



DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 917

[SATS No. KY-262-FOR; Docket No. OSM-2019-0014; SID1S SS08011000

SX064A000 201S180110; S2D2S SS08011000 SX064A000 20XS501520]

Kentucky Regulatory Program

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

ACTION: Final rule; partial approval of the amendment

SUMMARY: We, the Office of Surface Mining Reclamation and Enforcement (OSMRE), are approving, in part, amendments to the Kentucky regulatory program (Kentucky program) under the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act). With this amendment, Kentucky will revise its administrative regulations and make non-substantive changes such as paragraph renumbering.

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

FOR FURTHER INFORMATION CONTACT: Mr. Michael Castle, Field Office Director, Lexington Field Office, Telephone: (859) 260-3900. E-mail:

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SUPPLEMENTARY INFORMATION:

- I. Background on the Kentucky Program
- II. Submission of the Amendment
- III. OSMRE's Finding
- IV. Summary and Disposition of Comments
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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 approved State 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). Based on these criteria, the Secretary of the Interior conditionally approved the Kentucky program effective 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 the Kentucky program and program amendments at 30 CFR 917.11, 917.12, 917.13, 917.15, 917.16, and 917.17. The regulatory authority in Kentucky is the Kentucky Energy and Environment Cabinet (herein referred to as the Cabinet).

II. Submission of the Amendment

By letter dated November 25, 2019 (Administrative Record Number KY-2004), the Cabinet submitted an amendment to its program under SMCRA (30 U.S.C. 1201 *et seq.*), docketed as KY-262-FOR. The amendment seeks to revise chapter 10:001 of title 405 of the Kentucky Administrative Regulations (KAR), *Bond and Insurance Requirements, Definitions for 405 KAR Chapter 10*. The Cabinet seeks to revise Section 1, *Definitions*, subsection (4), definition of "*Adjacent area*," by adding "surface water" to the list of resources on land located outside the affected area or permit area that could be adversely impacted by surface coal mining and reclamation operations. The Cabinet also seeks to add new subsection 26, defining "*Long term treatment*" to mean:

the use of any active or passive water treatment necessary to meet water quality effluent standards at the time a permit or any affected permit increment attains phase one (1) bond release standards as determined by the cabinet pursuant to 405 KAR 10:040.

In addition, the Cabinet has proposed certain non-substantive revisions at 405 KAR 10:001. These revisions include paragraph renumbering but do not change the administrative regulations substantively. Because these changes are non-substantive, we make no findings on them.

Additional Background Information:

On November 25, 2019, in addition to submitting proposed amendment KY-262, the Cabinet also submitted a related amendment, KY-261, requiring calculation of an additional bond when a need for long term treatment is identified by the Cabinet. Both submissions, KY-261 and KY-262, were made in response to an amendment OSMRE required at section 30 CFR 917.16(p). We required the amendment after our review of Kentucky's proposed bonding provisions under Program Amendment No. KY-256, as published in the January 29, 2018 **Federal Register** (83 FR 3948), which we found to be inadequate.

The Cabinet mentions in its submission for KY-262 that it believes the amendment submitted as KY-261 is sufficient to satisfy the requirements of SMCRA when viewed in conjunction with the definition of "Long term treatment" proposed in KY-262. Importantly, on May 10, 2022, we approved KY-261 with a slight modification not relevant here. *See* 87 FR 27938. In approving KY-261, we did not find it necessary to approve KY-262 in conjunction. Now, for reasons explained below, we are approving, in part, the changes proposed in KY-262. We are not approving the definition of "Long term treatment" in subsection 26.

We announced receipt of the proposed amendment in the February 25, 2020 **Federal Register** (85 FR 10633). In the same notice, we opened a public comment period and provided an opportunity for a public hearing on these provisions (Administrative Record Number KY-2004-3). The public comment period closed on

March 25, 2020. We received a response from one Federal agency and one public comment, which we addressed in the Public Comments section of part IV, Summary and Disposition of Comments, below.

III. OSMRE's Finding

The following are the findings we made concerning the proposed Kentucky amendment under SMCRA and the Federal regulations at 30 CFR 732.15 and 732.17, which govern OSMRE approval of state programs and program amendments. We are approving the amendment in part, as described below. The full text of the approved amendment is available online at www.regulation.gov.

