

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

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

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

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

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

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

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

*Comments.* On April 7, 1995, OSM published in the **Federal Register** (60 FR 17741) an opportunity for a public hearing and a request for public comment to assist OSM in making its decision on how the underground coal mine subsidence control and water replacement requirements should be implemented in Kentucky. The comment period closed on May 8, 1995. Because OSM did not receive a request for one, OSM did not hold a public hearing. Following are summaries of all substantive comments that OSM received and OSM's responses to them.

A mining association responded on May 12, 1995 (Administrative Record No. KY-1356). The party commented that the enforcement alternatives incorporating total or partial direct interim Federal enforcement (items (3) and (4) in section I.B. above) have no statutory basis in SMCRA and are not consistent with Congress' intent in creating section 720 of SMCRA. Specifically, the party commented that SMCRA contains various statutory procedures for the amendment, preemption, and substitution of Federal enforcement of State programs (sections 503, 505, and 521(b) that should be used in lieu of direct interim Federal enforcement.

In response to this comment, OSM's position remains as was stated in the March 31, 1995, preamble for the Federal regulations at 30 CFR 843.25, which in part implement section 720 of SMCRA:

OSM has concluded that it is not clear from the legislation or legislative history, how Congress intended that section 720 was to be implemented, in light of existing SMCRA provisions for State primacy. Thus, OSM has a certain amount of flexibility in implementing section 720. After weighing these considerations, OSM intends to implement section 720 promptly, but will pursue Federal enforcement without undermining State primacy under SMCRA.

(60 FR 16722, 16743). Using this rationale, OSM concludes that there is not inconsistency in its implementation of section 720 of SMCRA with sections 503, 505, and 521(b) of SMCRA.

Further, the party commented that Congress' intent was that agreements between coal mine operators and landowners would be used to ensure that the protection standards of section 720 of SMCRA would occur rather than enforcement by State regulatory authorities and OSM. The party did not supply any legislative history to support this conclusion, and the plain language

of section 720 of SMCRA does not support this conclusion.

Lastly, the party commented that the waiving of ten-day notice procedures in implementing direct Federal enforcement is not consistent with Federal case law. OSM does not agree with the commenter's assertion. The following response to a similar comment in the March 31, 1995, **Federal Register** (60 FR 16722, 16742-16745) also applies to this comment.

[The commenter stated that] the proposal to provide for direct Federal enforcement ignores Federal case law which indicates that, as a general proposition, the State program, not SMCRA, is the law within the State. OSM recognizes that, under existing rules implementing SMCRA, States with approved regulatory programs have primary responsibility for implementing SMCRA, based on the approved program. However, in this rule, OSM has carved out a limited exception to the general proposition, to the extent necessary to give reasonable force and effect to section 720, while maintaining so far as possible State primacy procedures. OSM believes that the process adopted in this final rule is consistent with and authorized by Congress under the Energy Policy Act, and that case law interpreting other provisions of SMCRA is not necessarily dispositive.

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

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