

**DEPARTMENT OF THE INTERIOR****Office of Surface Mining Reclamation and Enforcement**

**30 CFR Parts 740, 745, 761, 762, 772, 773, 778, 780, and 784**

**RIN 1029-AB42**

**Valid Existing Rights**

**AGENCY:** Office of Surface Mining Reclamation and Enforcement (OSM), Interior.

**ACTION:** Final rule and record of decision.

**SUMMARY:** This rule redefines the circumstances under which a person has valid existing rights (VER) to conduct surface coal mining operations on lands listed in section 522(e) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA or "the Act"). Section 522(e) prohibits or restricts surface coal mining operations on certain lands, including, among other areas, units of the National Park System, Federal lands in national forests, and buffer zones for public parks, public roads, occupied dwellings, and cemeteries. The rule also establishes requirements for submitting and processing requests for VER determinations for those lands. Finally, the rule modifies the exception for existing operations; revises the procedures for compatibility findings for surface coal mining operations on Federal lands in national forests; and establishes requirements governing coal exploration activities on the lands listed in section 522(e) of SMCRA. Adoption of this rule removes all existing suspensions affecting 30 CFR part 761.

**EFFECTIVE DATE:** January 18, 2000.

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

**SUPPLEMENTARY INFORMATION:****Table of Contents**

- I. How did we obtain and consider public input?
- II. What general comments did we receive on the proposed rule?
- III. How does the final rule differ stylistically from the proposed rule?
- IV. In what context does the term VER appear in SMCRA?
- V. What is the legislative history of the VER provision in section 522(e)?
- VI. How did we previously define or attempt to define VER?
- VII. Section 761.5: How are we defining VER in this final rule?
  - A. Introductory Language.
  - B. Paragraph (a): Property Rights Demonstration.
  - C. Paragraph (b): Primary Standards for VER.
    1. What alternatives did we consider?
    2. Why did we select the good faith/all permits standard?
    3. What comments did we receive regarding takings issues concerning the good faith/all permits standard?
    4. Why did we reject the takings standard?
    5. Why did we reject the ownership and authority standard?
  - D. Paragraph (b)(2): "Needed for and Adjacent" Standard.
    1. What is the history of this standard?
    2. How did we propose to revise this standard in 1997?
    3. How does the standard in the final rule differ from the one that we proposed in 1997?
    4. What comments did we receive on the proposed standard and how did we dispose of them?
  - E. Paragraph (c): VER Standards for Roads.
  - F. How does the definition address VER for lands that come under the protection of section 522(e) after August 3, 1977?
- VIII. How does our definition of VER compare with VER under other Federal statutes?
- IX. Are VER transferable?
- X. Sections 740.4, 745.13, and 761.14(a): Who is responsible for VER determinations for non-Federal lands within section 522(e)(1) areas?
  - A. Statutory Background and Rulemaking History.
  - B. What alternatives did we consider?
  - C. Which alternative are we adopting?
- XI. Sections 740.11 and 761.14(a): Which VER definition (State or Federal) applies to lands listed in section 522(e)(1) and (e)(2) of the Act?
- XII. What other changes are we making in the Federal lands program regulations in 30 CFR Parts 740 and 745?
- XIII. Why are we removing the definition of "surface coal mining operations which exist on the date of enactment" from 30 CFR 761.5?
- XIV. Why are we adding definitions of "we" and "you" and their grammatical forms to 30 CFR 761.5?
- XV. How have we revised 30 CFR 761.11, which is the regulatory counterpart to the prohibitions and limitations of section 522(e) of the Act?
- XVI. Section 761.12: Which operations qualify for the exception for existing operations?
- XVII. Why are we removing the prohibitions in former 30 CFR 761.11(h)?
- XVIII. Why did we reorganize former 30 CFR 761.12 as §§ 761.13 through 761.17 and 762.14?
- XIX. Section 761.13: How have we revised the procedural requirements for compatibility findings for surface coal mining operations on Federal lands in national forests?
- XX. How do 30 CFR 761.14 and 761.15, which concern waivers for buffer zones for public roads and occupied dwellings, differ from former 30 CFR 761.12(d) and (e)?
- XXI. Section 761.16: What are the submission requirements for requests for VER determinations and how will these requests be processed?
  - A. In what major ways does the final rule differ from the proposed rule?
    1. Role of Federal Surface Management Agencies.
    2. Handling of Situations Involving Property Rights Disputes.
    3. Action on Incomplete Requests.
    4. Administrative Completeness Reviews.
    5. Notification Requirements for Lands Listed in 30 CFR 761.11(a).
  - B. Paragraph (a): To which agency must you submit a request for a VER determination?
  - C. May a request for a VER determination be submitted separately from a permit application?
  - D. Paragraph (b): What information must you include in a request for a VER determination?
  - E. Paragraph (c): How will the agency initially review my request?
  - F. Paragraph (d): What notice and comment requirements apply to the VER determination process?
  - G. Paragraph (e): How will a decision be made?
  - H. Paragraph (f): How may a VER determination be appealed?
  - I. Paragraph (g): To what extent and in what manner must records related to the VER determination process be made available to the public?
  - J. May the regulatory authority reconsider VER determinations during review of a subsequent permit application?
- XXII. How does new 30 CFR 761.17, which concerns regulatory authority obligations at the time of permit application review, differ from its predecessor provisions in former 30 CFR 761.12?
- XXIII. How and why are we revising Part 762, which contains criteria for the designation of lands as unsuitable for surface coal mining operations?
- XXIV. Section 772.12: What are the requirements for coal exploration on lands designated unsuitable for surface coal mining operations?
- XXV. Technical Amendments to Parts 773, 778, 780, and 784.
- XXVI. What effect will this rule have in Federal program States and on Indian lands?
- XXVII. How will this rule affect State programs?
- XXVIII. How does this rule impact information collection requirements?
- XXIX. Procedural Matters.
  - A. Executive Order 12866: Regulatory Planning and Review.
  - B. Regulatory Flexibility Act.

- C. Small Business Regulatory Enforcement Fairness Act.
- D. Unfunded Mandates Reform Act of 1995.
- E. Executive Order 12630: Takings.
- F. Executive Order 13132: Federalism.
- G. Executive Order 12988: Civil Justice Reform.
- H. Paperwork Reduction Act.
- I. National Environmental Policy Act of 1969 and Record of Decision.

### I. How Did We Obtain and Consider Public Input?

This final rule is based on a proposed rule that we published for public review and comment on January 31, 1997 (62 FR 4836). We also posted the proposed rule and associated documents on our home page on the Internet. In response to requests from the public, we held public hearings on the proposed rule in Athens, Ohio; Billings, Montana; Washington, Pennsylvania; and Whitesburg, Kentucky. The comment period was originally scheduled to close June 2, 1997, but, in response to several requests, we extended the deadline until August 1, 1997. See 62 FR 29314, May 30, 1997.

In addition to the testimony offered at the four hearings, we received approximately 75 written comments specific to the proposed rule: 31 from private citizens, 28 from companies and associations affiliated with the mining industry, 4 from environmental organizations, and 11 from Federal, State, and local governmental entities and associations. In developing the final rule, we considered all comments that were germane to the proposed rule. In this preamble, we discuss how we revised the proposed rule in response to comments. We also explain the disposition of those comments that did not result in a change in the proposed rule.

### II. What General Comments Did We Receive on the Proposed Rule?

Many comments from private citizens expressed general opposition to mining on public lands, especially in national parks and national forests. Since SMCRA allows mining on these lands under certain circumstances, we have no authority to adopt a regulation that would impose an absolute prohibition on mining on these lands.

One commenter representing several States disputed the need for any rulemaking, arguing that the present system is working well and is consistent with the principles of State primacy under SMCRA. However, some commenters representing individual State regulatory authorities expressed support for the clarity and additional specificity that the rule would provide.

Furthermore, two Federal district courts have ordered OSM to take steps to promulgate a final rule defining VER. *Belville Mining Co. v. Lujan*, No. C-1-89-790 (S.D. Ohio 1991) and *Helmick v. U.S.*, No. 95-0115 (N.D. W.Va. 1997).

Finally, we believe that a Federal definition is necessary to establish a reference point for State definitions and to ensure that the lands listed in section 522(e) of the Act are protected as Congress intended. The good faith/all permits standard that we are adopting as part of the VER definition in this final rule will cause relatively little disruption to existing State regulatory programs. Twenty of the 24 States with approved regulatory programs under section 503 of the Act already rely upon a good faith/all permits or all permits standard for VER.

One commenter requested that the final rule and related documents consistently use the term "type" to refer to the distinction between surface and underground mining. Similarly, the commenter stated that the term "method" should refer only to the specific techniques employed for either surface or underground mining operations; e.g., area, contour or mountaintop removal for surface mining operations and longwall or room and pillar for underground mining operations. We have endeavored to apply these terms in the manner recommended, although "type" may also mean "method," depending upon context, deed nuances, and the vagaries of State property law.

### III. How Does the Final Rule Differ Stylistically From the Proposed Rule?

On June 1, 1998, President Clinton issued an Executive Memorandum requiring the use of plain language in all proposed and final rulemaking documents published after January 1, 1999. The memorandum provides the following description of plain language:

Plain language requirements vary from one document to another, depending on the intended audience. Plain language documents have logical organization, easy-to-read design features, and use:

- Common, everyday words, except for necessary technical terms;
- "you" and other pronouns;
- the active voice, and
- short sentences.

The President's memorandum includes an exception for final rules based upon proposed rules published before January 1, 1999. While that exception applies to this final rule, we have incorporated some plain language principles in this rule, as required by a memorandum dated June 10, 1998, from the Office of the Secretary of the

Department of the Interior. Thus, the final rule and preamble use the pronouns "we," "us," and "our" to refer to OSM, and the pronouns "you" and "your" to refer to a person who claims or seeks to obtain an exception or waiver authorized under 30 CFR 761.11 or section 522(e) of the Act. In all other cases, we specifically identify the person or agency to which the rule or preamble refers. Other changes include avoidance of the word "shall." Instead, the final rule and preamble use "must" to indicate an obligation, "will" to identify a future event, and "may not" to convey a prohibition.

We recognize that more could be done to comply more fully with plain language principles. However, further changes would require a wholesale revision of the entire regulation, which would delay considerably publication of a final rule. For this reason, we have deferred a more extensive plain language rewrite.

### IV. In What Context Does the Term VER Appear in SMCRA?

As summarized below, section 522(e) of SMCRA, 30 U.S.C. 1272(e), prohibits or restricts surface coal mining operations on certain lands after the date of SMCRA's enactment (August 3, 1977). However, the Act specifies that these prohibitions and restrictions are "subject to valid existing rights." It further provides that these prohibitions and restrictions do not apply to operations in existence on the date of enactment.

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) prohibits surface coal mining operations on Federal lands within the boundaries of any national forest unless the Secretary finds that there are no significant recreational, timber, economic, or other resources that may be incompatible with such operations. If the Secretary makes this finding, the Act allows the approval of surface operations and impacts incident to an underground mine on any national forest lands. In addition, if the Secretary makes this finding, the Act allows approval of any type of surface coal mining operations on national forest lands west of the 100th meridian (except the Custer National Forest) that lack significant forest cover, provided

the proposed operations comply with certain statutes.

Section 522(e)(3) prohibits surface coal mining operations that would adversely impact publicly owned parks and properties listed on the National Register of Historic Places. However, this paragraph of the Act provides a waiver for surface coal mining operations that receive joint approval from the regulatory authority and the agency with jurisdiction over the park or place.

Section 522(e)(4) prohibits surface coal mining 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. It also exempts mine access and haulage roads at the point of intersection with a public road.

Section 522(e)(5) prohibits surface coal mining 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.

The term VER also appears in section 601(d) of SMCRA, which pertains to the designation of Federal lands as unsuitable for mining operations for minerals or materials other than coal. Specifically, this paragraph of the Act provides that “[v]alid existing rights shall be preserved and not affected by such designation.”

SMCRA does not define or explain the meaning of VER in the context of either section 522(e) or section 601. Today’s rulemaking addresses VER only in the context of section 522(e).

#### V. What Is the Legislative History of the VER Provision in Section 522(e)?

The legislative history of section 522(e) in general and the VER exception in particular is sparse. In this portion of the preamble, we either quote or summarize all the legislative history that we found pertinent to the rationale for the final rule and disposition of comments. The other portions of this preamble discuss how we and others interpret the legislative history, and how these interpretations influenced the decision-making process.

#### *Language in Previous Versions of SMCRA*

The phrase “subject to valid existing rights” and the current outline of section 522(e) first appear in the conference committee version of the 1974 precursor to SMCRA. Prior to the

conference committee changes, the Senate bill (S. 425) excluded only existing operations from the prohibitions of what is now section 522(e). The House bill (H.R. 11500) contained an exception only for certain situations in which a person had made substantial legal and financial commitments in an existing mine before September 1, 1973—and that exception applied only to the lands listed in what is now paragraphs (e)(1) and (e)(2) of section 522 of the Act.

#### *Committee Reports*

The 1977 conference committee report on the legislation that became SMCRA does not address VER. See H.R. Conf. Rep. No. 95–493, at 110–11 (1977). Thus, the most authoritative source in the legislative history of SMCRA does not clarify congressional intent with respect to the meaning of VER under section 522(e).

The 1974 conference committee report explains that the addition of the phrase “subject to valid existing rights” to section 522(e) was intended to address surface coal mining operations on national forest lands. H.R. Conf. Rep. No. 93–1522, at 85 (1974). Subsequent committee reports on succeeding versions of SMCRA contain either substantively identical or abbreviated discussions of this topic without further elucidation on the meaning of VER under section 522(e). See S. Rep. No. 94–28, at 220 (1975); H.R. Conf. Rep. No. 94–189, at 85 (1975); H.R. Rep. No. 94–896, at 47–48 (1976); H.R. Rep. No. 94–1445, at 47 (1976); H.R. Rep. No. 95–218, at 95 (1977); and S. Rep. No. 95–128, at 94–95 (1977). Therefore, for purposes of providing background for this rulemaking, we will quote only the discussions from the most recent committee reports, which pertain to the legislation that the President ultimately signed into law.

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

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*, [131] 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. 95–218, at 95 (1977).

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

All of these bans listed in subsection (e) are subject to valid existing rights. This language is intended to make clear that the prohibition of strip mining on the national forests is subject to previous state court interpretation of valid existing rights. The language of 422(e) [now 522(e)] is in no way intended to affect or abrogate any previous State court decisions. 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.

S. Rep. No. 95–128, at 94–95 (1977).

Congressman Manuel Lujan, Jr. attached the following statement of separate views to the House committee report:

Much has been said about the problem presented by the language contained in Sec. 522(e) of H.R. 2 \* \* \*.

As the Committee Report indicates, this section’s limitation that the prohibition is “subject to valid existing rights” is not intended to open up national forest lands to strip mining when previous legal precedents have prohibited stripping. Naturally, the bill’s language is also subject to the corollary that it is not intended to preclude mining where the owner of the mineral has the legal right to extract the coal by surface mining method[s].

Concerns in this area are not merely hypothetical. For example, in the establishment of the national forest system in many areas of the country, grantors sold the land to the United States government for inclusion in a national forest, but reserve[d] mineral rights for themselves and deeds of conveyance for which the United States was a party. The language of Sec. 522(e) itself, the thrust of the report discussion and common sense all dictate that the only logical interpretation of Sec. 522(e) is that enactment of this legislation does not disrupt the relationship between the owner of the coal and the Federal government.

I believe, therefore, that it would be contrary to the intention of the Act, and a misuse of the Act, for the Forest Service (or anyone else) to argue that [SMCRA] somehow modifies the relationship between the owner of the surface and subsurface rights. Clearly, alienation by sale, assignment, gift, or inheritance of the property right of the coal is not affected by the Act nor is the legal right

to mine the coal in any way modified if such right existed prior to enactment of the Act.

H.R. Rep. No. 95-218, at 189 (1977).

Part VII.C.5. of this preamble contains a discussion of the significance of Congressman Lujan's statements.

#### *Floor Debate (Congressional Record)*

In remarks made on the House floor during debate on the 1975 precursor to SMCRA, Congressman John Dingell questioned the need for the phrase "subject to valid existing rights," stating that "it is extra verbiage and really has no meaning." 121 Cong. Rec. H7048 (March 18, 1975) (statement of Rep. Dingell). He offered an amendment that would have removed this phrase and replaced it with a provision allowing surface coal mining operations in national forests and grasslands whenever the deeds conveying lands to the United States reserved the coal and specifically provided for the use of surface mining methods. The House rejected the amendment. 121 Cong. Rec. H7050 (March 18, 1975).

During floor debate on the same bill, Congressman Delbert Latta asked "whether this legislation affects in any way the rights of an owner of mineral rights situated below land owned by the Federal Government." 121 Cong. Rec. H6679 (March 14, 1975). In response, Congressman Morris Udall cited section 714 of SMCRA, which he characterized as requiring surface owner consent before any underlying Federal coal may be mined. Congressmen Latta, Udall, and others then engaged in the following exchange:

Mr. Latta. That takes care of the Federal Government when it owns the mineral rights, but I have reference to the opposite situation where the surface is owned by the Federal Government, but the mineral rights have been retained by a private owner.

Mr. Udall. We did not deal with that problem. I do not know of any instance in which it would arise or be affected.

Mr. Latta. It is not covered by this bill.

Mr. Ottinger. Mr. Speaker, if the gentleman would yield, why would not the rights of a surface owner be protected where the mineral rights were not owned by the Federal Government, but were owned privately?

Mr. Udall. The problem we dealt with was the situation in the instance where private interests owned the surface but the Federal Government owned the coal.

\* \* \* \* \*

Mr. Ottinger. If the gentleman will yield further, I think there are situations where private owners own both the surface and the coal, and there is no protection provided.

Mr. Udall. In that case the whole thrust of the bill is to regulate how to mine coal, whatever the ownership is.

\* \* \* \* \*

Mr. Latta. \* \* \* [If I understood what you said, this bill does not deal with the situation propounded in my question, meaning where a private citizen has sold the surface to the Federal Government and has retained the mineral rights. This bill would not in any way affect the mineral rights of that private citizen?]

Mr. Udall. This is a bill that deals with how one mines coal in that situation and every other situation, but we do not attempt to change property rights in the situation the gentleman talks about and thus the mineral rights are not affected.

121 Cong. Rec. H6679 (1975).

Part VII.C.5. of this preamble includes a discussion of the significance of this colloquy.

Some commenters referred to a floor debate on a proposed amendment to section 601 of H.R. 2, the House bill that eventually became SMCRA. (Section 601 provides for the designation of Federal lands as unsuitable for the mining of minerals and materials other than coal.) Congressman Teno 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." Congressman Udall 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 [*sic*]." 123 Cong. Rec. H12878 (1977) (April 29, 1977) (statement of Rep. Udall). The House rejected the amendment and retained the language at issue. However, as discussed in parts VII.C.4. and VIII of this preamble, we now find this colloquy to be of little relevance to the meaning of VER under section 522(e).

#### **VI. How Did We Previously Define or Attempt To Define VER?**

##### *The 1978 Proposed Rule*

In our first attempt to define VER after the enactment of SMCRA, we proposed to adopt different VER standards for different categories of lands. For lands protected under paragraphs (e)(1) and (e)(2) of section 522, we proposed a form of the ownership and authority standard. Specifically, the proposed rule would have defined VER as:

Those property rights in existence on August 3, 1977, that were created by a legally binding conveyance, lease, deed, contract, or other document which expressly authorizes the applicant to produce coal by surface coal mining operations and the exercise of such rights cannot, under applicable State or Federal law, be conditioned or denied in the manner provided in [30 CFR Part 761].

For lands protected under paragraphs (e)(3) through (e)(5) of section 522, we

proposed to limit VER to those lands for which a person had obtained all State and Federal permits needed to conduct surface coal mining operations as of August 3, 1977. The preamble to the proposed rule indicates that we presumed that the first standard would apply only to Federal lands, while the second standard would apply only to State and privately owned lands. See 41 FR 41662, 41686, 41826, September 18, 1978.

##### *The 1979 Final Rule*

After evaluating the comments received on the 1978 proposed rule, we decided that the proposed "dual definition was not really workable because it did not distinctly separate Federal lands from private lands." 44 FR 14993, March 13, 1979. Section 522(e)(1) includes both Federal and non-Federal lands, and paragraphs (e)(3) through (e)(5) of that section apply regardless of land ownership. Except for paragraph (e)(2), Congress did not establish Federal versus non-Federal ownership as a criterion for protection under section 522(e). Nor did Congress prescribe different levels of protection under section 522(e) for Federal and non-Federal lands.

Accordingly, the final rule promulgated in 1979 contains a single definition of VER that applies to all lands listed in section 522(e). In developing this definition, we relied upon (1) a belief that Congress created the VER exception as a means of avoiding compensable takings of private property and (2) the principle that 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 Constitution. Specifically, we "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, March 13, 1979, col 1.

The definition 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 exception 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). See 44 FR 14902, 15342, March 13, 1979.

#### *Litigation Concerning the 1979 Final Rule*

The mining industry, the State of Illinois, the National Wildlife Federation, and assorted environmental organizations all challenged the validity of the 1979 definition. Industry and Illinois alleged that this definition entailed a taking of property in violation of the Fifth and Fourteenth Amendments. Because the plaintiffs presented no evidence that the definition had caused actual loss or harm to a specific party, the court declined to rule on the constitutionality of the definition on the basis of a hypothetical claim. However, the court asserted 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 Env’t Rep. Cas. (BNA) 1083, 1091 (D.D.C., Feb. 26, 1980), (“PSMRL I, Round I”).

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 Federal Circuit remanded the appeal 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. The remand order specified that the judgment of the District Court could not be considered final. See *In re Permanent Surface Mining Regulation Litigation*, No. 80–1810, Order of Remand (D.C. Cir., Feb. 1, 1983).

#### *The 1980 Suspension Notice*

To comply with the decision in *PSMRL I, Round I*, 14 Env’t Rep. Cas. (BNA) 1091 (1980), which partially remanded the all permits standard, we suspended the 1979 definition of VER to the extent that it required that all permits have been obtained before August 3, 1977. See 45 FR 51547–48, August 4, 1980. The suspension document stated that, pending further rulemaking, we would interpret the definition as including the court’s suggestion that a good faith effort to obtain all permits by that date should suffice to establish VER. This standard

is known as the “good faith/all permits” standard.

#### *The 1982 Proposed Rule*

On June 10, 1982 (47 FR 25278), we published a proposed rule setting out 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” 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.”

#### *The 1983 Final Rule*

Commenters criticized each option in the 1982 proposed rule 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 Constitution. Because the Supreme Court has consistently declined to prescribe set formulas for determining when a taking will occur, we 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, on September 14, 1983 (48 FR 41314), we adopted 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 Constitution. This standard is known as the “takings” standard.

The revised definition also (1) removed the requirement for a demonstration of a property right to the coal on August 3, 1977, (2) defined the “needed for” aspect of the needed for and adjacent standard, and (3) added a provision (sometimes referred to as “continually created VER”) to establish VER standards for lands that come under the protection of section 522(e) after August 3, 1977. This situation would arise, for example, when a park is created or expanded or a protected structure is built after that date.

#### *Litigation Concerning the 1983 Final Rule*

The mining industry, the National Wildlife Federation, and assorted environmental organizations all challenged the validity of the 1983 definition. The U.S. District Court for the District of Columbia subsequently

remanded most of that definition on procedural grounds. The court held that the takings standard represented such a significant departure from the options presented in the 1982 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 *In re Permanent Surface Mining Regulation Litigation II, Round III—Valid Existing Rights*, 22 Env’t Rep. Cas. (BNA) 1557, 1564 (D.D.C. 1985) (“PSMRL II, Round III—VER”). 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 paragraphs (a) and (d)(2) of the definition, which relied upon the takings standard to determine VER, and the revised needed for and adjacent standard in paragraph (c) of the definition to the Secretary for proper notice and comment.

#### *The 1986 Suspension Notice*

In response to the remand order in *PSMRL II, Round III—VER*, 22 Env’t Rep. Cas. (BNA) at 1564 (1985), we suspended paragraphs (a) and (c) of the 1983 definition of VER on November 20, 1986 (51 FR 41952, 41961). These paragraphs contained the takings standard and the revised needed for and adjacent standard. We also suspended paragraph (d)(2) of the definition to the extent that it relied upon the takings standard. As discussed at 51 FR 41954–55, this action effectively reinstated the 1980 good faith/all permits standard and the 1979 needed for and adjacent standard.

The preamble to the suspension notice stated that, with two exceptions, we would use the VER definition in the applicable State or Federal regulatory program when making VER determinations. As discussed at 51 FR 41955, one of these exceptions occurs when a State definition relies upon an all permits standard. In that case, we would apply the State standard as if it included a good faith component. The second exception involves State programs that include a takings standard for VER. In those situations, the preamble stated that, pending promulgation of a new Federal definition of VER, we would not process requests for VER determinations involving lands within units of the National Park System.

#### *The 1988 Proposed Rule*

On December 27, 1988 (53 FR 52374), we proposed the good faith/all permits

standard and the ownership and authority standard as options for a regulatory definition of VER. Under the ownership and authority standard, a person could establish VER by demonstrating both a property right to the coal and the right to mine it by the method intended, as determined by State law. After evaluating the comments received, we withdrew the entire proposed rule for further study on July 21, 1989 (54 FR 30557).

#### *The 1990 VER Symposium*

On April 3–4, 1990, we and the University of Kentucky College of Law, in cooperation with the American Bar Association, cosponsored a national symposium on the meaning of VER under section 522(e) of SMCRA. Volume 5, Number 3 of the *Journal of Mineral Law and Policy* contains the proceedings of this symposium. The participants provided extensive analyses of takings jurisprudence and case law related to VER, but they did not reach a consensus on how to define VER. The arguments presented ranged from the theory that we could prohibit all mining in section 522(e) areas as a public nuisance or noxious use to the position that Congress intended the VER exception to operate as complete protection for all property rights in existence on August 3, 1977.

#### *The Belville Litigation*

In 1990, the Belville Mining Company, an Ohio mining firm, filed suit against the Secretary of the Interior alleging that he had, among other things:

- Failed to perform a mandatory duty to promulgate the definition of VER needed to implement section 522(e);
- 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
- Made VER determinations relying on State regulations identical to an invalidated Federal regulation.

See *Belville Mining Co. v. Lujan*, No. C-1-89-790 (S.D. Ohio 1991), modified September 21, 1992 (“*Belville I*”).

In a July 22, 1991, decision, the court in *Belville I* ordered the Secretary to begin proceedings to promulgate a final rule defining VER; 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 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 portion of its ruling concerning disapproval of State program definitions to require only the disapproval of the Ohio program definition of VER insofar as that definition affects Belville and its requests for VER determinations. 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 requests for VER determinations. Consequently, we interpreted the decision barring use of the 1986 policy as applying only to Ohio. The final rule that we are adopting today effectively renders both the *Belville I* decision and the 1986 suspension notice moot with respect to the applicable definition of VER.

#### *The 1991 Proposed Rule*

On July 18, 1991, we 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, we proposed to eliminate the separate standards for VER for lands that come under the protection of section 522(e) after August 3, 1977. Instead, the proposed rule modified the other VER standards in the definition to incorporate the concept that VER determinations should reflect the circumstances that existed when the land came under the protection of section 522(e), which may be later than August 3, 1977.

#### *The Energy Policy Act*

On October 24, 1992, the President signed the Energy Policy Act of 1992 (Pub. L. 102-486, 206 Stat. 2776) (“EPAct”) into law. 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 staying implementation of the July 1991 *Belville I* decision, as modified in September 1992, and halting publication of a new final rule defining VER based upon the 1991 proposed rule.

#### *Appropriations Act Moratoriums*

The EPAct provision expired on October 24, 1993. However, at the Department’s request, the appropriations acts for the Department of the Interior and related agencies for fiscal years 1994 and 1995 each included language that effectively

placed 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 Pub. L. 103-332) lapsed on October 1, 1995. Congress did not include similar language in any legislation for fiscal year 1996 or subsequent fiscal years.

#### *The 1997 Proposed Rule*

After evaluating the comments received on the 1991 proposed rule and taking intervening events into consideration, on January 31, 1997 (62 FR 4836), we withdrew the 1991 proposal and published a new, extensively revised proposed rule concerning the definition of VER and related issues. This proposal forms the basis for the final rule being published today.

### **VII. Section 761.5: How Are We Defining VER in This Final Rule?**

#### *A. Introductory Language.*

The definition of VER that we are adopting today as part of 30 CFR 761.5 describes VER as a set of circumstances under which a person may, subject to regulatory authority approval, conduct surface coal mining operations that section 522(e) of the Act and 30 CFR 761.11 would otherwise prohibit. This language establishes the conceptual framework within which the provisions of paragraphs (a) through (c) of the definition must be applied.

In a change from the proposed rule, we have added the phrase “subject to regulatory authority approval” to emphasize that a person with VER is not automatically entitled to conduct surface coal mining operations on protected lands. One commenter appeared to believe otherwise. For the same reason, we have added a sentence to the introductory portion of the definition to clarify that, even if a person has VER and thus is exempt from the prohibitions and limitations of section 522(e) and 30 CFR 761.11, surface coal mining operations on these lands are subject to all other pertinent requirements of the Act and the applicable regulatory program. The VER exception does not entitle a person to an exemption from any permitting requirements or performance standards.

One commenter charged that by defining VER as a condition rather than as a right, the proposed rule altered the essence of VER from a recognition of property rights to a regulatory standard or condition that a surface coal mining operation must meet prior to mining. We have made a few essentially editorial changes in response to this

comment to clarify that VER means a set of circumstances (rather than “conditions”) under which a person is exempt from the prohibitions and restrictions of section 522(e) and 30 CFR 761.11 and may seek approval from the regulatory authority to conduct surface coal mining operations on those lands in accordance with standard regulatory program requirements.

While property rights are an element of some of the standards for VER, we do not agree with the commenter’s claim that VER must be defined solely in terms of property rights. Congress did not define VER, and the legislative history of section 522(e) emphasizes that, with certain exceptions, Congress intended to prohibit new surface coal mining operations on the lands listed in that section. *See*, for example, S. Rep. No. 95–128, at 55 (1977). We believe that these facts argue against adoption of a rule that defines VER solely in terms of property rights. Except for unleased Federally owned coal, such a rule would present little or no impediment to surface coal mining operations on the lands listed in section 522(e) of the Act. Thus, it would offer little protection to those lands beyond the protection that the permitting requirements and performance standards of the regulatory program afford to all lands.

#### *B. Paragraph (a): Property Rights Demonstration.*

Paragraph (a) of the definition of VER in the final rule provides that a person claiming VER for any type or component 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 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 documents relied upon to establish property rights must be based upon applicable State statutory or case law, unless otherwise provided under Federal law. If no applicable law exists, interpretation of these documents must reflect custom and generally accepted usage at the time and place that the documents came into existence.

Under the final rule, a person need not necessarily provide a property rights demonstration for roads used or constructed as part of surface coal mining operations. Instead, a person may demonstrate VER for roads using any of the standards in paragraph (c) of the definition.

The final rule is substantively identical to the corresponding

provisions of the 1997 proposed rule, with one exception. We have added a clause clarifying that the provision requiring the use of State law to interpret documents does not apply if Federal law provides otherwise, as may be the case if the documents were issued under the Mineral Leasing Act or similar laws. In terms of organization, the final rule differs slightly from the proposed rule in that, for reasons of clarity and consistency with plain language principles, we have segregated the property rights demonstration into a separate paragraph, rather than including it in the same paragraph as the good faith/all permits and needed for and adjacent standards.

The requirement for a property rights demonstration and the provisions concerning interpretation of documents are consistent 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. 95–493, at 106 (1977); H.R. Rep. No. 95–218, at 95 (1977); and S. Rep. No. 95–128, at 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.

In addition, these provisions receive support from section 510(b)(6)(C) of SMCRA, which provides that, in cases where the private mineral estate has been severed from the private surface estate, “the surface-subsurface legal relationship shall be determined in accordance with State law,” and that “nothing in this Act shall be construed to authorize the regulatory authority to adjudicate property rights disputes.” Language similar to the latter proviso also appears in the right-of-entry provisions of section 507(b)(9) of the Act.

#### *History*

The requirement for a property rights demonstration has its origins in paragraphs (a)(1) and (c) of the March 13, 1979 VER definition. Paragraph (c) of that definition required that interpretation of the terms of the documents be based not only upon usage and custom, but also upon a showing that the parties to the document actually contemplated a right to conduct the same underground or surface mining activities for which the person claims VER. However, on November 27, 1979, in connection with

the *PSMRL I, Round I* litigation, we published a **Federal Register** notice stating that, as an alternative to the language of paragraph (c), “existing State law may be applied to interpret whether the document relied upon establishes valid existing rights.” 44 FR 67942, November 27, 1979. This alternative reflected the strong interest Congress expressed in deferring to State property law when interpreting documents relating to property interests. *See* the summary of and excerpts from the legislative history in Part V of this preamble.

For reasons that the preamble does not explain, the revised VER definition that we adopted on September 14, 1983, did not contain a counterpart to the property rights demonstration required by paragraph (a)(1) of the 1979 definition. However, the 1983 rule retained a revised version of paragraph (c) of the 1979 definition, which concerned interpretation of documents. This provision, which was codified as paragraph (e) of the 1983 definition, required that interpretation of the terms of documents “be based upon either applicable State statutory or case law concerning interpretation of documents conveying mineral rights or, where no applicable State law exists, upon the usage and custom at the time and place it came into existence.”

On January 31, 1997 (62 FR 4836), we proposed to reinstate a revised version of the property rights demonstration required under paragraph (a)(1) of the 1979 definition. The proposed rule differed from the 1979 rule in three ways:

- It did not describe the person making the VER demonstration as the permit applicant, since the proposed rule also clarified that a person may request a VER determination without preparing and submitting a permit application.
- It provided that the requisite property rights must be vested as of the date that the land comes under the protection of 30 CFR 761.11 or section 522(e), rather than as of August 3, 1977.
- It did not limit eligible property rights to the right to produce coal.

The proposed rule incorporated the 1983 language pertaining to the interpretation of documents. However, we proposed to modify that language to eliminate its restriction to documents concerning mineral rights, since surface coal mining operations may involve property interests other than mineral rights. Also, unlike the 1983 definition, we proposed to require a property rights demonstration and apply the interpretation of documents provision to the needed for and adjacent standard.

(See the discussion of this standard in Part VII.D. of this preamble.)

The final rule incorporates all elements of the proposed rule as described above. The following discussion summarizes the comments that we received on this aspect of the proposed rule and our disposition of those comments.

#### *Summary and Disposition of Comments on the Proposed Rule*

One commenter requested that we revise the rule to clarify that the deed, lease, or other documents relied upon for the property rights demonstration must include explicit authority to conduct surface coal mining operations. In addition, the commenter asserted that these documents must explicitly sanction both the type of activity for which VER is claimed and the scope and location of that activity. We do not agree. In enacting the permitting requirements of sections 507(b)(9) and 510(b)(6) of SMCRA, Congress considered measures that would have required either explicit authority or surface owner consent in situations in which the surface and mineral estates are in separate ownership, but in the end decided to defer to State property law as interpreted by State courts. See S. Conf. Rep. No. 95-337 and H.R. Conf. Rep. No. 95-493, at 105-6 (1977); 123 Cong. Rec. H7587-88 (July 21, 1977) (statement of Rep. Seiberling). See also, Congress' failure to adopt Secretary Andrus' recommendation that surface owner consent be required in all cases for the entire area covered by a permit application (H.R. Rep. No. 95-218, at 156 (1977)). There is no suggestion in the Act or its legislative history that Congress intended to accord lesser deference to State property law in determining VER under section 522(e). Indeed, the discussion of the *Polino* decision and related discussions concerning mining on national forest lands in the congressional reports quoted or referenced in Part V of this preamble indicate otherwise.

Another commenter asserted that the property rights demonstration should be limited to discerning whether the person has a property right to conduct surface mining, not whether he or she has a right to use a specific method of surface mining. As summarized and excerpted in Part V of this preamble, the legislative history of the VER provision in section 522(e) clearly indicates that Congress did not intend for this provision to be construed in a manner that would allow surface coal mining operations of a nature that are not authorized under State property law. Therefore, the nature and detail of the

property rights demonstration is dependent upon State property law concerning the interpretation of the language of deeds and other conveyances. It may be as simple as demonstrating the right to conduct surface coal mining operations in general, or, depending upon the wording of the conveyance and State property law, the requester may need to demonstrate that the method of surface coal mining operations meets the restrictions imposed by the conveyance or State law.

Some commenters expressed concern that the definition could be interpreted as negating a VER determination each time an operation or permit experiences a change in ownership. We disagree. As discussed in Part IX of this preamble, State law, the applicable VER standard, and the terms of the instrument of conveyance govern the extent to which a transfer of property rights or a change in ownership of a permit or operation impact VER. In general, we view VER as transferable because, unless otherwise provided by State law, the property rights, permits, and operations that form the basis for VER determinations are transferable. Therefore, except as discussed in Part IX of this preamble, we anticipate that permit transfers and changes in ownership of operations and property rights subsequent to a VER determination would have no effect on VER or the validity of the VER determination.

One commenter stated that, by requiring a property rights demonstration as part of the definition of VER, the proposed rule failed to recognize that mining entities may seek and obtain a permit for a surface coal mining operation before acquiring property rights for all lands within the permit area. We believe that the commenter's concern is misplaced. Under the final rule, there is no requirement that the same person make both the property rights demonstration required by paragraph (a) of the definition and the demonstration of compliance with the good faith/all permits or needed for and adjacent standard under paragraph (b) of the definition. In other words, under the final rule, the person who makes the property rights demonstration required by paragraph (a) of the definition need not be the same person as the one who demonstrates compliance with the requirements of the good faith/all permits or needed for and adjacent standards under paragraph (b) of the definition. However, each request must demonstrate compliance with both paragraphs (a) and (b) of the definition of VER. And the person holding the

permits must obtain the necessary property rights before actually initiating surface coal mining operations on the land in question.

Some commenters opposed the proposed rule to the extent that it provided that property rights must be vested as of the date that the land comes under the protection of the Act, rather than as of the date of enactment of SMCRA (August 3, 1977) as in the 1979 rule. The commenters argued that persons conducting surface coal mining operations after the enactment of SMCRA should have immediately procured all necessary property rights (e.g., purchased a 300-foot buffer around all planned minesites to preclude application of the prohibition on mining within 300 feet of an occupied dwelling) to avoid potential adverse impacts from the creation of new protected areas after August 3, 1977. We do not agree. The lease or purchase of a buffer zone would be impractical in cases where the owners of that land refuse to lease or sell. Moreover, we first adopted the concept of basing VER on the circumstances that existed when the land came under the protection of section 522(e) rather than on the circumstances that existed on August 3, 1977, as part of our 1983 definition of VER. As discussed in Parts VII.F. and XVI of this preamble, this concept withstood a legal challenge. In view of the existence of this concept as part of our rules for 16 years, and the expectations engendered by that rule, we are not persuaded by the commenters' argument.

Some commenters opposed the proposed rule to the extent that it provided that property rights other than the right to produce coal are eligible for consideration. The commenters argued that this modification was arbitrary, an imprudent and unreasonable giveaway of surface rights, and inconsistent with congressional intent. They also argued that this aspect of the proposed rule had no basis under SMCRA, and that it was in violation of the definition of surface coal mining operations in section 701(28) of the Act. We disagree.

The statutory definition of surface coal mining operations in section 701(28) includes "activities conducted on the surface of lands in connection with a surface coal mine or \* \* \* surface operations and surface impacts incident to an underground coal mine." In addition to "excavation for the purpose of obtaining coal," the definition expressly includes "the cleaning, concentrating, or other processing or preparation" of coal. And paragraph (B) of the definition includes "any adjacent land the use of which is

incidental to any such activities" as well as roads, impoundments, ventilation shafts, refuse banks, overburden piles, "repair areas, storage areas, processing areas, shipping areas and other areas upon are sited structures, facilities, or other property or materials on the surface, resulting from or incident to such activities [the activities listed in paragraph (A) of the definition]." Clearly, the definition is not restricted to coal extraction activities or operations on lands from which coal is extracted. Therefore, our final rule properly acknowledges that, to the extent that a person has a right under State property law to conduct an activity or construct a facility included within the definition of surface coal mining operations on any lands listed in 30 CFR 761.11 and section 522(e), that person may seek to apply the VER exception to the proposed activity or facility even if there are no plans to extract coal from those lands.

As discussed above, the legislative history of the right-of-entry provisions of sections 507(b)(9) and 510(b)(6)(C) of SMCRA and of the prohibitions of section 522(e) indicates that Congress wanted to respect and defer to State court interpretations of documents concerning property rights. Hence, we find it appropriate to defer to State property law to determine whether a person has a property right to use a particular parcel of land for any activity or facility included in the definition of surface coal mining operations, rather than arbitrarily limiting the scope of the property rights to which the VER exception applies to the right to extract coal.

One commenter argued that the property rights demonstration must include explicit authority, by deed, lease or otherwise, to engage in non-extraction activities. He also asserted that the property rights documents must explicitly sanction both the type of activity for which VER is claimed and the scope and location of that activity. However, the commenter failed to provide a rationale for these statements. We see no reason or basis to establish differing standards for property rights demonstrations based on whether the land will be used for coal extraction or whether it will be used for other activities or facilities included within the definition of surface coal mining operations. Section 522(e) refers to surface coal mining operations without differentiating among the various activities and facilities included in the definition of that term. As discussed above and as excerpted in Part V of this preamble, the legislative history of SMCRA clearly indicates that Congress

wanted to defer to State court interpretations of documents concerning property rights. Therefore, we see no basis or need to require that the documents in question expressly authorize use of the land for activities and facilities that are included in the definition of surface coal mining operations but that do not directly produce coal. A demonstration that State statutory or case law recognizes a person's right to use the land for those activities and facilities under the terms of the document used to establish property rights will suffice.

Some commenters stated that the VER inquiry should begin and end with the property rights demonstration. They argue that the Act and its legislative history as well as various court decisions mandate adoption of an ownership and authority standard for VER. That is, if a person has the property right under State law to conduct surface coal mining operations, the person also has VER under section 522(e) of SMCRA. As discussed in detail in Part VII.C.5. of this preamble, we do not agree that the Act and its legislative history require the adoption of an ownership and authority standard for VER. For the reasons outlined in Parts VII.A. and VII.C. of this preamble, we do not view VER as coextensive or synonymous with property rights. Instead, we view property rights as a prerequisite for demonstrating VER under the good faith/all permits and needed for and adjacent standards.

### C. Paragraph (b): Primary Standards for VER

On January 31, 1997, we proposed to adopt two standards for VER for surface coal mining operations in general: the good faith/all permits standard (paragraph (a)(1) of the proposed definition) and the needed for and adjacent standard (paragraph (a)(2) of the proposed definition). The final rule revises these standards in response to comments and moves them to paragraph (b) of the definition. Part VII.C. of this preamble provides an explanation of the good faith/all permits standard and the disposition of related comments, while Part VII.D. of the preamble discusses the needed for and adjacent standard and related comments.

Several commenters argued that standards for the VER exception in section 522(e), which identifies lands that Congress designated as unsuitable for surface coal mining operations, should be more restrictive than the standard for exceptions under section 522(a), which pertains to lands designated by petition. In the preamble

to the 1979 definition of VER, we concurred with this argument:

OSM decided that the VER phrase must be distinguished from the definition of substantial legal and financial commitments. \* \* \* The latter exemption applies to the petition process under Section 522(a), whereas VER applies to the Congressional prohibitions of mining under Section 522(e). This distinction suggests that, in order to qualify for VER and thereby mine in the prohibited areas of Section 522(e), they must have a property interest in the mine that is even greater than the substantial legal and financial commitments needed to mine despite a designation by petition under Section 522(a).

44 FR 14491-92, March 13, 1979.

We repeated this position in the *Greenwood Land and Mining Co.* VER determinations at 46 FR 36758, July 15, 1981; 46 FR 50422, October 13, 1981; and 47 FR 56191, December 15, 1982.

However, we reversed our stance in the preamble to the 1983 VER definition, stating that "the two concepts are separate and distinct." 48 FR 41316, September 14, 1983. Neither the language of the Act nor its legislative history supports the proposition that the lands designated by Congress under section 522(e) are more deserving of protection than the lands designated by petition under section 522(a). See S. Rep. No. 95-128, at 55 (1977), which states that:

[C]ertain lands simply should not be subject to new surface coal mining operations. These include primarily and most emphatically those lands which cannot be reclaimed under the standards of this Act and the following areas dedicated by the Congress [in section 522(e)].

The phrase "lands which cannot be reclaimed under the standards of this Act" refers to petition-initiated mandatory designations under section 522(a)(2), while the remainder of this passage addresses lands designated by Congress under section 522(e). Clearly, the Senate committee found at least some lands designated under section 522(a) to be equal in importance to lands designated under section 522(e). Consequently, we find no basis for the assumption that VER under section 522(e) must be more restrictive than the standard for exemptions from petition-initiated designations under section 522(a).

