

Dated: July 19, 1995.

Russell F. Price,

Acting Regional Director, Western Regional Coordinating Center.

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30 CFR Part 935

Ohio Regulatory Program

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

ACTION: Notice of decision.

SUMMARY: OSM is announcing its decision on initial enforcement of underground coal mine subsidence control and water replacement requirements in Ohio. Amendments to the Surface Mining Control and Reclamation Act of 1977 (SMCRA) and the implementing Federal regulations require that underground coal mining conducted after October 24, 1992: promptly repair or compensate for subsidence-caused material damage to noncommercial buildings and to occupied residential dwellings and related structures and promptly replace drinking, domestic, and residential water supplies that have been adversely affected by underground coal mining. After consultation with Ohio and consideration of public comments, OSM has decided that initial enforcement in Ohio will be accomplished through State enforcement.

EFFECTIVE DATE: July 27, 1995.

FOR FURTHER INFORMATION CONTACT: Beverly C. Brock, Acting Director, Columbus Field Office, Office of Surface Mining Reclamation and Enforcement, Eastland Professional Plaza, 4480 Refugee Road, 2nd Floor, Columbus, Ohio 43232, Telephone: (614) 866-0578.

SUPPLEMENTARY INFORMATION:

A. The Energy Policy Act

Section 2504 of the Energy Policy Act of 1992, Pub. L. 102-486, 106 Stat. 2776 (1992) added new section 720 to SMCRA. Section 720(a)(1) requires that all underground coal mining operations promptly repair or compensate for subsidence-caused material damage to noncommercial buildings and to occupied residential dwellings and related structures. Repair of damage includes rehabilitation, restoration, or replacement of the structures identified in section 720(a)(1), and compensation must be provided to the owner in the full amount of the reduction in value of the damaged structures as a result of subsidence. Section 720(a)(2) requires

prompt replacement of certain identified water supplies if those supplies have been adversely affected by underground coal mining operations.

These provisions requiring prompt repair or compensation for damage to structures, and prompt replacement of water supplies, went into effect upon passage of the Energy Policy Act on October 24, 1992. As a result, underground coal mine permittees in States with OSM-approved regulatory programs are required to comply with these provisions for operations conducted after October 24, 1992.

B. The Federal Regulations Implementing the Energy Policy Act

On March 31, 1995, OSM promulgated regulations at 30 CFR Part 817 to implement the performance standards of sections 720(a) (1) and (2) of SMCRA (60 FR 16722).

30 CFR 817.121(c)(2) requires in part that:

The permittee must promptly repair, or compensate the owner for, material damage resulting from subsidence caused to any non-commercial building or occupied residential dwelling or structure related to thereto that existed at the time of mining. * * * The requirements of this paragraph apply only to subsidence-related damage caused by underground mining activities conducted after October 24, 1992.

30 CFR 817.41(j) requires in part 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 regulatory authority received the permit application for the activities causing the loss, contamination or interruption.

Alternative OSM Enforcement Decisions

30 CFR 843.25 provides that by July 31, 1995, OSM will decide, in consultation with each State regulatory authority with an approved program, how enforcement of the new requirements will be accomplished. As discussed in the April 7, 1995, **Federal Register** (60 FR 17741) and as reiterated below, enforcement could be accomplished through the 30 CFR Part 732 State program amendment process, or by State, OSM, or joint State and OSM enforcement of the requirements.

(1) *State program amendment process.* If the State's promulgation of regulatory provisions that are counterpart to 30 CFR 817.41(j) and 817.121(c)(2) is imminent, the number and extent of underground mines that have operated in the State since October 24, 1992, is low, the number of complaints in the State concerning

section 720 of SMCRA is low, or the State's investigation of subsidence-related complaints has been thorough and complete so as to assure prompt remedial action, then OSM could decide not to directly enforce the Federal provisions in the State. In this situation, the State would enforce its State statutory and regulatory provisions once it has amended its program to be in accordance with the revised SMCRA and to be consistent with the revised Federal regulations. This program revision process, which is addressed in the Federal regulations at 30 CFR Part 732, is commonly referred to as the State program amendment process.

(2) *State enforcement.* If the State has statutory or regulatory provisions in place that correspond to all of the requirements of the above-described Federal regulations at 30 CFR 817.41(j) and 817.121(c)(2) and the State has authority to implement its statutory and regulatory provisions for all underground mining activities conducted after October 24, 1992, then the State would enforce its provisions for these operations.

