

DEPARTMENT OF THE INTERIOR**Minerals Management Service****30 CFR Part 250**

RIN 1010-AC32

Oil and Gas and Sulphur Operations in the Outer Continental Shelf—Postlease Operations Safety, Correction

AGENCY: Minerals Management Service (MMS), Interior.

ACTION: Correction to final regulations.

SUMMARY: This document makes a correction to the final rule titled "Postlease Operations Safety" that was published Tuesday, December 28, 1999 (64 FR 72756). We are correcting a citation error in the table of Documents Incorporated by Reference.

EFFECTIVE DATE: January 27, 2000.

FOR FURTHER INFORMATION CONTACT: Alexis London, Rules Processing Team,

Engineering and Operations Division, (703) 787-1600.

SUPPLEMENTARY INFORMATION:**Background**

The final regulations that are the subject of these corrections supersede 30 CFR 250, subpart A, General, regulations on the effective date and affect all operators and lessees on the Outer Continental Shelf.

The published final regulations contained a complete listing of all of the documents MMS has incorporated by reference in the 30 CFR part 250 regulations. The rulemaking also included revisions and reaffirmations of several documents. The table of documents incorporated by reference in § 250.198(e) of the published final rule contained an error, which we are correcting.

Need for Correction

As published, the final regulations contain an error which may prove to be

misleading and is in need of clarification.

Correction of Publication

Accordingly, the publication on December 28, 1999, of the final regulations, which were the subject of FR Doc. 99-31869, is corrected as follows:

§ 250.198 [Corrected]

On page 72792, in the table in § 250.198(e), the entry for API RP 14H, Recommended Practice for the Installation, Maintenance and Repair of Surface Safety Valves and Underwater Safety Valves Offshore, is corrected to read as follows:

§ 250.198 Documents incorporated by reference.

* * * * *

(e) * * *

Title of document					Incorporated by reference at
* * * * *					* *
API RP 14H, Recommended Practice for the Installation, Maintenance and Repair of Surface Safety Valves and Underwater Safety Valves Offshore Fourth Edition, July 1, 1994, API Stock No. G14H04.					§ 250.802(d); 250.804(a)(4)
* * * * *					* *

Dated: May 23, 2000.

John V. Mirabella,

Acting Chief, Engineering and Operations Division.

[FR Doc. 00-13868 Filed 6-7-00; 8:45 am]

BILLING CODE 4310-MR-P

DEPARTMENT OF THE INTERIOR**Office of Surface Mining Reclamation and Enforcement****30 CFR Part 901**

[SPATS No. AL-070-FOR]

Alabama Regulatory Program

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

ACTION: Final rule.

SUMMARY: OSM is approving an amendment to the Alabama regulatory program (Alabama program) under the Surface Mining Control and Reclamation Act of 1977 (SMCRA). Alabama proposed revisions to the Alabama Surface Mining Control and Reclamation Act (ASMCRA) concerning the repair or compensation for material damage to any occupied residential

dwelling and related structures or any noncommercial building. The proposed revisions also concern the replacement of contaminated, diminished, or interrupted drinking, domestic or residential water supplies. The damage to the protected structures or water supplies has to have been caused by subsidence resulting from underground coal mining operations. Alabama proposed to revise its program at its own initiative.

EFFECTIVE DATE: June 8, 2000.

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION:

- I. Background on the Alabama 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 Alabama Program

On May 20, 1982, the Secretary of the Interior conditionally approved the Alabama program. You can find

background information on the Alabama program, including the Secretary's findings, the disposition of comments, and the conditions of approval in the May 20, 1982, **Federal Register** (47 FR 22062). You can find later actions concerning the Alabama program and previous amendments at 30 CFR 901.15, 901.16, and 901.17.

II. Submission of the Amendment

By letter dated August 17, 1999 (Administrative Record No. AL-0589), Alabama submitted an amendment to its approved permanent regulatory program according to the Federal regulations at 30 CFR 732.17(b). Alabama sent the amendment at its own initiative.

We announced the proposed rulemaking in the September 7, 1999, **Federal Register** (64 FR 48573). In the same document, we opened the public comment period and provided an opportunity for a public hearing or meeting on the adequacy of the amendment. The public comment period closed on October 7, 1999. We held a public hearing in Birmingham, Alabama, on October 4, 1999. We reopened the public comment period in the October 15, 1999, **Federal Register** (64 FR 55878) in order to allow the

public additional time to submit comments. The public comment period closed on November 1, 1999.

During our review of the amendment, we identified concerns regarding section 9-16-91(f) of ASMCRA, remedies for subsidence damage and subsidence damage agreements. We notified Alabama of these concerns by letter dated February 3, 2000 (Administrative Record No. AL-0627). By letter dated February 15, 2000, and May 3, 2000 (Administrative Record Nos. AL-0629 and AL-0634, respectively), Alabama sent us additional explanatory information. Because the explanatory information did not make any change to Alabama's amendment regarding remedies for subsidence damage and subsidence damage agreements, we did not reopen the public comment period.

III. Director's Findings

Below, in accordance with SMCRA and the Federal regulations at 30 CFR 732.15 and 732.17, are the Director's findings concerning the amendment on the Alabama permanent regulatory program. Any revisions that we do not discuss below are about minor wording changes, or revised cross-references and paragraph notations to reflect organizational changes resulting from this amendment.

A. Alabama proposed to revise section 9-16-91(e)(1) of ASMCRA to read as follows:

(1) Promptly repair or compensate for material damage to any occupied residential dwelling and related structures or any noncommercial building caused by surface subsidence resulting from underground coal mining operations. Repair of damage shall include rehabilitation, restoration, or replacement of the damaged occupied residential dwelling and related structures or noncommercial building. Compensation shall be provided to the owner of the damaged occupied residential dwelling and related structures or noncommercial building which shall be in the full amount of the diminution in value resulting from subsidence caused damage. Compensation may be accomplished by the purchase, prior to mining, of a non-cancelable premium-prepaid insurance policy.

The above proposed revision involves minor wording changes to this previously approved statute and it does not change its meaning. Therefore, we are approving the revision because it is no less stringent than the Federal statute at section 720(a)(1) of SMCRA.

B. Alabama proposed to add new section 9-16-91(e)(3) of ASMCRA to read as follows:

(3) Promptly correct any material damage resulting from subsidence caused to surface lands, to the extent technologically and economically feasible, by restoring the land

to a condition capable of maintaining the value and reasonably foreseeable uses that it was capable of supporting before subsidence.

We do not have a counterpart Federal statute in SMCRA for this proposed addition. However, the provision is consistent with requirements in section 516(b)(1) of SMCRA and is found in the Federal regulations at 30 CFR 817.121(c)(1). We are approving the addition of this provision to Alabama's statutes because it is consistent with our Federal regulations and SMCRA and will not make the Alabama statutes less stringent than the Federal statutes.

C. Alabama proposed to add new section 9-16-91(e)(4) of ASMCRA to read as follows:

(4) The regulatory authority shall issue such notices or orders and take such actions as necessary to compel compliance with these requirements.

This provision that Alabama proposed to add to its statutes is not found in our Federal statutes. Alabama's intent by adding this provision is to make it clear that it has the power to enforce the provision of section 9-16-91 of ASMCRA. We are approving this statute because it is not inconsistent with our Federal regulations or statutes and will not make the Alabama statutes less stringent than the Federal statutes.