Another commenter asserts that restricting VER to the circumstances set out in the definition, especially the good faith/all permits standard, is inconsistent with our posture concerning the 1979 definition. He notes that briefs filed on behalf of the Secretary in connection with assorted litigation concerning the definition of

VER interpret the preamble to the 1979 definition of VER as meaning that we did not intend to limit the scope of the VER exception to cases meeting the standards prescribed by the definition. According to the briefs, the definition identified only those situations in which a person unequivocally has VER. In all other cases, VER would be determined on a case-by-case basis.

The briefs derive this characterization of the 1979 definition from the first and last sentences of the following preamble discussion:

VER is a site-specific concept which can be fairly applied only by taking into account the particular circumstances of each permit applicant. OSM considered not defining VER, which would leave questions concerning VER to be answered by the States, the Secretary and the courts at later times. Without a definition, however, many interpretations of VER would be made and no doubt challenged by both operators and citizens; and once valid existing rights determinations are challenged, the permitting process would be delayed. OSM has therefore concluded that VER should be defined in order to achieve a measure of consistency in interpreting this important exemption. Under the final definition, VER must be applied on a case-by-case basis, except that there should be no question about the presence of VER where an applicant had all permits for the area as of August 3, 1977.

44 FR 14993 (March 13, 1979), col. 2-3.

The supplemental final environmental impact statement prepared for a 1983 rulemaking describes the 1979 definition as follows:

[T]he existing regulation, as modified by the court, provides that at a minimum, an operator should be determined to have VER if he had made a good faith effort to apply by August 3, 1977, for all permits necessary to mine in one area. OSM, however, has consistently maintained, in court and elsewhere, that in each case OSM would examine the totality of the circumstances before deciding on any VER application and that the regulatory standard is not the exclusive means of obtaining VER.

January 1983 Supplement to OSM-EIS-1, Vol. 1: Analysis, at IV-39 (citations omitted).

In 1985, the U.S. District Court for the District of Columbia acknowledged that the 1979 preamble could be read as suggesting the interpretation discussed above, but the court questioned both the accuracy of this interpretation, given the context of the sentence upon which it depends, and the validity of the premise that preamble language could supersede regulatory language:

The government and the industry-intervenors argue that even under the old "all-permits" test promulgated in 1979, states had to make, in addition to the all-permits

determination, an independent takings analysis on a case by case basis in order to determine whether VER existed. \* \* \*

To support their claim that the 1979 \* \* \* rule included an independent takings test, in addition to the all-permits test, defendants and intervenors point to one sentence in the preamble to the 1979 rule. "Under the final definition, VER must be applied on a case-by-case basis, except that there should be no question about the presence of VER where an applicant had all permits for the area as of August 3, 1977." 44 Fed. Reg. 14993 (1979). That sentence, to be sure, does suggest that there would be instances other than the all-permits situation in which a VER determination could be made. But the paragraph in which it is included, however, may also mean simply that the VER all-permits issue must of necessity be decided anew each time a person seeks VER. In any event, *no such alternate method* of obtaining VER was included in the final 1980 rule, *see* 30 C.F.R. § 761.5 (1980).

*PSMRL II, Round III—VER*, 22 Env't Rep. Cas. (BNA) at 1561 (1985) (footnote omitted), emphasis in original.

For purposes of this rulemaking, we find it unnecessary to determine whether the interpretation advanced in the briefs and environmental impact statement remains valid in view of the pronouncements in the court opinion. As discussed in Part VII.C. of this preamble, we have reevaluated the language of the Act and its legislative history. We have determined that adherence to the terms of the good faith/all permits and needed for and adjacent standards in paragraph (b) of the definition is the most reasonable interpretation of VER and will better satisfy congressional intent in enacting section 522(e). And, in practice, to the extent allowed by the courts, we have always adhered to the definition established in the rules in making VER determinations, rather than relying upon the 1979 preamble to do otherwise.

One commenter urged us to adopt more restrictive permitting and bonding requirements and performance standards for surface coal mining operations conducted under the VER exception, regardless of the standard that we selected for the definition of VER. We find no basis under SMCRA for doing so, since there is no indication that Congress intended stricter standards for surface coal mining operations on these lands. Furthermore, we believe that our existing requirements are sufficiently stringent to protect environmental resources to the extent that SMCRA authorizes or requires protection of those resources. Among other things, section 510(b)(2) of the Act and 30 CFR 773.15(c)(2) prohibit approval of a permit application unless

the applicant affirmatively demonstrates that reclamation as required by the Act and the regulatory program can be accomplished under the reclamation plan in the permit application. In addition, section 509(a) of the Act and 30 CFR 800.14(b) require that the permittee post a performance bond in an amount sufficient to assure completion of the reclamation plan if the regulatory authority has to complete the work in the event of forfeiture.

#### 1. What Alternatives Did We Consider?

In addition to the "no action" (no rulemaking) alternative, the environmental impact statement prepared for this rulemaking identified four major options for a primary standard for VER to accompany the needed for and adjacent standard:

- *Good Faith/All Permits*: Under this alternative, a person would have 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 permits and other authorizations required to conduct surface coal mining operations.

- *Good Faith/All Permits or Takings*: Under this alternative, a person who could not meet the good faith/all permits standard would still have VER whenever a failure to recognize VER would be expected to result in a compensable taking of that person's property interests under the Fifth and Fourteenth Amendments to the U.S. Constitution.

- *Ownership and Authority*: Under this alternative, demonstration of both a property right to the coal and the right to mine it by the method intended would constitute VER.

- *Bifurcated*: Under this alternative, the ownership and authority standard would apply if the coal rights were severed from the surface estate before the land came under the protection of 30 CFR 761.11 and section 522(e). Otherwise, the good faith/all permits standard would apply.

In the proposed rule published on January 31, 1997, we announced our intention to adopt the good faith/all permits standard and the needed for and adjacent standard as the primary standards for VER. The draft environmental impact statement released on the same date identified the good faith/all permits standard as the preferred alternative to accompany the needed for and adjacent standard. In general, the environmental community and members of the public at large supported the good faith/all permits alternative, while industry advocated

the ownership and authority alternative. The few States that commented split among the good faith/all permits, takings, and bifurcated alternatives.

## 2. Why Did We Select the Good Faith/All Permits Standard?

In enacting SMCRA, Congress did not provide clear or dispositive direction on the meaning or purpose of VER under section 522(e). There are credible supporting and opposing arguments for each alternative. Indeed, as summarized in Part VI of this preamble, at various times during the past two decades, we have either proposed or adopted all the listed alternatives, plus some variations on these alternatives.

However, after carefully evaluating all comments received and conducting a rigorous analysis of the legislative history of section 522(e), relevant litigation, and the potential environmental impacts of each alternative, we believe that the good faith/all permits standard best achieves protection of the lands listed in section 522(e) in a manner consistent with congressional intent at the time of SMCRA's enactment. At the same time, it protects the interests of those persons who had taken concrete steps to obtain regulatory approval for surface coal mining operations on lands listed in section 522(e) before those lands came under the protection of 30 CFR 761.11 and section 522(e). And, since 20 of the 24 approved State regulatory programs under SMCRA already rely upon either the good faith/all permits standard or the all permits standard, adoption of a good faith/all permits standard would cause the least disruption to existing State regulatory programs.

The good faith/all permits standard is 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 on the lands listed in that section, either to protect human health or safety, or because the environmental values and other features associated with those lands are generally incompatible with surface coal mining operations. The report prepared by the Senate Committee on Energy and Natural Resources on S. 7, the Senate version of the legislation that became SMCRA, states that:

[T]he Committee has made a judgment that certain lands simply should not be subject to new surface coal mining operations. These include primarily and most emphatically those lands which cannot be reclaimed under the standards of this Act and the following areas dedicated by the Congress in trust for the recreation and enjoyment of the American people: lands within the National

Park System, the National Wildlife Refuge System, the National Wilderness Preservation System, the Wild and Scenic Rivers System, National Recreation Areas, National Forests with certain exceptions, and areas which would adversely affect parks or [places listed on the] National Register of Historic Sites [sic].

In addition, for reasons of public health and safety, surface coal mining will not be allowed within one hundred feet of a public road (except to provide access for a haul road), within 300 feet of an occupied building or within 500 feet of an active underground mine.

Since mining has traditionally been accorded primary consideration as a land use there have been instances in which the potential for other equally or more desirable land uses has been destroyed. The provisions discussed in this section were specifically designed and incorporated in the bill in order to restore more balance to Federal land use decisions regarding mining.

S. Rep. No. 95-128, at 55 (1977).

In addition, the report prepared by the House Committee on Interior and Insular Affairs on H.R. 2, the House version of the legislation that became SMCRA, states that:

[T]he decision to bar surface mining in certain circumstances is better made by Congress itself. Thus section 522(e) provides that, subject to valid existing rights, no surface coal mining operations except those in existence on the date of enactment, shall be permitted on lands within the boundaries of units of certain Federal systems such as the national park system and national wildlife refuge system \* \* \* or in other special circumstances \* \* \*.

H.R. Rep. No. 95-218, at 95 (1977).  
See also S. Rep. No. 95-128, at 94-95 (1977).

The final environmental impact statement (EIS) for this rulemaking indicates that, compared with the other alternatives considered, the good faith/all permits standard is the most protective of the lands listed in section 522(e). According to the analysis in the EIS, adoption of the takings standard in place of the good faith/all permits standard would result in the mining of an estimated additional 2,855 acres of protected lands between 1995 and 2015 (185 acres of section 522(e)(1) lands, 1,686 acres of Federal lands in eastern national forests, and 984 acres of State park lands and buffer zones for State parks). Adoption of either the bifurcated alternative or the ownership and authority standard would result in the mining of an estimated additional 3,062 acres during that time frame (304 acres of section 522(e)(1) lands, 1,761 acres of Federal lands in eastern national forests, and 997 acres of State park lands and buffer zones for State parks). See Table V-1 in Final Environmental Impact Statement OSM-EIS-29 (July 1999),

entitled "Proposed Revisions to the Permanent Program Regulations Implementing Section 522(e) of the Surface Mining Control and Reclamation Act of 1977 and Proposed Rulemaking Clarifying the Applicability of Section 522(e) to Subsidence from Underground Mining."

As these numbers show, the model predicts that the additional disturbance would occur entirely on some of the lands for which the Senate Committee expressed the most concern; i.e., public parks and the lands protected by paragraphs (e)(1) and (e)(2) of section 522 of the Act. See S. Rep. No. 95-128, at 55 (1977). Therefore, we believe that adoption of the good faith/all permits standard for VER will best fulfil the intent of Congress, as expressed in that report, to prohibit new surface coal mining operations on the lands protected by section 522(e), with certain exceptions.

In addition, the economic analysis that the U.S. Geological Survey and we prepared for this rulemaking found that adoption of the good faith/all permits standard would have a net positive benefit to society, while adoption of the takings, ownership and authority, or bifurcated alternatives would have a net negative benefit to society. The analysis found negligible differences among the alternatives in terms of their economic impact. None of the alternatives would have a significant economic impact on the mining industry or the cost of producing and delivering coal, assuming that the prohibitions and restrictions of section 522(e) do not apply to subsidence from underground mining operations. See "Final Economic Analysis: Proposed Revisions to the Permanent Program Regulations Implementing Section 522(e) of the Surface Mining Control and Reclamation Act of 1977 and Proposed Rulemaking Clarifying the Applicability of Section 522(e) to Subsidence from Underground Mining" (July 1999).

The good faith/all permits standard in the final rule requires a demonstration that the person claiming VER, or a predecessor in interest, had obtained, or made a good faith effort to obtain, all permits and other authorizations required to conduct surface coal mining operations on the land before it came under the protection of 30 CFR 761.11 and section 522(e) of the Act. Potentially necessary permits and authorizations include, but are not limited to, mining permits, National Pollutant Discharge Elimination System (NPDES) permits, U.S. Forest Service special use permits, Mine Safety and Health Administration authorizations, air quality plan approvals, local

government approvals, and (for some types of facilities) building permits and zoning changes.

The proposed rule language referred only to "State and Federal permits and other authorizations." Several commenters objected to this limitation, noting that other governmental entities such as counties may require permits for surface coal mining operations. The commenters argued that these permits should be included within the universe of all necessary permits and authorizations under the good faith/all permits standard. In response, we have deleted the limiting phrase "State and Federal" from the rule. We agree with the commenters that the good faith/all permits standard should consider all necessary permits and authorizations, not just State and Federal permits and authorizations.

When permits and authorizations to operate do not establish boundaries for the mining operation, the geographical extent of the VER determination will be defined by the extent of surface coal mining operations contemplated by all parties at the time of issuance of or application for the permit or authorization. See the *Greenwood Land and Mining Co.* VER determinations at 46 FR 36758, July 15, 1981; 46 FR 50422, October 13, 1981; and 47 FR 56191, December 15, 1982; and the *Mower Lumber Co.* VER determinations at 45 FR 52467, August 7, 1980 and 45 FR 61798, September 17, 1980.

Some commenters complained that the good faith/all permits standard is not truly a bright-line standard. They cited the potentially wide and continually changing array of permits and authorizations required for surface coal mining operations and the difficulty in identifying which permits were required at any particular time. We believe that persons requesting a VER determination and the agency responsible for making the VER determination will be able to use public records to reconstruct what permits and authorizations were required for a particular site on the date that the land comes under the protection of 30 CFR 761.11 and section 522(e) of the Act. As demonstrated in the *Greenwood* and *Mower* determinations cited above, we have experienced little difficulty in identifying what permits are required at any particular time.

One commenter expressed concern that the good faith/all permits standard does not take into consideration the fact that mining firms may not be legally required to apply for or obtain certain permits and authorizations, such as an air quality plan approval, before obtaining a SMCRA permit and

initiating surface coal mining operations. We do not interpret the good faith/all permits standard as requiring submission of applications for all necessary permits and authorizations before the date that the land comes under the protection of 30 CFR 761.11 or section 522(e) of the Act. We believe that the language of this standard is sufficiently flexible to remedy the concern raised by the commenter. Specifically, we interpret this standard as providing the agency making the VER determination with the discretion to decide (1) which non-SMCRA permits and authorizations are needed to initiate surface coal mining operations, and (2) what constitutes a good faith effort to obtain all necessary permits and authorizations. In making these decisions, the agency should consider any permitting time lines or regulatory authority policies in place when the land came under the protection of 30 CFR 761.11 and section 522(e).

A good faith effort may not necessarily require actual submission of applications for all required permits and authorizations in every instance. However, at a minimum, a good faith effort to obtain all necessary permits must include application for any required SMCRA permit. Because the SMCRA permit is the major permit needed for a surface coal mining operation, requiring submission of an application for this permit will ensure that the requester has made a significant effort to acquire the necessary permits. Therefore, we have added a sentence to paragraph (b)(1) of the definition specifying that, at a minimum, an application for any permit required under SMCRA must have been submitted before the land comes under the protection of 30 CFR 761.11 and section 522(e).

However, if, at the time that the land came under the protection of 30 CFR 761.11 and section 522(e) of SMCRA, State and Federal law did not require a SMCRA permit for the type of operation planned, none is needed to establish VER for that type of operation under this standard. In that case, the person must have obtained, or made a good faith attempt to obtain, all other necessary permits and authorizations to operate from the appropriate agencies by that date.

Revoked, expired or lapsed permits or authorizations do not qualify for consideration under the good faith/all permits standard because (1) they are no longer valid authorizations to operate and (2), in the case of an expired permit, the failure to renew or seek renewal in a timely fashion indicates a lack of a good faith effort to obtain all necessary

permits and authorizations. One commenter stated that this restriction is incongruous with our position endorsing the transferability of VER and our statement in the preamble to the proposed rule that VER attach to the land rather than to a person or operation. The commenter expressed concern that this restriction would inhibit the re-mining and re-permitting of bond forfeiture sites.

The commenter has misinterpreted the scope of this restriction. What we are saying is that once a permit expires, lapses, or is revoked, a person who requests a VER determination subsequent to the expiration, lapse, or revocation of that permit cannot rely upon the prior existence of that permit to satisfy the requirements of paragraph (b)(1) of the definition of VER. However, the expiration, lapse, or revocation of a permit in no way alters the validity of VER determinations made under the good faith/all permits standard before the permit expired, lapsed, or was revoked. As discussed in Part IX of the preamble to this final rule, we no longer adhere to the position that VER always attach to the land. However, in the case of the good faith/all permits standard, VER would effectively attach to the land since the only requirement apart from the property rights demonstration is a requirement that someone have made a good faith effort to obtain all necessary permits. There is no requirement that a person actually obtain a permit to demonstrate VER under this standard. Therefore, once we or the State regulatory authority determine that a person has VER for a particular site under the good faith/all permits standard, that determination remains valid for all future surface coal mining operations of the type and method covered by the determination, regardless of the status of any permit that may exist for that land. Therefore, the language to which the commenter objects does not present a barrier to re-permitting lands for which permits have expired, lapsed, or been revoked. Previous VER determinations applicable to the site under the good faith/all permits standard would remain valid and any areas that come under the protection of 30 CFR 761.11 and section 522(e) before the permit expired, lapsed, or was revoked would be covered by the exception for existing operations in 30 CFR 761.12.

Some commenters argued that the good faith/all permits standard is inherently unfair and unreasonable because so few persons could qualify for VER under that standard 20 years after the enactment of SMCRA. They also note that, while industry generally

acquires mineral rights well in advance of any planned mining, it does not seek permits for those lands until mining is reasonably imminent. Section 506(b) of the Act generally limits permit terms to 5 years and section 506(c) provides that a permit will terminate if the permittee has not begun surface coal mining operations within 3 years of the date of issuance. Thus, the commenters argue, the good faith/all permits standard unfairly penalizes persons who have purchased coal reserves for investment purposes or to provide for the company's long-term security or future expansion.

We believe that the good faith/all permits standard properly implements the intent of Congress to prevent most new surface coal mining operations on the lands listed in section 522(e). We agree that, except for lands coming under the protection of 30 CFR 761.11 and section 522(e) after August 3, 1977, few persons will qualify for VER under this standard. But this result is fair, reasonable, and appropriate, given the congressional intent to protect section 522(e) lands.

To some extent, speculative investors in land and interests in land assume the risk of future changes in the regulatory environment. Under the 1979 Federal rule, the 1980 suspension notice, State regulatory programs, and our 1986 suspension notice, an all permits or good faith/all permits standard has been in place for most of the time since the enactment of SMCRA for most of the lands listed in section 522(e). Therefore, few mineral owners could plausibly claim that they were unaware of the applicability of the restriction, or that they had reasonable expectations of being held to a less restrictive standard. Furthermore, the needed for and adjacent VER standard in paragraph (b)(2) of the definition offers relief to some persons who are unable to meet the good faith/all permits standard. And, as discussed in the final environmental impact statement and final economic analysis for this rulemaking, mineral owners and mine operators frequently rely upon the other exceptions provided by section 522(e), such as waivers for the buffer zones for public roads and occupied dwellings, compatibility findings for Federal lands in national forests, and joint approval for publicly owned parks and historic places.

Section 522(e) of the Act affects a person's eligibility to obtain a permit for surface coal mining operations. Logically, then, the VER exception under section 522(e) should ensure fairness by protecting a pre-existing interest under the regulatory process

that was in place when the prohibitions of section 522(e) took effect. That is, in general, the VER exception should protect an equitable interest in regulatory approval of proposed surface coal mining operations for which a person had taken steps to obtain regulatory approval in reliance upon the circumstances that existed before the land came under the protection of section 522(e). The good faith/all permits standard protects this equitable interest in regulatory approval.

This standard is also consistent with the general principles of equitable estoppel; *i.e.*, that one who has in good faith relied upon and complied with the requirements for obtaining an interest by "doing all he could do" should not be deprived of the interest. See Shostak and Barrett, *Valid Existing Rights in SMCRA*, 5 J. Min. L. & Pol'y 585, 600 (1990), and Note, *Regulation and Land Withdrawals: Defining "Valid Existing Rights"*, 3 J. Min. L. & Pol'y 517 (1988). Thus, under the good faith/all permits standard, in determining whether a person has demonstrated VER, the agency will examine whether the record demonstrates that, by the time that the land came under the protection of 30 CFR 761.11 and section 522(e), that person or a predecessor in interest had relied upon and complied with all regulatory requirements for obtaining the necessary permits and authorizations by doing all that could be done to obtain those permits and authorizations. If a person makes both this demonstration and the property rights demonstration required by paragraph (a) of the definition of VER, it would be unfair to deny that person eligibility to apply for and obtain a permit under SMCRA.

SMCRA and its legislative history do not compel or support adoption of a VER standard crafted to (1) ensure continuation of all standard pre-SMCRA industry practices, (2) preserve the ability of all mineral owners to extract coal from protected areas by surface coal mining operations whenever authorized under State property law, or (3) maintain broad eligibility for VER on a nondeclining basis. We believe that adoption of a standard incorporating these principles would effectively vitiate the protections of section 522(e) for all lands except those overlying unleased Federal coal. This result would contravene Congress' intention in enacting this section.

Some commenters argued that nothing in the statute or its legislative history remotely suggests that VER be defined in terms of a good faith/all permits standard. We agree that neither the statute nor its legislative history

mentions a good faith/all permits standard for VER. However, as discussed above, we believe that the good faith/all permits standard is consistent with the legislative history of section 522(e). In addition, the definition of VER is not restricted to the good faith/all permits standard; it also includes the needed for and adjacent standard.

Commenters also argue that if Congress had intended to provide a permit-based exception to the prohibitions of section 522(e), it would have done so expressly as it did in section 510(b)(5) (restrictions on mining alluvial valley floors), section 510(d)(2) (special requirements for surface coal mining operations on prime farmlands), and section 522(a)(2) (petition-initiated designations of land as unsuitable for surface coal mining operations). According to the commenters, adoption of a permit-based definition of VER conflicts with the judicially endorsed presumption that Congress has acted both purposely and intentionally when it includes particular language in one statutory provision but not in another.

We agree that the statute's use of different terminology for each of these exceptions means that Congress probably intended a somewhat different meaning for the VER exception under section 522(e) than for the exceptions provided under the other statutory provisions cited by the commenters. However, we do not agree that the difference in terminology rules out the adoption of any type of permit-based standard for VER under section 522(e). And the good faith/all permits standard in this final rule differs from the permit-based exceptions under other provisions of the Act in that it includes a good faith component, which the others do not. Furthermore, our definition of VER includes the needed for and adjacent standard, which is not a permit-based standard. Finally, nothing in the litigation history of the definition of VER indicates that the courts would likely find a permit-based standard unacceptable for the reasons advanced by the commenters.

Many commenters characterized *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 296 n.37 (1981) ("*Hodel v. VSMRA*") as representing a rejection of a permit-based standard for VER, or at least an indication that the courts would view such a standard with disfavor. In that case, the Supreme Court stated in a footnote that nothing in the statutory language of SMCRA or its legislative history would compel adoption of an all permits standard for VER. One commenter also argued that, in *National*

*Wildlife Fed'n v. Hodel*, 839 F.2d 694, 750 n.86 (D.C. Cir. 1988) (“*NWF v. Hodel*”), the U.S. Court of Appeals for the Federal Circuit characterized this Supreme Court pronouncement as a rejection of the all permits standard: “[T]he Supreme Court has previously rejected a too-restrictive interpretation of VER in an early challenge to the SMCRA brought by industry.” We respectfully disagree with these characterizations of the Supreme Court’s decision and opinion. First, the definition of VER was not before the court. Second, the language chosen by the Supreme Court is decidedly neutral. It addresses only the question of whether the statute compels adoption of an all permits standard. It does not reach the issue of whether an all permits standard (or good faith/all permits standard) is permissible.

Commenters attacked the good faith/all permits standard as unconstitutionally defining property rights in violation of the Tenth Amendment to the Constitution, which reserves that power to the States as one of their unenumerated powers. We disagree. Our definition of VER clearly defers to State property law on all questions of property rights. The final rule defining VER does not by its terms deprive any person of property rights. Instead, our definition establishes the limits of the VER exception to the prohibitions and restrictions of section 522(e), based on equitable considerations.

Furthermore, in *Hodel v. VSMRA*, 452 U.S. at 291 (1981), the Supreme Court stated:

The Court long ago rejected the suggestion that Congress invades areas reserved to the States by the Tenth Amendment simply because it exercises its authority under the Commerce Clause in a manner that displaces the States’ exercise of their police powers.

Commenters also argued that the good faith/all permits standard denies property owners due process under the Fifth Amendment because it conditions the retention of a property right on conditions that are unreasonable and of which the property owner had inadequate notice. We disagree. Property owners had the opportunity to comment on either an all permits or good faith/all permits standard in the 1978, 1982, 1988, 1991, and 1997 proposed rules. Furthermore, the final rule creates little change in the status quo since most States have applied a good faith/all permits or all permits standard ever since they obtained approval of their SMCRA regulatory programs. In addition, when the VER standard is applied, all VER

determinations have been and will continue to be subject to administrative and judicial review.

Commenters allege that the good faith/all permits standard improperly relies upon the opinion in *PSMRL I, Round I*, 14 Env’t Rep. Cas. (BNA) at 1090–91 (1980). They note that, on February 1, 1983, the U.S. Court of Appeals for the Federal Circuit remanded these regulations to the Secretary for review and revision at his request. The order of remand in this case stated that the judgment of the district court in *PSMRL I, Round I, supra*, could not be considered final. See *In re Permanent Surface Mining Regulation Litigation*, No. 80–1810, Order of Remand (D.C. Cir., Feb. 1, 1983). While the district court’s decision lacks precedential weight, the order of remand does not prohibit use of the opinion as guidance in developing revised regulations. Regardless, as discussed above, our rationale for adoption of the good faith/all permits standard rests primarily upon our analysis of the legislative history of section 522(e) and Congress’ purpose in enacting that section, not upon the opinion accompanying the court’s decision. Only the good faith component has its origins in the *PSMRL I, Round I* decision.

Commenters also asserted that the definition of VER does not comport with our statement in the *PSMRL I, Round I* litigation that “Congress intended the term valid existing rights to encompass property rights recognized as valid under state case law.” 14 Env’t Rep. Cas. (BNA) at 1090 (1980). The commenters overlook the context of this statement, which pertained only to paragraph (c) of the 1979 definition of VER. See 44 FR 67942, November 27, 1979. Paragraph (c) established criteria for the interpretation of documents used as part of the property rights demonstration. It did not comprise an independent standard for VER, contrary to the apparent assumptions of the commenters.

As noted in the decision, the Secretary committed only to revise the definition to state that documents dealing with property rights entitling one to surface mine coal will be interpreted in accordance with appropriate State court decisions. He did not agree to waive the other requirements of the 1979 definition, which include compliance with one of the VER standards in paragraphs (a) and (b) of the definition (the all permits standard, the needed for and adjacent standard, or the separate standard for haul roads). Nor did he agree to alter paragraph (d) of the 1979 definition,

which provided that VER “does not mean mere expectation of a right to conduct surface coal mining operations.”

One commenter complained that the version of the good faith/all permits standard that we proposed in 1997 differs sharply from our representations to the courts concerning the meaning of VER under section 522(e). The commenter specifically referred to and quoted a reply brief that the Government filed with the Supreme Court in *Hodel v. VSMRA*, 452 U.S. 264 (1981), on behalf of the Secretary. We agree that the final rule is not fully consistent with the statements in this brief. However, as discussed above and in Part VII.C.5. of this preamble, we no longer subscribe to this brief’s interpretation of the legislative history of section 522(e). Furthermore, the discussion of VER in the brief occurred in the context of a facial challenge to section 522(e) of the Act. The definition of VER was not before the Court, and the Court did not rule on the meaning of the VER exception. As the brief itself notes, the Secretary was engaged in rulemaking to redefine VER at the time that the brief was filed. And, as discussed above and in Part VII.C.5. of this preamble, we believe that the VER standards in the final rule are the standards that are most consistent with the legislative history and Congress’ intent in enacting section 522(e).

Some commenters opposed the good faith/all permits standard as a violation of the principle of statutory construction that a statute must be construed in a manner that affords each provision separate effect. Specifically, they charged that adoption of the good faith/all permits standard would effectively merge the VER exception under section 522(e) into the exception for existing operations under the same section, and thus improperly render the VER exception superfluous. We do not agree. First, as defined in this rule, the exception for existing operations does not apply to lands for which a permit has not actually been obtained; *i.e.*, it has no good faith component.

Second, the exception for existing operations includes authorized operations that have already begun surface coal mining operations before the land comes under the protection of 30 CFR 761.11 and section 522(e); the VER exception is not intended to apply to these operations. Third, the definition of VER is not restricted to the good faith/all permits standard. It also includes the needed for and adjacent standard and a separate standard for roads, neither of which has any counterpart in the exception for existing

operations in 30 CFR 761.12. Therefore, the VER exception includes significant differences from the exception for existing operations. The only overlap occurs with respect to unstarted operations that have obtained a permanent program permit under SMCRA.

In summary, we believe that the good faith/all permits standard is both reasonable and consistent with congressional intent. As discussed above and as summarized in Part V of this preamble, the legislative history is sparse and unclear, and parts are arguably inapplicable with respect to how Congress intended the VER exception in section 522(e) of the Act to be interpreted. In the face of this difficulty in determining Congress' intent, we believe that the good faith/all permits standard best balances a number of statutory purposes and policy objectives. These purposes and objectives include establishing a reasonable standard that is practicable to administer, providing substantial environmental protection to congressionally designated areas, providing an exception to the prohibition on surface coal mining operations in those areas when it would be unfair to apply the prohibition, protecting surface landowners from the adverse effects of surface coal mining operations, minimizing disruption of existing State regulatory programs and expectations engendered thereunder, and, to the extent that it harmonizes with the other purposes and objectives, mitigating or minimizing compensable takings of property interests.

### 3. What Comments Did We Receive Regarding Takings Issues Concerning the Good Faith/All Permits Standard?

Many commenters argued that the good faith/all permits standard is constitutionally infirm because of its Fifth Amendment takings implications. This argument appears to rely upon three premises: (1) that any interference with property rights recognized under State law would be a compensable taking, (2) that the good faith/all permits standard would effectively deny mineral owners any reasonable economic use of their property, and (3) that a standard which, when applied, might result in some compensable takings is facially unconstitutional. We do not agree that any of these premises is correct.

With respect to the definition of VER under section 522(e) of SMCRA, the U.S. District Court for the District of Columbia has held that "no mechanical formula [for VER] will ever perfectly define the universe of circumstances in which failure to grant VER will

constitute a taking." *PSMRL II, Round III—VER*, 22 Env't Rep. Cas. (BNA) at 1563 (1985). And the Supreme Court has long held that regulation that affects the value, use, or transfer of property may constitute a compensable taking if it goes too far. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). However, the courts have also long held that the rights of property owners are not absolute and that government may, within limits, regulate the use of property. See the summary of takings law published at 56 FR 33161, July 18, 1991.

The Supreme Court has identified three factors as having particular significance in a regulatory takings analysis: (1) the economic impact of the proposed government policy or action on the property interest involved, (2) the extent to which the action or regulation interferes with any reasonable, investment-backed expectations of the owner of the property interest, and (3) the character of the government action. *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 224–25 (1986). The courts generally find that a compensable taking exists only if the government action would cause inequitably disproportionate economic impacts on the property or interfere with reasonable, investment-backed expectations of persons with an interest in the property to such an extent that justice and fairness would require that the public, rather than the private property owners, pay for the public benefit resulting from the restrictions that the government action places on the property. *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

In declining to review the constitutionality of section 522(e) of SMCRA, the Supreme Court explained its historic approach to takings analyses as follows:

[T]his court has generally "been unable to develop any "set formula" for determining when "justice and fairness" require that economic injuries caused by public action be compensated, rather than remain disproportionately concentrated on a few persons." Rather, it has examined the "taking" question by engaging in essentially ad hoc, factual inquiries that have identified several factors—such as the economic impact of the regulation, its interference with reasonable investment-backed expectations, and the character of the government action—that have particular significance. *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979). \* \* \* These "ad hoc factual inquiries" must be conducted with respect to specific property, and the particular estimates of economic impact and ultimate valuation relevant in the unique circumstances.

*Hodel v. VSMRA*, 452 U.S. at 296 (1981) (citations omitted).

When regulation goes too far in infringing on private property rights is not precisely definable. The Supreme Court has consistently "eschewed any 'set formula' for determining how far is too far, preferring to 'engage in \* \* \* essentially ad hoc, factual inquiries.'" *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992) ("*Lucas*"), quoting *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978). In *Lucas*, the Supreme Court recognized what it characterized as a "logically antecedent inquiry" into a takings claimant's title prior to the inquiry into whether the government has interfered with rights inherent in that title in a manner that rises to the level of a Fifth Amendment taking. *Id.* at 1027. The Court noted in *Lucas* that its takings jurisprudence "has traditionally been guided by the understandings of our citizens regarding the content of, and the State's power over the 'bundle of rights' that they acquire when they obtain title to property." *Id.* at 1027. Thus, the Court continued, some regulation of rights should be expected. "In the case of personal property, by reason of the State's traditionally high degree of control over commercial dealings," the possibility of significant impacts should be anticipated. *Id.* at 1027–28. But the Court indicated that interests in land have greater expectations of protection. *Id.* at 1028. Further, the Court suggested that an "owner's reasonable expectations" may be critical to a takings determination. *Id.* at 1016 n.7. These expectations are those that "have been shaped by the State's law of property; i.e., whether and to what degree the State's law has accorded legal recognition and protection to the particular interest in land with respect to which the takings claimant alleges a diminution (or elimination) of value." *Id.* at 1016 n.7.

However, in a subsequent case, the Supreme Court reiterated that "our cases have long established that mere diminution in the value of property, however serious, is insufficient to demonstrate a taking." *Concrete Pipe & Prod. v. Construction Laborers Pension Trust*, 508 U.S. 602, 645 (1993). The Court cited *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 384 (1926), which involved an approximate 75 percent diminution in value, and *Hadacheck v. Sebastian*, 239 U.S. 394, 405 (1915), which involved a 92.5 percent diminution in value, as examples of the cases to which it was referring.

Even under *Lucas* (see *id.* at 1027–28), coal owners and the coal mining industry may not necessarily enjoy the same expectations of freedom from government interference as persons who have historically been subject to a lesser degree of regulation, a factor that must be considered when evaluating the impact of the governmental action on investment-backed expectations. The Supreme Court recently held that “those who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end.” *Concrete Pipe & Prod. v. Construction Laborers Pension Trust*, 508 U.S. 602, 645 (1993) (citations omitted). And, in the same case, the Court ruled that “legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations.” *Id.* at 646 (citations omitted).

In *PSMRL I, Round I*, 14 Env’t Rep. Cas. (BNA) at 1091 (1980), the U.S. District Court for the District of Columbia declined to rule on the constitutionality of the 1979 all permits standard for VER because the plaintiffs’ takings claims were purely hypothetical. However, in its opinion, the court stated that it found persuasive the government’s arguments that the definition met the standards of existing takings jurisprudence. And the definition that we are adopting today is consistent with that court’s declaration 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. VSMRA*, 452 U.S. at 296 n.37 (1981), the 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.” The definition of VER that we are adopting today likewise does not prohibit nonmining uses of land protected by section 522(e). Therefore, we believe that the good faith/all permits standard is consistent with the principles established by the Supreme Court.

The commenters are correct in noting that neither of these decisions specifically endorses the good faith/all permits standard as constitutionally sound. However, there is nothing in these court decisions, SMCRA, or its legislative history that precludes adoption of a good faith/all permits standard for VER under section 522(e) or suggests that adoption of this

standard would be a facial regulatory taking. Therefore, the only question is the degree to which its application to individual situations may result in a compensable taking.

The takings implication assessment in Part XXIX.E. of this preamble states that the good faith/all permits standard has significant takings implications as that term is defined by Executive Order 12630. It also states that, of all the alternatives that we considered, this standard has the greatest potential to result in compensable takings. However, the assessment explains that, while these takings implications are unquantifiable, we anticipate that the rule will result in very few compensable takings. The final environmental impact statement and final economic analysis for this rulemaking suggest that any takings that do occur will be limited largely to lands in eastern national forests with Federal surface and non-Federal mineral ownership and to lands in State and local parks and buffer zones for those parks.

Also, we anticipate that, in most cases, the lands protected by section 522(e) and 30 CFR 761.11 will comprise only a small portion of the relevant property interests as a whole. Therefore, under established takings jurisprudence, these prohibitions are unlikely to result in compensable takings. See *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 130 (1978) (“Takings jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated.”) For example, because mineral ownership is commonly less fragmented than surface ownership, the buffer zones for dwellings, cemeteries, roads, public buildings, and parks are unlikely to preclude surface coal mining operations on the bulk of a parcel for which a person owns the mineral rights. Even if the entire parcel lies within one or more of the prohibited areas, there may be no compensable taking because (1) the person may be able to recover the coal through underground mining methods without constructing surface facilities on the protected lands, or (2) there may be residual non-coal interests in the property which are unaffected or even enhanced by the prohibitions. For example, prohibition of surface coal mining operations could increase the value of the surface estate for residential or commercial development.

One commenter stated that *Penn Central* retains little currency in view of the subsequent *Lucas* decision. We find nothing in *Lucas* that expressly or by implication reverses the aspect of *Penn Central* quoted in the previous

paragraph. And, in a decision rendered after *Lucas*, the Supreme Court reaffirmed this aspect of its *Penn Central* decision:

We reject Concrete Pipe’s contention that the appropriate analytical framework is the one employed in our cases dealing with permanent physical occupation or destruction of economically beneficial use of real property. [Citation to *Lucas* omitted.] While Concrete Pipe tries to shoehorn its claim into this analysis by asserting that “the property of [Concrete Pipe] which is taken, is taken in its entirety,” we rejected this analysis years ago in *Penn Central*, where we held that a claimant’s parcel of property could not first be divided into what was taken and what was left for the purpose of demonstrating the taking of the former to be complete and hence compensable. To the extent that any portion of property is taken, that portion is always taken in its entirety; the relevant question, however, is whether the property taken is all, or only a portion of, the parcel in question.

*Concrete Pipe & Prod. v. Construction Laborers Pension Trust*, 508 U.S. 602, 643–44 (1993), citations omitted.

One commenter argued that the statutory prohibition in section 522(e), when combined with the good faith/all permits standard for VER, would physically appropriate a distinct property interest (the right to surface mine) and thus would constitute a compensable taking regardless of how much of a person’s property was actually affected by section 522(e) or what other uses of the property might remain. However, the commenter did not explain why this situation would qualify as a physical intrusion under the standard established in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). And we are aware of no basis for such an argument under existing takings jurisprudence.

One commenter stated that, based upon the takings implication assessment, adoption of the good faith/all permits standard is proscribed by *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568 (1988). In that case, which dealt with First Amendment issues, the Supreme Court held that if “an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.” *Id.* at 575. The commenter argued that, under this decision, we must select an alternative other than the good faith/all permits standard because the takings implication assessment in the proposed rule found that the good faith/all permits standard has the greatest potential to result in

compensable takings. We do not agree that the rationale in this decision prohibits adoption of the good faith/all permits standard.

First, we believe that adoption of another alternative would be contrary to the intent of Congress. In enacting section 522(e) of SMCRA, Congress clearly intended to minimize the number of new surface coal mining operations on protected lands. The other alternatives for the definition of VER are all less protective of the lands in section 522(e). Therefore, we believe that adoption of one of those alternatives would be contrary to the intent of Congress in enacting section 522(e).

Second, we do not agree that adoption or implementation of the good faith/all permits standard presents a constitutional problem. The Fifth Amendment only prohibits the taking of property without compensation. And the Tucker Act, 28 U.S.C. 1491, provides recourse for an individual to seek compensation in any situation in which a compensable taking might arise as a result of a Federal action. According to the Supreme Court, when "compensation is available for those whose property is in fact taken, the government action is not unconstitutional." *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 128 (1985). And the Supreme Court also ruled that the Takings Clause "is designed not to limit governmental interference with property rights *per se*, but rather to secure compensation in the event of otherwise proper interference amounting to a taking." *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 315 (1987).

Furthermore, we have used the good faith/all permits standard most of the time since SMCRA's enactment. And 20 of the 24 approved State regulatory programs under SMCRA rely upon a VER definition that includes either the all permits standard or the good faith/all permits standard. Apart from two cases of limited precedential weight from the U.S. District Court for the Southern District of Ohio, *Belville Mining Co. v. Lujan*, No. C-1-89-790 (S.D. Ohio 1991) (*Belville I*) and *Sunday Creek Coal Co. v. Hodel*, No. C-2-88-0416 (S.D. Ohio, June 2, 1988), we are not aware of any final decisions in which 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. And we are aware of no final decisions in which the U.S. Court of Federal Claims has held that a person who could not meet the good faith/all permits standard suffered a compensable taking. Therefore, we anticipate that application of the good faith/all permits standard will result in very few compensable takings.

The preamble to the proposed rule contains the following discussion, which relies upon a zoning analogy to support the validity of the good faith/all permits standard in the face of a Fifth Amendment challenge:

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 law 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.

62 FR 4844, January 31, 1997.

One commenter attacked this analogy as inappropriate and inconsistent with constitutional law. The commenter argued that zoning authority arises from the plenary police powers reserved to the States under the Tenth Amendment to the Constitution, while Congress' authority to regulate intrastate coal mining derives from judicial interpretation of the Commerce Clause of the Constitution. See *United States v. Lopez*, 514 U.S. 549, 566 (1995), citing *Hodel v. VSMRA*, *supra*. The commenter also quoted a different Supreme Court decision on SMCRA, in which the Court stated:

We do not share the view of the District Court that the Surface Mining Act is a land-use measure after the fashion of the zoning ordinances typically enacted by state and local governments.

*Hodel v. Indiana*, 452 U.S. 314, 331 n.18 (1981).

We agree that the constitutional authority for SMCRA is the Commerce Clause. See *Hodel v. VSMRA*, 452 U.S. at 275-283 (1981), and *Hodel v. Indiana*, 452 U.S. at 321-329 (1981). We did not intend the discussion in the proposed rule to be interpreted as identifying the police power as a source of authority for either SMCRA or adoption of implementing regulations. Rather, we intended that discussion to explain in part why we do not anticipate that the courts will find this standard to be a facial regulatory taking; *i.e.*, we expect the courts to evaluate this rule as a justifiable balancing of private rights with protection of public interests, given the dictates of SMCRA. Our statement that, in general, the courts have upheld land use restrictions as a legitimate exercise of the police power under the Constitution referred to litigation involving measures enacted by State and local governments, not Federal laws and regulations.

One commenter argued that the good faith/all permits standard has no takings implications because all mining in section 522(e) areas would be either a public nuisance or a threat to public health and safety. The commenter stated that, under background principles of property and nuisance law, prohibition of surface coal mining operations in these areas would never rise to the level of a compensable taking. While this statement may be true in some cases for some lands listed in section 522(e), the *ad hoc*, fact-specific nature of takings jurisprudence means that we cannot assume that it will always be true.

In *Lucas*, *supra*, at 17-25, the Supreme Court stated that the "harmful or noxious use" principle in *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962), and *Mugler v. Kansas*, 123 U.S. 623 (1887) (the nuisance law to which the commenter refers) was merely an earlier description by the Court of the police power justification for allowing the government to cause some diminution in the value of private property without requiring that the owner of that property be compensated. However, in *Lucas*, the Court held that a property owner must be compensated for all total regulatory takings; *i.e.*, situations in which the owner retains no economically viable or beneficial use of the property, unless the use or uses in question are already prohibited under background principles of State nuisance and property law.

The Court further stated that "[t]he fact that a particular use has long been engaged in by similarly situated owners

ordinarily imports a lack of any common law prohibition." *Lucas*, 505 U.S. at 1015. This premise might apply to surface coal mining operations in many of the areas protected by section 522(e) because State and local laws often did not prohibit surface coal mining operations in these areas before SMCRA. Its exact applicability would vary from State to State and locality to locality depending on State and local laws and the facts of each case. Hence, the commenter's claim that all mining in section 522(e) areas is *per se* a public nuisance and a threat to public health and safety is of questionable merit. See also *Whitney Benefits, Inc. v. United States*, 18 Cl.Ct. 394 (1989), *aff'd* 926 F.2d 1169 (Fed. Cir. 1991), in which the court of appeals held that, at least in the context of prohibiting surface coal mining operations on alluvial valley floors, "Congress was not in SMCRA abating a 'nuisance', within the meaning of Supreme Court and other cases." *Whitney Benefits* at 926 F.2d 1177. However, as discussed above and in the takings implication assessment, we believe that successful takings claims under the good faith/all permits standard will be rare.

Some commenters argued that adoption of any standard other than the good faith/all permits standard would result in compensable takings of surface owners' property rights to peaceful enjoyment of their property. We know of no Federal case law supporting this argument. However, because we are adopting the good faith/all permits standard, which the commenters favored, there is no need to respond to this comment.

A few commenters warned that the takings implications of the good faith/all permits standard may significantly disrupt State regulatory programs because a single successful claim could devastate State funding of these programs. The commenters stated that the threat of large inverse condemnation awards would cause some States to relinquish primacy, which, one commenter noted, would threaten "the federalist foundation of the Act." We find this possibility to be remote since 20 of the 24 approved State regulatory programs already include either an all permits or a good faith/all permits standard, and have done so since the date that we approved their programs under section 503 of the Act.

