

intended to be removed. Not removing the section resulted in the next section being redesignated incorrectly. Section I.H. and the note following section I.H. were intended to be removed, but were not, and section I.H. was incorrectly designated as section I.F. This document corrects these errors by removing section I.H. and the note following section I.H., and redesignating section I.I. as section I.F.

### Correction of Publication

Accordingly, the publication on September 5, 2000, of the final rule (T.D. 00-57, 65 FR 53565) is corrected as follows:

1. On page 53578, in the third column, the fifth amending instruction is revised to read as follows:

#### Appendix C to Part 171 [Amended]

5. Appendix C to Part 171 is amended by removing the Note following section I.D., removing section I.E., redesignating section I.F. as section I.E., removing sections I.G. and I.H. and the NOTE following section I.H., and redesignating section I.I. as section I.F.

Dated: October 30, 2000.

**Stuart P. Seidel,**

*Assistant Commissioner, Office of Regulations and Rulings.*

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## DEPARTMENT OF THE INTERIOR

### Office of Surface Mining Reclamation and Enforcement

#### 30 CFR Part 931

[NM-040-FOR]

#### New Mexico Regulatory Program

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

**ACTION:** Final rule; approval of amendment.

**SUMMARY:** The Office of Surface Mining Reclamation and Enforcement (OSM) is approving a proposed amendment to the New Mexico regulatory program (hereinafter, the "New Mexico program") under the Surface Mining Control and Reclamation Act of 1977 (SMCRA). New Mexico proposed new rules and revisions to rules concerning a guidance document, Coal Mine Reclamation Program Vegetation Standards (including success standards, sampling techniques, and normal husbandry practices); definitions; time frames within the liability period for demonstrating success of revegetation;

and annual report requirements. New Mexico revised its program to be consistent with the corresponding Federal regulations and clarify ambiguities.

**EFFECTIVE DATE:** November 2, 2000.

**FOR FURTHER INFORMATION CONTACT:** Willis L. Gainer, Telephone: (505) 248-5096, Internet address: WGAINER@OSMRE.GOV.

#### SUPPLEMENTARY INFORMATION:

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

#### I. Background on the New Mexico Program

On December 31, 1980, the Secretary of the Interior conditionally approved the New Mexico program. You can find background information on the New Mexico program, including the Secretary's findings, the disposition of comments, and conditions of approval in the December 31, 1980, **Federal Register** (45 FR 86459). You can also find later actions concerning New Mexico's program and program amendments at 30 CFR 931.11, 931.15, 931.16, and 931.30.

#### II. Submission of the Proposed Amendment

By letter dated December 1, 1999 (administrative record No. NM-816), New Mexico sent to us an amendment to its program under SMCRA (30 U.S.C. 1201 *et seq.*). New Mexico submitted the proposed amendment at its own initiative and in response to the required program amendments at 30 CFR 931.16(m), (n), and (z).

We announced receipt of the proposed amendment in the December 22, 1999 **Federal Register** (64 FR 71700). In the same document, we opened the public comment period and provided an opportunity for a public hearing or meeting on the amendment's adequacy (administrative record No. 819). We did not hold a public hearing or meeting because no one requested one. The public comment period ended on January 21, 2000.

During our review of the amendment, we identified concerns and notified New Mexico of the concerns by letter dated February 17, 2000 (administrative record no. NM-825). New Mexico responded in two letters dated April 26, 2000, by submitting (1) rule revisions never before submitted (administrative record No. NM-828) and (2) additional revisions to the December 1, 1999,

amendment (administrative record No. NM-830).

Based upon New Mexico's revisions to and additional explanatory information for its amendment, we reopened the public comment period in the June 7, 2000, **Federal Register** (65 FR 36104; administrative record No. 834) and provided an opportunity for a public hearing or meeting on the adequacy of the revised amendment. We did not hold a public hearing or meeting because no one requested one. The public comment period ended on July 7, 2000.

#### III. Director's Findings

Following are the findings we made concerning the amendment under SMCRA and the Federal regulations at 30 CFR 732.15 and 732.17. We are approving the amendment.

##### 1. Revisions to New Mexico's Rules That Respond to Required Amendments

A. General Revegetation Requirements, Required Amendment at 30 CFR 931.16(m)(1)

OSM required at 30 CFR 931.16(m)(1) that New Mexico revise 19 NMAC 8.2 2065.A to require that revegetation success be based on the general revegetation requirements at 19 NMAC 8.2 2060 and 2061 (See finding No. 16(a), 58 FR 65907, 65918, December 17, 1993; administrative record no. NM-706).

New Mexico (1) proposed to revise 19 NMAC 8.2 2065.A to require that success of revegetation shall be measured by techniques identified in the Director's Coal Mine Reclamation Program Vegetation Standards, as approved by the Directors of the New Mexico Mining and Minerals Division (MMD) and OSM after consultation with appropriate State and Federal agencies, and (2) submitted for OSM's approval the Coal Mine Reclamation Program Vegetation Standards guidance document.

The introductory sentence in section I. D., Establishment and Monitoring of Revegetation Success Standards, in the Coal Mine Reclamation Program Vegetation Standards guidance document, requires that "[t]he success of revegetation on reclaimed lands is measured against either an unmined reference area or technical (numeric) standards, and the general revegetation requirements of 19 NMAC 8.2, Subpart 2060." Because proposed 19 NMAC 8.2 2065.A states that revegetation success shall be measured in accordance with the Coal Mine Reclamation Program Vegetation Standards, the requirement to determine success based in part on

the general revegetation requirements of 19 NMAC 8.2 2060 (concerning establishment of a vegetative cover that is diverse, effective, and permanent) is incorporated by reference into 19 NMAC 8.2 2065.A. Therefore, the Director finds that New Mexico's proposed rule at 19 NMAC 8.2 2065.A has satisfied the requirement that the success of reclamation be judged upon New Mexico's counterpart, 19 NMAC 8.2 2060, to the Federal regulation at 30 CFR 816.111(a)(1).

The Federal regulations at 30 CFR 816.111(a)(2) and New Mexico's rules at 19 NMAC 8.2 2061 require that the permittee establish a vegetative cover that is comprised of native species or of introduced species approved by the regulatory authority. New Mexico's proposed Coal Mine Reclamation Program Vegetation Standards guidance document includes the list of introduced species that may be approved in a permit application package. Therefore, the Director finds that by revision of 19 NMAC 8.2 2065 to include the guidance document in its approved program, New Mexico has satisfied the requirement that the success of reclamation be judged upon New Mexico's counterpart, 19 NMAC 8.2 2061, to the Federal regulation at 30 CFR 816.111(a)(2).

