

CSR 38-2-3.12.a.2., or otherwise amend the West Virginia program to require that the water supply survey required by CSR 38-2-3.12.a.2. include all drinking, domestic, and residential water supplies within the permit area and adjacent area, without limitation by an angle of draw, that could be contaminated, diminished, or interrupted by subsidence.

(bbbb) By April 12, 1999, West Virginia must submit either a proposed amendment or a description of an amendment to be proposed, together with a timetable for adoption to revise 38-2-3.12.a.2., or otherwise amend the West Virginia program to require that the permit applicant pay for any technical assessment or engineering evaluation used to determine the premining condition or value of non-commercial buildings or occupied residential dwellings or structures related thereto and the quality of drinking, domestic or residential water supplies, and to require that the applicant provide copies of any technical assessment or engineering evaluation to the property owner and to the regulatory authority.

(cccc) By April 12, 1999, West Virginia must submit either a proposed amendment or a description of an amendment to be proposed, together with a timetable for adoption to amend the definition of "non-commercial building" at 38-2-3.12.a.2. to clarify that "non-commercial building" includes such buildings used on a regular or temporary basis.

(dddd) By April 12, 1999, West Virginia must submit either a proposed amendment or a description of an amendment to be proposed, together with a timetable for adoption to amend its regulations at CSR 38-2-16.2.c.3., or otherwise amend the West Virginia program, to provide that a rebuttable presumption of causation would exist within the applicable angle of draw, regardless of whether or not a presubsidence survey has been conducted.

(eeee) By April 12, 1999, West Virginia must submit either a proposed amendment or a description of an amendment to be proposed, together with a timetable for adoption to amend its regulations at CSR 38-2-16.2.c.3.B., or otherwise amend its program, to make it clear that the presumption of causation of damage by subsidence can be rebutted by evidence that the damage was proximately caused by some other factors and was not proximately caused by subsidence.

(ffff) By April 12, 1999, West Virginia must submit either a proposed amendment or a description of an

amendment to be proposed, together with a timetable for adoption to amend 38-2-16.2.c.4., or otherwise amend the West Virginia program, to be no less effective than the Federal regulations at 30 CFR 817.121(c)(5), which provide that an extension of the 90-day abatement period may be granted for one of only three reasons: that subsidence is not complete; that not all subsidence related material damage has occurred; or that not all reasonably anticipated changes have occurred affecting the protected water supply.

(gggg) By April 12, 1999, West Virginia must submit either a proposed amendment or a description of an amendment to be proposed, together with a timetable for adoption to amend 38-2-16.2.c.4., or to otherwise amend the West Virginia program, to be no less effective than the Federal regulations at 30 CFR 817.121(c)(5) by requiring additional bond whenever protected water supplies are contaminated, diminished or interrupted by underground mining operations conducted after October 24, 1992. The amount of the additional bond must be adequate to cover the estimated cost of replacing the affected water supply.

(hhhh) By April 12, 1999, West Virginia must submit either a proposed amendment or a description of an amendment to be proposed, together with a timetable for adoption to amend CSR 38-2-16.2.c.4., or to otherwise amend the West Virginia program, to be no less effective than the Federal regulations at 30 CFR 817.121(c)(5), by requiring that the 90-day period before which additional bond must be posted begin to run from the date of occurrence of subsidence-related material damage.

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DEPARTMENT OF DEFENSE

Office of the Secretary

32 CFR Part 235

Sale or Rental of Sexually Explicit Material on DoD Property

AGENCY: Department of Defense.

ACTION: Final rule.

SUMMARY: This rule concerns sexually explicit audio recordings, films, video recordings, or periodicals with visual depictions available for sale or rental on property under the jurisdiction of the Department of Defense. It implements 10 U.S.C. 2489a.

EFFECTIVE DATE: This rule is effective June 29, 1998.

FOR FURTHER INFORMATION CONTACT: LTC Bernard Ingold, USA, 703-697-3387.

SUPPLEMENTARY INFORMATION:

Executive Order 12866, "Regulatory Planning and Review"

It has been determined that 32 CFR part 235 is not a significant regulatory action. The rule does not:

- (1) Have an annual effect to the economy of \$100 million or more or adversely affect in a material way the economy; a section of the economy; productivity; competition; jobs; the environment; public health or safety; or State, local, or tribal governments or communities;
- (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another Agency;
- (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or
- (4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive Order.

Pub. L. 96-354, "Regulatory Flexibility Act" (5 U.S.C. 601)

It has been certified that this rule is not subject to the Regulatory Flexibility Act (5 U.S.C. 601) because it would not, if promulgated, have a significant economic impact on a substantial number of small entities.

Pub. L. 96-511, "Paperwork Reduction Act" (44 U.S.C. Chapter 35)

It has been certified that this part does not impose any reporting or recordkeeping requirements under the Paperwork Reduction Act of 1995.

List of Subjects in 32 CFR Part 235

Business, Civilian personnel, Concessions, Government contracts, Military personnel.

Accordingly, title 32 of the Code of Federal Regulations, Chapter I, subchapter M, is amended to add part 235 to read as follows:

PART 235—SALE OR RENTAL OF SEXUALLY EXPLICIT MATERIAL ON DOD PROPERTY

Sec.

- 235.1 Purpose.
- 235.2 Applicability and scope.
- 235.3 Definitions.
- 235.4 Policy.
- 235.5 Responsibilities.
- 235.6 Procedures.
- 235.7 Information requirements.