One State regulatory authority warned that the financial exposure resulting from adoption of the good faith/all permits standard would likely lead to States referring all VER determinations to us to avoid any liability for compensable takings awards, which

could easily bankrupt a regulatory agency. However, there is no provision of the Act that authorizes such referrals. Furthermore, we believe that referrals are unlikely because 20 of the 24 approved State programs, including the one for the State that the commenter represents, already include an all permits or good faith/all permits standard for VER. If a State does attempt to refer a VER determination to us, we will take whatever measures are appropriate under sections 503 and 504 of SMCRA.

#### 4. Why Did We Reject the Takings Standard?

For the reasons discussed in Part VII.C.2. of this preamble, we believe that, of all the alternatives considered for the definition of VER, the good faith/all permits standard best comports with the intent of Congress in enacting section 522(e). For this and other reasons, we did not propose to adopt a takings standard for VER. However, some persons elected to comment on either this standard or the validity of our reasons for failing to propose a takings standard. None of the comments received on the proposed rule provides sufficient basis for reconsideration of our preferred alternative.

To the extent that they chose to comment on the possibility of a takings standard, most commenters from every interest group expressed opposition, just as they did when we formally proposed one in 1991. Commenters provided various reasons for their opposition. Some characterized the takings standard as unacceptably subjective or unpredictable, with results that would vary widely from State to State and perhaps within a State as well. Many expressed concern about the potentially onerous information collection and analytical burdens that this standard could place both on persons seeking a VER determination and on the agency making the determination. Commenters noted that these agencies are unlikely to have the resources needed to conduct a comprehensive takings analysis. Other commenters argued that only the courts have both the authority and the competence to determine whether an agency action would result in a compensable taking. In addition, a number of commenters opposed the takings standard because of their belief that it would be far less protective of the lands listed in section 522(e) than the good faith/all permits standard. Because we did not propose a takings standard, we find it unnecessary to discuss the merits of these arguments here.

In the preamble to the 1997 proposed rule, we explained that one of the

reasons why we did not propose to adopt the takings standard is that a takings standard would be relatively difficult to administer, compared to the other alternatives. The few commenters who supported a takings standard as either their first or second choice argued that difficulty in administration is not a valid reason for not selecting an otherwise viable rulemaking alternative. We disagree. Executive Order 12988, "Civil Justice Reform," encourages the adoption of rules that do not present or create administrative difficulties.

And, in a 1985 opinion, the U.S. District Court for the District of Columbia, while declining to rule on the merits of a takings standard, cast doubt upon its administrative viability:

The Secretary seems to assume, and this court expresses no opinion on this issue, that Congress intended each and every VER determination made by a state agency or OSM to coincide precisely with what a judicial determination of a taking would be in that given factual setting. But \* \* \* only a court can decide whether a taking has occurred. Thus, while at first blush, it would appear that the broad constitutional takings test as promulgated by the Secretary comports with Congress' wishes to avoid any takings, it is not clear whether the broad test or one of the mechanical tests will better carry out congressional intent.

*PSMRL II, Round III—VER*, 22 Env't Rep. Cas. (BNA) at 1563 (1985).

One commenter stated that there is nothing in SMCRA or its legislative history that suggests that VER under section 522(e) is coextensive with the Takings Clause of the Fifth Amendment. As discussed above and in Parts VII.C.2. and VII.C.3. of this preamble, we agree.

Other commenters who favored either the takings standard or the ownership and authority standard noted that both we and the courts have frequently stated or implied that a principal purpose of the VER exception in section 522(e) is to avoid compensable takings. This statement is true. However, the expressions of opinion in the court decisions cited by the commenters are not binding, either because this particular question was not at issue in the cases before the courts or because the court declined to rule on the merits of the issue. Furthermore, both our prior statements suggesting that Congress included the VER exception in section 522(e) to avoid compensable takings (see, for example, 44 FR 14992, March 13, 1979, col. 1) and similar expressions of opinion in court decisions relied upon the colloquy between Congressmen Udall and Roncalio concerning VER under section 601 of the Act. See 123 Cong. Rec. H12878 (April 29, 1977).

We now believe that this colloquy has little if any relevance to the meaning of VER under section 522(e). Section 601 relates only to the mining of minerals and materials other than coal on *Federal* lands, while section 522(e) relates to surface coal mining operations on both Federal and non-Federal lands. Given this distinction and the references in section 601 to withdrawal of public lands from mineral entry or leasing, we believe that it is reasonable to conclude that the VER provision in section 601 refers to rights under the General Mining Law, the Mineral Leasing Act, and similar Federal statutes concerning the management and disposition of Federal lands and minerals. As discussed in Part VIII of this preamble, the concepts of VER under other Federal statutes are not readily translatable to VER under section 522(e).

And, most importantly, under the canons of statutory construction, the colloquy deserves little weight as a statement of congressional intent. The quoted exchange is an extemporaneous discussion between two legislators, reflecting their individual concerns and perceptions, and it does not appear in any form in any congressional report. Thus, it cannot be relied upon or accorded substantial weight as an expression of congressional intent concerning VER under section 522(e). See *PSMRL I*, 627 F.2d 1346, 1362 (D.C. Cir. 1980) *reh. den.* July 10, 1980, quoting *Duplex Printing Press Co. v. Deering*, 254 U.S. 443 (1921), and referencing 2A Sutherland, *Statutory Construction*, § 48.13 (4th ed. 1973), which states that legislative debates “are not a safe guide \* \* \* in ascertaining the meaning and purpose of the law-making body” because they are merely “expressive of the views and motives of individual members.”

One commenter argued that a takings standard would be more restrictive and environmentally protective than a good faith/all permits standard in situations in which application of the prohibitions would not constitute a compensable taking even though a good faith effort to obtain all permits had been made. While this situation is theoretically possible, the environmental impact statement for this rulemaking predicts that, on balance, the good faith/all permits standard would be more environmentally protective than a takings standard.

##### 5. Why Did We Reject the Ownership and Authority Standard?

Many commenters argued that the legislative history of SMCRA, in combination with court decisions concerning section 522(e) of the Act and

its implementing regulations, compel the adoption of an ownership and authority standard for VER as the only effective means of complying with the expressed intent of Congress to preserve property rights and avoid infringement on State property law. Commenters also noted that the ownership and authority standard has some of the favorable characteristics that we ascribed to the good faith/all permits standard. In particular, they stated that the ownership and authority standard is a bright-line standard, easy to understand and administer, and more objective than the takings standard.

We agree with the commenters that the ownership and authority standard is a relatively bright-line standard, relatively easy to understand and administer, and arguably more objective than the takings standard. However, these characteristics are not the primary factors that we considered in selecting the good faith/all permits standard. As discussed in part VII.C.2. of this preamble, we believe that the good faith/all permits standard best comports with the intent of Congress in enacting section 522(e).

While the legislative history of SMCRA could be construed in a manner consistent with an ownership and authority standard for VER under section 522(e), we do not concur with the commenters' assertions that the legislative history and judicial remarks concerning that history *compel* the adoption of an ownership and authority standard. Indeed, one of the cases frequently cited, *NWF v. Hodel*, 839 F.2d 694 (1988), states: “Neither the statutory language nor the legislative history elaborate on the meaning of the phrase ‘valid existing rights’ (‘VER’).” *Id.* at 749.

The legislative history of section 522(e) provides little clear or dispositive guidance on the purpose or meaning of the VER exception apart from the statement in both the Senate and House Committee reports that the phrase “subject to valid existing rights” in section 522(e) is intended to clarify that the prohibition on strip mining in the national forests is subject to previous State court interpretations of VER, such as the *Polino* decision in West Virginia. The congressional reports further state that this phrase is “in no way intended to open up national forest lands to strip mining where previous legal precedents have prohibited stripping.” H. R. Rep. No. 95–218, at 95 (1977) and S. Rep. No. 95–128, at 94–95 (1977).

Commenters interpreted these passages, in combination with the separate views that Congressman Lujan attached to the House report, as

meaning that Congress intended an ownership and authority standard for VER. In his statement of separate views, Congressman Lujan argued that:

As the Committee Report indicates, this section's limitation that the prohibition is “subject to valid existing rights” is not intended to open up national forest lands to strip mining when previous legal precedents have prohibited stripping. Naturally, the bill's language is also subject to the corollary that it is not intended to preclude mining where the owner of the mineral has the legal right to extract the coal by surface mining method[s].

H.R. Rep. No. 95–218, at 189 (1977).

However, the interpretation that Congressman Lujan insists is a corollary to the House committee report language appears only in his statement of separate views. If a majority of the committee concurred with his views, this corollary presumably would have appeared in the committee report. Because the committee report does not endorse Congressman Lujan's corollary, we are not persuaded that his interpretation of the committee report and the bill's language is a legitimate expression of the intent of Congress as a whole.

In addition, the interpretation advanced by Congressman Lujan and endorsed by the commenters likely would negate the section 522(e) prohibitions in most situations except those involving unleased Federal coal. This result would be inconsistent with the frequently expressed desire of Congress to prevent new surface coal mining operations in the areas listed in section 522(e), with certain exceptions. See, e.g., S. Rep. No. 95–128, at 55 (1977).

Therefore, we believe that the repeated legislative history discussions of the *Polino* case and property rights on national forest lands are best read as expressing Congress' intent that the VER clause not be construed in a manner that would ignore limitations under State property law. We believe that our reading receives support from the statement in the committee reports that the VER clause in section 522(e) is “in no way intended to open up national forest lands to strip mining where previous legal precedents have prohibited stripping.” H.R. Rep. No. 95–218, at 95 (1977) and S. Rep. No. 95–128, at 94–95 (1977). And, regardless of which reading is correct, there is no clear indication that Congress intended these discussions to apply to lands other than the ones listed in section 522(e)(2) (Federal lands in national forests). See, e.g., 5 J. Min. L. & Pol'y 585, 591, 592, 596 (1990).

Some commenters cited a colloquy between Congressmen Delbert Latta and Morris Udall during floor debate on the 1975 version of SMCRA as supporting an ownership and authority standard for VER under section 522(e). In this colloquy, Congressman Latta asked "whether this legislation affects in any way the rights of an owner of mineral rights situated below land owned by the Federal Government." 121 Cong. Rec. H 6679 (March 14, 1975). After a lengthy discussion, the colloquy concludes with the following exchange:

Mr. Latta. \* \* \* [I]f I understood what you said, this bill does not deal with the situation propounded in my question, meaning where a private citizen has sold the surface to the Federal Government and has retained the mineral rights. This bill would not in any way affect the mineral rights of that private citizen?

Mr. Udall. This is a bill that deals with how one mines coal in that situation and every other situation, but we do not attempt to change property rights in the situation the gentleman talks about and thus the mineral rights are not affected.

121 Cong. Rec. H 6679 (1975).

Although this colloquy does not specifically mention section 522(e) or VER, some commenters interpret Congressman Udall's concluding response as equating property rights under State law with VER under section 522(e). However, we believe that his response is better read as expressing the congressman's opinion that those provisions of SMCRA that govern how and where one may mine coal do not change mineral or other property rights. In any event, as discussed in part VII.C.4. of this preamble, legislative debates cannot be relied upon or accorded substantial weight as an expression of congressional intent. See *PSMRL I*, 627 F.2d 1346, 1362 (D.C. Cir. 1980) *reh. den.* July 10, 1980.

Furthermore, in 1975, the House rejected an amendment that would have replaced the phrase "subject to valid existing rights" in section 522(e) with a provision allowing surface coal mining operations on Federal lands in national forests and grasslands whenever the deeds conveying lands to the United States reserved the coal and specifically provided for the use of surface mining methods. 121 Cong. Rec. H 7048-50 (March 18, 1975). We find the House's rejection of an amendment providing an express ownership and authority standard for VER on Federal lands in national forests to be strongly suggestive of congressional intent. That is, we believe that this rejection suggests that Congress did not intend an ownership and authority standard for VER.

Except for lands with unleased Federal coal, an ownership and authority standard would offer no significant protection to section 522(e) lands beyond that independently afforded by the right-of-entry provisions of SMCRA's permitting requirements. Those permitting requirements apply to all surface coal mining operations on all lands. We find it unlikely that Congress intended the VER exception to be so broad that the prohibitions and restrictions of section 522(e) would afford only marginal and duplicative protection to most lands listed in that section. See the statements emphasizing the importance of protecting these lands in S. Rep. No. 95-128, at 54-55 and 94 (1977).

Industry argues that the ownership and authority standard would still give meaning to the prohibitions of section 522(e) because it would prohibit surface coal mining operations on those lands in section 522(e) for which the Federal Government owns the mineral interests. We do not agree with the commenters' argument. Federal coal leases in existence at the time that land comes under the protection of section 522(e) and 30 CFR 761.11 might convey sufficient property rights to satisfy an ownership and authority standard. Furthermore, we do not believe that Congress intended to restrict the prohibitions in this fashion. If it did, Congress could have achieved this result in a far more straightforward manner by prohibiting any future leases of Federal coal interests for the lands listed in section 522(e). In fact, Congress did just that with respect to Federal lands designated as unsuitable for all or certain types of surface coal mining operations pursuant to section 522(b) of the Act. In addition, if this were Congress' sole intent in creating section 522(e), Congress would have had little reason to enact the prohibitions of paragraphs (e)(3) through (e)(5) of that section, since these paragraphs apply primarily to non-Federal lands.

Commenters favoring the ownership and authority standard and opposing the good faith/all permits standard cite various Federal court decisions involving the application of SMCRA requirements as supporting their position. These cases include *Meridian Land & Mineral Co. v. Hodel*, 843 F.2d 340, 346 (9th Cir. 1988); *Ainsley v. U.S.*, 8 Cl.Ct. 394, 401 (1985); *Otter Creek Coal Co. v. U.S.*, 231 Ct. Cl. 878, 880 (1982); *Sunday Creek Coal Co. v. Hodel*, C.A. No. C-2-88-0416 (S.D. Ohio June 2, 1988); and *Belville Mining Co. v. U.S.*, 763 F. Supp. 1411, 1420 (S.D. Ohio 1991) and 999 F.2d 989, 992 (6th Cir. 1993) ("*Belville II*"). However, apart

from *Sunday Creek*, which lacks precedential effect outside the Southern District of Ohio, these cases do not involve a challenge to the validity of the good faith/all permits standard for VER. Indeed, except for *Belville II* and *Sunday Creek*, the decisions do not even involve VER determinations. Therefore, to the extent that the judicial opinions cited by the commenters theorize on the meaning of VER under section 522(e), those statements of theory are properly regarded as dicta because that question was not properly before the court in any of these cases.

Furthermore, the theoretical discussions in these opinions generally center on the colloquy between Congressmen Udall and Roncalio concerning VER under section 601 of the Act. See 123 Cong. Rec. H 12878 (1977) (April 29, 1977). We believe that the colloquy, which does not concern surface coal mining operations or section 522(e), has little relevance to the meaning of VER under section 522(e). As discussed in part VII.C.4. of this preamble, it cannot be relied upon or accorded substantial weight as an expression of congressional intent concerning VER under section 522(e). See *PSMRL I*, 627 F.2d 1346, 1362 (D.C. Cir. 1980) *reh. den.* July 10, 1980 (citations omitted).

In *Belville II*, the courts did not consider any regulatory definition of VER in determining whether Belville had the right to conduct surface coal mining operations on Federal lands within the Wayne National Forest. Instead, they proceeded directly to an examination of property rights under State law, finding that Belville had VER under SMCRA whenever it had authority under State property law to conduct surface coal mining operations. However, these decisions lack precedential effect outside the Sixth Circuit.

For the reasons discussed above and in other portions of Part VII.C. of this preamble, we decline to adopt the rationale advanced in the *Belville II* decisions. We believe that the legislative history of SMCRA either supports or is not demonstrably inconsistent with adoption of a good faith/all permits standard for VER. In addition, we believe that the good faith/all permits standard is the most reasonable policy choice for a VER standard consistent with the purposes of section 522(e) as discussed in part VII.C.2. of this preamble.

Commenters also point to the decision of the U.S. Court of Appeals for the Federal Circuit upholding the portion of the 1983 VER definition that extended VER to existing operations on lands that

come under the protection of section 522(e) after August 3, 1977. In its opinion, the court stated that:

The legislative history, however, is of some help. Although it does not answer the specific question before us, it does suggest that Congress did not intend to infringe on valid property rights or effect takings through section 522(e).

*NWF v. Hodel*, 839 F.2d at 750 (1988) (footnote omitted).

However, the court did not identify any element of the Act's legislative history that supports this conclusion. And its opinion also states: "Neither the statutory language nor the legislative history elaborate on the meaning of the phrase 'valid existing rights' ('VER')." *Id.* at 749. Finally, we note that the entire VER definition was not before the court—only the issue of VER for operations in existence on lands coming under the protection of the Act after August 3, 1977. Therefore, we cannot agree with the commenters that the court's decision provides clear guidance concerning the meaning of VER under section 522(e).

#### *D. Paragraph (b)(2): "Needed for and Adjacent" Standard.*

##### 1. What Is the History of This Standard

The needed for and adjacent standard first appears in the definition of VER promulgated on March 13, 1979 (44 FR 14902, 15342); we did not include it in the 1978 proposed rule that preceded the 1979 final rule. The 1979 definition provided that a permit applicant with a property right to produce coal by surface coal mining operations as of August 3, 1977, possessed VER if the coal was both needed for and immediately adjacent to an ongoing surface coal mining operation for which all permits were obtained prior to August 3, 1977. The preamble provides the following explanation of the basis for this standard:

In analyzing the value of the property, the courts have distinguished an owner's value in an ongoing operation which must be halted, as compared with value that an owner has paid for some future operation that will be restricted. The taking cases reflect less sympathy for property owners who are denied some future opportunity to exploit their property interests based on prior beliefs that the property would be available for development; but most courts express concern over government interference with an ongoing operation which causes a 100 percent diminution in value unless it is a harmful use and falls within the noxious use category. This distinction suggests that VER could be defined differently for owners of coal which is essential to continue an ongoing mine, as compared to property rights in coal for a potential new mine.

44 FR 14992, March 13, 1979, col. 2.

The National Wildlife Federation challenged this standard as unduly expanding the scope of the VER exception 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 Env't Rep. Cas. (BNA) at 1091-92 (1980).

On September 14, 1983 (48 FR 41312, 41349), we promulgated a revised definition of VER that modified the needed for and adjacent standard by deleting the requirement for a demonstration that the property right to remove the coal by surface coal mining operations existed as of August 3, 1977 (although our response to a comment concerning this issue at 48 FR 41316 suggests that the deletion may have been unintentional). In that rulemaking, we 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 we 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. *See PSMRL II, Round III-VER*, 22 Env't Rep. Cas. (BNA) at 1566-67.

On November 20, 1986 (51 FR 41952, 41961), we suspended paragraph (c) of the 1983 definition of VER. In the preamble to the suspension notice, we stated that, pending adoption of a new rule, we 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." *See* 51 FR 41954-55, November 20, 1986.

On July 18, 1991 (56 FR 33152, 33164), we proposed to revise the 1983 definition by reinstating the property rights demonstration requirement and by removing the sentence defining the "needed for" component of the standard. In the preamble to that proposed rule, we 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, we proposed to replace the requirement that both the operation and the property rights to expand the operation onto adjacent lands 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 exception is sought came under the protection of 30 CFR 761.11 and section 522(e) of the Act. The latter change reflects the concept embodied in paragraph (d)(1) of the former (1983) definition, which was upheld in *NWF v. Hodel*, 839 F.2d at 750 (1988).

##### 2. How Did We Propose To Revise This Standard in 1997?

On January 31, 1997 (62 FR 4836, 4860), we proposed a needed for and adjacent standard similar to the one proposed in 1991, with a few modifications. In addition to the changes in the property rights demonstration component (see Part VII.B. of this preamble), the 1997 proposed rule specified that the standard would apply to land, not just coal, needed for an existing operation. Under State law, a permittee or operator may have legitimate property interests in land apart from the coal itself. 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. Part VII.B. of this preamble contains a more extensive discussion of this issue.

The definition proposed in 1997 also attempted to eliminate any ambiguity caused by use of the term "ongoing surface coal mining operation" in the 1979 and 1983 rules. In 1991, we essentially proposed to replace "ongoing" with "existing." However, comments received on that proposal indicated some uncertainty as to whether "ongoing" or "existing" included operations that are fully approved but inactive or unstarted. Accordingly, in 1997, we proposed to define this standard to include land needed for and adjacent to surface coal mining operations for which all permits had been obtained, or a good faith effort to obtain such permits had been made, before the land came under the protection of 30 CFR 761.11 and section 522(e) of the Act. The preamble to the proposed rule explained that we could find no rational basis for differentiating between active operations and those that are approved but inactive or unstarted. Both categories of operations engender the same type of investment-backed expectations. Both involve situations in which the permittee has

made significant resource outlays in an effort to realize those expectations.

### 3. How Does the Standard in the Final Rule Differ From the One That We Proposed in 1997?

After evaluating the comments received, we are adopting the needed for and adjacent standard as proposed in 1997, with several substantive and editorial changes. To establish VER under the needed for and adjacent standard in paragraph (b)(2) of the definition of VER in the final rule, a person must (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 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 land came under the protection of 30 CFR 761.11 and section 522(e) of the Act.

In addition, we are adding the following language to the rule in response to comments:

To meet this standard, a person must demonstrate that prohibiting expansion of the operation onto that land would unfairly impact the viability of the operation as originally planned before the land came under the protection of § 761.11 or 30 U.S.C. 1272(e). Except for operations in existence before August 3, 1977, or for which a good faith effort to obtain all necessary permits had been made before August 3, 1977, this standard does not apply to lands already under the protection of § 761.11 or 30 U.S.C. 1272(e) when the regulatory authority approved the permit for the original operation or when the good faith effort to obtain all necessary permits for the original operation was made.

In evaluating whether a person meets this standard, the agency making the determination may consider factors such as:

(i) The extent to which coal supply contracts or other legal and business commitments that predate the time that the land came under the protection of § 761.11 depend upon use of that land for surface coal mining operations.

(ii) The extent to which plans used to obtain financing for the operation before the land came under the protection of § 761.11 rely upon use of that land for surface coal mining operations.

(iii) The extent to which investments in the operation before the land came under the protection of § 761.11 rely upon use of that land for surface coal mining operations.

(iv) Whether the land lies within the area identified on the life-of-mine map submitted under § 779.24(c) or § 783.24(c) of this chapter before the land came under the protection of § 761.11.

As stated in the preamble to the proposed rule, abandoned sites and sites with expired or revoked permits, including permits that have expired under section 506(c) of SMCRA, do not qualify as operations that could form the basis for a VER determination under the needed for and adjacent standard. Nor do long-inactive facilities for which no permit was required before SMCRA and which would have to be substantially or completely reconstructed before usage could resume. Allowing defunct operations such as those listed above to qualify as existing or authorized operations would contradict the plain meaning of that term and would be inconsistent with the congressional intent to prohibit, with certain exceptions, new surface coal mining operations on the lands identified in section 522(e). See, for example, S. Rep. No. 95-128, at 55 (1977).

### 4. What Comments Did We Receive on the Proposed Standard and How Did We Dispose of Them?

Some commenters opposed reinstatement of any type of requirement for a property rights demonstration as part of the needed for and adjacent standard, arguing that Congress intended the exception for existing operations in section 522(e) to apply to all lands needed by existing surface coal mining operations, regardless of whether those operations had the legal right to mine those lands when the land came under the protection of section 522(e). We have revised the definition in the final rule in a manner that will allow the needed for and adjacent standard to be met even if the operation for which the land is needed and to which it is adjacent does not yet own the requisite property rights for the land. However, in that situation, the property right to conduct the type of surface coal mining operations intended must exist at the time that the land comes under the protection of 30 CFR 761.11 or section 522(e), and the property rights demonstration required by paragraph (a) of the definition must be made as part of the request for a VER determination.

One commenter expressed concern that the proposed rule did not explicitly address "the misconception that the land for which VER is claimed must be 'immediately adjacent' to an area covered by a permit issued or applied for before the enactment of SMCRA." The commenter noted that many large mining operations include sufficient reserves to operate for 20 to 50 years, even though, at least in pre-SMCRA times, most did not seek a permit for these lands that far in advance of

mining. Because of the investments in reserves, land, equipment, and long-term coal supply contracts made on the assumption that these reserves would be available for surface coal mining operations, the commenter argued that all such lands should be considered part of, or at least needed for, the surface coal mining operation in existence at the time that the land came under the protection of 30 CFR 761.11 and section 522(e).

As the commenter implicitly acknowledges, section 506(b) of SMCRA authorizes the issuance of a permit with a term in excess of 5 years when the applicant demonstrates a need for the longer term to obtain necessary financing. Even if the applicant does not qualify for a "life-of-mine" permit term, nothing in SMCRA prohibits a company from seeking a permit with a normal term for the entire area upon which it plans to conduct operations for the life of the mine. Section 506(d) of the Act provides that any valid permit has the right of successive renewal upon expiration for lands within the permit area at that time. Once a valid permit exists for an area, that area becomes part of an existing operation and thus qualifies for the exception for existing operations under 30 CFR 761.12. Therefore, we do not believe that the commenter's concerns are valid with respect to post-SMCRA operations, because the operator or permittee can avoid these problems with proper planning.

However, we recognize the possibility that operations that started before SMCRA may have a legitimate concern. Therefore, we have added language to the definition to clarify that, in evaluating whether a person meets the needed for and adjacent standard, the agency making the determination may consider factors such as:

- The extent to which coal supply contracts or other legal and business commitments that predate the time that the land came under the protection of section 522(e) or 30 CFR 761.11 depend upon use of that land for surface coal mining operations.

- The extent to which plans used to obtain financing for the operation before the land came under the protection of section 522(e) or 30 CFR 761.11 rely upon use of that land for surface coal mining operations.

- The extent to which investments in the operation before the land came under the protection of section 522(e) or 30 CFR 761.11 rely upon use of that land for surface coal mining operations.

We believe that these provisions will adequately protect the interests of companies that acquired contiguous

reserves for a pre-SMCRA operation with the expectation of being able to obtain permits for those reserves in a sequential fashion.

One commenter also urged deletion of the "immediately adjacent" portion of the standard since, to meet market specifications, companies may need coal of a different quality for an operation if the coal immediately adjacent to the existing operation does not satisfy a customer's demands. We do not agree that changing market conditions provide a basis for VER under the needed for and adjacent standard. This situation represents the normal risks of the marketplace—and we do not believe that failure to anticipate changing market conditions entitles an operation to protection from the prohibitions of 30 CFR 761.11 and section 522(e).

However, there may be situations in which the company has included the coal in its mining plans but, for legitimate reasons, has been unable to obtain a permit for that area before the land came under the protection of section 522(e) and 30 CFR 761.11 despite efforts to do so. Therefore, we have revised the definition to include language that would allow the agency making the determination to consider lands within the area identified on the life-of-mine map submitted under 30 CFR 779.24(c) or 783.24(c) before the land came under the protection of 30 CFR 761.11 and section 522(e) to be adjacent to the original operation on a case-by-case basis. By adding this language, we do not intend to imply that all lands within the area identified on the life-of-mine map automatically qualify for the VER exception under the needed for and adjacent standard. The agency responsible for the VER determination must evaluate each situation on its merits and determine whether the request meets all requirements of the needed for and adjacent standard, including a demonstration that prohibiting expansion of the operation onto those lands would unfairly impact the viability of the operation as originally planned before the land came under the protection of § 761.11 or 30 U.S.C. 1272(e).

In addition, there is some flexibility in the term "adjacent," which "Black's Law Dictionary" defines as:

Lying near or close to; sometimes, contiguous; neighboring. Adjacent implies that the two objects are not widely separated; though they may not actually touch, \* \* \* while adjoining imports that they are so joined or united to each other that no third object intervenes.

Certainly, an intervening road, pipeline, stream, or power line would not preclude land from being considered immediately adjacent to an existing operation's permit boundaries. Beyond that point, application of the needed for and adjacent standard is of necessity a judgment call, best decided on a documented, case-by-case basis by the agency responsible for the VER determination. In making this determination, the agency must consider both the "needed for" and "immediately adjacent to" components of the standard. That is, a determination that the land is immediately adjacent to an existing operation, or an operation for which a good faith effort has been made to obtain all necessary permits, is not sufficient to find that the operation may proceed onto those lands under the VER exception. As stated in the final rule, the agency also must find that prohibiting expansion of the operation onto those lands would unfairly impact the viability of the operation as originally planned before the land came under the protection of 30 CFR 761.11 or section 522(e).

Several commenters argued that the scope of the needed for and adjacent standard should be coextensive with that of the prime farmland grandfather exemption in section 510(d)(2) of the Act. According to one commenter, if an area has been determined to be part of an existing surface coal mining operation for purposes of the prime farmland grandfather exemption, then that area must qualify for the VER exception under the needed for and adjacent standard. We do not agree. The needed for and adjacent standard is part of the VER exception in section 522(e), not the exception for existing operations. Furthermore, the needed for and adjacent standard is created by rule, not by statute. Therefore, the argument that Congress must have intended similar terms to have similar meanings is not applicable, as Congress did not devise the needed for and adjacent standard.

Some commenters asserted that because the needed for and adjacent standard requires the existence of an operation for which all permits have been obtained or a good faith effort to obtain all permits has been made, this standard should be a component of the exception for existing operations rather than the definition of VER. We disagree. Section 522(e) does not define either VER or the exception for existing operations, apart from describing the latter exception as including "surface coal mining operations which exist on the date of enactment of this Act." Therefore, we have considerable

latitude in developing a final rule to implement these provisions of the Act. We believe that the final rule is a reasonable interpretation of both the VER exception and the exception for existing operations.

In developing the 1997 proposed rule and this final rule, we endeavored, for practical reasons, to limit the exception for existing operations to those situations in which the operator has full authorization to conduct surface coal mining operations on the lands in question before those lands came under the protection of section 522(e) and 30 CFR 761.11. In other words, the exception for existing operations applies in those circumstances in which the regulatory authority does not need to take any additional action before the operator may continue or commence surface coal mining operations on the newly protected lands. In contrast, a person planning to conduct surface coal mining operations under the VER exception in the final rule must (1) demonstrate the existence of VER, and (2) obtain a permit from the regulatory authority before initiating surface coal mining operations on protected lands. There is some overlap between the two exceptions in that persons who have obtained all necessary permits and authorizations to operate before the land comes under the protection of 30 CFR 761.11 and section 522(e) may either request a VER determination or avail themselves of the exception for existing operations.

Some commenters argued that the needed for and adjacent standard functioned purely as a transitional device between pre-SMCRA and post-SMCRA regulatory schemes. Since that transition is now complete, commenters assert that the standard is obsolete and should be removed or at least limited to surface coal mining operations in existence on August 3, 1977, the date of enactment of SMCRA. According to the commenters, the Constitution provides no protection to speculative investments. In addition, the commenters argue that the passage of SMCRA placed all parties on notice that surface coal mining operations in certain areas would be prohibited in the future, and that operators therefore should have planned their operations and acquired property and mining rights with a view to the existence of those prohibitions. In other words, the commenters assert that there is no longer any basis for anyone to have a reasonable expectation that properties outside the boundary of a mining permit could be incorporated into the permit area or mining plan.

As discussed earlier in this section of the preamble, the Act's provisions allowing life-of-mine permit terms and granting a right of successive renewal to permits with normal terms should minimize the need for the needed for and adjacent standard for mines that begin operations after August 3, 1977. However, we do not agree that this standard has no post-transitional value. Nor do we agree that the standard should be limited to operations in existence on August 3, 1977. The commenters' argument that the needed for and adjacent standard is purely a transitional device for persons who did not anticipate the enactment of SMCRA is true only if one assumes that no one would have a reasonable expectation of being able to conduct surface coal mining operations under the VER exception in section 522(e).

Since SMCRA does not define VER, this assumption is not necessarily correct. In particular, we do not agree with the commenters that, after the enactment of SMCRA, a person had a reasonable expectation of conducting surface coal mining operations on the lands listed in section 522(e) only if those lands were already under permit on August 3, 1977. The history of our attempts to define VER by regulation provides some basis for persons to anticipate that the VER exception sweeps more broadly than the good faith/all permits standard. And in 1983, we adopted a standard for "continually created VER," which provided for the determination of VER on the basis of rights and documents in existence as of the date that the land came under the protection of section 522(e) and 30 CFR 761.11 rather than as of August 3, 1977. The courts subsequently recognized this approach as valid. See *PSMRL II, Round III—VER*, 22 Env't Rep. Cas. (BNA) at 1564 (1985), and *NWF v. Hodel*, 839 F.2d at 749-751 (1988). Adoption and judicial affirmation of this standard created the expectation that the VER exception would not be limited to lands under permit on August 3, 1977, or to operations in existence on that date. Similarly, our approval of a takings standard for VER as part of the West Virginia program in 1983 and as part of the Illinois program in 1989 may have created the expectation, at least in those States, that the VER exception is not limited to the good faith/all permits standard and that a person may have the right to conduct surface coal mining operations in protected areas even if an operation was not in existence on August 3, 1977.

Therefore, the final rule retains the needed for and adjacent standard and, as proposed, it extends that standard to

lands needed for and immediately adjacent to surface coal mining operations in existence when those lands came under the protection of section 522(e) after August 3, 1977. Extension of the standard to these lands is a fair means of addressing the expectations discussed above. In addition, it is consistent with the purpose of the continually created VER standard that we adopted in 1983.

Some commenters challenged our extension of this standard to lands needed for and immediately adjacent to operations for which a good faith attempt had been made to obtain all necessary permits. They argued that the standard should apply only to operations that had already received all necessary permits since only those operations could legitimately be considered existing operations. We do not agree. The scope of the VER exception is not restricted by the scope of the exception for existing operations in 30 CFR 761.12. We believe that the needed for and adjacent standard should apply to lands needed for and immediately adjacent to an operation for which a good faith attempt has been made to obtain all necessary permits since there is no question that such an operation has VER under paragraph (b)(1) of the definition of VER in the final rule. Accordingly, we believe that inclusion of a good faith component in the needed for and adjacent standard is appropriate because it provides fair treatment of reasonable expectations while avoiding significant impairment of the prohibitions of section 522(e).

In the preamble to the proposed rule, we stated that, to avoid subverting the congressional prohibitions in section 522(e), we believed that VER determinations under the needed for and adjacent standard must be based on an analysis of how denial of the claim would affect the value, as of the date that 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, we stated, this standard could be used to justify unlimited expansion of operations adjoining protected areas, which could effectively nullify the prohibition. We suggested that this approach receives implied support in *PSMRL I, Round I*, 14 Env't Rep. Cas. (BNA) at 1091-92 (1980), in which the court upheld the needed for and adjacent standard as a reasonable means of avoiding compensable takings:

The need and adjacent [*sic*] component of the Secretary's definition is consonant with Supreme Court declarations regarding taking of property. This test allows the grant of a valid existing right exemption when extension of mining to an adjacent area is necessary to maintain, as a whole, the value of the mining operation. Stated otherwise, the need and adjacent test requires a valid existing right exemption when denial of mining on the adjacent area will rob the mining operation, as a whole, of its value. See *Penn Central, supra*, 438 U.S. 130 at 130-31; *Goldblatt v. Hempstead*, 369 U.S. 590, 8 L. Ed. 2d 130, 82 S. Ct. 987 (1962). The need and adjacent test is thus 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.

In the preamble to the proposed rule, we requested comment on whether the rule language should be revised to explicitly incorporate this interpretation. Most commenters did not respond to this request. Of those who did, some favored codification of our preamble interpretation as a welcome limit on the scope of the exception. Others opposed this interpretation as too restrictive, too burdensome, and inconsistent with our arguments in favor of the good faith/all permits standard and against the takings standard. One commenter stated that it is disingenuous for us to argue, on the one hand, that Congress did not intend to define the VER exception in terms of avoiding compensable takings, and then to propose to define or interpret the needed for and adjacent standard in a manner that resembles a takings standard.

One commenter asserted that the interpretation in the preamble to the proposed rule ignores the court's direction in *PSMRL I, Round I*, 14 Env't Rep. Cas. (BNA) at 1091-92 (1980), and is impermissibly ambiguous. According to this commenter, the only legal interpretation is the "gravely diminish" standard that the court cited in the decision quoted above. We disagree. The court's reasoning does not require or suggest that we apply a takings analysis in determining whether a VER claim meets the needed for component of the needed for and adjacent standard. The court merely found that the 1979 needed for and adjacent standard was consistent with existing takings jurisprudence.

After evaluating all comments received, we have decided not to codify or otherwise adopt the interpretation of "needed for" that we set forth in the preamble to the proposed rule. We believe that this determination is best made on a case-by-case basis by the agency responsible for the VER

determination, relying upon all available information. However, in response to those commenters who expressed concern that the lack of a definition of "needed for" would lead to abuse, we have revised the rule to specify that the requester must demonstrate that prohibiting expansion of an operation onto the land in question would unfairly impact the viability of the operation as originally planned before the land came under the protection of 30 CFR 761.11 or section 522(e). We also added a list of examples of the type of factors that the agency should consider in evaluating whether the land is needed for and immediately adjacent to the existing operation. This list is not exhaustive and it does not exclude consideration of other appropriate factors.

Finally, in response to comments that the needed for and adjacent standard was too broad, we have added a sentence to the definition to clarify that, except for operations in existence before August 3, 1977, or for which a good faith effort to obtain all necessary permits had been made before August 3, 1977, this standard does not apply to lands already under the protection of 30 CFR 761.11 and section 522(e) when the regulatory authority approved the permit for the original operation or when the good faith effort to obtain all necessary permits for the original operation was made. We believe that this clarification is appropriate because the operator or permittee would have no reasonable expectation of being able to conduct surface coal mining operations on those lands.

#### *E. Paragraph (c): VER Standards for Roads*

Paragraph (c) of the definition of VER in the final rule provides that a person has VER for the use or construction of a road included within the definition of "surface coal mining operations" in 30 CFR 700.5 and section 701(28) of the Act if one or more of the following circumstances listed in paragraphs (c)(1) through (c)(4) of the definition exist:

- The road existed when the land upon which it is located came under the protection of 30 CFR 761.11 or section 522(e), and the person has a legal right to use the road for surface coal mining operations.
- A properly recorded right of way or easement for a road in that location existed when the land came under the protection of 30 CFR 761.11 or section 522(e), and, under the document creating the right of way or easement, and under subsequent conveyances, the person has a legal right to use or construct a road across the right of way

or easement for surface coal mining operations.

- A valid permit for use or construction of a road in that location for surface coal mining operations existed when the land came under the protection of 30 CFR 761.11 or section 522(e).

- A person has VER under paragraphs (a) and (b) of the definition of VER.

With the exception of the modifications discussed below, the first three standards resemble those in both the proposed rule and the previous (1983) definition.

The last standard, which we have added as proposed, reflects the fact that the definition of surface coal mining operations in section 701(28) of the Act and 30 CFR 700.5 includes "all lands affected by the construction of new roads or the improvement or use of existing roads to gain access to the site of such activities and for haulage." Therefore, if a person demonstrates VER for surface coal mining operations in general under the standards in paragraphs (a) and (b) of the definition, there is no reason why that person should have to separately demonstrate VER to use or construct roads on that land, since those roads are part of the operations for which he or she has already demonstrated VER. The standards in paragraphs (a) and (b) are of equal or greater rigor when compared with those in paragraphs (c)(1) through (c)(3). Accordingly, we have added paragraph (c)(4) to the definition to clarify that a person has the option of using the criteria and standards in paragraphs (a) and (b) of the definition to demonstrate VER for roads.

One commenter found the phrase "as of" in paragraphs (b)(2) and (b)(3) of the proposed rule confusing. We have revised the wording of these paragraphs, which the final rule redesignates as paragraphs (c)(2) and (c)(3), to clarify that a properly recorded right of way or easement, or a valid permit, must have existed when the land came under the protection of section 522(e) and 30 CFR 761.11.

As proposed, the final rule modifies the 1983 definition by incorporating the concept that VER for lands coming under the protection of section 522(e) or 30 CFR 761.11 after August 3, 1977, will be determined on the basis of the circumstances that exist when the land comes under the protection of section 522(e) and 30 CFR 761.11, not the circumstances that exist on August 3, 1977. Some commenters supported this change, but others opposed it as inconsistent with section 522(e) of SMCRA, which references the date of enactment (August 3, 1977). As the

commenters noted, the courts have held that SMCRA does not compel adoption of this approach. However, the same courts also have ruled that this approach is a reasonable interpretation of SMCRA. See *PSMRL II, Round III—VER*, 22 Env't Rep. Cas. (BNA) at 1564 (1985), and *NWF v. Hodel*, 839 F.2d at 749–751 (1988). Also, we believe that requiring that the road, easement, right of way, or permit be in place when the land comes under the protection of section 522(e) and 30 CFR 761.11 is more reasonable and consistent with the principles of basic fairness than requiring that the road, easement, right of way, or permit be in place on August 3, 1977, as the commenters advocate.

One commenter opposed this change because it "would doom all new homeowners in coalfield areas to having their rights intruded upon by the use of their roads as haul and access roads." The commenter apparently was operating under the erroneous belief that the 300-foot buffer zone for occupied dwellings under section 522(e)(5) and proposed 30 CFR 761.11(a)(5) [now 30 CFR 761.11(e)] would prohibit use of these roads in the absence of VER. We have never interpreted section 522(e)(5) as prohibiting a surface coal mining operation from using a public road that lies within 300 feet of an occupied dwelling.

The final rule differs from the previous and proposed definitions in that it expressly applies to all roads included within the definition of "surface coal mining operations" in 30 CFR 700.5 and section 701(28) of the Act. The 1979 and 1983 versions of this definition mentioned only haul roads. In the proposed rule, we used the term "access or haul road." One commenter supported the proposed rule, noting that prior definitions were interpreted as including access roads. The commenter viewed the references to haul roads in those definitions as a product of draftsmanship, not intent. Another commenter requested, without elaboration, that we revise the rule to differentiate between access and haul roads to avoid future misunderstandings. After evaluating these comments and reviewing the language of the Act, we have decided to avoid any reference to either access or haul roads. Instead, paragraph (c) of the definition in the final rule applies to all roads included in the definition of surface coal mining operations in 30 CFR 700.5 and section 701(28) of the Act. We believe that this change is consistent with both the language of the Act and our historic approach to the regulation of roads

under the Act. We do not interpret SMCRA as affording differential treatment to roads based on whether they are access or haul roads.

The definition of surface coal mining operations in section 701(28) of the Act includes "all lands affected by the construction of new roads or the improvement or use of existing roads to gain access to the site of such activities and for haulage." Section 522(e)(4) refers to "mine access roads or haulage roads." Section 515(b)(18) refers to "the construction of roads." We have always interpreted section 515(b)(17), which refers to "the construction, maintenance, and postmining conditions of access roads into and across the site of operations," as including both access and haul roads since a haul road also provides access. No one has opposed this interpretation of section 515(b)(17), which, in part, provides authority for our regulations governing roads that are used or constructed as part of surface coal mining operations. Our regulations at 30 CFR 701.5 define "road" as including both "access and haul roads," but they do not define "access road" or "haul road." And our road classification system and performance standards at 30 CFR 816.150 and 817.150 do not distinguish between access roads and haul roads. Therefore, we see no reason to distinguish between access and haul roads when defining VER under section 522(e).

One commenter opposed adoption of a separate, potentially less rigorous standard for VER for roads. We find this comment untimely. Both the 1979 and 1983 definitions similarly included separate, potentially less rigorous standards for roads, but no one filed suit challenging our authority to establish separate standards in those rules. Furthermore, we did not propose to change, nor did we seek comments on, this aspect of the definition. Like the 1979 and 1983 rules, both the 1997 proposed rule and this final rule include separate standards for VER for roads.

Several commenters alleged that we improperly adopted the original standard for VER for roads in 1979 without providing adequate public notice and opportunity for comment as required by the Administrative Procedure Act, 5 U.S.C. 551 *et seq.* One commenter stated that justifying a VER standard on the basis of environmental impacts, as we did in the preamble to the portion of the 1979 definition pertaining to roads, is inappropriate. The commenter also argued that we failed to provide documentation in the record of that rulemaking for our claim that allowing VER for all existing roads

would be less environmentally disruptive than constructing new roads. We find these comments untimely since the deadline for challenging the 1979 rules has passed.

One commenter asserted that there is no legal basis for providing a lower VER standard for roads than for any other aspect of a regulated surface coal mining operation because the statutory definition of surface coal mining operations draws no distinction between roads and the other activities and facilities that it includes. The commenter argued that the person claiming VER must demonstrate investment-backed expectations to use the road for surface coal mining operations. According to the commenter, if the mere existence of a property right to conduct surface coal mining operations does not suffice to demonstrate VER under paragraphs (a) and (b) of the definition, then the mere existence of a road should not suffice to demonstrate VER for a road under paragraph (c)(1) of the definition.

As discussed in Parts VII.A. through VII.D. of this preamble, we are not adopting a takings standard for VER. Hence, we do not agree that a person must demonstrate investment-backed expectations to qualify for VER. And, because the courts have held that the definition of surface coal mining operations does not exclude all public roads, we believe that a separate standard for VER for existing roads is essential as a practical matter. Unless otherwise provided by the agency with jurisdiction over the road, all persons have a right to use a public road for any legitimate purpose, including access and haulage associated with a surface coal mining operation.

