I N T E R O F F I C E  M E M O R A N D U M

Date: 02-Mar-1999 07:28am EST
From: David Hogeman
HOGEMAN.DAVID
Dept: Mining and Reclamation
Tel No: (717) 787-4761

Original: 1924
McGinley
Copies: Harris
Sandusky
Wyatte

TO: Hobart Baker ( BAKER.HOBART )
TO: Milton McCommons ( MCCOMMONS.MILTON )

CC: Roderick Fletcher ( FLETCHER.RODERICK )
CC: Sharon Freeman ( FREEMAN.SHARON )

Subject: FWD: FW: Comments on Mining Regulations 25 Pa. Code, Chapter

Bud - please address these comments as well.
Mick - based on the Bulletin notice, an acknowledgement of these comments is required within 2 working days. Please coordinate this with Sharon.
Thanks.

I N T E R O F F I C E  M E M O R A N D U M

Date: 01-Mar-1999 04:33pm EST
From: Freeman, Sharon
Freeman.Sharon@dep.state.pa.us
Dept:
Tel No:

TO: HOGEMAN DAVID ( HOGEMAN.DAVID@A1.dep.state.pa.us@PMD

Subject: FW: Comments on Mining Regulations 25 Pa. Code, Chapter 86

Dave - not sure how I got this, but here they are in case you didn't receive it.

Sharon
-----Original Message-----
From: Tom Struthers [mailto:tstruthe@johnmilnerassociates.com]
Sent: Monday, March 01, 1999 2:59 PM
To: David Hogeman
Subject: Comments on Mining Regulations 25 Pa. Code, Chapter 86

March 1, 1999

Comment

David C. Hogeman
Bureau of Mining and Reclamation
Rachel Carson State Office Building
400 Market Street
5th Floor
Harrisburg, PA 17101-2301

Re: Surface and Underground Coal Mining Regulations
25 Pa. Code, Chapter 86

Dear Mr. Hogeman:

We are writing to express our opposition to the Draft Final Rulemaking for Surface and Underground Mining. We represent John Milner Associates, Inc., a Pennsylvania business specializing in historic preservation.

As pointed out by the comments of the Pennsylvania Historical and Museum Commission, the proposed changes to Chapter 86 reduce the consideration afforded the Commonwealth's historic and archeological resources. In some instances, the proposed changes directly conflict with federal regulations implementing Section 106 of the National Historic Preservation Act. (The proposed changes fail to meet their stated purpose, "to enhance the consistency with the language used in federal regulations.")

Although the decreased environmental protection proposed in the changes

to Chapter 86 may benefit some segments of the mining industry over the short term, it will have long term, detrimental consequences for the many businesses associated with the recreation and tourism industries, including Pennsylvania's rapidly growing heritage tourism industry.

We urge you to revise the proposed changes to Chapter 86 in accordance with the detailed comments provided by the Pennsylvania Historical and Museum Commission and to enhance, not reduce, environmental protection for the benefit of all businesses and people of Pennsylvania.

Thank you for considering our comments.

Sincerely

JOHN MILNER ASSOCIATES, INC.

Daniel G. Roberts
Vice President and Director,
Associate Director,
Cultural Resources Department

droberts@johnmilnerassociates.com

Thomas L. Struthers
Vice President and
Cultural Resources Department

tstruthe@johnmilnerassociates.com

RFC-822-headers:
Received: from gatekeeper.pader.gov by PADER.GOV (PMDF V5.1-12 #D3533)
 with SMTP id <01J8BK8FFZYE9OFME5@PADER.GOV> for HOGEMAN.DAVID@a1.pader.gov;
 Mon, 1 Mar 1999 15:30:50 EDT
Received: by gatekeeper.pader.gov; (5.65v3.2/1.3/10May95) id AA24805; Mon,
 01 Mar 1999 15:36:36 -0500
Received: by erexecimcs01.pader.gov with Internet Mail Service (5.5.2448.0)
 id <GDL0NTVQ>; Mon, 01 Mar 1999 15:33:34 -0500
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JMA

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**John Milner Associates, Inc.**
**535 North Church Street**
**West Chester, PA 19380**
**Tel. (610) 436-9000**

e-mail

# Tri-State Citizens Mining Network

March 2, 1999
551 Pittsburgh Rd.
W. Brownsville, PA 15417

Mr. David C. Hogeman
Bureau of Mining and Reclamation
Department of Environmental Protection
Rachel Carson State Office Building
400 Market Street, 5th Floor
Harrisburg, PA 17101

Original: 1924
McGinley
Copies: Harris
Sandusky
Wyatte



Dear Mr. Hogeman:

The following comments address the proposed changes as found in the Draft Final Rulemaking for Surface and Underground Mining (25 PA Code, Chapter 86) as published in the Pennsylvania Bulletin January 30, 1999:

Pennsylvania has a good Areas Unsuitable for Mining Program which has worked well in protecting vital water and other resources. In general, we feel that the proposed changes as outlined in the advance notice of final rulemaking will diminish the effectiveness of the program. The Federal Surface Mining Control and Reclamation Act (SMCRA) was meant to establish minimally acceptable base standards. As states developed primacy programs, they were permitted to adapt the standards to meet their particular needs as long as base standards were met. The mining Legislative Task Force (of which I was a member) established the Pennsylvania program with specific intent to protect watersheds and other important natural resources. We should not be weakening our standards simply to "ease the regulatory burden." Our first priority should be to have the strongest procedures in place.

Current efforts to reduce the oversight authority of the federal Office of Surface Mining contribute to states attempting to lower their standards. Citizens of the Commonwealth deserve the highest standards in the protection of our natural resources.

We are particularly concerned with the changes proposed which would remove underground surface mining activity from being eligible for designation as Unsuitable for Mining. With coal production coming predominantly from underground mines (and an even higher percentage predicted for the future), it is increasingly important to consider the harmful potentials of underground mining.

In the draft proposal, all reference to underground mining (i) through (v) in the definition of Valid Existing Richts has been eliminated and replaced with the rights which exist under the federal definition of VER in 30 CFA, Section 761.5. The eliminated points were not identical to the OSM rule in CFR, Section 761.5, but that section does include underground coal mining which "...either conducted on the surface....or disturb the surface, air or water resources of the area...."

Sec. Seif's cover letter to the draft proposal makes the claim that this change will make the definition consistent with the equivalent federal legal interpretation and also with the interpretation in the federal proposed rulemaking on Section 522(e) of SMCRA. But even if, for underground mining, the areas unsuitable designation were not applicable to 522(e) (an absolute prohibition), it does not follow that 522(a) or CFR 761.5 (d) as in petitions for Unsuitable for Mining could be eliminated.

Those referenced federal rules do not clearly eliminate underground mining activity from consideration for petitions for underground mining. Nor does the proposed rulemaking change those provisions. The proposal specifically says subsidence effects of underground mining cannot be considered automatically for 522(e)categories. 522(e) does not speak to water resources. However, 522(a) and clearly in CFR 761.5(d) include underground mining. OSM has not eliminated those sections.

OSM has not been clear or consistent in addressing "Areas Unsuitable for Mining." This is obvious in the famous "M" opinion of the Dept. of Interior solicitor. Pennsylvania should not be basing its rules on shaky federal proposals.

Other Areas of Concern in the Proposed Rulemaking:

Definitions - Fragile Lands. Insertion of "significantly" into the phrase "resources that could be ...damaged or destroyed" should be withdrawn. It would weaken this definition significantly. Also, in the same definition, buffer zones should be retained. Such zones are always desirable and often critical in protection of resources.

Definitions - Public Park. Eliminating non-profit organization owned land from protection is not right. If they are dedicated to public recreational use, they should be treated as parks. They are "public lands" regardless of who owns them.

Definitions - Surface Mining Operations. Again removing reference to underground coal mining is inappropriate. SMCRA applies to both surface and underground mining. Does the Department imply here that surface activities of underground mining will no longer be regulated?

Sec. 86.102. Areas where mining is prohibited or limited. (3) "on or eligible for inclusion" has been eliminated. This would be defiance of Federal law.

Sec. 86.012 (9)(11) The word "current" needs to be inserted before "owner." We would make the same comment on (iii) and on 86.103 (d).

86.103 (e). As stated above, the important issue is protection of the park or place - not who owns it. Also, changing may adversiely affect to will might eliminate notification of appropriate agencies.

(2) (i). Up to 60-day extension would be more realistic.

(2) (ii). Should be reworded to "approval or disapproval" shall be given by appropriate agency.

86.121 (5). Definition of person having an interest implies petitioner's interest is not substantial. Petitioner should not have the burden of proof - that should rest with mining interest seeking development.
Adding "serious merit" to definition of "frivolous petition is unnecessary. The review process whill determine merit.

86.124. Procedures.

We strongly oppose substituting the Department for EQB's traditional role in the Designation process. EQB is an independent body and reaches a wider public. Since the Board will rule on final recommendation, it sould also preside as the hearing forum.

Thank you for your consideration of our comments.

Sincerely,

Wyona S. Coleman

Wyona S. Coleman, Chair
Tri-State Citizens Mining Network

and Chair
Mining Committee, Pennsylvania
Chapter Sierra Club

**Pennsylvania Coal Association**
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GEORGE ELLIS
President

Original: 1924
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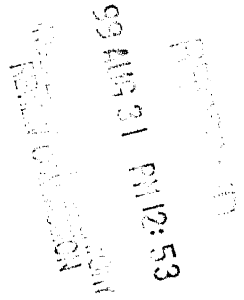
March 2, 1999



Mr. David C. Hogeman
Chief, Division of Environmental Analysis and Support
Pa. Dep't of Environmental Protection
P.O. Box 2063
Harrisburg, PA 17105-2063

*Re: Advanced Notice of Final Rulemaking, 25 Pa. Code Chapter 86 -- Areas Unsuitable for Mining (January 30, 1999* Pennsylvania Bulletin*)*

Dear Mr. Hogeman:

The Pennsylvania Coal Association (PCA) submits the following comments on the above-referenced rulemaking (the "ANFR").

**General Comment**

PCA supports the regulatory changes proposed in the ANFR as generally consistent with Executive Order 1996-1, the Regulatory Basics Initiative ("RBI"), the federal Surface Mining Conservation and Reclamation Act ("SMCRA") and state laws governing surface and underground coal mining.

**Specific Comments**

*Section 86.1 -- Definitions*

*Surface mining operations* -- PCA supports the revised definition, which is consistent with state and federal law, regulations and policy and the Regulatory Basics Initiative. The definition in the ANFR is well supported by authority, including the U.S. Department of Interior Solicitor's opinion and the legislative history on which that opinion is founded.

Adopting a different interpretation than that put forth in the ANFR would render meaningless much of the Bituminous Mine Subsidence and Land Conservation Act ("the Subsidence Act") -- including the amendments made by Act 54 of 1994. This would obviously be inconsistent with the express and specific intent of the legislature, which

unanimously enacted the detailed provisions contained in Act 54, and which has specifically addressed the effects of subsidence from underground mining for more than three decades under the Subsidence Act. These issues have also been specifically addressed by Congress in the 1992 Energy Policy Act amendments to SMCRA, thus solidifying the definition's conformance to Congressional intent and common sense.

*Section 86.102(9)(iii) -- Areas where mining is prohibited or limited*

PCA supports the revision to this subsection, in accordance with the recommendation of the Mining and Reclamation Advisory Board. The revised language addresses the concerns raised by members of the MRAB.

*Section 86.121 -- Areas EXEMPT FROM DESIGNATION AS unsuitable for surface mining operations.*

PCA supports the reorganization and clarification contained in this section; however, subsection (2) should conclude with ". . . *OR* THE BITUMINOUS MINE SUBSIDENCE AND LAND CONSERVATION ACT . . ." Surface mining operations will not usually be issued under all of these statutes, and changing "and" to "or" clarifies this fact.

Thank you for your consideration of these comments. Please feel free to contact me if you have any questions.

Sincerely,

Michael G. Young
Director of Regulatory Affairs

# National Citizens' Coal Law Project

A Project of the Kentucky Resources Council, Inc.
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Original: 1924
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March 2, 1999

David C. Hogeman
PADEP Bureau of Mining & Reclamation
Rachel Carson State Office Building
400 Market Street 5th Floor
Harrisburg PA 17101-2301

By e-mail & first-class mail

Re: Proposed Amendments
25 Pennsylvania Code Chapter 86
Subchapters A and D
Regulatory Basics Initiative

To Whom It May Concern:

The National Citizens Coal Law Project, a project of the non-profit Kentucky Resources Council, Inc., dedicated to providing legal assistance to coalfield individuals and groups concerning the full and fair implementation of the 1977 Surface Mining Control and Reclamation Act, has been asked to review and comment on the proposed revisions to Chapter 86. The comments follow a general discussion of the scope and standard for review.

The Commonwealth of Pennsylvania is a "state regulatory authority" within the meaning of 30 U.S.C. 1253 of SMCRA, Section 503, and as such has been delegated primary regulatory responsibility for implementation of the approved "state program" for the Commonwealth of Pennsylvania.

The state laws and regulations which comprise the approved state program cannot be altered without approval by the federal Office of Surface Mining Reclamation and Enforcement, and in the administration, interpretation and implementation of the state program, the Commonwealth is obligated to conform to those federal laws and regulations.

A state which has achieved primary regulatory responsibility for implementation of the permanent program for regulation of surface coal mining and reclamation operations has a continuing responsibility to "implement, administer, enforce, and maintain [the approved State program] in accordance with the Act, this Chapter, and the provisions of the approved State program." 30 CFR 733.11.

Where a state proposes to amend the provisions of the approved State regulatory program, it must first submit those changes to the appropriate field office of the Office of

Surface Mining Reclamation and Enforcement (OSM) for review and approval. 30 CFR 732.17. Changes to a statute or regulation that is contained in the approved state program are among those changes which must be handled as program amendments. 30 CFR 732.17(b)(3).

For obvious reasons, no state program change is to be implemented *prior* to approval of the proposed amendment by OSM. 30 CFR 732.17(g) ("No such change to laws or regulations shall take effect for purposes of a State program until approved as an amendment.") Thus, as an interim matter and unless and until the proposed state program amendment is approved by OSM, the Commonwealth of Pennsylvania, Department for Environmental Resources (PADER) should refrain from implementation of any of the proposed program changes.

The standard for review of a proposed state statutory change is established in the regulations implementing Section 503(a) of SMCRA. Section 503(a)(1) of SMCRA demands that the state law provide "for the regulation of surface coal mining and reclamation operations in accordance with the requirements of this Act" and 503(a)(7) requires similarly that the regulations adopted under the approved state program be "consistent with regulations issued by the Secretary pursuant to this Act." Thus, the state statutes must be "in accordance with" and "consistent with" SMCRA; a term which is defined to mean "with regard to the Act, the State laws and regulations are no less stringent than, meet the minimum requirements of, and include all applicable provisions of the Act." With regard to the Secretary's regulations, the State law and regulations must be "no less effective than the Secretary's regulations in meeting the requirements of the Act." 30 CFR 730.5.

The preamble to the final rule clarifying the standard of review, 46 FR 53375 at 84 (October 28, 1981) explained that in reviewing any state program laws or regulations for compliance as against the federal regulations, where the proposed state law or regulation departs from the Secretary's regulation, the question for the Secretary on review of the proposed state amendment is whether "the Secretary's regulatory objective is as likely to be achieved by the State alternative as by the comparable Federal regulation." 46 Fed. Reg. 53377, col.2. The Secretary, responding to criticism that the 1981 rulemaking would eliminate the comparison of state programs to federal regulation, further clarified that:

> A State's program must still have provisions as stringent as the requirements in the Act. But under the revised rules a State's program will be compared to the Secretary's regulations *to insure that the objective or purpose of the requirements of the Act (to protect the environment, to induce operators to comply, to afford citizen rights, etc.) is as likely to be achieved* by the State's provisions as by the Secretary's regulations. While the State is no longer required to match each component part of its provisions with a corresponding part of the Secretary's regulations, it must be able to demonstrate that its rules afford the same protections or guarantees that the Secretary's rules provide.

46 Fed. Reg. 53378 (October 28, 1981). (Emphasis added).

The comments that follow represent the *minimum* level of environmental protection that must be provided by the Commonwealth in order to maintain compliance with the federal Act and Secretary of Interior's regulations. Others will comment that those standards of compliance should be increased, and the Project supports those comments. These comments are intended to reference the minimum, and not necessarily the *appropriate* level of accountability and protection that should be provided the land, people, and water resources of the Commonwealth of Pennsylvania.

Specific comments follow.

**86.1** The proposed revision adding the definition of "administratively complete application" is awkwardly drafted and should be revised in two respects, in order to better conform the definition to the federal counterpart at 30 CFR 701.5. First, the term should apply to coal exploration permits and approvals in addition to mining permits. Second, the structure of the sentence should be revised to read more plainly, reflecting that an administratively complete application is one which is filed *on forms provided by the Department* and which *contains the information necessary for the Department to initiate processing and public review*, and which is *accompanied by proof of publication and the filing fee.*

**86.1** The proposed revision to the definition of "valid existing rights" is confusing. The test that should be applied is the "all permits test" as modified by Judge Flannery's opinion finding that a "good faith effort" to have obtained all permits as of the date of enactment of SMCRA (August 3, 1977) should suffice. The elimination of the current standard for determining VER and the proposal to define VER by referencing 30 CFR Section 761.5 is entirely unworkable, since the federal definition of VER adopted in 1983 was suspended in substantial part on November 20, 1986 (51 FR 41952). In so doing, OSM indicated that it would use the definition of VER contained in each state program with respect to federal lands designations.

The effect of the proposed state amendment will be to create a situation in which litigation will abound, since arguments will be made that either the 1979 "good-faith, all-permits" test applies by default, or that since the state regulation references a federal definition that has been rejected by the U.S. District Court for the District of Columbia and has been suspended, no standard applies to govern VER determinations.

The proposal may also be argued to be an excessive delegation of state authority, depending on how the courts of the Commonwealth of Pennsylvania view a state regulation which is dependent for its terms on a federal regulation which has and may again be altered in the future by a federal agency.

The appropriate revision to the existing standard would be to incorporate the "good faith-all permits" standard as modified by Judge Flannery.

**86.101**

The proposed definitions of "fragile lands", "historic lands", "public building" and "public park" appear to conform to 30 CFR 762.5.

While the proposed revision to "public park" conforms to minimum federal requirements, the deletion of the former explanatory text concerning lands privately held but publicly dedicated should be reevaluated, since the augmentation of scarce public funds with private donations supporting dedicated public-use areas should be encouraged by recognizing and protecting such lands as "public" parks.

The proposed revision to the definition of "renewable resource lands" is consistent with the federal counterpart definition at 30 CFR 762.5. The regulation should clarify that this definition, which is more restrictive in defining such lands in the context of whether a land area should be designated as unsuitable, is not intended to modify or restrict the broader definition of renewable resource lands that is found in 30 CFR 701.5, and which applies to set the standards for, *among other things*, subsidence control plan protection requirements.

The definition of "significant recreational, timber, economic or other values incompatible with surface mining operations" should be modified to remove the phrase "which could be affected by mining" since that clause is redundant to the phrase "affected area". Also, Some clarification is needed in the use of the term "surface mining operations" rather than "surface coal mining operations."

Section 522(e) allows mining after the date of enactment of the act, on federal lands within the boundaries of any national forest *only where* a finding of "no significant recreational, timber, economic, or other values. . . " is made and the proposed mining is either west of the 100th meridian and complies with Section 522(e)(2)(B) or the mining is **underground mining.** See: Section 522(e)(2)(A) ("surface operations and impacts are incident to an underground coal mine."

The use of "surface coal mining operations" is more appropriate than "surface mining operations" since the former term includes the surface operations and effects of underground coal mines, as defined in Section 701(28)(A) of the federal Act.

The definition of "surface mining operations" should be revised to incorporate all of the activities and areas which are required to be included under the ambit of the regulatory program as "surface coal mining operations," as provided in Section 701(28) of the federal Act and 30 CFR 700.5.

For example, coal loading and other support facilities must be included, as well as areas affected by underground coal mining (such as subsidence areas). The deletion of the last phrase removes from consideration *areas of land affected by* surface and underground coal removal, since the earlier definition language limits coverage of underground mining to areas on which the "activity" occurs and could be read to exclude affected areas.

Section 701(28)(A) addresses activities; subsection (B) addresses areas affected by, incidental to or used in connection with such activities. The state

definition scope must be broad enough to encompass such areas, including any lands potentially affected by subsidence.

**86.102** The proposed change to (1) appears consistent with 30 CFR 761.11.

Concerning the proposal to allow remining in state parks as long as approved by the state Department of Conservation and Natural Resources differs from federal law, which prohibits mining within 300 feet of parks. The proposed revision also departs from 30 CFR 761.11(c), which requires joint approval of the agency with jurisdiction over any publicly-owned park or place on the National Register, before any operation which could adversely affect a park is approved.

Absent authorization under state law to allow remining within state parks, and *approval* of that state law by the Secretary of Interior as a state program amendment, the regulation appears to conflict with the federal Act and regulations by being less protective of state parks.

Similarly, absent state law authorization and approval by the Secretary of Interior, the provision allowing mining on lands **within** state picnic areas, state forest natural areas and state forest wild areas may violate the same federal regulatory provisions. To the extent that any of these areas constitute "publicly-owned parks," joint approval by the agency with jurisdiction over the parks and by PADEP is required for any mining that might adversely affect the parks, but federal regulations do not allow mining *within 300 feet* ***of*** these parks, even if jointly approved. 30 CFR 761.11(f).

The provisions for remining within the boundaries of state wild rivers is a matter of state law except to the extent that the boundary areas are considered "parks" within the meaning of 30 CFR 761.11(f), in which case mining cannot be approved within 300 feet regardless of whether approved by the agency with jurisdiction over the wild river.

Further, to the extent that those state wild rivers are either designated or under study as federal wild or scenic rivers, mining within the boundaries of such rivers is prohibited under 30 CFR 761.11.

"Mining," for the purposes of this discussion, includes both surface mining and surface effects of underground coal mining, since Congress used "surface coal mining operations" to define the scope of protections afforded by Section 522 of the Act, and that term is defined in Section 701(28) of that law to include **both.**

The waiver language of (9) should reference "surface coal mining operations" rather than "surface mining operations."

The language allowing a waiver which predated the enactment of SMCRA is inappropriate and should be deleted. A knowing waiver cannot be obtained where the waiver was executed before enactment of the federal law which conferred the right to deny mining. To construe a pre-existing waiver as defeating a subsequently conferred federal right is inappropriate and unduly restricts the intended scope of federal protection.

Likewise, it is inappropriate to construe a waiver as running with the land rather than as a personal right conferred as a license. A waiver is often granted to a particular entity based on that entity's manner of operation, and to provide for durability of such waivers in the event of transfers of the permit or property to subsequent owners may burden a landowner with a permittee who lacks the compliance record of the former owner. A waiver is not in the nature of an easement, but is properly viewed as a license which is revocable as against future operations and future parties. The waiver should be limited to the permit and the entity for which the waiver is sought and which is referenced in the waiver.

**86.103** The language of (e) should be modified to reflect the obligation of the Department to *make a determination of whether the proposed mining will affect* a publicly-owned park or National Register site. This obligation arises under 30 CFR 761.12(f) and should be explicitly referenced.

**86.121** The commenter does not have access to a full set of Pennsylvania mining laws and regulations, but assumes that the scope of exemptions under this section is limited to areas proposed to be designated under the state counterpart to Section 522(a), and is not intended to exempt operations or lands from the scope of Section 522(e).

With reference to proposed (2), it is assumed that in order to be exempt one has to hold all necessary permits and approvals under *all* of those laws, since approval under another state law would not be sufficient unless the applicant also held the equivalent of a surface coal mining permit issued in full accord with Title V of SMCRA.

**86.123** The proposed "standing" language is generally consistent with 30 CFR 764.13(a). The scope of "standing" was intended by Congress to be **coterminous** with the **broadest** enunciation of standing from the U.S. Supreme Court, so that application of the standing and injury-in-fact standard of S.C.R.A.P. II rather than the more-recent Lujan standard, is the appropriate test for determining injury-in-fact. See: House Rept. No. 95-218, 95th Cong. 1st Sess. 90 (1977); S. Rep. 95-128, 95th Cong. 1st Sess. 87-88 (1977).

**86.124** The amendment regarding frivolous petitions should clarify that where a petition is determined to be frivolous, the Department will return it to the petitioner with a written statement of the reasons for the determination. 30 CFR 764.15(a)(3).

Similarly, where the petition is deemed incomplete, a written statement of the reasons for that determination *and* identification of the categories of information needed to make the petition complete, must be provided. *Id.*

**86.129** Coal exploration should not be approved in areas that are designated as unsuitable for mining unless the findings outlined in the proposed regulation are made *and* the applicant receives a coal exploration permit and complies with all requirements contained in the state counterpart regulations to 30 CFR Parts 772 and 815.

Thank you for your consideration of these comments.

Sincerely,
Tom FitzGerald
Director

Copy of email message

Subj: **Comments On Chapter 86**
Date: 3/2/99 1:32:18 PM EST
From: FitzKRC
To: Hogeman.David@A1.dep.state.pa.us

File: ncclppa5.txt (17772 bytes)
DL Time (28800 bps): < 1 minute

Attached, in text format, is a copy of my comments on the proposed regulation changes. Please acknowledge receipt by return email.
Thanks in advance.
Tom FitzGerald

bcc: B. A. Beach
H. P. Quinn (NMA)
R. E. Smith
S. G. Young
"A" File



**CONSOL Inc.**
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412-831-4000
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July 25, 1997

Administrative Record
Office of Surface Mining, Reclamation and Enforcement
1951 Constitution Ave. N.W.
Washington, DC 20240

Original: 1924
McGinley
Copies: Harris
Sandusky
Wyatte

Subject: Proposed Interpretative Rule - Section 522(e)

Dear Administrative Record:

CONSOL Inc. is pleased to submit comments on the Office of Surface Mining's proposed interpretative rule on the prohibitions of Section 522(e) as published in the Federal Register dated January 31, 1997.

The CONSOL Coal Group is both the nation's leading producer of bituminous coal and the nation's leading producer of coal by underground mining methods. CONSOL has active underground coal mines in six states and operates nineteen longwall mining systems, more than any other coal company in the United States (19 of 69). As CONSOL leads the industry in technical expertise with longwall mining systems and resultant subsidence under a number of conditions, we have also led the industry in the development of programs to address the surface impacts associated with subsidence. We have worked with state regulatory authorities in the development of rules to implement both federal and state laws addressing subsidence issues, and we have witnessed dramatic improvements in how the industry and the states handle subsidence concerns. We have seen an overall increase in the states-of-the-art in subsidence impact prediction and remediation, with the end result being a significant enhancement in our ability to keep surface owners informed and to more completely address their concerns.

We support the Office of Surface Mining's "Prohibitions Do Not Apply" position as discussed in the proposed interpretative rule. We believe this is the only position OSM can take on this issue given the facts contained in both the Draft Economic Analysis and the Draft Environmental Impact Statement that accompanied the proposed rules. We also believe that the original Congressional intent relative to Section 522(e) and subsidence was that subsidence impacts were not subject to the buffer zones restrictions, and this is further clarified by the subsidence provisions of the National Energy Policy Act of 1992. As we discuss below, the Energy Policy Act amendments to the Surface Mining Control and Reclamation Act clearly detail requirements for the repair or compensation for subsidence damage to structures. These are provisions that make no sense if subsidence is a restricted activity under Section 522(e). In any event, we urge the Office of Surface Mining to maintain its current position on this proposed interpretative rule and to further consider the following points made in support of this decision:

I. Impact on Full Extraction Mining

The buffer zone prohibitions described in Sections 522(e)(4)and (5) make sense only when applied to surface mines, and they are clearly out of place relative to underground mining operations, except for surface facilities associated with underground mines. The surface and coal areas associated with implementing buffer zone restrictions on underground mining impacts, with a goal to prevent subsidence within the buffer zone areas, would far exceed the area needed to protect the structure under consideration. This is perhaps the most compelling argument for not applying the prohibitions to subsidence impacts.

Only one state, Pennsylvania, has ever enacted a law to specifically protect surface structures from subsidence impacts. The Pennsylvania Bituminous Mine Subsidence and Land Conservation Act of 1966 required coal operators to mine so as to not cause subsidence to dwellings built prior to 1966 and public buildings. Although this law was amended in 1994 to allow for these structures to be subsided in exchange for repairs or compensation, during its original term hundreds of structures were protected from subsidence by leaving support coal beneath them. This support coal area was calculated by measuring horizontally out from the structure 15 feet and then projecting a 15 degree angle outward and downward to the coal seam. The area circumscribed by this angle at the coal seam was the protection block of coal. Mining was restricted to a maximum of 50 percent extraction in this block. As an example, under the old Pennsylvania law mining coal 750 feet beneath a 30 foot by 50 foot house would have required the following:

Surface area using a 15' buffer = Width: 30'+15'+15' = 60'
Length: 50'+15'+15' + 80'

**60' x 80' = 4800' = 0.11 acre on the surface**

Support block at 750' depth using a 15 degree angle:

Tangent 15 x 750' = 201' (outward projection from surface area on each side)

Width: 60'+201'+201' = 462'
Length: 80'+201'+201' = 482'

**462' x 482' = 222,684' = 5.11 acres at the coal seam depth**

Therefore, the area to protect a 30 foot by 50 foot home under the old Pennsylvania law, at a depth of 750 feet, was 5.11 acres. The adequacy of this system, relative to preventing

subsidence damage to structures is well documented. In fact, state data show that over a 28 year span, there are virtually no instances where this system failed to protect a structure on the surface.

Contrast the above information with the numbers generated by applying the Section 522(e) buffer zones, ostensibly to achieve the same end results, that is to protect the structure from subsidence.

Surface area using a 300' buffer zone = Width: 30'+300'+300' = 630'
Length: 50'+300'+300' = 650'

**630' x 650' = 409,500 sq. ft. = 9.4 acres**

Support block at 750' depth to the coal seam using a 15 degree angle:

Width: 630'+201'+201' = 1032'
Length: 650'+201'+201' = 1052'

**1032' x 1052' = 1,085,664 sq. ft. = 24.9 acres at the coal seam**

The acres and tons of coal impacted by the above scenario is staggering. That the mining of nearly 25 acres of coal should be restricted to protect a 1500 square foot house on the surface exceeds all aspects of reasonableness and certainly exceeds the bounds of any technical justification. **If one where to use the 30 degree angle of draw in OSM's 1995 final subsidence rules, over 52 coal acres would be impacted.** With a six foot thick coal seam, over 261,000 tons of coal would be sterilized and lost forever. This would result in a terrible loss of resources and may be tantamount to an unconstitutional taking.

We contend that the size of the coal acres impacted by any application of the Section 522(e) buffer zones to subsidence, given the above numbers, validates the Office of Surface Mining's proposed position in this draft interpretative rule. OSM's own data at appendix C-6 of the draft economic analysis illustrate the huge impact associated with this point.

We have attached for the record two tables that we developed that illustrate the sizes of the buffer zones at the coal seam for both dwellings and roads using a 30 degree angle at various depths to the coal. We draw the record's attention to the size of the buffer zones and tons of coal sterilized by these zones.

## II. Congressional Support for not Applying Section 522(e) to Subsidence

A. The history of the Surface Mining Control and Reclamation Act, as well as the Act

itself, clearly supports the virtual unrestricted use of full extraction mining methods in exchange for operators addressing the impacts as they occur.

House Report 95-218, that accompanied H.R. 2, from the Committee on Interior and Insular Affairs dated April 22, 1977, notes on page 126:

> "It is the intent of this section to provide the Secretary with the authority to require the design and conduct of underground mining methods to control subsidence to the extent technologically and economically feasible in order to protect the value and use of surface lands. Some of the measures available for subsidence control include:
>
> (1) leaving sufficient original mineral for support;
>
> (2) refraining from mining under certain areas...;
>
> (3) causing subsidence to occur at a predictable time and a relatively uniform and predictable manner. This specifically allows for the uses of longwall and other mining techniques which completely remove the coal."

It is difficult to comprehend how Congress, on one hand, could specifically look at removing all the coal and causing planned subsidence as equivalent to leaving coal in place to support the surface, then turn around and limit the use of full extraction mining as would occur with the application of the Section 522(e) buffer zones. In fact, nowhere in the section in the House Report that deals with "Surface Impacts of Underground Mines" is there any mention that Congress intends to control impacts to structures by prohibiting subsidence within specified areas of surface structures. Rather, this section identifies "causing subsidence to occur at a predictable time and a relatively uniform and predictable manner" as a control measure with no restriction on its use or applicability.

Perhaps an even more compelling indication of Congressional intent can be found on pages 94 and 95 of the House Report. Here, under the title of "Land Use Considerations" the report addresses the lands unsuitable for mining provisions of Section 522. It states:

> "The committee wishes to emphasize that this section does not require the designation of areas as unsuitable for **surface mining** other than where it is demonstrated that **reclamation** of an area is not physically or economically feasible under the standards of the act . . . ,"
>
> "Although the designation process will serve to limit mining where such activity is inconsistent with rational planning in the opinion of the committee, the 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 operation, except those in existence on the date of enactment, shall be permitted . . . ."

> "As subsection 522(e) prohibits **surface coal mining** on lands within the boundaries of national forests, subject to valid existing rights, it is not the intent, nor is the effect of this provision to **preclude surface coal mining on private inholdings** within the national forests. 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 . . . ."(Emphasis added)

It is apparent that the focus of Congress relative to Section 522 in general, and 522(e) specifically, was with regard to surface mining impacts. The second paragraph goes directly to the Congressional intent to address "surface mining" in creating the 522(e) buffer zones. The frequent use of the term "surface mining" while addressing the "reclamation" related goals in the act; the discussion about "strip mining" (which has the same limited meaning as surface mining and surface coal mining) in the national forests and the absence of any subsidence reference anywhere in this discussion seems clearly to direct Section 522 to surface mining and to exclude subsidence from the realm of consideration.

B. Public Law 95-87, the Surface Mining Control and Reclamation Act of 1977, contains numerous provisions that clearly point to the Section 522(e) prohibitions not applying to subsidence. These include:

1. Title I findings and purposes encourage the "full utilization of coal resources through the development and application of underground extraction technologies."

2. Section 516 contains detailed provisions for permitting underground coal mining operations, including subsidence impacts and contains a specific exception relative to mining that results in planned subsidence.

3. Section 516(c) contains specific language to suspend underground operations beneath towns and communities if imminent danger is likely, a provision that would be totally unnecessary if subsidence from underground mining was prohibited as the result of Section 522(e).

C. The National Energy Policy Act of 1992 also addressed subsidence issues. Section 2504 of the Act amended Section 720 of the Surface Mining Control and Reclamation Act of 1977 with the following language:

> "(a)REQUIREMENTS. --Underground coal mining operations conducted after the date of enactment of this section shall comply with each of the following requirements:
>
> (1) Promptly repair, or compensate for, material damage resulting from subsidence

> caused to any occupied residential dwelling and structures related thereto, or non-commercial building due to underground coal mining operations. Repair of damage shall include rehabilitation, restoration, or replacement of the damaged occupied residential dwelling and structures related thereto . . . . Nothing in this section shall be construed to prohibit or interrupt underground coal mining operations."

Congress clearly reaffirms the status quo of the 522(e) issue given that these amendments were put into place fifteen years after the enactment of the Surface Mining Act and no mention is made or is any effort taken to clarify the applicability of Section 522(e) relative to subsidence. In fact, nothing in the above referenced amendment comes close to restricting underground mining operations, rather it seems to give it an unrestricted green light so long as the operator addresses the repair or compensation issues. Had Congress wanted to deviate from the fifteen years of practice and apply the Section 522(e) prohibitions, it would have been simple to add a proviso to this language doing so. Consequently, it seems safe to say that Congress, even as late as 1992, saw no reason to treat subsidence impacts any differently than they had been treated for fifteen years, except, of course, for specifically mandating repair or compensation for damages.

## III. Office of the Solicitor's Opinion

The draft economic analysis, in Appendix A-7, discusses the opinion the Office of Surface Mining requested and received from the Office of the Solicitor in July, 1991. As the draft analysis points out, the opinion concluded that the best interpretation of SMCRA is that subsidence is not a surface coal mining operation subject to he prohibitions of Section 522(e). The opinion further concluded that Section 516 of SMCRA contains sufficient authority to protect the surface features addressed in Section 522(e) and that the decision was based on the plain reading of the term "surface coal mining operations," an evaluation of the regulatory scheme under SMCRA and the legislative history of the Act.

This opinion provides a detailed and exhaustive look at the issues surrounding Congressional efforts to control, rather than proscribe, subsidence in SMCRA and its legislative history. Virtually no stone has been left unturned relative to investigating the applicability of the definition of "surface coal mining operations" to subsidence with the conclusion being that it does not apply. It points out that the word "subsidence" does not even appear in Section 522(e) nor in its legislative history and that Congressman Morris Udall, one of the Act's prime sponsors, commented on the issue of subsidence with the following:

> "The House Bill contemplates rules to 'prevent subsidence to the extent technologically and economically feasible.' The word prevent led to fears expressed by Secretary of the Interior Morton, that the effect would be to outlaw longwall mining, with its obvious

subsidence . . . . In fact the bill's sponsors consider longwall mining ecologically preferable and it and other methods of controlled subsidence are explicitly endorsed."

We agreed then with this position and believe our above comments directly support the conclusions in the opinion. Subsidence impacts are regulated under Section 516 of the Act and any further regulation under Section 522(e) is unnecessary and inappropriate.

## IV. OSM's Draft Economic Analysis

The Office of Surface Mining has put considerable effort into the draft economic analysis that accompanied the proposed interpretative rule. We compliment the agency for doing such an evaluation of the impacts associated with the different alternatives that were considered. It is clear from the analysis that the costs of applying the proposed prohibitions far exceed the potential benefits. **As noted in the report, the limitations on the analysis resulted in an underestimate of the net costs of pursuing such prohibitions.** Additionally, there are several points in the document that we would like to clarify or expand upon relative to impacts of the prohibitions on full extraction mining operations.

In our opinion, the most important conclusion of the economic analysis is found on page V-5: "While the $2.1 billion cost estimate for the PA/GFAP rule is firmly grounded on data and systematic analysis, it is clearly too low because it leaves out transitional coasts and additional costs to room-and-pillar mining. Time and resources were not available to extend the analysis. **But we can conclude that expected costs of the PA/GFAP rule are likely to be several times larger than $2.1 billion.**" (Emphasis added)

We agree with this conclusion and we urge OSM to stand firm against any attempt to change this interpretative rule based on attacks on the economic analysis. Unless one fully understands the limitations of the relatively low estimate of $2.1 billion, then one cannot and should not propose changes to the rule.

Focusing on the Summary, page S-9, a number of statements are made relative to the conclusions contained in the balance of the report. Several items here need no clarification because they stand on their own: longwall mining is an important and expanding type of underground mining; it can be relatively low-cost (although the capital outlays are considerable); and the mining technique yields little in the way of flexibility once underground. It should also be noted that longwall mining is the safest method of underground mining. However, contrary to the one statement about the flexibility of room and pillar retreat mining, room and pillar mining may not be economically viable under a "prohibitions apply" scenario in many situations. The economics of room and pillar retreat mines are based on the expected recovery of a certain amount of coal. If that expected amount were reduced, as the result of the Section 522(e) prohibitions,

then the mine may not be viable. Although room and pillar retreat mines don't have the starting and stopping problems and costs associated with longwall systems, they still have productivity goals that must be met or the mine can't operate. Coal operators buy the all the coal when a reserve is purchased and only a certain percentage can be left to make the economics work out.

Another aspect that isn't mentioned in this Summary is that many seams can or would only be mined with a longwall system. This includes seams that for geological reasons are only amenable to longwall mining. Many of the deeper coal seams can only mined with longwall systems, and this raises an ironic aspect to Section 522(e) type prohibitions; namely, that as the coal seam gets deeper, the surface impacts get smaller; yet, the protection areas resulting from Section 522(e) get larger thus sterilizing more and more coal. The total surface movement associated with the full extraction of deep coal seams may only be inches, however, by using the angle of draw approach, the sterilized coal block gets larger and larger with increasing depth. A coal seam that is 1,500 feet deep would have to leave almost 50 acres of coal in a support block using a 15 degree angle of draw and a 130 acre block using a 30 angle of draw, both to support a 1,500 square foot house with a 300 foot buffer zone.

The Summary also discusses that the withholding of ten percent of waivers by surface owners would significantly alter longwall mining plans. As noted in footnote 3 on page S-9, this is a representative rate only and, depending on the location of certain houses, we believe as little as a five percent holdout could render longwall mining plans in the East and Midwest uneconomical. For holdout rates above ten percent, as the report points out, the ten percent holdout rate for homeowner waivers was used as the estimate for all higher holdout rates. This assumption: **"probably vastly underestimates additional coal-mining and coal-delivery costs at holdout rates above 10%."** (P.V-29, emphasis added) This was done, again, due to limitations on time and resources beyond those available for the project.

