

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 901

Intergovernmental relations, Surface mining, Underground mining.

Dated: January 22, 2002.

Charles E. Sandberg,

Acting Regional Director, Mid-Continent Regional Coordinating Center.

For the reasons set out in the preamble, 30 CFR Part 901 is amended as set forth below:

PART 901—ALABAMA

1. The authority citation for Part 901 continues to read as follows:

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

2. Section 901.15 is amended in the table by adding a new entry in chronological order by “Date of final publication” to read as follows:

§ 901.15 Approval of Alabama regulatory program amendments.

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Original amendment submission date	Date of final publication	Citation/description
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August 28, 2001	February 5, 2002	ASMC Rules 880-X-2A-.06; 7B-.06(a) through (g), .07 through .12; 8C-.05(1)(g), .06(2)(e); 8D-.08(3); and 8F-.14(1)(2).

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DEPARTMENT OF THE INTERIOR
Office of Surface Mining Reclamation and Enforcement

30 CFR Part 917
[KY-220-FOR]

Kentucky Regulatory Program

AGENCY: Office of Surface Mining Reclamation and Enforcement, Interior.
ACTION: Final rule, approval of amendment.

SUMMARY: We, the Office of Surface Mining Reclamation and Enforcement (OSM), are approving a proposed amendment to the Kentucky regulatory program (the Kentucky program) under the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act). Kentucky proposed to revise its program at 405 KAR 7:097 pertaining to reclamation in lieu of cash payment of civil penalties. Kentucky intended to revise its program as required by Federal regulations.

EFFECTIVE DATE: February 5, 2002.

FOR FURTHER INFORMATION CONTACT: William J. Kovacic, Director, Lexington Field Office, 2675 Regency Road, Lexington, Kentucky 40503. Telephone: (859) 260-8402.

SUPPLEMENTARY INFORMATION:
I. Background on the Kentucky Program
II. Submission of the Proposed Amendment
III. OSM’s Findings
IV. Summary and Disposition of Comments

V. OSM’s Decision
VI. Procedural Determinations

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 State 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 the Act* * *; and rules and regulations consistent with regulations issued by the Secretary pursuant to the Act.” 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 the conditions of the approval in the May 18, 1982, **Federal Register** (47 FR 21404). You can also find later actions concerning Kentucky’s program and program amendments at 30 CFR 917.12, 917.13, 917.15, 917.16 and 917.17.

II. Submission of the Amendment

By letter dated December 22, 1998 (Administrative Record No. KY-1449), the Kentucky Department of Surface Mining Reclamation Enforcement (Kentucky) sent us an amendment to its program under SMCRA (30 U.S.C. 1201 *et seq.*). Kentucky sent the amendment in response to a required program

amendment at 30 CFR 732.17(b) and to include the changes made at its own initiative. The amendment, at 405 KAR 7:097, authorizes the Natural Resources and Environmental Protection Cabinet (Cabinet) to allow a permittee, person, or operator (hereinafter collectively called the in-kind permittee) to perform in-kind reclamation, environmental rehabilitation, or similar action to correct environmental pollution— instead of making cash payment of a civil penalty assessed under KRS 350.990(11).

We announced receipt of the proposed amendment in the January 25, 1999, **Federal Register** (64 FR 3670). The public comment period ended on February 24, 1999. Kentucky made changes to the original submission. On April 9, 1999, a Statement of Consideration and amended regulations were filed with the Kentucky Legislative Research Committee (Administrative Record No. KY-1458). By letter dated June 10, 1999 (Administrative Record No. KY-1461), Kentucky submitted the final version of the proposed amendment to OSM. A new comment period was opened in the July 16, 1999, **Federal Register** (64 FR 38391) and closed on August 2, 1999. In both **Federal Register** notices, we opened the public comment period and provided an opportunity for a public hearing or meeting on the amendment’s adequacy. We did not hold a public hearing or meeting because no one requested one. We received comments from an environmental group and a mining company.

During our review of this amendment, we identified several issues requiring

clarification. A list of questions to Kentucky and Kentucky's responses are provided in an OSM memorandum, dated November 20, 2000, (Administrative Record No. KY-1507). We requested further clarification on one of the issues by letter dated February 23, 2001, (Administrative Record No. KY-1504). Kentucky responded in a letter dated April 2, 2001 (Administrative Record No. KY-1510).

