

**DEPARTMENT OF THE INTERIOR****Office of Surface Mining Reclamation and Enforcement****30 CFR Parts 740, 745, 761, and 772**

RIN 1029-AB42

**Valid Existing Rights**

**AGENCY:** Office of Surface Mining Reclamation and Enforcement, Interior.  
**ACTION:** Proposed rule.

**SUMMARY:** The Office of Surface Mining Reclamation and Enforcement (OSM) is proposing to amend its regulations to redefine the circumstances under which a person has valid existing rights (VER) to conduct surface coal mining operations in areas where these operations are otherwise prohibited by section 522(e) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA or "the Act"). OSM also is proposing to establish requirements and procedures and define responsibilities for the submission and processing of requests for VER determinations, modify and clarify the applicability of the existing operation exemption, remove the requirement that requests for compatibility determinations for surface coal mining operations on national forest lands be accompanied by a permit application, and, with certain exceptions, require a VER determination as a prerequisite for approval of coal exploration activities that may result in substantial disturbance of the lands listed in section 522(e) of SMCRA. The proposed rule also contains numerous editorial revisions and organizational changes intended to improve overall consistency and clarity. If the proposed rule becomes final, it would result in removal of all existing suspensions of the affected regulations.

**DATES:** *Electronic or written comments:* OSM will accept electronic or written comments on the proposed rule until 5:00 p.m. Eastern time on June 2, 1997.

*Public hearings:* Anyone wishing to testify at a public hearing must submit a request on or before 5:00 p.m. Eastern time on March 17, 1997. Because OSM will hold a public hearing at a particular location only if there is sufficient interest, hearing arrangements, dates and times, if any, will be announced in a subsequent Federal Register notice. Any disabled individual who needs special accommodation to attend a public hearing should contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

**ADDRESSES:** *Electronic or written comments:* Submit electronic comments to [osmrules@osmre.gov](mailto:osmrules@osmre.gov). Mail written

comments to the Administrative Record, Office of Surface Mining Reclamation and Enforcement, 1951 Constitution Avenue, N.W., Washington, DC 20240 or hand-deliver to the person listed under **FOR FURTHER INFORMATION CONTACT**.

*Public hearings:* If there is sufficient interest, hearings may be held in Billings, MT; Denver, CO; Lexington, KY; Washington, DC; and Washington, PA. To request a hearing, contact the person listed under **FOR FURTHER INFORMATION CONTACT** by the time specified under **DATES** using any of the methods listed for "*Electronic or written comments*".

**FOR FURTHER INFORMATION CONTACT:** Dennis Rice, Rules and Legislation, Office of Surface Mining Reclamation and Enforcement, Room 115, South Interior Building, 1951 Constitution Avenue, N.W., Washington, DC 20240. Telephone: (202) 208-2829. E-mail address: [drice@osmre.gov](mailto:drice@osmre.gov). Additional information concerning OSM, this rule, and related documents may be found on OSM's home page at <http://www.osmre.gov>.

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## I. Public Comment Procedures

*Electric or Written Comments*

Comments should be specific and confined to issues pertinent to the proposed rule. They also should include explanations in support of the commenter's recommendations. OSM appreciates any and all comments, but those most useful and likely to influence decisions on the content of a final rule will be those that either involve personal experience or include citations to and analyses of the Act, its legislative history, its implementing regulations, case law, other pertinent State or Federal laws or regulations, technical literature, or other relevant publications.

Except for comments provided in an electronic format, commenters should submit two copies of their comments whenever practicable. Comments received after the time indicated under **DATES** or at locations other than the OSM office listed under **ADDRESSES** will not necessarily be considered in the final decision or included in the administrative record.

*Public Hearing*

Persons wishing to testify at a public hearing must contact the person listed under **FOR FURTHER INFORMATION CONTACT** by the time indicated under **DATES**. If no one requests an opportunity to comment at a public hearing, no hearing will be held.

If a public hearing is held, it will continue until all persons scheduled to speak have been heard. Persons in the audience who were not scheduled to speak but who wish to do so will be heard following the scheduled speakers. The hearing will end after all scheduled speakers and any other persons present who wish to speak have been heard.

Filing of a written statement at the time of the hearing will assist the transcriber and facilitate preparation of an accurate record. Submission of electronic or written statements to OSM in advance of the hearing will allow OSM officials to prepare adequate responses and appropriate questions.

#### *Public Meeting*

If there is only limited interest in a hearing at a particular location, a public meeting, rather than a public hearing, may be held. Persons wishing to meet with OSM representatives to discuss the proposed rule may request a meeting by contacting the person listed under **FOR FURTHER INFORMATION CONTACT**. All meetings will be open to the public and, if possible, notice of the meetings will be posted at the appropriate locations listed under **ADDRESSES**. A written summary of each public meeting will be made a part of the administrative record of this rulemaking.

## II. General Background on Proposed Rule

Section 522(e) of SMCRA provides that, subject to VER, there shall be no surface coal mining operations on certain lands after the date of enactment (August 3, 1977). The Act exempts operations in existence on that date. Section 522(e)(1) protects all lands within the boundaries of units of the National Park System; the National Wildlife Refuge System; the National System of Trails; the National Wilderness Preservation System; the Wild and Scenic Rivers System, including study rivers designated under section 5(a) of the Wild and Scenic Rivers Act; and National Recreation Areas designated by Act of Congress. Section 522(e)(2) protects Federal lands within the boundaries of any national forest, although it provides a mechanism and criteria for approving (a) surface operations and impacts incident to an underground mine on any type of national forest land, and (b) any type of surface operations on lands that lack significant forest cover and are located west of the 100th meridian. Section 522(e)(3) prohibits operations that would adversely impact publicly owned parks and properties listed on the National Register of Historic Places; however, it permits operations that receive joint approval from the regulatory authority and the agency with jurisdiction over the park or place. Except for mine access and haul roads, section 522(e)(4) prohibits operations within 100 feet of the outside right-of-way line of any public road, but it

provides a mechanism and criteria for approval of exceptions from this prohibition. Section 522(e)(5) prohibits operations within 100 feet of a cemetery or within 300 feet of a public building, school, church, community or institutional building, or public park. This paragraph also prohibits operations within 300 feet of an occupied dwelling, but it allows the owner of the dwelling to waive the prohibition.

SMCRA does not define or explain the VER exemption. As discussed in greater detail in other sections of this preamble, OSM previously defined or attempted to define VER by regulation in 1979, 1983, 1988, and 1991. None of these efforts was fully successful. Judicial review of the 1979 and 1983 definitions and related rules resulted in the remand of several provisions, including most of the 1983 definition of VER. In 1988, OSM proposed a new definition, which it withdrew in 1989 for further study.

On July 18, 1991 (56 FR 33152-65), OSM again proposed to revise the definition of VER and related rules. The comment period for this proposal originally closed September 16, 1991, but, by notice dated September 12, 1991 (56 FR 46396), OSM extended the deadline until October 16, 1991. In addition, in response to requests from interested persons, OSM scheduled and held two public hearings on the proposed rule, one in Knoxville, Tennessee, which attracted 27 speakers, and another in Morgantown, West Virginia, at which 3 individuals offered testimony.

The overwhelmingly majority of the approximately 750 comments received did not directly discuss either the proposed rule language or the specific issues upon which OSM had requested comment. Instead, the commenters opposed the proposed rule in principle because they believed that it would lead to increased mining in national parks and wildlife refuges and irreparable or uncompensated damage to dwellings, cemeteries, churches, and other structures. Copies of all comments received and transcripts of the public hearings are on file as part of the administrative record of the 1991 rulemaking effort.

Before OSM completed development of a final rule, the President signed the Energy Policy Act of 1992 (EPAAct), Public Law 102-486, 206 Stat. 2776, into law on October 24, 1992. Section 2504(b) of that statute effectively placed a one-year moratorium on adoption of a new or revised VER definition.

At the Department's request, Congress included a revised version of this

moratorium in the appropriations acts for fiscal years 1994 and 1995 for the Department of the Interior and related agencies. Specifically, the Fiscal Year 1995 Appropriations Act (Pub. L. 103-332) contained a provision that effectively prohibited the Department from publishing a final Federal VER definition or disapproving existing State definitions of VER until October 1, 1995. However, Congress did not include the moratorium language in the fiscal year 1996 appropriations legislation or continuing resolutions.

After evaluating the comments received and taking intervening events into consideration, OSM has decided to withdraw the 1991 proposal and publish a new, extensively revised proposed rule concerning the definition of VER and related issues. The new proposed rule is based upon, but not identical to, the 1991 proposal. Except as discussed below, all substantive comments received in response to the 1991 proposed rule have been considered in developing the rule being proposed today. However, because OSM has decided to withdraw the 1991 proposal in favor of the rule being proposed today, the preamble does not necessarily discuss the disposition of all comments. Persons who believe that the new proposal does not adequately address their 1991 concerns must submit new comments or resubmit relevant portions of earlier comments to insure consideration of those concerns during development of the final rule.

Some commenters expressed opposition to OSM's position that the prohibitions and limitations of section 522(e) of SMCRA do not apply to subsidence or other adverse surface impacts resulting from underground mining activities conducted beneath or adjacent to protected lands. OSM announced this policy in a separate Federal Register document (56 FR 33170-71) published on July 18, 1991, in tandem with the proposed rule concerning VER. However, on September 21, 1993, in *National Wildlife Fed'n v. Babbitt*, 835 F. Supp. 654 (D.D.C. 1993), the court vacated the policy set forth in the notice and remanded the issue to the Secretary for rulemaking in accordance with the notice and comment procedures of the Administrative Procedure Act (5 U.S.C. 553). OSM is addressing this issue in a separate rulemaking, which is also being published in proposed form in today's Federal Register.

### III. Discussion of Proposed Rule

#### A. Sections 740.4, 740.11 and 745.13: VER Determinations for Lands Protected by Paragraphs (e)(1) and (e)(2) of Section 522 of SMCRA

##### 1. Who Is Responsible for VER Determinations for Non-Federal Lands Within Section 522(e)(1) Areas?

While SMCRA does not directly address responsibilities for VER determinations, section 503(a) speaks of States having exclusive jurisdiction over the regulation of surface coal mining and reclamation operations on non-Federal lands. In accordance with this principle, former 30 CFR 761.4, as promulgated on March 13, 1979 (44 FR 15341), assigned the responsibility for VER determinations to the regulatory authority, with the Secretary retaining responsibility for VER determinations involving Federal lands.

On February 16, 1983 (48 FR 6935), OSM revised the Federal lands regulations at 30 CFR 740.4 by adding paragraph (a)(4). This paragraph narrowed the Secretary's responsibility for VER determinations by restricting it to proposed surface coal mining operations that would be located on Federal lands within the boundaries of any areas listed in paragraph (e)(1) or (e)(2) of section 522 of the Act. In the same rulemaking, OSM revised 30 CFR 745.13 by adding paragraph (o). This paragraph specifies that the Secretary may not delegate the responsibility for making VER determinations on Federal lands within any areas listed in paragraph (e)(1) or (e)(2) of section 522 to the State in a cooperative agreement for the regulation of mining on Federal lands. The preamble to that rulemaking explains that exclusive authority for VER determinations involving those lands is an integral component of the Secretary's commitment to protect the areas listed in paragraphs (e)(1) and (e)(2) of section 522 in accordance with congressional direction and to prevent mining on Federal lands within the National Park System (48 FR 6917, col. 2, February 16, 1983).

On September 14, 1983 (48 FR 41312), OSM removed 30 CFR 761.4 because it was no longer needed in view of the provisions added to 30 CFR 740.4 and 745.13 on February 16, 1983. Citizen and environmental groups filed a challenge to the removal; they also used this occasion as an opportunity to argue that SMCRA requires that the Secretary make VER determinations in all cases involving lands within the boundaries of section 522(e)(1) areas, regardless of ownership. The court rejected the plaintiffs' arguments, noting that section

503(a) of the Act "permits States to assume exclusive jurisdiction over the regulation of surface coal mining and reclamation operations on non-Federal lands." *In re Permanent Surface Mining Regulation Litigation II, Round III—Valid Existing Rights*, 22 ERC 1557, 1566 (D.D.C. 1985) ("PSMRL II, Round III—VER"). The court also noted that nothing in section 523(c) of the Act, which prohibits the Secretary from delegating to the States his authority to designate Federal lands as unsuitable for mining under section 522 of the Act, "persuades the court to the contrary." *Ibid.*

However, in oral arguments defending against the challenge, counsel for the Government stated that:

[I]n those situations where surface mining on private inholdings will affect federal lands, that kicks in the Federal Lands Program, and under the Federal Lands Program, the Secretary makes the VER determination, so there may be circumstances where you have a private inholding within the protected area, in which the Secretary would make the VER determination, but he can't in the abstract know when he's going to be required to make that determination, until he knows what land is going to be mined, and what potential impact that might have on federal lands.

Transcript of Oral Argument, Dec. 21, 1984, at 46; quoted in *PSMRL II, Round III—VER*, 22 ERC at 1566.

The court did not address the validity or interpretation of this argument, which, taken at face value, would extend the reach of the Federal lands program to lands in which there is no element of Federal ownership.

On November 20, 1986 (51 FR 41952-62), OSM published a final rule document that suspended a number of regulations. Among other things, that document, which is known as the 1986 suspension notice, partially suspended the VER definition promulgated on September 14, 1983. In the preamble discussion of the impact of the suspension of the VER definition on the Federal lands program, OSM announced that the Secretary would make VER determinations for non-Federal lands within the boundaries of the areas listed in section 522(e)(1) whenever surface coal mining operations on those lands would affect the Federal interest (51 FR 41955). This policy is known as the "affected by" standard. However, the notice did not suspend or modify 30 CFR 740.4(a)(4), which provides only that the Secretary is responsible for VER determinations for Federal lands, or any other rule to reflect this policy.

In 1991, OSM requested comment on whether the policy set forth in the 1986 suspension notice (the "affected by"

standard) should be codified. Based on the comments received and further review of the background of this issue, the agency is reconsidering the 1986 policy. OSM is now seeking comment on four alternatives with respect to responsibility for VER determinations for non-Federal lands within the areas protected by section 522(e)(1):

(1) Reaffirming existing 30 CFR 740.4(a)(4), which would mean that OSM would be responsible for making all VER determinations for Federal lands in section 522(e)(1) areas and that the regulatory authority (either OSM or the State) would be responsible for making all determinations for non-Federal lands;

(2) Reaffirming existing 30 CFR 740.4(a)(4) and revising 30 CFR Part 761 to provide that the regulatory authority (either OSM or the State) must obtain the concurrence of the pertinent land management agency before finding that a person has VER for any lands within the boundaries of the areas listed in 30 CFR 761.11(a)(1) and section 522(e)(1) of the Act;

(3) Codifying the "affected by" standard, the policy set forth in the 1986 suspension notice; or

(4) In a variation on the affected by standard, requiring that OSM make all VER determinations for both Federal and non-Federal lands within the boundaries of the areas designated in 30 CFR 761.11(a)(1) and section 522(e)(1) of the Act.

For the reasons discussed below, OSM has selected the first alternative as the preferred alternative. Therefore, although OSM retains the option of adopting any of the alternatives, the rule text being proposed today reflects the first alternative, which would assign responsibility for making VER determinations for all non-Federal lands to the regulatory authority. If OSM ultimately adopts an alternative other than the preferred alternative, the text of the final rules will be revised in a manner consistent with the alternative selected. As discussed in finding G of this preamble, OSM also is proposing to revise 30 CFR Part 761 to clearly delineate agency responsibilities for VER determinations for both Federal and non-Federal lands. See proposed 30 CFR 761.13(a).

Adoption of the first alternative would be consistent with the congressionally mandated doctrine of State primacy as expressed in sections 101(f) and 503(a) of SMCRA. In particular, section 503(a) provides for exclusive State jurisdiction over the regulation of surface coal mining and reclamation operations on non-Federal lands, except as specified in sections

521 (Federal oversight) and 523 (Federal lands) and Title IV of the Act (abandoned mine land reclamation). The first alternative would also complement OSM's policy of a shared commitment with the States to achieve the goals of SMCRA. This policy promotes mutual trust and a spirit of cooperation between OSM and the States and maximizes the States' role in environmental protection and the regulation of surface coal mining and reclamation operations within their borders. Subchapter C of 30 CFR Chapter VII provides that State regulatory programs must be no less stringent than the Act and no less effective than the Secretary's regulations in meeting the requirements of the Act. Hence, there should be no difference in the degree of environmental protection regardless of whether OSM or the State makes the VER determination.

The second alternative is identical to the first in that the regulatory authority would be responsible for making VER determinations for all non-Federal lands, including those within the boundaries of section 522(e)(1) areas. However, under the second alternative, if the proposed operation would be located on land within the boundaries of an area listed in section 522(e)(1), the agency statutorily responsible for management of the protected lands would have to concur with the regulatory authority's determination before the determination could take effect. If adopted, this provision would be added to the decisionmaking requirements of proposed 30 CFR 761.13(d). This alternative would largely preserve the State's lead role in the regulatory process in keeping with the dictates of sections 101(f) and 503(a) of SMCRA while providing additional assurance that the lands designated in section 522(e)(1) receive the level of protection that Congress intended; i.e., minimization of surface coal mining operations on lands that Congress designated as unsuitable for surface coal mining operations. It is somewhat analogous to 30 CFR 816.116(b)(3)(i) and 817.116(b)(3)(i), which require that the regulatory authority obtain the concurrence of State agencies responsible for the administration of forestry and wildlife programs when approving revegetation success standards for operations with a postmining land use involving woody plants. Although SMCRA did not require adoption of that provision (just as SMCRA does not require the concurrence of the land management agency for VER determinations involving section 522(e)(1) areas), OSM

nevertheless deemed it appropriate to promote attainment of SMCRA's environmental protection and land reclamation goals.

The chief argument in favor of the third alternative (codification of the affected by standard) is that the Federal interest in lands included within the boundaries of section 522(e)(1) areas (national parks, wildlife refuges, wild and scenic rivers, wilderness areas, etc.) is not necessarily limited to lands included in the definition of Federal lands in section 701(4) of the Act. Activities on private inholdings may, in fact, affect Federal lands. The boundaries of section 522(e)(1) areas are established by Congress or the President in recognition of the national significance of these areas and the uniquely high natural, historical, or cultural values associated with the lands included therein. Surface coal mining operations on non-Federal lands within the boundaries of section 522(e)(1) areas could affect the Federal interest by adversely impacting the values for which the lands were designated, at least on a short-term basis.

Adoption of the third alternative would afford the Federal government (the Secretary) a decisionmaking role in VER determinations for operations on lands in which there is any type of Federal interest, even if the Federal government has no property interest in the lands in question. Historically, proponents of this alternative have argued that reserving this authority to the Secretary would ensure national consistency and may result in more favorable consideration of arguments advanced by the Federal land management agency with jurisdiction over the protected site. Implementation of this alternative would require delineation of the responsibilities of the various State and Federal agencies involved (including which agency has authority to make the affected by determination) and establishment of procedures to coordinate interagency processing of requests for VER determinations.

The fourth alternative, under which OSM would be responsible for making all VER determinations for all lands within the boundaries of section 522(e)(1) areas, is a variation on the affected by standard. This alternative relies upon the argument that because Congress or the President established the boundaries of those areas, all lands within their boundaries must possess values of national significance or interest. Therefore, surface coal mining operations on any lands within the boundaries of those areas would

automatically affect the Federal interest in some way. Also, in many cases, non-Federal lands are intertwined with Federal lands in such a fashion that activities on the non-Federal lands would have an impact on the Federal lands in terms of noise, dust, and other environmental factors.

