

be granted if the Secretary finds that such information is nondisclosable confidential business information. As defined in § 201.6(a)(2) of this chapter, nondisclosable confidential business information is privileged information, classified information, or specific information (e.g., trade secrets) of a type for which there is a clear and compelling need to withhold from disclosure. The request will be granted or denied not later than thirty (30) days (ten (10) days in a preliminary phase investigation) after the date on which the request is filed.

4. Amend § 207.62 to revise paragraph (b)(2) to read as follows:

**§ 207.62 Rulings on adequacy and nature of Commission review.**

\* \* \* \* \*

(b) \* \* \*

(2) Comments shall be submitted within the time specified in the notice of institution. In a grouped review, only one set of comments shall be filed per party. Comments shall not exceed fifteen (15) pages of textual material, double spaced and single sided, on stationery measuring 8 1/2 x 11 inches. Comments containing new factual information shall be disregarded.

\* \* \* \* \*

5. Amend § 207.64 to revise paragraph (b) to read as follows:

**§ 207.64 Staff Reports.**

\* \* \* \* \*

(b) *Final staff report.* After the hearing, the Director shall revise the prehearing staff report and submit to the Commission, prior to the Commission's determination, a final version of the staff report. The final staff report is intended to supplement and correct the information contained in the prehearing staff report. The Director shall place the final staff report in the record. A public version of the final staff report shall be made available to the public and a business proprietary version shall also be made available to persons authorized to receive business proprietary information under § 207.7.

Issued: May 30, 2002.

By Order of the Commission.

**Marilyn R. Abbott,**

*Secretary.*

[FR Doc. 02-13910 Filed 6-4-02; 8:45 am]

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**DEPARTMENT OF THE INTERIOR**

**Office of Surface Mining Reclamation and Enforcement**

**30 CFR Part 917**

[KY-216-FOR]

**Kentucky Regulatory Program**

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

**ACTION:** Proposed rule; reopening of public comment period.

**SUMMARY:** We, the Office of Surface Mining Reclamation and Enforcement (OSM), are reopening the public comment period on 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 has submitted additional explanatory information pertaining to a previously proposed amendment about subsidence, water replacement, impoundments, hydrology, and permits. Kentucky intends to revise its program to be consistent with the corresponding Federal regulations.

**DATES:** We will accept written comments on this amendment until 4:00 p.m., [e.s.t.] June 20, 2002.

**ADDRESSES:** You should mail or hand deliver written comments to William J. Kovacic at the address listed below.

You may review copies of the Kentucky program, this amendment, and all written comments received in response to this document at the addresses listed below during normal business hours, Monday through Friday, excluding holidays. You may receive one free copy of the amendment by contacting OSM's Lexington Field Office.

William J. Kovacic, Lexington Field Office, Office of Surface Mining Reclamation and Enforcement, 2675 Regency Road, Lexington, Kentucky 40503, Telephone: (859) 260-8400. E-mail: [bkovacic@osmre.gov](mailto:bkovacic@osmre.gov).

Department of Surface Mining Reclamation and Enforcement, 2 Hudson Hollow Complex, Frankfort, Kentucky 40601, Telephone: (502) 564-6940.

**FOR FURTHER INFORMATION CONTACT:** William J. Kovacic, Telephone: (859) 260-8400. Internet: [bkovacic@osmre.gov](mailto:bkovacic@osmre.gov).

**SUPPLEMENTARY INFORMATION:**

- I. Background on the Kentucky Program
- II. Description of the Proposed Amendment
- III. Public Comment Procedures
- IV. 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 conditions of approval of the Kentucky program in the May 18, 1982, **Federal Register** (48 FR 21404). 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**

