

List of Subjects in 29 CFR Part 4044

Pension insurance, Pensions.

In consideration of the foregoing, 29 CFR part 4044 is amended as follows:

PART 4044—ALLOCATION OF ASSETS IN SINGLE-EMPLOYER PLANS

1. The authority citation for part 4044 continues to read as follows:

Authority: 29 U.S.C. 1301(a), 1302(b)(3), 1341, 1344, 1362.

2. In appendix B, a new entry is added to Table I, and Rate Set 68 is added to Table II, as set forth below. The introductory text of each table is republished for the convenience of the reader and remains unchanged.

Appendix B to Part 4044—Interest Rates Used to Value Annuities and Lump Sums

TABLE I.—ANNUITY VALUATIONS

[This table sets forth, for each indicated calendar month, the interest rates (denoted by i_1, i_2, \dots , and referred to generally as i_t) assumed to be in effect between specified anniversaries of a valuation date that occurs within that calendar month; those anniversaries are specified in the columns adjacent to the rates. The last listed rate is assumed to be in effect after the last listed anniversary date.]

For valuation dates occurring in the month—	The values of i_t are:					
	i_t	for $t =$	i_t	for $t =$	i_t	for $t =$
June 19990570	1–20	.0525	>20	N/A	N/A

TABLE II.—LUMP SUM VALUATIONS

[In using this table: (1) For benefits for which the participant or beneficiary is entitled to be in pay status on the valuation date, the immediate annuity rate shall apply; (2) For benefits for which the deferral period is y years (where y is an integer and $0 < y \leq n_1$), interest rate i_1 shall apply from the valuation date for a period of y years, and thereafter the immediate annuity rate shall apply; (3) For benefits for which the deferral period is y years (where y is an integer and $n_1 < y \leq n_1 + n_2$), interest rate i_2 shall apply from the valuation date for a period of $y - n_1$ years, interest rate i_1 shall apply for the following n_1 years, and thereafter the immediate annuity rate shall apply; (4) For benefits for which the deferral period is y years (where y is an integer and $y > n_1 + n_2$), interest rate i_3 shall apply from the valuation date for a period of $y - n_1 - n_2$ years, interest rate i_2 shall apply for the following n_2 years, interest rate i_1 shall apply for the following n_1 years, and thereafter the immediate annuity rate shall apply.]

Rate set	For plans with a valuation date		Immediate annuity rate (percent)	Deferred annuities (percent)					
	On or after	Before		i_1	i_2	i_3	n_1	n_2	
68	06–1–99	07–1–99	4.25	4.00	4.00	4.00	7	8	

Issued in Washington, DC, on this 10th day of May 1999.

David M. Strauss,

Executive Director, Pension Benefit Guaranty Corporation.

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DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 948

[WV–077–FOR]

West Virginia Regulatory Program

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

ACTION: Final rule; decision on amendment.

SUMMARY: OSM is announcing that it is not approving an amendment to the West Virginia permanent regulatory program under the Surface Mining

Control and Reclamation Act of 1977 (SMCRA). The amendment would have revised the West Virginia Surface Coal Mining and Reclamation Act, and concerns fish and wildlife habitat and recreation lands as a postmining land use for mountaintop removal operations with variances from approximate original contour.

EFFECTIVE DATE: May 14, 1999.

FOR FURTHER INFORMATION CONTACT: Mr. Roger W. Calhoun, Director, Charleston Field Office, Telephone: (304) 347–7158.

SUPPLEMENTARY INFORMATION:

- I. Background on the West Virginia Program
- II. Submission of the Amendment
- III. Director's Finding
- IV. Summary and Disposition of Comments
- V. Director's Decision
- VI. Procedural Determinations

I. Background on the West Virginia Program

On January 21, 1981, the Secretary of the Interior conditionally approved the West Virginia program. You can find background information on the West Virginia program, including the

Secretary's findings, the disposition of comments, and the conditions of the approval in the January 21, 1981, **Federal Register** (46 FR 5915–5956). You can find later actions concerning the West Virginia program and previous amendments at 30 CFR 948.10, 948.12, 948.13, 948.15, and 948.16.

II. Submission of the Amendment

By letter dated April 28, 1997 (Administrative Record Number WV–1056), the West Virginia Division of Environmental Protection (WVDEP) submitted an amendment to its approved permanent regulatory program pursuant to 30 CFR 732.17. By letter dated May 14, 1997 (Administrative Record Number WV–1057), WVDEP submitted some revisions to the original submittal. The amendment contained revisions to section 38–2–1 *et seq.* of the West Virginia Surface Mining Reclamation Regulations [Code of State Regulations (CSR)] and to section 22–3–1 *et seq.* of the West Virginia Surface Coal Mining and Reclamation Act (WVSCMRA). The amendment mainly consisted of changes to implement the

standards of the Federal Energy Policy Act of 1992, and was intended to revise the State program to be consistent with the counterpart Federal provisions.

An announcement concerning the initial amendment was published in the June 10, 1997, **Federal Register** (62 FR 31543–31546). A correction notice was published on June 23, 1997 (62 FR 33785), which clarified that the public comment period closed on July 10, 1997. No one requested an opportunity to speak at a public hearing, so none was held.

We published our approval, with certain exceptions, of the West Virginia amendment in the **Federal Register** on February 9, 1999 (64 FR 6201–6218). In that rule, we deferred a decision on an amendment to section 22–3–13(c)(3) of the WVSCMRA. Section 22–3–13(c)(3) was amended to allow the approval of permits involving a variance from restoring approximate original contour (AOC) for mountaintop removal operations when the postmining land use includes fish and wildlife habitat and recreation lands.

