

PART 71—DESIGNATION OF CLASS A, CLASS B, CLASS C, CLASS D, AND CLASS E AIRSPACE AREAS; AIRWAYS; ROUTES; AND REPORTING POINTS

1. The authority citation for 14 CFR part 71 continues to read as follows:

Authority: 49 U.S.C. 105(g), 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

§ 71.1 [Amended]

2. The incorporation by reference in 14 CFR 71.1 of the Federal Aviation Administration Order 7400.9G, Airspace Designations and Reporting Points, dated September 1, 1999, and effective September 16, 1999, is amended as follows:

Paragraph 6002 Class E airspace designated as a surface area for an airport

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ANM WA E2 Oak Harbor, WA [Remove]

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Issued in Seattle, Washington, on February 10, 2000.

Daniel A. Boyle,

*Acting Manager, Air Traffic Division,
Northwest Mountain Region.*

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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; correction.

SUMMARY: This document corrects OSM's decision on an amendment submitted by the State of West Virginia as a modification to its permanent regulatory program under the Surface Mining Control and Reclamation Act of 1977 (SMCRA). OSM published its decision on the provision in the February 9, 1999, **Federal Register** (64 FR 6201). The decision being corrected concerns subsidence regulations, and specifically concerns certain rules that pertain to an "angle of draw" determination for subsidence damage. This correction is intended to comply with the decision of the United States Court of Appeals for the District of Columbia in *National Mining Association v. Babbitt*, No. 98–5320 (D.C. Cir., April 27, 1999).

EFFECTIVE DATE: February 28, 2000.

FOR FURTHER INFORMATION CONTACT: Mr. Roger W. Calhoun, Director, Charleston Field Office, 1027 Virginia Street East, Charleston, West Virginia 25301. Telephone: (304) 347–7158.

SUPPLEMENTARY INFORMATION:

Background

In a letter dated May 5, 1999 (Administrative Record Number WV–1127), the West Virginia Division of Environmental Protection (WVDEP) submitted an amendment to the West Virginia program. We subsequently reviewed the amendment, and approved it on October 1, 1999 (64 FR 53200). Also in the May 5, 1999, letter the WVDEP requested that we reconsider our previous disapproval of parts of the West Virginia regulations at CSR 38–2–3.12 (concerning subsidence control plan) and 38–2–16.2 (concerning surface owner protection from subsidence damage) and remove the corresponding required regulatory program amendments specified in the February 9, 1999, **Federal Register** rule. The WVDEP stated the reason for the request is the April 27, 1999, United States Court of Appeals decision in *National Mining Association v. Babbitt*.

Need for Correction

On April 27, 1999, the United States Court of Appeals for the District of Columbia struck down two OSM regulations on coal mine subsidence. The regulations struck down were among those issued on March 31, 1995, at 60 FR 16722–16751, pursuant to SMCRA and section 2504 of the Energy Policy Act of 1992 (the EPAct) which added a new section 720 to SMCRA. Section 720 requires underground mine operators to repair or to compensate for material damage to residential structures and noncommercial buildings, and to replace residential water supplies adversely affected by underground mining.

The Court of Appeals struck down the rebuttable presumption that, when subsidence damage occurs within the so-called "angle of draw," damage has been caused by the related underground mine (30 CFR 817.121(c)(4)). The Court emphasized that, for a regulatory presumption to withstand legal challenge, the circumstances giving rise to the presumption must make it more likely than not that the presumed fact exists. Slip op. at 6. The Court noted that OSM had characterized the angle of draw only as "one way to define the outer boundary of subsidence displacement that may occur at the surface." 60 FR at 16738 (emphasis

added by the Court). The Court ruled that OSM could not "impose a presumption of causation of damage on a party based merely on the possibility that the party caused the damage." Slip op. at 10. Because it could not be said that subsidence-caused damage to structures within the angle of draw is more likely than not to occur, the Court struck down the regulation. *Id.*

The Court also vacated OSM's regulation requiring coal operators to conduct presubsidence structural condition surveys (30 CFR 784.20(a)(3)), solely because that regulation was interconnected with the angle of draw regulation. The Court ruled that, after enactment of the Energy Policy Act, OSM possessed the authority to require such surveys. Slip op. at 13–14. The Court, however, found it necessary to vacate the regulation because the regulation defined the area within which the pre-subsidence survey is required by reference to the angle of draw. *Id.* at 14.