By letter dated July 30, 1997 (administrative record no. KY-1410), Kentucky sent us a proposed amendment to its program. The full text of the program amendment is available for you to read at the locations listed above under **ADDRESSES**. The provisions of the Kentucky Administrative Regulations (KAR) at section 405 that are being revised are: 8:001, 8:030, 8:040; 16:001, 16:060, 16:090, 16:100, 16:160, 18:001, 18:060, 18:090, 18:100, 18:160, and 18:210. The proposed amendment was announced in the September 5, 1997, **Federal Register** (62 FR 46933). On November 14, 1997, a Statement of Consideration of public comments was filed with the Kentucky Legislative Research Committee. As a result of the comments and by letter dated March 4, 1998, Kentucky made changes to the original submission (administrative record no. KY-1422). The revisions were made at 405 KAR 8:040, 16:060, 18:060, and 18:210. By letter dated March 16, 1998, Kentucky made additional changes to the original submission (administrative record no. KY-1423). The revisions were made at 8:001, 8:030, 8:040, 16:001, 16:060, 16:090, 16:100, 16:160, 18:001, 18:060, 18:090, 18:100, 18:160, and 18:210. By letter dated July 14, 1998, Kentucky submitted a revised version of the

proposed amendments (administrative record no. KY-1431). All the revisions, except for a portion of those submitted March 16, 1998, were announced in the August 26, 1998, Federal Register (63 FR 45430). The March 16, 1998, revisions not included in previous notices will be included in this document.

During our review of the amendment, we identified concerns relating to the provisions at 405 KAR 8:001, 8:030, 8:040, 16:001, 16:060, 16:090, 16:100, 16:160, 18:001, 18:060, 18:090, 18:100, 18:160, and 18:210. We notified Kentucky of the concerns by letter dated May 26, 2000 (administrative record no. KY-1479). Kentucky responded in a letter dated August 10, 2000, and submitted additional explanatory information (administrative record no. KY-1489).

#### A. Response to Issue Letter

##### 1. Water Replacement and Subsidence Issues

a. Kentucky law and regulations do not use the term "drinking, domestic, or residential" and therefore do not define it. Our law and regulations for both surface and underground mines, and the federal law and regulations for surface mines only, refer to water supplies for "domestic, agricultural, industrial, or other legitimate use," whereas the federal law and regulations for underground mines refers more narrowly to "drinking, domestic, or residential" water supplies. Our program is more inclusive and therefore more protective than the federal program.

The federal definition of "replacement of water supply" is not included in our program. The federal definition is largely a collection of substantive requirements. The Kentucky Legislative Research Commission's Informational Bulletin 118, Kentucky Administrative Regulations, June 1996, pp. 60-63, states that substantive requirements should not be placed in a definition. Therefore, the cabinet promulgated the provisions of the federal definition as substantive requirements in 405 KAR 16:060 Section 8 and 405 KAR 18:060 Section 12.

b. Our regulations use "proximately" because KRS 350.421(2) uses "proximately resulting from the surface or underground coal mine." 30 U.S.C. 1307(b) uses "proximately resulting from such surface coal mine operation," and 30 U.S.C. 1309(a)(2) uses "resulting from underground coal mining operations." The definition of "proximate cause" is, in short, "direct cause," which is not significantly different in practice from "resulting from." We do not believe SMCRA or the federal regulations intend a different standard of causation for surface and underground mines.

The term "proximate cause" has been defined in Kentucky case law as follows:

Proximate cause is to be determined as a fact in view of the circumstances attending it. (Citation omitted.) It is that cause which naturally leads to, and which might have been expected to have produced, the result.

The connection of cause and effect must be established. And if a cause is remote, and only furnished the condition or occasion of the injury, it is not the proximate cause thereof. (Citation omitted.) The proximate cause is a cause which would probably, according to the experience of mankind, lead to the event which happened, and remote cause is a cause which would not, according to such experience, lead to such an event.