Please note that New Mexico's proposed 19 NMAC 8.2 2065.A requires that the Directors of New Mexico MMD and OSM consult with appropriate State and Federal agencies prior to approval of techniques for measuring success; such a requirement for consultation has no counterpart in the Federal program. New Mexico's requirement for consultation with appropriate agencies prior to approval of measuring techniques is not inconsistent with the Federal regulations; however, the Director makes this finding with the interpretation that the consultation requirement applies only to New Mexico and not to OSM.

Based on the discussion above, the Director finds that New Mexico's proposed revision of 19 NMAC 8.2 2065.A and the Coal Mine Reclamation Program Vegetation Standards guidance document are no less effective than the counterpart Federal regulations at 30 CFR 816.111 and satisfy the required amendment at 30 CFR 931.16(m)(1). Therefore, the Director removes the required amendment at 30 CFR 931.16(m)(1).

#### B. Technical Guidance Procedure Publications, Required Amendment at 30 CFR 931.16(m)(2)

OSM required at 30 CFR 931.16(m)(2) that New Mexico revise 19 NMAC 8.2

2065.A to specifically identify the technical guidance procedures published by USDA that may be used as the basis for technical success standards demonstrating revegetation success (See finding No. 16(a), 58 FR 65907, 65918, December 17, 1993; administrative record no. NM-706.

New Mexico proposed to revise 19 NMAC 8.2 2065.A to delete the allowance for the use of technical guidance procedures published by USDA or other techniques approved by MMD. With the deletion of unspecified technical guidance procedures, New Mexico has resolved the need for any further action.

The Director finds that New Mexico's proposed revision of 19 NMAC 8.2 2065.A is no less effective than the counterpart Federal regulations at 30 CFR 816.116(a)(1) and 817.116(a)(1) and satisfies the required amendment at 30 CFR 931.16(m)(2). Therefore, the Director removes the required amendment at 30 CFR 931.16(m)(2).

#### C. Standards, Measuring Techniques, and Statistical Analyses for Demonstrating Revegetation Success, Required Amendment at 30 CFR 931.16(m)(3) and (n)

OSM required at 30 CFR 931.16(m)(3) that New Mexico propose revisions to 19 NMAC 8.2 2065.A to require that all standards for success and measuring techniques be approved by the Director of OSM for inclusion in New Mexico's approved regulatory program (See finding No. 16(a), 58 FR 65907, 65918, December 17, 1993, administrative record No. NM-706). OSM required at 30 CFR 931.16(n) that New Mexico revise 19 NMAC 2065.B(1) to require that all revegetation success standards and measuring techniques be approved by the Director of OSM as well as the Director of MMD (See finding No. 16(b), 58 FR 65907, 65919, December 17, 1993; administrative record No. NM-706).

New Mexico (1) proposed to revise (a) 19 NMAC 8.2 2065.A to require that the measuring techniques identified in the Coal Mine Reclamation Program Vegetation Standards be approved by Directors of both MMD and OSM, and (b) 19 NMAC 8.2 2065.B(1) to require approval of the Coal Mine Reclamation Program Vegetation Standards by both MMD and OSM, and (2) submitted for OSM's approval the Coal Mine Reclamation Program Vegetation Standards guidance document. In the second paragraph of this document, New Mexico states that "[t]he use of procedures or practices that are not included in these standards, however, requires prior approval of the Directors of both the MMD and OSM."

Based on the proposed revisions described above and the discussion below concerning revegetation success standards and measuring techniques, the Director finds that New Mexico's proposed revision of 19 NMAC 8.2 2065.A and 2065.B(1) and the Coal Mine Reclamation Program Vegetation Standards guidance document are no less effective than the counterpart Federal regulations at 30 CFR 816.116(a)(1) and (2) and 817.116(a)(1) and (2) and satisfy the required amendments at 30 CFR 931.16(m)(3) and (n). Therefore, the Director removes the required amendments at 30 CFR 931.16(m)(3) and (n).

i. *Revegetation Success Standards*. Section I.D. ("Establishing and Monitoring Revegetation Success Standards") in the New Mexico's Coal Mine Reclamation Program Vegetation Standards guidance document sets forth revegetation success standards on reclaimed lands, which may be measured against either an unmined reference area or technical (numeric) standards, and the general revegetation requirements of 19 NMAC 8.2, Subpart 2060.

New Mexico encourages applicants to develop and use technical standards when suitable reference areas are not available and baseline data or historical records are incomplete. For the development of technical standards, New Mexico requires data collected from undisturbed vegetation types remaining on the mine or adjacent to the mine area in combination with additional documentation from data collection from vegetation types similar to those of premine or predisturbance conditions (which should take the form of peer-reviewed scientific, government, or extension publications that describe the condition, production, and potential of natural vegetation communities resembling premine vegetation).

New Mexico requires that reference areas must include each native vegetation type that comprises greater than 15% of the undisturbed premine area, and that reference areas or technical standards for reclaimed croplands and pasture lands must be established regardless of size.

To provide a reasonable measure of revegetation success, New Mexico requires that reference areas must include enough variation in slope, slope position, aspect and edaphic conditions to adequately represent the undisturbed condition of the premine vegetation types. New Mexico also encourages the establishment of extended reference areas whenever mining operations will disturb more than one or two native plant communities. An extended

reference area must include each of the major premine vegetation types, and should constitute a logical grazing unit.

The Director finds that the revegetation success standards set forth in Section I.D. of New Mexico's Coal Mine reclamation Program Vegetation Standards guidance document are consistent with and no less effective and the Federal regulations at 30 CFR 816.116(a)(1) and (2) and 817.116(a)(1) and (2).

ii. *Measuring Techniques for Demonstrating Success of Revegetation.* Section II.B. ("Measurement of Cover, Production, Density and Diversity") in New Mexico's Coal Mine Reclamation Program Vegetation Standards guidance document sets forth methods and procedures for measuring or sampling vegetation on reclaimed land. New Mexico provides for the use of (1) ocular estimation techniques and intercept techniques (e.g., line interception and point interception) to measure cover; (2) clipping of herbaceous production, regression models that predict the annual production of individual shrub species, and enclosures to measure productivity; (3) plotless and nearest neighbor methods, quadrat and belt transect methods, and exact counts to measure tree and shrub density; and (4) alpha (a) or species diversity, beta (b) or inter-community diversity, and gamma (g) or landscape diversity to measure diversity.