At the same time we were reviewing the amendment to section 22–3–13(c)(3), our Charleston Field Office conducted an evaluation and prepared a draft oversight report on portions of the West Virginia program. The draft report was focused, in part, on postmining land uses pertaining to mountaintop mining operations. We requested comments on the draft report, and at the same time we reopened the public comment period on the amendment to section 22–3–13(c)(3) because we expected that some of the comments received concerning the oversight report would address the proposed amendment to section 22–3–13(c)(3) (December 10, 1998, 63 FR 68221). The comment period on the draft oversight report closed on February 12, 1999. Therefore, we deferred a decision on section 22–3–13(c)(3) until after we could review the public comments that were received in response to the evaluation report.

III. Director's Finding

Following, according to SMCRA and the Federal regulations at 30 CFR 732.15 and 732.17, is our finding concerning the proposed amendment.

The West Virginia legislature amended section 22–3–13(c)(3) of the WVSCMRA to allow the approval of permits involving a variance from restoring approximate original contour (AOC) for mountaintop removal operations when the postmining land use includes "fish and wildlife habitat and recreation lands."

Mountaintop removal operations seeking a variance from the requirement to restore the affected land to AOC must comply with section 515(c)(3) of SMCRA, which states that:

In cases where an industrial, commercial, agricultural, residential or public facility (including recreational facilities) use is proposed or the postmining use of the affected land, the regulatory authority may grant a permit for a surface mining operation of the nature described in subsection (c)(2) [concerning mountaintop removal operations] where—

(A) After consultation with the appropriate land use planning agencies, if any, the proposed postmining land use is deemed to constitute an equal or better economic or public use of the affected land, as compared with premining use;

(B) The applicant presents specific plans for the proposed postmining land use and appropriate assurances that such use will be—

- (i) Compatible with adjacent land uses;
- (ii) Obtainable according to data regarding expected need and market;
- (iii) Assured of investment in necessary public facilities;
- (iv) Supported by commitments from public agencies where appropriate;
- (v) Practicable with respect to private financial capability for completion of the proposed use;
- (vi) Planned pursuant to a schedule attached to the reclamation plan so as to integrate the mining operation and reclamation with the postmining land use; and
- (vii) Designed by a registered engineer in conformance with professional standards established to assure the stability, drainage, and configuration necessary for the intended use of the site.

The Federal regulations at 30 CFR 785.14(c)(1) concerning mountaintop removal mining mirror the SMCRA provisions at section 515(c)(3) that are quoted above. Neither of these Federal provisions authorizes "fish and wildlife habitat and recreation lands" as a postmining land use that qualifies for the AOC variance needed by mountaintop removal operations.

The land use category of "fish and wildlife habitat" is defined at 30 CFR 701.5 under the definition of "land use" as land "dedicated wholly or partially to the production, protection or management of species of fish or wildlife." A variance from achieving AOC is simply not needed for the management of species of fish or wildlife, because fish and wildlife habitats do not require flat or rolling terrain, which is created by mountaintop removal operations, in order to be successful. (For an analogous discussion that concludes that silviculture is not a postmining land use authorized for mountaintop removal operations requesting an AOC variance,

see the preamble to the March 13, 1979 **Federal Register** document, 44 FR 14901, 15288–15289). Therefore, the land use of "fish and wildlife habitat" is not authorized as a postmining land use that qualifies for an AOC variance for mountaintop removal operations.

If we interpret the phrase "fish and wildlife and recreation lands" in accordance with its plain meaning, we conclude that it constitutes one postmining land use, with both "fish and wildlife" and "recreation lands" components. Given this construction, the entire phrase should be disapproved, because operations proposing fish and wildlife postmining land uses do not qualify for AOC variances under SMCRA. However, one could conceivably construe the phrase to create two separate, additional postmining land uses which would qualify for the AOC variance.

OSM has reason to believe that the State intends this term to include two separate uses. This interpretation is based on the fact that the State further defines "fish and wildlife habitat and recreation lands" at CSR 38–2–7.2.k as "wetlands, fish and wildlife habitat, and areas managed primarily for fish and wildlife or recreation" (emphasis added). Therefore, we have chosen to discuss the "recreation lands" use separately, in order to ascertain whether we could reach a different decision. For the reasons discussed below, however, we find we must still disapprove the proposed amendment in its entirety.

The land use category of "recreation lands" that is proposed by West Virginia is not specifically defined in the Federal regulations. However, the land use category of "recreation" is defined at 30 CFR 701.5 under the definition of "land use." "Recreation" land use means "land used for public or private leisure-time activities, including developed recreation facilities such as parks, camps, and amusement areas, as well as areas for less intensive uses such as hiking, canoeing, and other undeveloped recreational uses." SMCRA at section 515(c)(3) and the implementing Federal regulations at 30 CFR 785.14(c)(1) specifically authorize "public facilities (including recreation facilities)" as a postmining land use which qualifies for the variance from AOC for mountaintop removal mining. The term "public facilities (including recreation facilities)" bears some resemblance to, but is not the same as, the Federal regulatory definition of the "recreation" land use. To qualify for the variance, the recreation facilities must be "developed," and must also be "public" in nature. Specifically, SMCRA's use of the term "public

facility (including recreational facilities) use at section 515(c)(3) means that, unlike the definition of "recreation" at 30 CFR 701.5 under "land use," the use is limited to applications of public use. That is, a purely private postmining land use does not qualify under SMCRA for a mountaintop removal AOC variance.

