

should have been eligible for a vessel permit because of hardship or other factors. The RA will notify the applicant of the decision and the reason for it, in writing, within 15 days of receiving the recommendations from the Application Oversight Board members. The RA's decision will constitute the final administrative action by NMFS.

(e) *Transfer of an endorsement.* A limited access endorsement for South Atlantic rock shrimp is valid only for the vessel and owner named on the permit/endorsement. To change either the vessel or the owner, an application for transfer must be submitted to the RA. An owner of a vessel with an endorsement may request that the RA transfer the endorsement to another vessel owned by the same entity, to the same vessel owned by another entity, or to another vessel with another owner. A transfer of an endorsement under this paragraph will include the transfer of the vessel's entire catch history of South Atlantic rock shrimp to a new owner; no partial transfers are allowed.

(f) *Renewal.* The RA will not reissue a limited access endorsement for South Atlantic rock shrimp if the endorsement is revoked or if the RA does not receive a complete application for renewal of the endorsement within 1 year after the endorsement's expiration date.

(g) *Non-renewal of inactive endorsements.* In addition to the sanctions and denials specified in § 622.4(j)(1), a limited access endorsement for South Atlantic rock shrimp that is inactive for a period of 4 consecutive calendar years will not be renewed. For the purpose of this paragraph, "inactive" means that the vessel with the endorsement has not landed at least 15,000 lb (6,804 kg) of rock shrimp from the South Atlantic EEZ in a calendar year.

(h) *Reissuance of non-renewed permits.* A permit that is not renewed under paragraph (g) of this section will be made available to a vessel owner randomly selected from a list of owners who had documented landings of rock shrimp from the South Atlantic EEZ prior to 1996 but who did not qualify for an initial limited access endorsement. To be placed on the list, an owner must submit a written request to the RA postmarked or hand-delivered not later than January 16, 2004. The written request must contain documentation of each specific landing claimed, i.e., date, quantity of rock shrimp, name and official number of the harvesting vessel, ownership of the vessel at the time of landing, and name and address of the purchasing dealer. Claimed landings that are not verified by comparison with

state trip ticket or dealer records will not be recognized.

8. In § 622.41, the heading of paragraph (g) is revised and paragraph (j) is added to read as follows:

**§ 622.41 Species specific limitations.**

\* \* \* \* \*

(g) *Penaeid shrimp in the South Atlantic.* \* \* \*

\* \* \* \* \*

(j) *Rock shrimp in the South Atlantic off Georgia and Florida.* The minimum mesh size for the cod end of a rock shrimp trawl net in the South Atlantic EEZ off Georgia and Florida is 1 7/8 inches (4.8 cm), stretched mesh. This minimum mesh size is required in at least the last 40 meshes forward of the cod end drawstring (tie-off rings), and smaller-mesh bag liners are not allowed. A vessel that has a trawl net on board that does not meet these requirements may not possess a rock shrimp in or from the South Atlantic EEZ off Georgia and Florida.

[FR Doc. 03-1014 Filed 1-15-03; 8:45 am]

**BILLING CODE 3510-22-S**

**DEPARTMENT OF THE INTERIOR**

**Office of Surface Mining Reclamation and Enforcement**

**30 CFR Part 917**

**[KY-234-FOR]**

**Kentucky Regulatory Program**

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

**ACTION:** Final rule; approval of amendment.

**SUMMARY:** We are approving, with one exception, 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 revisions to the Kentucky Revised Statutes (KRS) at 350.445 pertaining to the construction of a road above a highwall. Kentucky revised its program to be consistent with the corresponding Federal regulations.

**EFFECTIVE DATE:** January 16, 2003.

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

**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 conditions of 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 917.11, 917.12, 917.13, 917.15, 917.16 and 917.17.