*Stevens' Adm'r v. Watt*, Ky., 99 S.W.2d 753, 755, 266 Ky. 608 (1936)

c. The proposal that a notice of noncompliance be issued whenever the cabinet determines that the permittee has damaged a water supply was removed during the legislative review part of the promulgation process. The final regulation requires that the cabinet promptly notify the permittee of receipt of a complaint. After appropriate investigation, if the cabinet determines the permittee damaged the water supply it notifies the permittee of his obligation to replace the water supply and the timetables for replacement. The replacement timetables are not triggered by the mere receipt of a complaint by the permittee or the cabinet, nor are they triggered by the cabinet's initial notice to the permittee that a complaint has been received. The replacement timetables are triggered by the cabinet's notice to the permittee that water loss has occurred, that the permittee caused it, and that he has the obligation to replace the supply. It is simply unfair and unworkable for legally binding timetables for replacement, particularly the 48-hour emergency replacement of domestic water supplies, to begin running upon a mere complaint. There are many cases where alleged impacts to water supplies prove to be nonexistent or to be the result of factors such as drought or inadequate well systems.

With regard to the time period to be used as a basis for payment of increased operation and maintenance expenses, the "predicted useful life of a water supply system" is a concept expressed in the federal preamble, not in the federal regulations. Part (a) of the federal definition of "replacement of water supply" at 30 CFR 701.5 requires that the time basis is "a period agreed to by the permittee and the water supply owner." Kentucky provides a standard of 20 years that prevails unless a different time period is agreed to by the permittee and water supply owner. It is a reasonable standard that we believe will generally provide a fair outcome to the injured property owner and will provide certainty to the permittee. Because we allow a time period agreed to by the permittee and water supply owner to override the 20-year period, we are completely consistent with the federal regulation. To require that "remaining useful life" of a water system be imposed as a rigid standard to be determined on a case by case basis would not only be inconsistent with the federal regulation itself, but also could bog down the enforcement process in wrangling over estimates of useful life that are necessarily subjective. Our 20-year provision is working well in practice.

d. "Underground or surface source" is used in KRS 350.421(b) for both surface and underground mines, and is used in 30 U.S.C.

717(b) for surface mines only. Presumably it has the same meaning in both federal and state law, and by including the universe of sources it plainly includes "wells and springs."

e. Our identical counterpart to the 30 CFR 784.20(a)(3) requirement that the survey be provided to the property owner is at 405 KAR 18:210 Section 1(4)(a), not Section 1(4)(b). Further, we have procedural protections for the property owner at Section 1(4)(b) that the federal regulations do not have. Further still, the court struck down and OSM has suspended the 784.20(a)(3) requirement for presubsidence condition surveys of structures, so we are not now required to have any of these requirements in our program. Finally, we plan to delete the requirement for presubsidence surveys of structures. See issue 1(i) below.

f. In the previous version of this regulation (before detailed presubsidence surveys were required), which was approved by OSM, undermining sooner than 90 days after the initial notice required a second notice, and in no case could undermining take place sooner than 30 days after the second notice. In this regulation, any undermining sooner than 90 days after the initial notice requires a second notice, must be requested and justified by the permittee, and may be approved by the cabinet, only if the presubsidence survey has been completed (or access denied) and any dispute about the survey has been resolved. With the addition of these safeguards it is possible to allow the minimum time after the second notice to be shorter (as short as 10 days in rare circumstances), and to allow for a possible waiver of the 10-day minimum in writing by the property owner. As presently structured the regulation provides ample notice and opportunity for the property owner to become involved in the decision making about the adequacy of the subsidence control plan and about the adequacy of the presubsidence survey and thereby protect his property.

However, because we intend to delete the requirement for presubsidence surveys of structures, we also intend to amend 405 KAR 18:210 Section 2(2) to return to the previously approved time periods for permittee notice to surface owners. See issue 1(i) below.

g. Procedures for requesting confidentiality of submitted materials are set out in 405 KAR 8:010 Section 12. However, there are limits on what material may be kept confidential and we doubt that information critical to a subsidence control plan can reasonably be kept confidential under state law.

h. Extraction ratios and other information required in 30 CFR 817.121(g) are required in 405 KAR 18:210 Section 5(1), and Section 5(2) expressly states that Mines and Minerals maps will fulfill the requirements of this section if they include all the information required under Section 5(1).