In addition, SMCRA at section 515(c)(3) specifically uses the term "facilities." The term "facilities" means that various structures that support the public or recreational use of the land are required to be developed. For example, the postmining land use of "public facility (including recreational facilities)" requires a structure or development of some sort created by man that the public is able to use. A "public facility" might include developments such as governmental buildings, prisons, schools, reservoirs, or airports. "Recreational facilities" might include developed recreational facilities such as parks, camps, and amusement areas, as well as areas developed for uses such as hiking, canoeing, and other less intensive recreational uses. The designs of some of these recreational facilities, including the less intensive recreational facilities (for example, hiking and camping recreational facilities), could incorporate fish and wildlife habitat as an integral component of the recreation facility. However, even the less intensive recreation facilities would require structures or developments to support the public uses. For example, less intensive recreation facilities such as those for hiking and camping may require access roads, parking lots, rest rooms, developed trails, boat ramps, camping shelters, etc.

The term "recreation lands" proposed by the State may not be inconsistent with the Federal term "public facility (including recreational facilities) use" as discussed above. However, the West Virginia program at section 22-3-13(c)(3) of the WVSCMRA currently authorizes a postmining land use of "public use" as a postmining land use for an AOC variance for mountaintop removal operations. The State's authorization of a "public use" postmining land use is West Virginia's counterpart to the "public facility (including recreational facilities)" land use which qualifies for an AOC variance pursuant to section 515(c)(3) of SMCRA. That is, the State term "public use" already authorizes a postmining land use of "public facility (including recreational facilities)" for an AOC variance for mountaintop removal operations. Therefore, the proposed postmining land use of "recreation

lands" is not necessary, as the currently approved term "public use" already authorizes "public facility (including recreational facilities)." When OSM initially approved West Virginia's term "public use" (46 FR 5915, January 21, 1981) it did so without discussion. If OSM had intended its approval of the term "public use" to mean something other than the Federal term "public facility (including recreation facilities)" it would have discussed its rationale in the preamble. Since such a discussion is lacking, we conclude that when it approved West Virginia's term "public use," OSM interpreted that term to be equivalent to the Federal term "public facility (including recreation facilities)." However, we also recognize that the difference in terms has led to confusion concerning the meaning of the State's term "public use." Therefore, we are requiring that the term "public use" at section 22-3-13(c)(3) be amended to include the term "facility" and to further clarify that the State term will be interpreted the same as "public facility (including recreation facilities) use" at section 515(c)(3).

Based on the discussion above, we are not approving the proposed language "or fish and wildlife habitat and recreation lands." The addition of the term "fish and wildlife habitat" would render the West Virginia program less stringent than SMCRA, which does not authorize "fish and wildlife habitat" as a postmining land use that qualifies for an AOC variance for mountaintop removal operations. The term "recreation lands" need not be added to the West Virginia program, because the currently approved "public use" variance corresponds to the Federal authorization of "public facility (including recreational facilities) use." Moreover, some of the public facilities or recreational facilities which could be approved under section 22-3-13(c)(3) as "public uses" could incorporate "fish and wildlife habitat" as an integral component of the design of the public or recreation facility. Therefore, OSM is requiring that section 22-3-13(c)(3) be amended to remove the phrase "or fish and wildlife habitat and recreation lands." Finally, as stated above, we are requiring that the term "public use" at section 22-3-13(c)(3) be amended to include the term "facility" and further clarify that the term will be interpreted the same as "public facility (including recreation facilities) use" at SMCRA section 515(c)(3).

IV. Summary and Disposition of Comments

Federal Agency Comments

According to 30 CFR 732.17(h)(11)(i), we solicited comments on the proposed amendment from various Federal agencies with an actual or potential interest in the West Virginia program. Except for the U.S. Environmental Protection Agency as discussed below, no other Federal agencies commented on the amendment relating to "fish and wildlife habitat and recreation lands."

Public Comments

We solicited public comments on several different occasions. The following is a summary and disposition of the public comments received on the amendment.

1. General Comments Against Approval

Comments: Several commenters made general statements against approval of the proposed amendment. One commenter suggested that we defer our decision concerning the proposed postmining land use until after the Environmental Protection Agency (EPA) completes its environmental impact statement on mountaintop removal operations. The commenter also urged OSM to not allow it as an approved postmining land use during the interim period.

One commenter said that fish and wildlife habitat has several faults. On the plus side, however, allowing the creation of wetlands on mined areas was a step in a positive direction. But, the commenter asserted, fish and wildlife habitat has been used which included non native, invasive plants.

One commenter stated that fish and wildlife postmining land use should not be approved, because the language and legislative history of SMCRA demonstrate that Congress intended to restrict permissible postmining land uses to socially beneficial and developed uses, not passive and undeveloped uses such as "fish and wildlife habitat and recreation lands." The commenter asserted that the "fish and wildlife habitat and recreation lands" use is not socially beneficial; it does not require any development; it does not require any public facilities; and it is not a use which otherwise might not be available.

Further, one of these commenters did not support West Virginia's contention, via the amendment, that "fish and wildlife habitat and recreation lands" is an appropriate postmining land use.

Another commenter stated that allowance of ill-defined land uses such as "fish and wildlife habitat," rather

than conformance to the specific requirements of the law, results in improper off-site disposal as a matter of course, rather than as an exception to the rule of on-bench retention.

Response: In response to these comments, and for the reasons discussed in the Finding above, we have not approved this amendment.