**II. Submission of the Proposed Amendment**

By letter dated May 9, 2000 (administrative record no. KY-1473), Kentucky submitted a proposed amendment to its approved permanent regulatory program. Three house bills were included in the submission. House Bill (HB) 502 continues in effect the current administrative regulations on ownership and control. HB 599 creates a new section of KRS Chapter 350 and pertains to an easement of necessity. HB 792 amends KRS 350.445(3) and is the subject of this rule. We previously announced our decisions on HB 502 and 599 in the April 30, 2002 **Federal Register** (67 FR 21173), and the June 20, 2001 **Federal Register** (66 FR 33020), respectively.

We announced receipt of the proposed amendment in the May 31, 2000, **Federal Register** (65 FR 34625), invited public comment, and provided an opportunity for a public hearing on the adequacy of the proposed amendment. The public comment period closed on June 30, 2000.

By letter dated July 10, 2002, (administrative record no. KY-1547), Kentucky submitted additional explanatory information in response to our letter dated February 13, 2002. Because the information merely clarified certain provisions of the proposed amendment, we did not reopen the comment period.

### 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. For the reasons described below, we are approving the amendment, with an exception. Any revisions that we do not specifically discuss below concern nonsubstantive wording or editorial changes.

House Bill 792, Subsection(3), amends KRS 350.445(3)—Steep Slopes. It allows disturbance of the land above the highwall for the construction of a permanent road only if the permittee affirmatively demonstrates, and the Natural Resources and Environmental Protection Cabinet (Cabinet) makes a detailed written determination, that the proposed disturbance facilitates compliance with KRS Chapter 350, and it requires that the land disturbed be limited to that amount necessary to facilitate compliance. The Cabinet determination must be made upon the permittee demonstration that certain, specific requirements will be met. These requirements are contained in KRS 350.445(3)(a) through (j). For example, the permittee must completely eliminate the production highwall and backfill the mined areas to approximate original contour with no road remaining on the bench. In addition to the specified requirements, the permittee must meet all other performance standards of this chapter.

Section 515(d)(3) of SMCRA allows disturbances above the highwall if the disturbances will facilitate compliance with the environmental protection (performance) standards of Section 515. In addition, the disturbances "shall be limited to that amount necessary to facilitate \* \* \* compliance" with Section 515.30 U.S.C. 1265(d)(3).

Kentucky requires compliance with KRS Chapter 350. In its letter dated July 10, 2002, Kentucky clarified that KRS 350 includes both application requirements and performance standards. However, Kentucky stated that the demonstrations required of the permittee are directed towards, and would facilitate compliance with, performance standards. Kentucky further explained how constructing roads above highwalls would facilitate

that compliance by stating, "permanent roads constructed above the highwall result in a more stable mine backfill configuration than the steeper backfill required with an on-bench road at the toe of the backfill. Further, the disturbance of the area above the highwall, in creating the road cut, results in smaller volumes of excess spoil than would placement of an on-bench road at the base of the backfill resulting in a reduction of spoil materials placed in off-bench hollow fills and associated stream loss."

Additionally, the backfilling and grading plan must incorporate a narrative, applicable specifications (plan, profile and section drawings), and volumetric calculations sufficient for the Cabinet to make an affirmative finding. The reclamation plan will be based on the construction requirements for a permanent road. No road embankments would exist. The roadbed would be surfaced with durable rock or cut to a solid rock surface. That section of the exposed road cut constructed in soils materials and the undisturbed natural barrier would be revegetated in accordance with the approved plan. The roadway width in the approved plan must be designed to be appropriate for the amount of traffic and for the equipment to manage the approved postmining land use. Evaluation of the postmining land use would be based on the level of management and road specifications (volume of traffic, size and weight of vehicles, and periodic/daily use required by the landowner). The roads will connect with other roads and must support the approved postmining land use. The Cabinet will make a written determination upon a demonstration by the permittee that the requirements of KRS 350.445 (3) (a-j) are met. Kentucky also affirmed that it retains discretion to ultimately approve or disapprove a permittee's request to construct a permanent road above a highwall.

