

Under section 512(c)(2)(F)(iii) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 360b(c)(2)(F)(iii)), this approval qualifies for 3 years of marketing exclusivity beginning September 21, 2001, because the application contains substantial evidence of the effectiveness of the drug involved, any studies of animal safety or, in the case of food-producing animals, human food safety studies (other than bioequivalence or residue studies) required for approval of the application and conducted or sponsored by the applicant.

The agency has carefully considered the potential environmental impact of this action and has concluded that the action will not have a significant impact on the human environment and that an environmental impact statement is not required. FDA's finding of no significant impact and the evidence supporting that finding, contained in an environmental assessment, may be seen in the Dockets Management Branch (address above) between 9 a.m. and 4 p.m., Monday through Friday.

This rule does not meet the definition of "rule" in 5 U.S.C. 804(3)(A) because it is a rule of "particular applicability." Therefore, it is not subject to the congressional review requirements in 5 U.S.C. 801-808.

List of Subjects

21 CFR Part 556

Animal drugs, Food.

21 CFR Part 558

Animal drugs, Animal feeds.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs and redelegated to the Center for Veterinary Medicine, 21 CFR parts 556 and 558 are amended as follows:

PART 556—TOLERANCES FOR RESIDUES OF NEW ANIMAL DRUGS IN FOOD

1. The authority citation for 21 CFR part 556 continues to read as follows:

Authority: 21 U.S.C. 342, 360b, 371.

§ 556.175 [Redesignated as § 556.185]

2. Section 556.175 is redesignated as § 556.185 and is amended by revising paragraph (b)(1) and by adding paragraph (b)(2) to read as follows:

§ 556.185 Diclazuril.

* * * * *

(b) *Tolerances*—(1) *Chickens*—(i) *Liver*. The tolerance for parent diclazuril (the marker residue) is 3 parts per million (ppm).

(ii) *Muscle*. The tolerance for parent diclazuril (the marker residue) is 0.5 ppm.

(iii) *Skin/fat*. The tolerance for parent diclazuril (the marker residue) is 1 ppm.

(2) *Turkeys*—(i) *Liver*. The tolerance for parent diclazuril (the marker residue) is 3 ppm.

(ii) *Muscle*. The tolerance for parent diclazuril (the marker residue) is 0.5 ppm.

(iii) *Skin/fat*. The tolerance for parent diclazuril (the marker residue) is 1 ppm.

PART 558—NEW ANIMAL DRUGS FOR USE IN ANIMAL FEEDS

3. The authority citation for 21 CFR part 558 continues to read as follows:

Authority: 21 U.S.C. 360b, 371.

4. Section 558.198 is amended in paragraph (b) by removing "556.175" and by adding in its place "556.185"; and in paragraph (d)(1) by adding a heading and by revising the introductory text, and by adding paragraph (d)(2) to read as follows:

§ 558.198 Diclazuril.

* * * * *

(d) *Conditions of use*—(1) *Chickens*. For chickens it is used as follows:

* * * * *

(2) *Turkeys*. For turkeys it is used as follows:

Diclazuril grams/ton	Combination grams/ton	Indications for use	Limitations	Sponsor
(i) 0.91 (1 ppm)	Growing turkeys: For the prevention of coccidiosis caused by <i>E. adenoeides</i> , <i>E. gallopavonis</i> and <i>E. meleagridis</i> ..	Feed continuously as the sole ration. Do not feed to breeding turkeys. Not for use in hens producing eggs for human consumption..	000061
(ii) [Reserved]

Dated: November 9, 2001.

Stephen F. Sundlof,

Director, Center for Veterinary Medicine.

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DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 944

[SPATS No. UT-037-FOR]

Utah Regulatory Program

AGENCY: Office of 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 Utah regulatory program (hereafter, the "Utah program") under the Surface Mining Control and Reclamation Act of 1977 (SMCRA or "the Act"). Utah proposed changes to definitions and engineering and hydrology provisions in its rules about subsidence control plans, subsidence control, and water replacement. Utah intended to revise its program to be consistent with the corresponding Federal regulations.

EFFECTIVE DATE: December 4, 2001.

FOR FURTHER INFORMATION CONTACT: James F. Fulton, Chief, Denver Field Division; telephone: (303) 844-1424; e-mail address: jfulton@osmre.gov.

SUPPLEMENTARY INFORMATION:

- I. Background on the Utah 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 Utah Program

Section 503(a) of the Act permits a State to assume primacy for the regulation of surface coal mining and reclamation operations on non-Federal and non-Indian lands within its borders by demonstrating that its program includes, among other things, " * * * a State law which provides for the regulation of surface coal mining and reclamation operations in accordance with the requirements of the Act * * * ; and rules and regulations consistent with regulations issued by the Secretary pursuant to the Act." See 30 U.S.C. 1253(a)(1) and (7). On the basis of these criteria, the Secretary of the Interior conditionally approved the Utah

program on January 21, 1981. You can find background information on the Utah program, including the Secretary's findings, the disposition of comments, and the conditions of approval of the Utah program in the January 21, 1981, **Federal Register** (46 FR 5899). You also can find later actions concerning Utah's program and program amendments 30 CFR 944.15 and 944.30.

II. Submission of the Proposed Amendment

By letter dated March 20, 1998 (administrative record number UT-1103), Utah sent to us an amendment to its program (SPATS No. UT-037-FOR, administrative record number 1105) under SMCRA (30 U.S.C. 1201 *et seq.*). Utah sent the amendment in response to a June 5, 1996, letter (administrative record number UT-1083) that we sent to the State in accordance with 30 CFR 732.17(c).

Changes to the Utah Administrative Rules (Utah Admin. R.) that the State proposed included: Adding definitions for "material damage," "non-commercial building," "occupied residential dwelling and structures related thereto," "replacement of water supply," and "State-appropriated water supply" at Utah Admin. R. 645-100-200; adding requirements at Utah Admin. R. 645-301-525.100 through -525.130 for pre-subsidence surveys; removing existing requirements for subsidence control plans at Utah Admin. R. 645-301-525 through -525.170; recodifying rules at Utah Admin. R. 645-301-525.200 through -525.240 pertaining to protected areas; removing existing requirements for subsidence control at Utah Admin. R. 645-301-525.200 through -525.232; adding requirements at Utah Admin. R. 645-301-525.300 through -525.490 for subsidence control and subsidence control plans; adding requirements for subsidence damage repair at Utah Admin. R. 645-301-525.500 through -525.530; adding a rebuttable presumption of causation by subsidence at Utah Admin. R. 645-301-525.540 through -525.545; adding provisions at Utah Admin. R. 645-301-525.550 for adjusting bond amounts for subsidence damage; recodifying rules at Utah Admin. R. 645-301-525.600 and 645-301-525.700 that require compliance with approved subsidence control plans and public notice of proposed mining, respectively; removing existing provisions for surveys of renewable resource lands at Utah Admin. R. 645-301-724.600; adding a provision at Utah Admin. R. 645-301-728.350 for finding whether underground coal mining and reclamation activities might

contaminate, diminish or interrupt State-appropriated water; and adding a requirement at Utah Admin. R. 645-301-731.530 for replacing State-appropriated water supplies that are contaminated, diminished, or interrupted by underground coal mining activities.

We announced receipt of the proposed amendment in the April 8, 1998, **Federal Register** (63 FR 17138). 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 number UT-1108). We did not hold a public hearing or meeting because nobody requested one. The public comment period ended on May 8, 1998. We received comments from two law firms on behalf of a special service district, a water conservancy district, an irrigation company, and a water users association. We also received comments from a mining association, the State Historic Preservation Officer, and two Federal agencies.

During our review of the amendment, we identified a concern relating to Utah's use of the undefined term "underground mining activities" at proposed Utah Admin. R. 645-301-731.530, which is entitled "State-appropriated water supply." We discussed our concern with Utah in telephone conversations on April 29 and May 11, 1998 (administrative record numbers UT-1111 and UT-1113, respectively).

Utah formally responded in a letter dated May 13, 1998, that its use of the undefined term was an oversight (administrative record number UT-1115). In the same letter, the State committed to replacing the undefined term "underground mining activities" with its defined term "underground coal mining and reclamation activities" in its rules, though its May 13 letter was sufficient to revise the proposed amendment. Based on Utah's response, we decided that reopening the comment period was not necessary and continued our review of the amendment. Utah promulgated a rule that includes the defined term on September 30, 1998 (Utah Division of Administrative Rules (DAR) file number 21334).

We completed our review of the amendment and the comments we received and identified five topics of concern. Two of those topics involved pre-subsidence surveys and contents of subsidence control plans. They appeared to require changes in Utah's proposed rules. The remaining three topics required additional clarification from Utah on the scope of the terms

"State-appropriated water" and "State-appropriated water supply," the scope of water replacement with respect to "developed" water supplies, and of the proposed definition of "replacement of water supply." We notified Utah of our concerns in a letter dated October 1, 1998 (administrative record number UT-1125).

In a letter dated July 8, 1999 (administrative record number UT-1131), Utah notified us that the Huntington-Cleveland Irrigation Company filed a civil action in the State's Seventh Judicial District Court challenging the proposed water replacement rules included in this amendment. At Utah's request, we suspended our review of the amendment while the State addressed the legal and technical issues involved in that litigation.

On December 22, 1999, we suspended certain Federal regulations pertaining to subsidence in relation to underground mining as a result of the April 27, 1999, decision of the U.S. Court of Appeals for the District of Columbia in *National Mining Association v. Babbitt*, 173 F.3d 906 (1999). We suspended the part of 30 CFR 784.20(a)(3) that required a pre-subsidence survey of certain structures within an angle of draw unless the permit applicant was denied access to do such a survey by the structure owner(s). We also suspended 30 CFR 817.121(c)(4) (i) through (iv) in their entirety. Those regulations established an angle of draw and created a rebuttable presumption that subsidence damage to structures protected under section 2504 of the Energy Policy Act of 1992 (Pub.L. 102-486, 106 Stat. 2776; hereafter "EPAct"), and section 720 of SMCRA (as revised by EPAct) within an area defined by an angle of draw was caused by the underground mining operation. We notified Utah of the suspension by electronic mail on December 22, 1999, and included the December 22, 1999, **Federal Register** notice of that suspension with our message (64 FR 71652; administrative record number 1132).

In a letter dated September 1, 2000 (administrative record number UT-1144), Utah asked us to resume our review of the amendment, noting that litigation of the proposed water replacement rules would continue. The State also committed to respond to our October 1, 1998, issue letter.

Utah responded to our October 1, 1998, letter with a letter dated October 31, 2000 (administrative record number 1145). The State revised two proposed rules in its amendment and provided additional clarification on three topics. However, the State's response showed

that it did not revise its proposed amendment in light of our December 22, 1999, suspension of 30 CFR 784.20(a)(3) and 817.121(c)(4) (i) through (iv). We discussed this with Utah in a telephone conversation on November 8, 2000 (administrative record number 1146), at which time the State agreed to consider whether it would revise its amendment in light of our suspension of those Federal regulations. A follow-up telephone conversation of November 21, 2000 (administrative record number UT-1148), confirmed that Utah wanted us to review the amendment as originally submitted on March 20, 1998, corrected on May 13, 1998, and addressed in its October 31, 2000, response to our issue letter without further revisions related to our suspension of the Federal regulations.

We announced receipt of revisions to the amendment in the February 20, 2001, **Federal Register** (66 FR 10866; administrative record number UT-1157). In the same document, we reopened the public comment period for 15 days to provide for review of the changes and additional information Utah included in its October 31, 2000, response letter. The extended comment period closed on March 7, 2001.

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 731.17. We are approving the amendment as described below.

A. Minor Revisions to Utah's Administrative Rules

Utah proposed minor recodification changes to the following previously approved rules (with the counterpart Federal regulations shown in parentheses):

Utah Admin. R. 645-301-525.240 through -525.270, areas protected from underground mining and subsidence, recodified as 645-301-525.200 through -525.240 (30 CFR 817.121(d) through (g));

Utah Admin. R. 645-301-525.220, compliance with approved subsidence control plan, recodified as 645-301-525.600 (30 CFR 817.121(a)(3)(b)); and

Utah Admin. R. 645-301-525.300, public notice of proposed mining, recodified as 645-301-525.700 (30 CFR 817.122).

Because these changes are minor and non-substantive in nature, we find that they will not make Utah's rules less effective than the corresponding Federal regulations.