With the exception of the use of ocular estimation to measure cover, all of New Mexico's proposed measurement procedures are typical methods used for evaluating plant cover, production, density and diversity and have been previously approved by OSM in other State programs.

OSM's previously identified concerns with use of the ocular technique are repeatability and observer bias. However, in Chapter 8, *Measuring and Monitoring Plant Populations* (C. Elzinga, D. Salzer and J. Willoughby, BLM Technique Reference 1730-1, 1998), the authors note problems with all cover estimation techniques. None is problem or bias free. The BLM authors also include a discussion comparing ocular plot and point intercept (the most commonly used cover estimating technique) methods. The authors indicate that Dethier et al. (1993) created simulated plots containing a known cover of 13 species and compared cover measured by point intercept to cover visually estimated to the nearest percent in the plot. Cover estimations done with the aid of subdividing the 50x50 centimeter plots into 4x5 centimeter rectangles were close between observers, and closer to

the true value of cover than measured points. In the field, point intercept failed to detect 19% of the species that were detected by cover estimation. Differences between observers were less for cover estimations than for point measurements. This discussion indicates that cover estimation using ocular methods can be as reliable as point intercept and is more likely to detect a greater diversity of plant species present on the reclaimed area.

New Mexico's guidance document also reflects the concerns with repeatability and observer bias. New Mexico indicates that variability may be reduced by using smaller quadrats for evenly dispersed vegetation (rhizomatous grasses) and larger quadrats for clumped vegetation such as forbs, shrubs, and bunch grasses. Further, New Mexico requires the use of the following techniques to improve the reliability of ocular estimates:

- Frames should be painted to indicate various areal percentages or marked with grids that delineate known percentages.

- The number of observers should be limited, and each observer should be similarly trained (e.g., by making joint estimates using cardboard shapes of known cover values).

- Sampling error can be reduced by ensuring that vertical projections of ground covered by vegetation, litter or rock contained or rooted within a circular plot or quadrat are carefully estimated and recorded to the nearest percent.

- The use of cover classes as the sole means of establishing or measuring a cover standard will not be accepted.

Based on the above discussion, the Director finds that the methods and procedures for measuring or sampling vegetation on reclaimed land set forth in Section II of New Mexico's Coal Mine Reclamation Program Vegetation Standards guidance document, including the use of ocular estimation for evaluating plant cover, are consistent with and no less effective than the Federal regulations at 30 CFR 816.116(a)(1) and (2) and 817.116(a)(1) and (2).

iii. *Statistical Analyses for Demonstrating Revegetation Success with 90 Percent Statistical Confidence.* Section III ("Statistical Analyses of Vegetation Data") and Appendix C ("Statistical Formulas, Examples and Tables") in New Mexico's Coal Mine Reclamation Program Vegetation Standards guidance document sets forth the acceptable methods of statistical analyses for demonstrating revegetation success with 90 percent statistical confidence. In addition to the

traditional approaches for statistically demonstrating revegetation success when evaluating cover, production or stocking density, New Mexico proposes to allow the use of the reverse null hypothesis. For this text, New Mexico has defined the null hypothesis to be that the parameter mean of the revegetated area is less than 90 percent of the parameter mean of the reference area (or technical standard). The alternative hypothesis is that the parameter mean of the revegetated area is greater than or equal to 90 percent of the parameter mean of the reference area (or technical standard). In all cases, a 90 percent confidence interval and a one-sided test with an alpha error of 0.1 is used. The reverse null hypothesis assumes that mining has affected the land and it must be demonstrated that the performance standards required by the regulations have been achieved. In support to its proposed reverse null hypothesis, New Mexico references M. Ames' 1993 publication "Sequential Sampling of Surface-mined Land to Assess Reclamation," in the *Journal of Range Management* (46:498-500); W. P. Erikson's 1992 publication "Hypothesis Testing Under the Assumption That a Treatment Does Harm to the Environment," M.S. thesis, University of Wyoming, and Erikson and McDonald's 1995 publication "Tests for Bioequivalence of Control Media and Test Media in Studies of Toxicity," in *Environmental Toxicology and Chemistry* (14:1247-1256).

This reverse null hypothesis is the opposite of the null hypothesis for the Federal regulations. In the September 2, 1983 **Federal Register** (48 FR 40140, 40152), OSM states that the null hypothesis usually states that there is no difference between the true value of the population parameter and that which is hypothesized. The null hypothesis is a proposition that is considered valid unless evidence throws doubt on it. This means that the mine operator has achieved the required degree of revegetation success unless evidence as provided by the sample data indicates that the standard has not been attained.

The use of the reverse null hypothesis is a more stringent statistical standard to meet than the classical null hypothesis. A mine operator must, in effect, demonstrate that the lower limit of the 90 percent confidence interval for the reclaimed area parameter is greater than (1) the upper limit of the 90 percent confidence interval for 90 percent of the reference area standard or (2) 90 percent of the technical standard. Under the classical null hypothesis an operator must only demonstrate that either the two confidence intervals for the

reclaimed parameter and the reference area parameter overlap or the confidence interval for the reclaimed parameter and 90 percent of the technical standard overlap.

An advantage in using the reverse null hypothesis is that sample size is no longer an issue. Small sample sizes are usually associated with large variances and, therefore, large confidence intervals. With the reverse null hypothesis the goal of sampling is to reduce the variance and size of the confidence interval around the sample mean. It is to the operator's benefit to take a sample of sufficiently large size to minimize variance, reduce the width of the confidence interval and ensure that the null hypothesis can be rejected. For this reason, New Mexico does not specify the use of a sample adequacy formula for demonstrating revegetation success. However, New Mexico does recommend a minimum sample size of 30.

The Director finds that Sections III.A and B ("Statistical Analysis of Vegetation Data") and Appendix C ("Statistical Formulas, Examples and Tables") in New Mexico's Coal Mine Reclamation Program Vegetation Standards guidance document are consistent with and no less effective than the Federal regulations at 30 CFR 816.116(a)(1) and (2) and 817.116(a)(1) and (2).

