed regulation adds twelve new definitions: “day,” “exploration,” “financial assurance,” “geotechnical and water resource investigations,” “Indian Tribe,” “long-term post-closure operations,” “mining laws,” “notice or submission,” “prospecting,” “reasonably incident uses,” “reclamation,” and “surface resources.” The definitions in the proposed regulation will create internal consistency in implementation and provide clarity to authorized officers, Agency personnel, operators, and the public regarding the meaning of key terminology. For example, the proposed regulation defines the term “day” (section 228.3(b)) to clarify how time periods are calculated for actions such as review periods, response time requirements, and notification requirements set forth in the proposed regulation.

The proposed regulation defines the terms commonly used in the mining industry and used throughout this regulation: “exploration,” “geotechnical and water resource investigation,” and “prospecting.” The proposed new term “reasonably incident uses” clarifies the statutory standard in the Surface Resources Act of 1955 (30 U.S.C. 612) requiring that operators be restricted to using reasonable methods of surface disturbance appropriate to their stage of operations. Reasonable and necessary uses of NFS lands must employ sound and accepted mining industry practices and operational methods

appropriate for the stage of mining operations (*United States v. Richardson*, 599 F.2d 290 (9th Cir. 1979)), which include prospecting, exploration, production (mining and processing), and reclamation.

The proposed definition of “notice or submission” is intended to provide clarity as to the acceptable methods of delivery for any written communication from the operator or the authorized officer. Each method provides a reliable delivery date so that time limits can be calculated and adhered to easily. The defined term applies to all notices and submissions except for notices of noncompliance. Section 228.7 identifies the acceptable methods of service for notices of noncompliance.

The current regulation uses the term “surface resources” but does not define it. The new proposed term “surface resources” refers to any biological, ecological, environmental, scenic, cultural, archaeological, historic, paleontological, or other resources subject to the administration of the Forest Service pursuant to the Organic Administration Act of 1897 (16 U.S.C. 551), the Surface Resources Act (30 U.S.C. 612), and the Multiple Use Sustained Yield Act (16 U.S.C. 583, *et seq.*). “Surface resources” does not include the mineral resources that comprise the subsurface estate. In the context of the language proposed at section 228.10(b)(7)(i), however, “surface resources” may include materials that are disposed of pursuant to Subpart C of this part (referred to as mineral materials or salable minerals).

The proposed term “mining laws” describes the Mining Law of 1872, as amended. This definition reflects the fact that the 1872 Act has been subsequently amended by many other laws, including the Surface Resources Act of 1955.

The proposed regulation replaces the term “reclamation bond” by defining and using the term “financial assurance.” The change in terminology helps clarify that any of the instruments listed in proposed section 228.11 are acceptable forms of financial assurance. The proposed definition also better reflects the purpose of a financial

assurance, which is to ensure performance of all obligations associated with one or more operating notice or plan of operations. The proposed regulation also includes a definition of the term “reclamation,” including long-term post-closure operations, to clarify that reclamation encompasses not only minimization of impacts but also focuses on the final condition of lands post-mining, whether reclaimed to pre-disturbance conditions or another acceptable final condition.

Section 228.4 Requirements for Initiating Operations

The proposed regulation at section 228.4, Requirements for Initiating Operations, replaces the current regulation at section 228.4, Plan of operations—notice of intent—requirements. The current regulation addresses three categories of operations: plans of operations, notices of intent, and a third, unnamed category. This third category in the current regulation acknowledges there are some limited mining operations that do not result in impacts different from those of other forest users who are not required to obtain a permit for their activities. The unnamed category in the current regulation does not require submission of a notice to the Forest Service before beginning such use.

The proposed regulation revises the current 3-tier system of operations. The proposed regulation classifies the previously unnamed category of operations that do not require notice to or approval from the Forest Service as “limited operations.” Operations requiring prior notice, but no approval—currently known as a notice of intent—would require an “operating notice” under the proposed regulation. For operations that require Agency approval prior to initiating, an operator would continue to submit a “plan of operations.”

The existing regulation specifies under section 228.4(a)(1) when a notice of intent does not need to be filed. These operations do not require any notice or approval prior to initiating operations. The proposed regulation names these types of operations “limited operations.” Consistent with the 2005 change to 36 CFR 228.4 (70 FR 32713), certain

activities that will not cause more than minimal impacts not substantially different than those of other NFS users not requiring a special use authorization, a contract, or other written authorization are considered to be limited operations. Limited operations will not require notice to the Forest Service prior to initiating operations. The proposed regulation includes examples of operations consistent with the 2005 regulation (70 FR 32713), including removing samples for analysis, using small non-motorized hand tools, non-motorized sluices, metal detectors, or other battery-operated hand-held devices, and marking and monumenting mining claims, which generally involve negligible surface disturbance.

Section 228.4(a)(1) specifies that an operator does not have to give prior notice before beginning limited operations. Section 228.4(a)(2) of the proposed regulation includes additional examples of the types of operations in this category, such as removing certain types of non-woody species that will not exceed 10 feet in height at maturity and removing parts of plants not likely to result in the death of the plant, as necessary for line-of-sight activities for surveys, mapping, or geophysical activities, unless either of those operations involve species that are protected under the Endangered Species Act. The Forest Service added these provisions to clarify the type of vegetation that could be removed during limited operations. Similarly, proposed provisions at section 228.4(a)(2)(viii) provide that motor vehicle use consistent with other regulations, road designations under 36 CFR 212.51, and any relevant land management plans or forest orders, is considered limited operations and would not require prior notice to the authorized officer.

Examples of activities not considered limited operations are identified at section 228.4(a)(3) of the proposed regulation. Because limited operations have no provisions for requiring mitigation, reclamation, or financial assurance, the types of operations described in section 228.4(a)(3) require submitting an operating notice (section 228.4(d))

or plan of operations (section 228.4(c)). Many of these mining-related activities could have adverse environmental impacts or potentially affect facilities constructed or maintained with public funds.

The proposed regulation at section 228.4(a)(3)(vi) lists using suction dredges as an example of operations that are not considered limited operations. The Forest Service recognizes suction dredging can affect fish and their habitat, and that effects can differ from stream section to stream section. This may include the fish species found in the stream; the time of year fish are present; and the type of habitat that may be affected, including physical characteristics such as fine-grained material in streambeds that could produce large amounts of turbidity. Because of these effects, the Forest Service may need to request additional information from the operator. The Forest Service would not have the opportunity to request additional information if suction dredging was considered “limited operations.” Therefore, the proposed rule includes suction dredging as an example of operations that cannot occur without prior notice.

Section 228.4(a)(3)(xvi) informs operators that any operation that would cause a violation of an Indian Tribe’s reserved treaty rights or other reserved rights under Federal law may not occur under limited operations. Limited operations, by regulation, will not cause more than minimal impacts not substantially different than those of other NFS users not requiring a special use authorization, a contract, or other written authorization, and therefore the Forest Service finds it unlikely that these operations would violate a treaty right or other reserved rights. However, in the event that a limited operation would violate a treaty right or other reserved rights, the regulation is intended to inform operators that, if the violation of rights is expected or is occurring, the regulation prohibits those operations from continuing. According to proposed section 228.4(c)(8)(vi), a plan of operations would be required, and the Agency can then follow processes, including consultation, to mitigate the operations so that no violation of treaty

rights occurs. If operations will occur within areas with reserved treaty rights or other reserved rights, tribes have repeatedly requested that they be notified, via consultation on this proposed rule and in other local consultations, as well as in the conversations as documented in the final report “Recommendations to Improve Mining on Public Lands” (2023). If the Forest Service becomes aware that limited operations are occurring within an area where reserved treaty rights or other reserved rights occur, the Forest Service expects to inform the tribes potentially affected by these operations and inform the operator that reserved treaty rights or other reserved rights may be at risk and therefore the operations cannot continue under limited operations.

Section 228.4(a)(3)(xv) also states that operations that involve the simultaneous onsite presence of ten or more individuals on the same operation or who are affiliated with or employed by the same operator will require the operator to comply with either section 228.4(c) (plans of operations) or section 228.4(d) (operating notices) prior to initiating operations. This clarification is in response to issues the Forest Service has had in areas where, for example, multiple people engage in panning or other low-impact activities which as individuals will not result in impacts substantially different than those of other NFS users not requiring a special use authorization, a contract, or other written authorization, but together amount to impacts that require reclamation, and thereby require an operating notice or a plan of operations so that a reclamation cost estimate and financial assurance are accepted or approved.

The proposed regulation at section 228.4(a)(4) provides the authorized officer with an avenue to address problems that can occur in areas where the effects of limited operations have resulted in, or are expected to result in, more than negligible impacts on surface resources. Where numerous operators congregate to operate, collectively their actions can result in adverse impacts that exceed the threshold of limited operations. Individually, their activities, such as access routes, digging with hand tools, or camping,

may be negligible and fall within the limited operations category. However, their activities in aggregate may result in adverse environmental impacts on surface resources that may need to be mitigated or reclaimed, requiring an operating notice or plan of operations. Under the proposed regulation, the authorized officer may, through notification to the public, designate areas where all operations require an operating notice or plan of operations, allowing the Forest Service to prevent or mitigate adverse impacts.

A new requirement was added in the proposed section 228.4(b) for pre-submittal meetings between the operator and authorized officer or their designee prior to submitting an operating notice or a plan of operations. The operator and authorized officer or designee must hold a pre-submittal meeting(s) to facilitate an information exchange and provide an opportunity for gathering more information if needed. The pre-submittal meeting between appropriate Forest Service staff and the operator will occur within 21 days of receipt of a request by the operator for such meeting, or on a mutually agreed-upon date. This process implements a recommendation in the 2016 Government Accountability Office report, *Hardrock Mining* (GAO-16-165), “to provide an opportunity to inform operators about the requirements of operating notices and plans of operations to help ensure critical information is collected.” The GAO determined that these meetings have been helpful in reducing the length of the review process. Pre-submittal meetings will provide the operator with the opportunity to discuss with the Forest Service the requirements of operating notices and plans of operations and, as experienced by the BLM, improve workforce planning to increase review efficiency. The pre-submittal meeting gives operators an opportunity to identify and discuss issues regarding their proposed operations and gives the authorized officer or designee an opportunity to help the operator understand the regulations and how the regulations apply to their operations, so that the operator can make an informed decision as to whether they

might proceed under an operating notice or whether a plan of operations might be required.

The Forest Service believes the pre-submittal meetings can also help clarify operators' understanding of surface resource protection obligations, including: the relevant standards and guidelines in the applicable land management plan; State and Federal laws and regulations that may affect their project; the requirements of environmental review and the timeframes involved; the need for baseline surveys (for example, water quality); the potential for formal consultation with other agencies under the Endangered Species Act; and coordination with tribes or other agencies as a result of historic, archaeological, or culturally significant resources that may be in the project area. For example, this conversation will give the Forest Service an opportunity to point out the applicable components in the relevant land management plan and inform the operator that the Forest Service may need to undertake a site-specific amendment to the land management plan before the Agency can approve a plan of operations. With this information, the operator may decide to alter proposed operations to be consistent with the existing land management plan, thereby avoiding the additional time involved for the Forest Service to amend the land management plan in order to approve a plan of operations. By discussing issues and site conditions the operator may not have been aware of, the Forest Service is giving the operator information regarding how site conditions and the regulations are linked to determine what is necessary in a proposed operation. The goal is to make sure the operator will provide a more complete operating notice or plan of operations. This in turn will save operators time and money by increasing the sufficiency and completeness of information provided to the Forest Service, reducing permitting delays and costs for both the Agency and operator.

The pre-submittal meeting provides the authorized officer information regarding operations being proposed in areas of Tribal interest, and an opportunity to inform tribes

of these proposed operations in advance of formal proposals. This gives the tribes time to respond with information that may inform the authorized officer if reserved treaty rights or other reserved rights under Federal law of an Indian Tribe are known within the project area, or if sacred sites are present, so that the authorized officer may inform the operator that a plan of operations may be required under section 228.4(c). A Tribe can also choose to engage the Forest Service in consultation after being informed of potential operations in the area of interest.

The proposed regulation at section 228.4(c) lists specific criteria and circumstances to clarify thresholds at which an operator must obtain review and approval of a plan of operations from the Forest Service prior to commencing operations. Defining this threshold is a substantial change from current regulation, which requires a plan of operations when “the operations will likely cause a significant disturbance of surface resources.” The Forest Service believes eliminating this subjective threshold and replacing it with specific criteria and circumstances will add clarity for operators and Agency personnel, resulting in increased efficiency and consistency when implementing the regulation. The Forest Service is requesting comment on the proposed criteria and circumstances to clarify thresholds that will best facilitate orderly development of the nation’s minerals while minimizing impacts on surface resources, especially Tribal resources.

The circumstances and scenarios listed under section 228.4(c) represent operations that the Forest Service believes result in impacts on surface resources requiring Forest Service approval. For example, the Agency believes that the thresholds regarding the type of activity, size of disturbance, the materials involved, and long-term liabilities represent an operation progressing from early exploration with limited surface impacts on more advanced exploration or development that typically results in greater surface impacts. The proposed regulation requires an approved plan of operations for

these more advanced operations. The Agency also proposes requiring an approved plan of operations for any operation ordinarily conducted under an operating notice where the authorized officer has issued a suspension order (see proposed section 228.7) and terminated an operating notice in effect as a result. This allows the authorized officer to review a proposed plan of operations and enforce mitigation measures to minimize adverse effects to surface resources, which resulted in the issuance of a suspension order.

The current regulations' criteria used to determine whether a plan of operations is required is a subjective judgment of the operator or authorized officer, sometimes leading to inconsistent interpretation of the current regulations by operators and authorized officers between Forest Service units. To reduce the subjectivity in the current regulations, proposed section 228.4(c) identifies more specific criteria to determine whether a plan of operations is required. This change will help eliminate inconsistent interpretation by operators and authorized officers between Forest Service units and provide additional certainty for the public.

The current regulations do not specifically address whether or when a plan of operations is required in areas with special designations. This has led to administrative delays or operations occurring without mitigation. Under the proposed regulation, areas listed under section 228.4(c)(8) are areas that have specific designations and management plans, legal requirements, or mandatory consultation requirements, or where Federal facilities (such as bridges, roads, and structures) constructed with public funds may be affected by operations. Based on these designations, a plan of operations would be required even for operations that would ordinarily qualify for an operating notice. Requiring a plan of operations in these instances acknowledges the special character of these areas and ensures that the Forest Service can analyze and disclose the environmental impacts in such special areas and impose mitigation measures where necessary. As is current practice, with any proposed plan of operations, the Forest Service

will continue to notify tribes of proposed plans of operations in the areas of interest to the relevant tribes and invite the tribes to engage in consultation regarding those plans of operations.

Proposed section 228.4(d) is a brief description of operations requiring an operating notice. It explains that operations that do not qualify as limited operations, but do not require a plan of operations, require an operating notice per requirements specified in proposed section 228.5. The Forest Service believes that the combination of strong surface resource protection standards and financial assurance requirements will work together to ensure impacts on surface resources are minimized to the extent practicable. This new category is similar to the BLM's "notice-level operations" classification.

Proposed section 228.4(d)(3) prohibits an operator from filing a series of operating notices for related operations in a particular area for the purpose of avoiding submitting a plan of operations. This is consistent with BLM regulations, and also a common-sense approach to ensure the intent of the criteria listed at 228.4(c) can function as intended, which is to facilitate the orderly development of the nation's minerals while minimizing impacts on surface resources.

Section 228.5 Operating Notices

The proposed regulation categorizes operations that are not limited operations but do not meet the criteria for operations requiring a plan of operations as "operating notices." Similar to the current regulations' direction related to the submittal of a notice of intent, an operator must provide specific information to the Forest Service, and the authorized officer must review the operating notice to ensure it contains all required information and determine if a plan of operations is required. No decision or approval by the authorized officer is required for an operating notice. This section of the proposed regulation details the information the operator must submit prior to beginning operations

under an operating notice, as well as the process the operator and authorized officer will follow as the authorized officer reviews a submitted operating notice.

Proposed section 228.5(a) lists the information to be included in an operating notice so the authorized officer can review the notice to determine whether it is complete. The proposed regulations require that the information within the operating notice shall contain the appropriate level of detail to clearly describe the intended operations. The proposed regulations also require that the operator must include a reclamation plan, a reclamation cost estimate, and the date the operations will begin. To avoid confusion and ensure that operators understand what information they are required to include in their operating notice, the proposed regulations require the operator to schedule a pre-submittal meeting (36 CFR 228.4(b)).

Current regulations require a notice of intent to contain information sufficient to identify the area involved, the nature of the proposed operations, the route of access to the area of operations, and the method of transport. The proposed regulations require operators to include similar information in their operating notice but provide more detail as to what information is necessary. For example, the proposed regulations require a list of the types and sizes of equipment the operator plans to use, the planned access route or routes and the methods of access, the types of facilities or improvements the operator will use or construct, an explanation of why the operations are reasonably incident to mining, and a schedule of activities.

The proposed regulations require the operator to: 1) describe compliance with surface resource protection measures and operating standards (see proposed section 228.10) and with Federal or State laws related to protection of surface resources; 2) describe how operations will minimize, to the fullest extent practicable, adverse impacts on surface resources; and 3) develop a reclamation plan with a reclamation cost estimate. This increased level of detail compared to the current regulations will assist the

authorized officer in reviewing the submitted operating notice to determine whether the operating notice is complete. The information regarding known land status or conditions will assist the authorized officer in reviewing the submitted operating notice to determine whether a plan of operations is required. The proposed regulation includes a detailed description of the required elements of an operating notice, which will assist the operator in understanding the Agency's needs and will allow the operator and authorized officer to work together to ensure compliance with the regulations. The level of detail will also help the operator develop a reclamation cost estimate and will allow the authorized officer to determine whether the reclamation cost estimate is adequate.

The proposed regulations at section 228.5(b) provide a list of specific responses an authorized officer may send to an operator who submitted an operating notice. The listed responses recognize that the authorized officer may need additional information or time to determine whether an operating notice is complete. The authorized officer may also find that a plan of operations is required, or that these regulations do not apply. The authorized officer may inform the operator that an operating notice cannot take effect because the operator is under a suspension order. The Forest Service includes this provision to prevent situations where an operator is in noncompliance on one operation, suspended from operating, and elects to pursue a different operation on a different site. This will help gain the compliance of the operator and prevent potential noncompliance elsewhere. If the authorized officer determines the operating notice includes proposed uses not reasonably incident to mining, the authorized officer can notify the operator that those activities may not be authorized under the regulations at 36 CFR Part 228, Subpart A.

The proposed regulations at section 228.5(c)(1) describe how an operating notice takes effect. An operating notice is in effect if the authorized officer does not respond within 60 days, or when the authorized officer confirms that the operations described in

an operating notice do not require a plan of operations. Under current regulations, the authorized officer has 15 days to review a notice of intent; in some instances, the Forest Service has had difficulty completing a review within that timeframe. The proposed rule increases the timeframe for the review of a proposed operating notice-level operation to 60 days. The Forest Service believes this will still encourage efficiency and timeliness but allow the authorized officer sufficient opportunity to review the operating notice without undue difficulty.

Under the proposed regulations, if the authorized officer completes the review sooner than 60 days, the authorized officer has the opportunity to provide written notification to the operator that the operating notice is complete. In such cases, the operating notice is effective on the date of the notification. When the operator receives the written notification, the operator needs no further authorization from the Forest Service and may begin operations as described in section 228.5(d). Alternatively, if the authorized officer does not respond, the operating notice will take effect 60 days after the Forest Service receives the notification. If the authorized officer responds that the operating notice is incomplete or otherwise does not include adequate information as required in the proposed section 228.5(a), the authorized officer must include a detailed description of the required information. This process may repeat until the operating notice is complete.

The Agency expects the combination of the authorized officer working closely with the operator, including in the pre-submittal meeting as described in section 228.4(b), and the detailed description of the information required in an operating notice to result in the submission of complete operating notices. A complete operating notice will minimize the need for multiple iterations of information requests before an operating notice is complete and therefore decrease the amount of time it takes for operators to begin operations.

The proposed regulation at section 228.5(d) provides that operations can begin after (1) the operating notice is in effect and (2) any required financial assurance has been accepted by the authorized officer, presuming the reclamation cost estimate as required in 228.5(a)(8) results in estimated reclamation costs. The Agency recognizes there may be narrow circumstances in which an operating notice is required but reclamation will not be necessary, and therefore the reclamation cost estimate for those operations might be \$0, resulting in no financial assurance. A delay between when an operating notice goes into effect and the date at which an operator provides financial assurance or elects to begin operating, if required, does not change the 2-year end date described in section 228.5(h). The proposed regulation describes the provisions for modifications or extensions of an operating notice in effect.

The proposed regulations at section 228.5(e) include a requirement that the operator notify the authorized officer in writing when operations begin. The term of the operating notice is calculated from the date when the operating notice takes effect, not from the date that operations begin.

The proposed regulations at section 228.5(g) describe the process for modifying an operating notice, explaining that a modified operating notice will be processed in the same way as a new operating notice, including up to 60 days for line officer review unless any of the conditions described in 228.5(b) or 228.4(c) apply. The operator must submit a modified operating notice if a change in operations is necessary to prevent any noncompliance or if the operator intends to make material changes to operations described in the operating notice in effect. Material changes include disturbance of new areas, changes to the reclamation plan, a change in operator, or any changes that would result in impacts of a different kind, degree, or extent than those described in the operating notice in effect.

The proposed regulation at section 228.5(h) explains the expiration and extension of a 2-year operating notice and notes that nothing shall change the expiration date of an operating notice in effect except if the operator submits a modified operating notice and the modified operating notice takes effect. The operator can submit an extension of an operating notice at any time between 6 months and 60 days before the expiration date of the existing operating notice. The Agency feels that 6 months prior to expiration is reasonable timeframe for accepting extensions so that operators have had enough time under their operating notice already in effect to determine whether an extension is warranted and if so, whether they also want to modify that operating notice or simply extend it without modification. An extension, with or without modification, will be processed in the same manner as a new operating notice in section 228.5(b). If an extension is submitted fewer than 60 days prior to the expiration and the authorizing officer's review goes beyond the expiration date, operations must cease until the review is complete, consistent with the requirement in section 228.5(h)(1) that operations must cease at the expiration of an operating notice. The Forest Service recognizes that this could result in a gap between the expiration date and the completion of the review, and when operations may take place. Depending on the time period during which operations cease and the Forest Service completes review of the proposed extension, the operator could be found in noncompliance. If an operator wishes to continue operating after extending an operating notice for the second time, the operator must submit a plan of operations, even if the operations would otherwise qualify as an operating notice under 228.4(d).

