

**FEDERAL REGISTER: 52 FR 2421 (January 22, 1987)**

DEPARTMENT OF THE INTERIOR

AGENCY: Office of Surface Mining Reclamation and Enforcement (OSM)

30 CFR Parts 761 and 784

Intent to Prepare an Environmental Impact Statement and a Regulatory Impact Analysis on;  
Prohibitions to Coal Mining and Valid Existing Rights

**ACTION:** Notice of intent to prepare an environmental impact statement and a preliminary regulatory impact analysis and to hold a scoping meeting.

**SUMMARY:** The Office of Surface Mining Reclamation and Enforcement (OSMRE) has redefined the scope of its proposed environmental impact statement (EIS) and regulatory impact analysis (RIA) on the applicability of the prohibitions set forth in section 522(e) of the Surface Mining Control and Reclamation Act to coal mining operations to include related issues of valid existing rights (VER).

A public meeting will be held to receive comments from interested persons on the scope and significance of issues to be analyzed in the EIS and the RIA. The EIS and the RIA will assist the Secretary of the Interior in making a decision on the proposed rulemakings and related issues.

**DATES:** Written comments: OSMRE will accept written comments on the scope of the EIS and RIA until March 9, 1987.

**Scoping meeting:** OSMRE will hold a public scoping meeting at the location shown in "ADDRESSES." This meeting will begin at 9:00 a.m., February 6, 1987, and will continue until all individuals who want to present information have had an opportunity to do so. Because it is not a hearing, OSMRE will not be using a court reporter. Persons wishing to speak are asked to provide OSMRE with a copy of their comments at the meetings.

**ADDRESS:** Written comments: Hand deliver to the Office of Surface Mining Reclamation and Enforcement, Division of Permit and Environmental Analysis, Room 5111, 1100 L Street, NW., Washington, DC; or mail to the Office of Surface Mining Reclamation And Enforcement, Division of Permit and Environmental Analysis, Room 5111 L, U.S. Department of the Interior, 1951 Constitution Avenue, NW., Washington, DC 20240.

**Scoping meeting:** Room 7000, Main Interior Building, 18th and C Street, NW., Washington, DC.

**FOR FURTHER INFORMATION CONTACT:** Ms. Catherine Roy at the Washington, DC, address listed above (telephone: 202/343-5143).

**SUPPLEMENTARY INFORMATION:**

OSMRE published a notice of intent on April 3, 1985, to conduct rulemaking on the applicability of the prohibitions in section 522(e) (4) and (5) of The Surface Mining Control and Reclamation Act of 1977 (SMCRA) (50 FR 13250). This section prohibits, subject to valid existing rights, surface coal mining operations within certain distances of specified structures or facilities.

On June 19, 1985 (50 FR 25473), OSMRE published a notice of intent to prepare a draft environmental impact statement and a preliminary regulatory impact analysis on the 522(e) rulemaking.

As a result of public comments received during the scoping period on the 522(e) rulemaking EIS, OSMRE has developed the following set of options for consideration:

(1) No Action: Current regulations are adequate to implement the Act. States will continue to interpret 522(e) (4) and (5).

(2) Prohibit all underground mining activities, including underground workings and surface facilities, and any subsidence within areas currently delineated in section 522(e) (4) and (5). Given angle of draw and depth of seam characteristics, this alternative would effectively prohibit mining beyond the protected areas.

(3) Allow underground mining operations within zones currently delineated in section 522 (e) (4) and (5), but prohibit surface facilities and any measurable subsidence in the reasonably foreseeable future.

(4) Allow underground mining operations, but prohibit surface facilities and subsidence causing material damage to protected features and structures within the ones currently delineated in section 522(e) (4) and (5). This alternative could allow mining within the buffer zone, but enough coal would have to be left in place immediately under the protected features and structures to prevent material damage.

(5) Apply the prohibitions of section 522(e) (4) and (5) only to surface facilities related to surface or underground coal mining but not to subsidence effects of underground mining.

As a result of public comment received during the scoping process on the 522(e) (4) and (5) rulemaking, OSMRE has decided to broaden the scope of the EIS and RIA to address the issue of valid existing rights (VER) under 30 CFR 761.5. Section 522(e) of SMCRA establishes certain prohibitions on mining unless a mining company holds "valid existing rights" for the coal underlying the area in question. Surface coal mining operations are prohibited on lands within National Parks, Wildlife Refuges, and Wilderness Areas, and with certain exceptions National Forests, places listed on the National Register of Historic Places, public parks, within 100 feet of cemeteries and public roads, and within 300 feet of occupied dwellings, public buildings, schools, and churches.