2. Fish and Wildlife Habitat

Comments: A commenter supported the amendment and stated that fish and wildlife habitat clearly should qualify as a recreational use and consequently, a public use. From an environmental standpoint, the commenter stated, you couldn't have a better postmining land use for the environment. Though not one of the four listed postmining land uses in SMCRA, the commenter noted, there clearly isn't any prohibition of this as a valid postmining land use, nor are there any environmentally sound arguments for precluding it as a postmining land use. The commenter further stated that the State of Kentucky has had a postmining land use of "fish and wildlife" as part of its regulatory program since 1991.

Response: In response, we disagree with the statement that there clearly is not any prohibition of "fish and wildlife habitat" as a valid postmining land use. The fact that "fish and wildlife habitat" is not listed at SMCRA section 515(c)(3) as an allowable postmining land use for mountaintop-removal operations is a clear prohibition of "fish and wildlife habitat" as a postmining land use under SMCRA. While we have no doubt about the value of "fish and wildlife habitat" in the natural environment, and as a postmining land use in a mining situation where the site is to be restored to approximate original contour, "fish and wildlife habitat" is not an approvable postmining land use for mountaintop removal operations with variances from AOC under SMCRA section 515(c)(3). Finally, Kentucky has not had an approved postmining land use of "fish and wildlife habitat" as part of its regulatory program since 1991. Rather, the Kentucky program was authorizing "fish and wildlife habitat" as a postmining land use for mountaintop-removal operations with AOC variances under an internal memorandum dated May 29, 1991, that was never approved by OSM. The State no longer implements that memorandum.

3. Public Use Versus Public Facility Use

Comments: A few commenters noted that the West Virginia program authorizes "public use" as a valid postmining land use for an AOC

variance for mountaintop removal operations, whereas SMCRA authorizes "public facility use." One commenter said that the West Virginia program must be brought into conformity with SMCRA. Another commenter said that "any public use" is too broad a definition and provides a loophole for mining companies. Still another commenter stated that the rational response would be to clarify this matter through a policy statement, with a provision to allow maximum input from stakeholders.

A commenter asserted that while the word "facility" may mean that some type of structure or appurtenance must accompany the public use, this is not the only permissible interpretation of the term "public facility." For example, the commenter asserted, land that is reclaimed to support the propagation and preservation of wildlife, or leisure activities such as hiking, hunting or camping, are public facilities. Similarly, dedicated open space used as a park is a public facility even in the absence of buildings or other structures. The commenter also stated that the "public" character of the land use should not be interpreted to be unduly narrow. The commenter stated that OSM has previously addressed the question of the public nature of a land use for purposes of SMCRA's land use requirements. The commenter stated that OSM declined to adopt a regulatory definition of the term "public use" because public use "overlaps more than one of the existing land use categories" 48 FR 39893, September 1, 1983. In that notice, OSM stated that a use is public "if it involves benefit, utility, or advantage to the public generally or any part of the public, as distinguished from benefitting an individual or a few specific individuals." The commenter stated that land that is reclaimed to support the propagation and preservation of wildlife is a public facility. Finally, the commenter stated that whether or not these uses would require buildings or other appurtenances is a question that would be evaluated in the context of the specific plans for the proposed postmining use.

Response: In response, the one commenter is saying that all land uses have a public utility and that, for example, land that is reclaimed to support the propagation and preservation of wildlife is a public facility. We believe that such an interpretation only serves to render meaningless the term "public facility (including recreational facilities) use." Although the commenter believes that the public character of the land use should not be interpreted too narrowly,

we believe that to be meaningful, the term "public facility (including recreational facilities) use" must not be interpreted too broadly. Were it otherwise, instead of stating "public facility (including recreational facilities) use" SMCRA could merely state "public use," or even "fish and wildlife habitat use." Instead, SMCRA excludes "fish and wildlife habitat" from the list of approvable postmining land uses at section 515(c)(3), and it specifically provides for "public facility (including recreational facilities) use."

SMCRA uses the term "facility" rather than the more generic term "public use" in the approvable postmining land use of "public facility (including recreational facilities) use." We interpret the term "public facility (including recreational facilities) use" to require some sort of structure or man-made development that actually supports or facilitates the public use. Such facilities could include community centers, buildings and runways as at an airport, amphitheatres or parking lots, rest rooms, developed hiking trails, boat ramps, camping shelters, or shooting ranges, etc. at less intensive public recreational facilities.

Finally, we agree that the specific plans for each proposed postmining land use must be assessed on a case-by-case basis. However, as stated above, we believe that SMCRA requires that the various structures or developments discussed above be required for a postmining land use of "public facility (including recreational facilities)."

Comment: Another commenter contends that the term "public use" in the West Virginia program was approved by OSM and is not limited to "public recreation facilities." The commenter also asserted that because the State's regulations require that proposed postmining land uses of fish and wildlife habitat and recreation lands include a planting plan prepared or approved by a state mining biologist, whose job it is to encourage the propagation of "desirable" species, these plans necessarily confer public benefit.

Response: In response, we are aware of the confusion that exists concerning the interpretation of West Virginia's term "public use" and the term "public facility (including recreational facilities)" in SMCRA at section 515(c)(3). As a consequence, and as discussed in the Finding above, we are requiring that the State further amend its program to clarify that its term "public use" means the same as the term "public facility (including recreational facilities)" at SMCRA section 515(c)(3). To be no less stringent

than SMCRA at section 515(c)(3), the West Virginia term "public use" at section 22-3-13(c)(3) of WVSCMRA must be equivalent to the Federal term "public facility (including recreational facilities) use."

4. Fish and Wildlife Habitat and Public Use

Comments: One commenter supported the amendment and said that fish and wildlife habitat is a recreational use and consequently a public use. The commenter stated that "public use" as a postmining land use has been part of the approved West Virginia program since 1981. If public access is available to the site, the commenter asserted, then it would appear that the conditions of this land use category have been met.

