

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.

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 Indiana will be accomplished through joint State and OSM enforcement. 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 Indiana by letter dated February (sic) 20, 1995, and in discussions held with Indiana on June 28, 1995. The Director has concluded that Indiana law at IC 13-4.1-9-2.5 authorizes enforcement of provisions of the Energy Policy Act of 1992 in Indiana from June 30, 1994. As for enforcement during the interim period (October 24, 1992, through June 30, 1994), Indiana will enforce the provisions of the Energy Policy Act of 1992 to the extent authorized by existing Indiana law. OSM will enforce the provisions of the Energy Policy Act of 1992 during the interim period in any circumstances where the State cannot so enforce. Neither the IDOR nor OSM

anticipates any cases where the IDOR would not be able to enforce the provisions of the Energy Policy Act of 1992 during the interim period.

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

Dated: July 24, 1995.

Charles E. Sandberg,

Acting Regional Director, Mid-Continent Regional Coordinating Center.

[FR Doc. 95-18611 Filed 7-27-95; 8:45 am]

BILLING CODE 4310-05-M

30 CFR Part 917

Kentucky 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 Kentucky. 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 Kentucky and consideration of public comments, OSM has decided that initial enforcement in Kentucky will be accomplished through State and OSM enforcement.

EFFECTIVE DATE: July 28, 1995.

FOR FURTHER INFORMATION CONTACT:

William J. Kovacic, Director, Lexington Field Office, OSM, 2675 Regency Road, Lexington, Kentucky 40503, Telephone (606) 233-2894.

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 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 17739) 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 Kentucky

Kentucky program activity, requirements, and enforcement. By letter to Kentucky dated December 14, 1994, OSM requested information that would be useful in determining how to implement section 720(a) of SMCRA and the implementing Federal regulations in Kentucky (Administrative Record No. KY-1336). By letter dated January 31, 1995, Kentucky responded to this request (Administrative Record No. KY-1337).

Kentucky stated that 410 underground coal mines were active in Kentucky after

October 24, 1992. Kentucky indicated that existing State program provisions at 405 Kentucky Administrative Regulations (KAR) 18:210 section 3 are adequate State counterparts to section 720(a)(1) of SMCRA and the implementing Federal regulations. Section 720(a)(1) of SMCRA requires prompt repair or compensation to the owner for subsidence-related material damage to non-commercial buildings or occupied dwellings and related structures. Kentucky explained that it will enforce this State program provision in accordance with 405 KAR 18:210 section 3.

Kentucky stated that the Kentucky program does not fully authorize enforcement of the new water replacement requirements of section 720(a)(2) of SMCRA and the implementing Federal regulations. Kentucky submitted a program amendment to OSM dated April 29, 1994, (Administrative Record No. KY-1279) which will modify language at Kentucky Revised Statutes (KRS) 350.421. KRS 350.421, as modified, will require replacement of water loss caused by underground mining operations. OSM approved the amendment on June 27, 1995 (60 FR 33110) with two exceptions. The Director required that Kentucky amend its program to provide for the "prompt" replacement of water. He deferred a decision on the enforcement of the provisions of SMCRA section 720 during the period from October 24, 1992 (the effective date of SMCRA section 720) to July 16, 1994 (the effective date of Kentucky's House Bill 338 which provides for water replacement). Kentucky has stated that the effective date of the program amendment, when approved, will be July 16, 1994. Kentucky also stated that it does not have authority to issue enforcement actions for water loss caused by underground mining operations conducted after October 24, 1992, and before July 16, 1994.

Kentucky has investigated 115 citizen complaints alleging water supply loss or contaminations as a result of underground mining operations conducted after October 14, 1992, and before July 16, 1994. Of the 115 citizens' complaints, 30 are pending resolution of currently outstanding ten-day notices; 29 have been satisfactorily resolved; and 47 will require further investigation.

By letter dated June 2, 1995, Kentucky submitted additional clarifying information (Administrative Record No. KY-1358). Kentucky stated, in part:

KRS 350.421 was revised effective July 16, 1994, to place upon underground mining

operations the same obligation to replace affected water supplies that previously applied only to surface mining operations. The Kentucky provisions apply to water supplies for domestic, agricultural, industrial or other legitimate use from an underground or surface source, and thus are at least as broadly encompassing as the Federal requirements with regard to the types of supplies that must be replaced when affected by mining operations. For underground mining, the Kentucky after July 16, 1994, the effective date of the legislation. With regard to the level of replacement, we believe the affected party must be made whole, and that depends upon the factual circumstances of each case and, to some appropriated degree, the preferences of the affected party.

We recognize that it will be necessary to amend the approved Kentucky program by amending the cabinet's administrative regulations to be consistent with and as effective as the OSM regulations revised March 31, 1995. While it is difficult to establish a rigid timetable for adoption of amended administrative regulations, we believe the following target dates may be the earliest feasible dates for these actions, considering the length of Kentucky's promulgation process and considering that we also must continue development and promulgation of amendments to our regulations for impoundments and roads.

1. By August 15, 1995, submit to the Kentucky Legislative Research commission (LRC), a Notice of Intent to promulgate administrative regulations on water supply replacement and subsidence consistent with the March 31, 1995, OSM rules.

2. By December 15, 1995, file with LRC proposed amendments to administrative regulations.

On June 14, 1995, representatives from OSM's Lexington Field Office (LFO) and Kentucky's Department for Surface Mining Reclamation and Enforcement (DSMRE) met to discuss and finalize the implementation of the Energy Policy Act in Kentucky. A written record of the issues discussed was made (Administrative Record No. KY-1359). The following decisions were made. For repair or compensation of material damage, Kentucky's program has the equivalent provisions and enforcement authority. Therefore, DSMRE would enforce the State counterparts to 30 CFR 817.121(c)(2) while OSM would conduct normal oversight using the ten-day notice process if necessary. This enforcement approach was agreed to by the participants.