One commenter noted that the concept of VER presupposes some claim of right to use of the road, which the existing and proposed rules did not require in all circumstances. The commenter further stated that the VER standard for roads should rely upon either the good faith/all permits standard or documentation that an existing road was actually in use as an access or haul road as of August 3, 1977. Finally, the commenter argued that the property rights demonstration required for demonstration of VER under paragraph (a) of the definition also should be a prerequisite for VER for roads.

The facets of the proposed definition to which the commenter objects (VER for existing roads, regardless of whether the road has ever been used for surface coal mining operations, and the lack of a property rights demonstration requirement for VER for roads) have

remained essentially unchanged since we first adopted a definition of VER on March 13, 1979. The deadline for challenging the validity of that definition has passed. The proposed rule did not alter those facets of the definition to which the comments pertain, nor did we seek comment on whether they should be changed. Therefore, these comments are neither timely nor within the scope of this rulemaking, and there is no requirement to address them in this rulemaking.

However, we agree with the commenter that the concept of VER presupposes some claim of right to use of the road under applicable State law. Therefore, to avoid misapplication or abuse of the VER standards for roads, we have revised the definition in the final rule to clarify that, to qualify for VER under the existing road criterion in paragraph (c)(1) of the definition, a person must demonstrate a legal right to use the road for surface coal mining operations. In addition, we have revised paragraph (c)(2) of the definition to clarify that, to qualify for VER under the easement or right-of-way criterion, a person must demonstrate that, under the document creating the right of way or easement and under subsequent conveyances, that person has a legal right to use or construct a road across the right of way or easement for surface coal mining operations. These changes merely make explicit an unstated assumption in both the existing and proposed rules.

The commenter also asserted that the proposed rule would effect an uncompensated taking by sanctioning physical intrusion through dust and noise on properties adjoining such roads. We do not agree. The VER standards for roads would not preclude any private remedy available to affected parties under State law, including State trespass and nuisance law. Therefore, this rule does not effect a facial taking.

#### *F. How Does the Definition Address VER for Lands That Come Under the Protection of Section 522(e) After August 3, 1977?*

As we proposed, each standard in the definition of VER in the final rule provides for determination of VER based on property rights and other conditions in existence on the date that the land comes under the protection of 30 CFR 761.11 and section 522(e) of the Act. This concept has sometimes been referred to "continually created VER." We have included this concept in the definition of VER in the final rule because houses, churches, roads, parks, and other features protected by section 522(e) and 30 CFR 761.11 come into

existence and are expanded on an ongoing basis. In the interest of fairness, persons claiming VER for lands coming under the protection of the Act after the date of enactment should not have to demonstrate that they owned the requisite property rights on August 3, 1977, the date of enactment, as the 1979 definition required.

Some commenters opposed this change as being inconsistent with the express language of section 522(e) of SMCRA, which reads: "After the enactment of this Act and subject to valid existing rights no surface coal mining operation except those which exist on the date of enactment of this Act shall be permitted" on certain enumerated lands.

According to the commenters, this language means that the Act does not authorize use of a date other than the date of enactment (August 3, 1977) when determining exceptions from the prohibitions of section 522(e). Under this interpretation, VER must be determined on the basis of property rights and other conditions as they existed on August 3, 1977.

We disagree. The Act provides that the prohibitions of section 522(e) are subject to VER, but it neither defines VER nor specifies that VER must be determined on the basis of property rights and other conditions as they existed on the date of enactment. Because the lands and features protected by 30 CFR 761.11 and section 522(e) are continually changing, we believe that VER should be determined on the basis of the property rights and circumstances that exist at the time that lands come under the protection of section 522(e) and 30 CFR 761.11, not the date of enactment of SMCRA, which recedes ever further into history.

The commenters argue that this approach violates the purpose of section 522(e), which is to prohibit new surface coal mining operations on certain lands. They assert that an industry as pervasively regulated as coal mining had no reasonable expectation of being able to mine any lands without addressing the potential extension of protection to those lands once SMCRA became law. They state that the enactment of SMCRA placed operators and other interested persons on notice that certain lands are subject to the protections of section 522(e), even when the features triggering that protection do not come into existence until after the enactment of SMCRA. Therefore, according to the commenters, any investments after that date are made with full knowledge of that risk and are not entitled to protection from the prohibitions of section 522(e), regardless

of when the features listed in section 522(e) come into existence.

One commenter argued that the only way to avoid the proscriptions of section 522(e) is to obtain a permit before the lands come under the protection of section 522(e). Alternatively, some commenters stated, persons conducting surface coal mining operations after the enactment of SMCRA should have immediately procured all necessary property rights (for example, purchased a 300-foot buffer around all planned minesites to preclude application of the prohibition on surface coal mining operations within 300 feet of an occupied dwelling) to avoid potential adverse impacts from the creation of new protected areas after August 3, 1977.

These arguments are identical to those advanced by the National Wildlife Federation in a challenge to paragraph (d) of the 1983 definition of VER, where this concept first appeared. The district court rejected those arguments:

The court does not agree with plaintiffs that the legislative history they cite, or the language of the statute[,] requires a finding that the Secretary's concept of "continually created VER" is inconsistent with law. Given the language of the Act, and Congress' concern with takings, the court finds that "continually created VER" is in accord with law.

*PSMRL II, Round III—VER*, 22 Env't Rep. Cas. (BNA) at 1564 (1985).

The district court's decision was upheld on appeal. See *NWF v. Hodel*, 839 F.2d at 749–751 (1988). "We find such a rule to be a reasonable interpretation of the Act, and thus affirm the decision of the district court upholding the Secretary's VER regulation." *Id.* at 751.

These court decisions focused on paragraph (d)(1) of the 1983 definition of VER. This paragraph established a "continually created VER" standard for existing operations. However, we believe that the rationale underlying this paragraph applies with equal force to all standards under the VER exception. In other words, when land comes under the protection of 30 CFR 761.11 and section 522(e) after August 3, 1977, we believe that it is not fair to determine VER for those lands on the basis of property rights and other conditions in existence on August 3, 1977. Rights under the VER exception should be no less important than rights under the exception for existing operations.

We previously endorsed this principle in adopting paragraph (d)(2) of the 1983 definition of VER. This paragraph provided that, when land comes under the protection of 30 CFR 761.11 and

section 522(e) after August 3, 1977, we would determine VER using a takings standard based on the property rights that existed when the land came under the protection of section 522(e) rather than on the property rights that existed on August 3, 1977. The court subsequently remanded this portion of the rule because we failed to provide adequate notice and opportunity for comment on the takings standard. The court never reached a decision on the merits of this paragraph. However, in discussing the merits of paragraph (d) in general, the judge specifically rejected the argument that the word "existing" in the term valid existing rights means that those rights must have existed on August 3, 1977, the date of enactment of SMCRA. See *PSMRL II, Round III—VER*, 22 Env't Rep. Cas. (BNA) at 1564 (1985). And, in implementing the remand order, we suspended paragraph (d)(2) of the 1983 definition of VER only to the extent that it incorporated the takings standard. See 51 FR 41952, 41961, November 20, 1986.

One commenter argued that this concept is inconsistent with the decision in *M&J Coal versus United States*, 47 F.3d 1148 (Fed. Cir. 1995). The commenter argued that this case upheld the principle that persons have no legitimate expectation of the right to conduct surface coal mining operations on lands that come under the protection of the Act after August 3, 1977. We do not agree. In *M&J*, the court ruled that a person who acquires property after passage of a law restricting use of that property does not have sufficient legal basis to support a claim that the requirements of the law constitute a compensable taking. However, this case involved a situation in which a regulatory authority limited coal extraction from an underground mine to protect overlying structures from the damage that could result from subsidence caused by underground mining activities. It did not concern the applicability of the VER exception to lands that come under the protection of 30 CFR 761.11 and section 522(e) after August 3, 1977, the date of enactment. Therefore, we do not believe that this decision is relevant to this rulemaking.

History and Disposition of Former 30 CFR 761.5(d), the Original "Continually Created VER" Provision

On September 14, 1983 (48 FR 41312, 41349), we added paragraph (d) to the definition of VER to address situations where the prohibitions of section 522(e) become applicable to a particular site after August 3, 1977, the date of enactment of SMCRA. This paragraph provided 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) extended the exception for existing operations to validly authorized surface coal mining operations in existence on the date that the land upon which they are located comes under the protection of section 522(e). Paragraph (d)(2) extended the takings standard for VER to property interests that existed on the date that the land came under the protection of section 522(e), rather than limiting its scope to property interests that existed on August 3, 1977.

In *PSMRL II, Round III—VER*, 22 Env't Rep. Cas. (BNA) at 1564 (1985), the district court upheld both paragraph (d)(1) and the concept of determining VER based upon property rights and conditions in existence on the date that land comes under the protection of section 522(e) rather than property rights and conditions in existence on August 3, 1977, the date of enactment of SMCRA. However, the court remanded paragraph (d)(2) because it incorporated the takings standard, which, the court held, had not been subject to proper notice and opportunity for comment under the Administrative Procedure Act. See 22 Env't Rep. Cas. (BNA) at 1564. The district court's decision was upheld on appeal. See *NWF versus Hodel*, 839 F.2d at 749-751 (1988). To comply with these decisions, we subsequently suspended paragraph (d)(2) to the extent that it incorporated the takings standard. See 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 replacing the reference to August 3, 1977, in each of the VER standards in the other paragraphs of the definition with a reference to the date that the lands came under the protection of section 522(e) of the Act. However, neither of the proposed definitions included a counterpart to paragraph (d)(1) of the 1983 definition. This omission would have had the effect of eliminating the VER standard for existing operations with respect to lands that come under the protection of section 522(e) after August 3, 1977. We did not intend this result. As stated in

the preamble to the 1991 proposal, although paragraph (d) of the 1983 VER definition "is rewritten and reorganized in this proposal, the basic intent and application are not changed." 56 FR 33156, July 18, 1991.

Therefore, we have revised the exception for existing operations, now located in 30 CFR 761.12, to incorporate language consistent with paragraph (d)(1) of the 1983 definition. Specifically, 30 CFR 761.12 provides that the prohibitions of 30 CFR 761.11 do not apply to (1) surface coal mining operations on land for which a valid permanent program permit exists when the land comes under the protection of 30 CFR 761.11 or section 522(e) of SMCRA, or, (2) for surface coal mining operations subject to the initial regulatory program in Subchapter B of 30 CFR Chapter VII, lands upon which validly authorized surface coal mining operations exist on that date. Further discussion of this change and the exception for existing operations appears in Part XVI of this preamble.

#### **VIII. How Does Our Definition of VER Compare With VER Under Other Federal Statutes?**

In the preamble to our proposed rule, we stated that the VER exception in section 522(e) of SMCRA differs from VER under other Federal laws because the section 522(e) VER exception applies to both Federal and non-Federal lands while VER provisions under other Federal laws apply only to lands in Federal ownership. Also, VER clauses and case law under other Federal statutes and executive orders typically relate to when a person may complete an already initiated process to obtain a property interest in public lands if there is a change in the laws or other requirements governing the vesting or perfecting of interests in those lands. In contrast, the preamble to the proposed rule explains, the VER exception in section 522(e) concerns a person's right to use land for a particular purpose (conducting surface coal mining operations) when that person already has fully vested property rights in the land. We arrived at this conclusion because, unlike other Federal statutes with VER provisions, section 522(e) of SMCRA does not involve a transfer of property rights or interests from the Federal government to another party. Instead, it prohibits surface coal mining operations on certain lands, generally without regard to who owns those lands.

Commenters disagreed with our explanation of the significance of the difference between SMCRA and other Federal laws. Specifically, one

commenter argued that the only distinction is the source law used to determine the nature of property interests and whether they are entitled to protection as VER. According to the commenter, the source law for VER under Federal statutes other than SMCRA is the Federal statute that prescribes the requirements for creation of a non-Federal right or interest in public lands. Conversely, the commenter argued, the source law for VER under section 522(e) of SMCRA is State common law, at least for non-Federal lands. As discussed in more detail later in this section of the preamble, we cannot concur with this analysis because to do so would effectively negate the prohibitions of section 522(e) in most situations.

The commenter attacked the good faith/all permits standard for VER as "an unlawful attempt to prevent not the mere acquisition of an additional interest, but [to] preclude the use or enjoyment of an existing property interest under state law." The commenter noted that many public lands statutes prescribe certain steps or conditions that are necessary to secure legal title, equitable title, or other forms of property rights to use public lands or resources. According to the commenter, the government, in its proprietary capacity, may preclude someone from acquiring an additional property interest in public lands if that person does not satisfy all necessary conditions, but the government cannot extinguish an existing property interest. The commenter further noted that the VER exception under section 522(e) of SMCRA generally pertains to property rights under State law that are fully perfected and vested and that are not conditioned upon the satisfaction of any new requirements. Hence, the commenter argues, since VER provisions under other Federal statutes have "historically protected unvested property rights in order to allow persons to perfect a vested property interest against the United States in its *proprietary* capacity, surely the same principles apply with more force to preserve superior vested rights against impairment when the United States acts, as it does under SMCRA, in its *regulatory* capacity."

We do not find the commenter's arguments persuasive. As discussed in more detail in Part VII.C. of this preamble, the definition of VER in this final rule does not extinguish any property rights. We agree with the commenter that, at least for non-Federal properties, State law is the appropriate source law to determine property rights when making a VER determination

under section 522(e) of SMCRA. But, as discussed below, we do not agree that the VER inquiry should end with the property rights demonstration.

We continue to believe that VER under section 522(e) of SMCRA is not analogous to VER under other Federal statutes. We found no definitions of VER in other Federal statutes. Our review of these statutes, applicable case law, and the literature discussing them indicates that the VER provisions in these laws and pertinent executive orders usually protect an expectation or property interest that arose under an earlier law, which is normally a Federal public lands law but may occasionally be State law. Generally, the protected interest is less than vested title and is asserted against Federal title. *See, e.g., Laitos, The Nature and Consequences of "Valid Existing Rights" Status in Public Land Law*, 5 J. Min. L. & Pol'y 399, 416-18 (1990).

As a commenter noted, the Supreme Court interpreted the phrase "valid existing claims" in a VER exception in an executive order concerning the homestead laws in the following manner:

Obviously, this means something less than a vested right, such as would follow from a completed final entry, since such a right would require no exception to insure its preservation. The purpose of the exception evidently was to save from the operation of the order claims which had been lawfully initiated and which, upon full compliance with the land laws, would ripen into a title.

*Stockley v. United States*, 260 U.S. 532, 544 (1923).

As another example of the meaning of VER under other Federal statutes, we offer the following excerpt from one of the court decisions cited by several commenters:

We conclude that "valid existing rights" does not necessarily mean vested rights. Under the [Alaska Native Townsite] Act before its repeal, a municipality, and all individuals who had occupied specific lots within the subdivision limits, had a legitimate claim for municipal control of any unoccupied lots \* \* \*. It is rational to conclude that when the Congress repealed the law and enacted a savings clause for "existing rights," that this claim would be preserved. The term "valid existing rights" does not necessarily mean present possessory rights, or even a future interest in the property law sense of existing ownership that becomes possessory upon the expiration of earlier estates. Legitimate expectations may be recognized as valid existing rights, especially where the expectancy is created by the government in the first instance. \* \* \* A government is most responsible when it recognizes as a right that which is not strictly enforceable but which flows nevertheless from the government's own prior representations. That in essence is what the

Secretary has done here. The Secretary's reading of the words "valid existing rights" to mean something other than "vested" is reasonable.

*Aleknagik Natives Ltd. v. U.S.*, 806 F.2d 924, 926-27 (9th Cir. 1986).

Thus, under Federal laws other than section 522(e) of SMCRA, the term VER typically refers to the set of circumstances under which persons who have unvested or incompletely vested interests or expectations in Federal lands or minerals will be allowed to vest or complete those interests or expectations as property rights against the United States as the fee owner. In general, the VER provisions of those statutes, or case law concerning VER under those statutes, apply to situations in which the Federal government withdraws land from the operation of a public lands statute or changes the eligibility criteria or other requirements for vesting or completing of property rights. In these cases, the term VER refers to the point at which a person who has taken some action toward vesting or completing a property interest in Federal lands or minerals has the right to complete the process regardless of any statutory or regulatory changes to the contrary.

In some instances, the courts have indicated that Congress intended for VER provisions under other Federal laws to operate as a means of avoiding compensable takings. *See Cameron v. United States*, 252 U.S. 450 (1920) and *Utah v. Andrus*, 486 F. Supp. 995, 1011 (D. Utah 1979). However, there is no consensus that this principle is always true or even usually true. *See, generally*, 5 J. Min. L. & Pol'y No. 3. We conclude that the record does not clearly establish that Congress always intended avoidance of compensable takings to be an underlying principle for all VER provisions. If Congress had this intent, VER provisions would protect only those property rights that are protected under the Fifth Amendment. However, the purpose of a VER provision may be to protect expectations or interests that are not property for purposes of the Fifth Amendment, or to preserve the status quo for preexisting interests. *See Arnold v. Morton*, 529 F.2d 1101 (9th Cir. 1976); Solicitor's Opinion M-36910 (Supp.), 88 I.D. 909, 913 (Oct. 5, 1981); *Sierra Club v. Hodel*, 848 F.2d 1068, 1087-88 (10th Cir. 1988); and *Beard Oil Co.*, 111 IBLA 191 (1989).

For the reasons discussed below and in the first paragraph of this portion of the preamble, we do not find that the meaning of VER under other Federal laws provides useful guidance in determining the meaning of VER for

surface coal mining operations under section 522(e) of SMCRA. First, section 522(e) and the VER exception in that section apply to both Federal and non-Federal lands. Neither section 522(e) nor the VER exception in that section involves a transfer of a property right from the Federal government or a vesting of a property right vis-a-vis the Federal government. As discussed in Part VII.C.2. of this preamble, the VER exception in section 522(e) of SMCRA concerns a person's eligibility to obtain a permit to conduct surface coal mining operations when vested property rights already exist. In short, the VER exception in section 522(e) differs from VER under other Federal laws because SMCRA has a fundamentally different nature than the other Federal laws to which the commenters refer. Unlike those laws, SMCRA regulates the use of non-Federal lands.

Second, the section 522(e) VER exception applies in the context of a regulatory program that already imposes a requirement that a permit applicant demonstrate the property right to mine the coal by the method intended. Thus, to provide that a person who has the necessary property rights under State law is exempt from the prohibitions and restrictions of section 522(e) would render the VER exception surplusage, or at best insignificant, in relation to the independent permitting requirements in the Act. Further, except in situations involving unleased Federal coal, this interpretation would effectively render the protections of section 522(e) void or insignificant. A fundamental principle of statutory construction provides that "effect must be given, if possible, to every word, clause and sentence of a statute" \* \* \* so that no part will be inoperative or superfluous, void, or insignificant." *PSMRL I*, 627 F.2d at 1362, citing 2A Sutherland, *supra*, at § 46.06.

Third, a VER standard that is primarily intended to determine whether, under Federal law, property rights may vest against the Federal government, arguably would be irrelevant or inappropriate in the circumstances to which section 522(e) applies. Property rights for the lands listed in section 522(e) are already vested under State law. Furthermore, application of this type of VER standard would be inappropriate because SMCRA is not a statute under which Congress intended to resolve title disputes or change the process for vesting real property rights.

#### IX. Are VER Transferable?

In general, we view VER as transferable because, unless otherwise

provided by State law, the property rights, permits, and operations that form the basis for VER determinations are transferable. There is one significant exception to this principle. If an operation with VER under the needed for and adjacent standard divests itself of the land to which the VER determination pertains, the new owner does not have the right to conduct surface coal mining operations on those lands under the prior VER determination. That determination is no longer valid because it was based on a representation that the lands were needed for the operation. Of course, if the sale involves the entire operation (as opposed to a portion of its reserves), the VER determination would retain validity since there is no change in the operation's need for the land.

However, the right to alienate or transfer real or personal property is not absolute. Certain property interests such as leases, licenses, and contracts may be inherently nontransferable or of limited transferability, either by their terms or by operation of State law. If a person's property interests are of this nature, then any VER resting on those interests also would be nontransferable.

The VER exception in section 522(e) may be considered 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 that the zoning ordinance took effect. Zoning variances typically convey with the title to the property even if the rights conferred by the variance have not been exercised.

Some commenters objected strongly to our statements in the preamble to the proposed rule that characterize VER as attaching to the property interests. They argue that VER should attach only to the person, and that these rights should expire if the person does not exercise them. We do not find this argument persuasive. VER determinations are based on property rights, permits, and/or operations, depending upon the standard that applies. To the extent that State law and the conveyances in question either authorize or do not prohibit the transfer of these property rights, permits, and operations, we see no reason to prohibit the transfer of any associated VER. Furthermore, as specified in section 505(a) of the Act, SMCRA does not supersede any State law or regulation unless the State law or regulation is inconsistent with the Act. Since SMCRA does not address the transferability of VER, we have no authority under the Act to limit the

operation of State laws related to or affecting transferability of VER.

In adopting this rule, we do not intend 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. One commenter argued that any State law or regulation that prohibits the transfer of VER would constitute the taking of private property without compensation in violation of the Fifth and Fourteenth Amendments to the U.S. Constitution. We do not find it appropriate or necessary to respond to this theoretical argument, which lies outside the scope of SMCRA and is best left to the courts to address if the situation materializes.

One commenter argued that VER is not a property right, but a recognition of some equitable consideration that Congress intended to afford to persons whose mine plans were in substantial stages of development on the date of enactment of SMCRA. According to the commenter, VER should not be transferable because they are personal rights intended to protect the legitimate expectations of the property owner. The commenter expressed concern that allowing transfer of VER would elevate an equitable consideration into an estate in land or a property right. However, the commenter failed to cite any supporting documentation for these arguments and characterizations of Congressional intent regarding VER.

As summarized and excerpted in Part V of this preamble, the legislative history of the VER exception in section 522(e) is quite sparse; there is no passage that supports the commenter's claims. And we are aware of no basis for the commenter's belief that VER are personal rights and that allowing transfer of VER would convert an equitable consideration into a property right. But, even if the commenter is correct, we do not see how this distinction would preclude transfer of VER. Unless otherwise specified by agreement of the parties, a personal right to use property for a particular purpose or in a particular manner may also be transferable if State law so provides.

The commenter also argued that allowing individual States to determine transferability of VER would result in disparate levels of protection for both public and private lands. The commenter provided no basis for this assertion. We know of no reason to expect that there will be any significant difference in terms of disturbance of protected lands between States that allow transferability and those that do

not. However, to the extent that a difference may exist, we do not find any conflict with SMCRA. Section 505(a) of the Act provides that:

No State law or regulation in effect on the date of enactment of this Act, or which may become effective thereafter, shall be superseded by any provision of this Act or any regulation issued pursuant thereto, except insofar as such State law or regulation is inconsistent with the provisions of this Act.

Because SMCRA does not address the transferability of VER, we believe that deferral to State law is appropriate.

The commenter also argued that to the extent that we allow transfer of VER, we should restrict transfers in the same manner as zoning law limits the transfer of a non-conforming use. According to the commenter, the right to a non-conforming use generally lapses unless exercised on a continuous basis. We do not accept the commenter's argument. There is no indication in SMCRA, its legislative history, or elsewhere that Congress intended the VER exception in section 522(e) to operate as a nonconforming use does under zoning law. We see no compelling reason to restrict transfer of VER in this fashion. And, as previously discussed, restricting transfer in the manner advocated by the commenter may run afoul of section 505(a) of the Act, which preserves State law unless it is inconsistent with SMCRA.

One commenter expressed the fear that allowing transfer of VER would expand the scope of the VER exception to the point where nearly anyone with a backhoe could access protected lands in a devastating fashion. We do not agree that allowing transfer of VER would create the result feared by the commenter. The definition of VER in the final rule provides appropriate limitations on the scope of the VER exception.

Finally, one commenter asserted, without further elaboration, that transfer of VER is not permissible under current law, and that our rule would create a new right contrary to law and in excess of our authority. We disagree. Both SMCRA and its implementing regulations are silent on the question of transferability.

#### **X. Sections 740.4, 745.13, and 761.14(a): Who Is Responsible for VER Determinations for Non-Federal Lands Within Section 522(e)(1) areas?**

##### *A. Statutory Background and Rulemaking History*

SMCRA does not directly address responsibilities for VER determinations. However, section 503(a) of the Act

specifies that States with surface coal mining and reclamation operations on non-Federal lands may assume exclusive jurisdiction over the regulation of surface coal mining and reclamation operations within their borders, except as otherwise provided in section 521 (Federal oversight of State regulatory program implementation), section 523 (Federal lands), and Title IV of the Act (reclamation of abandoned mine lands). In addition, section 101(f) of the Act asserts that "the primary governmental responsibility for developing, authorizing, issuing, and enforcing regulations for surface coal mining and reclamation operations subject to this Act should rest with the States." In accordance with these principles, former 30 CFR 761.4, as published on March 13, 1979 (44 FR 15341), assigned the responsibility for VER determinations for non-Federal, non-Indian lands to the regulatory authority, with the Secretary retaining responsibility for VER determinations for Federal lands.

On February 16, 1983 (48 FR 6935), we 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 section 522(e)(1) or (e)(2) of the Act. In the same rulemaking, we added paragraph (o) to 30 CFR 745.13 to specify that the Secretary may not delegate the responsibility for making VER determinations on Federal lands within any areas listed in section 522(e)(1) or (e)(2) to the State in a cooperative agreement for the regulation of surface coal mining and reclamation operations 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 section 522(e)(1) and (e)(2) in accordance with congressional direction and to prevent mining on Federal lands within the National Park System. See 48 FR 6917, col. 2, February 16, 1983.

On September 14, 1983 (48 FR 41312), we removed 30 CFR 761.4 because we found it unnecessary 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." *PSMRL II, Round III—VER*, 22 Env't Rep. Cas. (BNA) at 1566 (1985). 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." *Id.*

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 Env't Rep. Cas. (BNA) at 1566 (1985).

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), we suspended a number of regulations. Among other things, that **Federal Register** document, which is known as the 1986 suspension notice, partially suspended the VER definition published on September 14, 1983. In the preamble discussion of the impact of this suspension on the Federal lands program, we 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) or any other rule to reflect this policy. (Section 740.4(a)(4) (1983) provides that the Secretary is responsible for VER determinations for Federal lands, but it does not extend that responsibility to non-Federal lands.)

The 1986 suspension notice does not explain the basis or origin of the "affected by" standard. However, it appears to arise from the Government's oral argument in *PSMRL II, Round III—VER*, as quoted in the decision at 22 Env't Rep. Cas. (BNA) 1566 (1985). 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) of the Act, all surface coal mining and reclamation operations on Federal lands are subject to the Federal lands program.

#### B. What Alternatives Did We Consider?

In the preamble to the proposed rule published on January 31, 1997 (see 62 FR 4838-40), we requested 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 the 1983 version of 30 CFR 740.4(a)(4), which would mean that we would be responsible for making all VER determinations for Federal lands in section 522(e)(1) areas and that the regulatory authority (which may be either OSM or the State) would be responsible for making all determinations for non-Federal lands.

(2) Reaffirming the 1983 version of 30 CFR 740.4(a)(4) and revising Part 761 to provide that the regulatory authority 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) and section 522(e)(1) of the Act. Under this 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 VER determination before the determination could take effect.

(3) Revising 30 CFR 740.4(a)(4) and Part 761 to codify the "affected by" standard, which is the policy established in the 1986 suspension notice. This alternative relies upon the theory that the scope of the Federal lands program is not necessarily limited to lands included in the definition of Federal lands in section 701(4) of the Act; i.e., lands in which the Federal

government has a property interest. Under this theory, the Federal lands program would extend to include non-Federal lands within the boundaries of section 522(e)(1) areas if surface coal mining operations on those lands could affect the Federal interest by adversely impacting the values for which the lands were designated as protected areas.

(4) Revising 30 CFR 740.4(a)(4) and Part 761 to require that we make all VER determinations for both Federal and non-Federal lands within the boundaries of the areas listed in 30 CFR 761.11(a) and section 522(e)(1) of the Act. This alternative relies upon the same theory as the "affected by" standard, with the additional argument that because Congress or the President established the boundaries of the areas identified in section 522(e)(1), all lands within those boundaries must possess values of national significance or interest. Therefore, surface coal mining operations on any lands within those boundaries would automatically affect the Federal interest in some way.

#### *C. Which Alternative Are We Adopting?*

Commenters divided sharply on which alternative we should adopt. After evaluating the comments and reviewing the Act, we have decided to adopt the first alternative, which means that we are not making any substantive changes to 30 CFR 740.4(a)(4). (We are making a few editorial changes to reflect plain language principles and update cross-references to other rules.) Under the final rule, the regulatory authority has the responsibility for making VER determinations for all non-Federal lands, including those within the areas listed in section 522(e)(1) of the Act.

Many commenters supported this alternative as the only one that is fully consistent with SMCRA's provisions for State primacy in the regulation of surface coal mining operations on non-Federal lands. We agree. Section 101(f) of the Act asserts that "the primary governmental responsibility for developing, authorizing, issuing, and enforcing regulations for surface coal mining and reclamation operations subject to the Act should rest with the States." In relevant part, section 503(a) provides that, once a State meets certain conditions, it has the right to assume "exclusive jurisdiction" over the regulation of surface coal mining and reclamation operations on non-Federal lands within its borders, with the exception of the Federal oversight and enforcement authority reserved under section 521 of the Act. Other sections of the Act grant us specific, limited, additional authority in States with

primacy, such as the right to conduct oversight inspections under section 517, but these rights and authorities do not extend to making VER determinations on non-Federal lands in those States.

Commenters who supported this alternative opposed the second alternative because it would effectively grant the Federal surface management agency veto authority over all VER determinations for section 522(e)(1) areas. They argued that nothing in SMCRA supports this alternative and that Congress would have included a specific concurrence requirement if it believed that one was needed, as it did with respect to State program approval in section 503(b), compatibility findings under section 522(e)(2), and joint agency approval under section 522(e)(3). One commenter noted that delays in decision-making as a result of the concurrence requirement could increase the Government's exposure to compensable takings claims. On balance, we find that these arguments, while not necessarily fatal, militate against adoption of the second alternative, the concurrence requirement.

These commenters also opposed the third and fourth alternatives as inconsistent with section 503(a) of SMCRA, because those alternatives would require us to make VER determinations on some or all non-Federal lands within section 522(e)(1) areas. In contrast, section 503(a) of the Act establishes a mechanism by which States may assume "exclusive jurisdiction" over surface coal mining and reclamation operations on non-Federal lands within their borders. As discussed at length in this portion of the preamble, we concur with this comment.

Opponents of the alternative that we are adopting argue that reserving VER determination authority for all lands listed in section 522(e)(1) to the Secretary would ensure national consistency and may result in more favorable consideration of arguments advanced by the Federal surface management agency with jurisdiction over the protected site. However, the commenters offered no empirical evidence to support this theory. Nor do we find it persuasive in view of SMCRA's emphasis on State primacy.

Some commenters argued that the alternative that we are adopting would provide insufficient protection for lands of national significance, such as units of the National Park Service. In support of this argument, the commenters cite various provisions of SMCRA's legislative history in which Congress expresses dissatisfaction with the

quality of State regulation prior to the enactment of SMCRA.

We also find these arguments unpersuasive. 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 Federal regulations in meeting the requirements of the Act. We conduct oversight of the implementation of State regulatory programs to ensure that each State is properly administering and enforcing its approved program. The final rule requires that the regulatory authority use the Federal definition of VER whenever it is making determinations for non-Federal lands within section 522(e)(1) areas, so both we and the States will use the same decision criteria for all lands within these areas. Hence, there should be no significant difference in the degree of environmental protection regardless of whether we or the States make the VER determination.

The degree to which States failed to control the environmental impacts of surface coal mining operations or engaged in lax enforcement practices before the approval of permanent State regulatory programs under section 503 of SMCRA is not relevant because, before that time, States did not have to meet Federal standards. In addition, there was no back-up Federal enforcement authority, apart from the brief dual enforcement arrangement of the initial regulatory program under section 502 of SMCRA. Furthermore, States and local communities generally value national parks and the other areas protected under section 522(e)(1) of the Act. We have no reason to anticipate that States will be less than conscientious in administering the VER determination provisions of their approved programs.

Opponents of the alternative that we are adopting also express concern that allowing State regulatory authorities to make VER determinations for non-Federal inholdings within section 522(e)(1) areas, in combination with their authority under former 30 CFR 761.12(f) [now redesignated as 30 CFR 761.17(d)] to determine whether surface coal mining operations would adversely affect features (including publicly owned parks) protected under section 522(e)(3), would leave the protection of Federal lands in the hands of State agencies. According to the commenters, these agencies are likely the least knowledgeable of the proper management of those lands and least able to determine whether mining would cause an adverse effect. The commenters argue that the agencies that

manage the Federal lands are in the best position to determine whether surface coal mining operations will adversely affect those lands, and that only the Federal surface management agency has the expertise to evaluate whether surface coal mining operations will adversely affect the values for which the land was designated as a protected area. The commenters further state that responsibility for VER determinations for private inholdings should reside with the agency that Congress designated to manage Federal lands within the protected area. According to the commenters, Congress would not have extended categorical protection to the areas in section 522(e) only to leave the protection of those lands in the hands of State regulatory authorities.

We disagree with these comments. First, it is a matter of settled law that the regulatory authority has the responsibility for determining whether a proposed operation would adversely affect a publicly owned park or historic place under section 522(e)(3) of the Act. We adopted this provision as part of 30 CFR 761.12(f), now redesignated as 30 CFR 761.17(d), on September 14, 1983. The National Park Service expressed an interest in revisiting that version of 30 CFR 761.12(f) and the section 522(e)(3) adverse effect determination process. However, this rulemaking is not the proper vehicle to do so since we did not propose changes to, or request comment on, former 30 CFR 761.12(f).

Second, as already discussed, we disagree with the commenters' unsubstantiated assertions concerning the capability of State regulatory authorities and the integrity of their decision-making procedures. Under section 503 of SMCRA, we may not approve State programs unless they demonstrate possession of the technical expertise necessary to administer all facets of the regulatory program, including decisions relating to designation of lands as unsuitable for surface coal mining operations under section 522 of the Act. See 30 CFR Parts 731 and 732. In addition, State regulatory authorities deal with surface coal mining operations and their impacts on a daily basis, while most agencies with management responsibility for the features protected by section 522(e) rarely encounter such operations. Therefore, we believe that State regulatory authorities will likely have more technical expertise and greater familiarity with surface coal mining operations and their environmental impacts than the agency with jurisdiction over the protected feature.

Furthermore, the environmental impacts of any potential surface coal mining operations are not germane to determining whether a person has VER. Under the standards in the definition of VER that we are adopting today, this decision is a strictly legal determination in which the potential impacts of mining play no role. The regulatory authority must address the impacts of any proposed surface coal mining operations as part of the permitting process and during inspection and enforcement activities.

Third, the commenters err in stating that Congress could not have intended State regulatory authorities to determine whether a person has VER for non-Federal lands within section 522(e)(1) areas. Section 503(a) of SMCRA clearly provides a mechanism for a State to assume exclusive jurisdiction for the regulation of surface coal mining operations on non-Federal lands within its borders. Congress did not exclude either VER determinations for section 522(e)(1) areas or adverse effect determinations under section 522(e)(3) from the reach of section 503(a).

For the reasons discussed at length above, we reject the argument advanced by one commenter that section 102(a) of the Act obligates us to reserve the authority to make VER determinations for non-Federal inholdings within section 522(e)(1) areas. Section 102(a) provides that one of the purposes of the Act is "to protect society and the environment from the adverse effects of surface coal mining operations." The commenter asserts that we must have authority over all lands within the boundaries of section 522(e)(1) areas to effectuate this purpose, since OSM authority is the only practical remedy for a wide range of violations of the Act. The commenter claims that reservation of this authority to the Secretary is consistent with the Supreme Court's description of SMCRA's regulatory structure as one of cooperative federalism:

The most that can be said is that the Surface Mining Act establishes a program of cooperative federalism that allows the States, within limits established by federal minimum standards, to enact and administer their own regulatory programs, structured to meet their own particular needs.

*Hodel v. VSMRA*, 452 U.S. at 289 (1981).

We strongly disagree with these comments. For the reasons discussed above, we believe that States are fully capable of implementing the Act. Commenters provided no evidence to support their inference that States either cannot or will not protect section

522(e)(1) areas to the extent required under SMCRA. The alternative that we have selected is fully consistent with both section 102(a) of SMCRA and the Supreme Court's description of the Act in *Hodel v. VSMRA*, *supra*, as establishing a program of cooperative federalism in which the States enact and administer their own regulatory programs within limits established by federal minimum standards. *Id.* at 289. And the commenters fail to take notice of section 102(g) of the Act, which clearly indicates that Congress envisioned that States would develop and implement "a program to achieve the purposes of the Act," (including the purpose in section 102(a)); section 101(f), in which Congress declares that "the primary governmental responsibility" for the regulation of surface coal mining operations "should rest with the States;" and section 503(a), in which Congress provides that States may assume "exclusive jurisdiction" over the regulation of surface coal mining operations on non-Federal lands.

To ensure that the interests of the Federal surface management agency and other surface owners are taken into consideration, we have added a provision to 30 CFR 761.16(b)(1) to require that each person seeking a VER determination first notify and request comments from the surface owner. Any comments received must be submitted as part of the request for a VER determination. In addition, under 30 CFR 761.16(d)(2), the agency responsible for making the VER determination must independently notify and provide opportunity to comment to both the surface owner and, when applicable, any agency with primary jurisdiction over the values or features that caused the land to come under the protection of 30 CFR 761.11. Under 30 CFR 761.16(e)(1), when making a decision on the request for a VER determination, the agency must consider all comments received.

We also disagree with the commenters' argument that the National Park Service Organic Act, 16 U.S.C. 1, prevents adoption of the alternative that we selected. The commenters represent this act as requiring the Secretary to "promote and regulate" units of the National Park System "to conserve the scenery and the nature and historic objects and the wild life therein and \* \* \* leave them unimpaired for the enjoyment of future generations." However, 16 U.S.C. 1 assigns this responsibility to "the service thus established," not the Secretary. Thus, by its own terms, this provision of the Organic Act applies only to the National

Park Service. It does not extend to other programs and other bureaus within the Department. We believe that if Congress had intended the National Park Service to have concurrent decision-making authority for VER determinations for non-Federal lands within units of the National Park System, it would have amended either the Organic Act or SMCRA to provide the Service with this authority. We acknowledge that, as the commenters note, the courts have held that the Organic Act and related statutes provide the Park Service with broad rulemaking authority. *Wilkinson v. Dept. of Interior*, 634 F. Supp. 1265, 1278-79 (D. Colo. 1986). However, we do not agree with the commenters' argument that the reach of the Organic Act extends beyond the Park Service or that it governs rulemakings that interpret and implement other statutes for other bureaus within the Department.

We find nothing in the Organic Act that would allow us to override the VER exception provided in section 522(e) of SMCRA or the State primacy provisions of section 503(a) of the Act, which allow States to assume exclusive jurisdiction for the regulation of surface coal mining and reclamation operations on non-Federal lands within their borders. Paragraphs (e)(1) and (e)(3) of section 522 of SMCRA provide special protection for units of the National Park System, but there is no indication that Congress intended to grant either the Federal land management agency or us exclusive or concurrent authority for VER determinations for non-Federal inholdings within those units. Whenever Congress intended other Federal agencies to have a concurring role in decisions made under SMCRA, it specifically provided for this role in the Act. See, for example, section 501(a), which requires the concurrence of the Environmental Protection Agency with respect to certain rulemaking activities, and section 515(f), which requires the concurrence of the U.S. Army Corps of Engineers with respect to regulations governing coal mine waste impoundments. Furthermore, if Congress had intended to subordinate SMCRA to the provisions of the Organic Act, it would have included that statute in section 702(a) of SMCRA, which lists the Federal laws to which SMCRA is subordinate. And, as previously discussed, we find no basis for the assumption that States will be lax in protecting units of the National Park System.

Several commenters argue that the Property Clause of the U.S. Constitution provides us with the authority to reserve VER determination responsibilities on

non-Federal lands within section 522(e)(1) areas to the Secretary. The Property Clause (article IV, section 3, clause 2) provides that "Congress shall have the Power to dispose of and make all needful Rules and Regulations respecting the Territory or other property belonging to the United States." We agree with the commenters that there is extensive case law supporting an expansive interpretation of the Property Clause as it relates to the ability of the Federal government to regulate activities on Federal lands. However, SMCRA is not a public lands statute and OSM is not a Federal land management agency. Therefore, we find no basis for reliance upon the Property Clause as authority for rulemaking under SMCRA. As previously discussed, in *Hodel v. VSMRA*, 452 U.S. at 275-283 (1981), and *Hodel v. Indiana*, 452 U.S. at 321-329 (1981), the Supreme Court upheld Congress' authority to enact SMCRA under the Commerce Clause.

Furthermore, our authority to regulate non-Federal lands under section 522(e)(1) is not at issue in this rulemaking. That authority is a matter of settled law under the two 1981 *Hodel* cases cited in the preceding paragraph. The issue is whether, under SMCRA, that authority, including the responsibility for VER determinations on non-Federal lands, is properly delegated to States with primacy. Therefore, the commenters' arguments concerning the meaning of the Property Clause are not helpful or relevant to this rulemaking.

For the reasons discussed above, we believe that the alternative that we have adopted in the final rule is the alternative that is most consistent with SMCRA's emphasis on State primacy for the regulation of surface coal mining operations on non-Federal lands. See sections 101(f), 102(g), and 503(a) of the Act. As previously discussed, we believe that this alternative will provide an appropriate level of protection to these lands since, under 30 CFR 732.15(a) and 730.5, State regulatory programs must be no less effective than the Federal regulations in meeting the requirements of SMCRA. And, as discussed above and in Part XI of this preamble, we believe that the final rule provides for consistency in VER determinations for these lands by requiring use of the Federal definition of VER in all cases.

One commenter argued that section 102(m) of SMCRA obligates us to adopt an alternative that reserves to the Secretary the right to make VER determinations on non-Federal inholdings within section 522(e)(1)

areas. The paragraph that the commenter cites provides that one of the purposes of the Act is to "wherever necessary, exercise the full reach of Federal constitutional powers to insure the protection of the public interest through effective control of surface coal mining operations." The commenter noted that under *United States v. Vogler*, 859 F.2d 638, 641 (9th Cir. 1988), *cert. denied*, 488 U.S. 1006 (1989), those constitutional powers include the power to protect public lands from "trespass and injury." As discussed above, we believe that States are fully capable of protecting the public interest to the extent required by SMCRA. And we believe that the alternative that we have adopted in the final rule is the alternative that is most consistent with SMCRA's emphasis on State primacy for the regulation of surface coal mining operations on non-Federal lands. See sections 101(f), 102(g), and 503(a) of the Act. Therefore, we do not agree that section 102(m) of SMCRA requires adoption of the alternative favored by the commenter.

One commenter argued that the decisions in *PSMRL II, Round I*, No. 79-1144 (D.D.C. July 6, 1984), slip op. at 11-15, and *PSMRL II, Round III—VER*, 22 Env't Rep. Cas. (BNA) at 1566 (1985), compel adoption of an "affected by" standard. We disagree.

*PSMRL II, Round I, supra*, has no applicability here because the issue that was before the court concerned Federal lands. In deciding that case, the court struck down 30 CFR 740.11(a)(3) (1983) only to the extent that that rule did not apply to 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." *PSMRL II, Round I, supra*, 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 the court's 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*." *PSMRL II, Round I, supra*, at 14. Furthermore, when we repromulgated 30 CFR 740.11(a) in 1990 to address the judicial remand of the 1983 version of this rule in *PSMRL II, Round I, supra*, we 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, we 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 *PSMRL II, Round III-VER*, 22 Env't Rep. Cas. (BNA) at 1566 (1985), the other decision cited by the commenters as supporting adoption of an "affected by" standard, the court did not review the merits of the "affected by" standard suggested in oral argument by Government counsel. Hence, the court's mention of the Government's representation at oral argument concerning the applicability of an "affected by" standard is purely dictum. Furthermore, the "affected by" standard outlined in the Government's oral arguments as quoted in the court's decision refers to section 701(28)(B) of the Act, which specifies that "all lands affected by the construction of new roads or the improvement or use of existing roads to gain access to the site and for haulage" are included within the definition of surface coal mining operations. Nothing in this definition differentiates between Federal and non-Federal lands or addresses which agency is responsible for regulating surface coal mining operations on those lands. Nor does it suggest use of an "affected by" standard to extend the scope of the Federal lands program to include non-Federal lands within section 522(e)(1) areas.

Therefore, we find no merit to the commenters' arguments in favor of an "affected by" standard. In addition, we do not believe that this standard is consistent with section 503(a) of SMCRA, which provides for exclusive

State jurisdiction over the regulation of surface coal mining operations on non-Federal lands.

Under the final rules adopted today, we retain exclusive authority for making VER determinations for Federal lands within the boundaries of the areas listed in 30 CFR 761.11(a) and for Federal lands within any national forest [the lands listed in 30 CFR 761.11(b)]. The regulatory authority has sole responsibility for VER determinations for all non-Federal lands, regardless of whether we or the State are the regulatory authority. If a State has a regulatory program approved under section 503 of SMCRA, but does not have a Federal lands cooperative agreement pursuant to 30 CFR Part 745, we are responsible for making VER determinations under the State program counterparts to 30 CFR 761.11(c) through (g) for Federal lands. In States with a Federal lands cooperative agreement, the State regulatory authority is responsible for making VER determinations under the State program counterparts to 30 CFR 761.11(c) through (g) for Federal lands not listed in 30 CFR 761.11(a) or (b), unless the cooperative agreement specifies otherwise.