(3) *Interim direct OSM enforcement.* If the State does not have any statutory or regulatory provisions in place that correspond to the requirements of the Federal regulations at 30 CFR 817.41(j) and 817.121(c)(2), then OSM would enforce in their entirety 30 CFR 817.41(j) and 817.121(c)(2) for all underground mining activities conducted in the State after October 24, 1992.

(4) *State and OSM enforcement.* If the State has statutory or regulatory provisions in place that correspond to some but not all of the requirements of the Federal regulations at 30 CFR 817.41(j) and 817.121(c)(2) and the State has authority to implement its provisions for all underground mining activities conducted after October 24, 1992, then the State would enforce its provisions for these operations. OSM would then enforce those provisions of 30 CFR 817.41(j) and 817.121(c)(2) that are not covered by the State provisions for these operations.

If the State has statutory or regulatory provisions in place that correspond to some but not all of the requirements of the Federal regulations at 30 CFR 817.41(j) and 817.121(c)(2) and if the State's authority to enforce its provisions applies to operations conducted on or after some date later than October 24, 1992, the State would enforce its provisions for these operations on and after the provisions' effective date. OSM would then enforce 30 CFR 817.41(j) and 817.121(c)(2) to the extent the State statutory and

regulatory provisions do not include corresponding provisions applicable to all underground mining activities conducted after October 24, 1992; and OSM would enforce those provisions of 30 CFR 817.41(j) and 817.121(c)(2) that are included in the State program but are not enforceable back to October 24, 1992, for the time period from October 24, 1992, until the effective date of the State's rules.

As described in items (3) and (4) above, OSM could directly enforce in total or in part the applicable Federal regulatory provisions until the State adopts and OSM approves under 30 CFR Part 732, the State's counterparts to the required provisions. However, as discussed in item (1) above, OSM could decide not to initiate direct Federal enforcement but rather to rely instead on the 30 CFR Part 732 State program amendment process.

In those situations where OSM determined that direct Federal enforcement was necessary, the ten-day notice provisions of 30 CFR 843.12(a)(2) would not apply. That is, when on the basis of a Federal inspection OSM determined that a violation of 30 CFR 817.41(j) or 817.121(c)(2) existed, OSM would issue a notice of violation or cessation order without first sending a ten-day notice to the State.

Also under direct Federal enforcement, the provisions of 30 CFR 817.121(c)(4) would apply. This regulation states that if damage to any noncommercial building or occupied residential dwelling or structure related thereto occurs as a result of earth movement within an area determined by projecting a specified angle of draw from the outermost boundary of any underground mine workings to the surface of the land (normally a 30 degree angle of draw), a rebuttable presumption exists that the permittee caused the damage.

Lastly, under direct Federal enforcement, OSM would also enforce the new definitions at 30 CFR 701.5 of "drinking, domestic or residential water supply," "material damage," "non-commercial building," "occupied dwelling and structures related thereto," and "replacement of water supply" that were adopted with the new underground mining performance standards.

OSM would enforce 30 CFR 817.41(j), 817.121(c) (2) and (4), and 30 CFR 701.5 for operations conducted after October 24, 1992.

C. Enforcement in Ohio

Ohio Program Activity, Requirements, and Enforcement

By letter to Ohio dated December 15, 1994, OSM requested information that would be useful in determining how to implement section 720(a) of SMCRA and the implementing Federal regulations in Ohio (Administrative Record No. OH-2073). By letter dated January 18, 1995, Ohio responded to this request (Administrative Record No. OH-2085).

Ohio provided a list of permitted underground coal mining operations. There are eighteen active underground coal mines in Ohio. The term "active underground coal mines" includes coal mines that are currently producing coal. The term also includes coal mines that are not currently producing coal but are being inspected by Ohio at the same rate as those mines that are producing coal. Thus, the number of mines actually producing coal varies and is usually much lower than eighteen. (Administrative Record Number OH-2090). Ohio indicated that existing program provisions at Ohio Revised Code sections 1513.162 and the Ohio Administrative Code sections 1501:13-1-02(S), 1501:13-9-04(P), and 1501:13-12-03 (C), (D), (E), (F), (H), and (I) are the State's authority for enforcement of water replacement and subsidence related structural damage. Ohio explained that it has enforced these State program provisions requiring replacement of water supplies impacted by underground mining operations since 1977 and enforced State program provisions requiring repair or compensation for subsidence related structural damage since 1988. Ohio has distributed Division Policy Procedures addressing subsidence related water replacement at PPD Underground 93-2, subsidence related damages to structures at PPD Underground 90-2 and 90-3.