D. Alabama proposed to add new section 9-16-91(f) to read as follows:

(f) Notwithstanding any other provision in this chapter to the contrary, the remedies prescribed in this section or any rule promulgated under authority of this chapter pertaining to repair or compensation for subsidence damage and replacement of water shall be the sole and exclusive remedies available to the owner for such damage and its effects. Neither punitive damages nor, except as specifically prescribed in this section or any rule promulgated under authority of this chapter pertaining to repair or compensation for subsidence damage and replacement of water, compensatory damages shall be awarded for subsidence damage caused by longwall mining or other mining process employing a planned subsidence method and conducted in substantial compliance with a permit issued under authority of this chapter. Nothing in this chapter shall prohibit agreements between the surface owner and the mineral owner or lessee that establish the manner and means by which repair or compensation for subsidence damage is to be provided. However, the remedies prescribed for subsidence damage shall not be diminished or waived by contrary provisions in deeds, leases, or documents (other than such subsidence damage agreements) which leave the owner without such prescribed remedies. Provided, however, the provisions of this subsection do not apply to any actions brought for, and in which the trier of the fact finds, intentional, willful, or wanton conduct; provided further, that conduct in

substantial compliance with applicable mining permits may not be deemed to be intentional, willful, or wanton.

The above provision establishes that the remedies outlined in section 9-16-91 of ASMCRA are the sole and exclusive remedies available to a surface owner for subsidence damages, unless the operator violates the conditions or provisions of a permit issued under the authority of ASMCRA. It also allows a surface owner and mineral owner or lessee to enter into a subsidence damage agreement that establishes the manner and means that the mineral owner or lessee will provide repair or compensation.

1. *Remedies for Subsidence Damage.* Section 720(a) of SMCRA provides two remedies to surface landowners for material damage caused by subsidence to protected structures and water supplies. First, a coal operator must promptly repair or compensate a surface landowner for any material damage, caused by subsidence, to any occupied dwelling and related structures or non-commercial buildings. Second, a coal operator must promptly replace any drinking, domestic, or residential water supplies that are damaged as a result of subsidence.

Sections 9-16-91(e)(1) and (2) of ASMCRA provide the same remedies to surface landowners for material damage caused by subsidence to protected structures and water supplies that section 720(a) of SMCRA provides. Alabama's amendment at 9-16-91(f) establishes that these remedies found in 9-16-91 are the sole and exclusive remedies available to the surface owner for such damage and its effects as long as the operator is conducting longwall mining or other mining process employing a planned subsidence method in substantial compliance with a permit issued under the authority of ASMCRA. If the operator is found to have engaged in intentional, willful, or wanton conduct that is not in substantial compliance with a permit, the ability to seek additional damages is preserved. We interpret "substantial compliance with the permit" to be equivalent to "compliance with all rules, regulations, orders, and permits."

In a letter dated February 15, 2000 (Administrative Record No. AL-0629), Alabama confirmed that section 9-16-91(f) of ASMCRA does not limit any other remedies available under SMCRA.

The Alabama program contains all the remedies provided for under SMCRA for material damage caused to protected structures and water supplies. In addition, Alabama has stated that the provision does not limit any other remedies available under SMCRA.

Therefore, we are approving the above provisions concerning remedies for subsidence damage in section 9–16–91(f) of ASMCRA, as clarified by the above interpretations, because the remedies are consistent with and are no less stringent than the remedies provided by section 720(a) of SMCRA. We note that Alabama has established conditions under which a surface owner may obtain additional damages. However, comparable provisions are not found in SMCRA and they do not conflict with any requirements of SMCRA. Therefore, the provisions do not render the Alabama program less stringent than SMCRA and we are approving them.

2. *Subsidence Damage Agreements.* Section 9–16–91(f) of ASMCRA provides for subsidence damage agreements between surface owners and mineral owners or lessees, and further contains a sentence that reads as follows:

* * * However, the remedies prescribed for subsidence damage shall not be diminished or waived by contrary provisions in deeds, leases, or documents (other than such subsidence damage agreements) which leave the owner without such prescribed remedies * * *

The reference to subsidence damage agreements in the above quoted sentence would be inconsistent with and less stringent than SMCRA if interpreted to allow a surface landowner and mineral owner or lessee to enter into subsidence damage agreements that diminish or waive the surface landowner's right to the remedies prescribed in section 9–16–91 of ASMCRA. This is because sections 515(b)(2) and 516(b)(1) of SMCRA, as well as the implementing Federal regulations at 30 CFR 817.121(c)(1), establish that a permittee has a duty under SMCRA to maintain the value and reasonably foreseeable use of the surface land and to restore all land which is materially damaged by subsidence. Also, section 720(a)(1) of SMCRA and the implementing Federal regulations at 30 CFR 817.121(c)(2) provide that a permittee has a duty to repair or compensate for material damage to non-commercial buildings and occupied residential dwellings. Finally, section 720(a)(2) of SMCRA and its implementing Federal regulation at 30 CFR 817.41(j) provide that a permittee must promptly replace any drinking, domestic or residential water supply that is contaminated, diminished or interrupted by underground mining activities. Nothing can exempt a permittee from any one of these duties.

We stated in a June 1, 1983, **Federal Register** (48 FR 24644) final rule that

“the duty to restore land materially damaged by subsidence will apply irrespective of the operator's liability under State law.” In addition, in a March 31, 1995, **Federal Register** (62 FR 16735) final rule, we stated, “[a]ny permittee/owner agreements cannot negate the requirement of the Energy Policy Act to repair or compensate for subsidence-related material damage to occupied residential dwellings and related structures as well as non-commercial buildings.”

Further, in the March 31, 1995, **Federal Register** (62 FR 16733) final rule, we stated that “the terms of the Energy Policy Act unequivocally require replacement” of water supplies adversely affected by underground mining operations. In other words, surface landowners and mineral owners or lessees may enter into private subsidence damage agreements, but these agreements cannot diminish or waive the surface landowner's right to the remedies prescribed in section 9–16–91 of ASMCRA. To do so would be inconsistent with and less stringent than sections 515(b)(2), 516(b)(1), and 720(a) of SMCRA and its implementing Federal regulations at 30 CFR 817.121(c)(1) and (2) and 817.41(j).

In its letter dated February 15, 2000 (Administrative Record No. AL–0629), Alabama responded to our concerns about the subsidence damage agreements provision in 9–16–91(f) of ASMCRA. The State asserted that the United States Court of Appeals for the District of Columbia had addressed the validity of subsidence damage agreements in its ruling in the case of *National Mining Association (NMA) v. Babbitt*, No. 98–5320, decided April 27, 1999. Alabama interpreted the court's decision as saying that while a coal operator has an obligation to make full repair or compensation, the affected parties may agree among themselves as to what constitutes full repair or compensation.

In ruling on this issue, the court clearly confirmed OSM's longstanding policy that waiver agreements between surface landowners and underground coal operators cannot diminish or waive the surface landowner's right to full compensation for subsidence related damages to protected structures and water supplies.

We agree with Alabama's interpretation of the court's opinion that a mineral owner or lessee and a surface landowner may execute a pre-subsidence damage agreement in which they agree as to what constitutes full repair or compensation with the stipulation that such agreements do not constitute a waiver of the surface

landowner's rights under the Energy Policy Act.

