PART 171—AVAILABILITY OF INFORMATION AND RECORDS TO THE PUBLIC

1. The authority citation for Part 171 is revised to read as follows:

Authority: 5 U.S.C. 551 *et seq.*, 552, 552a; 5 U.S.C. App. 201; E.O.12600, 52 FR 23781, 3 CFR, 1987 Comp., p. 235; E.O.12958, 60 FR 19825, 3 CFR, 1995 Comp., p. 333.

Subpart B—Freedom of Information Provisions

2. Section 171.12 is revised to read as follows:

§ 171.12 Time limits/expedited processing.

(a) Whenever possible, the Department will furnish the requested records within 20 days (excluding Saturdays, Sundays, and legal public holidays), except as cited in § 171.4.

(b) A separate queue shall be established for requests meeting the test for expeditious processing. Requests for expedited processing shall be granted to the requester after the requester has demonstrated that a compelling need exists. A notice of the determination as to whether to grant expedited processing shall be provided to the requester within ten (10) days of the date of the request. The request for expedited processing shall set forth with specificity the relevant facts upon which the requester relies and demonstrate to the Department that substantive records relevant to the stated needs may exist and be deemed releasable.

(c) A ''compelling need'' is deemed to exist where the requester can demonstrate one of the following:

(1) Failure to obtain requested information on an expedited basis could reasonably be expected to pose an imminent threat to the life or physical safety of an individual;

(2) The information is urgently needed by an individual primarily engaged in disseminating information in order to inform the public concerning actual or alleged Federal Government activity. News media requesters would normally qualify; however, other persons must demonstrate that their primary activity involves publishing or otherwise disseminating information to the public, not just a particular segment or group.

(i) *Urgently needed.* The information has a particular value that will be lost if not disseminated quickly. Ordinarily this means a breaking news story of general public interest. However, information of historical interest only, or information sought for litigation or commercial activities would not qualify, nor would a news media publication or broadcast deadline unrelated to the newsbreaking nature of the information;

(ii) *Actual or alleged Federal Government activity.* The information concerns some actions taken, contemplated, or alleged by or about the government of the United States, or one of its components or agencies, including the Congress;

(3) Substantial due process rights of the requester would be impaired by the failure to process immediately; or

(4) Substantial humanitarian concerns would be harmed by the failure to process immediately.

(d) A demonstration of compelling need by a requester shall be made by a statement certified by the requester to be true and correct to the best of their knowledge. This statement must accompany the request in order to be considered and responded to within the ten (10) days required for decisions on expedited access.

(e)(1) The Department's decision to deny expedition may be appealed to the Chief of the Requester Liaison Division, Room 1512, Department of State, 2201 C Street, NW., Washington, D.C. 20520. Appeals should contain as much information and documentation as possible to support the request for expedited processing in accordance with the criteria set forth in paragraph (c) of this section.

(2) The Requester Liaison Division Chief will issue a final decision in writing within ten (10) days from the date on which the Department received the appeal.

Dated: September 3, 1997.

Patrick F. Kennedy,

Assistant Secretary for the Bureau of Administration.

[FR Doc. 97–24654 Filed 9–16–97; 8:45 am]

BILLING CODE 4710–24–P

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 946

[VA–106–FOR]

Virginia Regulatory Program

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

ACTION: Final rule; approval of amendment.

SUMMARY: OSM is approving with exceptions a proposed amendment to the Virginia permanent regulatory program (hereinafter referred to as the Virginia program) under the Surface Mining Control and Reclamation Act of 1977 (SMCRA). The proposed amendment consists of regulatory changes to implement the standards of the Federal Energy Policy Act of 1992, and the Code of Virginia. The amendment is intended to revise the State program to be consistent with the Federal regulations as amended on March 31, 1995 (60 FR 16772) concerning subsidence damage.

EFFECTIVE DATE: September 17, 1997.

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

SUPPLEMENTARY INFORMATION:

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

I. Background on the Virginia Program

On December 15, 1981, the Secretary of the Interior conditionally approved the Virginia program. Background information on the Virginia program including the Secretary's findings, the disposition of comments, and the conditions of approval can be found in the December 15, 1981, **Federal Register** (46 FR 61085–61115). Subsequent actions concerning the conditions of approval and program amendments are identified at 30 CFR 946.11, 946.12, 946.13, 946.15, and 946.16.

II. Submission of the Amendment

By letter dated May 21, 1996 (Administrative Record No. VA–882), Virginia submitted amendments to the Virginia program concerning subsidence damage. The amendments are intended to make the Virginia program consistent with the Federal regulations as amended on March 31, 1995 (60 FR 16722). Virginia stated that the proposed amendments implement the standards of the Federal Energy Policy Act of 1992, and sections 45.1–243 and 45.1–258 of the Code of Virginia.

Virginia also noted that the state has adopted a revised system for numbering the Virginia regulations. For the Virginia program, the prefix ''480–03–19.'' has been replaced with ''4 VAC 25–130–.'' The part of the existing Virginia numbering system that corresponds to the Federal number remains the same. For example, old ''480–03–19.700.5'' has become ''4 VAC 25–130–700.5.'' The Virginia Division of Mines,

Minerals and Energy (DMME) will be reprinting the Virginia program regulations to incorporate the new prefix, both in the numbering of the regulations and in references contained in the regulations. However, the DMME is continuing to use the ''480–03–19.'' prefix pending the reprint.

