



DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

[S1D1S SS08011000 SX064A000 245S180110; S2D2S SS08011000 SX064A000
24XS501520]

Request for Determination of Valid Existing Rights Within the Monongahela National Forest, West Virginia

AGENCY: Office of Surface Mining Reclamation and Enforcement, Interior.

ACTION: Notice and request for comment.

SUMMARY: We, the Office of Surface Mining Reclamation and Enforcement (OSMRE), are providing an opportunity for the public to comment on a request for a determination of valid existing rights (VER) to use an existing United States Forest Service (USFS) road as a coal mine access and haul road across Federal lands within the boundaries of the Monongahela National Forest (MNF). The mine is located on privately owned land.

DATES: We will accept written comments on this amendment until 4 p.m., eastern time, [INSERT DATE 30 DAYS AFTER THE DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

ADDRESSES: You may submit comments, by any of the following methods:

- *Mail/Hand Delivery:* Mr. Justin Adams, Director, Charleston Field Office, Office of Surface Mining Reclamation and Enforcement, 1027 Virginia Street East, Charleston, West Virginia 25301
- *Fax:* (304) 347-7170
- *Email:* jadams@osmre.gov

Instructions: For detailed instructions on submitting comments and additional information, see section V, “How Do I Submit Comments on the Request?”, in the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Mr. Justin Adams, Director, Charleston Field Office, Telephone: (304) 347-7158. E-mail: osm-chfo@osmre.gov.

SUPPLEMENTARY INFORMATION:

I. What Is the Nature of the VER Determination Request?

II. What Legal Requirements Apply to This Request?

III. What Information Is Available Relevant to the Basis for the Request?

IV. How Will We Process the Request?

V. How Do I Submit Comments on the Request?

I. What Is the Nature of the VER Determination Request?

On September 18, 2024, Babst/Calland Attorneys at Law (Babst/Calland) submitted a request, on behalf of South Fork Coal Company, LLC (SFCC), to OSMRE for a determination whether SFCC has valid existing rights to receive and hold a mining permit for the northern 1.2-mile portion of an existing road located within the MNF, known as Forest Service Road 249. Babst/Calland asserts that SFCC has VER under paragraph (c)(1) or (c)(2) of the “[v]alid existing rights” definition in 30 CFR 761.5 (the Federal definition) to use the existing road as an access and haul road for its Rocky Run Surface Coal Mine.

II. What Legal Requirements Apply to This Request?

Section 522(e)(2) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA) prohibits surface coal mining operations on Federal lands within the boundaries of any national forest, with two exceptions. 30 U.S.C. 1272. The first exception pertains to surface operations and impacts incidental to an underground coal mine. The second relates to surface operations on lands within national forests west of the

100th Meridian. Neither of those exceptions applies to the request now under consideration.

The introductory paragraph of section 522(e) also provides two general exceptions to the prohibitions on surface coal mining operations in that section. Those exceptions apply to operations in existence on the date of SMCRA enactment, which occurred on August 3, 1977, and to land for which a person has VER. Because SMCRA does not define VER, we subsequently adopted regulations defining VER. *See* 30 CFR 761.5. We clarified that, for lands that come under the protection of section 522(e) and the implementing Federal regulations after the date of SMCRA enactment, the applicable date is the date that the lands came under protection, not August 3, 1977.

On December 17, 1999 (64 FR 70766-70838), we adopted a revised definition of VER, established a process for submission and review of requests for VER determinations, and otherwise modified the regulations implementing section 522(e). At 30 CFR 761.16(a), we published a table clarifying which agency (OSMRE or the State regulatory authority) is responsible for making VER determinations and which definition (State or Federal) will apply. That table specifies that OSMRE is responsible for VER determinations for Federal lands within national forests and that the Federal VER definition applies to those determinations.

Paragraph (c) of the Federal definition of VER contains the standards applicable to VER for roads that lie within the definition of surface coal mining operations. 30 CFR 761.5. SFCC is seeking a VER determination under paragraph (c)(1) or, in the alternative, paragraph (c)(2). Paragraph (c)(1) provides that a person who claims VER to use or construct a road across the surface of lands that are protected by section 522(e) of SMCRA or by the implementing Federal regulations must demonstrate that the “road existed when the land upon which it is located came under the protection of 30 CFR 761.11 or 30 U.S.C. 1272(e), and the person has a legal right to use the road for surface

coal mining operations.” *Id.* Paragraph (c)(2) allows the applicant to demonstrate that a properly recorded right of way or easement existed when the land came under such protection and, under the document creating the right of way or easement and subsequent conveyances, the applicant has a legal right to use a road across the right of way or easement for surface coal mining operations.