The analysis notes that at holdout rates above ten percent, "additional costs in total could accumulate rapidly even when extra costs per ton appear small. In addition, larger costs for room-and-pillar mines could make underground mining less competitive with surface mining. Underground production could be displaced by coal produced in other regions. There could be large and abrupt shocks to regional economies. The erosion of regional economies could lead to unemployment. It might become necessary to retrain and relocate large numbers of workers."

Something that the draft analysis fails to adequately address are the local impacts associated with applying the prohibitions. Local impacts, beyond those associated with employment and regional economies, include the erosion of the local tax base if coal mines could no longer operate as would be the case in the prohibitions apply scenario. Coal mining operations contribute significantly to the local and county tax bases not only through the payment of employee income or local earned wage taxes, both through payment of local real estate taxes. As

an example, local governments and school districts in both Pennsylvania and West Virginia assess real estate taxes on the value of the coal in the ground. Coal in an "inactive" or reserve status may be taxed anywhere from $400 per acre up to $1300 per acre. Once the status changes to "active", as it would if a permit is issued to mine the coal, the value of the minable block of coal increases tenfold and sometimes more. In a recent case involving our Bailey Mine in Greene County, Pennsylvania, the submission of a permit application to the PA Department of Environmental Protection for a mining permit resulted in a change of status of over 22,000 acres in the Bailey Mine reserve. This change of status means that the West Greene School District will see an annual increase in tax revenues from the Bailey Mine go from $129,040 to $1,165,696. This is a ninefold increase in coal tax revenues for a school district with a total budget of $10,021,406. In other words, the increase in the coal tax assessment alone will fund ten percent of the school district's budget for the 1997-98 school year and for many years thereafter.

Additionally, the business manager for West Greene School District claims the coal industry's support for funding education goes far beyond this particular issue. **A recent analysis done by the District reveals that the longwall mining (which is the only method of mining used in the District) directly and indirectly provides 65 percent of the revenue for the District's budget.** This is in the form of real estate taxes, wage taxes, business taxes and transfer taxes. If longwall mining revenues were not available to support education in West Greene, the school district would have to impose the equivalent of a 58 mill increase to maintain their current level of education. Longwall mining's contribution to some local governments and school districts can't be overstated and points to the fact that these types of local economic factors must be considered when evaluating the impacts of Section 522(e) rulemaking.

Two other points are worth noting. First, the analysis concludes that average electricity prices would rise only slightly under the prohibitions apply scenario. Those regions where power generators rely heavily on low-cost longwall coal, however, would be affected more dramatically with potentially significant adverse effects on regional economies. Second, a significant portion of longwall coal is exported to overseas markets, where the substitute would not be U.S. room-and-pillar coal or coal from other U.S. regions but coal from other countries. The economic cost of losing these markets does not appear to be accounted for in the analysis.

Another factor that isn't addressed is the cost associated with waivers that are obtained. Does one assume waivers would be obtainable for ten percent of the market value of the property, or would it be 50 percent or 500 percent? Based on CONSOL's experiences in Pennsylvania under the old 1966 subsidence law, waivers can sometimes be obtained but many at a cost which includes a total buy-out of the surface owner, e.g. house, barn, garage and all land. The impacts of this scenario are that the coal operators soon become the largest landowners in the areas being mined and the surface owners take their money and leave the area.

Page V-37 of the Draft Economic Analysis notes that homeowners who do not sign

waivers under a "Prohibitions Apply" scenario receive a value no less than the net value of the repair package they would have received if they were undermined. We're not quite sure these issues can in any way be quantified given that most holdouts have a price where they are willing to begin negotiations. As noted above, the real issues are: do local governments want coal companies to end up owning every homestead that is undermined; should coal companies repair houses that they had to purchase and are now vacant; and is it reasonable to expect a coal company to pay two, three or four times the market value for a property as the cost of obtaining a waiver? Although OSM's analysis is helpful relative to trying to model the number of holdouts and the impacts they might have, the real bottom line question is: if the "Prohibitions Apply" scenario was actually adopted, how expensive would waivers become? Coal operators can accurately anticipate costs to repair or compensate, but we can't calculate what waivers might cost when every surface owner has the potential to sterilize several hundred thousand tons of coal and force dramatic changes in mining plans.

We have attached to these comments our own drawn-to-scale illustration of the impact Section 522(e) buffer zones for dwellings could have on longwall mining plans. This includes the calculated support block and the additional coal lost in order to "square up" the mining face given the inflexibility of longwall mining systems. The illustration shows the impact of just six homes over a four panel area, which as noted below, is a very low housing density even in rural areas, and it doesn't include additional buffer zones for roads, parks or cemeteries. This illustration also uses a 15 degree angle of draw to establish the support block, so the support block would be significantly larger if OSM's 30 degree angle was used. This area could not be economically longwall mined as shown with these buffer zones.

For comparison, we have looked at the dwelling density at our Bailey Mine located in Greene County, Pennsylvania. Part of the Bailey Mine reserve area is included in the figure III-14 map of the Draft Economic Analysis and the Bailey Mine, in conjunction with our Enlow Fork Mine, comprise the two largest underground coal mines in the United States. Combined, these mines produced in excess of 16 million tons of coal in 1996. A review of the mine plan area maps reveals that there are 294 dwellings over the longwall panels in the existing mine permit area. This area contains 55 longwall panels. **This averages about 5.35 dwellings per longwall panel.** The future expansion area for the Bailey Mine contains about 230 dwellings and will have about 30 longwall panels. **This averages 7.67 dwellings per panel.** Using either average number of dwellings in the above discussed illustration makes it clear that neither longwall mining nor any full extraction mining would be economically feasible under a prohibitions apply scenario. Nor do these numbers reflect the additional impacts associated with public roads, cemeteries and parks.

We read with interest the compensation scenario on page V-38, where electric energy users would band together to buy-out homeowners who might withhold waivers, in a last ditch effort to keep the longwall mines operating. While this approach is theoretically possible, and it perhaps

illustrates the national implications associated with decimating the longwall mining industry, such a system would be improbable, if not impossible, to implement. Our experiences in Pennsylvania under the old subsidence law that required waivers highlighted the fact that people will hold-out agreeing to any waiver until the last minute. Long range mine planning becomes difficult because the uncertainty about obtaining waivers, production and economic forecasting is destroyed, and coal operators can find little incentive to pursue mining plans.

As noted above, CONOL supports OSM's position on this draft interpretative rule. We urge OSM to remain mindful of their own conclusions contained in their draft economic and environmental analyses. **There is no middle or compromise position on this issue. OSM must maintain the status quo and not apply the Section 522(e) prohibitions to subsidence impacts. The legislative history, the legislation, OSM's regulatory history, OSM's regulations, state programs and coal industry subsidence mitigation programs have shown that subsidence need not be restricted and that coal operators can address the impacts they create in a responsible manner while maximizing the recovery of the coal resource. Further, we do not believe the severe impacts associated with implementing a "prohibitions apply" option have been fully quantified, particularly as it relates to the devastating effects one would see on local economies should longwall mine production be reduced or eliminated.**

CONSOL also endorses the comments submitted by the National Mining Association, the Pennsylvania Coal Association, the West Virginia Coal Association, the Illinois Coal Association, the Kentucky Coal Association, and the Virginia Coal Association.

Sincerely,

Gary E. Slagel

Gary E. Slagel, Director
Environmental Regulatory
Activities

# SEE 522 (e) BUFFER ZONE IMPACTS FOR PUBLICROADS (40' ROAD WIDTH, 100' BUFFER, 30° ANGLE OF DRAW, 6' COAL SEAM)

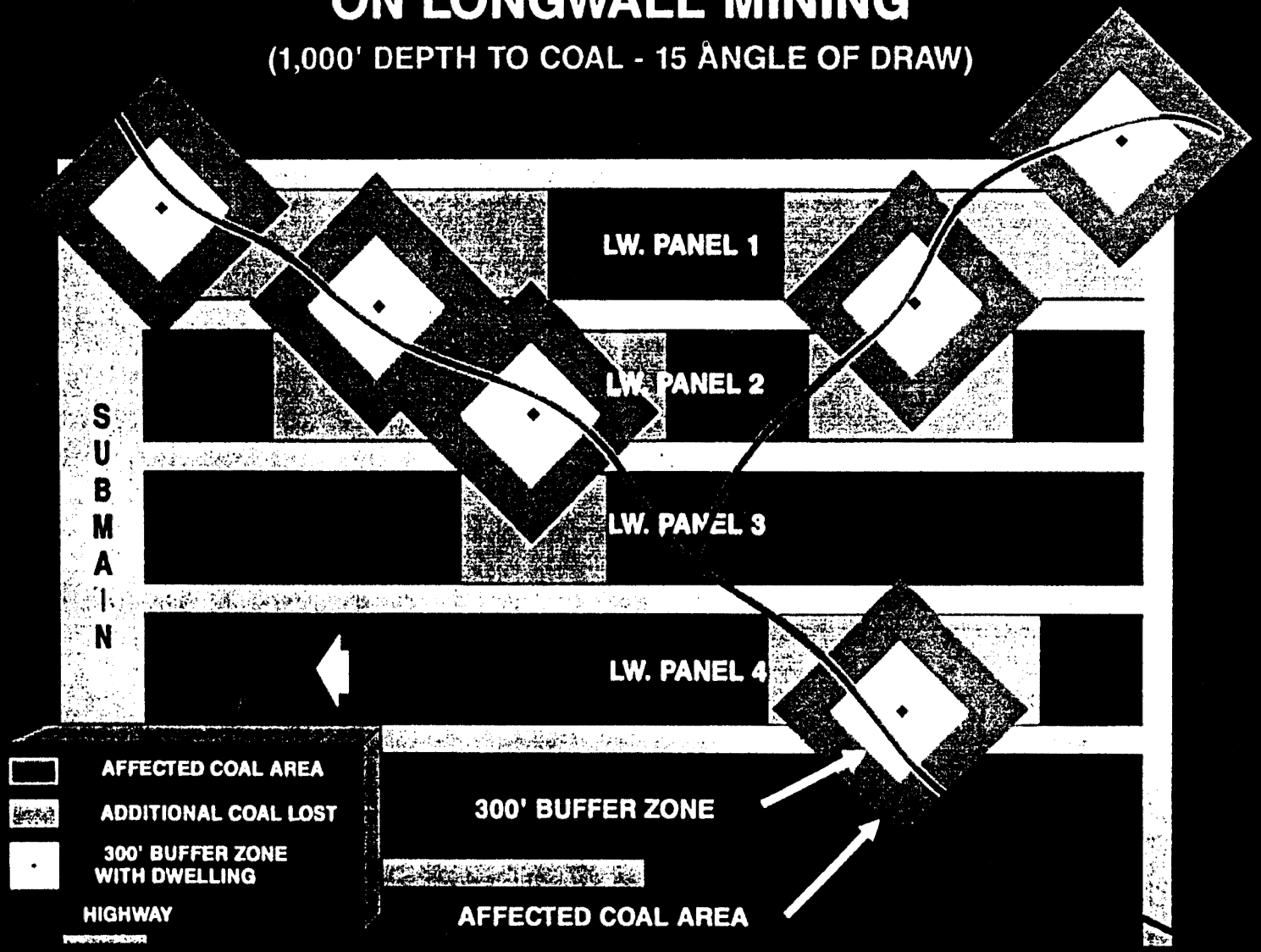
| DEPTH TO COAL | BUFFER ZONE WIDTH AT COAL SEAM | TONS OFCOAL STERILIZED |
|---|---|---|
| 200' | 470' | 595,536 |
| 300' | 586' | 742,519 |
| 500' | 818' | 1,036,482 |
| 750' | 1106' | 1,401,411 |
| 1000' | 1394' | 1,766,335 |

# UNMINED AREA TO SUPPORT A 32' X 50' HOME (300' BUFFER, 30° ANGLE OF DRAW, 6' SEAM)

| DEPTH TO COAL | DIMENSION OF SUPPORT AREA | SQ. FT. | TONS |
|---|---|---|---|
| 200' | 880 X 862 | 758,560 | 182,039 |
| 300' | 996 X 978 | 974,088 | 233,762 |
| 500' | 1226 X 1208 | 1,481,008 | 355,413 |
| 750' | 1516 X 1498 | 2,270,968 | 544,989 |
| 1000' | 1804 X 1786 | 3,221,944 | 773,205 |

# IMPACT OF 522(e) BUFFER ZONES ON LONGWALL MINING

(1,000' DEPTH TO COAL - 15 ANGLE OF DRAW)



Pennsylvania Department of Environmental Protection
**Rachel Carson State Office Building**
**P.O. Box 2063**
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August 25, 1999

**Office of Mineral Resources Management**

717-783-5338

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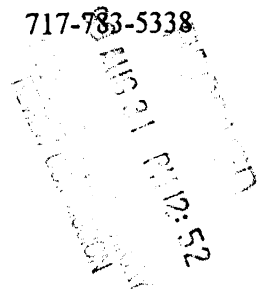

Ms. Jolene Chinchilli
Chair
Citizens Advisory Council
P.O. Box 8459
Harrisburg, PA 17105-8459

Dear Ms. Chinchilli:

At its July 20 meeting, the Environmental Quality Board (EQB) considered the final rulemaking for 25 Pa. Code, Chapter 86, dealing with General Provisions and Areas Unsuitable for Mining. The Citizens Advisory Council (CAC) raised concerns that the Department did not adequately provide for public comment and did not respond to all of the CAC comments submitted during the public comment period on the Advance Notice of Final Rulemaking (ANFR). The purpose of this letter is to provide the Department's responses to the issues raised in the CAC comment letter that were not specifically addressed in the Issues and Discussion Document.

The Department has made every effort to ensure meaningful public participation and review of these regulatory amendments. We solicited public input through a notice in the Pennsylvania Bulletin at 25 Pa. Code 3343 (August 9, 1995) and at the Department's web site (http://www.dep.state.us). The draft proposed amendments, resulting from public suggestions and the Department's own review of its regulations, were discussed with the Mining and Reclamation Advisory Board (MRAB) at its meeting of October 3, 1996. The proposed rulemaking was adopted by the EQB and published in the Pennsylvania Bulletin on February 14, 1998 (28 Pa.B. 941, February 14, 1998), with a 60-day public comment period. The only two organizations to submit comments were the Pennsylvania Coal Association and the Independent Regulatory Review Commission (IRRC). These comments, and a draft of the final rulemaking, were discussed with the MRAB at its meeting of July 10, 1998. The CAC had several opportunities to provide input, and did, through its representation on both the MRAB and on the EQB.

Subsequent to this MRAB meeting, the Department developed two changes to the proposed regulations that it believed were significant and should be subject to public review and comment. Those changes pertained to the definition of "surface mining operations" in Section 86.101 and

changes to Section 86.126 dealing with EQB procedures for decisions on a petition to designate an area as unsuitable for surface mining operations. It is these changes that prompted the Department to solicit additional public input through the ANFR process. These draft final rulemaking changes, and the comments received on the ANFR, were discussed with the MRAB on April 22, 1999. The MRAB, with a unanimous vote, recommended that the EQB adopt the regulations as final rulemaking.

Because of the number of comment letters received on the ANFR, the Department consolidated and summarized the key issues raised in the Issues and Discussion Document. Specific issues raised by the CAC, and responses, are presented below.

- The CAC asked if the change proposed to the definition of "public building" in Section 86.101 excluded schools and similar buildings.

  The proposed change does not exclude schools or similar buildings. This definition was changed to be consistent with the definition of public building in federal regulations in 30 CFR 762.5. Schools and similar educational facilities are included in the definition of "Community or institutional building" which was not changed.

- The CAC asked why a change was proposed to the definition of "renewable resource lands" and if there was a comparable federal definition.

  This change was made to be consistent with the existing federal definition found in 30 CFR 762.5.

- In comments concerning Section 86.102(9), the CAC believed that the term "current" owner should be retained in subparagraph 9(ii) and questioned the difference between constructive or actual knowledge of a waiver.

  The language used is consistent with the federal language in 30 CFR 761.12. The term "current" owner is unnecessary and confusing. A waiver that was granted by the owner of an occupied dwelling remains valid regardless of when it was granted (9(iii)). If an owner grants a waiver and subsequently sells or transfers the dwelling to another person, the waiver remains in effect if the new owner had constructive or actual knowledge of the waiver (9(ii)(a) and (b)). The requirement of constructive knowledge would be met if the waiver was properly filed in public property records or if the owner had been advised that the surface mining operations had proceeded to within 300 feet (91.44 meters) of the dwelling. The requirement for actual knowledge is satisfied if the owner had seen the waiver or had viewed the surface mining operations at the dwelling.

- The CAC also had questions about the statutory citation regarding relocation of cemeteries.

  This statutory citation was included for clarity reasons because federal language in 30 CFR 761.11(g) includes language regarding such relocation if authorized by state law. We have determined that PennDOT has relocated cemeteries for road-building projects under this law; however, the mining program has no record of ever requiring a cemetery to be moved in response to mining activities. Therefore, no additional investigation of the provisions of this law is proposed at this time.

- In Section 86.121, the CAC questioned the changes to this Section's title and content.

  The changes make this Section more consistent with 30 CFR 762.13. The language clearly identifies areas to which the petition designation process does not apply. In regard to what constitutes "substantial legal and financial commitments in surface mining operations"; this term is defined in Section 86.101. Definitions. Additional definition here is redundant. In the history of the unsuitable for mining program, only one operation has been found to have substantial legal and financial commitments (Rogues Harbor Run §86.130(8)). The Department has not approved any mine permit applications from this operator within the area designated as unsuitable for surface mining operations, because surface mining was found to be incompatible with protection of water supply resources for which the area was designated unsuitable.

- CAC noted that the prohibition of cross-examination of witnesses in Section 86.125 is inconsistent with federal regulations (30 CFR 764.17(a)) relating to hearing requirements.

  Federal statute and regulation provide for an adjudicatory areas unsuitable for mining program. Federal regulations provide that the regulatory authority may subpoena witnesses and allow for cross-examination of expert witnesses. Pennsylvania's program was established as an administrative regulatory procedure under the Surface Mining Conservation and Reclamation Act (SMCRA) and the Administrative Code of 1929. Under these statutes, the Department is not empowered to subpoena witnesses or to administer oaths for cross-examination of witnesses. For the remainder of the comments on this section, the Department did not change any of the regulatory or notification requirements. The structure of the section was changed to provide clarification.

- CAC also recommended that the Proposed Rule changes to Section 86.125(i) concerning the length of the public comment period following a public hearing on a petition should be retained.

  The Department had proposed this change to provide additional flexibility in receiving public comment. However, the Independent Regulatory Review Commission found this language to be vague and suggested that a definite time period be established.

- CAC commented that the proposed rulemaking included changes in Section 86.127(a) and (c) that were not included in the final rulemaking.

  Changes to these sections were not included in the proposed rulemaking.

- The CAC questioned the changes to Section 86.129 relating to coal exploration, asking why the requirement that an applicant describe the nature and intent of the proposed operation was deleted.

  The changes to this Section are consistent with the federal regulations in 30 CFR 762.14 which reference the requirements of 30 CFR Part 772 concerning the specific application requirements for coal exploration activities. Pennsylvania's regulations now reference 25 Pa. Code Subchapter E, which similarly provides more detailed requirements for coal exploration activities.

- Finally, CAC questioned the reference to Section 86.121 that was added to Section 86.130(b)(13)(ii).

  This change provides consistency with the approach required by the Legislative Reference Bureau for a regulation that cites another regulation as authority for an action. Areas that are covered by permits issued by the Department are exempt from the designation process. There is no change to the area designated as unsuitable for mining under this paragraph.

The items discussed above represent individual CAC comments that were not specifically addressed in the Issues and Discussion Document. We apologize for any comments that were overlooked in our responses and regret any difficulties this may have caused. In the future, we will ensure that each comment is thoroughly addressed.

Your interest in this program and in our efforts to conserve and protect our natural resources is greatly appreciated.

Sincerely,

Robert C. Dolence

Robert C. Dolence
Deputy Secretary for
Mineral Resources Management

cc: Susan Wilson

bcc: Robert Dolence
Sharon Freeman
Barbara Sexton
Michael Bedrin
Joseph Pizarchik
Marc Roda
Joseph Sieber
Roderick Fletcher
David Hogeman
M.C. McCommons
UFM File
Crossfile

RCD:alb

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cc: B. A. Beach
H. P. Quinn (NMA)
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S. G. Young
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July 25, 1997

Administrative Record
Office of Surface Mining, Reclamation and Enforcement
1951 Constitution Ave. N.W.
Washington, DC 20240

Original: 1924
McGinley
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Sandusky
Wyatte

Subject: Proposed Interpretative Rule - Section 522(e)

Dear Administrative Record:

CONSOL Inc. is pleased to submit comments on the Office of Surface Mining's proposed interpretative rule on the prohibitions of Section 522(e) as published in the Federal Register dated January 31, 1997.

The CONSOL Coal Group is both the nation's leading producer of bituminous coal and the nation's leading producer of coal by underground mining methods. CONSOL has active underground coal mines in six states and operates nineteen longwall mining systems, more than any other coal company in the United States (19 of 69). As CONSOL leads the industry in technical expertise with longwall mining systems and resultant subsidence under a number of conditions, we have also led the industry in the development of programs to address the surface impacts associated with subsidence. We have worked with state regulatory authorities in the development of rules to implement both federal and state laws addressing subsidence issues, and we have witnessed dramatic improvements in how the industry and the states handle subsidence concerns. We have seen an overall increase in the states-of-the-art in subsidence impact prediction and remediation, with the end result being a significant enhancement in our ability to keep surface owners informed and to more completely address their concerns.

We support the Office of Surface Mining's "Prohibitions Do Not Apply" position as discussed in the proposed interpretative rule. We believe this is the only position OSM can take on this issue given the facts contained in both the Draft Economic Analysis and the Draft Environmental Impact Statement that accompanied the proposed rules. We also believe that the original Congressional intent relative to Section 522(e) and subsidence was that subsidence impacts were not subject to the buffer zones restrictions, and this is further clarified by the subsidence provisions of the National Energy Policy Act of 1992. As we discuss below, the Energy Policy Act amendments to the Surface Mining Control and Reclamation Act clearly detail requirements for the repair or compensation for subsidence damage to structures. These are provisions that make no sense if subsidence is a restricted activity under Section 522(e). In any event, we urge the Office of Surface Mining to maintain its current position on this proposed interpretative rule and to further consider the following points made in support of this decision:

I. Impact on Full Extraction Mining

The buffer zone prohibitions described in Sections 522(e)(4)and (5) make sense only when applied to surface mines, and they are clearly out of place relative to underground mining operations, except for surface facilities associated with underground mines. The surface and coal areas associated with implementing buffer zone restrictions on underground mining impacts, with a goal to prevent subsidence within the buffer zone areas, would far exceed the area needed to protect the structure under consideration. This is perhaps the most compelling argument for not applying the prohibitions to subsidence impacts.

Only one state, Pennsylvania, has ever enacted a law to specifically protect surface structures from subsidence impacts. The Pennsylvania Bituminous Mine Subsidence and Land Conservation Act of 1966 required coal operators to mine so as to not cause subsidence to dwellings built prior to 1966 and public buildings. Although this law was amended in 1994 to allow for these structures to be subsided in exchange for repairs or compensation, during its original term hundreds of structures were protected from subsidence by leaving support coal beneath them. This support coal area was calculated by measuring horizontally out from the structure 15 feet and then projecting a 15 degree angle outward and downward to the coal seam. The area circumscribed by this angle at the coal seam was the protection block of coal. Mining was restricted to a maximum of 50 percent extraction in this block. As an example, under the old Pennsylvania law mining coal 750 feet beneath a 30 foot by 50 foot house would have required the following:

Surface area using a 15' buffer = Width: 30'+15'+15' = 60'
Length: 50'+15'+15' + 80'

**60' x 80' = 4800' = 0.11 acre on the surface**

Support block at 750' depth using a 15 degree angle:

Tangent 15 x 750' = 201' (outward projection from surface area on each side)

Width: 60'+201'+201' = 462'
Length: 80'+201'+201' = 482'

**462' x 482' = 222,684' = 5.11 acres at the coal seam depth**

Therefore, the area to protect a 30 foot by 50 foot home under the old Pennsylvania law, at a depth of 750 feet, was 5.11 acres. The adequacy of this system, relative to preventing

subsidence damage to structures is well documented. In fact, state data show that over a 28 year span, there are virtually no instances where this system failed to protect a structure on the surface.

Contrast the above information with the numbers generated by applying the Section 522(e) buffer zones, ostensibly to achieve the same end results, that is to protect the structure from subsidence.

Surface area using a 300' buffer zone = Width: 30'+300'+300' = 630'
Length: 50'+300'+300' = 650'

**630' x 650' = 409,500 sq. ft. = 9.4 acres**

Support block at 750' depth to the coal seam using a 15 degree angle:

Width: 630'+201'+201' = 1032'
Length: 650'+201'+201' = 1052'

**1032' x 1052' = 1,085,664 sq. ft. = 24.9 acres at the coal seam**

The acres and tons of coal impacted by the above scenario is staggering. That the mining of nearly 25 acres of coal should be restricted to protect a 1500 square foot house on the surface exceeds all aspects of reasonableness and certainly exceeds the bounds of any technical justification. **If one where to use the 30 degree angle of draw in OSM's 1995 final subsidence rules, over 52 coal acres would be impacted.** With a six foot thick coal seam, over 261,000 tons of coal would be sterilized and lost forever. This would result in a terrible loss of resources and may be tantamount to an unconstitutional taking.

We contend that the size of the coal acres impacted by any application of the Section 522(e) buffer zones to subsidence, given the above numbers, validates the Office of Surface Mining's proposed position in this draft interpretative rule. OSM's own data at appendix C-6 of the draft economic analysis illustrate the huge impact associated with this point.

We have attached for the record two tables that we developed that illustrate the sizes of the buffer zones at the coal seam for both dwellings and roads using a 30 degree angle at various depths to the coal. We draw the record's attention to the size of the buffer zones and tons of coal sterilized by these zones.

II. Congressional Support for not Applying Section 522(e) to Subsidence

A. The history of the Surface Mining Control and Reclamation Act, as well as the Act

itself, clearly supports the virtual unrestricted use of full extraction mining methods in exchange for operators addressing the impacts as they occur.

House Report 95-218, that accompanied H.R. 2, from the Committee on Interior and Insular Affairs dated April 22, 1977, notes on page 126:

> "It is the intent of this section to provide the Secretary with the authority to require the design and conduct of underground mining methods to control subsidence to the extent technologically and economically feasible in order to protect the value and use of surface lands. Some of the measures available for subsidence control include:
>
> (1) leaving sufficient original mineral for support;
>
> (2) refraining from mining under certain areas...;
>
> (3) causing subsidence to occur at a predictable time and a relatively uniform and predictable manner. This specifically allows for the uses of longwall and other mining techniques which completely remove the coal."

It is difficult to comprehend how Congress, on one hand, could specifically look at removing all the coal and causing planned subsidence as equivalent to leaving coal in place to support the surface, then turn around and limit the use of full extraction mining as would occur with the application of the Section 522(e) buffer zones. In fact, nowhere in the section in the House Report that deals with "Surface Impacts of Underground Mines" is there any mention that Congress intends to control impacts to structures by prohibiting subsidence within specified areas of surface structures. Rather, this section identifies "causing subsidence to occur at a predictable time and a relatively uniform and predictable manner" as a control measure with no restriction on its use or applicability.

Perhaps an even more compelling indication of Congressional intent can be found on pages 94 and 95 of the House Report. Here, under the title of "Land Use Considerations" the report addresses the lands unsuitable for mining provisions of Section 522. It states:

> "The committee wishes to emphasize that this section does not require the designation of areas as unsuitable for surface mining other than where it is demonstrated that reclamation of an area is not physically or economically feasible under the standards of the act . . . ,"
>
> "Although the designation process will serve to limit mining where such activity is inconsistent with rational planning in the opinion of the committee, the 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 operation, except those in existence on the date of enactment, shall be permitted . . . ."

> "As subsection 522(e) prohibits surface coal mining on lands within the boundaries of national forests, subject to valid existing rights, it is not the intent, nor is the effect of this provision to preclude surface coal mining on private inholdings within the national forests. 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 . . . ."(Emphasis added)

It is apparent that the focus of Congress relative to Section 522 in general, and 522(e) specifically, was with regard to surface mining impacts. The second paragraph goes directly to the Congressional intent to address "surface mining" in creating the 522(e) buffer zones. The frequent use of the term "surface mining" while addressing the "reclamation" related goals in the act; the discussion about "strip mining" (which has the same limited meaning as surface mining and surface coal mining) in the national forests and the absence of any subsidence reference anywhere in this discussion seems clearly to direct Section 522 to surface mining and to exclude subsidence from the realm of consideration.

B. Public Law 95-87, the Surface Mining Control and Reclamation Act of 1977, contains numerous provisions that clearly point to the Section 522(e) prohibitions not applying to subsidence. These include:

1. Title I findings and purposes encourage the "full utilization of coal resources through the development and application of underground extraction technologies."

2. Section 516 contains detailed provisions for permitting underground coal mining operations, including subsidence impacts and contains a specific exception relative to mining that results in planned subsidence.

3. Section 516(c) contains specific language to suspend underground operations beneath towns and communities if imminent danger is likely, a provision that would be totally unnecessary if subsidence from underground mining was prohibited as the result of Section 522(e).

C. The National Energy Policy Act of 1992 also addressed subsidence issues. Section 2504 of the Act amended Section 720 of the Surface Mining Control and Reclamation Act of 1977 with the following language:

> "(a)REQUIREMENTS. --Underground coal mining operations conducted after the date of enactment of this section shall comply with each of the following requirements:
>
> (1) Promptly repair, or compensate for, material damage resulting from subsidence

> caused to any occupied residential dwelling and structures related thereto, or non-commercial building due to underground coal mining operations. Repair of damage shall include rehabilitation, restoration, or replacement of the damaged occupied residential dwelling and structures related thereto . . . . Nothing in this section shall be construed to prohibit or interrupt underground coal mining operations."

Congress clearly reaffirms the status quo of the 522(c) issue given that these amendments were put into place fifteen years after the enactment of the Surface Mining Act and no mention is made or is any effort taken to clarify the applicability of Section 522(e) relative to subsidence. In fact, nothing in the above referenced amendment comes close to restricting underground mining operations, rather it seems to give it an unrestricted green light so long as the operator addresses the repair or compensation issues. Had Congress wanted to deviate from the fifteen years of practice and apply the Section 522(e) prohibitions, it would have been simple to add a proviso to this language doing so. Consequently, it seems safe to say that Congress, even as late as 1992, saw no reason to treat subsidence impacts any differently than they had been treated for fifteen years, except, of course, for specifically mandating repair or compensation for damages.

## III. Office of the Solicitor's Opinion

The draft economic analysis, in Appendix A-7, discusses the opinion the Office of Surface Mining requested and received from the Office of the Solicitor in July, 1991. As the draft analysis points out, the opinion concluded that the best interpretation of SMCRA is that subsidence is not a surface coal mining operation subject to he prohibitions of Section 522(e). The opinion further concluded that Section 516 of SMCRA contains sufficient authority to protect the surface features addressed in Section 522(e) and that the decision was based on the plain reading of the term "surface coal mining operations," an evaluation of the regulatory scheme under SMCRA and the legislative history of the Act.

This opinion provides a detailed and exhaustive look at the issues surrounding Congressional efforts to control, rather than proscribe, subsidence in SMCRA and its legislative history. Virtually no stone has been left unturned relative to investigating the applicability of the definition of "surface coal mining operations" to subsidence with the conclusion being that it does not apply. It points out that the word "subsidence" does not even appear in Section 522(e) nor in its legislative history and that Congressman Morris Udall, one of the Act's prime sponsors, commented on the issue of subsidence with the following:

> "The House Bill contemplates rules to 'prevent subsidence to the extent technologically and economically feasible.' The word prevent led to fears expressed by Secretary of the Interior Morton, that the effect would be to outlaw longwall mining, with its obvious

subsidence . . . . In fact the bill's sponsors consider longwall mining ecologically preferable and it and other methods of controlled subsidence are explicitly endorsed."

We agreed then with this position and believe our above comments directly support the conclusions in the opinion. Subsidence impacts are regulated under Section 516 of the Act and any further regulation under Section 522(e) is unnecessary and inappropriate.

## IV. OSM's Draft Economic Analysis

The Office of Surface Mining has put considerable effort into the draft economic analysis that accompanied the proposed interpretative rule. We compliment the agency for doing such an evaluation of the impacts associated with the different alternatives that were considered. It is clear from the analysis that the costs of applying the proposed prohibitions far exceed the potential benefits. **As noted in the report, the limitations on the analysis resulted in an underestimate of the net costs of pursuing such prohibitions.** Additionally, there are several points in the document that we would like to clarify or expand upon relative to impacts of the prohibitions on full extraction mining operations.

In our opinion, the most important conclusion of the economic analysis is found on page V-5: "While the $2.1 billion cost estimate for the PA/GFAP rule is firmly grounded on data and systematic analysis, it is clearly too low because it leaves out transitional coasts and additional costs to room-and-pillar mining. Time and resources were not available to extend the analysis. But we **can conclude that expected costs of the PA/GFAP rule are likely to be several times larger than $2.1 billion.**" (Emphasis added)

We agree with this conclusion and we urge OSM to stand firm against any attempt to change this interpretative rule based on attacks on the economic analysis. Unless one fully understands the limitations of the relatively low estimate of $2.1 billion, then one cannot and should not propose changes to the rule.

Focusing on the Summary, page S-9, a number of statements are made relative to the conclusions contained in the balance of the report. Several items here need no clarification because they stand on their own: longwall mining is an important and expanding type of underground mining; it can be relatively low-cost (although the capital outlays are considerable); and the mining technique yields little in the way of flexibility once underground. It should also be noted that longwall mining is the safest method of underground mining. However, contrary to the one statement about the flexibility of room and pillar retreat mining, room and pillar mining may not be economically viable under a "prohibitions apply" scenario in many situations. The economics of room and pillar retreat mines are based on the expected recovery of a certain amount of coal. If that expected amount were reduced, as the result of the Section 522(e) prohibitions,

then the mine may not be viable. Although room and pillar retreat mines don't have the starting and stopping problems and costs associated with longwall systems, they still have productivity goals that must be met or the mine can't operate. Coal operators buy the all the coal when a reserve is purchased and only a certain percentage can be left to make the economics work out.

Another aspect that isn't mentioned in this Summary is that many seams can or would only be mined with a longwall system. This includes seams that for geological reasons are only amenable to longwall mining. Many of the deeper coal seams can only mined with longwall systems, and this raises an ironic aspect to Section 522(e) type prohibitions; namely, that as the coal seam gets deeper, the surface impacts get smaller; yet, the protection areas resulting from Section 522(e) get larger thus sterilizing more and more coal. The total surface movement associated with the full extraction of deep coal seams may only be inches, however, by using the angle of draw approach, the sterilized coal block gets larger and larger with increasing depth. A coal seam that is 1,500 feet deep would have to leave almost 50 acres of coal in a support block using a 15 degree angle of draw and a 130 acre block using a 30 angle of draw, both to support a 1,500 square foot house with a 300 foot buffer zone.

The Summary also discusses that the withholding of ten percent of waivers by surface owners would significantly alter longwall mining plans. As noted in footnote 3 on page S-9, this is a representative rate only and, depending on the location of certain houses, we believe as little as a five percent holdout could render longwall mining plans in the East and Midwest uneconomical. For holdout rates above ten percent, as the report points out, the ten percent holdout rate for homeowner waivers was used as the estimate for all higher holdout rates. This assumption: "**probably vastly underestimates additional coal-mining and coal-delivery costs at holdout rates above 10%.**" (P.V-29, emphasis added) This was done, again, due to limitations on time and resources beyond those available for the project.

The analysis notes that at holdout rates above ten percent, "additional costs in total could accumulate rapidly even when extra costs per ton appear small. In addition, larger costs for room-and-pillar mines could make underground mining less competitive with surface mining. Underground production could be displaced by coal produced in other regions. There could be large and abrupt shocks to regional economies. The erosion of regional economies could lead to unemployment. It might become necessary to retrain and relocate large numbers of workers."

Something that the draft analysis fails to adequately address are the local impacts associated with applying the prohibitions. Local impacts, beyond those associated with employment and regional economies, include the erosion of the local tax base if coal mines could no longer operate as would be the case in the prohibitions apply scenario. Coal mining operations contribute significantly to the local and county tax bases not only through the payment of employee income or local earned wage taxes, both through payment of local real estate taxes. As

waivers under a "Prohibitions Apply" scenario receive a value no less than the net value of the repair package they would have received if they were undermined. We're not quite sure these issues can in any way be quantified given that most holdouts have a price where they are willing to begin negotiations. As noted above, the real issues are: do local governments want coal companies to end up owning every homestead that is undermined; should coal companies repair houses that they had to purchase and are now vacant; and is it reasonable to expect a coal company to pay two, three or four times the market value for a property as the cost of obtaining a waiver? Although OSM's analysis is helpful relative to trying to model the number of holdouts and the impacts they might have, the real bottom line question is: if the "Prohibitions Apply" scenario was actually adopted, how expensive would waivers become? Coal operators can accurately anticipate costs to repair or compensate, but we can't calculate what waivers might cost when every surface owner has the potential to sterilize several hundred thousand tons of coal and force dramatic changes in mining plans.

We have attached to these comments our own drawn-to-scale illustration of the impact Section 522(e) buffer zones for dwellings could have on longwall mining plans. This includes the calculated support block and the additional coal lost in order to "square up" the mining face given the inflexibility of longwall mining systems. The illustration shows the impact of just six homes over a four panel area, which as noted below, is a very low housing density even in rural areas, and it doesn't include additional buffer zones for roads, parks or cemeteries. This illustration also uses a 15 degree angle of draw to establish the support block, so the support block would be significantly larger if OSM's 30 degree angle was used. This area could not be economically longwall mined as shown with these buffer zones.

For comparison, we have looked at the dwelling density at our Bailey Mine located in Greene County, Pennsylvania. Part of the Bailey Mine reserve area is included in the figure III-14 map of the Draft Economic Analysis and the Bailey Mine, in conjunction with our Enlow Fork Mine, comprise the two largest underground coal mines in the United States. Combined, these mines produced in excess of 16 million tons of coal in 1996. A review of the mine plan area maps reveals that there are 294 dwellings over the longwall panels in the existing mine permit area. This area contains 55 longwall panels. This averages about 5.35 dwellings per longwall panel. The future expansion area for the Bailey Mine contains about 230 dwellings and will have about 30 longwall panels. This averages 7.67 dwellings per panel. Using either average number of dwellings in the above discussed illustration makes it clear that neither longwall mining nor any full extraction mining would be economically feasible under a prohibitions apply scenario. Nor do these numbers reflect the additional impacts associated with public roads, cemeteries and parks.

We read with interest the compensation scenario on page V-38, where electric energy users would band together to buy-out homeowners who might withhold waivers, in a last ditch effort to keep the longwall mines operating. While this approach is theoretically possible, and it perhaps

illustrates the national implications associated with decimating the longwall mining industry, such a system would be improbable, if not impossible, to implement. Our experiences in Pennsylvania under the old subsidence law that required waivers highlighted the fact that people will hold-out agreeing to any waiver until the last minute. Long range mine planning becomes difficult because the uncertainty about obtaining waivers, production and economic forecasting is destroyed, and coal operators can find little incentive to pursue mining plans.

As noted above, CONOL supports OSM's position on this draft interpretative rule. We urge OSM to remain mindful of their own conclusions contained in their draft economic and environmental analyses. **There is no middle or compromise position on this issue. OSM must maintain the status quo and not apply the Section 522(e) prohibitions to subsidence impacts. The legislative history, the legislation, OSM's regulatory history, OSM's regulations, state programs and coal industry subsidence mitigation programs have shown that subsidence need not be restricted and that coal operators can address the impacts they create in a responsible manner while maximizing the recovery of the coal resource. Further, we do not believe the severe impacts associated with implementing a "prohibitions apply" option have been fully quantified, particularly as it relates to the devastating effects one would see on local economies should longwall mine production be reduced or eliminated.**

CONSOL also endorses the comments submitted by the National Mining Association, the Pennsylvania Coal Association, the West Virginia Coal Association, the Illinois Coal Association, the Kentucky Coal Association, and the Virginia Coal Association.

