resolution of the matter. OSM notes, however, that the *Taylor* decision was vacated on jurisdictional grounds by the U.S. District Court for the Eastern District of Kentucky. *Coal Mac. Inc.* v. *Babbitt*, Civil No. 93–117 (October 3, 1994). The implications of these and other right-of-entry cases for Federal and State programs is under review by OSM.

The two environmental commenters who generally supported the Kringlen petition raised issues and made several rulemaking suggestions which were beyond the narrow scope of the Kringlen petition. OSM is, however, concerned that these comments may reflect some misunderstanding of the operation of the current rules. Therefore, OSM wishes to respond to the comments as follows:

(a) One environmental commenter would require that the permit applicant conduct a record search to ensure that the permit information is accurate and complete as implicitly required by sections 507(b) 1) and (2) and 507(b) (9) and (13) of the Act. OSM readily acknowledges that many times the need for the permit applicant to conduct a record search is implicit in fulfilling the information requirements of the cited sections.

However, there are many other times when a record search would reasonably not be necessary and, therefore, should not be required. For example, one commenter opposing the petition noted that documents dispositive to right-of-entry disputes providing for right-of-way, temporary easements, etc., are often not recorded in the courthouse and therefore would not be included among the petitioner's requested documents of record.

(b) This same environmental commenter opposed the current provisions of 30 CFR 778.15 which specifically require only that the application contain a description of the documents upon which the applicant bases his legal right to enter and begin surface coal mining operations. The commenter faults the preamble logic of the proposed and final § 778.15 which considered and rejected the required submission in all cases of actual copies of right-of-entry documents relied upon. 43 FR 41692, September 18, 1978, and 44 FR 15028, March 13, 1979. The commenter argues that the permit applicant should be required to submit in all cases, or at a bare minimum in disputed cases, the actual copies of all right-of-entry documents relied upon. For the reasons expressed in its 1978 and 1979 preambles and as echoed by another commenter oppossing the instant petition, OSM continues to believe that the required submission of all right-of-entry documents in all cases would often impose a significant and unnecessary burden on the permit applicant.

In support of its argument for the required submission of all right-of-entry documents in *disputed* cases, the prior environmental commenter expressed particular concern that once a right-of-

entry dispute arose, the regulatory authority might not have authority under 30 CFR 778.15 to require actual copies of the documents but would have to rely merely on a description of documents upon which the asserted applicant right-of-entry was based. The major industry commenter opposing the petition reviewed the 1979 preamble discussion of proposed 30 CFR 778.15 and concluded that the regulatory authority currently has authority to request such copies to resolve a dispute of fact as to whether a legal right claimed by the applicant exists. OSM concurs that the preamble discussions of proposed and final section 778.15 support this conclusion. 43 FR 41692, September 18, 1978, and 44 FR 15028, March 13, 1979.

Indeed, in most cases it would be difficult to conceive of the regulatory authority being able to resolve such disputes without viewing actual copies of documents relied upon for right-ofentry. Of course, because of the proviso clause in paragraph 507(b)(9) of the Act, such a determination of fact would not mean that the regulatory authority was making a legal determination about the right to enter. 43 FR 41692, September 18, 1978. With regard to the concerns raised by the petitioner, OSM has found that, with the exception of a few instances where the State counterpart to 30 CFR 778.15 was improperly applied in the State of Kentucky, the rule has generally worked to protect the rights of landowners as required by section 102(b) of the Act.

(c) The prior environmental commenter also requested that OSM: (1) Provide clarification as to the appropriate interpretation of existing procedures in the event of a dispute as to right-of-entry information in a permit application; and (2) conduct a national study of the right-of-entry issues raised by the petitioner and commenters. As noted above, these requests extend far beyond the narrow scope of the instant petition.

(d) The other environmental commenter suggested that the regulatory authority check and substantiate all submitted ownership documentation for completeness and authenticity. OSM experience indicates that this is not necessary on a routine basis and should be carried out only when needed. The regulatory authority does not have the manpower to do this on a routine basis nor the statutory authority to resolve the property disputes which could result from efforts to authenticate ownership documentation.

Summary

The information available to OSM indicates that the incident that prompted the petition represents a problem localized in the State of Kentucky. Requiring the applicant in all

cases to include documentation with public records identifying the surface owners of the property they propose to mine as well as the property contiguous to the proposed mining property as requested by the petitioner would often impose a substantial and unnecessary burden, particularly to coal companies and regulatory authorities involved in the permitting of large Western mines. Since the incident that prompted the petition, Kentucky has instituted a new policy which requires that when a surface owner files a protest to the issuance of a permit the Natural Resources and Environmental Protection Cabinet must make a determination as to whether the applicant has made a prima facie showing that he has the right to enter and mine the property. These facts lead us to conclude that there is insufficient basis for the national rulemaking requested by the petitioner. OSM shall, through its oversight program, evaluate Kentucky's protection of landowner rights to make certain that the State regulations as implemented are as effective as the Federal regulations in protecting those rights. In addition, OSM is reviewing the implications for Federal and State programs of recent court and IBLA decisions on right-ofentry issues. This petition and comments thereto shall become part of the record as OSM conducts oversight of the Kentucky State Program.

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FEDERAL EMERGENCY MANAGEMENT AGENCY

44 CFR Part 67

[Docket No. FEMA-7124]

Proposed Flood Elevation Determinations

AGENCY: Federal Emergency Management Agency, FEMA.

ACTION: Proposed rule.

summary: Technical information or comments are requested on the proposed base (100-year) flood elevations and proposed base flood elevation modifications for the communities listed below. The base (100-year) flood elevations are the basis for the floodplain management measures that the community is required either to adopt or to show evidence of being already in effect in order to qualify or remain qualified for participation in the National Flood Insurance Program (NFIP).