

3. Wallis, C., and J. L. Melnick, "Rapid, Calorimetric Method for the Detection of Microorganisms in Blood Culture," *Journal of Clinical Microbiology*, 21:505-508, 1985.

4. Washington, II, J. A., and D. M. Ilstrue, "Blood Cultures: Issues and Controversies," *Reviews of Infectious Diseases*, 8:792-802, 1986.

5. Welch, W. D., et al., "Variability in CO<sub>2</sub>, O<sub>2</sub>, and pH levels in Blood Culture Bottles from Five Different Manufacturers," *Journal of Clinical Microbiology*, 20:881-883, 1984.

**III. Environmental Impact**

The agency has determined under 21 CFR 25.24(a)(8) and (a)(10) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

**IV. Analysis of Impacts**

FDA has examined the impact of the final rule under Executive Order 12866 and the Regulatory Flexibility Act (Pub. L. 96-354). Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity). The agency believes that this final rule is consistent with the regulatory philosophy and principles identified in the Executive Order. In addition, the final rule is not a significant regulatory action as defined by the Executive Order and so is not subject to review under the Executive Order.

The Regulatory Flexibility Act requires agencies to analyze regulatory options that would minimize any significant impact of a rule on small entities. Because this final rule revokes an exemption and places manufacturers of these devices on a level with manufacturers of other devices, the agency certifies that the final rule will not have a significant economic impact on a substantial number of small entities. Therefore, under the Regulatory Flexibility Act, no further analysis is required on small entities.

**List of Subjects in 21 CFR Part 866**

Biologics, Laboratories, Medical devices.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner

of Food and Drugs, 21 CFR part 866 is amended as follows:

**PART 866—IMMUNOLOGY AND MICROBIOLOGY DEVICES**

1. The authority citation for 21 CFR part 866 continues to read as follows:

**Authority:** Secs. 501, 510, 513, 515, 520, 701 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 351, 360, 360c, 360e, 360j, 371).

2. Section 866.2560 is amended by revising paragraph (b) to read as follows:

**§ 866.2560 Microbial growth monitor.**

\* \* \* \* \*

(b) *Classification.* Class I. With the exception of automated blood culturing system devices that are used in testing for bacteria, fungi, and other microorganisms in blood and other normally sterile body fluids, this device is exempt from the premarket notification procedures in subpart E of part 807 of this chapter.

Dated: July 18, 1995.

**William B. Schultz,**

*Deputy Commissioner for Policy.*

[FR Doc. 95-18446 Filed 7-26-95; 8:45 am]

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**DEPARTMENT OF THE INTERIOR**

**Office of Surface Mining Reclamation and Enforcement**

**30 CFR Parts 902, 926, 934, and 950**

**Alaska, Montana, North Dakota, and Wyoming Regulatory Programs**

**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 Alaska, Montana, North Dakota, and Wyoming. Amendments to the Surface Mining Control and Reclamation Act of 1977 (SMCRA) and the implementing Federal regulations require that underground coal mining operations 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 Alaska, Montana, North Dakota, and Wyoming and consideration of public comments,

OSM has decided that initial enforcement in Alaska and North Dakota will be accomplished through the State program amendment process; in Montana through State enforcement and, if necessary, direct Federal enforcement; and in Wyoming through State enforcement and the State program amendment process.

**EFFECTIVE DATE:** July 27, 1995.

**FOR FURTHER INFORMATION CONTACT:** Guy Padgett, Director, Casper Field Office, Telephone: (307) 261-5776.

**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 (60 FR 16722) to implement the performance standards of sections 720(a)(1) and (2) of SMCRA. 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 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, after consultation with each State regulatory authority with an approved program, how enforcement of the new requirements will be accomplished. As discussed in the April 6, 1995, **Federal Register** (60 FR 17459) and as reiterated below, enforcement could be accomplished by State, OSM, or joint State and OSM enforcement of the requirements, or by a State after it has amended its program.

(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 into 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 here 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 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 implement the new definitions at 30 CFR 701.5 of "drinking, domestic or residential water supply," "material damage," "non-commercial building," "occupied residential 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 implement the definitions at 30 CFR 701.5 for operations conducted after October 24, 1992.

