

of underground mining operations. As of January 13, 1995, Virginia found that a violation of the Act existed on 35 of the complaints, no violation of the Act existed on 202 of the complaints, and technical reports and a final decision were pending on 25 complaints.

On May 10, 1995 (Administrative Record Number VA-856), OSM met with the Virginia Division of Mined Land Reclamation (DMLR) to discuss implementation issues relative to the Energy Policy Act of 1992. At that meeting, OSM agreed with DMLR concerning the following interpretation of the Virginia program:

- Virginia has full statutory authority at section 43.1-258. of the Code of Virginia to require the replacement of drinking, domestic or residential water supplies contaminated, diminished or interrupted by underground mining activities conducted after October 24, 1992.

- Virginia has full authority at section 480-03-19.817.121(C)(2) of the Virginia Coal Surface Mining Reclamation Regulations to require the repair or compensation for damage to non-commercial buildings and dwellings and related structures resulting from subsidence caused by underground mining activities conducted after October 24, 1992.

Comments. On April 7, 1995, OSM published in the **Federal Register** (60 FR 17743) 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 Virginia. 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.

One commenter (Administrative Record Numbers VA-862) asserted that the enforcement alternatives incorporating total or partial direct interim Federal enforcement (items (3) and (4) in section I.B. above) have no statutory basis in SMCRA and are not consistent with Congress' intent in creating section 720 of SMCRA. The party also commented that the waiving of ten-day notice procedures under direct Federal enforcement is not consistent with Federal case law. A second commenter adopted these comments by reference. OSM does not agree with the commenter's assertions, and it addressed similar comments in the March 31, 1995, **Federal Register** (60 FR 16722, 16742-16745). These concerns about direct Federal

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

Another commenter stated that the Virginia program currently has adequate counterpart provisions in place and has proper authority to implement the requirements of the Energy Policy Act of 1992 in Virginia (Administrative Record Number VA-860). The party also stated that Virginia's investigations of subsidence related complaints has been designed to ensure prompt remedial action. These investigations, the commenter asserted, have been deemed fair by both the mining industry and the affected public. The commenter concluded that initial enforcement of the requirements of the Energy Policy Act of 1992 in Virginia is already being accomplished by the Virginia program.

One commenter requested "interim direct OSM enforcement" (Administrative Record Number VA-857). The commenter asserted that even though Virginia has statutory and regulatory provisions in place that are counterparts to the Energy Policy Act of 1992, Virginia provides inadequate protection for citizens residing in the coalfields. The commenter asserted that Virginia fails to attribute subsidence and water loss damages of any extent to underground coal mining operations. The commenter asserted that subsidence damages to the hydrologic regime and personal property (homes, ponds, outbuildings, etc.) are each looked at by the State as an isolated event rather than tied together to show the wide expanse of subsidence damage in Virginia. On March 10, 1995 this same commenter requested that OSM conduct a review of the Virginia program to verify similar allegations. That review is currently being conducted by OSM and it will address the commenter's allegations concerning the Virginia program.

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 Virginia will be accomplished through State enforcement. The Director has made this decision after soliciting public comment and providing opportunity for public hearing (no requests for a hearing were received), and considering information provided by Virginia by letters dated January 13, 1995, and May 26, 1995, and in discussions held with Virginia on May 4, 1995. The Director has concluded that under the Code of Virginia section 41.1-258, the State has full authority to require the replacement

of drinking, domestic or residential water supplies contaminated, diminished or interrupted by underground mining activities conducted after October 24, 1992. In addition, Virginia has full authority at section 480-03-19.817.121(c)(2) of the Virginia Coal Surface Mining Reclamation Regulations to require the repair or compensation for damage to non-commercial buildings and dwellings and related structures resulting from subsidence caused by underground mining activities conducted after October 24, 1992.

If circumstances within Virginia 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.

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30 CFR Part 948

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

EFFECTIVE DATE: July 28, 1995.

FOR FURTHER INFORMATION CONTACT: James C. Blankenship, Jr., Director, Charleston Field Office, Office of Surface Mining Reclamation and Enforcement, 1027 Virginia Street East, Charleston, West Virginia 25301-2816, Telephone: (304) 347-7158.

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 noncommercial 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 11, 1995, **Federal Register** (60 FR 18381) 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 provision's 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 that 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 buildings," "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 West Virginia

West Virginia program activity, requirements, and enforcement. By letter to West Virginia dated December

16, 1994, OSM requested information that would be useful in determining how to implement section 720(a) of SMCRA and the implementing Federal regulations in West Virginia (Administrative Record No. WV 965). By letter dated January 11, 1995, West Virginia to this request (Administrative Record No. WV 966).

The West Virginia Division of Environmental Protection (WVDEP) notified OSM that there were approximately 650 active underground coal mines operating in West Virginia at the time. West Virginia stated that it believed the existing State program provisions are adequate to fully implement the letter and intent of section 720 of SMCRA. WVDEP further explained that its continued enforcement of its State program provisions at sections 22A-3-14(b)(1) and 22A-3-24(b) of the West Virginia Code and/or West Virginia Code of State Regulations (CSR) sections 38-2-14.5(h) and 38-2-16.2 would ensure compliance with section 720 of SMCRA.

