

FEDERAL REGISTER: 52 FR 4860 (February 17, 1987)

DEPARTMENT OF THE INTERIOR

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

30 CFR Parts 784 and 817

Permanent Program Performance Standards; Underground Activities; Subsidence Control

ACTION: Final rule.

SUMMARY: The Office of Surface Mining Reclamation and Enforcement (OSMRE) of the U.S. Department of the Interior (DOI) is issuing final subsidence control rules relating to the protection of surface structures and facilities. These final rules are promulgated pursuant to the District Court's order in *In Re: Permanent Surface Mining Regulation Litigation (II)*, No. 79-1144 (D.D.C.) (Memorandum Opinion filed Oct. 1, 1984).

Under the final rule, operator responsibility for material damage to structures or facilities resulting from subsidence will derive from applicable provisions of State law. Also, the final rule addresses whether subsidence control plans should include the results of a pre-subsidence survey of structures and a description of monitoring near structures. The monitoring requirement of Section 784.20(d)(5) has been revised to make clear that monitoring may also be appropriate when planned subsidence mining methods are employed.

EFFECTIVE DATE: March 19, 1987.

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SUPPLEMENTARY INFORMATION:

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I. BACKGROUND

On March 13, 1979, OSMRE promulgated permanent program rules (*44 FR 14902*) as required by section 501(b) of the Surface Mining Control and Reclamation Act of 1977 (the Act), *30 U.S.C. 1201 et seq.* In the 1979 rules, 30 CFR 817.121, 817.122, 817.124, and 817.126 established performance standards relating to subsidence control and reclamation at underground coal mines. The requirements for a pre-subsidence survey and monitoring and for a subsidence control plan as part of the permit application were established by 30 CFR 784.20.

Section 817.124 of the 1979 rule set forth requirements for the correction of subsidence-caused material damage to both structures and surface lands without reference to State law. The 1979 rule required that underground operators mitigate the subsidence-related material damage by restoring the land to its premining capabilities, and by restoring, rehabilitating, removing and replacing, or purchasing damaged structures or facilities or, alternatively, by compensating surface structure owners through the purchase of non-cancellable, premium-prepaid insurance policy or other means designed to cover the amount of diminution in value caused by subsidence. *44 FR 14902, 15440* (March 13, 1979).

Industry plaintiffs challenged the restoration requirement of former 30 CFR 817.124 in *In Re: Permanent Surface Regulation Litigation*, No. 79-1144 (D.D.C. 1980) (*In Re: Permanent (I)*), and based their attack on the argument that Congress intended the insurance requirement of section 507(f) of the Act as the exclusive means for setting operator responsibility for subsidence damage. The Court rejected that argument and held that the prior rules for remedying the effects of subsidence "find support in the Act. The restoration requirement is consonant with section 515(b)(2) of the Act." *In Re: Permanent (I)*, *supra*, February 26, 1980. Opinion at 63-64. The Court also held that the compensation requirement of the 1979 rules, which extended to surface structures and facilities, was "an insurance mechanism authorized by section 507(f) of the Act." *Id.* at 64.

On April 16, 1982, OSMRE proposed permanent program rules (*47 FR 16604*) to amend 30 CFR 784.20, 817.121, 817.122, 817.124, and 817.126 pertaining to subsidence control. On June 1, 1983, OSMRE promulgated the final permanent rules on subsidence control. 30 CFR 784.20, 817.121, and 817.122 (*48 FR 24638*).

The June 1, 1983 rule at 30 CFR 817.121(c)(2) (*48 FR 24652*) made operators responsible for correcting material damage to any structures and facilities resulting from subsidence only to the extent required by State law. The rule at 30 CFR 817.121(c)(1) (*48 FR 24652*) required the operator to correct, to the extent technologically and economically feasible, all subsidence-caused material damage to surface lands without regard to State law. In essence, the 1983 rule retained the land restoration requirement of the 1979 rule, but modified the requirement to repair structures by specifying that material damage to structures shall be repaired or corrected in accordance with the requirements of State law. The 1983 rule was intended to remedy inequities created by the 1979 rules which imposed a restoration requirement for structures materially damaged by subsidence regardless of whether the operator purchased the structure overlying the underground workings or purchased or retained the right to cause subsidence under a structure. OSMRE deferred to State property rights regarding structures in part because Congress indicated in section 102(b) and other sections that the Act was not intended to create new property rights but to assure the protection of existing rights.

In the case of *In Re: Permanent Surface Mining Regulation Litigation (II)*, No. 79-1144 (D.D.C.), citizen and environmental groups, industry and States challenged a number of OSMRE rulemaking proceedings, including provisions of the June 1, 1983, subsidence control rules.

On October 1, 1984, the Court issued a memorandum opinion addressing the revised subsidence control rules. *In Re: Permanent Surface Mining Regulation Litigation (II)*, No. 79-1144 (D.D.C. 1984) (*In Re: Permanent (II)*, October Op.).

The Court held that the 1983 final rule, 30 CFR 817.121(c)(2) (*48 FR 24652*), requiring operators to redress subsidence-caused material damage to structures only to the extent required by State law, represented a "radical change" from both the earlier rule and the 1982 proposed rule, 30 CFR 817.121(c), *47 FR 16604, 16610* (April 16, 1982), which both required such redress irrespective of State law. October Op. at 10. Accordingly, the Court remanded 30 CFR 817.121(c)(2) to the Secretary for proper notice and comment. *Id.* at 10-11. The Court never reached the merits of the Secretary's rule on damage to structures.

The court also determined that the 1979 rule requiring the subsidence control plan to include the results of a pre-subsidence survey of structures, and a detailed description of any monitoring proposed to measure subsidence near structures, 30 CFR 784.20(d), *44 FR 14902, 15369* (March 13, 1979), which was deleted in the 1983 final rule, was "inextricably linked" to the issue of whether the operator must restore structures materially damaged by subsidence. Thus, it ordered the Secretary to request additional public comments on this deletion in conjunction with the comments on 30 CFR 817.121(c)(2). *In Re: Permanent (II)*, October Op. at 14.