The proposed amendment was published in the June 11, 1996, **Federal Register** (61 FR 29506), and in the same notice, OSM opened the public comment period and provided opportunity for a public hearing on the adequacy of the proposed amendment. The comment period closed on July 11, 1996. The public comment period was reopened on July 24, 1996 (61 FR 38422), to accept additional comments on the proposed use of a 28-degree angle of draw with the rebuttable presumption of causation by subsidence provision. That comment period ended on August 8, 1996. On September 12, 1996 (61 FR 48110), OSM announced a scheduled public hearing on the proposed amendments. The hearing was held on September 18, 1996 (Administrative Record Number VA–896).

By letter dated July 11, 1996 (Administrative Record Number VA–894), OSM requested that Virginia provide additional information on the proposed amendments, including technical justification for the use of the 28 degree angle of draw. Virginia responded to that request for additional information by letter dated January 3, 1997 (Administrative Record Number VA–902). Virginia also submitted to OSM on March 20, 1997, changes to correct minor punctuation and typographical errors Administrative Record Number (VA–914). OSM reopened the public comment period on April 7, 1997, to provide for public comment on Virginia's technical justification of the proposed use of the 28 degree angle of draw. The comment period closed on April 22, 1997 (62 FR 16509).

III. Director's Findings

Set forth below, pursuant to SMCRA and the Federal regulations at 30 CFR 732.15 and 732.17, are the Director's findings concerning the proposed amendment to the Virginia program.

The amendments proposed by Virginia are as follows:

1. Section 480–03–19.700.5 Definitions

(a) ''Drinking, domestic or residential water supply'' has been added to mean water received from a well or spring and any appurtenant delivery system that provides water for direct human consumption or household use. Wells and springs that serve only agricultural, commercial or industrial enterprises are not included except to the extent the water supply is for direct human consumption or human sanitation, or domestic use.

The Director finds this definition to be identical to and no less effective than the counterpart Federal definition at 30 CFR 701.5.

(b) ''Material damage, in the context of §§ 480–03–19.784.20 and 480–03–19.817.121'' of this chapter has been added to mean:

(a) Any functional impairment of surface lands, features, structures or facilities;

(b) Any physical change that has a significant adverse impact on the affected land's capability to support any current or reasonably foreseeable uses or causes significant loss in production or income; or

(c) Any significant change in the condition, appearance or utility of any structure or facility from its presubsidence condition.

The Director finds this definition to be substantively identical to and no less effective than the counterpart Federal definition at 30 CFR 701.5.

(c) ''Non-commercial building'' has been added to mean 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 in § 480–03–19.700.5 of this chapter. Any building used only for commercial agricultural, industrial, retail or other commercial enterprises is excluded.

The Director finds this definition to be substantively identical to and no less effective than the counterpart Federal definition at 30 CFR 701.5.

(d) ''Occupied residential dwelling and structures related thereto'' has been added to mean, for purposes of §§ 480–03–19.784.20 and 480–03–19.817.121, any building or other structures that, at the time the subsistence occurs, is used either temporally, occasionally, seasonally, or permanently for human habitation. This term also includes any building, structure or facility installed on, above or below, or a combination thereof, the land surface if that building, structure or facility is adjunct to or used in connection with an occupied residential dwelling. Examples of such structures include, but are not limited to, garages; storage sheds and barns; greenhouses and related buildings; utilities and cables; fences and other enclosures; retaining walls; paved or improved patios, walks and driveways; septic sewage treatment facilities; and lot drainage and lawn and garden irrigation systems. Any structure used only for commercial agricultural, industrial, retail or other commercial purposes is excluded (hereinafter referred to in this preamble as ''protected structure'').

The Director finds this definition to be substantively identical to and no less effective than the counterpart Federal definition at 30 CFR 701.5.

(e) ''Replacement of water supply'' has been added to mean, with respect to protected water supplies contaminated, diminished, or interrupted by coal mining 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 post mining 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.

The Director finds this definition to be identical to and no less effective than the counterpart Federal definition at 30 CFR 701.5.

2. Section 480–03–19.784.14 Hydrologic Information

Subsection (e) has been amended by adding new subsection (e)(3)(iv) to provide that the probable hydrologic consequences (PHC) determination shall contain findings on: ''Whether the underground mining activities conducted after October 24, 1992 may result in contamination, diminution, or interruption of a well or spring in existence at the time the permit application is submitted and used for domestic, drinking, or residential purposes within the permit or adjacent areas.''

The Director finds this provision to be identical to and no less effective than

the counterpart Federal provision at 30 CFR 784.14(e)(3)(iv).

3. Section 480–03–19.784.20 Subsidence Control Plan

The existing language of this provision is deleted and replaced by new language. New subsection (a) provides for a pre-subsidence survey that includes a map to identify structures, renewable resource lands and drinking, domestic and residential water supplies that subsidence may affect; an accompanying narrative; and a pre-subsidence survey of all non-commercial buildings or occupied residential dwellings and structures related thereto, that may be damaged by subsidence, and a survey of the quantity and quality of all drinking, domestic, and residential water supplies within the permit and adjacent area that could be contaminated, diminished, or interrupted by subsidence.

Subsection (b) provides for a subsidence control plan. The subsidence control plan shall contain a description of the mining method; a map of underground workings showing areas of planned subsidence, and areas where measures to minimize subsidence and subsidence related damage; a description of the overlying rock strata that affect the likelihood or extent of subsidence and subsidence related damage; a description of monitoring if needed; a description of subsidence control measures, except for areas where planned subsidence is projected to be used; a description of the anticipated effects of planned subsidence, if any; a description of methods to be employed to minimize the effects of planned subsidence, or the written consent of the owner that such measures not be taken; a description of the measures to be taken to replace adversely affected protected water supplies or to mitigate or remedy any subsidence related material damage to the land and protected structures; and other information as specified by the Division of Mined Land Reclamation (DMLR).