By letter dated February 1, 1995 (Administrative Record Number OH-2090), Ohio provided information concerning complaints related to underground mining operations in Ohio. Ohio has investigated 26 citizen complaints alleging water supply loss or contamination as a result of underground mining operations conducted after October 24, 1992. To date, Ohio has made a determination on six of the complaints that water loss was not mining related and on six of the complaints that water loss was mining related. Fourteen complaints are still being investigated. Twelve of the 14 are related to water supplies associated with one underground coal mining

operation and are not subsidence related. Ohio also stated that there is only one pending complaint related to structure damage from subsidence.

On June 2, 1995, OSM met with the Ohio Division of Reclamation to discuss the enforcement scheme to be followed in Ohio. Ohio stated that counterparts to 30 CFR 817.41(j) and 817.121(c)(2) are fully provided for in the Ohio program and that the appropriate enforcement scheme for Ohio is State enforcement of the approved Ohio program (Administrative Record Number OH-2131).

Comments. On April 7, 1995, OSM published in the **Federal Register** (60 FR 17741) an opportunity for a public hearing and a request for public comment to assist OSM in making its decision on how the underground coal mine subsidence control and water replacement requirements should be implemented in Ohio. The comment period closed on May 8, 1995. Because OSM did not receive a request for one, OSM did not hold a public hearing. OSM received comments from one party in response to its notice (Administrative Record Number OH-2141).

The party commented that the enforcement alternatives incorporating total or partial direct interim Federal enforcement (items (3) and (4) in section I.B. above) have no statutory basis in SMCRA and are not consistent with Congress' intent in creating section 720 of SMCRA. The party also commented that the waiving of ten-day notice procedures under direct Federal enforcement is not consistent with Federal case law. OSM does not agree with the commenter's assertions, and it addressed similar comments in the March 31, 1995, **Federal Register** (60 FR 16722, 16742-16745). These concerns about direct Federal enforcement are moot issues in Ohio because the Regional Director has decided, as set forth below, not to implement an enforcement alternative including direct Federal enforcement.

Director's Decision. Based on the information discussed above, the Director has decided that enforcement of the underground coal mine subsidence control and water replacement requirements in Ohio will be accomplished by State enforcement of the Ohio program. The Director has made this decision after soliciting public comment (one comment was received) and providing opportunity for public hearing (no requests for a hearing were received), and considering information provided by Ohio by letters dated January 18, 1995, and February 1, 1995, and in discussions held with Ohio on June 2, 1995. The Director would like

to clarify the meaning of subsection (E) of OAC 1501:13-12-03. This subsection states that any agreement between the operator and the structure owner takes precedence over 1501:13-12-03. This section appears to conflict with the requirements of section 720(a)(1) of SMCRA, which requires repair or compensation of damaged structures without regard to private agreements (see 60 FR 16722, 16735; March 31, 1995). When OSM approved this subsection in 1991, OSM asked for clarification from Ohio about this subsection. Ohio clarified this subsection to mean that the agreement must at a minimum require repair or compensation for subsidence damage of a protected structure and that anything less than this would be considered no agreement between the parties (56 FR 52469, 52470-71; October 21, 1991). Therefore, this subsection is in accordance with section 720(a)(1) of SMCRA. The Director has concluded that Ohio law at ORC 1513.162 and rules at OAC 1501:13-1-02(S); 1501:13-9-04(P); and 1501:13-12-03 (C); (D); (E) as clarified in 56 FR 52469 (October 21, 1991); (F); (H); and (I) authorize enforcement of provisions of the Energy Policy Act of 1992 in Ohio from October 24, 1992.

If circumstances within Ohio change significantly, the Director may reassess this decision. Formal reassessment of this decision would be addressed by **Federal Register** notice.

Dated: July 20, 1995.