On February 21, 1985, in accordance with the Court's ruling, OSMRE suspended the portion of 30 CFR 817.121(c)(2) limiting operator responsibility to State law, *50 FR 7274* (February 21, 1985). Subsequently, on July 8, 1985, OSMRE repropose 30 CFR 817.121(c)(2) with a provision for deference to State law, with respect to damage to surface structures and facilities and solicited additional public comment on the deletion of former 30 CFR 784.20(d).

II. RESPONSE TO COMMENTS AND RULES ADOPTED

A. GENERAL

Following publication of this rule as a proposed rule in the Federal Register on July 8, 1985, a public hearing was held in Ina, Illinois. That hearing, held on September 12, 1985, was in response to a request from interested citizens. The public comment period provided for in the proposed rule closed on September 16, 1985. However, as announced at the hearing, additional written comments were accepted through September 27, 1985 from persons who attended the public hearing. Through September 27, 1985, a total of forty commenters (including public hearing attendees) provided comments.

Most of the comments received were specifically directed at the rulemaking issues. However, many persons speaking at the public hearing made more broadly directed comments about damages and injuries they claimed to have suffered as a result of subsidence due to longwall mining. Such comments generally involved allegations of not receiving adequate,

or any, compensation for damage to homes, barns, businesses, and farmland drainage systems (especially agricultural tiling). Others spoke of emotional trauma stemming from fears for the safety of their families and from being forced to move from subsidence damaged homes.

One commenter representing an interest group objected to not having been consulted earlier in the rulemaking process. In this instance, sufficient public participation occurred following publication of the proposed rule.

B. SUBSIDENCE CONTROL PLAN -- SECTION 784.20 (INTRODUCTORY PARAGRAPH)

In addition to the revision to Section 784.20(d) discussed at length below, OSMRE is taking this opportunity to correct an error inadvertently introduced into Section 784.20 during the June 1, 1983 rulemaking. *48 FR 24638*. Although the introductory paragraph to Section 784.20 would have been eliminated by the April 16, 1982 proposed rule (*47 FR 16604*), OSMRE decided to retain that paragraph unchanged in the 1983 final rule. In the preamble at *48 FR 24639*, OSMRE concluded:

“* * * OSM has decided to accept the comments suggesting that the previous position be retained and not to eliminate the introductory paragraph of previous Section 784.20. * * * The language of the introductory paragraph of previous Section 784.20 has been retained and is repeated in the final rule solely for convenience in understanding the other requirements adopted in the final rule.”

Despite this preamble statement, the word "and" in the third sentence of the introductory paragraph was unintentionally changed to "or" in the text of the 1983 final rule.

Elimination of the error is accomplished by replacing the second "or" in the third sentence of the paragraph with an "and". This action conforms the paragraph with the preamble discussion of *48 FR 24639* and restores the former parallelism of language between the first and third sentences of the paragraph found in the previous (1979) rule. Thus, a subsidence control plan is to be submitted if the survey shows there are renewable resource lands and that subsidence could cause material damage or a diminution of value or the foreseeable use of the land.

C. SUBSIDENCE CONTROL PLAN -- SECTION 784.20(d)

As explained above, the Court ordered OSMRE to request comments on the deletion of 30 CFR 784.20(d) (*44 FR 14902*, March 13, 1979), from the 1983 final rule. October Op. at 14. Former 30 CFR 784.20(d) required the subsidence control plan to contain:

“A detailed description of measures to be taken to determine the degree of material damage or diminution of value or foreseeable use of the surface, including such measures as --

(1) The results of a pre-subsidence survey of all structures and surface features which might be materially damaged by subsidence.

(2) Monitoring, if any, proposed to measure deformations near specified structures or features or otherwise as appropriate for the operation.”

As explained in the preamble to the April 16, 1982 proposed rule (*47 FR 16605*) and the June 1, 1983 final rule (*48 FR 24638*), OSMRE deleted former 30 CFR 784.20(d) from the 1983 final rule to reduce the burden on the operator and to avoid unnecessary duplication. This final rule does not restore the language of Section 784.20(d) found in the 1979 rule.

A number of commenters agreed with OSMRE that the 1979 rules should not be reinstated, asserting that the 1983 rules were adequate and that they provided the same degree of protection as the 1979 rules. One of the commenters added that the former 1979 rule was not only redundant but oppressive.

Other commenters disagreed, however, as a number of comments were also received asking for a return to the 1979 rule. OSMRE does not agree with these commenters.

A comment was received stating "the Secretary is correct that monitoring and pre-subsidence surveys must be performed, irrespective of State law and irrespective of the final disposition of the Section 817.121(c)(2) rule respecting

dependence of State law, in all cases where land or structures might be damaged by subsidence." Other commenters asserted that the previous Section 784.20(d) rule was "extremely critical as a means of evaluating and assessing the degree of material damage and as a performance standard indicator," and that there can be no meaningful right under State law "unless there is a way to prove the damage."

Contrary to the commenter's assertion, the Secretary does not take the position that "monitoring and pre-subsidence surveys must be performed, irrespective of State law and irrespective of the final disposition of the Section 817.121(c)(2) rule respecting dependence on State law, in all cases where land or structures might be damaged by subsidence." Although OSMRE agrees that surveys must always be performed pursuant to the introductory paragraph of Section 784.20, requirements for monitoring are an optional part of the subsidence control plan. Furthermore, OSMRE does not agree that monitoring near structures is required to evaluate and assess the degree of material damage and as a performance standard indicator. Material damage to a structure can be determined by direct comparison not to its post-mining condition, but to its pre-mining condition, regardless of whether the precise extent of subsidence has been monitored. The final rule insures that adequate information will be available to "prove the damage" when, under State law, there is a requirement to repair or compensate.

