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: 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 section 720(a) (1) and (2) of SMCRA (60 FR 16772).

30 CFR 817.121(c)(2) requires in part that: The permittee must promptly replace the well or spring that is contaminated, diminished or interrupted 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.

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 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 in place that correspond to 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 statutory and regulatory provisions for all underground mining activities conducted after October 24, 1992, then the State would enforce its provisions for these operations.

(2) State enforcement. If the State has statutory or regulatory provisions that are counterpart to the Federal regulations at 30 CFR 817.41(j) and 817.121(c)(2) and the State has authority to implement 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's 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 the State has authority to implement its provisions for all underground mining activities conducted after October 24, 1992, 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's 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 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 operations on or after that date.

SUPPLEMENTARY INFORMATION:

A. The Energy Policy Act


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.

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(3) Interim direct OSM enforcement. If the State does not have any statutory or regulatory provisions in place that correspond to the Federal regulations at 30 CFR 817.41(j) and 817.121(c)(2) and the State has authority to implement its 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.

(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 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 operations on or after that date.

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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 OSM determined that a violation of 30 CFR 817.121(c) existed, OSM would issue a notice of violation or cessation order without first sending a ten-day notice to the State.

C. Enforcement in Alabama

OSM has concluded that it is not clear whether the protection standards of section 720 of SMCRA with sections 503, 505, and 521(b) should be used in lieu of direct interim Federal enforcement. OSM received comments from one party in response to its notice (Administrative Record Number AL-546). The party stated that the enforcement alternatives for 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 pursuing Federal enforcement without undermining State primacy under 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.
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 programs 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 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. 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.