#### D. Normal Husbandry Practices, Required Amendment at 30 CFR 931.16(z)

OSM required at 30 CFR 931.16(z) that New Mexico revise its rules to either identify selected husbandry practices and submit them with documentation verifying that the proposed practices would be considered normal in the areas being mined, or state that selected husbandry practices approved by the Director may not be implemented prior to approval by OSM in accordance with the State program amendment process at 30 CFR 772.17 (See finding No. 18, 61 FR 26825, 26831, May 29, 1996; administrative record No. NM-786).

New Mexico proposed to revise 19 NMAC 8.2 2065.B(1) to require that the period of extended responsibility under the performance bond requirements of Subparts 14 and 15 begins after the last year of augmented seeding, fertilizing, irrigation, or other work, excluding husbandry practices that are approved by the Director in accordance with paragraph 2065.B(6), and submitted, for OSM's approval, the Coal Mine Reclamation Program Vegetation Standards guidance document.

New Mexico identified proposed normal husbandry practices in Sections IV.A and IV.B of the Coal Mine Reclamation Program Vegetation Standards guidance document and provided the documentation showing that the practices would be considered normal in the areas being mined. In addition, New Mexico requires that applicants must ensure that the current permit contains a management plan that discusses the use of approved husbandry practices before they are implemented. The plan should describe the purpose of the practices, the methods to be used, and the schedule for implementation. Upon approval of the plan by New Mexico, the applicant may implement the husbandry practice.

New Mexico's Coal Mine Reclamation Program Vegetation Standards guidance document discusses the use of the following normal husbandry practices (see finding No. 2.A below for a discussion of one additional normal husbandry practice concerning interseeding and planting of tree and shrub seedlings):

(1) Additional mulching (applicable to the grazing land, fish and wildlife habitat, forestry, and recreation postmining land uses, must be completed at least six (6) years prior to Phase III bond release, no reclaimed acreage limit applies);

(2) Use of fire or controlled burning (applicable to all postmining land uses at any time during the liability period, no reclaimed acreage limit applies);

(3) Mechanical practices or selective cutting, mowing and raking to control weeds, to reduce standing dead vegetation or litter, increase decomposition of organic matter, and to stimulate vegetative regrowth (applicable to all postmining land uses, at any time during the liability period, no reclaimed acreage limit applies);

(4) Pest control, including weeds, vertebrate and invertebrate animals, fungi, and diseases (applicable to all postmining land uses and at any time during the liability period, no reclaimed acreage limit applies);

(5) Grazing (applicable to the grazing land, pasture land, fish and wildlife habitat, cropland, and forestry postmining land uses. Grazing may be conducted at any time during the liability period after the revegetation has become sufficiently established to withstand grazing, as determined in consultation with New Mexico, no reclaimed acreage limit applies);

(6) Erosion and subsidence repair or hand work with shovels and similar tools, mechanical manipulation of small areas, the installation of erosion-control matting, silt fence, and hay or straw bales, and hand seeding and raking (applicable to all postmining land uses at any time during the liability period, no more than 10 percent of the reclaimed acreage may be repaired as a normal husbandry practice, if erosion and subsidence repairs are required on more than 10 percent of the reclaimed acreage, the liability period will be reinitiated);

(7) Ancillary disturbance and reclamation or installation, removal, and reclamation of 2-track access roads, firebreaks, fences, pipelines, power lines, surface water and groundwater monitoring sites, erosion and subsidence monitoring sites, and small, undesignated sediment control measures, such as traps, riprap, rock or straw bale check dams, and silt fences (applicable to all postmining land uses at any time during the liability period, ancillary disturbance and reclamation of more than 10 percent of the reclaimed acreage will reinitiate the liability period);

(8) Developed water resources maintenance or normal maintenance (cleaning, repair, upgrading, stabilizing with rock, and interseeding or replanting of vegetation) of developed water resources and, if applicable, their shorelines, and structures associated with developed water sources (applicable only to the developed water resources land use; cleaning, repair, and upgrading may be conducted at any time during the liability period, with no reclaimed acreage limits; stabilization, interseeding, and replanting must be completed at least six years prior to Phase III bond release, on no more than 10 percent of the reclaimed acreage); and

(9) Agricultural and landscaping activities or annual or periodic seeding, fertilizing, irrigating, or other normal agricultural or landscaping activity (applicable to cropland or in conjunction with special use pasture, commercial forest land, residential, industrial/commercial or recreation postmining land uses at any time during the liability period; not applicable to grazing land or fish and wildlife habitat at any time during the liability period; no reclaimed acreage limits are applicable).

OSM considers, on a practice-by-practice basis, the administrative record supporting each normal husbandry practice proposed by a regulatory authority (53 FR 34641, September 7, 1988). OSM also has provided specific guidance concerning the repair of rills and gullies by stating that a regulatory authority could allow the repair of rills and gullies as a husbandry practice that would not restart the liability period if the general standards of 30 CFR 816.116(c)(4) are met and after consideration of the normal conservation practices within the region (48 FR 40157, September 2, 1983).

For each proposed normal husbandry practice, New Mexico referenced in the Coal Mine Reclamation Program Vegetation Standards guidance document the National Resources Conservation Service's (NRCS) Standard Conservation Practices supplements which support the use of these practices as normal husbandry in the New Mexico coal field regions. New Mexico thus has demonstrated that the proposed normal husbandry practices listed above are normal husbandry practices within there region for unmined lands having land uses similar to the approved

postmining land use of the disturbed area. In addition, New Mexico set appropriate limits on aerial extent and time frames for implementation for each proposed practice. If a permittee exceeded these limits, the permittee would have to extend the period of liability for demonstrating success of revegetation.

The Director finds that New Mexico's proposed normal husbandry practices identified above, as discussed in the Coal Mine Reclamation Program Vegetation Standards guidance document, are consistent with and no less effective than the Federal regulations at 30 CFR 816.116(c)(1) and (4) in meeting the requirements of SMCRA. The Director approves the normal husbandry practices identified above and removes the required amendment at 30 CFR 931.16(z).

## 2. Revisions to New Mexico's Rules That Are Not the Same as the Corresponding Provisions of the Federal Regulations

### A. Definition of "Augmented Seeding and "Interseeding" and Interseeding and Transplanting of Trees and Shrubs Allowed as a Normal Husbandry Practice

New Mexico proposed to revise the definition of "Augmented Seeding" at 19 NMAC 8.2 107.A(20) to mean seeding in excess of the normal husbandry practices approved in the Coal Mine Reclamation Program Vegetation Standards guidance document, or reseeded with fertilization or irrigation, or reseeding in response to unsuccessful revegetation in terms of adequate germination or establishment or permanence.