When deleting the pre-subsidence survey requirements of Section 784.20(d)(1) of the 1979 rule on June 1, 1983, OSMRE believed that this requirement was redundant. Several commenters on the 1985 reproposal asserted that the pre-subsidence survey requirement is not redundant since, in their view, the prior rules used that survey to "effect the protections of section 516(b) [of the Act] in a way the 1983 rule fails to do."

OSMRE continues to believe that the requirement is redundant. Former Section 784.20(d)(1) is duplicative of the requirement in the introductory paragraph of Section 784.20 requiring a premining survey, "which shall show whether structures or renewable resource lands exist * * * and whether subsidence, if it occurred, could cause material damage or diminution of reasonably foreseeable use of such structures or renewable resource lands." Another commenter agreed with OSMRE that the 1979 pre-subsidence survey requirements are redundant stating "there is no distinction between the requirements for a survey showing structures and renewable resource lands and a pre-subsidence survey." Another commenter also favored OSMRE's position and asserted that the former rule was unnecessary because many operators voluntarily conduct pre-subsidence surveys for their own protection. Another commenter asserted that pre-subsidence surveys should be like blasting surveys and include specific descriptions of the conditions of the homes, buildings, etc. However, the language of former Section 784.20(d)(1) would not assume such detail. Moreover, Section 784.20(h) (formerly Section 784.20(g)) provides the opportunity for the regulatory authority to require whatever additional information is deemed necessary including as much detail as required in a blasting survey.

A commenter contended that the preamble of the proposed rule did not clearly explain the pre-subsidence survey requirement issue. OSMRE rejects this comment. The issue is accurately described in the preamble to the proposed rule. If the commenter was unsure of the issue, it could have consulted the 1984 court opinion and the final 1983 rule and preamble, all of which are referenced in the proposed rule. Finally, OSMRE personnel were available for public meetings to discuss any issue relating to the proposal.

Three commenters stated that they opposed "the proposed new wording relating to pre-subsidence surveys and subsidence monitoring" because "the proposed wording of Section 784.20 is too general and it could be interpreted to exempt longwall and other planned subsidence mining from doing the surveys." OSMRE disagrees. The introductory paragraph of Section 784.20 clearly requires the permit application to include a survey regardless of the mining method employed.

MONITORING

In response to the Court's linking of the monitoring requirement with the restoration standard for structures, OSMRE stated in the proposal its belief that the monitoring provision contained originally in Section 784.20(b)(3)(v), and later in Section 784.20(d)(5), was adequate, regardless of whether the obligation to repair structures was controlled by State law. In this regard, commenters were urged to consider whether a more specific requirement for monitoring subsidence near structures is required or whether the monitoring provision of 30 CFR 784.20(d)(5) is sufficient.

Having considered the comments, OSMRE, in this final rule revises the language of the 1983 rule (and 1985 proposed rule) to make clear that monitoring may be appropriate regardless of the mining method to be employed by the operator.

OSMRE agrees with the commenter that the proposed wording of Section 784.20 can be interpreted to exempt operators using planned subsidence mining methods from having to perform subsidence monitoring over the areas where controlled subsidence will occur. Proposed Section 784.20(d)(5) required the subsidence control plan to contain "except for those areas where planned subsidence is projected to be used," a detailed description of "monitoring, if any, to determine the commencement and degree of subsidence so that other measures can be taken to prevent or reduce material damage." Consequently, as described above, OSMRE has revised the Section 784.20 rule to make it clear that the discretionary monitoring requirement is applicable irrespective of whether the mining method calls for planned or unplanned subsidence. A further, more complete, discussion of the issue of monitoring follows.

This change is effected by deleting Section 784.20(d)(5) of the 1983 rule and inserting a new Section 784.20(d). Paragraphs 784.20(d) through 784.20(g) of the 1983 rule are redesignated accordingly as 784.20(e) through 784.20(h). New Section 784.20(d) requires:

A description of monitoring, if any, needed to determine the commencement and degree of subsidence so that, when appropriate, other measures can be taken to prevent, reduce, or correct material damage in accordance with Section 817.121(c) of this chapter.

OSMRE continues to view the 1979 monitoring requirement as redundant with new Section 784.20(d). Furthermore, as under the 1979, 1983, and the proposed 1985 rules, this final rule includes the qualifying phrase "if any" to provide discretion as to the extent of monitoring needed. Therefore, final Section 784.20(d) does not mandate monitoring in all cases where material damage to structures of facilities will occur. However, regulatory authorities may refuse to approve permit applications containing subsidence control plans which do not include monitoring provisions when such provisions are essential to fulfilling the performance standards of Section 817.121. If the regulatory authority is not satisfied that the operator will mitigate or remedy subsidence related material damage to structures or facilities as required by State law, the regulatory authority may deny the permit or direct that alternative measures be included in the subsidence control plan. Such measures may include a provision for monitoring, and may specify where and how such monitoring will take place. Such measures may also include direct measurement of material damage to the structure through a pre-mining and post-mining comparison. One key ingredient is to ensure that the pre-mining condition of the structure was recorded before the subsidence occurred. Essentially this provides the same coverage as provided by the 1979 rule, except that the performance standard which the monitoring provision assists in implementing is tied to State law. Thus, the owners of structures may have the monitoring data made available to them to exercise any rights arising under State law, irrespective of the method of underground mining employed.

A commenter asserted that it is uncertain whether monitoring is required when it has been determined that subsidence is likely.

Under this final rule monitoring will most likely be performed when the pre-subsidence survey indicates that subsidence and related material damage to structures and facilities are anticipated, and State tort, contract, or other law (either codified or enunciated through judicial decisions) requires repair or compensation.

Another commenter stated that the "weak" provisions for monitoring are inconsistent with the District Court's October 1, 1984 decision and congressional intent. OSMRE does not believe it is inconsistent. The court did not rule on the substance of the issue, but only ordered further comment in view of the rule's relation to the restoration standard.

For all the reasons discussed above, OSMRE believes that the pre-subsidence survey and monitoring requirements of this final rule provide the information required to assure the Act can be appropriately enforced.