The Director finds this provision to be substantively identical to and no less effective than the counterpart Federal provision at 30 CFR 784.20 concerning subsidence control plan.

4. Section 480–03–19.817.41 Hydrologic Balance Protection

New subsection (j) is added to provide that the permittee must promptly replace any drinking, domestic or residential water supply that is contaminated, diminished or interrupted by underground mining activities conducted after October 24, 1992, if the affected well or spring was in existence before the date the DMLR received the permit application for the activities causing the loss, contamination or interruption. The baseline hydrologic information required in § 480–03–19.784.14 and the geologic information concerning baseline hydrologic conditions required in § 480–03–19.784.22 will be used to determine the impact of mining activities upon the water supply.

The Director finds this provision to be substantively identical to and no less effective than the counterpart Federal provision at 30 CFR 817.41(j) concerning drinking, domestic or residential water supply.

5. Section 480–03–19.817.121 Subsidence Control

Subsection (a) concerning measures to prevent or minimize damage is amended by adding new language (at new subsection (a)(2)) to provide that planned subsidence must include measures to minimize material damage to protected structures, except if the permittee has written consent of the structure owners, or unless the anticipated damage would constitute a threat to health or safety, the costs of such measures exceed the anticipated costs of repair, or the structure owners deny the permittee access to implement the measures to minimize material damage and the permittee provides written evidence of good faith efforts to obtain access.

The proposed language is substantively identical to and no less effective than the counterpart Federal language at 30 CFR 817.121(a)(2) with one exception. 30 CFR 817.121(a)(2) contains no counterpart to the proposed language that provides an exception to the requirement to include measures to minimize material damage to protected structures if the structure owners deny the permittee access to implement the measures to minimize material damage.

''Planned subsidence in a predictable and controlled manner'' includes longwall mining and pillar retreat mining. Mitigation efforts for longwall mining are performed on the surface. Such efforts include trenching, bracing or jacking of the protected structure. These mitigation measures remain in place while the ground underneath the structure subsides, keeping the structure level. For example, jacks cannot be placed in the underground mine because longwall machinery moves as one continuous unit and cannot ''skip'' over the area under the structure. Thus, if a permittee conducting longwall operations (''longwall permittee'') is denied access to a protected structure, it is not viable for the longwall permittee to place jacks under the structure or place braces/trenches around the structure. However, if the planned subsidence involves pillar retreat mining, then mitigation efforts could be performed underneath the protected structure regardless of whether or not a structure owner denied the permittee access to his structure. The permittee in a pillar retreat operation could protect the structure by either leaving the pillars of coal under and surrounding the protected structure or replacing the pillars of coal with a support. Thus, Virginia's proposal with regard to longwall mining operations is consistent with the federal rule at 30 CFR 817.121(a)(2) which requires measures to minimize subsidence damage only when such measures are ''consistent with the mining method employed'' and ''technologically feasible.''

OSM was also concerned about whether or not the structure owner would be notified by the longwall permittee of the consequences of failing to allow access for the placement of mitigation measures. Since Virginia's proposal had no direct federal counterpart, there was no direct federal notice counterpart. The Federal regulation at 30 CFR 784.20(a)(3) provide a relevant comparison. 30 CFR 784.20(a)(3) provides that, if an owner denies access for a pre-mining survey, the permittee must provide certain information to the landowner concerning the potential negative effect of their actions, but the lack of access does not prevent the permittee from mining. Virginia, by a letter dated January 3, 1997, (Administrative Record Number VA–902) clarified that under 480–03–19.817.121(a)(2)(iii), the permittee must provide a written document to the structure owner informing the owner of the consequences of denying access. Further, the permittee must provide Virginia with evidence documenting such notice.

Accordingly, the Director finds that with respect to longwall permittees, the proposed language is consistent with the Federal regulations and is approving 480–03–19.817.121(a)(2)(iii) to the extent it applies to longwall permittees. The Director notes that denial of entry to the longwall permittee to perform mitigation measures does not relieve the longwall permittee from the obligation to comply with the repair or compensation requirements of 30 CFR 817.121(c)(4).

Subseciton (c) has been revised by deleting the existing language and replacing new language. The new language provides for the repair of damage to surface lands; the repair or

compensation for damage to non-commercial buildings and dwellings and related structures; repair or compensation for damage to other structures; rebuttable presumption of causation by subsidence; approval of site-specific angle of draw; no presumption where access for pre-subsidence survey is denied; rebuttal of presumption; information to be considered in determination of causation; and adjustment of bond amount for subsidence damage.