New Mexico proposed a new definition of "Interseeding" at 19 NMAC 8.2 107.I(8) to mean a secondary seeding practice into established vegetation cover in order to take advantage of climatic conditions that favor species requiring special conditions for germination and establishment, or to improve or alter the composition between forage and shrubs, or between warm and cool season grasses.

New Mexico proposed in Section IV.B of the Coal Mine Reclamation Program Vegetation Standards guidance document (1) interseeding and (2) planting of tree and shrub seedlings as normal husbandry practices applicable to the postmining land uses of grazing land, fish and wildlife habitat, forestry, and recreation.

Specifically, New Mexico proposes to allow as normal husbandry, practices:

(1) Interseeding of individual native species and approved introduced species

contained in the original seed mix up to (that is, before) the period six years prior to bond release to be counted in determinations of revegetation success and suitability for the post-mining land use;

(2) Interseeding and planting of native herbaceous, shrub, and tree species not contained in the original seed mix to be allowed any time prior to six (6) years before bond release (Note: New Mexico will allow all approved interseeding and planting to be counted towards the revegetation success and demonstration of suitability for the post-mining land use; and New Mexico will not allow as a normal husbandry practice interseeding of introduced and non-native species other than those listed in a Appendix B in the guidance document); and

(3) Transplanting of native tree and shrub stock and the planting of containerized or bare-root tree and shrub stock on reclamation units (this will promote and enhance establishment of wildlife habitats, increase diversity, and improve age-class structure in monotypic stands of trees or shrubs); if the trees and shrubs are planted 6 years prior to bond release they will be counted toward the shrub density standard in accordance with 19 NMAC 8.2 2066.A (Note: New Mexico will allow all transplants moved from pre-existing native stands of trees and shrubs to be applied at any time towards revegetation success and demonstration of suitability for the post-mining land use).

The Federal regulations at 30 CFR 816.116(c)(1) required that the period of extended responsibility for successful revegetation shall begin after the last year of augmented seeding, fertilizing, irrigation, or other work, excluding husbandry practices that are approved by the regulatory authority in accordance with 30 CFR 816.116(c)(4). The Federal regulations at 30 CFR 816.116(c)(4) require that a State may approve selective husbandry practices, excluding augmented seeding, fertilization, or irrigation, provided it obtains prior approval from OSM that the practices are normal husbandry practices without extending the period of responsibility for revegetation success and bond liability, if such practices can be expected to continue as part of the post-mining land use or if discontinuance of the practices after the liability period expires will not reduce the probability of permanent vegetation success. Approved practices shall be normal husbandry practices with in the region for unmined land having land uses similar to the approved postmining land use of the disturbed area, including such practices as disease, pest, and vermin control, and any pruning, reseeding, and transplanting specifically necessitated by such actions.

i. *Definitions of "Augmented Seeding" and "Interseeding" and use of interseeding as a normal husbandry practice.* In 1983, OSM considered and rejected the idea of allowing

interseeding and supplemental fertilization during the first 5 years of the 10 year responsibility period. While allowing replanting of trees and shrubs "to utilize the best technology available" without extending the responsibility period, OSM determined that augmented seeding, fertilizing or irrigation is not allowed during the responsibility period. (See 48 FR 40156, September 2, 1983.)

However, in 1988, (53 FR 34641, September 7, 1988) OSM stated, in the context of the Federal regulation at 30 CFR 816.116(c)(4), that

seeding, fertilization, or irrigation performed at levels that do not exceed those normally applied in maintaining comparable unmined land in the surrounding area would not be considered prohibited augmentative activities.

Further, in the response to comments received concerning an Ohio program amendment, OSM stated that

[t]he legislative history of the Act [SMCRA] reveals no specific Congressional intent in the use of the term augmented seeding. Accordingly, OSM's interpretation of augmented seeding is given deference so long as it has a rational basis (see 63 FR 51832, September 29, 1998).

New Mexico's proposed definitions for "augmented seeding" and "interseeding" distinguish the differences between them. Interseeding is clearly aimed at establishing species that require special conditions for germination and the establishment or altering of species composition. New Mexico's discussion of interseeding as a normal husbandry practice in the Coal Mine Reclamation Program Vegetation Standards guidance document further clarifies that interseeding is done to enhance the revegetation, rather than to augment the revegetation. New Mexico reiterates that interseeding is defined as a secondary seeding into established revegetation in order to improve composition, diversity or seasonality. In contrast, augmented seeding is reseeding with fertilization or irrigation, or in response to unsuccessful revegetation in terms of adequate germination or establishment or permanence. Thus, New Mexico's goal for interseeding is not to ensure that the reclaimed area will meet the success standards, but to go beyond the minimum standards of the regulations and improve the overall composition, diversity or seasonality of the reclaimed area.

New Mexico also proposes appropriate time frames limiting the application of interseeding as a normal husbandry practice without restarting the bond liability period and requires

the all interseeding consist of only native species and approved introduced species contained in the original seed mix.

To support interseeding as a normal husbandry practice, New Mexico submitted *New Mexico Rangeland* (Circular 525, Cooperative Extension Service, New Mexico State University, 1988, as well as the NRCS's Standard Conservation Practices Code No. 550 for New Mexico. The extension publication indicates that the goals of rangeland seeding, including interseeding, are restoring production potential, changing composition of the vegetation, achieving a higher quality forage resource, getting a better seasonal balance of forage supply, and improving wildlife habitat. Both referenced publications support the use of interseeding as a normal husbandry practice.

OSM previously approved Indiana's definition of "augmented seeding, fertilization, or irrigation" as seeding, fertilizing, or irrigation in excess of normal agronomic practices within the region. OSM's approval was based on the concept that the proposed definition made a distinction between normal conservation practices that were not augmented seeding, fertilizing, irrigation or other work, and augmented husbandry practices (60 FR 53512, October 16, 1995).