D. SUBSIDENCE CONTROL -- Section 817.121(c)(2)

SECTION 817.121 - PROVIDES PERFORMANCE STANDARDS FOR SUBSIDENCE CONTROL.

Section 817.121(c) establishes the operator's responsibility for material damage caused by subsidence. The statutory authority for its provisions is sections 507(f), 515(b)(2), 515(b)(3), 516(b)(1), and 516(b)(10) of the Act. Liability for damage to surface and subsurface structures and facilities under section 507(f) of the Act is tied to liability under State law because the Act was not intended to create additional property rights. For this reason, under final Section 817.121(c)(2) operator responsibility for material damage caused to structures or facilities is tied to liability under State

law. Thus, material damage to structures and facilities must be remedied or monetary damages paid if the operator is liable under State law.

The 1979 subsidence control rules which imposed a restoration requirement for structures materially damaged by subsidence did not provide exceptions for situations where the operator has purchased a structure overlying the underground workings, where the operator has purchased the right to cause subsidence under a structure, or, as in Pennsylvania, where State legislation has established subsidence responsibilities for different classes of structures. The 1979 rules did not defer to State law and allow an operator not to repair damaged structures where the operator had no legal liability under State law. This final rule accommodates situations in which the operator is not liable for subsidence damage to surface structures under State law. Conditioning liability for restoration of materially damaged structures upon State law lessens the concern that the contract in which the operator may have obtained the right to subside the surface under a structure will be impaired. In States which have not enacted special subsidence legislation, State property rights, as established by contracts, deeds, and other agreements, and interpreted in judicial decisions, will determine whether the operator is liable to a surface owner. Liability of the operator where the owner of the surface facility may have conveyed the right to support or may have waived it will also be left to determination under State law.

This final rule is supported by both law and policy. As discussed below, the Surface Mining Act does not require operators to repair subsidence-caused material damage to structures irrespective of State law. As the district court found in 1980, the authority of OSMRE to require an operator to compensate an owner for material damage to structures or facilities resulting from subsidence or to repair such material damage derives from Section 507(f) of the Act. In *re: Permanent (I)*, supra., section 507(f) of the Act requires liability insurance for personal injury and property damage in an amount adequate to compensate any persons damaged as a result of surface coal mining and reclamation operations who are entitled to compensation under the applicable provisions of State law. Although the 1979 rule did not limit the compensation requirement to situations where liability exists under State law, a more precise reading of section 507(f) supports the imposition of such a constraint in this final rule.

Sections 515 and 516 do not require subsidence damaged structures to be restored without regard to State law. Section 516(b)(1) of the Act requires underground mine operators to prevent subsidence-caused material damage to the "extent technologically and economically feasible" and to maintain the value and use of "surface lands." This provision does not itself require the restoration of structures damaged by subsidence. Although through section 516(b)(10) of the Act, the surface mining performance standards of section 515 may be made applicable to any surface impacts of underground mining not specified in section 516(b), the standards of section 515 do not apply to structures materially damaged by subsidence. Section 515(b)(2), the provision certain commenters suggest as support for the structure restoration requirement, requires the surface coal mining operator to "restore the land affected" to a condition capable of supporting premining uses. There is no similar explicit mandate from Congress to require restoration of structures materially damaged by subsidence. The word "land," as it is used in section 515(b)(2) is interpreted to refer to land in its unimproved or natural state (see *48 FR 24644*). This interpretation of land as a natural resource is consistent with the use of that term in other provisions of the Surface Mining Act. For instance, in order to protect the "stability of the land," section 516(c) of the Act requires the suspension of underground coal mining under "buildings" if imminent danger exists. Also, when setting reclamation priorities for abandoned mine lands, Congress in section 403 distinguished between the "restoration of land and water resources * * * previously degraded by adverse effects of coal mining practices" and the repair of "facilities adversely affected by coal mining practices."

If Congress meant to include structures and facilities in section 515(b)(2), it certainly would have enumerated such. Nothing in the plain wording of that paragraph suggests that its application to structures as well as to land is mandated. To the contrary, as suggested by the Court in upholding the land restoration requirements of 30 CFR 817.121(c)(1), there is a sound basis for distinguishing between the restoration requirement for land and that for structures. See *In Re: Permanent II*, supra, October Op. at 5-6. n1

n 1 Finding the Secretary's reading of the statute "reasonable," the Court upheld the land restoration requirements of 30 CFR 817.121(c)(1) against an industry challenge that the regulation infringes on State laws which provide for remedies in contract and tort for subsidence damage to land. October Op. at 6-7. This issue has been appealed to the U.S. Court of Appeals for the D.C. Circuit.

The District Court ruled that section 515(b)(2) applied to subsidence damaged land, through section 516(b)(10). The Court reasoned that while these State remedies may "redress injuries suffered by private parties" they do not redress

injury to the "land itself." *Id.* at 6. As the Court cautioned, private parties should not be able to circumvent Congressional intent by forming contracts. The Court held that the Act was passed not only to protect individual property rights, but also to protect this Nation's land from the surface effects of underground mining for "generations yet unborn." *Id.* at 7. Therefore, the Court found that any State remedy inconsistent with the requirement of section 515(b)(2) to restore land materially damaged by subsidence would be preempted by the Act. *Id.* at 7. However, as explained above, the Court's rationale as to the public interest in protecting land does not extend to structures. Damage to structures are in the nature of injuries suffered by private parties that may be appropriately addressed by State remedies.

In policy, as well as law, there is clear reason to distinguish the protection provided for land and structures. Where an underground mine operator purchases from the surface owner the right to subside the land, or in conveying surface property reserves the right to subside the surface, the individual's property rights are protected, but the long term public interest in the land is not protected. Thus, Section 817.121(c)(1) functions to prevent this injury to the land by assuring that in all cases, irrespective of private contract, this valuable natural resource will be restored to its premining capabilities, to the extent technologically and economically feasible. On the other hand, no environmental or public interest exists in protecting a building or structure where its present or past owner has either conveyed or waived a right to subjacent support. For example, in some instances an operator may purchase the right to subside a structure owned by the surface owner. In such an instance, the parties have worked out a mutually agreeable solution to account for private damage. The operator should not have to recompensate the surface owner. This final rule leaves this determination of the relative rights and liabilities to State law.