The affected by standard represents current OSM policy. Although the 1986 suspension notice does not explain the basis or origin of the policy, it appears that the policy arises from the Government's oral argument in *PSMRL II, Round III-VER*, as quoted in the decision. This argument apparently derives from and expands upon language in the court's earlier decision in *In re Permanent Surface Mining Regulation II, Round I*, No. 79-1144 (D.D.C. July 6, 1984), slip op. at 11-15 (hereinafter "*PSMRL II, Round I*"). In that decision, the court noted that the definition of "surface coal mining operations" in section 701(28) of the Act includes a broad "affected by" test and that under section 523(a) of SMCRA and the definition of "Federal lands program" in section 701(5), all surface coal mining and reclamation operations on Federal lands are subject to the Federal lands program.

Because the scope of the decision in *PSMRL II, Round I* was limited to Federal lands, and because the court in *PSMRL II, Round III-VER* did not review the merits of the position suggested in oral argument by Government counsel, neither decision compels adoption of an affected by standard.

Also, in *PSMRL II, Round I*, the court struck down 30 CFR 740.11(a)(3) (1983) only to the extent that that rule did not apply the Federal lands program to all Federal lands. Specifically, the court held that, with respect to the jurisdiction of the Federal lands program, the Secretary is "powerless to limit" the statutory definition of "surface coal mining operations" in section 701(28) and that, "if surface mining activities take place on Federal lands, the Secretary is powerless to exclude them from the Federal lands program." *Id.* at 14-15. The court rejected the Secretary's argument, as stated in the preamble to the 1983 rulemaking, that

because of the interaction of the State primacy provision, section 503 of the Act, with section 523 of the Act, the Federal lands program can be interpreted to exclude State or privately-owned surface overlying Federally-owned coal where the operation will not involve mining the Federally-owned coal and where there will be no disturbance of the Federally-owned estate.

48 FR 6921, February 16, 1983.

Nothing in this decision would compel extension of the Federal lands program to lands in which there is no Federal property interest, i.e., lands in which both the surface and mineral estates are entirely in non-Federal ownership. There is no indication that the court contemplated using the affected by test in section 701(28) to extend the Federal lands program to lands in which there is no Federal property interest. The court noted that "[w]hen Congress discussed state administration of the Act, it virtually always referred to *non-federal lands*." *Id.* at 14.

Furthermore, when OSM repromulgated 30 CFR 740.11(a) in 1990 to address the judicial remand, the agency rejected a commenter's argument that the court had explicitly endorsed an affected by test to determine the jurisdiction of the Federal lands program. In declining to adopt an affected by standard, OSM stated that:

An "affected by" test would be very difficult to administer. A determination that the Federal interest would or would not be affected would have to be made on a case-by-case basis, and could be subject to different interpretations.  
55 FR 94001, March 13, 1990.

In summary, SMCRA does not appear to require adoption of an affected by standard. Therefore, OSM's preferred alternative is to return to the pre-1986 approach, which, in accordance with the language of section 503(a) of the Act, provided the regulatory authority with exclusive jurisdiction to make VER determinations for all non-Federal lands.

Regardless of which alternative is adopted, the Secretary would retain exclusive authority for making VER determinations for Federal lands within the boundaries of the areas listed in 30 CFR 761.11(a)(1) and section 522(e)(1) of the Act and for Federal lands (but not private inholdings) within the boundaries of any national forest. None of the alternatives would affect the memorandum of understanding between OSM and the U.S. Department of Agriculture, Forest Service, which details the procedures applicable to the processing of requests for VER determinations involving lands for which the Forest Service owns the surface estate. Each primacy State (State with a regulatory program approved under section 503 of SMCRA) would retain the authority to make VER determinations for non-Federal lands within national forest boundaries.

Under the first and second alternatives, the regulatory authority would be responsible for making VER

determinations for all non-Federal lands, including those within the boundaries of section 522(e)(1) areas. The second alternative includes an additional requirement that the regulatory authority obtain the concurrence of the agency with management jurisdiction over the area if the land is located in an area listed in section 522(e)(1). The third alternative would extend the Secretary's responsibility to include VER determinations for non-Federal lands within section 522(e)(1) areas whenever surface coal mining operations on those lands would affect the Federal interest. And, under the fourth alternative, the Secretary would be responsible for making VER determinations for all non-Federal lands within the boundaries of section 522(e)(1) areas.

None of the alternatives would affect responsibilities for VER determinations for other types of Federal or non-Federal lands. Except as provided in the second, third, and fourth alternatives, the regulatory authority would retain sole responsibility for VER determinations for non-Federal lands. In primacy States without a Federal lands cooperative agreement pursuant to 30 CFR Part 745, the Secretary would remain responsible for making VER determinations for Federal lands under paragraphs (3), (4), and (5) of section 522(e) of the Act. In primacy States with a Federal lands cooperative agreement, the State regulatory authority would remain responsible for making VER determinations pursuant to paragraphs (3), (4), and (5) of section 522(e) for Federal lands not listed in paragraph (1) or (2) of section 522(e).

## 2. Which VER Definition Applies to Lands Listed in Paragraphs (e)(1) and (e)(2) of Section 522?

Under section 503(a) of SMCRA, States with regulatory programs approved by the Secretary have exclusive jurisdiction (except as otherwise provided in sections 521 and 523 of the Act) over all surface coal mining and reclamation operations located or proposed to be located on non-Federal, non-Indian lands within the State's borders. Section 523(c) further provides that a State may enter into a cooperative agreement with the Secretary under which the State also would assume responsibility for the regulation of mining on Federal lands within its borders.

The Federal lands rules at 30 CFR 740.11(a) currently specify that, upon approval of a State regulatory program pursuant to 30 CFR Part 732 or promulgation of a Federal program for a State under 30 CFR Part 736, that

program will apply to all surface coal mining and reclamation operations on any Federal lands within the State except Indian lands. Therefore, under the current rules, the Secretary must apply the State program definition of VER when making VER determinations for Federal lands in primacy States.

However, on November 20, 1986, at 51 FR 41952-62, OSM published a document that, among other things, partially suspended the VER definition promulgated on September 14, 1983. Although the document did not suspend any provision of 30 CFR Part 740, the portion of the preamble that discusses the impact of the suspension of the VER definition on the Federal lands program slightly modifies the general principle that, consistent with 30 CFR 740.11(a) as discussed in the preceding paragraph, OSM must use the VER definition set forth in the applicable State or Federal regulatory program when making VER determinations for Federal lands. Specifically, the preamble states at 51 FR 41955 that when a state definition relies upon an all-permits standard, OSM will apply the State standard as if it includes a good faith component. In addition, the preamble provides that, pending promulgation of a new Federal definition of VER, OSM will not process requests for VER determinations involving lands within the boundaries of units of the National Park System if the approved State program definition of VER includes a takings standard. (See Part III.C. of this preamble for an explanation of the all-permits, good faith/all permits, and takings standards for VER.) At present, the deferral policy affects only units of the National Park System within Illinois and West Virginia. OSM adopted this policy as a result of concerns expressed by the National Park Service.

OSM is now proposing to revise 30 CFR 740.11 (a) and (g) to specify that the Federal definition of VER will apply whenever a VER determination involves lands listed in paragraph (e)(1) or (e)(2) of section 522 of SMCRA, regardless of whether OSM or the State is responsible for making the determination. Application of the Federal definition will ensure that requests for VER determinations involving lands of national interest and importance are evaluated on the basis of the same criteria.

In primacy States without a Federal lands cooperative agreement pursuant to 30 CFR Part 745, the Secretary would continue to use the approved State program definition of VER when making VER determinations for all other types of Federal lands under paragraphs (3), (4), and (5) of section 522(e) of the Act.

Similarly, in States with a Federal lands cooperative agreement, the State regulatory authority would continue to use the State program definition of VER when making VER determinations pursuant to paragraphs (3), (4), and (5) of section 522(e) for Federal lands not listed in paragraph (1) or (2) of section 522(e) of the Act.

### 3. What Other Changes Are Proposed?

OSM is proposing to revise 30 CFR 740.4(a)(5) and 30 CFR 745.13(p) to incorporate references to the provisions of 30 CFR Part 761 that correspond to section 522(e) of SMCRA. In addition, to conform with the language of section 522(e) of the Act, which refers only to surface coal mining operations, OSM is proposing to replace the term "surface coal mining and reclamation operations" in 30 CFR 740.4(a)(4) and 745.13(o) with "surface coal mining operations." This change will also ensure consistency with the policy set forth in the preamble to a final rule published on April 5, 1989 (54 FR 13814), which specifies that SMCRA does not require a permit or other regulatory authority approval as a prerequisite for conducting reclamation work alone. In other words, the latter change clarifies that the prohibitions and restrictions of 30 CFR 761.11(a) and section 522(e) do not apply to reclamation activities such as the restoration of abandoned mine lands or bond forfeiture sites.

#### B. Sections 740.10 and 745.10: Information Collection

The proposed rule changes discussed in III.A. will not alter the information collection burden associated with Parts 740 and 745. However, OSM is proposing certain editorial revisions to §§ 740.10 and 745.10 to maintain consistency with Departmental guidance concerning the format and content of these sections.

#### C. Section 761.5: Definition of Valid Existing Rights

##### 1. Statutory and Regulatory History

As discussed in the portion of this preamble entitled "General Background on Proposed Rule," section 522(e) of SMCRA (30 U.S.C. 1272(e)) prohibits surface coal mining operations on certain lands in the absence of a waiver or compatibility finding unless a person has VER to conduct such operations or unless the operation was in existence on the date of enactment (August 3, 1977). SMCRA does not define or explain VER, and the legislative history of both section 522(e) in general and the phrase

"subject to valid existing rights" in particular is sparse.

The committee report on H.R. 2, the House version of the legislation that ultimately became SMCRA, contains the following discussion:

The language "subject to valid existing rights" in section 522(e) is intended, however, to make clear that the prohibition of strip mining on the national forests is subject to previous court interpretations of valid existing rights. For example, in West Virginia's Monongahela National Forest, strip mining of privately owned coal underlying federally owned surface has been prohibited as a result of *United States v. Polino*, 133 F. Supp. 772 (1955). In this case the court held that "stripping was not authorized by mineral reservation in a deed executed before the practice was adopted in the county where the land lies, unless the contract expressly grants stripping rights by use of direct or clearly equivalent words. The party claiming such rights must show usage or custom at the time and place where the contract is to be executed and must show that such rights were contemplated by the parties." The phrase "subject to valid existing rights" is thus in no way intended to open up national forest lands to strip mining where previous legal precedents have prohibited stripping. H.R. Rep. No. 218, 95th Cong., 1st Sess. 95 (1977).

The committee report on S. 7, the Senate version of the legislation that ultimately became SMCRA, contains a similar discussion, including the statement that:

The language of 422(e) [now 522(e)] is in no way intended to affect or abrogate any previous State court decisions. \* \* \* The phrase "subject to valid existing rights" is thus in no way intended to open up national forest lands to strip mining where previous legal precedents have prohibited stripping. S. Rep. No. 218, 95th Cong., 1st Sess. 94-95 (1977).

Thus, the committee reports accompanying the versions of SMCRA passed by each chamber of Congress emphasize that the VER exemption is intended to maintain existing State prohibitions on surface coal mining operations. The reports do not discuss whether or how Congress intended VER to apply as a means of authorizing operations that SMCRA would otherwise prohibit. In other words, the reports emphasize that nothing in SMCRA was intended to create new property rights or mining authority for surface coal mining operations.

The conference committee report does not address this issue. See H.R. Conf. Rep. No. 493, 95th Cong., 1st Sess. 110-11 (1977).

On several occasions, a colloquy between Congressmen Udall and Roncalio during floor debate on H.R. 2, the House bill that eventually became

SMCRA, has been interpreted to mean that one purpose of the VER provision in SMCRA may be to avoid the compensable takings that could otherwise result from the application of the prohibitions of section 522(e). Congressman Roncalio proposed an amendment to delete the sentence in section 601(d) that reads, "[v]alid existing rights shall be preserved and not affected by such designation." (Section 601 provides for the designation of Federal lands as unsuitable for noncoal mining.) Congressman Udall, who is generally recognized as the chief architect of SMCRA, opposed the amendment "because it takes from the bill a statement that valid legal rights should be preserved. I do not think we should do that without paying compensation under the fifth amendment." 123 *Cong. Rec.* 12,878 (1977). The House rejected the amendment and retained the language at issue.

However, nothing in this colloquy provides any guidance on how Congress intended VER under section 522(e) to be defined. Because section 601 addresses only noncoal mining operations on Federal lands, Congressman Udall's statement and the sentence in question in section 601(d) probably refer to VER as that term is defined under the General Mining Law of 1872 and similar Federal laws involving the public domain. In such statutes, the term VER typically refers to the set of circumstances under which persons who have unvested interests or expectations in Federal lands or minerals will be allowed to vest those interests or expectations as property rights when the United States is the fee owner. In general, the VER provisions of those statutes apply to cases in which the Federal government changes the eligibility criteria or other requirements for vesting of property rights. In such cases, the term VER refers to circumstances in which a person who has taken some action to vest a property right in Federal lands or minerals has the right to complete the process regardless of any statutory or regulatory changes to the contrary. This type of VER is not analogous to VER for surface coal mining operations under section 522(e) of SMCRA, which applies to both private and Federal lands and does not involve a transfer of a property right from the Federal government to another party. Instead, VER under section 522(e) of SMCRA concerns a person's right to use property for a particular purpose (conducting surface coal mining operations) when that person already has vested property rights.

Although the legislative history of SMCRA is largely silent on the meaning of VER, the extent to which the Federal government and States may prohibit or restrict the exercise of private property rights without providing compensation is determined by case law established pursuant to the Fifth and Fourteenth Amendments to the U.S. Constitution. Accordingly, in its first rulemaking defining VER, OSM "endeavored to determine the point at which payment would be required because a taking had occurred, then to define 'valid existing rights' in those terms, i.e., those rights which cannot be affected without paying compensation." 44 FR 14992-93, March 13, 1979.

OSM's first regulatory definition of VER provided that, except for haul roads, VER included only those property rights in existence on August 3, 1977, the owners of which either had obtained all necessary permits for the proposed surface coal mining operation on or before August 3, 1977 (the "all permits" standard), or could demonstrate that the coal for which the exemption was sought was both needed for and immediately adjacent to a surface coal mining operation in existence on August 3, 1977 (the "needed for and adjacent" standard). 44 FR 14902, 15342 (March 13, 1979).

The mining industry, the State of Illinois, the National Wildlife Federation, and assorted environmental organizations all challenged the validity of the 1979 definition. Because the plaintiffs presented no evidence of specific harm, the court declined to rule on the constitutionality of the definition. However, the court held that a person who applies for all permits, but fails to receive one or more through government delay, engenders the same investments and expectations as a person who has obtained all permits. Specifically, the court stated that "a good faith attempt to have obtained all permits before the August 3, 1977 cut-off date should suffice for meeting the all permits test." *In re Permanent Surface Mining Regulation Litigation I*, 14 ERC 1083, 1091 (D.D.C. 1980), ("PSMRL I, ROUND I").

To comply with this decision, which partially remanded the all permits standard, OSM suspended the definition of VER insofar as it required that all permits have been obtained prior to August 3, 1977 (45 FR 51547-48, August 4, 1980). The suspension document stated that, pending further rulemaking, OSM would interpret the definition as including the court's suggestion that a good faith effort to obtain all permits should suffice to

establish VER. This standard is known as the "good faith/all permits" standard.

The industry plaintiffs appealed those portions of the District Court's decision in *PSMRL I, ROUND I* that were adverse to their interests. However, the U.S. Court of Appeals for the District of Columbia Circuit remanded the appeal in 1981 after the government informed the court that it was reconsidering the 1979 definition. Thus, the court never reached a decision on the merits of the appeal.

On June 10, 1982 (47 FR 25278), OSM published a proposed rule setting forth six options for revising the definition of VER. These options included the good faith/all permits standard, a mineral rights ownership standard, a mineral rights ownership plus right to mine by the method intended standard (the "ownership and authority to mine" standard), and three variations on the latter two standards. Since the proposed standards all attempted to establish a clearly defined "bright line" test for VER, they became known as "mechanical tests."

Commenters criticized each option as either too broad or too narrow, and many argued that one or more of the proposed options would result in a taking of property without just compensation in violation of the Fifth and Fourteenth Amendments to the U.S. Constitution. Because the Supreme Court has consistently declined to prescribe set formulas for determining when a taking will occur, OSM concluded that any mechanical test likely would be either over-inclusive or under-inclusive of all potential takings that might result from the section 522(e) prohibitions. Therefore, the final rule promulgated on September 14, 1983 (48 FR 41314) included a definition of VER which provided, in part, that a person has VER if a prohibition on surface coal mining operations would result in a compensable taking of that person's property interests under the Fifth and Fourteenth Amendments to the U.S. Constitution. This standard is known as the "takings" standard.

The revised definition also defined the "needed for" aspect of the needed for and adjacent standard and established the concept of "continually created VER" to protect the rights of persons with mining operations or mineral interests in areas that come under the protection of section 522(e) sometime after August 3, 1977, as would occur, for example, when a park is created or expanded or a protected structure is built after that date.

However, the U.S. District Court for the District of Columbia subsequently remanded most of the revised definition

on procedural grounds. The court held that the takings standard represented such a significant departure from the options presented in the proposed rule that a new notice and comment period was necessary to comply with the public participation requirements of the Administrative Procedure Act (5 U.S.C. 553). See *PSMRL II, ROUND III-VER*, 22 ERC 1557, 1564. The court also held that the proposed rule failed to provide adequate notice that it would expand the needed for and adjacent standard to include properties acquired after the date of enactment of SMCRA (August 3, 1977). Accordingly, the court remanded both the takings standard (including that portion of the newly adopted continually created VER provision that relied on the takings standard) and the revised needed for and adjacent standard to the Secretary for proper notice and comment.

In response to this order, on November 20, 1986 (51 FR 41952, 41961), OSM suspended most of the September 14, 1983 definition of VER. Since the court upheld the concept of continually created VER for existing operations as set forth in 30 CFR 761.5(d)(1), that portion of the revised definition was not suspended. As discussed at 51 FR 41954-55, in the absence of an applicable State program definition of VER, the suspension notice effectively reinstated the 1980 good faith/all permits standard and the original (1979) needed for and adjacent standard, while adding a continually created VER component for operations in existence at the time a protected feature comes into existence or is expanded. Except as discussed in Part III.A. of this preamble, the suspension notice did not impact State program definitions or their application by either the State or OSM.

On December 27, 1988 (53 FR 52374), OSM proposed the good faith/all permits standard and the ownership and authority to mine standard as options for a regulatory definition of VER. Under the ownership and authority to mine standard, an individual could establish VER by demonstrating possession of both a right to the coal and the right to mine it by the method intended, as determined by State law. After evaluating the comments received, OSM withdrew the entire proposed rule for further study on July 21, 1989 (54 FR 30557).

As part of that study, OSM and the University of Kentucky College of Law, in cooperation with the American Bar Association, cosponsored a national symposium on April 3-4, 1990, on the meaning of VER under SMCRA. Volume 5, Number 3 of the Journal of Mineral

Law and Policy, contains the proceedings of this symposium. The participants did not reach a consensus on how to define VER.