Based on New Mexico's proposed definitions of "augmented seeding" and "interseeding," the guidance provided for use of interseeding as a normal husbandry practice in New Mexico's Coal Mine Reclamation Program Vegetation Standards guidance document, and documentation supporting interseeding as a normal husbandry practice in New Mexico, the Director finds that New Mexico has demonstrated that the proposed use of interseeding is not an augmented seeding. Because the use of interseeding is not an augmented seeding. Because the use of interseeding as proposed by New Mexico clearly supports a key goal of SMCRA, the establishment of a permanent, a key goal of SMCRA, the establishment of a permanent, diverse, and effective vegetative cover without compromising compliance of the State program with the Act, the Director also finds that New Mexico's proposed definitions of "augmented seeding" and "interseeding," as proposed at 19 NMAC 8.2 107.A(20) and 107.I(8), and use of interseeding, as described in the Coal Mine Reclamation Program Vegetation Standards guidance document, are consistent with and no less effective than the Federal regulations at 30 CFR 816.116(c)(1) and (4) in meeting the requirements of

SMCRA. The Director approves New Mexico's proposed definitions of "augmented seeding" and "interseeding," proposed at 19 NMAC 8.2 107.A(20) and 107.I(8), and the use of interseeding as a normal husbandry practice, proposed in New Mexico's Coal Mine Reclamation Program Vegetation Standards guidance document.

ii. *Transplanting of trees and shrubs as a normal husbandry practice.* The Federal regulations at 30 CFR 816.116(b)(3)(ii) require that trees and shrubs that will be used in determining the success of stocking and the adequacy of the plant arrangement shall have utility for the approved postmining land use. Trees and shrubs counted in determining such success shall be healthy and have been in place for not less than two growing seasons. At the time of bond release, at least 80 percent of the trees and shrubs used to determine such success shall have been in place for 60 percent of the applicable minimum period of responsibility. In the preamble to this regulation, OSM indicates that the rule represents a reasonable compromise that allows some replanting if approved as normal husbandry practice (53 FR 34638, September 7, 1988).

In support of its proposal to allow the transplanting of trees and shrubs as a normal husbandry practice, New Mexico provided a copy of the NRCS's Standard Conservation Practice Code No. 612, which discusses tree and shrub establishment.

The NRCS publication clearly specifies the need for replanting when survival is inadequate. New Mexico further restricts the transplanting of trees and shrubs to six years prior to bond release. This is equivalent to 60 percent of the applicable minimum period of responsibility, which is 10 years in New Mexico. New Mexico has demonstrated that the transplanting of trees and shrubs is a normal husbandry practice in New Mexico.

The Director finds that the proposed transplanting of trees and shrubs as a normal husbandry practice is consistent with and no less effective than the Federal regulations at 30 CFR 816.116(b)(3)(ii) and (c)(4) and approves it.

#### B. Time-frames To Demonstrate Success of Revegetation for Bond Release

New Mexico proposed to revise:

(1) 19 NMAC 8.2 2064, concerning grazing, to require that when the approved postmining land use is range or pasture land, the operator shall demonstrate to the Director, that the reclaimed land has the capability of

supporting livestock grazing at rates approximately equal to that for similar non-mined lands for at least two of the last four full years of liability required under paragraph 2065.B of these regulations;

(2) 19 NMAC 8.2 2065.B(2) to require that in areas of more than 26.0 inches average annual precipitation, the period of liability under the performance bond requirements of Subpart 14 shall continue for not less than five full years. Ground cover and productivity shall equal or exceed the approved standard for two of the last four years of the responsibility period;

(3) 19 NMAC 8.2 2065.B(3) to require that in areas of less than or equal to 26.0 inches average annual precipitation, the period of liability under the performance bond requirements of Subpart 14 shall continue for not less than 10 full years. Ground cover and productivity shall equal the approved standard for at least two of the last four years, starting no sooner than year eight of the responsibility period; and

(4) 19 NMAC 8.2 2065.B(5)(iii) to require, "[f]or areas to be used for cropland, success in revegetation of cropland shall be determined on the basis of crop production from the mined area as compared to approved reference areas or other technical guidance procedures. Crop production from the mined area shall be equal to or greater than that of the approved standard for two of the last four growing seasons of the 5 or 10 year liability period established in paragraph 2065.B(1), (2) and (3), starting no sooner than year eight of the 10 year period. The applicable 5 or 10 year period of responsibility for revegetation shall commence at the date of initial planting of the crop being grown."

The Federal regulations at 30 CFR 815.116(c)(2)(i) and (ii) require

in areas of more than 26.0 inches of annual average precipitation, that the period of responsibility shall continue for a period of not less than: (i) Five full years, except as provided in paragraph (c)(2)(ii). The vegetation parameters identified in paragraph (b) for grazing land, pasture land, or cropland shall equal or exceed the approved success standard during the growing season of any 2 years of the responsibility period, except the first year. Areas approved for the other uses identified in paragraph (b) shall equal or exceed the applicable success standard during the growing season of the last year of the responsibility period. (ii) Two full years for lands eligible for remining included in permits issued before September 30, 2004, or any renewals thereof. To the extent that the success standards are established by paragraph (b)(5), the lands shall equal or exceed the standards during the growing season of the last year of the responsibility period.



The Federal regulations at 30 CFR 816.116(c)(3) require

in areas of 26.0 inches or less average annual precipitation, the period of responsibility shall continue for a period of not less than: (i) Ten full years, except as provided in paragraph (c)(3)(ii). Vegetation parameters identified in paragraph (b) shall equal or exceed the approved success standard for at least the last two consecutive years of the responsibility period. (ii) Five full years for lands eligible for re-mining included in permits issued before September 30, 2004, or any renewals thereof. To the extent that the success standards are established by paragraph (b)(5), the lands shall equal or exceed the standards during the growing seasons of the last two consecutive years of the responsibility period.

In support of the time frames proposed in 19 NMAC 8.2 2064, 2065.B(2) and (3), and 2065.B(5)(iii), New Mexico stated in the April 26, 2000, cover letter submitting the proposed rules:

Revegetation comparisons conducted during two of the last four years of liability, starting no sooner than year eight, would be no less effective than the federal rules. Revegetation success demonstrations during any two of the last four years of the liability period is currently the [F]ederal requirement in areas averaging more than 26 inches of annual precipitation. Thus, a precedent has been set in areas that are less subject to climatic variation than New Mexico. Revegetation that is capable of meeting the performance standards both before and after a period of drought or pestilence would provide a better demonstration of resilience, effectiveness, and permanence than revegetation that could meet the standards during two consecutive (and fortuitous) years of more or less normal precipitation and damage. The likelihood of drought in New Mexico needs to be recognized. The proposed rule changes ensure that performance standards will be met without undue costs or extensions of the ten-year liability period.