The Director finds the proposed provision to be substantively identical to and no less effective than the counterpart Federal provision at 30 CFR 817.121(c)(4) with a few exceptions.

a. Virginia's regulation at § 480–03–19.817.121(c)(4)(i), creates a rebuttable presumption that subsidence caused damage to a protected structure if that structure is within an area that is ''determined by projecting a specified angle of draw from the outermost boundary of any underground mine workings to the surface of the land.'' Virginia's language is substantively identical to the federal regulation at 30 CFR 817.121(c)(4)(i). However, in a letter dated January 3, 1997 from Virginia to OSM (Administrative Record Number VA–902), Virginia stated that the ''Division will continue to measure angle of draw from the edge of high extraction mining areas, where subsidence is likely to occur (areas where 50% or more of the coal has been removed).'' This interpretation by Virginia is inconsistent with the Federal rules. The angle of draw is defined in the preamble to the 1995 Federal rules on subsidence as ''the angle of inclination between the vertical at the edge of the underground mine workings and the point of zero vertical displacement at the edge of the subsidence trough.'' 60 FR 16722, 16738 (March 31, 1995). OSM does not limit the angle of draw to high extraction areas. Thus, Virginia's interpretation could create a smaller area within which the presumption of causation would apply. Accordingly, since Virginia's language is substantively identical to the federal regulation, OSM is approving § 480–30–19.817.121(c)(4)(i) to the extent it is interpreted consistently with the plain language of 30 CFR 817.121(c)(4)(i). OSM is not approving § 480–03–19.817.121(c)(4)(i) to the extent it will be applied in a manner consistent with the plain language of the federal rule that states the angle of draw will be projected ''from the outermost boundary of any underground mine workings to the surface of the land.''

Virginia is also adding language to allow for the approval of the site-specific angle of draw. This language is substantive identical to 30 CFR 817.121(c)(4)(ii). However, as noted above Virginia is not interpreting how the angle of draw will be determined in a manner consistent with the federal rules. Therefore, OSM is approving § 480–03–19.817.121(c)(4)(ii) to the extent it is interpreted consistently with the plain language of 30 CFR 817.121(c)(4). OSM is not approving § 480–03–19.817.121(c)(4)(ii) to the extent it will be applied in a manner inconsistent with the plain language of the federal rule.

(b) At proposed at § 480–03–17.817.121(c)(4)(i), Virginia has provided for a 28-degree angle of draw rather than the 30-degree angle of draw provided in the Federal regulations at 30 CFR 817.121(c)(4)(i).

OSM approved the Federal regulations concerning angle of draw at 30 CFR 817.121(c)(4) on March 31, 1995 (60 FR 16722–16751). The preamble to the approval of 817.121(c)(4) appears on pages 16737 through 16741. That preamble presents OSM's explanation for approval of the 30-degree angle of draw and the flexibility which allows states to apply for an angle of draw other than the 30-degree angle of draw, and an explanation of how the angle of draw is implemented.

> The purpose of paragraph 30 CFR 817.121(c)(4) is to set out a procedure under which a specified area would be subject to a rebuttable presumption that subsidence from underground mining caused surface damage to non-commercial buildings or occupied residential dwellings and related structures. This evidentiary standard would simplify establishing causation of subsidence damage in many cases, by relieving the regulatory authority of the initial burden of providing evidence that damage was caused by the mine operation. [60 FR at 16737]
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> The presumption would be established only after it is determined that damage caused by earth movement did in fact occur within the specified angle of draw. The burden of rebutting the presumption will be appropriately on the mine operator, who will have the best information as to the nature, timing, and sequence of mining activities, geological conditions, etc.; i.e., the types of facts directly related to causation of the damage. [60 FR at 16737]
>
> OSM believes that the establishment of a specific angle for the presumption is important and has a number of effects or ramifications. In any enforcement proceedings concerning allegations of subsidence damage to protected structures, it will affect the initial burdens of going forward with the evidence for both the regulatory authority and the permittee * * * [o]nce the angle of draw is established, permit applicants will be required to comply with all presubsidence survey requirements covering at least the area within the angle of draw * * * OSM believes [that] applying the presumption to a specified angle of draw will balance the various purposes of SMCRA, including both environmental protection and the SMCRA section 102(k) purpose of encouraging the full utilization of coal resources through the application of under ground extraction technologies. (60 FR at 16737–16738)

The ''angle of draw'' is the angle formed between a line drawn vertically from the edge of the underground workings upward to the surface, and a line drawn from that same point on the edge of the underground workings up to the surface through the point at the outside edge of a subsidence trough where the subsidence has diminished to zero. Therefore, ''the angle of draw is one way to define the outer boundary of subsidence displacement that may occur at the surface.'' (60 FR at 16738)

In practice (in accordance with 817.121(c)(4)), such an angle of draw is drawn upward from all points along the outermost boundary of any (all) underground mine workings. Therefore, it is presumed (rebuttable) that damage caused by earth movement to protected structures that are either directly above mine workings or within the specific angle of draw of those workings, has been caused by the permittee. The Director notes that the purpose of the use of an angle of draw is not to prevent mining or subsidence. The purpose of the use of an angle of draw is to ease the initial investigative burden on the regulatory authority in those cases where the probability is high that damage by earth movement was caused by the underground mining operations.

While recognizing regional and site-specific variability in the angle of draw, OSM decided to establish a national standard of 30 degrees. This is consistent with the outer limits determined for earth movement in most subsidence studies across the United States, particularly later studies addressing long wall mining * * *. This nationwide standard is conservative'' (most subsidence is expected to take place within this angle of draw) and ''offers reasonable protection to surface owners anticipated subsidence scenarios.'' (60 FR at 16739)

On the other hand, while the Federal standard is conservative, it was not intended to encompass 100 percent of possible subsidence damage. OSM concluded that such a standard would place an unreasonable burden on the permittee with regard to pre-subsidence survey obligations. Some causes will likely occur where earth movement has caused damage to protected structures, but those structures may be outside of

the angle of draw standard. In those cases, the State regulatory authority will not have the benefit of the presumption of causation. The regulatory authority must, nevertheless, investigate such occurrences to obtain the evidence necessary to determine whether or not such damage is caused by the permittee.