III. What Information Is Available Relevant to the Basis for the Request?

The following information has been submitted by Babst/Calland or obtained from the USFS or the West Virginia Department of Environmental Protection (WVDEP):

1. The 1.2-mile segment of road designated as Forest Service Road 249 exists on land to which the VER determination pertains.

2. Ownership of the surface property rights to the Forest Service Road 249 (and the surrounding area) was conveyed by Cherry River Boom and Lumber Company to the United States Government by deed dated October 9, 1934, which is recorded in the office of the Clerk of Pocahontas County, West Virginia, in deed book 70, page 332.8.

3. A chain of conveyance from 1959 through 2016 purportedly exists between Cherry River Boom and Lumber Company, through several corporate entities, to Weyerhaeuser Company.

4. SFCC has a mineral lease with Highland Mineral Resources, LLC, a purported affiliate of Weyerhaeuser Company, and a separate mineral lease with WPP, LLC.

5. The land upon which Forest Service Road 249 is located was in Federal ownership as part of the MNF when the land came under the protection of 30 U.S.C. 1272(e) on August 3, 1977, the date of SMCRA enactment.

6. The Forest Service Road 249 is visible and shown on the United States Geological Survey map from 1972, in the lower left-hand portion (beginning near the words, “Sugar Tree Mt.”).

7. USFS issued SFCC a special use permit for use of Forest Service Road 249, through Permit No. FS-7700-41, as a coal access and haul road on September 29, 2021.

IV. How Will We Process the Request?

We received the VER request on September 18, 2024, and determined it was administratively complete on September 24, 2024. That determination did not include an assessment of the technical or legal adequacy of the materials submitted with the request.

We will further process this request in accordance with 30 CFR 761.16(d) and (e). As required by 30 CFR 761.16(d)(1), we are publishing this notice to seek public comment on the merits of the request. A similar notice will also be published in a newspaper of general circulation in Pocahontas County, WV.

After the close of the comment period, we will review the materials submitted with the request, all comments received in response to this and other notices, and any other relevant, reasonably available information to determine whether the record is sufficiently complete and adequate to support a decision on the merits of the request. If not, we will notify the requester, in writing, explaining the inadequacy of the record and will request submittal, within a specified time, of any material needed to remedy the deficiency.

Once the record is complete and adequate, we will determine whether the requester has demonstrated VER for the proposed access and haul road. Our decision document will contain findings of fact and conclusions, along with an explanation of the reasons for our conclusions. We will publish a notice of the decision in the *Federal Register* and a newspaper of general circulation in Pocahontas County, WV.

However, as provided in 30 CFR 761.16(d)(1)(iv), we will not make a decision on the merits of the request, if, by the close of the comment period under this notice or the notice required by 30 CFR 761.16(d)(3), a person with a legal interest in the land to which the request pertains initiates appropriate legal action in the proper venue to resolve

any differences concerning the validity or interpretation of the deed, lease, easement, or other documents that form the basis of the request. This provision applies only if our decision is based on the standard in paragraph (c)(1) and (c)(2) of the VER definition in 30 CFR 761.5.

V. How Do I Submit Comments on the Request?

We will make the VER determination request and associated materials available to you for review as prescribed in 30 CFR 842.16, except to the extent that the confidentiality provisions of 30 CFR 773.6(d) apply. Subject to those restrictions, you may review a copy of the VER determination request and all comments received in response to this request at the Charleston Field Office (see **ADDRESSES**). Documents contained in the administrative record are available for public review at the Field Office during normal business hours, Monday through Friday, excluding holidays.

Electronic or Written Comments

If you wish to comment on the merits of the request for a VER determination, please send electronic or written comments to us at the addresses above (see **ADDRESSES**) by the close of the comment period (see **DATES**). Under 30 CFR 761.16(d)(1)(vii), you may request a 30-day extension of the comment period. Requests for an extension of the public comment period must be submitted to the same addresses by the date indicated.

If you submit comments by E-mail, please include your name and return address in your message. You may contact the Charleston Field Office at 304-977-7450 if you wish to confirm receipt of your message.

Availability of Comments

We will make all comments, including names and addresses of respondents, available for public review during normal business hours at the location listed in **ADDRESSES**. We will not consider anonymous comments. If you are commenting as an

individual, you may request that we withhold your name or address from public review, except for the city or town. We will honor your request to the extent allowable by law. You must state this request prominently at the beginning of your comments. We will make all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, available for public review in their entirety.

Thomas D. Shope,

Regional Director

North Atlantic - Appalachian Region

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