Another commenter agrees and stated that OSM issued a Federal permit in West Virginia effective August 23, 1993, that granted an AOC variance for "fish and wildlife habitat." According to the commenter, the variance was apparently approved based on the rationale that the postmining fish and wildlife habitat development constituted a public use.

Response: In response, we disagree with the commenters that assert that "fish and wildlife habitat" is a recreational use and consequently a public use. The "fish and wildlife habitat" postmining land use is defined at 30 CFR 701.5 under the definition of "land use." It is defined as land dedicated wholly or partially, to the production, protection, or management of species of fish or wildlife. Sites that are not open to the public at all can meet this definition. Therefore, "fish and wildlife habitat" by itself cannot be considered a public use.

The second commenter is referring to Permit Number OC-1 (subsequently converted to OC-2). OSM approved a postmining land use of "public use" for this permit. The permit was for a 20-acre surface mining operation at R.D. Bailey Lake in Mingo County. R.D. Bailey Lake is managed by the U.S. Army Corps of Engineers (COE). The COE specified that the reclaimed surface, especially the side facing the lake, dam and visitor center, should have some minor degree of slope to make it appear natural in relation to the general topography of the ridge areas. This was specified so that as viewed from the nearby public use areas of the lake the reclaimed area would be aesthetically pleasing. The COE agreed that at least three acres of the reclaimed site would be for water fowl habitat, which would consist of two acres of flat surface and a one-acre depression ranging from one to two feet in depth. All surface areas accessible by mowing

equipment had to be graded and free of rock, boulders and other debris to facilitate mowing and other wildlife management activities. OSM agrees that fish and wildlife habitat was a component of the postmining land use. However, and more importantly, because the site was accessible to the public, managed by a governmental agency, and developed for public use, OSM was able to approve the permit with an AOC variance in accordance with the approved State program.

Comment: Another commenter disagrees with the proposed amendment, and stated that the State has not demonstrated that a proposed postmining land use of "fish and wildlife habitat and recreation lands" is consistent with SMCRA. The commenter asserted that the State's justification of the proposed amendment, which states that "[b]ecause of the feral nature of wildlife the proposed program amendment conforms with CFR 824.11(a)(3) by providing enhanced recreational benefits in the form of additional wildlife for public hunting and observation," has no meaning. The commenter said that a public use is one that is available to the public permanently. The commenter stated that Congress did not intend to allow passive "recreational areas" which are maintained and controlled by private companies, instead of public authorities. Hence, the public would have to own the land for it to qualify as a public use. The commenter also stated that a public use must allow unimpeded public access, must be a higher and better use than the pre-mining use, and the permit application must demonstrate that there is a need for the use and that financing is available for public projects such as golf courses, public parks, or swimming pools with public facilities. The public facilities, the commenter asserted, would also have to be owned by the public; otherwise the public nature of the enterprise could be revoked at any time after mining is complete.

Response: In response, we agree with the commenter that "fish and wildlife habitat" is not, by itself, a public use. However, we disagree with the commenter's assertion that to qualify as a public facility the facility must be owned by the public. SMCRA section 515(c)(3) does not require public ownership to qualify as a "public facility (including recreational facilities)" postmining land use. Neither does SMCRA section 515(c)(3) specify that an approved postmining land use be continued permanently, or that the use be higher and better than the

premining use. Rather, section 515(c)(3)(A) requires that the proposed postmining land use be an equal or better economic or public use, as compared with the premining use. SMCRA section 515(c)(3) does, however, require that the reclaimed site be capable of supporting the postmining land use in accordance with the requirements at subsection 515(c)(3). SMCRA also specifies minimum requirements such as consultation with land use planning agencies, and specific plans and assurances that the proposed postmining land use will be compatible with adjacent land uses; obtainable according to data regarding expected need and market; assured of investment in necessary public facilities; supported by commitments from public agencies where appropriate; practicable with respect to private financial capability for completion of the proposed use; and planned pursuant to a schedule attached to the reclamation plan so as to integrate the mining operation and reclamation with the postmining land use.

Comment: One commenter noted that SMCRA at section 515(c)(3) does not specifically authorize "fish and wildlife habitat" as a postmining land use for an AOC variance for mountaintop-removal operations. However, the commenter asserted, this is no impediment to those land uses falling within one of the general categories of land uses listed in the statute. This view is supported by another commenter who said that there is nothing which precludes a "fish and wildlife habitat and recreation" postmining land use from serving as the basis of an AOC variance "so long as it can be viewed as a subset of one of the list of land uses set out in W.Va. Code § 22-3-13(c)(3)."

Moreover, the commenter said, the list of uses set forth in the Federal rules is not exhaustive or exclusive, but simply a "minimum list that would meet the requirements of the Act." 44 FR at 14933.

Response: In response, and as discussed above in the Finding, the design of a "public facility (including recreational facilities) use" could include areas that are designed as fish and wildlife habitat. This is not to say that "fish and wildlife habitat" is the primary postmining land use. Rather, fish and wildlife habitat may be a component of the design of a "public facility (including recreational facilities) use." And, it is the "public facility (including recreational facilities) use" that must be the focus of the applicant's demonstration, and the regulatory authority's determination that the proposed postmining land use meets the requirements for an AOC variance.

Comment: The commenter further stated that the specific land uses of "fish and wildlife habitat and recreation lands" comfortably fit within the general land use category of public facility/public use as set forth in both section 515(c)(3) and 515(e)(2) of SMCRA.