West Virginia noted that section 22A-3-24(b) of the West Virginia Code allows for a waiver of water replacement rights by current landowners. According to WVDEP, this is part of a program amendment that is under review by OSM.

West Virginia also acknowledges that since WVDEP revised its rules on June 1, 1991, it has been requiring operators to either correct material damage resulting from subsidence caused to any structures or facilities by repairing the damage or compensate the owners of such structures or facilities in the full amount of the diminution in value resulting from subsidence. In addition, West Virginia issued a policy directive on March 23, 1993, which provides that permits issued before June 1, 1991, and which have a waiver to subsidize without liability are exempt from the new requirements. Permits issued prior to June 1, 1991, without waivers and all permits issued after that date are required to comply with the revised regulations.

OSM estimates that West Virginia has investigated approximately 190 citizen complaints between June 1, 1991, and October 24, 1992, and approximately 330 citizen complaints after October 24, 1992, that allege subsidence-caused structural damage and/or water supply loss or contamination as a result of underground mining operations. To date, West Virginia has investigated these complaints and determined that the problems: (1) Were not caused by mining; (2) were caused by mining with resultant enforcement action/or corrective measures taken; or (3) are

problems under continuing investigation to determine whether caused by mining.

Upon initial review of the West Virginia program, OSM was concerned that the State did not have adequate authority to fully enforce the provisions of the Energy Policy Act of 1992. Specifically, the State's March 31, 1993, policy, which provides that permits issued prior to June 1, 1991, that have waivers to subsidize without liability do not have to repair or compensate owners for material damage caused by subsidence, is inconsistent with the Energy Policy Act which requires repair or compensation for subsidence damage which occurs after October 24, 1992. In addition, West Virginia Code section 22A-3-24(b) and State regulations at CSR 38-2-14.5(h) authorize the waiver of water supply replacement.

On June 30, 1995 (Administrative Record Number WV-996), West Virginia revised its subsidence policy procedures to address these concerns. The revised procedures took effect on July 10, 1995. The revised policy requires owners of permits with waivers issued prior to June 1, 1991, to repair or compensate owners of residential dwellings for subsidence related damage. The new policy is retroactive, and makes all permits, regardless of issuance date, liable for subsidence damage caused by underground mining that occurred after October 24, 1992.

The West Virginia program currently contains the requirements of 30 CFR 817.41(j), pertaining to replacement of drinking, domestic or residential water supplies. However, in those cases where the owner has waived replacement of a water supply West Virginia's program does not require the permit applicant to demonstrate that an alternate water source is available which is equivalent in quality and quantity to the premining water supply, that the affected water supply was not needed for the land use in existence at the time the supply was affected, or that the affected water supply is not essential to achievement of the approved postmining land use. These demonstrations are all required as prerequisites to waiver of water replacement pursuant to the new Federal definition of "replacement of water supply" at 30 CFR 701.5. West Virginia has stated that its new policy with regard to water replacement and subsidence repair, effective July 10, 1995, is intended to address the requirements of the Energy Policy Act of 1992 and the accompanying Federal regulations, published on March 31, 1995. 60 FR 16722. With the exception of the water replacement waiver criteria, the West Virginia program and

accompanying policy document do contain the necessary counterparts to 30 CFR 817.41(j) to allow for state enforcement of that provision. Further, the Director believes that the discrepancy between the Federal regulations and West Virginia's program with regard to water replacement waivers is of insufficient magnitude to warrant direct Federal enforcement of the water replacement requirement. The Director reaches his conclusion because he believes that few or no situations are likely to arise involving underground mining and waiver of water supply replacement where the approved postmining land use is residential. Therefore, the Director finds that state enforcement is the most reasonable option for West Virginia.

Comments. On April 11, 1995, OSM published in the **Federal Register** (60 FR 18381) an opportunity for a public hearing and 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 West Virginia. The comment period closed on May 11, 1995. OSM received one request to conduct a hearing. Although the party that requested the hearing subsequently withdrew that request, a public meeting was held on May 8, 1995, at the OSM Area Office, Logan, West Virginia (Administrative Record Number WV-977). No person attended to speak or discuss recommendations with OSM. One individual attended only as an observer to the activities. A summary of the meeting was entered into the administrative record (Administrative Record Number WV-977). OSM received three comments in response to its notice. Following are summaries of all the substantive comments that OSM received, and OSM's responses to them.

One party commented 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 Number WV-994). The party also commented that the waiving of ten-day notice procedures under direct Federal enforcement is not consistent with Federal case law. OSM does not agree with the commenter's assertions, and it addressed similar comments in the March 31, 1995, **Federal Register** (60 FR 16722, 16742-16745). These concerns about direct Federal enforcement are moot issues in West Virginia because the Regional Director has decided, as set forth below, not to implement an

enforcement alternative including direct Federal enforcement.