One commenter opposed any rule that would require that we make VER determinations for Federal lands on which the State is otherwise the regulatory authority under a cooperative agreement approved under 30 CFR Part 745 and section 523(c) of the Act. In the commenter's view, section 523(c) grants States with cooperative agreements exclusive authority to regulate surface coal mining and reclamation operations on Federal lands, except as specifically provided to the contrary in the Act. We disagree with the commenter's interpretation of the Act. While section 523(c) specifies certain functions that the Secretary may not delegate to a State, we find nothing in this section that expressly requires delegation of all other, unlisted functions. This interpretation forms the basis for the regulations governing cooperative agreements in 30 CFR part 745.

**XI. Sections 740.11 and 761.14(a): Which VER Definition (State or Federal) Applies to Lands Listed in Section 522(e)(1) and (e)(2) of the Act?**

As proposed, the final rule modifies 30 CFR 740.11 by revising paragraph (a) and adding paragraph (g) to specify that the Federal definition of VER will apply to all VER determinations for the lands listed in 30 CFR 761.11 (a) and (b), regardless of whether we or the State are responsible for making the determination. Application of the

Federal definition will ensure that requests for VER determinations involving lands of national interest and importance, as listed in 30 CFR 761.11 (a) and (b) and section 522(e)(1) and (2) of the Act, are evaluated on the basis of the same criteria.

The final rules differ from the 1990 version of 30 CFR 740.11(a), which required use of the State program definition in place of the Federal definition. However, the new rules differ from the 1990 rules only with respect to the lands listed in 30 CFR 761.11 (a) and (b). We will continue to use the approved State program definition when making VER determinations for Federal lands under the State program counterparts to 30 CFR 761.11 (c) through (g). Similarly, in States that assume responsibility for VER determinations under a Federal lands cooperative agreement, the State regulatory authority will continue to use the State program definition when making VER determinations under the State program counterparts to 30 CFR 761.11 (c) through (g) for Federal lands not listed in 30 CFR 761.11 (a) or (b).

We received few comments on this issue, but those persons who did comment generally supported the approach adopted in the final rule. One commenter opposed the change, arguing that all existing State program VER definitions are illegal or improper and that we must require that States amend their programs to adopt an ownership and authority standard. As previously discussed, we do not agree that the Act mandates adoption of an ownership and authority standard for VER under section 522(e).

In addition, we disagree with the commenter's assertion that, because the court remanded the 1979 and 1983 Federal definitions of VER, State VER definitions based on those Federal definitions are illegal or improper. We are not aware of any ruling of this nature that is still in effect. The commenter may be referring to the initial *Belville* decision in Ohio, but, in September 1992, the court modified its order by vacating the portion of its ruling concerning the validity of State program definitions of VER in States other than Ohio.

**XII. What Other Changes Are We Making in the Federal Lands Program Regulations in 30 CFR Parts 740 and 745?**

We have revised 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, we are replacing 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 is consistent with the policy established in the preamble to a final rule published on April 5, 1989 (54 FR 13814). In that preamble, we specify that SMCRA does not require a permit or other regulatory authority approval as a prerequisite for conducting reclamation work alone. In other words, this change in the terminology of the final rule clarifies that the prohibitions and restrictions of 30 CFR 761.11 and section 522(e) do not apply to reclamation activities such as the restoration of abandoned mine lands and bond forfeiture sites.

Some commenters objected to this clarification, stating that reclamation work performed on abandoned mine lands or bond forfeiture sites must be done in accordance with plans approved by the abandoned mine land reclamation agency or the regulatory authority. We agree that reclamation work performed under a contract executed by the abandoned mine land reclamation agency under Title IV of the Act must adhere to contract plans and specifications. Similarly, we agree that any bond forfeiture reclamation activity conducted under 30 CFR 800.50 or its State counterpart must adhere to plans approved by the regulatory authority. However, neither the reclamation of abandoned mine lands nor the reclamation of bond forfeiture sites is a surface coal mining operation as 30 CFR 700.5 and section 701(28) of the Act define that term. Therefore, as discussed at 54 FR 13814-18 (April 5, 1989), there is no requirement for a permit for these reclamation activities. For similar reasons, there is no requirement that these reclamation activities comply with 30 CFR Part 761 or section 522(e) of the Act, which apply only to surface coal mining operations. Also, third parties that rely upon funds other than Title IV grants or bond forfeiture proceeds may perform reclamation work without any approval or involvement by the regulatory authority or the abandoned mine land reclamation agency. Reclamation activities of this nature are beyond the scope of SMCRA.

The commenters also sought clarification that this change would not exempt reclamation work on illegally mined sites from the supervision and approval of the regulatory authority. We agree that the regulatory authority must monitor reclamation work performed by or for the illegal miner in response to an enforcement action. Nothing in this rule alters that responsibility. However, for

the reasons discussed in the preceding paragraph, other parties may reclaim the site without the approval or involvement of the regulatory authority.

#### **XIII. Why Are We Removing the Definition of "Surface Coal Mining Operations Which Exist on the Date of Enactment" From 30 CFR 761.5?**

For the reasons discussed in Part XVI of this preamble, we are revising 30 CFR 761.12 to clarify that the statutory exception for existing operations in section 522(e) of the Act applies to all surface coal mining operations in existence before the land comes under the protection of section 522(e) and 30 CFR 761.11. Under the previous rule, this exception applied only to operations in existence on the date of enactment of SMCRA. As a result of this change, the term "surface coal mining operations which exist on the date of enactment" no longer appears in the final rule or elsewhere in part 761. Therefore, we are revising 30 CFR 761.5 to delete the definition of this now-obsolete term.

One commenter opposed the deletion as contrary to the express language of the Act, based on the mistaken impression that we were eliminating the exception for existing operations in section 522(e) and merging it with the definition of VER. In reality, the final rule maintains separate exceptions for both VER and existing operations, as does the Act. Any operation that would qualify for the exception for existing operations under the Act or the previous rules would continue to qualify for this exception under the revised rules.

#### **XIV. Why Are We Adding Definitions of "We" and "You" and Their Grammatical Forms to 30 CFR 761.5?**

We are adding definitions of "we" and "you" and their grammatical forms because we have revised the other sections of part 761 to reflect plain language principles, one of which requires the use of "we" and "you" whenever practicable. "We," "us," and "our" refer to the Office of Surface Mining Reclamation and Enforcement. "You" and "your" refer to a person who claims or seeks to obtain an exception or waiver authorized by 30 CFR 761.11 and section 522(e) of the Act. In all other cases, we specifically identify the person or agency to whom we are referring.

#### **XV. How Have We Revised 30 CFR 761.11, Which Is the Regulatory Counterpart to the Prohibitions and Limitations of Section 522(e) of the Act?**

We have reorganized and revised this section to incorporate plain language

principles, improve clarity, maintain consistency with revisions to other sections of 30 CFR Part 761, and add informational cross-references to 30 CFR 761.12 through 761.17 as appropriate. The provisions concerning the exception for existing operations, which originally appeared in the introductory language of this part and which we proposed to revise and recodify as 30 CFR 761.11(b), now appear in revised form in 30 CFR 761.12. (See part XVI of this preamble.) Except for the removal of former paragraph (h) (see the discussion in part XVII of this preamble), there are no other substantive changes from the 1983 version of this section.

#### **XVI. Section 761.12: Which Operations Qualify for the Exception for Existing Operations?**

The exception for existing operations formerly appeared in the introductory language of 30 CFR 761.11. The 1997 proposed rule would have revised and recodified the exception as 30 CFR 761.11(b). To better adhere to plain language principles, the final rule recodifies this exception as a separate section, 30 CFR 761.12, and clearly distinguishes between initial program operations and permanent program operations. The exception for existing operations subject to the permanent regulatory program appears as paragraph (a) of that section, while the exception for existing operations subject to the initial regulatory program appears in paragraph (b) of that section.

Paragraph (a) of the final rule provides that the prohibitions of 30 CFR 761.11 do not apply to surface coal mining operations for which a valid permanent regulatory program permit exists when the land comes under the protection of 30 CFR 761.11 or section 522(e) of the Act. The rule further clarifies that this exception applies only to lands within the permit area as it exists when the land comes under the protection of 30 CFR 761.11.

To address situations in existence before completion of the transition between the initial and permanent regulatory programs, paragraph (b) of the final rule further specifies that, with respect to operations subject to subchapter B of 30 CFR chapter VII, the exception applies to all lands upon which validly authorized surface coal mining operations exist when the land comes under the protection of section 522(e) of the Act or 30 CFR 761.11. This provision has no prospective applicability apart from one remaining active initial program mine on Indian lands.

As proposed, the exception for existing operations in the final rule incorporates paragraph (d)(1) of the 1983 definition of VER. This paragraph provided that validly authorized surface coal mining operations in existence on the date that land comes under the protection of section 522(e) after August 3, 1977, automatically have VER. For this reason and the reasons discussed below and in part VII.F. of this preamble, we believe that this former VER standard more properly resides with the exception for existing operations.

As stated in the preamble to the proposed rule, illegal ("wildcat") operations and operations for which the permit has expired or been revoked do not qualify as existing operations under 30 CFR 761.12(b). Because no valid permit exists in those situations, there are no validly authorized surface coal mining operations. Similarly, the exception does not apply to sites for which the regulatory authority has terminated jurisdiction under 30 CFR 700.11(d)(1) or its State program counterpart.

On-site activity or physical disturbance of the protected land is not a prerequisite for the exception. This interpretation is consistent with the underlying language in section 522(e), which excludes surface coal mining operations "which exist on the date of enactment of this Act" from the prohibitions of that section. Nothing in the Act or the term "exist" requires on-site activity or physical disturbance as opposed to legal existence. Therefore, the final rule recognizes any validly authorized operation as eligible for the exception for existing operations regardless of whether the permittee has actually begun to conduct surface coal mining operations on the site.

The exception for existing operations does not extend to abandoned or reclaimed operations. As discussed in part VII.C.2. of this preamble, in enacting section 522(e), Congress intended to prohibit new surface coal mining operations on the lands listed in that section, with certain exceptions. We believe that both that intent and the express language of section 522(e) extends to the prohibition of new operations on lands upon which surface coal mining operations permanently ceased before the lands came under the protection of section 522(e). Any person seeking to reactivate an abandoned mine or facility or to remine an abandoned or reclaimed site must comply with the prohibitions and limitations of section 522(e) and 30 CFR 761.11 as a prerequisite for obtaining a permanent program permit. Allowing abandoned or

reclaimed operations to qualify for the exception for existing operations would be inconsistent with both the purpose of section 522(e) and the accepted meaning of "existing."

The proposed rule would have limited the scope of the exception for existing operations 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 that the land in question came under the protection of 30 CFR 761.11 or section 522(e) of SMCRA. By limiting the exception for existing operations in this fashion, the proposed rule effectively required 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 had been obtained before the land came under the protection of section 522(e).

After evaluating the comments received, we have decided not to include this provision in the final rule. In implementing other requirements of SMCRA, we consider lands within the permit area for which the permittee has not yet obtained right of entry to be distinct from other lands within the permit area only in one respect: the permittee may not disturb those lands before obtaining right of entry. After obtaining right of entry, the permittee may enter those lands and conduct surface coal mining operations to the extent authorized under the permit.

We anticipate that this change from the proposed rule will have little practical effect in terms of the actual right to mine. The final rule specifies that the exception for existing operations includes all lands covered by an approved permanent program permit at the time that the lands come under the protection of 30 CFR 761.11. However, nothing in SMCRA, its implementing regulations, or the permit authorizes the permittee to disturb lands within the permit area before obtaining proper right of entry. Therefore, if the permittee is unable to procure right of entry for the lands within the permit area covered by the exception for existing operations, there will be no surface coal mining operations on those lands.

The final rule that we are adopting today is consistent with 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) of the 1983 definition 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.

We relied upon the same rationale to develop the 1997 proposed rule and this final 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 that land is determined to be unsuitable for surface coal mining operations. The court held that this principle "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 v. Hodel*, 839 F.2d at 750 (1988). The court ruled 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). *Id.* at 750-51. Although the court did not fully explain the meaning of "lawfully established," we believe that its characterization of industry arguments is significant because it ultimately ruled in favor of industry:

Industry, supporting the district court, argues that \* \* \* once a permit has been validly issued the permit area is insulated from subsequent unsuitability designations.

*Id.* at 750.

Furthermore, once a permit is issued, there is no legal impediment to initiating surface coal mining operations on the permit area, apart from any restrictions imposed as permit conditions.

Therefore, the final rule considers an operation to be lawfully established upon issuance of a permanent program permit. 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 covered by an approved permanent program permit come under the protection of 30 CFR 761.11 and section 522(e) after permit issuance, the permittee has the right to continue to operate on those lands under the exception for existing operations 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. A person who believes that a permit has been improperly issued because a protected feature came into existence before rather than after permit issuance has the option of either filing a timely challenge to approval of the permit application or submitting a complaint to the regulatory authority in accordance with the State program counterpart to 30 CFR 842.12 or to us under 30 CFR 842.12. 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), the exception for existing operations includes all lands covered by whatever permit existed when the land came under the protection of section 522(e) or 30 CFR 761.11. However, except for one operation on Indian lands, we and the State regulatory authorities have completed the repermitting of initial program operations as required by 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 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 disturbance of these sites for purposes of conducting surface coal mining operations is permissible unless the person first obtains a permanent program permit under Subchapter G of 30 CFR Title VII or its State program counterpart.

In addition, all States with the potential for coal production in the foreseeable future now have either a permanent State regulatory program approved under section 503 of SMCRA or a Federal regulatory program approved under section 504 of SMCRA. Therefore, we do not anticipate that there will be any new surface coal mining operations under the initial regulatory program. For all practical purposes, the rules that we are adopting today will be applied only to operations with permanent program permits.

Some commenters argued that by its very terms, the phrase "existing operation" applies only to mines for which at least some site preparation work has occurred. For the reasons discussed above, we do not agree.

Some commenters argued that the exception for existing operations should apply to all lands that the permittee contemplates mining as part of the operation. Under this rationale, the exception would not be restricted to lands under permit before the land comes under the protection of section 522(e) and 30 CFR 761.11. We believe that such an expansive interpretation of the exception for existing operations runs contrary to the purpose for which Congress enacted section 522(e). To foreclose the possibility of this interpretation, we have added language to 30 CFR 761.12(a) to clarify that the exception applies only to lands under permit at the time that the land comes under the protection of 30 CFR 761.11.

#### **XVII. Why Are We Removing the Prohibitions in Former 30 CFR 761.11(h)?**

As proposed, we are removing former 30 CFR 761.11(h), which provided 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. We published 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 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. 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) of the Act prohibits surface coal mining operations on any lands within the statutorily protected areas listed in 30 CFR 761.11(h). See *PSMRL II, Round III—VER*, 22 Env't Rep. Cas. (BNA) at 1565 (1985).

We subsequently suspended 30 CFR 761.11(h) to comply with the court's order. See 51 FR 41952, 41956, November 20, 1986.

On September 22, 1988, the Department of the Interior issued a policy statement explaining the actions that the Department would take to prevent surface coal mining operations on lands protected under section 522(e)(1) of the Act. 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 section 522(e)(1) whenever a person attempts to exercise VER. Unlike 30 CFR 761.11(h), the policy applies to all lands within the areas listed in section 522(e)(1), not just to Federal lands.

We published this policy statement in the **Federal Register** on December 27, 1988 (53 FR 52384), in conjunction with a previous proposed rule concerning VER. The policy remains in effect even though we subsequently withdrew the proposed rule on July 21, 1989.

Contrary to the expectations of some commenters on our 1997 proposed rule, the policy statement will not, and is not intended to, provide protection equivalent to that afforded by former 30 CFR 761.11(h). As the court noted in its decision remanding 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*, 22 Env't Rep. Cas. (BNA) at 1565 (1985). Furthermore, section 522(e) only applies to surface coal mining operations, which section 701(28) of the Act specifically defines as excluding coal exploration.

Therefore, we believe that it would be inappropriate to repromulgate 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.

Some commenters questioned the utility of the policy since the Department's discretionary funds for land acquisition are extremely limited, there is little Federal land in the East available for exchange, and the Federal Land Policy and Management Act places severe constraints on the exchange of Federal coal for non-Federal coal across State lines. The commenters also noted that most Federal lands in the East are in the National Forest System, which is under the jurisdiction of the Department of Agriculture and thus not available to the Secretary for exchange purposes. We acknowledge these limitations. If adequate funds or suitable exchange lands are not available, nothing in the policy obligates the Secretary to acquire lands for which a person has demonstrated VER.

Other commenters argued that the policy should be extended to cover all lands protected under section 522(e), not just those areas listed in paragraph (e)(1). We understand the commenters' interest in protecting buffer zones for homes, schools, roads, and other features listed in paragraphs (e)(3) through (e)(5) of section 522 of the Act. However, the Secretary has neither the resources nor the authority to acquire these lands without specific congressional authorization or appropriation. Furthermore, in publishing the proposed rule, we did not seek comments on the policy or propose any changes to the policy. Therefore, both the policy and comments suggesting revision of the policy are outside the scope of this rulemaking.

**XVIII. Why Did We Reorganize Former 30 CFR 761.12 as §§ 761.13 Through 761.17 and 762.14?**

Former § 761.12 included a number of mostly unrelated provisions under the heading "Procedures." Plain language principles encourage the use of multiple short sections with informative headings that address a single topic in preference to long, less focused sections with headings that convey relatively little information about their contents. We also determined that former 30 CFR 761.12(g), which addressed the eligibility of lands listed in section 522(e) for designation as unsuitable for surface coal mining operations under 30 CFR Parts 762, 764, and 769, would be better placed in 30 CFR Part 762, which contains the criteria for designating

lands as unsuitable for mining pursuant to those parts of our regulations.

Therefore, we are reorganizing and recodifying former § 761.12 as shown in the following table:

Previous citation	New citation
761.12(a) .....	761.17(a)
761.12(b)(1) .....	761.17(b)
761.12(b)(2) .....	761.17(c)
761.12(c) .....	761.13
761.12(d) .....	761.14
761.12(e) .....	761.15
761.12(f) .....	761.17(d)
761.12(g) .....	762.14
761.12(h) .....	761.16(f)

In addition, we are consolidating all procedural requirements related to VER determinations into a new § 761.16 and expanding those requirements to cover all steps of the VER determination process. The portion of former 30 CFR 761.12(b)(2) that pertains to notification of the National Park Service and the U.S. Fish and Wildlife Service no longer appears as a separate requirement because the general notification requirements of new 30 CFR 761.16(d) subsume this provision.

As proposed, we are removing the portion of former 30 CFR 761.12(h) that provided for administrative appeals of existing operation determinations. The exception for existing operations in 30 CFR 761.12 does not require any affirmative action or decision on the part of either the permittee or the regulatory authority. As explained in Part XVI of this preamble, the exception for existing operations merely allows an already permitted operation to continue operating within the permit boundaries in existence at the time that the land comes under the protection of section 522(e) and 30 CFR 761.11. Hence, there is no action or decision to appeal.

**XIX. Section 761.13: How Have We Revised the Procedural Requirements for Compatibility Findings for Surface Coal Mining Operations on Federal Lands in National Forests?**

This new section revises and replaces former 30 CFR 761.12(c). No commenters opposed the changes that we proposed. Nor did any commenter suggest revisions to the proposed rule.

Paragraph (a) of the final rule provides that, if you intend to rely upon the compatibility exception in 30 CFR 761.11(b) to conduct surface coal mining operations on Federal lands in national forests, you must request that we obtain the Secretarial findings required by 30 CFR 761.11(b). This paragraph does not differ substantively

from the corresponding sentence in the proposed rule.

Paragraph (b) of the final rule clarifies that you may submit a request for these findings before you prepare and submit an application for a permit or boundary revision. As we noted in the preamble to the proposed rule, our experience has shown that evaluation of the entire permit application is not essential to preparation of the requested findings. In addition, this clarification is consistent with 43 CFR 4.1391(b)(1), which provides for administrative review of compatibility findings that are made independently of a decision on a permit application.

If your request is part of a permit application, that application will usually include all the information that we and the U.S. Forest Service need to determine compatibility.

However, if you seek a compatibility finding before preparing and submitting a permit application, we will not have access to the information normally included in the application. Therefore, paragraph (b) of the final rule also specifies that, if you submit a request independently of a permit application, your request must include sufficiently comprehensive information about the proposed operation to enable the U.S. Forest Service and us to properly evaluate the request and prepare adequately documented determinations and findings.

To provide better guidance as to the meaning of this requirement, the final rule fleshes out the proposed rule, which required "information about the nature and location of the proposed surface coal mining operations," by requiring that you submit a map of the proposed operation and an explanation of how the proposed operation would not damage the values listed in the definition of "significant recreational, timber, economic, or other values incompatible with surface coal mining operations" in 30 CFR 761.5. (Under 30 CFR 761.11(b), one of the findings that the Secretary must make before the regulatory authority may approve a permit application is that there are no significant recreational, timber, economic, or other values that may be incompatible with the proposed surface coal mining operations.) Finally, paragraph (b) of the final rule specifies that we may request that you provide any additional information that we determine is needed to make the required findings. We believe that our authority to request this information is inherent in our responsibility to make the findings.

Paragraph (c) of the final rule provides that, when a proposed surface

coal mining operation or a proposed boundary revision for an existing surface coal mining operation includes Federal lands within a national forest, the regulatory authority may not issue the permit or approve the boundary revision before the Secretary makes the findings required by 30 CFR 761.11(b). This paragraph does not differ substantively from the corresponding sentence in the proposed rule. As proposed, the final rule clarifies that this provision applies to all types of permit applications that involve the addition of new acreage, including incidental boundary revisions.

**XX. How Do 30 CFR 761.14 and 761.15, Which Concern Waivers for Buffer Zones for Public Roads and Occupied Dwellings, Differ From Former 30 CFR 761.12(d) and (e)?**

Sections 761.14 and 761.15 establish procedures for obtaining a waiver from the prohibitions of 30 CFR 761.11(d) and (e) concerning public roads and occupied dwellings. We did not propose any substantive revisions to these rules, which previously appeared in 30 CFR 761.12(d) and (e). However, one commenter expressed a general concern that the proposed rule and its preamble did not clearly specify that the VER exception, the exception for existing operations, and the variance and waiver provisions of 30 CFR 761.11(c) through (e) operate independently of each other; *i.e.*, that a person who qualifies for one type of exception or waiver does not need to comply with the requirements for other types of exceptions or waivers. To address this concern, we have added a new paragraph (a) to 30 CFR 761.14 and 761.15 to clarify that a person need not obtain a waiver or variance under those sections if the VER exception or the exception for existing operations applies. Section 761.14(a)(3) also recognizes that, under the conditions specified in 30 CFR 761.11(d)(2), a person need not obtain a waiver or variance under 30 CFR 761.14(b) to use or construct an access or haul road that joins a public road. Similarly, 30 CFR 761.15(a)(3) recognizes that, consistent with 30 CFR 761.11(e)(2), a person need not obtain a waiver or variance under 30 CFR 761.15(b) to use or construct an access or haul road that joins a public road on the opposite side of the public road from an occupied dwelling.

There are no other substantive changes from the previous rules. We have made some organizational and editorial changes to more closely adhere to plain language principles and to reflect the addition of the term "you" to the definitions in 30 CFR 761.5.

**XXI. Section 761.16: What Are the Submission Requirements for Requests for VER Determinations and How Will These Requests Be Processed?**

We are adding this new section to codify submission and processing requirements for requests for VER determinations under section 522(e) of the Act. Apart from a few provisions transferred from former 30 CFR 761.12(b)(2) and (h), this section has no counterpart in the previous (1983) version of Part 761. In the proposed rule, this section appeared in somewhat different form as 30 CFR 761.13.

SMCRA does not contain procedural requirements for VER determinations under section 522(e), nor does it expressly require the development of regulations establishing such requirements. However, section 201(c)(2) of the Act provides sufficient authority for adoption of these regulations. This provision requires that we "publish and promulgate such rules and regulations as may be necessary to carry out the purposes and provisions of this Act." The regulations in 30 CFR 761.16 provide the procedural framework necessary to ensure that the prohibitions of 30 CFR 761.11 and section 522(e) of the Act are fully and properly implemented in the manner intended by Congress. These rules are intended to ensure that all affected persons receive equitable treatment and have adequate notice and opportunity to participate in the decision-making process, consistent with the Administrative Procedure Act (5 U.S.C. 551 *et seq.*) and section 102(i) of SMCRA, which states that one of the purposes of SMCRA is to assure that appropriate procedures are provided for public participation. Many of the requirements in these regulations, especially those pertaining to notice and comment, also address 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."

Most commenters either supported the addition of rules establishing VER determination procedures or did not oppose such rules in principle. However, some commenters took issue with individual aspects of the proposed rules. As a result of these comments, the final rule contains a number of substantive, editorial, and format changes from the proposed rule.

*I. In What Major Ways Does the Final Rule Differ From the Proposed Rule?*

**1. Role of Federal Surface Management Agencies**

If the coal interests have been severed from other property interests and the surface estate is in Federal ownership, proposed 30 CFR 761.13(b)(2) would have required a person requesting a VER determination for those lands to first obtain a title opinion or other official statement from the Federal surface management agency confirming that the requester has the property right to conduct the type of surface coal mining operations intended. This proposed requirement was intended to ensure that the requester and the Federal surface management agency reach agreement on the underlying property rights, or, if there is a dispute, that the parties obtain proper adjudication of the dispute without involving the agency responsible for processing VER determination requests.

Several commenters attacked this provision as effectively providing the Federal surface management agency with veto authority over the VER determination in violation of the principle of State primacy under SMCRA. They argued that nothing in section 522(e) or other provisions of SMCRA either requires or authorizes a decision-making role for the Federal surface management agency in the VER determination process. One commenter further noted that the proposed rule may be inconsistent with section 510(b)(6) of the Act, which does not necessarily require surface owner consent to a surface coal mining operation. Under that section of the Act, the permit applicant has the option of demonstrating the right to conduct surface coal mining operations either under the terms of the instrument of conveyance or under State law pertaining to interpretation of property conveyances.

We agree that the commenters' arguments have some validity. In addition, SMCRA may provide insufficient basis for the proposed rule's disparate treatment of Federal and non-Federal surface owners of lands protected under section 522(e). When presented with a very similar controversy involving 30 CFR 761.11(h) in the 1983 rules, the court noted that there appeared to be no rational basis for distinguishing between Federal and non-Federal lands in the context of section 522(e)(1) because Congress did not incorporate this distinction into that provision of the Act. *See PSMRL II, Round III—VER*, 22 Env't Rep. Cas. (BNA) at 1565 (1985). Therefore, we are

replacing proposed 30 CFR 761.13(b)(2)(vi) with two new paragraphs in 30 CFR 761.16. The new paragraphs apply to all situations in which the coal rights have been severed from the surface estate, not just to those situations in which the surface estate is in Federal ownership.

New paragraph (b)(2)(viii) of 30 CFR 761.16 provides that, if the coal interests have been severed from other property interests, the request for a VER determination must include documentation that the requester has notified and provided reasonable opportunity for the owners of all other property interests to comment on the validity of the rights claimed by the requester. New paragraph (b)(2)(ix) provides that the request must include copies of all comments received in response to this solicitation. Under the final rule, any person requesting a VER determination for Federal lands must seek and submit the views of the Federal surface management agency, but, unlike the proposed rule, the final rule does not require submission of a title opinion or other official statement confirming the property rights claimed by the requester. In other words, the final rule requires consideration of information provided by the Federal surface management agency, but, unlike the proposed rule, it does not provide that agency with a veto authority over the VER determination process.

Some commenters expressed a desire for rules that would be more protective of Federal lands than of other lands, based on the argument that the national interest in Federal lands justifies special treatment of those lands. We find nothing in section 522(e) to support this argument. Congress did not provide for greater protection of the Federal lands listed in that section relative to the non-Federal lands listed therein. We believe that the final rule protects all section 522(e) lands in an equitable manner.

The final rule provides ample notice and comment opportunity to all surface owners, including Federal surface management agencies. First, under 30 CFR 761.16(b)(1)(viii) and (ix), the person requesting the VER determination must seek comment from the surface owner and other persons with a property interest in the land; any comments received must be submitted as part of the request. Second, under 30 CFR 761.16(d)(2), upon finding that a request is administratively complete, the agency responsible for the VER determination must notify both the surface owner and, when applicable, any agency with primary jurisdiction over the feature or values causing the land to come under the protection of 30

CFR 761.11. Under 30 CFR 761.16(d)(3), the agency responsible for the VER determination must provide a 30-day comment period to all persons notified under 30 CFR 761.16(d)(2), with a minimum of another 30 days available upon request. And, under 30 CFR 761.16(e)(1), the agency responsible for the VER determination must evaluate the merits of all comments received and the information presented by the requester before making a decision. Finally, the surface owner or any other person with an interest in the land has the option of filing a quiet title action in the appropriate administrative or judicial forum at any time. Under 30 CFR 761.16(e)(3)(i), when such an action is filed before or during the comment period on a request for a VER determination, the agency making the VER determination must find that the requester has not demonstrated VER, pending a final decision in the litigation process.

One commenter argued that providing concurrence or veto authority to another Federal agency would expose the government to liability for both temporary or permanent takings claims under the Fifth Amendment to the Constitution. As discussed above, the final rule does not provide concurrence or veto authority to any other Federal agency, including the surface management agency. While we will continue to seek input from these agencies and consider all comments received, we will no longer suspend processing of a request for a VER determination solely because the surface management agency advises us that it does not concur with the requester's property rights claims. In reaching a decision on the request, we will evaluate the merits of all information in the record, including that supplied by the requester and the surface management agency.

## 2. Handling of Situations Involving Property Rights Disputes

In establishing right-of-entry requirements for permit applications for surface coal mining operations, section 507(b)(9) of SMCRA provides that "nothing in this Act shall be construed as vesting in the regulatory authority the jurisdiction to adjudicate property title disputes." Similarly, in setting forth the findings that the regulatory authority must make before approving a permit application, section 510(b)(6)(C) of SMCRA provides that "nothing in this Act shall be construed to authorize the regulatory authority to adjudicate property rights disputes."

In deference to these provisos, proposed 30 CFR 761.13(d)(2) would

have required deferral of a decision on a request for a VER determination if the underlying property rights are in dispute. The preamble contained the following discussion of the meaning of the proposed rule:

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.

62 FR 4851, January 31, 1997, col. 3.

One commenter argued that because sections 510(b)(6) and 507(b)(9) concern permitting requirements, their prohibitions on regulatory authority adjudication of property rights disputes are not applicable to VER determinations under section 522(e). We disagree. The sections of the Act that the commenter references specifically provide that "nothing in this Act" authorizes regulatory authorities to adjudicate property rights disputes. Clearly, Congress did not intend to limit the scope of the prohibition to sections 507 and 510 of the Act, as the commenter asserts. Furthermore, VER determinations are precursors to the permitting process and they may be made as part of the permitting process in situations in which the regulatory authority and the agency responsible for the VER determination are the same.

Some commenters supported the proposed rule and its preamble discussion. Others argued that, in view of Congress' expressed interest in section 102(b) in protecting the rights of surface owners, we should extend the deferral requirement to include all situations in which the surface owner or other parties disagree with the property rights claims made by the requester. For the reasons discussed later in this

section, we no longer believe that deferral is appropriate or necessary.

Many commenters opposed the proposed deferral requirement, arguing that deferring a decision is an abdication of our decision-making responsibilities under SMCRA. One commenter expressed concern that deferral would deprive persons of the right to a reasonably timely decision under the Administrative Procedure Act (APA). At 5 U.S.C. 555(b), the APA provides that “[w]ith due regard for the convenience and necessity of the parties or their representatives and within a reasonable time, each agency shall proceed to conclude a matter presented to it.” Some commenters argued that unreasonable delays in the decision-making process would expose the government to temporary or permanent takings claims.

Several commenters stated that property rights disputes do not relieve the Secretary or the regulatory authority of the duty to render a final decision on a matter before the agency. These commenters argue that administrative decisions on requests for VER determinations would not violate the statutory prohibition on adjudication of property rights disputes because an aggrieved party still has the opportunity to file a quiet title action in the appropriate forum even after a VER determination is made. As discussed in greater detail later in this section, the final rule requires that the agency make a decision on each request for a VER determination. That decision must be made on the merits of the information in the record unless the property rights are the subject of pending litigation in an appropriate legal forum. If there is pending litigation, we believe that the statutory prohibitions on adjudication of property rights disputes apply.

Therefore, in those cases, the final rule at 30 CFR 761.16(e)(3)(i) requires that the agency find that the requester has not demonstrated VER. This decision will be subject to administrative and judicial review, and it will be made without prejudice, meaning that the request may be refiled once the property rights dispute is finally adjudicated.

Several commenters expressed concern that deferrals would deprive persons requesting a VER determination of the opportunity for administrative and judicial review. One commenter stated that the effect of a refusal to process a request for a VER determination is the same as a negative determination, with one important distinction: unlike a negative determination, a deferral or other cessation of processing means that there is no final agency action subject to

judicial review. As discussed in greater detail later in this section, these comments have some merit and we have revised the rule accordingly. The final rule at 30 CFR 761.16(e) requires that the agency make a decision on each request for a VER determination that the agency receives. The requester will always have the opportunity to pursue administrative and judicial review of that decision.

One commenter argued that when a Federal surface management agency asserts a title defect, the only vehicle to evaluate the merits of property rights disputes is a decision on whether the requester has demonstrated VER. We do not agree. Any person with a valid legal interest has the right to file a timely quiet title action in a court of competent jurisdiction to resolve a property rights dispute with a Federal surface management agency, provided the statute of limitations has not expired. There is no statutory or case law requiring an administrative VER determination as a prerequisite for such action.

Other commenters argued that deferrals would violate the statutory prohibition on adjudication of property rights disputes. According to the commenters, a deferral is a *de facto* adjudication of the property rights dispute in favor of the surface owner because it effectively denies the requester the right to conduct surface coal mining operations. These commenters advocated revising the rule to require that the agency make an administrative decision on each request. They noted that any person with standing who disagrees with the agency's decision on the VER determination has the right to seek judicial review of the decision.

For reasons discussed in greater detail later in this section, the final rule at 30 CFR 761.16(e) requires that the agency make a decision on each request for a VER determination that the agency receives. We are not adopting the proposed rule that would have authorized deferral of a decision under some circumstances. However, we do not agree with the commenters that a deferral would be a *de facto* adjudication of the property rights dispute in favor of the surface owner. Under the proposed rule, the agency would have had to make a decision on the request for a VER determination once the property rights dispute was properly adjudicated or ceased to exist. Therefore, a deferral would only temporarily delay a decision on whether the requester has demonstrated the property right to conduct surface coal mining operations.

One commenter stated that we should revise the proposed rule to authorize the deferral, or dismissal without prejudice, of a request for a VER determination only for situations in which the property rights are currently the subject of pending litigation. The commenter argued that section 507(b)(9) of the Act implies that this is the only circumstance under which Congress did not envision that we or the regulatory authority would make a decision purely on the basis of a *prima facie* demonstration of property rights by the requester. As discussed in greater detail later in this section, we concur that section 507(b)(9) may reasonably be read in this manner. For this and other reasons, final 30 CFR 761.16(e) provides that, unless the underlying property rights are in litigation, the agency responsible for the VER determination must make that determination based on the merits of the information in the record. If the property rights are in litigation, final 30 CFR 761.16(e)(3)(i) requires that the agency find that the requester has not demonstrated VER. The final rule specifies that this decision must be made without prejudice, as the commenter suggested.

One commenter expressed concern that, under the proposed rule, persons with no legal standing could allege a property rights dispute and thus preclude a decision on the request for a VER determination. The commenter urged that, at a minimum, we incorporate the preamble restrictions on the meaning of the term “property rights disputes” into the rule itself. As discussed below, we have revised the final rule to address the commenter's concerns.

Most commenters opposing the proposed rule and its deferral requirement cited two Federal court decisions from the Eastern District of Kentucky, *Akers v. Baldwin*, No. 84–88 (February 28, 1985) and *Akers v. Bradley*, No. 84–88 (June 1988) as supporting their position. Both decisions concern the same case, which dealt with the issue of what action the regulatory authority could and should take on a permit application while a property rights dispute is pending resolution in State court. In its opinion, the court included the following discussion of the meaning of the section 510(b)(6)(C) prohibition on regulatory authority adjudication of property rights disputes:

The court finds itself simply unable to accept the arguments of the state defendants and intervening defendants that Congress did not intend that the state agency regulating surface mining not be required to make a determination whether the permit

application reflects a *prima facie* right under state law to engage in surface mining.

Such argument flies in the face of the plain and unambiguous language of the statute and also its context and history. Thus, 30 U.S.C. § 1260(b)(6) [section 510(b)(6) of SMCRA] requires the mining company applicant for a permit to demonstrate in one of three ways that it has the right to surface mine. This may be done by furnishing the written consent of the surface owner, a conveyance expressly granting the right to surface mine, or a deed which when considered with applicable state law will reflect such right.

The state and intervening defendants argue that for the state agency to construe a deed in the light of state law is to engage in the resolution of a property dispute in violation of the language of the federal statute. This construction is not borne out by the legislative history.

\* \* \* \* \*

Proper principles of statutory construction require the court to construe the statute as a whole giving effect to all of its language. [Citation omitted.] The only construction of 30 U.S.C. 1260(b)(6) which meets this criterion is that \* \* \* Congress intended that the state regulatory authority reviewing the permit application administratively ascertain that a *prima facie* showing of the right to surface mine under state law has been properly documented by the applicant. *To this extent, the agency is required to make a legal determination.* This is subject, of course, to the right of the parties to resort to the courts for a final determination, which the state agency must then respect.

The court concludes that the language so heavily relied upon by the state and intervening defendants appearing at the end of § 1260(b)(6)(C)—

“Provided, That nothing in this [Act] shall be construed to authorize the regulatory authority to adjudicate property rights disputes”—means only that the regulatory agency would not have power to determine whether any given conveyance had been obtained by fraud, whether the consent obtained was signed by the proper heirs to a particular tract of land, whether there was a boundary line or other dispute concerning the realty’s description, and other such individualized matters.

*Akers v. Baldwin*, C.A. No. 84–88 (E.D. Ky, Feb. 28, 1985), slip op. at 9–12, emphasis added.

The court noted that, under SMCRA, the regulatory authority has no administrative procedures for ruling on boundary line or fraud claims, on who is the proper heir to a particular tract of real estate, or other individualized disputes of similar nature. The court further stated its belief that the regulatory authority could not prohibit permit issuance on the basis of disputes of this nature. According to the court, construing the Act in this manner “could prevent issuance of a permit even where a deed expressly granted the right to surface mine,” a result which the court found to be inconsistent with

Congressional intent. *Akers v. Baldwin*, *supra*, at 15.

In a June 20, 1988 decision finally disposing of this case, now entitled *Akers v. Bradley*, the court reiterated its conclusion in *Akers v. Baldwin*, *supra*, that “[30] U.S.C. § 1260(b)(6) [section 510(b)(6) of SMCRA] and the legislative history reflect a congressional intent that the regulatory authority reviewing the permit application make an administrative determination that the language of the severance instrument is construed under state law to authorize surface mining.” The court also rejected plaintiffs’ argument that the regulatory authority must withhold or suspend the permit if the agency receives an objection disputing the applicant’s right to mine coal by surface methods: “The court finds no clear indication that Congress intended the permit process to be suspended in this circumstance \* \* \*.” *Akers v. Bradley*, unpaginated slip op.

After considering the *Akers* court’s analysis of the meaning of the statutory prohibition on adjudication of property rights, commenters’ arguments concerning the deferral provisions of the proposed rule, and the language of the Act, we have decided against adoption of proposed 30 CFR 761.13(d)(2)(ii), which would have required deferral of a decision on a request for a VER determination whenever the underlying property rights are in dispute. Our decision not to proceed with the approach in the proposed rule also receives support from *Helmick v. United States*, No. 95–0115 (N.D. W.Va. 1997), in which the court ordered us to make a decision on a VER determination request even though the surface and mineral owners disagreed about the proper interpretation of the deeds for the property.

By requiring that the agency make an appealable decision on every request, the final rule is consistent with the public policy interest in expeditious decision-making. And, by requiring that the agency find that the requester has not demonstrated VER if the property rights are the subject of pending litigation, the final rule properly balances that public policy interest with the need to protect the interests of surface landowners and other persons with a legal interest in the property, as directed by section 102(b) of SMCRA. In addition, the final rule is consistent with the Interior Board of Land Appeals’ interpretation of section 510(b)(6)(C) of SMCRA in *Marion A. Taylor*, 125 IBLA 271, 277 (February 19, 1993), as discussed later in this portion of the preamble.

The final rule that we are adopting today requires that the agency make a decision on every request for a VER determination that it receives. Under 30 CFR 761.16(e)(3)(i), the agency must determine that the requester has not demonstrated VER whenever the property rights claimed by the requester are the subject of pending litigation in a court or administrative body with jurisdiction over the property rights in question. That determination must be subject to administrative and judicial review and it must be made without prejudice, meaning that the requester may refile the request once the property rights dispute is finally adjudicated. In all other cases involving property rights disagreements, the final rule, at 30 CFR 761.16(e)(3)(ii), requires that the agency evaluate the merits of the information in the record, including all comments received, and determine whether the requester has demonstrated that the requisite property rights exist in accordance with paragraph (a), (c)(1), or (c)(2) of the definition of VER. In the absence of pending litigation, the agency may not defer a decision on the merits of the request merely because the surface owner, the surface management agency, or other persons oppose the request or disagree with the validity of the property rights claimed by the requester.

We believe that the final rule reflects good administrative practice by reducing the lengthy delays that sometimes result from deferring decisions until property rights disagreements are fully resolved. The rule is responsive to those comments arguing for a more expedited, understandable, and predictable decision-making process in situations that involve property rights disagreements. The rule also is consistent with commenters’ desire for decisions that are subject to administrative and judicial review. And it provides ample opportunity for persons who disagree with the requester’s property rights claims to initiate legal action contesting those claims and thus activate the provision of the rule that requires the agency to find that the requester has not demonstrated VER, pending final adjudication of the dispute.

We believe that 30 CFR 761.16(e)(3)(i), which requires that the agency determine that the requester has not demonstrated VER whenever the property rights claimed by the requester are the subject of pending litigation, is consistent with section 102(b) of SMCRA. That section 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.” Section 102(m), which states that another purpose of SMCRA is “protection of the public interest,” provides further support for this rule.

The final rule also is consistent with the court’s assertion in the *Akers* decision that the regulatory authority should not issue mining permits prior to the conclusion of litigation concerning the interpretation of property rights conveyances for lands within those permit applications. In reaching this decision, the court found that:

[T]he public interest dictates that the physical integrity of the surface lands be preserved until the constitutionality of the statute discussed herein [relating to broad form deeds] has been finally determined. The mining companies can always do their mining after the statute is declared unconstitutional, if such is the result. The lands, once strip mined, cannot be restored to their pristine state.

*Akers v. Baldwin*, No. 84–88 (E.D. Ky. 1985), slip op. at 14–15.

We believe that a similar rationale should apply to VER determinations under section 522(e), since these determinations are precursors to permitting actions, and may be made as part of the permitting process.

In addition, the final rule is consistent with the Interior Board of Land Appeals’ interpretation of section 510(b)(6)(C) of SMCRA in *Marion A. Taylor*, 125 IBLA 271, 277 (February 19, 1993). In that case, the Board held that, if the regulatory authority receives notice of a legal dispute concerning the validity of property rights, but nonetheless allows the applicant or permittee to conduct surface coal mining operations on the disputed area, the regulatory authority has effectively adjudicated the property rights dispute in favor of the applicant or permittee in violation of section 510(b)(6)(C) of the Act. The Board found that the existence of a legitimate ongoing legal dispute means that the permit applicant was unable to demonstrate—and the regulatory authority was unable to find—that the applicant had the legal right to mine the coal by the method intended. VER determinations are precursors to permitting actions, and may be made as part of the permitting process. Therefore, the Board’s rationale also would apply to VER determinations in situations involving property rights disputes that are pending resolution in a court of competent jurisdiction or other appropriate legal venue.

However, we do not interpret the proviso in section 510(b)(6)(C) of SMCRA as applying to situations in

which there is only a mere allegation of a property rights dispute. As stated in the preamble to the proposed rule, if the parties are not diligently pursuing resolution of their disagreement in the proper administrative or judicial venue, then the agency processing the request for a VER determination may reasonably conclude that the lack of any serious attempt to resolve the disagreement in the appropriate legal venue means that no *bona fide* dispute exists. We believe that the threshold that 30 CFR 761.16(e)(3)(i) establishes for property rights disputes is a reasonable approach that will comply with the requirements of the Act while avoiding the potential disruption of the permitting process and mining industry that could result from a lower threshold that countenances unsupported or frivolous allegations. This threshold also should resolve a commenter’s concern that, under the proposed rule, persons with no legal standing could allege a property rights dispute and thus preclude a decision on the request for a VER determination.