Any revisions that we do not specifically discuss below concerning non-substantive wording or editorial changes may be found in the full text of the program amendment available at www.regulations.gov.

The Cabinet proposed to revise KAR Chapter 10:001, Bond and Insurance Requirements, Definitions for 405 KAR Chapter 10, as follows.

1. *Definition of "Adjacent area"*: The Cabinet seeks to revise Section 1, *Definitions*, subsection (4), by adding "surface water" to the list of resources that could be impacted by surface coal mining operations.

OSMRE Finding: The term "Adjacent area" arises in various places in 405 KAR Chapter 10. We are approving the revised definition because it is as stringent as the prior regulation, which is already part of Kentucky's approved program, and it is as effective as the OSMRE regulation at 30 CFR 701.5, which defines "Adjacent area." Previously, Kentucky's definition of "Adjacent area" in subsection (4) encompassed land outside the affected area or permit area where "air, surface, or groundwater, fish, wildlife, vegetation, or other [protected] resources" could be adversely impacted by surface coal mining and reclamation operations. Under this rule, the definition is modified to include land where "air, surface, surface water, groundwater, fish, wildlife, vegetation, or other [protected]"

resources” could be adversely impacted by surface coal mining and reclamation operations. As revised, the definition specifies that surface water is also a protected resource and it makes clear, where before it was ambiguous, that the regulatory authority, when applying regulations in Chapter 10 that refer to adjacent areas, must take into account whether surface waters, in addition to the other listed resources, may be adversely impacted.

2. *Definition of “Long term treatment”*: The Cabinet seeks to add a new subsection 26, defining “*Long term treatment*” to mean:

“the use of any active or passive water treatment necessary to meet water quality effluent standards at the time a permit or any affected permit increment attains phase one (1) bond release standards as determined by the cabinet pursuant to 405 KAR 10:040.”

OSMRE Finding: We are not approving this subsection of the amendment as we find it is less stringent than section 509(a) of SMCRA, 30 U.S.C. 1259(a) (Performance Bonds), which directs that the regulatory authority “assure,” upon discovery of a polluttional discharge, that bonds are adequate to cover the cost of reclamation. We reach this conclusion because the definition could be read to delay the time when the regulatory authority may declare a need for long-term treatment to the point where a permitted site “attains phase one (1) bond release standards.” The problem with this temporal limitation is that the need for long-term treatment could become apparent long before phase one bond release. We believe this falls short of the statutory requirement in section 509(a). We similarly conclude the definition is less effective than the Federal regulation at 30 CFR 800.14, which echoes section 509(a) in requiring that the bond amount “be sufficient to assure the completion of the reclamation plan if the work has to be performed by the regulatory authority in the event of forfeiture.” Further, EPA has commented that the approval of this definition seems to conflate two separate areas under

the Clean Water Act (CWA), those being the water quality standards and the water quality based effluent limitation under National Pollutant Discharge Elimination System (NPDES) permits. For these reasons, we are not approving the definition.

IV. Summary and Disposition of Comments

Public Comments

We asked for public comments on the KY-262 amendment in the proposed rule notice published in the **Federal Register** on February 25, 2020 (85 FR 10633), OSMRE received one comment. This comment is summarized and addressed below.

The Kentucky Coal Association (KCA) submitted comments in support of KY-262, stating that the revisions to the definitions of “Adjacent area” and “Long term treatment” satisfy the criteria of 30 CFR 732.15 and are in accordance with SMCRA. KCA also stated that the views of all stakeholders had been considered. KCA further stated that both definitions improve clarity and provide certainty for both permittees and the community as a whole. KCA added that approval of the revision should resolve the ongoing “733” process between Kentucky and OSMRE and pending litigation among the Cabinet, KCA, and OSMRE concerning Kentucky’s bonding program.

OSMRE Response: We are approving the definition of “Adjacent area” and the non-substantive changes and disapproving the definition of “Long-term treatment” for the reasons stated above. While we agree with KCA that the definition of “Long-term treatment” may help to add clarity and certainty for the public, it does so in a manner that is less stringent than section 509(a) of SMCRA and less effective than the Federal regulation at 30 CFR 800.14.

Federal Agency Comments

On December 16, 2019, under 30 CFR 732.17(h)(11)(i) and section 503(b) of SMCRA, we requested comments on the amendment from various Federal agencies with an actual or potential interest in the Kentucky (KY-262) program (Administrative Record

No. KY-2004-1). We received comments from Environmental Protection Agency.