Also in 1990, Belville Mining Company, an Ohio mining firm, filed suit against the Secretary of the Interior alleging that he had, among other things, (1) failed to perform a mandatory duty to promulgate the definition of VER needed to implement section 522(e); (2) in lieu of regulations, issued various statements and directives on VER (including the policy set forth in the November 20, 1986 suspension notice) without notice and comment in violation of the Administrative Procedure Act; and (3) made VER determinations relying on State regulations identical to an invalidated Federal regulation. *Belville Mining Co. v. Lujan*, No. C-1-89-790 (S.D. Ohio 1991) ("*Belville I*").

In a July 22, 1991, decision, the court in *Belville I*, (1) ordered the Secretary to begin proceedings to promulgate a final rule defining VER; (2) enjoined him from enforcing or applying the November 20, 1986 suspension notice or any temporary directive that extends the policy of the suspension notice; and (3) directed him to immediately begin proceedings to disapprove State program definitions of VER that rely upon the all permits standard. On September 21, 1992, pursuant to the Government's motion for reconsideration, the court narrowed the latter portion of its ruling to require only the disapproval of the Ohio program definition of VER insofar as that definition affects Belville and its VER applications. In doing so, the court accepted the Government's argument that federal remedy law prohibits the imposition of injunctive remedies that are beyond the scope of the plaintiff's individual injuries and related VER applications. Consequently, OSM interprets the decision barring use of the 1986 policy as applying only to Ohio. In all other States, OSM continues to adhere to the policy set forth in the November 20, 1986 suspension document.

On July 18, 1991, OSM proposed to revise the definition of VER by reinstating the takings standard, the good faith/all permits standard, and the 1979 version of the needed for and adjacent standard. In addition, the proposed rule eliminated the separate provisions concerning continually created VER for existing operations and incorporated the concept of continually created VER into the other standards for VER.

OSM did not finalize this rule before the President signed the Energy Policy

Act of 1992 (Pub. L. 102-486, 206 Stat. 2776) (EPA Act) into law on October 24, 1992. Section 2504(b) of that law required adherence to the VER policy in the November 20, 1986 suspension notice (51 FR 41952) for one year after the date of enactment. That provision had the effect of suspending the *Belville I* decision in Ohio and halting publication of a new final rule defining VER. Although the EPA Act provision expired on October 24, 1993, the appropriations acts for the Department of the Interior and related agencies for fiscal years 1994 and 1995 each included a moratorium on adoption of a new or revised Federal VER definition or disapproval of existing State program definitions of VER. The last moratorium (section 111 of H.R. 4602 (1994)) expired October 1, 1995. Congress did not include similar language in any legislative for fiscal year 1996.

## 2. Basic Definition

In many respect, the definition of VER being proposed today resembles the definition previously proposed on July 18, 1991. Both rules include a basic definition that describes VER as a set of circumstances under which a person may conduct surface coal mining operations which section 522(e) of the Act would otherwise prohibit. The definition also clarifies that, even if a person has VER, surface coal mining and reclamation operations on these lands are subject to all other requirements of the Act and the pertinent regulatory program. The VER exemption does not entitle a person to an exemption from any other permitting requirements or performance standards. This language establishes the conceptual framework within which the standards of paragraphs (a) and (b) of the definition must be applied.

## 3. Property Rights Demonstration

Like the 1991 proposal, paragraph (a) of the definition of VER at 30 CFR 761.5 in this proposed rule would reinstate the requirement that a person claiming VER for any type or aspect of surface coal mining operations other than roads must demonstrate that a legally binding conveyance, lease, deed, contract, or other document vests that person with the property right, as of the date that the land came under the protection of section 522(e) of the Act and 30 CFR 761.11, to conduct the type of surface coal mining operations intended. Interpretation of the comments relied upon to establish these rights must be based upon applicable State statutory or case law, or, if no applicable law exists, upon custom and generally accepted

usage at the time and place that the documents came into existence.

This provision, which originally appeared in the 1979 definition but was deleted in 1983 without explanation, should ensure consistency with section 510(b)(6)(C) of SMCRA, which provides that "the surface-subsurface legal relationship shall be determined in accordance with State law," and with the legislative history of the Act, which indicates that Congress did not intend to enlarge or diminish property rights under State law. See H.R. Conf. Rep. No. 493, 95th Cong. 1st Sess. 106 (1977); H.R. Rep. No. 218, 95th Cong. 1st Sess. 95 (1977); and S. Rep. No. 128, 95th Cong. 1st Sess. 94-95 (1977). The legislative history frequently references *United States v. Polino*, 131 F. Supp. 772 N.D. W.Va. 1955), in which the court held that the right to use surface mining methods to recover privately owned coal underlying Federal lands within the Monongahela National Forest depends upon the language of the deed, the interpretation of which is a matter of State law.

The property rights demonstration requirement being proposed today differs slightly from the 1979 rule. First, it incorporates the concept of continually created VER, which means that the property rights must be vested as of the date that the land comes under the protection of the Act. In some cases, this date may be later than the date of enactment of SMCRA (August 3, 1977), which is the date referenced in the 1979 rule. The proposed change recognizes that houses, churches, roads, parks, and other features protected by section 522(e) come into existence and are expanded on an ongoing basis. Because the protection of section 522(e) is not limited to those features in existence on the date of enactment, VER for lands coming under the protection of the Act after the date of enactment should not be limited to property rights in existence on the date of enactment.

Second, the proposed rule no longer limits eligible property rights to the right to produce coal. Property rights (and hence VER) may exist for (1) surface coal mining operations such as coal preparation plants and coal mine waste disposal sites that do not involve coal extraction, and (2) non-extractive activities, facilities, and surface disturbances (such as support facilities, ventilation shafts, and topsoil storage areas) associated with coal-producing surface coal mining operations.

As in the 1979 rule, the property rights demonstration requirement does not necessarily apply to roads. VER standards for roads are set forth in paragraph (b) of the proposed definition.

#### 4. Good Faith/All Permits Standard

In addition to the property rights demonstration, the proposed definition requires that a person claiming VER for surface coal mining operations other than roads meet either the good faith/all permits standard of paragraph (a)(1) or the need for and adjacent standard of paragraph (a)(2), which is discussed at length under a subsequent heading in this preamble.

The good faith/all permits standard provides that a person has VER if, prior to the date the land came under the protection of 30 CFR 761.11 and section 522(e) of the Act, that person or a predecessor in interest had obtained, or made a good faith effort to obtain, all State and Federal permits and other authorizations required to conduct surface coal mining operations. Potentially necessary permits and authorizations include, but are not limited to, State mining permits, National Pollutant Discharge Elimination System (NPDES) permits, U.S. Forest Service special use permits, air quality plan approvals, U.S. Mine Safety and Health Administration ground control plan approvals, and (for some types of facilities) building permits and zoning charges. Expired or lapsed permits or authorizations are not acceptable. If no permits were required prior to the enactment of SMCRA, none are needed to establish VER, provided the person obtained, or made a good faith attempt to obtain, all necessary authorizations to operate from all appropriate State and Federal agencies by the pertinent date. See the *Greenwood Land and Mining Company* and *Mower Lumber Company* VER determinations at 46 FR 36758 and 45 FR 52467, respectively.

OSM believes that the good faith/all permits standard is the standard most consistent with the legislative history of section 522(e), which indicates that Congress' purpose in enacting section 522(e) was to prevent new surface coal mining operations in the listed areas, either to protect human health, safety, and general welfare or because the environment values and other features associated with these areas are generally incompatible with surface coal mining operations. See S. Rep. No. 128, 95th Cong. 1st Sess. 94 (1977). The two other principal potential standards (the takings standard and the ownership and authority to mine standard) would be either far more complex and difficult to administer (the takings standard) or much less protective of the areas listed in section 522(e) (the ownership and authority to mine standard).

Almost all commenters from every interest group opposed the takings standard when OSM first formally proposed it in 1991. In particular, they objected to its subjective or unpredictable nature and the potentially onerous information collection and analytical burdens it would place on persons seeking a VER determination and the agency making the determination. The ownership and authority to mine standard arguably would be less complex and more objective than the takings standard, but it would offer no protection to section 522(e) lands beyond that afforded by the right-of-entry provisions of the permitting requirements applicable to surface coal mining and reclamation operations on all lands. Such a result most likely would not be in accordance with congressional intent in enacting the prohibitions of sections 522(e). See S. Rep. No. 128, 95th Cong. 1st Sess. 94 (1977).

OSM recognizes that the U.S. Court of Appeals for the District of Columbia Circuit found that the legislative history of SMCRA suggests that "Congress did not intend to infringe on valid property rights or effect takings through section 522(e)." *Nat'l Wildlife Fed'n v. Hodel*, 839 F.2d 694, 750 (D.D.C. 1988) ("*NWF*"). However, OSM does not believe that this statement militates against adoption of a good faith/all permits standard for VER. As discussed at length in the portion of this preamble entitled "Statutory and Regulatory History," in *PSMRL I, ROUND I, supra*, at 14 ERC 1091, the court declined to find the closely related 1979 all permits standard unconstitutional. The definition being proposed today is consistent with that court's decision that "a good faith attempt to have obtained all permits before the August 3, 1977 cut-off date should suffice for meeting the all permits test." Furthermore, in *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 296 n.37 (1981) ("*Hodel*"), the U.S. Supreme Court stated that, while nothing in the statutory language of SMCRA or its legislative history would compel adoption of an all permits standard for VER, section 522(e) "does not, on its face, deprive owners of land within its reach of economically viable use of their land since it does not proscribe nonmining uses of such land." There is nothing in court decisions to date, the statute, or the legislative history that would preclude OSM from exercising its discretion to adopt a good faith/all permits standard for VER under section 522(e).

Section 522(e) is a form of land use regulation that may be considered

analogous to certain provisions of zoning law. VER under section 522(e) is generally analogous to those provisions of land use laws that define when a person attains a vested right to a particular land use regardless of subsequent changes in zoning ordinances that would otherwise prohibit or restrict that use. State laws vary widely with respect to when a person develops a vested interest in a particular land use, but mere ownership is rarely sufficient. Some States require that a person both obtain all necessary permits and make significant expenditures in reliance on those permits. Others require that a person reach a certain point in the permit process or make substantial good faith expenditures based on the existing zoning before he or she develops a vested interest in uses allowed under that zoning.

The good faith/all permits standard for VER has a similar effect and is based in part on a similar rationale. Therefore, OSM anticipates that, in any review of the validity of a final VER standard, a court would consider principles analogous to those that have guided judicial decisions on challenges to the validity of zoning ordinances and similar land use regulatory provisions. In general, the courts have upheld land use restrictions as a legitimate exercise of the police power under the U.S. Constitution.

In making VER determinations, OSM and 20 of the 24 States with primacy rely upon a VER definition that includes either the all permits standard or the good faith/all permits standard. Apart from the *Belville* litigation and *The Sunday Creek Coal Co. v. Hodel*, No. C-2-88-0416 (S.D. Ohio, June 2, 1988) ("*Sunday Creek*"), OSM is aware of no cases in which the State or Federal courts have found that the good faith/all permits standard or an agency determination that a person did not have VER under the good faith/all permits standard was invalid on the basis of a conclusion that the standard or determination would result in a compensable taking of a property interest under the Fifth and Fourteenth Amendments to the U.S. Constitution. *Belville* and *Sunday Creek* are isolated cases that do not establish precedent outside the Southern District of Ohio.

OSM believes that the good faith/all permits standard proposed in this rule is both reasonable and consistent with congressional intent. As discussed above, there is a lack of clear or directly applicable legislative history with respect to how Congress intended the VER exemption in section 522(e) of the Act to be interpreted. In the absence of

such guidance or direction, the good faith/all permits standard would balance a number of statutory purposes and policy objectives for this rulemaking, including ensuring basic fairness, establishing a reasonable standard that is practicable to administer, providing substantial environmental protection to congressionally designated areas, encouraging efficient removal of coal resources, minimizing disruption of existing State regulatory programs and expectations engendered thereunder, and avoiding across-the-board or indiscriminate compensable takings of property interests.

##### 5. "Needed for and Adjacent" Standard

The "needed for and adjacent" standard in the definition of VER promulgated on March 13, 1979 (44 FR 14902, 15342) provided that any person who owned an ongoing surface coal mining operation for which all permits were obtained prior to August 3, 1977, possessed VER for coal immediately adjacent to that operation if the person had a property right to the coal as of August 3, 1977, and if he or she could demonstrate that the coal was needed for the ongoing operation. The National Wildlife Federation challenged this standard as unduly expanding the scope of the VER exemption beyond that intended by Congress. However, the court upheld the standard, finding it to be "a rational method of allowing mining when denial would gravely diminish the value of the entire mining operation, thereby constituting a taking under Supreme Court declarations." *PSMRL I, Round I*, 14 ERC 1083, 1091-92 (D.D.C. 1980).

The revised definition of VER promulgated on September 14, 1983 (48 FR 41315-16) modified the "needed for and adjacent" standard by deleting the requirement that the owner of the operation have acquired the property rights to the coal for which the exemption is sought prior to August 3, 1977 (although OSM's response to a comment concerning this issue at 48 FR 41316 suggests that the deletion may have been unintentional). In that rulemaking, OSM also defined "needed for" as meaning that the extension of mining to the coal in question is essential to make the surface coal mining operation as a whole economically viable.

The National Wildlife Federation challenged these changes as being both procedurally and substantively improper. The U.S. District Court for the District of Columbia agreed in part, finding that the agency had failed to comply with the Administrative

Procedure Act (5 U.S.C. 553) by not affording the public adequate notice and opportunity for comment on these two changes. The court did not rule on the merits of the revised standard. *PSMRL II, Round III-VER*, 22 ERC 1566-67. In response, on November 20, 1986 (51 FR 41952, 41961), OSM suspended paragraph (c) of the 1983 definition of VER. In the preamble to the suspension notice, OSM stated that, pending adoption of a new rule, it would rely upon the approved State program definition in primacy States. In non-primacy States, the suspension had the effect of restoring the 1979 version of the needed for and adjacent standard, which did not contain a definition of "needed for." 51 FR 41954-55, November 20, 1986.

On July 18, 1991, OSM proposed to revise the 1983 definition by reinstating the property rights ownership requirement and removing the sentence defining the "needed for" component of the standard. In the preamble to this proposed rule, OSM stated that the explanation of "needed for" in the 1983 definition did not substantively clarify the meaning or application of the needed for and adjacent standard. In addition, OSM proposed to replace the requirement that both the property rights and the operation have been in existence on August 3, 1977, with a requirement that both have been in existence on the date that the land for which the exemption is sought came under the protection of 30 CFR 761.11 and section 522(e) of the Act. The latter change reflects the concept of continually created VER, which was upheld in *NWF, supra*, 839 F.2d 694, 750.

With two significant exceptions, the definition being proposed today substantively resembles the one proposed on July 18, 1991. One change clarifies that the standard applies to land, not just coal, needed for an existing operation. Land may be essential to the operation for reasons other than the coal it contains. For example, an operator has little leeway in the location of ventilation shafts for underground mines.

Also, OSM has attempted to eliminate any ambiguity caused by use of the term "ongoing surface coal mining operation" in the 1979 and 1983 rules. In 1991, OSM essentially proposed to replace "ongoing" with "existing." However, comments received indicated some uncertainty as to whether this term included inactive or approved but unstarted operations. OSM believes that there is no rational basis for differentiating between active operations and those which are inactive

or approved but unstarted. Both engender the same type of investment-backed expectations and rely upon the same economic planning considerations. Both also require a significant resource outlay. Accordingly, OSM is now proposing to define this standard to include land needed for and adjacent to operations for which all permits had been obtained, or a good faith effort to obtain such permits had been made, as of the date the section 522(e) prohibitions became applicable to the land in question.

Under the revised needed for and adjacent standard being proposed today, VER would exist if a person can (1) make the property rights demonstration required by paragraph (a) of the definition, and (2) document that the land is both needed for and immediately adjacent to a surface coal mining operation for which all State and Federal permits and other authorizations required to conduct surface coal mining operations had been obtained, or a good faith effort to obtain all necessary permits and authorizations had been made, prior to the date the land came under the protection of section 522(e) and 30 CFR 761.11. OSM does not intend for this standard to authorize surface coal mining operations on bond forfeiture sites, sites with expired or revoked permits (including permits that have expired under section 506(c) of SMCRA), abandoned sites, or long-dormant facilities for which no permit was required prior to the enactment of SMCRA and which would have to be substantially or completely reconstructed before usage could resume.

To avoid subverting the congressional prohibitions in section 522(e), OSM believes that VER determinations under this standard must be based on an analysis of how denial of the claim would affect the value, as of the date the land came under the protection of 30 CFR 761.11 and section 522(e), of the operation as a whole from the time it began operation, not merely whether the additional land or coal would prolong the operation's life or provide increased profits. Otherwise, this standard could be used to justify unlimited expansion of operations adjoining protected areas, which could effectively nullify the prohibition. This approach receives implied support in *PSMRL I, ROUND I*, 14 ERC 1083, 1091-92, in which the court upheld the needed for and adjacent standard as a reasonable means of avoiding compensable takings. OSM seeks comment on whether the rule language should be revised to explicitly incorporate this interpretation.

#### 6. VER for Access and Haul Roads

As in 1991, OSM is proposing to revise paragraph (b) of the definition of VER to incorporate the concept of continually created VER, which was previously promulgated as paragraph (d) of the September 14, 1983 definition and upheld in subsequent litigation. The revised definition would recognize VER for the use or construction of an access or haul road as part of a surface coal mining operation if (1) the road was in existence on the date the land upon which it is located came under the protection of section 522(e), (2) a right of way or easement for the road was properly recorded as of that date, (3) the regulatory authority had issued a permit for an access or haul road in that location as of the applicable date, or (4) the person can demonstrate the existence of VER under the standards of paragraph (a) of the definition. The last alternative is a new addition intended to clarify that, because the definition of surface coal mining operations in 30 CFR 700.5 includes access and haul roads, a person may also demonstrate VER for such roads using the same criteria applicable to other types of surface coal mining operations and activities.

OSM also is proposing to expand the scope of paragraph (b) to apply to access roads. Previous versions of this definition have applied only to haul roads. None of the earlier preambles explains why access roads were not included, but a reading of the 1979 preamble suggests that this failure may have been an accidental by-product of the fact that the comments received focused exclusively on haul roads. That preamble sets forth the following rationale for allowing existing roads to be used as haul roads, regardless of location or prior use:

OSM believes that it is less damaging [to the environment] to use existing roads, whether or not previously used for coal haulage, than to require construction of additional roads. Therefore, all roads in existence as of August 3, 1977, have valid existing rights.

44 FR 14993, March 13, 1979.

This line of reasoning would apply equally well to the use of existing roads as access roads—perhaps more so, since roads used solely for access generally involve less massive construction impacts and are usually used less intensively than haul roads. Consequently, the environmental impacts of access roads are usually less severe than those associated with haul roads, which often carry heavy truck and equipment traffic resulting in significant noise, dust, vibration, and

other problems. In addition, permits and recorded rights of way for access roads are no less legitimate than permits and recorded rights of way for haul roads. Accordingly, OSM is proposing to apply the standards of paragraph (b) to both access and haul roads.

