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	U· S· DEPARTMENT OF THE INTERIOR OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT DIRECTIVES SYSTEM	Subject Number: REG-27 (RESCINDED) Transmittal Number: 474 Date: 10/19/88

Subject: Water Replacement

Approval: [signature] Title: Deputy Director

1. PURPOSE. The purpose of this directive is to provide guidance for (1) implementing the water supply replacement requirement of section 717(b) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA) where OSMRE is the regulatory authority and (2) evaluating water supply replacement provisions of approved State regulatory programs.

2. DEFINITIONS. None.

3. POLICY/PROCEDURES.

a. Background. Section 717(b) of SMCRA requires that a person who conducts surface mining activities "shall replace the water supply of an owner of interest in real property who obtains all or part of his supply of water for domestic, agricultural, industrial or other legitimate use from an underground or surface source where such supply has been affected by contamination, diminution, or interruption proximately resulting from such surface coal mine operation." The permanent program regulations at 30 CFR 816.41(h) incorporate these requirements and also contain the statement that baseline hydrologic information required in 30 CFR 780.21 and 780.22 shall be used to determine the extent of the impact of mining upon surface water and groundwater.

In promulgating the permanent program regulations, OSMRE established a policy framework within which water supply replacement is to occur. This directive clarifies OSMRE's published policy on water supply replacement.

In the preamble to the final 1979 permanent program regulations on water replacement (44 FR 15175, March 13, 1979), OSMRE articulated three concepts in response to comments on the proposed rules. The first is that SMCRA requires replacement, not compensation, for water loss. The second is that under the normal rules of administrative law, the initial burden of production and proof rests with the party asserting that a water supply has been adversely affected. Third, OSMRE stated that SMCRA requires replacement of the water supply in all instances and that the landowner cannot waive replacement, since such a waiver would not provide adequate protection for present lessees or for future owners of the property involved.

In 1983 OSMRE added the requirement at 30 CFR 816.41(h) that baseline hydrologic information required in 30 CFR 780.21 and 780.22 (permit application contents) shall be used to determine the extent of the impact of mining upon surface water and groundwater (48 FR 43980, September 26, 1983). The preamble language clarified that the alternative water supply must be capable of restoring the water user's supply that was lost due to

surface mining impacts. OSMRE also stated that the water supply replacement requirement is tied to pre-existing uses and not to the postmining land use. OSMRE affirmed that water replacement rights operate in accordance with State water law and that the requirements of SMCRA do not change these rights except for requiring operators of surface coal mines to replace affected water supplies. Furthermore, since SMCRA requires a use be a "legitimate" use before it can qualify for replacement, OSMRE stated that any use that would be in violation of State water rights would not be a "legitimate" use.

In the preamble to the final 1979 rules on determination of bond amount (currently found at 30 CFR 800.14), OSMRE established a policy that has important implications for water replacement. Concerning situations where the unplanned consequences of mining, such as the need to abate groundwater pollution, may result in an increase in the cost of reclamation, OSMRE pointed out that the regulatory authority is authorized to impose additional bond liability in order to ensure adequate funding to complete the required abatement work (44 FR 15111, March 13, 1979). Although this preamble statement does not explicitly refer to water supply replacement, mining-related groundwater pollution is one of the primary causes of water supply problems. The implications for water supply replacement are that the unanticipated costs of replacing a water supply authorizes an increase in the bond amount.

b. Policy/Procedures. OSMRE's policy in cases where there has been contamination, diminution, or interruption of a water supply proximately resulting from surface coal mining operations is to assure water replacement equivalent in terms of quality, quantity, and duration to the supply developed for the premining use. Release of bond liability sufficient to cover the cost of water supply replacement shall not occur until OSMRE is satisfied that there is a contract between the permittee and the landowner enforceable under State laws that provides for ongoing water replacement sufficient to allow the premining use to continue without restrictions or limitations for a duration comparable to the duration expected where no mining had occurred.

(1) Quality of Replacement Water Supplies.

(a) A replacement source is acceptable in terms of water quality if the water quality of the replacement supply does not restrict or limit the premining use.

(b) In accordance with 30 CFR 816.41(h), baseline data contained in the permit shall be used to determine impacts of mining upon surface water and groundwater. In addition to the hydrologic and geologic information contained in the permit application pursuant to 30 CFR 780.21-22, the regulatory authority may also use information concerning the location and depth of water wells in the permit area and adjacent area (30 CFR 779.25(a)(10)) and information contained in preblasting surveys (30 CFR 816.62) to identify and characterize premining water supplies.

If no baseline data for the particular affected water supply exists or if inadequate data exists, then the acceptability of the replacement water supply shall be judged in comparison to water supplies put to the same premining use in the immediate surrounding area. If no such supplies exist, then the premining use shall be classified and the replacement supply compared to the state water quality standards for the appropriate use classification. If no applicable state water quality standards exist, then the replacement may be compared to applicable Federal standards, such as those established pursuant to the Safe Drinking Water Act of 1974.

(c) To the extent the permit information is insufficient, the burden of proof is with the party making the assertion that the water supply has been adversely affected. An affected party has the right to request a Federal inspection pursuant to 30 CFR 842.12.

(d) Replacement water may be treated to achieve the required quality.

(2) Quantity and Duration of Replacement Water Supplies. A replacement source is acceptable in terms of water quantity if the quantity supplied shall not restrict or limit the premining use for a duration comparable to the duration expected where no mining had occurred.

(3) Cost of Replacement Water Supplies.

(a) The permittee shall pay the capital costs of installing a replacement water supply. If the use of well water can continue, a permittee shall pay the cost of designing, drilling, and completing a new or deeper well; purchasing and installing a pump; or purchasing and/or installing a treatment system, as necessary. If the replacement water supply involves a hook up to a water supply system, the permittee shall pay the hook-up costs, including fees, purchase of equipment and supplies, and construction.

(b) If a permittee provided or was ordered to provide a temporary water supply before the replacement water supply is provided, the permittee shall pay the cost of providing the temporary water supply.

(c) Operation and maintenance costs associated with the replacement water supply shall be borne by the landowner, unless such costs are higher than those associated with the premining supply. In such cases, the permittee shall make provision to offset the increased costs.

(4) Bond Release. Bond cannot be released until an agreement is in place delineating the responsibilities of the permittee in the period following bond release. The regulatory authority has jurisdiction over replacement requirements only until final bond release. Subsequently, an agreement between the permittee and the landowner is controlling and is subject to applicable State or common law.

c. Oversight of State Programs. When evaluating a State's implementation of its approved regulatory program, OSMRE personnel shall adhere to any requirements or policies contained within or adjunct to the approved program. Where a State program does not contain any specific guidance on water supply replacement, the State program shall be considered no less effective than Federal requirements if program provisions are applied in a manner that is consistent with this directive.

4. REPORTING REQUIREMENTS. None.

5. REFERENCES.

a. SMCRA. Sections 102(b) and 717(b)

b. Federal regulations. 30 CFR 715.17(i), 779.25(a)(10), 780.21-22, 800.14, 800.15, 816.41(h), 816.62, 816.133(c)(2) and 842.12

c. Federal Register. 44 FR 15111 & 15175 (March 13, 1979) and 48 FR 43980 (September 26, 1983)

6. EFFECT ON OTHER DOCUMENTS. None.

7. EFFECTIVE DATE. Upon issuance.

8. CONTACT. Branch of Federal and Indian Programs, Division of Regulatory Programs; Telephone (202) 343-1864.