While private parties may not be motivated to protect the environment, they have a great incentive to protect structures that they own. State law has traditionally provided remedies in contract and tort for those parties who own subsidence-damaged structures. Accordingly, it is inappropriate for OSMRE to step in and protect owners of these structures thereby creating an additional private property right which clearly was not intended by Congress.

In those instances where a public interest does exist in the protection of certain structures, the rules continue to provide such protection without regard to State law. For instance, 30 CFR 817.121(d) prohibits underground mining activities beneath or adjacent to public buildings and facilities, churches, schools and hospitals, and large bodies of water unless an operator can demonstrate before a permit is issued that subsidence will not cause material damage. If damage is caused to such facilities or features regulatory authorities are empowered to suspend mining until the operator ensures that no further material damage will occur (see 30 CFR 817.121(e)). Finally, if imminent danger from underground mining exists to inhabitants of urbanized areas, cities, towns or communities, such mining must be suspended. Taken together with the land restoration requirement of Section 817.121(c)(1), OSMRE's rules will amply protect the public interests endangered by subsidence.

At least one State has a statute which specifically addresses subsidence under structures. Pennsylvania's Bituminous Mine Subsidence and Land Conservation Act of 1966, 52 Pa. Stat. Ann, Section 1406 et seq. (Purdon's) establishes certain classes of protected structures. For instance, if a materially damaged occupied dwelling were in existence on the date of enactment of the Pennsylvania statute (April 27, 1966), the operator would have to repair the dwelling or compensate the owner for the diminution in value. This final rule allows a State, such as Pennsylvania, to choose to protect selected classes of structures (see *48 FR 24645*). The constitutionality of this scheme is presently before the Supreme Court (*Keystone Bituminous Coal Ass'n v. Duncan*, No. 85-1092 (cert. granted March 24, 1986)).

A number of comments were received on the issue of limiting liability for repair of subsidence damaged structures in response to the original proposal of April 16, 1982 (*47 FR 16604*). The reader is referred to the discussions of those comments found in the preamble to the June 1, 1983 final rule (*48 FR 24638*) as they will not be repeated here.

During the comment period on the July 8, 1985 proposal, numerous comments were received on the issue of leaving the correction of subsidence-damaged structures up to the requirements of State law. Several commenters favoring the proposed rule agreed with OSMRE's conclusion that the rule is supported by both law and policy. Among the reasons given for this agreement were (1) the Act does not require repair or compensation for damaged structures; it only requires insurance coverage adequate to cover claims arising under State laws; (2) the 1979 rule requiring repair or compensation irrespective of State law is in violation of the Act; (3) the 1979 rule represents an unconstitutional "taking" of property without just compensation; and, (4) there is no support in the legislative history for the 1979 rule. Opposing this viewpoint were commenters who contended that (1) the proposed change is illegal since it violates congressional intent given in section 102(b) of the Act; (2) the old rule was upheld by the District Court; (3) the proposal is contrary to

section 101 (d), (e), and (h) and 102(h) of the Act; and the proposed rule is unworkable in view of the recent Appeals Court decision in *Keystone Bituminous Coal Ass'n v. Duncan*, 771 F.2d 707 (3d Cir. 1985) in affirming the constitutionality of the Pennsylvania Bituminous Mine Subsidence and Land Conservation Act and its implementing regulations.

OSMRE's views on the legality of implementing the proposed rule have been addressed above. OSMRE disagrees with the commenters who conclude that the rule change is illegal. Contrary to the commenter's assertion, section 102(b) of the Act supports this final rule. The intent expressed in section 102(b) is to preserve and protect the rights of persons with a legal interest in appurtenances to the land. This rule does just that. Where such a right exists under State law, it is expressly recognized and will continue to exist. The rule is also consistent with the other provisions cited, taken together with section 102(k) of the Act which was not cited by the commenters. Section 102(k) sets forth as one of the Act's purposes the need to "encourage the full utilization of coal resources through the development and application of underground extraction technologies; . . ." 30 U.S.C. 1202. Clearly this rule is intended, in part, to encourage full extraction technologies, such as longwall mining. Also, the contention that the decision of the appeals court in *Keystone v. Duncan* renders the proposed rule illegal is incorrect. The holding in that case that the Pennsylvania statute is legal does not affect the validity of OSMRE's final rule. To the contrary, this rule clearly recognizes existing State laws and property rights. A number of other commenters expressed additional reasons for favoring adoption of the rule. One felt that the preamble discussion for the proposed rule provided accurate and ample justification for the rule. Two others think there is no conflict between section 102(b) of the Act and State common law on subjacent support. Another commenter expressed concern that the former rule entitles persons to compensation for damage to structures built on lands for which a coal company had the prior right to mine. That commenter made the further claim that this has actually occurred in Illinois. Also, a commenter expressed the opinion that the economics of the coal industry and the conservation of the mineral resource have both been adversely affected by the former rule.

OSMRE acknowledges the comments supporting its reasons for the rule change expressed in the preamble to the proposed rule, and agrees in principle with those stating the previous rule created an inequity by granting absolute protection, irrespective of State laws and contractual agreements, to owners of structures built on land for which the owners of the structures do not have the right of subjacent support.