III. OSM's Findings

Following are the findings we made concerning the amendment under SMCRA and the Federal regulations at 30 CFR 732.15 and 732.17. We are approving the amendment.

The submittal of this proposed amendment implements House Bill 839 passed by the Kentucky 1986 General Assembly. OSM's approval of the Kentucky statute required Kentucky, prior to implementation, to submit to OSM for its approval proposed regulations to implement House Bill 839. This was codified at 30 CFR 917.16(c)(3). Therefore, we are removing the required amendment at 30 CFR 917.16(c)(3).

Kentucky proposes to authorize the Cabinet to allow an in-kind permittee to perform in-kind reclamation, environmental rehabilitation, or similar action to correct environmental pollution (hereinafter collectively called in-kind reclamation or in-kind work)—instead of making cash payment of a civil penalty assessed under KRS 350.990. This regulation also establishes criteria and procedures to implement KRS 350.990(11). A written request must be filed to perform in-kind work. If authorized, the performer of the work must enter into a binding Civil Penalty Reclamation Agreement (Agreement) with the Cabinet for work selected by the Cabinet. No fees are required for the written request or the Agreement. Those who enter into an Agreement: must obtain legal right of entry to the work site; must maintain liability insurance coverage; will, in some cases, be required to obtain a performance bond; and must perform the work activities specified in the Agreement. If the in-kind work is not completed according to the Agreement, the full amount of the assessed civil penalty must be paid. Certain proposed in-kind permittees, civil penalties, and sites are ineligible for in-kind activities. Certain kinds of activities and costs are not authorized.

There are no corresponding Federal regulations that establish specific requirements applicable to State regulatory programs that provide for in-kind reclamation. In a January 29, 1987, letter to Kentucky and other State

regulatory authorities, OSM established minimum criteria for approval of State program amendments concerning in-kind reclamation (Administrative Record No. KY-1508). To be approved for in-kind reclamation, a State program amendment must:

1. Identify categories of sites that qualify for reclamation under the program amendment;
2. Specify the criteria and procedures for determining the dollar value of reclamation work to be performed;
3. Contain a plan for evaluating the performance of the reclamation work;
4. Contain timeframes for completion of the reclamation work; and
5. Specify the recourse available to the State regulatory authority should the reclamation work not meet established standards or not be completed.

Section 1 of the proposed amendment establishes the applicability and general provisions of in-kind reclamation. An in-kind permittee may perform in-kind reclamation in lieu of cash payment of one or more civil penalties if the aggregate amount of the penalties is \$2,500 or more. The in-kind reclamation will be authorized under a legally binding Agreement. The in-kind permittee will be held responsible for obtaining a legal right of entry to the activity site and liability insurance coverage. The amendment requires that the liability-insurance policy remain in force during the course of the Agreement. Upon the incapacity of the insurer to continue coverage, the in-kind permittee is required to promptly notify the Cabinet. The Cabinet will give the in-kind permittee up to 90 days to replace the coverage, after which the in-kind reclamation must cease. The Cabinet may then terminate the Agreement. By a letter dated April 2, 2001, Kentucky stated it will exercise its discretion as to how rapidly to terminate the Agreement in view of all the facts at hand such as: the likelihood that the in-kind permittee will obtain replacement insurance in a short time and then expeditiously complete the in-kind reclamation; the amount of work uncompleted; and the severity of environmental problems at the site. The State noted that absent convincing evidence of a good faith effort to obtain replacement insurance and evidence of probable success in timely obtaining it, Kentucky will move quickly to terminate the Agreement, within two weeks and almost certainly 30 days of the cessation of the in-kind reclamation work (Administrative Record No. KY-1510).

Section 1 states that the in-kind permittee is required to provide a performance bond for in-kind

reclamation of a mine site. In a memorandum dated November 20, 2001, Kentucky stated that the term "mine site" is used to differentiate between a site that was disturbed by mining (either coal or non-coal) and a site affected by some other type of environmental problem (trash dumps, straight pipes, brine from gas wells, etc.). The term is not meant to represent or replace any terms formally used in SMCRA (Administrative Record No. KY-1507).

