

of the underground coal mine subsidence control and water replacement requirements in Texas is not reasonably likely to be required and that implementation will be accomplished through the State program amendment process. In the near future, and in accordance with 30 CFR 732.17(d), OSM intends to notify Texas of the specific revisions that it must make to its regulatory program to be no less stringent than SMCRA and no less effective than the implementing Federal regulations.

If circumstances within Texas 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 906, 931, and 944

Colorado, New Mexico, and Utah 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 Colorado, New Mexico, and Utah. 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 Colorado, New Mexico, and Utah and consideration of public comments, OSM has decided that initial enforcement will be accomplished in Colorado through State enforcement, in New Mexico through the State program amendment process, and in Utah through State enforcement and, if necessary, direct Federal enforcement of Federal provisions protecting water supplies.

EFFECTIVE DATE: July 27, 1995.

FOR FURTHER INFORMATION CONTACT:

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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 17501) announcing the public comment period and opportunity for public hearing 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 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 implement the new definition 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 implement the definitions at 30 CFR 701.5 for operations conducted after October 24, 1992.

C. Enforcement in Colorado

Colorado Program Activity, Requirements, and Enforcement

By letter to Colorado dated December 14, 1994, OSM requested information that would help OSM decide which approach to take in Colorado to implement the requirements of section 720(a) of SMCRA, the implementing Federal regulations, and/or the counterpart Colorado program provisions (Administrative Record No. CO-652). By letter dated February 24, 1995, Colorado responded to OSM's request (Administrative Record No. CO-661).

Colorado stated that, of the 25 underground coal mines that had permits as of October 24, 1992, 11 actually mined coal after that date.

Colorado indicated that prior to June 1, 1992, Colorado had in place surface owner protection performance standards at 2 Code of Colorado Regulations 407-2, rules 4.20.3(1) and 4.20.3(2) that encompassed the requirements of section 720(a)(1) of SMCRA. Rule 4.20.3(2), which contained requirements regarding an operator's obligation to repair or compensate for material damage or reduction in value or reasonably foreseeable use caused by subsidence to surface structures, features, or values, expired on June 1, 1992, under Colorado's "Sunset Law." The rule expired because Colorado's Office of Legislative Legal Services found during November 1991 it was not supported by statute. Colorado subsequently developed language for a bill to amend the Colorado Surface Coal Mining and Reclamation Act (the Colorado Act) and introduced the bill during the 1995 legislative session. The intent of the bill was to amend Colorado Revised Statute (C.R.S.) 34-33-121(2)(a)

to provide specific statutory support for Rule 4.20.3(2).

Colorado explained that, although the specific language of Rule 4.20.3(2) expired during June 1992, the Division of Minerals and Geology has continued since that time to interpret its rules to require that mine operators are responsible for repairing or compensating surface owners for subsidence-caused material damage to structures. Colorado based its authority for doing so on the general provisions of Rule 4.20.3(1) and the subsidence control plan mitigation requirements of Rule 2.05.6(6)(iv).

Colorado indicated that there may be a conflict between the provisions of section 720(a)(2) of SMCRA, which requires prompt replacement of drinking, domestic, or residential water supplies adversely impacted by underground mining operations, and Colorado water law. Consequently, Colorado has requested an opinion from the Colorado Assistant Attorney General in this regard. Existing Colorado Rule 4.05.15 requires operators to " * * * replace the water supply of any owner of a vested water right which is proximately injured as a result of the mining activities in a manner consistent with applicable State law" (emphasis added).

For underground mining operations conducted after October 24, 1992, Colorado has received one complaint alleging subsidence-related structural damage and two complaints alleging water supply loss or contamination. Colorado investigated all three complaints. Colorado determined the complaint alleging subsidence-caused structural damage to be without basis. One of the complaints alleging water supply loss or contamination was withdrawn, and the second was under investigation by Colorado.

On May 4 and 31, 1995, OSM confirmed with Colorado that 11 of its 25 underground coal mines produced coal after October 24, 1992 (Administrative Record No. CO-668). At that time, OSM also discussed with Colorado the status of the State's revision of its program to include counterparts to SMCRA and the implementing Federal regulations.

