



4310-05-P

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 917

[KY-254-FOR; OSM-2011-0005;
S1D1SSS08011000SX064A000189S180110;
S2D2SSS08011000SX066A00018XS501520]

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 (hereinafter, the “Kentucky program”) under the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act). Kentucky submitted a proposed amendment to OSMRE that includes revisions to the Kentucky Revised Statutes (KRS) as authorized by House Bill 385 (HB 385), regarding bonding of surface coal mining and reclamation operations.

DATES: The effective date is [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

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SUPPLEMENTARY INFORMATION:

- I. Background on the Kentucky Program
- II. Description 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, State laws and regulations that govern surface coal mining and reclamation operations in accordance with the Act and consistent with the Federal regulations. See 30 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 21404, 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. Description of the Proposed Amendment

On May 10, 2011, Kentucky submitted an amendment to OSMRE for approval that proposed bonding revisions to the KRS as authorized by HB 385, which passed during the State's regular 2011 legislative session. HB 385 was passed in response to OSMRE's findings in its January 5, 2011, National Priority Oversight Evaluation of the Adequacy of Kentucky Reclamation Performance Bond Amounts (National Oversight Study) report. In that report, OSMRE oversight and programmatic reviews identified that current reclamation performance bonds in Kentucky are not sufficient to complete the reclamation required in approved permits. On February 3, 2011, the Kentucky Department for Natural Resources (KYDNR) and OSMRE signed an Action Plan detailing the steps necessary for correcting identified bond calculation deficiencies. The Action Plan required KYDNR to complete revised bonding protocols by April 1, 2011, along with a timetable for implementation for new and existing permits. HB 385 amends Kentucky Revised Statutes 350.060 to provide that:

Within thirty (30) days of a cabinet determination of a need to change a bond protocol currently in use, the cabinet shall

immediately promulgate administrative regulations setting forth bonding requirements including, but not limited to, requirements for the amount, duration, release, and forfeiture of bonds. Bond protocols shall not be exempt from KRS 13A.100 and shall be established by promulgating administrative regulations under KRS Chapter 13A. Failure to include the formula for establishing the amount of the bond in any administrative regulation on bonding requirements shall be deemed a failure to comply with the prescriptions of this section and the administrative regulation shall automatically be declared deficient in accordance with KRS Chapter 13A.

We announced receipt of the amendment and asked for comments in a Federal Register notice published on August 15, 2011 (76 FR 50436). In the same document, we opened the public comment period and provided an opportunity for a public hearing or meeting. We did not hold a public hearing or meeting because no one requested one. The public comment period ended on September 14, 2011. We received comments from two organizations.

III. OSMRE's Findings

The following are the findings we made concerning Kentucky's proposed amendment under SMCRA at Section 509, 30 U.S.C. 1259 and the Federal regulations at 30 CFR 800.14 and 800.15.

KRS 350.060 (11) Processing Permit Applications

The new language in KRS 350.060(11) is intended to ensure that bond protocol regulations include the formula for establishing the amount of the bond. Failure to do so

would result in any administrative regulations or bonding requirements to be declared deficient automatically, in accordance with KRS Chapter 13A.

While these proposed State revisions have no direct Federal counterparts there is no provision in SMCRA or its implementing regulations that prohibits a State from requiring its bond protocols to be implemented solely as regulations. On their face, the proposed revisions are not inconsistent with Section 509 of SMCRA and 30 CFR 800.14, and we are therefore approving them, as noted below.

While HB 385 could be construed to require the KYDNR to implement all bond adjustments as regulations before the adjustments can be made, to do so would be inconsistent with the literal construction of the language of the bill. Therefore, we do not construe HB 385 to apply to individual bonding adjustments, or other individual bonding decisions.

Rather, we are approving the proposed amendment, in accordance with its plain language, which will not impede implementation of the requirement in Section 509 of SMCRA that “[t]he amount of the bond shall be sufficient to assure the completion of the reclamation plan if the work had to be performed by the regulatory authority in the event of forfeiture.” Nor will the proposed amendment impede the obligation of the regulatory authority to adjust the amount of bond in accordance with 30 CFR 800.15. Should we find, however, during oversight, that the amendment is being interpreted in a manner that

would render it inconsistent with either Section 509 of SMCRA or 30 CFR 800.15 we will initiate proceedings under 30 CFR 730.11(a), to publish a notice in the Federal Register setting forth the text or a summary of that provision and provide 30 days' notice for public comment. Following the public comment period, a final determination will be made and published in the Federal Register.