The Forest Service's proposed regulations specify an operator can only receive up to two 2-year extensions of an operating notice, providing a maximum time period of 6 years per operating notice before operations must cease and reclamation must be completed, or the operator submits a plan of operations. The extension provision

recognizes that multiple factors can delay the completion of an exploration project and that the operator may require more time for exploration to progress in a logical and sequential fashion. Based on Agency experience, 6 years is an adequate time to complete a project that is exploratory in nature, would disturb no more than 5 acres, and would cumulatively disturb up to 1,000 tons of material. Because the proposed regulations do not allow for a series of operating notices to be ongoing over a long period of time, if the operator needs more time to continue a similar level of operations, the operator can submit a plan of operations. The proposed regulations in section 228.5(h)(4) put a reasonable limitation on the extension of operating notices so that, consistent with section 228.4(d)(3), an operator cannot rely on a continuous series of operating notices to avoid filing a plan of operations.

Section 228.6 Plans of Operations

The proposed regulations at section 228.6 clarify the content, submittal, and processing of a plan of operations, so the public, the operator, and the Forest Service have a clear understanding of the process and the roles and responsibilities.

The proposed regulations at section 228.6(a) require an operator to submit a proposed plan of operations in writing using optional form FS-2800-5 or a format of the operator's choice. The details of what is required in a proposed plan of operations are similar to section 228.4(c) of the current regulations. The plan of operations must contain a full description of the proposed operation, such as maps, a description of the project area, the types of structures or equipment proposed to be constructed or utilized, access routes, and other details of the proposed operations, as well as a projected schedule and a reclamation plan and cost estimate. The plan of operations must also include a description of how the proposed operations will comply with applicable resource protection standards, laws, and regulations, as well as how the proposed operations will minimize, to the fullest extent practicable, adverse impacts on surface resources.

The proposed regulations at section 228.6(a)(11) add a provision requiring a monitoring plan to demonstrate compliance with the approved plan of operations or other requirements, to provide early detection of potential problems, and to supply information that will assist in directing corrective actions if necessary. The proposed regulations also add a requirement at § 228.6(a)(12) for the proposed plan of operations to contain an interim management plan, detailing measures the operator will take during periods of temporary cessation of operations under proposed section 228.8(b), in order to protect NFS lands. For example, a discussion of such measures, as appropriate, may include whether equipment will be removed during seasonal cessations of operations and whether water treatment plants will continue to operate in the event of a temporary cessation of operations. The Forest Service proposes this requirement, recognizing that because of seasonal conditions, availability of equipment, changes in commodity prices, or other factors, operators occasionally choose to pause operations temporarily without ending operations and commencing final reclamation. The discussion of section 228.8 describes how the Agency will work with the operator to determine that cessation is no longer temporary and reclamation should begin.

The proposed regulations describe the phased review by the authorized officer. The initial review under section 228.6(b) will determine whether the plan of operations contains all required elements in 228.6(a) and is therefore complete. After a plan of operations has been determined to be complete pursuant to section 228.6(b), the authorized officer will initiate the appropriate level of environmental review of the plan of operations as set forth in section 228.6(c).

Under the proposed regulations, the authorized officer will respond to a plan of operations in a manner similar to the current regulations. However, the Forest Service's experience since the current regulations were promulgated in 1974 has shown that the current regulations do not provide clear guidance for operators and the public about what

actions the authorized officer will take in response to a proposed plan. The Forest Service's proposed regulations in section 228.6(b) revise the ways an authorized officer may respond to a submitted plan of operations in order to add clarity for both the operator and the public.

The authorized officer has 60 days to conduct the initial completeness review of a submitted plan of operations under 228.6(b). Under the current regulations, the authorized officer can request another 60 days to review the plan of operations (days the site is not accessible do not count against the number of days); however, under the proposed regulations, the authorized officer may respond that additional time is needed but cannot exceed an additional 30 days to complete the initial review. The current rule allows for 30 days to review with an additional 60 days for review at the authorized officer's discretion; the proposed rule allows for 60 days for completeness review with an additional 30 days for completeness review at the authorized officer's discretion, to be consistent with timeframes for an operating notice. Under the proposed rule, if the Forest Service needs to visit the site or discuss access routes, the time for initial review will be suspended until the site visit or discussion is complete. The authorized officer may also respond that the submitted plan of operations is complete and contains sufficient information to initiate further review and, as appropriate, Tribal consultation.

After a plan of operations has been accepted as complete, the environmental review under the National Environmental Policy Act (NEPA) will begin. The proposed regulations at section 228.6(c) clarify that a review of the proposed plan of operations under NEPA will ensure that the implementation of the proposed plan will minimize, to the fullest extent practicable, adverse impacts on surface resources. This section clarifies the requirement that the operator incorporate into the plan of operations any mitigations or terms and conditions required to minimize adverse surface resource impacts that were identified during the environmental review process. Under proposed section 228.6(c)(4),

the authorized officer will communicate to the operator the Forest Service's progress on a regular basis, but no less than once every month, in order to ensure clear and regular communication on the progress of the environmental review.

The proposed regulation at section 228.6(d) states that the authorized officer shall notify the operator in writing that the plan of operations is approved. If there is an outstanding suspension order under section 228.7(c)(3), the Forest Service will notify the operator that the authorized officer cannot approve a plan of operations until the operator has addressed the issues identified in the suspension order and the authorized officer has canceled the suspension order. Consistent with current practice, under proposed 228.6(d)(3), the authorized officer cannot approve the plan of operations until the operator has obtained the proper Clean Water Act section 401 certification or waiver of certification.

The proposed regulations at section 228.6(e) state that the operator shall not conduct operations until the authorized officer has accepted the financial assurance, including ratifying all instruments required to establish a trust fund under § 228.13, if any, and the operator has obtained all required Federal or State permits and approvals.

The current regulations do not describe when and how an operator may propose a modification to an approved plan of operations. The current regulations at section 228.4(e) do allow the authorized officer to require an operator to modify an approved plan of operations in one instance: when an unforeseen significant disturbance of surface resources occurs. This limits the Agency's ability to address new issues of significant disturbance of surface resources, such as unexpected acid drainage, problems with water balance, the adequacy of approved containment structures, or the discovery of impacts on wells and springs.

Under the proposed regulations as set forth in section 228.6(f), the Forest Service would review modifications using the same process described for the review of new plans

of operations. The proposed regulations allow an operator to submit proposed modifications to an approved plan of operations at any time. For example, an operator may want to expand operations, resulting in a larger area of disturbance. An operator may want to add exploration operations within or adjacent to the existing operating area. In both examples, the operator may need to propose a modification to the approved plan of operations to accomplish additional activities or to encompass new areas or operations within the existing operations.

The proposed regulations also provide for situations when modification to an approved plan of operations could be initiated by the Forest Service to prevent ongoing or reasonably foreseeable violations of 36 CFR Part 261, the surface resource protection requirements and operating standards in the proposed regulations at section 228.10, or other State or Federal laws relating to the protection of surface resources.

When the authorized officer requires a modification to an approved plan of operations, the authorized officer will first provide written notice to the operator. This notice must explain why the plan of operations needs modification, and give the operator 30 days to respond. The authorized officer will consider the operator's responses and review the project file for the operations. If the authorized officer decides a modification is still required after receiving the operator's response, the authorized officer will specify the changes required, including a date when the operator shall submit the modification. If the operator does not submit a modified plan of operations, the authorized officer may take action pursuant to proposed section 228.7.

Under the proposed rule, the operator may continue to operate under the existing approved plan of operations unless the authorized officer issues a suspension order or takes emergency actions to prevent harm, that is occurring or imminent, to public health or safety, the environment, or surface resources, pursuant to proposed section 228.7.

The proposed regulation provides for the transfer of a plan of operations from one operator to another. In the past, the transfer process has caused confusion, particularly with small-scale operators. The proposed regulations clarify that the current operator must notify the authorized officer in writing 30 days in advance of the transfer, and both operators must follow the provisions of section 228.11(i). Consistent with the intent of the pre-submittal meeting, to provide the opportunity for a new operator to discuss the regulations and the conditions of the approved plan of operations, the proposed regulations require a new operator to meet with the authorized officer or their designee before the Forest Service will recognize the transfer. Consistent with the intent of 228.6(h)(5), a transfer shall not be made to a new operator who is subject to an ongoing suspension order pursuant to section 228.7(c)(3).

The proposed regulations at section 228.6(i) contain clear and transparent directions to operators, Agency employees, and the public regarding how a plan of operations is closed after completion of operations. The proposed section 228.6(i) also requires a plan modification when transitioning to a long-term post-closure plan if such operations are necessary.

Section 228.7 Noncompliance

The current regulations at section 228.7 contain limited administrative tools and directions for identifying and addressing noncompliance issues. The process to address issues of noncompliance is difficult to enforce and not well understood by operators or the public. The lack of consequences to operators for not coming into compliance and the burden of proof on the Forest Service to demonstrate that an issue of noncompliance is “unnecessarily or unreasonably causing injury, loss, or damage to surface resources” have created additional challenges for the Agency to enforce compliance and minimize impacts on surface resources, leading to concern about the efficacy of the notice of noncompliance in preventing harm to those resources. The Forest Service believes that

consistent and accessible procedures to address issues of noncompliance would increase the efficiency of administering operations under these regulations and enhance the Agency's ability to protect surface resources.

The proposed regulation seeks to address these challenges by explicitly stating operations and operators must continuously maintain compliance with the following: 36 CFR Part 228, Subpart A; 36 CFR Part 261; applicable Federal or State laws related to the protection of surface resources; and the operating notice in effect or approved plan of operations. By stating an operation and operators must always comply with applicable laws, regulations, and the operating notice or an approved plan of operations, the need to prove "unnecessarily or unreasonably causing injury, loss, or damage to surface resources" is eliminated, and the Forest Service can address issues of noncompliance before those issues cause damage to or loss of surface resources.

The proposed regulations include a description of additional enforcement tools, including the initiation of a civil action, the issuance of a violation notice under 36 CFR Part 261, or the use of the reclamation financial assurance to take all necessary measures to protect the environment specified by the notice of noncompliance.

The proposed regulations provide for escalating levels of enforcement, whereby the authorized officer can issue a suspension order to an operator who has not met the required terms in a notice of noncompliance by the date specified or has conducted operations or activities that are a substantial deviation from an operating notice in effect or an approved plan of operations. The threshold of "substantial deviation" is an action or result not analyzed when a plan of operations was processed, or not included in an operating notice. The proposed regulations also allow an authorized officer to issue a suspension order that goes into effect immediately to an operator who has conducted operations that may result in harm to public health or safety, to the environment, or to surface resources without first issuing a notice of noncompliance. The ability to

immediately suspend an operation that may cause harm allows the Agency to respond in a proactive manner to avoid imminent or prevent further harm. Additionally, the proposed regulations allow the authorized officer to take action necessary to abate the harm, and bill the costs to the operator pursuant to § 228.7(d)(5).

The final subsection in the proposed noncompliance regulation codifies the relationship between the enforcement provisions of Part 228, Subpart A, and the procedures under Part 261. On November 6, 2008, the Forest Service published a final rule amending 36 CFR Part 261, “Clarification for the Appropriate Use of a Criminal or a Civil Citation to Enforce Mineral Regulations” (73 FR 65984). In the preamble to the final rule, the Forest Service responded to concerns that the amendment would allow abuses of the notice of violation under Part 261, in conflict with the right to access and develop minerals under the mining laws. The preamble stated that, except in emergencies, the Forest Service would only issue citations under Part 261 after making every attempt to work with an operator to achieve compliance. Proposed section 228.7 reflects this interplay between Part 261 and Part 228, Subpart A by providing that one reason for issuing a suspension order might be that an operator has failed to perform actions needed to address issues identified in a notice of noncompliance. The procedures proposed in section 228.7 still require the authorized officer to attempt to resolve the issues with the operator prior to taking the official actions spelled out in the section. The procedures also respond to a need for the Forest Service to be able to act immediately on noncompliance issues in cases of imminent or current harm to public health or safety, to the environment, or to surface resources.

Notwithstanding any other provision in these regulations, operators are subject to Federal laws and regulations governing activities on NFS lands, including Part 261. Thus, proposed section 228.7(i) puts operators on notice that the Forest Service may pursue any legal remedies available under the statutes and regulations governing conduct on NFS

lands. The Forest Service may pursue those legal remedies irrespective of whether the Forest Service has provided a prior notice of noncompliance under section 228.7, including: 1) informal resolution under 228.7(c)(1); a notice of noncompliance under 228.7(c)(2); a suspension order under 228.7(c)(3) or take emergency action, including issuing an immediate suspension order, under 228.7(c)(4). Nothing in this part limits or conditions the Forest Service's authority to monitor, investigate, and enforce compliance with Federal laws and applicable regulations, including those under 36 CFR Part 261 or any other provision of statute or applicable regulation.

Section 228.8 Temporary Cessation or Abandonment of Operations

The current regulations at section 228.10 provide notification requirements but do not contain detail concerning any procedure the operator or authorized officer shall follow to determine when a cessation has transitioned from temporary to permanent. The current regulation also lacks information pertaining to the steps to follow if the operator does not notify the Forest Service of any cessation of operations, whether the cessation is temporary or permanent, or whether cessation of operations might amount to abandonment of operations by the operator. Without clear enforcement provisions differentiating between cessation and abandonment of operations, some operators have been able to delay or avoid taking appropriate interim or final closure or reclamation actions by continually claiming their operations are in temporary cessation, which can lead to ongoing and worsening environmental and safety conditions at sites where operators do not intend to resume operations or have abandoned operations entirely.

One way the proposed regulations address the challenges described above is through the requirement proposed in section 228.6(a)(12) for an operator to include an interim management plan as part of a plan of operations. The required components of an interim management plan will help an operator think through and identify all the tasks required during a temporary cessation of operations and help the authorized officer

understand what to expect if an operation temporarily ceases, whether for seasonal or other less predictable reasons.

These provisions and procedures will allow the operator and the authorized officer to know what to expect, how to react, and actions to take in the event of cessations that are planned, unplanned, or longer than originally planned. These procedures will help the Forest Service achieve consistency across the Agency in how cessations of operations are addressed and will also help the Forest Service be more proactive in working with operators to manage sites to quickly address ongoing or potential harm to surface resources and human health and safety concerns.

The Forest Service proposed regulations describe the process for reviewing and determining whether an operation has become abandoned, including specific criteria for when an authorized officer may consider operations abandoned. These criteria require the operator to engage with the authorized officer in periods of temporary cessation of operations and allow the authorized officer to take action when an operator has not followed the process. If an authorized officer is uncertain whether an operation is abandoned, they may request a surface use determination (section 228.8(g)). These provisions collectively provide greater clarity regarding the process of considering an operation abandoned while also increasing the transparency of the Agency requirements and consequences.

The proposed changes to the regulations are not expected to impede development of mineral resources. Proposed section 228.8 increases operators' accountability for their operations conducted on NFS lands, including the financial responsibilities associated with site reclamation.

Section 228.9 Reasonably Incident Uses

The proposed regulations add a section that describes the scope of reasonably incident uses of the surface of NFS lands as provided in the Surface Resources Act when

conducting operations under the mining laws. The Surface Resources Act, which applies to NFS lands, authorizes the use of surface and vegetative resources on Federal lands under the mining laws for “prospecting, mining, or processing operations and uses reasonably incident thereto.” Current regulations at 36 CFR Part 228, Subpart A acknowledge these provisions but do not explain what does or does not constitute a reasonably incident use.

Forest Service Manual Chapter 2810 – Mining Claims details the existing Agency policy for resolving questions about whether operations are logically sequenced and whether an activity or proposed use, including the need for structures and residential occupancy, is reasonably incident to the stage of mining operations and extent of available information on the mineral resource. Forest Service Manual 2810 encourages the authorized officer to seek the input of a certified mineral administrator, mineral specialist, and/or certified mineral examiner, as appropriate, based on case- or project-specific circumstances to make an informed decision. Reasonable and necessary uses of NFS lands must employ sound and accepted practices to avoid or minimize adverse environmental impacts. These uses also must practice sound, accepted operational methods appropriate for the applicable stage of mining operations, including prospecting, exploration, production (mining and processing), or reclamation. The Forest Service publication titled *Anatomy of a Mine from Prospect to Production* (INT-GTR-35), as well as Forest Service Handbook 2809.15, chapter 10, each describe and give examples of the reasonable stages of a mining operation to guide the authorized officer’s determination.

Despite this guidance, the Agency has experienced numerous challenges, both administrative and judicial, resulting from operators conducting activities that are not reasonably incident to mining. Forest Service personnel have a difficult time resolving these types of cases, and the public, including operators, is generally unaware of such guidance and do not know what to expect. An explicit regulation that identifies the scope

of permissible reasonably incident uses will provide the public, including operators, with additional clarity on appropriate uses of NFS lands in connection with operations. The Forest Service seeks to improve the management of surface resources by explicitly describing in the proposed regulation the types of activities that are not generally considered “reasonably incident” to mining operations. The Forest Service also seeks to establish a process for evaluating the reasonableness of operations or incident uses when the authorized officer is uncertain whether an ongoing, completed, or proposed use is reasonably incident. The authorized officer can evaluate uses such as occupancy and, in particular, residence under this section to determine whether those uses are necessary based on the nature or stage of ongoing or proposed operations.

The proposed regulations include examples of activities that are not reasonably incident to mining operations, reflecting new statutes, case law, and current Agency policy. Examples of activities that are not considered reasonably incident to mining include the search for paleontological specimens and activities that are providing educational or recreational services or activities for hire. The latter addresses activities in which the organizer hosts a group of paying or non-paying individuals for large gatherings to participate in or learn how to gold pan, suction dredge, or other sampling, exploration, or mining methods. Though the activities might be similar to those activities a prospector or operator might use to “access and develop” minerals, the organizer is actually using NFS lands to facilitate hosting and guiding groups for educational or recreational purposes. If the operator is charging individuals for such recreational or educational activities on NFS lands, including membership fees and donations, that will be considered support for the authorized officer to find that the activities are not reasonably incident to mining. In addition, even if the operator is not receiving money or things of value in exchange for hosting or guiding other individuals, if the focus of the activity is on providing educational or recreational opportunities to others as opposed to

bona fide prospecting, exploration, development, mining, and processing of locatable minerals, then the activities will not likely qualify as reasonably incident to mining.

The proposed regulation includes a description of the process for the operator and authorized officer to follow if the authorized officer questions whether one or more proposed or current uses would be or are reasonably incident to mining.

Section 228.10 Surface Resource Protection Requirements and Operating Standards

The current regulation at section 228.8 discusses the requirements for environmental protection. The requirements listed for the various resources consist of qualitative standards rather than quantitative ones. This allows the Forest Service and operators to develop a plan of operations for the specific conditions at each unique site on NFS lands. However, the current regulations contain much less detail for surface resources on NFS lands and do not detail operating standards. The proposed regulations add clarity for both the Forest Service and operator as to what is expected in an operating notice or plan of operations.

The proposed regulation at section 228.10 expands upon the current requirements for environmental protection and continues to be qualitative in nature to maintain flexibility to react to site-specific conditions of each operation. The proposed changes respond to changes in mining technology, best practices, and scientific understanding since the original 228.8 regulation was promulgated in 1974. Proposed section 228.10 provides a more detailed description of the required resource protection measures and operating standards so operators can more easily fulfill the requirement under proposed sections 228.5 (a)(7)(i) and 228.6 (a)(8)(i) to describe how they will comply with 228.10. The proposed section 228.10 is organized with clarity in mind, so that 228.10(a) describes the generally applicable requirements that are not specific to any one resource or subset of an operation. For example, section 228.10(a)(4) makes clear that it is the

operator's responsibility to conduct operations in a manner that is consistent with the applicable Forest Service land management plans.

Second, section 228.10(b) is focused on considerations and requirements that are specific to surface resources, such as cultural or paleontological resources. For example, operators are prohibited from knowingly disturbing, altering, injuring, or destroying any paleontological remains or any historic or archaeological sites, structures, buildings, or objects on Federal lands. Operators are required to immediately notify the authorized officer regarding any cultural, historic, archaeological, or paleontological resources that might be altered, injured, or destroyed by proposed operations. Operators shall leave any such discoveries intact, until permitted to proceed by the authorized officer.

Finally, section 228.10(c) contains operating standards that are not resource-specific but instead focus on the various components of an operation. For example, such standards include those regarding the construction and maintenance of impoundment facilities, roads and access routes, or water management operations.

The proposed regulations continue to require the operator to conduct operations to minimize, to the fullest extent practicable, adverse impacts on surface resources (proposed section 228.10(a)(2)). The proposed regulations also continue to require the authorized officer to consider the economics of the operations when determining the reasonableness of requirements for surface resource protection (proposed section 228.10(a)(2)), as is currently required under 228.5(a). The Forest Service may not unduly burden an operation with environmental protective measures that amount to a prohibition of mining. This does not imply, however, that regulatory standards can be relaxed or removed in order to ensure that an operation is economically feasible. Measures should be reasonable and in keeping with the measures the Forest Service uses for other similar activities.

The proposed regulation at section 228.10(a)(3) would clarify that the operator is responsible for ensuring everyone involved in the operations, including employees, contractors, subcontractors, and others who may be present at the site of operations, are aware of the Federal and State laws applicable to the operations. The proposed regulations also state that this awareness extends to possible consequences, including civil or criminal penalties, for not complying with laws and regulations. Additionally, the proposed 228.10(a)(4) requires operations to be consistent with applicable Forest Service land management plans. If such consistency cannot be reached, the Forest Service may consider a site-specific amendment to the land management plan to allow the mining operation. This procedure exists under the National Forest Management Act and 36 CFR Part 219, and will be discussed during the pre-submittal meeting to clarify the Agency's responsibilities and the potential processes that result from a proposal that is not consistent with land management plans.

The proposed regulations in section 228.10(b)(7) address the removal or use of vegetation, including timber. The proposed regulations would clarify when the operator may use or dispose of surface resources in connection with mining operations.

The proposed regulations rearrange certain sections of the current regulations and incorporate them into the proposed section 228.10. The Agency partially incorporates the current section 228.12 regarding access into the proposed section 228.10(c)(6), Roads and Access Routes, with respect to the aspects of access related to prevention of resource damage, such as protection against erosion and reclamation of access routes once operations have ended. Additionally, the proposed sections 228.10(c)(7-8) incorporate the language addressing maintenance during operations and public safety in the current regulation at 228.9, and prevention and control of fire at 228.11, respectively. Pulling these pieces of the current regulation into one section having to do with resource

protection will simplify the implementation of the regulation as well as clarify the intent of the regulation.

The proposed language at section 228.10(c)(9) adds more detail concerning reclamation and reclamation plans. The proposed regulation also states that any operator other than those engaged in the proposed category of “limited operations,” which do not require notice to the Forest Service, shall provide a reclamation plan as part of an operating notice or a proposed plan of operations. The Agency recognizes that in some cases, especially under an operating notice, a reclamation plan may be very simple and short, but in most cases, it will need to address control of surface runoff. The reclamation plan should be appropriate to the nature of the operations. The collective paragraphs in proposed section 228.10 provide a much greater level of detail and clarity than the current regulation at section 228.8. The Forest Service believes that this increased detail and clarity will assist the authorized officer, operator, and the public in understanding the Agency and operator roles and responsibilities, as well as expectations, and thus will increase consistency in the implementation of the regulation across the national forests and grasslands.

Section 228.11 Establishing, Maintaining, and Releasing Financial Assurances

In proposed section 228.11, the Forest Service seeks to clarify the roles and responsibilities of the operator and the Agency, as well as increase consistency in the implementation of the processes for collection, administration, and release of financial assurances. In the Forest Service’s experience, the current regulation, section 228.13, could be improved with clearer direction and expectations about the Agency’s processes for the collection, return, or forfeiture of a financial assurance. As a result, under the current regulation, operators have experienced a lack of consistency in interpreting and implementing this section.

The proposed language in section 228.11 reflects current Agency practice, developed from lessons learned over time, and is described in part in the Forest Service Manual chapter 2840 (1994) and the Agency's 2004 *Training Guide for Reclamation, Bond Estimation, and Administration*. Therefore, while appearing different from current regulation, the proposed language represents only a few changes from Agency policy and current Agency practices.

Proposed section 228.11 describes the process of estimating the costs of reclamation and determining and accepting a financial assurance, as well as defines the Agency and operator roles and responsibilities in this process. Proposed section 228.11 also reiterates that, presuming the reclamation cost estimate results in estimated reclamation costs greater than \$0, an operator must provide financial assurance prior to commencing operations. The Agency recognizes there may be narrow circumstances in which an operating notice or a plan of operations is required, but reclamation will not be necessary, and therefore the reclamation cost estimate for those operations might be \$0, resulting in no financial assurance. Proposed sections 228.11(a) and (b) describe the roles and responsibilities of the operator and the authorized officer when proposing and reviewing a reclamation cost estimate. Section 228.11(b) describes that an operator must calculate a cost estimate as if the Forest Service were hiring a third-party contractor to complete the reclamation work, including any long-term post-closure operations.

If an operator is unwilling or unable to perform the reclamation obligations that it has committed to as part of the operating notice in effect or approved plan of operations, the Agency would hire a contractor to complete that work, and the financial assurance provided by the operator would cover the entire cost to the Federal government.

Proposed section 228.11(c) describes the process the authorized officer will use to determine the financial assurance amount. Proposed section 228.11(d) lists the types of instruments that are acceptable to the Forest Service as forms of financial assurance. The

instruments are consistent with currently accepted instruments, which are: cash; a surety bond meeting certain standards; an irrevocable letter of credit; an assignment of certificates of deposit or savings accounts meeting certain standards; and negotiable securities of the United States having a market value at the time of deposit of not less than the required dollar amount of the reclamation cost estimate. Trust funds are intended only for long-term post-closure obligations as described in 228.13. Trust funds are not intended to provide financial assurance for shorter-term, traditional reclamation tasks such as earthwork and demolition. General changes from prior language of “bond” to “financial assurance” helps clarify that any of the listed instruments are acceptable forms of financial assurance, and that the Agency has no preferred instrument.

Proposed section 228.11(f) provides for, and describes the process of, phased financial assurances. This allows operators to account for discrete phases of larger projects while preventing a financial liability on the public, because an operator cannot proceed to construct or operate the subsequent phase until it has provided the financial assurance for that phase to the Agency. If an operator wishes to employ phased financial assurance, the operator must clearly identify the point in time during each phase at which the costs to reclaim all unreclaimed disturbances during that phase are at a maximum. In this way, the Agency can ensure that the financial assurance for each phase is adequate to provide for the reclamation of all operations that are part of that phase. That maximum estimate for each phase will be the basis for the calculation of the cost estimate of the total reclamation costs of the operation; the total cost estimate is the sum of the reclamation costs that will arise throughout the project based on the maximum level of approved disturbance of unreclaimed land.

Proposed section 228.11(g) provides explicit language regarding the necessary periodic review of financial assurances and the associated reclamation cost estimates. This is important because, as circumstances change, the Forest Service must be able to

ensure that the financial assurance changes accordingly. Changes in circumstances that can affect the reclamation cost estimate or financial assurance include changes to rental rates, fuel costs, expected contractor profits and overheads, or inflation rates. Changes might also include the viability of the financial assurance instrument, or changes in the operations or site conditions. The Forest Service needs to ensure that the financial assurance in place is a viable instrument that will cover the full reclamation costs. Section 228.11(g) also describes the processes the authorized officer and the operator shall follow to adjust the financial assurance if the authorized officer finds it to be either inadequate or in excess of the required amount, including requiring that the authorized officer notify the operator of the finding and consider the operator's response.

Proposed sections 228.11(h) and (i) refer to the process of replacing a financial assurance instrument, whether due to an operator-initiated change in the preferred instrument or the transfer of an operation from one operator to another. These changes will ensure that the Agency is never without financial assurance for a specific operation. Proposed section 228.11(j) discusses the circumstances under which an authorized officer may authorize a partial or full release of a financial assurance, as well as the processes the authorized officer and operator shall follow to coordinate such a release. This section makes clear that no part of a financial assurance will be returned to an operator unless the authorized officer determines, based upon verification after inspections, that the operator has met the reclamation obligations identified in the operating notice or plan of operations. This section clarifies that release of a financial assurance in part or in full does not release or waive any claim the Forest Service or other persons may have against any person or entity under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (42 U.S.C. 9601, *et seq.*), or under any other applicable statutes or regulations. The Forest Service proposes these changes as enhancements to clarify the processes of financial assurance review, administration, and

release. These proposed changes will also allow the operator, the authorized officer, and the public to understand the various roles and responsibilities associated with ensuring that the Agency and the public do not bear the costs to complete reclamation of an operation if the operator cannot or will not perform that duty.

Section 228.12 Forfeiture of Financial Assurances

The current regulation at section 228.13 is silent on the circumstances and process under which the Forest Service might initiate forfeiture of the financial assurance supplied by the operator. The new language in the proposed section 228.12 clarifies the circumstances under which the authorized officer may initiate forfeiture of the financial assurance, in part or in whole, to complete reclamation work. Proposed section 228.12 also describes the process the authorized officer will follow to initiate forfeiture of the financial assurance, including consideration of the operator's response to initial notification that such a determination has been made. This proposed new section will facilitate a consistent interpretation of when to initiate forfeiture of an operator's financial assurance and clarify for operators, sureties, and the public the specific processes that the Agency and authorized officer shall follow to do so.

The proposed language still requires the authorized officer to notify the operator prior to initiating forfeiture of the financial assurance and consider the operator's response before taking any action. This proposal also provides for the Forest Service to be able to send an operator a bill for collection for the balance of reclamation costs if the financial assurance is insufficient to complete the reclamation tasks necessary, thus protecting the Agency and taxpayers from being responsible for impacts caused by operators who are unwilling or unable to perform their reclamation obligations.

Section 228.13 Trust Funds

The current regulation at section 228.13(e) describes trust funds as a way to ensure that funds are available to complete post-closure operational tasks such as water

treatment or ongoing necessary infrastructure maintenance once operations have ceased, but it does not describe the process. Proposed section 228.13 describes the processes and sideboards that will be in place regarding the collection, administration, review, and closure of such an instrument.

The proposed regulation includes the requirement that the financial assurance provides adequate annual earnings without depleting the principal to complete all required tasks once an operation has ceased production and requires annual reviews to ensure the performance of the trust. Proposed section 228.13 also lays out the process to collect additional funds for investment into the trust if it is not meeting performance measures, as well as the process to offer the operator a release of that part of the fund, if applicable, that exceeds performance goals by a given percent. The Forest Service believes these reviews and processes are crucial to the success of a trust fund mechanism as a financial assurance.

As a whole, these three proposed sections regarding financial assurances will provide clear roles and responsibilities, defined processes, and consistent implementation to strengthen the Agency's ability to implement and enforce a robust financial assurance program. The public, operators, and Forest Service staff will have the ability to clearly understand the Agency's expectations and processes by referencing the proposed regulation, which will ultimately lead to higher-quality proposed cost estimates, thus saving review time and therefore Agency funds.

Section 228.14 Operations on National Forest System Lands, Including National Forest Wilderness Areas, That Have Been Segregated or Withdrawn From the Operation of the Mining Laws subject to valid existing rights.

Federal lands can be segregated or withdrawn from entry and appropriation under the mining laws by Congressional, Presidential, or certain executive branch administrative authorities. Where the segregation or withdrawal is made subject to valid

existing rights, proposed section 228.14 describes the steps operators must take to conduct operations. Proposed section 228.14 grew out of the current regulation at section 228.15, covering operations within national forest wilderness, which recognizes that these lands are withdrawn and operations are subject to valid existing rights.

Furthermore, the Forest Service has historically limited the preparation of mineral examination reports to situations where valid existing rights must be verified because the lands in question have been segregated or withdrawn from mineral entry, as described in existing Forest Service Manual policy at FSM 2803(5) which states, “ensure valid existing rights have been established before allowing mineral or energy activities in a congressionally designated or other withdrawn area.” Hence, long-standing Forest Service regulation and policy have been to confirm the existence of valid existing rights prior to approving a plan of operations on withdrawn lands. Proposed section 228.14 provides greater clarity for operators by expressly addressing requirements or procedures for approval of a plan of operations on segregated lands, which neither existing Forest Service regulation nor existing Forest Service policy addresses. The proposed rule’s provisions regarding segregated lands would create greater certainty among operators and consistency in Agency evaluations of proposed operations on segregated lands.

This proposed regulation at section 228.14 would establish additional requirements for operators who wish to, or who are, conducting locatable minerals operations on NFS lands that have been segregated or withdrawn from the operation of the U.S. mining laws, subject to valid existing rights. Under proposed section 228.14(a)(2), a plan of operations is required for almost all operations on segregated or withdrawn lands, even for operations that might otherwise be conducted under an operating notice. Requiring a plan of operations is consistent with proposed section 228.4(c)(8), which requires a plan of operations on lands that have specific designations and management plans or legal requirements.

In the case of operations on lands that were segregated or withdrawn lands, subject to valid existing rights, the proposed regulation allows new operations only on lands subject to mining claims with verified valid existing rights. As a result, when the Forest Service receives a proposed plan of operations on lands that are segregated or withdrawn, subject to valid existing rights, the Agency will notify the operator that it is suspending its completeness review until the Forest Service completes a mineral examination report to verify valid existing rights for the mining claims before a plan of operations can be approved. The authority under proposed section 228.14 is in addition to the government's authority, so long as the lands remain in Federal ownership, to assess the validity of any mining claim at any time, regardless of whether the subject lands are segregated or withdrawn from mineral entry.

Proposed section 228.14(b) would require a mineral examination report prior to approval of a plan of operations on segregated lands. The Forest Service believes that having mandatory mineral examination requirements for both segregated and withdrawn NFS lands is appropriate for several reasons. First, the proposed regulation would clarify the scope of the policy and provide additional consistency and certainty to operators about what is required before conducting operations on segregated NFS lands. Second, the Forest Service recognizes the importance and significance of proposing or planning for various proposed actions whereby lands are segregated from entry and appropriation under the mining laws pending a formal decision. For example, Federal lands may be segregated, subject to valid existing rights, pending the execution of a land exchange or disposal of Federal land. As another example, publication of a notice of proposed withdrawal by the Secretary of the Interior under section 204 of the Federal Land Policy and Management Act in the *Federal Register* segregates the subject lands from entry and appropriation under the public land laws, including the mining laws, to the extent specified in the notice, for up to 2 years, subject to valid existing rights. In both

examples, the period of segregation serves to maintain the status quo while the required analysis and documentation are completed to support a formal decision on the proposed action.

The proposed regulation allows the Forest Service to suspend the Agency's time limits in proposed section 228.6(b) for the initial completeness review of a proposed plan of operations until the existence of valid existing rights is determined, including any subsequent administrative contest action or Federal court proceedings. Under 228.6(a)(6)(xiii), operators are expected to provide any and all available and relevant information and data to the Forest Service to support their assertion that they have a valid existing right that allows them to operate on the segregated or withdrawn lands. This information may include a compilation of available geologic or mineral resource information, data, and reports pertinent to the deposit. This information also includes the results of all allowable work conducted under the limited operations provisions of section 228.4(a), such as geologic mapping, sampling and analysis of existing exposures with hand tools, and similar activities, prior to the segregation or withdrawal.

Because operators must be able to provide such information, the proposed regulation also specifies that the Forest Service may approve an interim plan of operations to allow certain limited activities before the final determination of valid existing rights. Specifically, the Forest Service may approve an interim plan of operations that is limited to taking samples to confirm or corroborate mineral exposures that were physically disclosed and existing on the mining claim before the segregation or withdrawal date, usually whichever is earlier. The Forest Service may also approve an interim plan of operations to perform any minimum necessary annual assessment work, if required under applicable law and regulations, prior to completion of a mineral examination report.

The proposed regulation sets forth the processes to follow when a mineral examination report recommends contesting the mining claim for lack of validity. In such cases, the operator can alter the proposed operations to avoid any segregated or withdrawn NFS lands or the lands covered by mining claims recommended for contest. If the operator declines to alter its proposed plan of operations, the Forest Service may request that the BLM initiate contest proceedings to determine the validity of all such mining claims.

Additionally, proposed section 228.14(g) states that an operator is required to cease all operations on segregated or withdrawn lands, except required reclamation, on any mining claims determined to be void, whether as a result of an administrative contest proceeding following a mineral examination as described in paragraph (h), automatic forfeiture for failure to make the required payments and filings with BLM, or otherwise.

The Forest Service has been involved in recent litigation regarding approved plans of operations on lands that were segregated and withdrawn after the Forest Service's approval. Proposed section 228.14(c) makes clear that a plan of operations approved before a segregation or withdrawal will remain in effect during the period of segregation or withdrawal, provided the operator has commenced operations before the date of segregation or withdrawal. Additionally, proposed section 228.14(c) makes clear that, absent statutory language requiring a mineral examination in order for operations to continue after the segregation or withdrawal takes effect, no mineral examination is required in order for operations to continue under the approved plan, or for modified operations that remain within the footprint of the plan approved before the segregation or withdrawal. Similarly, an operating notice in effect as of the date of segregation or withdrawal of the subject lands would generally remain in effect for the remainder of its term but would not be subject to the operating notice extension provisions under

proposed section 228.5(h). This provision follows from the proposed regulation's general requirement of a plan of operations for operations on segregated or withdrawn lands.

As part of developing this proposed regulation, the Agency reviewed the Wilderness Act of 1964 (16 U.S.C. 1131–1136) and associated wilderness-area-specific regulations in the current 36 CFR Part 228, Subpart A regulations. Any wilderness-area-specific provisions in the current regulations that are clearly stated in and redundant with the Wilderness Act were removed from the proposed regulation. Similarly, any other wilderness-area-specific provisions in the current regulations that were determined to be adequately addressed by the general provisions of other sections of this proposed regulation were also removed. The proposed regulation recognizes the provisions of both the Wilderness Act as well as any subsequent legislation establishing a wilderness area on NFS lands, the latter of which often contains requirements and provisions specific to a particular wilderness area.

The Forest Service made several clarifications in the proposed regulation concerning information gathering about any type of mineral as authorized by the Wilderness Act (16 U.S.C. 1133(d)(2)) on lands the Act has withdrawn from appropriation under the mining laws. The mining laws do not govern such information gathering, and therefore the proposed regulation does not repeat the language in the current regulations at 36 CFR 228.15(f).

Section 228.15 Procedures for Operations Involving Possible Mineral Materials

The Materials Act of 1947, as amended (61 Stat. 681; 30 U.S.C. 601, *et seq.*) provides the Secretary the authority to dispose of mineral materials (including but not limited to common varieties of the following: sand, stone, gravel, pumice, pumicite, cinders, and clay), under such rules and regulations as they prescribe. The Forest Service implemented its mineral material disposal regulations at 36 CFR Part 228, Subpart C in 1984 and revised them in 1990. The 1990 revision provided additional criteria on the

classification and sale of mineral materials in view of the Surface Resources Act in an attempt to concisely distinguish between common varieties of sand, stone, gravel, pumice, pumicite, cinders, and petrified wood, which are not locatable, and the uncommon varieties of these materials which are locatable (the term uncommon varieties of minerals is used consistent with its use in other regulatory provisions (see, for example, 36 CFR Part 228, Subpart C) to refer to those minerals that are subject to disposition under the mining laws and these regulations) . The 1990 revision at 36 CFR 228.41(c) created five categories of mineral materials based on characteristics and uses of the materials: (1) agricultural supply and animal husbandry materials; (2) building materials; (3) abrasive materials; (4) construction materials; and (5) landscaping materials. In addition, the 1990 revision to 36 CFR 228.41(d) established that mineral materials do not include any mineral used in manufacturing, industrial processing, or chemical operations for which no other mineral can be substituted due to unique properties giving the particular mineral a distinct and special value, nor do mineral materials include block pumice, which in nature occurs in pieces having one dimension of two inches or more that is valuable and used for some application that requires such dimensions.

Proposed section 228.15 specifies how the authorized officer should proceed if there is a question whether a possible mineral material is considered locatable, subject to 36 CFR Part 228, Subpart A or a mineral material, subject to Subpart C. The Forest Service frequently responds to operators asserting that their operations are for locatable minerals under 36 CFR Part 228, Subpart A, when the commodity of interest is possibly a mineral material disposed of under Subpart C. The Forest Service does not have any clear regulations or existing policy guidance to dictate the requirements and process for addressing such issues. A December 22, 1986, direction letter signed by Deputy Chief George Leonard and entitled “Plan of Operations under 36 CFR 228(A)/Classification of

Common Variety Mineral Materials” has formed the basis of the Agency’s policy and procedures concerning this issue to date. This proposed regulation adds clarity and incorporates most provisions from the 1986 direction letter. The Forest Service has also reviewed and considered the relevant BLM regulations. This proposed regulation is generally consistent with the BLM regulations, but there are slight differences because the agencies operate under different statutory authorities and regulations. This section of the proposed regulation applies to all operations for removal of possible mineral materials under 36 CFR Part 228, Subpart A, unless such operations take place on mining claims located before July 23, 1955, the date that common varieties of those minerals were removed from the operation of the mining laws.

The Forest Service will continue to classify mineral materials according to the provisions of 30 U.S.C. 601 and 36 CFR 228.41, as appropriate. However, the Forest Service recognizes that neither the Agency’s certified mineral examiners nor the extensive administrative and judicial case law on this subject have evaluated all mineral materials, their physical or chemical properties, and economic factors relevant to their use to determine whether or not a material is a common variety. One standard for determining whether an “uncommon variety” mineral subject to appropriation under the mining laws that has provided a broad framework for numerous administrative decisions was set forth in *McClarty v. Secretary of the Interior*, 408 F.2d 907, 908 (9th Cir. 1969). That case provided a five-factor approach for determining whether a deposit meets those requirements: (1) There must be a comparison of the mineral deposit in question with other deposits of such minerals generally; (2) the mineral deposit in question must have a unique property; (3) the unique property must give the deposit a distinct and special value; (4) if the special value is for uses to which ordinary varieties of the mineral are put, the deposit must have some distinct and special value for such use; and (5) the distinct and special value must be reflected by the higher price which the material

commands in the market place. The *McClarty* decision also provided that a finding of the special economic value of a deposit due to a unique property might be based on reduced costs or overhead, resulting in a greater margin of profit. In addition to the provisions of 30 U.S.C. 601 and 36 CFR 228.41, some cases will require application of the so-called “*McClarty* criteria” to classify materials and determine whether disposal under Subpart C or appropriation under the mining laws and application of subpart A are appropriate.

The Forest Service uses a mineral classification report to determine whether possible mineral materials are subject to disposal under Subpart C or to appropriation under the mining laws and regulation of mining operations under Subpart A.

Under this proposed regulation, an operator shall not remove possible mineral materials under this subpart before a mineral classification report has been prepared which determines that all or parts of the deposit are subject to appropriation under the mining laws. The proposed regulation suspends the time limits imposed on the Forest Service for processing an operating notice or a plan of operations, pending completion of the mineral classification report. Operators are expected to provide any and all available and relevant information and data to the Forest Service to support their assertion that the materials subject to their operations are an “uncommon variety” mineral that is subject to disposal under the mining laws. This information may include a compilation of available geologic or mineral resource information, data, and reports pertinent to the deposit. This information also includes the results of all allowable work conducted under the limited operations provisions of section 228.4(a), such as geologic mapping, sampling and analysis of existing exposures with hand tools, and similar activities. Because operators must be able to provide such information, the proposed regulation provides that the authorized officer may allow certain interim operations to allow operators to do so. The proposed regulation at section 228.15(e)(2) specifies that, for bona fide cases the Forest Service can allow the operator, under an interim operating notice or plan of operations, to

conduct the minimum necessary sampling and analysis to determine the properties of the materials present, their distribution, suitable end uses, and associated markets. For removal of materials under an interim plan of operations that consists of more than the minimum necessary assessment work or the minimum necessary sampling, section 228.15(e)(3) specifies the operator must establish an escrow account and place the dollar amount equivalent to the fair market value for materials removed into the escrow account pending completion of the mineral classification report. The authorized officer will consider all information and data provided by the operator, as well as the would-be operator's likelihood of success in making the case that any materials on the lands subject to their operations are subject to appropriation under the mining laws, before approving an interim plan of operations for the removal of possible mineral materials. The Forest Service intends that the operator can conduct interim operations concurrently with an ongoing mineral classification report because the purpose of those operations is to further inform the operator and provide the data required to support the completion of the report.