Effective July 1, 1995, the Colorado legislature amended the Colorado Surface Coal Mining Reclamation Act, C.R.S. 34-33-101, *et seq.*, (Administrative Record No. CO-664) to serve as a statutory basis for a subsidence material damage rule to replace Rule 4.20.3(2), which, as discussed above, expired under Colorado's Sunset Law. On May 24, 1995, the Colorado Mined Land

Reclamation Board commenced rulemaking to replace this rule. Upon the completion of these actions, Colorado believes that it will have fully implemented counterparts to the subsidence material damage provisions of the Federal regulations at 30 CFR 817.121(c)(2).

Colorado stated that C.R.S. 34-33-111(1)(m) and Rule 2.05.6(3), which address protection of the hydrologic balance, give it the necessary authority to require replacement of drinking, domestic, or residential water supplies in a manner no less effective than 30 CFR 817.41(j) (Administrative Record No. CO-664). However, Colorado has not yet received an opinion from the Colorado Assistant Attorney General as to whether related Rule 4.05.15 limits the replacement of water supplies to those with "vested water rights."

Colorado received no additional complaints. The investigation of the water supply complaint is ongoing. With respect to the structural damage complaint that Colorado initially determined was without basis, Colorado and OSM are reviewing information supplied by the complainant with the intent of resolving the complainant's concerns.

Comments. On April 6, 1995, OSM published in the **Federal Register** (60 FR 17501) 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 Colorado (Administrative Record No. CO-662). The comment period closed on May 8, 1995. Because OSM did not receive a request for a public hearing, OSM did not hold a public hearing. OSM received comments from two parties in response to its notice.

One 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. CO-666). 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 Utah section E. These concerns about direct Federal enforcement are moot

issues for Colorado because the Regional Director has decided, as set forth below, not to implement an enforcement alternative including direct Federal enforcement.

Another party commented on the national Federal regulations (Administrative Record No. CO-665) after OSM published them as a final rule on March 31, 1995 (60 FR 16722). These comments are not germane to OSM's April 6, 1995, **Federal Register** 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 Colorado.

Regional Director's decision. Prior to the Regional Director making this decision on which enforcement alternative should be implemented in Colorado, the Albuquerque Field Office on May 4 and 31, 1995, consulted with Colorado in accordance with 30 CFR 843.25(a)(4) (Administrative Record No. CO-668). Because the number of mines in Colorado that are subject to section 720(a) of SMCRA is low, Colorado has made significant progress in promulgating the necessary statutory and rule provisions, and Colorado has shown a commitment to investigating citizen complaints regarding subsidence and water supply impacts, the Field Office and Colorado agreed that Colorado should be the primary enforcer of its State program provisions for subsidence-caused material damage to noncommercial buildings and to occupied dwellings and related structures and for drinking, domestic, and residential water supplies adversely affected by underground coal mining. Only, if a situation arises in which Colorado's enforcement role as primary enforcer does not appear to fully meet the requirements of section 720(a) of SMCRA, would OSM through Federal oversight issue ten-day notices.

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 Colorado will occur through State enforcement.

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

D. Enforcement in New Mexico

New Mexico Program Activity, Requirements, and Enforcement

By letter to New Mexico dated December 14, 1994, OSM requested information that would help OSM decide which approach to take in New Mexico to implement the requirements of section 720(a) of SMCRA, to implementing Federal regulations, and/or the counterpart New Mexico program provisions (Administrative Record No. NM-725). By letter dated December 22, 1994, New Mexico responded to OSM's request (Administrative Record No. NM-726).

New Mexico stated that two underground coal mines were active in New Mexico after October 24, 1992. New Mexico stated that it intended to revise its subsidence information and control plan provisions at Coal Surface Mining Commission (CSMC) Rule 80-1-20-124 to be no less stringent than section 720 of SMCRA.

New Mexico did not indicate whether it had authority within its program to investigate citizen complaints of structural damage or water supply loss or contamination caused by underground mining operations conducted after October 24, 1992. New Mexico had not received 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. New Mexico indicated that both of the underground mines that operated after October 24, 1992, are located several miles from structures subject to the Federal requirements for subsidence-related material damage.

On May 13, 1995, New Mexico proposed an amendment to OSM for its permit application requirements at CSMC Rule 80-1-9-39 (Administrative Record No. NM-739). Specifically, New Mexico proposed to revise its subsidence information and control plan requirements at this rule with the intent of making it consistent with section 720 of SMCRA. OSM is currently reviewing the effectiveness of this proposed rule.