Further, as one commenter noted, applying the statutory prohibition on adjudication of property rights disputes only to those disputes pending resolution in the appropriate legal venue is consistent with section 507(b)(9) of the Act. This section, which, like section 510(b)(6)(C), contains a prohibition on regulatory authority adjudication of property title disputes, provides that a permit applicant must identify whether the claimed right of entry is the subject of pending court litigation. Although not necessarily conclusive, this provision does suggest that Congress did not consider a property rights dispute to be *bona fide* in the absence of litigation.

Finally, in *Akers v. Bradley*, *supra*, the court held that there is no indication that Congress intended section 510(b)(6)(C), the other provision of SMCRA that contains a prohibition on adjudication of property rights disputes, to be interpreted as requiring that the regulatory authority withhold or suspend the permit whenever the agency receives an objection disputing the applicant’s right to mine coal by surface methods.

Some commenters argued that a mere allegation of a property rights dispute should suffice to invoke the prohibition on adjudication of property rights disputes in section 510(b)(6)(C) of the Act because many persons would likely become aware of a potential dispute only upon receipt of the notice required by the rule. We recognize that the situation posited by the commenters is likely to occur. However, we believe that the final rule provides persons with

legitimate property rights concerns ample opportunity to initiate the appropriate legal or administrative action during the comment period on the VER determination request.

For clarity, we have revised the public notice content requirements in 30 CFR 761.16(d)(1) by adding a new paragraph (iv) to require that the notice include a statement specifying that the agency will not make a decision on the merits of the request if, by the close of the comment period on the request, a person with a legal interest in the property initiates appropriate legal action to resolve the property rights dispute in the proper venue. But even if a person is unable to take legal action during this time, the property rights adjudication prohibition of section 510(b)(6)(C) means that subsequent initiation of litigation to resolve the property rights dispute can prevent regulatory authority approval of any permit application that might follow the VER determination. See *Marion A. Taylor*, 125 IBLA 271 (February 19, 1993).

One commenter argued that an agency determination that a person has VER despite the presence of comments in the record that disagree with the requester’s property rights claims would expose the agency to takings claims on the basis that the decision authorized physical intrusion. According to the commenter, it would constitute “an official blessing of an improper usurpation of landowner and homeowner rights to uninterrupted possession and enjoyment of property.” We are not aware of any case law supporting these assertions.

### 3. Action on Incomplete Requests

The proposed rule did not specify what action the agency responsible for the VER determination could or should take if the person requesting the VER determination does not respond to an agency request for additional information. Final 30 CFR 761.16(c)(4) and (e)(4) state that if you do not provide the necessary additional information in a timely fashion, the agency must issue a determination that you have not demonstrated VER.

The rules also specify that the agency must make these determinations without prejudice, meaning that you may refile the request at a later time if desired.

We are adding these provisions to the final rule in response to several comments urging us to streamline the decision-making process to minimize delays. One commenter requested that the final rules be revised to “avoid the inefficient and unfair delays attendant to the agency’s historic procedural

posturing to avoid disposition of issues critical to private property rights." The commenter stated that prompt issuance of final decisions also would reduce the agency's takings exposure and better comport with 5 U.S.C. 555(b), which provides that "[w]ith due regard for the convenience and necessity of the parties or their representatives and within a reasonable time, each agency shall proceed to conclude a matter presented to it."

We do not agree that the commenter has accurately characterized the agency's previous actions concerning VER determinations. However, we agree that prompt decisions are desirable. Accordingly, we are adding 30 CFR 761.16(c)(4) and (e)(4) to avoid decision-making delays resulting from incomplete submissions or failure to respond to agency requests for additional information. Under those rules, when a person does not supply the information requested by the agency under 30 CFR 761.16(b) or (e)(1) within the time specified, the agency must issue a determination that the person has not demonstrated VER. A person who receives this type of VER determination has the right to seek administrative and judicial review of the determination. In addition, the final rules specify that the agency must make these determinations without prejudice, meaning that the request may be resubmitted at any time.

We anticipate that this provision of the final rule will eliminate the lengthy delays in decision-making that sometimes have occurred in the past as a result of incomplete submissions. In addition, the final rule is consistent with *Helmick v. United States*, No. 95-0115 (N.D. W.Va. 1997), in which the court ordered us to issue a VER determination even though the requester had not supplied all requested information.

Whenever an agency issues a decision under 30 CFR 761.16(c)(4) or (e)(4), it will retain the materials submitted with the request. Those materials will become part of the administrative record for the decision. If the requester subsequently desires a new determination, the agency may, at its discretion, either require complete resubmission of the request or allow the requester to submit only the new materials together with a request for reconsideration of the previous determination.

#### 4. Administrative Completeness Reviews.

When a person submits a request for a VER determination, the proposed rule would have required the agency

responsible for the VER determination to initiate notice and comment procedures without first reviewing the request to determine whether it contained all components required under 30 CFR 761.13(b). We believe that this approach represents an inefficient use of resources on the part of both the agency and the requester because it could result in premature notice and comment.

Therefore, the final rule includes a new 30 CFR 761.16(c), which provides that, upon receipt of a request for a VER determination, the agency must conduct an initial review to determine whether the request includes all applicable components of the submission requirements of 30 CFR 761.16(b). This review addresses only the administrative completeness of the request, not its legal or technical adequacy.

Under the final rule, the agency must proceed to implement the notice and comment requirements of 30 CFR 761.16(d) if the request includes all necessary components. However, if the request does not include all necessary components, the rule requires that the agency notify the requester and establish a reasonable time for submission of the missing information. If the requester does not submit this information within the specified time or any subsequent extensions, the final rule requires that the agency issue a determination that the requester has not demonstrated VER. Under the final rule, the agency must issue this determination without prejudice, meaning that the requester may refile the request at any time after obtaining the missing information.

We believe that the addition of this step will streamline the decision-making process, as desired by several commenters. It also will promote more efficient use of resources by avoiding the expenses and delays associated with providing notice and comment on an incomplete request. And it is consistent with the permit application review requirements of 30 CFR 773.13(a), which do not require initiation of notice and comment procedures until the regulatory authority determines that the application is administratively complete. Since VER determinations are precursors to the permitting process, and may be made as part of that process, we believe that the use of similar review procedures is appropriate.

#### 5. Notification Requirements for Lands Listed in 30 CFR 761.11(a)

As published on September 14, 1983, 30 CFR 761.12(b)(2) included a requirement that the agency responsible

for the VER determination notify the National Park Service or the U.S. Fish and Wildlife Service of any request for a VER determination for lands within the boundaries of an area over which one of those agencies has jurisdiction. Proposed 30 CFR 761.13(c)(4) would have applied this requirement to all areas protected under section 522(e)(1) of SMCRA and 30 CFR 761.11(a), not just to those areas under the jurisdiction of the National Park Service or the Fish and Wildlife Service.

However, upon reconsideration, we find no basis for disparate treatment of section 522(e)(1) lands relative to other lands protected under section 522(e). In enacting section 522(e), Congress did not establish a hierarchy of protection or make any other substantive distinction among the lands protected under that section. Furthermore, this provision is largely duplicative of proposed 30 CFR 761.13(c)(1)(iv) and (2), which would have required that the agency provide notice and reasonable opportunity to comment to the owner of the structure or feature causing the land to come under the protection of 30 CFR 761.11.

Therefore, we are not adopting proposed 30 CFR 761.13(c)(4). Instead, we are modifying the notice and comment provisions of proposed 30 CFR 761.13(c)(1)(iv) and (2) to incorporate the minimum comment period requirements of proposed 30 CFR 761.13(c)(4) and the 1983 version of 30 CFR 761.12(b)(2). In the final rule, those requirements appear at 30 CFR 761.16(d)(1)(vi) and (vii), (2)(ii), and (3), which provide for a minimum initial comment period of 30 days from the date that the agency with primary jurisdiction over the values or feature causing the land to come under the protection of 30 CFR 761.11 receives the notice, with another 30 days automatically available upon request. We have also added a proviso to 30 CFR 761.16(d)(3) stating that the agency responsible for the VER determination may grant additional time for good cause upon request. The latter provision is intended to cover extenuating and unusual circumstances such as situations in which critical agency personnel or one or more persons listed in 30 CFR 761.16(d)(2) are legitimately absent or unavailable during the comment period. Another example would be a situation in which a surface owner or surface management agency is unable to complete the necessary legal research within 60 days despite reasonably diligent efforts to do so.

*B. Paragraph (a): To Which Agency Must You Submit a Request for a VER Determination?*

Final 30 CFR 761.16(a) provides that we will make all VER determinations for Federal lands within the areas listed in 30 CFR 761.11 (a) and (b). Those areas 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 areas listed in 30 CFR 761.11(a), are the responsibility of the regulatory authority. The final rule thus reflects the revised Federal lands

regulations at 30 CFR 740.4(a)(4) and 745.13(o).

Consistent with revised 30 CFR 740.11(g), the final 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) or (b), including non-Federal lands within the areas listed in 30 CFR 761.11(a), regardless of whether we or the State make the determination. For all other lands, both we and State regulatory authorities must use the definition of VER in the appropriate approved regulatory program. Within primary States without a cooperative

agreement under 30 CFR part 745, and in any State with a cooperative agreement that does not delegate VER determination responsibility to the State, we will apply the approved State program definition of VER when making VER determinations for Federal lands outside the areas listed in 30 CFR 761.11 (a) and (b), as required by 30 CFR 740.11(a).

In keeping with plain language principles and a request from a commenter, final 30 CFR 761.16(a) presents these requirements in tabular form:

Paragraph of §761.11 that provides protection	Protected feature	Type of land to which request pertains	Agency responsible for determination	Applicable definition of valid existing rights
(a) .....	National parks, wildlife refuges, etc.	Federal .....	OSM .....	Federal. <sup>1</sup>
(a) .....	National parks, wildlife refuges, etc.	Non-Federal .....	Regulatory authority .....	Federal. <sup>1</sup>
(b) .....	Federal lands in national forests <sup>3</sup> .	Federal .....	OSM .....	Federal. <sup>1</sup>
(c) .....	Public parks and historic places.	Does not matter .....	Regulatory authority .....	Regulatory program. <sup>2</sup>
(d) .....	Public roads .....	Does not matter .....	Regulatory authority .....	Regulatory program. <sup>2</sup>
(e) .....	Occupied dwellings .....	Does not matter .....	Regulatory authority .....	Regulatory program. <sup>2</sup>
(f) .....	Schools, churches, parks, etc.	Does not matter .....	Regulatory authority .....	Regulatory program. <sup>2</sup>
(g) .....	Cemeteries .....	Does not matter .....	Regulatory authority .....	Regulatory program. <sup>2</sup>

<sup>1</sup> Definition in 30 CFR 761.5.

<sup>2</sup> Definition in applicable State or Federal regulatory program in 30 CFR Chapter VII, Subchapter T.

<sup>3</sup> Neither section 522(e) of SMCRA nor 30 CFR 761.11 provides special protection for non-Federal lands within national forests. Therefore, this table does not include a category for those lands.

See Parts X and XI of this preamble for a discussion of the comments received on this aspect of the proposed rule.

*C. May a Request for a VER Determination Be Submitted Separately From a Permit Application?*

Paragraph (b) of 30 CFR 761.16 expressly states that you may submit a request for a VER determination before preparing and submitting a permit application, unless the applicable regulatory program provides otherwise. The final rule thus codifies existing policy, as stated 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), and removes language in conflict with that policy. It also is consistent with 43 CFR 4.1391(b)(1), which provides for administrative review of VER determinations that are made independently of a decision on 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 areas specified in 30 CFR 761.11 (a) and (b), for which we have sole authority to process requests for VER determinations even when we are not the regulatory authority responsible for reviewing permit applications.

However, our adoption of this rule does not prevent States from requiring 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, before reaching a decision on a request for a VER determination, we reserve the right to request information normally submitted as part of a permit application. We will make

this request only if we determine, on a case-specific basis, that we need that information to properly evaluate the request for a VER determination.

*D. Paragraph (b): What Information Must You Include in a Request for a VER Determination?*

Paragraph (b) of 30 CFR 761.16 contains submission and content requirements for requests for VER determinations. As discussed in the preamble to the proposed rule, we derived these requirements primarily from provisions that we proposed as 30 CFR 761.12(a)(1) on July 18, 1991, which, in turn, are similar to guidelines in the preamble to the 1983 definition of VER. See 48 FR 41314, September 14, 1983. However, because the definition of VER that we are adopting today does not contain a takings standard, the final rule does not include items from the 1983 and 1991 documents that pertain only to that standard.

*Paragraph (b)(1): Submission Requirements for Property Rights Demonstration*

All requests for VER determinations for surface coal mining operations other than roads must include the information

required by 30 CFR 761.16(b)(1). The agency responsible for making the VER determination will use this information to evaluate whether you have met the property rights demonstration requirement of paragraph (a) of the definition of VER in 30 CFR 761.5.

Paragraphs (b)(1) (i) through (vi) of the final rule are substantively identical to paragraphs (b)(2) (i) through (v) and (vii) of 30 CFR 761.13 in the proposed rule. These paragraphs 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 complete 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 that the land came under the protection of 30 CFR 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.

Some commenters opposed these information requirements as excessive, overly burdensome, and improper. They argue that the rule should require no more documentation of property rights than the right-of-entry information that must be submitted under 30 CFR 778.15 as part of a permit application. We do not agree. In enacting the prohibitions of section 522(e) of the Act, Congress clearly wished to minimize surface coal mining operations on the lands listed in that section. See the discussion in Part VII.C. of this preamble. Therefore, we and State regulatory authorities have an obligation to ensure that a person seeking to conduct surface coal mining operations on those lands provides complete documentation of the requisite property rights. It has been our experience that a simple *description* of the permit applicant's basis for claiming the right to enter and begin surface coal mining operations, which is all that 30 CFR 778.15 requires to obtain a permit, does not satisfy this obligation.

We believe that the requirements of 30 CFR 761.16(b)(1) are the minimum necessary to ensure that the agency has a record which accurately and completely documents that the necessary property rights exist. Property rights and related legal issues can be very complex. The previous rules provided little guidance on what information must be submitted as part

of a request for a VER determination. We have found that persons requesting VER under those rules sometimes had difficulty understanding exactly what information was necessary or what legal issues needed to be addressed. Incomplete submissions resulted in repeated requests for additional information. These requests and the time required to collect and review the additional documentation sometimes caused significant delays in the decision process and occasionally the permitting process. Therefore, in this final rule, we are establishing specific information requirements in an attempt to ensure that a person knows what documentation must be submitted as part of a request for a VER determination. These requirements should expedite the decision-making process.

Proposed 30 CFR 761.13(b)(2)(vi) provided that, if the coal interests have been severed from other property interests and the surface estate is in Federal ownership, the request must include a title opinion or other official statement from the Federal surface management agency confirming that the requester has a property right to conduct the type of surface coal mining operations intended. However, several commenters opposed this provision of the proposed rule as improperly providing the Federal surface management agency with a veto authority over the VER determination in violation of the principle of State primacy under SMCRA.

For the reasons discussed in Part XXI.A.1. of this preamble, we are replacing proposed paragraph (b)(2)(vi) with two new paragraphs in the final rule. New 30 CFR 761.16(b)(1)(viii) provides that, if the coal interests have been severed from other property interests, the request for a VER determination must include documentation that the requester has notified and provided reasonable opportunity for the owners of all other property interests to comment on the validity of the property rights claimed by the requester. New 30 CFR 761.16(b)(1)(ix) provides that the request must include copies of all comments received in response to that solicitation.

Finally, in response to a request from a State regulatory authority, we are adding 30 CFR 761.16(b)(1)(vii) to clarify that the proposed rule's requirement for complete documentation of the nature and ownership of all property interests includes the names and addresses of all current owners of the surface and mineral estates in the land. As the

commenter noted, the agency needs that information to comply with the notification requirements of 30 CFR 761.16(d)(2).

Paragraph (b)(2): Submission Requirements for Good Faith/All Permits Standard

Final 30 CFR 761.16(b)(2) provides that, if your request relies upon the good faith/all permits standard in paragraph (b)(1) of the definition of VER in 30 CFR 761.5, you must submit the property rights information required by 30 CFR 761.16(b)(1). In addition, the final rule requires that you submit the following information about permits, licenses, and authorizations for surface coal mining operations on the land to which your request pertains:

- Approval and issuance dates and identification numbers for any permits, licenses, and authorizations that you or a predecessor in interest obtained before the land came under the protection of 30 CFR 761.11 or section 522(e). [30 CFR 761.16(b)(2)(i)]
- Application dates and identification numbers for permits, licenses, and authorizations for which you or a predecessor in interest submitted an application before the land came under the protection of 30 CFR 761.11 or section 522(e). [30 CFR 761.16(b)(2)(ii)]
- An explanation of any other good faith effort that you or a predecessor in interest made to obtain the necessary permits, licenses, and authorizations as of the date that the land came under the protection of 30 CFR 761.11 or section 522(e). [30 CFR 761.16(b)(2)(iii)]

Relevant permits and authorizations may include, but are not limited to, State or Federal surface or underground coal mining permits, site-specific wetlands disturbance permits, zoning or other local governmental approvals, National Pollutant Discharge Elimination System permits, State air pollution control permits, Mine Safety and Health Administration authorizations, 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. This list is not exhaustive, nor does it imply that every surface coal mining operation will require each of these permits and authorizations.

Except for 30 CFR 761.16(b)(2)(iii), the requirements in the final rule are substantively identical to those that we proposed as 30 CFR 761.13(b)(2)(ix) in 1997. We have added the third item because, under the good faith/all permits standard, a good faith effort does not necessarily mean that an application has been filed for all

required permits, licenses, and authorizations. See Part VII.C.2. of the preamble to this rulemaking for a full discussion of what a good faith effort entails.

The agency responsible for the VER determination needs the information required by this rule to determine whether you have met the requirements of paragraph (b)(1) of the definition of VER in 30 CFR 761.5 and to establish a documented record of the basis for that determination.

#### Paragraph (b)(3): Submission Requirements for Needed for and Adjacent Standard

Final 30 CFR 761.16(b)(3), which we proposed as 30 CFR 761.13(b)(1)(viii), provides that, if your request relies upon the needed for and adjacent standard in paragraph (b)(2) of the definition of VER in 30 CFR 761.5, you must explain how and why the land is needed for and immediately adjacent to the operation upon which the request is based. This explanation must include a demonstration that prohibiting expansion of the operation onto that land would unfairly impact the viability of the operation as originally planned before the land came under the protection of 30 CFR 761.11 or section 522(e). You also must supply the property rights information required by 30 CFR 761.16(b)(1). The agency responsible for the VER determination needs the information required by this rule to determine whether you have met the requirements of paragraph (b)(2) of the definition of VER in 30 CFR 761.5 and to establish a documented record of the basis for that determination.

The final rule contains three substantive differences from the proposed rule. First, the final rule applies to land needed for the operation. The proposed rule referred to coal needed for the operation. The change from coal to land ensures consistency with the revised definition of VER, which, in both the proposed and final rules, applies the needed for and adjacent standard to lands, not just coal reserves, that are needed for any activity or facility included in the definition of surface coal mining operations.

Second, the final rule requires an explanation of how and why the land is needed for and immediately adjacent to the operation upon which the request is based. The proposed rule only applied this requirement to the "needed for" component of the standard.

However, because paragraph (b)(2) of the definition of VER requires a demonstration that the land is both needed for and immediately adjacent to the operation upon which the request is

based, we believe that a request for a VER determination under this standard must include an explanation of how and why the land meets both the "needed for" and "immediately adjacent to" components of the standard.

Third, the final rule adds the requirement that the explanation of how and why the land is needed for the operation upon which the request is based must include a demonstration that prohibiting expansion of the operation onto the land would unfairly impact the viability of the operation as originally planned before the land came under the protection of 30 CFR 761.11 or section 522(e). This addition is consistent with paragraph (b)(2) of the definition of VER in 30 CFR 761.5, which establishes that requirement as part of the needed for and adjacent standard.

The new language also is responsive to those commenters who urged us to include a requirement that the requester explain how and why the land is needed to ensure the economic viability of the operation. However, we do not fully agree with the commenters' argument that the land must be necessary to ensure the economic viability of the operation. As provided in the final rule and discussed in Part VII.D.3. of the preamble to this rule, we believe that the "needed for" element of the needed for and adjacent standard may be satisfied by a demonstration that prohibiting expansion of the operation onto the land would unfairly impact the viability of the operation as originally planned before the land came under the protection of 30 CFR 761.11 or section 522(e).

#### Paragraph (b)(4): Submission Requirements for Roads

The VER standards for roads in paragraphs (c)(1) through (c)(3) of the definition of VER in 30 CFR 761.5 do not include the property rights demonstration required by paragraph (a) of the definition of VER. Therefore, there is no need for requests for VER determinations for roads under those standards to include all information required to make that demonstration. Accordingly, the final rule establishes separate information requirements at 30 CFR 761.16(b)(4) for requests for VER determinations for roads. The final rule is substantively identical to the one that we proposed as 30 CFR 761.13(b)(1), except for the revisions needed to conform with the changes to the VER standards for roads in paragraph (c) of the definition of VER in 30 CFR 761.5, as discussed in Part VII.E. of this preamble.

If your request relies upon one of the VER standards for roads in paragraphs (c)(1) through (c)(3) of the definition of VER, you must submit satisfactory documentation that at least one of the following statements is true:

- The road existed when the land upon which it is located came under the protection of 30 CFR 761.11 and section 522(e), and you have a legal right to use the road for surface coal mining operations. [30 CFR 761.16(b)(4)(i)]

- A properly recorded right of way or easement for a road in that location existed when the land came under the protection of 30 CFR 761.11 and section 522(e), and, under the document creating the right of way or easement, and under any subsequent conveyances, you have a legal right to use or construct a road across the right of way or easement to conduct surface coal mining operations. [30 CFR 761.16(b)(4)(ii)]

- A valid permit for use or construction of a road in that location for surface coal mining operations existed when the land came under the protection of 30 CFR 761.11 and section 522(e). [30 CFR 761.16(b)(4)(iii)]

Paragraph (c)(4) of the definition of VER in 30 CFR 761.5 provides that you may elect to demonstrate VER for roads by demonstrating VER under either the good faith/all permits standard or the needed for and adjacent standard under paragraph (b) of the definition of VER. Therefore, if your request relies upon the standard in paragraph (c)(4) of the definition, you must submit the information required by 30 CFR 761.16(b)(1), which relates to the property rights demonstration required under paragraph (a) of the definition. You also must submit the information required by either 30 CFR 761.16(b)(2) (for the good faith/all permits standard) or 30 CFR 761.16(b)(3) (for the needed for and adjacent standard).

#### *E. Paragraph (c): How Will the Agency Initially Review My Request?*

For the reasons discussed in Part XXI.A.4. of this preamble, the final rule includes a new 30 CFR 761.16(c). Under paragraph (c)(1) of this rule, upon receipt of your request for a VER determination, the agency must conduct an initial review to determine whether the request includes all applicable components of the submission requirements of 30 CFR 761.16(b). This review will address only the administrative completeness of your request, not its legal or technical adequacy. If your request includes all necessary components, paragraph (c)(3) of the final rule requires that the agency

implement the notice and comment requirements of 30 CFR 761.16(d).

Under paragraph (c)(2) of the final rule, if your request does not include all components required by 30 CFR 761.16(b), the agency must notify you of the missing components and establish a reasonable time within which you must submit this information. If you do not submit this information within the specified time or any subsequent extensions that the agency approves, paragraph (c)(4) of the final rule requires that the agency issue a determination that you have not demonstrated VER. The rule specifies that the agency will issue this determination without prejudice, meaning that you may refile the request at any time.

Whenever an agency issues a determination that you have not demonstrated VER, it will retain the materials that you submitted with the request. These materials will become part of the administrative record of the decision. If you subsequently desire a new determination, the agency may, at its discretion, either require complete resubmission of the request or allow you to submit only the new materials together with a request for reconsideration of the previous determination.

We believe that the addition of this step will streamline the decision-making process, as desired by several commenters. It also will promote more efficient use of resources by avoiding the expenses and delays associated with providing notice and comment on an incomplete request.

*F. Paragraph (d): What Notice and Comment Requirements Apply to the VER Determination Process?*

Paragraph (d) of 30 CFR 761.16 establishes notice and comment requirements and provisions for public participation in the VER determination process. We proposed those requirements as 30 CFR 761.13(c), but, because of organizational changes, they appear as 30 CFR 761.16(d) in the final rule.

As we noted in the preamble to the proposed rule, the notice and comment requirements in 30 CFR 761.16(d) generally parallel those that we previously used for VER determinations. We have tailored these requirements to minimize resource demands on affected persons while maintaining consistency with section 102(i) of SMCRA, which states that one of purposes of the Act is to assure that appropriate procedures are provided for public participation.

Under paragraph (d)(1) of the final rule, when the agency responsible for the VER determination finds that a

request meets the requirements of 30 CFR 761.16(c)(3), the agency must publish a notice in a newspaper of general circulation in the county in which the land is located. The notice must invite comment on the merits of the request. In response to a comment, we have revised the final rule to clarify that the agency may require that the requester publish this notice and provide the agency with a copy of the published notice. As proposed, the final rule specifies that we will also publish the notice in the **Federal Register** if the request involves Federal lands listed in 30 CFR 761.11(a) or (b).

The final rule requires that the notice describe the location of the land involved, the type of surface coal mining operations planned, the applicable VER standard, and the procedures that the agency will follow in processing the request. See 30 CFR 761.16(d)(1)(i), (ii), (iii), and (v). It also requires that the notice include the name and address of the agency office at which a copy of the request is available for public inspection and to which comments should be sent, the closing date of the comment period, and a statement that an additional 30 days are available upon request. See 30 CFR 761.16(d)(1)(vi) through (viii). We added the portion of 30 CFR 761.16(d)(1)(viii) that requires the name and address of the agency office at which a copy of the request is available for public inspection in response to a comment expressing concern about the proposed rule's lack of a provision for public access to requests for VER determinations.

Proposed 30 CFR 761.13(c)(1)(iv) would have required that the comment period be of sufficient length to afford interested persons a reasonable opportunity to prepare and submit comments. However, for the reasons discussed in Part XXI.A.5. of this preamble, final 30 CFR 761.16(d)(1)(vi) and (vii) provide that the comment period must be a minimum of 30 days after the publication date, with another 30 days automatically available upon request.

As proposed, the final rule requires that the notice describe the property rights claimed and the basis for that claim. See 30 CFR 761.16(d)(1)(iii)(A). Because the definition of VER in 30 CFR 761.5 only requires a property rights demonstration as part of requests for VER determinations based upon one of the standards in paragraph (b) of the definition, we are restricting the scope of 30 CFR 761.16(d)(1)(iii)(A) to requests for VER determinations based upon the good faith/all permits standard or the needed for and adjacent standard under paragraph (b) of the definition of VER.

Certain property rights also may be a component of the VER determination process for requests based upon one of the standards for roads in paragraphs (c)(1) and (c)(2) of the definition of VER. Therefore, we are adding two paragraphs to the final rule to address these situations. Under 30 CFR 761.16(d)(iii)(B), if your request relies upon the standard in paragraph (c)(1) of the definition of valid existing rights, the notice must include a description of the basis for your claim that the road existed when the land came under the protection of 30 CFR 761.11 or section 522(e). In addition, the notice must include a description of the basis for your claim that you have a legal right to use that road for surface coal mining operations. Under 30 CFR 761.16(d)(iii)(C), if your request relies upon the standard in paragraph (c)(2) of the definition of valid existing rights, the notice must include a description of the basis for your claim that a properly recorded right of way or easement for a road in that location existed when the land came under the protection of 30 CFR 761.11 or section 522(e). In addition, the notice must include a description of the basis for your claim that, under the document creating the right of way or easement, and under any subsequent conveyances, you have a legal right to use or construct a road across the right of way or easement to conduct surface coal mining operations.

In response to commenters' concerns about property rights disputes, we have added 30 CFR 761.16(d)(1)(iv). This new paragraph requires that the notice include a statement that the agency will not make a decision on the merits of the VER determination request if, by the close of the comment period under this notice or the notice required by 30 CFR 761.16(d)(3), a person with a legal interest in the property initiates appropriate legal action to resolve the property rights dispute in the proper venue. See Part XXI.A.2. of this preamble for further discussion of the background of and reasons for this requirement. We are restricting this provision to requests for VER determinations based upon one or more of the standards in paragraphs (b), (c)(1), or (c)(2) of the definition of VER in 30 CFR 761.5 because only those standards have the potential for property rights disputes as part of the VER determination process.

We have combined proposed 30 CFR 761.13(c)(2) and (c)(3) into 30 CFR 761.16(d)(2) in the final rule. That paragraph requires that the agency promptly provide a copy of the notice required under 30 CFR 761.16(d)(1) to (i) all reasonably locatable owners of

surface and mineral estates in the land included in the request, and (ii) the owner of the feature causing the land to come under the protection of 30 CFR 761.11, and, when applicable, to the agency with primary jurisdiction over that feature with respect to the values causing the land to come under the protection of 30 CFR 761.11. The final rule differs from the proposed rule in two respects.

First, paragraph (d)(2)(i) requires notification of all owners of surface and mineral estates in the land included in the request. The proposed rule would have only required notification of these owners if the land involved severed estates or divided interests. The final rule does not include this limitation because, upon further evaluation, we find no basis or reason for restricting notification in this fashion.

Second, paragraph (d)(2)(ii) requires notification of both the owner of the feature causing the land to come under the protection of 30 CFR 761.11, and, when applicable, the agency with primary jurisdiction over that feature with respect to the values causing the land to come under the protection of 30 CFR 761.11. The proposed rule would have required notification of only the owner of the feature. The change from the proposed rule to the final rule recognizes that the agency with jurisdiction over the protected feature may not own the feature or certain lands within the feature. For example, many sites listed on the National Register of Historic Places are privately owned. Similarly, some lands within section 522(e)(1) areas, such as national parks and national wildlife refuges, are in non-Federal ownership. In situations such as these, we believe that, in the interest of fairness, the agency with jurisdiction over the protected feature also should receive notice and opportunity to comment. For lands and features owned by the United States or by a State, notification of the Federal or State agency with responsibility for managing the land or feature will fully satisfy the requirements of 30 CFR 761.16(d)(2)(ii).

One commenter expressed concern that the notification requirements of proposed 30 CFR 761.13(c)(3) could impose a significant burden on the agency responsible for the VER determination unless we revised the submission requirements to specify that the requester must provide names and addresses of all owners of interest. As discussed in Part XXI.D. of this preamble, we agree. Final 30 CFR 761.16(b)(1)(vii) requires that the requester supply current names and addresses of the owners of all property

interests in the land. In adopting 30 CFR 761.16(b)(1)(vii) and 761.16(d)(2)(i), we do not intend to impose an unreasonable burden to locate owners of property interests if that information is not readily available from established sources. Therefore, the final rule provides that the notification requirements of 30 CFR 761.16(d)(2)(i) extend only to reasonably locatable owners. If comments received on the request or other available information indicates that the names and addresses supplied by the requester are either inaccurate or incomplete, the agency may either conduct its own title research or require the requester to correct the deficiencies in the original submittal.

Under final 30 CFR 761.16(d)(3), the letter transmitting the notice required under 30 CFR 761.16(d)(2) must clarify that the comment period for persons receiving notice is 30 days from the date of service of the notice, with another 30 days available upon request. At its discretion, the agency responsible for the VER determination may grant additional time for good cause upon request. These times originally appeared in proposed 30 CFR 761.13(c)(4), which would have applied only to requests for VER determinations involving land within an area under the protection of 30 CFR 761.11(a) and section 522(e)(1) of the Act. As discussed in Part XXI.A.5. of this preamble, we are not adopting proposed 30 CFR 761.13(c)(4). That paragraph of the proposed rule would duplicate the requirements of final 30 CFR 761.16(d)(1)(vi) and (vii), (2), and (3). In addition, we find no basis in SMCRA to establish notice and comment provisions that differ based upon which paragraph of section 522(e) protects the land.

#### *G. Paragraph (e): How Will a Decision Be Made?*

Paragraph (e), which we proposed as 30 CFR 761.13(d), contains procedural requirements and decision-making criteria for the evaluation of requests for VER determinations. Under paragraph (e)(1) of the final rule, the agency responsible for the VER determination must review the materials submitted with the request, the information received during the comment period, and any other relevant, reasonably available information to determine whether the record is sufficiently complete and adequate to support a decision on the merits of the request. This language differs slightly from that of the proposed rule, which would have required a determination of whether the record was adequate to support a decision in favor of the requester. The

new language reflects the fact that, under the Administrative Procedure Act, any agency decision must be supported by an adequate administrative record.

If the record is not sufficiently complete and adequate to support a decision on the merits of the request, paragraph (e)(1) of the final rule requires that the agency notify the requester in writing, explaining the inadequacy of the record and requesting submittal, within a specified reasonable time, of any additional information that the agency deems necessary to remedy the inadequacy. The proposed rule did not specify what action the agency responsible for the VER determination could or should take if the person requesting the VER determination does not respond to the request for additional information. However, under paragraph (e)(4) of the final rule, if the necessary information is not submitted within the time specified or as subsequently extended, the agency must issue a determination that the requester has not demonstrated VER. Under the final rule, the agency must issue these determinations without prejudice, meaning that the person could refile the request at a later time. See Part XXI.A.3. of this preamble for a discussion of the reasons and basis for this final rule.

Like the proposed rule, paragraph (e)(2) of the final rule provides that, once the record is complete and adequate, the agency must determine whether the requester has demonstrated VER. Under the rule, the decision document must explain how the requester has or has not satisfied all applicable elements of the definition of VER. Paragraph (e)(2) of the final rule also incorporates proposed 30 CFR 761.13(d)(2)(i). Like that paragraph of the proposed rule, the final rule requires that the decision document also set forth relevant findings of fact and conclusions and specify the reasons for the conclusions.

Paragraph (d)(2)(ii) of the proposed rule would have required that the agency defer a decision until all outstanding property rights disputes were resolved. For the reasons discussed in Part XXI.A.2. of this preamble, we are not adopting that paragraph of the proposed rule. Instead, the final rule includes a new paragraph (e)(3), which requires that the agency make a determination on the merits of the record unless the conflicting property rights claims are the subject of pending litigation in a court or administrative body of competent jurisdiction. If the property rights are the subject of such litigation, the final rule requires that the agency determine

that the requester has not demonstrated VER. The agency must make this determination without prejudice, meaning that the requester may refile the request at any time. See Part XXI.A.2. of this preamble for a more extensive discussion of this paragraph of the final rule. The final rule also clarifies that paragraph (e)(3) applies only to requests for VER determinations that rely upon one or more of the standards in paragraphs (b), (c)(1), and (c)(2) of the definition of VER in 30 CFR 761.5. Only requests based upon those standards have the potential for a property rights dispute as part of the VER determination process.

Under paragraph (e)(5)(i) of the final rule, which we proposed as 30 CFR 761.13(d)(3)(i), the agency must provide a copy of the determination to the requester, the owner or owners of the land to which the determination applies, to the owner of the feature causing the land to come under the protection of 30 CFR 761.11, and, when applicable, to the agency with primary jurisdiction over the feature with respect to the values that caused the land to come under the protection of 30 CFR 761.11. The final rule differs from the proposed rule in two ways. First, the final rule includes a requirement to provide a copy of the determination to the owner or owners of the land to which the determination applies. We believe that, in the interest of fairness, landowners should receive the same notification as the requester and the agency with primary jurisdiction over the protected feature. Second, the final rule replaces the disjunctive "or" in the proposed rule with "and" to clarify that both the owner of the feature causing the land to come under the protection of 30 CFR 761.11 and any agency with primary jurisdiction over that feature must receive notification, not just one or the other as the proposed rule could have been read to mean. As with the first change, we believe that, in the interest of fairness, both the owner of the feature and the agency with primary jurisdiction over that feature should receive notification of the decision. In addition, the final rule adds a requirement that the agency provide an explanation of appeal rights and procedures along with a copy of the determination. We believe that this provision is necessary to ensure that all persons are aware of those rights and procedures.

Paragraph (e)(5)(ii) of the final rule, which we proposed as 30 CFR 761.13(d)(3)(ii), requires that the agency publish notice of the determination in a newspaper of general circulation in the county in which the land is located. At

the request of a commenter, the final rule clarifies that the agency may require that the requester publish this notice and provide a copy of the published notice to the agency. When the request includes Federal lands within the areas listed in 30 CFR 761.11(a) or (b), the final rule requires that we publish the determination in the **Federal Register**. The final rule adds a requirement that both the notice of decision published in the newspaper and the determination published in the **Federal Register** must provide an explanation of appeal rights and procedures. We believe that this provision is necessary to ensure that all persons are aware of those rights and procedures.

#### *H. Paragraph (f): How May a VER Determination Be Appealed?*

Paragraph (f), which we proposed as 30 CFR 761.13(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. This provision is substantively identical to the appeal rights for VER determinations in both the 1979 and 1983 versions of 30 CFR 761.12(h).

Some commenters urged that we modify this provision to eliminate the requirement to exhaust administrative remedies before seeking judicial review of VER determinations. The commenters argued that these decisions are final for purposes of section 10(c) of the Administrative Procedure Act because SMCRA does not specifically require VER determinations. They also cite a series of Federal court decisions concerning SMCRA that have held that adherence to an administrative review process is a prerequisite to judicial review only when the Act expressly requires administrative review.

We do not agree with the commenters' arguments. VER determinations are a threshold requirement in the permitting process and an inherent component of the permit application approval finding required by section 510(b)(4) of SMCRA and 30 CFR 773.15(c)(3)(ii). Hence, VER determinations are appropriately subject to the same administrative and judicial review requirements as apply to any other type of permitting decision under the Act; in this case, the regulations at 30 CFR 775.11 and 775.13. In addition, providing the right of administrative review maximizes the opportunity for public participation in the VER determination process. Thus, the final rule is consistent with section 102(i) of SMCRA, which states that one of the

purposes of the Act is to assure that appropriate procedures are provided for public participation.

#### **II. Paragraph (g): To What Extent and in What Manner Must Records Related to the VER Determination Process Be Made Available to the Public?**

Final 30 CFR 761.16(g) provides that, if a request for a VER determination is subject to the notice and comment requirements of 30 CFR 761.16(d), the agency responsible for processing the request must make a copy of that request available to the public in the same manner as the agency, when acting as the regulatory authority, must make permit applications available to the public under 30 CFR 773.13(d). The final rule also specifies that the agency must make records associated with that request and any subsequent determination under 30 CFR 761.16(e) available to the public in accordance with the requirements and procedures of either 30 CFR 840.14 or 30 CFR 842.16.

We added this paragraph to the final rule in response to a commenter who argued that requests for VER determinations should be placed on file in the local courthouse or other accessible office for public inspection and copying, just as 30 CFR 773.13(a)(2) and section 507(e) of the Act require for permit applications. We did not adopt the specific requirement sought by the commenter. Because requests for VER determinations are not complete permit applications, they are not necessarily subject to all statutory and regulatory provisions concerning permit applications.

However, requests for VER determinations are subject to section 517(f) of the Act, which requires that copies of any information that the regulatory authority obtains under Title V of SMCRA "be made immediately available to the public at central and sufficient locations in the county, multicounty, and State area of mining so that they are conveniently available to residents in the areas of mining." Therefore, to address the commenter's concern, the final rule expressly requires that records associated with requests for VER determinations be made available for public review in accordance with the regulations that implement this statutory requirement: 30 CFR 773.13(d) and either 30 CFR 840.14 (when a State regulatory authority is responsible for the VER determination) or 842.16 (when we are responsible for the VER determination). Under those rules, the agency has the option of making copies of records available to the public by mail upon

request instead of placing them on file in a government or other public office in the county to which the records pertain.

We do not intend to require disclosure of proprietary information that is not otherwise available for public review as a matter of law. Requests for VER determinations may include information concerning property interests and the chemical and physical properties of coal. Under paragraphs (a)(12) and (b) of section 508 of SMCRA, with certain exceptions, the regulatory authority must hold that information in confidence unless it is on public file pursuant to State law. We see no reason why information should be treated differently when it is submitted as part of a request for a VER determination, especially since 30 CFR 761.16(b) allows a request for a VER determination to be submitted either as part of or in advance of a permit application. Therefore, under the final rule, the confidentiality provisions of 30 CFR 773.13(d)(3) also apply to requests for VER determinations under 30 CFR 761.16.

#### *J. May the Regulatory Authority Reconsider VER Determinations During Review of a Subsequent Permit Application?*

Commenters divided on the question of whether VER determinations made in advance of submission of a permit application would or should be subject to comment and reevaluation at the time of permit application review. As discussed in Part XXI.C. of this preamble and in the preamble to the proposed rule, the intent of the provision in the final rule authorizing advance VER determinations is to allow VER questions to be fully settled in advance of permit application preparation and review. We anticipate that advance VER determinations would be subject to reconsideration during a subsequent permit application review process only under exceptional circumstances, as discussed below and in the preamble to the proposed rule. The final rule establishes notice, comment, and public participation requirements for the submission and processing of requests for VER determinations. Therefore, the lack of opportunity for reconsideration of advance VER determinations during a subsequent permit application review process would not improperly abridge or violate the rights of citizens to participate in the permitting process, as some commenters alleged.

Circumstances that might justify reconsideration of an advance VER determination include, but are not

limited to, a material misrepresentation of fact, 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).

Under 30 CFR 773.15(c)(3)(ii), the regulatory authority may not approve a permit application unless the agency first finds that the proposed permit area is not within an area subject to the prohibitions or limitations of 30 CFR 761.11. Therefore, when the permit application review process documents or provides reason to believe that the basis for a prior VER determination is false or inaccurate, the regulatory authority has an obligation to withhold approval of the application pending reevaluation of the VER determination by the agency responsible for that determination. Without VER, the application would not meet the criteria for permit approval in section 510(b)(4) of the Act (documentation that "the area proposed to be mined is not included within an area designated unsuitable for surface coal mining pursuant to section 522") or 30 CFR 773.15(c)(3)(ii) (a demonstration that the permit area is not subject to the prohibitions and limitations of 30 CFR 761.11).

We recognize that the regulatory authority or the agency responsible for the VER determination may not become aware of a defective VER determination until after permit issuance. In these circumstances, the regulatory authority should refer the information to us, if we are responsible for the determination, or reconsider the determination, if the regulatory authority is responsible for the determination. Then, using any reconsidered VER determination, 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).

A State regulatory authority may not reconsider or overturn a VER determination that we make for lands for which we have exclusive responsibility for VER determinations. However, the State may and should notify us of any concerns, changes in fact, or apparent errors in the determination. We will then reconsider the determination.

In the preamble to the proposed rule, we referred to reconsideration as *de novo* review. One commenter opposed allowing *de novo* review of advance VER determinations under any circumstances, arguing that to do so would violate the principles of res

judicata. We do not agree. In *Belville Mining Co. v. U.S.*, 999 F.2d 989 (6th Cir. 1993), the court held that we have the authority to reconsider VER determinations:

Even where there is no express reconsideration authority for an agency, however, the general rule is that an agency has inherent authority to reconsider its decision, provided that reconsideration occurs within a reasonable time after the first decision.

*Id.* at 997 (citations omitted).

The court also found that section 201(c)(1) of SMCRA, which provides that the Secretary, acting through OSM, shall "review and vacate or modify or approve orders and decisions \* \* \*," expressly authorizes us to review and vacate erroneous VER determinations. *Id.*

Reconsideration may take one of several pathways. If the reason for reconsideration is an alleged misrepresentation of material facts, reconsideration might involve reopening the record to enter new information, investigating to determine whether misrepresentation of a material fact occurred, and issuing a reconsidered VER determination based on the record as supplemented by the new information. If the reason for reconsideration is discovery of new information that significantly alters the basis of the determination, reconsideration might involve reopening the record and issuing a reconsidered VER determination based on the record as supplemented by the new information. If the reason for reconsideration is a substantial change in the operation, such as a change from underground to surface mining, reconsideration might involve seeking comment on whether the person has demonstrated the property rights for that type of mining, reopening the record to enter new information, and issuing a reconsidered VER determination based on the revised record.

One commenter argued that a change in the type of mining would necessitate a completely new VER determination since each determination is specific to a particular type of mining. We agree that a change of this magnitude should involve a new notice and comment period. However, we do not agree that a person must submit a completely new request for a VER determination if there is a change in the type of surface coal mining operations planned for the site. There is no need to resubmit those parts of the original request and determination that are unaffected by the

change. Completely discarding the original record and determination could result in an unnecessary duplication of effort and waste of resources on the part of both the requester and the reviewing agency. We believe that the agency should determine the scope of the reconsideration on a case-by-case basis. This approach also is consistent with the goals established by the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*

The commenter also stated that misrepresentation of a material fact does not justify *de novo* review, or, as we refer to it in this preamble, reconsideration, of a VER determination. Instead, in his view, the agency should seek judicial review, issuance of an injunction, and possibly prosecution for fraud. For the reasons discussed above, we do not agree that the agency is limited to these alternatives or that reconsideration of the VER determination is inappropriate. However, the alternatives listed by the commenter may be useful measures to prevent the harm that may otherwise result from an inaccurate or defective VER determination.