#### **C. Enforcement in Alaska**

*Alaska program activity, requirements, and enforcement.* By letter to Alaska dated December 15, 1994, OSM requested information from Alaska that would help OSM decide which approach to take in Alaska to implement the requirements of section 720(a) of SMCRA, the implementing Federal regulations, and/or the counterpart Alaska program provisions (Administrative Record No. AK-F-01). By letter dated January 27, 1995, Alaska responded to OSM's request (Administrative Record No. AK-F-02).

Alaska stated that no underground coal mines were operating in Alaska after October 24, 1992.

Alaska stated that its program does not contain or authorize enforcement of the structural damage repair and water supply replacement requirements of section 720(a) of SMCRA. To be no less stringent than SMCRA, Alaska indicated that it would have to amend section 27.21.220 of the Alaska Surface Coal Mining Control and Reclamation Act to add subsection (c) to require prompt repair or compensation for material damage resulting subsidence, and prompt replacement of water supplies affected by underground coal mining operations. It indicated that it realistically believed that this statutory change could be made in the spring of 1996.

Alaska concluded that it did not believe that it has the statutory authority to investigate complaints of structural damage or water loss caused by underground coal mining operations after October 24, 1992.

On May 18, 1995, OSM confirmed with Alaska that no underground mines were active after October 24, 1992 (Administrative Record No. AK-F-07). However, there is an underground coal mine exploration site that would likely be permitted within 6 months. Alaska has indicated that it would address the requirements of section 720(a) of SMCRA in its permitting process for this mine. Due to the remote location of this operation, it is highly unlikely that material damage to noncommercial buildings and to occupied residential dwellings and related structures and that damage to drinking, domestic, and residential water supplies would occur.

*Comments.* On April 6, 1995, OSM published in the **Federal Register** (60 FR 17495) notice of 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 Alaska (Administrative Record No. AK-F-04). The comment period closed on May 8, 1995. Because OSM did not receive a request for a public hearing, OSM did not hold one. OSM received comments from one party in response to its notice.

The party stated that the enforcement alternatives incorporating total or partial direct interim Federal enforcement (items (3) and (4) in section B. above) have no statutory basis in SMCRA and are not consistent with Congress' intent in creating section 720 of SMCRA (Administrative Record No. AK-F-08). The party also commented that the waiving of ten-day notice procedures in implementing 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) and also responds to these comments below in the "Comments" subsection of following Montana section D. These concerns about direct Federal enforcement are moot issues for Alaska because the Regional Director has decided, as set forth below, not to implement an enforcement alternative including direct Federal enforcement.

*Regional Director's decision.* Prior to the Regional Director making this decision on which enforcement alternative should be implemented in Alaska, the Casper Field Office on May

18, 1995, consulted with Alaska in accordance with 30 CFR 843.25(a)(4) (Administrative Record No. AK-F-07). Because there has been no underground mining activity since October 24, 1992; there is little likelihood for subsidence damage to noncommercial buildings and to occupied residential dwellings and related structures, or adverse effects to drinking, domestic, and residential water supplies by a proposed underground coal mining operation; and Alaska has indicated it would address the requirements of section 720(a) of SMCRA in the permit for the proposed mine, the Field Office and Alaska agreed that it is unlikely that any enforcement would be necessary in the State during the interim period between October 24, 1992, and the date by which Alaska revises its program in accordance with SMCRA and the Federal regulations.

On this basis and the disposition of the comments received, the Regional Director decides the initial enforcement of the underground coal mine subsidence control and water replacement requirements in Alaska is not reasonably likely to be required and that implementation will be accomplished through the State program amendment process.

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

#### **D. Enforcement in Montana**

##### *Montana Program Activity, Requirements, and Enforcement*

By letter to Montana dated December 15, 1994, OSM requested information from Montana that would help OSM decide which approach to take in Montana to implement the requirements of section 720(a) of SMCRA, the implementing Federal regulations, and/or the counterpart Montana program provisions (Administrative Record No. MT-13-01). By letter dated March 6, 1995, Montana responded to OSM's request (Administrative Record No. MT-13-02).