Response: In response, we disagree with this comment. As discussed above in the Finding, the proposed postmining land use of "fish and wildlife habitat and recreation lands" is not approvable under SMCRA section 515(c)(3). "Fish and wildlife habitat" is not a listed postmining land use at section 515(c)(3) of SMCRA and, therefore, cannot be approved. In addition, the State's proposed term "recreation lands" is not approved because, to the extent it refers to public recreational facilities, it is redundant with the term "public use" that is already part of the approved West Virginia program. To the extent that it creates a more expansive category, which would include undeveloped recreational areas or purely private developed recreational facilities, it is inconsistent with section 515(c)(3) of SMCRA. As discussed in the Finding, we have concluded that when OSM approved the term "public use" in the State program, it did so with the interpretation that the term "public use" is no less stringent than the Federal standard, which allows only a "public facility (including recreational facilities) use."

Comment: The commenter also asserted that there are public benefits from fish and wildlife habitat regardless of whether general access is provided.

Response: In response, and as discussed in the Finding above, "fish and wildlife habitat" is not an approvable postmining land use for mountaintop-removal operations with AOC variances. We believe that the approvable postmining land use of "public facility (including recreation facility) use" clearly contains a "public" component, and a requirement that the public's use of the land be facilitated. We believe that the term "facility" requires the inclusion of a structure or other man-made developments such as parking lots, rest rooms, or shelters that would facilitate the use of the land by the public. Some public facilities, such as water treatment plants, transmission lines, and solid waste disposal facilities that directly benefit the public, may not allow public access. However, recreational areas must be available for public access in order for the public to be able to use and benefit from them, and that access should be facilitated by the inclusion of necessary structures or developments.

5. Other Comments

Comment: One commenter suggested that fish and wildlife habitat should be accepted as valid. The commenter said this would be especially beneficial if that use could be used in conjunction with a postmining use of reservation for future economic development. In such a manner, the commenter said, the land could be reclaimed for wildlife habitat and used as such indefinitely or until such time as a need develops for some other qualified project.

Response: In response, and as noted in the Finding above, fish and wildlife habitat cannot be approved as a postmining land use under section 515(c)(3) of SMCRA. While SMCRA does not specify exactly when a postmining must actually be implemented, it does specify that the land must be capable of supporting the postmining land use, and also specifies the minimum criteria which must be met to qualify for a variance. SMCRA section 515(c)(3)(vi) provides that the proposed use must be planned pursuant to a schedule attached to the reclamation plan so as to integrate the mining operation and reclamation with the postmining land use. In addition, the Federal regulations at 30 CFR 785.14(c)(1)(ii), governing AOC variances for mountaintop-removal operations, specify that compliance with the Federal regulations at 30 CFR 816/817.133(a) through (c), concerning postmining land use, is required. 30 CFR 816/817.133(c)(3)(iii) provides that the proposed postmining land use will not involve unreasonable delay in implementation.

Comment: A commenter stated that SMCRA does not require the land to be actually put to the use proposed, but only that it be capable of supporting the postmining land use proposed. As the Supreme Court held, "[t]he Act imposes no restrictions on post reclamation use of mined lands." *Hodel v. Indiana*, 452 U.S. 314, 330 n. 18 (1981).

Response: In response, we note that SMCRA at section 515(c)(2) specifies that the applicant for an AOC variance for mountaintop removal operations must create a postmining land that is "capable of supporting postmining uses in accordance with the requirements of this subsection." However, SMCRA at section 515(c)(3) also provides that an applicant must present specific plans and appropriate assurances that the proposed postmining land use will be compatible with adjacent land uses; obtainable according to data regarding expected need and market; assured of investment in necessary public facilities; supported by commitments

from public agencies where appropriate; practicable with respect to private financial capability for completion of the proposed use; and planned pursuant to a schedule attached to the reclamation plan so as to integrate the mining operation and reclamation with the postmining land use. These specific plans and assurances should be sufficiently detailed to allow the regulatory authority to determine if there is a reasonable likelihood for achievement of the proposed postmining land use, and the use will not be impractical or unreasonable, or involve unreasonable delay in implementation.

Comment: A commenter also stated, in comments directed against approval of the amendment, that if the proposed amendment is approved, regulators must approve postmining land use of any mountaintop removal permit application that proposes to flatten mountains and fill streams as long as that application proposes a "fish and wildlife habitat and recreation lands" variance.

Response: In response, and as explained in the Finding above, we are not approving the proposed amendment. In addition, we disagree that the regulatory authority must approve a variance from the requirements of AOC just because a permittee proposes one of the approvable postmining land uses listed at section 515(c)(3). SMCRA at section 515(c)(3) specifies that a regulatory authority "may" approve such a request if it finds that the permittee also demonstrates compliance with all the other criteria specified at section 515(c)(3). If all of the requirements of section 515(c)(3) of SMCRA are not met, the regulatory authority must reject the variance request.

