

§ 931.16 [Amended]

3. Section 931.16 is amended by removing and reserving paragraphs m, n, and z.

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DEPARTMENT OF THE INTERIOR**Office of Surface Mining Reclamation and Enforcement****30 CFR Part 946**

[VA-118-FOR]

Virginia Regulatory Program

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

ACTION: Final rule; approval of amendment.

SUMMARY: OSM is approving an amendment to the Virginia permanent regulatory program (hereinafter referred to as the Virginia program) under the Surface Mining Control and Reclamation Act of 1977 (SMCRA). The amendment consists of changes to the Virginia Surface Mining Reclamation Regulations concerning subsidence control. The amendment is intended to revise the Virginia program to be consistent with the corresponding Federal regulations.

EFFECTIVE DATE: November 2, 2000.

FOR FURTHER INFORMATION CONTACT: Mr. Robert A. Penn, Director, Big Stone Gap Field Office, Office of Surface Mining Reclamation and Enforcement, 1941 Neeley Road, Suite 201, Compartment 116, Big Stone Gap, Virginia 24219, Telephone: (540) 523-4303.

SUPPLEMENTARY INFORMATION:

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

I. Background on the Virginia Program

On December 15, 1981, the Secretary of the Interior conditionally approved the Virginia program. You can find background information on the Virginia program, including the Secretary's findings, the disposition of comments, and the conditions of approval in the December 15, 1981, **Federal Register** (46 FR 61085-61115). You can find later actions on conditions of approval and program amendments at 30 CFR 946.11, 946.12, 946.13, 946.15, and 946.16.

II. Submission of the Amendment

By letter dated June 27, 2000 (Administrative Record Number VA-999) the Virginia Department of Mines, Minerals and Energy (DMME) submitted an amendment to the Virginia program. In its letter, the DMME stated that on December 22, 1999, OSM suspended and modified portions of 30 CFR 784.20 and 30 CFR 817.121 pursuant to an order of the United States Appeals Court for the District of Columbia. The DMME further stated that the corresponding sections of the Virginia Surface Mining Reclamation Regulations also contain the same language the court found inappropriate and which OSM consequently removed from the Federal rules. The DMME stated that it proposes to amend its rules to be consistent with and in the same manner that OSM modified the Federal regulations. We announced receipt of the proposed amendment in the July 14, 2000, **Federal Register** (65 FR 43723), invited public comment, and provided an opportunity for a public hearing on the adequacy of the proposed amendment. The comment period closed on August 14, 2000. No one requested to speak at a public hearing, so no hearing was held.

Procedural History of Suspended Federal Rules

The Energy Policy Act was enacted October 24, 1992, Pub. L. 102-486, 106 Stat. 2776 (1992) (hereinafter, The Energy Policy Act or EPAct). Section 2504 of that Act, 106 Stat. 2776, 3104, amends SMCRA, 30 U.S.C. 1201 *et seq.* Section 2504 of EPAct added a new section 720 to SMCRA. Section 720(a)(1) requires that all underground coal mining operations conducted after October 24, 1992, promptly repair or compensate for material damage to non-commercial buildings and occupied residential dwellings and related structures as a result of subsidence due to underground coal mining operations. Repair of damage includes rehabilitation, restoration, or replacement of the structures identified by section 720(a)(1), and compensation must be provided to the owners in the full amount of the diminution in value resulting from the subsidence. Section 720(a)(2) requires prompt replacement of certain identified water supplies which have been adversely affected by underground coal mining operations. Under section 720(b), the Secretary of the Interior was required to promulgate final regulations to implement the provisions of section 720(a).

On September 24, 1993 (58 FR 50174), OSM published a proposed rule to

amend the regulations applicable to underground coal mining and control of subsidence-caused damage to lands and structures through the adoption of a number of permitting requirements and performance standards. We adopted final regulations on March 31, 1995 (60 FR 16722).

The rules were challenged by the National Mining Association in the District Court for the District of Columbia and in the U.S. Court of Appeals for the District of Columbia Circuit. On April 27, 1999, the U.S. Court of Appeals issued a decision vacating certain portions of the regulatory provisions of the subsidence regulations. See *National Mining Association v. Babbitt*, 173 F.3d 906 (1999). We suspended those regulatory provisions that are inconsistent with the rationale provided in the U.S. Court of Appeals' decision. The following Federal provisions were suspended.