Montana stated that one underground coal mine was active in Montana after October 24, 1992. Montana stated that its program does not fully authorize enforcement of the structural repair and water replacement requirements of section 720(a) of SMCRA and the implementing Federal regulations.

Specifically, Montana indicated that (1) Administrative Rules of Montana 26.4.911(5), which address compensation for structural damage

resulting from subsidence, are not clearly authorized by the subsidence prevention provisions of section 82-4-231(10)(f) of the Montana Strip and Underground Mine Reclamation Act (MSUMRA); (2) section 82-4-253(2) of MSUMRA excepts water derived from "a subterranean stream having a permanent, distinct, and known channel" from the requirement for underground coal miners to promptly replace drinking, domestic, or residential water supplies affected by underground coal mining, and (3) the procedural requirements of section 82-4-253(2) of MSUMRA would not, in Montana's opinion, result in "prompt" replacement of water supplies adversely affected by underground coal mining.

Montana has stated that statutory changes to address these issues will need to be sought in the next legislative session in January 1997, and subsequent rule changes would follow adoption of statute changes. OSM has determined that Montana has not received or investigated any citizen complaints alleging subsidence-related structural damage or water supply loss or contamination as a result of underground mining operations conducted after October 24, 1992.

On May 3, 1995, Montana indicated its preferred enforcement alternative for the State (Administrative Record No. MT-13-05). Because it would enforce its currently approved program to the fullest extent and introduce in the 1997 legislative session program amendments to address the issues in its March 6, 1995, letter, Montana recommended that OSM only initiate direct Federal enforcement in the interim period (between October 24, 1992, and the effective date of Montana's revision of its program to be no less stringent than SMCRA and no less effective than the Federal regulations) when enforcement is needed and the Montana program falls short of the Federal standards.

OSM has determined that only the one underground coal mine has operated after October 24, 1992, and that Montana has not received any complaints alleging subsidence-related structural damage or water supply loss or contamination as a result of this underground mine's operations conducted after October 24, 1992.

*Comments.* On April 6, 1995, OSM published in the **Federal Register** (60 FR 17495) notice of 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 Montana (Administrative Record No. MT-13-04).

The comment period closed on May 8, 1995. Because OSM did not receive a request for a public hearing, OSM did not hold one. OSM received from the party that commented on the Alaska program the same comments for the Montana program (Administrative Record No. MT-13-12).

The party stated that the enforcement alternatives incorporating total or partial direct interim Federal enforcement (items (3) and (4) in section B. above) have no statutory basis in SMCRA and are not consistent with Congress' intent in creating section 720 of SMCRA. Specifically, the party commented that SMCRA contains various statutory procedures for the amendment, preemption, and substitution of Federal enforcement of State programs (sections 503, 505, and 521(b)) that should be used in lieu of direct interim Federal enforcement.

In response to this comment, OSM's position remains as was stated in the March 31, 1995, preamble for the Federal regulations at 30 CFR 843.25, which in part implement section 720 of SMCRA:

OSM has concluded that it is not clear from the legislation or legislative history, how Congress intended that section 720 was to be implemented, in light of existing SMCRA provisions for State primacy. Thus, OSM has a certain amount of flexibility in implementing section 720. After weighing these considerations, OSM intends to implement section 720 promptly, but will pursue federal enforcement without undermining State primacy under SMCRA. (60 FR 16722, 16743). Using this rationale, OSM concludes that there is no inconsistency in its implementation of section 720 of SMCRA with sections 503, 505, and 521(b) of SMCRA.

Further the party commented that Congress' intent was that agreements between coal mine operators and landowners would be used to ensure that the protective standards of section 720 of SMCRA would occur rather than enforcement by State regulatory authorities and OSM. The party did not supply any legislative history to support this conclusion, and the plain language of section 720 of SMCRA does not support this conclusion.

Lastly, the party commented that the waiving of ten-day notice procedures in implementing direct Federal enforcement is not consistent with Federal case law. OSM does not agree with the commenter's assertion. The following response to a similar comment in the March 31, 1995, **Federal Register** (60 FR 16722, 16742-16745) also applies to this comment.