New Mexico also provided an analysis which compares the inherent variability of precipitation in Henderson, KY (an area with more than 26 inches of precipitation) to several locations in the mining regions of New Mexico (administrative record No. NM-837). The analysis clearly shows that precipitation is far more variable in New Mexico (note: the coefficient of variation represents a relative measure of the variability of the data and is useful for comparisons between locations): Typical Midwest Station—Henderson, KY Precipitation Record, 1978–1998  
*Annual Precipitation Range:* 30.94 to 63.27 inches  
*Mean:* 45.64  
*Standard Deviation:* 8.89  
*Coefficient of Variation:* 0.19  
 (CV=standard deviation/mean)

New Mexico Stations, Proceeding from Wettest to Driest Coal Mine Sites

Vermejo Park, NM Precipitation Record, 1914–1981 (York Canyon Complex)  
*Annual Precipitation Range:* 10.40 to 23.16 inches  
*Means:* 16.45  
*Standard Deviation:* 3.53  
*Coefficient of Variation:* 0.21  
 Fence Lake 1N, NM Precipitation Record, 1961–1990 (Fence Lake Mine)  
*Annual Precipitation Range:* 7.75 to 19.99 inches  
*Mean:* 14.41  
*Standard Deviation:* 3.34  
*Coefficient of Variation:* 0.23  
 Gallup 5E, NM Precipitation Record, 1918–1979 (McKinley and Carbon Coal Mines)  
*Annual Precipitation Range:* 4.94 to 14.29 inches  
*Mean:* 9.47  
*Standard Deviation:* 2.58  
*Coefficient of Variation:* 0.27  
 San Mateo, NM Precipitation Record, 1918–1988 (Lee Ranch)  
*Annual Precipitation Range:* 5.07 to 16.06 inches  
*Mean:* 9.19  
*Standard Deviation:* 2.89  
*Coefficient of Variation:* 0.31  
 Fruitland 2E, NM Precipitation Record, 1914–1999 (San Juan and Yampa Mines)  
*Annual Precipitation Range:* 3.05 to 15.43 inches  
*Mean:* 7.95  
*Standard Deviation:* 2.52  
*Coefficient of Variation:* 0.32

New Mexico also stated that if a two-year demonstration of revegetation success had been approved and there appeared to be a problem with the revegetation in the final year of liability, New Mexico would require additional information via a Director's order. New Mexico pointed out that because the proposed rules clearly state that the demonstration of success must be done for at least two of the last four years, the proposed rules provide for requiring additional demonstrations as needed (administrative record No. NM-837).

The Federal regulations at 30 CFR 816.116(c)(3) require that revegetation success standards be met during the last two consecutive years of the 10-year revegetation responsibility period in areas in which the average annual precipitation is equal to or less than 26 inches. OSM revised the Federal regulations at 30 CFR 816.116(c)(2) to provide that in areas with more than 26 inches of average annual precipitation the vegetation parameters identified in 30 CFR 816.116(b) for grazing land,

pasture land, or cropland must equal or exceed the approved success standards during the growing seasons of any two years of the 5-year responsibility period, excluding the first year (53 FR 34636, September 7, 1988). This change eliminated the requirement to measure revegetation success during the last two years of the responsibility period in areas with more than 26 inches of average annual precipitation.

The data provided by New Mexico clearly demonstrates that the climatic variability within New Mexico is at least as great as that of the areas receiving more than 26 inches of precipitation. New Mexico's proposal, which provides that revegetation comparisons be conducted during two of the last four years of liability, starting no sooner than year eight offers the same flexibility as the Federal regulation at 30 CFR 816.116(c)(2) for areas that receive more than 26 inches of precipitation. New Mexico's proposed rules prohibit the inclusion of measurements taken during the first seven years of the responsibility period. This ensures that the plants will have the opportunity to become well established prior to any evaluation of the vegetation. This also provides the same level of flexibility in evaluating revegetation success provided by the Federal regulations for States receiving more than 26 inches of precipitation. Further, New Mexico has asserted that they have the authority to require additional data if problems are observed following the evaluation of revegetation success. The proposed rules do not affect the length of the extended period of responsibility, which is 10 years in New Mexico.

Based on the above discussion, the Director finds that New Mexico's proposed rules at 19 NMAC 8.2 2064, 2065.B(2) and (3), and 2065.B(5)(iii) are as effective as the corresponding Federal regulations at 30 CFR 816.116(c)(3) in achieving the revegetation requirements of sections 515(b)(19) and (b)(20) of SMCRA. Therefore, the Director approves New Mexico's proposed rules at 19 NMAC 8.2 2064, 2065.B(2) and (3), and 2065.B(5)(iii).

### 3. Revisions to New Mexico's Rules With No Corresponding Federal Regulations

New Mexico proposed to revise 19 NMAC 8.2 507.A(1), concerning annual reports, to require "a map on a high quality aerial photo base, although a topographic base will be acceptable if it is current and complete. The map shall be the same scale as the mining and reclamation sequence maps found in the approved permit with 5' contour intervals. The map must be made on a

single sheet, or series of sheets, each sheet of the map being no larger than 4' × 4'. The scale and all lines and symbols must be clearly described in the legend."

The proposed revision requires, in the annual reports that must be submitted to New Mexico, maps to a scale that will match information included in the permits. New Mexico stated that it was its intention to use the annual reporting requirements as a way to initiate bond release applications.

There are no counterpart Federal regulations requiring an annual report. New Mexico's requirement for an annual report and proposed revision of 19 NMAC 8.2 507.A(1) does not adversely affect the implementation of the New Mexico program. The Director finds that the proposed revision of 19 NMAC 8.2 507.A(1) is not inconsistent with the Federal regulations; therefore, the Director approves proposed 19 NMAC 8.2 507.A(1).

#### IV. Summary and Disposition of Comments

##### *Public Comments*

We asked for public comments on the amendment (administrative record Nos. NM-817 and NM-832).

The Navajo Nation commented, by letter dated January 21, 2000 (administrative record No. 821), the New Mexico's proposed rule at 19 NMAC 8.2 2065.A would require OSM to consult with appropriate State and Federal agencies prior to approving New Mexico's proposed amendment which also included the Coal Mine Reclamation Program Vegetation Standards guidance document. The Navajo Nation said that it was unclear what form this consultation would take, *i.e.*, whether there would be a public notice and comment period.