Although the Federal regulation provides that the presumption shall apply to a 30-degree angle of draw, 30 CFR 817.121(c)(4)(i) allows the States to establish a different angle of draw if the State shows in writing that the angle has a more reasonable basis than the 30-degree angle of draw, based on geotechnical analysis of the factors affecting potential surface impacts of underground coal mining operations in the State. Such an angle of draw should be the angle within which vertical displacement of the surface is reasonably expected. Further, the Federal rule ensures that the regulatory authority also has the flexibility to establish a different angle of draw on a site-specific basis, where such variation is justified by appropriate geotechnical analysis.

By letter dated January 3, 1997 (Administrative Record Number VA–902), Virginia submitted information to OSM that is intended to show that a 28-degree angle of draw has a more reasonable basis for Virginia than the 30-degree angle of draw. Virginia's justification for the proposed 28-degree angle of draw is based on a review of existing literature, information submitted by consultants on permit applications, and the use of the Surface Deformation Prediction System (SDPS) computer modeling software to predict the zero point of movement on the surface (Angle of Draw). The detailed information presented by Virginia shows Angle of Draw ranging from 16 to 21 degrees in Dickenson County, general angle of draw statement for the eastern coal fields as 21 to 26 degrees from published literature, and detailed surface subsidence measurements by coal companies over long wall mines of 7 to 15 degrees. The SDPS computer subsidence model predicts 13 to 15. The 28-degree angle of draw proposed by Virginia is well outside of any of the above data and, therefore, is the angle within which vertical displacement of the surface is reasonably expected.

The Director finds that Virginia has provided sufficient written justification based on a geotechnical analysis of the factors affecting potential surface impacts for the proposed use of a 28-degree angle of draw in accordance with 30 CFR 817.121(c)(4)(i). Therefore, the Director is approving Virginia's use of the 28-degree angle of draw so long as it is to be measured from the outermost boundary of any underground mine workings to the surface of the land. The Director notes, as discussed above, that it is possible that earth movement that causes damage to protected structures that are outside the 28-degree angle of draw standard could occur. In those cases, Virginia will not have the benefit of the presumption of causation. Virginia must, nevertheless, investigate such occurrences to obtain the evidence necessary to determine whether or not such damage is caused by the permittee.

c. New § 480–03–19.817.121(c)(5) of the Virginia rules is substantively identical to the counterpart Federal regulations except that Virginia has also added the following. Virginia provides that no additional bond is required if the permittee demonstrates that the liability insurance required under § 480–03–19.800.60 provides applicable coverage.

There is no direct Federal counterpart to the proposed language at 30 CFR 817.121(c)(5). However, the preamble to the Federal provision at 30 CFR 817.121(c)(5) (see 60 FR 16741–16742; March 31, 1995) specifically addresses the option that would be implemented by the Virginia language. In that preamble, OSM stated that under 30 CFR 800.14(c), if the liability insurance policy required under section 30 CFR 800.60 would provide coverage sufficient to fund the reclamation of subsidence damage, that insurance may be substituted for increased bond. Therefore, the Director finds that Virginia's proposed language is consistent with and no less effective than 30 CFR 817.121(c)(5).

IV. Summary and Disposition of Comments

Federal Agency Comments

Pursuant to section 503(b) SMCRA and 30 CFR 732.17(h)(11)(I), comments were solicited from various interested Federal agencies. The U.S. Department of Labor, Mine Safety and Health Administration (MSHA) responded (Administrative Record Number VA–888) and stated that the proposed amendments pose no conflict with MSHA regulations. The U.S. Fish and Wildlife Service (FWS) responded and stated that the FWS has reviewed the amendments and has determined that it appears unlikely that the proposed amendments will affect Federally listed critical habitat or species (Administrative Record Number VA–893).

The U.S. Department of Agriculture, Natural Resources Conservation Service (NRCS) responded (Administrative Record Number VA–892) and commented on the proposed 28-degree angle of draw. NRCS stated that while tests and analyses conducted by and for the NRCS in the Appalachian coal fields have shown a 25-degree angle of draw from the edge of extraction, NRCS has usually assumed a 30-degree angle of draw for land rights and safety reasons. NRCS said that the 30-degree figure, while somewhat conservative, is widely accepted in the academic, technical and engineering communities. In response, the Director notes that in Finding 5, above, Virginia has submitted technical justification for using a 28-degree angle of draw. That is, the Virginia technical information shows that the 28-degree angle of draw has a more reasonable basis for Virginia. As noted in the finding, Virginia's justification does not guarantee (nor does the Federal standard of 30-degree angle of draw guarantee) that all subsidence damage will necessarily take place within the specified angle of draw. Rather, it is expected that the great majority of subsidence damage would occur within the specified angle of draw. It is possible that earth movement could occur that causes damage to protected structures that are outside the 28-degree angle of draw standard. In those cases, Virginia will not have the benefit of the presumption of causation. Virginia must, nevertheless, investigate such occurrences to obtain the evidence necessary to determine whether or not such damage is caused by the permittee.

Public Comments

The following comments were received in response to the announced public comment periods. A public hearing was held on September 18, 1997, and the comments below also reflect those offered at the hearing.