In addition, in a letter dated May 3, 2000 (Administrative Record No. AL–0634), Alabama stated that it recognizes that the Energy Policy Act mandates full compensation or repair for subsidence damage to protected structures and the prompt replacement of water for subsidence damage to protected water supplies. Alabama stated that it does not interpret section 9–16–91(f) to mean that a subsidence damage agreement can negate a surface owner's right to full and fair compensation or repair for subsidence damage to protected structures or replacement of water for subsidence damage to protected water supplies as provided for by the Alabama statutory equivalent to the Energy Policy Act requirements. Alabama further stated that it would take appropriate enforcement action against an operator who fails to fully repair or compensate for subsidence damage to protected structures or who fails to fully replace water for subsidence damage to protected water supplies.

Therefore, based on (1) Alabama's interpretation that the provisions of section 9–16–91(f) allow subsidence damage agreements only insofar as those agreements are consistent with the Energy Policy Act and do not purport to diminish or waive the surface landowner's right to full compensation for subsidence related damages to protected structures and water supplies and (2) Alabama's assurance that it will take appropriate action against an operator who fails to fully repair or compensate for subsidence damage to protected structures or who fails to fully replace water for subsidence damages to protected water supplies, we are approving section 9–16–91(f) of ASMCRA because it is no less stringent than SMCRA.

IV. Summary and Disposition of Comments

Federal Agency Comments

On August 25, 1999, we asked for comments from various Federal agencies who may have an interest in the Alabama amendment (Administrative Record No. AL–0590). We requested comments in accordance with section 503(b) of SMCRA and 30 CFR 732.17(h)(11)(i) of the Federal regulations. We did not receive any comments.

Environmental Protection Agency (EPA)

According to 30 CFR 732.17(h)(11)(ii), we are required to get a written agreement from the EPA for those provisions of the proposed program

amendment that relate to air or water quality standards put into force under the authority of the Clean Water Act (33 U.S.C. 1251 *et seq.*) or the Clean Air Act (42 U.S.C. 7401 *et seq.*). None of the revisions that Alabama proposed to make in this amendment pertain to air or water quality standards. Therefore, we did not ask the EPA to agree on the amendment.

According to 30 CFR 732.17(h)(11)(i), we requested comments on the amendment from the EPA in a letter dated August 25, 1999 (Administrative Record No. AL-0590). The EPA did not respond to our request.

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

According to 30 CFR 732.17(h)(4), we are required to request comments from the SHPO and ACHP on amendments that may have an effect on historic properties. On August 25, 1999, we requested comments on Alabama's proposed program amendment (Administrative Record No. AL-0590), but neither responded to our request.

Public Comments

We received comments on Alabama's proposed amendment from fourteen individuals and twelve representatives of various groups. The comments consisted of both supporting and opposing statements about the amendment in general, as well as supporting and opposing statements about the specific provisions of the amendment. Further, several of these comments pertained to the impact of SMCRA on Alabama common law. Therefore, for ease of discussion, we will first discuss the comments pertaining to the impact of SMCRA on Alabama common law. Then, we will discuss general comments in favor of Alabama's amendment and general comments opposing Alabama's amendment. Finally, we will discuss comments on specific provisions of the amendment.

A. Comments Pertaining to the Impact of SMCRA on Alabama Common Law

We received several comments, both opposing and supporting the Alabama amendment, that pertained to the impact of SMCRA on Alabama common law. As commenters have informed us, Alabama's common law gives a surface owner an absolute right to subjacent support of the surface absent an express waiver of that right. See *Williams v. Gibson*, 4 So. 350 (Ala.1888), *West Pratt Coal Co. v. Dorman*, 49 So. 849 (Ala.1909), *Bibby v. Bunch*, 58 So. 916 (Ala.1912), and *Alabama Clay Products*

Co. v. Black, 110 So.151 (Ala.1926). The commenters, however, disagree on the impact that the enactment of SMCRA, including the Energy Policy Act, has on the respective rights of surface owners and the holders of mineral interests.

Citing section 505(a) of SMCRA, supporters of Alabama's amendment argue that the enactment of section 516 of SMCRA and the Alabama counterpart at section 9-16-91 of ASMCRA have preempted the state law pertaining to subjacent support. According to these commenters the state property law is inconsistent with SMCRA since it provides for land use and environmental controls and regulations that are different from those required by SMCRA.

Opponents, on the other hand, argue that the enactment of SMCRA did not impact Alabama's common law. They argue that common law provides more stringent land use and environmental controls and regulations than do the provisions of SMCRA or its implementing regulations. Accordingly, as section 505(b) of SMCRA states, any State law that provides for more stringent land use and environmental controls can not be construed to be inconsistent with SMCRA.

Response: We think that the use of section 505 of SMCRA, whether it be subsection 505(a) or 505(b), to resolve this debate over whether SMCRA preempts the common law of Alabama, however, is inappropriate. Section 505 of SMCRA applies to State laws that directly address matters covered under SMCRA—such as environmental protection standards, reclamation standards, and the like. Section 505(a) was not intended to invalidate as “inconsistent” with SMCRA State common law of property rights which affords protection to surface owners by establishing the property right of the subjacent support.

Generally, preemption analysis is informed by two basic presumptions: (1) that historic police powers of the States are not superseded by the Federal act unless that was the clear and manifest purpose of Congress, and (2) the purpose of Congress is the ultimate touchstone in every preemption case. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992). Congress' intent is primarily discerned from the statutory text and from a “fair understanding” of the statute as a whole by looking at the statutory framework, the structure and purpose of the statute and the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law. *Medtronic v. Lohr*, 518 U.S. 470, 485 (1996).

The text and history of SMCRA reveal no “clear and manifest” congressional intent to modify the State common law pertaining to subjacent support. To the contrary, it is an express purpose of SMCRA to establish uniform national standards that will “fully protect the rights of the nation's surface landowners.” 30 U.S.C. 1202 (b). It would hardly protect the rights of surface landowners for SMCRA to be interpreted as extinguishing their property right of subjacent support in exchange for more limited protection under SMCRA. Congress expressly indicated, moreover, that the respective property rights of the mineral interest holder and the surface owner are matters beyond the scope of SMCRA. Two separate sections of SMCRA state that SMCRA does not authorize a regulatory authority to resolve property rights disputes. Section 507(b)(9) of SMCRA provides in pertinent part:

Provided, That nothing in this Act shall be construed as vesting in the regulatory authority the jurisdiction to adjudicate property title disputes;

30 U.S.C. 1257(b)(9). Section 510(b)(6)(C) of SMCRA contains an almost identical proviso:

Provided, That nothing in this Act shall be construed to authorize the regulatory authority to adjudicate property rights disputes.

30 U.S.C. 1260(b)(6)(C). The legislative history of SMCRA indicates that the proper forum for resolving property rights disputes is the State courts and that it is the State common law that delineates the extent and scope of property rights. See H.R. Conf. Rep. No. 95-493, at 105,106 (1977). Consequently, contrary to the fears of at least one commenter, SMCRA does not authorize the regulatory authority to make a permitting decision that adjudicates a property rights dispute so as to augment the property rights of the mineral interest holder at the expense of the surface owner. See *Citizens Organized Against Longwalling v. Division of Reclamation*, 535 N.E.2d 687, 699-700 (Ohio App. 1987) where the Ohio court held that a permit obtained by a coal mine operator to continue longwall mining would not resolve property disputes between the operator and the owners of surface estates, and would not immunize the operator from liability for damages caused by mining pursuant to the permit. If, under Alabama's common law, a particular surface owner in fact possesses the absolute right to subjacent support of the surface absent an express waiver, SMCRA does not authorize a

decision by the regulatory authority to extinguish that right.

