FEDERAL REGISTER: 53 FR 52942 (December 29, 1988)

DEPARTMENT OF THE INTERIOR
AGENCY: Office of Surface Mining Reclamation and Enforcement (OSM)

30 CFR Parts 772, 815 and 942
Permanent Program Performance Standards -- Coal Exploration;
Tennessee Federal Program -- Requirements for Coal Exploration

ACTION: Final rule.

SUMMARY: The Office of Surface Mining Reclamation and Enforcement (OSMRE) of the U.S. Department of the Interior (DOI) is amending its rules pertaining to coal exploration operations. The amendments require a notice of intent for all coal exploration operations in which 250 tons of coal or less is removed, clarify limitations on commercial use or sale of coal obtained by exploration and clarify which permit information requirements pertain to exploration. The exploration rules for the Tennessee Federal program are also amended to bring them into conformance with the notice requirements adopted herein. The rules for all other Federal program States cross-reference the coal exploration rules at 30 CFR Part 772; therefore all changes to the Federal rules automatically apply in these States.

EFFECTIVE DATE: January 30, 1989.

FOR FURTHER INFORMATION CONTACT: Dr. Fred Block, Office of Surface Mining Reclamation and Enforcement, U.S. Department of the Interior, 1951 Constitution Ave., NW., Washington, DC 20240; Telephone: 202-343-1864 (Commercial or FTS).

SUPPLEMENTARY INFORMATION:

I. BACKGROUND

The Surface Mining Control and Reclamation Act of 1977 (SMCRA), *30 U.S.C. 1201* et seq., at section 512, requires that each State or Federal program ensure that coal exploration operations that substantially disturb the natural land surface are conducted in accordance with exploration rules issued by the regulatory authority. Section 512 of SMCRA sets forth the notice, permit, reclamation, and other requirements for conducting coal exploration operations. In addition to the general requirement to file a notice of intent to conduct coal exploration, the removal of more than 250 tons of coal during exploration requires the specific written approval of the regulatory authority.

The informational requirements for a notice of intent to explore and for an exploration permit are contained in 30 CFR 772.11 and 772.12, and are distinct from the more expansive permit requirements for a surface coal mining operation contained in 30 CFR Parts 773, 777 through 780, and 783 through 785 of the OSMRE regulations. These differing requirements reflect the fact that the definition of surface coal mining operations in section 701(28) of SMCRA excludes coal exploration operations, which are subject to the requirements of section 512 of SMCRA.

OSMRE first promulgated rules establishing general requirements for coal exploration at 30 CFR Part 776, and permanent program performance standards for coal exploration at 30 CFR Part 815, on March 13, 1979 *(44 FR 15311).* These 1979 exploration rules were revised on September 8, 1983 *(48 FR 40622),* and Part 776 was redesignated as Part 772.

Challenges to these 1983 regulations resulted in a court ruling on July 15, 1985, In Re: Permanent Surface Mining Regulation Litigation (II), No. 79-1144, (D.D.C. July 15, 1985) (In Re: Permanent (II)), and a suspension notice was issued by OSMRE on November 20, 1986 *(51 FR 41961).*

On June 22, 1988, OSMRE published in the Federal Register *(53 FR 23532)* a proposed rule to revise the coal exploration notice requirements, to revise various coal exploration permit requirements, to add requirements for approval

of commercial sale or use of coal extracted during exploration for testing purposes, to clarify which permit information requirements pertain to exploration, and to revise the Tennessee Federal Program requirements to conform with the revised rules proposed in the rulemaking.

A public comment period commenced with publication of the proposed rule and ended on August 8, 1988. A public hearing that had been scheduled to be held in Washington, DC on August 1, 1988, was not held because no one requested to testify at the hearing.

II. DISCUSSION OF COMMENTS AND RULES ADOPTED

GENERAL COMMENTS

Twelve sets of comments were received on the proposed rule.

Several commenters expressed general support for the rulemaking, although they included some specific suggestions for improvement that are addressed below. One commenter generally disagreed with the proposed rulemaking, and along with other commenters, commented on specific provisions of the proposed rule, expressing agreement or disagreement and suggesting changes.

One commenter suggested that after the rule is finalized, OSMRE immediately require States, under 30 CFR Part 732, to amend their approved regulatory program regulations to render them no less effective than the new Federal regulations, Another commenter stated that OSMRE should not automatically require State regulatory programs to be revised where such State programs adequately address regulation of coal exploration operations. Following promulgation of this final rule OSMRE will evaluate all permanent State regulatory programs approved under SMCRA as expeditiously as possible to determine whether any changes in these programs will be necessary. If the Director determines that certain State program provisions should be amended to make them no less effective than the revised Federal rules, the individual states will be notified according to the provisions of 30 CFR 732.17.

One commenter stated that except for the narrative and map revisions, the proposed rules were meant to address isolated activities in perhaps two states, which should be addressed within the states where the problems occur. OSMRE disagrees with the commenter. Revised national standards pertaining to coal exploration are necessary to ensure application of minimum national standards for control of the potential harmful effects from coal exploration activities.

The U.S. Department of Agriculture Forest Service requested that the role of the Forest Service, or other land management agency, be recognized and acknowledged in authorizing exploration on lands under their jurisdiction. OSMRE's promulgation of revised exploration regulations at 30 CFR Part 772 does not limit or affect in any way the role and authority of the Forest Service to impose its own requirements to control or limit exploration operations on lands under its jurisdiction.

SECTION 772.11(a) - NOTICE REQUIREMENTS FOR EXPLORATION; REMOVING 250 TONS OR LESS OF COAL

Final Section 772.11(a) is promulgated as proposed except that the proposed requirement that the provisions of Section 772.14 apply to exploration under a notice of intent has not been adopted. Paragraph (a) requires any person who conducts coal exploration operations where 250 tons or less of coal are removed to file a notice of intention to explore. Previous Section 772.11(a) required a notice only for those operations which may substantially disturb the natural land surface. That rule was challenged in the District Court of the District of Columbia and was remanded on the grounds that OSMRE had failed to explain adequately its departure from the previous rule or to address adequately the concerns raised by commenters. In Re: Permanent Surface Mining Regulation Litigation (II), No. 79-1144 (D.D.C. July 15, 1985) (In Re: Permanent (II)).

