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	U·S·DEPARTMENT OF THE INTERIOR OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT DIRECTIVES SYSTEM	Subject Number: REG- 3 Transmittal Number: 652 Date JAN 4 1991

Subject: Subsidence-Caused Material Damage to Structures or Facilities Where the Office of Surface Mining is the Regulatory Authority

Approval: [signature] **Title:** Director

1. Purpose. This directive provides guidance to the Office of Surface Mining Reclamation and Enforcement (OSM) Field Offices and Support Centers for determining the extent of operator responsibility for subsidence-caused material damage to structures or facilities when OSM is the regulatory authority on Federal lands, on Indian lands or under a Federal program for a State.

2. Summary. This directive establishes procedures for the OSM Field Offices and Support Centers to follow in implementing the February 12, 1990, District Court decision in NWF v. Lujan which remanded that part of 30 CFR 817.121(c)(2) that limited to the extent required by State law, operator responsibility for subsidence-caused material damage to structures or facilities.

3. Definition. Federal permitting entity (FPE). The OSM organizational unit with responsibility for receiving and processing applications and other materials related to Federal permits, i.e., the Division of Federal Programs in the Western Support Center in Denver or the Division of Tennessee Permitting in the Knoxville Field Office.

4. Policy/Procedures.

a. Background/Policy. Section 102(b) of the Surface Mining Control and Reclamation Act (SMCRA) assures that the rights of surface landowners and other persons with a legal interest in the land or appurtenances thereto be fully protected from the adverse effects of surface coal mining operations which include the surface effects of underground mining. Section 516(b)(1) of SMCRA requires the operators of underground coal mines to adopt measures consistent with known technology to prevent subsidence causing material damage to the extent technologically and economically feasible and to maintain the value and reasonably foreseeable use of surface lands.

Regulations to implement subsidence control measures include the permitting requirements at 30 CFR 784.20 "Subsidence control plan" and the performance standards at 30 CFR 817.121 "Subsidence control." The District Court ruled in NWF v. Lujan (D.D.C. February 12, 1990) that 30 CFR 817.121(c)(2) was inconsistent with SMCRA sections 102(b) and 516(b)(1) insofar as it limited an

operator's responsibility to correct or compensate for material damage to structures or facilities caused by subsidence, to the requirements of existing State law. The court ruled that the operator is responsible for the harm caused by subsidence regardless of any State law limitation. The regulation was remanded to the Secretary for revision.

The court did not expressly address 30 CFR 784.20(g)(2), which uses similar language in requiring that each subsidence control plan include a description of the measures to be taken to mitigate or remedy any subsidence-related material damage to structures or facilities. However, the intended use of the subsidence control plan is, in part, to support 30 CFR 817.121(c)(2) and OSM has the authority under 30 CFR 784.20(h) to require other information. Therefore, it is OSM's policy to require correction of subsidence-caused material damage without regard to any liability limitations imposed by State law, and to require permit applicants to submit sufficient information in their subsidence control plans to demonstrate that appropriate remedial action will occur.

b. Procedures/Responsibilities.

1. Review of Permit Applications and Existing Permits. The Federal Permitting Entity (FPE) shall review permit applications and existing permits for underground mines to make sure that the subsidence control plan does not reflect any limitation of State law. The FPE shall not approve any permit application with such a limitation. If the FPE finds that the subsidence control plan in an existing permit is inadequate in this regard, the FPE shall require a revision to the permit pursuant to 30 CFR 774.11.

2. Material Damage Due to Subsidence. Prior to an inspection for an underground mine, the inspector shall review the subsidence control plan.

a. If during an inspection, an OSM inspector becomes aware of material damage to a structure or facility due to subsidence which has not been or is not being repaired or compensated for in a timely fashion in accordance with the measures required under 30 CFR 784.20(g)(2) without regard to any limitations for liability under State law, he/she shall notify the permittee of the material damage encountered to ensure that the requirements to repair or compensate are implemented. The inspector shall request information concerning the permittee's plans for repair or compensation and indicate that failure to correct or compensate is a violation.

b. If during an inspection, an OSM inspector becomes aware of material damage to a structure or facility due to subsidence which the permittee has knowledge of or has been

notified of but which has not been or is not being repaired or compensated for in a timely fashion in accordance with the measures required under 30 CFR 784.20(g)(2) without regard to any limitations for liability under State law, the inspector shall issue a Notice of Violation (NOV) or a Cessation Order (CO), as appropriate. The NOV or CO shall not be terminated until OSM determines that the repair or compensation requirements have been met. This determination should be made based on whatever methods the FPE finds suitable, which may include appraisals.

3. Citizen Complaints. If the Field Office Director is made aware of material damage to a structure or facility through a citizen complaint, he/she shall take appropriate action to investigate and resolve the complaint as determined on a case-by-case basis. See Directive INE-24, "Response to Citizen Complaints in Primacy States" for guidance on informal review notification.

5. Reporting Requirements. None.

6. Effect on Other Documents. None.

7. Reference. Directive INE-24, "Response to Citizen Complaints in Primacy States."

8. Effective Date. Upon issuance.

9. Contact. Chief, Branch of Federal and Indian Programs, Division of Regulatory Programs, (202) 208-2564 or FTS 268-2564.

10. Keywords. Material damage, Subsidence, Federal program States.

11. Appendices. None.