B. General Comments in Favor of Alabama's Amendment

We received comments in favor of Alabama's amendment from five representatives of various coal companies, the Alabama Coal Association, and the State of Alabama Surface Mining Commission (ASMC). All the comments assert that we should approve Alabama's amendment because it is consistent with, and no less stringent than, SMCRA and the existing Alabama program. The comments are discussed below.

1. Several commenters assert that the proposed amendment reflects the Alabama Legislature's intent to modify state law, a power which is entirely within their discretion. Because this is a state matter, the amendment does not run afoul of any federal regulatory purpose. The proposed amendment deals only with a surface owner's right to recover punitive damages in state court, and as such, is entirely a State law matter.

Response: We agree that the amendment reflects the Alabama Legislature's intent to modify state law. However, we disagree that the amendment only deals with a surface owner's right to recover punitive damages in state court. The amendment concerns the repair or compensation to any occupied residential dwelling and related structures or any noncommercial building for material damage caused by subsidence resulting from underground coal mining operations. It also concerns the replacement of protected water supplies that are adversely affected by underground coal mining operations. Both of these issues are addressed in section 720(a) of SMCRA. We are approving Alabama's amendment because it is either no less stringent than SMCRA or is not inconsistent with SMCRA. Please refer to III. Director's Findings.

2. Commenters also believe that the proposed amendment does not give an unfair advantage to Alabama coal mining companies or impose an unfair burden on Alabama landowners. They state that the amendment "fairly balances the legal interests of surface landowners with Alabama's and the Nation's need for coal as an essential source of energy." This balance, the commenters point out, is exactly what SMCRA was designed to provide.

Response: In order to approve amendments to State program statutes, we must ensure that the amendments are consistent with and no less stringent than SMCRA or are not inconsistent

with it. We believe that Alabama's amendment meets these criteria and we are approving it. Please refer to III. Director's Findings.

3. One commenter asserts that if the proposed amendment is not approved, the underground mining industry in Alabama will shut down. He writes, "[d]eath of an industry was not the purpose of the carefully crafted federal and state programs now in place."

Response: We agree that the demise of the underground mining industry in Alabama or any other State was not the purpose of the federal and state programs. Indeed, section 102(k) of SMCRA encourages the full use of coal resources through the development and application of underground extraction technologies. Therefore, we carefully review state statute amendments in light of SMCRA, including section 102(k), to ensure that they are consistent with and are no less stringent than SMCRA or are not inconsistent with it.

4. Several commenters allege that before the enactment of SMCRA and Alabama's counterpart to SMCRA, Alabama common law provided that coal mine operators could not subside the land unless they had the express permission of the surface owners. They state that the enactment of section 516 of SMCRA and the Alabama counterpart at section 9-16-91 of ASMCRA changed the applicability of Alabama's common law. They contend that the Federal and State Acts now allow coal mine operators to subside the land without the express consent of the surface owners, and provide specific remedies for correcting any damages that might result from such subsidence. The existing common law provision, they explain, is therefore inconsistent with SMCRA and the Alabama counterpart to SMCRA. The commenters further explain that section 505(a) of SMCRA states that SMCRA supercedes any state law that is inconsistent with its provisions. Therefore, the commenters maintain that Alabama's common law is superceded by SMCRA and Alabama's counterpart to SMCRA. The current proposed changes to Alabama's program merely "eliminates the application of inconsistent and contrary State law" which SMCRA specifically prohibits in the first place.

Response: Please refer to our response at IV. Summary and Disposition of Comments *Public Comments A. Comments Pertaining to the Impact of SMCRA on Alabama Common Law.*

5. Some commenters point out that the proposed amendment does not seek to lessen the federal requirements. They maintain that it "does not alter in any way a surface owner's right, or a coal

company's obligation, to 'repair or compensation' for damages caused by subsidence."

Response: We agree that Alabama's proposed revisions and additions at section 9-16-91(e) of ASMCRA do not affect a surface owner's right or a coal company's obligation to repair or compensation for damages caused by subsidence. Please refer to III. Director's Findings A. through C. Neither does section 9-16-91(f) of ASMCRA that pertains to the remedies for subsidence damage affect a surface owner's right or a coal company's obligation to repair or compensation for damages caused by subsidence in light of Alabama's statement in its letter dated May 3, 2000, that it will take appropriate enforcement action against an operator who fails to fully repair or compensate for subsidence damage to protected structures or who fails to fully replace water for subsidence damage to protected water supplies. Please refer to III. Director's Findings D.

6. Finally, many commenters argue that the amendment merely clarifies what is implicit in both the state and federal regulatory schemes—that the remedies for damages caused by subsidence outlined in section 9-16-91 of ASMCRA are the "only" remedies available to surface owners. One commenter wrote, "The amendment simply makes clear that the 'repair or compensation' remedy available to surface owners for subsidence related damages is generally exclusive." The amendment clarifies that a surface owner cannot seek punitive damages in state court for subsidence related damage if the mining company is in substantial compliance with its mining permit. The remedy for the surface owner is the repair or compensation provisions of SMCRA.

Response: Nothing in SMCRA or the implementing Federal regulations explicitly or implicitly limits the remedies available to surface landowners for damages to protected structures and water supplies caused by subsidence to only those listed at sections 516 and 720 of SMCRA and the Federal regulations at 30 CFR 817.121(c). SMCRA provides minimum standards for repair and compensation of subsidence related damage to protected structures and for replacement of protected water supplies. States must, at the very least, adopt these minimum standards. Any remedies available under State law which exceed the minimum requirements set forth in SMCRA are not changed by SMCRA. However, a State may change or limit only those available remedies that exceed those found in SMCRA without

violating SMCRA. As discussed in III. Director's Findings, Alabama's program provides these minimum standards.

C. General Comments Opposing Alabama's Amendment

We received comments from fourteen individuals, two attorneys representing surface landowners, and representatives from five organizations (the Alabama Farmers Federation, WildLaw, the Alabama Environmental Council, Friends of Hurricane Creek, and the Citizen's Coal Council). These individuals and groups oppose Alabama's amendment and assert that we should disapprove it because it is inconsistent with and less stringent than SMCRA and the existing Alabama program. The comments are discussed below.

1. Many commenters contend that the amendment is unconstitutional because it: (1) Deprives property owners of their property without due process; (2) is an ex post facto law; (3) does not distinguish between the two types of surface rights ownership in Alabama: surface rights that require surface support and surface rights where mineral release is a statement on the deed; (4) gives coal companies the right of eminent domain; (5) gives coal companies the private right of condemnation; (6) prevents property owners from suing; (7) prevents any relief from the violation of their surface rights; (8) is an unconstitutional interference with contracts; and (9) is an unconstitutional redrafting of the common law.

Response: We found that we can approve the amendment. Please refer to III. Director's Findings. Also, in approving or disapproving any amendment, we can only consider whether the amendment satisfies the applicable program and amendment approval criteria of 30 CFR 732.15 and 732.17(h)(10). The constitutionality of changes to State law cannot be determined by OSM, but must be addressed by the institutions of the State with the authority to determine such issues.

2. One commenter asserts that if unlimited power of destruction is given to the coal companies, then it must also be given to any other big company that wants it. There will be no end to it. He writes, "Act 99-593 could be the most devastating act ever introduced and passed through legislature, and if approved, would no doubt be the greatest threat to landownership ever recorded in history."