1. 30 CFR 817.121(c)(4)(i)-(iv)

This regulation provided that if damage to any non-commercial building or occupied residential dwelling or structures related thereto occurred as a result of earth movement within an area determined by projecting a specific angle of draw from the outer-most boundary of any underground mine workings to the surface of the land, a rebuttable presumption would exist that the permittee caused the damage. The presumption typically would have applied to a 30-degree angle of draw. Once the presumption was triggered, the burden of going forward shifted to the mine operator to offer evidence that the damage was attributable to another cause. The purpose of this regulatory provision was to set out a procedure under which damage occurring within a specific area would be subject to a 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.

The Court of Appeals vacated, in its entirety, this rule that established an angle of draw and that created a rebuttable presumption that damage to EPAct protected structures within an area defined by an "angle of draw" was in fact caused by the underground mining operation. 173 F.3d at 913.

In reviewing the regulation, the Court rejected the Secretary's contention that the angle of draw concept was reasonably based on technical and scientific assessments and that it logically connected the surface area that could be damaged from earth movement to the underground mining operation.

The angle of draw provided the basis for establishing the surface area within which the rebuttable presumption would apply. The Secretary had explained that the rebuttable presumption merely shifted the burden of document production to the operator in evaluating whether the damage was actually caused by the underground mining operation within the surface area defined by the angle of draw. The Court nevertheless held that the angle of draw was irrationally broad and that the scientific facts presented did not support the logical inference that damage to the surface area would be caused by earth movement from underground mining within the area.

Based on the conclusion that there was no scientific or technical basis provided for establishing a rational connection between the angle of draw and surface area damage, the Court further concluded that the rebuttable presumption failed. In reviewing the rebuttable presumption requirement, the Court held "an evidentiary presumption is 'only permissible if there is sound and rational connection between the proved and inferred facts, and when proof of one fact renders the existence of another fact so probable that it is sensible and timesaving to assume the truth of [the inferred] fact * * * until the adversary disproves it.';" That is to say, for the presumption to be permissible, the facts would have to demonstrate that the earth movement from the underground mining operation "more likely than not" caused the damage at the surface. See *National Mining Association*, 173 F.3d at 906–910. In compliance with the Court of Appeals' decision of April 27, 1999, we suspended 30 CFR 817.121(c)(4)(i) through (iv).

Paragraph (v) within this section applies generally to the types of information that must be considered in determining the cause of damage to an EAct protected structure and is not limited to or expanded by the area defined by the angle of draw. Therefore, paragraph (v) remains in force.

2. Section 784.20(a)(3)

This regulatory provision required, unless the applicant was denied access for such purposes by the owner, a survey which identified certain features. First, the survey had to identify the condition of all non-commercial buildings or occupied residential dwellings and related structures which were within the area encompassed by the applicable angle of draw and which might sustain material damage, or whose reasonably foreseeable use might be diminished, as a result of mine

subsidence. Second, the survey had to 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. In addition, the applicant was required to notify the owner in writing that denial of access would remove the rebuttable presumption that subsidence from the operation caused any postmining damage to protected structures that occurred within the surface area that corresponded to the angle of draw for the operation. (See discussion of angle of draw above). This regulatory provision was challenged insofar as it required a specific structural condition survey of all EAct protected structures. The Court of Appeals vacated the specific structural condition survey regulatory requirement in its decision on April 27, 1999. In reviewing the Secretary's requirement, the Court clearly upheld the Secretary's authority to require a pre-subsidence structural condition survey of all EAct protected structures. The Court accepted the Secretary's explanation that this specific structural condition survey was necessary, among other requirements, in order to determine whether a subsidence control plan would be required for the mining operation. However, because of the Court's ruling on the "angle of draw" regulation discussed above, it vacated the requirement for a specific structural condition survey because it was tied directly to the area defined by the "angle of draw."

In compliance with the Court of Appeals' decision, we suspended that portion of 30 CFR 784.20(a)(3) which required a specific structural condition survey of all EAct protected structures. The remainder of this section continues in force to the extent that it applies to the EAct protected water supplies survey and any technical assessments or engineering evaluations necessarily related thereto.

III. Director's Findings

Following, according to SMCRA and the Federal regulations at 30 CFR 732.15 and 732.17, are our findings concerning Virginia's amendment.

4 VAC 25–130–784.20. Subsidence Control Plan

Subsection 4 VAC 25–130–784.20(a)(3) is amended by adding the following language at the end of subdivision (3).

However, the requirements to perform a survey of the condition of all noncommercial buildings or occupied residential dwellings

and structures related thereto, that may be materially damaged or for which the reasonably foreseeable use may be diminished by subsidence, within the areas encompassed by the applicable angle of draw is suspended consistent with the Secretary's suspension of the corresponding federal rule.