Sincerely,

Gary E. Slagel

Gary E. Slagel, Director
Environmental Regulatory
Activities

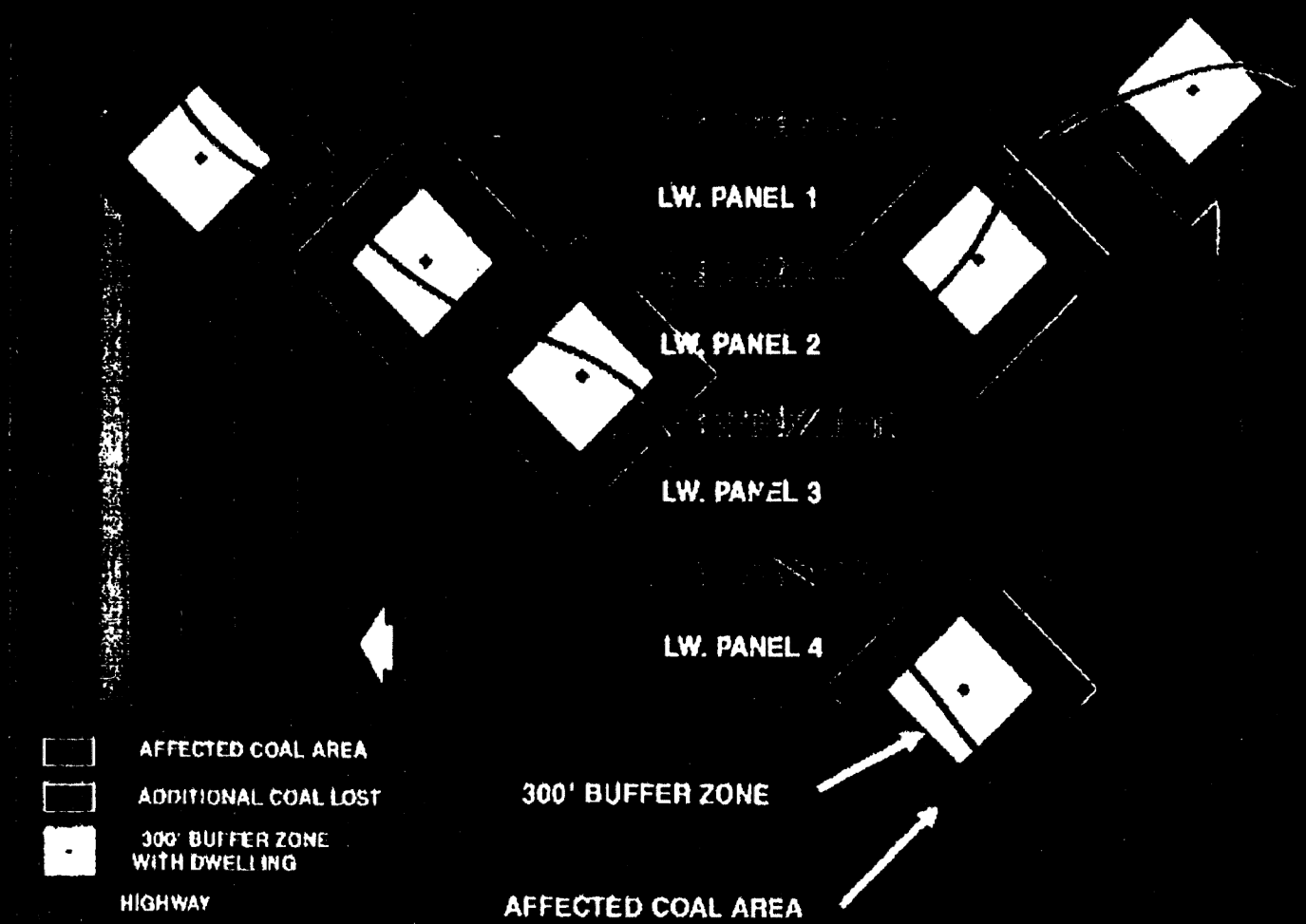
# SEE 522 (e) BUFFER ZONE IMPACTS FOR PUBLICROADS (40' ROAD WIDTH, 100'BUFFER, 30° ANGLE OF DRAW, 6' COAL SEAM)

| DEPTH TO COAL | BUFFER ZONE WIDTH AT COAL SEAM | TONS OFCOAL STERILIZED |
|---|---|---|
| 200' | 470' | 595,536 |
| 300' | 586' | 742,519 |
| 500' | 818' | 1,036,482 |
| 750' | 1106' | 1,401,411 |
| 1000' | 1394' | 1,766,335 |

# UNMINED AREA TO SUPPORT A 32' X 50' HOME (300' BUFFER, 30° ANGLE OF DRAW, 6' SEAM)

| DEPTH TO COAL | DIMENSION OF SUPPORT AREA | SQ. FT. | TONS |
|---|---|---|---|
| 200' | 880 X 862 | 758,560 | 182,039 |
| 300' | 996 X 978 | 974,088 | 233,762 |
| 500' | 1226 X 1208 | 1,481,008 | 355,413 |
| 750' | 1516 X 1498 | 2,270,968 | 544,989 |
| 1000' | 1804 X 1786 | 3,221,944 | 773,205 |

# IMPACT OF 522(e) BUFFER ZONES ON LONGWALL MINING



**CONSOL Inc.**
Consol Plaza
1800 Washington Road
Pittsburgh, PA 15241-1421
412-831-4000
FAX: 412-831-4916

March 3, 1999

Mr. David C. Hogeman
Bureau of Mining and Reclamation
Rachel Carson State Office Building
400 Market St.
Harrisburg, PA 17101-2301

Re: Advanced Notice of Final Rulemaking - PA Bulletin, January 30, 1999

Dear Mr. Hogeman:

CONSOL Inc. is pleased to submit comments on the above referenced draft final rule. CONSOL is the nation's largest producer of bituminous coal by underground mining methods. We also operate several underground mines in Pennsylvania including the two largest underground coal mines in the United States. We recently acquired the active Pennsylvania operations and reserves of the Rochester and Pittsburgh Coal Company and A. T. Massey Coal Company. We operate more longwall mining systems than any other coal company in the United States and we lead the industry in our underground mining technical expertise. We have also worked with numerous state and federal agencies on issues related to underground mining impacts and we have led and continue to lead the industry on the development of programs to address subsidence related impacts on the surface. Consequently, we have a strong interest in this draft final rule as it relates to underground mining issues.

We support these draft final rules. In particular, we support the change to the definition of "Surface mining operation" contained in Section 86.101. We believe the deletion of the language that refers to activities involved in or related to underground mining, or changes in the land surface or water resources, is both appropriate and necessary. As the Department notes, this change is needed to conform with draft federal interpretative rules addressing Section 522(e) of the federal Surface Mining Control and Reclamation Act. Further, this change is necessary because it assures the uninterrupted mining of the Commonwealth's valuable coal resources and allows for the full utilization of the provisions of Act 54 and its regulations. We urge the Department to finalize these rules as proposed to bring closure to this issue. This action acknowledges the intent of both Congress and the Office of Surface Mining, as well as the intent of the Pennsylvania Legislature, and will allow Pennsylvania coal operators to maintain their existing and long established relationships with the surface owners over their coal reserves.

As noted above, we agree with the Department's adoption of the concepts contained in the Office of Surface Mining's draft interpretative rule on the applicability of SMCRA Section 522(e)

prohibitions to subsidence impacts. This OSM draft interpretative rule was published in the Federal Register on January 31, 1997. CONSOL submitted comments to the Office of Surface Mining on July 25, 1997 and supported the agency's conclusion in the draft rule. OSM's position that the Section 522(e) prohibitions do not apply to surface impacts associated with underground coal extraction was strongly supported by both the draft economic analysis and draft environmental impact statement that accompanied the draft rule.

Our comments to OSM also discussed how specific provisions of the 1992 Energy Policy Act amendments to the Surface Mining Control and Reclamation Act clearly detailed requirements to address subsidence related impacts to structures. We noted that these amendments would be meaningless if the true intent of Congress was to prohibit subsidence within the Section 522(e) buffer zones. It would also render meaningless all previous rulemaking efforts by OSM and state agencies to address subsidence impacts to structures; it would sterilize huge tracts of coal from being mined and would decimate all Eastern and Midwestern longwall mining plans. A copy of our comments to OSM are attached for your consideration. Note that we even draw a comparison between the pre-Act 54 support requirements that were previously used in Pennsylvania to what would be required using Section 522(e) buffer zones. The amount of surface and coal acres impacted to protect a single dwelling under the Section 522(e) buffer zones is both staggering and senseless.

We agree with and support the Department's proposed changes to the "Public building" and the "Renewable resource lands" definitions. These changes clarify the definitions and will enable them to be more effectively implemented as part of the Subchapter D program.

The changes to Section 86.102(9) relating to waivers remaining in effect with successive owners is critical in the spirit of fairness and to allow coal operators to properly plan their operations. Since coal operators have no say over the sale of private property, the sale of property that has a waiver shouldn't negate the waiver and require the operator to negotiate another time with a new owner.

We support the changes to Sections 86.124 and 86.125 that delete the EQB and insert the Department as the body that will handle any petition relative to processing, recordkeeping and notifications.

In summary, we support the changes contained in this draft final rule notice and encourage the Department to move to finalize them as soon as possible. We also support the comments submitted by the Pennsylvania Coal Association on this notice. Thank you for your consideration.

Sincerely,

Gary E. Slagel, Director
Regulatory Affairs

Brenman

# I N T E R O F F I C E  M E M O R A N D U M

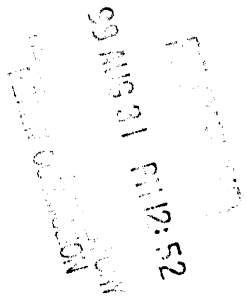
Original: 1924
McGinley
Copies: Harris
Sandusky
Wyatte

Date: 02-Mar-1999 03:08pm EST
From: David Hogeman
HOGEMAN.DAVID
Dept: Mining and Reclamation
Tel No: (717) 787-4761

TO: Hobart Baker ( BAKER.HOBART )

CC: Milton McCommons ( MCCOMMONS.MILTON )
CC: Roderick Fletcher ( FLETCHER.RODERICK )

Subject: FWD: FW: Comments to UFM regs



I N T E R O F F I C E  M E M O R A N D U M

Date: 02-Mar-1999 04:09pm EST
From: Freeman, Sharon
Freeman.Sharon@dep.state.pa.us
Dept:
Tel No:

TO: HOGEMAN DAVID ( HOGEMAN.DAVID@A1.dep.state.pa.us@PMD
TO: MCCOMMONS MILTON ( MCCOMMONS.MILTON@A1.dep.state.pa.us@

Subject: FW: Comments to UFM regs

Nobody reads notices. Here's another one. I have acknowledged it.

-----Original Message-----
From: Beverly Braverman [mailto:bevb@helicon.net]
Sent: Tuesday, March 02, 1999 2:58 PM
To: RegComments
Subject: Comments to UFM regs

Comments to Advance Notice of Final Rulemaking on 25 Pa. Code, Chapter 86.
Coal Mining-Areas Unsuitable for Mining

We strongly object to the Department's position in this rulemaking on several fronts. One is that we continue to find the dumbing of Pennsylvania 's hard fought improvements over the existing federal law to be a disgusting retreat from a saner and more thoughtful approach to the protection of the Commonwealth's resources. In a state that has more than three-thousand two hundred miles of streams degraded from mining, one would think protections specifically tailored to this deplorable situation should be held firmly in place.

Surface mining operations do indeed include surface effects of underground mining resulting from activities that were conducted beneath the land surface. To deny the surface effects of underground mining is to deny the evidence of one's own senses. We know that the only reason 522(e) has been interpreted to preclude subsidence within 300 feet of homes is to continue to facilitate the long-wall mining of populated areas. To interpret this section any other way would effectively preclude mining under our homes and would impact the long-wall mining industry by preventing it from destroying our homes and depriving 80% of the coal industry work force of jobs.

Additionally, we do not agree that 522(e) alone addresses Unsuitable for Mining Petitions or underground mining, but that 522(a) and CFR 761.5(d) also apply to underground mining. Unsuitable for Mining petitions address water resource impacts, not subsidence. We submit that 522(e) addresses subsidence effects, not water resource impacts.

The Department bases its interpretation on one section of federal law, but does not consider other sections that provide additional protections for water resources.

Further, we object to the adoption of an interpretation by the federal government of 522(e) that is only proposed, but not adopted. We believe, at least we hope, the verdict is still out on the adoption of this idiotic

interpretation of the law. The M opinion is just that-an opinion. And not a very intelligent one!

We also concur with and join in the comments submitted by both the Tri-State

Citizens Mining Network and the Kentucky Resources Council, Inc.

Sincerely,

Beverly Braverman, Executive Director
Mountain Watershed Association, Inc.
724 455-4200

RFC-822-headers:
Received: from gatekeeper.pader.gov by PADER.GOV (PMDF V5.1-12 #D3533)
 with SMTP id <01J8CXNIE96E9OFPX2@PADER.GOV>; Tue, 2 Mar 1999 15:06:24 EDT
Received: by gatekeeper.pader.gov; (5.65v3.2/1.3/10May95) id AA06451; Tue,
 02 Mar 1999 15:12:13 -0500
Received: by erexecimcs01.pader.gov with Internet Mail Service (5.5.2448.0)
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X-Mailer: Internet Mail Service (5.5.2448.0)

## Freeman, Sharon

**From:** Beverly Braverman [bevb@helicon.net]
**Sent:** Tuesday, March 02, 1999 2:58 PM
**To:** RegComments
**Subject:** Comments to UFM regs

Comments to Advance Notice of Final Rulemaking on 25 Pa. Code, Chapter 86.
Coal Mining-Areas Unsuitable for Mining

We strongly object to the Department's position in this rulemaking on several fronts. One is that we continue to find the dumbing of Pennsylvania 's hard fought improvements over the existing federal law to be a disgusting retreat from a saner and more thoughtful approach to the protection of the Commonwealth's resources. In a state that has more than three-thousand two hundred miles of streams degraded from mining, one would think protections specifically tailored to this deplorable situation should be held firmly in place.

Surface mining operations do indeed include surface effects of underground mining resulting from activities that were conducted beneath the land surface. To deny the surface effects of underground mining is to deny the evidence of one's own senses. We know that the only reason 522(e) has been interpreted to preclude subsidence within 300 feet of homes is to continue to facilitate the long-wall mining of populated areas. To interpret this section any other way would effectively preclude mining under our homes and would impact the long-wall mining industry by preventing it from destroying our homes and depriving 80% of the coal industry work force of jobs.

Additionally, we do not agree that 522(e) alone addresses Unsuitable for Mining Petitions or underground mining, but that 522(a) and CFR 761.5(d) also apply to underground mining. Unsuitable for Mining petitions address water resource impacts, not subsidence. We submit that 522(e) addresses subsidence effects, not water resource impacts.

The Department bases its interpretation on one section of federal law, but does not consider other sections that provide additional protections for water resources.

Further, we object to the adoption of an interpretation by the federal government of 522(e) that is only proposed, but not adopted. We believe, at least we hope, the verdict is still out on the adoption of this idiotic interpretation of the law. The M opinion is just that-an opinion. And not a very intelligent one!

We also concur with and join in the comments submitted by both the Tri-State

Citizens Mining Network and the Kentucky Resources Council, Inc.

Sincerely,

Beverly Braverman, Executive Director
Mountain Watershed Association, Inc.
724 455-4200

## Freeman, Sharon

**From:** Beverly Braverman [bevb@helicon.net]
**Sent:** Tuesday, March 02, 1999 3:29 PM
**To:** RegComments
**Subject:** Fw: Comments to UFM regs

> Comments to Advance Notice of Final Rulemaking on 25 Pa. Code, Chapter 86.
> Coal Mining-Areas Unsuitable for Mining
> We strongly object to the Department's position in this rulemaking on >several fronts. One is that we continue to find the dumbing of Pennsylvania's hard fought improvements over the existing federal law to be a disgusting retreat from a saner and more thoughtful approach to the protection of the Commonwealth's resources. In a state that has more than three-thousand two
>hundred miles of streams degraded from mining, one would think protections specifically tailored to this deplorable situation should be held firmly in place.
> Surface mining operations do indeed include surface effects of underground >mining resulting from activities that were conducted beneath the land >surface. To deny the surface effects of underground mining is to deny the >evidence of one's own senses. We know that the only reason 522(e) has been >interpreted to preclude subsidence within 300 feet of homes is to continue >to facilitate the long-wall mining of populated areas. To interpret this >section any other way would effectively preclude mining under our homes and >would impact the long-wall mining industry by preventing it from destroying >our homes and depriving 80% of the coal industry work force of jobs.
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> The Department bases its interpretation on one section of federal law, but >does not consider other sections that provide additional protections for >water resources.
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>least we hope, the verdict is still out on the adoption of this idiotic >interpretation of the law. The M opinion is just that-an opinion. And not >a very intelligent one!
>
> We also concur with and join in the comments submitted by both the >Tri-State Citizens Mining Network and the Kentucky Resources Council, Inc.
>
> Sincerely,
>
>
> Beverly Braverman, Executive Director
> Mountain Watershed Association, Inc.
> 724 455-4200
Box 408
Melcroft, PA 15462
>
>
>

**THE PINE CREEK VALLEY WATERSHED ASSOCIATION, INC.**
P.O. Box 239
Oley, PA 19547

March 8, 1999

Original: 1924
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Wyatte

David C. Hogeman
PADEP Bureau of Mining and Reclamation
Rachel Carson State Office Building
400 Market Street, 5th Floor
Harrisburg, PA 17101-2301

Re: Comments on Draft Final Chapter 86 MiningRegulations

Dear Mr. Hogeman:

This letter is to provide comments on the Draft Final Rulemaking for Surface and Underground Mining (25 PA Code, Chapter 86) as published in the Pennsylvania Bulletin on 30 January 1999 (Vol. 29, No. 5, p. 548).

Overall, the proposed revisions will weaken protections of the public and the environment, and for that reason should not be adopted as proposed.

(A) The Regulatory Basics Initiative, which is the basis of the proposed changes, has as its focus "easing the regulatory burden". This should not be equated with "eliminating necessary regulations". Poorly defined regulations, inconsistent application of the regulations by DEP, inadequate enforcement -- these are problems that should be corrected. The environmental protection requirements can be made less ambiguous without making them less effective. If the regulations were clearly defined and consistently applied, that would ease the burden on the regulated public. The goal should be to address the problems that evoked the regulations in the first place, not to eliminate the regulations themselves. For the Department of Environmental Protection to weaken environmental protection requirements in order to make it easier for mines to open and operate is simply irresponsible.

B) A questionable assumption built into the Regulatory Basics Initiative is that federal standards and protections are acceptable, or even adequate. In the case of mining, the responsibility for administering the regulatory program has been delegated to Pennsylvania, and along with it the responsibility for protection of our natural resources. The federal SMCRA program was meant to provide a minimum baseline level of environmental protection. The original intent was that states receiving primacy would adapt the federal standards to their own local needs and conditions,

deleted. In those instances where a nonprofit organization has designated lands for public recreational use, it is entirely appropriate that those lands should be treated as public parks. It is the park's public use, not its ownership, that is the significant factor. For the same reasons, the word "primarily" should not be added in an apparent attempt to distinguish some public recreational uses from others; all such uses should be fully and equally protected.

(G) Subchapter D. 86.101. Definitions: Surface mining operations: The last part of the definition ("and activities involved in or related to underground coal mining which are conducted on the surface of the land, produce changes in the land surface, or disturbs the surface, air or water resources of the area") should not be deleted. To delete this section of the definition would significantly weaken existing environmental protections. Despite its title, the federal SMCRA has always regulated both surface coal mining and the surface effects of underground coal mining. Thus it is appropriate to maintain this section in the definition. Furthermore, no comparable language is proposed to replace it in the underground mine regulations, and so this would become an unregulated class of activities.

(H) 86.102.(3). Areas where mining is prohibited or limited: The phrase "on or eligible for inclusion" should be retained. To delete this phrase would significantly weaken existing protections of recognized historic resources. The term "eligible for inclusion" refers to specific resources that have been approved by the SHPO for listing on a State Register and/or have been formally nominated for listing on the National Register. In accordance with federal requirements under Section 106 of the National Historic Preservation Act, both listed and eligible resources must be protected in certain situations. The proposed deletion of the above phrase is an unacceptable reduction of current protections and should not be adopted.

(I) 86.102.(9).ii and iii. The proposed changes reduce the protections of individuals whose dwellings are within 300 feet of proposed operations and thus should not be adopted. The proposed requirements lessen the burden on the mine applicant to gain the permission of existing landowners by expanding what is considered to be a valid waiver to include such things as a "lease, deed, or other conveyance" and the "constructive knowledge" of future owners. The existing language is adequate and should not be changed.

(J) 86.103.e. Procedures. The proposed change from "may" to "will" reduces the protections currently afforded to public parks and National Register places, and thus should not be adopted. If proposed mining operations are adjacent to, or upstream from, a public park or National Register site, there is a good likelihood that adverse effects will result. If there is any doubt, the regulations should take the cautious approach. In every such instance, therefore, the applicant rightfully should be required to transmit a copy of the application to the appropriate agency and

(N) 86.124.(a).2. Procedures: initial processing, etc. The proposed new sentence "A frivolous petition is one in which the allegations of harm lack serious merit." is unnecessary and should not be adopted. The commonly accepted meaning of the word "frivolous" as used in the existing regulations does not need to be clarified by the proposed sentence. Furthermore, who would decide up front whether the allegations "lack serious merit"? This is what the petition process is set up to do: to review proposals and determine whether a designation of unsuitability is warranted.

(O) 86.124.(c). Procedures: initial processing, etc. and 86.125. Procedures: hearing requirements. The forum for the hearing should not be changed from the EQB to the DEP as proposed. It is appropriate that the more disinterested EQB forum be used to hear the petitions. This proposed change in forum should not be adopted.

(P) 86.124.(f). Procedures: initial processing, etc. It is appropriate to impose a deadline on the preparation of a recommendation on a petition. The 12-month timeframe following receipt of a complete petition should be adequate. However, until the petition has been deemed to be administratively complete, a milestone that should be made clear to all parties involved, the clock should not begin.

(Q) 86.129.(a) and (b). Coal exploration. The change from prohibiting coal exploration on areas designated unsuitable for mining to allowing it should not be made. This is a major reversal in the regulation and it is entirely inappropriate. It may be reasonable to allow coal exploration on lands for which a petition has been filed and is pending, but once an area has been formally designated as unsuitable, no mining or coal exploration should be allowed. The proposed change should not be adopted.

In conclusion, the proposed revisions to Chapter 86 clearly were not made with the interests of the public and the protection of the environment in mind. The proposed changes undoubtedly will reduce the burden on the mine applicant, but at the expense of the environment and the general public. The people of the Commonwealth want and expect DEP to promote and protect their rights to clean land, air and water. The changes proposed for Chapter 86 are contrary to the goals of environmental protection and, therefore, should not be adopted.

Sincerely,

Harlan J. Snyder, v.pres.

**CONSOL Inc.**
Consol Plaza
1800 Washington Road
Pittsburgh, PA 15241-1421
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March 3, 1999

Original: 1924
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Mr. David C. Hogeman
Bureau of Mining and Reclamation
Rachel Carson State Office Building
400 Market St.
Harrisburg, PA 17101-2301

Re: Advanced Notice of Final Rulemaking - PA Bulletin, January 30, 1999

Dear Mr. Hogeman:

CONSOL Inc. is pleased to submit comments on the above referenced draft final rule. CONSOL is the nation's largest producer of bituminous coal by underground mining methods. We also operate several underground mines in Pennsylvania including the two largest underground coal mines in the United States. We recently acquired the active Pennsylvania operations and reserves of the Rochester and Pittsburgh Coal Company and A. T. Massey Coal Company. We operate more longwall mining systems than any other coal company in the United States and we lead the industry in our underground mining technical expertise. We have also worked with numerous state and federal agencies on issues related to underground mining impacts and we have led and continue to lead the industry on the development of programs to address subsidence related impacts on the surface. Consequently, we have a strong interest in this draft final rule as it relates to underground mining issues.

We support these draft final rules. In particular, we support the change to the definition of "Surface mining operation" contained in Section 86.101. We believe the deletion of the language that refers to activities involved in or related to underground mining, or changes in the land surface or water resources, is both appropriate and necessary. As the Department notes, this change is needed to conform with draft federal interpretative rules addressing Section 522(e) of the federal Surface Mining Control and Reclamation Act. Further, this change is necessary because it assures the uninterrupted mining of the Commonwealth's valuable coal resources and allows for the full utilization of the provisions of Act 54 and its regulations. We urge the Department to finalize these rules as proposed to bring closure to this issue. This action acknowledges the intent of both Congress and the Office of Surface Mining, as well as the intent of the Pennsylvania Legislature, and will allow Pennsylvania coal operators to maintain their existing and long established relationships with the surface owners over their coal reserves.

As noted above, we agree with the Department's adoption of the concepts contained in the Office of Surface Mining's draft interpretative rule on the applicability of SMCRA Section 522(e)

prohibitions to subsidence impacts. This OSM draft interpretative rule was published in the Federal Register on January 31, 1997. CONSOL submitted comments to the Office of Surface Mining on July 25, 1997 and supported the agency's conclusion in the draft rule. OSM's position that the Section 522(e) prohibitions do not apply to surface impacts associated with underground coal extraction was strongly supported by both the draft economic analysis and draft environmental impact statement that accompanied the draft rule.

Our comments to OSM also discussed how specific provisions of the 1992 Energy Policy Act amendments to the Surface Mining Control and Reclamation Act clearly detailed requirements to address subsidence related impacts to structures. We noted that these amendments would be meaningless if the true intent of Congress was to prohibit subsidence within the Section 522(e) buffer zones. It would also render meaningless all previous rulemaking efforts by OSM and state agencies to address subsidence impacts to structures; it would sterilize huge tracts of coal from being mined and would decimate all Eastern and Midwestern longwall mining plans. A copy of our comments to OSM are attached for your consideration. Note that we even draw a comparison between the pre-Act 54 support requirements that were previously used in Pennsylvania to what would be required using Section 522(e) buffer zones. The amount of surface and coal acres impacted to protect a single dwelling under the Section 522(e) buffer zones is both staggering and senseless.

We agree with and support the Department's proposed changes to the "Public building" and the "Renewable resource lands" definitions. These changes clarify the definitions and will enable them to be more effectively implemented as part of the Subchapter D program.

The changes to Section 86.102(9) relating to waivers remaining in effect with successive owners is critical in the spirit of fairness and to allow coal operators to properly plan their operations. Since coal operators have no say over the sale of private property, the sale of property that has a waiver shouldn't negate the waiver and require the operator to negotiate another time with a new owner.

We support the changes to Sections 86.124 and 86.125 that delete the EQB and insert the Department as the body that will handle any petition relative to processing, recordkeeping and notifications.

In summary, we support the changes contained in this draft final rule notice and encourage the Department to move to finalize them as soon as possible. We also support the comments submitted by the Pennsylvania Coal Association on this notice. Thank you for your consideration.

Sincerely,

Gary E. Slagel, Director
Regulatory Affairs

Pennsylvania Environmental Council

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March 2, 1999

Bureau of Mining and Reclamation
Attention: David C. Hogeman
Rachel Carson State Office Building, 5th Floor
400 Market Street
Harrisburg, PA 17101-2301

**Re: Advance Notice of Final Rulemaking, 25 Pa. Code, Chapter 86**

Dear Mr. Hogeman,

The Pennsylvania Environmental Council (Council) respectfully submits the following comments on the Department of Environmental Protection's Advance Notice of Final Rulemaking delineating changes to Subchapter D of 25 Pa. Code, Chapter 86. It is the Council's position that the Department of Environmental Protection (Department) is making a premature and unsound decision by deleting activities and impacts related to underground coal mining that affect the land surface from the definition of "surface mining operations." The Council's position is predicated upon the legislative intent and language of the Federal Surface Mining Control and Reclamation Act ("SMCRA" or "the Act"); the environmental, social and economic impacts of underground mining in the Commonwealth; and the lack of definitive guidance from existing federal regulations.

As noted by the Supreme Court of the United States in *Hodel v. Virginia Surface Mining & Reclamation Association, Inc*, 452 U.S. 264 (S.Ct. 1981), the Act establishes a program of "cooperative federalism" that allows each State, subject to federal minimum standards, to enact and administer its own regulatory program structured to fit that State's own particular needs. This is reflected in the Congressional Findings listed in Section 1201(f) of the Act:

> because of the diversity in terrain, climate, biologic, chemical, and other physical conditions, the primary governmental responsibility for developing, authorizing, issuing, and enforcing regulations . . . should rest with the state.

This regulatory philosophy is based upon the understanding that each state, due to differing geographic and geological characteristics and qualities, faces unique needs and challenges to ensure adequate environmental protection under the mandates of the Act.

Pennsylvania is one of several eastern states that is significantly impacted by underground coal

mining. According to the Pennsylvania Coal Association's 1997 Report, bituminous coal production now out-paces anthracite production in the Commonwealth by a 6 to 1 ratio. Underground mining operations account for 75% of bituminous coal production and 93% of known bituminous reserves. Over the past twenty years, surface production of bituminous coal in Pennsylvania has decreased by 50 percent, a trend that is expected to continue in the future.

By deleting consideration of the surface effects of underground mining in Subchapter D, Section 101 of Chapter 86, the Department is in essence exempting the primary source of coal production in Pennsylvania from necessary and authoritative environmental standards. It is well demonstrated that the surface effects of underground coal mining have significant, long-term environmental and socioeconomic impacts in the Commonwealth. These surface effects adversely affect important environmental and recreational resources, public and private water supplies, community infrastructure, public utilities, property values, and tax revenues. Subsidence impacts residential, commercial, industrial, agricultural and public uses of the state's land and water resources. Due to current trends in coal production, the area of land and the number of property uses affected by underground mining will only increase in the foreseeable future.

Awareness of and concern for these adverse surface affects from underground mining is demonstrated throughout the Act, including Section 522 which governs designation of areas unsuitable for mining. This purpose is explicitly recognized in the Act's legislative history:

> A basic tenet underlying this legislation is the principal that environmental protection and reclamation, at a minimum meeting the standards of the Act, are a coequal objective with that of producing coal. [H.Rep. NO. 219 (95th Cong., 1st Sess. (1977)]

SMCRA envisions mining as only a temporary use of land, and places high priority on environmental protection and restoration (see the Congressional Findings and Statements of Purpose in Sections 101 and 102 of the Act). Given the reality of coal production in Pennsylvania, coupled with the demonstrated adverse surface affects of underground mining, it is unclear why the Department would forfeit this vital environmental, economic and social protection afforded by SMCRA. Section 522 makes no distinctions between surface operations and surface impacts incident to an underground coal mine; it is questionable why the Commonwealth of Pennsylvania, a state that is highly impacted by underground mining, would make such a distinction. In addition, relaxing this standard works against recent state initiatives directed toward sustainable use of the Commonwealth's land and water resources such as the 21st Century Environment Commission Report and the Governor's Growing Greener proposal.

Another concern with the Advance Notice is the uncertain status of the federal regulations for §522 of SMCRA. While a proposed interpretative rule was published in the beginning of 1997 (62 Fed.Reg. 4836-72, Jan. 31, 1997), to date, no further action has been taken. The most recent OSM Regulatory Agenda does not call for final action on this matter until, at the earliest, May of 1999. Without definitive guidance, the Department is risking a premature decision that may

ultimately prove to be invalid in the face of controlling federal regulations.

While the Department is to be commended for allowing public comment on the proposed regulatory changes, it is evident that further discussion is warranted. The Department should stay these proposed changes to Subchapter D of 25 Pa. Code, Chapter 86, at a minimum until the federal regulations are determinative on the issue.

Thank you for the opportunity to comment.

John Walliser

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GEORGE ELLIS
President



December 31, 1999

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Wyatte

Mary Lou Harris, Esq.
Senior Regulatory Analyst
Independent Regulatory Review Commission
333 Market St.
Harrisburg, PA 17101

*Re: IRRC Reg. No. 7-331, Environmental Quality Board Final Rulemaking: Surface and Underground Coal Mining,Areas Unsuitable for Mining*

Dear Ms. Harris:

I'm forwarding a copy of the final Interpretive Rule promulgated by the federal Office of Surface Mining, Reclamation and Enforcement (OSM) in the December 17, 1999 *Federal Register*. I recall the commission being interested in the federal government's final rule on this subject.

As we anticipated, the final Interpretive Rule does not apply SMCRA's UFM prohibitions to the surface effects of underground mining. This affirms the position taken by DEP in the Advanced Notice of Final Rulemaking.

If you have any questions or need additional information, I hope you will contact me. Best wishes for a happy New Year!

Sincerely,

Michael G. Young
Director of Regulatory Affairs

Enclosures

## 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."

[FR Doc. 99–30892 Filed 12–16–99; 8:45 am]

BILLING CODE 4310–05–p

## 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



### 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,

churches, community and institutional buildings; and
—Cemeteries.

Section 701(28) Defines "Surface Coal Mining Operations."

This interpretive rulemaking is in part the result of litigation concerning the applicability of:

—The section 522(e)(4) prohibition to underground mining within 100 feet of any public road; and
—The (e)(5) prohibition to underground mining within 300 feet from any occupied dwelling, unless waived by the owner, or within 300 feet of public buildings or public parks, or within 100 feet of a cemetery.

In that litigation, environmental and citizen plaintiffs contended that our regulations implementing SMCRA section 522(e), at 30 CFR 761.11(d) through (g), did not explicitly prohibit subsidence from underground mining in 522(e)(4) and (5) areas. Citizen Plaintiffs' Mem. Round III of *In Re: Permanent Surface Mining Regulation Litigation*, No. 79–1144, (D.D.C. 1985) [hereafter, *In Re: Permanent (II)]* at 56. There is still disagreement over whether and to what extent subsidence and underground mining which causes or is expected to cause subsidence, are prohibited. Environmental and citizen groups believe all subsidence is prohibited. Industry groups believe subsidence is not covered by the prohibitions. In its decision on the issue, the court affirmed our regulations, stating that they track the statutory language, while noting that the Secretary had committed to further rulemaking on the applicability of sections 522(e)(4) and (5) to underground mining. *In Re: Permanent (II)*, Mem. Op. at 70 (July 15, 1985).

In 1988, we issued a proposed rule to address the issue. See 53 FR 52374, Dec. 27, 1988. In 1989, we withdrew the proposed rule for further study due to the comments we received and our analysis indicating that this was fundamentally a legal issue. 54 FR 30557, July 21, 1989. We then decided to seek a formal opinion on this matter from the Department of the Interior's Office of the Solicitor. The Solicitor completed his review of this issue in July 1991, and concluded that the best interpretation of SMCRA is that subsidence is not a surface coal mining operation subject to the prohibitions of § 522(e). Memorandum Opinion of the Solicitor, Department of the Interior, M–36971, Applicability of Section 522(e) of the Surface Mining Control and Reclamation Act to Subsidence (100 I.D. 85 (1993)) [hereafter, the "M–Op',].

The M–Op is based on an extensive analysis of the statute, the legislative history, relevant case authority and our regulatory actions with respect to the applicability of section 522(e) to subsidence from underground mining. The M–Op:

—Concluded that Congress did not intend for the prohibitions of section 522(e) to apply to subsidence from underground mining and
—Noted that OSM may regulate subsidence solely under section 516 of SMCRA and not under section 522(e).

The M–Op recognizes that regulation under section 516 may not have the same effect as regulation under section 522(e). At the same time, the analysis of the statute and legislative history supports the conclusion that regulation under section 516 will achieve full protection of the environmental values which Congress sought to protect from subsidence under the Act while encouraging longwall mining.

On July 18, 1991, we published a Notice of Inquiry (NOI) which stated that no further rulemaking action was necessary in regard to the applicability of section 522(e) prohibitions to underground mining. The NOI stated that we based this conclusion upon our review of the Act and the legislative history, the comments received on the December 27, 1988, proposal, and the M–Op. We concluded that the regulations, at 30 CFR 761.11(d), (e), (f) and (g), adequately addressed underground mining and appropriately applied the statutorily-established buffer zones in a horizontal dimension only. 56 FR 33170.

On September 6, 1991, the National Wildlife Federation (NWF) filed suit against the Secretary challenging the July 18 NOI and the July 10 M–Op, on the applicability of 522(e) of SMCRA to subsidence. *National Wildlife Fed'n (NWF)* v. *Babbitt*, 835 F. Supp. 654 (D.D.C. September 21, 1993). The NWF contended that both the M–Op and the NOI violated the requirements of the Administrative Procedure Act (APA), the National Environmental Policy Act (NEPA), and SMCRA. NWF requested, among other things, that the court order OSM to undertake rulemaking to determine the applicability of section 522(e) to subsidence, and vacate the M–Op and the NOI. In addition, the Interstate Mining Compact Commission (IMCC) and a number of industry groups, including the National Coal Association (NCA) and American Mining Congress (AMC), filed a motion to intervene as defendants in this action. The court granted that motion .

The district court vacated the NOI on September 21, 1993, on procedural grounds, and remanded the case to the Secretary for rulemaking on the applicability of section 522(e) to subsidence, in accordance with the notice and comment procedures of the APA, 5 U.S.C. section 551 *et seq. National Wildlife Fed'n (NWF)* v. *Babbitt*, 835 F. Supp. 654 (D.D.C. September 21, 1993).

*B. What Process Did OSM Use To Develop the Final Rule?*

This final rule is based upon a proposed rule published for public review and comment on January 31, 1997 (62 FR 4864). We also posted the proposed rule and associated documents on the OSM 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. 62 FR 29314, May 30, 1997.

In addition to the testimony offered at the four hearings, we received approximately 491 written comments on the proposed rule (430 from private citizens, 40 from companies and associations affiliated with the mining industry, 9 from environmental organizations, and 12 from Federal, State, and local governmental entities and associations). We considered all comments and hearing transcripts in developing the final rule. With the exception of comments that did not address the substance or merits of the proposed rule, the preamble summarizes the major types of comments received and their disposition.

In addition to the changes made in response to comments, we have written this document in plain language, using better organization, more concise sentences, and pronouns.

*C. How Is This Rule Related to the Valid Existing Rights Rulemaking?*

Under section 522(e), surface coal mining operations are prohibited in specified areas unless a person can demonstrate a valid existing right to mine the coal resources, or can meet one of the other statutory exceptions to the prohibitions. SMCRA does not define the term "valid existing rights" (VER) . In a separate rulemaking, published in this issue of the **Federal Register**, we define valid existing rights, establish standards for VER, tell how to submit a

VER claim. and explain how we will process claims.

That separate rulemaking establishes a "good faith all permits" primary standard for VER, which provides that a person has VER if, before the land came under the protection of section 522(e), the person had obtained, or made a good faith effort to obtain, all necessary permits. In general, access to coal resources within western National Forests, and within protected historic sites, road buffers, and occupied dwellings buffers is largely gained by processes other than VER (compatibility findings, waivers, and avoidance). In addition, even though access to coal under churches, schools, public buildings, and cemeteries is generally dependent upon establishing VER, these protected areas are encountered at a frequency that generally allows mining operations to readily avoid them.

The EIS accompanying this rulemaking concludes that, overall, the areas most likely to be impacted through successful VER determinations appear to be:

—Section 522(e)(1) lands;
—State and local parks; and
—Some areas contained in eastern National Forests.

The "good faith all permits" standard is likely to have the least environmental impact and allow surface owners and resource management agencies the greatest control to decide whether to authorize adverse effects to protected areas. Under this standard, it appears that few, if any, areas protected by section 522(e) would be mined under VER determinations. See *Final Environmental Impact Statement: 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,* OSM–EIS–29 (July, 1999). [hereafter, "Final EIS, 1999"]. We don't expect the "good faith all permits" VER standard to significantly limit underground mining access to coal in areas protected under section 522(e) This is in part because, under this rulemaking, subsidence is not prohibited under section 522(e).

We analyzed the relative impacts of the various combinations of alternatives for the two rules in an Environmental Impact Statement (EIS) and an Economic Analysis (EA) that addressed the two rulemakings. The National Environmental Policy Act requires an EIS when a rulemaking will have a significant effect on the quality of the human environment. An EA is required when a rule is considered significant regulatory action under the criteria of Executive Order 12866. In 1994, we published a notice in the **Federal Register** (59 FR 21996) of our intent to prepare an EIS and EA on these two issues. The scoping process for the support documents identified several impact issues regarding the proposed rulemakings.

Simultaneously with the two proposed rulemakings published in January 1997, we published for review and comment a draft EIS (U.S. Department of the Interior. Office of Surface Mining Reclamation and Enforcement. *Draft Environmental Impact Statement Valid Existing Rights, 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,* OSM–EIS–29, September 1995).

We also made available for review and comment a draft EA (U.S. Department of the Interior. U.S. Geological Survey and Office of Surface Mining Reclamation and Enforcement. *Draft Economic Analysis Valid Existing Rights, 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,* March 1996).