#### **XXII. How Does New 30 CFR 761.17, Which Concerns Regulatory Authority Obligations at the Time of Permit Application Review, Differ From Its Predecessor Provisions in Former 30 CFR 761.12?**

As discussed in Part XVIII of this preamble, we have revised and redesignated paragraphs (a), (b)(1), (b)(2), and (f) of former 30 CFR 761.12 as paragraphs (a) through (d), respectively, of new 30 CFR 761.17. This section identifies actions that the regulatory authority must take upon receipt of an application for a permit for surface coal mining operations.

Apart from minor organizational and editorial changes, paragraphs (a) through (c) of 30 CFR 761.17 are substantively identical to the rules that we proposed as 30 CFR 761.12(a) and (b) on January 31, 1997. Most of our revisions reflect plain language principles. In addition, we have corrected obsolete cross-references, added new cross-references for clarity, more accurately characterized the exception provided in 30 CFR 761.11(c), and modified these paragraphs to maintain consistency with the changes to the definition of VER in 30 CFR 761.5 and the exception for existing operations in 30 CFR 761.12.

To be consistent with changes in terminology adopted as part of the permitting rules published on September 28, 1983 (48 FR 44349), we have replaced the obsolete term "complete application" in paragraph (a)

with its current equivalent, "administratively complete application." We also are revising paragraph (a) to clarify that its requirements apply to both applications for new permits and all applications for permit revisions (including incidental boundary revisions) that involve the addition of acreage not previously included within the permit boundaries. Although we always have 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.

We did not propose to revise former 30 CFR 761.12(f), which we have now redesignated as 30 CFR 761.17(d). This paragraph of the rules establishes procedures that the regulatory authority must follow when it determines that a proposed surface coal mining operation will adversely affect a publicly owned park or a place listed on the National Register of Historic Places. However, one commenter expressed the general concern that the proposed rule and its preamble did not clearly specify that the VER exception, the exception for existing operations, and the waivers and exceptions authorized by 30 CFR 761.11(c) through (e) operate independently of each other; i.e., that a person who qualifies for one type of exception or waiver does not need to comply with the requirements for other types of exceptions or waivers. To address this concern, we have added paragraph (d)(3) to 30 CFR 761.17 to clarify that the joint approval requirements of 30 CFR 761.11(c) and the related procedural requirements of 30 CFR 761.17(d) do not apply to lands to which the VER exception or exception for existing operations applies.

Section 761.17(d) contains no other substantive changes from former § 761.12(f). We have made some editorial and organizational changes to more closely adhere to plain language principles.

#### **XXIII. How and Why Are We Revising Part 762, Which Contains Criteria for the Designation of Lands as Unsuitable for Surface Coal Mining Operations?**

Former 30 CFR 761.12(g) provided that, pursuant to petition, the regulatory authority could consider lands listed in section 522(e) of the Act for designation as unsuitable for surface coal mining operations under 30 CFR Parts 762, 764, and 769. As discussed in Part XVIII of this preamble, we determined that this paragraph would be more appropriately

placed in 30 CFR Part 762, which contains criteria and other requirements for designation pursuant to the petition process. Therefore, we are redesignating former 30 CFR 761.12(g) as 30 CFR 762.14. To accommodate this addition to Part 762, we are redesignating former 30 CFR 762.14 as 30 CFR 762.15.

We have revised the language of new 30 CFR 762.14 for clarity and conformity with Part 762 and plain language principles. We intend no substantive changes from former 30 CFR 761.12(g).

#### **XXIV. Section 772.12: What Are the Requirements for Coal Exploration on Lands Designated Unsuitable for Surface Coal Mining Operations?**

Under 30 CFR 772.11(a) and 772.12(a), a person who intends to conduct any type of coal exploration on lands designated as unsuitable for surface coal mining operations under subchapter F of 30 CFR Chapter VII, which includes 30 CFR 761.11, must first obtain a permit in accordance with 30 CFR 772.12. These regulations do not require compliance with the prohibitions, restrictions, and procedural requirements of 30 CFR Part 761. On June 22, 1988 (53 FR 23532), we proposed a rule that would have required a VER demonstration as a prerequisite for approval or issuance of an exploration permit on the lands listed in 30 CFR 761.11 and section 522(e). However, we did not adopt that provision as part of the final rule published on December 29, 1988 (53 FR 52942). At 53 FR 52945, the preamble to that rule stated that we would reconsider the issue of VER demonstration requirements for coal exploration after we adopted a new definition of VER.

The National Wildlife Federation and other groups challenged our failure to adopt this provision of the proposed rule. Upon judicial review, the U.S. District Court for the District of Columbia held that we had failed to articulate a proper rationale for not adopting the proposed rule. *National Wildlife Fed'n v. 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), we 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 on the lands listed in 30 CFR 761.11 and section 522(e) if coal is to be removed for sale or commercial use.

On January 31, 1997 (62 FR 4836), we withdrew the 1991 proposal. In its place, we proposed to add a new paragraph (b)(14) to 30 CFR 772.12, the

section that contains 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) or 30 CFR 761.11 would have had 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 has demonstrated 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 authorized under proposed 30 CFR 761.11(a)(2) through (5) [now 30 CFR 761.11(a) through (e)].

Similarly, the proposed rule would have added 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. If exploration would substantially disturb those lands, the proposed rule would have authorized approval of the application only when the regulatory authority finds that the applicant has (1) demonstrated VER, (2) obtained one of the waivers or exceptions authorized under proposed 30 CFR 761.11(a)(2) through (5) [now 30 CFR 761.11(a) through (e)], or (3) demonstrated that the exploration is needed for mineral valuation purposes or authorized by judicial order.

Commenters were sharply divided on the merits and legality of the proposed rules. After careful consideration, we have decided not to proceed with the rules as proposed. Section 512 of SMCRA governs coal exploration, and that section does not mention section 522(e) as one of the provisions of the Act with which exploration must comply. Section 522(e) specifically limits the scope of its prohibitions and restrictions to surface coal mining operations. And the definition of surface coal mining operations in section 701(28) of the Act expressly excludes "coal explorations subject to section 512 of this Act." Therefore, we believe that the Act provides insufficient basis for rules that would impose a requirement for a VER demonstration as a prerequisite for coal exploration on the lands listed in 30 CFR 761.11 and section 522(e).

The preamble to the proposed rule also sought comment on whether we should revise 30 CFR Part 772 and/or Part 761 to include a provision similar

to 30 CFR 762.14, which we are redesignating as 30 CFR 762.15, either in addition to or in place of the proposed revisions to 30 CFR 772.12. Redesignated 30 CFR 762.15 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. However, this section applies only to lands designated as unsuitable for surface coal mining operations under the petition process in 30 CFR Part 762 and section 522(a) of the Act.

We have decided to adopt a modified version of this option rather than the rule language that we proposed. Under the final rule, coal exploration on lands listed in 30 CFR 761.11 and section 522(e) must be designed to minimize, but not necessarily prevent, interference with the values for which those lands were designated as unsuitable for surface coal mining operations. In other words, to gain the approval of the regulatory authority, an application for coal exploration on protected lands must demonstrate that, to the extent technologically and economically feasible, the operation has been designed to minimize interference with the values for which the land was designated as unsuitable for surface coal mining operations. However, the application need not demonstrate that the operation will prevent all interference with those values. Unlike the proposed rule language and, to some extent, the alternative discussed in the preamble to that rule, the provisions that we are adopting as part of the final rule do not include any conditions that would prohibit coal exploration. Therefore, we believe that the new provisions are consistent with the overall regulatory scheme for coal exploration under section 512 of SMCRA because they govern how coal exploration may be conducted, not whether it may be conducted.

The final rule modifies 30 CFR 772.12(b)(14) to require that each application for coal exploration include, for any lands listed in 30 CFR 761.11, a demonstration that, to the extent technologically and economically feasible, the proposed exploration activities have been designed to minimize interference with the values for which those lands were designated as unsuitable for surface coal mining operations. In addition, the final rule requires that the application include documentation of consultation with the owner of the feature causing the land to

come under the protection of 30 CFR 761.11, and, when applicable, with the agency with primary jurisdiction over the feature with respect to the values that caused the land to come under the protection of 30 CFR 761.11. We added this provision in response to comments that expressed concern about the potential impacts of coal exploration on the lands listed in 30 CFR 761.11 and that urged the inclusion of the agency with jurisdiction over the protected feature in the decision-making process.

The final rule also modifies 30 CFR 772.12(d)(2) by adding a new paragraph (iv). That paragraph requires that, as a prerequisite for issuance of a coal exploration permit for any lands listed in 30 CFR 761.11, the regulatory authority must find that the applicant has demonstrated that, to the extent technologically and economically feasible, the exploration and reclamation described in the application will minimize interference with the values for which those lands were designated as unsuitable for surface coal mining operations. Before making this finding, the regulatory authority must provide reasonable opportunity to the owner of the feature causing the land to come under the protection of 30 CFR 761.11, and, when applicable, to the agency with primary jurisdiction over the feature with respect to the values that caused the land to come under the protection of 30 CFR 761.11, to comment on whether the finding is appropriate.

We added the latter provision in response to comments that expressed concern about the potential impacts of coal exploration on the lands listed in 30 CFR 761.11. The new provision also responds to those commenters who urged us to revise the decision-making process to include the agency with jurisdiction over the protected feature. However, the final rule does not afford veto authority to the agency with jurisdiction over the protected feature. To do so would be inconsistent with the principles of State primacy under section 503 of SMCRA. Instead, the new provision requires that the regulatory authority consult with the agency with jurisdiction over the protected feature in determining which values are important and how exploration activities may be planned and conducted to minimize interference with those values. The administrative record of the decision on the exploration applications should indicate the disposition of all relevant comments received from the agency with jurisdiction over the protected feature.

These rules do not ban exploration on any lands. Instead, they require that the

adverse impacts of exploration activities on lands protected under section 522(e) of the Act be minimized to the extent technologically and economically feasible. In this respect, they are more protective of the environment than the rule language that we proposed, which would not have placed any unique restrictions on exploration if the regulatory authority determined that a

person had VER or qualified for one of the other exceptions proposed in 30 CFR 772.12(b)(14).

Finally, as a housekeeping measure, the final rule revises 30 CFR 772.12(d)(2)(ii) and (iii) to correct the manner in which they cite the Endangered Species Act and the National Historic Preservation Act.

**XXV. Technical Amendments to Parts 773, 778, 780, and 784**

As shown in the following table, the organizational changes to Part 761 require revision of cross-references to Part 761 in other portions of our regulations:

Regulation	Old cross-reference	New cross-reference
§ 773.13(a)(1)(v) .....	§ 761.12(d) .....	§ 761.14
§ 773.15(c)(3)(ii) .....	§§ 761.11 and 761.12 .....	§ 761.11
§ 778.16(c) .....	§ 761.12 .....	§ 761.14 or 761.15
§ 780.31(a)(2) .....	§ 761.12(f) .....	§ 761.17(d)
§ 780.33 .....	30 CFR 761.12(d) .....	§ 761.14
§ 784.17(a)(2) .....	§ 761.12(f) .....	§ 761.17(d)
§ 784.18 .....	30 CFR 761.12(d) .....	§ 761.14

To achieve consistency with the language of section 522(e) of the Act, we also made the following technical corrections to the language of those regulations:

- We replaced the term “surface coal mining activities” in 30 CFR 778.16(c) with “surface coal mining operations.” Part 778 applies to both surface and underground mines. Therefore, since section 522(e) applies to surface coal mining operations in general, the information requirements of 30 CFR 778.16(c) for permit applications that propose to disturb lands within the buffer zones for occupied dwellings and public roads must apply to all proposed surface coal mining operations within those buffer zones, not just to surface coal mining activities.
- We revised the titles of 30 CFR 780.31 and 784.17 by replacing the term “public parks” with “publicly owned parks.” We separately define these terms in 30 CFR 761.5, and “publicly owned parks” is the term that appears in section 522(e)(3) of the Act, which, in relevant part, provides the basis for these regulations.
- We replaced the term “underground mining activities” in 30 CFR 784.18(a) with “surface coal mining operations.” Paragraph (b) of the definition of “underground mining activities” in 30 CFR 701.5 includes underground operations that are not included in the definition of surface coal mining operations in 30 CFR 700.5 and section 701(28) of the Act. Since section 522(e) applies only to surface coal mining operations, the underground operations described in paragraph (b) of the definition of underground mining activities are not subject to the provisions of 30 CFR Part 761 and section 522(e).

In addition, since both 30 CFR 780.31(a)(2) and 784.17(a)(2) use the term “valid existing rights,” we revised those rules to include a cross-reference to the new VER determination rules at 30 CFR 761.16.

Finally, we made minor editorial revisions to 30 CFR 773.15(c)(3)(ii), 778.16(c), 780.31(a)(2), and 784.17(a)(2) to improve their accuracy, clarity, and consistency with plain language principles and to better accommodate the new or revised cross-references.

**XXVI. What Effect Will This Rule Have in Federal Program States and on Indian Lands?**

Through cross-referencing in the respective regulatory programs, this final rule applies 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 revisions to 30 CFR Part 761 apply to Indian lands by virtue of the incorporation of this part by reference in 30 CFR 750.14. Revised 30 CFR Part 772 applies to coal exploration on Indian lands to the extent provided in 30 CFR 750.15.

In the preamble to the proposed rule, we 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

final rules do not include any changes to the Indian lands rules or individual Federal programs.

One commenter stated that we should not adopt a final rule without seeking input from affected Indian nations and obtaining approval from both recognized Indian governmental entities and traditional elders who hold to native religions and traditions. As described in Part I of this preamble, we provided the public and all other interested parties ample notice and opportunity to comment on the proposed rule, as required by the Administrative Procedure Act, 5 U.S.C. 553. In developing the final rule, we gave serious consideration to all substantive comments received. Neither SMCRA nor any other Federal law or regulation requires that we obtain the approval of Indian governmental entities and traditional elders (or any other potentially affected parties) before adopting a final rule.

**XXVII. How Will This Rule Affect State Programs?**

We 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 are necessary to maintain consistency with Federal requirements. If we determine that a State program provision needs to be amended as a result of these revisions to the Federal rules, we will notify the State in accordance with 30 CFR 732.17(d).

Section 505(a) of the Act and 30 CFR 730.11(a) provide that SMCRA and Federal regulations adopted under SMCRA do not supersede any State law or regulation unless that law or regulation is inconsistent with the Act or the Federal regulations adopted under the Act. Section 505(b) of the Act

and 30 CFR 730.11(b) provide that we may not construe existing State laws and regulations, or State laws and regulations adopted in the future, as inconsistent with SMCRA or the Federal regulations if these State laws and regulations either provide for more stringent land use and environmental controls and regulations or have no counterpart in the Act or the Federal regulations.

Under 30 CFR 732.15(a), State programs must provide for the State to carry out the provisions of, and meet the purposes of, the Act and its implementing regulations. In addition, that rule requires that State laws and regulations be in accordance with the provisions of the Act and consistent with the Federal regulations. As defined in 30 CFR 730.5, "consistent with" and "in accordance with" mean that the State laws and regulations are no less stringent than, meet the minimum requirements of, and include all applicable provisions of the Act. The definition also provides that these terms mean that the State laws and regulations are no less effective than the Federal regulations in meeting the requirements of the Act. Under 30 CFR 732.17(e)(1), we may require a State program amendment if, as a result of changes in SMCRA or the Federal regulations, the approved State program no longer meets the requirements of SMCRA or the Federal regulations.

In the preamble to the proposed rule, we 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. We received few comments on this point, and those that we did receive took opposing positions. In general, commenters from both industry and the environmental community argued that we should require that States adopt definitions identical to ours if we adopted the particular VER definition that the commenter advocated. Otherwise, they favored allowing States to retain their existing definitions. We did not find these comments logical or persuasive.

One commenter argued that States should not have to change their VER definitions and procedures merely because we adopt a new definition and procedures, especially since States have not experienced problems using their current definitions and procedures. We do not agree. Under 30 CFR 730.5 and 732.17(e)(1), the standard for determining whether a program change is necessary in response to a new or revised Federal rule is whether the State program provisions are no less effective

than our regulations in meeting the requirements of the Act. Our adoption of a new definition of VER and related procedural rules determines the extent to which persons are eligible to receive permits for surface coal mining operations on lands protected under section 522(e) of the Act. Therefore, we will evaluate State programs to determine whether existing State program provisions would protect the lands listed in section 522(e) to the same extent as our rules and whether they would provide similar opportunity for public participation in the decision-making process. Contrary to the commenter's arguments, past performance and the question of whether the public has identified problems with existing State program provisions are not relevant to this determination since this final rule alters the standards for VER (and hence the degree of protection for section 522(e) lands), as well as the opportunity for public participation.

We specifically sought comment on whether we should require those States with an approved takings standard for VER to remove this standard or whether the rationale that we relied upon to approve the takings standard in the Illinois definition of VER remains valid. See 30 CFR 917.15(j) and 54 FR 123, January 4, 1989. In other words, could 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 purportedly balances the purposes of the Act and section 522(e) in a different manner with potentially different results in terms of the level of protection afforded to the areas listed in section 522(e) of the Act? Commenters were divided on this issue as well, depending upon which VER definition they favored.

As previously noted, under 30 CFR 730.5 and 732.17(e)(1), the standard for determining whether a State program amendment is necessary in response to new or revised Federal regulations is whether the State program provisions are no less effective than our regulations in meeting the requirements of the Act. The final environmental impact statement (EIS) for this rulemaking describes the takings standard as likely to be somewhat less protective of the lands listed in section 522(e) than the good faith/all permits standard. Specifically, the model used in the EIS analysis predicts that application of a takings standard nationwide would result in the mining of an additional 185 acres of section 522(e)(1) lands, 1,686 acres of Federal lands in eastern national forests, and 984 acres in State

parks between 1995 and 2015. See Table V-1 of the EIS. Therefore, we anticipate that States would have difficulty justifying retention of a takings standard for VER unless they can convincingly demonstrate that the State program would ensure that application of the takings standard would be no less protective of section 522(e) lands than the good faith/all permits standard in the rule that we are adopting today.

One commenter noted that we previously approved the takings standard in the Illinois program partly on the basis of the argument that section 522(e) has multiple purposes of equal importance. In the preamble to that decision, we stated that the purposes of section 522(e) include protection of the lands listed therein, preservation of valid property rights, and avoidance of compensable takings. According to the preamble, the takings standard is consistent with the Act and no less effective than the good faith/all permits standard even though the takings standard accords greater weight to protection of the rights of mineral owners and avoidance of compensable takings than it does to protection of the lands listed in section 522(e). See 54 FR 120, January 4, 1989. The commenter argued that we should apply the same principle in evaluating State VER definitions today. We disagree.

We no longer adhere to the position stated in the 1989 preamble. As discussed in Part VII.C. of this preamble, we believe that the purpose of section 522(e) is to prohibit new surface coal mining operations on the lands listed in that section, with certain exceptions. And, as we state in that discussion, in view of the purpose of section 522(e), we do not agree that VER must or should be defined in a way that would avoid all compensable takings. Therefore, we do not expect that an argument that the takings standard is more protective of the rights of the mineral owners and is more likely to avoid compensable takings than the good faith/all permits standard will provide sufficient justification for retention of the takings standard as no less effective than the good faith/all permits standard in protecting the lands listed in section 522(e).

One commenter argued that since we had previously approved the Illinois takings standard as no less effective than the good faith/all permits standard, we could not now find Illinois' use of the takings standard to be less effective than the good faith/all permits standard in our proposed rule. We disagree. We based our prior approval of the Illinois standard on, among other things, an interpretation of the legislative history

of SMCRA and pertinent court decisions that we no longer believe to be appropriate. As discussed in Part VII.C. of this preamble, we no longer believe that the legislative history of SMCRA requires that we define VER in a way that completely avoids compensable takings. Therefore, the fact that we also based our prior approval of the Illinois definition on the argument that a takings standard is appropriate and necessary to avoid compensable takings under the Illinois Constitution is not relevant to an evaluation of whether the Illinois takings standard is no less effective than the good faith/all permits standard.

### XXVIII. How Does This Rule Impact Information Collection Requirements?

The final rule does not alter the information collection burden associated with Parts 740, 745, 772, 773, 778, 780, and 784. However, the final rule includes editorial revisions to §§ 740.10, 745.10, and 772.10 to maintain consistency with Departmental guidance concerning the format and content of these sections.

In addition, we have revised section 761.10 to reflect the information collection burden changes resulting from the rule changes that we are adopting today.

### XXIX. Procedural Matters

#### A. Executive Order 12866: Regulatory Planning and Review

This document is a significant rule and has been reviewed by the Office of Management and Budget under Executive Order 12866.

(1) This rule will not have an effect of \$100 million or more on the economy. It will not adversely affect in a material way the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities. This determination is based on a cost-benefit analysis prepared for the final rule. The cost-benefit analysis indicated that the cost increase resulting from the rule will be negligible. A copy of the analysis is available for inspection at the Office of Surface Mining, Administrative Record—Room 101, 1951 Constitution Avenue, N.W., Washington, DC 20240. You may obtain a single copy by writing us or calling 202-208-2847. You may also request a copy via the Internet at [osmrules@osmre.gov](mailto:osmrules@osmre.gov).

(2) This rule will not create a serious inconsistency or otherwise interfere with an action taken or planned by another agency. The rule will not significantly change costs to industry or

to the Federal, State, or local governments. Furthermore, the rule will have no adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States enterprises to compete with foreign-based enterprises in domestic or export markets.

(3) This rule does not alter the budgetary effects of entitlements, grants, user fees, or loan programs or the rights or obligations of their recipients because the rule does not affect such items.

(4) This rule raises novel legal and policy issues as discussed in the preamble.

#### B. Regulatory Flexibility Act

Pursuant to the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, the Department of the Interior certifies that this rule will not have a significant economic impact on a substantial number of small entities. This certification is based on the findings that the rule will not significantly change costs to industry or to Federal, State, or local governments. Furthermore, the rule will have no adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States enterprises to compete with foreign-based enterprises in domestic or export markets.

#### C. Small Business Regulatory Enforcement Fairness Act

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act, because it will not:

- Have an annual effect on the economy of \$100 million or more.
- Cause a major increase in costs or prices for consumers; individual industries; Federal, State, or local government agencies; or geographic regions because the rule does not impose any substantial new requirements on the coal mining industry, consumers, or State and local governments. It essentially codifies current policy.
- Have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises for the reasons stated above.

#### D. Unfunded Mandates Reform Act of 1995

This rule does not impose an unfunded mandate on State, local, or Tribal governments or the private sector of more than \$100 million per year. The rule does not have a significant or unique effect on State, local, or Tribal governments or the private sector.

Therefore, a statement containing the information required by the Unfunded Mandates Reform Act, 1 U.S.C. 1531, *et seq.*, is not required.

#### E. Executive Order 12630: Takings

In accordance with Executive Order 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 522(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 parts of this preamble, the final rule defining VER establishes a good faith/all permits standard for VER under section 522(e).

Under the good faith/all permits 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 final rule may have some significant, but unquantifiable, takings implications. We do not expect that a court would find that this final rule constitutes a facial taking, because, as discussed in Part VI of this preamble, that issue was litigated in 1979–80, in *PSMRL I, Round I*, 14 Env't Rep. Cas. (BNA) 1083 (1980).

##### 1. No Facial Takings

It is unlikely that the good faith/all permits standard would be determined to constitute a facial taking. 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 *PSMRL I, Round I*, 14 Env't Rep. Cas. (BNA) at 1090–92 (1980), 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 takings 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 Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978). Because of the scope of the final rule and the lack of information on specific property interests that might be affected, this assessment cannot predict or evaluate the effects of the final rule on property rights. However, most States have been applying the good faith/all permits standard or a similar standard since the inception of state regulatory primacy under SMCRA, so experience to date with this standard provides some indication of the likelihood of future compensable takings. In light of this history, the assessment will discuss generally the anticipated impacts of the final rule, and compare them to the impacts of the other alternatives considered.

a. *History.* History does not suggest that the promulgation of a good faith/all permits standard would result in a significant number of takings compensation awards. Twenty State programs currently include either the good faith/all permits standard (15 States) or the all permits standard (5 States); we also have used the good faith/all permits standard for a number of years. Two State programs use a takings standard, one uses only the needed for and adjacent standard, and one State has no VER definition. We are not aware of any instance in which the States' use of these standards has resulted in a judicial determination of a compensable taking.

Likewise, use of these standards has not resulted in any financial compensation in those instances where our application of the standard has resulted in litigation.

The question of whether application of the good faith/all permits 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 counterpart to the good faith/all permits

standard, we found that the plaintiff did not have VER. The court ruled that our application of Ohio's VER standard would deprive Sunday Creek of its property rights in violation of the Fifth Amendment. The court therefore reversed our 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 conclude that application of the good faith/all permits standard for VER would effect a compensable taking. However, the United States Court of Federal Claims has exclusive jurisdiction to hear takings claims against the Federal government.

While the likelihood of some degree of financial exposure exists, based on the above data, we believe that adoption of a good faith/all permits standard will not result in any change in the Government's financial exposure.

b. *Character of the Governmental Action.* The purpose served and the statutory provisions implemented by this final rulemaking are discussed in the preamble to the final rule. The final 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 final rule substantially advances that purpose in several respects.

First, the final rule informs interested persons of what our interpretation and application of section 522(e) will be. Further, the rule sets out the procedures to be followed in implementation of section 522(e). Thus, the rule provides greater certainty, clarity, and predictability in implementation of section 522(e).

Second, the rule advances Congress' purpose of protecting the areas specified in section 522(e), by providing that the primary 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). (As discussed in the preamble to the final rule, the rulemaking also addresses other VER standards that may apply, and other exceptions to section 522(e).) The final definition of VER thus advances the regulatory scheme Congress developed to prevent the harms which surface coal mining operations would cause in those areas.

We do 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.

### c. *Economic Impact.*

#### Affected Property Interests

The property interests that could be affected by this rule are primarily coal rights in section 522(e) areas. We cannot determine in advance which coal rights would be affected by the eventual application of this final rule, or what value those rights would have. However, under both the good faith/all permits standard and the needed for and adjacent standard in this final rule, the person requesting the VER determination must first demonstrate the requisite underlying property right to mine the coal by the proposed method. Thus, those coal owners that cannot demonstrate the requisite property right would not be able to demonstrate VER.

In many instances, a coal holder may not be able to demonstrate the requisite property right to surface mine coal. This is the case when the coal rights were severed at such an early date that, under state property law, no right to surface mine was conveyed. In those cases, denial of VER to surface mine would not be a compensable taking, because no property rights would have been taken. See the discussion of this topic in Final Environmental Impact Statement OSM-EIS-29, entitled "Proposed Revisions to the Permanent Program Regulations Implementing Section 522(e) of the Surface Mining Control and Reclamation Act of 1977 and Proposed Rulemaking Clarifying the Applicability of Section 522(e) to Subsidence from Underground Mining" (July, 1999), and the accompanying Final Economic Analysis (EA) entitled "Proposed Revisions to the Permanent Program Regulations Implementing Section 522(e) of the Surface Mining Control and Reclamation Act of 1977 and Proposed Rulemaking Clarifying the Applicability of Section 522(e) to Subsidence from Underground Mining" (July, 1999). As discussed in the EIS and EA, we have no means of precisely

estimating how many such instances will occur.

In all other instances, if we find that a person does not have VER and a takings claim is filed with the United States Court of Federal Claims, that court would evaluate the claim. Because of the geographical scope and complexity of this rulemaking, we do not have sufficient information to accurately predict or evaluate the incidence of such claims, or their likely merits. 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 lands a VER determination would be necessary.

#### Likely Degree of Economic Impact, Character and Present Use of Property, and Mitigating Benefits

Similarly, because we cannot predict what VER determinations may be necessary, we cannot predict the likely degree of economic impact on the underlying property interests from application of this final rule. However, in general, application of the final rule might result in more economic impact on underlying property interests than would occur under the other alternatives considered. This greater impact could occur because, compared to those other alternatives, more holders of coal rights may be unable to mine the coal under the final rule because they could not demonstrate VER under the good faith/all permits standard.

However, as discussed in the EIS and in this preamble, holders of coal rights do access the coal on lands protected by section 522(e) by methods other than the VER exception. These methods include the compatibility findings, waivers and joint approvals authorized under paragraphs (e)(2) through (e)(4) of section 522 as well as outright purchase of a protected feature such as an occupied dwelling to remove it from protected status.

We do not have information on the character and present use of individual affected properties. Likewise, we do not have the specific information necessary to evaluate the extent to which, in particular cases, the benefits to the property holder from applying the

prohibitions of section 522(e) offset or otherwise mitigate the adverse economic impact of applying those prohibitions. In general, application of the prohibitions is expected to ensure that incompatible use is not made of such lands, where Congress has determined that surface coal mining operations are an incompatible use. The availability of other alternatives to the final rule is discussed below.

d. *Interference with reasonable investment-backed expectations.* Whether a coal holder has reasonable investment-backed expectations, and the degree to which application of the final rule might interfere with those expectations, cannot be determined until the coal holder has requested a determination or finding that a particular exception to the prohibitions and restrictions of section 522(e) applies. However, application of the final rule might result in more interference with reasonable investment-backed expectations than would occur under the other alternatives considered. Compared to the other alternatives, more holders of coal rights may be unable to mine the coal under the final rule because they could not demonstrate VER under the good faith/all permits 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 finding 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, we expect that holders of coal rights would not have the necessary property right to surface mine the coal, as discussed in more detail in the EIS and EA. These 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 on notice of the applicability of the prohibitions in section 522(e). If the purchaser unsuccessfully requested a determination or finding that a particular exception under section 522(e) applied, and filed a takings claim concerning denial of the request, it is likely that the United States Court of Federal Claims would deem the purchaser to be on notice concerning the prohibitions and the exceptions.

Thus, we would expect the court to find that the purchaser could have no reasonable expectation of evading the application of those requirements. In some cases, it is also likely that the court would find no reasonable expectation of mining under an exception. And if there is no reasonable expectation of mining, we would not expect the court to find that reasonable investment-backed expectations exist.

If a coal holder has made no significant expenditures, the holder probably would be unable to demonstrate sufficient investment-backed expectations to support a takings claim. Similarly, if VER for surface mining were denied, but underground mining were possible and economical, we expect that a takings claim would be difficult to sustain. Also, if a coal holder does not demonstrate VER, the holder may nonetheless be eligible for another exception to the prohibitions and restrictions of section 522(e), such as a compatibility finding or a waiver. The prohibitions and restrictions would not apply if the coal holder demonstrated that the other exception applies. We expect that a takings claim for denial of VER would be difficult to sustain if the holder failed to utilize another available exception—particularly in light of the fact that these other exceptions are used relatively often.

#### *Summary of Takings Implications for Section 522(e) Lands*

To provide a basis for comparing the relative environmental and economic impacts of the final rule and the alternatives, we developed impact estimates by using a model that relied on specific methodologies and assumptions. For purposes of this assessment, the evaluation of takings implications utilizes in part the analyses set out in the EIS and EA for the final rule. The EIS 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 extent of actual mining in protected areas under this rule, we could not predict the actual impacts of the alternatives. Therefore, the EIS and EA estimates of coal acreage that could be mined under the good faith/all permits 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 final rule, compared to the other alternatives. Tables V-1 through V-5 of the EIS 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:

(1) Relatively few persons would be able to demonstrate VER under a good faith/all permits standard.

(2) For some categories of lands, more persons might be able to demonstrate VER under a good faith/all permits or takings standard, and that in some cases, even more persons might be able to demonstrate VER under an ownership and authority standard.

(3) The impacts of the bifurcated alternative would be somewhere between the impacts of the good faith/all permits standard and those of the ownership and authority standard.

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

Based upon available information, including the EIS and EA for the final rule, and a survey of historical data concerning permitting, we anticipate that the final rule will have the following takings impacts.

*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. We anticipate relatively few takings impacts in (e)(1) areas because there has been a relative dearth of VER determinations and any resulting takings claims concerning (e)(1) areas since the enactment of SMCRA.

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, we anticipate 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:* As explained in a separate rulemaking published in today's **Federal Register**, the prohibitions of section 522(e) do not apply to subsidence from underground mining operations. Therefore, we expect that any takings award for denial of VER for surface activities in connection with 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. For the reasons summarized below, we anticipate relatively few takings from VER determinations on (e)(2) lands.

*Surface mining:* We anticipate that no takings claims would arise from application of the good faith/all permits standard in surface mining VER determinations in western national forests and national grasslands. Coal owners in the western (e)(2) areas have never pursued surface mining VER determinations, but rather have obtained compatibility findings under section 522(e)(2). We anticipate that some acreage might be precluded from surface mining, and some takings claims might arise, concerning surface mining VER determinations in eastern national forests.

For surface coal mining, we do not expect that a court would find that a compensable taking exists if underground mining is an economically and technically feasible alternative. In the absence of VER 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 EIS and EA, we anticipate 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. We do 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 exception would continue to apply. Therefore, we expect few takings claims from denial of VER for underground mining in national forests, because we assume that virtually all underground mining could qualify for a compatibility finding. 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 findings 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 522(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. We do 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, we anticipate 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. We anticipate relatively few takings claims concerning VER determinations for (e)(4) areas. Coal mines now tend to avoid areas with numerous roads and streets because of increased acquisition and public safety-related costs of mining in such areas. In the vast majority of cases, an exception to the prohibition of (e)(4) is obtained under the waiver provision of (e)(4), rather than through a VER determination. Therefore, we do not expect the choice of a VER standard to have a major effect on takings claims for coal located within the buffer zones for public roads. As noted above, our

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. We anticipate 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, we expect 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, our model does anticipate that in the next 20 years substantial coal acreage in (e)(5) public parks might be precluded from mining as a result of underground mining VER determinations under the final 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 final rule. Some portion of that acreage could result in takings awards.

### 3. Alternatives to the Final Rule

As summarized above in this assessment, and as discussed in detail in the EIS and the EA, we developed and considered three alternatives to the good faith/all permits standard for VER. They are the good faith/all permits or takings (GFAP/T) standard, the ownership and authority standard, and the bifurcated alternative. The good faith/all permits standard has the greatest potential for takings implications, and we have found no way to minimize the takings implications of the final rule except by selecting one of the other alternatives. However, we do not believe that such a selection is justified. We believe that the good faith/all permits standard adopted as part of the final rule is the best alternative because it best protects the areas listed in section 522(e) from surface coal mining operations, as Congress intended.

### GFAP/T Standard

Under this standard, a person could demonstrate VER by (1) demonstrating compliance with the good faith/all permits standard, or (2) demonstrating that denial of VER as of the date that the area became subject to section 522(e) would reasonably be expected to result in a compensable taking.

We would expect no takings implications from the GFAP/T 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 final rule, when we proposed the GFAP/T alternative in 1991, it elicited some of the strongest opposition that we have ever received on a proposed rule. We received approximately 750 comments, and virtually every comment emphatically opposed the GFAP/T standard. Opponents charged that this 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 GFAP/T standard as unworkable, unacceptable, or demonstrably inferior to some other alternative.

### Ownership and Authority Standard

Under this standard, 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 ownership and authority standard would require demonstrating, as of the date that 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.

We would not expect the ownership and authority 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 ownership and authority standard would have no significant takings implications, we believe that it suffers from a serious shortcoming in that it would effectively eviscerate the protections afforded under section 522(e) to lands underlain by non-Federal coal. This evisceration would result from the fact that the ownership and authority alternative would result in a finding of VER whenever a person met the permit application requirements for property rights. As a result, except for lands overlying unleased Federal coal, the prohibitions of section 522(e) would be meaningless and without practical effect, because they would add almost nothing to the protection already offered by the SMCRA permit requirements. Such a result would clearly be inconsistent with congressional intent.

### Bifurcated Alternative

Under this alternative, when the mineral and surface estates have been severed, the date of severance would determine whether the ownership and authority or the good faith/all permits standard for VER would be used. When the mineral estate was severed from the surface estate before the land came under the protection of section 522(e), the ownership and authority 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 good faith/all permits standard would be used. Thus, we believe the takings implications of this alternative would be somewhere between those of the ownership and authority and the good faith/all permits standards. We did not propose this alternative, because we concluded that it was questionable whether there is a basis in SMCRA for applying two different VER standards, depending on the date of severance.

### 4. Estimate of Potential Financial Exposure From the Final 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 final rule were held to effect a compensable taking. Given the geographic scope of this final 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 final rule, relative to the other alternatives considered. Federal financial exposure is greatest 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 final 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) and (e)(5) areas (State and local parks). 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) through (e)(5) areas other than public parks. 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 and application of this rule.

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

#### F. Executive Order 13132: Federalism

In accordance with Executive Order 13132, this rule does not have Federalism implications. The rule does not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

SMCRA delineates the roles of the Federal and State governments with regard to the regulation of surface coal mining and reclamation operations. One of the purposes of SMCRA is to "establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations." States are not required to regulate surface coal mining and reclamation operations under SMCRA, but they may do so if they wish

and if they meet certain requirements. The Act also provides for Federal funding of 50% of the cost of administering State regulatory programs approved under SMCRA. Section 503(a)(1) of SMCRA requires that State laws regulating surface coal mining and reclamation operations be "in accordance with" the requirements of SMCRA, and section 503(a)(7) requires that State programs contain rules and regulations "consistent with" regulations issued by the Secretary pursuant to SMCRA. Further, section 505 of SMCRA provides for the preemption of State laws and regulations that are inconsistent with the provisions of SMCRA.

#### G. Executive Order 12988: Civil Justice Reform

In accordance with Executive Order 12988, the Office of the Solicitor has determined that this rule (1) does not unduly burden the judicial system and (2) meets the requirements of sections 3(a) and 3(b)(2) of the order.

#### H. Paperwork Reduction Act

Under the Paperwork Reduction Act, agencies may not conduct or sponsor a collection of information unless the collection displays a currently valid Office of Management and Budget (OMB) control number. Also, no person must respond to an information collection request unless the form or regulation requesting the information has a currently valid OMB control number. Therefore, in accordance with 44 U.S.C. 3501 *et seq.*, we submitted the information collection and recordkeeping requirements of 30 CFR Parts 761 and 772 to OMB for review and approval. OMB subsequently approved the collection activities and assigned them OMB control numbers 1029-0111 and 1029-0112, respectively.

#### I. National Environmental Policy Act of 1969 and Record of Decision

This rule, issued in conjunction with the rule concerning the applicability of the prohibitions of section 522(e) of SMCRA to subsidence from underground mining operations (RIN 1029-AB82), constitutes a major Federal action significantly affecting the quality of the human environment under the National Environmental Policy Act of 1969 (NEPA). Therefore, we have prepared a final environmental impact statement (EIS) pursuant to section 102(2)(C) of NEPA, 42 U.S.C. 4332(2)(C). The Environmental Protection Agency has published a separate notice of the availability of the EIS in today's edition of the **Federal Register**. A copy of the EIS, which is entitled "Proposed

Revisions to the Permanent Program Regulations Implementing Section 522(e) of the Surface Mining Control and Reclamation Act of 1977 and Proposed Rulemaking Clarifying the Applicability of Section 522(e) to Subsidence from Underground Mining: Final Environmental Impact Statement OSM-EIS-29 (July, 1999)," is available for inspection at the Office of Surface Mining, Administrative Record—Room 101, 1951 Constitution Avenue, N.W., Washington, DC 20240. You may obtain a single copy by writing us or calling 202-208-2847. You also may request a copy via the Internet at [osmrules@osmre.gov](mailto:osmrules@osmre.gov).

The preamble to this final rule serves as the "Record of Decision" under NEPA. Because of the length of the preamble, we have prepared the following concise summary of the EIS and the decisions made in the final rule relative to the alternatives considered in the EIS.

The EIS addressed the general setting of the proposal, its purpose and need, the alternatives considered, existing environmental protection measures, the affected environment, the environmental consequences, and overall consultation and coordination activities. In addition, the EIS discussed the regulatory protections of SMCRA, the history of VER, and related rulemaking issues such as coal exploration on protected lands, the transferability of VER, procedural requirements for VER determinations, and responsibility for VER determinations for non-Federal inholdings within the areas listed in section 522(e)(1) of the Act.

We used a generic mine impact analysis on a hypothetical site-specific basis to describe impacts to certain resources when surface and underground mining operations are conducted within, and adjacent to, section 522(e) areas (see Chapter IV of the EIS). In addition, we estimated the coal resources within the areas defined by section 522(e) and subjected them to various tests and assumptions to provide an estimate of the number of acres that could be affected over a 20-year period (1995 to 2015). Using the generic mine impact analysis and the potentially affected acreage of section 522(e) areas, we were able to provide a measure of the relative degree of potential environmental impacts under each alternative.

Because of the comments we received on the proposed rule, the final rule differs somewhat from the proposed rule. In making these changes, we used the EIS to understand the potential environmental impacts. We

determined that there are no measurable environmental impacts associated with these changes, and that, in terms of environmental impacts, the changes do not constitute a significant departure from the alternatives evaluated in the EIS.

#### Alternatives Considered

We identified five alternatives for implementing the VER exception in section 522(e) of SMCRA. These alternatives are no action, good faith/all permits (the preferred alternative), good faith/all permits or takings, ownership and authority, and bifurcated. The last alternative is a combination of the good faith/all permits and the ownership and authority alternatives.

*No Action (NA) Alternative:* Under the no action alternative, we would not adopt a rule defining VER and establishing implementing procedures; the status quo would continue. We would make VER determinations using the policy established in the suspension notice published November 20, 1986 (51 FR 41954) in all States except Ohio. In Ohio, we would use a takings standard. We would continue to make VER determinations for Federal lands in section 522(e)(1) and (2) areas. We also would continue to make VER determinations for non-Federal lands within section 522(e)(1) areas when surface coal mining operations on those lands would affect the Federal interest. States would continue to use their current standards and procedures for determining VER.

*Good Faith/All Permits Alternative:* Under the good faith/all permits standard, a person has VER if, prior to the date that the land came under the protection of section 522(e), the person or a predecessor in interest had obtained, or made a good faith effort to obtain, all permits and other authorizations required to conduct surface coal mining operations.

*Good Faith/All Permits or Takings Alternative:* Under this alternative, a person must either comply with the good faith/all permits standard or demonstrate that denial of VER would result in a compensable taking. VER would be found to exist whenever the agency making the VER determination finds that, based on existing takings jurisprudence, denial of VER would be expected to result in a compensable taking of property under the Fifth and Fourteenth Amendments to the Constitution.

*Ownership and Authority Alternative:* Under this alternative, 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. Adoption of the ownership and authority alternative would likely result in the greatest number of determinations that VER did exist.

*Bifurcated Alternative:* Under this alternative, VER standards would be based on the date of severance of the mineral and surface estates in relation to the date that the land came under the protection of section 522(e). When the mineral estate was severed from the surface estate before the land came under the protections of section 522(e), VER would be determined based on the ownership and authority standard. When the mineral estate had not been severed from the surface estate before the land came under the protection of section 522(e), VER would be based on the good faith/all permits standard.

#### Decision

The final rule establishes the good faith/all permits alternative as the standard for VER. This decision is based upon the belief that the good faith/all permits standard best achieves protection of the lands listed in section 522(e) in a manner consistent with congressional intent at the time of SMCRA's enactment. At the same time, it protects the interests of those persons who had taken concrete steps to obtain regulatory approval for surface coal mining operations on lands listed in section 522(e) before those lands came under the protection of section 522(e). And, since 20 of the 24 approved State regulatory programs already rely upon either the good faith/all permits standard or the all permits standard, adoption of a good faith/all permits standard would cause the least disruption to existing State regulatory programs.

The good faith/all permits standard is 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 on the lands listed in that section, either to protect human health or safety, or because the environmental values and other features associated with those lands are generally incompatible with surface coal mining operations.

The analysis of environmental impacts indicated that, compared with the other alternatives considered, the good faith/all permits standard is the most protective of the lands listed in section 522(e). Adoption of the takings standard in place of the good faith/all permits standard would result in surface coal mining operations on an estimated additional 2,855 acres of protected lands between 1995 and 2015. Adoption of either the bifurcated standard or the

ownership and authority standard would result in surface coal mining operations on an estimated additional 3,062 acres of protected lands during that time frame. Therefore, adoption of the good faith/all permits standard for VER will best fulfil the intent of Congress to prohibit, with certain exceptions, new surface coal mining operations on the lands protected by section 522(e).

The EIS also identified certain issues common to the VER alternatives. We discussed these issues and their potential impacts in Chapters II and V of the EIS. As discussed below, we made the following decisions with respect to these issues.

*VER Definition Applicable to Section 522(e)(1) and (e)(2) Lands:* Under 30 CFR Title VII, Subchapter C, State regulatory programs under SMCRA must be no less effective than the Federal regulations in meeting the requirements of the Act. Therefore, we expect that there would be no differences in the environmental impacts of the two alternatives that we considered (use of State versus Federal definition). The final rule specifies that the Federal definition of VER, not the approved State program definition, will apply to all VER determinations for the lands listed in section 522(e)(1) and (e)(2) of SMCRA, regardless of whether OSM or the State regulatory authority 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.

*Continually Created VER:* The definition of VER in the final rule provides for determination of VER based on property rights and circumstances in existence when the land comes under the protection of section 522(e) of SMCRA. This concept has sometimes been referred to as "continually created VER." We first adopted it as a separate standard in the 1983 definition of VER. In the final rule, we are removing the separate standard and incorporating the concept into each VER standard and the exception for existing operations. The EIS found the differences in environmental impact between the existing and proposed (now final) rules to be negligible.