Environmental Protection Agency (EPA)

According to 30 CFR 732.17(h)(11)(ii), OSM is required to obtain the written concurrence of the EPA with respect to those provisions of the proposed program amendment that relate to air or water quality standards promulgated under the authority of the Clean Water Act (33 U.S.C. 1251 *et seq.*) or the Clean Air Act (42 U.S.C. 7401 *et seq.*). We requested EPA concurrence on June 6, 1997 (Administrative Record Number WV-1059) and again on March 19, 1999 (Administrative Record Number WV-1118). In accordance with 30 CFR 732.17(h)(11)(i), we also solicited comments from the EPA on the proposed amendment on June 5, 1997. (Administrative Record Number WV-1060)

EPA responded to our June 5 and 6, 1997, requests for comments and concurrence by letter dated October 23, 1998 (Administrative Record Number WV-1108). EPA expressed concerns about the proposed provision at section 22-3-13(c)(3) of the WVSCMRA that would allow an exemption for mountaintop removal operations from restoring mined land to its approximate original contour (AOC) if the post-mining land use is fish and wildlife habitat and recreation lands. EPA stated that the proposed revision would allow excess overburden to be disposed in valley fills rather than on top of the mined area to achieve AOC. A use designation as fish and wildlife habitat and recreation lands would not appear to be necessary if the goal was just to provide wildlife habitat and recreation land, rather than avoid the expense of placing overburden back on top of mined areas. It is very likely, EPA stated, that wildlife habitat areas would occur naturally on post-mining lands, including areas restored to the approximate original contour, as a result of appropriate reclamation without any special use designation. In addition, it appears that the proposed designation as wildlife habitat and recreation lands is not intended for lands to be used by the public since an exemption for "public use" is already in the State statute. EPA said that its concern is that disposal of excess overburden in valley fills may harm aquatic life in headwater streams and possibly downstream reaches.

EPA noted OSM's intention to defer action on proposed revisions to section 22-3-13(c)(3) of the WVSCMRA regarding an exemption to approximate original contour for mountaintop removal operations until a later date, and that the comment period would be reopened on this provision. With this understanding, the EPA concurred with the other proposed WVDEP revisions under the condition that the EPA be given an opportunity to concur or not concur with the proposed amendment to section 22-3-13(c)(3) of the WVSCMRA.

By letter dated April 2, 1999 (Administrative Record Number WV-1120), EPA responded to OSM's request for concurrence dated March 19, 1999 (Administrative Record Number WV-1118), and stated that it does not concur with the proposed revision at section 22-3-13(c)(3). EPA stated that it is withholding concurrence because the amendment would result in degradation of stream quality and aquatic life and violate the Anti-Degradation Policy of the West Virginia Water Quality Standards (Section 46-1-4 of the

Legislative Rules of the Environmental Quality Board). According to EPA, compliance with Water Quality Standards is a requirement of the Clean Water Act.

In its letter, the EPA stated that the proposed revision for exempting the restoration of mined lands to approximate original contour would result in an increase of excess spoil being placed in valley fills on stream beds rather than on top of mined areas. The reasons for allowing this exemption are not justified, since the lower and more level areas resulting from the exemption are not necessary to sustain "fish and wildlife habitat and recreation lands." Wildlife habitat areas would occur naturally on postmining lands, including areas restored to the approximate original contour, as a result of appropriate reclamation without any special use designation. Increased disposal of excess spoil in valley fills resulting from the proposed exemption will unnecessarily harm aquatic life in headwater streams and possibly downstream reaches, the EPA said.

In response, and in accordance with EPA's non-concurrence stated above, we have not approved the proposed amendment.

V. Director's Decision

Based on the finding above, we are not approving the proposed language "or fish and wildlife habitat and recreation lands" at section 22-3-13(c)(3), as submitted on April 28, 1997. In addition, we are requiring that section 22-3-13(c)(3) of the West Virginia program be further amended to remove the phrase "or fish and wildlife habitat and recreation lands." We are also requiring that the term "public use" at section 22-3-13(c)(3) be amended to include the term "facility" and to further clarify that the State term will be interpreted the same as "public facility (including recreation facilities) use" at SMCRA section 515(c)(3).

VI. Procedural Determinations

Executive Order 12866

This rule is exempted from review by the Office of Management and Budget (OMB) under Executive Order 12866 (Regulatory Planning and Review).

Executive Order 12988

The Department of the Interior has conducted the reviews required by section 3 of Executive Order 12988 (Civil Justice Reform) and has determined that, to the extent allowed by law, this rule meets the applicable standards of subsections (a) and (b) of that section. However, these standards

are not applicable to the actual language of State regulatory programs and program amendments since each such program is drafted and promulgated by a specific State, not by OSM. Under sections 503 and 505 of SMCRA (30 U.S.C. 1253 and 1255) and 30 CFR 730.11, 732.15, and 732.17(h)(10), decisions on proposed State regulatory programs and program amendments submitted by the States must be based solely on a determination of whether the submittal is consistent with SMCRA and its implementing Federal regulations and whether the other requirements of 30 CFR Parts 730, 731, and 732 have been met.

National Environmental Policy Act

No environmental impact statement is required for this rule since section 702(d) of SMCRA (30 U.S.C. 1292(d)) provides that agency decisions on proposed State regulatory program provisions do not constitute major Federal actions within the meaning of section 102(2)(C) of the National Environmental Policy Act (42 U.S.C. 4332(2)(C)).

Paperwork Reduction Act

This rule does not contain information collection requirements that require approval by OMB under the Paperwork Reduction Act (44 U.S.C. 3507 *et seq.*).

Regulatory Flexibility Act

The Department of the Interior has determined that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). The State submittal which is the subject of this rule is based upon corresponding Federal regulations for which an economic analysis was prepared and certification made that such regulations would not have a significant economic effect upon a substantial number of small entities. Accordingly, this rule will ensure that existing requirements previously promulgated by OSM will be implemented by the State. In making the determination as to whether this rule would have a significant economic impact, the Department relied upon the data and assumptions for the corresponding Federal regulations.

Unfunded Mandates

This rule will not impose a cost of \$100 million or more in any given year on any governmental entity or the private sector.