Further, we are approving the proposed amendment because, in accordance with its plain language, it will not impede the regulatory authority's ability to address the current bond deficiencies identified in the National Oversight Study and the February 3, 2011, Action Plan detailing the steps necessary for correcting bond calculation deficiencies that were identified in the study. Specifically, OSMRE expects the KYDNR to ensure the adequacy of bonds on all currently issued permits through the adjustment process, and all permits issued pending the formal revision to any existing bonding protocol. Should we find, however, during oversight, that the amendment is being implemented in a manner that would impede the regulatory authority's ability to address current bond deficiencies, we will initiate proceedings under 30 CFR 730.11(a), as appropriate, to have the provisions of the amendment set forth and set aside.

Finally, we are approving the amendment with the understanding that it would not apply to bond protocols or bonding regulations in existence as of the date that HB 385 became effective. Should we find, however, during oversight, that the amendment is being interpreted in a manner that would render it applicable to bond protocols or regulations in

existence as of the date that the amendment became effective, we will initiate proceedings under 30 CFR 730.11(a) to publish a notice in the Federal Register setting forth the text or a summary of that provision and provide 30 days' notice for public comment. Following the public comment period, a final determination will be made and published in the Federal Register.

IV. Summary and Disposition of Comments

Public Comments

We asked for public comments on the amendment and received responses from Coal Operators & Associates, Inc. (COA) and Kentucky Resources Council (KRC).

1. COA stated that the language of our August 15, 2011, Federal Register Notice (76 FR 50436) was somewhat misleading, insofar as it would lead one to believe that HB 385 addresses individual bond amounts. To the contrary, according to COA, HB 385 pertains to “bond protocols” and “bonding requirements,” not “a bond amount.” The plural nature of the phrases as well as common usage of the words “protocols” and “requirements” accurately reflect the fact that HB 385 addresses the overall scheme or template that will be used to establish bond amounts and the “formula” to be used.

Response - OSMRE has interpreted HB 385 to apply to bond protocols and bond formulas and not individual bond amounts. OSMRE's approval of the proposed

amendment reflects its understanding that it addresses these protocols and bond formulas used to determine bond amounts and that Kentucky will require all surface coal mining and reclamation permit applications to post a bond amount sufficient to meet the requirement in Section 509 of SMCRA that “[t]he amount of the bond shall be sufficient to assure the completion of the reclamation plan if the work had to be performed by the regulatory authority in the event of forfeiture.”

2. COA stated that the intent of HB 385 is to prevent Kentucky from arbitrarily changing bond protocols, requirements or formulae without adequate transparency and public comment.

Response – We believe that our approval of this amendment, with the limitations as set forth in the Findings above, will not diminish any requirements of the Kentucky program regarding the ability of the public to comment on regulations regarding bonding.

3. According to COA, the purpose of HB 385 is to insure that the Energy and Environment Cabinet (EEC) follows the statutory mandates that have existed since the inception of the Kentucky Permanent Regulatory Program. To accomplish that, HB 385 provides for statutory declarations of deficiency if the bonding formula is not promulgated as a KRS Ch. 13A regulation.

Response - While we agree that HB 385 provides for statutory declaration of deficiency

in the event bonding formulas are not promulgated as regulation, the basis of our decision is based on the understanding that bond adjustments for specific surface coal mining operations are not required to be promulgated as regulations.

4. The COA stated that the KRS Ch. 13A Administrative Regulation process is one based upon public input, comment and review. Briefly, proposed regulations are not only published in the Administrative Register of Kentucky, but, EEC provides electronic notification to any interested citizen or stakeholder. Oral testimonies at public hearings, written comments that are submitted, as well as testimonies before the Administrative Regulation Review Sub-committee and the appropriate House and Senate Committees provide interested parties adequate notice and input on proposed regulations.

Response – This is not an issue before OSMRE in its consideration or review of Kentucky’s proposed amendment on bonding protocols.

5. COA explained that some concern has been expressed about the length of time it takes under KRS Ch. 13A to adopt new, ordinary regulations. The Governor of the Commonwealth can issue an emergency regulation which becomes effective upon his signature. (KRS 13A.170 and 190). The ordinary regulation is filed simultaneously and proceeds through the mandatory process. Concurrently, the emergency regulation is in effect.

Response – OSMRE agrees that the Kentucky Governor can, under appropriate circumstances, issue emergency regulations.

6. KRC stated its belief that HB 385 was sought by the Kentucky coal industry as a mechanism for delaying the adoption of changes in the bonding calculations and amounts.

Response – As stated previously, OSMRE’s approval of the proposed amendment is based on its conclusion that it applies to bond protocols and formulas, and does not require bond adjustments for specific surface coal mining operations to be promulgated as regulations.