The proposed regulation at section 228.15(c) informs the public, operators, and employees of the process to follow when an operator proposes to prospect, explore, develop, or remove materials that are, based on statute or regulation, clearly mineral materials and therefore are not locatable minerals subject to the regulations in Subpart A. In such cases, upon receipt of operating notices or plans of operations submitted under Subpart A, the authorized officer may respond that the operating notice or plan of operations includes uses that are not reasonably incident to locatable minerals operations under the provisions of proposed sections 228.5, 228.6, and/or 228.9. The same responses would be applicable to the submission of an operating notice or plan of operations involving possible mineral materials lacking sufficient information and data supporting any assertion that the materials on the lands subject to operations are in fact an "uncommon variety" mineral or locatable mineral subject to the mining laws and the

provisions of Subpart A. Essentially, if there are no locatable minerals present, then any proposed uses are not reasonably incident to locatable minerals operations under this Subpart A.

The proposed regulation in section 228.15(f) contains requirements for a final determination on whether all or any portion of the materials to be removed are mineral materials, or locatable minerals governed by Subpart A. Based on that final determination, the authorized officer is required to take action regarding the distribution of any funds held in an escrow account associated with an approved interim plan of operations. The authorized officer must also take action regarding the disposition of any interim operating notices in effect, approved interim plans of operations, or proposed operating notices and plans of operations whose processing was suspended pending completion of the mineral classification report and final determination. For example, upon completion of a mineral classification report that finds the material to be subject to appropriation under the mining laws and an associated final decision, the authorized officer may remove the interim status of an interim operating notice or plan of operations under this section if/as appropriate. The authorized officer may also process any associated pending operating notice or plans of operations for which processing was suspended under this section pending completion of a classification report.

Finally, nothing in section 228.15 of the proposed regulation would preclude an operator from engaging in any reasonably incident uses, including overburden stripping, coincidental mining, storage, or onsite use of mineral materials for reclamation or other purposes associated with locatable minerals operations under an operating notice in effect or approved plan of operations.

Section 228.16 Administrative Appeals.

No change made from current regulations at section 228.14.

Section 228.17 Transitional Administration of Operations Between These Regulations and the Prior Version (1974 as Amended).

Proposed section 228.17 explains that operations will have 1 year from the effective date to comply with the proposed regulations, if finalized.

Section 228.18 Availability of Information to the Public.

This section clarifies and further explains the information in the current regulations at section 228.6. The Forest Service added an explanation of the process the authorized officer shall pursue to resolve questions regarding whether information is protected under this section.

Section 228.19 Information Collection.

Proposed section 228.19 discloses that certain information is required under this proposed regulation.

Regulatory Certifications

Regulatory Planning and Review (E.O. 12866 and E.O. 13563)

Executive Order (E.O.) 12866 requires that Federal agencies account for the regulatory impact of significant regulations, account for the possible costs and benefits, and provide such rules to the Office of Management and Budget (OMB) for designation and review. The proposed rule has been designated as significant by the OMB, per E.O. 12866 section 3(f). Therefore, the potential benefits and costs, as well as Agency costs, associated with the proposed rule were analyzed to fulfill the cost benefit analysis requirements, consistent with E.O. 12866 and OMB Circular A-4. E.O. 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the nation's regulatory system to promote predictability, reduce uncertainty, and use the best, most innovative, and least burdensome tools for achieving regulatory ends. The proposed rule is developed consistent with E.O. 13563.

The cost benefit analysis considers the costs and benefits associated with updates, modifications, or clarifications to different sections of 36 CFR Part 228, Subpart A, as they relate to key procedural steps for locatable minerals extraction on NFS lands. Changes in costs and benefits are primarily discussed in a qualitative manner due to challenges associated with quantifying costs and benefits at a programmatic level. Quantitative proxies are used when feasible to help describe the potential frequency or magnitude of activities and the corresponding costs affected by the proposed rule.

Costs to operators could be incurred if: (1) operators currently operating under the “no notice” category, but whose operations consist of operations that are excluded from “limited operations” under the proposed regulations (for example, underground with any surface component), will have to spend additional time developing an operating notice or a plan of operations; (2) operators’ current notices of intent will need to be updated to include additional levels of detail, so that the Forest Service can review whether or not the activities are below the threshold of a plan of operations (a reclamation plan, cost estimate, and financial assurance are required from the operator prior to initiating operations under an operating notice, which are not currently required for a notice of intent); (3) operators performing the types of operations that do not require a plan of operations under the current regulation, but for which circumstances require an approved plan of operations prior to operating (for example, operating a high banker within a “scenic” section of a Wild and Scenic River), will no longer be able to operate under a notice-level and will be required to submit a plan of operations (and, therefore, undergo a NEPA analysis); (4) operators have to update an approved plan of operations to provide specific interim management plans; or (5) operators have to update an approved plan of operations to explain why certain activities are reasonably incident. However, the Forest Service believes that the proposed rule will result in positive net benefits due to small increases in monetized cost to industry (\$211,000 per year, 2022 dollars), offset by

substantial cost savings to the Agency (\$2.6 million per year, 2022 dollars), and unquantified benefits resulting from increased clarity of process, the potential for a higher efficiency in the review process of submitted plans of operations based on increased consistency of completeness and quality of data in an initial plan of operations, and the revision of the operating notice category of operations, which will redefine the category for which prior notification of operations, but no Federal decision, is needed. The redefined operating notice category is predicted to increase the number of operations that can occur without any Agency action, which could also result in an increase in the number of operations that can occur without NEPA analysis and documentation. Agency costs include hiring financial consultants to help review trust agreements and Agency time to review trust agreements.

Cost savings to industry and the Forest Service could result from fewer plans of operations, including the time needed to prepare and review those plans as well as the NEPA documentation needed to support those plans. The cost to industry to prepare operating notices (requiring greater levels of effort compared to current regulatory conditions) is estimated to increase under the proposed rule. Total costs to industry are estimated to increase by \$200,000 per year after accounting for cost savings from reduced numbers of plans of operations and increased costs of operating notices.

The proposed rule more efficiently satisfies the legal requirement for the Forest Service to provide access to locatable mineral resources, while improving the Agency's ability to protect national forests and grasslands for mandated multiple uses.

Benefits of the proposed rule could result from a more modern and efficient Agency review and approval of plans of operations. The benefits to industry derive from timelier development of, access to, and use of locatable minerals on NFS lands. Expedited access and development of locatable mineral resources is expected to result in an increase in the time value of revenues generated by locatable operations. A potential

benefit to the public of facilitating access to NFS lands is the increased opportunity to develop domestic sources of strategic and critical minerals, which would decrease vulnerability to American supply chains. Most importantly, benefits to the public from the proposed rule are the continued protection and, in some cases, increased assurance about the protection of ecosystems and corresponding goods and services from the potential damages of locatable mining activities. These assurances are made possible by gains in the Agency's ability to monitor, identify, and mitigate potential environmental impacts, made possible by the following proposed rule provisions: 228.7 Noncompliance; 228.8 Temporary cessation or abandonment of operations; 228.10 Surface resource protection requirements and operating standards; 228.11 Establishing, maintaining, and releasing financial assurances; and 228.13 Trust Funds.

The proposed rule is not expected to have a significant or measurable impact on rates of locatable minerals extraction on NFS lands; market factors are likely to drive future changes in the growth of development and production.

The total or aggregate net benefits associated with the proposed rule cannot be quantified but are likely to be small. The Forest Service estimates a total cost savings of approximately \$2.4 million per year, accounting for Agency cost savings of \$2.6 million per year and increases in industry costs of approximately \$200,000 per year. The cost benefit analysis is available at <http://www.regulations.gov> (enter 0596-AD32 in the search box).

Regulatory Flexibility Act – Impact on Small Businesses

The Agency considered the impacts of the proposed rule on small entities consistent with requirements of the Regulatory Flexibility Act, as amended by the Small Business Regulatory Flexibility Enforcement Fairness Act of 1996 and E.O. 13272. An agency must prepare and make available for public comment a full regulatory flexibility analysis that describes the effects of the rule on small entities (i.e., small businesses,

small organizations, and small government jurisdictions) unless the head of the agency certifies the proposed rule will not have a significant economic impact on a substantial number of small entities. A threshold regulatory flexibility analysis was prepared for this proposed rule.

Small entities potentially impacted by the proposed rule include small businesses (firms) involved in precious and heavy metal mining North American Industry Classification System (NAICS) 2122, iron, gold, silver, copper, nickel, lead, zinc, uranium, and other metals); limestone and clay mining and quarrying (NAICS 2123, crushed or broken limestone, kaolin and ball clay, ceramic and refractory minerals, other chemical or fertilizer minerals, and other nonmetallic minerals); and geophysical surveying and mapping (NAICS 541360). A majority (75 to 80 percent) of existing locatable operations on NFS lands fall within the precious and heavy metal sectors, within the gold ore sector specifically. The proposed rule would only apply to the fraction of businesses that decide to engage in locatable minerals development and operations on NFS lands.

The threshold regulatory flexibility analysis indicates that the proposed rule has the potential to affect a substantial number of small businesses within relevant mining sectors. It is estimated that approximately 500 small businesses, or 25 percent of approximately 2,000 small businesses in the United States mining sector, would be affected by the proposed rule (primarily in the precious and heavy metal ore mining sectors) while seeking to operate on NFS lands. The analysis suggests that economic impacts on those small businesses are not expected to be significant; incremental annualized costs under the proposed rule are estimated to be less than 0.1 to 0.6 percent of annual business receipts for over 71 percent of businesses; and 3.5 percent of annual receipts for the remaining 29 percent of businesses in the smallest category (less than \$100,000 per year), each of which are assumed to have annual receipts of \$50,000 and

incur an annualized cost of \$1,734. However, for many of the operations in this smallest category incremental costs and economic impacts are likely to be substantially lower than 3.5 percent (or \$1,734), as the nature of operations are at such a small scale that the operator will not spend as much time as estimated in preparing an operating notice. Additional hours needed by the smallest operators to submit an operating notice under the proposed rule are likely to be less than the assumed average of 44 hours; information collected by the Forest Service suggests small-scale operators in this group of annual receipts less than \$100,000 may take only 6 to 8 additional hours.

Small businesses seeking to operate on NFS lands are expected to benefit from proposed rule provisions that clarify the definition of criteria for plans of operations and operating notices, codify and explain existing practices and procedures, and require engagement in pre-submission meetings, all of which are expected to help ease small business operator confusion and increase awareness of what to expect when seeking to conduct locatable minerals operations on NFS lands. Annually, an estimated 62 operations will be able to operate under the new operating notice category, which would have been plans of operations under the existing rule.

The evidence compiled in the threshold regulatory flexibility analysis indicates that there is potential for a substantial number of small entities to be affected by the proposed rule, but economic impacts on those small entities are not expected to be significant. This evidence supports the determination that the proposed rule is not expected to result in significant impacts on a substantial number of small entities, and a full regulatory flexibility analysis is therefore not required for the proposed rule. The Forest Service requests comment on the analysis and findings found in the threshold regulatory flexibility analysis. More information on the Regulatory Flexibility Act and Small Business Regulatory Flexibility Enforcement Fairness Act determination is available at <http://www.regulations.gov> (enter 0596-AD32 in the search box).

Congressional Review Act

Pursuant to Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996 (known as the Congressional Review Act) (5 U.S.C. 801 *et seq.*), the Office of Information and Regulatory Affairs (OIRA) has designated this proposed rule as not a major rule as defined by 5 U.S.C. 804(2).

Energy Effects (E.O. 13211)

The Agency has reviewed this proposed rule under E.O. 13211 issued May 18, 2001, “Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use.” The Agency has determined that this proposed rule does not constitute a significant energy action as defined in E.O. 13211. The Forest Service regulation does not authorize or approve any particular plan of operations or operating notice for locatable minerals development, but instead manages the process and impacts on surface resources on NFS lands stemming from activity under the mining laws. The proposed rule should increase the efficiency of processing locatable minerals plans of operations and clarify processing procedures for plans of operations on NFS lands. The increased efficiency should generally reduce the time and costs of making decisions concerning whether to approve a plan of operations; at the same time, the specific time and costs required for particular plans of operations are influenced by conditions specific to locations on NFS lands.

The proposed rule is not expected to have a significant adverse effect on the supply, distribution, or use of energy; competition or prices; other Agency actions related to energy; or raise novel issues regarding adverse effects on energy. The rule has not otherwise been designated by the Administrator of OIRA as a significant energy action. The proposed rule is therefore not expected to require a statement of energy effects, consistent with OMB guidance for implementing E.O. 13211.

Consultation and Coordination with Indian Tribal Governments (E.O. 13175)

The Agency has reviewed this proposed rule in accordance with the requirements of E.O. 13175, “Consultation and Coordination with Indian Tribal Governments.” E.O. 13175 requires Federal agencies to consult and coordinate with tribes on a government-to-government basis on policies that have Tribal implications, including regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian Tribes, on the relationship between the Federal government and Indian Tribes, or on the distribution of power and responsibilities between the Federal government and Indian Tribes.

To ensure Tribal perspectives are heard and fully considered during rulemaking, the Agency contacted federally recognized Indian Tribes and Alaska Native Corporations in accordance with E.O. 13175, USDA Departmental Regulation 1350-002 (Tribal Consultation, Coordination, and Collaboration), and Forest Service Handbook 1509.13, chapter 10 (Consultation with Indian Tribes and Alaska Native Corporations). The Agency initiated government-to-government consultation with Indian Tribes and government-to-corporation consultation with Alaska Native Corporations with e-mail notifications of the opportunity to consult on the rulemaking.

The Forest Service initiated consultation in September 2018 and re-initiated consultation in notifications sent to Tribal leaders and Alaska Native Corporation leaders on July 14, 2023. Prior to the initiation of consultation and to re-introduce the proposed rule revision, the Agency sent invitations to tribes and Alaska Native Corporations on April 17, 2023, to participate in a virtual Tribal forum the Office of Tribal Relations facilitated on May 17, 2023. Fifteen participants represented a total of ten Tribes and Tribal organizations. The notification letter sent by email on July 14, 2023, included hyperlinks to a consultation package that included a summary, a comparison table showing the current rule and the proposed rule, and the draft proposed regulatory text.

The Forest Service is requesting comment on the proposed criteria and circumstances to clarify thresholds that will best facilitate orderly development of the nation's minerals while minimizing impacts on surface resources, especially Tribal resources.

At the time of this proposed rule's publication, one Tribe had engaged in consultation. The Agency has had several meetings and is incorporating the feedback we received.

Federalism (E.O. 13132)

The Agency has considered this proposed rule under the requirements of E.O. 13132, issued August 4, 1999, "Federalism." The Forest Service has made an assessment that the proposed rule conforms with the federalism principles set out in E.O. 13132; would not impose any compliance costs on the States; and would not have substantial direct effects on the States, on the relationship between the Federal government and the States, nor on the distribution of power and responsibilities among the various levels of government. Therefore, the Agency concludes that this proposed rule does not have federalism implications.

Taking of Private Property (E.O. 12630)

The Agency has analyzed this proposed rule in accordance with the principles and criteria contained in E.O. 12630, "Governmental Actions and Interference with Constitutionally Protected Property Rights," and has determined that the rule does not pose the risk of a taking of private property.

Civil Justice Reform (E.O. 12988)

The Agency has analyzed this proposed rule in accordance with the principles and criteria of E.O. 12988, "Civil Justice Reform." The Forest Service has not identified any State or local laws or regulations that conflict with this regulation or that would impede the full implementation of this rule. Nevertheless, in the event that such conflicts were to be identified, the proposed rule, if implemented, would preempt the State or local laws or

regulations found to be in conflict. However, in that case, (1) no retroactive effect would be given to this proposed rule, and (2) the USDA would not require the use of administrative proceedings before parties could file suit in court challenging its provisions.

Unfunded Mandates Reform Act

Pursuant to Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538), the Agency has assessed the effects of the proposed rule on State, local, and Tribal governments, as well as the private sector. This proposed rule would not compel the expenditure of \$100 million or more—adjusted for inflation—by any State, local, or Tribal government, or anyone in the private sector. Therefore, a statement as required under section 202 of the Act is not required.

Paperwork Reduction Act

This proposed rule is related to a change in reporting or recordkeeping burdens under the reinstatement of OMB control number 0596-0022 that requires approval under the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35).

In accordance with section 3507(d) of the Paperwork Reduction Act of 1995, the information collection or recordkeeping requirements included in this proposed rule have been submitted for approval to OMB.

Title: Locatable Minerals

OMB Number: 0596-0022.

Expiration Date of Approval: 06/30/2018.

Type of Request: Reinstatement with changes.

Abstract:

Information required to be collected under this proposed rule pertains to operating notices, plans of operations, modifications to operating notices and plans of operations, and cessation of operations as specified in §§ 228.5, 228.6, and 228.8 of these proposed

regulations. The requested information is required by the Forest Service in order to adequately assess the scope of operations and associated surface disturbance as operations progress.

This information regarding operations is crucial for the Forest Service to assess potentially adverse impacts on surface resources, including biological communities and habitat, as well as public safety on NFS lands. The collected information will be assessed to ensure that the exploration, development, and production of mineral resources are conducted in such a manner as to minimize or mitigate potentially adverse impacts on surface resources to the fullest extent practicable. This information is also required to ensure compliance with these regulations and all other Federal, State, and local regulations as may apply to such operations. This information will also be used to identify and inventory operations proposed to occur on NFS lands.

Estimate of Annual Burden: 271 hours (224 hours – plans of operations; 46 hours – operating notice; 1 hour – cessation of operations).

Type of Respondents: Mining operators.

Estimated Annual Number of Respondents: 510 (136 – plans of operations; 372 – operating notices; 2 – cessation of operations).

Estimated Annual Number of Responses per Respondent: 1.

Estimated Total Annual Burden on Respondents: 47,578 hours (224 hours x 136 plans of operations = 30,464; 46 hours x 372 operating notices = 17,112; 1 hour x 2 cessation of operations = 2; 30,464 + 17,112 + 2 = 47,578).

Comment is invited on: (1) whether this collection of information is necessary for the stated purposes and the proper performance of the functions of the Agency, including whether the information will have practical or scientific utility; (2) the accuracy of the Agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and

clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including the use of automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

All comments received in response to this notice, including names and addresses when provided, will be a matter of public record. Comments will be summarized and included in the request for OMB approval.

National Environmental Policy Act

The Agency has reviewed the proposed rule per U.S. Department of Agriculture and Forest Service regulations and procedures, Council on Environmental Quality regulations, and NEPA. The U.S. Department of Agriculture issued an interim final rule on July 3, 2025 (90 FR 29632) modifying the department's regulations implementing NEPA and removing Forest Service NEPA regulations. In accordance with direction provided in the interim final rule, the Agency is relying on the previous version of the U.S. Department of Agriculture regulations and the prior Forest Service NEPA regulations at 36 CFR 220. The Agency is preparing a programmatic environmental impact statement (EIS) to analyze the possible environmental effects of the rule. An ANPR was published in the *Federal Register* on September 13, 2018 (83 FR 46451), which served as the Forest Service's notice of intent to complete either an environmental assessment or an EIS under NEPA in conjunction with revising the regulations and also initiated a 45-day public comment period. Another notice of intent was published in the *Federal Register* on April 1, 2020 (85 FR 18186) and confirmed the Agency's intent to publish an EIS.

The programmatic EIS discloses the effects of the proposed rule (proposed action) and those of continuing with the existing regulation (no action). The programmatic EIS will be published concurrently with the proposed regulation. The comment period for the

programmatic EIS will coincide with the 60-day comment period on the proposed regulations. The regulation revisions are generally procedural in nature and will continue to require that approvals of plans of operations be subject to the Agency's environmental analysis procedures. During the public comment period for the proposed regulation, the Agency will consider any new information received during the comment period that may inform the analysis of potential environmental effects of the rulemaking. A final EIS will be published with a final rule.

Family Policymaking Assessment

Section 654 of the Treasury and General Government Appropriations Act, 1999 (Pub. L. No. 105-277), requires Federal agencies to issue a Family Policymaking Assessment for a rule that may affect family well-being. The proposed rule will have no impact on the autonomy or integrity of the family as an institution. Accordingly, the Agency has concluded that it is not necessary to prepare a Family Policymaking Assessment for the proposed rule.

List of Subjects

36 CFR Part 228

Environmental protection, Mines, Miners, National forests, Natural resources, Oil and gas exploration, Public lands—mineral resources, Public lands-rights-of-way, Reclamation, Reporting and recordkeeping requirements, Surety bonds, Wilderness areas.

PART 228—MINERALS

1. The authority citation for Part 228 is revised to read as follows:

Authority: 16 U.S.C. 478, 551, 1133; 30 U.S.C. 22, 226, 352, 601, 611, 612; 94 Stat. 2400.

2. Revise Subpart A to read as follows:

Subpart A—Locatable Minerals

Section

- 228.1 Purpose.
- 228.2 Scope.
- 228.3 Definitions.
- 228.4 Requirements for initiating operations.
- 228.5 Operating notices.
- 228.6 Plans of operations.
- 228.7 Noncompliance.
- 228.8 Temporary cessation or abandonment of operations.
- 228.9 Reasonably incident uses.
- 228.10 Surface resource protection requirements and operating standards.
- 228.11 Establishing, maintaining, and releasing financial assurances.
- 228.12 Forfeiture of financial assurances.
- 228.13 Trust funds.
- 228.14 Operations on National Forest System lands, including national forest wilderness areas, that have been segregated or withdrawn from the operation of the mining laws, subject to valid existing rights.
- 228.15 Procedures for Operations involving possible mineral materials.
- 228.16 Administrative appeals.
- 228.17 Transitional administration of operations between these regulations and the prior version [1974 as amended].
- 228.18 Availability of information to the public.
- 228.19 Information collection.

Subpart A—Locatable Minerals

§ 228.1 Purpose.

The Forest Service, through the Organic Administration Act of 1897 (16 U.S.C. 473–482 and 551), is authorized to create rules to regulate the occupancy and use of

National Forest System (NFS) lands, including occupancy and use in connection with operations authorized by the mining laws, and to preserve the forests thereon from destruction. The purpose of this subpart is to set forth the rules and procedures that govern mining operations (throughout this subpart, the term “operations” is used as defined in § 228.3(k)) on NFS lands in order to minimize adverse impacts of operations to surface resources, to the fullest extent practicable. In the event any specific provision of this part is deemed by a court to be invalid, the remaining provisions shall remain in effect.

§ 228.2 Scope.