The final EIS and EA provide detailed responses to comments on the draft support documents. See, Final EIS, 1999; Final Economic Analysis, *Rulemaking Alternatives for a Standard for Valid Existing Rights and for the Rulemaking Alternatives for Application of 522(e) Prohibitions to Underground Mining,* prepared by U.S. Geological Survey and U.S. Office of Surface Mining, (July, 1999). (Hereafter "Final EA , 1999").

### *D. What Statutory Language Is OSM Interpreting?*

#### 1. Prohibition on Surface Coal Mining Operations—Section 522(e)

SMCRA 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. Congress determined that the nature and purpose of section 522(e) areas and land uses were incompatible with surface coal mining operations. See S. Rep. No. 128, 95th Cong. 1st Sess. 55 (1977). Under section 522(e), if a person who proposes to conduct a surface coal mining operation on protected lands does not qualify for one of the statutory exceptions, then the person cannot conduct the intended operation on such lands, and the permit area cannot include those lands. See 30 CFR § 773.15(c)(3)(ii). Section 522(e), subject to specified exceptions, states that no surface coal mining operations shall be permitted on lands designated in subsections (e)(1) through (5). Section 522(e) does not specifically mention subsidence.

Section 522(e) provides, in relevant part, as follows:

After the enactment of this Act and subject to valid existing rights *no surface coal mining operations* except those which exist on the date of enactment of the Act shall be permitted—

(1) On any lands within the boundaries of units of the National Park System, the National Wildlife Refuge Systems, 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;

(2) On any Federal lands within the boundaries of any national forest: *Provided, however,* That surface coal mining operations may be permitted on such lands if the Secretary finds that there are no significant recreational, timber, economic, or other values which may be incompatible with such surface mining operations and —

(A) Surface operations and impacts are incident to an underground coal mine; or

(B) where the Secretary of Agriculture determines, with respect to lands which do not have significant forest cover within those national forests west of the 100th meridian, that surface mining is in compliance with the Multiple-Use Sustained-Yield Act of 1960, the Federal Coal Leasing Amendments Act of 1975, the National Forest Management Act of 1976, and the provisions of this Act: *And provided further,* That no surface coal mining operations may be permitted within the boundaries of the Custer National Forest;

(3) Which will adversely affect any publicly owned park or places included in the National Register of Historic Sites unless approved jointly by the regulatory authority and the Federal, State, or local agency with jurisdiction over the park or the historic site;

(4) Within one hundred feet of the outside right-of-way line of any public road, except where mine access roads or

haulage roads join such right-of-way line and except that the regulatory authority may permit such roads to be relocated or the area affected to lie within one hundred feet of such road, if after public notice and opportunity for public hearing in the locality a written finding is made that the interests of the public and the landowners affected thereby will be protected; or

(5) Within three hundred feet from any occupied dwelling, unless waived by the owner thereof, nor within three hundred feet of any public building, school, church, community, or institutional building, public park, or within one hundred feet of a cemetery.

30 U.S.C. 1272(e) (emphasis added).

2. Definition of Surface Coal Mining Operations—Section 701(28)

The prohibitions of section 522(e) of SMCRA apply to "surface coal mining operations." Thus, determining the scope of the prohibitions requires an understanding of the definition of the term "surface coal mining operations" in section 701(28). As defined in section 701(28), "surface coal mining operations" specifically includes certain aspects of underground coal mining. However, the definition does not specifically mention subsidence.

Section 701(28) provides in full as follows: "surface coal mining operations" means—

(A) Activities conducted on the surface of lands in connection with a surface coal mine or subject to the requirements of section 1266 of this title surface operations and surface impacts incident to an underground coal mine, the products of which enter commerce or the operations of which directly or indirectly affect interstate commerce. Such activities include excavation for the purpose of obtaining coal including such common methods as contour, strip, auger, mountaintop removal, box cut, open pit, and area mining, the uses of explosives and blasting, and in situ distillation or retorting, leaching or other chemical or physical processing, and the cleaning, concentrating, or other processing or preparation, loading of coal for interstate commerce at or near the mine site: *Provided, however,* That such activities do not include the extraction of coal incidental to the extraction of other minerals where coal does not exceed 16 ⅔ per centum of the tonnage of minerals removed for purposes of commercial use or sale or coal explorations subject to section 512 of this Act; and

(B) The areas upon which such activities occur or where such activities disturb the natural land surface. Such areas shall also include any adjacent land the use of which is incidental to any such activities, 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, and excavations, workings, impoundments, dams, ventilation shafts, entryways, refuse banks, dumps, stockpiles, overburden piles, spoil banks, culm banks, tailings, holes or depressions, repair areas, storage areas, processing areas, shipping areas and other areas upon which are sited structures, facilities, or other property or materials on the surface, resulting from or incident to such activities.

30 U.S.C. 1291(28).

*E. What Other SMCRA Provisions Are Relevant?*

1. Surface Effects of Underground Coal Mining Operations—Section 516

Section 516 establishes the regulatory requirements for the surface effects of underground coal mining, including provisions for the control of subsidence from underground coal mining. SMCRA section 516 provides in relevant part:

(a) The Secretary shall promulgate rules and regulations directed toward the surface effects of underground coal mining operations, embodying the following requirements and in accordance with the procedures established under section 501 of this Act: *Provided however,* That in adopting any rules and regulations the Secretary shall consider the distinct difference between surface coal mining and underground coal mining * * *.

* * * * *

(b) Each permit issued under any approved State or Federal program pursuant to this Act and relating to underground coal mining shall require the operator to—

(1) Adopt measures consistent with known technology in order to prevent subsidence causing material damage to the extent technologically and economically feasible, maximize mine stability, and maintain the value and reasonably foreseeable use of such surface lands, except in those instances where the mining technology used requires planned subsidence in a predictable and controlled manner: *Provided,* That nothing in this subsection shall be construed to prohibit the standard method of room-and-pillar mining;

* * * * *

(8) Eliminate fire hazards and otherwise eliminate conditions which constitute a hazard to health and safety of the public;

* * * * *

(11) To the extent possible using the best technology currently available, minimize disturbances and adverse impacts of the operation on fish, wildlife, and related environmental values, and achieve enhancement of such resources where practicable * * *.

* * * * *

(c) In order to protect the stability of the land, the regulatory authority shall suspend underground coal mining under urbanized areas, cities, towns, and communities and adjacent to industrial or commercial buildings, major impoundments, or permanent streams if he finds imminent danger to inhabitants of the urbanized areas, cities, towns, and communities.

(d) The provisions of this subchapter relating to State and Federal programs, permits, bonds, inspections and enforcement, public review, and administrative and judicial review shall be applicable to surface operations and surface impacts incident to an underground coal mine with such modifications to the permit application requirements, permit approval or denial procedures, and bond requirements as are necessary to accommodate the distinct difference between surface and underground coal mining * * *.

30 U.S.C. 1266.

2. Subsidence—Section 720

Section 720 of SMCRA was added by the Energy Policy Act of 1992, Pub. L. 102–486, 106 Stat. 2776 (1992). (Hereafter "EPAct"). The statute was enacted on October 24, 1992. Section 720 provides, in relevant part:

(a) Underground coal mining operations conducted after Oct. 24, 1992 shall comply with each of the following requirements:

(1) Promptly repair, or compensate for, material damage resulting from subsidence caused to any occupied residential dwelling and structures related thereto, or non-commercial building due to underground coal mining operations. Repair of damage shall include rehabilitation, restoration, or replacement of the damaged occupied residential dwelling and structures related thereto, or non-commercial building. Compensation shall be provided to the owner of the damaged occupied residential dwelling and structures related thereto or non-commercial building and shall be in the full amount of the diminution in value resulting from the subsidence* * *.

(2) Promptly replace any drinking, domestic, or residential water supply from a well or spring in existence prior to the application for a surface coal

mining and reclamation permit, which has been affected by contamination, diminution, or interruption resulting from underground coal mining operations.

Nothing in this section shall be construed to prohibit or interrupt underground coal mining operations. 30 U.S.C. 1319a.

*F. What Existing Regulations Are Relevant?*

1. Provisions Implementing SMCRA Sections 522(e) and 701(28)

Section 522(e) is implemented in large part at 30 CFR Part 761, which sets forth the procedures and standards to be followed in determining whether a proposed surface coal mining and reclamation operation is excepted from the prohibitions and limitations of section 522(e). Part 761 reiterates the areas on which section 522(e) prohibits surface coal mining operations. Part 761 also reiterates the exceptions to the statutory prohibitions, and the procedures to be followed in determining whether an operation qualifies for an exception to the prohibitions. Part 761 is the subject of the rulemaking which accompanies this final rule in the **Federal Register**.

As noted previously, if a proposed operation includes Federal lands within the boundaries of any areas specified under section 522(e)(1) or (2), a determination of valid existing rights for surface coal mining and reclamation operations must be made. Part 740 describes the responsibilities of the Secretary, various Federal agencies and the States for regulating surface coal mining and reclamation operations on Federal lands under SMCRA, the Mineral leasing Act and other applicable Federal laws, regulations and executive orders. Section 740.4(a) provides that the Secretary is responsible for determining valid existing rights for surface coal mining and reclamation operations on Federal lands within 522(e)(1) or (2) areas. Valid existing rights determinations on such areas are of such national importance that the Secretary retains this responsibility to carry out the congressional mandate to protect these areas and to ensure that there will be no prohibited surface coal mining operations on Federal lands in national parks and national forests. See 48 FR 6917, Feb. 16, 1983.

The regulatory definition of surface coal mining operations adopted in the permanent program regulations tracks the statutory definition very closely, except that the regulations specifically include extraction of coal from coal refuse piles. See 44 FR 14914, Mar. 13, 1979. In keeping with SMCRA section 701(28)(A), the definition of surface coal mining operations under section 700.5 provides:

(a) Activities conducted on the surface of lands in connection with a surface coal mine or, subject to the requirements of section 516 of the Act, surface operations and surface impacts incident to an underground coal mine, the products of which enter commerce or the operations of which directly or indirectly affect interstate commerce. Such activities include excavation for the purpose of obtaining coals, including such common methods as contour, strip, auger, mountaintop removal, box cut, open pit, and area mining; the use of explosives and blasting; and in situ distillation or retorting; leaching or other chemical or physical processing; and the cleaning, concentrating, or other processing or preparation of coal. Such activities also include the loading of coal for interstate commerce at or near the mine site. *Provided,* these activities do not include the extraction of coal incidental to the extraction of other minerals, where coal does not exceed 16⅔ percent of the tonnage of minerals removed for purposes of commercial use or sale, or coal exploration subject to section 512 of the Act; and, *Provided further,* that excavation for the purpose of obtaining coal includes extraction of coal from coal refuse piles; and

(b) The areas upon which the activities described in paragraph (a) of this definition occur or where such activities disturb the natural land surface. These areas shall also include any adjacent land the use of which is incidental to any such activities, all lands affected by the construction of new roads or the improvement or use of existing roads to gain access to the site of those activities and for haulage and excavation, workings, impoundments, dams, ventilation shafts, entryways, refuse banks, dumps, stockpiles, overburden piles, spoil banks, culm banks, tailings, holes or depressions, repair areas, storage areas, processing areas, shipping areas and other areas upon which are sited structures, facilities, or other property or material on the surface, resulting from or incident to those activities.

2. Provisions Implementing SMCRA Sections 516 and 720

Sections 516 and 720 are implemented in large part at 30 CFR Parts 784 and 817, which set forth, respectively, permitting requirements and performance standards for underground mining activities.

Part 784 includes § 784.20, which sets out requirements for a subsidence control plan, including a pre-subsidence survey. The pre-subsidence survey must include a map that shows the type and location within the proposed permit area or adjacent area, of structures and renewable resource lands that subsidence may materially damage, or for which the reasonably foreseeable use may diminished by subsidence. The maps must also show the type and location within the proposed permit area or adjacent area, of drinking, domestic, and residential water supplies that could be contaminated, diminished, or interrupted by subsidence. In addition, a narrative is required that must indicate whether subsidence, if it occurred, could cause material damage to, or diminish the value or reasonably foreseeable use of the structures and renewable resource lands. The narrative is also required to indicate whether subsidence, if it occurred, could contaminate, diminish, or interrupt the drinking, domestic, or residential water supplies.

Section 784.20(a)(3) sets out requirements for a presubsidence structural condition survey. On April 27, 1999, the U.S. Court of Appeals for the District of Columbia vacated:

—Our rebuttable presumption that, when subsidence damage occurs within the "angle of draw" damage was caused by the related underground mine (30 CFR 817.121(c)(4)). *National Mining Ass'n v. Babbitt,* 172 F.3d 906 (D.C. Cir 1999) (hereafter, "*NMA*").

—Our regulation at § 784.20(a)(3) requiring a pre-subsidence structural condition survey, insofar as that regulation is interconnected with the angle of draw regulation. (The court held that we have the authority to require such a survey, but vacated the regulation because it defines the area in which the survey is required by reference to the angle of draw. *Id.*)

Under § 784.20 the pre-subsidence survey must identify the quantity and quality of all drinking, domestic, and residential water supplies within the proposed permit area and adjacent area that could be contaminated, diminished, or interrupted by subsidence. The applicant must provide copies of the survey and any technical assessments or engineering evaluations to the property owner and regulatory authority.

Section 784.20(b) requires a subsidence control plan if the initial survey, required under § 784.20(a), shows that subsidence could cause material damage to identified structures or renewable resource lands. The

subsidence control plan must include a map and physical description of the proposed underground operation and type of mining, a description of the monitoring, and details of the subsidence control monitoring measures. Longwall operations must either (1) describe the methods to be used to minimize damage to structures identified in the Energy Policy Act or (2) demonstrate that the costs of minimizing damage exceed the anticipated costs of repair. In addition, the operator must submit a description of the measures to replace adversely affected protected water supplies or to mitigate subsidence-related material damage to land and protected structures.

Other regulations in Part 784 ensure that each permit application contains the information necessary to determine that the operation will protect water supplies and reclaim the land after mining is completed. For example, these regulations require the application to include information on ground water and surface water quality and quantity sufficient to demonstrate seasonal variation and water usage. In addition, an analysis of both suspended and dissolved constituents helps determine the presence of heavy metals in the water supply. In particular, requirements ensure that, prior to mining, the permittee demonstrate whether the proposed operation may result in contamination, diminution, or interruption of a well or spring within a proposed permit area or adjacent area which is used for domestic, drinking or residential purposes. Moreover, throughout the application process, the regulatory authority may require additional information necessary to assure that the proposed operation will protect the hydrologic balance and to understand the potential impacts of the operation.

The provisions concerning subsidence control in Part 817 include performance standards which require the prevention of material damage and maintaining the value and reasonably foreseeable use of surface lands, or using mine technology for planned subsidence in a predictable and controlled manner; compliance with the subsidence control plan; repair of material damage; and a detailed plan of underground workings. See 30 CFR 817.121.

Specifically, § 817.121(a)(1) requires that the operator must either adopt measures consistent with known technology which prevent subsidence causing material damage to the extent technologically and economically feasible, maximize mine stability, and maintain the value and reasonably foreseeable use of surface lands; or adopt mining technology which provides for planned subsidence in a predictable and controlled manner.

Under § 817.121(a)(2), the operator of a mine using a planned subsidence technology must minimize damage to non-commercial buildings and occupied residential dwellings and related structures. The operator is obliged to take minimization measures that are technologically and economically feasible.

Section 817.121(c)(1) requires repair of material damage from subsidence to surface lands, to the extent technologically and economically feasible. The operator must restore the land to a condition capable of maintaining the value and reasonably foreseeable uses that it was capable of supporting before subsidence. Section 817.121(c)(2) requires that an operator promptly repair or compensate for material damage from subsidence to non-commercial buildings or occupied residential dwellings or related structures. These requirements apply to subsidence-related damage caused by underground mining activities conducted after October 24, 1992.

As noted above, on April 27, 1999, the U.S. Court of Appeals for the District of Columbia vacated the rebuttable presumption in § 817.121(c)(4). (*NMA*, supra.) That rule provided that if damage to non-commercial buildings or occupied residential dwellings and related structures occurs as a result of earth movement within the area determined by projecting a specified angle of draw from underground mine workings to the surface, a rebuttable presumption exists that an operator caused the damage.

Additional regulations detailed in Part 817 ensure that underground mining is conducted so as to protect the health and safety of the public, minimize damage to the environment, and protect the rights of landowners. These regulations require that all underground mining activities are conducted in a manner which preserves and enhances environmental and other values in accordance with SMCRA. Included are additional protections from subsidence-related damage from underground mining activities. For example, § 817.41(j) requires the prompt replacement of any drinking, domestic or residential water supply, in existence before the date of the permit application, that is contaminated, diminished or interrupted by underground mining activities conducted after October 24, 1992.

## II. Discussion of Final Rule

### *A. Do the Prohibitions of Section 522(e) Apply to Subsidence From Underground Mining?*

We interpret section 522(e) as not applying to subsidence from underground mining activities, or to the underground activities that may lead to subsidence.

### *B. What Is the Rationale for the Final Rule?*

For the reasons set forth below, we interpret section 522(e) in light of the statutory definition of "surface coal mining operations" in section 701(28), as not applying to subsidence from underground mining. We've based the final rule on extensive analysis of the statute, the legislative history, relevant case authority, our regulatory actions with respect to the applicability of section 522(e) to subsidence from underground mining, and consideration of all relevant comments. We conclude that the best reading of section 701(28) is that "surface coal mining operations" does not include subsidence, and that therefore the prohibitions of section 522(e) do not apply to subsidence from underground mining. We believe that this is consistent with legislative intent, and that subsidence is properly regulated under sections 516 and 720 and related regulatory provisions of SMCRA and not under section 522(e). While we recognize that regulation under sections 516 and 720 may not have precisely the same effect as regulation under section 522(e), based on our analysis we conclude that regulation under sections 516 and 720 will achieve full protection of the environmental values which Congress sought to protect from subsidence under the Act while encouraging longwall mining. We believe that this interpretation will promote the general statutory scheme of SMCRA and fully protect the environment and the public interest. We also believe this interpretation best balances all relevant policy considerations.

#### 1. Statutory Language

Section 522(e) prohibits "surface coal mining operations." However, the definition of "surface coal mining operations" in SMCRA section 701(28) is not a model of clarity. We believe a careful reading of the Act indicates Congress' intent that the SMCRA definition of "surface coal mining operation" does not include subsidence. Therefore, we conclude that the best reading of the law is that section 522(e) does not apply to subsidence. We base this conclusion on:

(1) A rigorous reading of section 701(28);

(2) Analysis of the language of sections 516, 522(e) and 701(28) of SMCRA; and

(3) A consideration of other relevant statutory provisions, including the congressional findings and purposes in sections 101(b) and 102(k).

We believe that paragraph (A) of section 701(28), and the analogous provision in the existing rules at 30 CFR 700.5, apply to "activities conducted on the surface of lands." Thus, subsidence is not included in paragraph (A) of the definition because it is not an activity conducted on the surface of the land. This interpretation is consistent with the fact that there is no mention in paragraph (A) of subsidence, underground activities, or surface impacts of underground activities, which might clearly establish that section 701(28) did include subsidence. By contrast, paragraph (A) does specifically mention numerous activities that occur on the surface of lands.

Therefore, we interpret the definition of "surface coal mining operations" at SMCRA section 701(28)(A) and in the analogous portion of the existing rules at 30 CFR 700.5, not to include subsidence, and to include only:

(1) Activities on the surface of lands in connection with a surface coal mine; and

(2) Activities subject to section 516, conducted on the surface of lands in connection with surface operations and surface impacts incident to an underground coal mine, the products of which enter commerce or the operations of which directly or indirectly affect interstate commerce.

The second part of this definition, at SMCRA section 701(28)(B), supports our interpretation that paragraph (A) refers to "*activities* conducted on the surface of lands in connection with [1] a surface coal mine or * * * [2] "surface operations and surface impacts incident to an underground coal mine." Paragraph (B) refers to "the areas upon which *such activities* occur or where *such activities* disturb the natural land surface" and to holes or depressions "resulting from or incident to *such activities* * * *" (emphases added). The only "activities" to which paragraph (B) could refer are those described in paragraph (A), namely those conducted on the surface of lands. Thus, these surface activities define the applicability of paragraph (B) to underground mining.

We construe SMCRA section 701(28)(B) (and the rules at 30 CFR 700.5) to include only:

(1) The areas upon which such surface activities occur;

(2) The areas where such surface activities disturb the natural land surface; adjacent lands the use of which is incidental to such surface activities;

(3) Lands affected by construction of new roads or improvement or use of existing roads to gain access to the site of such surface activities and for haulage; and

(4) Areas on which are sited structures, facilities, or other property or materials on the surface resulting from or incident to such surface activities.

Paragraph (B) includes a lengthy list of specific surface features resulting from or incident to surface activities, which are included in this last category. Those surface features include excavations, workings, holes or depressions, repair areas, *etc.* All of these areas and features included under paragraph B are referred to hereafter in this preamble as "surface features affected by" surface activities.

Surface activities in connection with surface operations incident to an underground coal mine, and surface activities in connection with surface impacts incident to an underground coal mine are included in the definition. Likewise, as provided in paragraph (B), surface features affected by such surface activities are included.

However, subsidence is not included within the term "surface coal mining operations" because it is not an activity conducted on the surface of lands, and it is not a surface feature affected by surface activities. In short, while subsidence is clearly a surface impact incident to underground mining, it is not included in the SMCRA definition of surface coal mining operations.

This reading of subsection 701(28) does not exempt subsidence from regulation under the Act, since Congress specifically provided for performance standards for subsidence under section 516, and subsequently section 720, of SMCRA. Most risks related to material damage caused by subsidence are addressed under the requirements of sections 516 and 720, such as the requirements for adopting measures consistent with known technology in order to prevent subsidence causing material damage, to the extent technologically and economically feasible, and maintaining the value and reasonably foreseeable use of surface lands, except in those instances where the mining technology used requires planned subsidence in a predictable and controlled manner. However, if an unforeseen subsidence danger arises, section 516(c) contains procedures to prohibit underground operations as necessary, providing a second level of protection for public health and safety. For example, section 516 requires:

(1) Sealing of all shafts, entryways, and exploratory holes between the surface and underground mine working when no longer needed;

(2) Elimination of fire hazards and any other conditions that constitute a hazard to health and safety of the public; and

(3) Suspension of underground coal mining under urbanized areas, cities, towns, and communities if mining poses an imminent danger.

Thus, we believe Congress addressed in section 516 those subsidence control measures necessary to protect public health and safety and the public interest in subsidence protection. Therefore, prohibition of subsidence in all section 522(e) areas is unnecessary.

Our interpretation is consistent with SMCRA's explicit intent to "encourage the full utilization of coal resources through the development and application of underground extraction technologies," SMCRA section 102(k), 30 U.S.C. section 1202(k). Similarly, SMCRA states that:

> * * * the overwhelming percentage of the Nation's coal reserves can only be extracted by underground mining methods, and it is, therefore, essential to the national interest to insure the existence of an expanding and economically healthy underground coal mining industry.

SMCRA section 101(b), 30 U.S.C section 1201(b).

These passages make clear that Congress intended to encourage and support an economically healthy and efficient underground coal mining industry. We believe that our interpretation best assures that these congressional intentions are met.

2. Legislative History

The legislative history on section 701(28) supports our interpretation, set out above, that the definition of "surface coal mining operations" includes only *surface activities* and, as set out in section 701(28)(B), surface features affected by surface activities. Our interpretation is consistent with the description of the effect of section 701(28) in the Senate Report on the adopted version:

> Surface [coal] mining operations" * * * includes all areas upon which occur *surface mining activities* and *surface activities incident to underground mining.* It also includes all roads, facilities, structures, property, and materials on the surface resulting from or incident to *such activities*

S. Rep. No. 128, 95th Cong. 1st Sess. 98 (1977) (emphasis added).

The Senate Report on the 1977 Senate bill discusses the significance of the definition in that Senate bill:

'Surface mining operations' is so defined to include not only traditionally regarded coal surface mining activities but also *surface operations incident to coal underground mining, and exploration activities.* The effect of this definition is that coal surface mining and *surface impacts* of underground coal mining are subject to regulation under the Act. * * *

S. Rep. No. 128, 95th Cong. 1st Sess. 98 (1977) (emphases added).'

The references in the above paragraph to surface "operations" incident to underground mining and to surface "impacts" of underground mining, and the assertions that exploration activities are included in the definition (although coal exploration is specifically *excluded* from the Act's definition) are inconsistent with the terms of the statute. Therefore, we conclude that the language of this passage is imprecise, and that it is not clear whether any weight should be attached to this discussion of the Senate bill (as opposed to the later Conference Committee Report's discussion of the Act).

Our interpretation that paragraph (A) of the definition of "surface coal mining operations" embodies only *surface activities* is consistent with the legislative history of section 522(e). This conclusion is supported by the discussion in the 1977 Senate report on section 522(e) which notes that "surface coal mining" is prohibited within the specified distances of public roads, occupied buildings, and active underground mines, "for reasons of public health and safety." S. Rep. No. 128 at 55. Thus, one of Congress' purposes in sections 522(e)(4)–(5) was to protect public health and safety. However, prohibition of subsidence in section 522(e) areas would be unnecessary, since an underground mine must meet the requirements of sections 516 (and subsequently 720), and those requirements should prevent almost all risks to public health and safety. If an unforeseen subsidence danger were to arise, section 516(c) sets forth procedures to prohibit underground mining as Congress found necessary, providing a second level of protection for public health and safety. Therefore, we believe Congress sufficiently addressed in sections 516 (and 720) the measures necessary to address public health and safety from subsidence.

Congressional discussion of the prohibitions on mining in section 522(e) is devoid of any mention of subsidence or underground activities of coal mining. H. Rep. No. 218, 95th Cong. 1st Sess. 95 (1977); S. Rep. No. 128, 95th Cong. 1st Sess. 55 (1977). Instead, the legislative history of section 522(e) does mention terms that do not include any aspects of subsidence or underground operations, such as:'strip mines," "surface coal mines," and "surface coal mining." See *National Wildlife Fed'n* v. *Hodel,* 839 F.2d 694 at 753–754 (D.C. Cir. 1988), interpreting "surface coal mine" and "surface coal mine operation" as not including underground mines for purposes of SMCRA section 717(b)).

The legislative history of SMCRA indicates that Congress was only concerned with subsidence insofar as it causes environmental or safety problems, disrupts land uses, or diminishes land values. Congress has repeatedly recognized that there is little concern about subsidence that causes no significant damage to a surface use or facility or danger to human life or safety. See H.R. Rep. No. 218, 95th Cong., 1st Sess. 126 (1977); H.R. Rep. No. 1445, 94th Cong., 2d Sess. 71–72 (1976); H.R. Rep. No. 896, 94th Cong., 2d Sess. 73–74 (1976); H.R. Rep. No. 45, 94th Cong. 1st Sess. 115–116 (1975); H.R. Rep. No. 1072, 93d Cong., 2d Sess. 108–109 (1974); H.R. Rep. No. 776, 102d Cong., 2d Sess. 102–474 (1992).

Analysis of the structure of Title V and the Act as a whole confirms that Congress set out related but separate regulatory schemes for surface and underground mining. Congress received ample testimony prior to the passage of the Act regarding the differences in both the nature and consequences of the two types of coal mining. The legislative history emphasizes that the differences in the nature and consequences of the two types of mining require significant differences in regulatory approach. For example, SMCRA section 516(a) requires that:

The Secretary shall promulgate rules and regulations directed toward the surface effects of underground coal mining operations * * *: *Provided, however,* That in adopting any rules and regulations the Secretary shall consider the distinct difference between surface coal mining and underground mining.

30 U.S.C. section 1266(a); See also SMCRA sections 516(b)(10) and (d), 30 U.S.C. §§ 1266(b)(10) and (d). See, *e.g.,* H.R. Rep. No. 218, 95th Cong., 1st Sess. 59 (1977); S. Rep. No. 128, 95th Cong., 2d Sess. 50 (1977); H.R. Rep. No. 1445, 94th Cong., 2d Sess. 19 (1976); S. Rep. No. 402, 93d Cong., 2d Sess. 83 (1973); H.R. Rep. No. 1072, 93d Cong., 2d Sess. 57, 108 (1974); H.R. Rep. No. 1462, 92d Cong., 2d Sess. 32 (1972); 123 Cong. Rec. 8083, 8154 (1977); 123 Cong. Rec. 7996 (1977); 123 Cong. Rec. 3726 (1977).

For instance, Congress was aware that environmental risks associated with underground mining are, for the most part, significantly different from those associated with surface mining. Environmental impacts associated with (pre-SMCRA) unregulated or unreclaimed underground mines include subsidence and hydrological problems that are hidden deep underground and not observable at the surface for an unpredictably long time. Such surface consequences could be severe and long-lasting. The problems in some cases remain fundamentally inaccessible or unchangeable because of adverse technological, geological, and hydrological conditions. By contrast, most of the impacts of unregulated pre-SMCRA surface mining result from surface activities that are more immediate and more readily observable, and the resulting conditions are relatively accessible for reclamation. See H.R. Rep. No. 1445, 94th Cong., 2d Sess. 20–22 (1976).

It is reasonable to conclude that Congress addressed specifically, in section 516(c), the limited types of surface features that might be so significantly affected by subsidence from underground mining that subsidence should be precluded where appropriate. This interpretation that preclusion of subsidence is provided for solely under 516(c) is buttressed by the discussion in the 1977 House report that subsidence has no appreciable impact on agricultural land and similar types of land. H.R. Rep. No. 218, 95th Cong., 1st Sess. 126 (1977). We believe Congress did not intend to impose the prohibitions of section 522(e) on subsidence, because those prohibitions would be unnecessary, since Congress had insured that the surface features that might need such protection are covered by section 516(c).

Further, the legislative history of SMCRA suggests that Congress may have wished to encourage longwall mining in particular:

Underground mining is to be conducted in such a way as to assure appropriate permanent support to prevent surface subsidence of land and the value and use of surface lands, except in those instances where the mining technology approved by the regulatory authority at the outset results in planned subsidence. Thus, operators may use underground mining techniques, such as long-wall mining, which completely extract the coal and which result in predictable and controllable subsidence.

S. Rep. No. 128, 95th Cong., 1st Sess. 84 (1977). See also S. Rep. No. 28, 94th Cong., 1st Sess. 215 (1975).

Congressman Udall, the bill's principal sponsor, also commented on this issue:

> The House Bill contemplates rules to "prevent subsidence to the extent technologically and economically feasible." The word "prevent" led to fears expressed by Secretary of the Interior Morton, that the effect would be to outlaw longwall mining, with its obvious subsidence * * *. In fact, the bill's sponsors consider longwall mining ecologically preferable and it and other methods of controlled subsidence are explicitly endorsed.

120 Cong. Rec. 22731 (1974).

Thus, our interpretation is consistent with Congress' intent to encourage planned, predictable, and controlled underground mining and full coal resource recovery. Because subsidence is likely from room-and-pillar mining and is virtually inevitable with longwall mining, prohibiting subsidence below homes, roads, and other features specified in section 522(e) could make it substantially less feasible to mine. This would frustrate Congressional intent to encourage longwall mining, which provides planned, predictable, and controlled subsidence. Prohibiting subsidence would also substantially reduce the level of coal recovery in areas where the features specified in section 522(e) are common on the surface.

After examining the SMCRA legislative history, we believe that including subsidence in the definition of "surface coal mining operations" at section 701(28), and applying the section 522(e) prohibitions to subsidence would not accommodate Congress' intent to encourage underground mining and longwall mining in particular. Applying the prohibitions in section 522(e) to subsidence could substantially impede longwall and other full-extraction mining methods. As discussed above, SMCRA demonstrates that Congress intended to encourage underground mining and especially full-extraction methods such as longwall mining. Congress intended that longwall and other mining techniques that completely remove the coal be used as subsidence control measures. See H.R. Rep. No. 218, *supra*. These techniques involve planned subsidence.

The legislative history of section 516 contains ample references to Congress' focus on controlling rather than prohibiting subsidence. The following is pertinent House report language:

> Surface subsidence has a different effect on different land uses. Generally, no appreciable impact is realized on agricultural land and similar types of land and productivity is not affected. On the other hand when subsidence occurs under developed land such as that in an urbanized area, substantial damage results to surface improvements be they private homes, commercial buildings or public roads and schools. One characteristic of subsidence which disrupts surface land uses is its unpredictable occurrence in terms of both time and location. Subsidence occurs, seemingly on a random basis, at least up to 60 years after mining and even in those areas it is still occurring. It is the intent of this section to provide the Secretary with the authority to require the design and conduct of underground mining methods to *control* subsidence to the extent technologically and economically feasible in order to protect the value and use of surface lands.

H.R. Rep. No. 218, 95th Cong., 1st Sess. 126 (1977) (emphasis added). See also H.R. Rep. No. 1445, 94th Cong., 2d Sess. 71–72 (1976); H.R. Rep. No. 896, 94th Cong., 2d Sess. 73–74 (1976); H.R. Rep. No. 45, 94th Cong. 1st Sess. 115–116 (1975); H.R. Rep. No. 1072, 93d Cong., 2d Sess. 108–109 (1974).

In those extreme cases in which Congress felt that precluding subsidence could be necessary, it provided broad authority under section 516(c):

> In order to prevent the creation of additional subsidence hazards from underground mining in developing areas, subsection (c) provides permissive authority to the regulatory agency to prohibit underground coal mining in urbanized areas, cities, towns and communities, and under or adjacent to industrial buildings, major impoundments or permanent streams.

S. Rep. No. 128 at 84–85.

In 1992, Congress enacted EPAct which amended SMCRA and added additional subsidence protection in a new SMCRA section 720, described above. 30 U.S.C. 1309(a), Energy Policy Act of 1992, section 2504, Pub. L. No. 102–486, 106 Stat. 3104. Although it is not germane to Congress' intent in enacting SMCRA, because it does postdate SMCRA's enactment, the EPAct provides evidence of continuing congressional support for recovering coal resources through underground mining techniques. Congress notes specifically that, "Nothing in this section shall be construed to prohibit or interrupt underground coal mining operations." SMCRA section 720, 30 U.S.C. section 1309a.

We believe, based on its interpretation of the language of section 516 and of the legislative history, that Congress intended section 516(c), in combination with other provisions of SMCRA, to offer sufficient prevention and mitigation of damage to features vulnerable to significant impairment from subsidence. The existence of such a comprehensive subsidence regulatory scheme addressing subsidence makes it unlikely that Congress also intended to prohibit subsidence under section 522(e).

3. Policy Considerations

a. This Rule Resolves Questions About Our Interpretation of Statutory Provisions

This rulemaking establishes that subsidence is not a surface coal mining operation under SMCRA section 701(28), and therefore is not prohibited under SMCRA section 522(e). In the past, we have taken varying positions on section 522(e)'s applicability to subsidence. In some instances, our position could be interpreted to mean section 522(e) does apply to subsidence from underground mining. However, we believe that in the majority of cases, we have interpreted section 522(e) as not applying to subsidence.

In the 1979 rulemaking which first established permanent program rules under SMCRA, we addressed this issue in two provisions. We rejected a commenter's suggestion that the definition at 30 CFR 761.5 of "surface operations and impacts incident to an underground coal mine" should be limited to subsidence. We stated that the definition was intended to provide comprehensive language that related to the definition of surface coal mining operations in section 701(28). We then went on to say that because the definition in section 701(28) (B) relates to disturbances of the natural land surface, and because SMCRA sections 516(b)(9) and (11) also relate to surface disturbances other than subsidence, the final definition should cover all surface disturbances. 44 FR 14990, Mar. 13, 1979. It appears that we were indicating that all surface disturbances, including subsidence, are covered under the definition in section 701(28) of "surface coal mining operations" and consequently are prohibited by section 522(e).

The preamble to the 1979 permanent program regulations also includes a discussion of 30 CFR 761.11(d), which concerns the SMCRA section 522(e)(4) prohibition on mining within 100 feet of the outside right-of-way of a public road. We accepted a comment that the 100 feet should be measured horizontally "so that underground mining below a public road is not prohibited". We stated that mining under a road should not be prohibited "where it would be safe to do so". 44 FR 14994, Mar. 13, 1979. One interpretation of this statement is that mining under a public road should be prohibited where it would be unsafe to do so. However, the preamble does not discuss whether the statutory authority

for this prohibition would come from section 516 or from section 522(e).

Similarly, in a 1981 letter to the U.S. Forest Service concerning *Otter Creek Coal Company* v. *United States,* we stated that "subsidence from mining activities under wilderness areas is acceptable as long as it does not significantly affect surface features. These effects can be predicted and mitigated if necessary". Letter of Patrick Boggs, Office of Surface Mining, to Ralph Albright, Jr., regarding *Otter Creek Coal Company* v. *United States,* at 2 (January 19, 1981). This document appears to conclude that *only* subsidence causing material damage is prohibited under section 522(e). However, in our later decision on the valid existing rights request of the Otter Creek Coal Company, we concluded that *all* subsidence from underground mining is a prohibited surface impact under section 522(e). 49 FR 31233, Aug. 3, 1984.

The Secretary took a different position in the supplemental M–Op filed with the District Court for the District of Columbia in 1985, in litigation challenging the validity of the 1983 rulemaking on VER. Federal Defendant's Supplemental Memorandum on the Relationship Between Section 522(e) and the Surface Impacts of Underground Coal Mining at 8, *In re Permanent Surface Mining Regulation Litigation II,* No. 79–1144 (D.D.C. 1985). In that case, the National Wildlife Federation (NWF), in its reply brief, raised for the first time the question of whether, in areas protected under sections 522(e)(4) and (5), all subsidence is prohibited. The supplemental memorandum stated that the Secretary had previously interpreted section 522(e)(5) as prohibiting subsidence causing material damage to protected features, and that 30 CFR 761.11 requires operators to prevent subsidence causing material damage within the areas protected under 522(e).

On several other matters, our actions are consistent with the position that subsidence is not a surface coal mining operation. In our most recent rulemaking defining "permit area," we indicated that we do not consider subsidence to be a "surface coal mining and reclamation operation". Our rules do not require including the "area overlying underground workings" (where subsidence may occur) within the definition of "permit area." In the preamble, we explained that the permit area should only include the "areas *upon* which surface coal mining and reclamation operations" are conducted, not areas where potential subsidence may occur. 48 FR 14820 (Apr. 5, 1983). Thus, no permit is required for these areas where there are no surface activities.

In the absence of a Federal regulation specifically addressing this issue, we have accepted the policy of the majority of States with active underground coal mining operations, which do not currently apply the prohibitions of section 522(e) to subsidence impacts of underground coal mining. Rather, the States apply existing subsidence control requirements, which require the operator to identify and mitigate potential subsidence damage to structures and renewable resource lands. The States regulate subsidence effects on surface features in State counterparts to the Federal regulations implementing sections 516 and 720 of SMCRA.

We have also accepted the policy of other States to apply the prohibitions only to subsidence causing material damage. Only four States with underground coal reserves, Colorado, Illinois, Indiana, and Montana, arguably prohibit (or may prohibit) subsidence in 522(e) areas, in some way. See Final EIS, 1999, Table II–1 at pages II–2–3. Montana has no defined policy regarding the regulation of subsidence, due in part to the fact that the State has no active underground mine. Colorado prohibits material damage to any structures through State regulations under, in part, section 516 of SMCRA. In Illinois, under state property law, the mineral owner must possess the right to subside through applicable waiver or VER. Indiana prohibits material damage from subsidence to certain structures and lands, but has not developed specific policies related to the approval of planned subsidence. Our interpretation that section 522(e) prohibitions do not apply to subsidence is consistent with what most states are currently doing.

b. This Rule Balances Economic and Environmental Considerations

We believe this final rule best balances the competing environmental and economic considerations involved in this rulemaking. The language of SMCRA demonstrates that Congress intended to encourage underground mining, especially full-extraction methods such as longwall mining. The statute and legislative history express Congress' intent to "encourage the full utilization of coal resources through the development and application of underground extraction technologies," SMCRA section 102(k), 30 U.S.C. 1202(k). Similarly, SMCRA states that, "* * * the overwhelming percentage of the Nation's coal reserves can only be extracted by underground mining methods, and it is, therefore, essential to the national interest to insure the existence of an expanding and economically healthy underground coal mining industry." SMCRA section 101(b), 30 U.S.C section 1201(b). Congress intended that longwall and other mining techniques that completely remove the coal be used as subsidence control measures. See H.R. Rep. No 218, 95th Cong., 1st Sess. 126 (1977). However, applying the prohibitions of section 522(e) to subsidence could substantially impede longwall and other full-extraction mining methods. Clearly, if subsidence is likely to occur from room-and-pillar underground mining and is a virtually inevitable consequence of longwall mining, then prohibiting all subsidence below homes, roads, and other features specified in section 522(e) could make it substantially less feasible to mine and could substantially reduce coal recovery in areas where these features are common. We therefore believe that including subsidence in the definition of "surface coal mining operations" at section 701(28), and applying the section 522(e) prohibitions to subsidence, would fail to accommodate congressional recognition of the importance of underground mining and longwall mining in particular.