Three commenters supported the reinstatement of the notice requirement for all exploration operations. One stated that the operator should not be in the position to determine whether he is regulated or not. One said that to maintain administrative control over exploration operations OSMRE should adopt the proposed requirement that operators notify the regulatory authority of all exploration where coal will be removed. This commenter further stated that OSMRE should exempt the collection of environmental baseline data from the notice requirement unless the land is substantially

disturbed. One commenter opposed the proposed requirement for a notice of intent for all exploration stating that "[a]ccepted canons of statutory interpretations dictate that the requirements of Section 512(a) [of SMCRA], including notice, pertain only to coal exploration which substantially disturbs the land," and that this was properly reflected in the 1983 rule. The commenter said that section 512(c) supports this interpretation since it only subjects exploration which substantially disturbs the surface to the penalty provisions of section 518.

In promulgating the final rule, OSMRE has considered the practical problems raised by the remanded rule, namely that for the regulatory authority to determine which proposed coal exploration operations may substantially disturb the natural land surface it must be informed of all proposed exploration. OSMRE has determined that coal exploration operators should not be in a position of making a determination of whether their operations substantially disturb the natural land surface and that the regulatory authority has the responsibility for making that determination. For effective monitoring and enforcement, the regulatory authorities should be informed of all exploration occurring within their jurisdictions, including exploration for environmental baseline data, and this can best be accomplished through notification by all who intend to explore.

As proposed, final Section 772.11(a) provides that any person who intends to conduct coal exploration on lands designated as unsuitable for surface coal mining operations under Subchapter F, Areas Unsuitable for Mining, must apply for and receive an exploration permit under Section 772.12. This revision does not change or add any regulatory requirement, but will alert anyone contemplating exploration on such lands that the requirements of Section 772.12 apply, including the requirement that prior written approval be obtained from the regulatory authority, regardless of the tonnage to be removed.

One commenter expressed disapproval of the provision allowing coal exploration in areas that have been designated unsuitable for surface coal mining operations. OSMRE wishes to make clear that this is not a new regulatory proposal but merely a reiteration of the existing requirement in 30 CFR 772.12(a) that such exploration must have prior written approval from the regulatory authority.

Final Section 772.11(a) further states that exploration under a notice of intent shall be subject to the compliance requirements prescribed under Section 772.13. The proposed provision that exploration under a notice of intent would be subject to the limitations on commercial sale or commercial use of coal obtained by exploration prescribed under Section 772.14 has not been adopted.

As pointed out by one commenter, 30 CFR 700.11(a)(2) exempts from the requirements for a permit for surface coal mining operations, "the extraction of 250 tons of coal or less by a person conducting a surface coal mining operation." Therefore, it would not be reasonable to require a person conducting coal exploration under a notice of intent to obtain a permit for a surface coal mining operation before commercial use or sale of 250 tons or less of coal.

The addition of the cross-reference to Section 772.13 does not change or add, as one commenter understood it, any requirement, but merely clarifies the applicability of an existing requirement.

One commenter stated that the notice requirement fails to incorporate the statutory distinction which subjects only those activities which substantially disturb the surface to the reclamation provisions under SMCRA and suggested the addition of a new paragraph under Section 772.11 to provide clarification. Sections 772.13 and 815.1 clearly provide that the standards of Part 815 apply only to those operations which substantially disturb the surface. Therefore, no paragraph need be added to Section 772.11 to this effect.

SECTION 772.11(b)(3) - NARRATIVE OR MAP IN A COAL EXPLORATION NOTICE.

Previous Section 772.11(b)(3) required either "a narrative or map" as part of a notice of intent to explore under Section 772.11. The rule was challenged on the basis that it did not require a narrative description of the exploration area in all instances. The court found that either a map or a narrative would meet the statutory requirement of a "description" of the exploration area as required in section 512(a)(1) of SMCRA, but determined that the map provisions of Section 772.11(b)(3) were not specific enough to satisfy the requirements of SMCRA. In Re: Permanent (II), July 15, 1985 Mem. op. at 139-140.

As proposed and adopted, Section 772.11(b)(3) continues to require either a narrative or a map describing the exploration area in a notice of intent to explore. In compliance with the court's ruling, this final rule defines the minimal information to be shown when a map is submitted in a notice of intent. Such maps must be at a scale of 1:24,000 or larger, and include the proposed area of exploration, the general location of drill holes and trenches, existing and proposed roads, occupied dwellings, topographic features, bodies of surface water, and pipelines. OSMRE believes that these additional requirements satisfy the court's concerns that the regulation explain the level of detail to be provided in a map which serves as the description of an exploration area.

One commenter supported the continuation of the rule that provided the option to provide a narrative or a map. Another commenter supported the proposed map detail and further recommended that the detail set out in Section 772.11(b)(3) should also apply to the narrative which has no specified level of detail. Although the final rule continues to provide the option of a narrative or a map for coal exploration notices of intent, OSMRE does not agree that the rule need contain any greater specificity for the narrative option, and will leave to the regulatory authority the determination of whether the narrative description sufficiently defines the proposed exploration.

One commenter stated that for accuracy and legibility, all maps should be required to be produced by the U.S. Geological Survey. OSMRE does not agree that the regulations should require the submittal of a map from a specific provider. OSMRE does agree that any materials submitted by an operator to the regulatory authority should be accurate and legible, but it is not necessary to include such a requirement in these regulations. The regulatory authority is responsible for requiring submission of legible materials.

The commenter also suggested that the map requirements for notices should be identical to those for permits. OSMRE disagrees. SMCRA recognizes two levels of exploration activity by requiring written approval from the regulatory authority where more than 250 tons of coal would be removed. Accordingly, the regulations contain differing levels of detail for a permit requiring prior approval as opposed to a notice requiring no prior approval.