As stated above, the Federal regulation at 30 CFR 784.20(a)(3), which required the performance of a survey of the condition of all noncommercial buildings or occupied residential dwellings and structures related thereto, that may be materially damaged or for which the reasonably foreseeable use may be diminished by subsidence, within the areas encompassed by the applicable angle of draw is suspended. In the proposed amendment, Virginia has suspended the State counterpart to the suspended Federal regulation. Since the language of 4 VAC 25–130–784.20(a)(3) and the added sentence suspending a portion of the regulation are substantively identical to the amended Federal regulation, we find these changes to the provisions at 4 VAC 25–130–784.20(a)(3) which required a specific structural condition survey of all EAct protected structures, are consistent with the suspension of the Federal regulation discussed above, and do not render the Virginia program regulations less effective than the Federal regulations. Therefore, we are approving this amendment.

4 VAC 25–130–817.121. Subsidence Control

Section 4 VAC 25–130–817.121(c)(4), is revised by deleting the title "Rebuttable presumption of causation by subsidence," and by deleting paragraphs (c)(4)(i) through (iv). New language is added which states that "Section (4)(i) through (iv) are suspended consistent with the Secretary's suspension of the corresponding Federal rule." The paragraph designation "(v)" is deleted.

As amended, section 4 VAC 25–130–817.121(c)(4) provides the following.

(4) Section [sic] (4)(i) through (iv) are suspended consistent with the Secretary's suspension of the corresponding federal rule.

Information to be considered in determination of causation. In determination whether damage to protected structures was caused by subsidence from underground mining, all relevant and reasonably available information will be considered by the division.

As discussed above, Federal regulations concerning the rebuttable presumption at 30 CFR 817.121(c)(4)(i) through (iv) have been suspended. Since the regulations at 4 VAC 25–130–817.121(c)(4)(i) through (iv) were previously approved by OSM as the

State counterparts to the suspended Federal regulations, we find that the suspension and deletion by Virginia to be consistent with the suspension of the Federal regulations and do not render the Virginia program regulations less effective than the Federal regulations. Therefore, we are approving the amendments.

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 Virginia program. The U.S. Department of Labor, Mine Safety and Health Administration (MSHA) responded and stated that there appears to be no conflict with the MSHA regulations or policy. The U.S. Fish and Wildlife Service (USFWS) responded and stated that it foresees no effects from the proposed amendment on the USFWS trust resources, including endangered and threatened species. The U.S. Department of Agriculture, Natural Resources Conservation Service (NRCS) responded and stated its concurrence with the amendments.

Environmental Protection Agency (EPA)

Pursuant to 30 CFR 732.17(h)(11)(ii), OSM is required to obtain the written concurrence of the EPA with respect to any provisions of the State 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.*).

None of the rule suspensions Virginia proposed pertain to air or water quality standards. Nevertheless, we requested EPA's comments on the proposed amendment.

The EPA responded by letter dated July 11, 2000 (Administrative Record Number VA-1002) and stated that it has no objections to the amendments since they are not contrary to the Clean Water Act or other statutes or regulations implemented by the EPA. The EPA also provided the following general comments. The EPA stated that Virginia's requirements for subsidence control plans and pre-subsidence surveys primarily relate to minimizing damage to surface structures and drinking water supplies, as required by SMCRA. The EPA recommended that, where there is a potential for subsidence problems associated with water loss in streams, that stream flow and aquatic life monitoring of streams in the path of any longwall mining operation also be

included in pre-subsidence surveys. The EPA also recommended that measures to minimize or prevent subsidence cracks in the stream beds be implemented to the extent feasible, including the avoidance of mining under the streams and the detecting and sealing of stream cracks after subsidence.

These comments are outside the scope of this amendment.

Public Comments

We solicited public comments on the amendment. One commenter responded and expressed support for the amendments and stated that OSM should approve them. In response, and for the reasons discussed above in the findings, we are approving the amendments.

V. Director's Decision

Based on the above findings, we approve the Virginia amendment as submitted by Virginia on June 27, 2000.

To implement this decision, we are amending the Federal regulations at 30 CFR Part 946 which codifies decisions concerning the Virginia program. We are making this final rule effective immediately to expedite the State program amendment process.

VI. Procedural Determinations

Executive Order 12866—Regulatory Planning and Review

This rule is exempted from review by the Office of Management and Budget under Executive Order 12866.

Executive Order 12630—Takings

This rule does not have takings implications. This determination is based on the analysis performed for the counterpart federal regulation.

Executive Order 13132—Federalism

This rule does not have federalism implications. SMCRA delineates the roles of the federal and state governments with regard to the regulation of surface coal mining and reclamation operations. One of the purposes of SMCRA is to "establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations." Section 503(a)(1) of SMCRA requires that state laws regulating surface coal mining and reclamation operations be "in accordance with" the requirements of SMCRA, and section 503(a)(7) requires that state programs contain rules and regulations "consistent with" regulations issued by the Secretary pursuant to SMCRA.