On May 3 and June 5, 1995, OSM confirmed with New Mexico that two underground coal mines were active after October 24, 1992 (Administrative Record No. NM-746). New Mexico stated that it had received no subsidence material damage or water supply complaints for these operations, and that neither operation has noncommercial buildings or occupied dwellings and related structures, or developed water sources, within the

projected subsidence angles of draw. New Mexico indicated that, if it were necessary to apply the provisions of 30 CFR 817.41(j) and 817.12(c)(2) before it had revised its program to be no less effective than these Federal regulations, it would pursue enforcement utilizing general provisions contained in the State regulations.

Comments. On April 6, 1995, OSM published in the **Federal Register** (60 FR 17501) 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 New Mexico (Administrative Record No. NM-737). 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 one of the parties that commented on the Colorado program the same comments regarding total or partial direct interim Federal enforcement and ten-day notice procedures (Administrative Record No. NM-749). OSM does not agree with the commenter's assertions. 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 Utah section E. These concerns about direct Federal enforcement are moot issues for New Mexico 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 New Mexico, the Albuquerque Field Office on May 3 and June 5, 1995, consulted with New Mexico in accordance with 30 CFR 843.25(a)(4) (Administrative Record No. NM-746). Because there has been little underground mining activity since October 24, 1992; there is little likelihood for subsidence damage to noncommercial buildings and to occupied dwellings and related structures, or adverse effects to drinking, domestic, and residential water supplies by underground coal mining; and New Mexico has already proposed to OSM revisions to part of its regulatory program, the Field Office and New Mexico agreed that it is unlikely that any State or Federal enforcement would be necessary in the State during the interim period between October 24, 1992, and the date by which New Mexico entirely 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 New Mexico is not reasonably likely to be required and that implementation will be accomplished through the State program amendment process. On June 22, 1995, OSM notified New Mexico of the specific revisions that it must make to its regulatory program to be no less stringent than SMCRA and no less effective than the implementing Federal regulations (Administrative Record No. NM-747).

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

E. Enforcement in Utah

Utah Program Activity, Requirements, and Enforcement

By letter to Utah dated December 14, 1994, OSM requested information that would help OSM decide which approach to take in Utah to implement the requirements of section 720(a) of SMCRA, the implementing Federal regulations, and/or the counterpart Utah program provisions (Administrative Record No. UT-1001). By letter dated January 20, 1995, Utah responded to OSM's request (Administrative Record No. UT-1015).

Utah stated that the number of underground coal mines in operation after October 24, 1992, may be found in the past and current grant applications filed annually with OSM. From review of these grant applications, OSM determined that there are approximately 21 underground mines that operated after October 24, 1992.

As submitted to OSM on April 14, 1994, and subsequently revised on December 14, 1995 (Administrative Record Nos. UT-917 and UT-997), Utah proposed subsidence material damage provisions at Utah Code Annotated (UCA) 40-10-18(4) that were intended to be counterparts to the provisions of section 720(a)(1) of SMCRA. OSM has not yet published, in accordance with 30 CFR Part 732.17, a final rule **Federal Register** notice detailing its decision on the proposed provisions.

In its January 20, 1995, letter, Utah indicated that it intends to promulgate by March 1996 water replacement statutory provisions that are

counterparts to the provisions of section 720(a)(2) of SMCRA.

Utah did not state whether it has authority to investigate citizen complaints of structural damage or water loss caused by underground mining operations conducted after October 24, 1992. Utah indicated that it did receive, investigate, and resolve one citizen complaint after October 24, 1992, but is also indicated that the complaint was judged not to be one that the Energy Policy Act of 1992 revisions to section 720 of SMCRA could remedy.

On May 1 and 31, and June 5, 1995, OSM discussed with Utah its regulatory program as it relates to section 720 of SMCRA (Administrative Record No. UT-1058).

After further review, OSM has determined that 16 underground mines conducted mining operations after October 24, 1992. Utah has not received for these operations any complaints relating to subsidence damage to noncommercial buildings and to occupied dwellings and related structures, or adverse effects to drinking domestic, and residential water supplies.