For in-kind reclamation of lands other than mine sites (non-mine sites), the Cabinet may require a performance bond if it determines that the authorized activities could create a risk of environmental harm. This bond would be in addition to any bond required by another Federal, State, or local law. Kentucky stated that because the activities under this administrative regulation are not surface coal mining and reclamation operations, as defined by SMCRA, the bond does not have to meet the provisions of 405 KAR Chapter 10. However, it noted that bonds that do meet these provisions would be acceptable to the Cabinet.

Finally, Kentucky said that because the activities are not "surface coal mining and reclamation operations," the in-kind reclamation would be subject to standards delineated in the Agreement, and would not be subject to Title V standards under SMCRA. We agree that in-kind reclamation of the sites described in the Kentucky amendment would not constitute surface coal mining and reclamation operations therefore, these sites would not be subject to the permitting or bonding requirements under Title V of SMCRA.

As we stated in the April 5, 1989, rulemaking (54 FR 13814), no permit is required "when reclamation activities are conducted where no coal extraction or other activities described in the definition of 'surface coal mining operations' at section 701(28) of SMCRA are taking place." We further stated that section 506(a) of SMCRA only requires a permit for surface coal mining operations as "defined in section 701(28), not the additional reclamation activities specified in the definition of surface coal mining and reclamation operations defined in section 701(27) [of SMCRA]." *Id.* at 13816.

At 405 KAR 7:097, Section 1(9), the Kentucky amendment prohibits the removal of coal in connection with any in-kind reclamation. Section 1(10) of the amendment specifies that authorized activities include only "on-ground activities that directly result in reclamation, environmental rehabilitation, or correction of

environmental pollution.” Therefore, the amendment does not authorize coal extraction or any of the other activities described in the definition of “surface coal mining operations” at section 701(28) of SMCRA. The reclamation obligation cited in the definition of “surface coal mining and reclamation operations” is an integral part of the surface coal mining operations and applies to entities mining coal. “The right to mine carries with it the obligation to restore the land after mining has ceased.” See 54 FR 13814 (April 5, 1989). Even an operator mining without a permit “incurs the obligation to reclaim.” See 54 *Id.* at 13821. Hence, an in-kind permittee under the Kentucky amendment would not be subject to the permitting, bonding requirements or reclamation standards of Title V of SMCRA.

Section 1 lists certain limitations with respect to the in-kind reclamation program. Some of these include the following:

- As previously stated, coal removal in connection with the authorized reclamation activities is prohibited;
- Educational, promotional, training, and other activities that may indirectly affect the environment is prohibited;
- In-kind reclamation activities that do not exceed in estimated cost the assessed amount of the civil penalty will not be authorized; and
- Crediting of costs incurred under the Agreement in excess of the civil penalty amount to satisfy penalties not covered by the Agreement will not be permitted.

Subsection 1 (13) specifies that the Kentucky Division of Abandoned Mine Lands (AML) shall determine the estimate of the cost of the in-kind reclamation activities. To clarify this statement, OSM met with Kentucky on November 20th, 2000 to determine how the cost estimates would be calculated. Kentucky stated that the cost estimates will be based upon the type of work to be performed at a unit cost and is based upon AML staff's most current actual cost experience in the vicinity of the work site (Administrative Record No. KY-1507).

The Director finds that Subsection 1 (13) satisfies the second minimum criterion set forth in the January 29, 1987, letter (Administrative Record No. KY-1508).

Sections 2 through 4 identify circumstances under which certain proposed in-kind permittees, civil penalties, and sites will not be eligible for in-kind reclamation. A proposed in-kind permittee that is ineligible to receive a permit under KRS Chapter 350 and 405 KAR Chapters 7-24 for a reason

other than nonpayment of a civil penalty will not be eligible for in-kind reclamation. In-kind reclamation in lieu of civil penalties will not be authorized if the violation that led to any of the civil penalties remains unabated; or if the proposed in-kind permittee entered into an agreed order with the Cabinet to pay the civil penalty and failed to comply with the agreed order. Section 4 defines an ineligible site as that which is:

- Under a valid permit under KRS Chapter 350 for which a bond has not been forfeited;
- Under another valid Federal, State, or local permit under which the permit holder has responsibility for environmental conditions at the site; or
- Is affected by an ongoing enforcement action for violation of Federal, State, or local environmental laws, unless the agency pursuing the enforcement action consents.