Another organization commented that West Virginia has immediate authority to implement the provisions of the Energy Policy Act of 1992 to protect water and homes from damage from underground mining (Administrative Record Number WV-978). To get prompt, strict enforcement of the provisions of the Energy Policy Act the commenter recommended that OSM log and track all water loss and subsidence complaints and independently assess the State's conclusions. The State and OSM have agreed to set up a joint team to review all the complaints relating to subsidence and water loss filed between October 24, 1992, through July 10, 1995, the date of the new State subsidence procedures discussed above. However, since West Virginia has equivalent provisions to the Federal subsidence regulations (with the subsidence procedures policy of July 10, 1995) it is the State's responsibility to enforce those provisions. OSM will conduct normal oversight of the West Virginia program for the period following July 10, 1995, using the ten-day notice process if necessary.

The commenter also made additional recommendations. The Regional Director notes, however, the subject of the comments (baseline groundwater well sampling, presubidence survey requirements at 30 CFR 784.20, and timeframes for submitting State amendments to fully address such other requirements) are outside the scope of this notice.

A third organization commented that although West Virginia has statutory and regulatory provisions in place that correspond in some ways to the requirements of the Federal law, OSM should select joint State and OSM initial enforcement of the provisions of the Energy Policy Act of 1992 that the State has not yet fully addressed (Administrative Record Number WV-981). The commenter specifically noted that the West Virginia program currently allows the waiver of water replacement rights by current landowners, and that it is unclear whether the State means to apply the requirements of the Energy Policy Act only to "permits" issued on or after October 24, 1992, or to all portions of operations conducted after October 24, 1992. The Regional Director notes, and as discussed above, the State has implemented on July 10, 1995, new subsidence policy procedures that address the commenter's concerns. According to the new State subsidence procedures, all permits, regardless of issuance date, are liable for subsidence damage caused by underground mining

that occurred after October 24, 1992. As for the waiver language at West Virginia Code section 22A-3-24(b) and the State regulations at CSR 38-2-14.5(h) concerning the waiver of water supply replacement, the Regional Director notes that the West Virginia program contains the requirements of 30 CFR 817.41(j) concerning drinking, domestic or residential water supply. The Regional Director notes that the State and OSM will jointly review all the complaints that were filed between October 24, 1992, and July 10, 1995, to ensure that the State's past enforcement actions complied with the requirements of the Energy Policy Act of 1992. If a complaint was filed that meets the criteria of the Energy Policy Act of 1992. If a complaint was filed that meets the criteria discussed above, State officials will take enforcement action to require the company to comply with the new policy.

The commenter also provided comments regarding proof of damage through presubidence surveys and baseline monitoring and delays in program implementation. Those concerns are outside the scope of this document, but will be addressed at a later date.

Director's decision. Based on the information provided by West Virginia, discussions held with the State on July 13, 1995, and the comments discussed above, the Regional Director has decided that enforcement of the underground coal mine subsidence control and water replacement requirements in West Virginia will be accomplished through State enforcement.

OSM's initial concern that the West Virginia program does not have adequate authority to enforce the provisions of the Energy Policy Act of 1992 has been addressed by the State. On July 10, 1995, West Virginia implemented new State subsidence policy procedures that require repair or compensation for subsidence damage after October 24, 1992, consistent with 30 CFR 817.121(c)(2), and the approved program requires replacement of water supplies consistent with 30 CFR 817.41(j). In addition, OSM and the State will jointly review all the complaints filed between October 24, 1992, through July 10, 1995, to ensure that the State's past actions with regard to these complaints are consistent with the Energy Policy Act of 1992.

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

Dated: July 24, 1995.

Allen D. Klein,

Regional Director, Appalachian Regional Coordinating Center.

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[TN131-1-6794a; TN136-1-6795a; TN137-1-6796a; FRL-5257-5]

Approval and Promulgation of Air Quality Implementation Plans; Tennessee; Basic Motor Vehicle Inspection and Maintenance Program

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: EPA is approving three state implementation plan (SIP) revisions submitted on March 17, July 8 and July 13, 1994, by the State of Tennessee, through the Tennessee Air Pollution Control Division. The revisions submitted March 17, 1994, modify the existing basic motor vehicle inspection and maintenance (I/M) program in Davidson County to meet the requirements of the EPA I/M regulations, as published on November 5, 1992. The revisions submitted on July 8 and July 13, 1994, establish and require the implementation of a basic I/M program in the four middle Tennessee counties of Rutherford, Sumner, Williamson, and Wilson. These counties, along with Davidson County, form the Nashville ozone nonattainment area. The regulations establishing the I/M program constituted the July 8, 1994, submittal while the nonregulatory components of the program were discussed in the July 13, 1994, submittal.

DATES: This final rule will be effective September 26, 1995 unless adverse or critical comments are received by August 28, 1995. If the effective date is delayed, timely notice will be published in the **Federal Register**.

ADDRESSES: Written comments on this action should be addressed to Dale Aspy at the EPA Regional office listed below.

Copies of the documents relative to this action are available for public inspection during normal business hours at the following locations. The interested persons wanting to examine these documents should make an appointment with the appropriate office at least 24 hours before the visiting day. Air and Radiation Docket and Information Center (Air Docket), U.S.