Two commenters suggested that the applicant should be required to provide all reasonably available knowledge and information about the exploration site. OSMRE believes that the exploration regulations contain sufficient detail to allow the regulatory authority to effectively monitor and enforce exploration operations and to review and determine the appropriateness of the proposed exploration and the subsequent reclamation.

Another commenter suggested that narratives and maps as well as any other relevant existing resource information, be provided in an exploration notice. This comment is not accepted because OSMRE agrees with Judge Flannery's 1980 decision on this issue specifically stating that OSMRE could not require both a narrative and a map (In Re: Permanent Surface Mining Regulation Litigation, No. 79-1144, (D.D.C. May 16, 1980)). In his 1985 decision, Judge Flannery affirmed his earlier opinion and clarified that either a narrative or a map would meet the statutory definition of a description of the exploration area as required by Section 512 of SMCRA (In Re: Permanent (II), supra).

Three commenters objected to the inclusion of "drill hole locations" in the map included with an exploration notice. The commenters stated that in some cases drill hole locations are not known in advance, since they will depend on results obtained from previous drill holes or other discoveries in the field. OSMRE recognizes that the exact drill hole locations will not always be known beforehand. Therefore, the final rule language has been modified to require the general location of drill holes on the map.

SECTION 772.12 - PERMIT REQUIREMENTS FOR EXPLORATION REMOVING MORE THAN 250 TONS OF COAL, OR OCCURRING ON LANDS DESIGNATED AS UNSUITABLE FOR SURFACE COAL MINING OPERATIONS.

The headnote for Section 772.12 is amended in this final rule for clarity at the suggestion of two commenters to indicate that any exploration which occurs on lands designated as unsuitable for surface coal mining operations is subject to the permit provisions of Section 772.12. Lands designated as unsuitable includes lands designated unsuitable under SMCRA section 522(a) and those designated by Congress under section 522(e). The final rule, as proposed, adds a statement to Section 772.12(a) to provide that exploration conducted outside a permit area during which more than 250 tons of coal is removed or which will take place on lands designated as unsuitable for mining, will be subject to the requirements of Sections 772.13 and 772.14. This revision does not add or change any regulatory requirement, but only clarifies existing requirements.

Two commenters stated that this rulemaking added the requirement to obtain an exploration permit for exploration in all section 522(e) areas, regardless of tonnage. Two other commenters stated that the permit requirement for exploration in all section 522(e) areas is not justified and OSMRE should exempt the permit requirement for the collection of environmental baseline data on lands designated unsuitable under Section 761.11(d)-(g), unless the land is substantially disturbed. Two other commenters recognized the existing requirement for a permit for any exploration on unsuitable areas regardless of tonnage and stated that OSMRE should not change the requirement.

OSMRE wishes to make clear that existing exploration regulations in Section 772.12(a) already contain the requirement for an exploration permit for all exploration in unsuitable areas regardless of tonnage removed and no change to it was proposed. This rulemaking only provides clarification that such exploration shall be subject to Sections 772.13 and 772.14.

SECTION 772.12(b)(3) - NARRATIVE IN A COAL EXPLORATION PERMIT APPLICATION.

As proposed and adopted, Section 772.12(b)(3) requires that a narrative describing the exploration area be included in an exploration permit application. The option to provide a map describing the proposed exploration area instead of a narrative is deleted. Previous Section 772.12(b)(3), which required a narrative or map to describe the exploration area, was challenged and remanded in In Re: Permanent II for the same reason that Section 772.11(b)(3) was remanded, namely that the map provisions of Section 772.12(b)(3) were not specific enough to satisfy section 512(a) of SMCRA which requires a description of the exploration area. However, the court in 1980 also ruled that either a narrative or a map, but not both, could serve as a description of the exploration area. On the basis of the court ruling that either a narrative or a map, but not both, could serve as a description of the exploration area, OSMRE has decided to require a narrative for that purpose. It is not necessary under Section 772.12(b)(3) to provide for an optional narrative or map since either is sufficient.

One commenter stated that the rule as proposed required a narrative and a map of the exploration area and that OSMRE has not adequately explained the rationale for deleting the narrative or map option. The commenter referred to the existing map requirement under Section 772.12(b)(12) and to the preamble to the proposed rule which stated that the map required under Section 772.12(b)(12) would include the essential features that would be required to satisfy the court requirement concerning Section 772.12(b)(3). If the map under (b)(12) is adequate to meet the requirements of Section 772.12(b)(3), the commenter asked why then is a narrative also needed. The commenter said that OSMRE should (1) allow for either a narrative or the map under Section 772.12(b)(12); (2) delete the requirement at Section 772.12(b)(3) for a narrative; or (3) limit the required narrative to areas not substantially disturbed (not covered by the map required in Section 772.12(b)(12)).

Although there is an existing map requirement included in Section 772.12(b)(12), and it is thus correct that the revised rules require a narrative and map, only the narrative is required to provide a description of the exploration area. The purpose of the map, which existing Section 772.12(b)(12) continues to require, is to show the areas of land to be disturbed by the proposed exploration and reclamation. Thus, as the court stated, the map under (b)(12) may not be the same as the map to describe the area of proposed exploration in accordance with Section772.12(b)(3). Under the existing requirements of Section 772.12(b)(12), an application for an exploration permit must include a map showing the locations of all areas to be disturbed by exploration, and specifically showing existing roads, occupied dwellings, topographic, and hydrologic features, roads and structures to be constructed, the location of land excavations, exploration holes, etc. Exploratory surveying and sampling areas that would not cause land to be disturbed would not necessarily be included on the map. Any geochemical, soil, water, vegetation, or other sampling and survey activities must be included in the narrative description of the exploration area.

One commenter suggested that the narrative requirement of Section 772.12(b)(3) must contain greater detail and must include all reasonably available information, as the narrative has no specified level of detail. OSMRE does not believe it is necessary to require any specific detail for a narrative, and will leave to the regulatory authority the determination of whether the narrative description sufficiently defines the proposed exploration.