The viability of underground coal mining continues to be important to the nation's economy. The Nation's Demonstrated Reserve Base for underground mining (32.9 billion tons) is almost twice that for surface mineable reserves 16.7 billion tons. In almost one third of the coal producing states, underground reserves are 4 to 5 times greater than surface mineable reserves. See Department of Energy, Energy Information Administration (DOE/EIA), "U.S. Coal Reserves: A Review and Update", pp. 10–12, (Aug. 1996).

Overall, coal continues to be the principal energy source for electric power generation in the United States. The electric power industry is the dominant coal consumer with about 90 percent of U.S. coal consumption issued for electricity generation. (DOE/EIA, Annual Energy Outlook, pp. 3–5, 1998). Total U.S. energy consumption is projected to continue growing between 1996 and 2020, and electricity consumption is expected to parallel that growth by 1.4 percent per year through 2020. Forecasts predict both increased demand for electricity and decline in nuclear power. With lower coal prices, lower capital costs for coal-fired generating technologies, and higher electricity demand, coal-fired generation is projected to increase. However, the *share* of coal generation is expected to

decline by 2020, because of anticipated restructuring of the electricity industry favoring less capital-intensive gas technologies for new capacity additions. Although coal-fired generation is anticipated to lose market share by 2020, it continues to account for more than one-half of electricity generation.

The continued rise in coal power generation accounts for the record high coal production in 1997. The electric power industry, the dominant coal consumer, used a record 922 million short tons in 1997, an estimated 2.8 percent increase over 1996, and record high production. The productivity gains that occurred in both underground and surface mines during the 1980's continued into the 1990's.

The three main underground mining methods used to extract coal are room-and-pillar, room-and-pillar with secondary mining, and longwall mining. Room-and-pillar is the predominant underground mining method in the United States, although longwall mining has increased in use since 1960. And longwall mining continues to gain wide acceptance in the U.S. mining industry, having nearly doubled its share of total coal production since 1980.

Room and Pillar Mining Method

The room and pillar method consists of driving entries, rooms, and cross-cuts into the coal seam to extract coal. Pillars of coal are left to support the mine roof, or for haulage and ventilation. This is called "development" mining. Movements of the ground surface during development mining are nearly always imperceptible. During the development mining phase, 30 to 50 percent of the coal may be extracted from the panel. To prevent subsidence, the remainder of the coal may be left in a mine panel, to permanently support the overburden.

To increase coal extraction where conditions allow, development mining is followed by "pillar recovery," which is called secondary or retreat mining. During secondary mining, some or all of the coal pillars left to support the mine roof are extracted to obtain maximum recovery of the coal. As the pillars are extracted, controlled subsidence occurs, because the overburden sags into the mined-out area. Secondary mining can increase coal recovery to 85 percent.

Longwall Mining Method

Longwall mining is a high-extraction mining method that maximizes coal recovery. Developing longwall mine main airways and sub-mains (underground ventilation channels needed for access and ventilation of the longwall panels) is essentially identical to developing room and pillar mining. However, longwall mining differs from room-and-pillar mining in that the panel is fully extracted by an automated shearer or plow. A longwall mining operation can extract as much as 90 percent of the coal in each panel. Retreat mining of a longwall panel can extract 100 percent of the coal.

The longwall mining method works as follows:

1. Groups of three or four parallel entries are driven perpendicular to the main entry on either side of the proposed panel. The width of the panel varies from 500 to 1,200 feet, and the length of a panel varies from 4,000 to 15,000 feet.

2. Longwall mining removes the coal in one operation from a long working face or wall that advances, or retreats, in a continuous line. The coal is cut by a shearer or coal plough which travels up and down along the face and makes cuts from 27 to 39 inches deep. The broken coal falls on to an armored flexible conveyor (AFC) which transfers the coal to the stage loader.

3. The coal is then conveyed to the surface through several belt conveyors. Mechanical steel supports known as shields or chocks are used to support the mine roof along the entire longwall face.

4. After each cutting cycle of the shearer/plough, the steel supports and AFC are hydraulically advanced. The mine roof immediately behind the AFC is allowed to cave. The space from which the coal has been removed is either allowed to collapse or is completely or partially filled with stone and debris. The roof rock that falls into the mined out area is referred to as the "gob."

5. As the overburden continues to collapse, effects of subsidence progress upwards toward the surface. However, some solid coal barriers and pillars are left in the mine for haulage, ventilation, and other purposes. Ninety percent of the surface subsidence caused by longwall mining occurs within 4 to 6 weeks of mining.

In the past two decades, the longwall mining method has become the safest, most productive and most economic underground mining method. We expect longwall mining to continue to be an important and expanding type of mining. In 1993, longwall mining accounted for 38 percent of the coal extracted by underground mining methods. The Economic Analysis estimates that longwall mining will account for 48 percent of production by 2015. Final EA, 1999.

Longwall mining requires only approximately one-third of the personnel required by room-and-pillar mining at the face. The high capital costs of longwall mining are generally offset by lower operating costs due primarily to higher productivity. The average operating costs for a coal mine operation include the operating cost per ton and the return on the capital cost allocated per ton. The operating costs for longwall mining range from $0.50 to $2.00 per ton, while operating costs for room-and-pillar range from $2.00 to $7.00 per ton. Room-and-pillar mining operating costs average $3.25 per ton more than longwall mining. The difference in costs is attributable to higher labor and material costs for room-and-pillar mining, and to economies of scale for longwall mining.

Effects on the Coal Mining Industry and on the Economy if 522(e) Prohibitions Were Applied to Subsidence

Under SMCRA, when coal is mined, the mine operator must meet all existing subsidence control requirements, as outlined above. If section 522(e) were deemed to apply to subsidence from underground mining, the operator could not mine in any part of the underground workings where mining would cause subsidence affecting a protected surface feature. The surface area affected by subsidence is usually considerably larger than the area actually mined underground. Because subsidence typically occurs in a funnel shape radiating upward and outward from the underground mine cave-in, any surface impacts may extend well beyond the area directly above the mine. Thus, to ensure that subsidence would not take place within a surface area specified in section 522(e), underground mine operations would be required to leave coal in place around each protected feature for a horizontal distance much larger than the protected area. In many cases, the amount of coal left in place to support dwellings would result in a pattern of irregular mined areas that would eliminate the contiguous coal reserves needed to make longwall operations economical. Consequently, few new longwall mines would be opened. In the Economic Analysis, we estimate that blocking longwall production would increase coal-mining and coal-delivery costs and would shift production patterns. The additional coal-mining and coal-delivery costs to the economy would be approximately $2.65 billion (discounted) over a 20-year period. Final EA, 1999.

However, if the section 522(e) prohibitions were applied to subsidence, subsidence could be allowed nonetheless on some lands protected by 522(e)(2), (3), and (4), and some (e)(5) areas. Before this could

happen, an operator would have to get a waiver or approval for subsidence on the protected lands. The area for which an operator would have to obtain a waiver would include the area directly under the protected feature, and the area within any specified buffer zone around the protected feature (either 300 feet or 100 feet). In the absence of that waiver, the operator would have to leave the coal in those areas, and in an additional buffer area based on the predicted angle of draw and the depth of the coal seam. Because of the potentially large amount of coal that would have to be left in the ground in the absence of a waiver, we estimated that if 10 percent or more of homeowners withheld waivers, a longwall mining operation would not be economically viable. *See* Final EIS, 1999; Final EA, 1999.

In Summary:

1. Longwall mining is an important and expanding type of mining. It accounted for 38 percent of the underground mining in 1993, and is forecast to increase its share to 48 percent by 2015.

2. Longwall mining is a low-cost underground mining method, and in some instances, may be the only economically feasible underground mining method when the coal seam is deep or the roof is extremely fragile.

3. The key to the competitive advantage of longwall mining is access to large blocks of uninterrupted coal.

4. If the prohibitions of 522(e) were to apply to subsidence, longwall mining would no longer be economically feasible if as few as 10 percent of the owners of occupied dwellings denied waivers for mining.

A more detailed discussion of the impacts is provided in the Final EA, 1999.

Alternatives Considered

We also evaluated potential environmental impacts of identified rulemaking alternatives concerning the applicability of section 522(e) prohibitions to subsidence. In the EIS prepared for the rulemaking, we concluded that subsidence-related impacts to section 522(e) lands have occurred in the past and are likely to continue to occur irrespective of whether or not the prohibitions apply. This conclusion was based on information showing that subsidence on National Forest lands, historic sites listed on the National Register of Historic Places, and roads is typically allowed through either compatibility findings or waivers granted by surface owners and land managers.

The EIS concludes that the interpretation in the final rulemaking would have the greatest level of environmental impact and afford the lowest level of protection to the areas listed in section 522(e)(1). However, for the reasons stated in the EIS, we predict relatively limited potential impacts over a 20-year period from the final rulemaking. On lands protected by section 522(e)(1), totaling nearly 200 million acres, approximately 5.2 million acres are underlain by coal, but only about 175,000 acres are underground mineable. Under the final rule, less than 2 percent (approximately 3,500 acres) of section 522(e)(1) lands is predicted to be underground mined over the next 20 years. Those areas most likely to be impacted are lands within the National Parks System and National Recreation Areas.

The EIS identified approximately 12,600 acres of State park lands that could be affected by subsidence-related impacts over the next 20 years if the prohibitions of section 522(e) do not apply to subsidence. However, the EIS predicted that impacts to State and local parks could be reduced by as much as 45 percent under the "good faith all permits" VER definition. This reduction could be caused if mineral owners are unable to demonstrate VER needed for surface support facilities such as roads, ventilation, and face-up areas for access to underground coal within the protected area.

The greatest level of impact is predicted for occupied dwellings in section 522(e)(5) areas. The EIS estimated that approximately 29,600 would be affected over a 20-year period under the interpretation that section 522(e) prohibitions do not apply to subsidence. These impacts generally would span an extended period of time, and could result in reduced property value, loss of income, and disruption to many aspects of daily life. Homeowners could suffer financial burdens from the repair of damaged land and structures. And while these impacts represent a significant amount of disruption to the dwelling owners, they are mitigated through the performance standards for underground coal mining. Those standards require that underground mining operations repair adversely affected dwellings, or compensate for diminution in value.

However, in evaluating these predicted environmental impacts, we noted that they are virtually identical to the impacts of taking no final rulemaking action, because the final rule is virtually the same as maintaining the status quo—the No Action Alternative. Final EIS, 1999.

c. This Rule Avoids a Regulatory Gap

As noted above, we have concluded that no regulatory gap occurs as a result of section 522(e) not applying to subsidence. This is so because sections 516 and 720 and related SMCRA provisions provide ample authority to regulate surface effects of underground mining under existing regulations. The detailed description of the existing relevant regulations in part I demonstrates that our regulations implementing sections 516 and 720 provide broad subsidence protection, and that a prohibition of subsidence within the buffer zones around dwellings, roads, and other surface features listed in section 522(e) would be superfluous, and that no regulatory gap results from our interpretation. And, if there are any environmental values or public interests that warrant additional protection beyond what is currently provided, we have full authority under sections 516 and 720 and other SMCRA provisions, to develop additional regulations to protect such values or interests, without the disruption in the longwall mining industry that would result from applying section 522(e) prohibitions to subsidence.

d. This Rule Balances the Interests of Surface Owners and Industry

Our interpretation recognizes that in most cases, the mineral owner purchased the property right to undermine and probably to subside, upon acquiring the mineral rights. This property right has already been made subject to regulatory requirements under SMCRA that protect the surface owner's interests to the extent Congress has established specific requirements. Thus, our interpretation best balances both the surface and owner's interests, because it ensures that the surface owner's property rights are protected, and allows the mineral owner to use its mineral rights consistent with existing SMCRA subsidence control requirements. And most importantly, we believe that the public interest in protecting 522(e) surface features from subsidence damage will be fully protected by SMCRA's subsidence control requirements.

e. This Rule Maintains Stability in SMCRA Implementation

We believe that the final rule will cause minimal disruption to existing State regulatory programs and expectations associated with them. Those programs reflect existing SMCRA regulatory provisions. We believe the existing provisions adequately protect 522(e) features and therefore do not

require change. Because this rule reflects current and longstanding practice and policy in state administration of regulatory programs, it avoids unnecessary change in state administration of regulatory programs.

Equally as important, the final rule enables the states to retain flexibility in regulating coal mining operations and protecting the environment. A goal of the SMCRA regulatory system is to create and maintain an effective balance between state and federal government. SMCRA sections 101(e), (g), and (k). To achieve this balance, Congress established state primacy under SMCRA. See SMCRA sections 101(f), 102(g). State primacy allows States to develop and implement regulatory programs that meet SMCRA requirements and also address the specific conditions and concerns of individual states. This allows states to address differences in terrain, geology, and other conditions when regulating subsidence.

Applying the section 522(e) prohibition to subsidence could require a major overhaul of State regulatory programs without a commensurate benefit to the citizens, the environment, the economy, or the State. We believe that existing subsidence controls under State and Federal programs properly implement SMCRA. Without a clearly demonstrated need, a requirement to impose new administrative burdens and costs would waste State and Federal resources.

f. This Rule Promotes Safety

Although capital-intensive, longwall mining has become the safest and most productive and economic underground mining method. The result of this mining technique is almost immediate subsidence that is highly predictable as to how much surface lands will subside. Hydraulic shields provide for temporary support for the miners and equipment at the longwall face, and as the mining progresses along the longwall face, the roof in the mined-out section collapses. The roof collapse progresses to the surface via fracturing and/or the flexing of strata, and manifests itself as surface subsidence.

Almost all surface displacement occurs within days of the underlying roof failure. The amount of surface displacement is fairly predictable and depends upon the thickness of the coal seam and the makeup and arrangement of the overlying strata. Since the amount and timing of the subsidence is both highly predictable and controlled it is referred to as "planned subsidence." However, this planned subsidence can cause damage to surface structures, since no supporting coal pillars are left within the mine to support the surface. And, while the probability of subsidence from longwall mining is relatively predictable, the nature and extent of subsidence damage to surface features and water resources is less predictable. However, because the subsidence occurs within a relatively short period, usually during the permit period, it is usually easier to verify the cause and to ensure mitigation or compensation for any structural damage and replacement of water supply.

In terms of worker safety, the longwall system also offers a number of advantages over room-and-pillar mining:

1. It concentrates miners and equipment in fewer working sections, making the mine easier to manage;
2. It improves safety through better roof control and reduction in the use of moving equipment;
3. It eliminates roof bolting at the working face to support the mine roof, and it minimizes the need for dusting mine passages with inert material to prevent coal dust explosions;
4. It involves no blasting and attendant dangers;
5. It also recovers more coal from deeper coalbeds than does room-and-pillar mining;
6. The coal haulage system is simpler, ventilation is better controlled, and subsidence of the surface is more predictable; and
7. It offers the best opportunity for automation.

Thus, if longwall mining is not precluded, it will continue to provide greater safety and faster, more controlled, and more quickly mitigated subsidence damage. As discussed above and in the EIS and EA, prohibiting subsidence in 522(e) areas could make longwall mining infeasible in substantial parts of the coal fields, and thus could preclude the safest, most economical and productive and most readily mitigated method of underground mining. See Final EIS, 1999; Final EA, 1999.

g. This Rule Acknowledges Existing Property Rights

The final rule recognizes existing property rights and avoids certain potential compensable takings of property interests. In most cases of severed coal rights, the severance also conveys the property right to undermine the surface, and may include the right to subside; and any such rights would still limit or burden the surface property rights. See, *e.g.* R. Roth, J. Randolph, C. Zipper, Coal Mining Subsidence Regulation in Six Appalachian States, 10 *Va. Envtl. L.J.* 311 (1991); C. Fox, Jr., Private Mining Law in the 1980's, 92 *W.Va. L. Rev.* 795 (1990); T. Gresham, M. Jamison, Do Waivers of Support and Damage Authorize Full Extraction Mining, 92 *W.Va. L. Rev.* 911 (1990). We believe failure to allow exercise of these conveyed rights would be inequitable and could risk compensable takings. The final rule allows the holder of such mining and subsidence rights to continue to exercise them, subject to existing SMCRA regulation.

## III. Response to Comments

Several commenters dispute the need for any rulemaking, arguing that our longstanding interpretation provides an efficient system consistent with the intent of SMCRA. However, several commenters disagree, expressing general support for the clarity and additional specificity that the rule provides. We believe that the clarity, specificity, and relative stability provided by a rulemaking support adoption of a final rule. Furthermore, as noted above the district court has ordered the Secretary to do a rulemaking on the applicability of section 522(e) to subsidence in accordance with the notice and comment procedures outlined in the Administrative Procedure Act. 5 U.S.C., section 551 *et seq. National Wildlife Fed'n* v. *Babbitt,* 835 F. Supp. 654 (D.D.C. September 21, 1993).

Many of the comments from private citizens expressed general opposition to the proposed rule and argued that mining should be prohibited entirely in the 522(e) areas. Similarly, some commenters argued that the question should not be framed in terms of whether protection against subsidence is required or not, but rather should address protection of the use of surface lands from all adverse effects of underground mining. Commenters noted that subsidence has both direct and indirect effects. Thus, uneven settlement from mining can cause dewatering of aquifers and other indirect effects on land stability, even though it may not directly impair use of the land surface through surface slumping and other surface land deformation. Additionally, when underground works intercept bedding planes and fracture zones, they can cause dewatering without subsidence. Commenters asserted that properly applying section 522 would require that underground mining be prohibited where any surface impacts (direct or indirect) could result from the underground mining activity.

SMCRA prohibits surface coal mining operations in section 522(e) areas, but

also specifies exceptions to those prohibitions. Therefore, the proposed rule did not include absolute prohibition as an option, and we are not adopting such a prohibition. Further, SMCRA does not prohibit underground mining *per se* in section 522(e) areas, or all surface impacts of underground mining, and for the reasons given above we are not adopting such a prohibition.

*A. SMCRA Definition of Surface Coal Mining Operations*

Some commenters support our interpretation that the definition of "surface coal mining operations" embodies only surface activities. Those commenters note that our interpretation is consistent with the description of the effect of section 701(28) in the Senate Report on the version of the definition that was adopted:

> "Surface [coal] mining operations" * * * includes all areas upon which occur surface mining activities and *surface activities incident to underground mining.* It also includes all roads, facilities, structures, property, and materials on the surface resulting from or incident to *such activities.*

S. Rep. No. 128, 95th Cong. 1st Sess. 98 (1977) (emphasis added).

These commenters agree with us that the legislative history of section 701 can reasonably be read to support the interpretation that the definition of "surface coal mining operations" embodies only surface activities. Commenters refer to the discussion in the 1977 House Report of the definition of "surface coal mining operations':

> (A) 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 * * *

H.R. Rep. No. 218 at 43.

Commenters also agree that paragraph (B) of section 701(28) supports our interpretation. While paragraph (A) applies to "*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 * * *," paragraph (B) applies to "the areas upon which *such activities* occur or where *such activities* disturb the natural land surface" and to holes or depressions "resulting from or incident to *such activities* * * *" (emphases added). The commenters agree that the only "activities" to which paragraph (B) could refer are those described in paragraph (A), namely those conducted on the surface of lands in connection with a surface coal mine or in connection with the surface operations and impacts incident to an underground coal mine. Thus, commenters agree that, if our reading of paragraph (A) were not adopted, paragraph (B) would not apply to any aspects of underground mining—an untenable result.

Commenters affirm that our reading of subsection 701(28) would not mean that subsidence would be exempt from regulation under the Act, since Congress specifically provided for regulation of subsidence under section 516 of SMCRA.

In contrast, other commenters argue that the plain meaning of the Act establishes that subsidence is included in the definition of "surface coal mining operations" and is therefore prohibited in section 522(e) areas. These commenters assert that the language of section 701(28)(A) encompasses two elements:

(1) "Activities conducted on the surface of lands in connection with a surface coal mine;" and

(2) "Surface operations and surface impacts incident to an underground mine."

These commenters argue that, in addition to activities and operations incident to underground mining, impacts incident to underground mining also clearly constitute "surface coal mining operations". Commenters assert that the D.C. Circuit stated that

> "The most natural reading of the statute as a whole, and the definition in section 701(28) in particular, * * * suggests that 'surface coal mining operations' encompasses both surface coal mines and the surface impacts [sic. The decision said "effects."] of 'underground coal mines.' *National Wildlife Fed'n* v. *Hodel*, 839 F.2d 694, 753 (D.C. Cir. 1988)."

We do not agree with commenter's interpretation of the significance of this passage in the court's 1988 decision. The issue before the court was whether the requirement of SMCRA section 717(b), for replacement of water supplies by the operator of "a surface coal mine," also requires water supply replacement by underground mine operators. Thus, the interpretation of section 701(28) as it applies to 522(e) was not before the court, and the passage quoted by the commenters is dictum.

Commenters also assert that, applying "the definition of 'surface mining' contained in the Act, *i.e.*, "surface impacts incident to an underground mine,' " the Sixth Circuit concluded that under section 522(e), "no coal mining which disturbs the surface 'shall be permitted * * * on any federal lands within the boundaries of any national forest." *Ramex Mining Corp.* v. *Watt*, 753 F.2d 521, 522, and 523 (6th Cir. 1985) quoting sections 701(28) and 522(e).

We conclude that the quoted language from the *Ramex* decision is best read as dictum, since the issue before the court was not the interpretation of section 701(28), but rather whether national forest lands on which a mineral holder proposed to mine severed coal rights, were "federal lands" for purposes of SMCRA section 522(e)(2). We note in passing that the court used a different term ("surface mining") than the term used in section 701(28) ("surface coal mining operations") and that the two terms are not properly interchangeable. We also note that the court did not quote and may not have considered the full and correct language of the definition of "surface coal mining operations", at section 701(28).

We considered these comments and the quoted comments of the courts. We believe these interpretations would require an alternative parsing of the definition of "surface coal mining operations" in section 701(28) in which the phrase "surface impacts incident to an underground coal mine" would be read as independent of the words "activities conducted on the surface of the lands." Therefore, for the reasons set out below, we do not agree with these interpretations.

There are at least three problems with this parsing of section 701(28)(A). First, it would render the phrase "on the surface of lands" superfluous, since all "[activities conducted * * * in connection with a surface coal mine" necessarily occur on the surface of lands. The phrase has meaning only if it also modifies "[activities conducted * * * in connection with * * * an underground coal mine."

Second, the remainder of paragraph (A) and all of paragraph (B) of this definition would not apply to underground coal mines, since those provisions refer back to the surface *activities* covered in the first portion of paragraph (A). We do not believe Congress could have intended such a result.

Third, this construction would require the reader to conclude that the phrase "in connection with" was not intended to apply to surface operations and surface impacts incident to an underground coal mine. This result would conflict with our position since the inception of the program that the term "surface coal mining operations" includes surface facilities operated in connection with an underground coal mine. The latter is a position which we regard as consistent with the Act and with legislative intent, and which we reaffirmed in a rulemaking concerning surface facilities in connection with an underground coal mine. 53 FR 47384

(Nov. 22, 1988). Consequently, we believe the alternative parsing is not a sound interpretation of the definition. Since these problems with the alternative parsing were not considered by the court in the quoted 1988 decision. We believe the courts did not have the opportunity to address these problems, and we expect that court would not have applied the quoted rationale if the court had considered these matters.

Commenters claim the 1991 Solicitor's opinion offered contradictory rationales for the conclusion that "subsidence from underground mining is properly regulated solely under SMCRA section 516 and not under section 522(e)." In their opinion, the Solicitor states that the statutory definition of "surface coal mining operations" is, on the one hand, clear on its face and excludes subsidence and, on the other hand, ambiguous enough to allow the Secretary [sic] discretion to exempt subsidence from its scope. (*citing* the M–Op at 2, 13 [100 I.D. 85 at 87, 93, and 99–100]). We do not agree that the M–Op contains contradictory statements. Rather the M–Op concludes that Congress has spoken to the issue, and gives the best reading of the statutory language. The M–Op then indicates that, even if this reading were not required by the terms of the statute and the legislative history, we would have ample authority to adopt the interpretation. The M–Op also notes that, to the extent there is confusion as to the meaning of the term "surface coal mining operations", an agency's interpretation of a statute it administers is entitled to great deference. *Id.*

Our proposed rule would interpret 701(28) to include "activities conducted on the surface of lands * * * in connection with * * * surface operations and surface impacts incident to an underground mine." Commenters refer to the M–Op and argue that if the Secretary's[sic] juxtaposition were accepted, it would lead to the absurd conclusion that *causing* subsidence in section 522(e) areas is permissible (because it does not involve "activities" on the surface) but that *correcting* subsidence is prohibited (because reclamation activities would constitute "activities conducted on the surface of lands in connection with * * * surface impacts incident to an underground coal mine").

By contrast, several commenters agree with our position that the reclamation of off-permit subsidence does not require a permit. In a 1983 rulemaking, we established that the "permit area" for an underground coal mine does not include the area overlying underground mining where subsidence may occur. 48 FR 14820 (Apr. 5, 1983). Areas overlying underground mining are included in the definition of "adjacent area". SMCRA section 510(b)(4) requires a determination that "the areas proposed to be mined are not included within an area designated unsuitable for *surface coal mining* pursuant to section 522 of the Act * * *". This statutory provision is implementing the requirement for a permit finding in section 773.15(c)(3). Some commenters further point out that the mere potential for subsidence is not a surface coal mining operation with attendant reclamation obligation. (*citing* Government Brief before the U.S. District Court in *National Wildlife Fed'n* v. *Hodel* at 99–109). (839 F. 2d 694 (D.C. Cir. 1988). These commenters note that if subsidence impacts occur, the regulations impose a reclamation responsibility upon an operator even if such impacts are outside the permit area. The commenters also note that whether the impacts are inside or outside the permit area, the performance standards of 30 CFR Part 817 provide applicable reclamation requirements. However, for other offsite "impacts" regulated under SMCRA, the commenters observe that no permit is required to conduct reclamation. These commenters add that throughout the years of program implementation, the Department's position has been clear and consistent: the area overlying underground workings does not need to be included in the "permit area" for a mine and is not subject to section 522(e).

We agree. We believe our interpretation is consistent with the 1983 rulemaking in which we defined "adjacent area" as "the area outside the permit area where a resource or resources * * * are or reasonably could be expected to be adversely impacted by proposed mining operations, including probable impacts from underground workings." 30 CFR 701.5. We stated in the April 5, 1983, rulemaking that the "requirements of section 522(e) *do not* apply to adjacent areas.", *i.e.*, potential off-site impacts. 48 FR 14816, Apr. 5, 1983. In that rulemaking, we defined "adjacent area" as "the area outside the permit area where a resource or resources * * * are or reasonably could be expected to be adversely impacted by proposed mining operations, including probable impacts from underground workings." 30 CFR 701.5. Thus, since 1983, our interpretation has been that areas where subsidence may occur are not required to be included in the permit area, and that section 522(e) does not apply to the adjacent areas (where subsidence may occur).

One commenter alleges that the proposed rule assumes that underground mining could be authorized within a section 522(e) area merely through a redefinition of "surface impacts" as it relates to subsidence. This commenter also alleges that this assumption fails to account for the other surface impacts intended to be avoid[ed] in section 522(e) areas: dewatering of aquifers, alteration of the prevailing hydrologic balance of the area, placement of mine support structures, entryways, ventilation shafts, and access or haulage roads. The commenter mischaracterizes our position. We agree that some of the things listed by the commenter would be "surface impacts." Other things listed, including placement, construction, maintenance, or use of structures or features on the surface, would be surface *activities* and the areas affected by them, and thus would be included in the definition of surface coal mining operations.

Commenters assert that the Secretary's reading is contrived and also fails to give effect to the portion of section 701(28)(A) that cross-references section 516. The commenters also assert that the "Secretary concedes the "subject to" language is merely a cross-reference indicating which activities conducted on the surface in connection with an underground coal mine are surface coal mining operations, *namely, those that are subject to regulation under section 516 SMCRA*". Commenters argue that *subsidence* is equally subject to regulation under section 516, and therefore, under the Secretary's own theory, must be included within the scope of section 701(28)(A). They further suggest that the Secretary's [sic] reading is contrary to the plain meaning of section 701(28)(A), and rests on a contorted and nonsensical reading of the statutory language. We are not persuaded by commenters' assertions. We believe that our interpretation outlined above is reasonable, and that only surface *activities* are properly included under section 701(28)(A). For the reasons set out in the rationale section, we have concluded subsidence is not included in paragraph (A) of the definition because it is not an activity conducted on the surface of the land. This interpretation is consistent with the fact that there is no mention in paragraph (A) of subsidence, underground activities, or surface impacts of underground activities, which might clearly establish that section 701(28) did include subsidence. By contrast, paragraph (A)

does specifically mention numerous activities that occur on the surface of lands.

Commenters allege that even if section 701(28)(A) were limited to surface "activities," subsidence in section 522(e) areas would still be prohibited by section 701(28)(B) because the paragraph expressly states that "holes or depressions * * * resulting from or incident to such activities" constitute "surface coal mining operations." They further point out that in the 1998 Draft Environmental Impact Statement the Secretary [sic] concedes that subsidence constitutes *holes or depressions:*

> Two types of topographic features caused by mine subsidence are *sinkholes* and troughs. A sinkhole is a circular *depression* in the ground surface that occurs when the overburden collapses into a typically shallow mine void. A trough is a *depression* in the ground surface, often rectangular in shape with rounded corners, that is formed by sagging of the overburden into a mined-out area.

We agree that subsidence may include holes or depressions. However, for the reasons explained above, our position is that only surface features affected by surface activities would be surface coal mining operations under section 701(28)(B).

Commenters argue that subsidence not only constitutes "holes or depressions;" it also is "resulting from or incident to such activities" within the meaning of the last phrase of section 701(28)(B). In their opinion, the initial excavation on the earth's surface through which miners and material are conveyed underground would constitute "*activities*" within the Secretary's reading of section 701(28)(A). We agree that the process of surface excavation would be a surface activity. However, commenters go on to incorrectly assert that any subsidence that occurs is necessarily "resulting from or incident to" these surface activities. Commenters believe that subsidence is functionally related to these surface activities and could not occur without them, i.e. subsidence is linked to these surface activities in a but-for chain of causation. Commenters refer to *NWF* v. *Hodel,* 839 F.2d at 742–45 (affirming DOI rule that applied the "resulting from or incident to" test to include even processing and support facilities that are entirely off-site). We do not agree with this assertion. Subsidence results from underground activities, not surface activities. If there were no underground activities, there would be no subsidence from underground mining.

Commenters charge that the applicability of section 522(e) to subsidence is confirmed by subsection 522(e)(2)(A) which prohibits "surface coal mining operations" within national forests, but allows a limited exception where "surface operations *and impacts* are incidental to an underground coal mine". Commenters argue that, if "impacts" were generally outside the scope of section 522(e), such an exemption would not have been necessary. We do not agree. We interpret the referenced language in 522(e)(2)(A) to refer to surface operations and impacts from underground mining which are included in the definition of surface coal mining operations at SMCRA section 701(28)(B) under our interpretation.

Commenters allege that the term "activities", which the Secretary considers to be the operative term for the entire definition of surface coal mining operations, is conspicuous by its absence from section 522(e)(2)(A). They suggest that if Congress had really intended the tangled parsing of section 701(28)(A) proposed by the Secretary, it would have drafted section 522(e)(2)(a) to apply where "*activities on the surface of lands* are incident to an underground coal mine". In their opinion, Congress did not do so, however, and they recommend that the Secretary respect Congress' decision to address "impacts".

We disagree with the commenters' characterization. Congress defined what "surface coal mining operations" means in section 701(28), and then used that term in section 522(e). The definition at 701(28) refers to "surface activities", and then refers repeatedly in 701(28) to "such activities"; but activities are not the only thing included in the definition. Section 701(28) also specifies certain surface features affected by surface activities. Section 701(28) includes all of the listed categories of surface activities and surface features. Thus, neither section 701(28) nor section 522(e) refers only to surface *activities.* We are not required to speculate about other ways Congress might have drafted this provision, if we have provided a reasonable interpretation of what Congress actually did say. For the reasons set out in this preamble, we believe our interpretation is reasonable.

Commenters suggest that the Secretary [sic] acknowledged the import of section 522(e)(2) in his discussion of the 1979 rulemaking:

> Concerning the definitions at 30 CFR section 761.5, we rejected a comment that "surface operations and impacts incident to an underground mine" should be limited to subsidence. 44 FR 14990 (Mar. 13, 1979). *The negative implication would appear to be that such operations and impacts (including subsidence) are otherwise prohibited by section 522(e).* (citing the M–Op at 11 n. 17 [100 I.D. 85 at 92, fn. 17]).

The commenters further assert that the Secretary [sic] failed to offer any justification for ignoring this "negative implication". This comment refers to a passage in the Solicitor's M-Op In that passage, the Solicitor did not ignore the implication but rather recognized it as one of numerous arguably inconsistent actions by OSM over the history of implementing 522(e). Similarly, in the proposed rule, we did not ignore the negative implication, but rather considered it as well as all other relevant factors. This rulemaking is the first time we specifically address the issue with this level of detailed analysis. And in this final rule, for the reasons stated above in the rationale section, we are not adopting the interpretation urged by these commenters.

Commenters claim that the 1979 rulemaking explicitly defines the section 522(e)(2)(A) phrase "surface operations and impacts incident to an underground coal mine" to include activities that are not conducted on the surface of the lands:

> [A]ll activities involved in or related to underground coal mining which are *either* conducted on the surface of the land, produce changes in the land surface *or* disturb the surface, air or water resources of the area, including all activities listed in section 701(28) of the Act and the definition of surface coal mining operations appearing in section 700.5 of this chapter.

30 CFR. 761.5.

Commenters urge that because subsidence both "produce[s] changes in the land surface" and "disturb[s] the surface, air, and water resources," it is included within the second and third disjunctive clauses of the definition. We agree that subsidence is a surface impact incident to an underground coal mine. However, for the reasons outlined above in section II. B., we do not agree that subsidence is a surface coal mining operation subject to the prohibitions of section 522(e). That is, we interpret section 701(28)(A) to apply only to surface activities of the types listed in that section (and not to surface operations and impacts *per se*); and we interpret section 701(28)(B) to apply only to the areas and features listed; and therefore section 701(28) does not include subsidence.

Other commenters agree with us , and argued that attempting to glean the term subsidence from the language of

subsection (B) is unavailing. The two words "holes or depressions," for instance, do not constitute Congress' vernacular for subsidence. We disagree in part with this comment. Subsidence may result in a hole or depression, but subsidence would be included under section 701(28) only if it is a surface feature affected by surface activities, as provided in section 701(28)(B).

*B. Congressional Intent*

As discussed below, various commenters point to language in the Congressional reports that appears to be imprecise and inconsistent with other report language and with the terms of the statute. We believe that in any case, the language of the Act prevails.

A group of commenters allege that the legislative history of SMCRA establishes that Congress intended that subsidence due to underground mining be considered a surface coal mining operation, and that subsidence therefore is prohibited in areas protected under SMCRA section 522(e). These commenters argue that committee reports from both houses of Congress compel a conclusion that subsidence constitutes "surface coal mining operations" and is therefore subject to section 522(e). Commenters note that the Senate Report includes a statement that the hazards from the surface effects of underground coal mining include the dumping of coal waste piles, subsidence and mine fires. The commenters refer to three statements in the Senate Report on SMCRA, to support their claim:

(1) The Act was addressed to "surface coal mining operations—including exploration activities and *the surface effects of underground mining.*

(2) Initial regulatory requirements extend to "[a]ll surface coal mining operations, which include, by definition *surface impacts incident to underground coal mines*";

(3) The Senate Report characterizes "Surface coal mining operations" as including not only traditionally regarded coal surface mining activities but also surface operations incident to underground coal mining, and exploration activities. The effect of this definition is that coal surface mining *and surface impacts of underground coal mining are subject to regulation under the Act.*"

S. Rep. No. 128, 95th Cong., 1st Sess. 49, 50, 71, 98 (1977).

We have considered the materials cited by the commenters. We are not persuaded by the commenters' arguments and interpretations. We agree that Congress considered subsidence to be a surface impact and a surface effect incident to underground mining. However, for the reasons given above, we do not agree that Congress intended to include subsidence in the definition of a surface coal mining operation. We recognize that the Act addresses subsidence as a surface effect of underground mining, but we believe the Act addressed those effects in sections 516, and subsequently 720, and not as surface coal mining operations under sections 701(28) and 522(e).

Regarding the first quoted passage from the 1977 Senate Report, we believe the report's statement that coal exploration is included in "surface coal mining operations", is inconsistent with the statutory definition in section 701(28). The definition in section 701(28) explicitly *excludes* coal exploration. It is not clear whether the passage's reference to "surface effects" is a vague reference to the surface effects of surface activities or is another inconsistency with the statutory language. In the alternative, this might be an anachronism, a reference to an earlier version, that should have been deleted from the final bill. It is also possible that this report statement reflects inconsistencies in Congress' interpretation of 701(28). In any case, if there is a conflict between report language and statutory language, the statutory language must prevail.

Regarding the second quoted passage from the Senate Report, which refers to initial program requirements, we are unsure what Congress intended by this statement. While this passage might be read to provide that subsidence is included in "surface coal mining operations", we have never interpreted the SMCRA initial program requirements to apply to subsidence. And that issue is not within the scope of this rulemaking.

Regarding the third quoted passage from the Senate Report, commenters believe this passage is especially significant in light of narrower language in previous Senate reports. For example, one earlier report said, "The effect of this definition is that only coal surface mining is subject to regulation under the Act." S. Rep. No. 28, 94th Cong., 1st Sess. 224 (1975); S. Rep. No. 402, 93d Cong., 1st Sess. 74 (1973). Commenters believe the very different language in the 1977 Senate Report was no mere accident, but rather a deliberate choice of more expansive words. We are not sure what significance to attribute to the third quoted passage. That language may be interpreted to confirm our interpretation, because the passage says the definition of "surface coal mining operation" includes surface operations incident to underground mines, and concludes that the *effect* is to regulate surface impacts. We believe that by referring to surface operations incident to underground coal mining, the passage may be referring to surface activities incident to underground coal mining. Thus, this may be an imprecise reference to the statutory language. This latter hypothesis is supported by the fact that the passage asserts that the term "surface coal mining operation" applies to exploration. However, the enacted definition specifically *excludes* exploration, and we have always interpreted the definition to exclude exploration. For the reasons outlined above, we believe the reading urged by these commenters inconsistent with a careful parsing of the language of section 701(28) (A) and (B), because it would not apply section 701(28)(B) to underground mining.

In summary, the quoted passages from the Senate Report, read alone, do raise some questions about Congress' intent, and are not the most precise guidance. However, we believe our interpretation of the language of section 701.28 itself is reasonable. We have found no other interpretation which gives meaning to all parts of the definition.

Commenters also believe that Congress intended to encompass more than merely subsidence effects in including underground mining within the ambit of the term "surface coal mining operations." They charge that acid mine drainage, waste disposal, fire hazards, disturbances to the hydrologic balance, surface operations and structures, impacts on fish and wildlife and related environmental values were impacts of underground mining to be regulated through the application of the performance standards. S. Rep. No. 95–128, 95th Cong., 1st Sess. 98 (1977). We do not take the position that the term "surface operations and surface impacts" of underground mining addresses only subsidence. This rulemaking, however, addresses only the question of whether the prohibitions of section 522(e) apply to subsidence.

Commenters allege that the statutory framework of SMCRA clearly applies the prohibitions of section 522(e) to subsidence, and commenters assert that the House Report supports their allegations. They point to the statement in the report that "environmental problems associated with underground mining for coal which are directly manifested on the land surface are addressed in section 212 [*i.e.*, section 516] *and such other sections which may have application.* These problems include surface subsidence[.]" H.R. Rep. No. 218, 95th Cong., 1st Sess. 125–126 (1977) (emphasis added).

We do not agree that this portion of the House Report on section 516 supports commenter's contention. Commenters apparently assume that the

emphasized language means that section 701(28) includes subsidence and that therefore, the prohibitions of section 522(e) must apply to subsidence. However, nowhere does the quoted language say this. Commenters cite no basis for such a conclusion; and we know of no basis for that conclusion. We believe the underlined House Report language would include any other SMCRA sections that apply to surface environmental problems associated with underground mining but for the reasons outlined above, we do not agree that sections 701(28) and 522(e) apply to subsidence.

Another commenter points to the Secretary's statement that subsidence effects constitute "surface impacts" incident to an underground mine. Commenters assert that if Congress had wished to cover only surface activities as the Secretary suggests, it would not have included the additional word "impacts'; and that the Secretary's theory renders this additional word surplusage. We disagree. As discussed above, we interpret 701(28)(A) to apply to surface activities "in connection with (1) surface operations and (2) surface impacts incident to an underground coal mine". Thus, if surface impacts are incident to an underground mine, then surface activities in connection with them constitute surface coal mining operations.