Response: In section 102 of SMCRA, two of the purposes of SMCRA are to assure that: (1) The rights of surface

landowners and other persons with a legal interest in the land or its related appurtenances are fully protected from the adverse effects of coal mining operations and (2) the coal supply essential to the Nation's energy requirements and its economic and social well-being is provided and strike a balance between protection of the environment and agricultural productivity and the Nation's need for coal as an essential source of energy. Therefore, we carefully review state statute amendments in light of SMCRA to ensure that they are consistent with and are no less stringent than SMCRA or are not inconsistent with SMCRA. Please refer to III. Director's Findings.

3. Commenters also contend that the amendment would exempt coal companies from having to pay penalties and compensatory damages for subsidence on land, or prevent compensation in the full amount of the diminution in value resulting from subsidence. One commenter states that the amendment allows coal companies to set their own standards as to what constitutes repair to a house or structure.

Response: We disagree that the amendment prevents compensation in the full amount of the diminution in value resulting from subsidence or allows coal companies to set their own standards as to what constitutes repair to a house or structure. As stated in III. Director's Findings, Alabama's proposed revisions to sections 9-16-91(e)(1), (e)(3), (e)(4), and (f) of ASMCRA which pertain to the repair and compensation for material damage to protected structures and water supplies caused by subsidence and subsidence damage agreements are no less stringent than or are not inconsistent with SMCRA. To the extent that the amendment affects Alabama law concerning penalties for subsidence on land, other than repair, compensation, or replacement required by SMCRA sections 515(b)(2), 516(b)(1), and 720(a), such penalties are beyond the scope of SMCRA. Also, please refer to IV. Summary and Disposition of Comments *Public Comments* B.5. and B.6.

4. Another commenter expressed a concern about the lack of balance in this law. He writes, "Under normal punitive damage laws, it is normal that if you take from one group, you give something to the other group. This law does not allow for that."

Response: Please refer to our response at IV. Summary and Disposition of Comments *Public Comments* C.2. and C.3.

5. One commenter asserts that the amendment is inconsistent with the

basic premise of SMCRA, which is to regulate. He writes, "The changes proposed by the Act do nothing to regulate or to control [the coal] industry. Instead, the Act takes one activity of the industry—which is not currently controlled by the regulatory authority because of the interpretation and enforcement of SMCRA—and removes all other restraint on that activity. The sole purpose of this change is to give underground coal operators the right to lawfully subsidize property without purchasing that right from the surface owner. It turns a regulatory act into an enabling act."

Response: Although one of the premises of SMCRA involves regulating coal mining operations, other premises exist. Section 102(b) of SMCRA involves fully protecting the rights of surface landowners and other persons with a legal interest in the land or its related appurtenances from the adverse effects of coal mining operations. It is our responsibility when reviewing and approving amendments to State program statutes to make sure that the amendments are no less stringent than or are not inconsistent with SMCRA. We found that Alabama's proposed amendments in sections 9-16-91(e) and (f) of ASMCRA that pertain to the repair and compensation for material damage to protected structures and water supplies and subsidence damage agreements meet this requirement. Please refer to III. Director's Findings.

6. One commenter argues that the amendment is inconsistent with the Energy Policy Act of 1992 which added US Code section 1309(a) to SMCRA. The Energy Policy Act created federal substantive rights that extend beyond the protections afforded by inconsistent or less protective state laws. Accordingly, "[s]ection 1309(a) rights are remedial—not preventative—and were intended to serve as additional rights—not replacement rights." The commenter argues that the proposed amendment attempts to interpret section 1309(a) of SMCRA to preempt all rights and remedies a surface owner has that are not expressly provided by SMCRA. Clearly, this is inconsistent with the purposes of SMCRA as amended by the Energy Policy Act.

Response: The purpose of section 720(a), which was added to SMCRA by the Energy Policy Act, is to establish minimum standards for the repair or compensation for material damage to protected structures and water supplies caused by subsidence. Remedies under State law which exceed these standards are unaffected by SMCRA. As stated in III. Director's Findings D.1., Alabama provides the minimum standards for

repair or compensation. Therefore, we are approving this provision of Alabama's amendment.

In response to questions concerning the impact of SMCRA on State laws, please refer to IV. Summary and Disposition of Comments *Public Comments A*.

7. One commenter also asserts that the amendment is inconsistent with the fundamental principle that SMCRA is a minimum standard that cannot preempt more stringent State laws. He argues that the only real protection a surface landowner in Alabama has from subsidence is found outside of SMCRA under the Alabama common law. This common law, which is more stringent than SMCRA, allows a surface owner an absolute right to support and full recovery of damages for subsidence. The commenter argues that since section 505(a) of SMCRA prohibits the Federal Act from superceding any more stringent State law, Alabama's counterpart to SMCRA cannot supercede any more stringent State law. Therefore, the proposed amendment, which would supercede Alabama common law, makes Alabama's Act less stringent than SMCRA.

Response: We have addressed the impact of SMCRA on State laws in IV. Summary and Disposition of Comments *Public Comments A. Comments Pertaining to the Impact of SMCRA on Alabama Common Law*. The changes to State law contained in section 9-16-91 of ASMCRA and enacted by the Alabama legislature do not conflict with the requirements of SMCRA. In approving or disapproving any amendment, we can only consider whether the amendment satisfies the applicable program and amendment approval criteria of 30 CFR 732.15 and 732.17(h)(10). We found that Alabama's proposed amendments in sections 9-16-91(e) and (f) of ASMCRA that pertain to the repair and compensation for material damage to protected structures and water supplies and subsidence damage agreements meet this requirement. Please refer to III. Director's Findings.

8. Two commenters contend that the intention of SMCRA, demonstrated at 30 U.S.C. 1255, 1270(e) and (f), 1271(d), and Public Law 102-486, Title XXV, § 2504(a)(2), was to leave in place all common, property, contract, and tort laws.

Response: Please refer to our response at IV. Summary and Disposition of Comments *Public Comments A. Comments Pertaining to the Impact of SMCRA on Alabama Common Law* for a discussion of the impact of SMCRA on State law.

9. Commenters contend that the amendment gives the Alabama regulatory authority the right to adjudicate property disputes, which is specifically prohibited in both federal and state law. One commenter writes, "If the changes are approved, the [regulatory authority] will have the power to renegotiate deeds that are eighty years old in favor of the mineral owner merely by the grant of a permit to the operator." Since ASMC does not engage in any determination of whether an applicant has a right to subside in considering whether or not to grant a mining permit, it will allow the operator to decide unilaterally that the surface owner is not entitled to support of the surface. In effect, ASMC will have the jurisdiction to adjudicate title disputes without a hearing, without input from the surface owner, and will strip that surface owner of his right to be heard and strip his right to a jury.

Response: We disagree that this amendment gives the Alabama regulatory authority the right to adjudicate property disputes by the mere issuance of a mining permit. Nothing in the amendment addresses adjudication of property disputes. Further, the issuance of a permit does not automatically settle property disputes. Such disputes can be settled only in accordance with the appropriate State law. Please refer to our response at IV. Summary and Disposition of Comments *Public Comments A. Comments Pertaining to the Impact of SMCRA on Alabama Common Law* for a discussion of the impact of SMCRA on State laws.

10. One commenter suggests that if the proposed changes are accepted to any degree, it should be made clear that the changes apply only to those who have already waived their surface support right and not to those who have not waived it.

Response: Again, property rights issues are not addressed in SMCRA. Property rights are the topic of Alabama law. Please refer to our response at IV. Summary and Disposition of Comments *Public Comments A. Comments Pertaining to the Impact of SMCRA on Alabama Common Law* for a discussion of the impact of SMCRA on State laws.