OSMRE has promulgated rules to define VER on two occasions. In 1979, VER was defined as those property rights in existence on August 3, 1977, which authorize the applicant to produce coal by a surface coal mining operation and the applicant either had obtained all necessary permits to mine prior to the enactment of SMCRA or can demonstrate that the coal is both needed for, and immediately adjacent to an ongoing operation for which all permits were obtained prior to August 3, 1977. A reviewing court remanded the "all permits" portion of this rule, stating that a good faith attempt to obtain all permits before the August 3, 1977, cutoff date should suffice for meeting the all permits trust (In Re: Permanent Surface Mining Regulation Litigation, No. 79-1144, D.D.C. February 26, 1980).

In 1983, VER was defined to exist when application of the prohibitions in section 522(e) would effect a taking of private property which would entitle the owner to just compensation under the Fifth and Fourteenth amendments to the United States Constitution. The court remanded this rule for further notice and comment (In Re: Permanent Surface Mining Regulation Litigation, No. 79-1144, D.D.C. March 22, 1985).

Possible options for interpreting VER to be addressed in the National Environmental Policy Act process include but are not limited to the following:

(1) VER exists when the person proposing to conduct surface coal mining operations on lands protected by section 522(e) of SMCRA had been validly issued, or had made a good faith effort to obtain, on or before August 3, 1977, all State and Federal permits necessary to conduct such operations on those lands.

(2) VER exists for those property rights in existence on August 3, 1977, that were created by a legally binding conveyance, lease, deed, contract, or other document that establishes a right to the coal resource and authorizes the extraction of coal by the method intended, as determined by the laws of the State in which the property is located.

(3) VER means those property rights, as defined by the laws of the State in which the property is located, that existed on August 3, 1977, for an area protected by section 522(e) of the Act that, if denied, would effect a taking of property that would entitle the person to just compensation under the Fifth and Fourteenth amendments to the United States Constitution.

(4) VER means that for lands listed in section 522(e)(1), i.e., lands within the boundaries of units of the National Park System, National Wildlife Refuge Systems, the National Wilderness Preservation System, the Wild and Scenic Rivers System, including study rivers, and National Recreation Areas, a person proposing to conduct surface coal mining operations had been validly issued, or had made a good faith effort to obtain, on or before August 3, 1977, all State and

Federal permits necessary to conduct such operations on those lands. VER means that for lands and features listed in section 522(e)(2), (3), (4) and (5), i.e., National Forests, publicly owned parks, places included on the National Register of Historic Places, public roads, occupied dwellings, etc., VER will exist for those property rights in existence on August 3, 1977, that were created by a legally binding conveyance, lease, deed, contract, or other document that establishes a right to the coal resource and authorizes the extraction of coal by the method intended, as determined by the laws of the State in which the property is located.

(5) No action.

OSMRE specifically requests comments on the range of actions and environmental impacts associated with the aforementioned issues both individually and collectively and on the specific alternatives that should be evaluated in the EIS and RIA. OSMRE is also interested in any other comments, suggestions, or recommendations the public may have on the various issues involved in this proposed action on the scope of the analyses.

Executive Order 12291 of February 17, 1981, requires that an analysis of proposed regulations be conducted to determine the economic impact of the regulation. In addition, the Regulatory Flexibility Act (*5 U.S.C. 601 et seq.*) requires that, in situations where proposed regulations may have a significant economic effect on a substantial number of small entities, the regulatory authority must prepare a small entity flexibility analysis (SEFA). OSMRE has made a determination that the proposed regulations on the applicability of 522(e) prohibitions to coal mining and on VER are significant within the meaning of Executive Order 12291 and the Regulatory Flexibility Act.

Department of Interior procedures provide that the RIA and the SEFA may be combined into a single document and that the RIA may incorporate the analytical requirements of the Regulatory Flexibility Act. OSMRE will address the requirements of both Executive Order 12291 and the Regulatory Flexibility Act in the RIA.

Dated: January 20, 1987.

Brent Wahlquist, Assistant Director, Program Policy.

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