Commenters further argue that the Secretary's reading makes no sense. Commenters assert that the reading given by the Secretary [sic] would have the second component of 701(28)(A) include "activities conducted on the surface of lands in connection with * * * subject to the requirements of section 516 surface operations and surface impacts incident to an underground coal mine." Citing M–Op pp. 2, 13 [100 I.D. 85 at 87, 93 (July 10, 1991)]. Commenters claim there would be no reason for Congress to refer to "*activities* conducted on the surface of lands in connection with * * * surface *operations*" * * *" Once Congress had swept "activities" within the scope of the definition, nothing additional would be accomplished by adding the word "operations." Commenters also suggest that there would be no reason for Congress to refer to "*activities* conducted on the surface of lands in connection with * * * surface impacts".

We disagree. All of the words of the definition are given meaning under our interpretation. Contrary to commenter's assertion, neither "surface operations" nor "surface activities" is surplusage or unnecessary under our interpretation. These terms help to delineate what is included and what is excluded. For example, there can be onsite activities that have no connection with the surface operations of the mine. The statutory language excludes such activities from the definition. Further, there may be activities that are not conducted on the surface but are in connection with surface operations. The statute also excludes these activities from the definition. We also believe there can be surface activities that are not in connection with surface operations or surface impacts of an underground mine, and there can be surface activities in connection with underground impacts rather than surface impacts. We believe Congress intended to exclude all of these types of activities, and that the words of the definition are needed to make this clear.

Commenters assert that the Secretary's statement that "section 701(28) does not specifically mention subsidence" (62 FR 4868) offers no basis for retreating from the plain meaning of SMCRA. As discussed above, we do not agree with commenter's assumption as to what is SMCRA's plain meaning on this issue. Further, this statement refers to only one of a number of factors we considered in reaching its interpretation. Commenters also argue that acceptance of this statement would require rejection of the Secretary's [sic] own interpretation. These commenters allege that under the Secretary's [sic] interpretation, "face-up or mine portal areas" associated with underground mines are banned in section 522(e) areas. *Citing* M–Op at 13, n.19 [100 I.D. 85 at 87 fn. 19]. Commenters note that, however, neither section 701(28) nor section 522(e) mentions either of these two items. We do not accept commenter's comparison. Our analysis makes clear that "face-up or mine portal areas" would come within the terms of 701(28), because they are areas where surface activities disturb the surface in connection with surface operations of an underground coal mine. Commenters also note the Secretary's assertion that section 516(c) applies to subsidence (*citing* 62 FR 4869), even though the word "subsidence" never appears there. We have consistently taken the position that subsidence could pose an "imminent danger", and thus is within the terms of section 516(c). We note that interpretation of 516(c) is outside the scope of this rulemaking.

Commenters feel the Secretary's assertion that subsidence is regulated only under section 516 is contrary to the House report's reference to "such other sections which may have application" to "subsidence." They argue that since subsidence is explicitly mentioned only in section 516, the only way it can be regulated by "other sections" is if it constitutes "surface coal mining operations", and therefore, it is banned in section 522(e) areas. Commenters' conclusion is flawed. For example, other SMCRA sections that may be applicable to subsidence or subsidence related impacts may include: Sections 508 (reclamation plan requirements), 510 (permit approval), 515 (portions concerning prime farmlands) and 720 (subsidence).

According to commenters, because we are unable to explain away these clear expressions of legislative intent, we are reduced to suggesting in effect that, because the Senate Report once refers to "surface *activities* incident to underground mining," any reviewing Court should overlook the word "impacts" in sections 701(28)(A) and 522(e)(2)(A), and should ignore the three references to "impacts" and "effects" elsewhere in the Senate Report. Commenters are wrong. As explained above, we are not overlooking, nor do we advocate overlooking, the use of the term "impacts" in section 701(28) or 522(e). Rather, our interpretation gives full and reasonable meaning to all terms in those sections. In contrast, commenter's interpretation would render the second half of the definition, at 701(28)(B), inapplicable to underground mining. That interpretation is untenable. Furthermore, we have not ignored the referenced passages in the legislative history. To the extent the passages of legislative history quoted by commenters cannot be explained or reconciled with the language of section 701(28), we believe the language of the Act must prevail.

Commenters also argue that our position is not supported by legislative history allegedly showing that underground and surface mining "require significant differences in regulatory approach." *Citing* 62 FR 4865. In support of their argument, they point out that (1) differences in *regulatory* approach to the two kinds of mining in areas where they are permitted in no way conflicts with an evenhanded prohibition of both surface mining and the surface impacts of underground mining in the special areas enumerated in section 522(e), and (2) where Congress wanted to allow the Secretary [sic] to accommodate differences between the two kinds of mining, it said so. Commenters mischaracterize our position. We believe that not applying 522(e) to subsidence *is* one of the differences in regulatory approach countenanced by Congress in Title V of SMCRA.

Likewise without merit, commenters charge, is the Secretary's citation of legislative history allegedly showing that "most of the impacts of unregulated pre-SMCRA surface mining resulted from surface activities that were more immediate and more readily observable, and the resulting conditions were relatively accessible for reclamation." Citing 62 FR 4866. Furthermore, they contend that the Secretary does not explain how this distinction supports exempting subsidence from section 522(e), and they submit that it does not. Commenters assert that, if anything, the greater difficulty of reclaiming subsidence-impacted surface features makes the preventive approach of section 522(e) more necessary, not less. Commenters have offered no basis for these assertions, and we believe neither the record nor our experience support commenters' characterizations. For the reasons given above, we find these comments unpersuasive.

Commenters allege the legislative history of section 720 further confirms that subsidence is covered by the term "surface coal mining operations." In support of their position, they submit two points. First, that the final bill enacted by Congress rejected a proposed amendment included in the House committee bill:

> Notwithstanding the reference to surface impacts incident to an underground coal mine in paragraph (28)(A), for the purpose of section 522(e), the term "surface coal mining operations" shall not include subsidence caused by an underground coal mine.

(Section 2805(b) of the committee bill, proposing to add section 701(35)(D) to SMCRA), H.R. Rep. No. 102–474, pt. 8 at 133 (1992).

The authors of this amendment stated that it "clearly exempts land surface subsidence from the prohibitions of section 522(e) of the Act." *Id.* pt. 8 at 133. Commenters believe that the House committee's attempt to "exempt" subsidence from section 522(e) necessarily reflects the committee's understanding that, absent such an exemption, subsidence was covered by section 522(e). This statement is not necessarily true. It is just as likely that the proposed amendment was rejected because Congress was aware of the language of the Act and its interpretation, including the M-Op, and agreed that section 701(28) is properly interpreted as not including subsidence; so that no further amendment of the Act was required in order to exclude subsidence.

Second, commenters submit that Congress's ultimate rejection of another House committee amendment to SMCRA may raise issues with respect to the interpretation of section 717(b), but does not raise an issue concerning the committee's understanding that provisions in section 701(28) cover surface impacts, not merely surface activities. The House committee proposed an amendment to SMCRA section 717, stating that:

> Section 2805(a)(1) would amend section 717(b) of the Surface Mining Control and Reclamation Act of 1977 to clarify the terminology used under that subsection. Recent litigation has called into question whether Congress, in using the term "surface coal mine operation" in section 717(b), intended to require underground coal mine operators to replace water supplies * * *.
>
> The Committee, in formulating legislation that was enacted as the Surface Mining Control and Reclamation Act of 1977, did not intend to exclude the impacts of underground mining from the scope of section 717(b). However, in light of the litigation, section 2805(a)(1) amends section 717(b) of the Act with the terminology defined under section 701(28) of the Act *so that a clear reading of the law expressly includes the surface impacts incident to an underground coal mine* under the scope of section 717(b). H.R. Rep. No. 102–474, pt. 8 at 132 (1992) (emphasis added). However, this proposed amendment was not accepted by Congress. In any case, we believe that Congress' action on this proposed amendment to SMCRA section 717 is irrelevant to the issues in this rulemaking because this action postdated passage of SMCRA and did not concern section 522(e) or section 701(28).

We also received other comments that agree with our analysis of the legislative history. These commenters also argue that a compelling indication of Congressional intent can be found on pages 94–95 of House Report 95–218 (Apr. 22, 1977). The commenters assert that the focus of Congress relative to section 522 in general, and 522(e) specifically, was on surface mining impacts. Commenters argue that the report, under the title of "Land Use Considerations", addresses the lands unsuitable for mining provision of section 522. The report states:

> The committee wishes to emphasize that this section does not require the designation of areas as unsuitable for **surface mining** other than where it is demonstrated that reclamation of an area is not physically or economically feasible under the standards of the act * * *.
>
> Although the designation process will serve to limit mining where such activity is inconsistent with rational planning in the opinion of the committee, the 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 operation, except those in existence on the date of enactment, shall be permitted * * *.
>
> As subsection 522(e) prohibits **surface coal mining** on lands within the boundaries of national forests, subject to valid existing rights, it is not the intent, nor is the effect of this provision to preclude **surface coal mining** on private inholdings within the national forests. 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 * * *. (Emphasis added)

H.R. Rep. No. 95–218 at 94, 95.

The commenters argue that the second paragraph goes directly to the Congressional intent to address "surface mining" in creating 522(e) buffer zones. The commenters also argue that frequent use of the term "surface mining" while addressing the "reclamation" related goals in the Act; the discussion about "strip mining" (which has the same limited meaning as surface mining and surface coal mining) in the national forests; and the absence of any subsidence reference anywhere in this discussion, seem clearly to direct section 522 to surface mining and to exclude subsidence from the realm of consideration.

We agree in part with these comments. While the House Report language quoted by the commenters does refer to the effect of section 522(e) on surface mining, we do not believe that SMCRA section 522(e) addresses only surface mining. As discussed above, we believe the language of section 701(28) also encompasses surface activities in connection with underground mining, as well as other surface features affected by surface activities. Paragraph (B) includes a lengthy list of specific surface features included in this last category.

### *C. History of Interpretation as to Applicability of Section 522(e) Prohibitions to Subsidence*

As previously discussed in other sections of this rule, we recognize that there appears to have been inconsistency in our past interpretations. However, we conclude that the majority of past OSM rulemaking and regulatory practices have not considered subsidence to be a surface coal mining operation, have not applied section 522(e) prohibitions to subsidence, and have not required regulatory authorities to do so. Comments on this aspect of this rulemaking fall into two camps. Numerous comments allege that we have consistently taken the position that

subsidence is not subject to the prohibitions of 522(e). Other comments assert that we have properly taken the position that subsidence is subject to the prohibitions of 522(e). Both sets of commenters have cited numerous instances to support their positions. Neither position is entirely correct. As discussed above, we acknowledge that our past actions have not been consistent on this issue.

Several commenters argue that in the administrative history of the implementation of SMCRA, we have never interpreted the statute to apply section 522(e) to subsidence. Furthermore, these commenters argue that there exists a longstanding interpretation of SMCRA that section 516 provides the exclusive provision to control subsidence effects. Commenters disagree with our statement in the proposed rule that in the past we have not taken a definitive position on the issue of the applicability of section 522(e) to subsidence. The commenters believe the administrative history shows from the outset the agency never interpreted the statute to apply section 522(e) to subsidence. These commenters referred to the examples we mentioned in the proposed rule to illustrate that the agency has not taken a consistent and definitive position. The commenters describe these examples as aberrational and pale in comparison to the overwhelming evidence demonstrating that section 522(e) has not been applied in the federal rules or state programs to subsidence. The commenters emphasize that the examples were used by us to describe what the agency calls "negative implications", but these commenters feel that the agency has misconstrued the implication properly drawn from these examples. For the reasons discussed above in Part II. B, we do not agree with commenter's assertions that OSM' interpretation has consistently been that 522(e) does not apply to subsidence. The proposed rule and this preamble acknowledge numerous past explicit or apparent inconsistencies.

In contrast, other commenters allege that our proposed interpretation is an abrupt substantive change of agency policy, particularly from the 1979 regulations and actions taken by the agency in 1984 and 1985. The commenters assert that in the 1979 rulemaking that established the permanent regulatory program regulations, the agency indicated plainly that the jurisdictional term "surface operations and surface impacts incident to an underground coal mine" included more than merely surface impacts attendant to the surface operations, but instead included subsidence and other impacts attendant to the underground coal removal itself. As discussed above, we continue to acknowledge that subsidence can be a surface impact incident to an underground coal mine. However, we do not regard this as inconsistent with the final rule's interpretation of section 701(28). And to the extent that our interpretation in this final rule may be a change from any past interpretations, we gave notice in the proposed rule of the proposed interpretation and rationale and acknowledged various past inconsistencies, so that commenters have had full notice and opportunity to comment.

Commenters further assert that the agency acknowledged in the 1979 rulemaking that the concept of VER applied to underground mining as well as surface mining; an applicability that would be unnecessary if, as the agency now posits, the prohibitions of section 522(e) did not apply to underground mining in the first instance. Citing 44 FR 14993, Mar. 13, 1979. We do not agree. As explained above, we continue to interpret section 522(e) as applying to those aspects of underground mining that are surface activities, and the areas and features affected by, incident to, or resulting from surface activities, as set out in more detail in SMCRA section 701(28)(B). Thus, we take the position that 522(e) continues to apply to those aspects of underground mining that constitute a surface coal mining operation. However, those aspects do not include subsidence. Further, as discussed elsewhere in this preamble, this interpretation is consistent with other rules implementing SMCRA, including for example, our rules concerning bonding and permitting, and our definition of "adjacent area."

Commenters believe that in the 1979 rules, when we addressed the measurement of the 300-foot buffer zone, we tacitly determined section 522(e) did not apply to underground mining. They allege that our subsequent actions contradict this strained analysis. They point out that in 1981 we published our findings on Greenwood Land and Mining Company's request for a determination of valid existing rights to conduct underground coal mining operations in the Daniel Boone National Forest in Pulaski and McCreary Counties, Kentucky. 46 FR 36758, July 15, 1981. These commenters assert that the discussion of the finding of valid existing rights in that instance makes clear that:

(1) Valid existing rights was considered by OSM to be applicable to underground mining activities under section 522(e) lands;

(2) The application of section 522(e) was not limited to face-up areas and those surface areas on which were sited support facilities, but also included the surface overlying underground workings; and

(3) The determination of VER was unrelated to potential subsidence effects but rather attached to the geographic extent of underground mine workings beneath protected lands. 46 FR 36759, July 15, 1981; 47 FR 56192–3, Dec. 15, 1982.

We do not agree with this characterization of our interpretation in the Greenwood VER decision. In the July 15, 1981 FR notice laying out the VER findings in Greenwood, we noted that VER was requested for three mines, one of which would have five face-ups directed at the same seam of coal. Our VER notice stated:

> OSM is in the process of obtaining additional information in order to determine the physical extent of the valid existing rights claimed by Greenwood. OSM is considering basically two alternatives in delineating the exact extent of the VER: (1) have VER over the surface area affected by the face-up and support activities incident to the underground mining; or (2) have VER over those areas (including surface overlying underground workings) contemplated to be affected under the operating plans submitted to the Forest Service prior to August 3, 1977.
>
> * * * OSM considers that Greenwood's valid existing rights should have the same geographical extent as the mining Greenwood contemplated and was committed to on August 3, 1977 * * *.
>
> Because the geographical limits of VER will depend on the evidence available, OSM has decided to reserve the right to use either or both of these alternatives in defining the extent of Greenwood's VER * * *. While the second alternative is preferable and precise geographical limits will be determined wherever possible, there may be cases where such a determination is impossible. In those cases, the first alternative would have to be used.

46 FR 36759, July 15, 1981.

Having concluded that the VER requester had established that it met the "all permits" VER test, the 1981 determination addressed the extent of the geographical area to which VER would apply. If available documentation delineated for some mines or face-ups only the surface area to be affected by face-up and support activities, VER would be found for only that surface area. The areas over underground workings were not to be delineated on the basis of whether subsidence would occur, but rather solely on the basis of the documentation in mining plans, of the area which Greenwood had committed to mine. If documentation for a particular mine or face-up did not show that, as of 1977, the requester was

committed to a specific location and extent for associated underground workings, then VER would extend only to the areas that documentation as of 1977 showed would be affected by surface face-ups and support activities. Thus, in this 1981 VER determination, we considered VER to attach to those areas for which documentation demonstrated that the mineral owner had committed to mine, as of August 3, 1977.

We note that we issued a similar VER determination approximately one year earlier. That determination, concerning a VER request from Mower Lumber Company, used a similar rationale for a VER determination concerning a similar fact pattern. The requester proposed multiple mines on National Forest lands, but the Forest Service required only that the company show the planned extent of mining for six-month intervals. Because there was evidentiary difficulty in determining geographical limits for VER, we had proposed two options for determining the geographical extent of VER. 45 FR 52468, Aug. 7, 1980.

> Under the first alternative, the VER for the actual surface disturbance, face-up, haul roads, etc., would be precisely defined, but *the company would be free to deep mine as much coal from the permitted seam(s) as could be reasonably reached by current mining methods using the precisely limited surface disturbances.* Under the second alternative, precise geographical limits would be set for both the surface and underground workings. [Emphasis added.]

Notice of the final Mower VER determination was published on September 17, 1980 (45 FR 61798). In that decision, we affirmed that Mower had VER at the five mines in question, but reserved decision on the exact extent of VER at all of the mines. We stated that

> * * * [A]s a result of limited State and Federal regulation prior to the passage of the Act, there is a limited amount of information relevant to a precise definition of the extent of VER. While the second alternative is preferable and precise geographical limits will be determined wherever possible, there may be cases where such determination is impossible. In those cases, the first alternative would have to be used.

*Id.*

Although the language of the two decisions is quite similar, it is not clear whether we were assuming in the later Greenwood case that the same consequences specified in Mower would follow when documentation as of 1977 showed only areas affected by surface activities. That is, if documentation showed only areas to be disturbed by surface activities, the operator would have VER only for those disturbed surface areas, but could mine all areas reasonably reached using the surface disturbances. And we reach no conclusion as to whether either alternative for VER determination should be read to say that subsidence is prohibited under 522(e), since the decisions did not specifically address whether subsidence was prohibited in the absence of VER. We are not aware of any previous or subsequent VER determinations that utilized the rationale of Greenwood or Mower. However, to the extent that either decision may be read to be inconsistent with this final rule, this final rule supersedes those earlier decisions.

Commenters believe that the Secretary [sic] reaffirmed the prohibition on subsidence within section 522(e) areas in the decision regarding privately held mining claims within the Otter Creek Wilderness in West Virginia. The commenter notes the Secretary [sic] stated that "certain surface impacts to the wilderness could not be avoided, namely subsidence and hydrologic effects. Thus, even the 22 percent accessible from outside the wilderness could not be recovered without causing prohibited surface impacts inside the wilderness area." 49 FR 31228, 31233, Aug. 3, 1984. To further support this point of view, these commenters also point to a decision by OSM to require two mining companies about to conduct underground mining operations which would disturb the surface of federal lands to obtain permits under SMCRA and subject them to the provisions of section 522(e)(2). *Ramex Mining Corp. v. Watt,* 753 F.2d 521, 523 (6th Cir. 1985). As noted above, in Part II.B.3. of this preamble, we agree that the *Otter Creek* decision did conclude that subsidence from underground mining is a prohibited surface impact under section 522(e). However, in part for the reasons set out in Part III. A. of this preamble, we do not agree that *Ramex* clearly supports the commenter's point. It is not clear from the decision whether the Ramex operation would have included surface activities on the national forest lands in question, and to conduct such activities would require VER under any interpretation.

Commenters also allege that the proposed interpretation is an abrupt substantive change from the 1988 proposed rule which proposed two options: banning all subsidence, or banning subsidence causing material damage; but did not seriously contemplate denying the applicability of the prohibitions to any surface impacts associated with underground mining. These commenters also assert that the preamble to that proposed rule stated that "The definition of 'surface operations and * * * impacts incident to an underground coal mine,' was promulgated specifically to apply to 30 CFR 761.11(b), the rule which implements the section 522(e)(2) prohibition against mining on Federal lands in National forests." We indicated in our 1978–79 rulemaking that, at a minimum, subsidence causing material damage was prohibited in section 522(e)(2) areas[.]" Citing 53 FR 52381, Dec. 27, 1988.

In December 1988, we proposed two alternative policies on the applicability of section 522(e) to subsidence. One proposal was that all subsidence would be subject to the prohibitions of section 522(e). The other proposal was that subsidence causing material damage would be subject to section 522(e). 53 FR 52374, Dec. 27, 1988. We withdrew the 1988 proposed rule. That withdrawal was not challenged , and no policy was established by the 1988 proposal. Therefore, we are not required to justify any changes from that withdrawn proposed rule. Nonetheless, we did discuss in the 1997 proposed rule our reasons for departing from the alternatives considered in the 1988 proposed rule. Those reasons, which continue to apply, can be summarized as follows:

One alternative proposed in 1988 was based on the argument that subsidence is a surface impact of underground mining, that surface impacts of underground mining are surface coal mining operations under section 701(28), and thus that all subsidence is a surface coal mining operation prohibited under section 522(e). One problem with this interpretation is that subsidence may or may not cause surface damage. We believe that Congress did not intend to prevent subsidence that causes no surface damage. All of the congressional concern about subsidence from underground mining is expressed in discussions of the damage caused by subsidence, and Congress repeatedly recognized that there was little concern about subsidence that caused no significant damage to surface features or uses or to human life or safety. See H.R. Rep. No. 218, 95th Cong., 1st Sess. 126 (1977); H.R. Rep. No. 1445, 94th Cong., 2d Sess. 71–72 (1976); H.R. Rep. No.896, 94th Cong., 2d Sess. 7374 (1976); H.R. Rep. No. 45, 94th Cong. 1st Sess. 115–116 (1976); H.R. Rep. No. 1072, 93d Cong., 2d Sess. 108–109 (1974). Indeed, there is little reason to regulate or prohibit subsidence that does not impair surface features and uses and does not endanger human life or safety.

Thus, we conclude that application of the section 522(e) prohibition to all subsidence would be unnecessarily restrictive, in light of Congress' recognition that subsidence would typically cause no significant damage to agriculture and similar uses. Many of the types of features listed in section 522(e) are low-intensity uses that are similar to agricultural land uses in that they have relatively low vulnerability to significant damage from subsidence.

This 1988 proposed alternative was also based in part on the argument that, given the serious congressional concern about subsidence, it would be illogical to conclude that Congress did not intend to include subsidence within the definition of "surface coal mining operations" or that Congress would have allowed subsidence within the areas protected by section 522(e). For two reasons, we do not now find this argument persuasive.

First, under SMCRA, certain impacts of coal mining are subject to regulation even if they are not included in the definition of a surface coal mining operation and are therefore not subject to the prohibitions of section 522(e). For example, offsite water supply diminution and air and water pollution attendant to erosion are also specifically regulated under SMCRA, even though they are not surface coal mining operations per se. SMCRA sections 515(b)(4) and 717. 30 U.S.C. 1265(b)(4) and 1307. The same is true for subsidence. Therefore, it is not necessary to include subsidence within the definition of a surface coal mining operation in order to regulate subsidence under sections 516 and 720.

Second, as noted above, there are no significant lapses in regulatory coverage under our proposed reading of SMCRA, since subsidence is fully and specifically regulated under sections 516 and 720. The requirements of the existing regulatory scheme for subsidence apply equally in areas covered by section 522(e) and in those not so covered.

The other alternative that we proposed in 1988 was that subsidence causing material damage is a surface coal mining operation subject to section 522(e). Proponents of this alternative contend that Congress intended that only subsidence that causes material damage be precluded. Prohibition of material damage would not preclude underground mining of all section 522(e)(4) and (e)(5) areas, because an operator could either negotiate a waiver of the prohibition or purchase the protected features.

We did not find the arguments for a material damage standard persuasive for several reasons. First, as outlined above, a material damage standard does not comport with the parsing of the definition at SMCRA section 701(28)(A),which we believe best gives meaning to all of the words of the statutory provision and therefore is the best and most reasonable interpretation of the language of section 701(28).

Second, as outlined above, we believe the best interpretation is that Congress intended to regulate subsidence under sections 516 [and subsequently 720], rather than under section 522(e), as indicated by both the provisions of the Act and the legislative history.

Third, application of a material damage test might result in significant costs and impairment of underground mining. This is because section 516(b)(1) requires prevention of material damage only "to the extent technologically and economically feasible," while a material damage threshold for applying section 522(e) would require prevention of all material damage.

We believe that, if subsidence causing material damage were prohibited, an operator would be precluded from causing subsidence except to the extent the operator could demonstrate that:

(1) Although subsidence might occur under the protected features, no material damage would occur from the subsidence;

(2) The operation would avoid mining within the area from which subsidence could damage the protected features; or

(3) Under the exceptions in section 522(e), the operator had, for example, obtained waivers from homeowners or permission from the regulatory authority concerning subsidence under public roads.

To the extent that these requirements would significantly increase the costs of mining, or significantly decrease the amount of coal available for mining, the material damage standard also would frustrate Congress' expressed intent to encourage full utilization of coal, to ensure an expanding underground mining industry and to encourage longwall mining. For example, as we determined in the EIS concerning this rulemaking, withholding of 10 percent of waivers for 522(e)(5) homes could make longwall mining economically infeasible. See Final EIS, 1999.

It is true that section 522(e) and section 561(c) would not be coextensive in their coverage, assuming section 522(e) applied to subsidence. Nevertheless, there would be a substantial overlap between the two provisions. Moreover, as discussed above, we conclude that subsidence was not intended to be addressed in section 522(e), and to apply the prohibitions of section 522(e) to material damage from subsidence would frustrate congressional aims in a way that is not mandated by the terms of the Act or supported by its legislative history.

Commenters also note that the coal states that already apply the prohibitions of section 522(e) to subsidence must have concluded that the prohibitions are fully consistent with a healthy coal industry. We do not agree. As discussed above, with the exception of Colorado, Illinois, Indiana, and Montana, states with active underground coal mining do not prohibit subsidence in areas protected under section 522(e). Rather, states regulate the effects of subsidence pursuant to sections 516 and 720 of SMCRA. Those regulations provide for the mitigation, repair, and compensation for subsidence and material damage to certain structures and to lands. As discussed, Montana has no defined policy regarding the regulation of subsidence. This is due in part to the fact that the State has only one underground mine, which has not begun production. Montana did not submit comments on the proposed rule. No states have commented that requiring states to apply the 522(e) prohibitions to subsidence is appropriate. In fact, states commented that the proposed rule would clarify, once and for all, that certain prohibitions on surface mining near occupied dwellings, public roads, and on federal lands within national forests, do not apply to subsidence from underground mining.

State commenters unanimously support continuation of the status quo; that is, the prohibitions of section 522(e) do not apply to subsidence. State commenters agree with our analysis that adequate means of control are available to the states and the federal government through existing statutory provisions to insure that the effects of subsidence are mitigated. The State commenters welcome clarification of the statutory requirements and assert that the interpretation enables the States to retain the flexibility that regulatory authorities need to effectively regulate coal mining operations and protect the environment.

The State of Colorado concurs with our interpretation, and indicates that the State has "always concurred with this interpretation by practice." Colorado commented that the State prohibits material damage to any structure through State regulations pursuant, in part, to section 516 of SMCRA. Further, the State noted that, although it does not invoke the prohibitions of section 522(e)

in addressing subsidence impacts of proposed underground coal mining, the State consistently requires subsidence inventories and control plans to identify and mitigate any potential "material damage" due to subsidence of structures or renewable resource lands. Colorado confirmed that it does not allow material damage to structures even with landowner waivers or VER.

Illinois also supports our interpretation inasmuch as Illinois prohibits *planned* subsidence in section 522(e) areas. Illinois indicates that they have "historically applied the prohibitions of section 761.11 "indirectly". An internal State policy was intended to provide protective procedures when planned, predictable and controlled subsidence was proposed under dwellings and roads. Under the State program, planned subsidence operations are required to establish VER via a "takings test" prior to subsiding the protected lands and features. However, absent VER, Illinois would allow subsidence within the established buffer zones if:

(1) The right to subside within the buffer zone was established, and

(2) The protected land or feature in question would not be materially damaged or adversely impacted by the adjacent subsidence operations.

In their comments, Illinois agrees with our analysis that existing regulations and the Federal subsidence regulations (60 FR 16722, Mar. 31, 1995) provide adequate safeguards to protect the public without applying the prohibitions enumerated under section 761.11. Illinois also points out that if VER were to apply, the good faith all permits standard would effectively eliminate longwall mining under most protected features. Illinois believes the ability to permit planned subsidence that would either not impact a protected feature, or could be effectively mitigated would be arbitrarily lost as few operators could pass the good faith all permits standard.

Indiana also supports our interpretation that the prohibitions of section 522(e) do not apply to subsidence because it best fits Congressional intent to encourage underground mining in SMCRA. Indiana applies the 522(e) prohibitions unless a waiver or other form of "subsidence right" is obtained. Indiana requires proof of acquisition of the right to subjacent support, or a waiver, to conduct planned subsidence mine operations. Indiana indicates that adoption of the proposed interpretation will not change Indiana's regulatory program because either one of these two conditions is necessary regardless of the existence of 522(e) buffer zones. Indiana notes that our interpretation protects both Indiana homeowners and the development of Indiana's valuable natural energy resources as required by Congress.

Indiana believes that:

(1) A change from the proposed rule would require a major overhaul of its regulatory program without a commensurate benefit to the citizens, the environment, the economy or the State; (2) without a demonstrated need, a requirement to overhaul the state subsidence programs would waste state and federal resources provided by the taxpayers;

(3) The regulations, and in some cases Indiana's SMCRA, would need to be rewritten which would take several years;

(4) The rules would have to be written to require the entire shadow area to be included in the permit area, and therefore bonding for the shadow area would be required; and

(5) Rules would be needed to address bond release for revegetation and structural restoration requirements.

*D. Regulatory Gap—Adequacy of SMCRA Protection of 522(e) Features From Subsidence Damage*

Some commenters disagree with our statement in the proposed rule preamble (62 FR 4868–69, 4871, Jan. 31, 1997) that sections 516 and 720 adequately address subsidence. Commenters believe the mandatory duty, imposed by the first clause of section 516(b)(1), to prevent subsidence damage is softened by (1) limiting its scope to cover only "material" subsidence damage and (2) including a feasibility standard "to the extent economically and technologically feasible". We do not agree. Other commenters believe that the "material damage" standard for regulating subsidence from underground mines is a flexible enough concept to provide heightened scrutiny of any permit application for mining beneath (e)(1) areas. We believe that subsidence protections under section 516 and 720 are adequate. We believe the legislative history demonstrates that these sections address the subsidence impacts Congress was concerned about, and we believe it is clear Congress intended to impose these limitations.

Some commenters assert that section 522(e) reflects Congress's determination that certain special areas require more protection than section 516(b)(1) can offer. Furthermore, in these limited areas, commenters believe Congress imposed on operators a mandatory duty not only to prevent subsidence from causing material damage to the extent feasible, but to prevent it altogether. They also note that the Secretary advanced, and the D.C. Circuit upheld, an interpretation providing that section 516(b)(1) does not mandate the restoration of structures damaged by subsidence. [This interpretation predated enactment of SMCRA section 720.] *National Wildlife Fed'n* v. *Lujan*, 928 F.2d 453 at 456–60 (D.C. Cir. 1991). These commenters allege that, if the Secretary [sic] believes Congress intended this interpretation of section 516(b)(1), it is all the less likely Congress intended dwellings and the other important structures listed in section 522(e) to be left without the benefit of section 522(e)'s preventive mandate. We do not agree. We believe that in section 522(e) areas, Congress did not intend to prohibit subsidence, but rather to prohibit those surface activities and those areas and features resulting from, incident to, or affected by surface activities, that are surface coal mining operations within the terms of 701(28).

Commenters point to a discussion of the 1988 proposed rule in the M-Op: "[M]any of the types of features listed in section 522(e) are low-intensity uses that are similar to agricultural land uses in that they have low vulnerability to significant damage from subsidence." These commenters believe Congress included national parks, wilderness areas, and other key recreational lands in section 522(e), but excluded agricultural land, and that the Secretary [sic] ignored this fact. The commenters further conclude that Congress did not consider farmland "similar" for purposes of section 522(e). Moreover, referring to a draft EIS that accompanied an earlier VER proposed rule, the commenters submit that the Secretary conceded that the impacts of subsidence on such "low-intensity" land uses as national parks and wilderness areas are quite serious indeed.

We disagree with these commenters' conclusions. We continue to believe many features protected under section 522(e) have low intensity uses that are not particularly vulnerable to subsidence damage, similar to certain low-intensity uses viewed by Congress as having low vulnerability. The fact that Congress did not address agricultural lands in section 522(e) is not particularly relevant to this point.

We believe the EIS accompanying this rulemaking best evaluates the relative impacts of the alternatives considered for this rulemaking. An extensive discussion of this issue can be found in Chapter IV of the EIS accompanying this rulemaking. See Final EIS, 1999.

Section 522(e) areas with low-intensity uses that are not particularly vulnerable to significant damage from subsidence may include many (e)(1), (2), (3), and (4) areas, as well as many (e)(5) public parks. But in any case, we do not argue that subsidence will never have impacts on the surface of 522(e) lands. And, as discussed above, we believe Congress was concerned with subsidence only insofar as it causes significant damage or danger, and was focused on control rather than prohibition of subsidence.

Another group of commenters argue that nothing in sections 516 and 720 purports to modify either section 522(e) or the definition of "surface coal mining operations" in section 701(28). The commenters go on to note that Congress has clearly provided in sections 516 and 720 that subsidence is (subject to exceptions) prohibited in section 522(e) areas and that it is not the Secretary's [sic]'s prerogative to substitute the Department's views of public policy for Congress's.

We agree that neither section 516 nor section 720 modifies section 522(e) or section 701(28). However, we disagree with these commenters' other conclusions. Based on a plain reading of the language of the relevant provisions we also believe that neither section 516 nor section 720 includes provisions that specifically interpret 522(e) and its applicability to subsidence. We believe that Congress intended section 516(c) [and subsequently 720], in combination with other regulatory provisions of SMCRA, to offer sufficient regulation of subsidence damage to those features that Congress considered vulnerable to significant impairment from subsidence. We believe that the existence of this comprehensive regulatory scheme in section 516 [and subsequently 720] makes it unlikely that Congress also intended to prohibit subsidence under section 522(e).

Another group of commenters argue that our interpretation of the language at section 516(d), as well as the language itself, confirms that subsidence is a "surface impact [ ] incident to an underground coal mine" within the meaning of sections 701(28) and 522(e). These commenters further note that section 516(d) applies to "surface operations and surface impacts incident to an underground coal mine", and that this is essentially the same language used in sections 701(28)(A) and 522(e)(2)(A).

Commenters also argue that our rulemaking invoking section 516(d) as authority for a regulation requiring bonds for subsidence demonstrates that we have in the past deemed subsidence to fall within the scope of this key phrase. We agree that subsidence can be a surface impact incident to an underground coal mine. However, as outlined above, we do not agree that a surface coal mining operation includes surface impacts *per se;* rather this term includes surface activities (under section 701(28)(A)) and the surface features affected by those activities (under section 701(28)(B)).

One group of commenters argues that our reasoning that subsidence must be regulated only by sections 516 and 720 is nullified since sections 516 and 720 do not contain all the requirements which apply to underground activities. Commenters argue that subsidence is also regulated under other sections. As noted above, we agree that other SMCRA provisions may apply to subsidence and subsidence-related impacts. However, performance standards for subsidence are set out primarily in sections 516 and 720. And, we believe that no regulatory gap results when section 522(e) does not apply to subsidence because sections 516 and 720 provide ample authority to regulate surface effects of underground mining under existing regulations. The detailed description of the existing relevant regulations in Part I of this preamble demonstrates that our permanent program regulations implementing sections 516 and 720 provide broad subsidence protection; that a prohibition of subsidence within the buffer zones around dwellings, roads, and other surface features listed in section 522(e) would be superfluous; and that no regulatory gap results from our interpretation. We have full authority under sections 516 and 720 and other SMCRA provisions, to develop additional regulations to protect any environmental values or public interests that warrant additional protection beyond that currently provided.

Some commenters assert that section 720 does not provide complete protection against mining impacts, and certainly does not give the same protection to the interests of surface landowners that section 522(e) would give if applied to subsidence under homes. Furthermore, commenters believe that while the law requires water supply replacement and subsidence compensation or repair, implementation of that law is problematic in the best of circumstances. Commenters argue that even in cases where subsidence is the causation, it is difficult to prove that the water loss is mine-related. Commenters also note that there can be a cost to the homeowner for hiring counsel or private consultants to develop evidence; and that it can take months or years to get water replacement. Commenters further argue that such replacement is rarely of comparable quality, and certain state laws, such as Pennsylvania law, do not extend the full protections intended by section 720. Further, commenters believe that some losses and impacts, even where mine-related, are not addressed by provisions other than section 522(e). Commenters note that unremediated impacts may include: the loss of use or habitability of a structure due to water loss, cost of temporary housing during such water loss; the ruined pumps, stained clothing and fixtures; and destroyed washers, dryers and other appliances. We agree that the impacts of subsidence on property owners are very real. These impacts can include, for example, emotional stress from the process of being subject to subsidence, lost productivity, potentially depressed property values, and other economic impacts. However, we believe that SMCRA addresses these impacts under sections 516 and 720, and related regulatory provisions, to the extent that Congress intended to address them in SMCRA.

Commenters allege that the subsidence regulations published in March 1995, as mandated by EPAct, are very limited and inadequate to protect section 522(e) resources from subsidence. Furthermore, commenters believe the EPAct is limited to subsidence damage "to any occupied residential dwelling and structures related thereto, or non-commercial building" and damage to "any drinking, domestic, or residential water supply from a well or spring in existence prior to the application for a surface coal mining and reclamation permit". Commenters assert that many section 522(e) structures are among the areas that lack EPAct protection. During the preparation of the final regulation implementing EPAct, timely comments concerning the merits of the rulemaking were considered; and further comments on the adequacy of the protection established by Congress in EPAct's provisions on subsidence protection, or on the rules implementing those provisions, are outside the scope of this rulemaking.

Commenters point to a lawsuit that was subsequently filed against the Department of the Interior, alleging that our 1995 subsidence regulations, (62 FR 16722, Mar. 31, 1995) went beyond the intent of the Energy Policy Act. Commenters argue that even if the EPAct regulations are upheld, every provision will likely be the subject of prolonged disputes, appeals and

litigation by coal operators who are reluctant to minimize damage, pay compensation or make repairs. Commenters assert that the existence of *any* real or imagined basis for dispute will be exploited by coal operators who will delay resolution for years until courts provide absolute answers and that these disputes will cause major delays and lack of repair and compensation. We disagree with the commenters' assumption regarding anticipated problems in implementation. We expect the rules will be implemented in good faith, and that any disputes as to proper implementation are appropriately handled through existing administrative and judicial procedures on a case-by-case basis. Further, these comments address anticipated concerns about implementation of a separate rulemaking and are outside the scope of this rulemaking.

Commenters express concerns that the Secretary's [sic] interpretation will place an additional economic burden on homeowners and will threaten the recreational value of national parks and other protected lands. These commenters point to statements in the M–Op that:

> We have seen no firm or final conclusion as to the extent to which costs and impairment would occur. Review of a preliminary draft Environment [sic] Impact Statement indicates that OSM has initially determined that there would be no significant decrease in coal production from application of a material damage standard.

Citing M–Op at 21, n.27 [100 I.D. 85 at 99, fn 27].

Commenters then point to another statement in the M–Op:

> [If] that is true, interpreting section 522(e) as prohibiting subsidence causing material damage would add nothing to the protections already afforded by section 516(b)(1)." *Id.*

Commenters argue that application of section 522(e) to subsidence, while not adversely affecting coal supply or price, will provide key benefits by shifting subsidence-prone underground mining outside of the important areas protected by section 522(e).

These commenters are addressing statements that are not included or relied on in either the proposed or final rule. The referenced statements were made by the Solicitor in a footnote in the 1991 M–Op before preparation of the Draft EIS or Final EIS for this rulemaking. As quoted by the commenters, the Solicitor noted that at the time of preparing the M–Op he had seen no firm or final conclusion as to the extent to which costs and impairment would occur. Thus, the Solicitor acknowledged that his tentative evaluation in the 1991 footnote had no basis in current and firm analysis by OSM. We believe the Final EIS and EA that accompany this rulemaking best evaluate the relative impacts of the alternatives considered in this rulemaking. See Final EIS, 1999; Final E A, 1999.