David G. Simpson,

Acting Regional Director, Appalachian Regional Coordinating Center.

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 271

[FRL-5264-8]

Ohio: Authorization of State Hazardous Waste Management Program

AGENCY: Environmental Protection Agency.

ACTION: Immediate final rule.

SUMMARY: Ohio submitted an application seeking final authorization of revisions to its hazardous waste program under the Resource

Conservation and Recovery Act of 1976, as amended (RCRA). The application included a program description, a statement by the Ohio Attorney General, a memorandum of agreement, and the revisions to Ohio's Administrative Code. The Environmental Protection Agency (EPA) has reviewed Ohio's application and has reached a decision, subject to public review and comment, that these hazardous waste program revisions satisfy all the requirements necessary to qualify for final authorization. Thus, EPA intends to grant final authorization to Ohio to operate its expanded program, subject to authority retained by EPA under the Hazardous and Solid Waste Amendments of 1984 (hereinafter HSWA).

EFFECTIVE DATE: Final authorization for Ohio shall be effective on September 25, 1995 unless EPA publishes a prior **Federal Register** (FR) action withdrawing this immediate final rule. All comments on Ohio's final authorization must be received by 4:30 p.m. central time on August 26, 1995. If an adverse comment is received, EPA will publish either (1) a withdrawal of this immediate final rule or (2) a document containing a response to the comment which either affirms that the immediate final decision takes effect or reverses the decision.

ADDRESSES: Copies of Ohio's final Authorization Revision Application are available for inspection and copying from 9 a.m. to 4 p.m., at the following addresses: Ms. Kit Arthur, Ohio Environmental Protection Agency, 1800 WaterMark Drive, Columbus, Ohio 43266, Phone 614/644-2956; Mr. Timothy O'Malley, U.S. EPA Region 5, Office of RCRA, 77 W. Jackson, Seventh Floor, Chicago, Illinois 60604, Phone 312/886-6085. Written comments should be sent to Mr. Timothy O'Malley, U.S. EPA Region 5, Office of RCRA, 77 W. Jackson (HRM-7J), Chicago, Illinois, 60604, Phone 312/886-6085.

FOR FURTHER INFORMATION CONTACT: Mr. Timothy O'Malley, Ohio Regulatory Specialist, U.S. EPA Region 5, HRM-7J, 77 West Jackson Blvd., Chicago, Illinois, 60604, (312) 886-6085.

SUPPLEMENTARY INFORMATION:

A. Background

States with final authorization under section 3006(b) of RCRA, 42 U.S.C. § 6929(b), have a continuing obligation

to maintain a hazardous waste program that is equivalent to, consistent with, and no less stringent than the Federal hazardous waste program.

In accordance with 40 CFR 271.21, revisions to State hazardous waste programs are necessary when Federal or State statutory or regulatory authority is modified or when certain other changes occur. Most commonly, State program revisions are necessitated by changes to EPA's regulations in 40 CFR Parts 124, 260-266, 268, and 270.

B. Ohio

Ohio initially received final authorization for its program effective June 30, 1989 (54 FR 27170). Subsequently, Ohio received authorization for revisions to its program, which became effective on June 7, 1991 (56 FR 14203) and August 19, 1991 (56 FR 28008). On June 21, 1994, Ohio submitted a program revision application for additional program approvals. Today, Ohio is seeking approval of its program revision in accordance with 40 CFR 271.21(b)(3).

EPA has reviewed Ohio's application, and has made an immediate final decision that Ohio's hazardous waste program revisions satisfy all of the requirements necessary to qualify for final authorization. Consequently, EPA intends to grant final authorization for the additional program modifications to Ohio. The public may submit written comments on EPA's immediate final decision up until August 26, 1995. Copies of Ohio's application for program revision are available for inspection and copying at the locations indicated in the **ADDRESSES** section of this notice.

Approval of Ohio's program revision shall become effective in 60 days unless an adverse comment pertaining to the State's revision discussed in this notice is received by the end of the comment period. If an adverse comment is received, EPA will publish either (1) a withdrawal of the immediate final decision or (2) a notice containing a response to comments which either affirms that the immediate final decision takes effect or reverses the decision.

On September 25, 1995, Ohio will be authorized to carry out, in lieu of the Federal program, those provisions of the State's program which are analogous to the following provisions of the Federal program: