

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