

Montana notes that it interprets its statutory language at 82–4–231(10)(f) to require that (except where planned subsidence is used) subsidence be prevented, rather than merely minimized or mitigated. For this reason, it has altered certain Federal counterparts in these proposed revisions, as will be discussed below.

At subparagraph ARM 17.24.901(1)(c)(i)(G), Montana proposed to require a survey of the condition of all residences (and related structures) and all non-commercial buildings within the area of the pre-subsidence survey (*i.e.*, the permit area and adjacent area). We consider this area to be at least as extensive as the area initially required by the Federal regulation at 30 CFR 784.20(a)(3) (*i.e.*, the angle of draw). However, the areal extent of the Federal requirement is in any case under suspension by court order.

At subparagraph 17.24.901(1)(c)(iii)(A)(II) and (III), Montana proposed (for the subsidence control plan) to require a description of measures to be taken underground and on the surface to prevent subsidence and material damage to structures and lands. These proposals reflect Montana's statutory interpretation noted above that the rules must prevent subsidence. The counterpart Federal requirements at 30 CFR 784.20(b)(5) require descriptions of measures to prevent or minimize subsidence and material damage. We find Montana's proposal to be no less effective than the Federal requirements.

At subparagraph 17.24.911(2), for operations with planned and controlled subsidence, Montana proposed to require that all necessary measures be taken to prevent material damage to protected structures. The only exception is if the operator has written consent from the owners. This proposal again reflects Montana's statutory interpretation noted above that the rules must prevent subsidence. The counterpart Federal requirements at 30 CFR 817.121(a)(2) require measures to minimize damage "to the extent technologically and economically feasible," and an additional exception is allowed for cost-benefit considerations. We find Montana's proposal to be no less effective than the Federal requirements.

At subparagraph 17.24.911(7)(d), Montana proposed to add a requirement that the operator must replace any adversely affected domestic water supply. This paragraph applies only when underground mining has resulted in subsidence that causes material damage or reduces the value or use of surface lands. So, by adding the new

provision to this particular paragraph, Montana appears to be limiting the water-replacement requirement to instances where subsidence has occurred and that subsidence has caused material damage or reduced the value or use of surface lands. The Federal requirement at 30 CFR 817.41(j) is not so limited, and applies to water supply contamination, diminishment, or interruption by any underground mining activities, regardless whether or not subsidence has occurred.

Additionally, there is an ambiguity on this point in Montana's statutory provision for water replacement for underground mines, at MCA 82–4–243. This statutory provision was submitted by Montana in a previous program amendment (Administrative Record MT–17–01; July 20 and August 17, 2000; approved by OSM on June 12, 2001 (66 FR 31530; see Finding No. 4)). The sentence requiring water replacement does not contain any limitation to subsidence ("The permittee of an underground coal mining operation shall * * * promptly replace any drinking, domestic, or residential water supply from a well or spring that was in existence prior to the application for the permit pursuant to 82–4–222 and that has been affected by contamination, diminution, or interruption resulting from the underground coal mining operation"). However, the entire section 82–4–243 is titled "Subsidence." Therefore, it is unclear whether Montana intends the statute to limit water replacement for underground mines to instances where subsidence has occurred.

Under standard canons of legal analysis, by proposing in this amendment to add the water replacement requirement at subparagraph ARM 17.24.911(7)(d), which applies only when subsidence has occurred, Montana may be understood to be resolving the statutory ambiguity by interpreting the statutory provision to be limited only to instances of subsidence. And were we to approve the proposal, we could be approving that limiting interpretation; such approval would render the statutory provision less stringent than SMCRA 720(a)(2). Additionally, under standard canons of legal analysis, a specific requirement for water replacement in one circumstance (where subsidence has occurred), as proposed here, while remaining silent on other circumstances (*i.e.*, where no subsidence has occurred) may be interpreted as a deliberate exclusion of the alternate (silent) circumstance. Therefore, Montana's proposed rule might be interpreted as requiring water replacement only when

subsidence has occurred and has caused material damage or reduced the value or use of surface lands. Such an interpretation would render the Montana rules less effective than the Federal requirement at 30 CFR 817.41(j), which is not so limited.

For these reasons, we do not approve the proposed addition of ARM 17.24.911(7)(d). Since the rule has already been promulgated, we are requiring Montana to amend its program by removing this provision. Further, in order to resolve the ambiguity in its statutory provision at 82–4–243, MCA (discussed above), we are requiring that Montana further amend its rules to require the prompt replacement of any drinking, domestic or residential water supply that is contaminated, diminished, or interrupted by underground mining activities, regardless of the occurrence of subsidence or whether subsidence has caused material damage or reduced the value or use of surface lands, to be no less effective in meeting the requirements of SMCRA 720(a)(2) than is 30 CFR 817.41(j).

At paragraph ARM 17.24.911(8), Montana proposed to add provisions establishing a rebuttable presumption of causation of damage by subsidence, and standards for rebutting the presumption. The proposal closely resembles the equivalent Federal counterparts at 30 CFR 817.121(4). However, these Federal requirements were suspended on December 22, 1999 (64 FR 71653). Montana's proposal provides another means for citizens to establish that damage to their buildings and/or residences was caused by subsidence (and hence subject to compensation or repair as discussed above). Even where the presumption is not applicable, citizens have other, though more difficult, means of proving causation. Protecting surface owners and those with legal interests in non-commercial buildings from the adverse effects of mining operations is one of the purposes of the Act specified at SMCRA 102(b). Therefore, providing the rebuttable presumption results in more stringent land use controls and regulation of mining operations than does the Federal regulations under the suspension. Therefore, under 30 CFR 730.11(b), we find that the proposal is not inconsistent with the Federal requirements.

Except as discussed above, the revisions proposed for ARM 17.24.901 and .911 are either minor editorial or recodification changes, or contain language that is the same as or similar to the corresponding Federal regulations promulgated to implement the Energy