This subpart applies to occupancy and use of NFS lands in connection with operations conducted under the United States mining laws, provided that:

- (a) Any area of NFS lands covered by a special act of Congress affecting the application of the mining laws is subject to the provisions of this subpart and the provisions of the special act, including, but not limited to, National Recreation Areas (such as Pub. L. No. 92-400 (86 Stat. 612)), and quartz crystals in Arkansas (Pub. L. No. 100-446 § 323 (102 Stat. 1774)). In the case of conflict, the provisions of the special act will apply;
- (b) Persons conducting operations under this subpart also are subject to regulations having general applicability to NFS lands, including, but not limited to, 36 CFR parts 212 (Travel Management), 223 (Sale and Disposal of National Forest System Timber, Special Forest Products, and Forest Botanical Products), 251 (Special Uses), and 261 (Prohibitions), and to any regulation specifically applicable to the area of operations, including, but not limited to, 36 CFR parts 292 (National Recreation Areas), 293 (Wilderness – Primitive Areas), 294 (Special Areas), and 297 (Wild and Scenic Rivers); and

- (c) When operations occur on non-NFS lands, and the operator proposes occupancy of NFS lands for uses reasonably incident to those operations, the Forest Service may elect to apply the provisions of 36 CFR Part 228, Subpart A to those reasonably incident uses on NFS lands. Nothing in this subpart shall expand or restrict any rights of access to non-NFS lands.
- (d) Savings Clause. Nothing in these regulations shall be construed to affect the United States' trust relationship with Indian Tribes or affect rights reserved by an Indian Tribe under a treaty or other Federal law.

§ 228.3 Definitions.

For the purposes of this subpart the following terms mean:

- (a) *Authorized officer.* The Forest Service official to whom authority has been delegated to approve a plan of operations and to take other actions set forth in this subpart. The authorized officer is the Forest Supervisor, unless otherwise provided by Forest Service delegations of authority.
- (b) *Day.* A calendar day. All time periods are computed using calendar days. A computation period begins on the calendar day after the triggering event. If the computation period ends on a day on which offices are officially closed, the computation period is extended to the end of the next day that offices are officially open.
- (c) *Exploration.* Operations undertaken to evaluate the type, extent, quantity, quality, or otherwise measure the value of a locatable mineral. Locatable minerals that are collected in the process of valid exploration activities may be used or sold; however, exploration does not include extraction, beneficiation, or processing of locatable minerals for commercial use or sale. Exploration methods may include but are not limited to geophysical investigations (such as gravity, magnetic, seismic, or induced polarization surveys); geochemical sampling of soil,

sediment, and rock; trenching; digging or drilling of test holes or pits; development of exploration drifts; limited bulk sampling; or limited excavation and onsite processing of placer materials.

- (d) *Financial assurance.* An agreement by which an operator promises to perform all reclamation obligations associated with one or more operating notices or plans of operations, consistent with the requirements of §§ 228.11–228.13, on the condition that the operator’s failure to perform the obligations will obligate the operator to pay or forfeit a specified amount of money pursuant to the terms of the agreement. The financial assurance performance obligations may be secured by any of the financial instruments listed in § 228.11(d).
- (e) *Geotechnical and water resource investigations.* Operations intended to gather data for purposes of mine facility design, such as in situ material testing, collection of samples for subsequent materials testing and analysis, installation of piezometers or other instruments for collection of surface and subsurface water resources data and subsequent monitoring, and assessment of water infiltration and/or flow rates, including any boring, digging, or trenching required for these activities.
- (f) *Indian Tribe.* Any Indian Tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688) [43 U.S.C. 1601 *et seq.*], which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.
- (g) *Long-term post-closure operations.* All functions, work, activities, and facilities in operation following the cessation of mining that are necessary to mitigate the long-term effects of the mining operations on surface resources or public safety.

Examples of long-term post-closure operations include, but are not limited to, the construction, operation, maintenance, replacement, removal, reclamation, and monitoring of impoundment and water treatment facilities.

- (h) *Mining claim.* Any unpatented mining claim, mill site, or tunnel site located under the mining laws.
- (i) *Mining laws.* The Mining Law of 1872 (30 U.S.C. 21–54), as amended and applied to NFS lands through the Organic Administration Act of 1897 (16 U.S.C. 478, 482, and 551), and the Surface Resources Act of 1955 (30 U.S.C. 611–614).
- (j) *Notice or Submission.* As used in this rule, except in § 228.7(h) regarding service of notices of noncompliance, whenever written notice, notification, or submission of documents is required, the notice or documents must be delivered by one of the following means: by certified mail, return receipt (or the equivalent private delivery service), by hand delivery during a day offices are officially open, by facsimile, or by email. Hand delivery to an authorized officer means to the office where the authorized officer or the designated staff are assigned during normal business hours. These delivery methods are used to establish the date by which time limits are calculated in the rules. Service on an operator by mail or equivalent private delivery or by facsimile is considered to be received by the operator 5 days after being sent to the addressee’s last known mailing address or facsimile number. Service on an operator by hand delivery or email is considered to be received by the operator on the date of delivery or email transmission.
- (k) *Operations.* All functions, work, facilities, and activities in connection with prospecting, exploration, discovery, mining claim assessment work, development, extraction, and processing of locatable mineral resources, reclamation and closure of disturbed areas, including long-term post-closure operations, whether conducted on lands subject to a mining claim or not. Operations also include all

uses reasonably incident to the operations, whether conducted on lands subject to a mining claim or not, including the construction and use of roads or other means of access, and facilities related to water management and treatment, tailings and waste rock management and disposal, as well as transmission lines and pipelines as required to support such facilities.

- (l) *Operator*. Any person conducting or proposing to conduct operations.
- (m) *Person*. Any individual, partnership, corporation, association, or other legal entity.
- (n) *Prospecting*. Sampling and data collection activities conducted to confirm the potential presence of locatable minerals.
- (o) *Reasonably incident uses*. Uses in connection with operations conducted in a logical sequential phased development process through the industry standard operational stages of prospecting, exploration, development, mining and mineral processing, and reclamation; uses that employ reasonable equipment, structures, and methods of surface disturbance that are appropriate and reasonably necessary for a particular stage of operations; and uses associated with a particular stage of operations whereby the stage of operations is justified based on the extent of available data and information concerning a mineral resource or deposit.
- (p) *Reclamation*. Measures taken to minimize the impacts of operations to surface resources, to protect the public from hazardous conditions created by the operations, and to restore the project area to its pre-disturbance condition or to its intended final condition, to the fullest extent practicable. Reclamation includes isolation, control, or removal of acid-forming, toxic, or deleterious substances, as well as long-term post-closure operations.
- (q) *Surface resources*. Any biological, ecological, environmental, scenic, cultural, archaeological, historic, paleontological, or other resources subject to the

administration by the Forest Service, pursuant to the Organic Administration Act of 1897 (16 U.S.C. 551). Surface resources may also include resources that are the subject of treaty obligations of the United States. For purposes of this regulation, “surface resources” do not include mineral resources, except as identified in § 228.10(b)(7), where mineral materials may be part of surface resources described in that section.

§ 228.4 Requirements for initiating operations.

This section defines three categories of mining operations recognized by the Forest Service and describes the specific procedures that an operator must follow before starting operations in any of these categories.

(a) *Limited operations.* Limited operations consist of operations that, in their totality, will not cause more than negligible impacts on surface resources. For the purposes of this subpart, negligible impacts are impacts on surface resources that are not substantially different than those caused by other NFS users who are not required to obtain a special use authorization, contract, or other written authorization from the Forest Service before beginning such use.

(1) An operator is not required to give prior notice for limited operations. If operations do not qualify as limited operations, an operator must submit an operating notice under § 228.4(d) or a proposed plan of operations under § 228.4(c), as appropriate.

(2) Limited operations may include, for example:

- (i) Use of small non-motorized hand tools;
- (ii) Hand panning;
- (iii) Non-motorized sluicing;
- (iv) Marking and monumenting a mining claim;

- (v) Use of metal detectors, gold spears, and other battery-operated devices for sensing the presence of minerals, and hand and battery-operated drywashers;
- (vi) Removal of plants identified as non-woody species or identified as species that, at maturity, do not exceed ten feet in height, unless they are protected under the Endangered Species Act;
- (vii) Removal, for line-of-sight activities, of parts of a plant that are not likely to result in the death of the plant, unless the plant is protected under the Endangered Species Act; or
- (viii) Use of motorized vehicles consistent with:
 - (A) The regulations governing such use;
 - (B) Any road designations pursuant to 36 CFR 212.51; and
 - (C) Conditions of any relevant land management plan or forest orders.

(3) Limited operations do not include the following:

- (i) Living, sleeping, or maintaining camp in excess of any stay limits applicable to other users of the NFS lands, and who have not obtained a special use authorization or other written authorization from the Forest Service;
- (ii) Overnight use of any area, whether or not enclosed or covered, for purposes of storage of equipment, machinery, parts, process materials, spent materials, supplies, tools, vehicles, or other personal property;
- (iii) Construction, maintenance, placement, repair, or use of any barrier to obstruct public access, including enclosures, walls, fences, gates, or signs;

- (iv) Use of a caretaker, guard, or watchperson to monitor, protect, or safeguard property, objects, workings, facilities, or the public;
- (v) Use of mechanized earth-moving equipment, including but not limited to track- or wheel-mounted drilling equipment;
- (vi) Use of suction dredges;
- (vii) Construction, reconstruction, maintenance, repair, or upgrading of a facility, road, or other means of access;
- (viii) Construction, reconstruction, placement, maintenance, repair, or upgrading of any form of water diversion, deflection, withdrawal, or drain;
- (ix) Use of motorized vehicles other than as provided in § 228.4(a)(2)(viii);
- (x) Use of toxic or hazardous chemicals, or explosives;
- (xi) Removal of plants or parts of plants other than as provided in §§ 228.4(a)(2)(vi) and (vii);
- (xii) Underground operations that cause more than negligible impacts on surface resources;
- (xiii) Operations requiring access to underground workings that have been closed with gates, grates, backfill, or other physical closures;
- (xiv) Operations that interfere with, or otherwise may impact, ongoing or completed reclamation activities at formerly mined sites;
- (xv) Operations involving the simultaneous onsite presence of ten or more individuals on the same operation, or who are employed by or affiliated with the same operator;
- (xvi) Operations which would cause a violation of an Indian Tribe's reserved treaty rights or other reserved rights under Federal law;

- (xvii) Operations in an area designated pursuant to § 228.4(a)(4); or
- (xviii) Operations that require an operating notice under § 228.4(d) or a plan of operations under § 228.4(c).

(4) In any area where the effects of limited operations have resulted in, or are reasonably expected to result in, more than negligible impacts on surface resources, the authorized officer may designate the area as one where either an operating notice or plan of operations is required. In order to designate such an area, the authorized officer shall inform the public of the designation.

(b) *Pre-submittal meeting.* The requirement for a pre-submittal meeting to initiate operations applies to any operations other than the limited operations under § 228.4(a). Prior to submitting either an operating notice or a plan of operations, an operator shall contact the applicable authorized officer to schedule a pre-submittal meeting. Upon receipt of such a request, the authorized officer shall hold the meeting between appropriate Forest Service staff and the operator within 21 days, or on such date as agreed between the operator and authorized officer. More than one meeting may be scheduled with agreement from the Forest Service and operator.

(1) The operator shall be prepared to discuss the following information during the pre-submittal meeting:

- (i) Operator name, mailing address, telephone number, and email address of the operator, and of the operator's designated agent, if any;
- (ii) Description of the proposed operations, including the type of equipment and mining methods proposed;

- (iii) Maps of the proposed project area at an appropriate scale to show the location of all proposed operations; and
 - (iv) Information related to the nature of the mineralization targeted for operations, and the known or likely presence of critical and strategic minerals.
- (2) During the pre-submittal meeting, the authorized officer or the designated staff will:
- (i) Identify land status;
 - (ii) Review the proposal and identify any activities that may not be reasonably incident to the stage of proposed operations;
 - (iii) Identify issues or conditions with the proposal that might clarify its categorization as requiring either an operating notice or a plan of operations;
 - (iv) Identify information regarding the existing conditions of the project area, including the presence of:
 - (A) Reserved treaty rights or other reserved rights of an Indian Tribe under Federal law;
 - (B) Cultural, historic, archaeological, or paleontological resources, or any other information necessary for the Forest Service to comply with applicable Federal laws such as the National Historic Preservation Act, the American Indian Religious Freedom Act, the Archaeological Resources Protection Act, and the Native American Graves Protection and Repatriation Act;
 - (C) Federally proposed or listed threatened or endangered species or their proposed or designated critical habitat;

(D) Essential fish habitat under the Magnuson-Stevens Fishery Conservation and Management Act;

(E) Waterbodies listed as impaired pursuant to § 303(d) of the Clean Water Act (33 U.S.C. 1215 *et seq.*); and

(F) Past mining activities including previously disturbed areas and areas reclaimed or remediated under the Comprehensive Environmental Response, Compensation, and Liability Act or State cleanup laws.

- (v) Identify the relevant Federal, State, Tribal and local regulatory requirements or contacts, as appropriate;
- (vi) Identify the relevant standards and guidelines within the applicable Forest Service land management plan;
- (vii) Ensure the operator understands that there may be financial obligations associated with operating on lands managed by the Forest Service, such as financial assurances, and potential liability under the Resource Conservation and Recovery Act and Comprehensive Environmental Response Compensation and Liability Act as well as other Federal statutes;
- (viii) Provide the operator with preliminary information about the environmental review process under the National Environmental Policy Act for a plan of operations. Inform the operator of information they may need to provide, such as environmental and operational baseline surveys and analyses, information to support environmental analysis of the plan of operations and potential reasonable alternatives under NEPA, and the procedures to identify

and protect Tribal reserved treaty resources, other Tribal reserved rights under Federal law, and historic properties;

- (ix) Inform the operator that the Forest Service may be notifying affected tribes of the proposed operations; and
- (x) Consistent with Federal laws governing data collection and storage and § 228.18, the Forest Service may share any information provided by the operator at this pre-submittal meeting with Federal, State, Tribal, and local government agencies to ensure these agencies are aware of any authorizations the operation may require from them and to initiate effective coordinated planning and, when appropriate, Tribal consultation as soon as possible.

(c) *Operations requiring an approved plan of operations.* Operations that meet any of the following criteria require an approved plan of operations as described in § 228.6 before commencing operations:

- (1) Operations other than prospecting, exploration, geotechnical investigations, and water resource investigations;
- (2) Operations on formerly mined sites, whether previously reclaimed or not;
- (3) Operations that will disturb more than 5 acres of NFS lands;
- (4) Operations for bulk sample removal that will cumulatively disturb 1,000 tons or more of material over the life of the operation;
- (5) Operations that use chemicals in the recovery or processing of minerals such as cyanide or sulfuric acid, regardless of test sample size;
- (6) Operations that require long-term post-closure reclamation;
- (7) Operations subject to an operating notice previously in effect that was terminated under § 228.7(c)(3) as a result of a suspension order; or
- (8) Operations situated on NFS lands that are or become:

- (i) Segregated or withdrawn from location and entry under the United States mining laws;
- (ii) Areas in the National Wild and Scenic Rivers System, legislatively mandated study rivers (16 U.S.C. 1276(a); 36 CFR 297.3), or river areas found eligible or determined suitable for inclusion in the National Wild and Scenic Rivers System through Agency planning processes (16 U.S.C. 1276(d)(1));
- (iii) Within the water body, the riparian area, or 100-year floodplain of a stream designated as impaired under § 303(d) of the Clean Water Act (33 U.S.C. 1215 *et seq.*), whichever is larger;
- (iv) Research natural areas, experimental ranges, or experimental forests identified in a land management plan;
- (v) Areas of Tribal importance identified in a land management plan;
- (vi) Areas subject to an Indian Tribe's reserved rights under a treaty or other Federal law or areas that contain sacred sites;
- (vii) Known to contain federally proposed or listed threatened or endangered species or their proposed or designated critical habitat;
- (viii) Known to contain essential fish habitat under the Magnuson-Stevens Fishery Conservation and Management Act;
- (ix) Known to contain historic properties, or cultural or historic resources included in, or eligible for inclusion in, the National Register of Historic Places (54 U.S.C. 300308); or
- (x) Federal facilities where the Forest Service has expended or authorized appropriated dollars. Examples include, but are not limited to, administrative sites and developed recreation sites.

(d) *Operations requiring the submittal of an operating notice.*

- (1) An operator shall provide an operating notice as described in § 228.5 before commencing any operations other than limited operations under § 228.4(a) or operations that require an approved plan of operations under § 228.4(c).
- (2) The term of an operating notice is 2 years following its effective date, which is determined as described in § 228.5(c)(1).
- (3) An operator shall not file a series of operating notices for related operations within an area to avoid submitting a proposed plan of operations.

§ 228.5 Operating notices.

(a) *Contents of an operating notice.* The operator shall submit in writing an operating notice, which shall include the following information:

- (1) The name, mailing address, telephone number, and email address of the operator, and of the operator's designated agent, lessees, assigns, or designees, if any;
- (2) The name and BLM serial number of any mining claim(s) or site(s) covering the land on which operations would occur, if applicable, and the name, mailing address, telephone number, and email address of the owners, lessees, assigns, or designees;
- (3) A description of the target mineralization, including whether the presence of critical or strategic minerals is reasonably expected based on known mineral companionship, geologic formation, mineralogy, or other factors;
- (4) A topographic map or maps and description of the project area, including GPS coordinates when available, at an appropriate scale and with sufficient detail to locate it on the ground and to determine land status;
- (5) A description of the operations, including:

- (i) Type and size of all equipment that will be used on site;
- (ii) Amount, location, and type of fuel and other petroleum products, explosives, and hazardous materials stored on site and spill prevention measures and response plan;
- (iii) Facilities, structures, or improvements that will be constructed, renovated, or maintained;
- (iv) Planned route or routes of access and the methods and vehicles used to transport people, equipment, utilities, and supplies, including any planned use of routes that are designated as closed to general public use;
- (v) Planned uses of water, including quantity, construction, reconstruction, placement, maintenance, repair, or upgrading of any new or existing form of water conveyance, diversion, deflection, withdrawal, or drain, and planned management of water impacted by operations;
- (vi) Planned method of access to underground workings currently closed with gates, grates, backfill, or other physical closures;
- (vii) Any overnight occupancy that will occur on NFS lands; and
- (viii) An explanation of why each of the activities that will occur on NFS lands is a reasonably incident use.

(6) Projected schedule of activities, including the date the operator expects to begin operations and the date the operator expects to complete reclamation;

(7) A description of:

- (i) How the operations will comply with the requirements described in § 228.10 and with any other requirements set forth in this subpart;

- (ii) How the operations will comply with the requirements of any other Federal or State laws related to the protection of surface resources;
 - (iii) How the operations will minimize, to the fullest extent practicable, adverse impacts on surface resources; and
 - (iv) All other required State or Federal permits or certifications.
- (8) A reclamation plan, as described in § 228.10(c)(9), including a reclamation cost estimate as described in § 228.11.
- (b) *Review of an operating notice.* Upon receipt of an operating notice, the authorized officer shall review the notice for completeness. Within 60 days of receipt of the operating notice, the authorized officer may notify the operator of one or more of the following:
- (1) The operations described can be conducted as limited operations under § 228.4(a), and therefore, no operating notice is required;
 - (2) The authorized officer cannot initiate the completeness review because the operator has not conducted a pre-submittal meeting as required by § 228.4(b);
 - (3) The operating notice is incomplete because it does not provide certain information required by § 228.5(a), as specified by the authorized officer;
 - (4) Based on the information contained in the operating notice and on any relevant land status records or Tribal consultations, if conducted, a plan of operations is required as described under § 228.4(c);
 - (5) Based on the information contained in the operating notice, uses are proposed that are not reasonably incident to mining, as described in § 228.9;
 - (6) The operating notice cannot take effect because the operator is subject to an ongoing suspension order under § 228.7(c)(3);

- (7) Further discussion is necessary regarding access routes prior to completing the review;
- (8) A site visit is necessary prior to completing the review. Such site visits will be conducted as early as possible;
- (9) The time for reviewing the operating notice shall be suspended and shall resume upon the completion of any discussion regarding access routes or a site visit;
- (10) The operations involve mineral materials subject to disposal under 36 CFR Part 228, Subpart C;
- (11) The operations appear to involve removal of possible mineral materials, and the Forest Service will follow the procedure in § 228.15;
- (12) The proposed operations are within segregated or withdrawn lands, and cannot be reviewed because a plan of operations is required; or
- (13) The authorized officer needs additional time, not to exceed 30 days, to complete the review for the reasons stated.

(c) *Steps following the authorized officer's review.*

- (1) If the authorized officer does not respond in one of the manners set forth in subsection (b), the operating notice shall take effect at the end of 60 days following the date of receipt by the Forest Service, as reflected in the return receipt or other proof of delivery. If the authorized officer completes the review sooner than 60 days, the authorized officer may notify the operator in writing that the review is complete, in which case the operating notice shall take effect on that date. The authorized officer is not required to approve an operating notice or to inform the operator that the authorized officer's review is complete.

(2) If the operating notice is incomplete pursuant to § 228.5(a), the authorized officer shall notify the operator in writing of the additional information the operator must submit. Upon receiving any additional information from the operator, the authorized officer shall review the operating notice, along with the additional information, in accordance with § 228.5(b). This process may repeat as required.

(d) *The operator may begin operations after:*

(1) The operating notice takes effect under § 228.5(c)(1); and

(2) The authorized officer accepts from the operator the financial assurance, if determined necessary, subject to § 228.11(e).

(e) *Notice of commencement of operations.* The operator shall notify the authorized officer in writing when operations begin. The date that the operator elects to begin operations shall not affect the end date of the term of the operating notice, which is determined by the date the operating notice takes effect under § 228.5(c)(1).

(f) *Change in contact information.* The operator shall notify the authorized officer in writing within 30 calendar days if there is any change in the contact for the operations or of the mailing address of the operator or contact for the operations.

(g) *Modifying an operating notice.*

(1) An operator may submit a modified operating notice at any time before the expiration date of the existing operating notice in effect. The Forest Service will process the modified operating notice in the same manner as a new operating notice.

(2) An operator must submit a modified operating notice in writing when a change is necessary to prevent a violation of the regulations in this part, including the resource protection requirements in § 228.10, or in 36 CFR Part 261, or of any other applicable Federal or State laws, or when the

operator intends to make material changes to the operations described in the existing operating notice in effect. Material changes include, but are not limited to, disturbance of areas not described in the existing operating notice, changes to the reclamation plan, a change in operator, or activities that will result in impacts of a different kind, degree, or extent than those described in the existing operating notice in effect.

(3) In the event a current operator under an operating notice in effect plans to transfer ownership of an operation covered by the operating notice in effect, the transferee operator must submit a modified operating notice in writing at least 30 days in advance of any planned transfer of ownership of an operation subject to an operating notice in effect. The modified operating notice must include the assumption of all of the obligations of the current operator under the operating notice in effect, including any previously accrued obligations and liabilities. Until the authorized officer has received the complete modified operating notice, the current operator shall remain responsible under this subpart for all obligations and liabilities that accrue as a result of operations conducted under the operating notice in effect. No transfer shall be made to a transferee operator who is subject to an ongoing suspension order pursuant to § 228.7(c)(3). The transfer shall be subject to the requirements of § 228.11(i).