OSM explained to the Navajo Nation, in a letter dated February 7, 2000 (administrative record No. NM-823), that OSM's published **Federal Register** notices, as well as OSM's distribution of the proposed amendment to interested parties (which included the Navajo Nation) were the vehicles by which OSM provided for a public comment period and solicited public comments. We also (1) sent to the Navajo Nation, by letter dated February 17, 2000 (administrative record No. NM-826), a copy of the February 14, 2000, letter to New Mexico identifying concerns that New Mexico had to resolve prior to our approval of the amendment and (2) extended, until March 6, 2000, the opportunity to comment and meet with us. The Navajo Nation did not respond to our letter.

As discussed in finding No. 1.A, the Director is approving New Mexico's proposed 19 NMAC 8.2 2065.A which requires consultation with appropriate agencies prior to approval of measuring techniques with the interpretation that the consultation requirement applies only to New Mexico and not to OSM.

The Director is taking no further action in responses to the Navajo Nation's January 21, 2000, letter.

##### *Federal Agency Comments*

Under 30 CFR 732.17(h)(11)(i), we requested comments on the amendment from various Federal agencies with an actual or potential interest in the New Mexico program (administrative record Nos. NM-817 and NM-832).

The U.S. Department of Army, Corps of Engineers, commented, by letter dated December 28, 1999 (administrative record No. NM-820), that it found the proposed changes to be satisfactory.

The Bureau of Land Management responded, by letter dated January 26, 2000 (administrative record No. NM-822), that it had no comments.

##### *Environmental Protection Agency (EPA) Concurrence and Comments*

Under 30 CFR 732.17(h)(11)(ii), we are required to get a written agreement from EPA for those provisions of the program amendment that related to air or water quality standards issued 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 revisions that New Mexico proposed to make in this amendment pertain to air or water quality standards. Under 30 CFR 732.17(h)(11)(i), OSM requested comments on the amendment from EPA (administrative record Nos. NM-817 and NM-832). EPA did not respond to our request.

##### *State Historic Preservation Officer (SHPO) and the Advisory Council on Historic Preservation (ACHP)*

Under 30 CFR 732.17(h)(4), we are required to request comments from the SHPO and ACHP on amendments that may have an effect on historic properties. We requested comments on New Mexico's amendment (administrative record Nos. NM-817 and 832), but neither responded to our request.

#### V. Director's Decision

Based on the above findings, we approve the amendment sent to us by New Mexico on December 1, 1999, as revised on April 26, 2000.

We approve, as discussed in:

Finding No. 1.A., 19 NMAC 8.2 2065.A and the Coal Mine Reclamation Program Vegetation Standards guidance document, concerning the requirement that revegetation success be based on general revegetation requirements;

Finding No. 1.B., 19 NMAC 8.2 2065.A, concerning the deletion of the allowance to use unspecified technical guidance procedures published by USDA as the basis for technical success standards demonstrating revegetation success;

Finding No. 1.C., 19 NMAC 8.2 2065.A and 2065.B(1) and the Coal Mine reclamation Program Vegetation Standards, concerning approval by the Directors of both MMD and OSM of the standards, measuring techniques, and statistical analyses used to demonstrate revegetation success;

Finding No. 1.D., 19 NMAC 8.2 2065.B(1) and the Coal Mine Reclamation Program Vegetation Standards guidance document, concerning normal husbandry practices;

Finding No. 2.A., 19 NMAC 8.2 107.A(20), definition of "Augmented Seeding," 19 NMAC 8.2 107.I(8), definition of "Interseeding," and the use of (1) interseeding and (2) planting of tree and shrub seedlings as normal husbandry practices applicable to the postmining land uses of grazing land, fish and wildlife habitat, forestry, and recreation, described in the Coal Mine Reclamation Program Vegetation Standards guidance document;

Finding No. 2.B., 19 NMAC 8.2 2064 and 2065.B(2), (3), and (5)(iii), concerning the time-frames used to demonstrate success of revegetation for bond releases; and

Finding No. 3., 19 NMAC 8.2 507.A(1), concerning maps in the annual report.

We approve the rules as proposed by New Mexico with the provision that they be fully promulgated in identical form to the rules submitted to and reviewed by OSM and the public.

To implement this decision, we are amending the Federal regulations at 30 CFR Part 931, which codify decisions concerning the New Mexico program. We are making this final rule effective immediately to expedite the State program amendment process and to encourage States to make their programs conform with the Federal standards. SMCRA requires consistency of State and Federal standards.

#### VI. Procedural Determinations

##### *Executive Order 12866—Regulatory Planning and Review*

This rule is exempted from review by the Office of Management and Budget



(OMB) under Executive Order 12866 (Regulatory Planning and Review).

*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 (Civil Justice Reform) and has determined that 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 the Federal regulations at 30 CFR 730.11, 732.15, and 732.17(h)(10), decisions on proposed State regulatory programs and program amendments submitted by the State 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*

This rule does not require an environmental impact statement because 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(c)(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 that 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 regulations.

*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; and 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*

OSM has determined and certifies under the Unfunded Mandates Reform act (2 U.S.C. 1502 *et seq.*) that this rule will not impose a cost of \$100 million or more in any given year on any local, State, or Tribal governments or private entities.

**List of Subjects in 30 CFR Part 931**

Intergovernmental relations, Surface mining, Underground mining.

Dated: October 13, 2000.

**Brent T. Wahlquist,**  
*Regional Director, Western Regional Coordinating Center.*

For the reasons set out in the preamble, 30 CFR 931 is amended as set forth below:

**PART 931—NEW MEXICO**

1. The authority citation for part 931 continues to read as follows:

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

2. Section 931.15 is amended in the table by adding a new entry in chronological order by “Date of Final Publication” to read as follows:

**§ 931.15 Approval of New Mexico regulatory program amendments.**

\* \* \* \* \*

Original amendment submission date	Date of final publication	Citation/description
* * * * * December 1, 1999 .....	* * * * * November 2, 2000 .....	* * * * * 19 NMAC 8.2 107.I(8); 107.A(20); 507.A(1); 2064; 2065.A; 2065.B(1), (2), (3), and (5)(iii); and the Coal Mine Reclamation Program Vegetation Standards guidance document.

**§ 931.16 [Amended]**

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

[FR Doc. 00-28195 Filed 11-1-00; 8:45 am]

BILLING CODE 4310-05-M

**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.