[The commenter stated that] the proposal to provide for direct Federal enforcement

ignores Federal case law which indicates that, as a general proposition, the State program, not SMCRA, is the law within the State. OSM recognizes that, under existing rules implementing SMCRA, States with approved regulatory programs have primary responsibility for implementing SMCRA, based on the approved program. However, in this rule OSM has carved out a limited exception to the general proposition, to the extent necessary to give reasonable force and effect to section 720, while maintaining so far as possible State primacy procedures. OSM believes that the process adopted in this final rule is consistent with and authorized by Congress under the Energy Policy Act, and that case law interpreting other provisions of SMCRA is not necessarily dispositive.

#### *Regional Director's Decision*

Prior to the Regional Director making this decision on which enforcement alternative should be implemented in Montana, the Casper Field Office on April 25, 1995, consulted with Montana in accordance with 30 CFR 843.25(a)(4) (Administrative Record No. MT-13-05).

Only one Montana mine has operated after October 24, 1992, and is subject to the provisions of section 720(a) of SMCRA and the implementing Federal regulations. Neither Montana nor OSM have received any complaints alleging subsidence-related structural damage or water supply loss or contamination as a result of this underground mine's operations conducted after October 24, 1992. The 1997 projection for promulgating counterpart State statutory provisions is consistent with the State legislature schedule for meeting in regular session every other year. Montana would not promulgate rules to implement these statutory provisions until after the legislature's action.

OSM agrees with Montana that the State should be the primary enforcer of its program provisions for subsidence-caused material damage to noncommercial buildings and to occupied residential dwellings and related structures and for drinking, domestic, and residential water supplies adversely affected by underground coal mining. It also agrees that if, during the interim period prior to Montana revising its program, Montana needs to, but is unable to, fully implement counterparts to the requirements of section 720(a) of SMCRA or the implementing regulations, OSM should initiate direct Federal enforcement.

On this basis and the disposition of the comments received, the Regional Director decides that initial enforcement of the underground coal mine subsidence control and water replacement requirements in Montana will occur through State enforcement and, if necessary, direct Federal enforcement of sections 720(a) (1) and

(2) of SMCRA and 30 CFR 817.121 and 817.41(j).

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

#### **E. Enforcement in North Dakota**

##### *North Dakota Program Activity, Requirements, and Enforcement*

By letter to North Dakota dated December 15, 1994, OSM requested information from North Dakota that would help OSM decide which approach to take in North Dakota to implement the requirements of section 720(a) of SMCRA, the implementing Federal regulations, and/or the counterpart North Dakota program provisions (Administrative Record No. ND-W-01). By letter dated December 21, 1994, North Dakota responded to OSM's request (Administrative Record No. ND-W-02). North Dakota indicated that its regulatory program does not include provisions for underground coal mining and that no underground coal mines have operated in North Dakota after October 24, 1992.

On April 11, 1995, OSM confirmed with North Dakota that no underground coal mines have operated in North Dakota after October 24, 1992, and that there is no underground mining activity proposed in the State (Administrative Record No. ND-W-07). Prior to the issuance of any permit allowing underground mining, North Dakota is aware that it would have to revise its program to incorporate underground mining provisions no less stringent than SMCRA and no less effective than the Federal regulations. Such provisions would include counterpart provisions to section 720(a) of SMCRA and the implementing Federal regulations.

*Comments.* On April 6, 1995, OSM published in the **Federal Register** (60 FR 17495) notice of 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 North Dakota (Administrative Record No. ND-W-08). The comment period closed on May 8, 1995. Because OSM did not receive a request for a public hearing, OSM did not hold one. The comments discussed above for the Alaska program, and OSM's responses to it, also apply to the North Dakota program (Administrative Record No. ND-W-09).

*Regional Director's Decision*

Prior to the Regional Director making this decision on which enforcement alternative should be implemented in North Dakota, the Casper Field Office on May 30, 1995, consulted with North Dakota in accordance with 30 CFR 843.25(a)(4) (Administrative Record No. ND-W-07).