In accordance with the Court's decision, we suspended the following regulations on December 22, 1999 (64 FR 71652). We suspended 30 CFR 817.121(c)(4) (i)–(iv). These provisions set out a procedure under which damage occurring within an area defined by an angle of draw would be subject to the rebuttable presumption: that subsidence from underground mining was the cause of any surface damage to non-commercial buildings or occupied residential dwellings and related structures within the angle of draw. We also suspended that portion of 30 CFR 784.20(a)(3) which required a specific structural condition survey of all EPAct protected structures within an area defined by an angle of draw.

The Regulatory Decisions We Are Correcting

1. CSR 38–2–3.12.a.1. In our February 9, 1999, decision, we did not approve the phrase "within an angle of draw of at least 30 degrees" at CSR 38–2–3.12.a.1. This provision requires the identification (on a map) of the lands, structures, and water supplies that could be damaged by subsidence. We disapproved the phrase "within an angle of draw of at least 30 degrees" because it limited the identification of water supplies to areas within the angle of draw. This limitation renders the provision less effective than the Federal regulations at 30 CFR 784.20(a)(1) which has no "angle of draw" limit for the identification of water supplies that may be affected by subsidence. Our suspension of the Federal "angle of draw" criterion at 30 CFR 817.121(c)(4) (i)–(iv) does not affect this disapproval

of the State as it pertains to water supplies. Therefore, our disapproval of the phrase "within an angle of draw of at least 30 degrees" at CSR 38-2-3.12.a.1. continues in force.

In addition we required, at 30 CFR 948.16(zzz), that CSR 38-2-3.12.a.1 be amended to require that the map identify the type and location of all lands, structures, and drinking, domestic and residential water supplies within the permit and adjacent areas, and to include a narrative indicating whether subsidence, if it occurred, could damage or diminish the use of the lands, structures, or water supplies. This required amendment is not affected by our suspension of the Federal regulations cited above and, therefore, remains in force.

We also approved CSR 38-2-3.12.a.1 pertaining to an alternative, site-specific angle of draw, but only with the understanding that such an alternative angle of draw would be justified based on a site-specific geotechnical analysis of the potential surface impacts of the mining operation. This decision is affected by our suspension of the "angle of draw" criterion, and must be corrected. We are correcting this decision by changing the qualified approval that CSR 38-2-3.12.a.1, to a complete approval, because there is now no Federal regulatory counterpart to this alternative angle of draw criterion. As we stated in the December 22, 1999, suspension notice, under section 505(b) of SMCRA, a State may elect to retain its existing regulations despite the fact that OSM has suspended their counterparts.

In addition we required, at 30 CFR 948.16(yyy), that CSR 38-2-3.12.a.1 be amended to clarify that approval of the proposed angle of draw has a more reasonable basis than the 30-degree angle of draw based on site-specific geotechnical analysis of the potential impacts of the proposed mining operation. Because our approval of CSR 38-2-3.12 is now unqualified, we are removing the required amendment at 30 CFR 948.16(yyy).

2. CSR 38-2-3.12.a.2. We approved CSR 38-2-3.12.a.2. concerning presubidence surveys, except we did not approve the phrase "within the area encompassed by the applicable angle of draw" as it applies to water supply surveys. In addition we required, at 30 CFR 948.16(aaaa), that CSR 38-2-3.12.a.2. be amended to require a pre-subidence survey without limitation by an angle of draw, of the quantity and quality of all drinking, domestic, and residential water supplies within the permit area and adjacent area that could be contaminated, diminished, or

interrupted by subsidence. The Federal regulations concerning pre-subidence surveys of water supplies have never incorporated an "angle of draw" criterion. CSR 38-2-3.12.a.2. does contain an "angle of draw" criterion for water supplies, and that criterion renders the State provision less effective than 30 CFR 784.20(a)(3) as it pertains to water supplies. Therefore, the disapproval and required amendment concerning water supplies continue to be in effect, because they are not affected by our suspension of the Federal "angle of draw" provision.