SECTIONS 772.12 (b)(14) and (d)(2)(iv) - EXPLORATION IN AREAS UNSUITABLE FOR SURFACE COAL MINING OPERATIONS UNDER SECTION 522(E)(1) OF SMCRA.

The revisions proposed at Section 772.12 (b)(14) and (d)(2)(iv) have not been adopted. Proposed Section 772.12 (b)(14) would have required that an application for a permit for exploration activities within an area covered by Section 761.11(a) contain documentation that the person has valid existing rights to conduct surface coal mining operations in the area. Proposed Section 772.12 (d)(2)(iv) would have required that the regulatory authority shall, prior to approval of exploration in areas covered by 30 CFR 761.11(a), find in writing that the exploration will be conducted by or on behalf of a person who possesses valid existing rights to conduct surface coal mining operations within the proposed exploration area.

A number of commenters supported the proposed requirement for VER to obtain a permit to explore on SMCRA section 522(e)(1) (Section 761.11(a)) areas.

Two commenters took the position that there should be no exploration within any section 522(e) areas without proof of VER, and the proposed prohibition should be extended to all section 522(e) areas. One noted that the preamble failed to give any reason for the distinction between section 522(e)(1) areas and areas protected by section 522 (e)(2) through (e)(5). The commenters stated that unlike section 522(a)(1) of SMCRA, section 522(e) does not explicitly provide that exploration on section 522(e) areas is allowed. One said that had Congress intended the section 522(e) areas to be subject to exploration, it would have so provided in SMCRA. The commenter also stated that section 522(e) of SMCRA expressly bans surface coal mining operations subject to VER, but not subject to coal exploration, and the only exploration allowed by SMCRA on unsuitable lands is on areas designated pursuant to a petition filed under section 522(a).

One commenter expressed general support for the proposed requirement for VER prior to exploration in section 522(e)(1) areas and noted that the proposed rulemaking would have an immediate effect in the New River Gorge National River (NRGNR), a unit of the National Park System in southern West Virginia. The commenter referred to public testimony in the hearing records of the Subcommittee on Mining and Natural Resources of the House Committee on Interior and Insular Affairs, expressing concern over a number of coal exploration activities taking place in the NRGNR. The commenter viewed surface mining of any type or degree as an inappropriate land use activity for national park unit lands, but said that SMCRA properly recognizes the concept of valid existing rights to mine on those lands.

Two other commenters referenced problems with coal exploration activities in the NRGNR in West Virginia, and expressed the belief that the proposed rule would help to resolve those problems.

One commenter stated that the VER requirement is not supported by SMCRA, and OSMRE has never interpreted section 522(e) to require VER prior to exploration. The commenter noted that the definition of surface coal mining operations in SMCRA section 701(28) excludes coal exploration operations subject to section 512 of SMCRA and that the SMCRA prohibitions in section 522(e) apply only to surface coal mining operations. The commenter stated that the proposal to require VER prior to exploration was an unauthorized attempt to amend SMCRA by regulation. The commenter objected to the VER requirement and suggested that alternatives other than the proposed rule changes exist to address concerns of the National Park Service (NPS), such as closer coordination and consultation, and that the VER requirement is unreasonable because there is no discussion or consideration of such alternatives.

One commenter stated that the biggest problem is that a new VER rule has not yet been proposed and that rule would have much bearing on the applicability of the proposed VER requirement of the exploration rule. The commenter said that the VER definition has a tremendous bearing on the applicability of the proposed rule in national park and other 522(e) areas.

OSMRE has carefully reviewed and analyzed all of these comments and has considered the effects of future VER rulemaking activities on the proposed requirement to show VER to explore on section 522(e)(1) areas. Section 522(e) of SMCRA prohibits, subject to valid existing rights, surface coal mining operations except those which existed on the date of enactment of SMCRA, on lands designated in section 522 (e)(1) through (e)(5). The definition of surface coal mining operations in section 701(28) of SMCRA excludes coal exploration subject to section 512 of SMCRA. Therefore, there is merit to the argument that SMCRA does not ban exploration in these areas rather than the commenter's analysis that because specific language relating to exploration appears in section 522(a) of SMCRA, the absence of similar language in

section 522(e) means that exploration is prohibited in areas covered by section 522(e). By its own terms, section 522(e) seems to be a prohibition which applies only to surface coal mining operations, and not to exploration. No need would exist to create an exception to allow exploration if the section does not apply to exploration. Although it is not clear why specific language was included in section 522(a) precluding unsuitability designations under that paragraph from preventing coal exploration under such designation, Congress may have included such language for clarity following a process to allow designations of "all or certain types" of surface coal mining operations. It is not necessary, however, to determine conclusively the meaning of section 522(a) to interpret section 522(e).

Notwithstanding these or other arguments for or against the prohibition of exploration in section 522(e) areas absent a showing of VER, OSMRE finds that a forthcoming promulgation of a new definition of VER is a significant factor that must be considered in the context of the proposed VER requirement for exploration in section 522(e)(1) areas. Until a new definition of VER is promulgated, the applicability of the proposed VER requirement for exploration cannot be clearly predicted. Therefore, OSMRE has determined that it would not be appropriate at this time to promulgate a VER requirement for exploration within section 522(e)(1) areas. When a new VER rule is promulgated, OSMRE will reconsider the issue of whether a person conducting exploration operations within section 522(e)(1) areas should be required to demonstrate VER prior to conducting such exploration.

The following additional comments pertain to the proposal to require VER for coal exploration of section 522(e)(1) areas.

One commenter stated that there is "virtually no justification for proving the existence of coal reserves on section 522(e) lands, when further surface mining permits will be denied." OSMRE does not fully agree with the commenter. There are instances when there may be compelling reasons to explore when surface mining permits may be denied. Mineral valuation may legitimately be necessary for reasons other than pre-development such as for acquisition purposes or to allow assessment of potential "takings" claims.