B. Revisions to Utah's Administrative Rules That Have the Same Meaning as the Corresponding Provisions of the Federal Regulations

Utah proposed revisions to the following rules containing language that is the same as, or similar to, the corresponding Federal regulations (which are listed in parentheses):

Utah Admin. R. 645-100-200, addition of new definitions of "material damage" and "occupied residential dwelling and structures related thereto" (30 CFR 701.5);

Utah Admin. R. 645-301-525.300 through -525.313, addition of new subsidence control provisions for preventing or minimizing damage, replacing existing Utah Admin. R. 645-301-525.200 and -525.210, which are removed (30 CFR 817.121(a)(1) through (a)(3));

Utah Admin. R. 645-301-525.410, new requirement for a description in the subsidence control plan of the coal removal method, replacing the existing provision at Utah Admin. R. 645-301-525.110, which is removed (30 CFR 784.20(b)(1));

Utah Admin. R. 645-301-525.420, new requirement for a map to be in the subsidence control plan showing underground workings where planned subsidence is expected and identifying areas where subsidence will be minimized and where subsidence-related damage will be minimized and corrected (30 CFR 784.20(b)(2));

Utah Admin. R. 645-301-525.430, new requirement for a description to be in the subsidence control plan of physical conditions affecting subsidence, replacing existing Utah Admin. R. 645-301-525.120, which is removed (30 CFR 784.20(b)(3));

Utah Admin. R. 645-301-525.440, new requirement for a description to be in the subsidence control plan of subsidence monitoring to be done, replacing existing Utah Admin. R. 645-301-525.140, which is removed (30 CFR 784.20(b)(4));

Utah Admin. R. 645-301-525.450 through -525.460, new requirement for a description to be in the subsidence control plan of subsidence control measures, replacing existing Utah Admin. R. 645-301-525.130 through -525.134 and Utah Admin. R. 645-301-525.150, which are removed (30 CFR 784.20(b)(5) through (b)(6));

Utah Admin. R. 645-301-525.470, new requirement for a description to be in the subsidence control plan of methods to minimize damage from planned subsidence (30 CFR 784.20(b)(7));

Utah Admin. R. 645-301-525.500, new section heading added for repair of

damage, replacing the existing introductory statement at Utah Admin. R. 645-301-525.230, which is removed (30 CFR 817.121(c));

Utah Admin. R. 645-301-525.510, new rule requiring repair of subsidence damage to surface lands, replacing existing Utah Admin. R. 645-301-525.231, which is removed (30 CFR 817.121(c)(1));

Utah Admin. R. 645-301-525.520, new rule requiring repair of, or compensation for, subsidence damage to non-commercial buildings and related structures, replacing, in part, existing Utah Admin. R. 645-301-525.232, which is removed (30 CFR 817.121(c)(2)); and

Utah Admin. R. 645-301-525.545, new provision added for information to be considered in determining the cause of damage (30 CFR 817.121(c)(4)(v)).

Because these rules contain language that has the same meaning as the corresponding Federal regulations, we find that they are no less effective than the Federal regulations. We also find that they satisfy item numbers B.2 and B.4 in their entirety, and C.3, D.2, and D.3 in part, of our June 5, 1996, 30 CFR part 732 letter.

C. Revisions to Utah's Rules That Are Not the Same as the Corresponding Provisions of the Federal Regulations

1. Utah Admin. R. 645-100-200, Definition of "Non-commercial Building"

Utah proposed to add the definition of "non-commercial building" at Utah Admin. R. 645-100-200 as follows:

Non-commercial Building means any building, other than an occupied residential dwelling, that, at the time the subsidence occurs, is used on a regular or temporary basis as a public building or community or institutional building as those terms are defined at R645-100-200. Any building used only for commercial agricultural, industrial, retail or other commercial enterprises is excluded.

Utah's proposed definition and the Federal definition of "non-commercial building" reference definitions of the terms "community or institutional building" and "public building." The definition of "public building" at Utah Admin. R. 645-100-200 is virtually identical to the Federal definition of "public building" at 30 CFR 761.5. Utah's definition of "community or institutional building" at Utah Admin. R. 645-100-200 differs slightly from the Federal definition of that term. Utah's version includes the phrase "* * * functions including, but not limited to * * *" in the second clause of the sentence in which building functions

are described. By including this phrase, Utah's definition includes community or institutional buildings within the scope of non-commercial buildings if they function as educational, cultural, historic, religious, scientific, correctional, mental-health or physical-health care facilities and those serving other unnamed functions as well. Structures included in the Federal definition of "community or institutional buildings" are limited to those serving the functions specifically listed.

The effect of this difference is to extend the protections against material damage caused by subsidence provided by Utah Admin. R. 645-301-525.100 through -525.700 to potentially more structures than encompassed by the Federal definition. Essentially, under Utah's proposed definition: More buildings may be subject to pre-subsidence surveys; permittees may be required to prevent or minimize subsidence-related damage to more buildings; subsidence control plans may have to describe methods to be used to minimize damage to more buildings from planned subsidence; and more buildings may be subject to provisions for repair or compensation for subsidence-related damage.

We note that part of the Federal regulation at 30 CFR 784.20(a)(3) concerning pre-subsidence surveys is suspended and that 30 CFR 817.121(c)(4)(i) through (iv) concerning the rebuttable presumption of causation by subsidence are suspended in their entirety. In part, Utah's proposed definition invokes subsidence protections in its rules the Federal counterparts to which are among the suspended regulations. That does not, however, make Utah's proposed definition inconsistent with SMCRA or less effective than the Federal regulations. Section 505(b) of SMCRA specifically states "Any provision of any State law or regulation in effect on the date of enactment of this Act, or which may become effective thereafter, which provides for the control and regulation of surface mining and reclamation operations for which no provision is contained in this Act shall not be construed to be inconsistent with this Act." This final rule describes the details of the suspended Federal regulations and its effect on Utah's proposed rules in greater detail in our findings concerning the State's proposed pre-subsidence survey rules, subsidence control plan contents, and the rebuttable presumption at parts III.C.6, III.C. 7, and III.C.9, respectively.

Based on the reasoning we described above, Utah's proposed definition of

"non-commercial building" is no less effective than the counterpart Federal definition and is not inconsistent with SMCRA. It also satisfies item B.3 of our June 5, 1996, 30 CFR part 732 letter.

2. Utah Admin. R. 645-100-200, Definition of "State-Appropriated Water Supply"

Utah proposed the definition of "State-appropriated water supply" at Utah Admin. R. 645-100-200 as follows:

State Appropriated Water Supply" means State-created water rights which are recognized under the provisions of the Utah Code.

The terms "State-appropriated water supply" and "drinking, domestic or residential water supply" are different terms used in Utah's proposed rules and the Federal regulations, respectively, in the same context. Utah refers to "State-appropriated water supply" in its permit application rules for subsidence control plans and for probable hydrologic consequences determinations related to underground coal mining and reclamation activities at Utah Admin. R. 645-301-525 and 645-301-728.350. Utah also uses the term in its water replacement performance standard for underground mining activities at Utah Admin. R. 645-301-731.530. The Federal regulations use the term "drinking, domestic or residential water supply" in the permit application regulations for probable hydrologic consequence determinations related to underground mining activities and for subsidence control plans at 30 CFR 784.14(e)(3)(iv) and 784.20(a). They also use this term in the underground mining performance standards for water replacement at 30 CFR 817.41(j).

Utah's proposed definition of "State-appropriated water supply" is based on its use of the term "State-appropriated water" at Utah Code Annotated (UCA) 40-10-18(15)(c). As written in that section of the Code,

Subject to the provisions of Section 40-10-29, the permittee shall promptly replace any State-appropriated water in existence prior to the application for a surface coal mining and reclamation permit, which has been affected by contamination, diminution, or interruption resulting from underground coal mining operations.

The Federal counterpart statutory provision is found at section 720(a)(2) of SMCRA, as amended by the Energy Policy Act of 1992. It provides for replacement of "any drinking, domestic, or residential water supply from a well or spring" rather than "any State-appropriated water."

In a January 29, 1997, letter clarifying the proposed use of the term "State-appropriated water" at UCA 40-10-18(15)(c) in amendment UT-035-FOR (administrative record number UT-1094), the State noted that it conferred and agreed with Utah water users and coal operators on use of that term. Utah wrote:

It appears to DOGM that the "subject to" clause in the proposed bill more logically should be read as a deliberate cross-reference to subsection 1 of Utah Code 40-10-29, which subsection states:

"(1) Nothing in this chapter shall be construed as affecting in any way the right of any person to enforce or protect, under applicable law, his interest in water resources affected by a surface coal mining operation."

Id. In other words, the water users want the "subject to" clause because they want to make absolutely clear that the new water replacement provisions in the Utah Coal Program supplement, rather than replace, any other common law or statutory remedies otherwise available to them. Stated otherwise, the water users are happy to get a new SMCRA-inspired statutory remedy for water replacement, but they do not want to give up other water resource protection remedies, if any, which they may already have under applicable water law. [Utah] does not think Congress intended to deprive water users of other existing remedies. Therefore, the "subject to" clause clearly does not make the Utah proposal less stringent than Section 720(a) of SMCRA.

The SMCRA counterpart to UCA 40-10-29(1) is found at section 717(a).

Utah further explained that existing statutes at Title 73 of the Utah Code Annotated govern all waters of the State. Utah wrote:

Under Utah water law, a person or entity cannot be a "legitimate" water user if he/she/it is using water that has not been appropriated by the State. The deliberately broad phrase "any state-appropriated water" covers the " * * * universe of legal Utah water uses by the universe of legal water users."

Utah asserted that use of "State-appropriated water" in its statute, therefore, provided broader water replacement protection than the Federal provision for underground mining activities which is limited to "drinking, domestic or residential water supply" from a well or spring. For example, Utah noted that State-appropriated agricultural irrigation and industrial water must be replaced under its provision. We agreed with Utah and approved the State's use of "State-appropriated water" at UCA 40-10-18(15)(c) as no less stringent than section 720(a)(2) of SMCRA (62 FR 41845, August 4, 1997; finding number 7).

We received public comments on amendment UT-037-FOR that questioned the scope of Utah's proposed water replacement provisions (administrative record number UT-1112). One commenter specifically wrote that

Utah Code Ann. § 40-10-18 is not limited to water "supply" but all state-appropriated water. Also, many water rights in Utah, including those in coal mining areas, predate statehood and thus are not state-created, but are recognized by Utah law.

The comment raised a question concerning the State's January 29, 1997, clarification that "State-appropriated water" covers all legal uses of water in Utah. It also prompted the need for clarification of Utah's proposed definition of "State-appropriated water supply" in this amendment.

We have previously said that section 717(a) of SMCRA requires deference to State water law on questions of water allocation and use (See 60 FR 16722, 16733; March 31, 1995). Utah's definition of "State-appropriated water supply" defers to existing State law in its recognition of State-created water rights. In its October 31, 2000, letter, Utah explained that, under UCA 73-3-5, the State can recognize water claims established by diversion ("diligence rights") before statehood and before the State Engineer's office was established. As a result, the scope of "State-appropriated water" includes territorial water rights (Utah provided this explanation in response to a question we asked in our October 1, 1998, letter that was prompted by a public comment. See Part IV.1 of this final rule for that discussion of "pre-statehood" water rights). Utah asserts that "State-appropriated water supply" includes all legal water uses and that all legal uses of water in Utah must be appropriated by the State under provisions of the Utah Code. The term therefore includes water from wells and springs and any appurtenant delivery systems providing water for direct human consumption or household use as does the Federal definition of "drinking, domestic or residential water supply." It also extends protection to other water uses not included in the Federal definition of the term "drinking, domestic or residential water supply," such as water used only for agricultural or industrial needs.

Based on the State's explanation that the term "State-appropriated water supply" encompasses the "universe of legal water uses by the universe of legal water users" in Utah, we find Utah's proposed definition of "State-appropriated water supply" at Utah

Admin. R. 645-100-200 to be no less effective than the Federal definition of "drinking, domestic or residential water supply" at 30 CFR 701.5. It also satisfies item B.1 of our June 5, 1996, 30 CFR part 732 letter.

3. Utah Admin. R. 645-100-200, Definition of "Replacement of Water Supply"

Utah proposed the definition of "replacement of water supply" at Utah Admin. R. 645-100-200 as follows:

"Replacement of Water Supply" means, with respect to State-appropriated water supplies contaminated, diminished, or interrupted by coal mining and reclamation operations, provision of water supply on both a temporary and permanent basis equivalent to premining quantity and quality. Replacement includes provision of an equivalent water delivery system and payment of operation and maintenance costs in excess of customary and reasonable delivery costs for premining water supplies.

(a) Upon agreement by the permittee and the water supply owner, the obligation to pay such operation and maintenance costs may be satisfied by a one-time payment in an amount which covers the present worth of the increased annual operation and maintenance costs for a period agreed to by the permittee and the water supply owner.

(b) If the affected water supply was not needed for the land use in existence at the time of loss, contamination, or diminution, and if the supply is not needed to achieve the postmining land use, replacement requirements may be satisfied by demonstrating that a suitable alternative water source is available and could feasibly be developed. If the latter approach is selected, written concurrence must be obtained from the water supply owner.

Under Utah's proposed definition, those water supplies subject to being replaced are State-appropriated water supplies contaminated, diminished, or interrupted by coal mining and reclamation operations. The Federal definition is similar but differs by extending replacement protection to "protected water supplies" that are adversely affected by "coal mining operations."