Utah stated that it still intends to introduce a water replacement counterpart section 720(a)(2) of SMCRA to its legislature during the 1996 session and that it intends to undertake rulemaking by the summer of 1996. Utah stated that, although there is potential for conflicts with State water law regarding replacement of "junior" water allocation, it is committed to developing water replacement regulations that meet both the requirements of section 720(a)(2) of SMCRA and 30 CFR 817.41(j) and water rights doctrine. Notwithstanding these future program revisions, Utah indicated that it has the authority under existing enactments and rules to adequately address water replacement issues as they arise. It stated that it is committed to the investigation and resolution of citizens' concerns regarding water sources.

Comments. On April 6, 1995, OSM published in the **Federal Register** (60 FR 17501) 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 Utah (Administrative Record No. UT-1039). The comment period closed on May 8, 1995. In response to a request, OSM held a public hearing on May 1, 1995, in Salt Lake City, Utah. OSM entered into the administrative record a verbatim transcript of the hearing testimony

(Administrative Record No. UT-1050). Following are summaries of all substantive comments that OSM received, and OSM's responses to them.

Two commenters indicated that there are 13 active underground mines in Utah (Administrative Record Nos. UT-1045, 1049, and 1050). By OSM's count, there are 16 mines that operated after October 24, 1992, and that are subject to the provisions of the Energy Policy Act.

One 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. UT-1060). 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.

Two commenters recommended that Utah take over the immediate enforcement of Energy Policy Act provisions and 30 CFR 817.41(j) and 817.121(c)(2) because (1) There is a relatively low number of active underground coal mines in Utah, (2) there have been a relatively low number of citizen complaints dealing with subsidence material damage or water supply damage. (3) Utah has promptly taken remedial action of all citizen complaints received, (4) Utah is Keenly aware of State water law, (5) Utah has qualified personnel to enforce the requirements of the Energy Policy Act (Administrative Record Nos. 1045, 1049, and 1050). OSM acknowledges these recommendations and took them into consideration in making a decision on enforcement in Utah.

One commenter stated that the water supply protections afforded by March 31, 1995, Federal regulations are currently in place under the Utah Water Code and that, without further amendment of Utah law, enforcement of these regulations may be accomplished through a memorandum of understanding (MOU) between the Utah Division of Oil, Gas and Mining (Division) and the Utah State Engineer (Engineer, Administrative Record No. UT-1046). Another commenter submitted a suggested MOU addressing water replacement that could be entered into the Division and the Engineer (Administrative Record No. UT-1050). In response to a commenter's perception that a regulatory gap exists between what the Division is willing to enforce and what the Utah State Engineer is willing to enforce (Administrative Record No. UT-1050), the Division endorsed the concept of an MOU with the Engineer as a means to bring together in a complete regulatory framework the Division's

determinations on mining's impact on water and the Engineer's determinations of adjudications on water rights. OSM's response to these comments and submission is that, although this is one approach that Utah may decide to pursue, this MOU is not in place and as such is not a consideration in the Regional Director's decision on whether to institute direct Federal enforcement in Utah. If Utah decides to modify its approved regulatory program through such an MOU, it would have to submit it as a State program amendment for OSM approval in accordance with 30 CFR 732.17.

The Utah Division of Oil, Gas and Mining stated that direct Federal enforcement in the State would amount to institution of a separate Federal program to address only subsidence damage and water replacement issues (Administrative Record No. UT-1050). In its opinion, this would be an inefficient and wasteful use of scarce budgetary resources because (1) It has adequate authority to implement the subsidence damage and water replacement provisions required by the Energy Policy Act and the implementing regulations, (2) there exists significant legal and administrative impediments to creation of a successful separate federal program, and (3) it can have new regulatory provisions in place, if necessary, by March 1996. In making the decision that is set forth below, OSM has given thoughtful consideration to Utah's concerns. OSM does not consider that any direct Federal enforcement in Utah would be inefficient and wasteful because OSM also has a responsibility under section 720(a) of SMCRA to ensure that the protective provisions to remedy subsidence material damage and adversely affected water supplies are promptly applied.

The Division indicated its intent to actively seek the input of the Utah Division of Water Rights when it develops water supply regulations so that these regulations are consistent with existing water rights doctrine. The Division and several other commenters made statements about what State water law and the Utah State Engineer require or do not require with respect to water rights and allocations. Some of these comments related directly or indirectly to the implementation of section 720(a) and 30 CFR 817.41(j). OSM responds to these comments by reiterating its position on water rights that was included in the preamble to the March 31, 1995, Federal regulations.