Those documents indicate that the application of section 522(e) prohibitions to subsidence would have relatively small impact on the overall extent of mineable coal reserves. However, we do not agree that there would be little impact on coal costs for the nation. The Economic Analysis, which was prepared under guidelines issued by the Office of Management and Budget (OMB), demonstrates that, if waiver withholding rates were to exceed 10% a substantial part of the longwall mining industry could be shut down. Mining would shift to alternative coal reserves but at an additional cost to the nation estimated to be upwards of $2.65 billion over the next 20 years. The commenter is referred to Chapter V of the Final EA for additional details. We considered both costs and benefits in analyzing alternative rules concerning the application of 522(e) prohibitions to subsidence. In our EIS and EA, we attempted to analyze sufficient cost and benefit information (both quantitative and qualitative) to determine the relative magnitude of net costs and benefits for the entire country from alternative subsidence rules.

Commenters also charge that the SMCRA post-subsidence bonding regulations are inadequate to protect the homeowner, particularly if subsidence does not occur for several years. The commenters allege that when the bond is needed to cover subsidence-related damage, the company that caused the subsidence may have been dissolved, gone bankrupt or lack sufficient resources to ensure an adequate bond. These comments address anticipated concerns about implementation of a separate rulemaking addressing subsidence issues (60 FR 16722, Mar. 31, 1995), and therefore the comments are outside the scope of this rulemaking. We expect that any disputes as to proper implementation are appropriately handled through existing administrative and judicial procedures.

One commenter referenced a local (Alabama) study that concluded that, after eight years the subsidence over a longwall panel is still measurable. The commenter believes this study supports his assertion that subsidence is not a short term effect. The commenter believes that subsidence precludes the area above longwall mining from use for any significant residential or other structures. He further notes that in addition to the protracted changes that subsidence brings, all affected insurance companies studied have terminated casualty homeowner's insurance in the vicinity of longwall mining. The commenter provided no documentation of this allegation, but we agree this may be a serious concern. However, it appears that this concern is primarily the result of local insurance practices, and outside the scope of this rulemaking. We did not receive any other comments to this effect.

*E. Impacts on Underground Mining if Prohibitions Do Apply to Subsidence*

As discussed in this preamble, after considering the comments on this matter, we continue to believe that subsidence is possible from room-and-pillar underground mining and other underground technologies, and is a virtually inevitable consequence of longwall mining. Therefore, prohibiting subsidence below homes, roads, and other features specified in section 522(e) could make mining substantially less feasible and could substantially reduce coal recovery in areas where these features are common .

As discussed previously in this preamble, if the section 522(e) prohibitions applied to subsidence from underground mining, mining would be precluded in all portions of the underground workings where mining would cause subsidence affecting a protected surface feature. Thus, to ensure that subsidence would not take place within a surface area specified in section 522(e), underground mine operations would be required to leave coal in place around each protected feature for a horizontal distance much larger than the protected area. In many cases, the amount of coal left in place to support dwellings would result in a pattern of irregular mined areas that would eliminate the contiguous coal reserves needed to make longwall operations economic. Consequently, few new longwall mines would be opened. As discussed in the Economic Analysis, if waiver withholding rates were to exceed 10% a substantial part of the longwall mining industry could be shut down. Mining would shift to alternative coal reserves but at an additional cost to the nation estimated to be upwards of $2.65 billion over the next 20 years.

*F. Codification of the final rule*

In the proposed rule (62 FR 4871, Jan. 31, 1997) , we solicited comments on the need to amend 30 CFR Chapter VII to codify our interpretation that section 522(e) does not apply to subsidence from underground coal mining

activities, or the underground activities that may lead to subsidence. A group of commenters suggested that we should codify this interpretation. We agree and have codified the interpretation at 30 CFR 761.200. Codification will allow interested persons to ascertain our policy from the regulations at 30 CFR part 761, without having to locate and refer to the **Federal Register** preamble for this rulemaking.

## IV. 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.

(a) 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 which was 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, NW, Washington, D.C. 20240. A single copy may be obtained by writing OSM or calling 202–208–2847. You may also request a copy via the Internet at: osmrules@osmre.gov.

(b) 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.

(c) 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 effect such items.

(d) This rule does raise 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 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.

### *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, this rule does not have significant takings implications. The rule is an interpretative rule which does not alter existing regulatory requirements.

### *F. Executive Order 13132: Federalism*

In accordance with Executive Order 13132, this rule does not have Federalism implications. The rule does not impose any new regulatory requirements. The rule:

(a) Does not substantially and directly affect the relationship between the Federal and State governments;

(b) Does not impose substantial direct compliance costs on States or localities; and

(c) Does not preempt State law.

### *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*

This rule does not contain collections of information which require approval by the Office of Management and Budget under 44 U.S.C. 3501 *et seq.*

### *I. National Environmental Policy Act of 1969 and Record of Decision*

This rule, issued in conjunction with the rule defining Valid Existing Rights (RIN 1029–AB42), 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). A separate notice of the availability of the EIS was published by the Environmental Protection Agency in this edition of the **Federal Register**. A copy of the final EIS, *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,* OSM–EIS–29 (July, 1999) is available for inspection at the Office of Surface Mining, Administrative Record—Room 101, 1951 Constitution Avenue, NW, Washington, D.C. 20240. A single copy may be obtained by writing OSM or calling 202–208–2847. You may also request a copy via the Internet at: osmrules@osmre.gov.

This preamble serves as the *Record of Decision* under NEPA. Because of the length of the preamble, the following is offered as a concise summary. The EIS that was prepared 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.

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 over a 20 year period (1995 to 2015) that could be affected. Using the generic mine impact analysis and the potentially affected acreage of section 522(e) areas, we was able to provide a measure of the relative degree of potential impacts under each alternative. Finally, we evaluated the combined effects of the VER and the Prohibitions alternatives to describe the impacts of underground mining.

Alternatives Considered

We identified five alternatives for determining the applicability of the section 522(e) prohibitions to subsidence resulting from underground coal mining. None of the alternatives authorizes mining. A person must submit a permit application that complies with all applicable permitting requirements in order to obtain a permit to mine. All Federal permitting decisions require site-specific NEPA compliance in addition to this EIS. The alternatives considered are No Action, Prohibitions Apply, Prohibitions Apply If There Is Material Damage, Prohibitions Apply If There Is Subsidence, and Prohibitions Do Not Apply (preferred prohibitions alternative).

*No Action (NA) Alternative:* Under the NA alternative, we would not promulgate rules and we would be guided by the Solicitor's Memorandum Opinion (M–36971) of July 10, 1991, which advised that subsidence from underground mining is properly regulated solely under SMCRA section 516 and not under section 522(e). Under this alternative, States would continue to regulate subsidence as provided in their approved regulatory programs.

*Prohibitions Do Not Apply (PDNA) Alternative:* This was the preferred alternative. Under this alternative we would determine through rulemaking that subsidence is not a surface coal mining operation subject to the prohibitions of section 522(e). This rulemaking would conclude, consistent with the Solicitor's opinion, that the SMCRA definition of surface coal mining operations, set out in SMCRA Section 701(28), includes only surface activities and the facilities and areas affected by or incidental to these surface activities, and that subsidence from underground mining would not be deemed a surface coal mining operation. The performance standards in sections 516 and 720 of SMCRA and the implementing regulations in 30 CFR Parts 783, 784, and 817 would still apply. Surface activities and surface features affected by surface activities in connection with underground coal mining would be subject to the prohibitions of section 522(e).

*Prohibitions Apply If There Is Material Damage (PAMD) Alternative:* Under this alternative we would determine through rulemaking that subsidence causing material damage would be a surface coal mining operation subject to the prohibitions of section 522(e). Unless an operator could demonstrate that underground mining would not reasonably be expected to result in subsidence that causes material damage, underground mining would be prohibited in section 522(e) areas.

*Prohibitions Apply If There Is Subsidence (PAS) Alternative:* Under this alternative we would determine through rulemaking that subsidence would be considered a surface mining activity subject to the prohibitions of section 522(e). Mining operations that would cause subsidence within section 522(e) areas in the reasonably foreseeable future would be prohibited unless the applicant could demonstrate to the regulatory authority that no subsidence would occur in the foreseeable future.

*Prohibitions Apply (PA) Alternative:* Under this alternative we would determine through rulemaking that any potential subsidence would be considered a surface coal mining operation subject to the prohibitions of section 522(e). Depending on the angle of draw, depth, and overburden and seam characteristics, some coal extraction activities located outside the protected area would also be prohibited if it would cause subsidence within the protected area.

Decision

For the reasons set forth in this preamble, OSM interprets section 522(e) as not applying to subsidence from underground mining. This decision is based on an extensive analysis of the statute, the legislative history, relevant case authority, public comments, and our regulatory actions with respect to the applicability of section 522(e) to subsidence from underground mining. With certain exceptions, section 522(e) prohibits "surface coal mining operations" on certain congressionally designated areas. The best reading of section 701(28) is that "surface coal mining operations" does not include subsidence, and that therefore the prohibitions of section 522(e) do not apply to subsidence from underground mining. This is consistent with legislative intent. Subsidence is properly regulated under sections 516 and 720 and related provisions of SMCRA and not under section 522(e). Although regulation under sections 516 and 720 and related provisions may not have precisely the same effect as regulation under section 522(e), regulation under sections 516 and 720 will achieve full protection of the environmental values which Congress sought to protect from subsidence under SMCRA while encouraging longwall mining. This interpretation will promote the general statutory scheme of SMCRA and fully protect the environment and the public interest. We also believe this interpretation best balances all relevant policy considerations, including the competing environmental and economic considerations involved in this rulemaking.

The language of SMCRA demonstrates that Congress intended to encourage underground mining, especially full-extraction methods such as longwall mining, and application of the prohibitions of section 522(e) to subsidence could substantially impede longwall and other full-extraction mining methods. Therefore, including subsidence in the definition of "surface coal mining operations" at section 701(28), and application of the section 522(e) prohibitions to subsidence, would fail to accommodate congressional recognition of the importance of underground mining and longwall mining in particular.

The final decision balances the interests of surface owners and industry, maintains stability in SMCRA implementation, promotes safety, acknowledges existing property rights, and results in no regulatory gap. The following points discuss the findings with respect to these considerations.

(a) *Balances the interests of surface owners and industry:* Our interpretation recognizes that in most cases the mineral owner purchased the property right to undermine, and probably to subside, upon acquisition. Thus, our interpretation best balances both the surface and mineral owner's interests, because our interpretation ensures that both the public interest and the property rights of the surface owner are protected under SMCRA's subsidence control requirements while allowing the mineral owner to make the safest and most efficient use of their mineral rights consistent with those subsidence control requirements.

(b) *Maintains stability in SMCRA implementation:* The final rule will cause minimal disruption to existing and longstanding State and Federal regulatory programs and the expectations associated with them. The existing provisions adequately protect section 522(e) features and therefore do not require change. Thus, this rule avoids unnecessary change in state administration of regulatory programs, enables the states to retain flexibility in regulating coal mining operations and protecting the environment, and allows states to address differences in terrain, geology, and other conditions when regulating subsidence.

Finally, application of the section 522(e) prohibition to subsidence could require a major overhaul of State regulatory programs without a commensurate benefit to the citizens, the environment, the economy or the State. Existing subsidence controls pursuant to State and Federal programs properly implement SMCRA. Without a clearly demonstrated need, a requirement to impose new administrative burdens and costs would waste State and Federal resources.

(c) *Promotes safety:* Longwall mining has become the safest and most productive and economic underground mining method. The result of this mining technique is almost immediate subsidence that is highly predictable as to how much the surface will subside. In terms of worker safety, the longwall system also offers a number of advantages over room-and-pillar mining. It improves safety through better roof control and reduction in the use of moving equipment. It eliminates roof bolting at the working face to support the mine roof, and it minimizes the need for dusting mine passages with inert material to prevent coal dust explosions. It involves no blasting and attendant dangers. It also recovers more coal from deeper coalbeds than does room-and-pillar mining. Thus, if longwall mining is not precluded, it will continue to provide greater safety and faster, more controlled, and more quickly mitigated subsidence damage.

(d) *Acknowledges existing property rights:* The final rule recognizes existing property rights and avoids certain potential compensable takings of property interests. In most cases of severed coal rights, the severance also conveys the property right to undermine the surface, and may include the right to subside; and any such rights would still limit or burden the surface property rights. We believe failure to allow exercise of these conveyed rights would be inequitable and could risk compensable takings. The final rule allows the holder of such mining and subsidence rights to continue to exercise them, subject to existing SMCRA regulation.

(e) *No regulatory gap:* Under the final rule, no regulatory gap occurs as a result of section 522(e) not applying to subsidence, because sections 516 and 720 and related SMCRA provisions provide ample authority to regulate surface effects of underground mining under existing regulations. Our regulations implementing sections 516 and 720 provide broad subsidence protection. A prohibition of subsidence within the buffer zones around dwellings, roads, and other surface features listed in section 522(e) would be superfluous. In addition, if there are any environmental values or public interests that warrant additional protection beyond what is currently provided, we have full authority under sections 516 and 720 and other SMCRA provisions, to develop additional regulations to protect such values or interests, without the disruption in the longwall mining industry that would result from applying section 522(e) prohibitions to subsidence.

Environmental Effects of the Alternatives

With the exception of section 522(e)(2) National Forest lands and (e)(3) historic sites, impacts to the protected areas under the prohibitions alternatives would be influenced by the choice of the VER standard. In general, the less restrictive VER alternatives (Ownership and Authority (O&A), Bifurcated (BF), and in some cases Good Faith All Permits or Takings (GFAP/T)) would allow mining that might otherwise be restricted under the PA, PAS, and PAMD prohibitions alternatives. If a more restrictive VER definition were applied (Good Faith All Permits (GFAP), and in some cases GFAP/T), the protections that are generally envisioned under the PA, PAS, and PAMD prohibitions alternatives would continue to apply to the 522(e) areas.

*PDNA Alternative:* Under the PDNA Alternative, disturbances from subsidence to protected resources, other than the (e)(5) public parks, are predicted to be consistent under all VER alternatives. For (e)(5) public parks, the GFAP VER alternative restricts the mining of coal resources because operations are unable to install surface facilities (ventilation shafts, roads, mine face-ups, and coal handling areas) within the protected areas. Such a restriction was predicted to result in as much as 45% less acreage disturbed than under the other PDNA alternative combinations. Under the PDNA Alternative, it appears that approximately 3,560 acres of section 522(e)(1) areas would be affected by subsidence over the next 20 years. The current DOI buy-out policy is not triggered by underground activities causing subsidence, under the PDNA Alternative.

The greatest level of impact from this alternative is predicted for 522(e)(5) occupied dwellings. The model predicts that approximately 158,161 acres (29,600 dwellings) would be affected over a 20 year (1995 to 2015) period. While this predicted impact would be partially mitigated through regulatory subsidence control requirements, it does represent a significant amount of disruption to the dwelling owners, families, and communities. It is the same level of impact that is predicted if OSM merely maintained the status quo by choosing the No Action Alternative.

*No Action Alternative:* The impacts that would result from selection of the No Action Alternative would be essentially the same as the PDNA alternative in combination with the GFAP VER Alternative.

*PA, PAS, and PAMD Alternatives:* The impacts predicted for these alternatives are influenced by the VER definition in place. If any of these prohibitions alternatives were combined with the O&A and BF VER definitions, the acres impacted would be essentially the same as under the PDNA Alternative. Applying a more restrictive VER definition would decrease the level of subsidence impact on the protected resources. Under the GFAP/T VER definition, section 522(e)(1) and (e)(5) public parks would still be predicted to be impacted because the model predicts that VER would be granted in many cases. Potential impacts on the 522(e)(1) lands and (e)(5) public parks would be substantially reduced if the GFAP VER definition were applied. Use of the GFAP alternative would also eliminate much of the projected DOI buy-out cost.

The PA, PAS, and PAMD Alternatives, in combination with either the GFAP or GFAP/T VER alternative, would allow occupied dwelling owners to withhold waivers when projected subsidence impacts reached the threshold level. In the absence of a waiver under these alternatives, the prohibition would preclude subsidence impacts on dwellings. It appears that the acres affected under the PA, PAS, and PAMD alternatives would be 7.0%, 5.7%, and 5.4% less (respectively) than those disturbed under alternatives where the prohibitions were not applicable.

In terms of economic effect, the PA, PAS, and PAMD alternatives in combination with the GFAP or GFAP/T alternatives would prevent new eastern longwall mining operations. This effect would begin to occur where dwelling waiver denial rates approached 10%. In summary, if the PA, PAS, or PAMD alternative were selected by the agency and the waiver denial rate were between 2% to 8%, the effect on the economy would likely be a savings of $5 to $7.7 million dollars with little or no increase in the cost of coal production. If the waiver denial rate is 10% or greater, the savings to the economy in reduced house and road repair would range from $15.2 to $62.4 million over a 20 year period. This savings, however, would be offset for the national economy by at least an additional $2.6 billion dollars in coal production and transportation costs.

Based upon potential impacts to Section 522(e) acres, the PA standard is the environmentally preferable alternative. The PA standard would minimize impacts to important environmental resources and would give surface owners a greater degree of control over subsidence impacts to the land. However, based upon the statutory, economic, technical, environmental, and other policy considerations discussed in this preamble, OSM has selected the PDNA alternative.

Mitigation, Monitoring and Enforcement

We have adopted all practicable means to avoid or minimize environmental harm from the alternatives selected. Under SMCRA performance standards, impacts to important resources are avoided or mitigated. The performance standards address: topsoils and subsoils, hydrologic balance, explosives, excess spoil, coal mine waste disposal, fish and wildlife, backfilling and grading, revegetation, subsidence, postmining land use, public safety, and exploration.

The primary purposes of SMCRA include: establishing a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations; assuring that the rights of surface landowners and other persons with a legal interest in the land are fully protected from such operations; assuring that surface coal mining operations are not conducted where reclamation required by SMCRA is not feasible; and assuring that surface coal mining operations are conducted so as to protect the environment.

The regulatory structure establishes five levels of protection. These five levels are SMCRA Performance Standards, SMCRA Permitting Process, Bonding, Inspection and Enforcement, and Lands Unsuitable for Mining. These five levels of environmental protection provided by SMCRA are integral parts of all approved regulatory programs and all have been determined to be no less effective than the Federal regulations. During the operation of a mine, violations would be identified through the inspection and enforcement programs. These routine inspections assure that the operations are in compliance with the conditions of the permit and the performance standards. Should an operator be found out of compliance, a notice of violation would be issued and the operator would be required to abate the violation in a timely manner commensurate with the seriousness of the problem.

SMCRA and the implementing regulations include a variety of subsidence control requirements, which are summarized in this preamble. As amended, SMCRA also requires repair and/or compensation for subsidence damage to occupied dwellings and non-commercial structures and replacement of domestic water supplies that have been adversely affected by underground mining.

This completes the Record of Decision for the 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.

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), those 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 the final rule is published in the **Federal Register**.

Author

The principal author of this rule is Nancy R. Broderick, Office of Surface Mining Reclamation and Enforcement, Room 210, South Interior Building, 1951 Constitution Avenue, N.W., Washington, DC 20240. Telephone: (202) 208–2700. E-mail address: nbroderi@osmre.gov.

**List of Subjects in 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.

Dated: September 3, 1999.

**Sylvia V. Baca,**

*Acting Assistant Secretary, Land and Minerals Management.*

For the reasons given in the preamble, OSM is amending part 761 as set forth below.

## PART 761—AREAS DESIGNATED BY ACT OF CONGRESS

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

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

2. Section 761.200 is added to read as follows:

**§ 761.200 Interpretative rule related to subsistence due to underground coal mining in areas designated by Act of Congress.**

OSM has adopted the following interpretation of rules promulgated in part 761.

(a) *Interpretation of § 761.11—Areas where mining is prohibited or limited.* Subsidence due to underground coal mining is not included in the definition of surface coal mining operations under section 701(28) of the Act and § 700.5 of this chapter and therefore is not prohibited in areas protected under section 522(e) of the Act.

(b) [Reserved]

[FR Doc. 99–30893 Filed 12–16–99; 8:45 am]

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**Pennsylvania Coal Association**
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GEORGE ELLIS
President

September 3, 1999

Original: 1924
McGinley
Copies: Harris
Sandusky
Wyatte



Mary Lou Harris, Esq.
Senior Regulatory Analyst
Independent Regulatory Review Commission
333 Market St.
Harrisburg, PA 17101

*Re: IRRC Reg. No. 7-331, Environmental Quality Board Final Rulemaking: Surface and Underground Coal Mining,Areas Unsuitable for Mining*

Dear Ms. Harris:

The Pennsylvania Coal Association (PCA) represents 31 surface and underground bituminous coal mining operators in the state of Pennsylvania and an additional 91 associate members who work with and depend on the mining industry. Our producing members account for approximately three-fourths of the bituminous coal produced in the Commonwealth and our membership has a direct and substantial interest in the subject matter of the above-referenced regulation (the "Final Rulemaking.")

PCA supports the Final Rulemaking as a necessary revision to existing regulations, which will ensure that those regulations are consistent with state and federal law. As you know, and as the record reflects, the Mining and Reclamation Advisory Board unanimously recommended approval of these regulations in its review of the Advanced Notice of Final Rulemaking in April, and the Environmental Quality Board voted 13-4 (with one abstention) to approve the Final Rulemaking.

The Final Rulemaking clarifies existing state law and interpretation, which excludes underground mining from the applicable definitions of "surface mining operations," "surface coal mining activities" and "surface mining activities." Pennsylvania statutes have never included underground mining operations or subsidence within the definition of "surface mining operations" for the purposes of the UFM provision. In fact, such operations are expressly excluded under state law.

DEP has correctly acknowledged that the legislative history of the governing Pennsylvania statutes clearly indicates that the areas UFM program was not intended to be applied to the surface effects of underground mining. The Bituminous Mine Subsidence and Land Conservation Act, which regulated subsidence prior to passage of

the federal SMCRA, was not changed to include areas UFM provisions, even though other mining laws were changed to accommodate Pennsylvania's permanent regulatory program and primacy under SMCRA.

The historical record also clearly indicates that the UFM program is not intended to include underground mining. In 17 years of primacy regulation, Pennsylvania has *never* designated a single area off-limits to underground mining. This is true even though Pennsylvania's UFM Program has led the nation in declaring lands "off limits" to mining. In fact, Pennsylvania has granted more UFM petitions than all other states and the federal government *combined.* The Final Rulemaking is simply the latest in a series of clarifications designed to make state regulations *consistent with the statutes and federal law.* This is the purpose of the RBI initiative, and the revision is thus consistent with mining law and regulatory policy.

The federal Office of Surface Mining Regulation and Enforcement (OSM) endorsed the exclusion of underground mining from the prohibitions contained in Section 522 of SMCRA, including the federal UFM provisions. The Proposed Interpretive Rule, published in the January 31, 1997 *Federal Register,* was a fully-staffed, well-reasoned regulatory action which included a comprehensive review of the history and text of SMCRA, the Congress' statements of findings and purpose of SMCRA and an environmental assessment and draft environmental impact statement. 62 *Federal Register* at 4871 (January 31, 1997).

In addition to proposing not to include subsidence within the areas UFM provisions of federal SMCRA, OSM's interpretive rule also noted that Pennsylvania is among the states which have already determined, in their approved programs, that subsidence impacts are not included in the areas UFM provisions. 62 *Federal Register* at 4866. Thus, it is apparent that OSM not only recognized as valid the exclusion of underground mining from the UFM program by Pennsylvania and other states, but relied on that decision in its interpretation of the federal law.

Finally, the UFM program is not needed to protect against the effects of underground mining. As noted by OSM and by DEP, other mining laws and regulations specifically address subsidence impacts. Pennsylvania, with OSM's approval, has traditionally regulated surface and underground mining separately under both pre-SMCRA and post-SMCRA laws and regulations. As a consequence, Pennsylvania has restricted and controlled underground mining under laws which are not affected by the regulatory change at issue.

OSM has similarly concluded that "subsidence from underground mining is properly and adequately regulated under sections 516 and 720 [of federal SMCRA]," and that "this interpretation will fully promote the general statutory scheme of SMCRA and fully protect the environment and public interest." 62 *Federal Register* at 4866. If the existing protections enacted pursuant to sections 516 and 720 of SMCRA "*fully* protect the

environment and public interest," it is obvious that the interpretation DEP has proposed does not remove any necessary protections from the law.

As you will recall from the EQB hearing, CAC member Michael Krancer, Esq., independently reviewed the draft interpretive rule and the relevant state and federal law and endorsed the soundness of both OSM's Proposed Interpretive Rule and the Final Rulemaking. We are confident that the Commission will reach the same conclusion.

Thank you for your consideration of these comments. For your convenience, I have enclosed the statutory definitions and the Proposed Interpretive Rule promulgated by the federal Office of Surface Mining, Reclamation and Enforcement (OSM) in the January 31, 1999 *Federal Register,* which further explain and support our position. If you have any questions or need additional information, I hope you will contact me. I look forward to seeing you at the meeting next Thursday morning.

Sincerely,

Michael G. Young
Director of Regulatory Affairs

Enclosures

Penalty escalation provision contained in regulations promulgated by the Department of Environmental Resources gave contractor a stake in the outcome which precluded the Environmental Hearing Board from dismissing the contractor's appeal from abatement order as moot following compliance since, in assessing future civil penalties, one factor to be considered was a prior violation. Al Hamilton Contracting Co. v. Com. Dept. of Environmental Resources, 494 A.2d 516, 90 Pa.Cmwlth. 228, 1985.

§ 1396.4d. Repealed. 1971, Nov. 30, P.L. 554, No. 147, § 9

### Historical and Statutory Notes

Prior to repeal, section 1396.4d was amended by Acts 1968, Jan. 19, P.L.(1967) 1012, § 4; and 1968, Dec. 10, P.L. 1167, No. 370, § 4.

### § 1396.4e. Designating areas unsuitable for surface mining

(a) Pursuant to the procedures set forth in subsection (b), the department shall designate an area as unsuitable for all or certain types of surface mining operations as such operations are defined in section 3,[1] if the department determines that reclamation pursuant to the requirements of this act is not technologically and economically feasible.

(b) Pursuant to the procedures set forth in this subsection, the department may designate an area as unsuitable for all or certain types of surface mining operations if such operations will:

(1) be incompatible with existing State or local land use plans or programs;

(2) affect fragile or historic lands in which such operations could result in significant damage to important historic, cultural, scientific and esthetic values and natural systems;

(3) affect renewable resources lands in which such operations could result in a substantial loss or reduction of long-range productivity of water supply or of food or fiber products and such lands to include aquifers and aquifer recharge areas; or

(4) affect natural hazard lands in which such operations could substantially endanger life and property, such lands to include areas subject to frequent flooding and areas of unstable geology.

(c) The department shall forthwith develop a process to meet the requirements of this act. This process shall include:

(1) a department review of surface mining lands;

(2) a data base and an inventory system which will permit proper evaluation of the capacity of different land areas of the State to support and permit reclamation of surface mining operations;

(3) a method or methods for implementing land use planning decisions concerning surface mining operations; and

(4) proper notice, opportunities for public participation, including a public hearing prior to making any designation or redesignation, pursuant to this section.

(d) Determinations of the unsuitability of land for surface mining, as provided for in this section, shall be integrated as closely as possible with present and future land use planning and regulation at the Federal, State and local levels.

(e) The requirements of this section shall not apply to lands on which surface mining operations were being conducted on August 3, 1977 or are being conducted under a permit issued pursuant to this act, or where substantial legal and financial commitments as they are defined under § 522 of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1201 et seq. if such operations were in existence prior to January 4, 1977.

(f) Any person having an interest which is or may be adversely affected shall have the right to petition the department to have an area designated as unsuitable for surface mining operations, or to have such a designation terminated. Pursuant to the procedures set forth in this subsection, the department may initiate proceedings seeking to have an area designated as unsuitable for surface mining operations, or to have such a designation terminated. Such a petition shall contain allegations of facts with supporting evidence which would tend to establish the allegations. Within ten (10) months after





receipt of the petition the department shall hold a public hearing in the locality of the affected area, after appropriate notice and publication of the date, time and location of such hearing. After a person having an interest which is or may be adversely affected has filed a petition and before the hearing, as required by this subsection, any person may intervene by filing allegations of facts with supporting evidence which would tend to establish the allegations. Within sixty (60) days after such hearing, the department shall issue and furnish to the petition and any other party to the hearing, a written decision regarding the petition and the reasons therefore. In the event that all the petitioners stipulate agreement prior to the requested hearing and withdraw their request, such hearing need not be held.

(g) Prior to designating any land areas as unsuitable for surface mining operations, the department shall prepare a detailed statement on (i) the potential mineral resources of the area, (ii) the demand for mineral resources, and (iii) the impact of such designation on the environment, the economy and the supply of the mineral.

(h) Subject to valid existing rights as they are defined under § 522 of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1201 et seq., no surface mining operations except those which existed on August 3, 1977 shall be permitted:

(1) on any 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[2] and National Recreation Areas designated by Act of Congress;

(2) on any Federal lands within the boundaries of any national forest: Provided, however, That surface mining operations may be permitted on such lands if the Department of Interior and the department finds that there are no significant recreational, timber, economic, or other values which may be incompatible with such surface mining operations and such surface mining operations and impacts are incident to an underground coal mine;

(3) which will adversely affect any public owned park or places included in the National Register of Historic Sites unless approved jointly by the department and the Federal, State, or local agency with jurisdiction over the park or the historic site;

(4) within one hundred feet of the outside right-of-way line of any public road, except where mine access roads or haulage roads join such right-of-way line and except that the department may permit such roads to be relocated or the area affected to lie within one hundred feet of such road, if after public notice and opportunity for public hearing in the locality a written finding is made that the interests of the public and the landowners affected thereby will be protected; or

(5) within three hundred feet from any occupied dwelling, unless waived by the owner thereof, nor within three hundred feet of any public building, school, church, community, nor institutional building, public park or within one hundred feet of a cemetery.

(i) No operator shall conduct surface mining operations within one hundred feet of the bank of any stream. The department may, however, grant a variance from this distance requirement if the operator demonstrates beyond a reasonable doubt that there will be no adverse hydrologic or water quality impacts as a result of the variance. Such variance shall be issued as a written order specifying the methods and techniques that must be employed to prevent adverse impacts. Prior to granting any such variance, the operator shall be required to give public notice of his application thereof in two (2) newspapers of general circulation in the area once a week for two (2) successive weeks. Should any person file any exception to the proposed variance within twenty (20) days of the last publication thereof, the department shall conduct a public hearing with respect thereto. The department shall also consider any information or comments submitted by the Pennsylvania Fish Commission prior to taking action on any variance request.

1945, May 31, P.L. 1198, § 4.5, added 1980, Oct. 10, P.L. 835, No. 155, § 8, imd. effective.

[1] Section 1396.3 of this title.

[2] 16 U.S.C.A. § 1276(a).

### Repealed

*Section 27 of Act 1984, Dec. 19, P.L. provided in § 1304 of this title, this s applies to the surface mining of minera cite coal".*

not, in any case, consider the economic benefit deriving from coal extraction. Necessary extraction shall in no case include:

(i) the extraction of coal in an area adjacent to the previously affected area which will be reclaimed; or

(ii) the extraction of coal beneath the previously affected area which will be reclaimed.

**"Land"** shall mean the surface of the land upon which surface mining is conducted.

**"Landowner"** shall mean the person or municipality in whom the legal title to the land is vested.

**"Minerals"** shall mean any aggregate or mass of mineral matter, whether or not coherent, which is extracted by surface mining, and shall include but not be limited to limestone and dolomite, sand and gravel, rock and stone, earth, fill, slag, iron ore, zinc ore, vermiculite, clay, and anthracite and bituminous coal.

**"Minimal impact post-mining discharge"** shall mean, for the purposes of section 4(g.2),[3] a discharge of mine drainage emanating from a surface mine site where all other Stage II reclamation standards have been achieved and which:

(1) untreated, does not alone or in combination with other discharges result in a violation of water quality standards; and

(i) has a pH which is always greater than 6.0 and an alkalinity which always exceeds the acidity; or

(ii) has acidity which is always less than one hundred (100) milligrams per liter, iron content which is always less than ten (10) milligrams per liter, manganese content which is always less than eighteen (18) milligrams per liter and flow rate which is always less than three (3) gallons per minute; or

(2) has in place a functioning passive treatment system approved by the department which meets the applicable effluent limitations in 25 Pa. Code (relating to environmental resources) or which meets the effluent limitations developed pursuant to section 4.2(j)[4] and as discharged does not result in a violation of the water quality standards in the receiving stream.

**"Municipality"** shall be construed to include any county, city, borough, town, township, school district, institution, or any authority created by any one or more of the foregoing.

**"Operation"** shall mean the pit located upon a single tract of land or a continuous pit embracing or extending upon two or more contiguous tracts of land.

**"Operator"** shall mean a person or municipality engaged in surface mining, as a principal as distinguished from an agent or independent contractor. Where more than one person is engaged in surface mining activities in a single operation, they shall be deemed jointly and severally responsible for compliance with the provisions of this act.

**"Overburden"** shall mean the strata or material overlying a mineral deposit or in between mineral deposits in its natural state and shall mean such material before or after its removal by surface mining.

**"Passive treatment"** shall mean treatment systems that do not require routine operational control or maintenance, including biological or chemical treatment systems, alone or in combination, as approved by the department, such as artificially constructed wetlands, cascade aerators, anoxic drains or sedimentation basins.

**"Person"** shall be construed to include any natural person, partnership, association or corporation or any agency, instrumentality or entity of Federal or State Government. Whenever used in any clause prescribing and imposing a penalty, or imposing a fine or imprisonment, or both, the term "person" shall not exclude the members of an association and the directors, officers or agents of a corporation.

**"Pit"** shall mean the place where any coal or metallic and nonmetallic minerals are being mined by the surface mining method.

**"Pollution abatement area"** shall mean, for the purposes of section 4.6, that part of



**"Secretary"** shall mean the Secretary of the Department of Environmental Resources of the Commonwealth of Pennsylvania.

**"Spoil pile"** shall mean the overburden and reject minerals as piled or deposited in surface mining.

**"Surface coal mining activities"** shall mean, for the purposes of section 4.6, activities whereby coal is extracted from the earth, from waste or stockpiles or from pits or banks by removing the strata or material which overlies or is above or between the coal or by otherwise exposing and retrieving the coal from the surface. The term shall include, but not be limited to, strip and auger mining and all surface activity connected with surface mining including exploration, site preparation, construction and activities related thereto. The term shall also include all activities in which the land surface has been disturbed as a result of, or incidental to, surface mining operations of the operator, including those related to private ways and roads appurtenant to the area, land excavations, workings, refuse banks, spoil banks, culm banks, tailings, repair areas, storage areas, processing areas, shipping areas, and areas where facilities, equipment, machines, tools or other materials or property which result from or are used in surface mining activities are situated.

**"Surface mining activities"** shall mean the extraction of coal from the earth or from waste or stock piles or from pits or banks by removing the strata or material which overlies or is above or between them or otherwise exposing and retrieving them from the surface, including, but not limited to, strip, auger mining, dredging, quarrying and leaching, and all surface activity connected with surface or underground mining, including, but not limited to, exploration, site preparation, entry, tunnel, drift, slope, shaft and borehole drilling and construction and activities related thereto, but not including those portions of mining operations carried out beneath the surface by means of shafts, tunnels or other underground mine openings. "Surface mining activities" shall not include any of the following:

(1) Coal extraction pursuant to a government-financed reclamation contract for the purposes of section 4.8.[5]

(2) Coal extraction as an incidental part of Federal, State or local government-financed highway construction pursuant to regulations promulgated by the Environmental Quality Board.

(3) The reclamation of abandoned mine lands not involving coal extraction or excess spoil disposal under a written agreement with the property owner and approved by the department.

(4) Activities not considered to be surface mining as determined by the United States Office of Surface Mining, Reclamation and Enforcement and set forth in department regulations.

**"Terracing"** shall mean grading where the steepest contour of the highwall shall not be greater than thirty-five (35) degrees from the horizontal, with the table portion of the restored area a flat terrace without depressions to hold water and with adequate provision for drainage, unless otherwise approved by the department.

**"Total project costs"** shall mean for the purposes of section 4.8[6] the entire cost of performing the government-financed reclamation contract as determined by the department even if the cost is assumed by the contractor pursuant to a no-cost contract with the department. In establishing the final contract price, the department shall consider the economic benefit resulting from coal extracted pursuant to the government-financed reclamation contract and deduct this amount from the contract price.

**"Tract"** shall mean a single parcel of land or two or more contiguous parcels of land with common ownership.

Amended 1968, Jan. 19, P.L.(1967) 1012, § 1; 1968, Dec. 10, P.L. 1167, No. 370, § 1; 1971, Nov. 30, P.L. 554, No. 147, § 2; 1972, Dec. 28, P.L. 1662, No. 355, § 1; 1977, July 25, P.L. 99, No. 36, § 1, imd. effective; 1980, Oct. 10, P.L. 835, No. 155, § 2, imd. effective; 1984, Oct. 4, P.L. 727, No. 158, § 2, effective in 60 days; 1992, Dec. 18, P.L. 1384, No. 173, § 2, effective in 60 days.

1 Section 1396.4f of this title.

2 Section 1396.4b of this title.

**Office of Surface Mining Reclamation and Enforcement**

**30 CFR Part 761**

**RIN 1029-AB82**

## Prohibitions of 522(e)

**AGENCY:** Office of Surface Mining Reclamation and Enforcement, Department of the Interior.

**ACTION:** Proposed interpretative rule.

**SUMMARY:** The Office of Surface Mining Reclamation and Enforcement (OSM) of the U.S. Department of the Interior (DOI) is proposing an interpretative rulemaking to address the question of whether subsidence due to underground mining is a surface coal mining operation and thus prohibited in areas enumerated in section 522(e) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA). OSM proposes to interpret SMCRA and implementing rules to provide that subsidence due to underground mining is not a surface coal mining operation, and therefore is not prohibited in areas protected under SMCRA section 522(e). OSM proposes to construe the definition of "surface coal mining operations" at SMCRA section 701(28)(A) and in the analogous portion of the existing rules at 30 CFR 700.5 not include subsidence, and to include only (1) surface activities in connection with a surface coal mine and (2) surface activities in connection with those surface operations and impacts of an underground coal mine subject to section 516. Similarly, OSM would construe the second part of this definition, at SMCRA section 701(28)(B) and in the analogous portion of the existing rules at 30 CFR 700.5, to include only the areas upon which such surface activities occur, and the areas where such surface activities disturb the surface and to holes or depressions resulting from or incident to such surface activities. Only "surface coal mining opearation" are prohibited within the areas protected by section 522(e). Therefore, neither subsurface activities that may result in subsidence, nor actual subsidence, would be prohibited on lands protected by section 522(e). Rather, such underground activities and their impacts, including subsidence, would be subject to regulation under sections 516 and 720.

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

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

**ADDRESSES:** *Electronic or written comments:* Submit electronic comments to osmruleso@smre.gov. Mail written comments to the Administrative Record, Office of Surface Mining Reclamation and Enforcement, 1951 Constitution Avenue, N.W., Washington, DC 20240 or hand-deliver to the person listed under **FOR FURTHER INFORMATION CONTACT.**

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

**FOR FURTHER INFORMATION CONTACT:** Nancy R. Broderick, Rules and Legislation, Office of Surface Mining Reclamation and Enforcement, Room 115, South Interior Building, 1951 Constitution Avenue, N.W., Washington, DC 20240. Telephone: (202) 208-2700.

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:**



## I. Public Comment Procedures

### *Electronic or Written Comments*

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

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

### *Public Hearing*

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

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

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

### *Public Meeting*

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

## II. Discussion of Rule

### *A. Background*

On March 13, 1979, OSM promulgated permanent program rules as required by section 501(b) of the Surface Mining Control and Reclamation Act of 1977 (Public Law 95-87, 30 U.S.C. 1201 *et seq.*) (SMCRA or the Act). See 44 FR 14902. 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) include any lands within the boundaries of units of the National Park System, the National Wildlife Refuge Systems, 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 (16 U.S.C. 1276(a)) or study rivers or study river corridors as established in any guidelines pursuant to that Act, and National Recreation Areas designated by Act of Congress. Additional lands designated by sections 522(e) (2), (3), (4), and (5) include National Forests; publicly owned parks; properties listed on the National Register of Historic Places; 100 foot buffer zones around public roads and cemeteries; and 300-foot buffer zones around occupied dwellings, public buildings, schools, churches, community or institutional buildings, and public parks. The term "valid existing rights" (VER) is not defined in SMCRA. In a separate rulemaking, published in this issue of the Federal Register OSM intends to define VER and address requirements and procedures for the submission and processing of VER claims.

Under section 522(e), if a person who proposes to conduct a surface coal mining operation on protected lands does not qualify for one of the statutory exceptions, then the person cannot conduct the intended operation on such lands. *See* 30 CFR section 773.15(c)(3)(ii) (1990). Section 522(e) does not specifically mention subsidence as a prohibited activity.