One commenter recommended various typographical corrections be made to the amendment. In response, the Director notes that Virginia has corrected all but one of the typographical errors that were identified by the commenter. The remaining error at § 480–03–19.784.20(b)(7), is clearly a typographical error and does not affect the meaning of 784.20(b). Therefore, as stated in the Director's finding 5, the Director finds it to be no less effective than the Federal regulation.

Several commenters stated that the proposed 28-degree angle of draw should not be approved. Some of these commenters expressed disbelief that any specific angle of draw could adequately protect the coalfield residents from damage from subsidence. One commeter said that he can't see how anyone can draw a line on a map and say on one

side of this line damage is caused by mining, but on the other side of the line damage can not be mining related. It is especially impossible, the commenter stated, to use a single measurement for any entire region or state. Another commenter stated that the current use and practical application of the angle of draw theory is totally without merit and is contrary to the way our earth is made or reacts to stress. If a specific angle of draw must be chosen, commenters recommended a 30-degree or 35-degree angle of draw. The commenter stated that the decision to use either the 28-degrees or 30-degrees angle of draw should consider the obvious, on-the-ground damages above high-extraction mines. Another commenter said that he was told by company officials that his residence is just outside the angle of draw and that he would have to prove that the damage was subsidence related.

To the extent that the comments question the concept of any angle of draw, these comments are not within the scope of this rulemaking because they question the federal rule which was approved by OSM in 1995. For a further discussion of the purpose of the angle of draw please see the federal rule at 60 FR at 16737–16738.

The Director notes that, as discussed above in Finding 5, the Federal regulations at 30 CFR 817.121(c)(4)(I), while specifying a 30-degree angle of draw, also authorize the States to amend their programs to apply the presumption to a different angle of draw. To receive approval of a different angle of draw, the regulatory authority must show in writing that the proposed angle has a more reasonable basis than the 30-degree angle of draw. Virginia has provided the required technical justification, and OSM, after reviewing the information supplied by Virginia, concluded (see Finding 5.b.) that Virginia has met the requirements of 30 CFR 817.121(c)(4)(I).

In addition, it should be understood that neither the State's 28-degree angle of draw, nor the Federal 30-degree angle of draw are intended to encompass 100 percent of the possible cases where damage to surface structures may be caused by underground mining. Rather, OSM designed the rule to apply an angle of draw within which it would be reasonable to presume that such damage is caused by the underground mining operations. The presumption, however, does not change the ultimate burden of proof in a damage determination.

The ultimate burden of persuasion that a permittee is responsible for damage to a structure still lies with the regulatory authority or OSM. ''The presumption * * * [is] established only after it is determined that damage caused by earth movement did in fact occur within the specified angle of draw.'' [60 FR at 16737] The burden of rebutting the presumption will be on the permittee. The ''[p]ermittee may provide information * * * either before an enforcement action is taken, when the regulatory authority or OSM is determining whether a violation exists * * * or after enforcement action occurs.'' [60 FR 17637]

If damage occurs to a protected surface structure that is outside the specified angle of draw, the presumption does not exist. That is, it cannot be presumed that the permittee caused the damage. Instead, the regulatory authority must gather and evaluate evidence that the damage is caused by the permittee. The permittee, of course, may submit evidence in an attempt to refute the evidence submitted by the regulatory authority. The Director notes that neither the use of the 30-degree angle of draw or the use of an alternative, approved angle of draw (such as 28 degrees) is intended to diminish the protection afforded to non-commercial buildings, and occupied residential dwellings and structures related thereto, under 30 CFR 817.121.

One commenter stated that landowners have no chance to prove anything when they can't get cooperation from coal company officials in even looking at maps to determine when and where mining under and around their property occurred. In response, the Director notes that it is the responsibility of the State to investigate subsidence damage complaints. Mine maps are available in the permit files that should provide enough information for the State to determine if mining is being conducted under a specific property. These maps are available for public inspection under § 480–03–19.773.13(a)(2). The permittees are required under § 480–03–19.817.122 to provide six-months advance notice to property owners of proposed mining under their property.

One commenter stated that the mining maps are not reliable enough to use the angle of draw on the inside part of a mining operation. The commenter pointed to the difficulty of rescuing trapped miners by using mine maps to locate their position and drill rescue shafts to reach them. How can you, the commenter asked, use an angle of draw determined from mine maps to consider damage to people's houses, when mining companies can't even hit a simple opening to rescue trapped miners? Because of this inaccuracy, the angle of draw should be done away with. The Director notes that this comment questions the concept of any angle of draw and, therefore, is not within the scope of this rulemaking because it questions the federal rule which was approved by OSM in 1995.

A commenter provided the following comments on Virginia's January 3, 1997, technical justification of the proposed 28-degree angle of draw. The commenter objected to the use of statistics, estimates, averages, and computer modeling for ''angle of draw calculations.'' In response, the Director notes that while some of these types of mathematical procedures were used in support of the reduction from 30 to 28 degrees, the basis for the models and estimates were actual, on-the-ground measurements of the extent of subsidence impacts from underground mining. These measurements were obtained in Virginia by scientifically-documented studies of Virginia Polytechnic Institute & State University (VPI), and the mining companies.

