

**FEDERAL REGISTER: 64 FR 71652 (December 22, 1999)**

DEPARTMENT OF THE INTERIOR

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

30 CFR Parts 784 and 817

Surface Coal Mining and Reclamation Operations; Permanent Regulatory Program; Compliance with Court Order

ACTION: Final rule: suspension.

**SUMMARY:** We, the Office of Surface Mining Reclamation and Enforcement (OSM), are suspending certain portions of our permanent program regulations dealing with subsidence from underground coal mining. We are taking this action to make our rules consistent with a recent decision by the U.S. Court of Appeals for the District of Columbia Circuit.

EFFECTIVE DATE: December 22, 1999.

FOR FURTHER INFORMATION CONTACT: Vermell Davis, Technology Development Staff, Division of Technical Support, Office of Surface Mining Reclamation and Enforcement, U.S. Department of the Interior, 1951 Constitution Ave., N.W., Washington, D.C. 20240 (202) 208-2802.

**SUPPLEMENTARY INFORMATION:**

Table of Contents

- I. What Is The Background Of The Rules We Are Suspending?
- II. Why Are We Publishing This Notice?
- III. What Is The Effect On Approved State Regulatory Programs?
- IV. Which Regulatory Provisions Are We Suspending?
- V. Procedural Matters.

**I. WHAT IS THE BACKGROUND OF THE RULES WE ARE SUSPENDING?**

The Energy Policy Act was enacted October 24, 1992, Pub. L. 102-486, 106 Stat. 2776 (1992) (hereinafter, "The Energy Policy Act or EPAct). Section 2504 of that Act, 106 Stat. 2776, 3104, amends the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. 1201 et seq.

Section 2504 of EPAct added a new section 720 to SMCRA. Section 720(a)(1) requires that all underground coal mining operations conducted after October 24, 1992, promptly repair or compensate for material damage to non-commercial buildings and occupied residential dwellings and related structures as a result of subsidence due to underground coal mining operations. Repair of damage includes rehabilitation, restoration, or replacement of the structures identified by section 720(a)(1), and compensation must be provided to the owners in the full amount of the diminution in value resulting from the subsidence. Section 720(a)(2) requires prompt replacement of certain identified water supplies which have been adversely affected by underground coal mining operations. Under section 720(b), the Secretary of the Interior was required to promulgate final regulations to implement the provisions of section 720(a).

On September 24, 1993 (58 FR 50174), OSM published a proposed rule to amend the regulations applicable to underground coal mining and control of subsidence-caused damage to lands and structures through the adoption of a number of permitting requirements and performance standards. We adopted final regulations on March 31, 1995 (60 FR 16722).

**II. WHY ARE WE SUSPENDING THESE RULES?**

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

### **III. WHAT EFFECT WILL THIS SUSPENSION HAVE ON EXISTING STATE REGULATORY PROGRAMS?**

States that have not yet revised their approved regulatory programs (see Subchapter T of 30 CFR Chapter VII) in response to our March 31, 1995 rule changes need not amend those programs to include counterparts to the provisions that we are suspending in this rulemaking.

States that have already revised their regulatory programs to include counterparts to the provisions that we are suspending in this rulemaking may remove or modify those counterparts in accordance with 30 CFR Part 732. However, under section 505(b) of SMCRA, these States also may elect to retain their existing regulations, unless otherwise provided by State law.

### **IV. WHICH REGULATORY PROVISIONS ARE WE SUSPENDING?**

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

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

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

In reviewing the regulation, the Court rejected the Secretary's contention that the angle of draw concept was reasonably based on technical and scientific assessments and that it logically connected the surface area that could be damaged from earth movement to the underground mining operation. The angle of draw provided the basis for establishing the surface area within which the rebuttable presumption would apply. The Secretary had explained that the rebuttable presumption merely shifted the burden of document production to the operator in evaluating whether the damage was actually caused by the underground mining operation within the surface area defined by the angle of draw. The Court nevertheless held that the angle of draw was irrationally broad and that the scientific facts presented did not support the logical inference that damage to the surface area would be caused by earth movement from underground mining within the area.