CSR 38-2-3.12.a.2. also contains a requirement for pre-subidence surveys for non-commercial or residential dwellings and structures that incorporates an "angle of draw" criterion. Although the counterpart Federal requirement contained an "angle of draw" criterion and has been suspended, the suspension does not render the State provisions inconsistent with the Federal regulations. Under section 505(b) of SMCRA, a State may elect to retain its existing regulations despite the fact that OSM has suspended its counterparts. Therefore, CSR 38-2-3.12.a.2. concerning pre-subidence surveys for non-commercial or residential dwellings and structures continues to be approved.

CSR 38-2-3.12.a.2.A. and B. We did not approve CSR 38-2-3.12.a.2.A. and B. concerning exemption and postponement of the pre-subidence structural survey. These provisions were disapproved because we found them to be less effective than 30 CFR 784.20(a)(3) and 817.121(c)(4)(ii). Both of these Federal provisions have been suspended. Therefore, CSR 38-2-3.12.a.2.A. and B. are no longer less effective than the Federal regulations. We are correcting our finding to approve CSR 38-2-3.12.a.2.A. and B. concerning exemption and postponement of the pre-subidence structural surveys. As we stated in the December 22, 1999, suspension notice, under section 505(b) of SMCRA, a State may elect to retain its existing regulations despite the fact that OSM has suspended its counterparts.

We required, at 30 CFR 948.16(bbbb), that CSR 38-2-3.12.a.2. be amended to require that the permit applicant pay for any pre-subidence surveys of protected structures and water supplies, and to require the applicant to provide copies of the surveys to the property owner and the regulatory authority. The Federal requirements at 30 CFR 784.20(a)(3) concerning pre-subidence structural surveys have been suspended, but the Federal requirements concerning pre-subidence surveys of water supplies

have not been suspended. Therefore, we are correcting our required amendment at 30 CFR 948.16(bbbb) to remove all references to presubidence surveys of protected structures, since the portion of 3.12.a.2. referring to presubidence surveys no longer has a Federal counterpart. Pursuant to section 505(b) of SMCRA, a State may elect to retain its existing regulations, despite the fact that OSM has suspended its counterparts. As corrected, 30 CFR 948.16(bbbb) will now only require that the permit applicant pay for any pre-subidence surveys of protected water supplies, and that the applicant provide copies of the surveys to the property owner and the regulatory authority.

We did not approve, at CSR 38-2-3.12.a.2., the definition of "non-commercial building." In addition, we required, at 30 CFR 948.16(cccc), that CSR 38-2-3.12.a.2. be amended to clarify that the definition of "non-commercial building" includes such buildings used on a regular or temporary basis. These two decisions are affected by our suspension of 30 CFR 784.20(a)(3). The State's definition of "non-commercial building" pertains directly to its pre-subidence survey requirement for structures at CSR 38-2-3.12.a.2. Since the Federal pre-subidence survey requirement for structures at 30 CFR 784.20(a)(3) has been suspended, the State's definition is applied to a provision for which the Federal regulations have no counterpart. Pursuant to SMCRA section 505(b), the State's use of the definition of "non-commercial building" at CSR 38-2-3.12.a.2. is not inconsistent with SMCRA and can be approved. Therefore, we are correcting our decision regarding the definition of "non-commercial building" at CSR 38-2-3.12.a.2. to approve the definition. In addition, we are deleting the required amendment at 30 CFR 948.16(cccc).

3. CSR 38-2-16.2.c.3. In our February 9, 1999, decision, we found that CSR 38-2-16.2.c.3. was less effective than 30 CFR 817.121(c)(4)(i) to the extent that the State's presumption of causation of subsidence damage only applies within the area which a pre-subidence structural survey is required. In addition, we required, at 30 CFR 948.16(dddd), that CSR 38-2-16.2.c.3. be amended to provide that a rebuttable presumption of causation would exist within the applicable angle of draw regardless of whether or not a pre-subidence survey had been conducted. These two decisions are no longer valid because of our suspension of the Federal regulations at 30 CFR 817.121(c)(4) (i)-(iv). The Federal regulations no longer contain a presumption of causation of

subsidence damage. As we stated in the December 22, 1999, suspension notice, under section 505(b) of SMCRA, a State may elect to retain its existing regulations despite the fact that OSM has suspended its counterparts. Therefore, we are correcting our decision on CSR 38-2-16.2.c.3. concerning presumption of causation of damage by subsidence, to be an approval of this provision. In addition, we are deleting the required amendment codified at 30 CFR 948.16(dddd).

