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4310-05-P

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 917

**[SATS No. KY-253-FOR; Docket ID: OSM-2009-0014;
S1D1S SS08011000 SX064A000 167S180110;
S2D2S SS08011000 SX064A000 16X501520]**

Kentucky Regulatory Program

AGENCY: Office of Surface Mining Reclamation and Enforcement (OSMRE), Interior.

ACTION: Final rule; approval of amendment.

SUMMARY: We are approving an amendment to the Kentucky regulatory program (the Kentucky program) under the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act). As a result of OSMRE's review of the Kentucky program, OSMRE has determined that two previously required amendments, 30 CFR 917.16(e) and (h), are to be removed because Kentucky's program, with regard to Ownership and

Control (O&C), and Transfer, Assignment or Sale of Permit Rights (TAS) is now consistent with SMCRA and the corresponding Federal regulations.

DATES: Effective Date: [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

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SUPPLEMENTARY INFORMATION:

- I. Background on the Kentucky Program
- II. Submission of the Amendment
- III. OSMRE's Findings
- IV. Summary and Disposition of Comments
- V. OSMRE's Decision
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I. Background on the Kentucky Program

Section 503(a) of the Act permits a State to assume primacy for the regulation of surface coal mining and reclamation operations on non-Federal and non-Indian lands within its borders by demonstrating that its program includes, among other things, "a State law which provides for the regulation of surface coal mining and reclamation operations in

accordance with the requirements of this Act...; and rules and regulations consistent with regulations issued by the Secretary pursuant to this Act.” See U.S.C. 1253 (a)(1) and (7). On the basis of these criteria, the Secretary of the Interior conditionally approved the Kentucky program on May 18, 1982. You can find background information on the Kentucky program, including the Secretary’s findings, the disposition of comments, and conditions of approval of the Kentucky program in the May 18, 1982, Federal Register (47 FR 21434). You can also find later actions concerning Kentucky’s program and program amendments at 30 CFR 917.11, 917.12, 917.13, 917.15, 917.16, and 917.17.

II. Submission of the Proposed Amendment

OSMRE first promulgated final rules to address O&C and TAS over 20 years ago. Subsequently, OSMRE published changes to O&C and TAS, some in response to Federal Court mandates, culminating in the issuance of Federal rulemaking on December 3, 2007. 72 FR 68000. Specifically, the Federal rulemaking amended definitions pertaining to ownership, control, and transfer, assignment, or sale of permit rights and OSMRE regulatory provisions governing: permit eligibility determinations; improvidently issued permits; ownership or control challenges; post-permit issuance actions and requirements; transfer, assignment, or sale of permit rights; application and permit information; and alternative enforcement.

Prior to the implementation of the December 2007 Federal rulemaking, OSMRE issued required amendments to the Kentucky Department of Natural Resources (KYDNR) in

1991 and 1993. These previously required amendments are codified at 30 CFR 917.16(e), as noticed in the September 23, 1991, Federal Register (56 FR 47907), and 30 CFR 917.16(h), as noticed in the January 12, 1993, Federal Register (58 FR 3833), respectively. These previously required amendments were established prior to OSMRE's final rulemaking on O&C on December 3, 2007, 72 FR 68000. On December 8, 2008, following publication in the Federal Register, and resolution of litigation resulting from this rulemaking, the Director of OSMRE issued a memorandum to the Regional Directors to conduct a review of the applicable provisions of all the State programs to ascertain what, if any, amendments were required to conform to the December 3, 2007, Federal rulemaking.

Following the instructions given by the Director, OSMRE's Lexington Field Office (LFO) conducted an evaluation of the Kentucky program to determine if amendments to the Kentucky program were required. Consistent with 30 CFR 732.17, LFO reviewed the Kentucky program, comparing it to the current Federal regulations using a standard no less stringent than SMCRA and no less effective than the Federal regulations, in meeting the requirements of the Act. This review included review of the determinations in 1991, and 1993, codified at 30 CFR 917.16(e) and (h), that Kentucky must submit two required amendments relative to O&C. As part of the evaluation, LFO conducted several meetings with KYDNR and considered whether the Kentucky program was being implemented in conformity with current Federal regulations.