Kentucky further clarified that the only post-SMCRA sites that are eligible are those “where the bond is forfeited, the bond is inadequate, alternative enforcement has failed and there is no other enforcement recourse under Title V” of SMCRA. The Director finds that Section 4 of the proposed amendment and the delineation of mine sites and non-mine sites in Section 1 and the Kentucky's November 20, 2000, response (Administrative Record No. 1507) satisfy the first minimum criterion set forth in the January 29, 1987, letter (Administrative Record No. 1508).

Provisions and requirements for the selection of sites for in-kind reclamation are included in Section 5 of the amendment. The amendment authorizes the Cabinet to compile a prioritized list of candidate sites for consideration, and requires that the list be made available to the public. The section further requires the Cabinet to consult with the county fiscal court; and authorizes the Cabinet to consult with the in-kind permittee, other government agencies, and the general public in its selection of a site and in-kind reclamation activity for each application. The amendment permits the Cabinet to give preference to sites or activities that address environmental impacts from coal mining.

Section 6 describes the criteria concerning the types of in-kind reclamation activities and what costs can be authorized. Activities not authorized include: those that the in-kind permittee already has a duty to perform under KRS Chapter 350 or other Federal, State or local law; activities which the in-kind permittee already has a legal obligation to perform under a valid contract; and activities on lands or

waters in which the in-kind permittee has a financial interest. The amendment prohibits certain costs such as: those which incurred prior to the Agreement; equipment or services donated by a party other than the in-kind permittee; payments for access to the site; transportation; and administrative costs and overhead. The amendment permits authorization of reclamation activities in conjunction with AML projects of the Cabinet under KRS 350.550 through 350.597. The amendment also permits the authorization of in-kind reclamation in conjunction with the reclamation of bond-forfeiture sites, provided the in-kind permittee: did not own or control the site under KRS Chapter 350; was not an operator or agent on the site under KRS Chapter 350; and has no direct or indirect ownership or other interest in the land.

Section 7 of the amendment specifies the procedures an in-kind permittee must follow to request performance of in-kind reclamation. Among other stipulations, the amendment clarifies that filing a request will not stay the collection of the civil penalty. The amendment also requires the Cabinet to notify the in-kind permittee in writing whether it intends to pursue an Agreement within 15 days of receipt of the request.

Section 8 lists the information required in the Agreement and other provisions and limitations relating to the Agreement. Subsection 8 (1)(g) requires that the Agreement specify the time span within which the authorized activities shall be completed. Subsection 8 (5) stipulates that the Cabinet may terminate the Agreement at any time if the in-kind permittee fails to satisfy its terms. Subsections 8 (7) and (8) state that the civil penalty shall remain due and payable until the Cabinet has determined in writing that the in-kind permittee has satisfactorily fulfilled the terms of the Agreement; and if the Agreement is breached, the full-assessed civil penalty will be due and payable. Subsection 8 (6) requires the Cabinet to conduct field inspections as necessary to monitor progress under the Agreement. In a November 20, 2000, memorandum (Administrative Record No. KY-1507), Kentucky stated that the in-kind reclamation site will be inspected during critical phases of the work and the number of inspections will depend in part on the size or duration of the project. Kentucky stated that at a minimum an in-kind reclamation site will be inspected once to ensure the work is satisfactorily completed under the terms of the Agreement (Administrative Record No. KY-1507).

The Director finds that Subsections 8 (1)(g) and (5) through (8), and the November 20, 2000, (Administrative Record No. KY-1507) memorandum satisfy the third, fourth and fifth minimum criteria, as set forth in the January 29, 1987, letter (Administrative Record No. KY-1508).

The civil penalty provisions at section 518 of SMCRA and the Federal rules at 30 CFR 845.20 do not specify the method of payment for assessed penalties. Since Kentucky is not changing how it assesses civil penalties, this amendment continues to uphold the purpose of civil penalties, which is to "deter violations and to ensure maximum compliance with . . . [SMCRA] on the part of the coal mining industry." (30 CFR 845.2) Allowing an in-kind permittee to perform reclamation in lieu of paying a civil monetary penalty is still a penalty. Therefore, the Director finds that the June 10, 1999, revised amendment is consistent with the purpose and requirements for payment of penalties in section 518 of SMCRA. Additionally, the amendment satisfies the minimum criteria for approval set forth in the January 29, 1987, letter.