Environmental Protection Agency (EPA) Concurrence and Comments

Under 30 CFR 732.17(h)(11)(ii), we are required to obtain written concurrence from EPA for those provisions of the program amendments that relate to air or water quality standards issued under the authority of the CWA (33 U.S.C. 1251 *et seq.*) or the Clean Air Act (42 U.S.C. 7401 *et seq.*). Because the program amendment does not relate to air or water quality standards we sought comment, not concurrence, from EPA. EPA commented that the term “water quality effluent standards” seems to conflate two separate areas under the CWA, those being water quality standards and water quality-based effluent limitations under NPDES permits. The EPA recommends that the definition be revised to include reference to both Kentucky’s water quality standards and NPDES permit effluent limits. EPA believes that this is consistent with OSMRE’s implementing regulations that acknowledge the relationship between the CWA and SMCRA. Because we are not approving the definition of “Long-term treatment,” the revisions to that definition recommended by EPA are unnecessary.

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

Under 30 CFR 732.17(h)(4), we are required to request comments from the SHPO and ACHP on amendments that may have an effect on historic properties. On December 16, 2019, we requested comments on Kentucky (KY-262) amendment (Administrative Record Number KY-2004-1). We did not receive comments from SHPO or ACHP.

V. OSMRE’s Decision

Based on the above findings, we are approving the revised definition of “Adjacent area” in subsection 4 as well as non-substantive changes, and we are not approving the new definition for “Long-term treatment” in subsection 26, based on the fact that the proposed amendment is less stringent than section 509(a) of SMCRA and less effective than the corresponding Federal regulation at 30 CFR 800.14, which requires that bonding

be adequate to ensure that the costs of treatment are covered. Kentucky's definition of "Long-term treatment" ties the decision requiring additional bond (when a long-term polluttional discharge is discovered) to phase 1 bond release. However, once a water violation is discovered and reclamation needs have changed (i.e., water treatment is now required), the operator has an obligation to treat and bond immediately. Approving this definition would potentially postpone acquisition of an additional bond to a point in time long after the discovery of a need for long-term water treatment. Therefore, we are not approving this portion of the amendment.

To implement this decision, we are amending the Federal regulations, at 30 CFR part 948, that codify decisions concerning the Kentucky program. In accordance with the Administrative Procedure Act, this rule will take effect 30 days after the 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. Statutory and Executive Order Reviews

Executive Order 12630 – Governmental Actions and Interference with Constitutionally Protected Property Rights

This rule would not effect a taking of private property or otherwise have taking implications that would result in public property being taken for government use without just compensation under the law. Therefore, a takings implication assessment is not required. This determination is based on an analysis of the corresponding Federal regulations.

Executive Orders 12866—Regulatory Planning and Review, 13563—Improving Regulation and Regulatory Review, and 14094 – Modernizing Regulatory Review

Executive Order 12866, as amended by Executive Order 14094, provides that the Administrator of the Office of Information and Regulatory Affairs within the Office of Management and Budget (OMB) will review all significant rules. Pursuant to OMB

guidance, dated October 12, 1993, the approval of State program and/or plan amendments is exempted from OMB review under Executive Order 12866, as amended by Executive Order 14094. Executive Order 13563, which reaffirms and supplements Executive Order 12866, does not supplant this exemption.

Executive Order 12988 - Civil Justice Reform

The Department of the Interior has reviewed this rule as required by Section 3 of Executive Order 12988. The Department determined that this **Federal Register** document meets the criteria of Section 3 of Executive Order 12988, which is intended to ensure that the agency review its legislation and proposed regulations to eliminate drafting errors and ambiguity; that the agency write its legislation and regulations to minimize litigation; and that the agency's legislation and regulations provide a clear legal standard for affected conduct rather than a general standard, and promote simplification and burden reduction. Because Section 3 focuses on the quality of Federal legislation and regulations, the Department limited its review under this Executive Order to the quality of this **Federal Register** document and to changes to the Federal regulations. The review under this Executive Order did not extend to the language of the State regulatory program or to the program amendment that the Cabinet proposed.