Other comments were received opposing this final rule. Some stated that the changes proposed were arbitrary and unreasonable. Others felt that the rule should be made stronger than the former rule, not weaker, and that standards similar to those imposed for surface mines be imposed on underground mines. Some others expressed the opinion (presumably as a matter of equity) that coal companies should be responsible for making repairs to both structures and land, and that mitigation of damage to structures should be a national policy. Many of these commenters were Illinois property owners who believe the rule would upset an existing balance in that State between coal operators and property owners, creating the potential for inflicting hardship and economic loss on the property owners. The basis for this view rests on a provision in the Illinois surface mining law (several other states have similar provisions) that the State regulations can be "no more stringent than" the Federal regulations. Two commenters claimed that due to this requirement the State of Illinois would have to drop its protection for structures in response to the rule change. Two others disagreed, asserting that Illinois is not absolutely bound to eliminate its current rules requiring repair or compensation for subsidence damage to structures.

One commenter asserted that OSMRE had not indicated why State law is adequate to protect structures from subsidence impacts. Another commenter felt that relying on State law to protect surface structures provides inadequate protection and believes it preferable to have national standards. In its view, national standards would cause consideration of potential subsidence damage at the time of mine planning and design and be coupled with provisions for protection or compensation, thereby avoiding costly litigation which may not result in proper settlement for any of the parties.

OSMRE has no obligation to demonstrate that State law is adequate to protect surface structures from subsidence impacts because the Act does not mandate that structures be protected, particularly in those instances where the right of subjacent support has been transferred or waived by the surface owner or his predecessor in title by valid legal contract.

Notwithstanding the absence of such an obligation, OSMRE has nevertheless analyzed the projected impacts of this rule in those States where most underground mining occurs. The six States chosen (Illinois, Kentucky, Pennsylvania, Utah, Virginia, and West Virginia) accounted for 87 percent of the Nation's underground coal production in 1983. In those States a total of between 107 and 528 dwellings are estimated to be at risk of subsidence annually. Under these

final rules this estimated total would not change. However, the compensation received by owners would change. The former rules required operators to correct or compensate for damage to structures irrespective of the requirements of State law. This final rule, depending upon State law and the extent to which property owners have waived their rights, results in responsibility (1) continuing to rest with operators, (2) being shifted to subsidence insurance programs, or (3) being shifted to the property owner. In each of the States analyzed, except Kentucky, some form of compensation would be available under this final rule. Only in Kentucky would neither the law of subjacent support nor a subsidence insurance program offer protection from loss to property owners. Depending upon the extent to which dwellings damaged by subsidence are covered by subsidence insurance, and the extent to which property owners have not waived or conveyed the right to subjacent support in States that recognize the right, it is estimated that the maximum total annual amount of subsidence damage to dwellings (for which responsibility would shift from operators to insurance programs or to property owners under this rule) could range from approximately \$2 million to about \$10.5 million in the six States that account for 87 percent of the Nation's underground production of coal. A more detailed discussion of these effects is found in the environmental assessment prepared for this final rule.

The impacts are somewhat uncertain because whether a particular surface property owner is entitled to subjacent support depends not just on State law but provisions in deeds and contracts affecting the property. Whereas State law generally requires subjacent support, some States may interpret similar provision differently thus affecting the ultimate amount of the operator's liability. Thus, the State by State analysis somewhat overstates the effect of this rule because it disregards owner waivers that may exist.

Pertinent to the issue of whether the requirement to correct or compensate for damage to structures should be left up to State law is the position of the various States affected by the change, especially the States of West Virginia and Pennsylvania which have the majority of active underground coal mining operations. During the comment period for the 1982 proposed rules (which would have retained the absolute requirement of the 1979 rules), only Montana, Kentucky, Virginia, and Illinois submitted comments on the issue. Montana and Illinois favored leaving the requirement up to State law and Kentucky and Virginia approved the retention of the absolute requirement to correct or compensate. Of the four, only Kentucky, Virginia, and Illinois have significant numbers of active underground coal mining operations. Only the State of Illinois, reversing the position it had taken in 1982, commented during the 1985 comment period for this proposed rule. The failure of West Virginia and Pennsylvania, the States with the largest number of active underground coal mining operations, to submit comments on the 1985 proposed rules does not necessarily indicate their lack of interest. Despite the failure to comment, it appears that West Virginia favors the change since it immediately and voluntarily implemented the change promulgated in the 1983 final rule by amending its State program to eliminate the absolute requirement to restore imposed by the 1979 OSMRE rules. Thus, the State which OSMRE expects (based on the 1986 Environmental Assessment) to experience approximately one-half of all anticipated subsidence damage incidents prefers that the requirement to correct for such damage be left to State law and contractual arrangements. Pennsylvania also favors deference to State law since, following promulgation of the 1983 rule, Pennsylvania voluntarily amended its State program to institute a less stringent regulatory interpretation of its 1966 Statute (as amended in 1980), the Bituminous Mine Subsidence and Land Conservation Act. Thus, under its current law and regulations Pennsylvania provides less than the absolute requirement to correct or compensate for subsidence damage to structures and facilities found in the 1979 OSMRE rules. Consequently, it is apparent that the two States with the greatest number of underground mining operations -- ones expected to experience approximately 70 percent of the incidents of subsidence damage to structures support the change leaving the restoration requirements to State law. In any event, because Pennsylvania and West Virginia already have programs which are consistent with this final rule, there will be no change required from the status quo. n2

n 2 If this final rule were not to recognize state law limits and imposed an absolute obligation to repair or restore materially damaged structures, then the affected State program would have to be amended to reflect such a rule.

Although homeowners may suffer financial and other injury as a result of subsidence due to underground mining in Illinois, the agency does not intend to interfere with State laws on this issue. The Act is not intended to provide rights for the repair of structures to property owners who voluntarily relinquished such rights or whose predecessors in interest did so. Further, whether States, such as Illinois, make their surface mining regulations "no more stringent than" the Federal regulations is a matter for States to determine. States may modify their "no more stringent than" requirements, particularly in specific situations where the State determines that local public policy concerns outweigh the general principle of not regulating in a manner more stringent than OSMRE's national rules.

Moreover, impacts of this rule are lessened because consideration of potential subsidence damage continues to be required at the mine planning state. A subsidence control plan must be submitted as part of the permit application if structures exist which potentially may be damaged (See 30 CFR 784.20). The plan must demonstrate that the operator will mine in a manner intended to prevent material damage resulting from subsidence.