Because the Kentucky amendment contains provisions that are substantively identical to those contained in section 515(d)(3) of SMCRA, and also imposes additional requirements for roads constructed above highwalls, we find that the proposed Kentucky amendment is no less stringent than section 515(d)(3) of SMCRA and can be approved, with one exception. Section (3)(g) requires that the road be constructed to a size and design appropriate to support coal mining activities and the proposed postmining land use. Allowing roads above highwalls "to support coal mining activities" is inconsistent with, and therefore less stringent than, section

515(d)(3) of SMCRA, which allows disturbances above highwalls only where the disturbances will facilitate compliance with environmental protection performance standards, and not where they will facilitate mining itself. For this reason, the phrase "to support coal mining activities and" cannot be approved.

### IV. Summary and Disposition of Comments

#### *Public Comments*

We asked for public comments on the amendment (administrative record no. KY-1494), and received two pertaining to HB 792. Because no one requested an opportunity to speak at a public hearing, none was held. By letter dated June 14, 2000 (administrative record no. KY-1480), the Kentucky Coal Association expressed its full support of HB 792. By electronic mail on July 5, 2000 (administrative record no. KY-1484), the Kentucky Resources Council, Inc. (KRC) expressed concern that to the extent that HB 792 eliminates Kentucky's discretion to approve or disapprove a proposed above-highwall disturbance and to mandate that it accepts as "facilitating compliance" any mine plan which proposes a permanent road above the top of a highwall, the provision would be inconsistent with Federal law. The KRC acknowledged that under certain configurations where a road above the highwall is constructed in lieu of a permanent mine bench road, that less spoil disposal in valley fills is necessary. It contends, however, that widespread abuse has occurred and safeguards must therefore be instituted. Kentucky must also retain discretion to determine whether the road approval will facilitate environmental compliance and meet all other performance standards. The KRC emphasized that only under narrowly drawn circumstances, with Kentucky retaining discretion to approve or disapprove the roads, can the proposed amendment be considered consistent with Federal law.

We acknowledge the KRC's concerns. We refer to Kentucky's letter dated July 10, 2002, discussed in the finding above, in which Kentucky affirms that the land above a highwall may be disturbed for the construction of a permanent road only when the applicant affirmatively demonstrates, and Kentucky makes a written determination that the proposed disturbances facilitate compliance with both application requirements and performance standards. Kentucky further affirms that it will retain full discretion to approve or disapprove a

permittee's request and will monitor compliance with an approved backfilling and grading plan through routine inspections. We feel Kentucky has demonstrated that by retaining discretion and by instituting necessary safeguards, that the provisions of the proposed amendment can be implemented in a manner consistent with the provisions of SMCRA.

The KRC also commented that the roads above highwalls must be constructed to an appropriate size and design standard, and must be part of the approved postmining land uses. In response, we note that these specific demonstrations are required at KRS 350.445(3)(g). The KRC also commented that the proposed mine plan and road construction sequencing in relation to the mining activity must be designed to maximize permanent retention of mined spoil on the mine bench. In response, we note that KRS 350.445(3)(h) requires these demonstrations. Finally, the KRC commented that the proposed mine plan must include removal of the bench road and restoration of the approximate original contour of the mined area, with no permanent road left on the mine bench. In response, we note that KRS 350.445(3)(a) requires this demonstration.

#### *Federal Agency Comments*

According to 30 CFR 732.17(h)(11)(i), we solicited comments on the proposed amendment submitted on May 9, 2000, from various Federal agencies with an actual or potential interest in the Kentucky program. None were received.

#### *Environmental Protection Agency (EPA)*

Pursuant to 30 CFR 732.17(h)(11)(ii), OSM is required to obtain the written concurrence of the EPA with respect to those provisions of the proposed program amendment that relate to air or water quality standards promulgated 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 provisions in this amendment pertain to clean water or clean air standards. Therefore, we did not ask EPA to concur on the amendment.

#### **V. OSM's Decision**

Based on the above findings, we approve the proposed amendment as submitted by Kentucky on May 9, 2000, with the exception noted in section III.