List of Subjects in 30 CFR Part 948

Intergovernmental relations, Surface mining, Underground mining.

Dated: May 4, 1999.

Allen D. Klein,

Regional Director, Appalachian Regional Coordinating Center.

For the reasons set out in the preamble, Title 30, Chapter VII,

Subchapter T, of the Code of Federal Regulations is amended as set forth below:

PART 948—WEST VIRGINIA

1. The authority citation for part 948 continues to read as follows:

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

2. Section 948.15 is amended in the table by adding a new entry in chronological order by "Date of Final Publication" to read as follows:

§ 948.15 Approval of West Virginia regulatory program amendments.

* * * * *

Original amendment submission date	Date of final publication	Citation/description
April 28, 1997	May 14, 1999	W.Va. Code 22-3 Section 13(c)(3) [not approved].

3. Section 948.16 is amended by adding new paragraph (iii) to read as follows:

§ 948.16 Required regulatory program amendments.

* * * * *

(iii) By July 13, 1999, West Virginia must submit either a proposed amendment or a description of an amendment to be proposed, together with a timetable for adoption, to:

(1) Amend section 22-3-13(c)(3) of the West Virginia program to remove the phrase "or fish and wildlife habitat and recreation lands"; and

(2) Amend "public use" at section 22-3-13(c)(3) to include the term "facility" and to further clarify that the term will be interpreted the same as "public facility (including recreation facilities) use" at SMCRA section 515(c)(3).

[FR Doc. 99-12212 Filed 5-13-99; 8:45 am]

BILLING CODE 4310-05-P

DEPARTMENT OF TRANSPORTATION

Coast Guard

33 CFR Part 117

[CGD 08-99-028]

Drawbridge Operating Regulation; Gulf Intracoastal Waterway, LA

AGENCY: Coast Guard, DOT.

ACTION: Notice of temporary deviation from regulations.

SUMMARY: The Commander, Eighth Coast Guard District, has issued a temporary deviation from the regulation in 33 CFR 117.451(e) governing the operation of the SR 27 drawbridge across the Gulf Intracoastal Waterway, mile 243.8, west of Harvey Canal Locks, near Hackberry, Calcasieu Parish, Louisiana. This deviation allows the Louisiana Department of Transportation and Development to maintain the bridge

in the close-to-navigation position from 7 a.m. until 10 p.m. on Tuesday, June 1, 1999. This temporary deviation is issued to allow for the replacement of the emergency electrical-power supply. **DATES:** This deviation is effective from 7 a.m. until 10 p.m. on Tuesday, June 1, 1999.

FOR FURTHER INFORMATION CONTACT: Mr. David Frank, Bridge Administration Branch, Commander (ob), Eighth Coast Guard District, 501 Magazine Street, New Orleans, Louisiana, 70130-3396, telephone number 504-589-2965.

SUPPLEMENTARY INFORMATION: The SR 27 drawbridge across the Gulf Intracoastal Waterway, mile 243.8 west of Harvey Canal Locks, near Hackberry, Calcasieu Parish, Louisiana, has a vertical clearance of 50 feet above high water in the closet-to-navigation position. Navigation on the waterway consists of tugs with tows, fishing vessels, sailing vessels, and other recreational craft. The Louisiana Department of Transportation and Development requested a temporary deviation from the normal operation of the bridge in order to accommodate the replacement of the emergency electrical-power supply and is essential for the continued operation of the draw span.

This deviation allows the draw of the SR 27 bridge across the Gulf Intracoastal Waterway, mile 243.8 west of Harvey Canal Locks, near Hackberry to remain in the closed-to-navigation position from 7 a.m. until 10 p.m. on Tuesday, June 1, 1999. Presently, the draw opens on signal when more than 50 feet of vertical clearance is required, if at least four hours' notice is given to the Louisiana Department of Transportation and Development, District Maintenance Engineer, at Lake Charles, Louisiana.

Dated: May 7, 1999.

A.L. Gerfin, Jr.,

Captain, U.S. Coast Guard, Acting Commander, 8th Coast Guard Dist.

[FR Doc. 99-12273 Filed 5-13-99; 8:45 am]

BILLING CODE 4910-15-M

DEPARTMENT OF TRANSPORTATION

Coast Guard

33 CFR Part 165

[CGD01-99-048]

RIN 2115-AA97

Safety Zone: Pepsi Gala Fireworks, New York Harbor, Upper Bay

AGENCY: Coast Guard, DOT.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary safety zone for the Pepsi Gala Fireworks Display located in Federal Anchorage 20C, New York Harbor, Upper Bay. This action is intended to restrict vessel traffic in a portion of Federal Anchorage 20C; it is necessary to provide for the safety of life on navigable waters during the event.

DATES: This rule is effective from 9:30 p.m. until 11 p.m. on Saturday, May 15, 1999. There is no rain date for this event.

ADDRESSES: Documents as indicated in this preamble are available for inspection or copying at Coast Guard Activities New York, 212 Coast Guard Drive, room 205, Staten Island, New York 10305, between 8 a.m. and 3 p.m., Monday through Friday, except Federal holidays. The telephone number is (718) 354-4193.

FOR FURTHER INFORMATION CONTACT: Lieutenant J. Lopez, Waterways Oversight Branch, Coast Guard Activities New York (718) 354-4193.

SUPPLEMENTARY INFORMATION:

Regulatory History

Pursuant to 5 U.S.C. 553, no notice of proposed rulemaking (NPRM) was published for this regulation. Good cause exists for not publishing an NPRM and for making this regulation effective less than 30 days after publication in the **Federal Register**. Because of the date