#### 7. Transferability of VER

As in 1991, OSM is proposing to reaffirm that VER are transferable, primarily because the proposed definition of VER includes a property rights component. In essence, OSM is proposing to consider VER as being attached to the property to which those rights pertain rather than as being valid only for the person claiming such rights or, with the exception of VER under the needed for and adjacent standard, for a specific operation. (VER under the needed for and adjacent standard would attach jointly to both the property and a specific surface coal mining operation.) Once attached to the property, VER would become subject to whatever State property law exists concerning rights of alienation as an element of property ownership. SMCRA (especially section 510(b)(6)) generally defers to State property law.

The VER exemption is analogous to a zoning variance, which, in the interest of equity, allows an otherwise prohibited use to occur under certain fact-specific circumstances even though that use was not in existence on the land in question at the time the zoning ordinance took effect. Like VER under the proposed rule, zoning variances typically convey with the title to the property even if the rights conferred by the variance have not been exercised.

However, the alienation or transfer of property is not an absolute right. Certain interests in real property, such as leases, licenses or *profits a prendre*, may be inherently nontransferable or of limited transferability, either by their terms or by operation of State law. If a person's coal property interests are of this nature, then any VER resting on those interests would also be nontransferable. Furthermore, it is possible that a State could designate VER under SMCRA as nontransferable as a matter of law.

In the rule being published today, OSM is proposing to reaffirm the transferability of VER to the extent that the underlying property rights are transferable under State law. Therefore, to the extent that State law allows the sale or other transfer of the underlying coal rights or other pertinent property rights, a person with VER may sell or transfer the VER to another person as an appurtenance to the coal or other property rights. Nothing in this rule is intended to create rights that do not

already exist in State law or expand upon those that do. Individual States may prohibit VER transfers to the extent that they have the authority to do so under State law.

#### 8. Continually Created VER: VER When Prohibitions Come Into Effect After August 3, 1977

On September 14, 1983, OSM added paragraph (d) to the definition of VER to address situations where the prohibitions of section 522(e) become applicable to a particular parcel after August 3, 1977, the date of enactment of SMCRA. This paragraph, which introduced the concept of continually created VER, provides that:

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

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

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

Paragraph (d)(1) extends the existing operation exemption to validly authorized surface coal mining operations in existence on the date the land on which they are located comes under the protection of section 522(e). Paragraph (d)(2) was intended to extend the VER exemption in a parallel manner to situations in which operations were not yet in existence when the land came under the protection of section 522(e).

In *PSMRL II, Round III-VER*, the court upheld the basic concept of continually created VER, but remanded paragraph (d)(2) because it incorporated the takings standard, which, the court ruled, had not been subject to proper notice and opportunity for comment under the Administrative Procedure Act. 22 ERC 1564. To comply with the court's decision, OSM subsequently suspended paragraph (d)(2) to the extent that it incorporated the takings standard. 51 FR 41961, November 20, 1986.

The VER definitions proposed on December 27, 1988, and July 18, 1991, would have deleted paragraph (d) in favor of incorporating the concept of continually created VER into each of the VER standards set forth in the other paragraphs of the definition. However, this change would have had the effect of eliminating continually created VER for existing operations since the

proposed definitions included no counterpart to paragraph (d)(1) of the 1983 definition. This clearly was not the intent of the proposed rules. As stated in the preamble to the 1991 proposal, although the continually created VER provision adopted in 1983 "is rewritten and reorganized in this proposal, the basic intent and application are not changed." 56 FR 33156, July 18, 1991.

Therefore, although the definition of VER being proposed today is similar to the 1991 proposal in that the concept of continually created VER has been incorporated into each of the individual VER standards in paragraphs (a) and (b) of the definition, OSM also is proposing to revise the existing operation exemption, now proposed for recodification as 30 CFR 761.11(b), to incorporate language consistent with paragraph (d)(1) of the 1983 definition. Specifically, proposed 30 CFR 761.11(b) provides that the prohibitions of 30 CFR 761.11(a) do not apply to (1) surface coal mining operations for which a valid permanent program permit exists on the date that the land came under the protection of 30 CFR 761.11(a) or section 522(e) of SMCRA, or (2) other surface coal mining operations that were validly authorized as of that date. Further discussion of this proposed change appears in Part III.E.1. of this preamble, which addresses the proposed revisions to 30 CFR 761.11 with respect to the existing operation exemption.

*D. Section 761.5: Definition of "Surface Coal Mining Operations Which Exist on the Date of Enactment"*

In a nonsubstantive editorial change, OSM is proposing to remove the term "surface coal mining operations which exist on the date of enactment" and its definition from 30 CFR 761.5. Application of the concept of continually created VER to the existing operation exemption will render this term obsolete. Two variations of this term appear in the current versions of 30 CFR 761.12(h) and the introduction to 30 CFR 761.11, but they are not used in the revised version of Part 761 being proposed today.

*E. Section 761.11: Areas Where Mining Is Prohibited or Limited*

OSM is proposing to reorganize and revise this section for clarity and consistency with revisions to other sections of 30 CFR Part 761. Except as discussed below, no substantive changes in meaning are intended.

1. Existing Operation Exemption

As discussed in the portion of this preamble addressing continually created

VER, OSM is proposing to recodify paragraph (d)(1) of the 1983 definition of VER, which establishes continually created VER for operations in existence on the date that land comes under the protection of section 522(e) after August 3, 1977, as part of the existing operation exemption. In addition, because several commenters on the 1991 proposal reflected confusion over the scope of the current existing operation exemption, OSM is proposing to adopt clarifying language. To accommodate these changes, OSM is proposing to move the exemption from the introductory portion of 30 CFR 761.11 to a separate paragraph (b) within the section.

Proposed 30 CFR 761.11(b) provides that the prohibitions of 30 CFR 761.11(a) do not apply to surface coal mining operations for which a valid permanent regulatory program permit is in existence on the date that the land comes under the protection of 30 CFR 761.11(a) or section 522(e) of the Act. To address situations in existence before completion of the transition between the initial and permanent regulatory programs, the rule further specifies that the exemption includes all other validly authorized operations in existence as of that date, although this provision has no prospective applicability apart from the one remaining active initial program mine. Illegal ("wildcat") operations and operations for which the permit has expired or been revoked do not qualify.

In all cases, the proposed rule limits the scope of the exemption to lands for which the permittee or operator had the right under State property law, as demonstrated in accordance with 30 CFR 778.15, to enter and conduct surface coal mining operations as of the date the land in question came under the protection of 30 CFR 761.11(a) or section 522(e) of SMCRA. By limiting the existing operation exemption in this fashion, the proposed rule effectively requires that the permittee seek and obtain a VER determination before initiating surface coal mining operations on any lands within the permit area for which no right of entry has been obtained as of the date the land comes under the protection of section 522(e). This additional step should ensure that the permittee demonstrates possession of the necessary property rights, including, when appropriate, a knowing waiver from the owner of the protected feature in accordance with 30 CFR 761.11(a) (2), (3), (4), or (5), before initiating surface coal mining operations in a protected area.

On-site activity or physical disturbance of the protected land is not a prerequisite for the exemption. This interpretation is consistent with the

underlying language in section 522(e), which exempts surface coal mining operations "which exist on the date of enactment of this Act." Nothing in the term "exist" requires on-site activity or physical disturbance. In addition, this interpretation is consistent with the language of section 522(a)(6), which enumerates lands exempt from designation as unsuitable for mining and which the legislative history also characterizes as an existing operation exemption. Specifically, section 522(a)(6) exempts all "lands on which surface coal mining operations are being conducted on the date of enactment of this Act or under a permit issued pursuant to this Act \* \* \*." The legislative history of this provision states that "an existing mine might not be one actually producing coal." H.R. Rep. No. 218, 95th Cong. 1st Sess. 94-95 (1977).

The proposed rule is consistent with the language of paragraph (d)(1) of the 1983 VER definition, its preamble, and the rationale used by the courts in upholding the concept of continually created VER. In particular, the 1983 preamble states that paragraph (d)(1) was intended to prevent the disruption of mining or deprivation of the right to mine after the permittee made the substantial investments required to obtain a permit. By way of explanation, the preamble stated that to do otherwise would be totally inconsistent with the framework of protection that SMCRA provides to both permittees and citizens:

Without the protection provided by this provision, it would be possible, for instance, for a person who objected to a mining operation to move a mobile home to the edge of the property adjoining a mine, and occupy it, thereby forcing the operator to cease all operations within 300 feet of this occupied dwelling. OSM does not believe that this is the intended result of section 522(e) of the Act. Congress provided the public ample opportunity to review and make objections to any proposed mining operation through the permitting process. The regulatory authority is required to seek and consider the views of the public [before] it issues or denies a permit. To allow any person the opportunity to take extraordinary means to disrupt mining or deprive the operator of a right to mine after the operator has made the substantial investments required to obtain a permit and begin operations is totally inconsistent with the framework of protection the Act gives to both operators and citizens.

48 FR 41315, September 14, 1983.

OSM has adhered to these principles in developing the proposed rule.

In upholding paragraph (d)(1) of the 1983 definition, the U.S. Court of Appeals for the District of Columbia

Circuit relied primarily on language in the legislative history of section 522 indicating that Congress intended to allow the continuance of mines already in existence at the time land is determined to be unsuitable for mining. The court held that this rule "should apply equally to mines in existence as of August 3, 1977, or to mines subsequently started on lands which have permits approved for mining." *NWF, supra*, 839 F.2d 694, 750. The court rules that the operative principle in determining whether an operation is exempt from the section 522(e) prohibitions is whether it had been "lawfully established" before the land came under the protection of section 522(e).

The rule being proposed today would consider an operation to be lawfully established upon issuance of a permanent program permit for lands for which the permittee has procured the necessary right of entry under 30 CFR 778.15. This approach is consistent with 30 CFR 774.13, which provides that the regulatory authority cannot summarily revise or revoke an approved permanent program permit. Therefore, when lands within an approved permanent program permit come under the protection of section 522(e) after permit issuance, the permittee would appear to have the right to continue to operate on those lands under the existing operation exemption unless the regulatory authority orders the permittee to revise the permit to remove those lands from the permit area in accordance with the procedures and criteria of 30 CFR 774.13. If a person believes that a permit has been improperly issued because a protected feature came into existence prior to rather than after permit approval, he or she has the option of either filing a timely challenge to approval of the permit application or submitting a complaint to the regulatory authority. If the permit is ultimately found to be defective, the regulatory authority must require that the permittee revise the permit in accordance with 30 CFR 774.13.

With respect to initial program operations (operations subject to Subchapter B of 30 CFR Chapter VII) and operations conducted prior to the effective date of the initial regulatory program, the existing operation exemption includes all lands disturbed by the operation as of the date the land came under the protection of section 522(e) or 30 CFR 761.11(a). However, except for one operation on Indian lands, OSM and the States have completed the repermitting of initial program operations in accordance with 30 CFR 773.11 and section 502(d) of the

Act. All initial program surface coal mining and reclamation operations on non-Indian lands that were not re-permitted under the permanent program (and thus remain subject to the initial regulatory program) are now abandoned, reclaimed, or in the process of reclamation. Under 30 CFR 773.11(a), no further coal removal or additional site disturbance for purposes of conducting surface coal mining operations is permissible unless the person first obtains a permanent program permit.

The existing operation exemption is similar to a nonconforming use exemption under State zoning law in that the right to use the site for a nonconforming use (in this case, the right to conduct surface coal mining operations) is extinguished when the use (in this case, the existing operation) ceases. Any person seeking to re-permit the site of an abandoned or reclaimed initial program operation must comply with the prohibitions and restrictions of 30 CFR 761.11(a) as a prerequisite for obtaining a permanent program permit.

Since all States with the potential for coal production in the foreseeable future now have either a State or Federal regulatory program approved under SMCRA, there will be no new surface coal mining operations under the initial regulatory program. Therefore, in effect, both the existing and proposed rules will be applied only to operations with permanent program permits.

## 2. Removal of Paragraph (h)

As in 1991, OSM is proposing to remove 30 CFR 761.11(h), which provides that no coal exploration or surface coal mining operations would be licensed or permitted on Federal lands within the National Park System, the National Wildlife Refuge System, the National System of Trails, the National Wilderness Preservation System, the Wild and Scenic Rivers System, or National Recreation Areas unless specifically authorized by acts of Congress. OSM promulgated this provision on September 14, 1983 (48 FR 41349), in response to numerous comments from persons concerned that mining or drilling would occur in national parks and other areas protected under section 522(e)(1) of the Act. Industry subsequently challenged the rule on both procedural and substantive grounds. Upon review, the court remanded the rule to the Secretary because it found that he had failed to provide adequate notice and opportunity for comment under the Administrative Procedure Act (5 U.S.C. 553). In its opinion, the court also noted that there appeared to be no rational

basis for distinguishing between Federal and non-Federal lands in this context since section 522(e)(1) prohibits surface coal mining operations on any lands within the statutorily protected areas. *PSMRL II, Round III-VER*, 22 ERC 1557, 1565 (D.D.C. 1985).

On November 20, 1986, OSM suspended 30 CFR 761.11(h) to comply with the court's order (51 FR 41952, 41956). As a result of the suspension, neither Federal nor private lands are subject to the absolute prohibitions found in 30 CFR 761.11(h).

On September 22, 1988, the Department of the Interior issued a policy statement setting forth the actions the Department would take to prevent surface coal mining operations in section 522(e)(1) areas. This policy statement, which was published in the Federal Register at 53 FR 52384 on December 27, 1988, in conjunction with a previous proposed rule concerning VER, remains in effect even though OSM subsequently withdrew the proposed rule on July 21, 1989. The policy statement commits the Department, subject to appropriation, to use available authorities (including exchange, negotiated purchase and condemnation) to seek to acquire mining rights within the areas listed in 30 CFR 761.11(h) whenever a person attempts to exercise VER. The policy applies to all lands within the boundaries of the areas listed in section 522(e)(1), not just to Federal lands.

The policy statement will not, and is not intended to, provide protection equivalent to that afforded by 30 CFR 761.11(h). As the court noted in its decision remaining paragraph (h), "an absolute proscription on any mining, permitting, licensing or exploration within the 522(e)(1) protected areas might run directly contrary to the statute's language that such proscriptions are subject to VER." *PSMRL II, Round III-VER* at 1565.

Accordingly, OSM believes that it would be inappropriate to re-promulgate the prohibitions in paragraph (h). The 1988 policy statement expresses the Secretary's intent to acquire privately held coal interests in areas of national significance to the extent financial or other resources are available to do so. Any further commitment would, in most cases, exceed the Secretary's legal authority since most land acquisition actions are subject to congressional authorization and appropriation.

## F. Section 761.12: Coordination With Permitting Process; Waiver Requirements and Procedures

OSM is proposing only minor revisions and editorial changes in

§ 761.12. These revisions include correcting references to § 761.11, adding a reference to newly proposed § 761.13, combining existing paragraphs (a) and (b)(1) and revising them for consistency with § 761.11. In addition, to be consistent with changes in terminology adopted as part of the permitting rules promulgated on September 28, 1983 (48 FR 44349), OSM is proposing to replace the obsolete term "complete application" in paragraph (a) with its current equivalent, "administratively complete application."

OSM also is proposing to revise paragraph (a) to clarify that its requirements apply to applications for incidental and other boundary revisions. Although OSM always has interpreted the somewhat ambiguous term "application for a surface coal mining operation permit" in 30 CFR 761.12 as including applications for all types of permit boundary revisions, this change will remove any question as to its meaning. Removal of this ambiguity should enhance adherence to the prohibitions of section 522(e) and 30 CFR 761.11(a).

As in 1991, OSM is proposing to revise paragraph (c) to specify that requests for the findings required prior to the approval of surface coal mining operations on Federal lands in national forests may be submitted in advance of, and separate from, the permit application. OSM's experience in the 18 years since the enactment of SMCRA has shown that evaluation of the entire permit application is not essential to preparation of the requested findings. However, in response to a concern raised by the U.S. Environmental Protection Agency about the 1991 proposal's complete lack of information requirements for such requests, OSM is proposing to specify that the requester remains responsible for submitting sufficiently comprehensive information about the nature and location of the proposed operation to enable OSM and other responsible parties to properly evaluate the request and prepare adequately documented findings.

In 1991, OSM proposed to add a new paragraph (a)(1) to 30 CFR 761.12 to establish information requirements for requests for VER determinations. However, section 761.12 pertains to permitting requirements and procedures. Because the rules being proposed today (like the preambles to both the 1983 final rule and the 1991 proposed rule) state that requests for VER determinations may be submitted and processed in advance of preparation and submission of a permit application, OSM is now proposing to place these information requirements in a new

§ 761.13, which addresses only the submission and processing of requests for VER determinations. For the same reason, OSM also is proposing to move existing 30 CFR 761.12(h), the VER determination appeal provisions proposed as 30 CFR 761.12(i) in 1991, and the sentence in existing 30 CFR 761.12(b)(2) that pertains to notification of the National Park Service and the U.S. Fish and Wildlife Service to the new section.

#### *G. Section 761.13: Submission and Processing of Requests for Valid Existing Rights Determinations*

This proposed new section consists of submission and documentation requirements for requests for VER determinations; notice, comment, public participation, and decision requirements for the processing of requests for VER determinations; and provisions for administrative and judicial review of decisions on requests for VER determinations. Major portions of this section previously appeared in, or were proposed in 1991 for addition to, 30 CFR 761.12. Other portions were added in response to comments received on the 1991 proposed rule or to provide consistency with rule changes in other parts of 30 CFR Chapter VII.

These requirements are intended to provide the procedural framework necessary to ensure that the prohibitions of section 522(e) are fully and properly implemented in the manner intended by Congress. They also should ensure that all affected persons receive equitable treatment and have adequate notice and opportunity to participate in the decisionmaking process.

#### *1. Paragraph (a): Which Agency Will Process a Request for a VER Determination?*

Proposed 30 CFR 761.13(a) provides that OSM will make all VER determinations for Federal lands within the boundaries of the areas listed in 30 CFR 761.11(a) (1) and (2), which correspond to the areas listed in paragraphs (e)(1) and (e)(2) of section 522 of SMCRA. VER determinations for all other lands, including non-Federal lands within the boundaries of the areas listed in 30 CFR 761.11(a)(1), would be the responsibility of the regulatory authority.

These provisions are consistent with the existing and proposed Federal lands regulations at 30 CFR 740.4(a)(4) and 745.13(o), which are discussed in Part III.A. of this preamble.

Consistent with the proposed changes to 740.11(g), the proposed rule also specifies that the definition of VER in 30

CFR 761.5 applies to all VER determinations for lands protected under 30 CFR 761.11.(a)(1) or (2), including non-Federal lands within the boundaries of the areas listed in 30 CFR 761.11(a)(1), regardless of whether OSM or the State is responsible for making the determination. For all other lands, both OSM and State regulatory authorities must use the definition of VER in the appropriate approved regulatory program.

#### *2. Paragraph (b): What Information Must a Request for a VER Determination Include?*

Paragraph (b) of proposed 30 CFR 761.13 contains submission and content requirements for requests for VER determinations. These requirements are primarily derived from provisions proposed as 30 CFR 761.12(a)(1) on July 18, 1991, which, in turn, are similar to guidelines set forth in the preamble to the 1983 definition of VER. See 48 FR 41314, September 14, 1983. However, because the proposed VER definition no longer contains an explicit takings standard, the proposed rule does not include items pertinent only to that standard. Other modifications are intended to improve clarity, provide additional specificity, and ensure that the rule includes requirements pertinent to each standard in the definition of VER.