i. In response to the suspension of the corresponding federal rules, we have filed with the Kentucky Legislative Research Commission a Notice of Intent to amend 405 KAR 18:210 to delete the requirement at Section 1(4) for presubsidence surveys of structures, and to delete the rebuttable

presumption of causation of subsidence damage at Section 3(4). We also intend to amend Section 2(2), regarding the required time periods for permittee notice to surface owners prior to undermining, returning to the previously approved time periods.

j. The regulations at 405 KAR 16:060 Section 8(4)(c), 18:060 Section 12(4)(c), and 18:210 Section 3(5)(c) are consistent with the purpose of the federal regulations because the bond cannot be not released or returned until after the permittee has completed the water supply replacement or repair or compensation for subsidence damage that the bond is intended to guarantee.

The sole purpose of the additional bond is to insure that the cabinet will have the money to replace, repair or compensate if the permittee fails to do so. Under the federal regulations, if the permittee repairs or compensates for subsidence damage or replaces a water supply within 90 days (which can be extended up to one year under appropriate circumstances), the additional performance bond is not required. Thus the federal regulations implicitly recognize that there is no reason to require the additional bond unless there develops some reasonable likelihood that the regulatory authority will have to complete the replacement, repair or compensation. If a bond is posted and the permittee then satisfactorily completes the required replacement, repair or compensation there is no reasonable likelihood that the regulatory authority will have to do so, and thus there is no need for the regulatory authority to retain the additional bond amount. Since the cabinet's regulations require that the replacement, repair or compensation insured by the additional bond must have been completed before any release or return of bond, the cabinet believes its regulations are not inconsistent with the federal regulations.

## 2. Impoundment Issues

k. The safety factors are provided in 405 KAR 16:100, Section 1(3).

l. 405 KAR 16:070 Section 1(2) requires other facilities, in addition to sedimentation ponds, to be installed, operated and maintained when necessary to insure that discharges meet effluent limitations. 405 KAR 16:070 Section 1(b) requires that the other treatment facilities be properly maintained and not be removed until no longer necessary to meet effluent limitations. 405 KAR 16:090 Section 3(2)(b) requires that other treatment facilities be used in conjunction with runoff storage volume to meet effluent limits. 30 CFR 816.46(d)(2) requires that other treatment facilities be designed in accordance with the applicable requirements of 816.46(c), but this is essentially meaningless since the requirements in 816.46(c) are design requirements for sedimentation ponds (detention time, dewatering devices, compaction, spillways, etc.). The federal regulation does not achieve any result that our regulation does not achieve.

m. The Kentucky regulations at 405 KAR 16:090/18:090 Section 4 are as effective as the federal regulations. The requirement that ponds be designed, maintained and operated to provide adequate detention time to meet effluent limits is in 405 KAR 16/18:100

Section 3(1). The requirement to use a nonclogging dewatering device is in Section 4. The purpose of the dewatering device is to remove inflow so that adequate detention time is maintained. To require that the nonclogging dewatering device must be adequate to maintain detention time to meet effluent limits would simply restate the purpose of the dewatering device. The language in 30 CFR 816/817.46(c)(1)(iii)(D) regarding detention time is redundant to the detention time requirement in 30 CFR 816/817.46(c)(1)(iii)(B).

n. The requirements at subsections (11), (12), and (13)(a) were deleted from 405 KAR 16/18:090 because they are provided in 405 KAR 16/18:100.

o. 405 KAR 8:030/8:040 Section 34(6) refers to Class B and C criteria under 405 KAR 7:040 Section 5 and 401 KAR 4:030 (administrative regulation of the cabinet's Division of Water regarding criteria for dams), whereas the federal regulation refers to Class B and C criteria in the USDA-SCS Technical Release No. 60 and incorporate TR-60 by reference.