As explained in the previous finding at Part III.C.2 of this final rule, the State's proposed definition of "State-appropriated water supply" at Utah Admin. R. 645-100-200 includes the same water supplies that are included under the Federal counterpart definition of "drinking, domestic or residential water supply" at 30 CFR 701.5. In addition, as Utah explained in its January 29, 1997, clarification (administrative record number UT-1094), the State's term includes other water supplies such as water for agricultural and industrial needs. The term "protected water supplies" used in

the Federal definition of "replacement of water supply" is not defined. However, the performance standard for water replacement at 30 CFR 817.41(j) identifies water supplies to be replaced as "* * * any drinking, domestic or residential water supply that is contaminated, diminished, or interrupted by underground mining activities * * *." Such water supplies are included in Utah's definition of "State-appropriated water supply" as supported by the underlying definition of "State-appropriated water" in UCA 40-10-18(15)(c). In its January 29, 1997, clarification, the State further explained that "State-appropriated water" includes all legal water uses in Utah.

Utah's proposed definition of "replacement of water supply" requires replacement of an adversely affected "State-appropriated water supply," which, in turn, is based on the term "State-appropriated water" as used at UCA 40-10-18(15)(c). That statutory provision addresses replacement of water adversely affected by *underground* coal mining operations. Utah clarified the scope of the term "State-appropriated water" in its January 29, 1997, letter as covering all legitimate water uses, including State-appropriated agricultural irrigation and industrial water. However, defining "replacement of water supply" in terms of "State-appropriated water supply" appeared to establish the scope of "replacement of water supply" in terms of underground coal mining operations only. As we explained in the preamble to the final rule approving the Federal counterpart definition of "replacement of water supply" (60 FR 16722, 16726; March 31, 1995), the Federal definition applies to underground *and* surface coal mining operations that affect water supplies. Our explanation added that the final rule is intended to apply to replacement of water supply under sections 717(b) and 720(a)(2) of SMCRA, which are the Federal counterparts to UCA 40-10-29(2) and 40-10-18(15)(c), respectively. Reference to "protected water supplies" in the Federal definition of "replacement of water supply" is broad enough to include water adversely affected by surface and underground operations.

In our October 1, 1998, letter (administrative record number UT-1125), we asked Utah to clarify its proposed definition of "replacement of water supply." We specifically asked Utah to clarify whether its term, as proposed to require replacement of adversely affected State-appropriated water supplies, requires replacement of water adversely affected by surface *and* underground coal mining operations

under UCA 40-10-18(15)(c) and 40-10-29(2).

Utah responded to our request for clarification in its October 31, 2000, letter (administrative record number UT-1145). In its response, Utah wrote:

The provisions for the replacement of water supplies that are made under the definition of "Replacement of Water Supply" at R645-100-200 are made for water supplies that are contaminated, diminished, or interrupted by coal mining and reclamation operations (emphasis added) which is a defined term also located at R645-100-200. Thus, the replacement of water supply(ies) as contemplated under the definition by the same name does include the replacement of water supplies affected by both surface and underground mining.

Utah's use of the term "coal mining and reclamation operations" in its proposed definition of "replacement of water supply" differs from the Federal term's definition but is consistent with it because it includes the same mining activities and effects, including "activities conducted on the surface of lands in connection with a surface coal mine * * *."

We received public comments concerning the scope of Utah's proposed water replacement rules in amendment UT-037-FOR (administrative record number UT-1112). Several comments suggested expanding Utah's water replacement provisions and are addressed under Part IV of this final rule.

In responses to comments the State received during its rulemaking process, Utah explained that it intends to require replacement of "developed" water supplies through its proposed water replacement rules (administrative record number UT-1119). That interpretation of the State's proposed rules does not appear to be consistent with its January 29, 1997, letter clarifying use of the underlying term "State-appropriated water" at UCA 40-10-18(15)(c). As asserted in that letter, any State-appropriated water covers the universe of legal Utah water uses by the universe of legal water users. Depending on what Utah considers "developed" water supplies to be, we believed some waters covered by the term "State-appropriated water" in the Utah Code might not be included in the proposed definition of "State-appropriated water supply" or covered by various rules incorporating that term throughout the proposed amendment.

In our October 1, 1998, letter, we asked Utah to describe what constitutes a "developed" water supply in its interpretation of its proposed rules. We also asked Utah to clarify how its interpretation is consistent with its

interpretation of the term "State-appropriated water" at UCA 40-10-18(15)(c). Utah responded to our request for clarification in its October 31, 2000, letter by stating, "The Division interprets that a "State-Appropriated Water Supply" includes the drinking, domestic, and residential water supplies of a water user."

As we explained above and in our finding for the proposed definition of "replacement of water supply," the State's proposed definition of "State-appropriated water supply" at Utah Admin. R. 645-100-200 includes the same water supplies included under the Federal definition of "drinking, domestic or residential water supply" at 30 CFR 701.5. Utah also explained in its January 29, 1997, clarification that its term includes other water supplies such as those supplying water for agricultural or industrial needs. The scope of water supply replacement under Utah's proposed definition of "replacement of water supply" is potentially broader than that provided by the Federal definition of "replacement of water supply" by virtue of the State's use of the term "State-appropriated water supplies" to identify water supplies subject to being replaced if contaminated, diminished, or interrupted by "coal mining and reclamation operations."

For these reasons, we find Utah's proposed definition of "replacement of water supply" is no less effective than the Federal definition. It also satisfies item B.5 of our June 5, 1996, 30 CFR part 732 letter.

4. Utah Admin. R. R645-301-525.100 through -525.130, Pre-subsidence Surveys

Utah proposed to delete the introductory statement at Utah Admin. R. 645-301-525 as well as its existing survey provisions at Utah Admin. R. 645-301-525.100 and 645-301-724.600. The State proposes to replace those rules with new rules introducing the subsidence control plan provisions in general and the pre-subsidence survey provisions at Utah Admin. R. 645-301-525 through -525.130.

In proposed section R645-301-525.100, Utah introduces the subsections on subsidence control plans and pre-subsidence survey requirements as pertaining to "underground coal mining and reclamation activities." Use of that term is consistent with Utah's definition of the same term at R645-100-200. Though the Federal regulation at 30 CFR 784.20 does not contain a similar qualifying statement, part 784 of the 30 CFR regulations is entitled, "UNDERGROUND MINING PERMIT

APPLICATIONS—MINIMUM REQUIREMENTS FOR RECLAMATION AND OPERATION PLAN" and includes section 784.20.

Utah's proposed section R645-301-525.110 differs from the Federal counterpart regulation at 30 CFR 784.20(a)(1) in two ways. First, it refers to a larger map scale required, if necessary, by the "Division" as compared to "the regulatory authority" in the Federal regulations. Second, it requires such maps to show the location and type of "State-appropriated water" compared to the Federal term, "drinking, domestic, and residential water supplies." The Division [of Oil, Gas and Mining] is the regulatory authority in Utah. As we explained in our finding for Utah's proposed definition of "State-appropriated water supply" at Part III.C.2 of this final rule, the State's use of this term is based its use of the term "State-appropriated water" in the statutory provision for water replacement at Utah Code Annotated 40-10-18(15)(c). We approved Utah's use of "State-appropriated water" in the Utah Code as no less stringent than the term "drinking, domestic, or residential water supply" at section 720(a)(2) of SMCRA in the August 4, 1997, final rule **Federal Register** (62 FR 4185).

The requirement at proposed Utah Admin. R. 645-301-525.120 for a narrative indicating if subsidence could materially damage or diminish the value or use of structures or renewable resource lands or adversely affect water supplies differs from the counterpart Federal regulation at 30 CFR 784.20(a)(2) only in Utah's use of the term "State-appropriated water supplies." As explained above, we find this term to be no less effective than the counterpart Federal term "drinking, domestic or residential water supplies."

Proposed Utah Admin. R. 645-301-525.130 requires a survey of the quantity and quality of all "State-appropriated water supplies" within the permit and adjacent areas that could be contaminated, diminished, or interrupted by subsidence. The counterpart Federal regulation also requires such a survey, but of the quantity and quality of "drinking, domestic, or residential water supplies." As explained above, we find this term to be no less effective than the Federal term "drinking, domestic or residential water supplies."

This same proposed rule also requires a permittee to give written notification to property owners who deny access to conduct surveys of buildings, dwellings, other structures, and water supplies of the effect denial will have as "described

in R645-301-525.543." Utah's original amendment contained a reference to Utah Admin. R. 645-301-525. In our October 1, 1998, letter (administrative record number UT-1125), we notified Utah of our concern that its reference should be more specific to ensure that applicants provide sufficient notice to owners that there will be no presumption of causation by subsidence if the owners deny applicants access to perform pre-subsidence surveys. Utah responded in its October 31, 2000, letter (administrative record number UT-1145) by changing the reference to cite Utah Admin. R. 645-301-525.543. The referenced rule provides that a rebuttable presumption does not exist if the permittee is denied access to conduct a pre-subsidence survey. Under proposed Utah Admin. R. 645-301-525.541, if material damage occurs to any noncommercial building, occupied residential dwelling, or related structure as a result of earth movement within the angle of draw from the outer boundary of underground mine workings to the land surface, a rebuttable presumption exists that the permittee caused the damage. Though the presumption can be rebutted, if it is not, the permittee must repair or compensate property owners for such damage under proposed Utah Admin. R. 645-301-525.520. Utah committed to promulgating the change proposed in its October 31, 2000, letter in its formal rulemaking process.

Proposed Utah Admin. R. 645-301-525.130 also requires permittees to give copies of the pre-subsidence survey and any technical assessment or engineering evaluation to the property owner and the "Division." The Federal regulation at 30 CFR 784.20(a)(3) requires copies to be given to the property owner and the "regulatory authority," which is the Division in Utah's case.

We note that the State based proposed Utah Admin. R. 6445-301-525.130 on the Federal regulation at 30 CFR 784.10(a)(3), part of which we suspended after our initial review of Utah's amendment. The last sentence of 30 CFR 784.20(a)(3) states "* * * 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 per court order."

In its April 27, 1999, decision in *National Mining Association v. Babbitt*, 173 F.3d 906 (1999), the United States Court of Appeals for the District of Columbia vacated certain parts of the

Federal subsidence regulations that were among those published on March 31, 1995, under SMCRA and section 2504 of the Energy Policy Act of 1992 ("EPAct;" Pub. L. 102-486, 106 Stat.2776 (1992)). EPAct added a new section 720 to SMCRA. Section 720 requires underground mine operators to repair or to compensate for material damage to residential structures and noncommercial buildings, and to replace drinking, domestic, or residential water supplies adversely affected by underground mining. The Federal regulation at 30 CFR 817.121(c)(4)(i) through (iv) provided that, if damage to any non-commercial building or occupied residential dwelling or related structures occurred as a result of earth movement in 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. The Court of Appeals vacated 30 CFR 817.121(c)(4)(i) through (iv) in their entirety. As we explained in the December 22, 1999, **Federal Register** (64 FR 71652), "* * * 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 Court 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. Essentially, the Court found that "* * * 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 * * *." We suspended 30 CFR 817.121(c)(4)(i) through (iv) in the December 22, 1999, final rule to comply with the Court's decision.

The Court also vacated the part of 30 CFR 784.20(a)(3) that required a specific

structural condition survey of all EPAct-protected structures located within an area defined by an angle of draw. As we explained in the December 22, 1999, final rule:

* * * the Court clearly upheld the Secretary's authority to require a pre-subsidence structural condition survey of all EPAct-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."

So, in the December 22, 1999, **Federal Register** (*Id.*), we suspended the part of 30 CFR 784.20(a)(3) that required a specific structural condition survey of all structures protected by EPAct. The rest of that regulation remains in force to the extent that it applies to the EPAct-protected water supplies survey and any technical assessments or related engineering evaluations.

Utah declined to revise its amendment in light of the suspended Federal regulations (administrative record number UT-1148). The fact that we suspended the part of 30 CFR 784.20(a)(3) requiring a pre-subsidence structural condition survey of EPAct-protected structures within the area defined by an angle of draw does not preclude Utah from having that provision in its rules. In addition, Utah's proposal to include such a provision in its rules does not make Utah's proposed rule less effective than the Federal regulations or less stringent than SMCRA. Section 505(b) of SMCRA provides that "Any provision of any State law or regulation in effect on the date of enactment of this Act, or which may become effective thereafter, which provides for the control and regulation of surface mining and reclamation operations for which no provision is contained in this Act shall not be construed to be inconsistent with this Act." The State promulgated proposed Utah Admin. R. 645-301-525.130 on March 15, 1998. In addition, this proposed rule provides for the control and regulation of surface mining and reclamation operations in accordance with section 505(b) of SMCRA. 0

Therefore, based on the reasoning presented above, we find proposed Utah Admin. R. 645-301-525 through -525.120 are no less effective than the counterpart Federal regulations, and proposed Utah Admin. R. 645-301-525.130 is not inconsistent with SMCRA

or the Federal regulations. The State's proposal to remove existing provisions at Utah Admin. R. 645-301-525 through -525.100 and at 645-301-724.600 is appropriate in light of the new provisions it is adding.