In keeping with the intent expressed in the preambles to the 1983 final rule (see 48 FR 41322, September 14, 1983) and the 1991 proposed rule (see 56 FR 33161, July 18, 1991), proposed paragraph (b) expressly states that a request for a VER determination may be submitted and decided in advance of preparation and submission of a permit application. Surface coal mining operations may not always be technically feasible, legally permissible, or economically viable in the absence of VER. Therefore, a requirement that requests for VER determinations be accompanied by a permit application may be unreasonably burdensome in that it could result in significant permit application preparation expenditures that would be futile if the agency ultimately determines that the requester does not have VER and consequently is ineligible to receive a permit. This is especially true of Federal lands within the boundaries of the areas specified in 30 CFR 761.11(a)(1) and (2), for which OSM has sole authority to process requests for VER determinations even when it is not the regulatory authority responsible for reviewing permit applications.

Nothing in the foregoing discussion should be interpreted as meaning that

States may not require that requests for VER determinations be accompanied by a permit application. Sections 503 and 505 of SMCRA afford States considerable discretionary authority to adopt requirements that either have no Federal counterparts or are more stringent than their Federal counterparts in achieving the requirements and purposes of the Act. Furthermore, OSM also reserves the right to require submission of a permit application if information in the application is needed or useful in evaluating the request for a VER determination.

The intent of the provision for advance VER determinations is to allow VER questions to be fully settled in advance of permit application preparation and review. Therefore, OSM anticipates that advance VER determinations would be subject to *de novo* review during the permit application review process only under exceptional circumstances. Because the proposed rule establishes notice, comment, and public participation requirements for the submission and processing of requests for VER determinations, the lack of opportunity for *de novo* review of VER determinations when such determinations are part of a subsequent permit application would not abridge violate the rights of citizens to participate in the permitting process.

Circumstances that might justify reconsideration of an advance VER determination include, but are not limited to, a material misrepresentation of facts, discovery of new information that significantly alters the basis of the VER determination, or a substantial change in the nature of the intended operation (e.g., a switch from underground mining methods to surface mining techniques). If these circumstances arise after permit issuance, the regulatory authority should, based upon written findings and subject to administrative and judicial review, order that the permit be revised to correct any deficiencies. See 30 CFR 774.11 (b) and (c). However, a State regulatory authority may not reconsider or overturn a VER determination made by OSM.

Because most of the VER standards for roads do not include the property rights component of paragraph (a) of the definition of VER in § 761.5, proposed 30 CFR 761.13(b)(1) establishes special, more limited information requirements for requests for VER determinations for coal mine roads. Specifically, if the request is based on one of the standards in paragraphs (b)(1) through (b)(3) of the definition of VER in § 761.5, the requester would have to submit

satisfactory documentation that (1) the road was in existence on the date the land upon which it is located came under the protection of § 761.11, (2) a right of way or easement for the road was properly recorded as of the date the land came under the protection of § 761.11, or (3) the regulatory authority had issued a permit for the access or haul road on the land in question as of the date the land came under the protection of § 761.11(a). If the request is based on the standard in paragraph (b)(4) of the definition of VER in § 761.5, the requester would have to comply with all other applicable information requirements since paragraph (b)(4) merely incorporates the standards of paragraph (a) of the definition.

All other requests for VER determinations would have to include the information set forth in paragraphs (b)(2) (i) through (vi) of proposed 30 CFR 761.13 to demonstrate compliance with the property rights component of paragraph (a) of the definition of VER in § 761.5. Specifically, these paragraphs would require a legal description of the land; complete documentation of the character and extent of the requester's current interests in the surface and mineral estates in question; a chain of title and discussion of any title instrument provisions concerning mining or mining-related surface disturbances or facilities; a description of the nature and ownership of all property rights for the surface or mineral estates in question as of the date the land came under the protection of § 761.11; and a description of the type and extent of surface coal mining operations planned, including the intended method of mining and any mining-related surface facilities, and an explanation of how the planned operations are consistent with State property law. If the coal interests have been severed from other property interests and the surface estate is held by a Federal agency, paragraph (b)(2)(v) would require submission of a title opinion or other official statement from the Federal agency confirming that the requester has a property right to conduct the type of surface coal mining operations intended. This requirement is intended to ensure that the record is adequate to determine whether a property rights dispute exists.

Proposed 30 CFR 761.13(b)(2)(vii) provides that, if the request is based on the needed for and adjacent standard set forth in paragraph (a)(2) of the definition of VER in 30 CFR 761.5, the requester must explain why and how the coal is needed for the operation. As several commenters noted in response to the lack of a similar provision in the

1991 proposal, the agency will need this information to make an informed decision on the request.

Proposed 30 CFR 761.13(b)(2)(viii) provides that, if the request is based on the good faith/all permits standard set forth in paragraph (a)(1) of the definition of VER in 30 CFR 761.5, the person making the request must submit the application dates and identification numbers and, if applicable, approval and issuance dates and identification numbers for any licenses, permits, or authorizations for surface coal mining operations on the land in question if such licenses, permits, or authorizations are or were held or applied for by the requester or predecessor in interest as of the date the land in question came under the protection of 30 CFR 761.11. Examples of relevant permits include State or Federal surface or underground coal mining permits, National Pollutant Discharge Elimination System permits, State air pollution control permits, and U.S. Forest Service special use permits, and (for some types of facilities such as coal preparation plants and ventilation housing for underground mines) building permits and zoning approvals. The agency will need this information to make an informed decision on the request.

### 3. Paragraph (c): How May the Public Participate in the VER Determination Process?

Because section 102(i) of SMCRA provides that one of the purposes of the Act is to assure that appropriate procedures are provided for public participation in the development and enforcement of State and Federal regulatory programs, OSM is proposing to include notice and comment requirements and provisions for public participation in the VER determination process, as suggested by several commenters on the 1991 proposal. The special protection Congress provided for the lands listed in section 522(e) also lends support to public participation in the VER determination process.

With minor modifications, the notice and comment requirements set forth in proposed 30 CFR 761.13(c) parallel those currently in use by OSM for VER determinations as a matter of policy. They also resemble the notice and comment requirements for applications for coal exploration permits under 30 CFR 772.12, which have been tailored to minimize resource demands on affected parties while maintaining consistency with the statutory provisions encouraging public participation.

Under the proposed rule, an agency receiving a request for a VER determination must publish a notice in

a newspaper of general circulation in the county in which the land is located inviting comment on whether the request should be approved. Because of the national significance of the areas listed in 30 CFR 761.11(a) (1) and (2), this notice also must appear in the Federal Register if the request involves Federal lands within the boundaries of those areas. (Under proposed 30 CFR 761.13(a)(2), OSM would have sole responsibility for making VER determinations on those lands. Hence, the Federal Register publication requirement would not place any added burden on State regulatory authorities.) The notice must identify the applicable VER standard, the location of the land involved, the name and address of the agency office to which comments should be addressed, and the closing date of the comment period, which must be a sufficient amount of time after the date of publication so as to afford interested persons a reasonable opportunity to prepare and submit comments. It also must describe the property rights claimed, the basis for the claim, the type of surface coal mining operations planned, and the procedures the agency will follow in processing the request.

If the land in question involves severed estates or divided interests, the proposed rule provides that the agency must make a reasonable effort to locate all owners of interest, both surface and mineral, and provide them with a copy of the notice. In addition, such notification must be provided to the owner of the structure or feature causing the lands to come under the protection of 30 CFR 761.11(a). These proposed requirements are intended to provide full protection for the listed lands consistent with section 102(b) of SMCRA, which states, that one of the Act's purposes is to "assure that the rights of surface landowners and other persons with a legal interest in the land or appurtenances thereto are fully protected from [surface coal mining] operations."

Finally, in paragraph (c)(3), OSM is proposing to provide that, whenever a request for a VER determination pertains to land within the boundaries of an area under the protection of 30 CFR 761.11(a)(1) and section 522(e)(1), the agency responsible for processing the request must notify the agency with jurisdiction over the protected land and allow that agency 30 days from receipt of the notification to respond. Upon request, the agency responsible for the VER determination must grant the agency with jurisdiction over the protected area an additional 30 days to review and comment upon the request.

After that time, the agency responsible for the VER determination would have the right to make the determination in accordance with proposed 30 CFR 761.13(d).

A similar requirement currently appears in 30 CFR 761.12(b)(2), where it applies only to lands within the jurisdiction of the National Park Service or the U.S. Fish and Wildlife Service. OSM is proposing to extend the consultation requirement to all lands protected under 30 CFR 761.11(a)(1) and section 522(e)(1) because there does not appear to be a rational basis for limiting it to lands under the jurisdiction of the two agencies identified in the current rule.

#### 4. Paragraph (d): How Will a Decision Be Made?

Paragraph (d) of proposed 30 CFR 761.13 specifies requirements pertinent to the decisionmaking process for requests for VER determinations. OSM originally proposed a version of this paragraph as part of 30 CFR 761.12(h) on July 18, 1991 (56 FR 33162, 33165). The rule being proposed today includes additional language in response to commenters' concerns regarding public participation issues and property rights disputes.

Specifically, the proposed rule provides that the agency responsible for making the VER determination must review the materials submitted with the request, the information received during the comment period, and any other relevant available information to determine whether the record is adequate to support a decision in favor of the requester. If not, the agency must notify the requester in writing, explaining the inadequacy of the record and requesting submittal, within a reasonable time, of any additional information the agency deems necessary to remedy the inadequacy. Upon receipt of the requested information or other explanation, the agency must determine whether the requester has demonstrated VER for the land in question.

In keeping with the intent of Congress in enacting the prohibitions of section 522(e), the agency processing requests for VER determinations has an obligation to critically analyze such requests to ensure that section 522(e) is fully implemented and that new surface coal mining operations in these areas are prohibited except to the extent that they qualify for one of the statutorily authorized waivers or exemptions. The proposed rules establish the procedural requirements and decision criteria needed to meet this obligation.

As currently proposed, 30 CFR 761.13(d)(2) includes a provision

requiring deferral of a decision on a request for a VER determination if the underlying property rights are in dispute. The deferral would remain in effect until the parties resolve the dispute in the proper venue, which is normally the State courts. To do otherwise would constitute *de facto* adjudication of the property rights dispute in favor of one of the parties, a result that would violate the prohibition on such adjudication in section 510(b)(6)(C) of SMCRA. In addition, deferral of a decision in situations involving property rights disputes is consistent with section 102(b) of SMCRA, which states that one of the Act's purposes is to "assure that the rights of surface landowners and other persons with a legal interest in the land or appurtenances thereto are fully protected from [surface coal mining] operations."

OSM does not interpret section 510(b)(6)(C) of SMCRA as requiring deferral of a decision if there is only a mere allegation of a property rights dispute. For example, if the parties to the alleged dispute are not diligently pursuing resolution of the disagreement in the proper venue, then, depending on the facts of the case, the agency processing the request for a VER determination might reasonably conclude that the lack of any serious attempt to resolve the dispute means that no *bona fide* dispute exists and, therefore, that no deferral is necessary.

Finally, proposed 30 CFR 761.13(d)(3) specifies that the decision document must (1) explain how the requester has or has not satisfied all applicable elements of the definition of VER, (2) set forth the relevant findings of fact and conclusions, and (3) specify the reasons for the conclusions. Under the proposed rule, the agency must provide a copy of the decision to the requester and the owner of (or agency with jurisdiction over) the area or feature that caused the land to come under the protection of 30 CFR 761.11(a). The agency would also have to publish notice of the decision in a newspaper of general circulation in the county in which the land is located. When Federal lands within the areas listed in 30 CFR 761.11(a) (1) or (2) are involved, OSM would publish notice of the decision in the Federal Register.

These requirements are similar to the procedures OSM has followed in the past to ensure adequate notice and public participation in VER determinations. OSM's experience indicates that the requirements are not unduly burdensome and should afford adequate notice and opportunity for adversely affected parties to appeal the decision. Federal Register publication

of decisions on requests for VER determinations affecting Federal lands within the boundaries of the areas listed in 30 CFR 761.11(a) (1) and (2) is appropriate because these lands are of national significance. Under proposed 30 CFR 761.13(d)(3)(ii), the Federal Register publication requirement would apply only to OSM and only to Federal lands.

#### 5. Paragraph (e): How May a Determination Be Appealed?

Paragraph (e) provides that VER determinations are subject to administrative and judicial review under 30 CFR 775.11 and 775.13, which contain administrative and judicial review requirements for permitting decisions. With respect to VER determinations, this provision is substantively identical to both existing 30 CFR 761.12(h) and 30 CFR 761.12(i) as proposed in 1991.

#### H. Section 772.12: Requirements for Coal Exploration on Lands Unsuitable for Surface Coal Mining

As promulgated on September 8, 1983, the regulations at 30 CFR Part 772 governing coal exploration require that a person who intends to conduct any type of coal exploration in areas designated as unsuitable for surface coal mining operations in 30 CFR 761.11(a) and section 522(e) of SMCRA first obtain a permit in accordance with 30 CFR 772.12. However, the 1983 regulations did not require a VER demonstration either as a mandatory component of the permit application or as a prerequisite for permit approval or issuance. On June 22, 1988 (53 FR 23532), OSM proposed to adopt a rule that would have done so, but the final rule promulgated on December 29, 1988 (53 FR 52942) did not include this provision. Instead, the preamble to that rule stated that OSM would reconsider the issue of VER requirements for coal exploration after promulgation of a new definition of VER (53 FR 52945).

The National Wildlife Federation and other groups challenged OSM's failure to adopt the proposed rule. Upon judicial review, the U.S. District Court for the District of Columbia held that OSM had failed to articulate a proper rationale for not adopting the proposed rule. *Nat'l Wildlife Fed'n versus Lujan*, Nos. 89-0504, 89-1221 and 89-1614, slip op. at 25-33 (D.D.C. September 5, 1990). In response, on July 18, 1991 (56 FR 33152), OSM proposed to add paragraph (b)(5) to 30 CFR 772.14 to require a VER demonstration as a prerequisite for approval of coal exploration activities in which coal is to be removed for sale or commercial use.

After considering the comments received, OSM is withdrawing this proposed change and is instead proposing to add a new paragraph (b)(14) to 30 CFR 772.12, the section containing permitting requirements for exploration that will remove more than 250 tons of coal or that will occur on lands designated as unsuitable for surface coal mining operations. Under the proposed rule, a person planning to conduct exploration on lands listed in section 522(e) and 30 CFR 761.11(a) would have to submit an application that includes a demonstration that (1) the exploration activities will not substantially disturb the protected lands, (2) the owner of the coal possesses VER, (3) the exploration is needed for mineral valuation purposes or is authorized by judicial order, or (4) the applicant has obtained a waiver or exception in accordance with 30 CFR 761.12 (c) through (f).

Similarly, OSM is proposing to add a new paragraph (d)(2)(iv) to 30 CFR 772.12 to provide that the regulatory authority may not approve an application for exploration unless it first finds that the exploration activities described in the application will not substantially disturb any lands listed in 30 CFR 761.11(a). Alternatively, the regulatory authority may find that the applicant has (1) demonstrated VER in accordance with 30 CFR 761.13, (2) obtained one of the waivers or exceptions authorized under 30 CFR 761.11(a) (2) through (5) in accordance with 30 CFR 761.12 (c) through (f), or (3) demonstrated that the exploration is needed for mineral valuation purposes or authorized by judicial order.

OSM recognizes that nothing in SMCRA prohibits coal exploration on lands designed as unsuitable for mining. The rule changes being proposed today do not ban exploration on any lands. Instead, they merely restrict the methods that may be used to conduct exploration on lands protected under section 522(e) of the Act or the potential impact of exploration on those lands.

Section 512(a) of the Act provides broad authority for the promulgation of regulations governing coal exploration, and section 201(c)(2) authorizes the Secretary to "promulgate such rules and regulations as may be necessary to carry out the purposes and provisions of this Act." As discussed below, the rules being proposed today will further the purposes of section 522(e) of the Act.

Coal exploration involving substantial disturbance can result in environmental impacts similar in both nature and extent to those resulting from surface coal mining operations. The legislative history of section 522(e) of the Act

indicates that Congress' purpose in enacting that section was to prevent new surface coal mining operations in the areas listed therein, either to protect human health, safety, and general welfare or because the environmental values and other features associated with these areas are generally incompatible with surface coal mining operations and their impacts. See S. Rep. No. 128, 95th Cong., 1st Sess. 94 (1977). In this context, allowing coal exploration that would result in similar impacts appears generally incompatible with congressional intent in the absence of VER or a waiver or exception authorized under section 522(e).

OSM recognizes that there may be circumstances in which exploration activities causing such impacts are unavoidable. Specifically, coal exploration involving substantial disturbance (road construction to provide access for a drill rig, for example) may sometimes be necessary for mineral valuation purposes or to comply with a judicial order even when there is no possibility of obtaining approval to conduct surface coal mining operations. Accordingly, the proposed rules authorize approval of a coal exploration permit under these circumstances. However, all exploration activities must be planned and conducted in accordance with the requirements and performance standards of 30 CFR Parts 772 and 815, which are designed to minimize adverse environmental effects.

Under proposed 30 CFR 772.12(b)(14)(ii), the VER determination requirements and procedures of 30 CFR 761.13(a) through (d) would apply to requests for VER determinations sought in connection with coal exploration. All determinations would be subject to administrative and judicial review in accordance with 30 CFR 761.13(e). The proposed prohibition of certain types of coal exploration in the absence of VER is intended to restrict the number of situations in which exploration could cause impacts similar to those that would result from surface coal mining operations. Specifically, it attempts to limit such exploration to those lands for which a person has the right to conduct surface coal mining operations. Therefore, OSM does not propose to define VER in a different fashion or differentiate procedurally between VER determinations sought in connection with plans to conduct surface coal mining operations and those sought in connection with plans to conduct coal exploration, regardless of the purpose of the exploration or type of mining operations contemplated.

A VER determination obtained in connection with an application for a coal exploration permit would remain valid for any subsequent application seeking approval of a permit for surface coal mining operations, provided the type of surface coal mining operations proposed in the application is consistent with the type of operations contemplated by the VER determination.

OSM acknowledges that exploration may sometimes be necessary to determine the feasibility of using underground mining methods to remove the coal underlying section 522(e) areas. Under current OSM policy, only surface facilities associated with underground operations are subject to the prohibitions of section 522(e). If no surface facilities are to be located on the lands protected by section 522(e), a VER determination is not a prerequisite for approval of a permit for an underground mine. For the reasons set forth above, the proposed rule would nevertheless require a VER determination as a prerequisite for approval of exploration in advance of such a mine if the exploration would involve substantial disturbance of the protected lands. This requirement would apply regardless of whether the person proposing the exploration planned to construct any surface facilities on the protected lands. To protect the values for which Congress designated certain lands as off-limits to surface coal mining operations, the guiding principle in determining whether a VER determination is needed for exploration should be the nature of the impacts of exploration on the protected lands, not the type of mining operation ultimately planned. Furthermore, OSM believes that, in most cases, the necessary exploration activities can be conducted either on adjacent lands or by using methods (such as core drilling from existing roads and pathways) that do not result in substantial disturbance of the land surface.