11. Opponents contend that the proposed amendment is inconsistent with sections 101, 102, and 520(e) of SMCRA.

Response: We did not find that the above referenced sections of SMCRA were affected by changes to section 9-16-91 of ASMCRA. Therefore, we did not find that Alabama's amendment was inconsistent with or less stringent than

any of the above referenced sections. Please refer to III. Director's Findings.

D. Comments on Specific Provisions of Alabama's Amendment

1. *Section 9-16-91(e)(1)*. We received comments from three people on this section of Alabama's amendment. The first commenter stated that the provision in this section is fully consistent with the Energy Policy Act of 1992. Another commenter asserted that subparagraph (e)(1) merely makes modest amendments to language in the paragraph and does not make any substantive changes. Because the provision was previously approved by OSM as no less stringent than SMCRA, it should be approved in this instance. However, a third commenter questioned why Alabama is making changes in the language that was substantively identical to the language at the Federal counterpart if there are no changes to the substance of this provision.

Response: As stated in III. Director's Findings A., Alabama's revision at section 9-16-91(e)(1) involves minor wording changes to a previously approved statute, that do not change its meaning. Therefore, we are approving the revision because it is no less stringent than the Federal statute at section 720(a)(1) of SMCRA.

2. *Section 9-16-91(e)(3)*. We received comments from two people on this section of Alabama's amendment. The first commenter stated that the provision extends a state legislative mandate to the existing requirement at section 880-X-10D-.58 of Alabama's surface mining regulations. Similarly, the second commenter contended that subparagraph (e)(3) is a necessary addition to the State program to make it compliant with the Federal regulation at 30 CFR 817.121(c)(1).

Response: As stated in III. Director's Findings B., we do not have a counterpart Federal provision in SMCRA for Alabama's section 9-16-91(e)(3) of ASMCRA. However, the provision is consistent with certain requirements of section 516(b)(1) of SMCRA and the language is substantively identical to the Federal regulations at 30 CFR 817.121(c). We are approving the addition of this provision to Alabama's statutes because it is consistent with our Federal regulations and statutes and will not make the Alabama statutes less stringent than the Federal statutes.

3. *Section 9-16-91(e)(4)*. We received comments from two people on this section of Alabama's amendment. The first commenter stated that this new section makes no change to existing State program requirements. The second

commenter contended that new subparagraph (e)(4), as required and consistent with 30 CFR 732.15(d), merely clarifies and established ASMC's authority to enforce the subsidence control requirements in section 9-16-91 of ASMCRA.

Response: As stated in III. Director's Findings C., we do not have a counterpart Federal statute in SMCRA for Alabama's statute addition at section 9-16-91(e)(4) of ASMCRA. However, Alabama's intent by adding this provision is to make it clear that it has the power to enforce the provision of section 9-16-91 of ASMCRA. We are approving this statute because it is not inconsistent with our Federal regulations or statutes and will not make the Alabama statutes less stringent than the Federal statutes.

4. *Section 9-16-91(f).* a. Supporting Comments. (1) Commenters contend that this particular provision represents an expression of the state legislative will in regards to the rights of the potentially aggrieved persons to seek and obtain particular remedies through the state civil justice system. Since the provision is in the nature of a civil damage limitation statute and has no direct bearing on the regulation of coal mining operations, review or approval by the Department of Interior should not be required in order for it to become law.

Response: We disagree with the assertion that Alabama's amendment does not require review or approval by the Department of the Interior. The provisions at 30 CFR 732.17(g) require States to submit any changes to their laws or regulations concerning their approved surface mining programs to the Director of OSM (Director) for review and approval. Further, no changes in a State's law or regulations concerning surface mining can take effect until such time as the Director approves them. Section 9-16-91(f) of ASMCRA is a revision to Alabama's Surface Mining Act. The revisions contained in section 9-16-91 of ASMCRA involve substantive changes to Alabama's surface mining regulatory program and, therefore, require our review and approval. We agree that certain aspects of the statute involve matters that are not covered by SMCRA. As discussed in III. Director's Findings D. we have approved changes to section 9-16-91(f) of ASMCRA because they are consistent with or do not conflict with provisions contained in SMCRA. While we have approved the changes, we made no judgment on changes that do not relate to or conflict with SMCRA.

(2) Commenters also assert that this provision does not impose any additional burdens or responsibilities

on the State Regulatory Authority and does not undermine the requirements of the state and federal statutes that coal operators fully compensate or repair subsidence related damage to protected structures or water supplies. Since section 9-16-91 of ASMCRA does not limit, proscribe, eliminate, amend or otherwise alter performance standards or subsidence remedies established by SMCRA, it meets the requirements of 30 CFR 732.15(a) and (c), and is consistent with or no less stringent than SMCRA.

Response: We agree that Alabama's proposed revisions and additions at section 9-16-91(e) and (f) of ASMCRA do not affect a coal company's obligation to repair or compensate for damages caused by subsidence. Please refer to III. Director's Findings.

(3) Many commenters argue that because SMCRA does not explicitly provide any right to recover punitive damages as compensation for subsidence effects, it implicitly limits a surface owner's right to full compensation or repair for subsidence damage and nothing more. One commenter writes, "[n]either SMCRA nor the regulations thereunder provide that operators of underground coal mines shall 'repair or compensate' and pay such additional damages as a jury may assess for punishment or otherwise." Thus, section 9-16-91(f) merely makes specific what was implied by SMCRA.

Response: Nothing in SMCRA or the implementing Federal regulations explicitly or implicitly limits the remedies available to surface landowners for damages to protected structures and water supplies caused by subsidence to only those listed at sections 516 and 720 of SMCRA and the Federal regulations at 30 CFR 817.121(c). SMCRA provides minimum standards for repair and compensation of subsidence related damage to protected structures and for replacement of protected water supplies. States must, at the very least, adopt these minimum standards. Any remedies available under State law which exceed the minimum requirements set forth in SMCRA are not changed by SMCRA. However, a State may change or limit only those available remedies that exceed those found in SMCRA without violating SMCRA. As discussed in III. Director's Findings, Alabama's program provides these minimum standards.

(4) Many commenters state that Alabama's common law is different from SMCRA because it requires a coal mine operator to get the express permission of the surface owner before subsidizing the land. Supporters contend that SMCRA does not require this. One

commenter points to a 1997 proposed rule published by OSM (62 FR 4864) as proof that SMCRA and the implementing regulations do not require coal mine operators to obtain the consent of surface owners to subsidize the land. The existing common law provision, therefore, is inconsistent with SMCRA and the Alabama counterpart. Section 505(a) of SMCRA states that SMCRA supercedes any state law that is inconsistent with its provisions. Therefore, the common law is superceded by SMCRA and Alabama's counterpart. The addition of this section just makes it clear that the common law is superceded.

Response: Please refer to our response to the comment at IV. Summary and Disposition of Comments *Public Comments A. Comments Pertaining to the Impact of SMCRA on Alabama Common Law.*

(5) One commenter states that a surface owner in Alabama should not be allowed to recover punitive damages for subsidence damage because Congress specifically encourages longwall mining.

Response: SMCRA does not specifically encourage longwall mining, but at section 102(k) "encourages the full utilization of coal resources through the development and application of underground extraction technologies." Further, section 520(e) of SMCRA does not restrict the right that any person (or class of persons) may have under any State statute or common law to seek enforcement of any of the provisions of SMCRA and its implementing regulations or to seek any other relief available under State law. The limitation of additional damages as related to certain types of mining is a matter outside the scope of SMCRA.