One commenter stated that it is unclear whether the proposed rule requires VER for all exploration in section 522(e)(1) areas (less and more than 250 tons) and said it should not apply for 250 tons or less. Another commenter strongly supported the proposed rule's application of the permit requirement to lands that have been designated unsuitable, regardless of tonnage. The requirement for VER to explore on section 522(e)(1) areas has not been adopted, as discussed above; therefore these comments are moot.

Another commenter suggested that the regulations could be improved by clarifying that the NPS should be routinely consulted on all surface disturbances within 300 feet of park boundaries and in park boundary adjustments pending in Congress. These comments are beyond the scope of this rulemaking. This rulemaking only addressed exploration in section 522(e)(1) areas with respect to NPS lands.

Another commenter stated that OSMRE should revise Section 772.12 to eliminate "excess tonnage" (more than 250 tons) permits in section 522(e) areas even if VER is proved. OSMRE disagrees with the commenter because eliminating exploration permits allowing removal of more than 250 tons in those areas would prevent those operators from conducting exploration as provided for by section 512 of SMCRA.

The commenter also stated that the proposed rule ignores revision to Section 762.14, which, in the commenter's view, is the source for allowing exploration in section 522(e) areas. OSMRE disagrees. Section 762.14 concerns exploration on lands in a State that have been designated unsuitable under the petition process described in section 522(a)(1) of SMCRA. Section 522(a)(1) of SMCRA expressly allows exploration on these areas.

One commenter questioned what actions OSMRE will take with respect to State adoption of final rules, once the proposed VER requirement was adopted but before all States were in compliance. The VER requirement has not been adopted in this final rule, as discussed above.

One commenter stated that there must be public input into the VER determination, and a right to challenge. The procedures for determination of valid existing rights is an entirely separate process unrelated to this rulemaking; thus the comment is not relevant to this final rule.

One commenter requested reassurance that until a new VER definition is promulgated, OSMRE would not process VER applications within units of the National Park System in States that use a "takings" standard. The Federal Register notice which established this policy *(51 FR 41955,* November 20, 1986) is unaffected by this rulemaking. Another commenter said that the proposed exploration rule changes would extend this policy to VER determinations for exploration purposes in National Park System units where a "takings" standard applies. The proposed VER requirement for exploration is not adopted.

One commenter suggested that for clarity the heading of Section 772.12(d) be modified to indicate that section 522(e)(1) areas are included. As proposed, the heading for Section 772.12(d) has been modified to be sufficiently general as to include these areas.

SECTION 772.14 - COMMERCIAL USE OR SALE.

Section 772.14 is adopted as proposed except for certain changes as discussed below. Section 772.14 is retitled "Commercial Use or Sale" and is expanded to include the commercial use of coal in addition to the sale of coal. Commercial use of coal encompasses those activities which provide a commercial benefit to the person conducting the exploration or another, such as when the owner of a power generating plant conducts coal exploration directly or when exploration is conducted on behalf of the power plant owner through an agent or subsidiary company and the coal is used in the power generating plant.

Paragraph 772.14(a) provides that except as provided under Sections 772.14(b) and 700.11(a)(5), any person who intends to commercially use or sell coal extracted during exploration under an exploration permit shall first obtain a surface coal mining and reclamation operations permit.

One commenter stated that the cross-reference under Section 772.14(a) should properly refer only to Section 700.11(a)(5) and not to all of Section 700.11(a). Section 700.11(a)(5) provides the specific exemption from Chapter VII requirements, for coal exploration on lands subject to the requirements of 43 CFR Parts 3480-3487. As suggested, final Section 772.14(a) refers to Section 700.11(a)(5).

Another commenter stated that it is unclear whether Section 772.14 applies to exploration where 250 tons of coal or less is removed. The commenter stated that the reference to Section 700.11(a) implies that the requirement to obtain a surface coal mining permit does not apply to exploration removing less than 250 tons even if it is commercially sold or used. The commenter recommended that it should not apply, and asked that clarification be provided.

OSMRE agrees with the commenter. Section 700.11(a)(2) provides that extraction of 250 tons or less of coal by a person conducting a surface coal mining operation is exempt from the requirements of 30 CFR Chapter VII. It would not be reasonable to require written approval for commercial sale or use under Section 772.14 if less than 250 tons of coal were removed, since under Section 700.11(a)(2) no permit is required for a surface coal mining operation removing 250 tons or less. OSMRE has deleted the language that would have required a permit to conduct surface coal mining operations for the sale or use of coal extracted under a notice of intent to explore, to clarify that Section 772.14 applies only to coal exploration operations removing more than 250 tons or occurring on lands designated unsuitable for mining.

Two commenters stated that they were in favor of the proposed information requirements. One said that abuse of exploration permits "undercuts legitimate mining activities and threatens the creation of unreclaimed areas mined under sham exemptions for which no bond is available to conduct reclamation."

One commenter referred to proposed revisions to Section 772.13 governing commercial sale or use of coal. This rule does not contain any revisions to Section 772.13 nor does that section concern commercial use or sale.

Paragraph 772.14(b) provides that with the prior approval of the regulatory authority, no permit to conduct surface coal mining operations is required for the sale or commercial use of coal extracted during exploration under an exploration permit if the sale or use is for coal testing purposes only. The application shall demonstrate that the coal testing is necessary for the development of a future surface coal mining and reclamation operation for which a surface coal mining operations permit application will be submitted in the near future, and that commercial use or sale is solely for the purposes of testing the coal. The proposed words "and reclamation" are deleted from the phrase "surface coal mining and reclamation operations permit application" in the final rule. This is not a substantive change, as this is merely

a descriptive term for a surface coal mining operations permit under 30 CFR Part 773 as distinct from a coal exploration permit. Final Section 772.14(b) adopts as proposed the requirements for specific information that must be met for approval of such testing. The rule has been edited from the proposed language to eliminate unnecessary repetition.