(4) Nothing shall change the expiration date of an operating notice except if the operator submits a modified operating notice in conformance with § 228.5(g), and the modified operating notice takes effect.

(h) *Expiration and extension of an operating notice.*

- (1) An operating notice shall expire 2 years after it takes effect under § 228.5(c)(1), unless extended under § 228.5(h)(3), in which case the expiration date of the extended operating notice controls. The operator shall cease all operations at the expiration of an operating notice.
- (2) Failure to complete all reclamation activities by the expiration date shall be considered a substantial deviation from the operating notice, subject to noncompliance procedures under § 228.7(c)(3)(ii), and it may result in the authorized officer forfeiting the financial assurance. All reclamation obligations shall continue beyond the expiration date of the operating notice until the reclamation obligations are complete.
- (3) An operator may extend an operating notice, with or without modification, by submitting a new operating notice at any time within 6 months, but it should not be less than 60 days before the expiration date of the existing operating notice. An operating notice extended under § 228.5(h) must state that it serves as an extension of the prior operating notice. An operating notice submitted as an extension of an existing operating notice shall be processed in the same manner as a new operating notice.
- (4) An operating notice shall not be extended more than twice, for a total term not to exceed 6 years. The operator must complete all reclamation by the end of the second or final extension period, unless approved in a plan of operations.

- (5) An operating notice shall not be extended if the operations are within lands that have been segregated or withdrawn during the time that the operating notice has been in effect. In that case, the authorized officer will notify the operator that a plan of operations is required under § 228.4(c)(8).
- (6) Extension of an operating notice shall not affect the limits on the amount of materials allowed under § 228.4(c)(4).

§ 228.6 Plans of operations.

(a) *Contents of a proposed plan of operations.* An operator shall submit a proposed plan of operations in writing using the optional form FS-2800-5 or in a format of the operator's choice. The proposed plan of operations shall include:

- (1) The name, mailing address, telephone number, and email address of the operator and of the operator's designated agent, lessees, assigns, or designees, if any;
- (2) The name and BLM serial number of any mining claim(s) or site(s) covering the land on which operations would occur, if applicable, and the name, mailing address, telephone number, and email address of the mining claim owners, lessees, assigns, or designees.
- (3) A description of the target mineralization, including:
 - (i) for exploration operations, whether the presence of critical or strategic minerals is reasonably expected, based on known mineral companionship, geologic formation, mineralogy, or other factors; and
 - (ii) for mining and production operations, whether primary or byproduct critical minerals will be recovered and produced.

- (4) A topographic map or maps and description of the project area, including GPS coordinates when available, at an appropriate scale and with sufficient detail to locate it on the ground and to determine land status;
- (5) Information, if known, regarding the existing condition of the project area, including the presence of:
- (i) Rights of an Indian Tribe reserved under a treaty or other Federal law;
 - (ii) Cultural, historic, archaeological, or paleontological resources, or any other information necessary for the Forest Service to comply with applicable Federal laws such as the National Historic Preservation Act, the American Indian Religious Freedom Act, the Archaeological Resources Protection Act, 16 U.S.C. 470aa-mm, and the Native American Graves Protection and Repatriation Act;
 - (iii) Federally proposed or listed threatened or endangered species or their proposed or designated critical habitat;
 - (iv) Essential fish habitat under the Magnuson-Stevens Fishery Conservation and Management Act;
 - (v) Waterbodies listed as impaired pursuant to § 303(d) of the Clean Water Act (33 U.S.C. 1215 *et seq.*); and
 - (vi) Past mining activities, including disturbed areas and areas reclaimed or remediated under the Comprehensive Environmental Response, Compensation, and Liability Act or State cleanup laws.
- (6) A detailed description of the operations, including:
- (i) Location and acreage of all planned disturbances of NFS lands;
 - (ii) The type and size of equipment that will be used;

- (iii) Amount, location, and type of fuel and other petroleum products; explosives; processing and water treatment chemicals; and hazardous materials stored on site, including spill prevention and response plan;
- (iv) Facilities, structures, or improvements that will be constructed, renovated, or maintained;
- (v) Preliminary or conceptual designs, cross sections, and operating plans for mining areas, processing and water treatment facilities, water ponds, and waste rock and tailings disposal facilities;
- (vi) Rock characterization and handling plans;
- (vii) Planned routes of access, methods of transportation, and types of vehicles that will be used to transport people, equipment, utilities, supplies, wastes, concentrates, and other products from operations, including a description and map of all existing and proposed roads, trails, bridges, landing areas for aircraft, utilities, and other access facilities to be used in connection with the operations, including their design standards;
- (viii) Overnight occupancy that will occur on NFS lands;
- (ix) Planned uses of water, including surface water, groundwater, or water impacted by operations, and water management plans for managing water used and impacted by operations;
- (x) Any planned construction, reconstruction, placement, maintenance, repair, or upgrading of any form of water conveyance, diversion, deflection, withdrawal, or drain;
- (xi) Quality assurance plans to describe the steps an operator will take to ensure that facilities are constructed and operated as designed,

including procedures or protocols for testing or monitoring of such facilities as pond liners, leach pads, tailings impoundments, etc.;

(xii) An explanation of why each of the activities that will occur on NFS lands is a reasonably incident use; and

(xiii) Additional information the authorized officer may deem necessary to ensure that the proposed operations will comply with this subpart, such as:

(A) Operational and baseline environmental information and analyses for the Forest Service to analyze potential environmental impacts as required by NEPA and to determine whether the plan of operations will minimize adverse impacts to the fullest extent practicable. This could include information related to surface resources in and around the project area, as well as information regarding the potential for operations to produce acid drainage or other leachate;

(B) Mineral resource information supporting the use of mining claims or sites on which operations are proposed; and

(C) Information relating to classification of possible mineral materials under 228.15.

(7) A projected schedule of activities from the commencement of operations through closure, and the period of time over which long-term post-closure operations are projected to occur;

(8) A description of how the proposed operations will:

(i) Comply with surface resource protection and operating standards in § 228.10 and with requirements set forth in this part;

- (ii) Comply with Federal and State laws related to the protection of surface resources; and
 - (iii) Minimize, to the fullest extent practicable, adverse impacts on surface resources.
- (9) A reclamation plan, containing the information described in § 228.10(c)(9);
- (10) A reclamation cost estimate compliant with § 228.11(b), including, if applicable, a description of proposed phases of operations and corresponding phases of cost estimates pursuant to 228.11(f);
- (11) A proposed plan for monitoring the environmental effects of operations. Where applicable, include in monitoring plans details on the type and location of monitoring devices, sampling parameters and frequency, analytical methods, reporting procedures, identification of action levels, and associated actions or procedures to respond to adverse monitoring results. Monitoring plans may incorporate existing State or other Federal monitoring requirements to avoid duplication. Examples of monitoring programs that may be necessary include surface water and groundwater quality and quantity, air quality, revegetation, stability, noise levels, and fish and wildlife mortality. The monitoring plans must be designed to meet the following objectives:
 - (i) To demonstrate compliance with the approved plan of operations and other Federal or State environmental laws and regulations;
 - (ii) To provide early detection of potential problems; and
 - (iii) To supply information that will assist in directing corrective actions should they become necessary.

(12) An interim management plan, including a schedule, and information regarding anticipated periods of temporary cessation during which the interim management plan will be in effect. The interim management plan shall describe how the operator proposes to manage the project area during periods of temporary cessation of operations. The interim management plan shall include measures to:

- (i) Stabilize excavations and workings, ponds, heap leach areas, and waste rock and tailings disposal areas;
- (ii) Isolate or control petroleum-based products and hazardous materials;
- (iii) Store or remove equipment, supplies, and structures;
- (iv) Maintain the project area, including structures, in a safe and clean condition;
- (v) Monitor site conditions;
- (vi) Prevent a violation of the regulations in this part (including the resource protection requirements in § 228.10), or in 36 CFR Part 261, or Federal or State laws related to the protection of surface resources, and to minimize, to the fullest extent practicable, adverse impacts on surface resources; and
- (vii) Maintain adequate financial assurance, even in periods of cessation of operations.

(b) *Completeness review.* Upon receipt of the proposed plan of operations, the authorized officer shall conduct the initial completeness review and shall notify the operator in writing within 60 days after receiving the plan that:

- (1) The proposed operations do not require an approved plan of operations, because they may be conducted pursuant to § 228.4(a) as limited operations or pursuant to § 228.4(d) under an operating notice;
- (2) The proposed plan of operations is complete and contains sufficient information to initiate an environmental review pursuant to § 228.6(c);
- (3) The proposed plan of operations is incomplete for one or more of the following reasons:
 - (i) The operator has not conducted a pre-submittal meeting as required by § 228.4(b);
 - (ii) The plan does not provide information required by § 228.6(a).

The authorized officer shall inform the operator of the required additional information. Upon receipt of the required additional information from the operator, the authorized officer shall review the proposed plan in accordance with § 228.6(b). This process may repeat until the information submitted by the operator is complete;
 - (iii) Further discussion is necessary regarding access routes; the time for initial review of the proposed plan of operations shall be suspended and shall resume upon the completion of such discussion;
 - (iv) A site visit is necessary; the time for initial review of the proposed plan of operations shall be suspended and shall resume upon the completion of such site visit; or
 - (v) The authorized officer needs additional time, not to exceed 30 days, to complete the initial completeness review for specific stated reasons.

- (4) The proposed plan of operations cannot be considered complete and will not be further reviewed because:
- (i) It includes uses that are not reasonably incident as described in § 228.9;
 - (ii) The operator is subject to an ongoing suspension order as per § 228.7(c)(3); or
 - (iii) The operations involve mineral materials subject to disposal under 36 CFR Part 228, Subpart C.
- (5) The completeness review will not occur until other requirements are met for the following reasons:
- (i) The proposed operations are within segregated or withdrawn lands, and cannot be reviewed until the conditions set forth in § 228.14 are met; or
 - (ii) The proposed operations appear to involve removal of possible mineral materials and cannot be reviewed until the conditions set forth in § 228.15 are met.

(c) *National Environmental Policy Act review of proposed plans of operations.*

- (1) The authorized officer shall initiate the appropriate level of analysis under the National Environmental Policy Act for a proposed plan of operations that has been determined to be complete.
- (2) The authorized officer will use the information from the environmental review to identify the environmental effects of implementing the proposed plan of operations and to determine whether the plan will minimize, to the fullest extent practicable, adverse impacts on surface resources.

- (3) The authorized officer may impose mitigation measures, other terms and conditions, or changes to the plan of operations identified during the environmental review of the plan of operations as necessary to minimize, to the fullest extent practicable, adverse impacts on surface resources. The operator must incorporate those items into the plan of operations prior to approval of the plan of operations.
- (4) The authorized officer or their designee shall advise the operator of the Forest Service's progress in analyzing the proposed plan of operations no less than once every month.

(d) *Approving plans of operations.*

- (1) The authorized officer shall notify the operator in writing that the plan of operations is approved.
- (2) If applicable, the authorized officer shall notify the operator that the proposed plan of operations has been reviewed but cannot be approved until a suspension order issued under § 228.7(c)(3) is canceled.
- (3) The authorized officer shall not approve a plan of operations until the operator has obtained any certification or waiver as required under section 401 of the Clean Water Act, 33 U.S.C. 1341.

(e) *Commencing operations.*

- (1) The operator shall not conduct operations until the authorized officer has accepted the required financial assurance subject to § 228.11(e), including ratifying all instruments required to establish a trust fund under § 228.13, if any.
- (2) The operator is responsible for obtaining all required Federal or State permits and approvals prior to commencing operations.

(f) *Modifying an existing plan of operations.*

- (1) A proposed modified plan of operations shall be reviewed in the same manner as a new plan of operations under this section.
- (2) An operator may submit a proposed modification to an approved plan of operations at any time prior to completing reclamation. Upon entering the post-closure phase of an operation, an operator shall submit a proposed modification for the long-term post-closure operations.
- (3) A modification may be necessary to remedy identified violations of other Federal or State laws or permits, or to address noncompliance in accordance with § 228.7.
- (4) The authorized officer shall require an operator to submit and obtain approval of a modification to an approved plan of operations when the authorized officer determines that:
 - (i) Modification is necessary to prevent an ongoing or reasonably foreseeable violation of the regulations in this subpart, including the resource protection requirements in § 228.10 or in 36 CFR Part 261, or to minimize, to the fullest extent practicable, adverse impacts on surface resources;
 - (ii) Operations have resulted in surface uses that are not reasonably incident to mining;
 - (iii) The operator is engaging in operations that are outside the scope of the approved plan of operations;
 - (iv) Modification is required to address noncompliance in accordance with § 228.7; or
 - (v) Modification is required to incorporate changes to an interim management plan in accordance with § 228.8(c)(1).

(5) An authorized officer considering whether to require an operator to submit a modified plan of operations pursuant to § 228.6(f)(3) shall:

- (i) Provide written notice to the operator, setting forth the reasons why modification of the approved plan of operations may be required. The operator must respond in writing to such notification within 30 days of receipt;
- (ii) Consider the operator's response and all other information in the project file in deciding whether to require modification of the approved plan of operations; and
- (iii) Issue a written decision stating whether modification of the approved plan of operations is required and, if so, describing the required modifications, explaining the reasons for such modifications, and specifying the date by which the operator shall submit the proposed modified plan of operations.

(6) If the authorized officer has required the operator to submit a modified plan of operations and the operator has not submitted a modified plan of operations by the specified date in § 228.6(f)(5)(iii), the authorized officer may take action pursuant to § 228.7.

(7) Operations may continue in accordance with the approved plan of operations until a modified plan is approved, unless the authorized officer takes action in accordance with § 228.7.

(g) *Change in contact information.* The operator shall notify the authorized officer in writing within 30 calendar days if there is any change in the contact information for the operations or of the mailing address of the operator or contact for the operations.

(h) *Transfer of a plan of operations.* The operator under an approved plan of operations shall notify the authorized officer in writing 30 days in advance of any transfer of ownership of an operation covered by the approved plan of operations.

- (1) The transfer notification shall include the name and contact information of the transferee operator.
- (2) The transferee operator shall meet with the authorized officer prior to completing the transfer. The purpose of the meeting is provide the opportunity for a new operator to discuss the regulations and the conditions of the approved plan of operations.
- (3) The transferee operator shall notify the authorized officer in writing that they are assuming all of the obligations of the current operator under the approved plan of operations, including any previously accrued obligations and liabilities. Until the authorized officer has received such notification, the current operator shall remain responsible under this subpart for all obligations and liabilities that accrue as a result of operations conducted under the approved plan of operations.
- (4) The transfer shall be subject to the requirements of § 228.11(i).
- (5) No transfer shall be made to a transferee operator who is subject to an ongoing suspension order pursuant to § 228.7(c)(3).

(i) *Closing an approved plan of operations.*

- (1) The operator shall notify the authorized officer in writing when all operations, including reclamation, have been completed. Upon inspection, the authorized officer shall advise the operator in writing that the obligations under the plan of operations have been met and the

plan of operations will be closed. If any obligations under the plan of operations have not been met, the authorized officer will notify the operator of all remaining conditions that must be completed before the plan can be closed.

- (2) When long-term post-closure operations are required, the operator shall modify the plan of operations according to § 228.6(f)(2). The modified plan of operations shall include the elements described in § 228.6(a). Nothing in this paragraph shall be construed to affect the operator's obligations, if any, to carry out long-term post-closure reclamation activities.

§ 228.7 Noncompliance.

- (a) Noncompliance is a failure to conduct operations in accordance with the regulations in this subpart, including the resource protection requirements in § 228.10 and in Part 261, with other Federal or State laws related to the protection of surface resources, and with any operating notice or approved plan of operations.
- (b) The Forest Service may inspect operations on NFS lands at any time to assess compliance with these requirements. Inspections may occur at scheduled intervals or without prior notification to the operator.
- (c) The authorized officer may address noncompliance by any of the following, which may include requiring a plan modification in accordance with § 228.6(f)(3):
 - (1) Informal resolution. If the authorized officer determines the operations are in noncompliance, the authorized officer may attempt to informally resolve the noncompliance with the operator.

(2) Notice of noncompliance. If the authorized officer elects not to pursue an informal resolution, or if informal resolution is unsuccessful, the authorized officer may issue a notice of noncompliance which will take effect once served unless the order is stayed on appeal pursuant to 36 CFR 214.13(b).

(3) Suspension order. The authorized officer shall notify the operator in writing in advance of the intent to issue a suspension order and shall provide an opportunity for a meeting to discuss the circumstances. The authorized officer may issue the suspension order if the operator has not responded within 14 days, informs the authorized officer they do not wish to meet, or fails to participate in a scheduled meeting. If a suspension order is issued under (3)(i) below, the notice of noncompliance shall serve as advance notice and the suspension order may issue without further notice. A suspension order shall take effect once served, unless the order is stayed on appeal pursuant to 36 CFR 214.13(b). While a suspension order is in effect, no new operating notice shall take effect, and no new plan of operations shall be approved on behalf of the operator subject to the suspension order. If a suspension order is issued in connection with an operating notice in effect, the authorized officer may terminate the operating notice. An immediate suspension order will continue in effect until canceled by the authorized officer. The authorized officer may issue a suspension order for all or any part of an operation under any of the following circumstances:

- (i) If, following the issuance of a notice of noncompliance under subsection (c)(2), the operations have not come into compliance by the date or dates specified in the notice of noncompliance, or the

operator fails to comply by the date(s) specified in the notice of noncompliance;

(ii) If the authorized officer determines the operations are in noncompliance based on a substantial deviation from the operating notice in effect or approved plan of operations, whether the authorized officer has previously issued the operator a notice of noncompliance; or

(iii) If the authorized officer finds the operations may result in harm to public health or safety, or impacts on the environment or surface resources, whether the authorized officer has previously issued the operator a notice of noncompliance and whether the operator is in noncompliance.

(4) Immediate suspension order and emergency action. The authorized officer may presume imminent danger or harm to public health, safety, the environment, or surface resources when an operator is conducting operations other than limited operations without an approved plan of operations or an operating notice in effect. If the authorized officer determines there is imminent danger or harm to public health, safety, the environment, or surface resources, whether the operator is in compliance with an approved plan of operations or operating notice in effect or has previously received a notice of noncompliance, the authorized officer may take the following emergency actions:

(i) Issue an immediate suspension order for any part of or all of the operations, which shall take immediate effect and does not require previous notification to, nor an opportunity for a meeting with, the operator; and/or

(ii) Take action as necessary to abate the harm, including the use of Forest Service personnel or third-party contractors. This will result in costs billed to the operator by the Forest Service pursuant to 228.7(d)(5).

(5) An immediate suspension order will continue in effect until canceled by the authorized officer and, while in effect, shall have the same consequences as described in § 228.7(c)(3) for a suspension order.

(d) Contents of notices of noncompliance, suspension orders, and immediate suspension orders. All notices of noncompliance, suspension orders, and immediate suspension orders shall be issued in writing, and shall:

(1) Identify the laws, regulations, or provisions of the operating notice in effect or of the approved plan of operations that have been violated, and the circumstances or activities that resulted in the violations;

(2) Specify the part or parts of the operations subject to the notice of noncompliance, suspension order, or immediate suspension order, or state the notice of noncompliance, suspension order, or immediate suspension order applies to all operations under a specified operating notice or plan of operations;

(3) Specify the actions the operator shall take before the authorized officer will cancel the notice of noncompliance, suspension order, or immediate suspension order, including actions required to remedy all injury, loss, or damage to surface resources that resulted from the circumstances giving rise to the order;

- (4) Specify the date(s) by which the operator shall complete the actions pursuant to the notice of noncompliance, suspension order, or immediate suspension order. An operator will not be given more than 30 days to complete these actions, unless the authorized officer determines the area of operations is temporarily inaccessible or if the actions cannot reasonably be completed within 30 days; and
- (5) The authorized officer shall notify the operator in writing of a decision to take emergency action to abate imminent harm under § 228.7(c)(4) but need not wait until notice has been provided to take action. The authorized officer shall issue a bill to the operator for any costs incurred by the Forest Service, including the costs of third-party contractors used by the Forest Service. The total cost to the Forest Service of such abatement actions becomes an obligation of the operator, and the Forest Service may initiate forfeiture of the operator's financial assurance under § 228.12 in order to recover such costs.
- (e) The authorized officer shall cancel a notice of noncompliance or suspension order upon determining that the operator has achieved compliance with the actions set forth in § 228.7(d)(3) and shall notify the operator in writing when the notice of noncompliance or suspension order has been canceled.
- (f) The authorized officer shall cancel an immediate suspension order upon determining that the operator has achieved compliance with an operating notice in effect or an approved plan of operations; has achieved compliance with the actions set forth in § 228.7(d)(3); and there is no continuing imminent danger or harm to public health, safety, the environment, or surface resources. The authorized officer shall notify the operator in writing that the order has been canceled.

(g) If an operator violates a suspension order or an immediate suspension order, the authorized officer may take one or more additional enforcement actions, including:

- (1) Requesting that the Department of Justice (including, but not limited to, the appropriate U.S. Attorney) initiate a civil action in an appropriate forum seeking relief, including but not limited to declaratory relief, injunctive relief, and monetary damages;
- (2) Forfeiting the operator's financial assurance under § 228.12 to complete the actions specified within the compliance order and to remedy all injury, loss, or damage to surface resources that resulted from the operator's actions; or
- (3) Requiring the operator to replenish any financial assurance funds forfeited pursuant to § 228.7(g)(2) if operations are allowed to continue following cancelation of the order.

(h) Service of notices of noncompliance, suspension orders, and emergency actions under this section.

- (1) The authorized officer or a Forest Service employee designated by the authorized officer may serve the operator with a notice of noncompliance, suspension order, or immediate suspension order issued under § 228.7(c) by any of the following means:
 - (i) Sending a copy of the notice of noncompliance, suspension order, or immediate suspension order by certified mail with a return receipt, or equivalent private delivery service, to the operator or the operator's designated agent;

- (ii) Hand-delivering a copy of the notice of noncompliance, suspension order, or immediate suspension order to the operator or the operator's designated agent; and
- (iii) Serving the notice of noncompliance, suspension order, or immediate suspension order upon the operator or the operator's designated agent, by any means consistent with the rules governing service of a summons and complaint under Rule 4 of the Federal Rules of Civil Procedure.