(6) Finally, commenters contend that current Alabama common law is more stringent than SMCRA because it allows for the recovery of punitive damages. This is inconsistent with Alabama's surface mining law that states that its rules and regulations cannot be more stringent than the federal surface mining law.

Response: In approving or disapproving any amendment, we can only consider whether the amendment satisfies the applicable program and amendment approval criteria of 30 CFR 732.15 and 732.17(h)(10). The stringency of an amendment compared to other State laws is not relevant to this amendment. Therefore, we cannot consider it in our decision making.

b. Opposing Comments. (1) Opponents question the constitutionality of this provision. One commenter states that "[b]y restricting

punitive damages in the fashion proposed, the landowners' constitutional rights are violated." Another commenter states that this section "will not withstand constitutional challenges, either under Alabama's constitution or the federal constitution, because it is an unlawful taking of property, favors one class of citizens over another, and violates the landowner's right to a jury trial through its limitations on damages."

Response: In approving or disapproving any amendment, we can only consider whether the amendment satisfies the applicable program and amendment approval criteria of 30 CFR 732.15 and 732.17(h)(10). The constitutionality of an amendment is something that must be addressed by the institutions in the State with the authority to determine such issues.

(2) Several commenters argue that because SMCRA does not explicitly limit a surface owner's right to full compensation or repair for subsidence damage and nothing more, it implicitly allows surface owners to seek punitive damages as compensation for subsidence effects. Section 9-16-91(f) of ASMCRA narrows a surface owner's common law and remedial rights in direct contravention of this implicit congressional intent.

Response: Nothing in SMCRA or the implementing Federal regulations explicitly or implicitly limits the remedies available to surface landowners for damages to protected structures and water supplies caused by subsidence to only those listed at sections 516 and 720 of SMCRA and the Federal regulations at 30 CFR 817.121(c). Section 520(e) of SMCRA does not restrict the right that any person (or class of persons) may have under any State statute or common law to seek enforcement of any of the provisions of SMCRA and its implementing regulations or to seek any other relief under State law. The changes to State law in section 9-16-91 of ASMCRA as enacted by the Alabama legislature and as clarified by us and Alabama do not conflict with the requirements found in SMCRA. Please refer to III. Director's Findings.

(3) Several commenters also point out that SMCRA exists to regulate the mining industry, yet this provision does nothing to add to that regulation. Instead, it provides civil justice reform to allow the industry to violate surface owners' rights with impunity. Opponents contend that civil justice reform does not belong in a regulatory Act. One commenter writes, "[l]et SMCRA regulate mining industry and let the surface owner's damages be

governed by the substantive law of property, contracts, tort and damages." Another commenter stated that he was disturbed by the attempt to use SMCRA as a vehicle for tort reform in Alabama.

Response: In approving or disapproving any amendment, we can only consider whether the amendment satisfies the applicable program and amendment approval criteria of 30 CFR 732.15 and 732.17(h)(10). Section 720 of SMCRA provides minimum standards that underground coal operators must adhere to regarding the repair and compensation for subsidence damage to protected structures and replacement of water for subsidence damage to protected water supplies. In part, section 9-16-91(f) of ASMCRA pertains to the remedies for subsidence damage and subsidence damage agreements and does not conflict with SMCRA. We are approving these provisions because they are no less stringent than the corresponding provisions in SMCRA. Please refer to III. Director's Findings D.

(4) Some commenters acknowledge that this provision may not affect the day-to-day operation of ASMC, but believe it will have a great impact on ASMC's ability to control the mining industry because it removes all deterrents on subsidence. One commenter writes, "The purpose of punitive damages is not to compensate for the injury suffered, but rather to punish the defendant for his conduct and to deter the defendant and others from engaging in the same conduct. If a coal mining company engages in activities that would subject it to punitive damages, then it deserves to be punished just like every other industry operating within Alabama. What will come of landowners rights if the only potential deterrent is removed?" Another commenter states that this provision allows underground mining companies to intentionally take the domestic water supplies from the landowners and force the landowners into long and costly legal battles with little adverse economic consequences. A third commenter points out that this provision eliminates a mining company's liability for damage to personal property, damage to physical injury, or wrongful death or emotional distress.

Response: For damage caused by subsidence, section 720 of SMCRA only requires coal companies to compensate or repair for material damage to protected structures and to replace for damage to protected water supplies. As stated in III. Director's Findings, Alabama's program provides these remedies. Any additional remedies including punitive damages are beyond

the scope of SMCRA. However, section 520(e) of SMCRA allows any person (or class of persons) to seek enforcement of any of the provisions of SMCRA or any other relief that he or she may have under State statute or common law. Any remedies under State law which exceed the minimum requirements set forth in SMCRA are not changed by SMCRA. However, a State may change or limit only those remedies that exceed those found in SMCRA without violating SMCRA.

(5) Other commenters believe that while the provision will not inhibit the remedial requirements to repair or compensate for damages to structures, it will undermine the purpose of SMCRA—to fully protect the rights of surface landowners. One commenter writes, "This approach of limiting remedies for actual damage suffered simply does not provide adequate protection for surface property owners."

Response: Please refer to our response to comment number four (4) of this section.

(6) Some commenters state that this provision is especially unfair to those landowners that have the absolute right to support of their surface in its natural state. One commenter contends that section 9-16-91(f) does not provide adequate protection for those persons whose property has been damaged by underground mining operations and have not waived their rights to the support of their surface interests through appropriate contractual provisions. Another commenter writes, "statutory remedies provided under a legislative act should not necessarily be the exclusive method used in determining the amount of recoverable damages in cases where the surface owner has not waived his or her right of support and where his property is, in fact, permanently and severely damaged."

Response: For damage caused by subsidence, section 720 of SMCRA only requires coal companies to compensate or repair for material damage to protected structures and to replace for damage to protected water supplies. As stated in III. Director's Findings, Alabama's program provides these remedies. Any additional remedies including punitive damages are beyond the scope of SMCRA. However, section 520(e) of SMCRA allows any person (or class of persons) to seek enforcement of any of the provisions of SMCRA or any other relief that he or she may have under State statute or common law. Any remedies under State law which exceed the minimum requirements set forth in SMCRA are not changed by SMCRA. However, a State may change or limit

only those remedies that exceed those found in SMCRA without violating SMCRA. In addition, sections 507(b)(9) and 510(b)(6)(C) of SMCRA clearly provide that nothing in SMCRA shall be construed to authorize the regulatory authority to adjudicate property rights or title disputes. Instead, matters concerning these issues are to be determined in accordance with State law. Changes in property rights or title disputes must be addressed by the institutions in the State with responsibilities for resolving such issues. Also, please refer to IV. Summary and Disposition of Comments *Public Comments A. Comments Pertaining to the Impact of SMCRA on Alabama Common Law.*

(7) One commenter asserts that actual cost of repair of an existing structure does not always reflect the actual loss of value that the structure may have suffered as a result of undermining. He writes, "The language of the Act in this provision would apparently lead to the especially bizarre result that no recovery at all would be available in situations where damage is particularly severe." Further, the commenter points out that the value of land typically includes not only the current use of the land, but also any potential future use. This provision would not allow these values to be taken into account when determining the loss in value of property as a result of subsidence. The commenter concludes that this provision is "grossly unfair to the surface landowner and amounts to a serious deprivation of important property rights that have been traditionally and are otherwise presently protected by Alabama law."