CSR 38-2-16.2.c.3.B. Finally, in our February 9, 1999, decision we did not approve the word "or" at CSR 38-2-16.2.c.3.B. concerning rebuttal of the presumption. In addition, we required, at 30 CFR 948.16(eeee) that CSR 38-2-16.2.c.3.B. be amended to make it clear that the presumption of subsidence causation of damage can be rebutted only where the permittee demonstrates that the damage was proximately caused by some other factor or factors "and" was not proximately caused by subsidence. These two decisions are no longer valid because of our suspension of the Federal regulations at 30 CFR 817.121(c)(4) (i)-(iv). As we stated in the December 22, 1999, suspension notice, under section 505(b) of SMCRA,

a State may elect to retain its existing regulations despite the fact that OSM has suspended its counterparts. Therefore, we are correcting our previous decision on CSR 38-2-16.2.c.3.B. concerning rebuttal of the presumption, and are approving this provision. In addition, we are deleting the required amendment codified at 30 CFR 948.16(eeee).

Administrative Procedure Act

The Administrative Procedure Act provides exceptions to its notice and public comment procedures when an agency finds that there is good cause for dispensing with such procedures on the basis that they are impracticable, unnecessary, or contrary to the public interest. We have determined that, under 5 U.S.C. 553(b)(3)(B), good cause exists for dispensing with the notice and public comment procedures in this case. Good cause exists because this rule merely makes corrections that are indirectly mandated by the decision of the court in *National Mining Association v. Babbitt, supra*. Therefore, notice and opportunity for prior comment are unnecessary and we are issuing these corrections as a final rule.

In addition, under 5 U.S.C. 553(d)(3), we find good cause for dispensing with

the 30-day delay in the effective date of this final rule because we are merely making corrections indirectly mandated by the court in *National Mining Association v. Babbitt, supra*.

List of Subjects in 30 CFR Part 948

Intergovernmental relations, Surface mining, Underground mining.

Dated: February 1, 2000.

Allen D. Klein,

Regional Director, Appalachian Regional Coordinating Center.

For the reasons set out in the preamble, 30 CFR part 948 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 revising the entry with the "Date of Final Publication" of February 9, 1999, 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	February 9, 1999	W.Va. Code 22-3 Sections 3(u)(2)(1) (decision deferred), (2)(not approved), (3); 3(x), (y) (partial approval), (z) (partial approval); 13(b)(20), (22), (c)(3) (decision deferred); 15(h); 17(b); 18(c), (f); 28 (a-c) (not approved), (d), (e) (decision deferred), (f). WV Regulations CSR 38-2 Sections 2.4, 2.43 (not approved), 2.95 (not approved), 2.108, 2.120; 3.2.e; 3.12.a.1 (partial approval), .2 (partial approval); 3.14.b.7 & .8 deleted, .12.E, .15.B deleted, .13.B; 3.29.a (partial approval); 3.35; 5.5.c; 6.5.a; 8.2.e; 9.2.i.2; 9.3.h.1, .2; 14.11.e, f, .g, .h; 14.15.b.6.A, .c, .d; 16.2.c (partial approval), .2, .3, .4 (partial approval for .4); 20.1.e
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3. Section 948.16 is amended by removing and reserving paragraphs (yy), (cccc), (dddd), and (eeee), and by revising paragraph (bbbb) to read as follows:

§ 948.16 Required regulatory program amendments.

* * * * *
(yy) [Reserved]
* * * * *

(bbbb) By April 28, 2000, West Virginia must submit either a proposed amendment or a description of an amendment to be proposed, together with a timetable for adoption to revise 38-2-3.12.a.2., or otherwise amend the West Virginia program to require that the permit applicant pay for any technical assessment or engineering evaluation used to determine the premining quality and quantity of drinking, domestic or residential water

supplies, and to require that the applicant provide copies of any technical assessment or engineering evaluation to the property owner and to the regulatory authority.

(cccc) [Reserved]
(dddd) [Reserved]
(eeee) [Reserved]
* * * * *