The Class B and C criteria of the cabinet and those of TR-60 are virtually identical criteria, since the Division of Water's criteria were originally developed based upon the SCS criteria. Thus there is no need for the cabinet's regulations to refer to, or to incorporate by reference, TR-60.

p. Rainfall amounts for PMP events of duration longer than six hours are provided in the cabinet's Division of Water's (formerly Division of Water Resources) Engineering Memorandum No.2, "Rainfall Frequency Values for Kentucky," April 30, 1971. The values are taken from the U.S. Weather Bureau's Technical Papers 40 and 49. Engineering Memorandum No. 2 is referenced in the Division of Water's Engineering Memorandum No. 5, "Design Criteria for Dams & Associated Structures," February 1, 1975, which is referenced in 401 KAR 4:030 Section 3, which in turn is referenced by 405 KAR 16:100/18:100 and 405 KAR 16:160/18:160. Section C(V) (page C-3) of Engineering Memorandum No. 5 makes clear that the PMP to be used is the 6-hour PMP unless the drainage area in question has a time of concentration greater than six hours.

q. The exemption from engineering inspections for certain impoundments without embankments at Section 1(9)(c) is extremely limited. The exemption is not available for impoundments that are sedimentation ponds, coal mine waste impoundments, or are otherwise intended to facilitate active mining. The engineering inspections required by Section 1(9) are intended for impoundments with embankment structures that could fail, and are intended to reveal any signs of instability, structural weakness or other hazardous conditions. The exempted impoundments are holes in the ground. They do not have embankment structures that could fail. They physically cannot present safety hazards or other environmental concerns that warrant the routine, detailed inspections by experienced registered professional engineers or other specialists. Even so, the exemption includes provisions that allow the cabinet to

require the inspections on a case by case basis if needed. It would be useless to require the permittee to attempt some kind of demonstration of the obvious, beyond the information normally included in the permit application.

The operator inspections required by Section 1(10) are intended for impoundments with embankment structures that could fail, but which are not Class B or C structures, and are not large enough to be subject to inspection under MSHA rules at 30 CFR 77.216. The required inspections are intended to reveal any signs of structural weakness or other hazardous conditions. The exemption at Section 1(10)(b) from quarterly inspections is only for small nonhazardous impoundments without embankment structures. The exempted impoundments are holes in the ground, so they do not have embankment structures that could fail. They physically cannot develop the hazardous conditions the inspections are intended to protect against, so the inspections are unnecessary for this class of structures. Again, it would be useless to require the permittee to attempt some kind of demonstration of the obvious, beyond the information normally included in the permit application, in order to qualify for the exemption.

r. 405 KAR 16:160/18:160 Section 3(1)(a) expressly mentions the 6-hour PMP. The 90 percent design requirement is in 405 KAR 16:160/18:160 Section 3(3). The 90 percent removal requirement is in 405 KAR 16:160/18:160 Section 4.

s. It is not necessary to reference the Minimum Emergency Spillway Hydrologic Criteria table in TR-60. The federal and Kentucky regulations achieve the same design precipitation values for the freeboard hydrograph criteria.

### 3. Other Issues

t. The definition of "historically used for cropland" cannot be read to decrease the acreage of prime farmland.

OSM is concerned that paragraph (c) of our definition (pertaining to the consideration of additional years of cropland history for lands that have not been used as cropland for any five of the ten years immediately preceding acquisition or application) differs from the federal definition in that does not contain the phrase "in which case the regulations for prime farmland may be applied to include more years of cropland history only to increase the prime farmland acreage to be preserved." The phrase in question is completely superfluous. The only possible use of paragraph (c) is to allow the cabinet to include additional lands as "historically used for cropland." If lands meet the "any five of ten years" criteria of paragraphs (a) or (b) they are necessarily "historically used for cropland." Paragraph (c) allows the cabinet to look beyond the ten years to see if land should clearly be considered cropland even though it fails to meet the "five of ten" test in paragraphs (a) and (b). Paragraph (c) cannot by any stretch of the imagination be read to say that, because of non-crop use beyond the ten-year period, land should not be considered cropland even though it meets the "any five of ten" test under paragraphs (a) or (b).