A commenter contended that the geologic data upon which the angle of draw is based, is unsubstantiated by adequate geological information on rock types and strength. In response, the Director notes as part of Virginia's justification of the use of a 28-degree angle of draw, the State included the results of subsidence models generated by the computer software Surface Deformation Prediction System (SDPS). This computer software, which was developed by VPI in cooperation with OSM, has been validated from actual mine subsidence data in Virginia. The software allows the prediction of the angle of draw, predicated on the amount of ''hardrock'' in the overburden above an underground mine. Overburden and other data from two Virginia mines were applied to SDPS. Hardrock for these two models consisted of 69.5 and 76.7 percent based on actual core samples, and the angle of draw predicted by SDPS equated to 15.1 and 13.8 degrees. The stratigraphy in southwestern Virginia is noted for massive sandstones and other types of hardrock above the coal. The hardrock is estimated to average 50 percent of coal overburden. When a 50 percent hardrock figure is applied to SDPS, the angle of draw equates to 23 degrees. Using a conservative figure of 30 percent hardrock (atypically low for southwestern Virginia), SDPS predicts the angle of draw of 28 degrees. Thus, under the typical conditions of southwestern Virginia, OSM believes a 28-degree angle of draw for the purposes of defining the limits of rebuttable presumption is reasonable, and renders the regulations proposed by Virginia no

less effective than the counterpart provision at 30 CFR 817.121(c)(4)(I).

A commenter was concerned that the studies preferred to in support of the 28-degree angle of draw were conducted on the initial mining panels or pillar extraction when only a minimal amount of ground disruption would occur. The commenter argued that, in reality, as mining progresses, damages become more substantial because more of the overburden's strength is weakened causing even greater area of impact. In response, the Director disagrees with the commenter for two reasons. First, there is no scientific support for the commenter's hypothesis that the angle of draw increases as multiple longwall panels are mined or when full extraction room-and-pillar mining extends beyond what has been shown to be a critical width. Secondly, the State cited numerous studies by several different authors in its justification of the use of a 28-degree angle of draw. There is no support for the commenter's allegation that all or any of these studies were conducted only during the initial mining of panels or pillars. Several of the supporting documents show that the studies were conducted using multipanel longwall mines or areas of extensive room-and-pillar mining.

Several commenters referred to the McClure #1 mine in Virginia and said that subsidence damage was not confined to a 28 degree angle of draw. One commenter added that the proportion of sandstone in the overburden above the McClure #1 mine is less than expected by the modeling. In response, the Director notes that Virginia's submittal to support their request for a 28-degree angle of draw specifically cites information that concerns the McClure #1 mine (Administrative Record Number VA 902). In that reference, the Clinchfield Coal Company (permit 1400411, revision 9402858) completed a study in 1989 of actual subsidence (not modeling data) over the McClure # mine in the Jawbone seam. Clinchfield's survey data measured a draw angle of 15 degrees. In its permit, however, Clinchfield requested a more conservative 24 degree angle of draw for the longwall mining. Both of these angles are well within the 28-degree angle of draw requested by Virginia. That is, the subsidence trough at the McClure #1 mine (subsidence trough is the zone of vertical displacement as measured by a vertical line at the edge of the underground workings and the point where the vertical displacement diminishes to zero) was measured to be well within the proposed 28-degree angle of draw. Therefore, the Director continues to believe that the proposed 28-degree angle of draw is reasonable.

As for allegations of damage outside of a 28-degree angle of draw, such allegations do not automatically discredit the reasonableness of the proposed angle of draw. As explained in Finding 5 above, the angle of draw (whether it be the Federal 30-degrees or the proposed 28 degrees) is not intended to encompass 100 percent of all subsidence damage. Rather, the angle of draw is intended to encompass an area within which it is reasonable to presume that subsidence damage is caused by the underground mining operations. Based on the actual measurements of vertical displacement above the McClure 11 mine as cited in the Clinchfield Coal Company study (15 degrees), it is reasonable to believe that most subsidence damage would be confined within the proposed angle of draw. Therefore, the Director continues to believe that the use of a 28-degree angle of draw is reasonable and no less effective than the Federal 30-degree angle of draw.

Several commenters expressed concern over how and where the line that represents the angle of draw is determined and drawn. One commenter stated that the angle should be computed from the outermost boundary of any underground mine workings. The commenter stressed the use of the word ''any'' as it refers to underground mine workings. The commenter acknowledged that the ''any'' requirement is in the Virginia regulations at § 480–03–19.817.121(c)(4), but explained that the angle should be computed to include the entire mine, the adjacent area, the affected area, the cumulative impact area, and the disturbed area. One commenter requested that OSM clarify where the angle of draw is measured from. Another commenter insists the measure of the angle of draw be outward from the perimeter of the underground mine, and suggests that Virginia's intent is to only measure outward from high-extraction mining areas. These comments pertain to Virginia's regulation at 480–03–19.817.121(c)(4)(I), which is discussed in the Director's Finding 5.a. As previously stated, the definition of ''angle of draw'' is defined as ''the angle of inclination between the vertical at the edge of the underground mine workings and the point of zero vertical displacement at the endge of the subsidence trough.'' 60 FR 16722, 16738 (March 31, 1995). The Director agrees with the commenter that Virginia's interpretation is to only measure the angle of draw from the high extraction mining areas which is inconsistent with the plain language of 30 CFR 817.121(c)(4)(I). Accordingly, Virginia's regulation is not approved to the extent it will be applied in a manner inconsistent with the plain language of the federal rule.

Environmental Protection Agency (EPA)

Under 30 CFR 732.17(h)(11)(ii), the Director is required to obtain the written concurrence of the Administrator of the EPA with respect to any provisions of a State program amendment that relate to air or water quality standards promulgated under the authority of the Clean Water Act (33 U.S.C. 1251 *et seq.*) or the Clean Air Act (42 U.S.C. 7401 *et seq.*). The Director has determined that this amendment contains no provisions in these categories and that EPA's concurrence is not required.