The North Dakota program does not currently allow underground coal mining. Prior to issuing a permit allowing underground mining, North Dakota would have to, through the State program amendment process, revise its program to incorporate underground mining provisions no less stringent than SMCRA and no less effective than the Federal regulations. These State provisions would include counterparts to section 720(a) of SMCRA and its implementing Federal regulations. Any underground mining permit that North Dakota would issue under the underground mining provisions it promulgated would have to address State counterparts to section 720(a) of SMCRA and its implementing Federal regulations. No underground mining activities could commence prior to the issuance of a permit.

On this basis and the disposition of the comment received, the Regional Director decides that no State or Federal enforcement of underground coal mine subsidence control and water replacement provisions would be needed in the interim period between October 24, 1992, and the date of issuance of any North Dakota underground mining permit.

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

**F. Enforcement in Wyoming***Wyoming Program Activity, Requirements, and Enforcement*

By letter of Wyoming dated December 15, 1994, OSM requested information from Wyoming that would help OSM decide which approach to take in Wyoming to implement the requirements of section 720(a) of SMCRA, the implementing Federal regulations, and/or the counterpart Wyoming program provisions (Administrative Record No. WY-29-01). By letter dated January 19, 1995, Wyoming responded to OSM's request (Administrative Record No. WY-29-02).

Wyoming stated that three underground coal mines were active in Wyoming after October 24, 1992. Wyoming indicated that existing State

program provisions at Wyoming Statutes 35-11-102 (policy and purpose); 35-11-406 (permit applications); 35-11-416 (surface owner protection); and 35-11-428 (in situ mining permit applications); and Wyoming Coal Rules and Regulations at chapter VI, section 2 (general environmental performance standards); chapter VII, sections 1 through 4 (underground mining permit applications, environmental protection performance standards, public notice, and surface owner protection); and chapter XVIII, section 3 (in situ mining permit applications) are adequate State counterparts to section 720(a) of SMCRA and the implementing Federal regulations.

Wyoming explained that it will enforce these State program provisions in accordance with the enforcement provisions that were in effect October 24, 1992. Wyoming has investigated one citizen complaint alleging subsidence-caused structural damage or water supply loss or contamination as a result of underground mining operations conducted after October 24, 1992. This complaint concerned subsidence damage to a reclaimed reservoir. This is a unique situation in that the alleged damage occurred within the permit area of an adjacent surface coal mine. The two mine operators have mutually agreed upon corrective measures and have not requested the State of Wyoming to intervene.

On May 11, 1995, OSM corresponded with Wyoming and reiterated the available alternative enforcement decisions in the State (Administrative Record No. WY-29-09).

On July 13, 1995, Wyoming sent to OSM a letter in which it stated that it preferred the State enforcement alternative (Administrative Record No. WY-29-12). Wyoming also stated that it interpreted its program and the Federal water replacement requirements (at section 720(a)(2) of SMCRA and 30 CFR 817.41(j)) to apply only to valid water rights as determined by the Wyoming State Engineer. That is, Wyoming would not require an underground mine operator to replace a drinking, domestic, or residential water supply that was being used illegally in contradiction of water rights as determined by the State Engineer.

OSM has determined that three underground coal mines have operated after October 24, 1992. For these mines, Wyoming has received the one complaint alleging subsidence-related damage to a water reservoir.

*Comments.* On April 6, 1995, OSM published in the **Federal Register** (60 FR 17495) notice of 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 Wyoming (Administrative Record No. WY-29-04). The comment period closed on May 8, 1995. Because OSM did not receive a request for a public hearing, OSM did not hold one. OSM received comments from three parties in response to its notice.

The comments discussed above for the Alaska program, and OSM's responses to it, also apply to the Wyoming program (Administrative Record No. WY-29-11).

A party supported the selection of the State enforcement alternative (Administrative Record No. WY-29-07). The Regional Director acknowledges this comment and took it into consideration before making the enforcement decision set forth below.

A party commented that several of Wyoming's statutory provisions are less stringent than the Federal counterparts at section 720(a) of SMCRA and less effective than the implementing Federal regulations at 30 CFR 817.121(c) and 817.41(j) (Administrative Record No. WY-29-08). Because of this, the party stated that OSM is required to provide direct Federal enforcement as set forth in item (3) of section B. of the April 6, 1995, **Federal Register** notice soliciting comment on the enforcement alternative that should be implemented in the State.