IV. Summary and Disposition of Comments

Public Comments

By letters dated, January 14, 1999 (Administrative Record No. KY-1453), February 8, 1999 (Administrative Record No. KY-1456), and July 21, 1999 (Administrative Record No. KY-1464), these three comment letters were submitted by an environmental group and a mining company.

One commenter posited that in-kind reclamation activities constitute a regulated "surface coal mining operation" and therefore must occur under a SMCRA Title V permit and bond. The commenter claimed that the proposal to substitute an Agreement for a permit is dubious unless the Agreement contains all of the safeguards and conditions of a permit, including public notice and the opportunity to comment on the proposed reclamation; bond coverage; and a specific reclamation plan setting enforceable and measurable benchmarks to assure that the site is left no worse and is in fact properly reclaimed. The commenter is concerned that in-kind reclamation will occur under circumstances that create a risk of inadequate reclamation from the surface landowner's standpoint. Third-party intervention on a site under an Agreement may extinguish the obligations of the party who initially disturbed and abandoned the site. If the

reclamation work turns out to have been inadequate, the landowner will be left without recourse.

As stated in our findings, we do not agree that the definition of "surface coal mining and reclamation operations" includes the in-kind activities authorized under this amendment. Therefore, no Title V permitting or bonding requirements apply. Sections (1)(6)(b) and (1)(7) of the amendment safeguard the landowner's interests by requiring that the permittee performing the in-kind reclamation (1) have a public liability insurance policy in effect in an amount adequate to compensate for both personal injury and property damage that may result from the reclamation activities; and (2) provide a performance bond for all in-kind reclamation of mine sites. For in-kind reclamation of sites other than mine sites, the Cabinet may require a performance bond if the reclamation activities could create a risk of environmental harm. Perhaps the most important safeguard is the requirement that the in-kind permittee obtain right of entry from the landowner.

We do not share the commenter's concern that third-party intervention on a mine site under an Agreement may extinguish the obligations of the party who initially disturbed and abandoned the site. First, to the extent that the in-kind permittee corrects outstanding violations, we see no reason why the landowner would have any objection to the extinguishments of those obligations. Second, Section 4 of the amendment provides that sites under a valid SMCRA permit for which the bond has not been forfeited are not eligible. It also specifies that sites under another valid federal, state, or local permit are not eligible if the permit holder still has responsibility for environmental conditions at the site. Third, nothing in the amendment absolves the previous permittee or operator of any liability.

One commenter questioned the adequacy of Section 7(6) of the amendment, which requires the Cabinet to notify the in-kind permittee within 15 days whether it intends to pursue an Agreement in response to the in-kind permittee's request to perform in-kind reclamation. According to the commenter, 15 days is insufficient time to involve the surface landowner and adjoining landowners in Agreement negotiation and the decision on whether to allow the in-kind reclamation activity.

SMCRA and the implementing Federal regulations contain no provisions relating to landowner participation in in-kind reclamation. Therefore, we have no legal basis for

requiring that Kentucky make the modifications sought by the commenter. In addition, we concur with Kentucky's Statement of Consideration that the landowner will automatically have a major role in the Agreement process because the in-kind permittee must first obtain right of entry from the landowner. Kentucky also stated that, as a practical matter, there will be discussions with the surface landowner, and possibly with adjoining surface owners, during the process of determining whether a specific site is an appropriate candidate for in-kind reclamation (Administration Record No. KY-1458). Section 5(4) of the amendment grants Kentucky the discretion to consult with private individuals regarding the selection of sites and the activities to be authorized. Additionally, Section 8 gives Kentucky the discretion to include other parties to the Agreement if they are necessary.

The commenter further stated that the amendment should specify a time by which negotiations will either be successfully completed or the penalty will be collected. In its Statement of Consideration, Kentucky stated that if the negotiation over the Agreement is unproductive, the Cabinet can end the discussion at any time and demand cash payment.

Finally, the commenter argued that any unpaid civil penalty interest should continue to accrue during negotiations. In response, Kentucky stated that any interest due and owing would not be tolled during discussions.