5. Utah Admin. R. 645-301-525.400, -525.480, and -525.490, Subsidence Control Plan Contents

Utah proposes to add new provisions at Utah Admin. R. 645-301-525.400 through -525.490 describing information that must be included in subsidence control plans. It also proposes to remove existing provisions for subsidence control plans at Utah Admin. R. 645-301-525.110 through -525.170.

Proposed R645-301-525.400, which describes the conditions under which a pre-subsidence survey is to be conducted and what information it must contain, differs somewhat from the Federal counterpart regulation at 30 CFR 784.20(b). Utah's rule refers to surveys conducted under "R645-301-525.100" where the Federal regulation refers to surveys conducted "under paragraph (a) of this section." The Federal reference is to 30 CFR 784.20(a), which introduces the pre-subsidence survey requirements of subsections (a)(1) through (a)(3). Referenced R645-301-525.100, as also proposed in this amendment, is Utah's counterpart to 30 CFR 784.20(a). Proposed R645-301-525.400 also refers to surveying for the existence of "State-appropriated water supplies" and the need for a permit application to include a subsidence control plan if a survey shows such water supplies exist or could be adversely affected by subsidence. As we explained previously in this final rule, we find the State's term "State-appropriated water supply" to be no less effective than the Federal term "drinking, domestic, or residential water supply." Additionally, references in proposed R645-301-525.400 to the "Division" are analogous to the counterpart Federal regulation's references to the "regulatory authority" because the Division is the regulatory authority in Utah.

Proposed Utah Admin. R. 645-301-525.480 requires subsidence control plans to include a description of measures to be taken "in accordance with R645-301-731.530 and R645-301-525.500 to replace adversely affected State-appropriated water supplies or to mitigate or remedy any subsidence-related material damage to the land and protected structures * * *." The counterpart Federal regulation at 30 CFR 784.20(b)(8) requires a description of measures taken to replace "protected

water supplies" and to mitigate or remedy subsidence damage to land and protected structures in accordance with " * * * §§ 817.41(j) and 817.121(c) of this chapter * * *." Referenced Utah Admin. R. 645-301-731.530 and 645-301-525.500 in Utah's proposed rule are the State's counterparts to OSM's performance standards for water replacement and surface damage repair at 30 CFR 817.41(j) and 817.121(c), respectively. We explained previously in our finding at Part III.C.3 of this final rule that, while the Federal regulations do not define "protected water supplies," 30 CFR 817.41(j) clearly identifies a protected water supply subject to replacement as a "drinking, domestic, or residential water supply." We also previously found that the State's term "State-appropriated water supply" is no less effective than the Federal term "drinking, domestic, or residential water supply."

Proposed Utah Admin. R. 645-301-525.490 requires subsidence control plans to include other information specified by the "Division" as needed to show the operation will be conducted according to R645-301-525.200, -525.300, -525.500, and -525.6500. In comparison, the counterpart Federal regulation at 30 CFR 784.20(b)(9) refers to the "regulatory authority" and to " * * * § 817.121 of this chapter." As we noted above, the Division is the regulatory authority in Utah.

In the original amendment, proposed Utah Admin. R. 645-301-525.490 only referred to Utah Admin. R. 645-301-525.300. That referenced rule includes the State's performance standards for preventing or minimizing subsidence-related damage under Utah Admin. R. 645-301-525.310 through -525.313. Referenced counterpart 30 CFR 817.121 includes a much wider range of provisions that an operation must be conducted under. Because the State's original reference was less inclusive than the referenced counterpart Federal regulation, we found originally proposed Utah Admin. R. 645-525-301.490 did not ensure that the Division will be provided with sufficient information to determine that an operation will be conducted in accordance with all applicable provisions for subsidence control. We notified Utah of our concern in our October 1, 1998, letter (administrative record number UT-1125), and advised the State that its proposed rule should include a more inclusive reference. In its October 31, 2000, response (administrative record number UT-1145), the State revised proposed Utah Admin. R. 645-301-525.490 to include references to Utah Admin. R. 645-301-

525.200, -525.500, and -525.600 in addition to the original reference to -525.300. These referenced rules contain provisions analogous to those included under 30 CFR 817.121. Utah committed to promulgating this change in its formal rulemaking process.

We note that the State based proposed Utah Admin. R. 645-301-525.400, -525.480, and -525.490 on the need for a subsidence control plan when indicated by the pre-subsidence survey conducted under Utah Admin. R. 645-301-525.130. That latter rule, in turn, is based on the Federal counterpart regulation at 30 CFR 784.20(a)(3), which is suspended in part. The fact that we suspended the part of 30 CFR 784.20(a)(3) requiring a pre-subsidence structural condition survey of EPA-protected structures within the area defined by an angle of draw does not preclude Utah from having that provision, and other provisions based on it, in its rules. As we explained previously, Utah's proposal to include provisions in its rules that are not found in SMCRA or the Federal regulations does not make Utah's proposed rules less effective than the Federal regulations or less stringent than SMCRA if those State provisions are in effect and control and regulate surface mining and reclamation operations in accordance with section 505(b) of SMCRA.

Based on these reasons, we find proposed Utah Admin. R. 645-301-525.400, -525.480, and -525.490 are no less effective than the counterpart Federal regulations and are not inconsistent with SMCRA. The State's proposal to remove existing provisions at Utah Admin. R. 645-301-525.110 through -525.170 is appropriate in light of the new provisions being added.

6. Utah Admin. R. 645-301-525.530, Repair or Compensation for Damage to Other Structures

Proposed Utah Admin. R. 645-301-525.530 requires repair of, or compensation for, subsidence-caused damage to structures or facilities not protected by Utah Admin. R. 645-301-525.520. The Federal counterpart regulation at 30 CFR 817.121(c)(3) provides that the permittee " * * * must, to the extent required under applicable provisions of State law, * * * correct material subsidence damage caused to any structures or facilities not protected " * * * by paragraph (c)(2) of this section * * * " by repairing damage or compensating owners for the decreased value resulting from subsidence. Utah's proposed rule does not require permittees to correct damage or compensate owners "to the

extent required under applicable provisions of State law” but says they “* * * shall either correct material damage from subsidence caused to any structures or facilities not protected by paragraph 525.520 * * *” by repairing such damage or by compensating owners for the resulting decreased value.

Utah’s proposed rule extends replacement or compensation protection to structures and facilities not provided such protections under Utah Admin. R. 645–301–525.520, which is based on UCA 40–10–18(15)(b)(i). Those sections of Utah’s rules and its Code, respectively, provide for repair of damage to occupied residential dwellings and related structures or noncommercial buildings caused by underground coal mining after October 24, 1992. However, they do not extend such protections to other structures damaged by subsidence as provided in proposed Utah Admin. R. 645–301–525.530. By not including a phrase corresponding to the phrase “to the extent required under applicable provisions of State law” in the counterpart Federal regulation, proposed Utah Admin. R. 645–301–525.530 is Utah’s legal requirement that a permittee repair or compensate for subsidence-caused material damage to structures not protected by UCA 40–10–18(15)(b)(i) or Utah Admin. R. 645–301–525.520. As a result, there is no need to qualify the remedies available to owners of structures or facilities by the extent to which they are otherwise required under applicable provisions of State law.

Other differences between the wording in the proposed State rule and the counterpart Federal regulation do not make Utah’s proposed rule less effective. Further, the State’s reference to “525.520” in its proposed rule refers to Utah Admin. R. 645–301–525.520, which is Utah’s counterpart to referenced “paragraph (c)(2) of this section,” or 30 CFR 817.121(c)(2), in the corresponding Federal regulation.

For these reasons, we find proposed Utah Admin. R. 645–301–525.530 is no less effective than the counterpart Federal regulation. It also satisfies item D.3 of our June 5, 1996, 30 CFR Part 732 letter.

7. Utah Admin. R. 645–301–525.540 Through –525.544, Rebuttable Presumption of Causation by Subsidence

Proposed Utah Admin. R. 645–301–525.540 through –525.544 introduce and establish a rebuttable presumption that damage sustained by certain structures was caused by mining. Proposed Utah

Admin. R. 645–301–525.541 provides that, if damage occurs to any non-commercial building or occupied residential dwelling or structure related thereto as a result of subsidence in an area determined by an angle of draw from the outermost boundary of any underground workings to the land surface, there is a rebuttable presumption that the permittee caused the damage. The angle of draw normally is 30 degrees from the vertical but may be different if amended by the Division on a mine-specific basis under proposed Utah Admin. R. 645–301–525.542. Proposed Utah Admin. R. 645–301–525.543 provides for no presumption where a landowner denies a permittee access to perform a pre-subsidence survey. Finally, proposed Utah Admin. R. 645–301–525.544 provides that the presumption will be rebutted if damage predated mining, was caused by something other than subsidence, or occurred outside the surface area in which mining actually caused subsidence.

The State based its proposed rules at Utah Admin. R. 645–301–525.540 through –525.544 on the counterpart Federal regulations at 30 CFR 817.121(c)(4)(i) through (iv), which are suspended in their entirety. The fact that we suspended the Federal provisions for a rebuttable presumption of causation by subsidence at 30 CFR 817.121(c)(4)(i) through (iv) does not preclude Utah from having those provisions in its rules. In addition, Utah’s proposal to include such provisions in its rules does not make Utah’s proposed rules less effective than the Federal regulations or less stringent than SMCRA. Again, Utah’s proposal to include provisions in its rules that are not found in SMCRA or the Federal regulations does not make Utah’s proposed rules less effective than the Federal regulations or less stringent than SMCRA if those State provisions are in effect and control and regulate surface mining and reclamation operations in accordance with section 505(b) of SMCRA.

Based on this reasoning, we find proposed Utah Admin. R. 645–301–525.540, –525.541, –525.542, –525.543, and –525.544 are no less effective than the counterpart Federal regulations and are not inconsistent with SMCRA.

8. Utah Admin. R. R645–301–525.550, Adjustment of Bond Amount for Subsidence Damage

Proposed Utah Admin. R. 645–301–525.550 adds provisions for adjusting bond amounts when protected land, structures, or facilities are materially damaged by subsidence or when

protected water supplies are contaminated, diminished, or interrupted. Utah’s proposed rule references land, structures, or facilities protected under Utah Admin. R. 645–301–525.500 through –525.530. Those referenced proposed rules address protected surface lands, non-commercial buildings, dwellings, and related structures, and other structures or facilities. Parts III.B and III.C.6 of this final rule contain our findings that those rules are no less effective than the Federal regulations. The Federal counterpart to Utah Admin. R. 645–301–525.550 is 30 CFR 817.121(c)(5). It provides for adjusting bond amounts as a result of subsidence damage to the same buildings, dwellings, structures and facilities but refers to lands, buildings, structures and facilities protected under “* * * paragraphs (c)(1) through (c)(3) of this section * * *.” Those referenced paragraphs are found at 30 CFR 817.121(c)(1) through (c)(3), which correspond to referenced Utah Admin. R. 645–301–525.500 through –525.530.

Utah’s proposed rule also provides for adjusting bond amounts when subsidence contaminates, diminishes, or interrupts water supplies protected under proposed Utah Admin. R. 645–301–731.530. As noted in previous findings in this final rule, Utah identifies protected water supplies as “State-appropriated water supplies.” The Federal regulation at 30 CFR 817.121(c)(5) similarly provides for bond adjustments when “* * * water supplies protected under §§ 817.41(j) * * *” are adversely affected by subsidence. Section 817.41(j) is the Federal counterpart to Utah Admin. R. 645–301–731.530 and identifies a protected water supply as a “drinking, domestic, or residential water supply.” As we explained previously, Utah’s term “State-appropriated water supply” is no less effective than the Federal term “drinking, domestic, or residential water supply.”

References to the “Division” in Utah’s proposed rule are analogous to the Federal regulation’s reference to the “regulatory authority” because the Division is the regulatory authority in Utah.

For the reasons explained above, we find proposed Utah Admin. R. 645–301–525.550 is no less effective than the Federal regulation at 30 CFR 817.121(c)(5). The State’s proposed rule also satisfies item D.5 of our June 5, 1996, 30 CFR Part 732 letter.

9. Utah Admin. R. 645-301-728.340 and 728.350, Probable Hydrologic Consequences (PHC) Determination

Proposed Utah Admin. R. 645-301-728.350 requires probable hydrologic consequences determinations to find whether underground coal mining and reclamation activities conducted after October 24, 1992, will adversely affect State-appropriated water that exists in the proposed permit or adjacent areas at the time a permit application is submitted, and that is used for legitimate purposes in those areas.