OSM also is considering revising 30 CFR Part 772 (or possibly Part 761 or both) to include a provision similar to 30 CFR 762.14, which provides that the regulatory authority has an obligation to use the exploration permit application review and approval process to ensure that exploration activities will not interfere with any of the values for which the area has been designated unsuitable for surface coal mining operations. (Section 762.14 applies only to lands designated unsuitable for surface coal mining operations pursuant to the petition process set forth in 30 CFR Part 762 and section 522(a) of the Act.) OSM seeks comment on whether

this provision should be adopted either in addition to or in place of the proposed revisions to 30 CFR 772.12 set forth in this rulemaking. As currently proposed, the rules would not place these restrictions on exploration if the regulatory authority determines that a person has VER or qualifies for one of the other exemptions in 30 CFR 772.12(b)(14).

Finally, as a housekeeping measure, OSM is proposing to revise 30 CFR 772.12(d)(2)(ii) and (iii) to correct a citation to the Endangered Species Act and to add a reference to the National Historic Preservation Act Amendments of 1992 in Public Law 102-575.

#### *I. Effect in Federal Program States and on Indian Lands*

Through cross-referencing in the respective regulatory programs, this proposed rule would apply to all lands in States with Federal regulatory programs. States with Federal regulatory programs include Arizona, California, Georgia, Idaho, Massachusetts, Michigan, North Carolina, Oregon, Rhode Island, South Dakota, Tennessee, and Washington. These programs are codified at 30 CFR Parts 903, 905, 910, 912, 921, 922, 933, 937, 939, 941, 942, and 947, respectively.

The proposed changes to 30 CFR Part 761 would apply to Indian lands by virtue of the incorporation of this part by reference in 30 CFR 750.14. The proposed changes to 30 CFR Part 772 would apply to coal exploration on Indian lands to the extent provided in 30 CFR 750.15.

In the preamble to the 1991 proposed rule, OSM invited the public to comment on whether there are unique conditions in any Federal program States or on Indian lands that should be reflected in the national rules or as specific amendments to the Federal programs or Indian lands rules. Since no commenters identified any unique conditions or amendment needs, the rules being proposed today do not include any changes to the Indian lands rules or individual Federal programs. However, the public is again invited to comment on whether any such changes would be necessary if OSM adopts the proposed rules.

#### *J. Effect on State Programs*

If the proposed rules are adopted, OSM will evaluate State regulatory programs approved under 30 CFR Part 732 and section 503 of the Act to determine whether any changes in these programs will be necessary to maintain consistency with Federal requirements. If the Director determines that a State program provision needs to be amended

as a result of these revisions to the Federal rules, he will notify the State in accordance with 30 CFR 732.17.

In the preamble to the 1991 proposed rule, OSM solicited comments on whether State program VER definitions must be amended to include standards identical to those of the revised Federal definition to be no less effective than the revised Federal definition. 56 FR 33156, July 18, 1991. Because the standards proposed today differ somewhat from those proposed in 1991, OSM once again invites comment on the need for revision of State program definitions of VER if the definition in 30 CFR 761.5 is adopted as proposed. OSM particularly seeks comment on whether those States with an approved takings standard should be required to remove this standard or whether the rationale OSM relied upon to approve the takings standard in the Illinois definition remains valid. (See 30 CFR 917.15(j) and 54 FR 123, January 4, 1989.) In other words, may the takings standard be considered no less effective than the good faith/all permits standard in achieving the purposes and requirements of the Act even though it balances the purposes in a different manner with potentially different results?

#### *IV. Procedural Matters*

##### *A. Federal Paperwork Reduction Act*

In accordance with 44 U.S.C. 3507(d), OSM has submitted the information collection and recordkeeping requirements of 30 CFR Parts 761 and 772 to the Office of Management and Budget (OMB) for review and approval. 30 CFR Part 761

*Title:* Areas designated by Act of Congress.

*OMB Control Number:* 1029-0102.

*Abstract:* Part 761 includes criteria and procedural requirements for waivers and exemptions (including the VER and existing operating exemptions) from the prohibition on conducting surface coal mining operations in the areas specified in section 522(e) of SMCRA. This part identifies the documentation persons need to provide to demonstrate possession of or eligibility for a waiver or exemption. It also establishes review and notification requirements and decision criteria for the agency responsible for making decisions on requests for VER determinations.

*Need for and Use:* OSM and State regulatory authorities use the information collected under 30 CFR Part 761 to ensure that persons planning to conduct surface have the right to do so

under one of the exemptions or waivers provided by this section of the Act.

*Respondents:* Persons who prepare the approximately 475 applications for permits for surface coal mining operations that OSM and State regulatory authorities receive each year, and the 24 State regulatory authorities who must evaluate the validity of waiver and exemption claims and requests for VER determinations that accompany or precede these applications.

*Total Annual Burden:* OSM estimates that a person will need an average of 6 hours to prepare each request for a VER determination under 30 CFR 761.13. The agency responsible for processing the request will require an average of 8 hours to comply with the information collection requirements of these section, resulting in an average total burden of 14 hours for each request. Under 30 CFR 761.12, preparation and processing of requests for other types of exemptions and waivers will require an average of 2 hours per request. The estimated total annual burden for part 761 is 2,366 hours.

#### 30 CFR PART 772

*Title:* Requirements for coal exploration.

*OMB Control Number:* 1029-0033.

*Abstract:* Section 512 of SMCRA provides that persons conducting coal exploration on non-Federal lands must comply with exploration regulations issued by the regulatory authority. Section 512(d) of the Act requires a permit and the prior approval of the regulatory authority for exploration removing more than 250 tons of coal; 30 CFR Part 772 extends this requirement to all exploration on lands designated as unsuitable for surface coal mining operations. For all other types of exploration, the Act and regulations require submission of a notice of intent to explore. The regulations in 30 CFR Part 772 establish content requirements for notices of intent, content and processing requirements for applications for coal exploration permits, and recordkeeping requirements for regulatory authorities.

*Need For and Use:* OSM and State regulatory authorities use the information collected under 30 CFR Part 772 to maintain knowledge of coal exploration activities, evaluate the need for an exploration permit, and ensure that exploration activities comply with the environmental protection and reclamation requirements of 30 CFR Parts 772 and 815 and section 512 of SMCRA.

*Respondents:* Persons who prepare the approximately 1,225 notices of

intent to explore and 4 applications for coal exploration permits received each year by OSM and State regulatory authorities. Also, the 24 State regulatory authorities that process notices of intent and applications for exploration permits.

*Total Annual Burden:* The estimated annual burden for this part totals 13,354 hours, which translates to an approximate burden of 11 hours for the average notice of intent (10 hours to prepare the notice and 1 hour for the regulatory authority to review and file it), and 104 hours for the average application for a coal exploration permit (70 hours to prepare the application and 34 hours for the regulatory authority to process and file it). See 30 CFR 772.10 for a section-by-section burden summary for this part.

Comments are invited on:

(a) Whether the proposed collection of information is necessary for the proper performance of OSM and State regulatory authorities, including whether the information will have practical utility;

(b) The accuracy of OSM's estimate of the burden of the proposed collection of information;

(c) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(d) Ways to minimize the burden of collection on the respondents.

Under the Paperwork Reduction Act, OSM must obtain OMB approval of all information and recordkeeping requirements. No person is required to respond to an information collection request unless the form or regulation requesting the information has a currently valid OMB control (clearance) number. These numbers appear in section xxx.10 of 30 CFR Parts 710 through 955. To obtain a copy of OSM's information collection clearance requests, explanatory information, and related forms, contact John A. Trelease at (202) 208-2783 or by e-mail at [jtreleas@osmre.gov](mailto:jtreleas@osmre.gov).

By law, OMB must submit comments to OSM within 60 days of publication of this proposed rule, but may respond as soon as 30 days after publication. Therefore, to ensure consideration by OMB, you must send comments regarding these burden estimates or any other aspect of these information collection and recordkeeping requirements by March 3, 1997, to the Office of Management and Budget, Office of Information and Regulatory Affairs, Attention: Interior Desk Officer, 725 17th Street, NW, Washington, DC 20503. Please refer to OMB Control Numbers 1029-0033 and 1029-0102 in any correspondence.

#### B. Executive Order 12866

The proposed rule is a significant regulatory action under section 3(f) of Executive Order 12866. Accordingly, OSM has prepared a cost/benefit assessment (economic analysis) of the rulemaking alternatives pursuant to section 6(a)(3)(C) of the executive order.

#### C. Regulatory Flexibility Act

Pursuant to the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, the Department of the Interior has determined that this proposed rule would not have a significant economic impact on a substantial number of small entities. See 50 FR 13250 (April 3, 1985). A small entity flexibility analysis has been prepared and placed in the administrative record of this rulemaking.

#### D. Unfunded Mandates

For purposes of compliance with the Unfunded Mandates Reform Act of 1995, this rule will not impose any obligations that individually or cumulatively would require an aggregate expenditure of \$100 million or more by State, local, and Tribal governments and the private sector in any given year.

#### E. National Environmental Policy Act (NEPA)

On April 3, 1985 (50 FR 13250), OSM published a notice of intent to conduct rulemaking on the applicability of the section 522(e) prohibitions to underground mining. On June 19, 1985 (50 FR 25473), OSM announced the agency's intent to prepare an environmental impact statement (EIS) pursuant to section 102(2)(C) of NEPA, 42 U.S.C. 4332(2)(C) for this rulemaking. OSM held scoping meetings for the EIS on August 1, 1985, in Pittsburgh, Pennsylvania; August 6, 1985, in St. Louis, Missouri; and on August 9, 1985, in Washington, D.C. to obtain public input. Written comments on the scope of the EIS were accepted separately through September 10, 1985.

Based on the comments received and the March 22, 1985, decision in *PSMRL II, Round III-VER* remanding the definition of VER, OSM decided to conduct a combined analysis of the rulemaking alternatives for both VER and the applicability of the section 522(e) prohibitions to underground mining. OSM announced its intent in another scoping notice published on January 22, 1987 (52 FR 2421). OSM also held a meeting on February 6, 1987, to solicit further input on the rulemaking alternatives and the scope of the EIS from the public and potentially affected Federal agencies. On February

23, 1987, OSM held another meeting to receive testimony from environmental groups and other organizations unable to attend the earlier meeting.

On December 27, 1988 (53 FR 52374), OSM published a draft EIS and regulatory impact analysis concurrently with a proposed rule addressing both VER and the applicability of the prohibitions to subsidence from underground mining. On July 21, 1989 (54 FR 30557), OSM withdrew the proposed rule.

On April 19, 1991 (56 FR 16111), OSM published a revised draft EIS for review and comment, followed by a new proposed VER rule on July 18, 1991 (56 FR 33152) and, on the same date, a notice of inquiry concerning the applicability of the prohibitions to underground mining.

OSM never finalized the VER rule, electing instead to develop the new proposed rule being published today. On April 28, 1994 (59 FR 21996), OSM published a notice of intent to prepare a revised EIS analyzing both VER and the applicability of the prohibitions to underground mining. After analyzing the comments received, OSM has completed a new draft EIS (OSM-EIS-29), which is now available to the public for review and comment.

#### F. Executive Order 12630 (Takings)

In accordance with E.O. 12630 (March 18, 1988), and the "Attorney General's Guidelines For the Evaluation of Risk and Avoidance of Unanticipated Takings," dated June 30, 1988, the Department has prepared a takings implication assessment, which has been made a part of the administrative record for this rulemaking, and is set forth below:

Section 5221(e) of SMCRA provides that, subject to VER (and with certain other specified exceptions), no surface coal mining operations shall be permitted on certain lands designated by Congress. As stated in the preceding sections, the proposed rule defining VER would establish a GFAP standard for VER under section 522(e).

Under the GFAP standard, a person would have VER if, prior to the date the land came under the protection of section 522(e), the person or a predecessor in interest had all necessary property rights and had obtained, or made a good faith effort to obtain all State and Federal permits and other authorizations required to conduct surface coal mining operations.

The proposed rule may have some significant, but unquantifiable, takings implications. OSM expects that the proposed rule would not be found by a

court to constitute a *per se* taking, since that issue was litigated in 1979-80.

#### 1. No Per Se Takings

It is unlikely that the GFAP standard would be determined to constitute a taking *per se*. This standard is a modification of the All Permits standard adopted on March 13, 1979, which required that a person demonstrate valid issuance by August 3, 1977, of all necessary State and Federal permits.

The rule was challenged in *In Re: Permanent Surface Mining Regulation Litigation I*, No. 79-1144 (D.D.C. February 26, 1980), 14 Env't Rep. Cas. 1083, as effecting a compensable taking of property. While the court declined to address the constitutionality of the VER definition, it found that a person who applies for all permits, but fails to receive one or more through government delay, engenders the same investments and expectations as a person who has obtained all permits. Therefore, the court found that a good faith attempt to obtain all permits before August 3, 1977, should suffice for purposes of VER. The court remanded to the Secretary that portion of the definition that required the property owner actually to have obtained all permits necessary to mine.

#### 2. Likelihood of Compensable Takings

In evaluating taking claims for compensation concerning government regulatory actions, the courts have typically considered three factors on a fact-specific, case-by-case basis: the character of the governmental action, the economic impact of the action, and the extent to which the government action interferes with reasonable investment-backed expectations. See *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1977). Because of the scope of the proposed rule and the lack of information on specific property interests that might be affected, this assessment cannot predict or evaluate the effects of the proposed rule on property rights. Instead, the assessment will discuss generally the anticipated impacts of the proposed rule, and compare them to the impacts of the other alternatives considered.

*a. Character of the governmental action.* The purpose served and the statutory provisions implemented by this proposed rulemaking are discussed in the preamble to the proposed rule. The proposed rule substantially advances a legitimate public purpose. The legitimate public purpose is the implementation of the protections for specified areas set forth in section 522(e) of SMCRA. In that section, Congress determined that subject to certain exceptions, including valid

existing rights, surface coal mining is prohibited on specified lands because such mining is incompatible with the values for which those lands were designated as unsuitable for surface coal mining operations.

The proposed rule substantially advances that purpose by providing that the VER exception for mining in those protected areas applies only to the extent that a person can demonstrate that a good faith effort had been made to obtain all required permits for a surface coal mining operation before the area came under the protection of section 522(e). The proposed definition of VER thus advances the regulatory scheme Congress developed to prevent the harms which surface coal mining operations would cause in those areas.

OSM does not know of any other property use or actions that would significantly contribute to the problems caused by surface coal mining operations in such areas.

*b. Economic impact.* Use of the GFAP standard or the All Permits standard by 20 States (and for a number of years, by OSM) has not resulted in any compensation awards to date, nor has it resulted in any financial compensation in those instances where the application of the standard by OSM has resulted in litigation, as discussed below. Therefore, OSM believes that adoption of a GFAP standard will not result in any change in the Government's financial exposure relative to the current situation.

The property interests that could be affected by this rule are coal rights in section 522(e) areas. It cannot be determined in advance which coal rights would be affected by the eventual application of this proposed rule, or what value those rights would have. There is no data base that definitively or reliably lists all properties protected under section 522(e), or the nature or extent of individual coal rights included in such areas. Such a list would not remain current for any appreciable time because individual properties would be added or removed on a continual basis as protected features come into existence, evolve, and sometimes disappear. Even if it could be determined which coal rights are subject to section 522(e), it cannot reliably be predicted which coal an owner might seek to mine or for which a VER determination would be necessary. Because takings determinations are case-specific, OSM cannot predict all the factors necessary to determine whether a denial of VER would constitute a compensable taking.

For purposes of this assessment, the evaluation of potential economic impact

utilizes in part the analyses set out in the Draft Environmental Impact Statement (DEIS) (OSM-EIS-29, September 1995) and Draft Economic Analysis (EA) (September 1, 1995) for the proposed rule. The DEIS and EA discussions of the alternatives summarize the number of acres estimated to be disturbed under each VER alternative over a 20-year period. Because of the difficulty in predicting the actual mining in protected areas under this rule, OSM could not predict the actual impacts of the alternatives. To provide a basis for comparing the relative environmental and economic impacts of the proposed rule and the alternatives, OSM developed impact estimates by using a model that relied on specific methodologies and assumptions.

Therefore, the DEIS and EA estimates of coal acreage that could be mined under the GFAPT alternative and the other alternatives are relevant to this assessment only to the limited extent that they show the anticipated *relative* economic impacts of the proposed rule, compared to the other alternatives. Tables V-1 through V-5 of the DEIS show relative amounts of coal acreage estimated to be mined over a 20-year period under the different alternatives, as calculated using the model.

Generally speaking, these analyses assume that relatively few persons would be able to demonstrate VER under a GFAP standard; that, for some categories of lands, more persons might be able to demonstrate VER under a GFAPT standard, and that in some cases, even more persons might be able to demonstrate VER under an O&A standard. The analyses further assume that the impacts of a Bifurcated standard would be somewhere between the impacts of the GFAP standard and those of the O&A standard.

In general, the GFAP standard is more likely to limit surface coal mining operations. As a result, more takings claims would be expected to be filed under a GFAP standard. Whether courts would find that a negative VER determination under the GFAP standard constituted a compensable taking should turn on the specific property rights involved.

For purposes of evaluating the economic impact of the proposed rule, OSM surveyed historical permitting information, relevant litigation, and the DEIS and EA analyses of anticipated mining impacts in individual section 522(e) categories of lands.

*Historical data:* Currently, five States use the All Permits standard and 15 use the GFAP standard. Two States use a Takings standard, one uses only the

Needed for and Adjacent standard, and one State has no VER definition. OSM is not aware of any instance in which the States' use of these standards has resulted in a judicial determination of a compensable takings. Therefore, history does not suggest that the promulgation of a GFAP standard would result in a significant number of takings compensation awards. While the likelihood of some degree of financial exposure exists, the use of the GFAP standard or the All Permits standard by 20 States (and for a number of years, by OSM) has not resulted in any compensation awards to date, nor has it resulted in any financial compensation in those instances where the application of the standard by OSM has resulted in litigation, as discussed below. Therefore, based on the above data, OSM believes that the adoption of a GFAP standard will not result in any change in the Government's financial exposure.

*Litigation on use of a GFAP standard:* The question of whether application of the GFAP standard for VER effects a compensable taking was examined by the court in *Sunday Creek Coal Co. v. Hodel* ("Sunday Creek"), No. 88-0416, Slip op. (S.D. Ohio June 2, 1988). In *Sunday Creek*, applying Ohio's equivalent of the GFAP standard of VER, OSM denied the plaintiff's VER request. The court ruled that OSM's application of Ohio's VER standard would deprive Sunday Creek of its property rights in violation of the Fifth Amendment. The court therefore reversed OSM's negative VER determination. In another case that considered the question of VER, *Belville Mining Co. v. United States* ("Belville II"), No. C-1-89-874 (S.D. Ohio), the court simply assumed that if an applicant could demonstrate a right to strip mine, then denial of VER would constitute a "taking" of that applicant's interest. These two decisions indicate that, at least in Ohio, a Federal court would be likely to find that application of the GFAP standard for VER would effect a compensable taking.

*Summary of takings implications for section 522(e) lands:* Based upon available information, including the DEIS and EA for the proposed rule, and a survey of permits, the following takings impacts from the proposed rule are anticipated.

*Section 522(e)(1) lands:* These areas include National Park lands, National Wildlife Refuge lands, National Trails, National Wilderness Areas, Wild and Scenic Rivers and study rivers, and National Recreation Areas. OSM anticipates relatively few takings impact in (e)(1) areas because there has been a

relative dearth of VER determinations and any resulting takings claims concerning (e)(1) areas in the last 18 years.