A commenter stated that the regulation should explicitly reference the process by which a third-party landowner can secure review and enforcement of the terms of a reclamation agreement. The commenter is concerned that, without explicit reference to such a process, an Agreement will fail to provide the required opportunity for public review that is mandated for permit-related actions by the Cabinet, and thus fail to provide a mechanism as effective as the permit in this regard. According to another comment, Section 8 of the amendment should clarify that when an Agreement falls within the ambit of the definition of "surface coal mining and reclamation operations," the inspection and citizen participation procedures of 405 KAR Chapters 7-24 apply. The commenter further states that, for other reclamation activities, inspections should occur at all critical times in the reclamation plan, and termination of the Agreement should automatically trigger forfeiture of whatever bond has been posted.

As discussed in our findings, in-kind reclamation is not a surface coal mining and reclamation operation. Therefore, there is no legal basis to require that reclamation agreements include provisions for inspection, enforcement, and public participation consistent with those applicable to permits and permitting actions under Title V of SMCRA. However, Kentucky has stated that if a landowner observes actions or conditions that he believes are inconsistent with the Agreement, he can bring them to the attention of the Cabinet and the in-kind permittee. In addition, Section 8(6) of the amendment requires that the Cabinet conduct field inspections as necessary to monitor progress under the Agreement. In subsequent correspondence Kentucky stated that it intends to conduct inspections during critical phases of the work and would conduct at least one inspection upon completion of work. Kentucky anticipates that most in-kind reclamation projects will be small and take less than a week to complete.

A commenter states that—

[I]t is not clear that the person performing in-lieu activity who fails to properly conduct such activity would be “permit-blocked” from future permit issuance if there remained outstanding violations of the law on an “in-lieu” site. While the regulation notes that the agreement must specify “the consequences of failure to satisfy the terms of the Civil Penalty Reclamation Agreement,” it must be clarified that the consequences of such failure include mandatory issuance of enforcement orders and permit blocking for outstanding unabated NOV’s and CO’s.

If the comment refers to outstanding violations of environmental laws committed on the in-kind reclamation site by someone other than the in-kind permittee, we disagree that the in-kind permittee should be held liable for violations he, himself, did not commit, even if he fails to satisfy the terms of the Agreement. There is no legal basis under SMCRA for assigning responsibility for those violations to the in-kind permittee.

If, on the other hand, the commenter is referring to violations committed by the in-kind permittee on the in-kind reclamation site, we have no authority to require the State to take enforcement action under Title V of SMCRA because in-kind reclamation is not a surface coal mining operation under SMCRA and is outside the jurisdiction of SMCRA. However, under Section 8(7) of the amendment, if Kentucky terminates the Agreement for failure to comply with all of its terms, the in-kind permittee will be liable for the full amount of all existing civil penalties he previously owed. Consequently, the permittee

would be subject to the prohibition on issuance of future surface coal mining permits under 405 KAR 8:010 Section 13 and section 510(c) of SMCRA.

One commenter expressed concerns over Subsections (3) through (5) of Section 2 in the December 22, 1998, version of the proposed amendment. In that version, an in-kind permittee was deemed ineligible for in-kind reclamation if: he had an outstanding violation under KRS Chapter 350 and had not corrected the violation; he owned or controlled a surface coal mining operation for which the permit had been revoked or the bond forfeited, or which was currently in violation of KRS Chapter 350, and the correction of the violation had not been completed; or he was in violation of other Federal, State, or local environmental laws. The commenter indicated that large companies with multiple operations are rarely, if ever, free from violations of any laws and regulations. The time required to avoid or correct violations of environmental laws can be extensive. The limitations imposed by the amendment would have afforded large companies very little opportunity to perform in-kind reclamation.

In response to a similar comment received during the state’s rulemaking process, Kentucky has eliminated Subsections (1) through (5) in the June 10, 1999, version of the amendment. The amendment now defines an ineligible in-kind permittee as one who is ineligible to receive a permit under KRS Chapter 350 and 405 KAR Chapters 7–24 for a reason other than non-payment of a civil penalty. The Director finds that this change renders the above comment moot.

A commenter recommends that Section 8 of the proposed amendment should require that the Agreement include other permits needed for the State or Federal government, including water, floodplain, air, dredge-and-fill, transportation, etc. We believe that adding this requirement is repetitive since subsection 1(8) already requires that the in-kind permittee comply with all Federal, State, and local laws and regulations.

Federal Agency Comments

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 program (Administrative Record No. KY–1509). No comments were received.