The proposed rule differs from the Federal counterpart regulation at 30 CFR 784.14(e)(3)(iv) in Utah's use of the term "State-appropriated water," reference to use of that water for "legitimate purposes," and reference to "underground coal mining and reclamation activities." Utah hydrology rules at Utah Admin. R. 645-301-700 establish requirements for information that must be included in applications for surface *and* underground coal mining. Because proposed Utah Admin. R. 645-301-728.350 pertains to a finding that must be included in PHC determinations specific to underground mines, the reference to "underground coal mining and reclamation activities" clearly identifies it as such. Similarly, adding a semi-colon at the end of the preceding subsection at Utah Admin. R. 645-301-728.340 and the word "OR" following it distinguishes proposed Utah Admin. R. 645-301-728.350 from subsection -728.340 as a finding that must be made for underground coal mining and reclamation activities as opposed to surface coal mining and reclamation activities. Utah's term "underground coal mining and reclamation activities" includes a reference to "coal mining and reclamation activities" as both are defined at Utah Admin. R. 645-100-200. The former term is the State's counterpart to the "underground mining activities" referred to in the counterpart Federal regulations at 30 CFR 784.14(e)(3)(iv), which are defined at 30 CFR 701.5.

The term "State-appropriated water" and reference to use of that water for "legitimate purposes" in proposed Utah Admin. R. 645-301-728.350 are not inconsistent with the Federal regulations. As noted in previous findings for this amendment, Utah's statutory provision for water replacement at Utah Code Annotated (UCA) 40-10-18(15)(c) is based on the term "State-appropriated water." As used in this proposed rule and UCA 40-10-18(15)(c) and clarified by Utah in its January 29, 1997, letter (administrative

record number UT-1094), "State-appropriated water" provides broader water replacement protection than is provided under the corresponding term "drinking, domestic, or residential water supply" used in the Federal regulation for PHC findings at § 784.14(e)(3)(iv) and protected under section 720(a)(2) of SMCRA. Utah's proposed qualification that the water in existence at the time a permit application is submitted be used for "legitimate purposes" refers back to its term "State-appropriated water." To paraphrase Utah's clarification about the term "State-appropriated water" in its January 29, 1997, letter, the only *legitimate* use of water in Utah is the use of water appropriated by the State. Moreover, the criterion for legitimate water use proposed at Utah Admin. R. 645-301-728.350 for underground mining is consistent with the requirement that PHC determinations include findings on the impacts of surface coal mining and reclamation activities on the source(s) of water used for domestic, agricultural, industrial, or *other legitimate purpose* at Utah Admin. R. 645-301-728-340 and counterpart 30 CFR 780.21(f)(3)(iii) (emphasis added).

Based on the reasons explained above, proposed Utah Admin. R. 645-301-728.350 and the proposed revision to Utah Admin. R. 645-301-728.340 are not inconsistent with, and are no less effective than, the Federal regulation at 30 CFR 784.14(e)(3)(iv). The proposed rules also satisfy item C.1 of our June 5, 1996, 30 CFR part 732 letter.

10. Utah Admin. R. R645-301-731.530, Hydrology: Operation Plan: State-Appropriated Water Supply

Proposed Utah Admin. R. 645-301-731.530 requires a permittee to replace any State-appropriated water supply that is contaminated, diminished, or interrupted by underground coal mining and reclamation activities conducted after October 24, 1992, if the affected water supply existed before the Division received the permit application for the activities causing the adverse effects. It also requires use of baseline hydrologic and geologic information required in Utah Admin. R. 645-301-700 to determine mining impacts on the water supply. Utah's proposed rule differs from the counterpart Federal regulation at 30 CFR 817.41(j) in its use of the terms "State-appropriated water supply," "underground coal mining and reclamation activities," and "Division" and by referring to Utah Admin. R. 645-301-700. The corresponding terms in the Federal regulation are "drinking, domestic or residential water supply," "underground mining activities," and

"regulatory authority." Also, the Federal regulation refers to baseline hydrologic information required in 30 CFR 780.21 and 784.14 and geologic information required in sections 780.21 and 784.22.

In Part IV.A of this final rule, we describe in detail commenters' concern for the scope of Utah's proposed water replacement rules and their suggestion for expanding the State's water replacement provisions (administrative record number UT-1112). As we explained above and in previous findings in this final rule, the State's proposed definition of "State-appropriated water supply" at Utah Admin. R. 645-100-200 includes those water supplies included under the Federal definition of "drinking, domestic or residential water supply" at 30 CFR 701.5. Utah explained in its January 29, 1997, clarification that its term includes other water supplies such as wells and springs that supply water for agricultural, commercial or industrial needs. Therefore, the scope of water supply replacement under Utah's proposed rule is potentially broader than that provided under the Federal definition of "replacement of water supply" by virtue of the State's use of its defined terms "State-appropriated water supplies" and "replacement of water supply" in describing those water supplies subject to replacement if contaminated, diminished, or interrupted by underground coal mining and reclamation activities.

Utah's original (March 20, 1998) submittal of this amendment required prompt replacement of water adversely affected by "underground mining activities." While that term appears to be identical to that in the counterpart Federal regulation, it is undefined in Utah's rules and statute. In telephone conversations on April 29 and May 11, 1998, we advised Utah that use of its defined term "underground coal mining and reclamation activities" would be more appropriate (administrative record numbers UT-1111 and UT-1113, respectively). The State responded with a letter dated May 13, 1998 (administrative record number UT-1115), in which it agreed to change "underground mining activities" to "underground coal mining and reclamation activities" through formal rulemaking. Utah promulgated the corrected rule that includes the term "underground coal mining and reclamation activities" on September 30, 1998 (DAR file number 21334), which is among those we are approving in this final rule. As defined at Utah Admin. R. 645-100-200, "underground coal mining and reclamation activities" is the State's counterpart to the Federal

term "underground mining activities" as defined at 30 CFR 701.5.

As noted previously, the Division is the regulatory authority in Utah.

Based on the reasons explained above, we find proposed Utah Admin. R. 645-301-731.530 is no less effective than the counterpart Federal regulation. It also satisfies item D.1 of our June 5, 1996, 30 CFR part 732 letter.

IV. Summary and Disposition of Comments

Following are summaries of all written comments on the proposed amendment that we received and our responses to those comments.

A. Public Comments

We asked for public comments on the proposed amendment as originally submitted (administrative record number UT-1106) and as revised in Utah's October 31, 2000, letter (administrative record number UT-1156). We received six comment letters, two of which attached comments from four water user groups.

The Utah Mining Association (UMA) responded in a May 5, 1998, letter, by expressing its support for the proposed amendment and urging us to approve it (administrative record number UT-1114). UMA noted that it was actively involved in developing the State legislation that enabled the rule changes. It explained how it worked with the State Engineer to ensure protection of water rights throughout the legislative process and with water users in Utah's coal regions to develop legislative language.

We also received comments submitted by two law firms on behalf of a special service district, a water conservancy district, an irrigation company, and a water users association (hereafter, collectively the "water users") (administrative record number UT-1112). These commenters represent water users in a predominant coal mining region of Utah. The remaining discussions under Part IV.A of this final rule describe the water users' comments and our responses.

A number of water user comments proposed changes to rules that are not the subject of amendment UT-037-FOR. Those comments addressed alternative water source information for surface coal mining and reclamation activities, PHC findings and requirements concerning acid- or toxic-forming materials, discharges into underground mines, and gravity discharges. While these comments pertain to water-related issues, we find that the rules and changes they suggested do not apply to this rulemaking. However, we

forwarded these comments to the State for its consideration.

1. Replacement of Water Supply; State-Appropriated Water Supply; and Water Supply

One comment described Utah's proposed definition of "replacement of water supply" at Utah Admin. R. 645-100-200 as applicable only to surface mining operations. The comment based this conclusion on Utah's reference to State-appropriated water supplies adversely affected by "coal mining and reclamation operations." It assumed that this term in Utah Admin. R. 645-100-200 is less inclusive than the term "coal mining operations" in the Federal definition of "replacement of water supply" at 30 CFR 701.5.

As defined at Utah Admin. R. 645-100-200, "coal mining and reclamation operations" includes activities conducted on the surface of lands in connection with a surface coal mine and surface coal mining and reclamation operations, as well as surface impacts incident to an underground coal mine. The phrase "surface impacts incident to an underground coal mine," also is defined at Utah Admin. R. 645-100-200 and means all operations involved in or related to underground coal mining and reclamation activities. It includes activities conducted on the land surface, that alter or disturb the land surface, or that disturb the surface, air, or water resources of the area.

The Federal counterpart to Utah's term "coal mining and reclamation operations" is "surface coal mining operations" and is defined at section 701(28) of SMCRA. "Surface coal mining operations" includes the scope of activities included in the term "coal mining operations" as defined at 30 CFR 705.5 and 706.3, and included in the Federal definition of "replacement of water supply." It also includes activities conducted on the surface of lands in connection with a surface coal mine as well as to surface operations and surface impacts incident to an underground coal mine. Also, as we explained in our finding at Part III.C.3. of this final rule, Utah clarified in its October 31, 2000, letter (administrative record number UT-1145) that its proposed definition of "replacement of water supply" provides for the replacement of water supplies adversely affected by "coal mining and reclamation operations." The latter term is defined in Utah's rules to include surface and underground mining. For these reasons, we found Utah's definition of "replacement of water supply" to be no less effective than the Federal counterpart definition at 30 CFR 701.5.

Other comments suggested removing the word "supply" from Utah's definitions of "replacement of water supply" and "State-appropriated water supply," and from references to water supply throughout Utah's proposed amendment. In some cases, comments suggested replacing the word "supply" or "supplies" with "source" or "sources" or to add the term "water sources." While the preamble to the final rule approving the Federal definition of "replacement of water supply" indicates that circumstances could require replacement of a water source (See 60 FR 16722, 16733, March 31, 1995), sections 717(b) and 720(a)(2) of SMCRA and the Federal regulations use the terms "supply" and "supplies." The standard we use for review of Utah's program is that it must be no less effective than the Federal regulations and no less stringent than SMCRA. We cannot require Utah's provisions to be more stringent than SMCRA or more effective than the Federal regulations. Utah's use of the terms "supply" and "supplies" in its proposed rules is consistent with use of those terms in SMCRA and the Federal regulations. We therefore find the State's proposed rules are no less stringent than SMCRA and no less effective than the counterpart Federal regulations without the suggested changes.

Another comment suggested replacing the term "water supply owner" in Utah's proposed definition of "replacement of water supply" with "water rights holder." Utah's use of the term "water supply owner" is consistent with use of the identical term in the counterpart Federal definition of "replacement of water supply" at 30 CFR 701.5. The State's proposed definition therefore is no less effective than the counterpart Federal definition in this regard as well without the suggested change.

One comment also maintained that UCA 40-10-18 is not limited to water "supply" but pertains to all State-appropriated water. It also stressed that many water rights in Utah pre-date statehood and thus are not State-created, but are recognized by Utah law. Sections of the State's rules to which this comment applied include: Utah Admin. R. 645-100-200, definitions; 645-301-525.120 and 525.130, pre-subsidence survey; 645-301-525.400 and 525.480, subsidence control plan contents; 645-301-525.550, adjustment of bond amount for subsidence damage; 645-301-728.350, PHC determinations for underground coal mining and reclamation activities; and 645-301-731.530, replacement of State-appropriated water supply.

In our October 1, 1998, letter to Utah (administrative record number UT-1125), we asked the State to further clarify its interpretation of the term "State-appropriated water" to address the question of whether there are legal uses of water in Utah that fall outside the scope of "State-appropriated water." We also asked Utah to clarify its interpretation of the proposed definition of "State-appropriated water supply" to address the assertion that legal water rights exist in the State that are recognized by Utah law but are not created by the State.

Utah responded to our request for clarification in a letter dated October 31, 2000 (administrative record number UT-1145). In its response, Utah said it has a process under Utah Code Annotated Section 73-5-13 [which it included in its letter] to recognize water claims established by diversion ("diligence rights") before the State Engineer's office was established and before Utah became a State. Utah's response concluded that "State-appropriated water" therefore includes territorial water rights. UCA 73-5-13 is entitled, "Claim to surface or underground water not otherwise represented—Information required—Corrections—Filing—Investigation—Publication—Judicial action to determine validity—Rules." Subsection (1)(a) provides that:

All claimants to the right to the use of water, including both surface and underground, whose rights are not represented by certificates of appropriation issued by the state engineer, by applications filed with the state engineer, by court decrees, or by notice of claim filed pursuant to law, shall submit the claim to the state engineer.

Subsection (2) describes the information that each claim must include, and subsection (4) requires that:

Upon submission by a claimant of a claim that is acceptably complete under Subsection (2) and the deposit of money by a claimant with the state engineer sufficient to pay the expenses of conducting a field investigation and publishing a notice of the claim, the state engineer shall (i) file the claim; (ii) endorse the date of its receipt; (iii) assign the claim a water right number; and (iv) publish a notice of the claim following the same procedures as provided in Section 73-3-6.

Subsection (4)(c) provides that "The acceptance of any claim filed under this section by the state engineer may not be considered to be an adjudication by the state engineer of the validity of the claimed water right." At the same time, however, the report of the State Engineer's investigation of the claim is " * * * admissible in any administrative or judicial proceeding on the validity of

the claim * * * " under subsection (5)(b)(ii).