One commenter was concerned that exceptions would be made in the application of the commercial sale and use restrictions. The commenter stated that the proposed rule allows exceptions at the discretion of the regulatory authority. OSMRE disagrees that the rule allows exceptions. Prior written approval of the regulatory authority is required under an exploration permit for any commercial sale or use of more than 250 tons of coal extracted without a permit to conduct surface coal mining operations.

One commenter stated that Section 772.14(b) would appear to limit the testing exemption to new coal operations since the proposed rule language referred to the "development" of a mining operation. The commenter said that existing operations should qualify for this exemption if it is necessary to conduct exploration off the permit area where existing operations may expand into unpermitted reserves. OSMRE does not agree that the rule language limits this exemption to new operations. The word "development" does not necessarily refer only to new operations.

Two commenters were concerned that the tonnage of coal used for approved testing may be subject to abuse and that strict recordkeeping is needed. OSMRE expects that any person extracting coal during exploration for a text burn will be able to demonstrate compliance with the terms of the approval. Such a demonstration would have to be from competent sources, including, for instance, records of the end user and the person performing the extraction. OSMRE does not believe, however, that the regulations should specify recordkeeping requirements for these provisions, but will leave any tracking or the imposition of recordkeeping requirements to the regulatory authority.

One commenter stated that the preamble of the proposed rule did not explain the "concern about abuses" to justify the new requirements and that the reasonableness of the new rule cannot be properly evaluated without such information. The commenter said that OSMRE should evaluate specific instances which raised concerns and seek solutions through the State program. OSMRE's evaluation of exploration operations has shown that in several cases, approved testing under an exploration permit appears to be an early start-up of mining rather than exploration to determine whether the coal would be suitable for commercial purposes. Exploration operations have also been approved which allow activities not envisioned by SMCRA, such as commercial sale of coal removed from exploration operations under the pretense that the coal is needed for testing. OSMRE has determined that the previous regulations do not require the applicant to provide sufficient information and assurances to enable the regulatory authority to establish whether the extraction of coal for commercial sale is necessary for testing purposes. OSMRE believes that revised national standards are necessary to ensure application of minimum standards to control the potential harmful effects of exploration activities.

Section 772.14(b)(1) requires that the application contain the name of the firm at which the coal will be tested and the locations for testing.

Section 772.14(b)(2) requires that if the coal is sold directly to or commercially used directly by the intended end user, the end user shall submit a statement that provides: the specific reasons for the test, including why the coal may be so different from the intended user's other coal supplies as to require the testing; the amount of coal necessary for the test and why a lesser amount is not sufficient; and a description of the specific tests that will be conducted.

As proposed, Section 772.14(b)(3) requires that if the coal is sold indirectly to the intended end user through an agent or broker, the agent or broker must submit the statement as described above. In the final rule, proposed paragraph (b)(3) has been incorporated in paragraph (b)(2), to avoid unnecessary repetition.

The information required to be submitted under Section 772.14(b)(2) includes a statement from the intended end user (e.g. a utility) or his/her agent or broker on the coal being tested, as independent verification of the need for testing and the kind of testing necessary. The rule recognizes that in some cases, such as when the coal is to be exported, a broker obtains the coal for an end-user. This rule allows a broker to verify the validity of the testing at either the end-user's facilities or at an appropriate other location. Typically, a coal broker assembles a test shipment by blending coal from various sources to suit the end-user's needs, and a test burn or other test may be needed to verify the coal quality and/or suitability for such shipments. Such testing of coal could be considered appropriate under this rule. The required documentation on the need for the testing provided by a broker acting for an end-user, could also be considered sufficient.

One commenter stated that the proposed rule was ambiguous on testing, and that the rule implies that the exemption for testing will only apply to tests for qualitative properties of the coal. The commenter noted that test burns may be necessary to determine the coal's compatibility with the customer's boiler specifications, or suitability for blending with other coals, rather than just to determine quality of the coal. OSMRE agrees with the commenter that test burns are sometimes required for determinations other than the quality of the coal. Testing for purposes of Section 772.14(b) is considered by OSMRE to include valid test burns that are required by the end-user, but only in an amount necessary to evaluate the coal's compatibility with boiler or other technical specifications or to determine properties of the coal.

Final paragraph (b)(3), proposed as paragraph (b)(4), requires that the application also contain evidence that sufficient reserves of coal are available to the person conducting exploration, or its principals, for future commercial use or sale to the intended end user to demonstrate that the amount of coal to be removed is not the total reserve, but is a sampling of a larger reserve. The phrase "or its principals" was added to recognize that in some situations the person conducting the exploration may be an agent of another.

Final paragraph (b)(4), proposed as paragraph (b)(5), requires the application to contain an explanation as to why other means of exploration, such as core drilling, are not adequate to determine the quality of the coal and/or the feasibility of future surface coal mining operations. The words "prospecting or" which preceded the word "exploration" in the proposed rule, do not appear in the final rule because "prospecting" is not defined, and, as intended, is a subset of exploration.

The intent of these new requirements is to continue to allow valid testing, while eliminating practices whereby testing is used as a means to circumvent the prohibition of commercial use or sale of coal obtained during exploration. Any exploration operation which sells or uses coal commercially without a valid testing approval shall be in violation of these rules, unless a permit for a surface coal mining and reclamation operation is first obtained.

30 CFR PART 815 -- PERMANENT PROGRAM PERFORMANCE STANDARDS -- COAL EXPLORATION

SECTION 815.2 - PERMITTING INFORMATION

As proposed, OSMRE adds new Section 815.2 to clarify the extent of the information required to be submitted in an application for an exploration permit. The performance standards for coal exploration at 30 CFR 815.15 currently contain requirements which cross-reference certain requirements in 30 CFR Part 816. The cross-referenced rules in Part 816 contain further cross references to permit application requirements for surface coal mining operations and, in particular, to those at 30 CFR Part 780. However, the cross-referenced permit application requirements are intended for surface coal mining operations and need not be applied to exploration operations because of the much more limited nature and scope of exploration activity.