During the review, LFO solicited assistance from the OSMRE Applicant Violator System

Office (AVSO). The AVSO is a division of OSMRE that assists regulatory authorities in making permit eligibility determinations using the Applicant Violator System (AVS) as required under section 510(c) of SMCRA for applicants of coal mining permits.

Subsequent to programmatic review by LFO and independent review by the AVSO, LFO requested removal of the two previously required amendments because LFO and AVSO independently verified and determined that Kentucky has proper statutory authority to implement the requisite O&C and TAS standards in a manner that is no less stringent than provisions in SMCRA found at 30 U.S.C. 1260(c), and no less effective than the Federal regulations at 30 CFR 778.14. Further, LFO and AVSO determined Kentucky is appropriately implementing the Federal O&C and TAS rules as required by the Federal rulemaking on December 3, 2007.

OSMRE announced the proposed decision, which would eliminate the previously required amendments, in the September 19, 2012, Federal Register (77 FR 58053). In the same document, OSMRE opened the public comment period and provided an opportunity for a public hearing or meeting. OSMRE did not hold a public hearing or meeting because neither was requested. The public comment period ended on October 19, 2012. OSMRE received one comment from the Kentucky Resources Council (KRC), an environmental advocacy group.

III. OSMRE's Findings

Following are the findings made concerning the amendment under SMCRA and the Federal regulations at 30 CFR 732.15 and 732.17. OSMRE is approving the removal of two previously required amendments to the Kentucky program, found at 30 CFR 917.16(e) and (h), due to the following: a) after significant review, OSMRE has determined that Kentucky has statutory authority to implement 405 Kentucky Administrative Regulations (KAR) 8:010 section 13, when coupled with the statutes and regulations referenced therein, in a manner no less stringent than SMCRA and no less effective than the Federal regulation counterpart found at 30 CFR Part 774; and b) Kentucky is implementing 405 KAR 8:010 section 13, in accordance with the Federal O&C regulations codified into law on December 3, 2007, as indicated in the Federal Register (72 FR 68000).

OSMRE approves the removal of the required amendment found at 30 CFR 917.16 (e) regarding the Kentucky O&C regulations. KYDNR implements the Kentucky program in a manner that is no less stringent than SMCRA and no less effective than the regulations found at 30 CFR Part 774. Previously, via a Federal Register notice dated September 23, 1991, (56 FR 47907), OSMRE reviewed and found a program amendment submitted by Kentucky to be less effective than the Federal counterpart. Among other things, Kentucky proposed to add a regulation which prohibited “the issuance of a permit if the applicant, operator or anyone who owns or controls the applicant, controls or has controlled any surface coal mining and reclamation operation with a demonstrated pattern of willful violations of KRS chapter 350 and regulations adopted thereto...” OSMRE disapproved the proposed revisions and required Kentucky to further amend its program

to correct the deficiencies identified, adding the following required program amendment:

30 CFR 917.16(e). By March 23, 1992, Kentucky shall amend its rules at 405 KAR 8:010 § 13(4) to include violations of Federal regulatory programs and other State regulatory programs, not just violations of KRS chapter 350 and regulations adopted thereto.

At the time the 1991 required amendment was authored, OSMRE took the position that Kentucky was solely and independently responsible for the collection of violation data in Kentucky and other states for the purpose of determining if it was necessary to deny a Kentucky permit applicant a surface mining permit, based on outstanding violations of SMCRA or certain other environmental protection statutes and rules. OSMRE's former position did not account for the Memorandum of Understanding (MOU) between OSMRE and the Commonwealth of Kentucky that provides, among other things:

OSMRE shall develop, maintain, and provide for the use of Kentucky the AVS, which contains or will contain ownership and control data and violator information to assist Kentucky in meeting the mandated requirements under KRS 350.085(6).

In addition to the required obligations of OSMRE, Kentucky, prior to making any decisions regarding permitting, agreed to perform an independent review of an applicant's history, then "query AVS to determine whether the applicant is linked to a violator through ownership and control." MOU, page 5, paragraph IV(C)(5).