(2) In addition to the methods of service described above, the authorized officer may distribute copies of the notice of noncompliance, suspension order, or immediate suspension order to workers at the operation at the time a notice of noncompliance, suspension order, or immediate suspension order is being served.

(3) Service is complete upon delivery of the notice of noncompliance, suspension order, or immediate suspension order by any method of delivery as described in § 228.7(h)(1) and is not incomplete because of refusal to accept. If the notice of noncompliance, suspension order, or immediate suspension order is undeliverable, it is considered to be received by the operator 5 days after being sent to the mailing address, facsimile number, or email address provided by the operator.

(i) Relationship to 36 CFR Part 261.

The operator is subject at all times to the provisions of 36 CFR Part 261 and of other statutes or regulations. The Forest Service may at any time charge or refer for prosecution any operator for a violation of any law, whether or not the authorized officer has provided written notice to the

operator under § 228.7, or taken any other steps set forth in this section to remedy a violation.

§ 228.8 Temporary cessation or abandonment of operations.

- (a) An operator conducting operations subject to an operating notice or a plan of operations shall notify the authorized officer in writing before ceasing operations for a 6 month or longer period, or as soon as the operator determines that the planned cessation is likely to last for 6 months or longer from the initial date of cessation. Such written notification shall include the anticipated duration of the cessation. The authorized officer will acknowledge receipt of the notification of cessation of operations. Any delay in the authorized officer's acknowledgment of receipt, however, will not affect the operator's obligations to comply with the operating notice in effect or plan of operations governing the operation, and will not affect the operator's obligation to comply with the requirements of this section. The authorized officer is not required to approve a cessation of operations.
- (b) During any cessation of operations, whether or not the operator has provided written notification under § 228.8(a), the operator shall comply with the terms of the operating notice in effect or the approved plan of operations and shall remain subject to the provisions of the regulations in this part, including the resource protection requirements and operating standards in § 228.10 and 36 CFR Part 261, and to all other Federal or State laws related to the protection of surface resources. Any cessation of operations under this section shall not extend the duration of the operating notice in effect. An operator may not extend an operating notice while in temporary cessation status. If an operating notice expires or reaches the six-year maximum term during a cessation, the operator must submit a new operating

notice or plan of operations as appropriate, unless determined by the authorized officer that an extension is permissible.

(c) Interim management plan.

(1) Upon receiving notification of cessation from the operator, the authorized officer shall review the notification and any interim management plan and may require the operator to modify the interim management plan pursuant to § 228.6(f).

(2) If the operator determines that a cessation of operations will last longer than anticipated, or that any of the information contained in the operator's cessation notification is no longer accurate, the operator shall promptly provide the authorized officer with a revised cessation notification and a revised interim management plan, if necessary.

(d) Long-term cessation of operations subject to an approved plan of operations.

(1) If the cessation of operations subject to an approved plan of operations lasts longer than 12 months, the operator shall, before the end of the twelfth month following the operator's cessation notification and of every twelfth month thereafter, notify the authorized officer in writing of the continuing cessation of operations and the reasons for the cessation. The notification shall include the anticipated duration of the cessation and shall describe measures that the operator has taken to comply with the interim management plan, including whether any deviation from the interim management plan has occurred.

(2) Upon receiving notification from the operator of a continuing long-term cessation of operations, the authorized officer shall review the notification and the interim management plan and may require the operator to modify the interim management plan pursuant to § 228.6(f).

- (e) The operator will notify the authorized officer in writing when the cessation of operations has ended, and operations are planned to commence under the approved plan of operations. If, after a cessation of operations, the authorized officer makes a determination that conditions at the site have changed, or that any of the circumstances in § 228.6(f)(4) exist, the authorized officer may require the operator to submit a modification to the approved plan of operations.
- (f) Following any period of cessation under this section, the authorized officer may determine the operations to be abandoned, and shall notify the operator in writing of the determination of abandonment, if the operator has:
- (1) Failed to engage in operations or reasonably incident uses as described in an operating notice in effect or approved plan of operations for a period greater than 6 months without having provided notice as required by subsection § 228.8(a); or
 - (2) Failed to provide a notification of cessation as set forth in § 228.8(a), or an annual notification to the authorized officer as set forth in § 228.8(d)(1), if required.
- (g) The authorized officer may initiate a surface use determination to inform any decision regarding abandonment.
- (h) If the authorized officer determines that the operator has abandoned the operations pursuant to § 228.8(f), the authorized officer may initiate forfeiture of the operator's financial assurance under § 228.12 to conduct reclamation activities. If the financial assurance is inadequate to cover the cost of reclamation, the authorized officer may complete the reclamation, and the operator and all other responsible persons shall be liable for the cost of reclamation as calculated pursuant to § 228.11(b). The United States may take title to any property that

remains on NFS lands in the abandoned operations area and may remove and dispose of such property consistent with applicable laws.

§ 228.9 Reasonably incident uses.

- (a) The authorized officer may require the preparation of a surface use determination to determine whether proposed or ongoing uses are reasonably incident to mining as defined in § 228.3. The surface use determination will assess whether the proposed or ongoing uses are consistent with the definition of reasonably incident uses under § 228.3 and provide conclusions and appropriate recommendations to the authorized officer.
- (b) The authorized officer will consider the conclusions and recommendations of the surface use determination and shall inform the operator whether all or some of the proposed or ongoing uses are reasonably incident to operations.
- (c) A surface use determination is not required for the following uses that are not considered reasonably incident to mining operations:
 - (1) Preventing or obstructing public passage over NFS lands, except for reasonable security and safety measures necessary for operations;
 - (2) Cultivating crops or produce, or rearing or pasturing animals;
 - (3) Living, sleeping, or maintaining camp in excess of any stay limits applicable to users of the NFS lands in question who are not operators, except to the extent necessary for operations;
 - (4) Storing, treating, processing, or disposing of hazardous or toxic waste materials that are not generated as part of an approved plan of operations;
 - (5) Recycling or reprocessing manufactured materials such as scrap electronic parts, appliances, or chemicals;
 - (6) Searching for buried treasure, a treasure trove, or archaeological or paleontological specimens;

- (7) Operating hobby or curio shops, cafés, or tourist stands;
- (8) Maintaining, managing, or hosting hunting or fishing camps; or
- (9) Providing or operating businesses, clubs, or organized entities engaged in rental, trade, guiding, educational, manufacturing, or recreational services or activities for hire, whether or not they are operated for profit.

§ 228.10 Surface resource protection requirements and operating standards.

(a) General requirements.

- (1) It is the responsibility of the operator to know the Federal and State laws applicable to their operations, and the potential criminal and civil penalties associated with noncompliance with these laws. Nothing in an operating notice in effect or an approved plan of operations shall be construed as relieving an operator from the obligation to comply with all other applicable Federal and State laws.
- (2) The operator shall conduct all operations in such a manner as to minimize, to the fullest extent practicable, adverse impacts on surface resources. The authorized officer shall consider the economics of the operations when determining the reasonableness of the requirements for surface resource protection.
- (3) The operator shall be responsible for all individuals, including but not limited to employees, contractors, and subcontractors, who are present on site in connection with the operations being familiar with the requirements of the approved plan of operations or the operating notice in effect, and the operator shall be responsible for any violation committed by such an individual.

(4) Operations carried out in accordance with operating notices in effect and approved plans of operations must be consistent with applicable Forest Service land management plans.

(b) Surface resources.

(1) Water quality. The operator shall comply with applicable Federal water quality standards for surface water, groundwater, and groundwater-dependent ecosystems, including regulations issued pursuant to the Federal Water Pollution Control Act, as amended (33 U.S.C. 1251, *et seq.*), and the Safe Drinking Water Act, as amended (42 U.S.C. 300f–300j). Where those programs have been delegated to State or Tribal entities, the operator shall comply with the delegated entity’s standards under those regulations.

(2) Air quality. The operator shall comply with applicable Federal air quality standards, including regulations issued pursuant to the Clean Air Act, as amended (42 U.S.C. 7401, *et seq.*). Where those programs have been delegated to State or Tribal entities, the operator shall comply with the delegated entity’s standards under those regulations.

(3) Fisheries and wildlife habitat. The operator shall take all practicable measures to ensure that operations do not interfere with the maintenance and protection of fisheries and wildlife habitat on NFS lands.

(4) Rights of an Indian Tribe reserved under a treaty or other Federal law. Where possible, the operator shall ensure that operations do not cause a violation of a Tribe’s reserved rights under a treaty or other Federal law.

(5) Cultural, historic, and paleontological resources.

(i) The operator shall comply with the National Historic Preservation Act consultation requirements, the Paleontological Resource Preservation Act, the Archaeological Resource Protection Act, the

Native American Graves Protection and Repatriation Act, and other related laws, and accordingly shall not disturb, alter, injure, or destroy any:

(A) Historic property, or cultural or historic resource included on, or eligible for inclusion on, the National Register of Historic Places;

(B) Paleontological resource, other than a common invertebrate or plant paleontological resource;

(C) Archaeological resource; or

(D) Native American or Alaska Native human remains.

(ii) If any resource listed in § 228.10(b)(5)(i) is discovered in the course of operations, the operator shall immediately notify the authorized officer, and shall leave the discovery intact until otherwise instructed by the authorized officer. The authorized officer shall act promptly to evaluate the discovery, take action to protect the resource when necessary, and determine an appropriate response in order to allow operations to proceed as soon as practicable consistent with the significance of the discovery.

(iii) If any Native American or Alaska Native human remains or cultural items are discovered in the course of operations, the operator shall comply with the requirements of the Archaeological Resources Protection Act, 16 U.S.C. 470aa-mm, the Native American Graves Protection and Repatriation Act, 25 U.S.C. 3002(d)(1), and any associated regulations.

(6) Scenic values. The operator shall take measures to maintain, to the fullest extent practicable, the scenic values of NFS lands through such measures

as the design and location of operating facilities, including roads and other means of access, vegetative screening of operations, and construction of structures and improvements that blend with the landscape.

(7) Vegetation and other surface resources, including timber.

(i) Any removal or use of vegetation or other surface resources (including materials that are disposed of pursuant to Subpart C of this part) shall be allowed under this subpart only for the purposes of:

(A) Operations under this subpart;

(B) Constructing buildings or structures in connection with operations described in § 228.10(b)(7)(i)(A); or

(C) Providing clearance for operations described in paragraphs 228.10(b)(7)(i)(A) or (B).

(ii) Any timber that is cut for use by the operator under paragraphs 228.10(b)(7)(i)(A) or (B) and is not required to provide clearance under § 228.10(b)(7)(i)(C), shall be harvested in accordance with sound principles of forest management.

(iii) Any vegetation that is removed in order to provide clearance under § 228.10(b)(7)(i)(C), and is not used by the operator under paragraphs 228.10(b)(7)(i)(A) or (B), shall:

(A) In the case of timber, be processed and stored in a manner that will allow the Forest Service to subsequently use it, or sell it under a timber contract to the operator or to another party, consistent with applicable law; and

(B) In the case of any non-timber vegetation, be managed or disposed of in accordance with any laws and standards governing slash management.

(c) Operating standards.

(1) Solid wastes. The operator shall:

- (i) Remove from NFS lands, dispose of, and/or treat all refuse, equipment, materials, or supplies no longer operable or needed for the operation;
- (ii) Place, dispose of, and/or treat all tailings and solid wastes resulting from the operations so as to minimize, to the fullest extent practicable, their adverse impact on surface resources and to meet all applicable laws and regulations; and
- (iii) Construct and maintain all tailings facilities, waste rock piles, and other solid waste storage areas in accordance with applicable engineering standards, occupational safety and health standards, and mine safety standards such that structural stability is maintained.

(2) Impoundment Facilities. The operator shall comply with all Federal and State laws and regulations, in connection with the design, operation, closure, and post-closure operations, maintenance, and monitoring of dam facilities that impound mine tailings, waste rock, and water impoundments.

(3) Mine openings and pit walls. The operator shall construct and maintain all mine openings and pit walls in accordance with applicable engineering standards, occupational safety and health standards, and mine safety

standards such that structural stability is maintained and to minimize adverse impacts upon the environment.

- (4) Surface water, groundwater, and groundwater-dependent ecosystem management: The operator shall conduct operations to minimize water pollution (source control) in preference to water treatment. The operator shall also conduct operations to minimize changes in water quantity in preference to water supply replacement. All operators shall comply with applicable Federal and State water quality standards, including the Safe Drinking Water Act and Federal Water Pollution Control Act, as amended (33 U.S.C. 1251, *et seq.*).
- (5) Acid-forming, toxic, or other deleterious materials: The operator must incorporate identification, handling, and placement of potentially acid-forming, toxic, or other deleterious materials into the operations, facility design, reclamation, and environmental monitoring programs to minimize the formation and impacts of acidic, alkaline, metal-bearing, or other deleterious leachate, including the following:
 - (i) potentially acid-forming, toxic, or other deleterious materials must be handled, placed, or treated in a manner that minimizes the likelihood of acid formation and toxic and other deleterious leachate generation (source control);
 - (ii) if the formation of acid, toxic, or other deleterious drainage cannot be prevented, the operator must minimize the uncontrolled migration of leachate; and
 - (iii) any acid drainage or other undesirable effluent must be captured and treated to the applicable standard if source controls and migration controls do not prove effective. The operator is

responsible for any costs associated with water treatment or facility maintenance after project closure. Long-term, or post-mining, effluent capture and treatment are not acceptable substitutes for source and migration control; long-term post-closure mitigations may be employed only after all reasonable source and migration control methods have been employed.

(6) Roads and access routes.

(i) Access to NFS lands for operations is subject to the following provisions:

(A) Whenever economically and technically feasible, the operator shall utilize existing means of access; and

(B) All access shall comply with State and Federal law, including the requirements set forth elsewhere in these regulations, the regulations in 36 CFR Part 261, any designations pursuant to 36 CFR 212.51, and the terms of any relevant forest orders, except as provided in an approved plan of operations or an operating notice in effect.

(ii) When access involves roads, the operator shall construct and maintain all roads and access routes on NFS lands in such a manner as to ensure adequate drainage and to minimize, to the fullest extent practicable, erosion, damage to soil, water, and other surface resources. This may include the construction of cross drains, dips, or water bars to prevent or control water flow. When a road or other access route is no longer required, the operator shall, unless otherwise approved by the authorized officer:

(A) Close the road to motor vehicle traffic;

(B) Remove any bridges and culverts associated with the road;

(C) Reshape the road surface to, so far as is practicable, restore the stable natural contour; and

(D) Revegetate the road surface using native plants or the Forest Service-approved seed mix so as to establish self-sustaining revegetation.

(7) Maintenance and public safety. Throughout the operations on NFS lands, the operator shall perform routine and necessary maintenance on all structures, equipment, and facilities to ensure safe and sanitary working conditions. The operator shall mark all hazardous conditions or areas with signs or other identification or otherwise take steps to protect public safety in accordance with Federal and State laws and regulations.

(8) Prevention and control of fire. The operator shall:

(i) Comply with all applicable Federal and State laws and regulations regarding fire prevention or control;

(ii) Take measures to prevent and control fires in the area of operations; and

(iii) Comply with all forest orders regarding fire prevention or control of fire, unless granted a waiver in writing by the authorized officer.

(9) Reclamation.

(i) All operators shall reclaim the surface disturbed in operations by taking such measures as will prevent or control onsite and offsite damage to the environment and forest surface resources, including actions listed in § 228.10(c)(9)(iii).

(ii) All operators, except those engaged only in limited operations, shall provide a reclamation plan as part of the operating notice or plan of operations. The reclamation plan shall:

(A) Describe the measures that the operator will implement as listed in § 228.10(c)(9)(iii);

(B) Describe any other measures that the operator will take following closure to minimize the impacts of the operations on surface resources, to protect the public from any hazardous conditions created by the operations, and to reclaim the project area, to the fullest extent practicable, to its pre-disturbance condition or to its intended final condition. If other than the pre-disturbance condition, the intended final condition must be consistent with applicable Forest Service land management plans;

(C) Describe the sequence and schedule of planned reclamation activities, including opportunities for concurrent reclamation wherever practicable. If deemed necessary, this shall also include a long-term post-closure schedule of the operations and tasks required in order to maintain the protection of surface resources; and

(D) Provide a reclamation cost estimate, calculated in accordance with § 228.11(b), including financial assurance release criteria linking categories of costs to specific activities or milestones included in the plan of operations or operating notice in effect.

(iii) The reclamation plan shall address:

- (A) Protection of surface water and groundwater;
- (B) Prevention and/or control of erosion, slope failure, and water runoff; and overtopping of ponds and impoundments;
- (C) Prevention and/or control of the introduction and spread of invasive species and noxious weeds;
- (D) Isolation, removal, and/or control of conditions associated with acid-forming, toxic, or hazardous materials, including pit walls, heap leach areas, and waste rock and tailings storage areas;
- (E) Removal of all property, equipment, structures, and facilities located within the project area when no longer needed or inoperable;
- (F) Stabilization of structures that remain;
- (G) Closing of mine facilities, including underground workings and open pits, and plugging drill holes in such a manner as to mitigate risks to public safety;
- (H) Reshaping disturbed areas, including road surfaces, so far as is practicable to restore the most stable natural contour;
- (I) Revegetating disturbed areas using native plants or the Forest Service-approved seed mix to establish self-sustaining vegetation;
- (J) Rehabilitating fish and wildlife habitat;
- (K) Monitoring surface resources and reclamation effectiveness and addressing additional reclamation needs identified by such monitoring; and

(L) Carrying out long-term post-closure obligations, if required.

(iv) All reclamation activities, except for long-term post-closure obligations, shall be completed prior to closing the operations.

§ 228.11 Establishing, maintaining, and releasing financial assurances.

(a) The operator shall maintain financial assurances to cover the full costs of reclamation, and long-term post-closure operations. In order to ensure that the operations are complying with the full financial assurances requirement, the authorized officer will periodically review the reclamation cost estimate and financial assurances for adequacy as detailed in § 228.11(g).

(b) The operator shall estimate the cost to reclaim in their entirety operations subject to a proposed plan of operations or operating notice. Reclamation cost estimates and financial assurance amounts under this subpart shall be calculated by the operator as if a third-party contractor hired by the Forest Service performed the reclamation. Such calculations shall include:

- (1) The costs of completing the tasks outlined in the reclamation plan;
- (2) The costs of constructing, maintaining, and operating any soil, tailings, waste rock, or water treatment facilities necessary to meet applicable Federal or State environmental standards;
- (3) The costs of any reclamation, stabilization, or other interim activities that would occur while any third-party contracts are developed and executed, including interim stabilization and site maintenance activities;
- (4) Any fees reasonably anticipated to be charged by a third-party contractor, such as profit and overhead;
- (5) The Forest Service's costs to administer the third-party contract;

(6) Any trustee's fees, taxes, or other costs reasonably anticipated to be paid out of a trust fund used as a financial assurance instrument as described in § 228.13; and

(7) Any inflation adjustment or cost increases reasonably anticipated to occur before reclamation is completed.

(c) Determining the financial assurance amount. The authorized officer shall review the operator's reclamation cost estimate, including the operator's cost estimate for any long-term post-closure reclamation activities, if applicable. If the authorized officer determines the reclamation cost estimate is adequate, then that estimate shall become the financial assurance amount. If the authorized officer determines the reclamation cost estimate is inadequate, the authorized officer shall work with the operator to determine the financial assurance amount. If an amount cannot be agreed upon, the authorized officer shall notify the operator in writing of the financial assurance amount.

(d) The financial assurance shall be supplied to the authorized officer by the operator identified in the operating notice or plan of operations. In the case of a corporation, the signatory to the approved plan of operations and the financial assurance shall be an authorized corporate officer. The operator shall provide financial assurance in one or a combination of the following instruments:

(1) A surety bond that names the Forest Service as a beneficiary, provided by a company meeting the requirements of 31 CFR Part 223 and listed in the current revision of Treasury Department Circular 570, and is available in full to the Forest Service;

(2) An irrevocable letter of credit from a bank or financial institution organized or authorized to transact business in the United States and

insured by the Federal Deposit Insurance Corporation or National Credit Union Administration;

- (3) An assignment of certificates of deposit or savings accounts not in excess of the maximum insurable amount as set by the Federal Deposit Insurance Corporation or National Credit Union Administration;
- (4) Negotiable securities of the United States having a market value at the time of deposit of not less than the required dollar amount of the reclamation cost estimate;
- (5) Cash; or
- (6) A trust fund for the purposes described in § 228.13 for long-term post-closure obligations.

(e) Acceptance of financial assurances. The operator shall not begin operations under an approved plan of operations or an operating notice in effect until they have been notified by the authorized officer that their financial assurance has been accepted. Once the operator has provided a financial assurance pursuant to § 228.11(b) and § 228.11(c), the authorized officer will determine whether the financial assurance instrument meets the conditions in § 228.11(d) and notify the operator that:

- (1) The financial assurance has been accepted and obligated; or
- (2) The financial assurance does not meet the conditions set forth in § 228.11(d).

(f) Phased financial assurances.

- (1) For operations subject to a plan of operations, the authorized officer may approve a financial assurance where the amount varies for each phase of the operation's lifecycle, if proposed by the operator.

- (2) The reclamation cost estimate for a phased financial assurance proposal shall include:
- (i) A reclamation cost estimate, calculated according to § 228.11(b), that accounts for the full cost of reclaiming the operations;
 - (ii) An explanation for why a phased financial assurance is appropriate;
 - (iii) A description of how the proposed operations can be divided into discrete, sequential phases separated by defined milestones, based on the logical progression of operations; and
 - (iv) For each proposed phase, including long-term post-closure obligations, an estimate of the maximum reclamation obligations resulting from activities performed during that phase, calculated according to § 228.11(b), shall be the reclamation cost estimate for that phase.
- (3) Financial assurance reviews shall take place before the commencement of each new phase, notwithstanding any other approved review schedule.
- (4) The operator shall not undertake any activities associated with a given phase until the authorized officer has accepted from the operator a financial assurance that is equal to or greater than the amount associated with that phase.
- (g) Periodic review of financial assurances.
- (1) For operations subject to a plan of operations, the authorized officer shall review the reclamation cost estimate and financial assurance

annually or on a schedule specified in the approved plan of operations.

The review may occur sooner if there is a change in circumstances.