The need for more careful specification of exploration permitting information was recently demonstrated by an administrative appeal to an exploration permit issued to Chatham Coal Co. The appeal alleged that the regulatory authority failed to require the Part 780 permitting information cross-referenced by the exploration performance standards. The Administrative Law Judge's decision held that, as written, the cross-referenced permit information requirements which were in question applied to coal exploration. Chatham County v. OSMRE, No. NX 7-1-A (August 24, 1987).

New Section 815.2 states that notwithstanding cross-references in other parts which may be otherwise construed, Part 772 establishes the permit information requirements for coal exploration. As a result of the addition of this provision, the cross-references to the surface coal mining permit application requirements in Part 816 (which are cross-referenced in the exploration performance standards in 30 CFR 815.15) do not apply to exploration permits. However, the cross-references to the 816 standards still apply except to the extent that they reference plans contained in 30 CFR Part 780. Thus, OSMRE is deleting the perceived applicability of the surface coal mining permit application requirements to exploration operation.

One commenter supported the addition of Section 815.2, and suggested that the language added under new Section 815.2 should also be added to Section 772.1, scope and purpose. OSMRE does not agree that the language need appear in both places and has not adopted the commenter's suggestion.

Another commenter stated that the proposed Section 815.2 necessitates a demonstration in Part 772 of how SMCRA section 512(a)(2) standards will be met. The commenter said that absent such a demonstration the proposed rule created a void in the preapproval information requirements, which must be filled in by requiring the application to demonstrate that the exploration will be conducted in conformance with Part 816 standards, applicable through Part 815. The commenter's assertion that proposed Section 815.2 created a void in the preapproval information requirements is incorrect. Permit application information requirements for exploration permits are set forth in 30 CFR 772.12(b). Section 772.12(b) establishes a numerous information requirements which provide the regulatory authority with sufficient data to make an informed decision on the application. In particular, Section 772.12(b)(10) requires an applicant to submit a description of the measures to be used to comply with the applicable requirements of Part 815. If an applicant's submittal is inadequate, the regulatory authority may always require the submission of additional information.

30 CFR PART 942 -- TENNESSEE

SECTION 942.772 - REQUIREMENTS FOR COAL EXPLORATION IN THE FEDERAL PROGRAM FOR TENNESSEE

The Tennessee Federal program, promulgated on October 1, 1984 *(49 FR 38874),* added a provision to the coal exploration rules for Tennessee at 30 CFR 942.772(b) requiring that any person who intends to use mechanized earth moving equipment or explosives to conduct coal exploration activities must file a written notice of intent with OSMRE. This provision is in addition to the requirements of 30 CFR 772.11(a) requiring a written notice of intention to explore from a person intending to conduct coal exploration activities that may substantially disturb the natural land surface. The additional provision in the Tennessee program rules was added to aid enforcement and because the use of mechanized earth moving equipment or explosives is a fairly reliable indicator that substantial disturbance would be likely to occur during exploration. However, those provisions could be less effective than this final rule, which requires all who would explore for 250 tons or less of coal to file a notice of intent. Therefore, the exploration rules for the Tennessee Federal program are revised to make them consistent with the final rules adopted for 30 CFR Part 772.

As proposed and adopted, Section 942.772(a) states that Part 772 of this chapter, Requirements for Coal Exploration, shall apply to any person who conducts or seeks to conduct coal exploration operations in Tennessee. Previous Section 942.772(b) is removed and replaced by a provision which provides consistency with the exploration application processing provisions contained in the other Federal programs for States. Final Section 942.772(b) provides that OSMRE shall make every effort to act on an exploration application within 60 days of its receipt, or such longer time as may be reasonably required, and OSMRE will notify the applicant if additional time is needed to complete the review, setting forth the reasons for the additional time that is needed.

III. PROCEDURAL MATTERS

Effect in Federal Program States

The rules under 30 CFR Parts 772 and 815 apply, through cross-referencing, in those States with Federal programs. These include California, Georgia, Idaho, Massachusetts, Michigan, North Carolina, Oregon, Rhode Island, South Dakota, Tennessee and Washington. The Federal programs for these States appear at 30 CFR Parts 905, 910, 912, 921, 922, 933, 937, 939, 941, 942 and 947, respectively.

Effects on State Programs

Upon promulgation of this final rule, OSMRE will evaluate permanent State regulatory programs approved under section 503 of SMCRA to determine whether any changes in these programs will be necessary. If the Director determines that certain State program provisions should be amended in order to be made no less effective than the revised Federal rules, the individual States will be notified in accordance with the provisions of 30 CFR 732.17.

Federal Paperwork Reduction Act

The collection of information contained in this rule have been approved by the Office of Management and Budget under *44 U.S.C. 3501* et seq. and assigned clearance number 1029-0033. Public reporting burden for this information is estimated to average 6.2 hours per response under 30 CFR Part 772, including the time for 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 this collection of information,

including suggestions for reducing the burden, to: Information Collection Clearance Officer, 1951 Constitution Avenue NW., Washington, DC 20240; and the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503.

Executive Order 12291 and Regulatory Flexibility Act

The U.S. Department of the Interior (DOI) has determined that this proposed rule is not a major rule under the criteria of Executive Order 12291 (February 17, 1981) and certifies that it will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act, *5 U.S.C. 601* et seq.

The rule does not distinguish between small and large entities. The economic effects of the rule are estimated to be minor and no incremental effects are anticipated as a result of the rule.

National Environmental Policy Act

OSMRE has prepared a final environmental assessment (EA), and has made a finding that the rules adopted in this rulemaking will not significantly affect the quality of the human environment under section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), *42 U.S.C. 4332*(2)(C). A finding of no significant impact (FONSI) has been approved for the final rule in accordance with OSMRE procedures under NEPA. The EA is on file in the OSMRE Administrative Record at the address specified previously (see "ADDRESSES").

Author

The principal author of this rule is Dr. Fred Block, Branch of Federal and Indian Programs, Office of Surface Mining Reclamation and Enforcement, 1951 Constitution Avenue NW., Washington, DC 20240; Telephone: 202-343-1864 (Commercial or FTS).