Our finding at Part III.C.2. of this final rule describes Utah's clarification of its term "State-appropriated water" at UCA 40-10-18(15)(c). We found the definition of this term to be no less effective than the counterpart Federal term "drinking, domestic, or residential water supply." That Federal term is based on the wording of section 720(a)(2) of SMCRA as amended by EPAct and requires replacement of water supplies adversely affected by underground mining coal mining operations. Our findings at Parts III.C.2, 3, 4, 5, 9 and 10 of this final rule also explain why we find Utah's definitions and rules as proposed with the terms water "supply" or "supplies" to be no less effective than the Federal regulations. As we further explained at Part III.C.2 of this final rule, and is found at UCA 40-10-29(1), this provision supplements, but does not otherwise affect in any way, anyone's right to protect or enforce his or her interest in water resources affected by a coal mining operation.

In addition, Utah's rules contain other provisions to ensure protection of surface and ground water beyond the protections afforded by this amendment. Utah Admin. R. 645-301-728 addresses determinations of the probable hydrologic consequences of mining on surface and groundwater in proposed permit and adjacent areas. As required by Utah Admin. R. 645-301-729, for each permit application, the State develops a cumulative hydrologic impact assessment (CHIAs) of probable impacts of mining and reclamation on surface and ground water systems in the cumulative impact area. A CHIA also determines if proposed mining and reclamation is designed to prevent material damage to the hydrologic balance outside the permit area. Performance standards at Utah Admin. R. 645-301-750 *et seq.* require all coal mining and reclamation operations to be conducted to minimize disturbance to the hydrologic balance in the permit and adjacent areas. They also require those operations to prevent material damage to the hydrologic balance outside the permit area and to support approved postmining land uses.

One comment suggested rewording Utah's definition of "replacement of water supply" to require payment of actual delivery costs instead of costs in excess of customary and reasonable delivery costs for premining water supplies. As proposed in Utah's definition, such payment pertains to operation and maintenance costs in excess of customary and reasonable

costs of premining water supply delivery. We considered payment of costs in the preamble to the final rule approving the Federal definition of "replacement of water supply" at 30 CFR 701.5 (60 FR 16722, 16726, March 31, 1995). In that discussion, we noted that payment of costs for replacement water supply operation and maintenance in excess of premining costs would ensure a water supply user or owner is made whole upon installation of the replacement supply by not passing-on to the user any additional costs beyond those that were customary and reasonable for the premining supply. The final Federal definition provides for payment of costs in excess of customary and reasonable delivery costs for premining supplies. Utah's proposed definition is no less effective than the Federal definition because it contains the same provision for payment of costs without the change suggested in the comment. As explained previously, the standard we use for review of Utah's program is that it must be no less effective than the Federal regulations and no less stringent than SMCRA. We cannot require Utah's provisions to be more stringent than SMCRA or more effective than the Federal regulations.

In another comment, water users suggested removing paragraph (b) from Utah's proposed definition of "replacement of water supply" at Utah Admin. R. 645-100-200. Paragraph (b) provides that demonstrating that a suitable alternative water source is available and could feasibly be developed will satisfy replacement requirements if the affected supply was not needed for the existing land use when it was lost, contaminated, or diminished, and if it is not needed to achieve the post mine land use. If this approach is selected, written concurrence from the supply owner must be obtained. The commenter maintained that no statutory provision excuses a permittee from the requirement to replace adversely affected State-appropriated water.

We considered similar comments in our preamble discussion of the Federal definition of "replacement of water supply" in the March 31, 1995, final rule (*Id.*, at 16727). We adopted the Federal definition, including the alternative water source demonstration, to give the water supply owner the option of foregoing installation of a delivery system in circumstances in which the system was not wanted or needed. We reasoned that the provision still would require all coal mining operations to be conducted to ensure water sources remain to support existing

and proposed land use by requiring the permittee to demonstrate water availability equal to premining quality and quantity. Only a water delivery system that would not be used for the postmining land use, and that was not needed for the premining land use, may be waived. We concluded that this provision ensures compliance with EPA Act and section 717 of SMCRA in all essential respects, while avoiding unneeded expense. The same reasoning applies to Utah's proposed definition of "replacement of water supply." Based on this reasoning, we believe Utah's proposed definition is no less effective than the counterpart Federal definition at 30 CFR 701.5 without the suggested change. Further, we cannot require Utah's provisions to be more stringent than SMCRA or more effective than the Federal regulations.

2. Suggested Additional Definitions and Rebuttable Presumptions

Four comments submitted by water users suggested that Utah should define a number of terms and create additional rebuttable presumptions to provide more protection to water rights holders. The terms included: "Promptly," as used to describe replacement of State-appropriated water at UCA 40-10-18(15)(c) and proposed Utah Admin. R. 645-301-731.530; and "contamination of water," "diminution of water," and "interruption of water" as used to describe water subject to replacement at UCA 40-10-18(15)(c) and included in several rules in this amendment. The comments also suggested that these additional definitions should include rebuttable presumptions of contamination, diminution, and interruption, respectively.

The Federal counterpart to UCA 40-10-18(15)(c) is section 720(a)(2) of SMCRA, as amended by EPA Act. SMCRA does not define the terms "promptly," "contamination of water," "diminution of water," or "interruption of water" as used in that section. We previously found UCA 40-10-18(15)(c) to be no less stringent than 720(a)(2) of SMCRA and approved it on that basis (62 FR 41845, August 4, 1997). In our discussion of comments in the preamble to the March 31, 1995, final rule, however, we decided that providing guidance on the issue of timing water supply replacement would promote consistent implementation of replacement requirements (*Id.*, at 16727). Guidance on "prompt" replacement, in particular, is provided in that discussion, and we intend it to help regulatory authorities decide if water supplies have been "promptly" replaced. We explained in our finding at

Part III.C.3 of this final rule that we found Utah's definition of "replacement of water supply" to be no less effective than the counterpart Federal definition at 30 CFR 701.5 as proposed by the State.

SMCRA and the Federal regulations do not require presumptions of water contamination, diminution, or interruption. In the preamble to the final rule approving the Federal regulation at 30 CFR 817.121(c)(4) that established the rebuttable presumption that subsidence damaged noncommercial buildings, dwellings, and related structures, we considered comments suggesting a presumption of subsidence causation for damage to water supplies (*Id.*, at 16741; **Note:** This pre-dated our suspension of 30 CFR 817.121(c)(4)(i) through (iv) on December 22, 1999). We did not establish a presumption for water supply damage because we believe determining the cause(s) of water supply damage does not lend itself to such a presumption. We based our conclusion, in part, on our belief that determining the cause of damage to a water supply from springs and wells can be much more complex than determining the cause of damage to surface lands and structures because the cause(s) of water supply damage can involve a potentially greater variety of geological and hydrological formations and dynamics. At the same time, we also concluded that a water supply owner's ability to have an adversely affected water supply replaced will not be inhibited by the absence of a presumption that subsidence damaged the supply. In Utah's case, if the Division ultimately proves that a water supply has been adversely affected by an underground mining operation, the permittee must promptly replace the affected supply. Consequently, we believe Utah's definition of "replacement of water supply" is no less effective than the counterpart Federal definition without the suggested presumptions.

3. Pre-Subsidence Survey

In another comment, water users suggested adding a sentence concerning map requirements in pre-subsidence surveys to the end of the proposed paragraph at Utah Admin. R. 645-301-525.110. The suggestion would require permittees to file such maps with the State Engineer, the local conservancy district, the largest water right holder in the drainage, and the County office(s) where the permit area is located in addition to including it in the permit application. In Part III.C.4 of this final rule, we found Utah Admin. R. 645-301-525.110 is no less effective than the

counterpart Federal regulation at 30 CFR 784.20(a)(1) without the provision for map submittal with a permit application as suggested by the comment. This comment would add requirements to Utah's proposed rule that go beyond the scope of the counterpart Federal regulation. As explained previously, we cannot require Utah's rules to be more effective than the Federal regulations.

In addition, however, existing State rules already require maps to be available to the public in their requirements for public participation and notice. Utah Admin. R. 645-300-121 provides for public notice of the Division's receipt of an application (including maps) in local newspapers, for making the application available for public inspection and copying at county courthouses, and notifying local governmental agencies, including planning agencies, water treatment authorities and water companies where they can inspect the complete application. Utah Admin. R. 645-300-122 provides for public comments and objections related to a permit application. Utah Admin. R. 645-300-123 provides for informal public conferences about permit applications. All permit applications (including maps) on file with the Division will be made available for public inspection and copying at reasonable times as provided by Utah Admin. R. 645-300-124.

Another comment suggested adding a statement to proposed Utah Admin. R. 645-301-525.130 requiring the [permit] applicant to consult water rights holder(s), land owner(s), and the State Engineer to determine that all springs and water sources have been properly identified, monitored, and addressed in the pre-subsidence survey. Utah's approved regulatory requirements for public participation and notice are described in the preceding paragraph's response to a similar comment. Further, the State's rules at Utah Admin. R. 645-301-700 *et seq.* require permit applications to include descriptions of existing hydrologic resources, including baseline information about surface and groundwater. We believe Utah Admin. R. 645-301-525.130 is not inconsistent with SMCRA and the Federal regulations as the State proposed it without the suggested additional statement.

4. Subsidence Control

Two water user comments suggested removing the phrase "and economically" from Utah Admin. R. 645-301-525.311 and -525.312, which require measures to respectively prevent

and minimize material damage to protected structures caused by subsidence to the extent technologically and economically feasible. We considered economic feasibility in our discussion of comments in the March 31, 1995, final rule adopting the Federal subsidence control regulations (*Id.*, at 16734). Recognizing that some material damage to protected structures from subsidence is possible, we required that such damage must be repaired. At the same time, we did not intend to discourage use of planned and controlled subsidence mining methods or to require underground mining methods not normally associated with such operations. We did, however, intend to require reasonable measures to be taken on the surface to protect occupied residential dwellings and related structures and non-commercial buildings from material damage. In that context, we reasoned that, by requiring measures to minimize subsidence damage to non-commercial buildings and occupied residential dwellings and related structures only when technologically and economically feasible, we mitigated any potential for unreasonably expensive minimization measures by providing that the requirement does not apply if the permittee demonstrates that minimization would cost more than repair. The same rationale applies to Utah Admin. R. 645-301-525.300 through -525.313. We believe the proposed rule is no less effective than the counterpart Federal regulations without the suggested change.

One water user comment suggested adding a new provision at Utah Admin. R. 645-301-525.312.3. The suggested provision would require written consent of all holders of State-appropriated water with a source in, adjacent to, or down drainage from the permit area as a second prerequisite for waiving measures to minimize material damage to protected structures to the extent technologically and economically feasible. We cannot require Utah to make this suggested change because it goes beyond the scope of the State's proposed rules and the Federal regulations by requiring water holders' consent in connection with the potentially unrelated issue of structural damage.

5. Subsidence Control Plan Contents

One comment suggested changes to proposed Utah Admin. R. 645-301-525.400 that would add requirements for concurrence by the State Engineer on the results of pre-subsidence surveys and with determinations by the Division that structures, renewable resource

lands, or water supplies will be adversely affected by subsidence. The same comment suggested replacing references to water "supplies" with water "sources." We previously explained in this final rule that Utah's use of the terms water "supply" or "supplies" is consistent with use of the same terms in the Federal regulations and SMCRA. We also previously explained that we cannot require Utah to include provisions in its rules that are more stringent than SMCRA or more effective than the counterpart Federal regulations. Additionally, in its January 29, 1997, clarification for statutory amendment UT-035-FOR (administrative record number UT-1094) Utah recognized the State Engineer's existing authority under State water law. For these reasons, we believe Utah Admin. R. 645-301-525.400 is no less effective than the Federal counterpart regulation at 30 CFR 784.20(b) without the suggested change.

One water user comment suggested adding a statement at the end of proposed Utah Admin. R. 645-301-525.420 that would require a separate plan, as part of the subsidence control plan, to replace any State-appropriated water that could be adversely affected by subsidence. Neither SMCRA nor the Federal regulations require a separate plan for this purpose so we cannot require Utah's rules to do so. Moreover, upon approval of this amendment, Utah will have measures in place to begin corrective action when water is adversely affected. They include: the second part of Utah Admin. R. 645-301-525.420, which refers to measures described in Utah Admin. R. 645-301-525.440, -525.450, and -525.470 that will be taken, when applicable, to correct subsidence-related material damage; and Utah Admin. R. 645-301-731.530, which requires replacement of certain adversely affected water supplies, using the baseline hydrologic and geologic information required in Utah Admin. R. 645-301-700 to determine the impact(s) of mining on water supplies. We believe Utah Admin. R. 645-301-525.420 is no less effective than counterpart 30 CFR 784.20(b)(2) without requiring a "plan within a plan" to replace water adversely affected by subsidence.