Further, as previously discussed, the Secretary's 1988 policy concerning exercise of VER in (e)(1) areas remains in effect. That policy states that, if a person acts to exercise VER on (e)(1) lands, then, subject to appropriation, the Secretary will use available authorities to seek to acquire the rights through exchange, negotiated purchase or condemnation.

All of this suggests that there may continue to be few VER requests, little economic impact, few takings cases, and even fewer takings awards in (e)(1) areas.

*Surface mining:* As discussed in the EA, OSM anticipates that in many cases a compensable taking for denial of VER to surface mine would not be found, because the requisite property right to surface mine coal could not be demonstrated. And in many cases, if VER for surface mining were denied, underground mining would still be a reasonable remaining use of the coal, so a takings award would not be likely for denial of VER to surface mine in section 522(e)(1) areas.

*Underground mining:* The related OSM rulemaking concerning applicability of section 522(e) prohibitions to subsidence proposes that the prohibitions would not apply to subsidence. Therefore, OSM expects that any takings award for denial of VER for underground mining would be limited to coal that could not be mined from portals outside the (e)(1) area.

*Section 522(e)(2) lands:* These areas consist of Federal lands within national forests. OSM anticipates relatively few takings from VER determinations on (e)(2) lands.

*Surface mining:* OSM anticipates that no takings claims would arise out of application of the proposed VER standard in surface mining VER determinations in the western national forests and national grasslands. This is because coal owners in the western (e)(2) areas have never pursued surface mining VER determinations, but rather have obtained compatibility determinations under section 522(e)(2). OSM does anticipate that some acreage might be precluded from surface mining, and some takings claims might arise, concerning surface mining VER determinations in the eastern national forests.

For surface coal mining, OSM expects that a compensable taking will be unlikely if underground mining is an economically and technically feasible alternative (because if VER were denied

for surface mining, most owners could qualify for a compatibility exception for underground mining, so underground mining would be a reasonable remaining use). As discussed in the DEIS and EA, OSM anticipates that in a substantial number of cases (a higher proportion in the eastern coal fields), a court would find no property right to surface mine under State property laws. This is because the coal in many cases was severed from the surface rights relatively early, when surface mining was not common at the time and place of severance. As a result, under State property law, typically the coal owner would not have the necessary right to surface mine. OSM does not have information on actual dates of severance of coal rights. (There might also be mitigation of takings in those limited instances where the United States decides to purchase coal rights.)

**Underground mining:** The (e)(2) compatibility determination exception would continue to apply. Therefore, OSM would expect few takings claims from denial of VER for underground mining in national forests, because OSM assumes that virtually all underground mining could qualify for a compatibility determination. This is based in part on the fact that the Multiple-Use Sustained Yield Act and the National Forest Management Act establish multiple use as the guiding principle for management of national forest lands, and in part on the fact that, in the past, requests for compatibility determinations have never been denied. Surface operations and impacts associated with underground mining generally disturb only a relatively minimal amount of the land surface. Roads and surface facilities can generally be sited in such a way as to avoid significant impacts on other land uses such as timber production, livestock grazing, and recreation.

**Section 552(e)(3) lands:** These areas include lands where surface coal mining operations would adversely affect a publicly owned park or site on the National Register of Historic Places. OSM does not anticipate that any significant takings would occur on (e)(3) lands as a result of surface or underground mining VER determinations. Pursuant to (e)(3), jurisdictional agencies, together with the regulatory authority, may approve mining in the vicinity of protected areas, and thus waive the prohibition of (e)(3). A sampling of permit records indicated that some such mining has occurred, but no VER requests were located for such areas. Therefore, OSM anticipates that, in many cases, operations may avoid such sites or resolve any jurisdictional agency

concerns about mining impacts, so that the jurisdictional agency and the regulatory authority would jointly approve mining pursuant to (e)(3). In such cases, a VER determination would be unnecessary.

**Section 522(e)(4) lands:** These areas include lands within one hundred feet of the right of way of a public road. OSM anticipates relatively few takings claims concerning VER determinations for (e)(4) areas. Coal mines now tend to avoid urban areas (where many roads and streets are located) because of increased acquisition and public safety-related costs of mining in such areas. In the vast majority of cases, an exception of the prohibitions of (e)(4) is obtained under the waiver provision of (e)(4), rather than through a VER determination. Therefore, OSM does not expect the choice of a VER standard to have a major effect on takings claims for coal located under roads. As noted above, OSM's survey of permitting data located only a few instances of VER determinations for (e)(4) areas.

**Section 522(e)(5) lands:** These areas include lands within 300 feet of an occupied dwelling, public building, school, church, community or institutional building, or public park, or within 100 feet of a cemetery. OSM anticipates relatively little economic impact for takings purposes on (e)(5) areas other than (e)(5) public park lands.

The survey of permit files indicated that in most cases (more than 85%), mining near dwellings occurs because (e)(5) waivers are negotiated with dwelling owners. Therefore, OSM expects that VER would not be necessary and would continue not to be pursued in most such areas. Proposals to mine in areas occupied by public buildings, schools, churches, and cemeteries are typically limited. It is usually less expensive for the operator to avoid such areas, rather than to pay the costs of seeking VER, avoiding material damage where prohibited, and paying reclamation costs.

In addition, the permit survey did not disclose any instances of VER requests for mining in the areas around non-NPS public parks protected under (e)(5). However, the OSM model does anticipate that in the next 20 years substantial coal acreage in (e)(5) public parks areas might be precluded from mining as a result of underground mining VER determinations under the proposed rule, and a relatively smaller but still significant acreage might be precluded from surface mining as a result of surface mining VER determinations under the proposed rule. Some portion of those acreages could result in takings awards.

**c. Interference with reasonable investment-backed expectations.** Application of the proposed rule might result in more interference with reasonable investment-backed expectations than would occur under the other alternatives considered. Such interference could occur when coal rights holders would be unable to mine the coal because they could not demonstrate VER under the GFAP standard. However, any such interference could be limited by factors such as the following:

In many cases, holders of coal rights in section 522(e) areas will not request VER, either because the holder determines that the coal is not economically minable, or because the holder determines that it is less costly to obtain some other exception (such as a compatibility determination or a waiver) from the prohibitions of section 522(e).

In other cases, under State property law, where the mineral rights have been severed from the surface estate, OSM expects that coal holders would not hold the necessary property right to surface mine the coal, as discussed in more detail in the DEIS and EA. Such holders could have no reasonable expectation of surface mining the coal.

If the holder of coal rights purchased those rights after the land came under the protections of section 522(e), the purchaser would be deemed to be on notice of the applicability of the prohibitions of section 522(e) and would have no reasonable expectation of being allowed to mine. Thus any significant investments made under these circumstances would not likely be found to be reasonable.

If a coal holder has made no significant expenditures, the holder would probably be unable to demonstrate sufficient investment-backed expectations to support a takings claim. Further, if VER for surface mining were denied, but underground mining were possible and economical, a takings claim would similarly be difficult to sustain.

### 3. Alternatives to the Proposed Rule

As previously discussed, OSM developed and considered three alternatives to the GFAP standard for VER. They are the GFAP standard, the O&A standard, and the Bifurcated standard. The GFAP standard has the greatest potential for takings implications, and the only way to minimize the takings implications of the proposed rule is to select one of the other alternatives. However, OSM does not believe that such a selection is justified. OSM believes that the

proposed rule is the best alternative because it best protects the areas listed in section 522(e) from surface coal mining operations, as Congress intended.

*GFAPT standard:* The GFAPT standard would provide that a person could demonstrate VER by demonstrating either compliance with the GFAP standard, or that denial of VER as of the date the area became subject to section 522(e) would reasonably be expected to result in a compensable taking.

OSM would expect no takings implications from the GFAPT standard because in all cases, VER should be granted if denial would result in a compensable taking. However, as noted in the preamble to the proposed rule, when OSM proposed the GFAPT alternative in 1991, it elicited some of the strongest opposition OSM has ever received on a proposed rule. OSM received approximately 750 comments, and virtually every comment emphatically opposed the GFAPT standard. Opponents charged that the GFAPT standard would be impossibly burdensome for States to implement. Some commenters charged that it was too complex, unpredictable, and uncertain. Many commenters urged adoption of a "bright-line" standard instead. Some charged that it was not protective enough of section 522(e) areas, and others charged that it was inappropriately restrictive of mining in section 522(e) areas. Some commenters felt that State regulatory authorities had no authority under State law to apply the standard. Every category of commenter rejected the GFAPT standard as unworkable, unacceptable, or demonstrably inferior to some other alternative.

*Ownership and authority standard:* The O&A standard would provide that a person would have VER upon demonstrating ownership of the coal rights plus the property right under State law to remove the coal by the method intended. The O&A standard would require demonstrating, as of the date the land came under the protection of section 522(e), the property right to mine the coal by underground methods if VER for underground mining were sought; and by surface mining methods if VER for surface mining were sought.

OSM would not expect the O&A standard to have significant takings implications. If a person could not demonstrate the right to mine the coal by the method intended, there would be no denial of or interference with property rights for which compensation would be due under takings law, since

a person must have the property right to a particular use to be compensated for denial of that use.

Although the O&A standard would have no significant takings implications, OSM believes that it suffers from a serious shortcoming in that it would effectively eviscerate the protections afforded under section 522(e). The O&A alternative would result in a finding of VER whenever a person met the permit application requirements for property rights. The prohibitions of section 522(e) would be meaningless and without practical effect. Such a result would clearly be inconsistent with congressional intent.

*Bifurcated standard:* Under the Bifurcated standard, when the mineral and surface estates have been severed, the date of severance would determine whether the O&A or the GFAP standard for VER would be used. When the mineral estate was severed from the surface estate prior to the date the land came under the protection of section 522(e), the O&A standard would be used to determine VER. When the mineral estate was severed from the surface estate after the date the land came under the protection of section 522(e), the GFAP standard would be used.

#### 4. Estimate of Potential Financial Exposure From the Proposed Rule

The Attorney General's guidelines and the Department's supplemental guidelines for takings implications assessments provide that the assessment should set out an estimate of the financial exposure if the proposed rule were held to effect a compensable taking. Given the geographic scope of this proposed rule, however, and the lack of information on the effects on individual property rights, a meaningful estimate of financial exposure is impossible. Instead, as discussed above, this assessment discusses generally the anticipated takings impacts of the proposed rule, relative to the other alternatives considered. Federal financial exposure might arise primarily from claims concerning VER denials in the eastern United States in section 522(e)(2) areas or from the costs associated with acquisition of property rights in section 522(e)(1) areas pursuant to the Secretary's 1988 policy statement, as discussed above.

#### 5. Conclusion

The proposed rule for VER is expected to have a greater potential for takings implications than the other alternatives considered. More significant takings implications are anticipated primarily in some (e)(2)

areas (Federal lands in eastern national forests); (e)(5) areas (State and local parks); and, to a lesser extent, (e)(4) areas (public roads). In light of the Secretary's 1988 policy on exercise of VER for (e)(1) areas, takings implications are less likely in (e)(1) areas. Takings implications are also substantially less likely in (e)(3) and (5) areas. Case-by-case application of the regulation might result in takings implications, but such an analysis is beyond the scope of this assessment and cannot be made until the rule is actually applied. Thus, insufficient information is available to enable an accurate assessment of the extent to which significant takings consequences might result from adoption of this rule.

Under the standards set forth in the "Attorney General's Guidelines For the Evaluation of Risk and Avoidance and Unanticipated Takings," dated June 30, 1988, and the Supplementary Takings Guidelines of the Department of the Interior, OSM therefore concludes that this rulemaking has significant takings implications.

#### G. Executive Order 12988 (Civil Justice Reform)

This proposed rule has been reviewed under the applicable standards of section 3(b)(2) of E.O. 12988, "Civil Justice Reform" (61 FR 4729). In general, the requirements of section 3(b)(2) are covered by the preamble discussion of this rule. Individual elements of the order are addressed below:

##### 1. What is the Preemptive Effect, If Any, To Be Given to the Regulation?

This proposed rule would have the same preemptive effect as other standards adopted pursuant to SMCRA. To retain primacy, States have to adopt and apply standards for their regulatory programs that are no less effective than those set forth in OSM's rules. Any State law that is inconsistent with or that would preclude implementation of this rule would be subject to preemption under section 505 of SMCRA and its implementing regulations at 30 CFR 730.11. To the extent that this rule might ultimately result in the preemption of State law, the provisions of SMCRA are intended to preclude inconsistent State laws and regulations unless they provide for more stringent land use or environmental controls and regulations. This approach is established in SMCRA and has been judicially affirmed.

2. What Is the Effect on Existing Federal Laws or Regulations, If Any, Including All Provisions Repealed, Circumscribed, Displaced, Impaired, or Modified?

This proposed rule would modify the implementation of SMCRA as described in the preamble. It is not intended to modify the implementation of any other Federal statute. The preamble discussion specifies the Federal regulatory provisions that would be affected by this rule.

3. Does the Rule Provide a Clear and Certain Legal Standard for Affected Conduct Rather Than a General Standard, While Promoting Simplification and Burden Reduction?

As discussed in the preamble, the standards proposed in this rule are as clear and certain as practicable, given the complexity of the topics covered, the mandates of SMCRA and the legislative history of section 522(e) of SMCRA.

4. What is the Retroactive Effect, if Any, To Be Given to This Regulation?

This proposed rule is not intended to have retroactive effect.

5. Are Administrative Proceedings Required Before Parties May File Suit in Court? Which Proceedings Apply? Is the Exhaustion of Administrative Remedies Required?

Since this rule is only in proposed form, these questions are not applicable. However, if the rule is adopted as proposed, the following answers would apply:

No administrative proceedings are required before parties may file suit in court challenging the provisions of this rule under section 526(a) of SMCRA, 30 U.S.C. 1276(a). However, administrative procedures must be exhausted prior to any judicial challenge to the application of this rule. In situations involving OSM application of this rule, applicable administrative procedures may be found at 30 CFR 775.11 and 43 CFR part 4. In situations involving State regulatory authority application of provisions analogous to those contained in this rule, applicable administrative procedures are set forth in each State regulatory program.

6. Does the Rule Define Key Terms, Either Explicitly or By Reference to Other Regulations or Statutes That Explicitly Define Those Items?

This proposed rule defines the term "valid existing rights." Other terms important to the understanding of this rule are set forth in 30 CFR 700.5, 701.5 and 761.5.

7. Does the Rule Address Other Important Issues Affecting Clarity and General Draftsmanship of Regulations Set Forth by the Attorney General, With the Concurrence of the Director of the Office of Management and Budget, That are Determined to be in Accordance With the Purposes of the Executive Order?

The Attorney General and the Director of the Office of Management and Budget have not issued any guidance on this matter.

Author: The principal author of this proposed rule is Dennis G. Rice, Rules and Legislation, Office of Surface Mining Reclamation and Enforcement, 1951 Constitution Avenue, NW., Washington, DC 20240; Telephone (202) 208-2829.

#### List of Subjects

##### 30 CFR Part 740

Public lands, Mineral resources, Reporting and recordkeeping requirements, Surety bonds, Surface mining, Underground mining.

##### 30 CFR Part 745

Intergovernmental relations, Public lands, Mineral resources, Reporting and recordkeeping requirements, Surface mining, Underground mining.

##### 30 CFR Part 761

Historic preservation, National forests, National parks, National trails system, National wild and scenic rivers system, Surface mining, Underground mining, Wilderness areas, Wildlife refuges.

##### 30 CFR Part 772

Reporting and recordkeeping requirements, Surface mining, Underground mining.

Dated: April 30, 1996.

Bob Armstrong,

Assistant Secretary, Land and Minerals Management.

For the reasons set forth in the preamble, the Department is proposing to amend 30 CFR Parts 740, 745, 761, and 772 as set forth below:

#### **PART 740—GENERAL REQUIREMENTS FOR SURFACE COAL MINING AND RECLAMATION OPERATIONS ON FEDERAL LANDS**

1. The authority citation for Part 740 continues to read as follows:

Authority: 30 U.S.C. 1201 *et seq.* and 30 U.S.C. 181 *et seq.*

2. In § 740.4, paragraphs (a)(4) and (a)(5) are revised to read as follows:

##### **§ 740.4 Responsibilities.**

(a) \* \* \*

(4) Determining whether a person possesses valid existing rights to conduct surface coal mining operations on Federal lands within the areas specified in paragraphs (a)(1) and (a)(2) of § 761.11 of this chapter.

(5) Determining whether there are significant recreational, timber, economic, or other values that may be incompatible with surface coal mining operations on any Federal lands within the boundaries of any national forest under § 761.11(a)(2) of this chapter.

3. Section 740.10 is revised to read as follows:

##### **§ 740.10 Information collection.**

(a) In accordance with 44 U.S.C. 3501 *et seq.*, the Office of Management and Budget (OMB) has approved the information collection requirements of this part. The OMB clearance number is 1029-0027. This information is needed to implement section 523 of the Act, which governs surface coal mining operations on Federal lands. Persons intending to conduct such operations must respond to obtain a benefit.

(b) OSM estimates that the public reporting burden for this part will average 26 hours per respondent, including time spent reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of these information collection requirements, including suggestions for reducing the burden, to the Office of Surface Mining Reclamation and Enforcement, Information Collection Clearance Officer, 1951 Constitution Avenue, N.W., Washington, DC 20240; and the Office of Management and Budget, Office of Information and Regulatory Affairs, Attention: Interior Desk Officer, 725 17th Street, NW, Washington, DC 20503. Please refer to OMB Control Number 1029-0027 in any correspondence.

4. In § 740.11, paragraph (a) introductory text is revised and paragraph (g) is added to read as follows:

##### **§ 740.11 Applicability.**

(a) Except as provided in paragraph (g) of this section, upon the approval of a State regulatory program under part 732 of this chapter or promulgation of a Federal regulatory program for a State pursuant to part 736 of this chapter, that program and this subchapter shall apply to:

\* \* \* \* \*

(g) Regardless of land ownership, the agency making the determination, or

State regulatory program provisions, the definition of valid existing rights in § 761.5 of this chapter applies to all decisions on requests for a determination of valid existing rights to conduct surface coal mining operations on lands within the boundaries of the areas specified in paragraphs (a)(1) and (a)(2) of § 761.11 of this chapter.

#### **PART 745—STATE-FEDERAL COOPERATIVE AGREEMENTS**

5. The authority citation for Part 745 continues to read as follows:

Authority: 30 U.S.C. 1201 *et seq.* and 30 U.S.C. 181 *et seq.*

6. Section 745.10 is revised to read as follows:

##### **§ 745.10 Information collection.**

(a) In accordance with 44 U.S.C. 3501 *et seq.*, the Office of Management and Budget (OMB) has approved the information collection requirements of this part. The OMB clearance number is 1029-0092. This information is needed to implement section 523(c) of the Act, which allows States to regulate surface coal mining operations on Federal lands under certain conditions. States that desire to enter into cooperative agreements to do so must respond to obtain a benefit.

(b) OSM estimates that the public reporting burden for this part will average 1,364 hours per respondent, including time spent reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of these information collection requirements, including suggestions for reducing the burden, to the Office of Surface Mining Reclamation and Enforcement, Information Collection Clearance Officer, 1951 Constitution Avenue, N.W., Washington, DC 20240; and the Office of Management and Budget, Office of Information and Regulatory Affairs, Attention: Interior Desk Officer, 725 17th Street, NW, Washington, DC 20503. Please refer to OMB Control Number 1029-0092 in any correspondence.