Environmental Protection Agency (EPA)

Under 30 CFR 732.17(h)(11)(i) and (ii), we are required to get a written

concurrence from EPA for those provisions of the proposed 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 in this amendment pertain to air or water quality standards. Therefore we did not ask EPA to concur on the amendment. By letter dated February 1, 1999, we requested comments on the amendment from EPA (Administrative Record Number KY–1509). EPA did not respond to our request.

V. OSM’s Decision

Based on the above findings we approve the amendment sent to us by Kentucky.

To implement this decision, we are amending the Federal regulations at 30 CFR part 917, which 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 demonstrates that the State has the capability of carrying out the provisions of the Act and meeting its purposes. Making this regulation effectively immediately will expedite that process. This will not create a hardship for Kentucky but rather aid Kentucky’s reclamation abilities. SMCRA requires consistency of State and Federal standards.

VI. Procedural Determinations

Executive Order 12630—Takings

This rule does not have takings implications under Executive Order 12630 and, therefore, a takings implication assessment is not required. This determination is based on the fact that the rule would allow a person assessed a civil monetary penalty the option of performing in-kind reclamation, environmental rehabilitation, or similar action to correct environmental damage in lieu of making cash payment.

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 (Regulatory Planning and Review).

Executive Order 12988—Civil Justice Reform

The Department of the Interior has conducted the reviews required by section 3 of Executive Order 12988 (Civil Justice Reform) 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 OSM. 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 13211—Regulations That Significantly Affect the Supply, Distribution, or Use of Energy

On May 18, 2001, the President issued Executive Order 13211 which 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 the 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.*). This determination is based on the fact that the rule would allow a person assessed a civil monetary penalty the option, after certain requirements are met, of performing in-kind reclamation, environmental rehabilitation, or similar action to correct environmental damage in lieu of making a cash payment. The rule does not impose any new costs. It is assumed that the person choosing this option would do so because of a perceived benefit that would result.

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. For the reasons previously stated, 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.
- 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.

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 merely provides an alternative means of paying a penalty. The rule does not impose any new costs.

List of Subjects in 30 CFR Part 917

Intergovernmental relations, Surface mining, Underground mining.

Dated: December 19, 2001.

Allen D. Klein,

Regional Director, Appalachian Regional Coordinating Center.

For the reasons set out in the preamble, 30 CFR 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 in the table by adding a new entry in chronological order by *date of final publication* to read as follows:

§ 917.15 Approval of Kentucky regulatory program amendments.

* * * * *

Original amendment submission date	Date of final publication	Citation/description
December 22, 1998	February 5, 2002	405 KAR 7:097 approved (in-kind reclamation)

§ 917.16 [Amended]

3. Section 917.16 is amended by removing and reserving paragraph (c) (3).

[FR Doc. 02-2748 Filed 2-4-02; 8:45 am]

BILLING CODE 4310-05-P

LIBRARY OF CONGRESS**Copyright Office****37 CFR Part 259**

[Docket No. 2002-3 CARP]

Filing of Claims for DART Royalty Funds

AGENCY: Copyright Office, Library of Congress.

ACTION: Waiver of regulation.

SUMMARY: Due to a serious disruption in the delivery of mail, the Copyright Office of the Library of Congress is announcing alternative methods for the filing of claims to the DART royalty funds for the year 2001. In order to ensure that their claims are timely received, claimants are encouraged to file their DART claims electronically or by fax, utilizing the special procedures described in this Notice.

EFFECTIVE DATE: February 5, 2002.

ADDRESSES: If hand delivered, an original and two copies of each claim should be brought to: Office of the Copyright General Counsel, James Madison Memorial Building, Room 403, First and Independence Avenue, SE, Washington, DC 20540. Submissions by electronic mail should be made to "dartclaims@loc.gov"; see

SUPPLEMENTARY INFORMATION for other information about electronic filing. Submissions by facsimile should be sent to (202) 252-3423. If sent by mail, an original and two copies of each claim should be addressed to: Copyright Arbitration Royalty Panel (CARP), P.O. Box 70977, Southwest Station, Washington, DC 20024.

FOR FURTHER INFORMATION CONTACT: David O. Carson, General Counsel, or Gina Giuffreda, CARP Specialist, P.O. Box 70977, Southwest Station, Washington, DC 20024. Telephone: (202) 707-8380. Telefax: (202) 252-3423.