- (2) The operator shall provide to the authorized officer any information necessary for the review, including, but not limited to, a description of operations and reclamation undertaken since the last review that includes as-built surveys of all existing disturbances and a description of operations that will take place before the next scheduled review.
- (3) If the authorized officer determines that there is a need for a new financial assurance, the authorized officer shall require the operator to prepare a new reclamation cost estimate that shall be subject to review and approval by the authorized officer in accordance with the procedures as set forth in § 228.11(c).
- (4) When conducting a periodic review of a phased financial assurance, the authorized officer shall also consider the total financial assurance amount required to reclaim all disturbances during the life of the operation, the schedule of remaining phases, and the incremental financial assurance amounts associated with each remaining phase.
- (5) If the authorized officer determines that the existing financial assurance is not sufficient, the authorized officer shall:
 - (i) Inform the operator in writing of such determination, include the calculations and assumptions that support the determination, and provide the operator with no less than 30 days to respond;
 - (ii) Consider the operator's response and all other information in the project file in deciding whether to require modification of the financial assurance; and

(iii) Notify the operator in writing whether modification of the financial assurance is required. If the financial assurance is required to be modified, the authorized officer shall provide in the notification:

(A) the rationale for the authorized officer's determination;

(B) the modified financial assurance amount; and

(C) the date by which the operator shall provide the authorized officer proof of the modified financial assurance instrument.

(6) If the operator fails to modify the financial assurance as required under § 228.11(g)(5), the authorized officer shall take action in accordance with § 228.7.

(7) If the authorized officer determines the existing financial assurance is excessive, the authorized officer shall inform the operator, and the operator may elect to request a partial release under § 228.11(j).

(h) Replacement financial assurances. An operator may voluntarily replace an existing financial assurance at any time, in whole or in part, with another financial assurance that satisfies the requirements of this section. The operator shall first provide the new financial assurance to the authorized officer for review and acceptance. Once the authorized officer has received and accepted the new financial assurance, the authorized officer shall release the previous financial assurance to the operator.

(i) Transfer of operations.

(1) The authorized officer shall initiate a review of the financial assurance amount under § 228.11(g) upon receipt of a notification from the operator that ownership of the operation is being transferred.

(2) The transferee operator shall provide a replacement financial assurance that satisfies the requirements of this section to the authorized officer. The authorized officer shall review the existing financial assurance amount as described in § 228.11(g) prior to accepting a replacement financial assurance from the transferee operator. The authorized officer shall release the existing financial assurance to the current operator upon acceptance of the replacement financial assurance from the transferee operator.

(j) Release of financial assurances.

(1) The operator shall maintain financial assurance complying with the requirements of this section until the reclamation obligations contained in the operating notice or plan of operations have been satisfied.

(2) The operator may request a partial or full release of the financial assurance upon providing written notice to the authorized officer that the reclamation obligations have been partially or fully satisfied. The operator shall provide documentation demonstrating that the obligations in question have been satisfied. The operator shall document how the release criteria have been met. Release of a financial assurance in part or in full does not release or waive any claim the Forest Service or other persons may have against any person or entity under the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended (42 U.S.C. 9601, *et seq.*), or under any other applicable statutes or regulations.

(3) The authorized officer shall review any request for full or partial release of financial assurance and, following a site inspection, shall:

- (i) Determine that the operator's reclamation obligations have been satisfied in full and release the financial assurance in full;
- (ii) Determine that the operator's reclamation obligations have been partially satisfied, inform the operator of the reclamation obligations that remain to be satisfied, and authorize a partial release of the financial assurance; or
- (iii) Determine that the operator's reclamation obligations have not been satisfied to an extent that justifies full or partial release of the financial assurance.

§ 228.12 Forfeiture of financial assurances.

- (a) The authorized officer may initiate forfeiture of an operator's financial assurance if:

- (1) The operator has failed to comply with reclamation obligations as set forth in the reclamation plan or the regulations in this subpart;
- (2) The operator has failed to meet the terms of the operating notice in effect or approved plan of operations;
- (3) The operator has not responded to the bill for costs provided to the operator under § 228.7(c)(4) within 30 days of receipt;
- (4) The operator has defaulted, or is at imminent risk of defaulting, on any of the conditions under which it obtained the financial assurance; or
- (5) The operator has been determined to have abandoned the operations pursuant to § 228.8 (h).

- (b) Upon determining the need to initiate forfeiture of the operator's financial assurance, the authorized officer shall provide written notice to the operator stating the reasons for the determination, including, if applicable, the required reclamation activities the operator has not performed, and of the amount of the

assurance to be forfeited, and the scheduled date of funds withdrawal, which shall not be sooner than 30 days from the notice. The authorized officer shall transmit a copy of the notification to any issuer, provider, surety, trustee, or financial institution associated with the financial assurance.

- (c) Prior to the scheduled withdrawal of the funds, the operator shall have the opportunity to address the determination and avoid funds withdrawal by:
 - (1) Providing written notice to the authorized officer demonstrating that the circumstances that gave rise to the authorized officer's determination have been corrected or scheduled for correction by the operator or an approved third party; or
 - (2) Obtaining written permission from the Forest Service for a surety to assume and perform all obligations of the operator.
- (d) The authorized officer will consider the operator's response and all other information in the project file in deciding whether to initiate forfeiture of the financial assurance and inform the operator in writing whether forfeiture of the financial assurance will occur, including the rationale for the authorized officer's determination.
- (e) The authorized officer shall require forfeiture of any amount that is to correct the circumstances that gave rise to the authorized officer's determination, up to the full remaining amount of the financial assurance, without regard to any financial assurance release criteria included in the operator's reclamation plan. If the financial assurance is insufficient to correct those circumstances, the authorized officer shall send the operator a bill for collection for the balance of the reclamation costs under § 228.11(g)(5). Failure to pay the bill for collection may result in additional legal action.

§ 228.13 Trust funds.

- (a) The purpose of a trust fund is to ensure the continuation of long-term treatment to achieve water quality standards and other long-term post-mining operations identified as necessary to minimize adverse impacts on surface resources. The authorized officer may require the operator to establish a trust fund to ensure that adequate funds are available for long-term post-closure reclamation activities identified in the operator's reclamation plan. The authorized officer shall determine which activities may be secured through a trust fund and which activities may be secured through another form of financial assurance. Establishing a trust fund does not relieve the operator of the responsibility to provide long-term management, maintenance, and reclamation of the site.
- (b) The Forest Service, in its role as regulator of operations, will ensure implementation of the performance obligation under the trust to complete the long-term post-closure obligations described in the reclamation plan.
- (c) If the operator ceases to exist or is subject to a dissolution proceeding or a petition under Chapter 7 of the United States Bankruptcy Code, Title 11 U.S.C., as it may be amended or revised, or as otherwise provided for in the trust fund, the trustee will ensure that any and all withdrawals, distributions, or disbursements from the trust fund are used to finance the long-term post-mining obligations described in the reclamation plan.
- (d) The trust fund shall be established and managed in a manner to ensure that in each year, beginning on the operations' closure, the fund will produce adequate income to provide for long-term post-closure reclamation activities until those activities are complete.
- (e) The trustee must be one of the following:

- (1) A bank or trust company chartered by the State in which the operations occur;
- (2) A national bank chartered by the Office of the Comptroller of the Currency;
- (3) An operating subsidiary of a national bank chartered by the Office of the Comptroller of the Currency;
- (4) Any other financial institution or company with trust powers in the State in which the operations occur, provided that the institution's or company's activities are examined or regulated by a State or Federal agency; or
- (5) An agency or instrumentality of the State in which the operations occur, if the State has provided, by law, that the agency or instrumentality shall be subject to the same fiduciary duties as a private trustee and shall be suitable to the same extent as a private trustee.
- (6) Other individuals or institutions may be considered by providing the line officer with the following:
 - (i) Indication that the trustee will act as a fiduciary;
 - (ii) Statement of Qualifications;
 - (iii) Demonstrated experience in dealing with natural resource rehabilitation or natural resource management;
 - (iv) Demonstrated experience acting as trustee;
 - (v) Experience with water quality management, or impoundment, or other similarities to the project in question;
 - (vi) Examples of previous experience and samples of regulatory instruments under the trustee's responsibility; and
 - (vii) References.

(f) When the authorized officer has required the use of a trust fund, the authorized officer will approve a trust fund agreement, which shall contain all terms and conditions required by the authorized officer, including but not limited to the following:

- (1) A provision that the United States is irrevocably established as the beneficiary of the trust. However, the trust agreement may not allow for payment of the funds directly to the Forest Service, or for the Forest Service to direct or control payments from the trust;
- (2) A description of the trustee's fiduciary duties toward the United States, as beneficiary of the trust fund;
- (3) The schedule described in § 228.10(c)(9)(ii)(C), which shall act as a guide for investment and payment milestones;
- (4) If the operator continues to perform the long-term obligations under the reclamation plan, the operator may seek reimbursement for that work from funds in the trust;
- (5) Investment objectives for the trust fund, including a description of financial instruments to be included in the fund. Subject to the approval of the authorized officer, financial instruments are limited to:
 - (i) Negotiable United States Government, State and Municipal securities or bonds;
 - (ii) Money market funds;
 - (iii) Certificates of deposits;
 - (iv) Investment-grade securities; and
 - (v) Stock equity shares listed on a national exchange.

- (6) A provision that the financial instruments must be maintained in a Securities Investors Protection Corporation insured trust account by a licensed securities brokerage firm for the benefit of the trust;
 - (7) A provision requiring that the trustee provide to the authorized officer a report describing the value of the fund, its composition, and the nature and market value of the instruments included in the trust fund. Such a report shall be provided at least once each year, beginning in the calendar year in which operations commence; and
 - (8) A provision that the trust cannot be terminated except with the written authorization of the authorized officer.
- (g) When determining the financial assurance amount under subsection § 228.11(c), the authorized officer shall consider the operator's cost estimations and establish the following:
- (1) The annual income that will be required, beginning with closure, to ensure the completion of long-term post-closure reclamation activities identified in the operator's reclamation plan, as required by § 228.13(a) and based on the schedule described in § 228.10(c)(9)(ii)(C); and
 - (2) The fund principal amount at closure that will be required, beginning with closure, to provide the annual income set forth in § 228.13(g)(1).
- (h) The authorized officer shall require the operator to deposit into the fund, as part of the financial assurance provided before the commencement of operations, the entire fund principal amount that will be required at closure set forth in 228.13(g)(2), unless the authorized officer approves a schedule by which the value of the fund shall reach the full fund principal amount by the closure date through a combination of reasonably anticipated growth and additional deposits by the operator. In no case shall the authorized officer approve a schedule that provides

for the operator to deposit into the fund less than 25 percent of the fund principal amount at closure before commencing operations. All deposits made by the operator into the fund shall be made in cash or a similar instrument.

- (i) The operator shall provide to the authorized officer a copy of the trustee's certified statement comparing the value of the trust fund to the fund principal amount required at closure, at least once each calendar year following commencement of operations, or to the amount specified in the schedule approved by the authorized officer under subsection (f).
- (j) If any certified annual statement pursuant to § 228.13(i) demonstrates that the value of the fund principal is less than 90 percent of the required fund principal amount at closure, the operator shall, within 10 days, deposit additional funds into the trust such that the value of the trust fund is not less than 100 percent of the required amount at closure. The operator shall send a certified statement to the authorized officer within 30 days of depositing such funds and eliminating the deficit that documents the actions taken by the operator to raise the value of the fund principal and shall include copies of any statements or reports furnished by the trustee documenting the increase in principal.
- (k) If the certified statement pursuant to § 228.13(i) demonstrates that the value of the trust fund is more than 110 percent of the required amount at closure, the operator may request in writing that the authorized officer authorize a release of that portion of the fund that exceeds 110 percent. The authorized officer shall not approve such a request if the operations have been subject to a related notice of noncompliance, suspension order, or immediate suspension order issued under § 228.7(c) within the past 12 months.

(l) The trust fund agreement shall address the release of funds from the trust fund.

Other than as provided in § 228.13(k), no funds shall be released from the trust fund except:

(1) to fund the activities described in § 228.13(a) as carried out by the Forest Service, a third-party contractor authorized by the Forest Service, or entities authorized by the trustee; or

(2) to reimburse the operator or their representative or designee for activities undertaken in accordance with § 228.13(a), in the event that the extractive operations have ceased and dissolution or abandonment has not occurred.

(m) The trust fund shall be terminated only by written authorization of the authorized officer, based on their determination that long-term post-closure reclamation activities have been completed or that an alternative financial assurance acceptable to the authorized officer has been posted.

§ 228.14 Operations on National Forest System lands, including national forest wilderness areas, that have been segregated or withdrawn from the operation of the mining laws, subject to valid existing rights.

(a) Except as specified in §228.14(c) and (e), an operator shall not conduct operations on lands that are segregated or withdrawn, subject to valid existing rights, until:

(1) the authorized officer has confirmed that the operations will occur on a mining claim or claims that were valid as of the date the lands were segregated or withdrawn and remain valid; and

(2) a plan of operations covering the proposed operations has been approved pursuant to this subpart.

(b) Except as described in § 228.14(c), the authorized officer shall not approve any plan of operations or approve a modification to any plan of operations that includes lands that were segregated or withdrawn, subject to valid existing rights,

before a mineral examination report has been prepared and confirms that all mining claims on which operations are proposed were valid as of the date the lands were segregated or withdrawn, and remain valid.

- (c) If an operator commenced operations under an approved plan of operations before the date of segregation or withdrawal, subject to valid existing rights, and that plan of operations remains in effect, the authorized officer is not required to prepare a mineral examination report under this section for operations to continue. If the operator proposes a modification to the approved plan of operations or the authorized officer requires a modification of the plan of operations in accordance with § 228.6(f), the authorized officer shall prepare a mineral examination report under this section prior to approving a new or modified plan of operations. The authorized officer is not required to prepare a mineral examination report prior to processing a modification to an approved plan of operations on lands that are segregated or withdrawn, subject to valid existing rights, if the modification is situated entirely within the area previously approved.
- (d) The time limits under this subpart for reviewing a proposed plan of operations shall be suspended while a mineral examination report is prepared pursuant to § 228.14(b), while the authorized officer is considering, in collaboration with the Bureau of Land Management and the Department of the Interior, whether to initiate an administrative contest proceeding challenging the validity of one or more mining claims on the lands included in the proposed plan of operations; or while the validity of one or more mining claims on the lands included in the proposed plan of operations is the subject of an administrative contest proceeding before the Department of the Interior, or a subsequent judicial proceeding.
- (e) The authorized officer may approve an interim plan of operations when the time limits for processing a plan of operations under this subpart are suspended, as

provided in § 228.14(d). An interim plan of operations shall be restricted to the following allowable operations:

- (1) taking samples to confirm or corroborate mineral exposures that were physically disclosed and existing on the mining claim before the earlier segregation or withdrawal dates; and
 - (2) performing the minimum necessary annual assessment work, if required by applicable law.
- (f) If a mineral examination report recommends one or more mining claims on segregated or withdrawn lands within the proposed plan of operations for contest, the operator may modify its proposed plan of operations to avoid any segregated or withdrawn lands embraced by the mining claims recommended for contest. If the operator does not do so, the Forest Service may request that the Bureau of Land Management initiate an administrative contest proceeding.
- (g) The authorized officer will notify the operator if the BLM determines mining claims on segregated or withdrawn lands to be void. The operator shall immediately cease all operations subject to that plan of operations except reclamation and shall complete reclamation promptly.
- (h) Notwithstanding any other provision in this subpart, the authorized officer may request the preparation of a mineral examination report to assess the validity of any mining claim on NFS lands, whether or not the lands are segregated or withdrawn from operation of the mining laws, subject to valid existing rights.
- (i) The following additional requirements are applicable to operations on lands within national forest wilderness areas:
- (1) Plans of operations located within national forest wilderness areas shall contain reasonable measures and stipulations for the protection of the wilderness character of the lands specified in the Wilderness Act and any

applicable subsequent legislation under which specific wilderness areas have been designated;

(2) Access to mining claims surrounded by national forest wilderness areas shall be by means consistent with the preservation of the wilderness character of the lands and shall conform to such means that have been, or are being, customarily used to access mining claims at a similar stage of development within national forest wilderness areas; and

(3) The operator may cut and use the volume of mature timber on the mining claims as needed for the extraction, removal, and beneficiation of the mineral deposit, provided such timber is not otherwise reasonably available.

(j) Gathering minerals information in national forest wilderness areas. Any activity, including prospecting, for the purpose of gathering information about minerals occurring within national forest wilderness areas pursuant to the Wilderness Act (16 U.S.C. 1133(d)(2)), is not subject to the regulations under this subpart.

§ 228.15 Procedures for operations involving possible mineral materials.

(a) For purposes of this section,

(1) “Mineral material” refers to a material as defined in 36 CFR Part 228, Subpart C. Disposal of mineral materials is implemented by 36 CFR Part 228, Subpart C. Mineral materials are not subject to these regulations at Subpart A.

(2) “Possible mineral material” means: A deposit for which an operator has asserted is subject to location, based on information they provide to the Forest Service, but whose status as locatable is not clear to the Forest Service based on the criteria provided in 36 CFR Part 228.41(c) and (d).

- (b) This section does not apply to operations on mining claims located before July 23, 1955 for which the United States has not determined surface rights pursuant to 30 U.S.C. 613.
- (c) Except as provided in § 228.15(e), the authorized officer shall not approve a plan of operations or modified plan of operations, and no operating notice shall go into effect for removal of possible mineral materials before a mineral classification report has been prepared to determine whether the materials in question are mineral materials subject to regulation under 36 CFR Part 228, Subpart C, or are locatable minerals subject to regulation under this subpart. However, the authorized officer is not required to prepare a mineral classification report prior to an operating notice or a modified operating notice going into effect or processing a plan of operations or modification to an approved plan of operations if a previous mineral classification report addressing the same lands and/or geologic deposit is deemed sufficient by the authorized officer.
- (d) The time limits under this subpart for processing an operating notice or proposed plan of operations shall be suspended while a mineral classification report is being prepared pursuant to § 228.15(c).
- (e) While processing of an operating notice or plan of operations is suspended during preparation of a mineral classification report as provided in § 228.15(d), an interim operating notice may go into effect, and the authorized officer may approve an interim plan of operations. Interim operating notices and interim plans of operations under § 228.15 shall be reviewed in accordance with the provisions in §§ 228.5 or 228.6, respectively. Interim operating notices and interim plans of operations shall be restricted to the following allowable operations:
- (1) Operations to perform the minimum necessary annual assessment work, if required, by applicable law;

- (2) Operations limited to the minimum necessary sampling and analysis to obtain data bearing on whether the material is a common variety or not. Such data will include the physical and chemical properties of the materials, their distribution, and their suitable end uses and associated markets, provided that any operations under this paragraph lasting more than 2 years shall require an interim plan of operations; or
 - (3) Operations may proceed under an approved interim plan of operations to remove possible mineral materials if the operator establishes an escrow account and places the fair market value for the full amount of materials removed into the escrow account pending completion of the mineral classification report. The operator shall make payments to the escrow account no less than annually, for the appraised fair market value of all materials removed since the previous payment.
- (f) Consistent with the findings, conclusions, and recommendations of the mineral classification report required by § 228.15(c), the authorized officer shall make a final determination on whether all or any portion of the materials in question are mineral materials subject to regulation under 36 CFR Part 228, Subpart C, or are locatable minerals subject to regulation under this subpart. The authorized officer shall, based on the final determination:
- (1) Direct the distribution of any funds in an escrow account established under § 228.15(e)(3) to the operator or to the U.S. Treasury, as appropriate;
 - (2) Process any pending operating notice or proposed plan of operations for any portion of the geologic deposit determined to contain locatable minerals, the processing of which was suspended under § 228.15(c);
 - (3) Process a modification to an interim operating notice in effect or a proposed modification to an approved interim plan of operations that was

previously processed under § 228.15(e) to allow for an expanded scope of operations beyond those allowed under the interim operating notice or interim plan of operations; and

(4) For any portion of the deposit determined to contain mineral materials, proceed according to § 228.15(g).

(g) If an authorized officer has determined that a geologic deposit contains mineral materials, any approved plans of operations or operating notices in effect involving the deposit shall be closed. The operator shall immediately cease all operations except reclamation, and shall complete reclamation promptly according to the terms of the plan of operations or operating notice unless the operator has obtained authorization to continue to remove those materials in accordance with the requirements of 36 CFR Part 228, Subpart C.

(h) Nothing in this section shall preclude an operator from engaging in any use within the boundaries of the approved plan of operations of mineral materials for reclamation or other purposes and for any reasonably incident uses, including overburden stripping, coincidental mining, or storage within the boundaries of the approved plan of operations.

§ 228.16 Administrative appeals.

Appeals of authorized officer decisions made pursuant to this subpart are governed by 36 CFR Part 214.

§ 228.17 Transitional administration of operations between these regulations and the prior version [1974 as amended].

Beginning on [effective date], any operations subject to the mining laws on NFS lands shall have 1 year to comply with these regulations. If a modification to a plan of operations is required to comply with these regulations, it shall be submitted within 1 year of [effective date].

§ 228.18 Availability of information to the public.

- (a) All information and data submitted by an operator pursuant to the regulations of this subpart is available for examination by the public pursuant to the Freedom of Information Act, 5 U.S.C. 552, and the provisions of 7 CFR 1.1 through 1.23 and sections 200.6 through 200.8 of this chapter, except as follows:
- (b) Information and data exempt from disclosure under the Freedom of Information Act (5 U.S.C. 552) that accordingly may be withheld from public examination include, but are not limited to:
- (1) Specific attributes of the mineral deposits as may comprise a trade secret or otherwise comprise confidential business information relating to competitive rights of the operator;
 - (2) Known or estimated outline of the mineral deposits and their location, attitude, extent, outcrops, and content;
 - (3) Other commercial information that relates to competitive rights of the operator; and
 - (4) Information subject to the confidentiality requirements in the Archaeological Resources Protection Act, 16 U.S.C. 470hh; the National Historic Preservation Act, 16 U.S.C. 307103; the Food, Conservation, and Energy Act of 2008 (25 U.S.C. 3056); and the Forest Service Regulations at 36 CFR 296.18.
- (c) If the authorized officer cannot determine whether information provided by an operator is a trade secret or privileged or confidential business information, the authorized officer shall:
- (1) Notify the operator of a request for that information;
 - (2) Afford the operator reasonable time in which to object to the disclosure of any specified portion of the information; and

(3) Provide the operator with written notification of intent to disclose such information prior to the disclosure date, so that the operator may seek judicial intervention to prevent the disclosure.

(d) The authorized officer shall notify an operator in writing of all instances in which Freedom of Information Act requests seek judicial intervention to compel disclosure of information submitted by the operator.

§ 228.19 Information collection.

Information collection is required for an operating notice, a proposed initial or modified plan of operations, and the cessation of operations.

* * * * *

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