Paragraphs (a) and (b) of our definition include land as “historically used for cropland” if it was, or likely would have been, used as cropland for any five of the ten years immediately preceding either the application or acquisition. Our definition on its face is at least as inclusive as the federal definition, which speaks only to acquisition.

u. In all recent promulgations we have been deleting the phrase “but not limited to” after the word “including.” Legal staff of the Kentucky Legislative Research Commission’s Administrative Regulation Review Subcommittee have insisted that this vague and open-ended language is inconsistent with KRS 13A. We believe that deletion of the term “but not limited to” significantly restricts our discretion, but does not necessarily eliminate it.

v. There is nothing in the statutes giving us the authority to adjudicate property title disputes in the first place. With or without the language in question, we cannot adjudicate property title disputes. The federal regulation says it does not intend to give the regulatory authority the authority to adjudicate property rights disputes.

w. You point out that 405 KAR 8:030 Section 12 refers to the 14th edition of *Standard Methods for the Examination of Water and Wastewater*, whereas 30 CFR 780.21(a) refers to the 15th edition. You do not state whether there are substantive differences between the two editions regarding the specific parameters for which sampling is required of coal mining applicants and permittees.

Reference to an earlier edition is not in itself a deficiency. Further, we note that the 20th edition appeared in 1998.

x. We could not find an official list of noxious plants for the state of Kentucky. In the absence of a list that we could place in the regulation or incorporate by reference, we deleted the definition. If there is no state list, there is no need for the definition. The federal regulation does not require that there be an official state list.

y. 30 CFR 816.41(f) requires “identifying and burying and/or treating, when necessary, materials which may . . .” The use of “or” and “when necessary” indicates that the federal regulation does not require “all three actions in all cases.” We removed the phrase “and/or” from 405 KAR 16:060 Section 4(1) because it is one of several phrases prohibited by KRS 13A.222(4)(k). Our regulation requires “identifying, burying, and treating, in accordance with 405 KAR 16:190, Section 3, materials which may . . .” 405 KAR 16:190 Section 3 prescribes the appropriate cover, and treatment as necessary.

The impoundment issues at 405 KAR 16:090 and 18:090, and at other sections as appropriate, will be addressed in a separate **Federal Register** notice (KY-228-FOR). Likewise, the subsidence issues at 405 KAR 18:210 will be addressed in a separate **Federal Register** notice (KY-229-FOR).

### B. March 16, 1998, Revisions

Editorial and organizational changes are not included in this notice. Only

those substantive changes not addressed in previous proposed rules relating to this amendment appear here.

1. 405 KAR 8:001/16:001/18:001—revision of the definition of “Sedimentation Pond” to mean “a primary sediment control structure: (a) designed, constructed, or maintained pursuant to 405 KAR 16:090 or 405 KAR 18:090; (b) that may include a barrier, dam, or excavated depression to: 1. slow water runoff; and 2. allow suspended solids to settle out; and (c) that shall not include secondary sedimentation control structures, including a straw dike, riprap, check dam, mulch, dugout, or other measure that reduces overland flow velocity, reduces runoff volume, or trap sediment, to the extent that the secondary sedimentation structure drains into a sedimentation pond.

2. 405 KAR 8:030—sections 34(3) and (5) require that “the following be submitted to the cabinet after approval by the Mine Safety and Health Administration (MSHA): 1. a copy of the final approved design plans for impounding structures; 2. a copy of all correspondence with MSHA; 3. a copy of technical support documents requested by MSHA; 4. a notarized statement by the applicant that the copy submitted to the cabinet is a complete and correct copy of the final plan approved by MSHA. These requirements are necessary to minimize duplication of technical review by MSHA and the cabinet, and to minimize conflicts that may arise from duplication of review.”

3. 405 KAR 16:001/18:001—deletion of the definition of “Noxious Plants” at section 1(98).

4. 405 KAR 16:001/18:001—revision of the definition of “Surface Blasting Operation” to mean “(a) the on-site storage, transportation, and use of explosives in association with: 1. a coal exploration operation; 2. surface mining activities; or 3. a surface disturbance of underground mining activities; and (b) includes the following activities: 1. design of an individual blast; 2. implementation of a blast design; 3. initiation of a blast; 4. monitoring of an airblast and ground vibration; and 5. use of access control, warning, and all-clear signals, and similar protective measures.