6. Repair of Damage to Surface Lands

In another comment, water users suggested removing the phrase "technologically and economically feasible" from proposed Utah Admin. R. 645-301-525.510, which concerns repair of damage to surface lands. The same reasoning we described in our

response to water users' comments under the *Subsidence Control* topic in Part IV.A.4 above applies to this comment as well. We believe Utah's proposed rule has the same meaning as the counterpart Federal regulation without the suggested change.

7. Adjustment of Bond Amount for Subsidence Damage

In one comment, water users suggested changes to Utah Admin. R. 645-301-525.550, which provides for adjusting bond amounts for subsidence damage. The suggested changes would replace the term water "supply" with water "source," remove the reference to Utah Admin. R. 645-301-731.530, and require the permittee to pay the water right holder for all damages caused by adverse effects on water or a water source if replacement does not occur within 30 days after the water or source is materially damaged. Our responses to other comments above concerning the term "water supply" explained that Utah's use of that term in its rules is consistent with the wording of the Federal regulations and SMCRA.

With respect to removing the reference to Utah Admin. R. 645-301-731.530, that rule is Utah's performance standard for water replacement. As referenced, it identifies those protected water supplies subject to replacement if adversely affected by subsidence. Such adverse effects invoke the requirement in proposed Utah Admin. R. 645-301-525.550 to adjust bond amounts sufficient to ensure replacement of water supplies if, and until, they are to be replaced. Removing the reference would render Utah Admin. R. 645-301-525.550 less effective than the counterpart Federal regulation at 30 CFR 817.121(c)(5), which similarly references the Federal performance standard for water replacement at 30 CFR 817.41(j).

The comment's suggestion to require payment of damages if replacement does not occur within 30 days after water is adversely affected is beyond the scope of payment of operation and maintenance costs provided under the State and Federal definitions of "replacement of water supply." At the same time, however, we note that the citizen suit provisions of section 520(e) of SMCRA provide that nothing (in that section) shall restrict any right which any person may have under any statute or common law to seek enforcement of any of the provisions of SMCRA and the regulations or to seek any other relief. Utah's counterpart to section 520 of SMCRA is found at UCA 40-10-21(5).

Based on the explanations given above, we believe proposed Utah

Admin. R. 645-301-525.550 is no less effective than counterpart 30 CFR 817.121(c)(5) without the suggested changes.

8. Public Notice of Proposed Mining and PHC Determinations for Surface Mines

Two water user comments suggested significant changes to two sections of Utah's rules that the State made only minor changes to in this amendment. One comment suggested changing Utah Admin. R. 645-301-525.700, which provides for public notice of proposed mining. This amendment only proposes to recodify Utah Admin. R. 645-301-525.700 in view of the new rules being added to the same subsection. The comment's suggested change would require a mine operator to mail written notification of proposed mining to all holders of State-appropriated water rights in or adjacent to the permit area at least one year prior to mining. That notification would identify where the operator's subsidence control and water replacement plans may be examined. This suggested change is beyond the scope of Utah's proposed rulemaking because it does not address Utah's proposed change. In addition, we explained previously in Part IV.A.3 of this final rule that Utah's rules already provide for public notice and review of permit applications. Those applications would include plans for subsidence control and water replacement. Utah Admin. R. 645-300-121 provides for public notice of the Division's receipt of an application in local newspapers, for making the application available for public inspection and copying at county courthouses, and notifying local governmental agencies, including planning agencies, water treatment authorities and water companies where they can inspect the complete application. Further, all permit applications on file with the Division will be made available for public inspection and copying at reasonable times as provided by Utah Admin. R. 645-300-124.

The other comment suggested changing Utah Admin. R. 645-301-728.340, which addresses findings to be included in PHC determinations for surface coal mining and reclamation activities. Utah Admin. R. 645-301-728.340 is revised in this amendment only by the addition of a semi-colon and the word "OR" at the end of the paragraph to distinguish it from the new PHC findings requirement being added for underground mining at Utah Admin. R. 645-301-728.350. The comment's suggested change would require PHC findings to determine whether *surface* mining and reclamation activities

conducted after October 24, 1992, would contaminate, diminish, or interrupt and underground or surface source of State-appropriated water (emphasis added). Also, it would delete the qualifying statement that such water be located within the permit or adjacent areas and be used for domestic, agricultural, industrial or other legitimate purpose. This comment does not address Utah's proposed change and is beyond the scope of the State's amendment. Nevertheless, we note that the suggested change to Utah Admin. R. 645-301-728.340 strives for consistency between that provision and the provision that follows at proposed Utah Admin. R. 645-301-728.350 for underground coal mining and reclamation activities. It is important to note that the underlying authority for proposed Utah Admin. R. 645-301-728.350 is UCA 40-10-18(15)(c), which in turn is based on section 720(a)(2) of SMCRA. Those statutory provisions require replacement of water supplies adversely affected by *underground* coal mining operations and do not affect existing water replacement requirements applicable to *surface* mining in the Federal regulations or in Utah's rules.

Though both comments are beyond the scope of this amendment, we forwarded them to the State for its consideration.

9. PHC Determinations for Underground Mines

One comment suggested rewording Utah Admin. R. 645-301-728.350, which addresses findings to be included in PHC determinations for underground coal mining and reclamation activities. The comment would change the phrase "* * * may result in contamination, diminution, and interruption * * *," which describes adverse effects of underground mining, to read, "may contaminate, diminish, and interrupt." It also suggested adding the term "water sources" after the term "State-appropriated water" and removing the qualifying statement that water be used for legitimate purposes within the permit or adjacent areas.

As proposed with the phrase "* * * may result in contamination, diminution, or interruption * * *," Utah Admin. R. 645-301-728.350 provides for PHC findings as to whether underground coal mining and reclamation activities may adversely affect State-appropriated water supplies directly or indirectly. The water users' suggested language potentially could limit PHC findings to findings only of direct adverse effects of underground mining and reclamation activities. That,

in turn, would render Utah Admin. R. 645-301-728.350 potentially less effective than the counterpart Federal regulation at 30 CFR 784.14(e)(3)(iv).

Utah's qualifying statement "* * * and used for legitimate purposes" * * *" at Utah Admin. R. 645-301-728.350 describing existing water use is supported by a clarification the State provided for Utah Code amendment UT-035-FOR in its January 29, 1997, letter (administrative record number UT-1094). We discussed Utah's characterization of legitimate water use in the context of PHC findings at Utah Admin. R. 645-301-728.350 in our finding at Part III.C.9 of this final rule. Further, in the same finding, we explained how Utah's qualifying statement for legitimate use is consistent with the similar provision at Utah Admin. R. 645-301-728.340 for surface coal mining and reclamation activities. Additionally, our finding at Part III.C.2 of this final rule discusses Utah's clarification of the term "State-appropriated water," including its reference to legitimate water use. Our previous responses to other comments concerning the term "water source" in Part IV.A of this final rule explain that Utah's use of "State-appropriated water" in its rules is no less effective than the Federal regulations and is no less stringent than SMCRA.

In the same comment, water users also maintained that there is no basis for Utah Admin. R. 645-301-728.350 to qualify that water subject to the PHC finding must have been used in the permit or adjacent areas. We considered the scope of "the permit and adjacent areas" in our discussion of comments in the March 31, 1995, final rule adopting the counterpart Federal regulation at 30 CFR 784.14(e)(3)(iv) (*Id.*, at 16729). In that discussion, we explained that "adjacent area" includes all areas outside the permit area where resources, including wells or springs, could reasonably be expected to be adversely impacted by the proposed mining operation, including probable impacts from underground workings. The same rationale applies to the provisions of Utah Admin. R. 645-301-728.350.

We therefore conclude that Utah Admin. R. 645-301-728.350 is no less effective than the counterpart Federal regulation at 30 CFR 784.14(e)(3)(iv) as proposed with its reference to State-appropriated water, its description of PHC findings of adverse effects, and its inclusion of the provision that existing water be used for legitimate purposes.

B. Federal Agency Comments

Under 30 CFR 732.17(h)(11)(i) and section 503(b) of SMCRA, we requested

comments on the proposed amendment from various Federal agencies with an actual or potential interest in the Utah program. We asked for comments on the amendment as Utah originally submitted it and as revised in the State's October 31, 2000, letter (administrative record numbers UT-1106 and UT-1156, respectively).

U.S. Department of the Interior, Fish and Wildlife Service (USFWS)

The Utah Field Office of USFWS responded to our request for comments on the original amendment in a letter dated April 21, 1998 (administrative record number UT-1110). USFWS supported the proposed amendment, noting how subsidence and water loss can impact hydrologic systems and wildlife that depend on them. Additionally, USFWS observed that the amendment appears to strengthen requirements for controlling and mitigating subsidence damage and determining and correcting water supply losses.

U.S. Department of Agriculture, Forest Service (USFS)

An office of the Manti-LaSal National Forest submitted comments on the original amendment on behalf of the USFS after the close of the first comment period (administrative record number UT-1116). Discussion of those comments and our responses follow.

1. Replacement of Water Supply

One USFS comment proposed changes to Utah's definition of "replacement of water supply" at Utah Admin. R. 645-100-200. It suggested changing the last sentence of paragraph (a) of the definition to require agreement to a one-time payment of increased operation and maintenance costs by the landowner or surface management agency in addition to the permittee and the water supply owner. The comment also suggested adding another part to the definition to read:

If the water supply or portion of the water supply is needed for the land use in existence at the time of loss, contamination, or diminution, or postmining land use, replacement requirements must meet such needs and be agreed to by the land owner or land management agency.

Both parts of this comment addressed concerns of the landowner and surface management agency for perpetuating water sources needed to sustain land uses and ecosystems. We agree that involving the landowner or surface management agency in determining water replacement needs is a prudent approach to resource management. However, imposing that as a

requirement in Utah's rules is beyond the scope of the Federal water replacement regulations. It also could create conflict if the land owner and surface management agency are not the water supply owner(s) and if their consent is not a condition of land or water supply ownership or land management required under other State law.

With respect to the suggested additional part of the definition, we cannot require Utah's rules to be more effective than the Federal regulations or more stringent than SMCRA. Utah's proposed definition already provides that water replacement support existing land uses and postmining land use, as demonstrated by its provision of waivers only for replacement of adversely affected supplies not needed for the existing or postmining land uses. Further, as noted above in our response to the first part of this comment, requiring landowner or surface management agency consent could create conflict if not required by other provisions of State law. We believe Utah's definition is no less effective than the counterpart Federal definition at 30 CFR 701.5 without the suggested additional language.

2. Subsidence Control Plans and Pre-Subsidence Surveys

Another USFS comment suggested that the part of Utah Admin. R. 645-301-525 which addresses subsidence control plans require pre-subsidence surveys of all renewable resource lands, structures, and water sources within a subsidence area whether or not the permittee determines they will be adversely affected by subsidence. The comment also asserted that limiting surveys to State-appropriated waters will generate insufficient baseline data to determine the causes and effects of subsidence because they will overlook other protected water resources.

We believe Utah's proposed rules adequately provide for pre-subsidence surveys of structures, renewable resource lands and water supplies. Proposed Utah Admin. R. 645-301-525.100 specifically requires pre-subsidence surveys in each application for underground coal mining and reclamation activities. Whether adverse effects on structures, renewable resources or State-appropriated water resulting from subsidence are expected to occur or not is the basis for determining if the subsidence control plan must include the additional information described in Utah Admin. R. 645-301-525.410 through -525.490. As provided in Utah Admin. R. 645-301-525.400, that additional

information will not be required in the subsidence control plan if the survey conducted under R645-301-525.100 shows, and the Division agrees, that: No structures, State-appropriated water supplies, or renewable resource lands exist; or, that no material damage to lands or structures, or no reduction in their value or use, and no adverse effects on water supplies, would occur as a result of subsidence. Proposed Utah Admin. R. 645-301-525 through -525.120 provide the same scope of pre-subsidence surveys as required by the counterpart Federal regulations at 30 CFR 784.20(a)(1) through (a)(2). Further, proposed Utah Admin. R. 645-301-525.130 provides for pre-subsidence structural surveys within an applicable angle of draw when that part of the corresponding Federal regulation at 30 CFR 784.20(a)(3) is suspended. We explained in our findings in Parts III.C.4 and III.C.5 of this final rule that partial suspension of 30 CFR 784.20(a)(3) does not make Utah's proposed provisions for pre-subsidence surveys of EPAct protected structures and subsidence control plan content inconsistent with SMCRA.

We also believe Utah's proposed rules adequately cover protected water supplies. As explained in our findings at Part III.C.3 and III.C.10 of this final rule and in our responses to other public comments in Part IV.A, Utah's water replacement provisions are based on its use of the term "State-appropriated water" at UCA 40-10-18(15)(c). Based on clarification provided by the State, that term expands Utah's protection and replacement provisions beyond the drinking, domestic, and residential water supplies from wells or springs included under the Federal regulations and SMCRA. Further, Utah's rules require baseline hydrologic data in addition to the pre-subsidence survey requirements proposed in this amendment. Provisions at Utah Admin. R. 645-301-700 *et seq.* list information required in permit applications to characterize hydrologic resources, identify potential impacts of mining on those resources, and to minimize disturbance of such resources located in proposed permit and adjacent areas.

