DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Parts 901 and 924

Alabama and Mississippi 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 Alabama and Mississippi. 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, be required in Mississippi and therefore accomplished through State and OSM enforcement. 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 section 720(a)(1) and (2) of SMCRA (60 FR 16722).

30 CFR 817.121(c)(2) 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 if 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 10, 1995, Federal Register (60 FR 18044) 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, than OSM could decide not to directly enforce the Federal provisions in the State. In this situation, the State would enforce its Statutory and regulatory provisions and OSM would modify 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) and the State does not have any statutory or regulatory provisions for all underground mining activities conducted after October 24, 1992, then the State would enforce its provisions for these operations.

(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.

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 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 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, 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 843.129a(2) would not apply. That is, when on the basis of a Federal inspection OSM determined that a violation of 30 CFR 817.121(c)(2) existed, OSM would issue a notice of violation or cessation order without first sending a ten-day notice to the State.

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

Lastly, under direct Federal enforcement, OSM would also implement the new definitions at 30 CFR 701.5 of "drinking, domestic or residential water supply," "material damage," "non-commercial building," "occupied dwelling," "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 Alabama

Alabama program activity, requirements, and enforcement. By letter to Alabama 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 Alabama (Administrative Record No. AL-521). By letter dated January 12, 1995, Alabama responded to this request (Administrative Record No. AL-521).

Alabama stated that ten underground coal mines were active in Alabama after October 24, 1992. Alabama stated that the Alabama program does not fully authorize enforcement of the repair or compensation of material damage requirements of Section 720(a) of SMCRA and the implementing Federal regulations. Alabama's regulations are silent on the issue of replacement of water supplies damaged by subsidence but do contain a "to the extent required by State law" limitation on repair of material damage to structures. Alabama has not determined whether a change to the State Act is necessary to implement the new definition at 30 CFR 701.5 of "drinking, domestic or residential water supply' that were adopted with the new underground mining regulations. Alabama has in fact adopted the replacement requirements should be required under the Energy Policy Act (EPACT). Further analysis would be necessary by the State legal staff before a determination can be made of the need for statutory revisions.

Alabama has assumed since the passage EPACT that the retroactive enforcement of its provisions by Alabama would be possible until regulatory changes can be made. Alabama has in fact adopted the position that since the effective date of EPACT they have had enforcement authority of its provisions.

Since October 24, 1992, Alabama has had only one citizen complaint where alleged damage to structures from subsidence has existed. This complaint covered a church and several houses. No complaints have been received alleging damage to water supplies due to subsidence.

Representatives from OSM's Birmingham Field Office met with Alabama on May 2, 1995. Alabama confirmed it has the authority to enforce the water replacement provisions of 30 CFR 817.41(j) for underground mining activities conducted after October 24, 1992. The State will not, however, be able to fully enforce the repair or compensation of material damage resulting from subsidence provisions of 30 CFR 817.121(c)(2) because of certain limitations placed on compensation in the current State status.

Comments. On April 10, 1995, OSM published in the Federal Register (60 FR 18044) 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 Alabama. The comment period closed on April 20, 1995. The comment period was subsequently extended to May 10, 1995 (60 FR 20193, April 25, 1995). Because OSM did not receive a request for one, OSM did not hold a public hearing. OSM received one comment in response to its notice. Following is OSM's response to it.

OSM received comments from one party in response to its notice (Administrative Record Number AL-546). The party stated 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 procedure 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 was 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 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 waiver 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 primary procedures. OSM believes that the process adopted in this final rule is consistent 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 provided by Alabama, discussions held with Alabama on May 2, 1995, and the comment discussed above, the Director has decided that enforcement of the underground coal mine subsidence control and water replacement requirements in Alabama will be accomplished through joint State and OSM enforcement. Alabama will enforce its provisions for the replacement of water supplies affected by underground mining activities conducted after October 24, 1992. OSM will enforce those provisions of 30 CFR 817.121(c)(2) pertaining to the repair of material damage resulting from subsidence that are not covered or are limited by the State provisions of underground mining activities conducted after October 24, 1992.

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

D. Enforcement in Mississippi

Mississippi program activity, requirements, and enforcement. By letter to Mississippi 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 Mississippi (Administrative Record No. MS±328). Mississippi did not respond to this request in writing. On May 10, 1995, representatives from OSM's Birmingham Field Office and the State met to discuss how the provisions of the Energy Policy Act would be implemented. Mississippi has had no surface or underground coal mining operations for several decades. At present, Mississippi is in the process of completely revising its approved regulatory program. It was agreed that the program revision process addressed in the Federal regulations at 30 CFR Part 732 would be implemented. Comments. On April 10, 1995, OSM published in the Federal Register (60 FR 18045) 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 Mississippi. The comment period closed on April 30, 1995. The comment period was subsequently extended to May 10, 1995 (60 FR 21093, April 25, 1995). Because OSM did not receive a request for one, OSM did not hold a public hearing. OSM received one comment in response to its notice. Following is OSM's response to it.

A mining association responded on May 12, 1995 (Administrative Record Number MS±331). The party stated that the enforcement alternatives incorporating total or partial direct/immediate Federal enforcement (items (3) and (4) in section I.B. above) have no statutory basis in SMCRA and are not consistent with Congress' intent in creating section 720 of SMCRA. The party also commented that the waiving of ten-day notice procedures under direct Federal enforcement is not consistent with Federal case law. OSM does not agree with the commenter's assertions, and it addressed similar comments in the March 31, 1995, Federal Register (60 FR 16722, 16742-16745). These concerns about direct Federal enforcement are moot issues in Mississippi because the Regional Director has decided, as set forth below, not to implement an enforcement alternative including direct Federal enforcement.

Director's Decision. Based on discussions held with the State on May 10, 1995, and the comment discussed above, the Director has decided that initial enforcement of the underground coal mine subsidence control and water replacement requirements in Mississippi is not reasonably likely to be required and that implementation will be accomplished through the State program amendment process. There have been no underground mines in Mississippi for decades. Mississippi is in the process of amending its entire regulatory program and would enforce its statutory and regulatory provisions when its program is determined to be in accordance with the revised SMCRA and consistent with the revised Federal regulations.

If circumstances within Mississippi 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.

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