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

In compliance with the Court of Appeals' decision of April 27, 1999, we are suspending 30 CFR 817.121(c)(4)(i) through (iv).

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

## **2. SECTION 784.20(a)(3)**

This regulatory provision required, unless the applicant was denied access for such purposes by the owner, a survey which identified certain features. First, the survey had to identify the condition of all non-commercial buildings or occupied residential dwellings and related structures which were within the area encompassed by the applicable angle of draw and which might sustain material damage, or whose reasonably foreseeable use might be diminished, as a result of mine subsidence. Second, the survey had to identify the quantity and quality of all drinking, domestic, and residential water supplies within the proposed permit area and adjacent area that could be contaminated, diminished, or interrupted by subsidence. In addition, the applicant was required to notify the owner in writing that denial of access would remove the rebuttable presumption that subsidence from the operation caused any postmining damage to protected structures that occurred within the surface area that corresponded to the angle of draw for the operation. (See discussion of angle of draw above).

This regulatory provision was challenged insofar as it required a specific structural condition survey of all EAct protected structures. The Court of Appeals vacated the specific structural condition survey regulatory requirement in its decision on April 27, 1999. In reviewing the Secretary's requirement, the Court clearly upheld the Secretary's authority to require a pre-subsidence structural condition survey of all EAct protected structures. The Court accepted the Secretary's explanation that this specific structural condition survey was necessary, among other requirements, in order to determine whether a subsidence control plan would be required for the mining operation. However, because of the Court's ruling on the "angle of draw" regulation discussed above, it vacated the requirement for a specific structural condition survey because it was tied directly to the area defined by the "angle of draw".

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

## **V. PROCEDURAL MATTERS**

### **1. National Environmental Policy Act**

This notice suspends those sections of the March 31, 1995, final rule invalidated by the U.S. Court of Appeals for the District of Columbia Circuit. The action is categorically excluded from the requirement to prepare an environmental document under the National Environmental Policy Act of 1969, as amended *42 U.S.C. 4332 et seq.* This determination is made in accordance with the Departmental Manual (516 DM 2, Appendix 1.10).

### **2. Author**

The author of this suspension notice is Vermell Davis, Office of Surface Mining Reclamation and Enforcement, U.S. Department of the Interior, 1951 Constitution Avenue, NW., Washington, D.C. 20240.

## **LIST OF SUBJECTS**

### **30 CFR Part 784**

Reporting and recordkeeping requirements, Underground mining.

### **30 CFR Part 817**

Environmental Protection, Reporting and recordkeeping requirements, Underground mining.

Dated: December 7, 1999.

Sylvia V. Baca, Acting Assistant Secretary, Land and Minerals Management.

For the reasons given in the preamble, we are suspending portions of 30 CFR Parts 784 and 817 as set forth below:

**PART 784 - UNDERGROUND MINING PERMIT APPLICATIONS--MINIMUM REQUIREMENTS FOR RECLAMATION AND OPERATION PLAN**

1. The authority citation for Part 784 continues to read as follows:

Authority: *30 U.S.C. 1201* et seq, as amended; and *16 U.S.C. 470* et seq.

2. In Section 784.20, paragraph (a)(3) is amended by adding a sentence at the end, reading as follows:

**SECTION 784.20 -- SUBSIDENCE CONTROL PLAN.**

(a) \* \* \*

(3) \* \* \* However, the requirements to perform a survey of the condition of all noncommercial buildings or occupied residential dwellings and structures related thereto, that may be materially damaged or for which the reasonably foreseeable use may be diminished by subsidence, within the areas encompassed by the applicable angle of draw is suspended per court order.

\* \* \* \* \*

**PART 817 - PERMANENT PROGRAM PERFORMANCE STANDARDS--UNDERGROUND MINING ACTIVITIES**

3. The authority citation for Part 817 is revised to read as follows:

Authority: *30 U.S.C. 1201* et seq., as amended.

**SECTION 817.121--[Suspended in part]**

4. In Section 817.121, paragraphs (c)(4)(i) through (iv) are suspended.

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