7. In § 745.13, paragraphs (o) and (p) are revised to read as follows:

##### **§ 745.13 Authority reserved by the Secretary.**

\* \* \* \* \*

(o) Determine whether a person possesses valid existing rights to conduct surface coal mining operations on Federal lands within the areas

specified in paragraphs (a)(1) and (a)(2) of § 761.11 of this chapter; or

(p) Determine whether there are significant recreational, timber, economic, or other values that may be incompatible with surface coal mining operations on any Federal lands within the boundaries of any national forest, as specified in § 761.11(a)(2) of this chapter.

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

8. The authority citation for Part 761 continues to read as follows:

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

9. Section 761.5 is amended by removing the definition of "surface coal mining operations which exist on the date of enactment" and revising the definition of "valid existing rights" to read as follows:

##### **§ 761.5 Definitions.**

\* \* \* \* \*

*Valid existing rights* means the conditions under which a person may, subject to the requirements of the Act and the pertinent regulatory program, conduct surface coal mining operations on lands where 30 U.S.C. 1272(e) and § 761.11 would otherwise prohibit such operations.

(a) Except as provided in paragraph (b) of this definition, a person claiming valid existing rights must demonstrate that a legally binding conveyance, lease, deed, contract, or other document vests that person with the right, as of the date the land came under the protection of 30 U.S.C. 1272(e) and § 761.11 of this chapter, to conduct the type of surface coal mining operations intended. Interpretation of the documents relied upon to establish the rights to which this paragraph applies must be based upon applicable State statutory or case law concerning interpretation of documents of this nature or, if no applicable State law exists, upon custom and generally accepted usage at the time and place that the documents came into existence. In addition, except as provided in paragraph (b) of this definition, any person claiming valid existing rights must demonstrate that one of the following conditions exists:

(1) All State and Federal permits and other authorizations required to conduct surface coal mining operations had been obtained, or a good faith effort to obtain all necessary permits and authorizations had been made, before the date the land came under the protection of § 761.11; or

(2) The land is needed for and immediately adjacent to a surface coal mining operation for which all State and

Federal permits and other authorizations required to conduct surface coal mining operations had been obtained, or a good faith effort to obtain all necessary permits and authorizations had been made, before the date the land came under the protection of § 761.11.

(b) A person claiming valid existing rights to use or construct an access or haul road, for use as part of surface coal mining operations, across the surface of lands protected by § 761.11 must demonstrate one of the following:

(1) The road was in existence on the date the land upon which it is located came under the protection of § 761.11;

(2) A right of way or easement for the road was properly recorded as of the date the land came under the protection of § 761.11;

(3) The regulatory authority had issued a permit for the access or haul road on the land in question as of the date the land came under the protection of § 761.11; or

(4) Valid existing rights exist under paragraph (a) of this definition.

10. Section 761.10 is added to read as follows:

##### **§ 761.10 Information collection.**

(a) In accordance with 44 U.S.C. 3501 *et seq.*, the Officer of Management and Budget (OMB) has approved the information collection requirements of this part. The OMB clearance number is 1029-0102. The regulatory authority or other responsible agency will use this information to determine whether a person has valid existing rights or qualifies for one of the other waivers or exemptions from the general prohibition on conducting surface coal mining operations in the areas listed in section 522(e) of the Act. Persons seeking to conduct surface coal mining operations on these lands must respond to obtain a benefit in accordance with 30 U.S.C. 1272(e).

(b) OSM estimates that the public reporting and recordkeeping burden for this part will average 2 hours per response under § 761.12 and 14 hours per response under § 761.13, including time spent reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. The burden for § 761.13 includes 6 hours for the person seeking the determination and 8 hours for the agency processing the request. Send comments regarding this burden estimate or any other aspect of these information collection and recordkeeping requirements, including suggestions for reducing the burden, to the Office of Surface Mining Reclamation and Enforcement,

Information Collection Clearance Officer, 1951 Constitution Avenue, N.W., Washington, DC 20240; and the Office of Management and Budget, Office of Information and Regulatory Affairs, Attention: Interior Desk Officer, 725 17th Street, NW, Washington, DC 20503. Please refer to OMB Control Number 1029-0102 in any correspondence.

11. In § 761.11, the section title is revised, paragraphs (a) through (g) are redesignated as paragraphs (a)(1) through (a)(7) and revised, the introductory text is redesignated as paragraph (a) introductory text and revised, paragraph (h) is removed, and a new paragraph (b) is added to read as follows:

**§ 761.11 Areas where surface coal mining operations are prohibited or limited.**

(a) Unless a person has valid existing rights as determined in accordance with § 761.13, no surface coal mining operation except those identified in paragraph (b) of this section may be conducted after August 3, 1977:

(1) On any lands within the boundaries of:

- (i) The National Park System;
- (ii) The National Wildlife Refuge System;
- (iii) The National System of Trails;
- (iv) The National Wilderness

Preservation System;

(v) The Wild and Scenic Rivers System, including study rivers designated under § 5(a) of the Wild and Scenic Rivers Act (16 U.S.C. 1276(a)) or study rivers or study river corridors established in any guidelines promulgated pursuant to that Act; or

(vi) National Recreation Areas designated by Act of Congress.

(2) On any Federal lands within the boundaries of any national forest, except that operations on these lands (excluding lands within the boundaries of the Custer National Forest) may be permitted if the Secretary finds that there are no significant recreational, timber, economic, or other values that may be incompatible with surface coal mining operations; and:

- (i) Any surface operations and impacts will be incident to an underground coal mine; or
- (ii) With respect to lands that do not have significant forest cover within national forests west of the 100th meridian, the Secretary of Agriculture has determined that surface mining is in compliance with the Act, the Multiple-Use Sustained Yield Act of 1960 (16 U.S.C. 528-531), the Federal Coal Leasing Amendments Act of 1975 (30 U.S.C. 181 *et seq.*), and the National Forest Management Act of 1976 (16 U.S.C. 1600 *et seq.*);

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

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

- (i) Where a mine access or haul road joins this right-of-way line, or
- (ii) When the regulatory authority (or the appropriate public road authority designated by the regulatory authority) allows the public road to be relocated or closed, or the area within the protected zone to be affected by the surface coal mining operation, after:

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

(B) Finding in writing that the interests of the affected public and landowners will be protected;

(5) Within 300 feet, measured horizontally, of any occupied dwelling, except when:

(i) The owner of the dwelling has provided a written waiver consenting to surface coal mining operations within the protected zone; or

(ii) The part of the operation which is located closer than 300 feet to the dwelling is an access or haul road that connects with an existing public road on the side of the public road opposite the dwelling;

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

(7) Within 100 feet, measured horizontally, of a cemetery, unless the cemetery is relocated in accordance with State law.

(b) The prohibitions of paragraph (a) of this section do not apply to surface coal mining operations for which a valid permit, issued pursuant to Subchapter G of this chapter or an approved State regulatory program, existed when the land came under the protection of paragraph (a) of this section or section 522(e) of the Act (30 U.S.C. 1272(e)), or to other validly authorized operations in existence on that date. This exemption applies only to lands upon which the permittee or operator had the right to enter and conduct the permitted or authorized surface coal mining operations as of the date the land comes under the protection of this section.

12. Section 761.12 is amended by removing paragraph (h) and revising the section title, paragraphs (a) through (c), and the introductory text of paragraph (d) to read as follows:

**§ 761.12 Coordination with permitting process; waiver requirements and procedures.**

(a) When the regulatory authority receives an administratively complete application for a permit for a surface coal mining operation or an administratively complete application for revision of the boundaries of a surface coal mining operation permit, the regulatory authority must review the application to determine whether the proposed surface coal mining operation would be located on any lands protected under § 761.11(a). The regulatory authority must reject any portion of the application that would locate surface coal mining operations on those lands unless the applicant:

(1) Qualifies for the existing operation exemption under § 761.11(b);

(2) Obtains a waiver or exception from the prohibitions of § 761.11(a) in accordance with paragraphs (c) through (f) of this section; or

(3) Has valid existing rights as determined in accordance with § 761.13.

(b) If the regulatory authority has difficulty determining whether an application reviewed under paragraph (a) of this section includes land within an area specified in § 761.11(a)(1) or within the specified distance from a structure or feature listed in paragraph (a)(6) or (a)(7) of § 761.11, the regulatory authority must request that the Federal, State, or local governmental agency with jurisdiction over the protected land, structure, or feature verify the location.

(1) The request for location verification must include:

(i) Relevant portions of the permit application;

(ii) A notice that any response provided more than 30 days after receipt of the request for location verification will not necessarily be considered during the application review process; and

(iii) A notice that, upon request, the agency will receive an additional 30 days to respond.

(2) If the agency does not respond in a timely manner, the regulatory authority may make the necessary determination based on available information.

(c) A person who intends to conduct surface coal mining operations on Federal lands within the boundaries of a national forest under the compatibility provisions of § 761.11(a)(2) must submit to OSM a request that the Secretary make the findings required by § 761.11(a)(2). If a person submits a request before preparing and submitting a permit application, the request must include sufficient information about the nature and location of the proposed

operation for the Secretary to evaluate the request and make adequately documented findings. The regulatory authority may not issue a permit for the proposed operation or approve a proposed boundary revision unless these findings have been made.

(d) When a person proposes to relocate or close a public road, or to conduct surface coal mining operations (other than mine access and haul roads as provided in § 761.11(a)(4)(i)) within 100 feet, measured horizontally, of the outside right-of-way line of a public road, the regulatory authority or public road authority designated by the regulatory authority must:

\* \* \* \* \*

13. Section 761.13 is added to read as follows:

**§ 761.13 Submission and processing of requests for valid existing rights determinations.**

(a) *Agency responsible for making valid existing rights determinations.*

(1) Except as provided in paragraph (a)(2) of this section, the regulatory authority will make valid existing rights determinations for all lands listed in § 761.11(a).

(i) In making these determinations, the regulatory authority must use the definition of valid existing rights in § 761.5 for land within the boundaries of the areas specified in § 761.11(a)(1).

(ii) For all other lands, the regulatory authority must use the definition of valid existing rights in the applicable regulatory program.

(2) OSM will make all determinations as to whether a person has valid existing rights to conduct surface coal mining operations on Federal lands within the areas specified in paragraphs (a)(1) and (a)(2) of § 761.11. In making these determinations, OSM will use the definition of valid existing rights in § 761.5.

(b) *What persons requesting valid existing rights determinations must submit.* A person who, on the basis of valid existing rights, intends to conduct surface coal mining operations on lands listed in § 761.11(a) must submit a request to the appropriate agency under paragraph (a) of this section. The request may be submitted with or without an application for a permit or boundary revision for those lands.

(1) If the request is based on one of the standards for access and haul roads in paragraphs (b)(1) through (b)(3) of the definition of valid existing rights in § 761.5, the requester must submit satisfactory documentation that:

(i) The road existed on the date that the land upon which it is located came under the protection of § 761.11;

(ii) A right of way or easement for the road was properly recorded as of the date the land came under the protection of § 761.11; or

(iii) The regulatory authority had issued a permit for an access or haul road in that location as of the date the land came under the protection of § 761.11.

(2) If the request is based on the standards in paragraph (a) of the definition of valid existing rights in § 761.5, the requester must submit:

(i) A legal description of the land to which the request pertains;

(ii) Complete documentation of the character and extent of the requester's current interests in the surface and mineral estates of the land to which the request pertains;

(iii) A complete chain of title for the surface and mineral estates of the land to which the request pertains;

(iv) A description of the nature and effect of each title instrument, including any provisions pertaining to the method of mining or mining-related surface disturbances and facilities;

(v) Complete documentation of the nature and ownership of all property rights for the surface and mineral estates of the land to which the request pertains as of the date the land came under the protection of § 761.11;

(vi) If the coal interests have been severed from other property interests and the surface estate is held by a Federal agency, a title opinion or other official statement from the Federal agency confirming that the requester has a property right to conduct the type of surface coal mining operations intended;

(vii) A description of the type and extent of surface coal mining operations planned, including the intended method of mining and any mining-related surface facilities, and an explanation of how the planned operations are consistent with State property law;

(viii) If the request is based on the standard in paragraph (a)(2) of the definition of valid existing rights in § 761.5, an explanation of why and how the coal is needed for the operation; and

(ix) If the request is based on the standard in paragraph (a)(1) of the definition of valid existing rights in § 761.5, the application dates and identification numbers and, if applicable, approval and issuance dates and identification numbers for any licenses, permits, and authorizations for surface coal mining operations on the land to which the request pertains. This requirement applies only to licenses, permits, and authorizations that the requester or predecessor in interest held

or had applied for as of the date the land came under the protection of § 761.11.

(c) *Notice and comment requirements and procedures.*

(1) When an agency receives a request for a determination of valid existing rights, the agency must publish a notice in a newspaper of general circulation in the county in which the land is located inviting comment on whether the request should be approved. If the request involves Federal lands within the boundaries of an area listed in paragraph (a)(1) or (a)(2) of § 761.11, OSM will publish a similar notice in the Federal Register. The notice must include:

(i) The applicable standard(s) under the definition of valid existing rights in § 761.5;

(ii) The location of the land to which the request pertains;

(iii) The name and address of the agency office to which comments should be addressed;

(iv) The closing date of the comment period, which must be sufficient to afford interested persons a reasonable opportunity to prepare and submit comments;

(v) A description of the property rights claimed and the basis for the claim;

(vi) A description of the type of surface coal mining operations planned; and

(vii) A description of the procedures the agency will follow in processing the request.

(2) The agency must provide a copy of the notice to the owner of the structure or feature causing the land to come under the protection of § 761.11(a).

(3) If the land to which the request pertains involves severed estates or divided interests, the agency must make a reasonable effort to provide a copy of the notice to all owners of interest, both surface and mineral.

(4) When a request pertains to land within the boundaries of an area protected under § 761.11(a)(1) or 30 U.S.C. 1272(e)(1), the agency responsible for the VER determination must notify the agency with jurisdiction over the protected land and provide that agency 30 days (with an option for a 30-day extension upon request) from receipt of the notification to comment. If the agency with jurisdiction over the land fails to respond in a timely manner, the agency responsible for the VER determination may make the determination in accordance with paragraph (d) of this section.

(d) *How a decision will be made.*

(1) The agency responsible for making the determination of valid existing

rights must review the materials submitted under paragraph (b) of this section, comments received under paragraph (c) of this section, and any other relevant information to determine whether the record supports a decision in favor of the requester. If not, the agency must notify the requester in writing, explaining the inadequacy of the record and requesting submittal, within a reasonable time, of any additional information the agency deems necessary to remedy the inadequacy.

(2) Upon receipt of the requested information or other explanation, the responsible agency must determine whether the requester has demonstrated valid existing rights.

(i) The decision document must explain how the requester has or has not satisfied all applicable elements of the definition of valid existing rights in § 761.5. It must set forth the relevant findings of fact and conclusions and specify the reasons for the conclusions.

(ii) If the underlying property rights are in dispute, the agency must defer a decision until the legal dispute is resolved.

(3) After making a decision, the agency must:

(i) Provide a copy of the decision to the requester and the owner of, or agency with jurisdiction over, the area or feature that caused the land to come under the protection of § 761.11(a); and

(ii) Publish notice of the decision in a newspaper of general circulation in the county in which the land is located. If the request includes Federal lands within an area listed in paragraph (a)(1) or (a)(2) of § 761.11, OSM will publish notice of the decision in the Federal Register.

(e) *Administrative and judicial review.* A determination under this section that a person has or does not have valid existing rights is subject to administrative and judicial review under §§ 775.11 and 775.13 of this chapter.

**PART 772—REQUIREMENTS FOR COAL EXPLORATION**

14. The authority citation for Part 772 is revised to read as follows:

Authority: 30 U.S.C. 1201 *et seq.* and 16 U.S.C. 470 *et seq.*

15. Section 772.10 is revised to read as follows:

**§ 772.10 Information collection.**

(a) In accordance with 44 U.S.C. 3501 *et seq.*, the Office of Management and Budget (OMB) has approved the information collection and

recordkeeping requirements of this part. The OMB clearance number is 1029–0033. OSM and State regulatory authorities use the information collected under this part to maintain knowledge of coal exploration activities, evaluate the need for an exploration permit, and ensure that exploration activities comply with the environmental protection, public participation, and reclamation requirements of parts 772 and 815 of this chapter and section 512 of SMCRA (30 U.S.C. 1262). Persons seeking to conduct coal exploration must respond to obtain a benefit.

(b) OSM estimates that the combined public reporting and recordkeeping burden for all respondents under this part will average 11 hours per notice or application submitted, including time spent reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Specifically, OSM estimates that preparation of a notice of intent to explore under § 772.11 will require an average of 10 hours, preparation and processing of an application for coal exploration under § 772.12 will require an average of 103 hours, compliance with § 772.14 will require an average of 18 hours, and recordkeeping and information collection under § 772.15 will require an average of approximately 1 hour per response. Send comments regarding this burden estimate or any other aspect of these information collection requirements, including suggestions for reducing the burden, to the Office of Surface Mining Reclamation and Enforcement, Information Collection Clearance Officer, 1951 Constitution Avenue, N.W., Washington, DC 20240; and the Office of Management and Budget, Office of Information and Regulatory Affairs, Attention: Interior Desk Officer, 725 17th Street, NW, Washington, DC 20503. Please refer to OMB Control Number 1029–0033 in any correspondence.

16. Section 772.12 is amended by revising the section title and paragraphs (d)(2)(ii) and (d)(2)(iii) and adding paragraphs (b)(14) and (d)(2)(iv) to read as follows:

**§ 772.12 Permit requirements for exploration that will remove more than 250 tons of coal or that will occur on lands designated as unsuitable for surface coal mining operations.**

\* \* \* \* \*

(b) \* \* \*

(14) For the lands described in § 761.11(a) of this chapter, a

demonstration that one of the following conditions exists:

(i) The exploration activities will not substantially disturb these lands.

(ii) The owner of the coal possesses valid existing rights as that term is defined in § 761.5 of this chapter. The demonstration of valid existing rights must be made in accordance with the requirements and procedures of § 761.13 of this chapter. The demonstration and request for a determination of valid existing rights may be submitted in advance of the remainder of the coal exploration permit application. When the agency makes a determination in the absence of a permit application, the determination is subject to administrative and judicial review under § 761.13(e) of this chapter.

(iii) The exploration is needed for mineral valuation purposes or authorized by judicial order.

(iv) The applicant has obtained a waiver or exception in accordance with paragraphs (c) through (f) of § 761.12 of this chapter.

\* \* \* \* \*

(d) \* \* \*

(2) \* \* \*

(ii) Not jeopardize the continued existence of an endangered or threatened species listed pursuant to section 4 of the Endangered Species Act of 1973 (16 U.S.C. 1533) or result in the destruction or adverse modification of critical habitat of those species;

(iii) Not adversely affect any cultural or historical resources listed on the National Register of Historic Places pursuant to the National Historic Preservation Act, as amended (16 U.S.C. 470 *et seq.* and Pub. L. 102–575), unless the proposed exploration has been approved by both the regulatory authority and the agency with jurisdiction over the resources to be affected; and

(iv) Not substantially disturb any lands listed in § 761.11(a) of this chapter unless the applicant has:

(A) Obtained a waiver or exception in accordance with paragraphs (c) through (f) of § 761.12 of this chapter;

(B) Demonstrated the existence of valid existing rights in accordance with § 761.13 of this chapter; or

(C) Demonstrated that the disturbance is needed for mineral valuation purposes or is authorized by judicial order.

\* \* \* \* \*