Pursuant to 732.17(H)(11)(I), OSM solicited comments on the proposed amendment from EPA. EPA responded on July 22, 1996 (Administrative Record No. VA–895) and stated that the amendment is in compliance with the Clean Water Act and offered no additional comments.

V. Director's Decision

Based on the findings above, and except as noted below, the Director is approving Virignia's amendment concerning subsidence damage as submitted by Virginia on May 21, 1996, and clarified by letter dated January 3, 1997, and revised by a letter dated March 20, 1997, to correct minor punctuation and typographical errors. The Director is not approving § 480–03–19.817.121(c)(4)(I) to (ii) to the extent it will be applied in a manner inconsistent with 30 CFR 817.121(c)(4). The Director is approving § 480–03–19.817.121(a)(2)(iii) to the extent it applies to longwall mining.

The Federal regulations at 30 CFR part 946 codifying decisions concerning the Virginia program are being amended to implement this decision. This final rule is being made effective immediately to expedite the State program amendment process and to encourage States to bring their programs into conformity with the Federal standards without undue delay. Consistency of State and Federal standards is required by SMCRA.

Effect of Director's Decision

Section 503 of SMCRA provides that a State may not exercise jurisdiction under SMCRA unless the State program is approved by the Secretary. Similarly, 30 CFR 732.17(a) requires that any alteration of an approved State program be submitted to OSM for review as a program amendment. Thus, any changes

to the State program are not enforceable until approved by OSM. The Federal regulations at 30 CFR 732.17(g) prohibit any unilateral changes to State programs. In his oversight of the Virginia program, the Director will recognize only the statutes, regulations and other materials approved by him, together with any consistent implementing policies, directives and other materials, and will require the enforcement by Virginia of only such provisions.

VI. Procedural Determinations

Executive Order 12866

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

The Department of the Interior has conducted the reviews required by section 3 of Executive Order 12988 (Civil Justice Reform) and has determined that, to the extent allowed by law, this rule meets the applicable standards of subsections (a) and (b) of that section. However, these standards are not applicable to the actual language of State regulatory programs and program amendments since each such program is drafted and promulgated by a specific State, not by OSM. Under sections 503 and 505 of SMCRA (30 U.S.C. 1253 and 1255) and 30 CFR 730.11, 732.15 and 732.17(h)(10), decisions on proposed State regulatory programs and program amendments submitted by the States must be based solely on a determination of whether the submittal is consistent with SMCRA and its implementing Federal regulations and Whether the other requirements of 30 CFR Parts 730, 731, and 732 have been met.

National Environmental Policy Act

No environmental impact statement is required for this rule since 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 which is the subject of this rule is based upon counterpart Federal regulations for which an economic analysis was prepared and certification made that such regulations would not have a significant economic effect upon a substantial number of small entities. Accordingly, this rule will ensure that existing requirements previously promulgated by OSM will be implemented by the State. In making the determination as to whether this rule would have a significant economic impact, the Department relied upon the data and assumptions for the counterpart Federal regulations.

Unfunded Mandates

This rule will not impose a cost of $100 million or more in any given year on any governmental entity or the private sector.

List of Subjects in 30 CFR Part 946

Intergovernmental relations, Surface mining, Underground mining.

Dated: August 29, 1997.

Allen D. Klein,

Regional Director, Appalachian Regional Coordinating Center.

For the reasons set out in the preamble, Title 30, Chapter VII, Subchapter T of the Code of Federal Regulations is amended as set forth below:

PART 946—VIRGINIA

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

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

2. Section 946.15 is amended in the table by adding a new entry in chronological order by ''Date of Final Publication'' to read as follows:

§ 946.15 Approval of Virginia regulatory program amendments.

* * * * *

Original amendment submission date	Date of final publication	Citation/description
* *	*	* *
May 21, 1996	September 17, 1997.	VA Code §§ 480–03–19.700.5; 784.14, .20; 817.41, .121.

[FR Doc. 97–24682 Filed 9–16–97; 8:45 am]

BILLING CODE 4310–05–M

DEPARTMENT OF TRANSPORTATION

Coast Guard

33 CFR Part 100

[CGD08–97–035]

RIN 2115–AE46

Special Local Regulations; Fleur De Lis Regatta Ohio River Mile 602.0–604.0, Louisville, KY

AGENCY: Coast Guard, DOT.

ACTION: Temporary final rule.

SUMMARY: Special local regulations are being adopted for the Fleur De Lis Regatta. This event will be held on September 27 & 28, 1997 from 9 a.m. until 3 p.m. at Louisville, Kentucky. These regulations are needed to provide for the safety of life on navigable waters during the event.

EFFECTIVE DATE: These temporary regulations are effective from 9 a.m. until 3 p.m., on September 27 & 28, 1997.

FOR FURTHER INFORMATION CONTACT: LT Jeffrey W. Johnson, Chief, Port Operations Department, USCG Marine Safety Office, Louisville, Kentucky at (502) 582–5194, ext. 39.

SUPPLEMENTARY INFORMATION:

Regulatory History

In accordance with 5 U.S.C. 553, a notice of proposed rule making for these regulations has not been published, and good cause exists for making them effective in less than 30 days from the date of publication. Following normal rule making procedures would be impracticable. The details of the event were not finalized in sufficient time to publish proposed rules in advance of the event or to provide for a delayed effective date.