LIST OF SUBJECTS

30 CFR Part 772

Reporting and recordkeeping requirements, Surface mining, Underground mining.

30 CFR Part 815

Reporting and recordkeeping requirements, Surface mining.

30 CFR Part 942

Intergovernmental relations, Reporting and recordkeeping requirements, Surface mining, Underground mining.

Accordingly, 30 CFR Parts 772, 815 and 942 are amended as set forth below:

Dated: November 21, 1988.
James E. Cason, Deputy Assistant Secretary, Land and Minerals Management.

PART 772 -- REQUIREMENTS FOR COAL EXPLORATION

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

Authority: *30 U.S.C. 1201* et seq., as amended; *16 U.S.C. 470* et seq.; and Pub. L. 100-34.

2. Section 772.11 is amended by revising paragraphs (a) and (b)(3) to read as follows:

SECTION 772.11 - NOTICE REQUIREMENTS FOR EXPLORATION REMOVING 250 TONS OF COAL OR LESS.

(a) Any person who intends to conduct coal exploration operations outside a permit area during which 250 tons or less of coal will be removed, shall, before conducting the exploration, file with the regulatory authority a written notice of intention to explore. Exploration which will take place on lands designated as unsuitable for surface coal mining

operations under Subchapter F of this chapter, shall be subject to the permitting requirements under Section 772.12. Exploration conducted under a notice of intent shall be subject to the requirements prescribed under Section 772.13.

(b) The notice shall include --

* * * * *

(3) A narrative describing the proposed exploration area or a map at a scale of 1:24,000, or greater, showing the proposed area of exploration and the general location of drill holes and trenches, existing and proposed roads, occupied dwellings, topographic features, bodies of surface water, and pipelines;

* * * * *

3. Section 772.12 is amended by revising the section heading, revising paragraphs (a) and (b)(3); and revising the heading for paragraph (d); to read as follows:

SECTION 772.12 - PERMIT REQUIREMENTS FOR EXPLORATION REMOVING MORE THAN 250 TONS OF COAL, OR OCCURRING ON LANDS DESIGNATED AS UNSUITABLE FOR SURFACE COAL MINING OPERATIONS.

(a) Exploration permit. Any person who intends to conduct coal exploration outside a permit area during which more than 250 tons of coal will be removed or which will take place on lands designated as unsuitable for surface mining under Subchapter F of this chapter, shall, before conducting the exploration, submit an application and obtain written approval from the regulatory authority in an exploration permit. Such exploration shall be subject to the requirements prescribed under Sections 772.13 and 772.14.

(b) Application information.

* * * * *

(3) A narrative describing the proposed exploration area.

* * * * *

(d) Decisions on applications for exploration. * * *

4. Section 772.14 is revised to read as follows:

SECTION 772.14 - COMMERCIAL USE OR SALE.

(a) Except as provided under Sections 772.14(b) and 700.11(a)(5), any person who intends to commercially use or sell coal extracted during coal exploration operations under an exploration permit, shall first obtain a permit to conduct surface coal mining operations for those operations from the regulatory authority under Parts 773 through 785 of this chapter.

(b) With the prior written approval of the regulatory authority, no permit to conduct surface coal mining operations is required for the sale or commercial use of coal extracted during exploration operations if such sale or commercial use is for coal testing purposes only. The person conducting the exploration shall file an application for such approval with the regulatory authority. The application shall demonstrate that the coal testing is necessary for the development of a surface coal mining and reclamation operation for which a surface coal mining operations permit application is to be submitted in the near future, and that the proposed commercial use or sale of coal extracted during exploration operations is solely for the purpose of testing the coal. The application shall contain the following:

(1) The name of the testing firm and the locations at which the coal will be tested.

(2) If the coal will be sold directly to, or commercially used directly by, the intended end user, a statement from the intended end user, or if the coal is sold indirectly to the intended end user through an agent or broker, a statement

from the agent or broker. The statement shall include:

(i) The specific reason for the test, including why the coal may be so different from the intended user's other coal supplies as to require testing;

(ii) the amount of coal necessary for the test and why a lesser amount is not sufficient; and

(iii) a description of the specific tests that will be conducted.

(3) Evidence that sufficient reserves of coal are available to the person conducting exploration or its principals for future commercial use or sale to the intended end user, or agent or broker of such user identified above, to demonstrate that the amount of coal to be removed is not the total reserve, but is a sampling of a larger reserve.

(4) An explanation as to why other means of exploration, such as core drilling, are not adequate to determine the quality of the coal and/or the feasibility of developing a surface coal mining operation.

PART 815 -- PERMANENT PROGRAM PERFORMANCE STANDARDS -- COAL EXPLORATION

5. The authority citation for Part 815 is revised to read as follows:

Authority: *30 U.S.C. 1201* et seq., as amended; and Pub. L. 100-34.

6. Section 815.2 is added to read as follows:

SECTION 815.2 - PERMITTING INFORMATION.

Notwithstanding cross-references in other parts which may be otherwise construed, Part 772 establishes the notice and permit information requirements for coal exploration.

SUBCHAPTER T -- PROGRAMS FOR THE CONDUCT OF SURFACE MINING OPERATIONS WITHIN EACH STATE

PART 942 -- TENNESSEE

7. The authority citation for Part 942 is revised to read as follows:

Authority: *30 U.S.C. 1201* et seq., as amended; and Pub. L. 100-34.

8. Section 942.772 is revised to read as follows:

SECTION 942.772 - REQUIREMENTS FOR COAL EXPLORATION.

(a) Part 772 of this chapter, Requirements for Coal Exploration, shall apply to any person who conducts or seeks to conduct coal exploration operations.

(b) The Office shall make every effort to act on an exploration application within 60 days of receipt or such longer time as may be reasonable under the circumstances. If additional time is needed, the Office shall notify the applicant that the application is being reviewed, but that more time is necessary to complete such reviews, setting forth the reasons and the additional time that is needed.

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