*Transferability of VER:* The final rule provides that, in general, VER are transferable because, unless otherwise provided by State law, the property rights, permits, and operations that form the basis for VER determinations are transferable. There is one significant exception. If an operation with VER

under the needed for and adjacent standard divests itself of the land to which the VER determination pertains, the new owner does not have the right to conduct surface coal mining operations on those lands under the prior VER determination. States may prohibit VER transfers to the extent that they have the authority to do so under State law.

*Needed for and Adjacent Standard:* The final rule adopts the needed for and adjacent standard as proposed in 1997, with several changes. To establish VER under the needed for and adjacent standard, a person must (1) make the required property rights demonstration, and (2) document that the land is both needed for and immediately adjacent to a surface coal mining operation for which all 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 land came under the protection of section 522(e) of SMCRA. Except for operations in existence before August 3, 1977, or for which a good faith effort to obtain all necessary permits had been made before August 3, 1977, this standard does not apply to lands already under the protection of section 522(e) when the regulatory authority approved the permit for the original operation or when the good faith effort to obtain all necessary permits was made. As stated in Chapter V of the EIS, we found that application of this standard would have no more than minor environmental impacts overall.

*Procedural Requirements for VER Determinations:* The existing rules had few requirements governing the submission and processing of requests for VER determinations. The final rule includes more complete requirements to promote public participation and establish consistent review and decision-making procedures. As discussed in Chapter V of the EIS, we found that adoption of more complete procedural requirements would result in minor to significant environmental benefits by improving decision accuracy and ensuring consideration of all relevant information.

*Responsibility for VER Determinations for Non-Federal Inholdings in Section 522(e)(1) Areas:* As discussed in Chapter V of the EIS, we determined that the environmental impacts of the alternatives that we considered for this issue would be determined more by the applicable VER standard than by which agency is responsible for making VER determinations for non-Federal lands

within section 522(e)(1) areas. Under the final rule, the regulatory authority has the responsibility for making VER determinations for all non-Federal lands within the areas listed in section 522(e)(1), but, as noted above, the agency must use the Federal definition of VER when doing so.

*VER for Coal Exploration Operations:* Of the five alternatives under consideration regarding requirements for coal exploration on the lands protected by section 522(e), we decided that the no action alternative best conforms with the provisions of SMCRA. The prohibitions of section 522(e) apply only to surface coal mining operations, and SMCRA specifically excludes coal exploration from the definition of surface coal mining operations. Therefore, we decided not to add any VER demonstration requirements or other potentially prohibitory barriers to coal exploration on the lands listed in section 522(e). However, as discussed in Chapter V of the EIS, the no action alternative is the least protective of the environment. To mitigate the environmental impacts of this alternative, we have revised our rules to add a requirement that each application for coal exploration on lands listed in section 522(e) include a demonstration that the proposed exploration activities have been designed to minimize interference with the values for which those lands were designated as unsuitable for surface coal mining operations. The final rule also provides that, before approving an application for coal exploration on lands listed in section 522(e), the regulatory authority must find that the proposed exploration activities have been designed to minimize interference with the values for which those lands were designated as unsuitable for surface coal mining operations.

#### Environmental Effects of the Alternatives

The areas most likely to be impacted by surface coal mining operations as a result of the VER exception are the lands listed in section 522(e)(1), State and local parks, and eastern national forests. Rather than claiming VER, operators generally use the waivers and compatibility findings authorized under SMCRA to gain access to coal resources within western national forests, adjacent to historic sites, or within the buffer zones for roads and occupied dwellings. While access to coal within the buffer zones for public parks, churches, schools, public buildings, and cemeteries is generally dependent upon establishing VER, mining operations can

generally avoid these protected areas without difficulty.

*Good Faith/All Permits Alternative:* According to our model, the good faith/all permits alternative would have the least environmental impact. It also would provide surface owners and resource management agencies with the greatest degree of control over surface coal mining operations and any resultant adverse impacts in protected areas. Our model predicts that the only section 522(e) areas that would be disturbed by surface coal mining operations between 1995 and 2015 pursuant to VER determinations under this alternative would be 883 acres of Federal lands in eastern national forests, 996 acres within the buffer zones for public roads, and 4,823 acres within the buffer zones for occupied dwellings. Therefore, the good faith/all permits alternative is the environmentally preferable alternative for the VER rulemaking.

*No Action Alternative:* The impacts of this alternative would likely resemble those of the good faith/all permits alternative. However, this alternative would allow use of the takings standard in Ohio and in those States that have adopted the takings standard as part of their approved regulatory programs. Therefore, some areas protected by section 522(e) would be mined under this alternative that would not be mined under the good faith/all permits alternative. The model used in the EIS predicts that, relative to the good faith/all permits alternative, the no action alternative would result in surface coal mining operations on an additional 711 acres of Federal lands in eastern national forests between 1995 and 2015.

*All Other VER Alternatives:* The ownership and authority, bifurcated, and good faith/all permits or takings alternatives afford the greatest potential for mining-related disturbances in protected areas. Our model predicts that use of one of these alternatives in place of the good faith/all permits alternative would result in surface coal mining operations on an additional 185 to 304 acres of section 522(e)(1) lands (national parks, national wildlife refuges, and national recreation areas), 1,686 to 1,761 acres of Federal lands in eastern national forests, and 984 to 997 acres of State park lands because of VER determinations under these alternatives between 1995 and 2015. See Figure V-1 of the EIS.

The potentially affected section 522(e)(1) acreage appears to be confined to one National Park unit in the Central Appalachian region, several wildlife refuge system units within North Dakota, and, to a lesser degree, two

national recreation areas in the Central Appalachian region. The estimated cost to implement the Department's policy to acquire the interests of persons with VER who plan to conduct surface coal mining operations in section 522(e)(1) areas is \$4.185 million during the 20-year time frame covered by our model.

*VER Alternatives in Combination with Alternatives for Companion*

*Rulemaking:* As discussed above, the good faith/all permits standard is the most environmentally preferable of the alternatives considered for the VER definition. However, the EIS also considered the impact of the VER alternatives in combination with the alternatives for the rulemaking concerning the applicability of the prohibitions of section 522(e) to subsidence from underground mining. Based upon the number of acres of section 522(e) lands that could be subject to either surface coal mining operations or subsidence from underground mining, the combination of the good faith/all permits alternative for the VER rule and the "prohibitions apply" (PA) alternative for the prohibitions rulemaking would be the most environmentally protective of all potential combinations of alternatives for the two rulemakings. However, for reasons discussed in the preamble to the rulemaking concerning the applicability of the prohibitions of section 522(e) to subsidence from underground mining, we have selected the "prohibitions do not apply" alternative rather than any of the PA alternatives for that rulemaking.

*Mitigation, Monitoring and Enforcement*

We have adopted all practicable means to avoid or minimize environmental harm from the alternatives selected. Congress enacted SMCRA to establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations; assure that the rights of surface landowners and other persons with a legal interest in the land are fully protected from such operations; assure that surface coal mining operations are not conducted where reclamation required by SMCRA is not feasible; and assure that surface coal mining operations are conducted so as to protect the environment.

SMCRA's permitting requirements and performance standards generally require avoidance, minimization, or mitigation of impacts to important environmental resources, and our regulations do likewise. Each SMCRA regulatory program includes five major elements: permitting requirements and procedures, performance bonds to guarantee reclamation in the event that

the permittee defaults on any reclamation obligations, performance standards to which the operator must adhere, inspection and enforcement to maintain compliance with performance standards and the terms and conditions of the permit, and designation of lands as unsuitable for surface coal mining operations. Each State regulatory program must be no less effective than our regulations in achieving the requirements of the Act. And we conduct oversight of each State's implementation of its approved regulatory program.

*Timing of Agency Action*

The regulations of the Council on Environmental Quality at 40 CFR 1506.10(b)(2) allow an agency engaged in rulemaking under the Administrative Procedure Act to publish a decision on the final rule simultaneous with the publication of the notice of availability of the final EIS. Under section 526(a) of SMCRA, 30 U.S.C. 1276(a), anyone wishing to challenge the agency's decision may do so by filing suit in the United States District Court for the District of Columbia within 60 days of the date that the final rule is published in the **Federal Register**.

*Author:* The principal author of this rule is Dennis G. Rice, Division of Technical Support, Office of Surface Mining Reclamation and Enforcement, 1951 Constitution Avenue, N.W., Washington, DC 20240; Telephone (202) 208-2829. E-mail address: drice@osmre.gov.

**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 762*

Historic preservation, Surface mining, Underground mining.

*30 CFR Part 772*

Reporting and recordkeeping requirements, Surface mining, Underground mining.

*30 CFR Part 773*

Administrative practice and procedure, Reporting and recordkeeping requirements, Surface mining, Underground mining.

*30 CFR Part 778*

Reporting and recordkeeping requirements, Surface mining, Underground mining.

*30 CFR Part 780*

Reporting and recordkeeping requirements, Surface mining.

*30 CFR Part 784*

Reporting and recordkeeping requirements, Underground mining.

Dated: September 3, 1999.

**Sylvia V. Baca,**

*Acting Assistant Secretary, Land and Minerals Management.*

For the reasons set forth in the preamble, the Department is amending 30 CFR Parts 740, 745, 761, 762, 772, 773, 778, 780, and 784 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. Section 740.4 is amended by deleting the word "and" at the end of paragraph (a)(2), replacing the period at the end of paragraph (a)(3) with a semicolon, and revising paragraphs (a)(4) and (a)(5) to read as follows:

**§ 740.4 Responsibilities.**

(a) \* \* \*

\* \* \* \* \*

(4) Decisions on requests to determine whether a person possesses valid existing rights to conduct surface coal mining operations on Federal lands within the areas specified in § 761.11(a) and (b) of this chapter; and

(5) Issuance of findings concerning whether there are significant recreational, timber, economic, or other values that may be incompatible with surface coal mining operations on Federal lands within a national forest, as specified in § 761.11(b) 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, NW, Washington, DC 20240; and the Office of Management and Budget, Office of Information and Regulatory Affairs, Attention: Interior Desk Officer, 725 17th Street, N.W., Washington, DC 20503. Please refer to OMB Control Number 1029-0027 in any correspondence.

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

**§ 740.11 Applicability.**

(a) Except as provided in paragraph (g) of this section, both this subchapter and the pertinent State or Federal regulatory program in subchapter T of this chapter apply to:

\* \* \* \* \*

(g) The definition of valid existing rights in § 761.5 of this chapter applies to any decision on a request for a determination of valid existing rights to conduct surface coal mining operations on the lands specified in § 761.11(a) and (b) 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, N.W., 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 has valid existing rights to conduct surface coal mining operations on Federal lands within the areas specified in § 761.11(a) and (b) of this chapter; or

(p) Issue findings on whether there are significant recreational, timber, economic, or other values that may be incompatible with surface coal mining operations on Federal lands within a national forest, as specified in § 761.11(b) 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,” adding definitions of “we, us, and our” and “you and your” in alphabetical order, and revising the definition of “valid existing rights” to read as follows:

**§ 761.5 Definitions.**

\* \* \* \* \*

*Valid existing rights* means a set of circumstances under which a person may, subject to regulatory authority approval, conduct surface coal mining operations on lands where 30 U.S.C. 1272(e) and § 761.11 would otherwise prohibit such operations. Possession of valid existing rights only confers an exception from the prohibitions of § 761.11 and 30 U.S.C. 1272(e). A person seeking to exercise valid existing rights must comply with all other pertinent requirements of the Act and the applicable regulatory program.

(a) *Property rights demonstration.* Except as provided in paragraph (c) 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, or a predecessor in interest, with the right to conduct the type of surface coal mining operations intended. This right must exist at the time that the land came under the protection of § 761.11 or 30 U.S.C. 1272(e). Applicable State statutory or case law will govern interpretation of documents relied upon to establish property rights, unless Federal law provides otherwise. If no applicable State law exists, custom and generally accepted usage at the time and place that the documents came into existence will govern their interpretation.

(b) Except as provided in paragraph (c) of this definition, a person claiming valid existing rights also must demonstrate compliance with one of the following standards:

(1) *Good faith/all permits standard.* All 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 land came under the protection of § 761.11 or 30 U.S.C. 1272(e). At a minimum, an application must have been submitted for any permit required under subchapter G of this chapter or its State program counterpart.

(2) *Needed for and adjacent standard.* The land is needed for and immediately adjacent to a surface coal mining operation for which all permits and other authorizations required to conduct surface coal mining operations had been obtained, or a good faith attempt to obtain all permits and authorizations had been made, before the land came under the protection of § 761.11 or 30 U.S.C. 1272(e). To meet this standard, a person must demonstrate that prohibiting expansion of the operation onto that land would unfairly impact

the viability of the operation as originally planned before the land came under the protection of § 761.11 or 30 U.S.C. 1272(e). Except for operations in existence before August 3, 1977, or for which a good faith effort to obtain all necessary permits had been made before August 3, 1977, this standard does not apply to lands already under the protection of § 761.11 or 30 U.S.C. 1272(e) when the regulatory authority approved the permit for the original operation or when the good faith effort to obtain all necessary permits for the original operation was made. In evaluating whether a person meets this standard, the agency making the determination may consider factors such as:

(i) The extent to which coal supply contracts or other legal and business commitments that predate the time that the land came under the protection of § 761.11 or 30 U.S.C. 1272(e) depend upon use of that land for surface coal mining operations.

(ii) The extent to which plans used to obtain financing for the operation before the land came under the protection of § 761.11 or 30 U.S.C. 1272(e) rely upon use of that land for surface coal mining operations.

(iii) The extent to which investments in the operation before the land came under the protection of § 761.11 or 30 U.S.C. 1272(e) rely upon use of that land for surface coal mining operations.

(iv) Whether the land lies within the area identified on the life-of-mine map submitted under § 779.24(c) or § 783.24(c) of this chapter before the land came under the protection of § 761.11.

(c) *Roads.* A person who claims valid existing rights to use or construct a road across the surface of lands protected by § 761.11 or 30 U.S.C. 1272(e) must demonstrate that one or more of the following circumstances exist if the road is included within the definition of "surface coal mining operations" in § 700.5 of this chapter:

(1) The road existed when the land upon which it is located came under the protection of § 761.11 or 30 U.S.C. 1272(e), and the person has a legal right to use the road for surface coal mining operations.

(2) A properly recorded right of way or easement for a road in that location existed when the land came under the protection of § 761.11 or 30 U.S.C. 1272(e), and, under the document creating the right of way or easement, and under subsequent conveyances, the person has a legal right to use or construct a road across the right of way or easement for surface coal mining operations.

(3) A valid permit for use or construction of a road in that location for surface coal mining operations existed when the land came under the protection of § 761.11 or 30 U.S.C. 1272(e).

(4) Valid existing rights exist under paragraphs (a) and (b) of this definition.

*We, us, and our* refer to the Office of Surface Mining Reclamation and Enforcement.

*You and your* refer to a person who claims or seeks to obtain an exception or waiver authorized by § 761.11 or 30 U.S.C. 1272(e).

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 Office of Management and Budget (OMB) has approved the information collection requirements of this part. The OMB clearance number is 1029-0111. 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 30 U.S.C. 1272(e). 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) We estimate that the public reporting and recordkeeping burden for this part will average 15 hours per response under § 761.13, 0.5 hour per response under § 761.14, 2 hours per response under § 761.15, 14 hours per response under § 761.16, 2 hours per response under § 761.17(c), and 2 hours per response under § 761.17(d), 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 § 761.16 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, N.W., Washington, DC

20503. Please refer to OMB Control Number 1029-0111 in any correspondence.

11. Sections 761.11 and 761.12 are revised and new §§ 761.13 through 761.17 are added to read as follows:

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

You may not conduct surface coal mining operations on the following lands unless you either have valid existing rights, as determined under § 761.16, or qualify for the exception for existing operations under § 761.12:

(a) Any lands within the boundaries of:

(1) The National Park System;  
(2) The National Wildlife Refuge System;

(3) The National System of Trails;  
(4) The National Wilderness Preservation System;

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

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

(b) Any Federal lands within a national forest. This prohibition does not apply 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:

(1) Any surface operations and impacts will be incident to an underground coal mine; or

(2) 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.* This provision does not apply to the Custer National Forest.

(c) Any lands where the operation would adversely affect any publicly owned park or any place in the National Register of Historic Places. This prohibition does not apply if, as provided in § 761.17(d), the regulatory authority and the Federal, State, or local agency with jurisdiction over the park or place jointly approve the operation.

(d) Within 100 feet, measured horizontally, of the outside right-of-way line of any public road. This prohibition does not apply:

(1) Where a mine access or haul road joins a public road, or

(2) When, as provided in § 761.14, 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:

(i) Providing public notice and opportunity for a public hearing; and

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

(e) Within 300 feet, measured horizontally, of any occupied dwelling. This prohibition does not apply when:

(1) The owner of the dwelling has provided a written waiver consenting to surface coal mining operations within the protected zone, as provided in § 761.15; or

(2) The part of the operation to be 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.

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

(g) Within 100 feet, measured horizontally, of a cemetery. This prohibition does not apply if the cemetery is relocated in accordance with all applicable laws and regulations.

#### **§ 761.12 Exception for existing operations.**

The prohibitions and limitations of § 761.11 do not apply to:

(a) Surface coal mining operations for which a valid permit, issued under Subchapter G of this chapter or an approved State regulatory program, exists when the land comes under the protection of § 761.11. This exception applies only to lands within the permit area as it exists when the land comes under the protection of § 761.11.

(b) With respect to operations subject to Subchapter B of this chapter, lands upon which validly authorized surface coal mining operations exist when the land comes under the protection of 30 U.S.C. 1272(e) or § 761.11.

#### **§ 761.13 Procedures for compatibility findings for surface coal mining operations on Federal lands in national forests.**

(a) If you intend to rely upon the exception provided in § 761.11(b) to conduct surface coal mining operations on Federal lands within a national forest, you must request that we obtain the Secretarial findings required by § 761.11(b).

(b) You may submit a request to us before preparing and submitting an application for a permit or boundary

revision. If you do, you must explain how the proposed operation would not damage the values listed in the definition of "significant recreational, timber, economic, or other values incompatible with surface coal mining operations" in § 761.5. You must include a map and sufficient information about the nature of the proposed operation for the Secretary to make adequately documented findings. We may request that you provide any additional information that we determine is needed to make the required findings.

(c) When a proposed surface coal mining operation or proposed boundary revision for an existing surface coal mining operation includes Federal lands within a national forest, the regulatory authority may not issue the permit or approve the boundary revision before the Secretary makes the findings required by § 761.11(b).

#### **§ 761.14 Procedures for relocating or closing a public road or waiving the prohibition on surface coal mining operations within the buffer zone of a public road.**

(a) This section does not apply to:

(1) Lands for which a person has valid existing rights, as determined under § 761.16.

(2) Lands within the scope of the exception for existing operations in § 761.12.

(3) Access or haul roads that join a public road, as described in § 761.11(d)(1).

(b) You must obtain any necessary approvals from the authority with jurisdiction over the road if you propose to:

(1) Relocate a public road;

(2) Close a public road; or

(3) Conduct surface coal mining operations within 100 feet, measured horizontally, of the outside right-of-way line of a public road.

(c) Before approving an action proposed under paragraph (b) of this section, the regulatory authority, or a public road authority that it designates, must determine that the interests of the public and affected landowners will be protected. Before making this determination, the authority must:

(1) Provide a public comment period and opportunity to request a public hearing in the locality of the proposed operation;

(2) If a public hearing is requested, publish appropriate advance notice at least two weeks before the hearing in a newspaper of general circulation in the affected locality; and

(3) Based upon information received from the public, make a written finding

as to whether the interests of the public and affected landowners will be protected. If a hearing was held, the authority must make this finding within 30 days after the hearing. If no hearing was held, the authority must make this finding within 30 days after the end of the public comment period.

#### **§ 761.15 Procedures for waiving the prohibition on surface coal mining operations within the buffer zone of an occupied dwelling.**

(a) This section does not apply to:

(1) Lands for which a person has valid existing rights, as determined under § 761.16.

(2) Lands within the scope of the exception for existing operations in § 761.12.

(3) Access or haul roads that connect with an existing public road on the side of the public road opposite the dwelling, as provided in § 761.11(e)(2).

(b) If you propose to conduct surface coal mining operations within 300 feet, measured horizontally, of any occupied dwelling, the permit application must include a written waiver by lease, deed, or other conveyance from the owner of the dwelling. The waiver must clarify that the owner and signator had the legal right to deny mining and knowingly waived that right. The waiver will act as consent to surface coal mining operations within a closer distance of the dwelling as specified.

(c) If you obtained a valid waiver before August 3, 1977, from the owner of an occupied dwelling to conduct operations within 300 feet of the dwelling, you need not submit a new waiver.

(d) If you obtain a valid waiver from the owner of an occupied dwelling, that waiver will remain effective against subsequent purchasers who had actual or constructive knowledge of the existing waiver at the time of purchase. A subsequent purchaser will be deemed to have constructive knowledge if the waiver has been properly filed in public property records pursuant to State laws or if surface coal mining operations have entered the 300-foot zone before the date of purchase.

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

(a) *Basic framework for valid existing rights determinations.* The following table identifies the agency responsible for making a valid existing rights determination and the definition that it must use, based upon which paragraph of § 761.11 applies and whether the request includes Federal lands.

Paragraph of § 761.11 that provides protection	Protected feature	Type of land to which request pertains	Agency responsible for determination	Applicable definition of valid existing rights
(a) .....	National parks, wildlife refuges, etc..	Federal .....	OSM .....	Federal <sup>1</sup>
(a) .....	National parks, wildlife refuges, etc..	Non-Federal .....	Regulatory authority .....	Federal <sup>1</sup>
(b) .....	Federal lands in national forests <sup>3</sup> .	Federal .....	OSM .....	Federal <sup>1</sup>
(c) .....	Public parks and historic places.	Does not matter .....	Regulatory authority .....	Regulatory program <sup>2</sup>
(d) .....	Public roads .....	Does not matter .....	Regulatory authority .....	Regulatory program <sup>2</sup>
(e) .....	Occupied dwellings .....	Does not matter .....	Regulatory authority .....	Regulatory program <sup>2</sup>
(f) .....	Schools, churches, parks, etc..	Does not matter .....	Regulatory authority .....	Regulatory program <sup>2</sup>
(g) .....	Cemeteries .....	Does not matter .....	Regulatory authority .....	Regulatory program <sup>2</sup>

<sup>1</sup> Definition in 30 CFR 761.5.

<sup>2</sup> Definition in applicable State or Federal regulatory program under 30 CFR Chapter VII, Subchapter T.

<sup>3</sup> Neither 30 U.S.C. 1272(e) nor 30 CFR 761.11 provides special protection for non-Federal lands within national forests. Therefore, this table does not include a category for those lands.

(b) *What you must submit as part of a request for a valid existing rights determination.* You must submit a request for a valid existing rights determination to the appropriate agency under paragraph (a) of this section if you intend to conduct surface coal mining operations on the basis of valid existing rights under § 761.11 or wish to confirm the right to do so. You may submit this request before preparing and submitting an application for a permit or boundary revision for the land, unless the applicable regulatory program provides otherwise.

(1) *Requirements for property rights demonstration.* You must provide a property rights demonstration under paragraph (a) of the definition of valid existing rights in § 761.5 if your request relies upon the good faith/all permits standard or the needed for and adjacent standard in paragraph (b) of the definition of valid existing rights in § 761.5. This demonstration must include the following items:

- (i) A legal description of the land to which your request pertains.
- (ii) Complete documentation of the character and extent of your current interests in the surface and mineral estates of the land to which your request pertains.
- (iii) A complete chain of title for the surface and mineral estates of the land to which your request pertains.
- (iv) A description of the nature and effect of each title instrument that forms the basis for your request, including any provision pertaining to the type or method of mining or mining-related surface disturbances and facilities.
- (v) A description of the type and extent of surface coal mining operations that you claim the right to conduct, including the method of mining, any mining-related surface activities and facilities, and an explanation of how

those operations would be consistent with State property law.

(vi) Complete documentation of the nature and ownership, as of the date that the land came under the protection of § 761.11 or 30 U.S.C. 1272(e), of all property rights for the surface and mineral estates of the land to which your request pertains.

(vii) Names and addresses of the current owners of the surface and mineral estates of the land to which your request pertains.

(viii) If the coal interests have been severed from other property interests, documentation that you have notified and provided reasonable opportunity for the owners of other property interests in the land to which your request pertains to comment on the validity of your property rights claims.

(ix) Any comments that you receive in response to the notification provided under paragraph (b)(1)(viii) of this section.

(2) *Requirements for good faith/all permits standard.* If your request relies upon the good faith/all permits standard in paragraph (b)(1) of the definition of valid existing rights in § 761.5, you must submit the information required under paragraph (b)(1) of this section. You also must submit the following information about permits, licenses, and authorizations for surface coal mining operations on the land to which your request pertains:

(i) Approval and issuance dates and identification numbers for any permits, licenses, and authorizations that you or a predecessor in interest obtained before the land came under the protection of § 761.11 or 30 U.S.C. 1272(e).

(ii) Application dates and identification numbers for any permits, licenses, and authorizations for which you or a predecessor in interest submitted an application before the land

came under the protection of § 761.11 or 30 U.S.C. 1272(e).

(iii) An explanation of any other good faith effort that you or a predecessor in interest made to obtain the necessary permits, licenses, and authorizations as of the date that the land came under the protection of § 761.11 or 30 U.S.C. 1272(e).

(3) *Requirements for needed for and adjacent standard.* If your request relies upon the needed for and adjacent standard in paragraph (b)(2) of the definition of valid existing rights in § 761.5, you must submit the information required under paragraph (b)(1) of this section. In addition, you must explain how and why the land is needed for and immediately adjacent to the operation upon which your request is based, including a demonstration that prohibiting expansion of the operation onto that land would unfairly impact the viability of the operation as originally planned before the land came under the protection of § 761.11 or 30 U.S.C. 1272(e).

(4) *Requirements for standards for mine roads.* If your request relies upon one of the standards for roads in paragraphs (c)(1) through (c)(3) of the definition of valid existing rights in § 761.5, you must submit satisfactory documentation that:

(i) The road existed when the land upon which it is located came under the protection of § 761.11 or 30 U.S.C. 1272(e), and you have a legal right to use the road for surface coal mining operations;

(ii) A properly recorded right of way or easement for a road in that location existed when the land came under the protection of § 761.11 or 30 U.S.C. 1272(e), and, under the document creating the right of way or easement, and under any subsequent conveyances, you have a legal right to use or construct

a road across that right of way or easement to conduct surface coal mining operations; or

(iii) A valid permit for use or construction of a road in that location for surface coal mining operations existed when the land came under the protection of § 761.11 or 30 U.S.C. 1272(e).

(c) *Initial review of request.* (1) The agency must conduct an initial review to determine whether your request includes all applicable components of the submission requirements of paragraph (b) of this section. This review pertains only to the completeness of the request, not the legal or technical adequacy of the materials submitted.

(2) If your request does not include all applicable components of the submission requirements of paragraph (b) of this section, the agency must notify you and establish a reasonable time for submission of the missing information.

(3) When your request includes all applicable components of the submission requirements of paragraph (b) of this section, the agency must implement the notice and comment requirements of paragraph (d) of this section.

(4) If you do not provide information that the agency requests under paragraph (c)(2) of this section within the time specified or as subsequently extended, the agency must issue a determination that you have not demonstrated valid existing rights, as provided in paragraph (e)(4) of this section.

(d) *Notice and comment requirements and procedures.* (1) When your request satisfies the completeness requirements of paragraph (c) of this section, the agency must publish a notice in a newspaper of general circulation in the county in which the land is located. This notice must invite comment on the merits of the request. Alternatively, the agency may require that you publish this notice and provide the agency with a copy of the published notice. We will publish a similar notice in the **Federal Register** if your request involves Federal lands within an area listed in § 761.11(a) or (b). Each notice must include:

(i) The location of the land to which the request pertains.

(ii) A description of the type of surface coal mining operations planned.

(iii) A reference to and brief description of the applicable standard(s) under the definition of valid existing rights in § 761.5.

(A) If your request relies upon the good faith/all permits standard or the needed for and adjacent standard in

paragraph (b) of the definition of valid existing rights in § 761.5, the notice also must include a description of the property rights that you claim and the basis for your claim.

(B) If your request relies upon the standard in paragraph (c)(1) of the definition of valid existing rights in § 761.5, the notice also must include a description of the basis for your claim that the road existed when the land came under the protection of § 761.11 or 30 U.S.C. 1272(e). In addition, the notice must include a description of the basis for your claim that you have a legal right to use that road for surface coal mining operations.

(C) If your request relies upon the standard in paragraph (c)(2) of the definition of valid existing rights in § 761.5, the notice also must include a description of the basis for your claim that a properly recorded right of way or easement for a road in that location existed when the land came under the protection of § 761.11 or 30 U.S.C. 1272(e). In addition, the notice must include a description of the basis for your claim that, under the document creating the right of way or easement, and under any subsequent conveyances, you have a legal right to use or construct a road across the right of way or easement to conduct surface coal mining operations.

(iv) If your request relies upon one or more of the standards in paragraphs (b), (c)(1), and (c)(2) of the definition of valid existing rights in § 761.5, a statement that the agency will not make a decision on the merits of your request if, by the close of the comment period under this notice or the notice required by paragraph (d)(3) of this section, a person with a legal interest in the land initiates appropriate legal action in the proper venue to resolve any differences concerning the validity or interpretation of the deed, lease, easement, or other documents that form the basis of your claim.

(v) A description of the procedures that the agency will follow in processing your request.

(vi) The closing date of the comment period, which must be a minimum of 30 days after the publication date of the notice.

(vii) A statement that interested persons may obtain a 30-day extension of the comment period upon request.

(viii) The name and address of the agency office where a copy of the request is available for public inspection and to which comments and requests for extension of the comment period should be sent.

(2) The agency must promptly provide a copy of the notice required under paragraph (d)(1) of this section to:

(i) All reasonably locatable owners of surface and mineral estates in the land included in your request.

(ii) The owner of the feature causing the land to come under the protection of § 761.11, and, when applicable, the agency with primary jurisdiction over the feature with respect to the values causing the land to come under the protection of § 761.11. For example, both the landowner and the State Historic Preservation Officer must be notified if surface coal mining operations would adversely impact any site listed on the National Register of Historic Places. As another example, both the surface owner and the National Park Service must be notified if the request includes non-Federal lands within the authorized boundaries of a unit of the National Park System.

(3) The letter transmitting the notice required under paragraph (d)(2) of this section must provide a 30-day comment period, starting from the date of service of the letter, and specify that another 30 days is available upon request. At its discretion, the agency responsible for the determination of valid existing rights may grant additional time for good cause upon request. The agency need not necessarily consider comments received after the closing date of the comment period.

(e) *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 (d) of this section, and any other relevant, reasonably available information to determine whether the record is sufficiently complete and adequate to support a decision on the merits of the request. If not, the agency must notify you in writing, explaining the inadequacy of the record and requesting submittal, within a specified reasonable time, of any additional information that the agency deems necessary to remedy the inadequacy.

(2) Once the record is complete and adequate, the responsible agency must determine whether you have demonstrated valid existing rights. The decision document must explain how you have or have not satisfied all applicable elements of the definition of valid existing rights in § 761.5. It must contain findings of fact and conclusions, and it must specify the reasons for the conclusions.

(3) *Impact of property rights disagreements.* This paragraph applies only when your request relies upon one

or more of the standards in paragraphs (b), (c)(1), and (c)(2) of the definition of valid existing rights in § 761.5.

(i) The agency must issue a determination that you have not demonstrated valid existing rights if your property rights claims are the subject of pending litigation in a court or administrative body with jurisdiction over the property rights in question. The agency will make this determination without prejudice, meaning that you may refile the request once the property rights dispute is finally adjudicated. This paragraph applies only to situations in which legal action has been initiated as of the closing date of the comment period under paragraph (d)(1) or (d)(3) of this section.

(ii) If the record indicates disagreement as to the accuracy of your property rights claims, but this disagreement is not the subject of pending litigation in a court or administrative agency of competent jurisdiction, the agency must evaluate the merits of the information in the record and determine whether you have demonstrated that the requisite property rights exist under paragraph (a), (c)(1), or (c)(2) of the definition of valid existing rights in § 761.5, as appropriate. The agency must then proceed with the decision process under paragraph (e)(2) of this section.

(4) The agency must issue a determination that you have not demonstrated valid existing rights if you do not submit information that the agency requests under paragraph (c)(2) or (e)(1) of this section within the time specified or as subsequently extended. The agency will make this determination without prejudice, meaning that you may refile a revised request at any time.

(5) After making a determination, the agency must:

(i) Provide a copy of the determination, together with an explanation of appeal rights and procedures, to you, to the owner or owners of the land to which the determination applies, to the owner of the feature causing the land to come under the protection of § 761.11, and, when applicable, to the agency with primary jurisdiction over the feature with respect to the values that caused the land to come under the protection of § 761.11.

(ii) Publish notice of the determination in a newspaper of general circulation in the county in which the land is located. Alternatively, the agency may require that you publish this notice and provide a copy of the published notice to the agency. We will publish the determination, together with

an explanation of appeal rights and procedures, in the **Federal Register** if your request includes Federal lands within an area listed in § 761.11(a) or (b).

(f) *Administrative and judicial review.* A determination that you have or do not have valid existing rights is subject to administrative and judicial review under §§ 775.11 and 775.13 of this chapter.

(g) *Availability of records.* The agency responsible for processing a request subject to notice and comment under paragraph (d) of this section must make a copy of that request available to the public in the same manner as the agency, when acting as the regulatory authority, must make permit applications available to the public under § 773.13(d) of this chapter. In addition, the agency must make records associated with that request, and any subsequent determination under paragraph (e) of this section, available to the public in accordance with the requirements and procedures of § 840.14 or § 842.16 of this chapter.

**§ 761.17 Regulatory authority obligations at time of permit application review.**

(a) Upon receipt of 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.

(b) The regulatory authority must reject any portion of the application that would locate surface coal mining operations on land protected under § 761.11 unless:

(1) The site qualifies for the exception for existing operations under § 761.12;

(2) A person has valid existing rights for the land, as determined under § 761.16;

(3) The applicant obtains a waiver or exception from the prohibitions of § 761.11 in accordance with §§ 761.13 through 761.15; or

(4) For lands protected by § 761.11(c), both the regulatory authority and the agency with jurisdiction over the park or place jointly approve the proposed operation in accordance with paragraph (d) of this section.

(c) *Location verification.* If the regulatory authority has difficulty determining whether an application includes land within an area specified in § 761.11(a) or within the specified distance from a structure or feature listed in § 761.11(f) or (g), 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:

(i) Include relevant portions of the permit application.

(ii) Provide the agency with 30 days after receipt to respond, with a notice that another 30 days is available upon request.

(iii) Specify that the regulatory authority will not necessarily consider a response received after the comment period provided under paragraph (c)(1)(ii) of this section.

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

(d) *Procedures for joint approval of surface coal mining operations that will adversely affect publicly owned parks or historic places.*

(1) If the regulatory authority determines that the proposed surface coal mining operation will adversely affect any publicly owned park or any place included in the National Register of Historic Places, the regulatory authority must request that the Federal, State, or local agency with jurisdiction over the park or place either approve or object to the proposed operation. The request must:

(i) Include a copy of applicable parts of the permit application.

(ii) Provide the agency with 30 days after receipt to respond, with a notice that another 30 days is available upon request.

(iii) State that failure to interpose an objection within the time specified under paragraph (d)(1)(ii) of this section will constitute approval of the proposed operation.

(2) The regulatory authority may not issue a permit for a proposed operation subject to paragraph (d)(1) of this section unless all affected agencies jointly approve.

(3) Paragraphs (d)(1) and (d)(2) of this section do not apply to:

(i) Lands for which a person has valid existing rights, as determined under § 761.16.

(ii) Lands within the scope of the exception for existing operations in § 761.12.

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

12. The authority citation for part 762 is revised to read as follows:

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

13. Section 762.14 is redesignated as § 762.15 and a new § 762.14 is added to read as follows:

**§ 762.14 Applicability to lands designated as unsuitable by Congress.**

Pursuant to appropriate petitions, lands listed in § 761.11 of this chapter are subject to designation as unsuitable for all or certain types of surface coal mining operations under this part and parts 764 and 769 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 1029–0112. 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 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 per notice, preparation and processing of an application for coal exploration under § 772.12 will require an average of 103 hours per application, compliance with § 772.14 will require an average of 18 hours per application, 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, N.W., Washington, DC 20503. Please refer to OMB Control Number 1029–0112 in any correspondence.

16. Section 772.12 is amended by revising the section heading, adding paragraph (b)(14), revising paragraphs (d)(2)(ii) and (d)(2)(iii), and adding paragraph (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 any lands listed in § 761.11 of this chapter, a demonstration that, to the extent technologically and economically feasible, the proposed exploration activities have been designed to minimize interference with the values for which those lands were designated as unsuitable for surface coal mining operations. The application must include documentation of consultation with the owner of the feature causing the land to come under the protection of § 761.11 of this chapter, and, when applicable, with the agency with primary jurisdiction over the feature with respect to the values that caused the land to come under the protection of § 761.11 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, 16 U.S.C. 470 *et seq.*, 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) With respect to exploration activities on any lands protected under § 761.11 of this chapter, minimize interference, to the extent technologically and economically

feasible, with the values for which those lands were designated as unsuitable for surface coal mining operations. Before making this finding, the regulatory authority must provide reasonable opportunity to the owner of the feature causing the land to come under the protection of § 761.11 of this chapter, and, when applicable, to the agency with primary jurisdiction over the feature with respect to the values that caused the land to come under the protection of § 761.11 of this chapter, to comment on whether the finding is appropriate.

\* \* \* \* \*

**PART 773—REQUIREMENTS FOR PERMITS AND PERMIT PROCESSING**

17. The authority citation for Part 773 is revised to read as follows:

**Authority:** 30 U.S.C. 1201 *et seq.*, 16 U.S.C. 470 *et seq.*, 16 U.S.C. 661 *et seq.*, 16 U.S.C. 703 *et seq.*, 16 U.S.C. 668a *et seq.*, 16 U.S.C. 469 *et seq.*, and 16 U.S.C. 1531 *et seq.*

**§ 773.13 [Amended]**

18. In paragraph (a)(1)(v) of § 773.13, “§ 761.12(d)” is revised to read “§ 761.14”.

19. In § 773.15, paragraph (c)(3)(ii) is revised to read as follows:

**§ 773.15 Review of permit applications.**

\* \* \* \* \*

(c) \* \* \*

(3) \* \* \*

(ii) Not within an area designated as unsuitable for surface coal mining operations under parts 762 and 764 or 769 of this chapter or within an area subject to the prohibitions of § 761.11 of this chapter.

**PART 778—PERMIT APPLICATIONS—MINIMUM REQUIREMENTS FOR LEGAL, FINANCIAL, COMPLIANCE, AND RELATED INFORMATION**

20. The authority citation for Part 778 is revised to read as follows:

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

21. In § 778.16, paragraph (c) is revised to read as follows:

**§ 778.16 Status of unsuitability claims.**

\* \* \* \* \*

(c) An application that proposes to conduct surface coal mining operations within 100 feet of a public road or within 300 feet of an occupied dwelling must meet the requirements of § 761.14 or § 761.15 of this chapter, respectively.

**PART 780—SURFACE MINING PERMIT APPLICATIONS—MINIMUM REQUIREMENTS FOR RECLAMATION AND OPERATION PLAN**

22. The authority citation for part 780 is revised to read as follows:

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

23. In § 780.31, the section heading and paragraph (a)(2) are revised to read as follows:

**§ 780.31 Protection of publicly owned parks and historic places.**

(a) \* \* \*

(2) If a person has valid existing rights, as determined under § 761.16 of this chapter, or if joint agency approval is to be obtained under § 761.17(d) of this chapter, to minimize adverse impacts.

\* \* \* \* \*

**§ 780.33 [Amended]**

24. In § 780.33, “30 CFR 761.12(d)” is revised to read “§ 761.14 of this chapter”.

**PART 784—UNDERGROUND MINING PERMIT APPLICATIONS—MINIMUM REQUIREMENTS FOR RECLAMATION AND OPERATION PLAN**

25. The authority citation for part 784 is revised to read as follows:

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

26. In § 784.17, the section heading and paragraph (a)(2) are revised to read as follows:

**§ 784.17 Protection of publicly owned parks and historic places.**

(a) \* \* \*

(2) If a person has valid existing rights, as determined under § 761.16 of this chapter, or if joint agency approval is to be obtained under § 761.17(d) of this chapter, to minimize adverse impacts.

**§ 784.18 [Amended]**

27. In § 784.18:

a. In the introductory paragraph, “30 CFR 761.12(d)” is revised to read “§ 761.14 of this chapter”; and

b. In paragraph (a), “underground mining activities” is revised to read “surface coal mining operations.”

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**DEPARTMENT OF THE INTERIOR**

**Office of Surface Mining Reclamation and Enforcement**

**30 CFR Part 761**

**RIN 1029–AB82**

**Interpretative Rule Related to Subsidence Due to Underground Coal Mining**

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

**ACTION:** Final rule and record of decision.

**SUMMARY:** The Office of Surface Mining Reclamation and Enforcement interprets sections 522(e) and 701(28) of the Surface Mining Control and Reclamation Act of 1977 and implementing rules to provide that subsidence due to underground mining is not a surface coal mining operation. Subsidence therefore is not prohibited in areas protected under the Act. Neither subsurface activities that may result in subsidence, nor actual subsidence, are prohibited on lands protected by section 522(e). Subsidence is subject to regulation under other applicable provisions of the Surface Mining Control and Reclamation Act of 1977, primarily sections 516 and 720.

**EFFECTIVE DATE:** January 18, 2000.

**FOR FURTHER INFORMATION CONTACT:**

Nancy R. Broderick, Office of Surface Mining Reclamation and Enforcement, Room 210, South Interior Building, 1951 Constitution Avenue, NW, Washington, DC 20240. Telephone: (202) 208–2700. E-mail address: nbroderi@osmre.gov. Additional information concerning OSM, this rule, and related documents may be found on OSM’s home page at <http://www.osmre.gov>.

**SUPPLEMENTARY INFORMATION:**

**Table of Contents**

- I. Background.
  - A. Why is OSM doing this rulemaking?
  - B. What process did OSM use to develop the final rule?
  - C. How is this rule related to the valid existing rights rulemaking?
  - D. What statutory language is OSM interpreting?
    - 1. Prohibition on surface coal mining operations—section 522(e).
    - 2. Definition of surface coal mining operations—section 701(28).
  - E. What other SMCRA provisions are relevant?
    - 1. Surface effects of underground coal mining operations—section 516.
    - 2. Subsidence—section 720.
  - F. What existing regulations are relevant?
    - 1. Provisions implementing SMCRA sections 522(e) and 701(28). Part 740

- 2. Provisions implementing SMCRA sections 516 and 720. Sections 784.20 and 817.121

II. Discussion of Final Rule.

- A. Do the prohibitions of section 522(e) apply to subsidence from underground mining?
- B. What is the rationale for the final rule?
  - 1. Statutory language.
  - 2. Legislative history.
  - 3. Policy considerations.
    - a. This rule resolves questions about our interpretation of statutory provisions.
    - b. This rule balances economic and environmental considerations.
    - c. This rule avoids a regulatory gap.
    - d. This rule balances the interests of surface owners and industry.
    - e. This rule maintains stability in SMCRA implementation.
    - f. This rule promotes safety.
    - g. This rule acknowledges existing property rights.

III. Response to Comments.

- A. SMCRA definition of surface coal mining operations.
  - B. Congressional intent.
  - C. History of interpretation as to applicability of section 522(e) prohibitions to subsidence.
  - D. Regulatory gap—Adequacy of SMCRA protection of 522(e) features from subsidence damage.
  - E. Impacts on underground mining if prohibitions do apply to subsidence.
  - F. Codification of the final rule.
- IV. Procedural Matters.
- A. Executive Order 12866: Regulatory Planning and Review.
  - B. Regulatory Flexibility Act.
  - C. Small Business Regulatory Enforcement Fairness Act.
  - D. Unfunded Mandates Reform Act of 1995.
  - E. Executive Order 12630: Takings.
  - F. Executive Order 13132: Federalism.
  - G. Executive Order 12988: Civil Justice Reform.
  - H. Paperwork Reduction Act.
  - I. National Environmental Policy Act of 1969 and Record of Decision.

**Background**

*A. Why Is OSM Doing This Rulemaking?*

The Surface Mining Control and Reclamation Act of 1977 (Public Law 95–87, 30 U.S.C. 1201 *et seq.*) (SMCRA or the Act) prohibits surface coal mining operations on all lands designated in section 522(e), subject to valid existing rights and except for those operations which existed on August 3, 1977. Lands designated in section 522(e)(1)–(5) include:

- Any lands within the boundaries of units of the National Park System;
- Federal lands within National Forests; publicly owned parks;
- Properties listed on the National Register of Historic Places;
- Buffer zones around public roads, homes, public buildings, schools,