SUPPLEMENTARY INFORMATION:**Background**

Chapter 10 of the Copyright Act, 17 U.S.C., places a statutory obligation on manufacturers and importers of digital audio recording devices and media ("DART") who distribute the products

in the United States to submit royalty fees to the Copyright Office. 17 U.S.C. 1003. Distribution of these royalty fees may be made to any interested copyright owner who has filed a claim and (1) whose sound recording was distributed in the form of digital musical recordings or analog musical recordings and (2) whose musical work was distributed in the form of digital musical recordings or analog musical recordings or disseminated to the public in transmissions. 17 U.S.C. 1006.

Section 1007 provides that claims to these royalty fees must be filed "[d]uring the first 2 months of each calendar year" with the Librarian of Congress "in such form and manner as the Librarian of Congress shall prescribe by regulation." 17 U.S.C. 1007. Part 259 of title 37 of the Code of Federal Regulations sets forth the procedures for the filing of claims to the DART royalty funds. Section 259.5 states that in order for a claim to be considered timely filed with the Copyright Office, the claims either have to be hand delivered to the Office by the last day in February¹ or if sent by mail, received by the Office by the last day in February or bear a January or February United States Postal Service postmark. 37 CFR 259.5(a). Claims received after the last day in February will be accepted as timely filed only upon proof that the claim was placed within the United States Postal Service during the months of January or February. 37 CFR 259.5(e). A January or February postmark of the United States Postal Service on the envelope containing the claim or, if sent by certified mail return receipt requested, on the certified mail receipt constitutes sufficient proof that the claim was timely filed.² 37 CFR 259.5(e). However, the regulations do not provide for the filing of DART claims by alternative methods such as electronic submission or facsimile transmission; and until now, the Office has perceived no need for alternative methods in filing these claims.

Unfortunately, recent events, namely the concerns about anthrax in the United States Postal Service facilities in the District of Columbia, have caused severe disruptions of postal service to the Office since October 17, 2001. See 66 FR 62942 (December 4, 2001) and 66 FR 63267 (December 5, 2001). Such

¹ In those years where the last day of February falls on a Saturday, Sunday, a holiday, or other nonbusiness day within the District of Columbia or the Federal Government, claims must be received by the first business day in March. 37 CFR 259.5(b).

² Claims dated only with a business meter that are received after the last day in February will not be accepted as having been timely filed. 37 CFR 259.5(c).

disruptions continue and will most likely worsen in the coming weeks, since all incoming mail will be diverted to an off-site location for treatment. Consequently, in light of these disruptions, the Office is offering and recommending alternative methods for the filing of DART claims to the 2001 royalty funds. The alternative methods set forth in this document apply only to the filing of DART claims for the 2001 royalties which are due by February 28, 2002, and in no way apply to other filings with the Office.

This document covers only the means by which claims may be accepted as timely filed; all other filing requirements, such as the content of claims, remain unchanged, except as noted herein. See 37 CFR part 259.

Acceptable Methods of Filing DART Claims for the Year 2001

Claims to the 2001 DART royalty funds may be submitted as follows:

a. Hand Delivery

In order to best ensure the timely receipt by the Copyright Office of their DART claims, the Office strongly encourages claimants to personally deliver their claims by 5 p.m. E.S.T. on February 28, 2002, to the Office of the Copyright General Counsel, James Madison Memorial Building, Room 403, First and Independence Avenue, SE, Washington, DC. Private carriers should not be used for such delivery, as packages brought in by private carriers are subject to treatment at the off-site facility before being delivered to the Office and will be deemed untimely and rejected unless the treated package is received by the Office of the Copyright General Counsel by 5 p.m. E.S.T. on February 28, 2002. Thus, claims should be hand delivered by the claimant or a representative of the claimant (i.e., the claimant's attorney or a member of the attorney's staff).

Claimants hand delivering their claims should note that they must follow all provisions set forth in 37 CFR part 259.

b. Electronic Submission

Claimants may submit their claims via electronic mail as file attachments, and such submissions should be sent to "dartclaims@loc.gov." The Office has devised forms for both single and joint DART claims, which are posted on its website at <http://www.loc.gov/copyright/forms/dart>. Claimants filing their claims electronically must use these and only these forms, and the forms must be sent in a single file in either Adobe Portable Document ("PDF") format, in Microsoft Word