For water replacement, LFO as a result of the consultation with DSMRE, is recommending State and OSM Federal enforcement of 30 CFR 817.41(j). For the period October 24, 1992, through July 15, 1994, LFO will enforce EPACT water replacement provisions at 30 CFR 817.41(j) in Kentucky. After July 16, 1994, DSMRE

has established both the authority to enforce and equivalent State provisions for water replacement resulting from damage caused by underground mining.

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 Kentucky. The comment period closed on May 8, 1995. Because OSM did not receive a request for one, OSM did not hold a public hearing. Following are summaries of all substantive comments that OSM received and OSM's responses to them.

A mining association responded on May 12, 1995 (Administrative Record No. KY-1356). 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. 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 not 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 protection 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.

A non-profit organization responded on May 8, 1995 (Administrative Record No. KY-1354), with several comments. Because of Kentucky's lack of statutory authority to mandate replacement of water supplies damaged by underground mining prior to July 16, 1994, the party feels OSM should initiate direct enforcement. The Director agrees. As discussed in the Director's Decision below, the Director has decided that OSM will enforce the provisions of 30 CFR 817.41(j) for the period from October 24, 1992, to July 16, 1994.

The party commented that Kentucky should be placed on an expedited schedule for submission of a State program amendment which incorporates emergency regulations for immediate implementation of the permitting requirements for water replacement and subsidence protection. The Director recognizes that Kentucky needs to amend its administrative regulations and accepts Kentucky's proposed schedule for the development and promulgation of amendments. As discussed in section I.C. above, by letter dated June 2, 1995, Kentucky proposes to amend its regulations to be consistent with the revised Federal regulations. By August 15, 1995, it plans to begin the promulgation process by submitting to its LRC a Notice of Intent to promulgate regulations on water supply replacement and subsidence.

The party also recommends that the implementation of the subsidence and water replacement rules should be an oversight topic (special study) for at least the first two years of implementation. The Director notes that OSM will continue to consider special studies of interest to its stakeholders as required by OSM's Directive REG-8 which establishes the procedures for conducting oversight. The State will be required to enforce the provisions of its approved program while OSM will conduct normal oversight using the ten-day notice process if necessary.

The party recommends that all citizen complaints relating to the water loss or subsidence provisions that are the subject of this notice be logged and tracked by OSM to assure proper implementation of the Energy Policy Act. The Director notes that the LFO has compiled a list of all water loss complaints received after October 24, 1992, and each complaint will be evaluated. Since Kentucky has equivalent provisions to the Federal subsidence regulations, the Director notes that State will enforce those provisions while OSM will conduct normal oversight using the ten-day notice process, if necessary.

The party feels that in those cases when the State has previously investigated a complaint, the ten-day notice process should not be used prior to Federal investigation and enforcement. The Director does not agree and reiterates his response to the comment above. For all subsidence-related complaints and for those water replacement-related complaints where damage occurred after July 16, 1994, OSM will conduct normal oversight using the ten-day notice process, if necessary.

The party's last comment concerned the permitting process. It recommends that pending submission of the State program amendment, if Kentucky does not modify the permitting process immediately through the use of existing language in the State program to require additional groundwater and subsidence information, OSM should demand that each permittee be required, prior to permit issuance, to develop groundwater and subsidence information for OSM's approval prior to permit issuance. Failing this, individual enforcement actions should be taken. The Director does not agree. Kentucky has jurisdiction over the regulation of its surface coal mining operations. Through the 30 CFR 732.17 process, the Director will notify Kentucky of required changes to its program.

Director's decision. Based on the information provided by Kentucky,

discussions held with the State on June 14, 1995, and the comments discussed above, the Director has decided that the enforcement of the underground coal mine subsidence control and water replacement requirements in Kentucky will be accomplished by State and OSM enforcement—Option #4. Kentucky will enforce its provisions that correspond to the Federal regulations at 30 CFR 817.41(c)(2) pertaining to the repair or compensation of material damage resulting from subsidence. Kentucky has statutory provisions in place that correspond to the Federal regulations and has the authority to implement its provisions for all underground activities conducted after October 24, 1992. Kentucky will also enforce its provisions that correspond to the Federal regulations at 30 CFR 817.41(j) pertaining to water replacement for the period after July 16, 1994. It has statutory provisions in place that correspond to the Federal regulations and has the authority to implement its provisions for all underground mining activities conducted after July 16, 1994—the effective date of Kentucky's statutory provisions for water replacement. For those underground mining activities conducted after October 24, 1992, and before July 16, 1994, OSM will enforce the provisions of 30 CFR 817.41(j) because Kentucky does not have the statutory authority to retroactively apply water replacement requirements to water losses prior to the effective date of its statute.

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

Dated: July 24, 1995.

Allen D. Klein,

Regional Director, Appalachian Regional Coordinating Center.

[FR Doc. 95-18581 Filed 7-27-95; 8:45 am]

BILLING CODE 4310-05-M

30 CFR Parts 920 and 938

Maryland and Pennsylvania 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 Maryland and Pennsylvania. 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 Maryland and Pennsylvania and consideration of public comments, OSM has decided that initial enforcement in Maryland will be accomplished through the State enforcement and in Pennsylvania through State and OSM enforcement.

EFFECTIVE DATE: July 28, 1995.

FOR FURTHER INFORMATION CONTACT:

George Rieger, Acting Director, Harrisburg Field Office, OSM, Harrisburg Transportation Center, Third Floor, Suite 3C, 4th and Market Streets, Harrisburg, Pennsylvania 17101, Telephone: (717) 782-4036.

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