5. 405 KAR 18:001—revision of the definition of “Material Damage” to delete reference to 405 KAR 8:040 Section 26.

6. 405 KAR 16:160/18:160—revision of maximum water elevation determination at section 3(1)(c).

### III. Public Comment Procedures.

Under the provisions of 30 CFR 732.17(h), we are seeking your

comments on whether the amendment satisfies the applicable program approval criteria of 30 CFR 732.15. If we approve the amendment, it will become part of the State program. However, we are not requesting comments on Issues 1(e), (f), and (i). These issues pertain to 405 KAR 18:210 Sections 1(4), 2(2), and 3(4). Subsequent to the submission of Kentucky’s August 10, 2000, response (administrative record no. KY-1489), Kentucky by letter dated January 25, 2001, submitted changes to 405 KAR 18:210 Sections 1(4), 2(2), and 3(4) (administrative record no. KY-1502). Since the language of these three subsections changed, the 2001 regulatory changes have superseded Kentucky’s earlier response. We have sought public comments on these three amended sections on March 5, 2001 (66 FR 13275) and August 15, 2001 (66 FR 42815). Accordingly, 405 KAR 18:210 Sections 1(4), 2(2), and 3(4) will be addressed in a separate final **Federal Register** notice (KY-229-FOR).

### Written Comments

Send your written or electronic comments to OSM at the address given above. Your written comments should be specific, pertain only to the issues proposed in this rulemaking, and include explanations in support of your recommendations. We will not consider or respond to your comments when developing the final rule if they are received after the close of the comment period see **DATES**. We will make every attempt to log all the comments into the administrative record, but comments delivered to an address other than the Lexington Field Office may not be logged in.

### Electronic Comments

Please submit Internet comments as an ASCII file avoiding the use of special characters and any form of encryption. Please also include “Attn: SPATS No. [KY-216-FOR] and your name and return address in your Internet message. If you do not receive a confirmation that we have received your Internet message, contact the Lexington Field Office at (859) 260-8400.

### Availability of Comments

We will make comments, including names and addresses of respondents, available for public review during normal business hours. We will not consider anonymous comments. If individual respondents request confidentiality, we will honor their request to the extent allowable by law. Individual respondents who wish to withhold their name or address from public review, except for the city or

town, must state this prominently at the beginning of their comments. We will make all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, available for public review in their entirety.

#### IV. 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 regulations.

##### *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, to the extent allowable by law, 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 since each such 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. 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 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, geographic regions, or Federal, State or local governmental agencies; and (c) Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S. based enterprises to compete with foreign-based enterprises. This determination is based upon the fact that the State submittal, which is the subject of this rule, is based upon counterpart Federal regulations for which an analysis was prepared and a determination made that the Federal regulation was not considered a major rule.

##### *Unfunded Mandates*

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

##### **List of Subjects in 30 CFR Part 917**

Intergovernmental relations, Surface mining, Underground mining.

Dated: April 11, 2002.

**Allen D. Klein,**

*Regional Director, Appalachian Regional Coordinating Center.*

[FR Doc. 02-14077 Filed 6-4-02; 8:45 am]

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## **DEPARTMENT OF TRANSPORTATION**

### **Coast Guard**

#### **33 CFR Part 110**

**[CGD09-01-122]**

**RIN 2115-AA98**

#### **Special Anchorage Area; Henderson Harbor, NY**

**AGENCY:** Coast Guard, DOT.

**ACTION:** Request for comments.

**SUMMARY:** The purpose of this document is to provide an additional opportunity to submit comments on the appropriate size of the Henderson Harbor Special Anchorage Area. The Coast Guard originally requested comments for 90 days starting on January 2, 2002. The Coast Guard has determined that additional comments will be helpful in determining the appropriate size of the Henderson Harbor Special Anchorage Area.