Another USFS comment suggested that Utah Admin. R. 645-301-724.600 should not be removed as proposed in this amendment. This existing rule requires a survey to determine if aquifers and recharge areas would be materially damaged or diminished by subsidence, if it occurred, from underground mining. The comment stressed the importance of aquifers and recharge areas to surface water. It also

stressed the need to inventory water resources other than those appropriated by the State and to address them in the subsidence control plan to ensure protection of hydrologic systems. Proposed Utah Admin. R. 645-301-525.110, which replaces Utah Admin. R. 645-301-724.600, provides for pre-subsidence surveys to determine whether subsidence, if it occurred, would adversely affect structures, renewable resource lands and State-appropriated water. As defined at Utah Admin. R. 645-100-200, "renewable resource lands" includes aquifers, aquifer recharge areas, and other underground waters. SMCRA (as amended by EPAct) and the implementing Federal regulations extend replacement protection to drinking, domestic and residential water supplies from wells or springs. We explained previously in this final rule that Utah's protection of "State-appropriated water supplies" is no less effective than the Federal regulation and no less stringent than SMCRA because it extends protection to a wider range of water supplies. Utah clarified in its October 31, 2000, letter (administrative record number UT-1145) that, because it has a process under UCA 73-5-13 to recognize water claims established by diversion ("diligence rights") before the State Engineer's office was established and before Utah became a State, "State-appropriated water" also includes territorial water rights. Our response to the preceding comment also showed that Utah requires baseline data for other water resources under Utah Admin. R. 645-301-700 *et seq.* As a result, we believe the State's proposed removal of existing Utah Admin. R. 645-301-724.600 is appropriate in light of the rules it proposed to add at Utah Admin. R. 645-301-525 through -525.130.

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 relate 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 changes Utah proposed in amendment UT-037-FOR pertain to air or water quality standards. As a result, we did not request EPA's concurrence.

Nevertheless, we provided copies of the original and revised amendments to EPA for review under 30 CFR 732.17(h)(11)(i) and asked if it had any comments (administrative record numbers UT-1106 and UT-1156). We

did not receive any comments from EPA.

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. In letters dated March 25, 1998, and April 6, 1998, we requested comments from the SHPO and the ACHP, respectively, on the original amendment (administrative record number UT-1106). We asked for comments on the revised amendment from the SHPO and the ACHP in letters dated January 11, 2001, (administrative record number UT-1156). We received one response from the SHPO in a letter dated April 7, 1998 (administrative record number UT-1109). In that letter, the SHPO concurred with the determination we made under the 36 CFR 800 regulations that the proposed amendment will have no effect on properties listed, or eligible for listing, on the National Register of Historic Places. We did not receive comments from the ACHP.

V. Director's Decision

Based on the above findings, we approve Utah's proposed amendment as submitted on March 20, 1998, corrected on May 13, 1998, and revised on October 31, 2000.

We approve, as discussed in Part III.A: Utah Admin. R. 645-301-525.200 through 525.240, recodified rules pertaining to protected areas; Utah Admin. R. 645-301-525.600, recodified rule pertaining to compliance with the approved subsidence control plan; and Utah Admin. R. 645-301-525.700, recodified rule pertaining to public notice of proposed mining; in Part III.B: Utah Admin. R. 645-100-200, definitions of "material damage" and "occupied residential dwelling and structures related thereto;" Utah Admin. R. 645-301-525.300 through -525.313, subsidence control measures to prevent or minimize damage, replacing existing Utah Admin. R. 645-301-525.200 and -525.210, which are removed; Utah Admin. R. 645-301-525.410, description in the subsidence control plan of coal removal method(s), replacing existing Utah Admin. R. 645-301-525.110, which is removed; Utah Admin. R. 645-301-525.420, requirement for a map to be in the subsidence control plan showing underground workings where planned subsidence is suspected, areas where subsidence will be minimized, and areas where subsidence-related damage

will be minimized and corrected; Utah Admin. R. 645-301-525.430, description in the subsidence control plan of physical conditions affecting subsidence, replacing existing Utah Admin. R. 645-301-525.120, which is removed; Utah Admin. R. 645-301-525.440, requirement for a description in the subsidence control plan of subsidence monitoring to be done, replacing existing Utah Admin. R. 645-301-525.140, which is removed; Utah Admin. R. 645-301-525.450 through -525.460, description in the subsidence control plan of subsidence control measures, replacing existing Utah Admin. R. 645-301-525.130 through -525.134 and Utah Admin. R. 645-301-525.150, which are removed; Utah Admin. R. 645-301-525.470, description in the subsidence control plan of methods to minimize damage from planned subsidence; Utah Admin. R. 645-301-525.500, heading "Repair of damage," replacing existing introductory statement at Utah Admin. R. 645-301-525.230, which is removed; Utah Admin. R. 645-301-525.510, requirement to repair damage to surface lands, replacing existing Utah Admin. R. 645-301-525.231, which is removed; Utah Admin. R. 645-301-525.520, requirement to repair, or compensate for, damage to non-commercial buildings and dwellings and related structures, replacing, in part, existing Utah Admin. R. 645-301-525.232, which is removed; and Utah Admin. R. 645-301-525.545, information to be considered in determination the cause of damage; in Part III.C.1: Utah Admin. R. 645-100-200, definition of "non-commercial building;" in Part III.C.2: Utah Admin. R. 645-100-200, definition of "State-appropriated water supply;" in Part III.C.3: Utah Admin. R. 645-100-200, definition of "replacement of water supply;" in Part III.C.4: Utah Admin. R. 645-301-525 through 645-301-525.130, subsidence control plans, pre-subsidence surveys, replacing existing Utah Admin. R. 645-301-724.600, which is removed; in Part III.C.5: Utah Admin. R. 645-300-525.400, -525.480, and -525.490, subsidence control plan contents, replacing existing Utah Admin. R. 645-301-525 through -525.170, which are removed; in Part III.C.6: Utah Admin. R. 645-301-525.530, repair or compensation for damage to other structures; in Part III.C.7: Utah Admin. R. 645-301-525.540, rebuttable presumption of causation by subsidence; Utah Admin. R. 645-301-525.541, rebuttable presumption of causation for damage within angle of draw; and Utah Admin. R. 645-301-

525.542, approval of site-specific angle of draw; in Part III.C.8: Utah Admin. R. 645-301-525.550, adjustment of bond amount for subsidence damage; in Part III.C.9: Utah Admin. R. 645-301-728.340 and 728.350, probable hydrologic consequences determination for underground mining effects; and in Part III.C.10: Utah Admin. R. 645-301-731.530, replacement of State-appropriated water supply.

We approve these rules as Utah proposed them with the provision that the State fully promulgate them in a form identical 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 944, which codify decisions concerning the Utah program. We find that good cause exists under 5 U.S.C. 553(d)(3) to make this final rule effective immediately. Section 405(d) of SMCRA requires that the State have a program that is in compliance with the procedures, guidelines, and requirements established under the Act. Making this regulation effectively will expedite that process. Further, SMCRA requires consistency of State and Federal standards.

VI. Procedural Determinations

Executive Order 12630—Takings

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

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 12988—Civil Justice Reform

The Department of the Interior conducted the reviews required by section 3 of Executive Order 12988 (Civil Justice Reform) and 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 because each 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 States must be based solely on a determination of whether the submittals

are consistent with SMCRA and its implementing Federal regulations and whether the other requirements of 30 CFR parts 730, 731, and 732 have been met.

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 13211—Regulations That Significantly Affect the Supply, Distribution, or Use of Energy

On May 18, 2001, the President issued Executive Order 13211, which requires agencies to prepare a Statement of Energy Effects for a rule that is (1) considered significant under Executive Order 12866, and (2) likely to have a significant adverse effect on the supply, distribution, or use of energy. Because this rule is exempt from review under Executive Order 12866, and because it is not expected to have a significant adverse effect on the supply, distribution, or use of energy, a Statement of Energy Effects is not required.

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(2)(C) of the National Environmental Policy Act (42 U.S.C. 4332(2)(C)).

Paperwork Reduction Act

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

Regulatory Flexibility Act

The Department of the Interior has determined that this rule will not have

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

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 on the fact that the State submittal, which is the subject of this rule, is based on 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 944

Intergovernmental relations, Surface mining, Underground mining.

Dated: September 18, 2001.

Brent Wahlquist,

Regional Director, Western Regional Coordinating Center.

For the reasons set out in the preamble, 30 CFR part 944 is amended as set forth below:

PART 944—UTAH

1. The authority citation for part 944 continues to read as follows:

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

2. Section 944.15 is amended in the table by adding a new entry in chronological order by “Date of Final Publication” to read as follows:

§ 944.15 Approval of Utah regulatory program amendments.

* * * * *

Original amendment submission date	Date of final publication	Citation/description
March 20, 1998	December 4, 2001	Definitions of “material damage,” “non-commercial building,” “occupied residential dwelling and structures related thereto,” “replacement of water supply,” and “State-appropriated water supply” at Utah Admin. R. 645–100–200; 645–301–525 through 525.170; 645–301–525.200 through 525.240; 645–301–525.300 through 525.313; 645–301–525.400 through 525.490; 645–301–525.500 through 525.550; 545–301–525.600; 645–301–525.700; 645–301–724.600; 645–301–728.340; 645–301– 728.350; and 645–301–731.530.

[FR Doc. 01–29982 Filed 12–3–01; 8:45 am]
BILLING CODE 4310–05–P

DEPARTMENT OF TRANSPORTATION

Coast Guard

33 CFR Part 117

[CGD01–01–048]

RIN 2115–AE47

Drawbridge Operation Regulations: Harlem River, NY

AGENCY: Coast Guard, DOT.

ACTION: Final rule.

SUMMARY: The Coast Guard is changing the drawbridge operating regulations which govern the Metro North (Park Avenue) Bridge, at mile 2.1, across the Harlem River at New York City, New York. This final rule will allow the bridge owner to require a four-hour advance notice for bridge openings, from 10 a.m. to 5 p.m., daily. This action is expected to meet the present needs of navigation.

DATES: This rule is effective January 3, 2002.

ADDRESSES: Comments and material received from the public, as well as documents indicated in this preamble as being available in the docket, are part of docket (CGD01–01–048) and are available for inspection or copying at the First Coast Guard District, Bridge Branch Office, 408 Atlantic Avenue, Boston, Massachusetts 02110, 7 a.m. to 3 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Mr. Jose Arca, Project Officer, First Coast Guard District, (212) 668–7165.

SUPPLEMENTARY INFORMATION:

Regulatory Information

On September 13, 2001, we published a notice of proposed rulemaking (NPRM) entitled Drawbridge Operation Regulations; Harlem River, New York, in the **Federal Register** (66 FR 47601). We received no comment letters in response to the notice of proposed rulemaking. No public hearing was requested and none was held.

Background and Purpose

The Metro North (Park Avenue) Bridge, at mile 2.1, across the Harlem River, has a vertical clearance of 25 feet at mean high water and 30 feet at mean low water. The existing drawbridge operation regulations listed at 33 CFR 117.789(e) require the bridge to open on signal, from 10 a.m. to 5 p.m., except as provided in paragraph (b).

The owner of the bridge, Metro North, requested a change to the operating regulations to allow the bridge to open on signal, from 10 a.m. to 5 p.m., after a four-hour advance notice is given.

Metro North advised the Coast Guard that all the bridge openings during the last five years were for either vessel traffic employed in the construction of the Oak Point Link railroad Bridge located upstream or Metro North test openings at the bridge. The large construction barges, with equipment such as cranes on board, generally require a bridge opening.

The vessels that frequently use this waterway on a regular basis fit under the bridges without requiring bridge openings, with the exception of the Spuyten Duyvil railroad bridge, which has only 5 feet of vertical clearance at mean high water. All the upstream bridges, with the exception of the Spuyten Duyvil railroad bridge, presently require a four-hour advance notice for bridge openings, from 10 a.m. to 5 p.m., daily.

The existing drawbridge operation regulations are consistent with regard to the four-hour advance notice requirement, from 10 a.m. to 5 p.m., daily.

In addition, all the bridges, except Spuyten Duyvil, have similar or greater vertical clearances at mean high water (MHW) and at mean low water (MLW). The clearances for the bridges on the Harlem River are as follows.

Bridge name	Mile	MHW & MLW	
Metro North (Park Ave)	2.1	25	30
Madison Avenue	2.3	25	29
145 Street	2.8	25	30
Macombs Dam	3.2	27	32
207 Street	6.0	26	30
Broadway	6.8	24	29
Spuyten Duyvil ..	7.9	5	9

As a result of all the above information the Coast Guard believes that it is reasonable to allow the Metro North (Park Avenue) railroad bridge to open on signal, from 10 a.m. to 5 p.m., after a four-hour advance notice is given, except as provided in paragraph (b).

Discussion of Comments and Changes

The Coast Guard received no comment letters. No changes will be made to this final rule.

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)