Executive Order 12988—Civil Justice Reform

The Department of the Interior has conducted the reviews required by section 3 of Executive Order 12988 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

Section 702(d) of SMCRA (30 U.S.C. 1292(d)) provides that a decision on a proposed state regulatory program provision does not constitute a major federal action within the meaning of section 102(2)(C) of the National Environmental Policy Act (NEPA) (42 U.S.C. 4332(2)(C)). A determination has been made that such decisions are categorically excluded from the NEPA process (516 DM 8.4.A).

Paperwork Reduction Act

This rule does not contain information collection requirements that require approval by the Office of Management and Budget 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 counterpart 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 counterpart federal regulation.

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. This rule:

- a. Does not have an annual effect on the economy of \$100 million.
 - b. Will not cause a major increase in costs or prices for consumers, individual industries, federal, state, or local government agencies, or geographic regions.
 - c. Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S. based enterprises to compete with foreign-based enterprises.
- This determination is based upon the fact that the state submittal which is the

subject of this rule is based upon counterpart federal regulations for which an analysis was prepared and a determination made that the federal regulation was not considered a major rule.

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 946

Intergovernmental relations, Surface mining, Underground mining.

Dated: October 19, 2000.

George C. Miller,
Acting 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 946—VIRGINIA

1. The authority citation for Part 946 continues to read as follows:

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

2. Section 946.15 is amended by adding a new entry to the table in chronological order by “Date of publication of final rule” to read as follows:

§ 946.15 Approval of Virginia regulatory program amendments.

* * * * *

Original amendment submission date	Date of publication of final rule	Citation/description
* June 27, 2000	* November 2, 2000	* 4 VAC 25–130–784.20(a)(3) amended and suspended in part; 817.121(c)(4)(i) through (iv) suspended and deleted.

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DEPARTMENT OF TRANSPORTATION

Coast Guard

33 CFR Part 165

[COTP SAVANNAH–00–098]

RIN 2115–AA97

Safety Zone Regulations: Savannah, GA

AGENCY: Coast Guard, DOT.
ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary safety zone starting at the Southern Natural Gas dock at Elba Island (N32.05.48, W080.59.48) and extending outward in a 100 yard radius into the Savannah River. This safety zone is necessary to protect boaters from the hazards associated with the compromised structural integrity of the Southern Natural Gas dock at Elba Island.

EFFECTIVE DATES: This regulation becomes effective at 8:50 p.m. on September 21, 2000 and will remain in effect until 11:30 p.m. on November 15, 2000.

FOR FURTHER INFORMATION CONTACT:
LTJG Peter Simonds, Coast Guard

Marine Safety Office Savannah, at (912) 652–4353.

SUPPLEMENTARY INFORMATION:

Regulatory Information

We did not publish a notice of proposed rulemaking (NPRM) for this regulation. Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing an NPRM. Publishing a NPRM would be contrary to the public interest since immediate action is needed to protect boaters from hazards associated with the compromised structural integrity of the Southern Natural Gas dock at Elba Island. The Coast Guard received notice of this compromised structural integrity of the facility on September 21, 2000 and the safety zone becomes effective on September 21, 2000.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**. Delaying its effective date would be contrary to the public interest since immediate action is needed to protect boaters from hazards associated with the compromised structural integrity of the Southern Natural Gas dock at Elba Island. The Coast Guard received notice of compromised structural integrity of the Southern Natural Gas dock at Elba Island on September 21, 2000 and the safety zone

becomes effective on September 21, 2000.

Background and Purpose

This regulation is necessary to protect boaters from the hazards associated with Compromised structural integrity of the Southern Natural Gas dock at Elba Island. All vessels are prohibited from anchoring or transiting restricted waters and channels unless specifically authorized by the Captain of the Port Savannah, GA. This regulation does not apply to authorized law enforcement or search and rescue vessels operating within the safety zone. The Captain of the Port Savannah, GA will issue a Marine Safety Information Broadcast Notice to Mariners (BNTM) to notify the marine community of the safety zone and the imposed restrictions.

Regulatory Evaluation

This rule is not a “significant regulatory action” under section 3(f) of Executive Order 12866 and does not require an assessment of potential costs and benefits under section 6(a)(3) of that order. The Office of Management and Budget has not reviewed it under that order. It is not “significant” under the regulatory policies and procedures of the Department of Transportation (DOT) (44 FR 11040, February 26, 1979). This rule will only be in effect in a limited area.