While evaluating the impact of the 2007 Federal rulemaking on O&C and TAS, OSMRE concluded that KYDNR is appropriately relying on AVS data when determining to block or approve a permit in accordance with applicable provisions of SMCRA, Federal regulations and the MOU, consistent with 30 CFR Parts 773 and 774. Further, OSMRE's AVSO independently verified that KYDNR utilizes the nationwide AVS on a daily basis

to determine if Kentucky applicants are permit eligible prior to issuing any permit, evidencing conformity with the MOU. Additionally, as part of the AVS review, it was determined that Kentucky denies any permit application associated with any unabated Federal violations or violations issued by other states. Moreover, OSMRE concludes Kentucky is supplying sufficient information to AVS, and KYDNR is implementing Kentucky statutes and regulations consistent with SMCRA and the Federal regulations.

OSMRE determines the current O&C program in Kentucky is implemented in a manner that ensures that no permit will be issued to an applicant who owns or controls operations with a demonstrated pattern of willful violations of the Kentucky program, SMCRA, or any other surface coal mining regulatory program, that are of such nature and duration that may result in irreparable damage to the environment as to indicate an intent not to comply with the Kentucky program, SMCRA, or with any other surface coal mining regulatory program.

Based upon the plain language contained in both SMCRA and corresponding Kentucky statutes there is an additional basis for removing the required amendment. Both the Federal and Kentucky provisions refer to violations that cause irreparable damage to the environment. These types of violations, by definition, can never be abated, because “irreparable” means “[i]ncapable of being rectified, repaired, or corrected.” Webster’s II New Riverside University Dictionary 645 (1984). Violators of SMCRA, or of other state programs’ provisions, whose violations cause irreparable damage would remain forever blocked on the AVS. Thus, they would be permanently blocked in Kentucky, regardless

of the state in which the violations occurred, since Kentucky faithfully follows AVS recommendations. Should it later be determined that Kentucky is not faithfully following AVS requirements as outlined in the MOU, OSMRE will take appropriate corrective action.

For these reasons, OSMRE concludes the Kentucky program is no less stringent than SMCRA and no less effective than the promulgated regulations thereunder, at 30 CFR 774.11(c). Specifically, Kentucky Revised Statute Annotated §§ 350.085 and 350.060(3)(h), and 405 KY Admin. Regs. 8:010 section 13(4), incorporating the corresponding statute by reference, in conjunction with the discussion of the meaning of “irreparable,” above, clarify that KYDNR must consider all violations of SMCRA and any law, rule, or regulation in effect for the protection of air or water resources when issuing permits. Thus, OSMRE is removing the required amendment at 30 CFR 917.16(e).

In addition, OSMRE approves the removal of the required amendment found at 30 CFR 917.16(h) regarding the Kentucky operator change revision regulations. Previously, OSMRE reviewed a program amendment submitted by Kentucky which proposed to “established a new category of permit revision for operator changes that do not constitute a transfer, assignment or sale of permit rights.” OSMRE disapproved that submission as detailed in the January 12, 1993, Federal Register (58 FR 3833), and added a required program amendment in its decision as follows:

30 CFR 917.16(h) By June 14, 1993, Kentucky shall amend its rules at 405 KAR 8:010 § 20(6)(h) by including OSM[RE] as one of the parties to be notified

of the cabinet's decision to approve or deny the application for an operator change and to require that the regulatory authority be notified when the approved change is consummated.