One commenter claimed Section 1817.124 of Illinois law (implementing the 1979 rule's repair or compensation requirement) is illegal and violates the approved Illinois permanent program.

The validity of the subsidence provisions of the Illinois State program is not at issue in this rulemaking. The Illinois State program was approved in 1982. Although a challenge to that program approval is currently in litigation, *Illinois South Project, et al. v. Hodel*, No. 82-2229 (C.D. 111), the validity of Illinois performance standards regarding subsidence is not an issue in this suit.

Another commenter criticized the practicality of the provision that compensation (pursuant to State law) may be accomplished by the purchase prior to mining of a non-cancellable premium-prepaid insurance policy, indicating such policies are not available and will not be available from the insurance industry. Although subsidence liability insurance may not be generally available, this option will be retained in the regulations because there may be some areas where such insurance will be obtainable. The purchase of an insurance policy is only one of several alternatives provided under Section 817.121(c)(2). Repair or compensation for subsidence damage may be arranged in other ways.

Several commenters asserted that farmland drainage systems, including agricultural tiling and irrigation ditches, should be subject to the same national repair and restoration standards found under the former rules for structures. OSMRE believes that agricultural tiling and other farmland drainage structures are not part of the land and therefore are directly protected against damage only to the extent required by State law under the provisions of Section 817.121(c)(2). However, agricultural tiling and other farmland drainage systems are indirectly protected by the requirements of Section 817.121(c)(1) for "restoring the land to a condition capable of maintaining the value and reasonably foreseeable uses which it was capable of supporting before subsidence". If necessary to meet the land restoration requirements of Section 817.121(c)(1) for farmland, regulatory authorities can require the restoration of agricultural drainage structures as a condition of permit approval.

Another commenter claimed that water supplies should be protected from subsidence damage and that there should be a national requirement to restore or replace water supplies damaged by subsidence. Water supplies are protected from subsidence damage by provisions of Section 817.121(d)(3) if they serve as a "significant water source for any public water supply system." That section provides an advance showing that such water supplies will not be damaged. Private water supplies, such as individual wells, are not similarly protected by Section 817.121. However, the hydrology requirements of the Act do provide some protection for all water supplies. Although the Act does not mandate replacement of water supplies in every event of damage or loss, it does require protection of water quantity and quality. In the permitting of underground mines, the regulatory authority must find, before the issuance of any permit, that the operation is designed to prevent material damage to the hydrologic balance outside the permit area (see 30 CFR 773.15(c)(5)). In addition, each permit application must include a determination of the probable hydrologic consequences (PHC) of the proposed operation upon the quality and quantity of surface water and groundwater (see 30 CFR 784.14(e)(1)). The PHC determination must include findings on, inter alia, the impacts the proposed operation will have on "ground-water and surface-water availability" (30 CFR 784.14(e)(3)(iii)(D)). Thus, for every permit application, the regulatory authority will be provided information on the PHC of the proposed operation. Based upon the PHC determination, each permit application must contain a hydrologic reclamation plan that specifically addresses "any potentially adverse hydrologic consequences * * * and shall include preventive and remedial measures" (30 CFR 784.14(g)). If the protection of water quantity or quality cannot otherwise be assured, the regulatory authority may deny the permit or direct that alternative mitigation measures be included in the reclamation plan. Such measures may include, at the operator's discretion, the provision of alternative water supplies. Thus, the requirements of the Act do serve the unified purpose of protecting the environment, including the area's hydrology, from damage caused by subsidence due to underground mining.

Disagreeing, another commenter stated that the rule changes should be dropped rather than made more stringent. OSMRE believes that the rule change is neither arbitrary nor unreasonable and that the dichotomy of opinion expressed by the commenters suggests that this rule has struck a reasonable balance.

One commenter speculated that savings institutions would no longer issue construction loans for homes to be built on lands subject to subsidence if the rule should be adopted. The commenter's concern is unsupported and appears exaggerated. Certainly construction loans existed prior to imposition of the 1979 rule. Business enterprises will adjust to the current rule, just as they did when no absolute protection for structures existed. Moreover, under State law compensation may be required, or the contract itself may prohibit subsidence damage from occurring. Additional protection may be provided through subsidence insurance programs which are either in place or are now being started with the aid of monies from the Abandoned Mines Lands fund established by the Act.

Two commenters objected to the promulgation of the final rule at this time because OSMRE is preparing rulemakings on related issues, particularly the applicability of the prohibitions of Section 522(e) (4) and (5) of the Act to subsidence and underground mining. These commenters suggested that action be delayed on the proposed rule at least until the planned environmental impact statement (EIS) and regulatory impact analysis (RIA) for the Section 522(e) (4) and (5) rule are completed. OSMRE considered delaying the final rule in this rulemaking, but concluded that this rule had an independent basis and there were inadequate reasons for delaying this final rule for more than one year until the rulemaking is completed on the scope of Section 522(e) (4) and (5). However as described below, possible cumulative effects of the two rules were considered prior to finalization of this rule.

Two related comments contended that the analysis in OSMRE's 1983 supplemental EIS regarding subsidence damage to structures is inadequate and that a new EIS should be prepared. Another commenter recommended that such an EIS include an analysis of the effects of protections for structures under the various State laws. Although it previously concluded in the supplemental EIS that there would be no significant impacts due to the promulgation of this rule, OSMRE made the decision to reexamine those earlier conclusions and prepare an environmental assessment (EA) on this rulemaking. In the EA, OSMRE reviewed the protection provided to property owners by the approved State regulatory programs, existing and proposed State subsidence insurance programs, and the extent to which the common law of subjacent support is applicable in selected States. Also, in view of ongoing studies in support of the Section 522(e) (4) and (5) EIS and RIA, the EA analysis assumed as the limiting case, the alternative providing the least protection for structures, i.e., that the Section 522(e) (4) and (5) prohibitions do not apply to subsidence. By assuming the least protection for structures, the conclusion reached in the EA will not be altered in the direction of greater impacts on structures by the ultimate outcome of the Section 522(e) (4) and (5) rulemaking. The EA concluded that there were no significant impacts due to this rulemaking on the quality of the human environment. This supports the conclusions previously reached in the 1983 supplemental EIS. From an environmental standpoint, there is no need therefore, to delay going forward with this rulemaking because the environmental consequences will either remain the same as projected in the EA or be lessened as a consequence of the Section 522(e) (4) and (5) rulemaking.