In the near future, OSM intends to send a letter to Wyoming in accordance with 30 CFR 732.17(d) notifying Wyoming of revisions that need to be made to its program. OSM does not agree with the commenter's conclusion that OSM is required to institute Federal enforcement in the interim period because Wyoming's program is less stringent than SMCRA and less effective than the implementing Federal regulations. As set forth in item (1) of section B. of the April 6, 1995, **Federal Register** notice, OSM could decide not to directly enforce the Federal SMCRA and regulation provisions in the interim period in Wyoming if it found that the number and extent underground mines that have operated since October 24, 1992, is low, the number of complaints concerning section 720 of SMCRA is low, the State's investigation of subsidence-related or water supply loss and contamination complaints has been thorough and complete so as to assure prompt remedial action, or the State's promulgation of counterparts to 30 CFR 817.41(j) and 817.121(c)(2) is imminent. Also, OSM could decide not to directly

enforce the Federal SMCRA and regulation provisions if some other similar extenuating circumstances exist. Even though OSM does not agree with this comment supporting direct Federal enforcement, the Regional Director acknowledges it and took it into consideration before making the enforcement decision set forth below.

#### *Regional Director's Decision*

Prior to the Regional Director making this decision on which enforcement alternative should be implemented in Wyoming, the Casper Field Office on May 11 and July 13, 1995, consulted with Wyoming in accordance with 30 CFR 843.25(a)(4) (Administrative Record Nos. WY-29-09 and WY-29-12).

Three Wyoming mines have operated after October 24, 1992, and are subject to the provisions of section 720(a) of SMCRA and the implementing Federal regulations. For one of these mines, Wyoming investigated a complaint relating to potential subsidence damage to a water reservoir.

The Regional Director acknowledges Wyoming's determination that its program would not require an underground mine operator to replace a drinking, domestic, or residential water supply that was being used illegally in contradiction of water rights as determined by the State Engineer. OSM believes this position is not inconsistent with section 720(a) of SMCRA regarding water supply replacement and section 717 of SMCRA regarding water rights. However, before OSM finally determines that Wyoming's program on this complicated issue is no less stringent than SMCRA, OSM will further review Wyoming's water right statutes, rules, policies, and procedures.

OSM agrees with Wyoming that the State should be the enforcer of its program provisions for subsidence-caused material damage to noncommercial buildings and to occupied residential dwellings and related structures and for drinking, domestic, and residential water supplies adversely affected by underground coal mining. Based upon the number and location of the underground mines, the potential is low for material damage to noncommercial buildings, occupied residential dwellings, and related structures and for damage to drinking, domestic, or residential water supplies. Given these circumstances, it is unlikely that any enforcement would be necessary in the State during the interim period between October 24, 1992, and the date by which Wyoming revises its program in accordance with SMCRA and the Federal regulations.

On this basis and the disposition of the comments received, the Regional Director decides that initial enforcement of the underground coal mine subsidence control and water replacement requirements in Wyoming will occur through State enforcement and the State program amendment process.

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

Dated: July 19, 1995.

**Russell F. Price,**

*Acting Regional Director, Western Regional Coordinating Center.*

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### **30 CFR Parts 904,918, 936, and 943**

#### **Arkansas, Louisiana, Oklahoma, and Texas Regulatory Programs**

**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 Arkansas, Louisiana, Oklahoma, and Texas. Amendments to the Surface Mining Control and Reclamation Act of 1977 (SMCRA) and the implementing Federal regulations require that underground coal mining operations conducted after October 24, 1992: promptly repair or compensate for subsidence-caused material damage to noncommercial buildings and to occupied 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 Arkansas, Louisiana, Oklahoma, and Texas and consideration of public comments, OSM has decided that initial enforcement is not reasonably likely to be required and that implementation in these States will be accomplished through the State program amendment process.

**EFFECTIVE DATE:** July 27, 1995.

#### **FOR FURTHER INFORMATION CONTACT:**

Tim L. Dieringer, Acting Director, Tulsa Field Office, Telephone: (918) 581-6430.

#### **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 (60 FR 16722) to implement the performance standards of sections 720(a)(1) and (2) of SMCRA.

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 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, after