Executive Order 13132 - Federalism

This rule is not a “[p]olicy that [has] Federalism implications” as defined by Section 1(a) of Executive Order 13132 because it does not have “substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.” Instead, this rule approves an amendment to the Kentucky program submitted and drafted by that State. OSMRE reviewed the submission with fundamental federalism principles in mind as set forth in sections 2 and 3 of the Executive Order and with the principles of cooperative federalism set forth in SMCRA. *See, e.g.,* 30 U.S.C. 1201(f). As such,

pursuant to section 503(a)(1) and (7) (30 U.S.C. 1253(a)(1) and (7)), OSMRE reviewed the program amendment to ensure that it is “in accordance with” the requirements of SMCRA and “consistent with” the regulations issued by the Secretary pursuant to SMCRA.

Executive Order 13175 - Consultation and Coordination with Indian Tribal Governments

The Department of the Interior strives to strengthen its government-to-government relationship with Tribes through a commitment to consultation with Tribes and recognition of their right to self-governance and tribal sovereignty. We have evaluated this rule under the Department’s consultation policy and under the criteria in Executive Order 13175 and have determined that it has no substantial direct effects on federally recognized Tribes or on the distribution of power and responsibilities between the Federal government and Tribes. Therefore, consultation under the Department’s tribal consultation policy is not required. The basis for this determination is that there are no federally recognized tribes present in Kentucky, and the Kentucky program is not approved to regulate activities on Indian lands as defined by SMCRA. Indian lands under SMCRA are regulated independently under the applicable, approved Federal program.

Executive Order 13211—Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

Executive Order 13211 requires agencies to prepare a Statement of Energy Effects for a rulemaking 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 a significant energy action under the definition in Executive Order 13211, a Statement of Energy Effects is not required.

Executive Order 13045—Protection of Children from Environmental Health Risks and Safety Risks

This rule is not subject to Executive Order 13045 because this is not an economically significant regulatory action as defined by Executive Order 12866; and this action does not address environmental health or safety risks disproportionately affecting children.

National Environmental Policy Act

Consistent with sections 501(a) and 702(d) of SMCRA (30 U.S.C. 1251(a) and 1292(d)) and the U.S. Department of the Interior Departmental Manual, part 516, section 13.5(A), State program amendments are not major Federal actions within the meaning of section 102(2)(C) of the National Environmental Policy Act (42 U.S.C. 4332(2)(C)).

National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 3701 *et seq.*) directs OSMRE to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. (OMB Circular A-119 at p. 14). This action is not subject to the requirements of section 12(d) of the NTTAA because application of those requirements would be inconsistent with SMCRA.

Paperwork Reduction Act

This rule does not include requests and requirements of an individual, partnership, or corporation to obtain information and report it to a Federal agency. As this rule does not contain information collection requirements, a submission to the Director of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*) is not required.

Regulatory Flexibility Act

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 corresponding 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 the data and assumptions for the corresponding 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 on an analysis of the corresponding Federal regulations, which were determined not to constitute a major rule.

Unfunded Mandates Reform Act

This rule does not impose an unfunded mandate on State, local, or Tribal governments, or the private sector of more than \$100 million per year. The rule does not have a significant or unique effect on State, local, or Tribal governments or the private sector. This determination is based on an analysis of the corresponding Federal regulations, which were determined not to impose an unfunded mandate. Therefore, a statement containing the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1531 *et seq.*) is not required.

List of Subjects in 30 CFR part 917

Intergovernmental relations, Surface mining, Underground mining.

Thomas D. Shope, Regional Director
North Atlantic - Appalachian Region

For the reasons set out 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.*

2. In § 917.15 amend the table in paragraph (a) by adding a second entry for “November 25, 2019” at the end of the table to read as follows:

Section 917.15 Approval of Kentucky regulatory program amendments.

(a) * * *

Original amendment submission date	Date of final publication	Citation/description

November 25, 2019	<u>[Insert date of publication in the Federal Register]</u>	KAR Chapter 10:001 Section 1, <i>Definitions</i> , subsection (4) - <i>Adjacent area</i>

3. Amend § 917.17 by adding paragraph (e) to read as follows:

§917.17 State regulatory program amendments not approved.

* * * * *

(e) We are not approving the following provision of the proposed Kentucky program amendments dated November 25, 2019: KAR Chapter 10:001 Section 1, Subsection 26 - Definition of “Long term treatment”.