Section 717(a) requires deference to State water law on questions of water allocation

and use. OSM interprets section 720 and the implementing rules as not requiring the replacement of water supplies to the extent underground mining activities consume or legitimately use the water supply under a senior water right determined under applicable State law. See *In re Permanent Surface Mining Regulation Litigation II, Round III*, 620 F. Supp. 1519, 1525 (D.C.D.C. 1985). However, OSM believes that section 717(a) concerns rights under State water law to consumption or use of water, and was not intended to address destruction or damage of the source of water, or contamination of water supply. Thus, OSM anticipates that underground mining activities which cause destruction or damage of a water supply source, or contamination of a water supply, would be subject to the replacement requirements of section 720 even if the permittee possessed senior water rights.

(60 FR 16722, 16733).

Two commenters indicated that, in a proceeding before the Board on Oil, Gas and Mining concerning alleged diminution and contamination by a Utah mining operation of a water source, the Division was unwilling to enforce the water replacement requirements of section 720(a) of SMCRA (Administrative Record Nos. UT-1047, 1048, and 1050). These commenters, and one other person (Administrative Record No. UT-1050), stated that the Division had not fully enforced the water protection provisions of the Utah program. One of the commenters recommended a number of changes in the implementation of the Utah program and indicated that, until these changes were made, OSM should conduct oversight Utah's implementation of the ground-water protection provisions of the Utah program and, if necessary, directly enforce water resources protection provisions in Utah. The other commenter recommended, at a minimum, joint Division and OSM enforcement of the Energy Policy Act requirements, or direct Federal enforcement. OSM acknowledges these comments and took them into consideration in making the decision set forth below.

One commenter stated that, to the best of his knowledge, Utah does not conduct any monitoring of the hydrological consequences of a mine after it has been permitted to determine whether the mine is affecting the hydrologic balance as predicted in the permit (Administrative Record No. UT-1050). In response to this statement, the Division indicated that, during the operation of a mine, it does reevaluate the hydrologic impact conclusions made at the permitting stage in light of monitoring data collected during the

mine's operation (Administrative Record No. UT-1050).

Regional Director's decision. Prior to the Regional Director making this decision on which enforcement alternative should be implemented in Utah, the Albuquerque Field Office, on May 1 and 31, and June 5, 1995, consulted with Utah in accordance with 30 CFR 843.25(a)(4) (Administrative Record No. UT-1058).

The majority of Utah mines have operated after October 24, 1992, and are subject to the provisions of section 720(a) of SMCRA and the implementing Federal regulations. Although Utah has implemented its regulatory program provisions concerning hydrologic information and hydrologic balance and is committed to the investigation and resolution of citizens' concerns regarding water sources, there are, as is documented in the written record of the public hearing, current concerns and potential for additional complaints regarding the loss, contamination, or diminution of water sources that serve large populations in the coal producing counties in Utah. The mid-1996 projection for promulgating statutory and regulatory State program provisions for water replacement is in keeping with usual timeframes for enactment of legislation and revision of regulations.

The Field Office and Utah agreed that Utah should be the primary enforcer of its State program provisions for subsidence-caused material damage to noncommercial buildings and to occupied dwellings and related structures and for drinking, domestic, and residential water supplies adversely affected by underground coal mining. However, the Field Office found that it is unclear that the water supply protections of section 720(a)(2) of SMCRA and 30 CFR 817.41(j) can be implemented by Utah in all cases. Therefore, the Field Office concluded that, if a situation arises in which Utah's enforcement role as primary enforcer does not appear to fully meet the water replacement requirements of section 720(a)(2) of SMCRA, OSM must take 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 Utah will occur through State enforcement and, if necessary, direct Federal enforcement of section 720(a)(2) of SMCRA and 30 CFR 817.41(j).

If circumstances within Utah 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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BILLING CODE 4310-05-M

30 CFR Parts 915, 916, and 925

Iowa, Kansas, and Missouri 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 Iowa, Kansas, and Missouri. 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 Iowa, Kansas, and Missouri 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: Michael C. Wolfrom, Acting Director, Kansas City Field Office, Telephone: (816) 374-6405.

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