Finally, three commenters asked for clarification in this final rule preamble that the State law referred to in Section 817.121(c)(2) is not limited to State surface mining laws. OSMRE accedes to that request; the State law referred to in the final rule includes all State law whether codified or uncodified, and is not limited to the State surface mining law.

III. PROCEDURAL MATTERS

Federal Paperwork Reduction Act

The information collection requirements in final Section 784.20 have been approved by the Office of Management and Budget (OMB) under *44 U.S.C. 3507* and assigned clearance number 1029-0039. OSMRE has codified the OMB approvals in Section 784.10.

The information required will be used by the regulatory authority in permitting, monitoring, and inspecting underground mining activities to insure that they are conducted in a manner which preserves and enhances environmental and other values of the Act. The information required by these rules is mandatory.

Executive Order 12291

The DOI has examined this final rule according to the criteria of Executive Order 12291 (February 17, 1981) and has determined that it is not major and does not require a regulatory impact analysis.

Regulatory Flexibility Act

The DOI also has determined, pursuant to the Regulatory Flexibility Act, *5 U.S.C. 601* et seq., that this final rule will

have a significant economic impact on a substantial number of small entities.

National Environmental Policy Act

Based on comments received on the proposed rule, OSMRE determined that this final rule required additional environmental analyses to evaluate the validity of the conclusions made by the existing environmental impact statement titled "Final Environmental Impact Statement, OSM-EIS-1: Supplement". Consequently an Environmental Assessment (EA) was done which has resulted in a finding of no significant impacts (FONSI) in agreement with OSM-EIS-1. Therefore, the preparation of any additional environmental documents under section 102(2)(C) is not required. The EA is available in the Administrative Record, Rm. 5315, 1100 L Street NW., Washington, DC.

Agency Approval

Section 516(a) of the Act requires that, with regard to rules directed toward the surface effects of underground mining, OSMRE must obtain written concurrence from the head of the department which administers the Federal Mine Safety and Health Act of 1977, the successor to the Federal Coal Mine Health and Safety Act of 1969. OSMRE has obtained the written concurrence of the Assistant Secretary for Mine Safety and Health, U.S. Department of Labor.

Author

The author of this regulation is Dermot Winters, Regulatory Development and Issues Management Group, Office of the Director, Office of Surface Mining Reclamation and Enforcement, 1951 Constitution Avenue, NW., Washington DC 20240, Telephone (202) 343-1928 (commercial or FTS).

LIST OF SUBJECTS

30 CFR Part 784

Coal mining, Reporting and recordkeeping requirements, Underground mining.

30 CFR Part 817

Coal mining, Environmental protection, Underground mining.

Accordingly, 30 CFR Part 784 and 817 are amended as set forth below.

Dated: January 5, 1987.

J. Steven Griles, Assistant Secretary for Land and Minerals Management.

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: Pub. L. 95-87, 91 Stat. 445 (*30 U.S.C. 1201 et seq.*) and Section 115, Pub. L. 98-146, 97 Stat. 938 (*30 U.S.C. 1257*), unless otherwise noted.

2. In Section 784.20, the third sentence of the introductory paragraph is revised, paragraph (b) is revised, paragraphs (d), (e), (f) and (g) are redesignated as paragraphs (e), (f), (g) and (h) respectively, paragraph (d) is added, paragraphs (e)(3) and (e)(4) are revised, and paragraph (e)(5) is removed, to read as follows:

SECTION 784.20 - SUBSIDENCE CONTROL PLAN.

* * * In the event the survey shows that such structures or renewable resource lands exist, and that subsidence could cause material damage or diminution of value or foreseeable use of the land, or if the regulatory authority determines that such damage or diminution could occur, the application shall include a subsidence control plan which shall contain the following information: * * *

* * * * *

(b) A map of underground workings which describes the location and extent of areas in which planned-subsidence mining methods will be used and which includes all areas where the measures described in paragraphs (d) and (e) of this section will be taken to prevent or minimize subsidence and subsidence related damage; and, where appropriate, to correct subsidence-related material damage.

* * * * *

(d) A description of monitoring, if any, needed to determine the commencement and degree of subsidence so that, when appropriate, other measures can be taken to prevent, reduce, or correct material damage in accordance with Section 817.121(c) of this chapter.

(e) * * *

(3) Leaving areas in which no coal is removed, including a description of the overlying area to be protected by leaving the coal in place; and

(4) Taking measures on the surface to prevent material damage or lessening of the value or reasonably foreseeable use of the surface.

* * * * *

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

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

Authority: Pub. L. 95-87, 91 Stat. 445 (*30 U.S.C. 1201 et seq.*) and Section 115, Pub. L. 98-146, 97 Stat. 938 (*30 U.S.C. 1257*), unless otherwise noted.

4. Paragraph (c)(2) of Section 817.121 is revised to read as follows:

SECTION 817.121 - SUBSIDENCE CONTROL.

* * * * *

(c) The operator shall -- * * *

(2) To the extent required under applicable provisions of State law, either correct material damage resulting from subsidence caused to any structures or facilities by repairing the damage or compensate the owner of such structures or facilities in the full amount of the diminution in value resulting from the subsidence. Repair of damage includes rehabilitation, restoration, or replacement of damaged structures or facilities. Compensation may be accomplished by the purchase prior to mining of a non-cancellable premium-prepaid insurance policy.

* * * * *