Authority: 10 U.S.C. 2489a.

§ 235.1 Purpose.

This part implements 10 U.S.C. 2489a, consistent with DoD Directive 1330.9¹ by providing guidance about restrictions on the sale or rental of sexually explicit materials on property under the jurisdiction of the Department of Defense or by members of the Armed Forces or DoD civilian officers or employees, acting in their official capacities.

§ 235.2 Applicability and scope.

This part: (a) Applies to the Office of the Secretary of Defense, the Military Departments (including the Coast Guard when it is operating as a Service in the Navy), the Chairman of the Joint Chiefs of Staff, the Combatant Commands, the Inspector General of the Department of Defense, the Defense Agencies, and the DoD Field Activities.

(b) Shall not confer rights on any person.

§ 235.3 Definitions.

Dominant theme. A theme of any material that is superior in power, influence, and importance to all other themes in the material combined.

Lascivious. Lewd and intended or designed to elicit a sexual response.

Material. An audio recording, a film or video recording, or a periodical with visual depictions, produced in any medium.

Property under the jurisdiction of the Department of Defense. Commissaries operated by the Defense Commissary Agency and facilities operated by the Army and Air Force Exchange Service, the Navy Exchange Service Command, the Marine Corps Exchanges, and U.S. Navy ships' stores (sometimes referred to collectively herein as "retail outlets"), excluding, for the purposes of this part, entities that are not instrumentalities of the United States.

Sexually explicit material. Material, the dominant theme of which is the depiction or description of nudity, including sexual or excretory activities or organs, in a lascivious way.

§ 235.4 Policy.

In implementing 10 U.S.C. 2489a, it is DoD policy that: (a) No sexually explicit material may be offered for sale or rental on property under the jurisdiction of the Department of Defense, and no member of the Armed Forces, or DoD civilian officer or employee, acting in his or her official capacity, shall offer for sale or rental any sexually explicit material.

(b) Material shall not be deemed sexually explicit because of any message or point of view expressed therein.

§ 235.5 Responsibilities.

(a) The Assistant Secretary of Defense for Force Management Policy, under the Under Secretary of Defense for Personnel and Readiness, shall:

(1) Monitor and, as to DoD resale activities under the Assistant Secretary's authority, direction and control, ensure compliance with this part;

(2) Establish, and appoint a chair of, the Resale Activities Board of Review (the "Board") and approve senior representatives from the Army and Air Force Exchange Service, the Navy Exchange Service, and the Marine Corps Exchange Service; and approve a senior representative from each of the Military Departments, if designated by the Military Department concerned, to serve as board members on the Resale Activities Board.

(3) Monitor the activities of the Resale Activities Board of Review and ensure that the Board discharges its responsibilities as set forth in § 235.6.

(b) The Secretaries of the Military Departments shall ensure that their respective component DoD resale activities comply with this part and may designate a senior representative to serve on the Board.

(c) The Secretary of the Army and the Secretary of the Air Force shall each appoint one senior representative from the Army and Air Force Exchange Service to serve on the Board.

(d) The Secretary of the Navy shall appoint a senior representative from the Navy Exchange Service Command and a senior representative from the Marine Corps Exchange Service to serve on the Board.

§ 235.6 Procedures.

(a) The Board shall have the authority and responsibility periodically to review material offered or to be offered for sale or rental on property under DoD jurisdiction, and to determine whether any such material is sexually explicit in accordance with this part. Within 60 days of the issuance of this part, the Board shall undertake and complete an initial review of material that is offered for sale or rental on the date that this part becomes effective.

(b) If the Board determines that any material offered for sale or rental on property under DoD jurisdiction is sexually explicit, such material shall be withdrawn from all retail outlets where it is sold or rented and returned to distributors or suppliers, and shall not

be purchased absent further action by the Board.

(c) Following its initial review under paragraph (a) of this section, the Board shall convene as necessary to determine whether any material offered or to be offered for sale or rental on property under DoD jurisdiction is sexually explicit. The Board members shall, to the extent practicable, maintain and update relevant information about material offered or to be offered for sale or rental on property under DoD jurisdiction.

(d) If any purchasing agent or manager of a retail outlet has reason to believe that material offered or to be offered for sale or rental on property under DoD jurisdiction may be sexually explicit as defined herein, and such material is not addressed by the Board's instructions issued under paragraph (e) of this section, he or she shall request a determination from the Board about such material.

(e) At the conclusion of its initial review under paragraph (a) of this section, and, thereafter, from time to time as necessary, the Board shall provide instructions to purchasing agents and managers of retail outlets about the withdrawal and return of sexually explicit material. The Board may also provide instructions to purchasing agents and managers of retail outlets about material that it has determined is not sexually explicit. Purchasing agents and managers of retail outlets shall continue to follow their usual purchasing and stocking practices unless instructed otherwise by the Board.

§ 235.7 Information requirements.

The Chair, Resale Activities Board of Review, shall submit to the Assistant Secretary of Defense for Force Management Policy an annual report documenting the activities, decisions, and membership of the Board. The annual report shall be due on October 1. The annual report required by this part is exempt from licensing in accordance with paragraph 5.4.3. of DoD 8910.1-M.²

Dated: February 3, 1999.

L.M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

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¹ Copies are available at <http://web7.osd.mil/corres.htm>.

² See footnote 1 to § 235.1.