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 Kentucky's program demonstrate that it has the capability of carrying out the provisions of the Act and meeting its purposes. Making this regulation effective immediately will expedite that process. SMCRA requires consistency of State and Federal standards.

#### *Effect of OSM's Decision*

Section 503 of SMCRA provides that a State may not exercise jurisdiction under SMCRA unless the State program is approved by the Secretary. Similarly, 30 CFR 732.17(a) requires that any change to an approved State program be submitted to OSM for review as a program amendment. The Federal regulations at 30 CFR 732.17(g) prohibit any changes to State programs that are not approved by OSM. In the oversight of the Kentucky program, we will recognize only the statutes, rules, and other materials approved by the Secretary or us, together with any consistent implementing policies, directives, and other materials. We will require Kentucky to enforce only approved provisions.

#### **VI. Procedural Determinations**

##### *Executive Order 12630—Takings*

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

##### *Executive Order 12866—Regulatory Planning and Review*

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

##### *Executive Order 12988—Civil Justice Reform*

The Department of the Interior has conducted the reviews required by section 3 of Executive Order 12988 and has determined that this rule meets the applicable standards of subsections (a) and (b) of that section. However, these standards are not applicable to the actual language of State regulatory programs and program amendments because each program is drafted and promulgated by a specific State, not by 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 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. Hence, this rule will ensure that existing requirements previously promulgated by OSM will be implemented by the State. 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 counterpart Federal regulations.

*Small Business Regulatory Enforcement Fairness Act*

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This rule: (a) Does not have an annual effect on the economy of \$100 million; (b) Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; and (c) Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete

with foreign-based enterprises. This determination is based upon the fact that the State submittal which is the subject of this rule is based upon counterpart Federal regulations for which an analysis was prepared and a determination made that the Federal regulation was not considered a major rule.

*Unfunded Mandates*

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

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

Intergovernmental relations, Surface mining, Underground mining.

Dated: October 28, 2002.

**Allen D. Klein,**

*Regional Director, Appalachian Regional Coordinating Center.*

For the reasons set out in the preamble, Title 30, Chapter VII, Subchapter T of the Code of Federal Regulations 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 917.12 is amended by adding paragraph (d) to read as follows:

**§ 917.12 State regulatory program and proposed program amendment provisions not approved.**

\* \* \* \* \*

(d) The phrase “\* \* \* coal mining activities and \* \* \*” in KRS 350.445(3)(g) is not approved.

3. 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
* * * * *	* * * * *	* * * * *
May 9, 2000 .....	January 16, 2003 .....	House Bill 792, KRS 350.445(3) (except for a portion of (3)(g))

[FR Doc. 03-976 Filed 1-15-03; 8:45 am]  
BILLING CODE 4310-05-P

**DEPARTMENT OF THE INTERIOR**

**Office of Surface Mining Reclamation and Enforcement**

**30 CFR Part 917**

[KY-240-FOR]

**Kentucky Regulatory Program**

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

**ACTION:** Final rule; technical amendment.

**SUMMARY:** We are announcing the removal of two instructions to Kentucky pertaining to required amendments to the Kentucky regulatory program (the “Kentucky program”). The Kentucky program was established under the

Surface Mining Control and Reclamation of 1977 (SMCRA or the Act) and authorizes Kentucky to regulate surface coal mining and reclamation operations in Kentucky. We are removing the instructions because the actions we required are no longer applicable and nothing further is required from the State.

**EFFECTIVE DATE:** January 16, 2003.

**FOR FURTHER INFORMATION CONTACT:** William J. Kovacic, Field Office Director, Telephone: (859) 260-8400, Internet address: *bkovacic@osmre.gov*.

- SUPPLEMENTARY INFORMATION:**
- I. Background on the Kentucky Program
  - II. OSM’s Findings
  - III. Summary and Disposition of Comments
  - 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 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 917.11, 917.12, 917.13, 917.15, 917.16, and 917.17.