The need for this interpretative rulemaking derives in part from litigation concerning the applicability of the sections 522(e) (4) and (5) prohibitions to underground mining. The issue is whether and to what extent subsidence and underground coal extraction operations which cause or are expected to cause subsidence are prohibited. In 1988, OSM issued a proposed rule to address the issue. See 53 FR 52374, December 27, 1988. However, the entire proposed rule was withdrawn for further study in 1989. 54 FR 30557, July 21, 1989. The withdrawal was based on comments received on the proposed rule, and on OSM's analysis of the issues, which indicated to OSM that this was fundamentally a legal issue. OSM therefore decided to seek a formal opinion from the Office of the Solicitor, U.S. Department of the Interior, on this matter. The Solicitor completed his review of this issue in July, 1991, and concluded that the best interpretation of SMCRA is that subsidence is not a surface coal mining operation subject to the prohibitions of § 522(e).

The Solicitor's Memorandum of Opinion (M–Op.) is based on an extensive analysis of the statute, the legislative history, relevant case authority and OSM's regulatory actions with respect to the applicability of section 522(e) to subsidence from underground mining. The M–Op. concluded that Congress did not intend for the prohibitions of section 522(e) to apply to subsidence from underground mining and noted that OSM may regulate subsidence solely under section 516 of SMCRA and not under section 522(e). While the M–Op. recognizes that regulation under section 516 may not have precisely the same effect as regulation under section 522(e), the analysis provides support for the conclusion that regulation under section 516 will achieve full protection of the environmental values which Congress sought to protect from subsidence under the Act while encouraging longwall mining.

On July 18, 1991, OSM published a Notice of Inquiry (NOI) which stated that, based on OSM's review of the Act and the legislative history, the comments received on the December 27, 1988, proposal, and the M–Op., OSM concluded that no further rulemaking action was necessary in regard to the applicability of section 522(e) prohibitions to underground mining. OSM concluded that the regulations, at 30 CFR 761.11 (d), (e), (f) and (g), adequately address underground mining and appropriately apply the statutorily-established buffer zones in a horizontal dimension only.

On September 6, 1991, the National Wildlife Federation (NWF) filed legal action against the Secretary challenging the July 18 NOI and the July 10 M–OP., on the applicability of 522(e) of SMCRA to subsidence. *National Wildlife Federation (NWF)* v. *Babbitt*, No. 91–2275–TAF (D.D.C. September 22, 1993). The NWF contended that both the M–Op. and the NOI violated the requirements of the Administrative Procedure Act (APA), the National Environmental Policy Act (NEPA), and SMCRA. NWF requested, among other things, that the court order OSM to undertake rulemaking to determine the applicability of Section 522(e) to subsidence, and vacate the M–Op. and the NOI. In addition, a motion was filed by the Interstate Mining Compact Commission (IMCC) and a number of industry groups, including the National Coal Association (NCA) and American Mining Congress (AMC), to intervene as defendants in this action. That motion was granted by the court.

The district court vacated the NOI on September 23, 1993, on procedural grounds, and remanded the case to the Secretary for rulemaking on the applicability of section 522(e) to subsidence, in accordance with the notice and comment procedures of the APA, 5 U.S.C. section 551 *et seq.* *National Wildlife Federation (NWF)* v. *Babbitt*, No. 91–2275–TAF (D.D.C. September 22, 1993).

*B. Statutory Analysis*

Title V of the Act sets forth the basic regulatory requirements for coal mining operations for which permits are required under the Act. Title V includes provisions which establish regulatory schemes for surface coal mining, the surface effects of underground coal mining, and protection of lands unsuitable for surface coal mining operations.

Analysis of the structure of Title V and the Act as a whole confirms that Congress set out related but separate regulatory schemes for surface and underground mining. Congress had received ample testimony prior to the passage of the Act regarding the differences in both the nature and consequences of the two types of coal mining. The legislative history emphasizes that the differences in the nature and consequences of the two types of mining require significant differences in regulatory approach. See SMCRA section 516(a), 30 U.S.C. 1266(a); see also SMCRA sections 516 (b)(10) and (d), 30 U.S.C. 1266 (b)(10) and (d). See, *e.g.*, H.R. Rep. No. 2 18, 95th Cong., 1st Sess. 59 (1977); S. Rep. No. 128, 95th Cong., 2nd Sess. 50 (1977); H.R. Rep. No. 1445, 94th Cong., 2nd Sess. 19 (1976); S. Rep. No. 402, 93rd Cong., 2nd Sess. 83 (1973); H.R. Rep. No. 1072, 93rd Cong. 2nd Sess. 57, 108 (1974); H.R. Rep. No. 1462, 92nd Cong., 2d Sess. 32 (1972); 123 Cong. Rec. 8083, 8154 (1977); 123 Cong. Rec. 7996 (1977); 123 Cong. Rec. 3726 (1977).

For instance, Congress was aware that the types of environmental risks associated with underground mining are, for the most part, significantly different from those associated with surface mining. Environmental impacts associated with (pre-SMCRA) unregulated or unreclaimed underground mines included subsidence and hydrological problems that were hidden deep underground and not observable at the surface for an unpredictably long time. Such surface consequences could be severe and long-lasting. The problems in some cases remained fundamentally inaccessible or

unchangeable because of adverse technological, geological and hydrological conditions.

By contrast, most of the impacts of unregulated pre-SMCRA surface mining resulted from surface activities that were more immediate and more readily observable, and the resulting conditions were relatively accessible for reclamation. See H.R. Rep. NO. 1445, 94th Cong., 2d Sess. 20–22 (1976).

This proposed rulemaking addresses whether the provisions of section 522(e), which expressly apply to "surface coal mining operations," should be construed as applying to subsidence from underground mining, which is not specifically referenced in the definition of that term. Addressing this issue requires interpretation of the phrase "surface coal mining operations" as used in section 522(e) and defined in section 701(28). See 30 U.S.C. 1272(e); 1291(28).

In the past, OSM has not taken a definitive position on the issue of the applicability of section 522(e) to subsidence. In some documents, OSM has apparently taken the position that section 522(e) does apply to subsidence from underground mining. In the 1979 rulemaking which first established permanent program rules under SMCRA, OSM dealt with this issue in two provisions. Concerning the definitions at 30 CFR 761.5, OSM rejected a comment that "surface operations and impacts incident to an underground mine" should be limited to subsidence. 44 FR 14990, March 13, 1979. Such operations and impacts are permitted in some circumstances in National Forests under an exception to section 522(e)(2). The negative implication would appear to be that such operations and impacts (including subsidence) are otherwise prohibited by section 522(e).

In the preamble discussion of the regulation at 30 CFR 761.11(d), which concerned the section 522(e)(4) prohibition on mining within 100 feet of the right-of-way of a public road, OSM accepted a comment that the 100 feet should be measured horizontally "so that underground mining below a public road is not prohibited." OSM stated its belief that mining under a road should not be prohibited "where it would be safe to do so." 44 FR 14994, March 13, 1979. The negative implication from this last clause would appear to be that mining under a public road should be prohibited where it would be unsafe to do so, but the preamble does not discuss whether such prohibition would come from section 516 or from an interpretation that section 522(e) prohibits subsidence that causes material damage.

*See also* letter of Patrick Boggs, Office of Surface Mining, to Ralph Albright, Jr., regarding *Otter Creek Coal Co.* v. *United States*, January 19, 1981; and Determination of Valid Existing Rights Within the Otter Creek Wilderness Area of Monongahela National Forest; Notice, 49 FR 31228, 31231, 31233 (August 3, 1984), characterizing subsidence as a prohibited surface impact under section 522(e); and Federal Defendant's Supplemental Memorandum on the Relationship Between section 522(e) and the Surface Impacts of Underground Coal Mining at 8, *In re Permanent Surface Mining Regulation Litigation II*, No. 79–1144 (D.D.C. 1985).

However, in its approvals of State regulatory programs, OSM has not required states to apply the lands unsuitable prohibitions to subsidence. In fact, OSM has accepted both the policy of some states not to apply the prohibitions to subsidence, and the policy of other states to apply the prohibitions only to subsidence causing material damage. *See* Statement of Interstate Mining Compact Commission Re Oversight Hearing on Subsidence Issues, Before the Mining and Natural Resources Subcommittee, Committee on Interior and Insular Affairs, U.S. House of Representatives, June 28, 1990. With the exception of Colorado, Illinois, Indiana, and Montana, states with active underground coal mining do not apply the prohibitions of section 522(e) to subsidence. The states regulate the effects of subsidence through state regulations which implement section 516 of SMCRA. Those regulations provide for the restriction, repair, and compensation for subsidence and material damage to certain structures and lands. Colorado does not allow material damage to structures even with landowner waivers or VER. Illinois prohibits planned subsidence in section 522(e) areas. The mineral owner must possess the right to subside through applicable waiver or VER. Indiana regulations prohibit material damage from subsidence to certain structures and lands. Indiana has not approved planned subsidence in past permits, and has not developed specific policies related to the approval of planned subsidence. Information obtained from Indiana indicates that it anticipates that it would prohibit subsidence unless the mineral owner possesses the specific right through applicable waiver or VER. Also, Montana has no defined policy regarding the regulation of subsidence. This is due in part to the fact that the State has one inactive underground mine that has not begun production. Montana is sparsely populated, and has not encountered conditions that require it to determine whether subsidence is prohibited in section 522(e) areas. See Proposed Revision to the Permanent Program Regulations Implementing section 522(e) of the Surface Mining Control and Reclamation Act of 1977, Draft Environmental Impact Statement: OSM–EIS–29 (June, 1995), prepared by U.S. Office of Surface Mining Reclamation and Enforcement, Table II–1 at pages II–2,3.

Because OSM arguably has taken conflicting or unclear positions in the past, OSM is proposing to develop a definitive position on this issue, consistent with the Act. For the reasons set forth below, OSM proposes to interpret SMCRA as regulating subsidence under sections 516 and 720; and proposes to interpret section 522(e) in light of the statutory definition of "surface coal mining operations" in section 701(28), as not applying to subsidence from underground mining.

Section 516

Section 516 establishes the regulatory requirements for the surface effects of underground coal mining, including provisions for the control of subsidence from underground coal mining. SMCRA section 516 provides in relevant part:

(a) The Secretary shall promulgate rules and regulations directed toward the surface effects of underground coal mining operations, embodying the following requirements and in accordance with the procedures established under section 501 of this Act: *Provided, however,* That in adopting any rules and regulations the Secretary shall consider the distinct difference between surface coal mining and underground coal mining. * * *

(b) Each permit issued under any approved State or Federal program pursuant to this Act and relating to underground coal mining shall require the operator to—

(1) adopt measures consistent with known technology in order to prevent subsidence causing material damage to the extent technologically and economically feasible, maximize mine stability, and maintain the value and reasonably foreseeable use of such surface lands, except in those instances where the mining technology used requires planned subsidence in a predictable and controlled manner: *Provided,* That nothing in this subsection shall be construed to prohibit the standard method of room-and-pillar mining;

(c) In order to protect the stability of the land, the regulatory authority shall suspend underground coal mining under urbanized areas, cities, towns, and major impoundments, or permanent streams if he finds imminent danger to inhabitants of the urbanized areas, cities, towns, and communities.

(d) The provisions of Title V of this Act relating to State and Federal programs,

permits, bonds, inspections and enforcement, public review, and administrative and judicial review shall be applicable to surface operations and surface impacts incident to an underground coal mine with such modifications to the permit application requirements, permit approval or denial procedures, and bond requirements as are necessary to accommodate the distinct difference between surface and underground coal mining. * * *

30 U.S.C. section 1266.

Section 516 is implemented in large part at 30 CFR Part 817, which sets forth the performance standards for underground coal mining. The provisions concerning subsidence control in Part 817 include performance standards which require the prevention of material damage and maintaining the value and reasonably foreseeable use of surface lands, or using mine technology for planned subsidence in a predictable and controlled manner; compliance with the subsidence control plan; repair of material damage; and a detailed plan of underground workings.

Section 516(b) sets the foundation for a regulatory scheme intended to control subsidence to the extent technologically and economically feasible in order to protect the value and use of surface lands. Section 516(c) authorizes suspension of underground mining under urban areas and water bodies, when there is imminent danger to inhabitants. Section 516(c) applies in those situations in which an underground mine has been permitted because all applicable permitting standards, including standards for prevention of material damage, have been met, but actual underground mining poses a serious subsidence danger to inhabitants of urban areas and water bodies.

Section 515

Section 515 of the Act sets out the environmental protection performance standards for surface coal mining, including standards for backfilling and grading to approximate original contour; revegetation; reconstruction of prime farmlands; impoundments; augering; protecting the hydrologic balance; protecting fish and wildlife values; disposal of excess spoil, mine waste, and acid-forming and toxic materials, use of explosives; and constrution of roads. This section is implemented in large part at 30 CFR Part 816.

Section 720

Section 720 of SMCRA was added by the Energy Policy Act of 1992, Public law 102-486, 106 Stat. 2776 (1992). The statute was enacted on October 24, 1992. Section 720 provides, in relevant part:

(a) Underground coal mining operations conducted after the date of enactment of this section shall comply with each of the following requirements:

(1) Promptly repair, or compensate for, material damage resulting from subsidence caused to any occupied residential dwelling and structures related thereto, or non-commercial building due to underground coal mining operations. Repair of damage shall include rehabilitation, restoration, or replacement of the damaged occupied residential dwelling and structures related thereto, or non-commercial building and shall be in the full amount of the diminution in value resulting from the subsidence. * * *

(2) Promptly replace any drinking, domestic, or residential water supply from a well or spring in existence prior to the application for a surface coal mining and reclamation permit, which has been affected by contamination, diminution, or interruption resulting from underground coal mining operations. Nothing in this section shall be contrued to prohibit or interrupt underground coal mining operations.

30 U.S.C. 1310.

On March 31, 1995, OSM published final regulations implementing these provisions. The implementing regulations are set forth primarily in Parts 701, 784, and 817. Amendments to Part 701 provide definitions of key terms. The regulations require a presubsidence survey to document the condition of protected structures and the quantity and quality of protected water supplies, that could be damaged by subsidence. The regulations also clarify that, if the proposed mining would provide for planned subsidence in a predictable and controlled manner, then, with certain exceptions, the permittee must take measures consistent with the mining method, to minimize material damage to the extent technologically and economically feasible to non-commercial buildings dwellings and related structures.

Section 522(e)

In addition to the regulation of surface and underground coal mining under sections 515, 516, and 720, SMCRA section 522(e) imposes certain prohibitions on surface coal mining operations on lands designated by Congress as unsuitable for those operations. Congress determined that the nature and purpose of certain areas and land uses were incompatible with surface coal mining operations. See S. Rep. No. 128, 95th Cong. 1st Sess. 55 (1977). Therefore, SMCRA section 522(e) states that, with certain exceptions, surface coal mining operations are prohibited on or within specified distances of those lands and uses.

Section 522(e) provides, in relevant part, as follows:

After the enactment of this Act and subject to valid existing rights no *surface coal mining operations* except those which exist on the date of enactment of the Act shall be permitted—

(1) on any lands within the boundaries of units of the National Park System, the National Wildlife Refuge Systems, 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;

(2) on any Federal lands within the boundaries of any national forest: *Provided, however,* That surface coal mining operations may be permitted on such lands if the Secretary finds that there are no significant recreational, timber, economic, or other values which may be incompatible with such surface mining operations and—

(A) surface operations and impacts are incident to an underground coal mines or

(B) where the Secretary of Agriculture determines, with respect to lands which do not have a significant forest cover within those national forests west of the 100th meridian, that surface mining is in compliance with the Multiple-Use Sustained-Yield Act of 1969, the Federal Coal Leasing Amendments Act of 1975, the National Forest Management Act of 1976, and the provisions of this Act: *And provided further,* that no surface coal mining operations may be permitted within the boundaries of the Custer National Forests;

(3) which will adversely affected any publicly owned park or places included in the National Register of Historic Sites unless approved jointly by the regulatory authority and the Federal, State, or local agency with jurisdiction over the park or the historic site;

(4) within one hundred feet of the outside right-of-way line of any public road, except where mine access roads or haulage roads join such right-of-way line and except that the regulatory authority may permit such roads to be relocated or the area affected to lie within one hundred fact of such road, if after public notice and opportunity for public hearing in the locality a written finding is made that the interests of the public and the landowners affected thereby will be protected; or (5) within three hundred feet from any occupied dwelling, unless waived by the owner thereof, nor within three hundred feet of any public building, school, church, community, or institutional building, public park, or within one hundred fact of a cemetery.

30 U.S.C. 1272(e) (emphasis added).

Section 522(e) is implemented primarily at 30 CFR Part 761. That part provides definitions of key terms concerning SMCRA section 522(e) and describes the procedures to be followed in implementing the prohibitions of section 522(e). Sections 522(e) (4) and (5) are implemented by 30 CFR 761.11 (d) through (g) which provides that

subject to valid existing rights and an exemption for mines existing on August 3, 1977, no surface coal mining operations shall be conducted within the specified distances, "measured horizontally," of the listed features and facilities. The regulation implementing section 522(e) requires a determination, as a prerequisite for permit issuance under section 515 or 516, whether a requester has the right to conduct a surface coal mining operation of such lands. 30 CFR 761.12 (1990).

The language "measured horizontally," was added in response to a comment which requested that OSM clarify that underground mining beneath a public road would not be prohibited. Although, OSM explained that it did not believe mining under a road should be prohibited when it would be safe to do so, OSM provided no clarification as to what is meant by "safe to do so."

Section 701(28)

Section 522(e) of SMCRA establishes that subject to VER and except for operations existing on August 3, 1977, "surface coal mining operations" are prohibited in each of the five areas set out in subparagraphs (e)(1) through (e)(5). Thus an understanding of the definition of the term "surface coal mining operations" in section 701(28) is required to determine the scope of the prohibitions. The term "surface coal mining operations" is defined in section 701(28) and includes certain aspects of underground coal mining. However, section 701(28) does not specifically mention subsidence.

Section 701(28) provides in full as follows:

"surface coal mining operations" means—

(A) activities conducted on the surface of lands in connection with a surface coal mine or subject to the requirements of section 516 surface operations and surface impacts incident to an underground coal mine, the products of which enter commerce or the operations of which directly or indirectly affected interstate commerce. Such activities include excavation for the purpose of obtaining coal including such common methods as contour, strip, auger, mountaintop removal, box cut, open pit, and area mining, the uses of explosives and blasting, and in situ distillation or retorting, leaching or other chemical or physical processing, and the cleaning, concentrating, or other processing or preparation, loading of coal for interstate commerce at or near the mine site: *Provided, however,* That such activities do not include the extraction of coal incidental to the extraction of other minerals where coal does not exceed 16⅔ per centum of the tonnage of minerals removed for purposes of commercial use or sale or coal explorations subject section 512 of this Act; and

(B) the areas upon which such activities occur or where such activities disturb the natural land surface. Such areas shall also include any adjacent land the use of which is incidental to any such activities, 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, and excavations, workings, impoundments, dams, ventilation shafts, entryways, refuse banks, dumps, stockpiles, overburden piles, spoil banks, culm banks, tailings, holes or depressions, repair areas, storage areas, processing areas, shipping areas and other areas upon which are sited structures, facilities, or other property or materials on the surface, resulting from or incident to such activities.

30 U.S.C. 1291(28).

Interpretation of Section 701(28)

While the definition of "surface coal mining operation" in SMCRA section 701(28) is not a clearly drafted provision, OSM believes that paragraph (A) of the definition includes only surface activities which are connected with a surface coal mine, and surface activities connected with those surface operations and surface impacts that are incident to an underground mine and that are subject to section 516. This proposed interpretation is consistent with the description of the effect of section 701(28) in the Senate Report on the version of the definition that was adopted:

"Surface [coal] mining operations" * * * includes all areas upon which occur surface mining activities and *surface activities incident to underground mining.* It also includes all roads, facilities, structures, property, and materials on the surface resulting from or incident to *such activities* S. Rep. No. 128, 95th Cong. 1st Sess. 98 (1977) (emphasis added).

Paragraph (B) of section 701(28) supports this interpretation. Paragraph (A) refers to "*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 * * *." Paragraph (B) refers to "the areas upon which *such activities* occur or where *such activities* disturb the natural land surface" and to holes or depressions "resulting from or incident to *such activities* * * *" (emphasis added). The only "activities" to which paragraph (B) could refer are those described in paragraph (A), namely those conducted on the surface of lands in connection with a surface coal mine or in connection with the surface operations and impacts incident to an underground coal mine.

Under this construction, subsidence would not be included within the term "surface coal mining operations" because it is not an activity conducted on the surface of lands, and it is not an area on which surface activities occur, or an area where surface activities disturb the surface, or a hole or depression resulting from or incident to surface activities. Surface activities associated with surface operations incident to underground mining, and surface activities associated with surface impacts incident to underground mining would be included in the definition. While subsidence is clearly a surface impact incident to underground mining, it is not a surface activity under the definition of surface coal mining operations. This reading of subsection 701(28), however, would not mean that subsidence would be exempt from regulation under the Act, since Congress specifically provided for regulation of subsidence under section 516 of SMCRA.

Relationship of Section 522(e) to Sections 516 and 720

OSM believes, based on its interpretation of the language of section 516 and of the legislative history, that Congress intended section 516(c), in combination with other regulatory provisions under section 516 and section 720, to offer sufficient prohibition, prevention, or repair of subsidence damage to those features that Congress considered vulnerable to significant impairment from subsidence. The existence of this comprehensive regulatory scheme in section 516 make it unlikely that Congress also intended to prohibit subsidence under section 522(e).

The legislative history of section 516 contains ample references to Congress' focus on control rather than prohibition. The following is pertinent House Report language:

Surface subsidence has a different effect on different land uses. Generally, no appreciable impact is realized on agricultural land and similar types of land and productivity is not affected. On the other hand when subsidence occurs under developed land such as that in an urbanized area, substantial damage results to surface improvements be they private homes, commercial buildings or public roads and schools. One characteristic of subsidence which disrupts surface land uses is its unpredictable occurrence in terms of both time and location. Subsidence occurs, seemingly on a random basis, at least up to 60 years after mining and even in those areas it is still occurring. It is the intent of this section to provide the Secretary with the authority to require the design and conduct of underground mining methods to control subsidence to the extent technologically and economically feasible in order to protect the value and use of surface lands.

H.R. Rep. No. 218, 95th Cong., 1st Sess. 126 (1977).

In those extreme cases in which Congress felt that prohibition could be necessary, it provided broad authority under section 516(c):

> In order to prevent the creation of additional subsidence hazards from underground mining in developing areas, subsection (c) provides permissive authority to the regulatory agency to prohibit underground coal mining in urbanized areas, cities, towns and communities, and under or adjacent to industrial buildings, major impoundments or permanent streams.
> S. Rep. No. 128 at 84–85.

It is reasonable to conclude that Congress addressed specifically, in section 516(c), the limited types of surface features that might be so significantly affected by subsidence from underground mining that a subsidence prohibition could be appropriate. This conclusion that prohibition was to be imposed solely under 516(c) is buttressed by the discussion in the House report quoted above, that subsidence has no appreciable impact on agricultural land and similar types of land. It is not necessary to impose the prohibitions of section 522(e) on subsidence because the surface features that might need such protection are covered by section 516(c).

This conclusion is also supported by the discussion in the 1977 Senate report on section 522(e) which notes that "surface coal mining" is prohibited within the specified distances of public roads, occupied buildings, and active underground mines, "for reasons of public health and safety." S. Rep. No. 128 at 55. Clearly, one of Congress' purposes in section 522(e)(4)–(5) was to protect public health and safety. Prohibition of subsidence in all section 522(e) areas would be unnecessary, however, given that an underground mine must meet the requirements of section 516 to prevent material damage and to maintain the value and use of lands, and those requirements should prevent risks to public health and safety. Moreover, if an unforeseen and imminent subsidence danger were to arise, section 516(c) requires that underground mining be suspended as necessary, thus providing a second level of protection for public health and safety. Therefore, Congress had already addressed in section 516 those subsidence control measures necessary to address public health and safety.

Sections 516 and 720, the sections of the Act expressly dealing with subsidence, treat subsidence as a surface impact to be regulated only to the extent that it:

> (1) Causes material damage (section 516(b)(1) and section 720(a)(1)), or
> (2) Diminishes the value or the reasonably foreseeable uses of the surface (section 516(b)(1)) or
> (3) Creates imminent danger (section 516(c)), or
> (4) Contaminants, diminishes, or interrupts a domestic water supply (section 720(a)(2)).

The legislative history of SMCRA indicates that Congress was only concerned with subsidence insofar as it causes environmental or safety problems, disrupts land uses, or diminishes land values. Congress has repeatedly recognized that there is little concern about subsidence that causes no significant damage to a surface use or facility or danger to human life or safety. See H.R. Rep. No. 218, 95th Cong., 1st Sess. 126 (1977); H.R. Rep. No. 1445, 94th Cong., 2nd Sess. 71–72 (1976); H.R. Rep. No. 896, 94th Cong., 2d Sess. 73–74 (1976); H.R. Rep. No. 45, 94th Cong. 1st Sess. 115–116 (1975); H.R. Rep. No. 1072, 93rd Cong., 2d Sess. 108–109 (1974); H.R. Rep. No. 776, 102nd Cong., 2d Sess. 102–474 (1992).

Congressional Intent

OSM's proposed interpretation is consistent with Congress' intent to encourage underground mining and full coal resource recovery. The statute and legislative history express Congress' intent to "encourage the full utilization of coal resources through the development and application of underground extraction technologies," SMCRA section 102(k), 30 U.S.C. section 1202(k). Similarly, Congress found that:

> The overwhelming percentage of the Nation's coal reserves can only be extracted by underground mining methods, and it is, therefore, essential to the national interest to insure the existence of an expanding and economically healthy underground coal mining industry.
> SMCRA section 101(b), 30 U.S.C. section 1201(b).

In fact, there is evidence that Congress wished to encourage longwall mining in particular:

> Underground mining is to be conducted in such a way as to assure appropriate permanent support to prevent surface subsidence of land and the value and use of surface lands, except in those instances where the mining technology approved by the regulatory authority at the outset results in planned subsidence. Thus, operators may use underground mining techniques, such as long-wall mining, which completely extract the coal and which result in predictable and controllable subsidence.
> S. Rep. No. 128, 95th Cong., 1st Sess. 84 (1977). See also S. Rep. No. 28, 94th Cong., 1st Sess. 215 (1975).

Clearly, if subsidence is likely to occur from room-and-pillar underground mining and is a virtually inevitable consequence of longwall mining, then prohibiting all subsidence below homes, roads, and other features specified in section 522(e) could make it substantially less feasible to mine and could substantially reduce the level of coal recovery in areas where such features are common on the surface.

Thus, inclusion of subsidence in the definition of "surface coal mining operations" at section 701(28), and application of the section 522(e) prohibitions to subsidence could be regarded as failing to accommodate congressional recognition of the importance of underground mining and longwall mining in particular. The application of the prohibitions in section 522(e) to subsidence could substantially impeded longwall and other full-extraction mining methods. As discussed above, the language of SMCRA demonstrates that Congress intended to encourage underground mining and especially full-extraction methods such as longwall mining. Congress intended that longwall and other mining techniques that completely remove the coal be used as subsidence control measures. See H.R. Rep. No. 218, *supra*. Such techniques involve planned subsidence.

Comparison of Underground Mining Techniques

Mine productivity improved significantly during the 1980's thus reversing the declining trend of the earlier decade. Productivity increased by an average of 6.6 percent per year between 1980 and 1990 (Department of Energy, Energy Information Administration (EIA), 1990). Improvement in underground mine productivity was particularly impressive. While surface mining productivity rose 86 percent during the 1980's, productivity at underground mines more than doubled.

The increases in productivity can be attributed to intense competition between coal producers, technology advancement, changing market conditions, improved labor/management relations, and a matured and more experienced labor force. The three primary underground mining methods principally used to extract coal are room-and-pillar, room-and-pillar with secondary mining, and longwall mining. Room-and-pillar is the predominant underground mining method, although longwall mining has increased in use in the United States since 1960.

Room and Pillar Mining

Room and pillar mining is the predominant method of coal extraction in the United States. The room and pillar method in its basic form consists of driving entries, rooms and cross-cuts into the coal seam to extract coal. Pillars of coal are left to support the mine roof, or for haulage and ventilation. This procedure is called "development" mining. Movements of the ground surface during this procedure are nearly always imperceptible.

To increase the extraction of coal where conditions allow, development mining is followed by "pillar recovery," where the pillars are systematically extracted. This is called secondary (or retreat) mining. Secondary mining occurs when the coal pillars left to support the mine roof are extracted during the retreat mining phase to obtain maximum recovery of the coal.

Pillar extraction is invariably accompanied by subsidence of the ground surface as the overburden sags into the mined-out area in response to the removal of mine-level support. Where pillar extraction is not conducted and the operator intends to leave surface support, the pillars must be designed to permanently support the overburden.

During the development mining phase, 30 to 50 percent of the coal may be extracted from the panel. In order to prevent subsidence, the remainder of the coal may not be recovered from a mine panel. However, when the roof collapses in a controlled fashion and the surface subsidence is not a limiting factor, secondary mining can be practiced to increase the coal recovery up to 85 percent.

Longwall Mining

Longwall mining is a high extraction mining method that maximizes the recovery of coal resources. The development of the mains and sub-mains for access and ventilation of the longwall panels is essentially identical to the development of room and pillar mining. However, the longwall mining methods differs from room-and-pillar mining in that the mine working panel is fully extracted during mining by a fully automated shearer or plow. The mineral extraction ratio for longwall mining operation can be as high as 90 percent in each panel. Retreat mining on a longwall panel results in 100 percent coal extraction.

In longwall mining, groups of three or four parallel entries are driven perpendicular to the main entry on either side of the proposed panel. The width of the panel varies from 500 to 1,200 feet, and length from 4,000 to 15,000 feet. Longwall mining removes the coal in one operation by means of a long working face or wall that advances, or retreats, in a continuous line. The coal is cut by a shearer or coal plough which travels up and down along the face and makes 27 to 39 inch deep cuts. The broken coal falls on to an Armored Flexible Conveyor (AFC) which transfers the coal to the Stage Loader. The coal is then conveyed to the surface through several belt conveyors. Mechanical steel supports known as Shields or Chocks are used to support the mine roof along the entire longwall face. After each cutting cycle of the shearer/plough, the steel supports and AFC are hydraulically advanced. The mine roof immediately behind the AFC is allowed to cave. The space from which the coal has been removed is either allowed to collapse or is completely or partially filled with stone and debris. The roof rock that falls into the mined our area is referred to as the "gob." As the overburden continues to collapse, effects of subsidence progresses upwards to the surface. However, solid coal barriers and pillars are left in the mine for haulage, ventilation, and other purposes. Ninety percent of the surface subsidence caused by longwall mining occurs within 4 to 6 weeks of mining.

*Significance of Longwall mining.* Longwall mining has a long history of use in Europe and has been tried at various times in the United States. In early attempts—some prior to 1900—labor costs associated with moving manual supports made the methods less competitive than room and pillar mining. But, in the past two decades, longwall mining has become the safest, most productive and most economic underground mining method. While overall underground production remained relatively flat between 1980 and 1993, longwall production grew at an annual rate of 6.1 percent. Longwall mining is anticipated to continue to be an important and expanding type of mining. In 1993, it accounted for 38 percent of the coal extracted by underground mining methods, were recovered by longwall mining. The Economic Analysis (EA) estimates that longwall mining will account for 48 percent of production by 2015. See (Proposed Revision 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 prepared by OSM and USGS, (September 1, 1995)

Longwall mining operations require large investments in capital equipment, but are less labor intensive than room-and-pillar operations. It is estimated that longwall mining requires only one-third of the manpower at the face as does room-and-pillar mining. The high capital costs associated with longwall mining are generally offset with lower operating costs, due primarily to the higher productivity of longwall mining. The average operating costs for a coal mine operation include the operating cost per ton and the return on the capital cost allocated per ton. The operating costs for longwall mine range from $0.50 to $2.00 per ton, while operating costs for room-and-pillar range from $2.00 to $7.00 per ton, while Room-and-pillar mining operation costs average an additional $3.25 per ton more than longwall mining because of increased labor and material costs associated with mine operation.

In some instances, use of the longwall mining method is the most economical and safest means to extract the coal in particular geologic areas. For example, when a coal seam is 1,000 feet or more below the surface, the cost of mining would be so high that it would effectively prevent coal from being mined by any method other than longwall. Another example are those areas where the high limestone content in particular coal seams creates fragile roof conditions which make room-and-pillar mining impossible. Longwall mining provides the economy of scale so that mining costs are lowered and a relatively safe working environment is created.

Implications of Applying 522(e) Prohibitions to Subsidence From Underground Mining

Currently, owners of coal reserves, who hold valid deeds, typically have the property right to mine coal beneath dwellings without obtaining explicit permission in the form of waivers from owners of the dwellings.

However, under SMCRA when the coal is mined, the mining companies must meet all existing subsidence performance standards, take steps to minimize damage to dwellings, repair or compensate for damage that does occur to dwellings, assure adequate domestic water supplies, and take other measures as set out in OSM's recent regulations on subsidence (60 FR 16722 (Friday, March 31, 1995)).

If Section 522(e) were to apply to subsidence from underground mining, the operator would be required to plan the operation to preclude mining in all portions of the underground workings where mining would cause subsidence

affecting a protected surface feature. The surface area affected by subsidence is usually considerably larger than the area actually mined underground. Because subsidence typically occurs in a funnel shape radiating upward and outward from the underground mine cave-in, any surface impacts may extend well beyond the area directly above the mine. Thus, to ensure that subsidence would not take place within a surface area specified in section 522(e), underground mine operations would be required to leave coal in place around each protected feature for a horizontal distance much larger than the protected area. The amount of coal left in-place to support dwellings would result in a pattern of irregular mined areas that would in effect, eliminate the contiguous coal reserves needed to sustain the economic advantage of longwall operations. Consequently, few new longwall mines would be opened. Over time, existing longwall mines could continue those operations that would extract coal reserves pursuant to the "needed for and adjacent to" valid existing rights provisions implementing SMCRA.

Mining could be allowed in some cases in lands protected by 522(e) (2), (3), and (4), and some (5) areas, if an appropriate waiver or approval were obtained by the permit applicant for mining coal directly underneath the protected feature. The coal for which a mining company would have to obtain a waiver would include the coal directly under the dwelling, a 300-foot buffer around the house, and an additional buffer area based on the predicted angle of draw and the depth of the coal seam. However, homeowners could decide to withhold waivers denying access to the coal under their dwellings and within the surrounding buffer area. Both the Environmental Impact Statement and the Economic Analysis indicate that the withholding of dwelling waivers has the potential to significantly alter coal mining operations. The waiver authority would apply to new longwall operations. Consequently, OSM estimated that if 10 percent or more of homeowners withheld waivers, longwall mining operations would not be economically viable. The economic impacts of applying the prohibitions of section 522(e) to subsidence are discussed in more detail in the draft Economic Analysis.

In summary, longwall mining is an important and expanding type of mining. It accounted for 38 percent of the underground mining in 1993, and is forecasted to increase its share to 48 percent by 2015. Longwall mining is a low-cost underground mining method, and in some instances, may be the only economically feasible underground mining method when the coal seam is deep or the roof is extremely fragile. The key to the competitive advantage of longwall mining is access to large blocks of uninterrupted coal. If the prohibitions of 522(e) were to apply to subsidence, longwall mining would no longer be economically feasible if as few as 10 percent of the owners of occupied dwellings denied waivers for mining. A more detailed discussion of impacts on mining is provided in the Draft Environmental Impact Statement (DEIS) on the Proposed Revision 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 OSM-EIS-29 (September, 1995) and Draft Economic Analysis prepared for this rulemaking. OSM also evaluated the impact of various policy options for this rulemaking in the DEIS and EA prepared for this proposed interpretative rulemaking. OSM encourages comments on the DEIS and EA.

Summary of Analysis

Under Section 516, OSM has ample authority to regulate surface effects of underground mining under existing regulations or under any additional regulations that OSM might reasonably conclude are necessary to implement the Act. There would be no regulatory hiatus if section 522(e) does not apply to subsidence. However, if OSM were to identify any environmental values or public interests that warrant additional protection, OSM has full authority under section 516 and other SMCRA provisions, to develop standards to protect such values or interests, without the disruption in the longwall mining industry that would result from applying section 522(e) prohibitions to subsidence.

Based on analysis of the language and the legislative history of sections 516, 522(e) and 701(28) of SMCRA, and a consideration of the congressional findings and purposes set out in sections 101 and 102, OSM proposes to interpret section 522(e) as not applying to subsidence from underground mining activities, or to the underground activities that may lead to subsidence. OSM bases this proposal in part on its conclusion that subsidence is not included in the term "surface coal mining operations" as defined in SMCRA section 701(28). OSM's interpretation is also based in part on a conclusion that subsidence from underground mining is properly and adequately regulated under sections 516 and 720. OSM believes that this interpretation will promote the general statutory scheme of SMCRA and fully protect the environment and public interest. OSM is soliciting comments on the need to amend 30 CFR to indicate that section 522(e) does not apply to subsidence from underground coal mining activities, or the underground activities that may lead to subsidence.

III. Procedural Matters

*Federal Paperwork Reduction Act*

This rule does not contain collections of information which require approval by the Office of Management and Budget under 44 U.S.C. 3501 *et seq.*

*Executive Order 12630*

In accordance with E.O. 12630, the Department has determined that the proposed interpretative rule does not have significant takings implications.

*Executive Order 12866*

This rule has been reviewed under E.O. 12866. It is considered significant and OSM has prepared an economic analysis which is now available to the public for review and comment.

*Regulatory Flexibility Act*

Pursuant to the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, the Department of the Interior has determined that this rule would not have a significant economic impact on a substantial number of small entities.

*National Environmental Policy Act*

On April 28, 1994 (59 FR 21996), OSM published a notice of intent to prepare a revised environmental impact statement (EIS) analyzing both VER and the applicability of the prohibitions in section 522(e) of the Act to underground coal mining. OSM has completed a revised draft EIS (OSM-EIS-29), which is now available to the public for review and comment.

*Executive Order 12988 (Civil Justice Reform)*

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

1. What is the preemptive effect, if any, to be given to the regulation?

This interpretative rule is not intended to have a preemptive effect on

existing state law. To the extent that this rule might ultimately result in the preemption of state law, the provisions of SMCRA are intended to preclude inconsistent State laws and regulations unless they provide for more stringent land use or environmental controls and regulations. This approach is established in SMCRA and has been judicially affirmed.

2. What is the effect on existing federal laws or regulations, if any, including all provisions repealed or modified?

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

3. Does the rule provide a clear and certain legal standard for affected conduct rather than a general standard, while promoting simplification and burden reduction?

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

4. What is the retroactive effect, if any, to be given to this regulation?

This proposed rule is not intended to have retroactive effect.

5. Are administrative proceedings required before parties may file suit in court? Which proceedings apply? Is the exhaustion of administrative remedies required?

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

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

6. Does the rule define key terms, either explicitly or by reference to other regulations or statutes that explicitly define those items?

Terms important to the understanding of this rule are set forth in 30 CFR 700.5, 701.5 and 761.5.

7. Does the rule address other important issues affecting clarity and general draftsmanship of regulations set forth by the Attorney General, with the concurrence of the Director of the Office of Management and Budget, that are determined to be in accordance with the purposes of the Executive Order?

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

*Unfunded Mandates*

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

Author: The principal author of this proposed rule is Nancy Broderick, Rules and Legislation, Office of Surface Mining Reclamation and Enforcement, 1951 Constitution Avenue, N.W., Washington, DC 20240; Telephone (202) 208-2700.

List of Subjects in 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.

Dated: April 30, 1996.

Bob Armstrong,

*Assistant Secretary, Land and Minerals Management.*

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BILLING CODE 4310-05-M

## Harris, Mary Lou

**From:** J. Turner [jturner@voicenet.com]
**Sent:** Friday, September 03, 1999 8:27 PM
**To:** maryh@IRRC.STATE.PA.US
**Cc:** jwilmer@ix.netcom.com
**Subject:** Re: Environmental Quality Board Regulation #7-331 - Chapter 86 Mining Regulations

Greetings:
Our previous comments stand.
Joe Turner

Original: 1924
McGinley
Copies: Harris
Sandusky
Wyatte

At 11:50 AM 09/01/1999 -0400, maryh@IRRC.STATE.PA.US wrote:
>
> Although you did not comment on the above regulation at the proposed
>stage of the rulemaking, we noted that the Raymond Proffitt Foundation
>submitted comments on the Anvanced Notice of Final Rulemaking. This e-mail
>is to advise you that the regulation is on the agenda of the Independent
>Regulatory Review Commission public meeting scheduled for 10:30 a.m. on
>September 9.
>
> Does your organization intend to comment on the final regulation or
>attend our public meeting? If so, please call me at 717-772-1284 or e-mail.
>If you e-mail after 10:00 a.m. on Tuesday, September 7, please send the
>e-mail to irrc.state.pa.us.
>

Audiatur et altera pars.