Response: For damage caused by subsidence, section 720 of SMCRA only requires coal companies to compensate or repair for material damage to protected structures and to replace for damage to protected water supplies. As stated in III. Director's Findings, Alabama's program provides these remedies. Any additional remedies including punitive damages are beyond the scope of SMCRA. However, section 520(e) of SMCRA allows any person (or class of persons) to seek enforcement of any of the provisions of SMCRA or any other relief that he or she may have under State statute or common law. Any remedies under State law which exceed the minimum requirements set forth in SMCRA are not changed by SMCRA. However, a State may change or limit only those remedies that exceed those found in SMCRA without violating SMCRA.

(8) One commenter states that the limitation of punitive damages is not inappropriate as a general manner.

However, in cases where fraud or misrepresentation has served as the basis for the permit, the ability of a surface owner to seek and obtain punitive damages should not be limited. The commenter believes that Alabama needs to clarify the language in this section to make it clear that punitive damages are limited only in cases where lawful activities are being undertaken.

Response: We believe that Alabama's amendment makes it clear that the provisions at section 9-16-91(f) only apply in cases where lawful activities are being undertaken. If the operator is found to have engaged in intentional, willful, or wanton conduct that is not in substantial compliance with a permit, the ability to seek additional damages is preserved. Please refer to III. Director's Findings D.1.

V. Director's Decision

Based on the above findings, we are approving the amendments to the Alabama program.

To implement this decision, we are amending the Federal regulations at 30 CFR part 901, which codify decisions concerning the Alabama program. We are making this final rule effective immediately to expedite the State program amendment process and to encourage Alabama to bring its program into conformity with the Federal standards without undue delay. SMCRA requires consistency of State and Federal standards.

VI. Procedural Determinations

Executive Order 12866—Regulatory Planning and Review

This rule is exempted from review by the Office of Management and Budget under Executive Order 12866.

Executive Order 12630—Takings

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

Executive Order 13132—Federalism

This rule does not have federalism implications. SMCRA delineates the roles of the federal and state governments with regard to the regulation of surface coal mining and reclamation operations. One of the purposes of SMCRA is to "establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations." Section 503(a)(1) of SMCRA requires that state laws regulating surface coal mining and reclamation operations be "in accordance with" the requirements of SMCRA, and section 503(a)(7) requires

that state programs contain rules and regulations "consistent with" regulations issued by the Secretary pursuant to SMCRA.

Executive Order 12988—Civil Justice Reform

The Department of the Interior has conducted the reviews required by section 3 of Executive Order 12988 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 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

Section 702(d) of SMCRA (30 U.S.C. 1292(d)) provides that a decision on a proposed state regulatory program provision does not constitute a major federal action within the meaning of section 102(2)(C) of the National Environmental Policy Act (NEPA) (42 U.S.C. 4332(2)(C)). A determination has been made that such decisions are categorically excluded from the NEPA process (516 DM 8.4.A).

Paperwork Reduction Act

This rule does not contain information collection requirements that require approval by the Office of Management and Budget 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 regulation.

Small Business Regulatory Enforcement Fairness Act

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This rule:

- a. Does not have an annual effect on the economy of \$100 million.
- b. Will not cause a major increase in costs or prices for consumers, individual industries, federal, state, or local government agencies, or geographic regions.
- c. Does not have significant adverse effects on competition, employment,

investment, productivity, innovation, or the ability of U.S. based enterprises to compete with foreign-based enterprises.

This determination is based upon the fact that the state submittal which is the subject of this rule is based upon counterpart federal regulations for which an analysis was prepared and a determination made that the federal regulation was not considered a major rule.

Unfunded Mandates

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 901

Intergovernmental relations, Surface mining, Underground mining.

Dated: May 16, 2000.
Charles E. Sandberg,
Acting Regional Director, Mid-Continent Regional Coordinating Center.

For the reasons set out in the preamble, 30 CFR part 901 is amended as set forth below:

PART 901—ALABAMA

1. The authority citation for Part 901 continues to read as follows:

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

2. Section 901.15 is amended in the table by adding a new entry in chronological order by “Date of final publication” to read as follows:

§ 901.15 Approval of Alabama regulatory program amendments.
* * * * *

Original amendment submission date	Date of final publication	Citation/description
* * *	* * *	* *
August 17, 1999	June 8, 2000	ASMCRA sections 9–16–91(e)(1), (e)(3), (e)(4); and (f)

[FR Doc. 00–14359 Filed 6–7–00; 8:45 am]
BILLING CODE 4310–05–P

DEPARTMENT OF TRANSPORTATION

Coast Guard

33 CFR Part 117

[CGD09–00–001]

RIN–2115–AE47

Drawbridge Operation Regulations; Pine River (Charlevoix), Michigan

AGENCY: Coast Guard, DOT.
ACTION: Direct final rule, confirmation of effective date.

SUMMARY: On March 22, 2000, the Coast Guard published a direct final rule (65 FR 15238, CGD09–00–001) in the **Federal Register**. This direct final rule notified the public of the Coast Guard’s intent to revise the operating regulations governing the U.S. Route 31 bridge, mile 0.3 over Pine River in Charlevoix, Michigan, to alleviate vehicular traffic congestion during the peak tourist season while still providing for the reasonable needs of navigation. The Coast Guard has not received any adverse comments or any notice of intent to submit adverse comments objecting to this rule as written. Therefore, this rule will go into effect as scheduled.

DATES: The effective date of the direct final rule is confirmed as June 20, 2000.
FOR FURTHER INFORMATION CONTACT: Mr. Scot M. Striffler, Project Manager, Ninth Coast Guard District (obr), at (216) 902–6084.

Dated: May 24, 2000.
James D. Hull,
Rear Admiral, U.S. Coast Guard, Commander, Ninth Coast Guard District.
[FR Doc. 00–14154 Filed 6–7–00; 8:45 am]
BILLING CODE 4910–15–U

DEPARTMENT OF TRANSPORTATION

Coast Guard

33 CFR Part 165

[CGD01–00–137]

RIN 2115–AA97

Safety Zone: Fireworks Display, New York Harbor, Ellis Island

AGENCY: Coast Guard, DOT.
ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary safety zone for a fireworks display located on New York Harbor. This action is necessary to provide for the safety of life on navigable waters during the event. This action is intended to restrict vessel traffic in a portion of New York Harbor.

DATES: This rule is effective from 8 p.m. (e.s.t.) until 9:30 p.m. (e.s.t.) on June 28, 2000.

ADDRESSES: Comments and material received from the public, as well as documents indicated in this preamble as being available in the docket, are part of docket (CGD01–00–137) and are available for inspection or copying at Coast Guard Activities New York, 212 Coast Guard Drive, room 204, Staten Island, New York 10305, between 8 a.m. and 3 p.m., Monday through Friday, except Federal holidays. The telephone number is (718) 354–4012.

FOR FURTHER INFORMATION CONTACT: Lieutenant M. Day, Waterways Oversight Branch, Coast Guard Activities New York (718) 354–4012.

SUPPLEMENTARY INFORMATION:

Regulatory Information

We did not publish a notice of proposed rulemaking (NPRM) for this regulation. Under 5 U.S.C. 553(b)(8), the Coast Guard finds that good cause exists for not publishing an NPRM. Good cause exists for not publishing an NPRM due to the date the Application for Approval of Marine Event was received, there was insufficient time to draft and publish an NPRM. Further, it is a local event with minimal impact on the waterway, vessels may still transit through New York Harbor during the event, the zone is only in affect for 1½ hours and vessels can be given