Historically, OSMRE interpreted the Federal rules as meaning the changes in the operator of the mine—as the term is defined at 30 CFR 701.5—must be processed as a TAS, consistent with 30 CFR Part 774. Following OSMRE's interpretation of the holding in *Peabody Western Coal Co., v. OSMRE*, No. DV 2000-1-PR (June 15, 2000), comments received in response to OSMRE's 2005 proposed rule setting forth revisions to the definition of TAS, and further communications with state regulatory authorities, OSMRE issued a Federal rulemaking, announcing that OSMRE no longer considers a change of operator of a mine as a transfer, assignment, or sale of permit rights. 72 FR 68000 (December 3, 2007). OSMRE concluded that a change of a permittee's owners or controllers does not constitute a TAS because nothing in SMCRA imports the ownership and control concepts of section 510(c) of the Act to the definition of TAS. However, OSMRE made it clear that regulatory authorities may continue to consider the two concepts linked. Kentucky continues to process a change in permittee as a TAS, as detailed in the Federal regulations set forth in 30 CFR Part 774. Additionally, as detailed above, Kentucky continues to enter all data concerning a revision of the mine operator in both AVS and the state counterpart, the Kentucky Surface Mining Information System.

For these reasons, OSMRE concludes that 405 KY Admin. Regs. 8:010 section 22 renders the Kentucky program no less stringent than SMCRA and no less effective than the promulgated regulations there under. Thus, OSMRE is removing the required amendment at 30 CFR 917.16(h).

IV. Summary and Disposition of Comments

Public Comments

We asked for public comments on the amendment via the Federal Register on September 19, 2012, (77 FR 58053) (Administrative Record No. OSM-2009-0014-001). Neither an extension of the public comment period nor a public hearing or meeting was requested. One comment (Administrative Record No. OSMRE-2009-0014-003) was received from a representative of Kentucky Resource Council (KRC) on October 22, 2012, indicating that the KRC had no comments. The public comment period closed on October 19, 2012.

Federal Agency Comments

Pursuant to 30 CFR 732.17(h)(11)(i) and section 503(b) of SMCRA, OSMRE is required to request comments on an amendment from various Federal agencies with an actual or potential interest or special expertise related to the Kentucky program. This amendment removes two previously required amendments relative to O&C and TAS. Therefore, no request for comments is required for this amendment as no Federal agency, other than OSMRE has an actual or potential interest or special expertise in the amendment. Moreover, in reviewing Kentucky statutes and regulations relevant to these issues in a December 3, 2007, Federal rulemaking, OSMRE sought appropriate agency review. OSMRE sought the review of the AVSO, the office within OSMRE having specialized

knowledge related to the issues within this amendment.

State Historical Preservation Officer (SHPO) and the Advisory Council on Historic Preservation (ACHP)

Pursuant to 30 CFR 732.17(h)(4), OSMRE is required to request comments from the SHPO and ACHP on amendments that may have an effect on historic properties. As detailed within this final rule, this amendment deals with O&C regulations; therefore, no SHPO or ACHP may be affected by these changes and their comment was not required.

Environmental Protection Agency (EPA) Concurrence

Pursuant to 30 CFR 732.17(h)(11)(ii), we are required to obtain written concurrence from the EPA for those provisions of the program amendment that relate to air or water quality standards issued under the authority of the Clean Water Act (33 U.S.C. 1251 *et seq.*) or the Clean Air Act (42 U.S.C. 7401 *et seq.*). As detailed within this final rule, this amendment deals with O&C regulations; therefore, no water or air quality standards are under review that trigger the requirement for EPA concurrence.

V. OSMRE's Decision

Based upon the above finding, we approve the removal of two previously required amendments found at 30 CFR 917.16(e) and (h).

To implement this decision, we are amending the Federal regulations, at 30 CFR Part 917, that codify decisions concerning the Kentucky program. We find that good cause exists under 5 U.S.C. 553(d)(3) to make this final rule effective immediately. Section 503(a) of SMCRA requires that the State's program demonstrate that the State has the capability of carrying out the provisions of the Act and meeting its purposes. Making this rule effective immediately will expedite that process. SMCRA requires consistency of State and Federal standards.

VI. Procedural Determinations

Executive Order 12630 -Takings

This rule does not have takings implications. This determination is based on the analysis performed for the counterpart Federal regulation.

Executive Order 12866 - Regulatory Planning and Review

This rule is exempted from review by the Office of Management and Budget (OMB) under Executive Order 12866.