7. KRC asserted that HB 385 was enacted at a time when Kentucky was in default of its ongoing, enforceable obligation under 30 CFR 733.11 to “implement, administer, enforce and maintain it in accordance with the Act, this chapter and the provisions of the approved State program.” More specifically, Kentucky was, and is, in continuing violation of mandatory obligations outlined in 30 CFR 800.4. KRC also believes that absent a commitment from Kentucky to resolve the bond amount issue, they are in default as required by 30 CFR 733.11. Therefore, KRC urged OSMRE to take steps to promptly remove State regulation approval with respect to bond calculation and adjustment for new and existing permits, and to substitute direct Federal enforcement of the requirements of 30 U.S.C. 1259, unless Kentucky revises the bond calculation

protocols to assure adequate bond amounts for new and existing permits, and commits to incorporate those revisions into emergency regulation.

Response – This comment, which requests that we take action pursuant to 30 CFR Part 733 is beyond the scope of this rulemaking.

8. KRC does not oppose the amendments on their face, since SMCRA is silent as to whether bond calculation methodologies must be implemented in regulatory form, and since requiring these methodologies to be promulgated as regulations will require OSMRE approval and public opportunity to comment. However, KRC states that OSMRE should request that the State clarify that it interprets the amendment to apply to bond calculation formulae and not to individual bond calculation decisions, or revisions thereto.

Response – As noted in the Findings, above, OSMRE is approving this proposed amendment based on the plain language of the amendment and OSMRE’s conclusion that the amendment does not apply to bond calculations for individual permits.

9. Next, KRC stated that OSMRE should require the State to clarify that the provision declaring deficient any bond calculation formula that is not promulgated as a regulation applies only to changes in such protocols, and not to existing protocols. KRC further stated that clarification should also be sought as to the State’s interpretation of the last

sentence of the amendment, since, read broadly; it could affect existing, approved bonding regulations that are a necessary component of the state regulatory program.

Response – As noted above, we are approving the amendment based on our understanding that the proposed amendment would not apply to bond protocols or bonding regulations in existence on the date that HB 385 became effective. Further, approval of this proposed amendment will not affect existing, approved bonding regulations that are a necessary component of the State regulatory program. If OSMRE finds that the promulgation of regulations impedes the implementation of the bond sufficiency requirement, OSMRE will notify Kentucky that the approval of the amendment will be revoked. If this occurs, the State will not be permitted to amend bond protocols via regulation.

Federal Agency Comments

Under 30 CFR 732.17(h)(11)(i) and Section 503(b) of SMCRA, on August 15, 2011, we requested comments on the amendments from various Federal agencies with an actual or potential interest in the Kentucky program (Administrative Record No. KY-1665). No comments were received.

Environmental Protection Agency (EPA) Concurrence and Comments

Under 30 CFR 732.17(h)(11)(ii), we are required to get a written concurrence from 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.*). None of the revisions that Kentucky proposed to make in this amendment pertains to air or water quality standards. Therefore, we did not ask EPA to concur on the amendment.

V. OSMRE's Decision

Based on our findings, OSMRE approves the amendment Kentucky sent to us on May 10, 2011, revising the Kentucky Revised Statutes (KRS) as authorized by HB 385 regarding bonding of surface coal mining and reclamation operations.

To implement this decision, we are amending the Federal regulations at 30 CFR Part 917 which codify decisions concerning the Kentucky program. In accordance with the Administrative Procedure Act, this rule will take effect 30 days after date of publication. 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. 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 the Interior has conducted the reviews required by Section 3 of Executive Order 12988 and has determined that this rule meets the applicable standards of Subsections (a) and (b) of that section. 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 with regard to 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. The basis for this determination is that our decision is on a State Regulatory program and does not involve a Federal Regulation involving Indian Lands.

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

Executive Order 13211 of May 18, 2001, requires 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 a 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. 1292(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 a 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 Kentucky 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 Kentucky 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 19, 2017.

Thomas D. Shope

Regional Director, Appalachian Region.

For the reasons set out in the preamble, 30 CFR part 917 is amended as set forth below:

PART 917—KENTUCKY

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

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

2. Section 917.15 is amended by adding a new entry to the table in paragraph (a) in chronological order by “Date of final publication” to read as follows:

917.15 Approval of Kentucky regulatory program amendments.

(a) * * *

Original amendment submission date	Date of final publication	<u>Citation/description</u>
* * * * * May 10, 2011	* * <u>[Insert date of publication in the Federal Register]</u>	KRS 350.060(11)

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