Executive Order 12988 - Civil Justice Reform

The Department of Interior has conducted the reviews required by section 3 of Executive

Order 12988, and has determined that, to the extent allowable by law, this rule meets the applicable standards of Subsections (a) and (b). However, these standards are not applicable to the actual language of State regulatory programs and program amendments because each program is drafted and promulgated by a specific State, not by OSMRE. Under sections 503 and 505 of SMCRA (30 U.S.C. 1253 and 1255) and the Federal regulations at 30 CFR 730.11, 732.15, and 732.17(h)(10), decisions on proposed State regulatory programs and program amendments submitted by the States must be based solely on a determination of whether the submittal is consistent with SMCRA and its implementing Federal regulations and whether the other requirements of 30 CFR Parts 730, 731 and 732 have been met.

Executive Order 13132 - Federalism

This rule does not have Federalism implications. SMCRA delineates the roles of the Federal and State governments regarding the regulation of surface coal mining and reclamation operations. One of the purposes of SMCRA is to “establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations.” Section 503(a)(1) of SMCRA requires that State laws regulating surface coal mining and reclamation operations be “in accordance with” the requirements of SMCRA, and Section 503(a)(7) requires that State programs contain rules and regulations “consistent with” regulations issued by the Secretary pursuant to SMCRA.

Executive Order 13175 - Consultation and Coordination With Indian Tribal Government

In accordance with Executive Order 13175, we have evaluated the potential effects of this rule on Federally-recognized Indian tribes and have determined that the rule does not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes.

Executive Order 13211 - Regulations That Significantly Affect the Supply, Distribution, or Use of Energy

On May 18, 2001, the President issued Executive Order 13211 requiring agencies to prepare a Statement of Energy Effects for a rule that is (1) considered significant under Executive Order 12866, and (2) likely to have significant adverse effect on the supply, distribution, or use of energy. Because this rule is exempt from review under Executive Order 12866, and is not expected to have a significant adverse effect on the supply, distribution, or use of energy, a Statement of Energy Effects is not required.

National Environmental Policy Act

This rule does not require an environmental impact statement because section 702(d) of SMCRA (30 U.S.C. 1992(d)) provides that agency decisions on proposed State regulatory program provisions do not constitute major Federal actions within the meaning of section 102(2)(C) of the National Environmental Policy Act (42 U.S.C. 4332(2)(C)).

Paperwork Reduction Act.

This rule does not contain information collection requirements that require approval by OMB under the Paperwork Reduction Act (44 U.S.C. 3507 *et seq.*).

Regulatory Flexibility Act

The Department of the Interior certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). The State submittal, which is the subject of this rule, is based upon counterpart Federal regulations for which an economic analysis was prepared and certification made that such regulations would not have a significant economic effect upon a substantial number of small entities. In making the determination as to whether this rule would have significant economic impact, the Department relied upon data and assumptions for the counterpart Federal regulations.

Small Business Regulatory Enforcement Fairness Act

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This rule: (a) Does not have an annual effect on the economy of \$100 million; (b) Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions;

and (c) Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises. This determination is based upon the fact that the State submittal, which is the subject of this rule, is based upon counterpart Federal regulations for which an analysis was prepared and a determination made that the Federal regulation was not considered a major rule.

Unfunded Mandates

This rule will not impose an unfunded mandate on State, local, or tribal governments or the private sector of \$100 million or more in any given year. This determination is based upon the fact that the State submittal, which is the subject of this rule, is based upon counterpart Federal regulations for which an analysis was prepared and a determination made that the Federal regulation did not impose an unfunded mandate.

List of Subjects in 30 CFR Part 917

Intergovernmental relations, Surface mining, Underground mining.

Dated: September 29, 2015.

Thomas D. Shope, Regional Director

Appalachian Region

For the reasons set forth in the preamble, 30 CFR Part 917 is amended as follows:

PART 917—KENTUCKY

1. The authority citation for Part 917 continues to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*

§917.16 [Amended]

2. Section 917.16 is amended in the table by removing and reserving paragraphs (e) and (h).

[FR Doc. 2015-26478 Filed: 10/16/2015 08:45 am; Publication Date: 10/19/2015]